Connecticut Law Tribune
May 28, 2013
An ALM Publication

Favorable Rulings For Employers In EEOC Litigation

Aggressive defense can offset agency's significant resources

By PETER J. MURPHY

The U.S. Equal Employment Opportunities Commission is the federal agency charged with addressing discrimination in the workplace. As documented in recent articles in the *Law Tribune* and other legal publications, the EEOC is no longer content just to investigate discrimination claims at the administrative level. Instead, the EEOC has become significantly more active with filing lawsuits against employers in the past several years. These lawsuits can differ from lawsuits brought by private attorneys in several respects.

As an initial matter, the EEOC often seeks to expand the scope of its litigation to involve multiple plaintiffs or classes of employees. The EEOC has significant litigation resources, and its attorneys do not need a settlement or verdict to get paid.

Moreover, although EEOC lawsuits aim to secure monetary and injunctive relief for individuals, the EEOC also uses them as vehicles for publicizing particular issues or practices that are the focus of its national litigation strategy. The EEOC's resources and publicity goals make it a determined, capable opponent, as demonstrated by a recent $240,000,000 verdict in its favor in a disability discrimination case brought on behalf of 32 individuals in Iowa. Nevertheless, recent opinions in other cases demonstrate that an aggressive, well-planned defense can lead to favorable rulings and results for employers in EEOC lawsuits.

Discovery Abuse Sanctions

The EEOC has increasingly brought cases that involve claims of systemic discrimination by a particular employer. In one such case in California, the EEOC sued a food company, claiming that 13 female employees were subjected to sexual harassment and to retaliation for the complaints they made about such conduct. The company learned that the plaintiffs were posting comments about the case on social media accounts and emailing each other about the lawsuit. Therefore, as part of its discovery strategy, the company sought the production of social media posts and emails sent by the various plaintiffs that were not privileged.

The EEOC's trial attorneys agreed to produce electronic communications and to do the searching through its own technology employees. However, the EEOC then reneged on that agreement and stonewalled further production efforts. A federal magistrate judge found that the EEOC's position was based on a change in position by EEOC supervisors, that the EEOC had engaged in "dilatory" and "cavalier" behavior, and that the EEOC's behavior had made the litigation "more time consuming, laborious and adversarial than it should have been." The court granted the company's motion to compel and motion for sanctions against the EEOC. As a result, the company will get the records it sought.


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Employers and defense counsel are pushed by plaintiffs' lawyers and governmental agencies, including the EEOC, for production of voluminous amounts of electronic documents during the course of discovery. Similar requests to plaintiffs for electronic communications often come back with limited or no documents. As this case demonstrates, however, electronic discovery is a two-way street, and courts will support a company's request for such information from individual plaintiffs and governmental agencies like the EEOC.

Investigation Information

Corporations defending against employment discrimination lawsuits must comply with a variety of discov-

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ery obligations, including the need in some cases to designate a corporate representative under Rule 30(b)(6) to testify about information known or reasonably available to the company. These 30(b)(6) depositions consume significant defense resources, and they generally cannot be used against individual plaintiffs or agencies such as the EEOC. However, as one recent case from Pennsylvania demonstrates, the EEOC may be subject to such depositions in the appropriate circumstance.

The EEOC must take several steps before it can file a lawsuit, including conducting an investigation on a charge of discrimination, issuing a reasonable cause finding, and attempting conciliation. The EEOC recently brought a lawsuit in federal court against two health care companies in Pennsylvania, claiming that the companies violated the Americans with Disabilities Act by subjecting employees to improper pre-employment medical examinations and inquiries about their health.

The companies believed that the EEOC had failed to follow its pre-filing obligations before initiating that lawsuit. Therefore, the companies noticed a Rule 30(b)(6) deposition for the EEOC.

The district court denied the EEOC's motion for a protective order and granted the companies' motion to compel, finding that the issue of whether an EEOC investigation actually occurred was a proper subject of discovery. Following prior case law, the court ruled that the companies could not delve into the sufficiency of that investigation; however, the court allowed the 30(b)(6) deposition of the EEOC to move forward.

The court also allowed the company to amend its answer and include an affirmative defense alleging that the EEOC had not satisfied the jurisdictional prerequisites for bringing the lawsuit and was improperly expanding the scope of the lawsuit beyond the issues investigated at the administrative stage. This ruling is an important precedent for employers who question the EEOC's compliance with its pre-filing obligations and the EEOC's efforts to expand the scope of litigation.

Religious Discrimination Case

Although the EEOC has focused on cases involving multiple plaintiffs in recent years, it still litigates cases on behalf of single employees -- particularly in cases that involve issues at the center of its litigation strategy.

One such case was brought in North Carolina on behalf of dump truck driver. In the lawsuit, the EEOC alleged that the employee was terminated when he refused to work on Saturday due to his religious obligations. The company's proposed accommodations of shift-swapping and paid personal leave were rejected.

The employee and the EEOC contended that three other accommodations were reasonable: hiring hourly drivers in his place on Saturdays; training additional company employee drivers who could serve as his Saturday replacement; or transferring the employee to a general equipment operator position, which did not involve Saturday work.

The district court found that the company had offered the employee a reasonable accommodation, and that the EEOC's proposed accommodations were not reasonable and would be an undue burden.

The U.S. Court of Appeals for the Fourth Circuit affirmed, concluding that the district court properly found the EEOC's proposed accommodations would be an undue hardship for the company. The Fourth Circuit noted that the company proved the substantial costs it would have incurred with hiring independent contractors to drive on Saturdays, as well as the money it lost when the employee's truck sat idle on Saturdays.

According to the Fourth Circuit, the company also proved that it would be an undue burden to train, insure, and license substitute drivers for intermittent Saturdays. Moreover, the evidence demonstrated that the employee would not have accepted a different position. Based on the substantial evidentiary record submitted by the company, the Fourth Circuit concluded that all of the EEOC's proposed accommodations must be rejected.

Although employers will continue to do all they can to avoid situations that lead to litigation with the EEOC, these three cases cited above demonstrate that once engaged in litigation, an aggressive and well-planned defense can lead to favorable rulings and results. ■

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