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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Talking Turkey About EEOC Overreach

Law360, New York (November 26, 2013, 4:08 PM ET) -- As the Thanksgiving holiday approaches, employers are likely giving thanks for the growing trend among federal courts to reign in what many perceive to be overly aggressive litigation tactics employed by the Equal Employment Opportunity Commission. There have been a surprising number of cases over the past year in which the EEOC has been dressed down for: (1) seeking to litigate claims that the agency failed to investigate and/or conciliate, (2) asserting baseless disparate impact claims; and (3) engaging in abusing litigation tactics. These cases likely have emboldened employer defendants, setting the table for continued challenges unless and until the EEOC makes necessary adjustments.

Perhaps the cause of all this trouble is that the EEOC has taken on more than it can chew with the launching of its "Systemic Initiative." While the EEOC's budget has decreased considerably in recent years, the number of systemic litigation claims has increased dramatically. In short, it appears that the EEOC may have initiated more complex employment litigation matters than its staff can manage or adequately supervise.

Failure to Investigate or Conciliate Cases

Unlike individual litigants, the EEOC must establish as part of any prima facie case of discrimination that it has engaged in certain pre-suit actions. Specifically, the EEOC must show that it: (1) received or promulgated a formal charge; (2) provided notice of the charge to the employer; (3) investigated the charge; (4) made a determination with respect to the charge and gave notice of that determination to the employer; and (5) made a good faith effort to conciliate. See 42 U.S.C. § 2000e-5(b).

Recently, a number of courts have refused to allow the EEOC to proceed with litigation upon concluding that the agency failed to comply with these basic requirements. Leading off, in EEOC v. CRST Van Expedited Inc., No. 07-cv-95 (N.D. Iowa Aug. 1, 2013), the court ordered the EEOC to pay the defendant employer $4.7 million in fees, costs and expenses in a class action sexual harassment lawsuit purportedly brought on behalf of approximately 270 women. Of these class members: (1) 97 were dismissed as a discovery sanction for not being made available for deposition; (2) nine were dismissed on the grounds that their claims were time barred; (3) one was dismissed on the grounds that her claims were "frivolous"; (4) 72 were dismissed because of lack of evidence that they were subject to unlawful harassment, or that the employer had knowledge of their claims; and (5) the remaining were dismissed because the EEOC wholly abandoned its pre-suit obligation to investigate and conciliate their claims.

Similarly, in EEOC v. Bloomberg L.P., No. 07-cv-8383 (S.D. N.Y. Sept. 9, 2013), the court dismissed the claims of all class members in a sex/pregnancy discrimination lawsuit brought on behalf of 32 women who took maternity leave. The court issued this decision after finding that the EEOC refused to identify

potential class members during its investigation or conciliation efforts and spurned efforts to conciliate individual claims beyond the original charging parties. The court held that the EEOC may not "use class wide claims ... to conduct an end run around the pre-litigation requirements that must be satisfied before bringing suit on behalf of individual claimants." The district court has invited Bloomberg to seek sanctions against the EEOC and that issue remains pending.

Finally, in EEOC v. Mach Mining, No. 13-2456 (7th Cir. 2013), the EEOC filed a class action lawsuit on behalf of female job applicants. In its answer, Mach Mining alleged that the EEOC had failed to conciliate the class members' claims in good faith. To avoid that issue, the EEOC brought a motion for summary judgment alleging that courts may only address whether conciliation occurred and not address the adequacy of the process. The district court rejected the EEOC's motion, finding that the adequacy of the process is subject to judicial review. However, the court then certified the issue for interlocutory appeal to the Seventh Circuit.[1] The U.S. Chamber of Commerceand National Federation of Independent Business filed amici briefs and the matter was heard in late October. While it remains to be seen how the Seventh Circuit will rule, it is clear that employers are advised to push back on EEOC efforts to litigate claims that have not been properly investigated or subject to conciliation.

Background Check Cases

The EEOC also has had its feathers plucked by a number of courts over the last year for asserting dubious disparate impact claims arising out of background check policies. Just last month, the Sixth Circuit affirmed a district court's decision to sanction the EEOC in the amount of $752,000 for asserting claims based upon a purported background check policy that did not exist. EEOC v. Peoplemark Inc., No. 11-2582 (6th Cir. Oct. 7, 2013). In that case, relying on a statement made by a vice president during the administrative investigation that Peoplemark had a policy of denying employment to applicants with felony convictions, the EEOC brought a disparate impact claim against the company alleging that this policy had a disparate impact on African Americans. However, during discovery, it became apparent that the statement of the vice president was incorrect, and that Peoplemark had no such policy. Nonetheless, the EEOC continued to pursue its claims. The district court was not amused.

In EEOC v. Freeman, No. 09-cv-2573 (D. Md. Aug. 9, 2013), the district court dismissed a putative class action alleging that the defendant's use of credit and criminal background checks had a disparate impact on African American and male applicants. The district court dismissed the EEOC's claims after concluding that the EEOC's expert opinion, upon which the agency's claims were based, was not reliable and failed to show that any specific employment practice created a disparate impact. Among other things, the expert cherry picked fails and added them to the supposed random sample.

In another disparate impact background check case, the district court allowed the defendant to conduct a rule 30(b)(6) deposition of the EEOC with respect to its own background check policies and procedures and ultimately dismissed the case after the EEOC could not produce admissible evidence of the race of the applicants at issue. EEOC v. Kaplan Higher Educ. Corp., No. 10-cv-2882 (N.D. Ohio April 18, 2012). Specifically, the court rejected the EEOC's attempt to establish applicant race based on the votes of a team of "race raters" who voted on a person's race based on DMV photos.

While the EEOC appears to relish the chance of bringing lawsuits against employers that appear to promulgate blanket hiring exclusions based on criminal or credit background checks, it is fast learning that it will not be allowed to proceed if its facts are mashed.

Abusive Litigation Tactics

Finally, the EEOC is finding itself increasingly on the short end of the drumstick when courts are asked to review its litigation tactics. The following are just a few recent examples:

In EEOC v. HomeNurse Inc., No. 13-cv-02927 (N.D. Ga. Sept. 30, 2013), the EEOC brought retaliation and class age, disability, race and pre-existing genetic condition discrimination claims against a home health aide provider. However, the charging party was white, under 40, not disabled and had no pre-existing genetic condition. Nonetheless, the EEOC conducted an unannounced raid on a HomeNurse office and, according to HomeNurse, intimidated staff and rummaged through files. In quashing a subpoena issued by the EEOC, the court stated, "The EEOC's highly inappropriate search and seizure operations, its failure to follow its own regulations, its foot dragging, its errors in communication which caused unnecessary expenses ... its demand for access to documents already in its possession, and its dogged pursuit of an investigation where it had no aggrieved person constitute a misuse of its authority as an administrative agency."

In EEOC v. Womble Carlyle Sandridge & Rice, LLC No. 13-cv-00046 (M.D.N.C. 2013), an employer recently sought sanctions against the EEOC after it uncovered evidence that the charging party shredded documents relating to her mitigation efforts after the EEOC commenced litigation against the employer based on her claims. The employer requested that the court dismiss the EEOC's economic damages claim or, alternatively, issue an adverse inference instruction to the jury.

In EEOC v. Cabrera, No. 11-cv-03560 (D. Colo. Feb. 27, 2013), the district court sanctioned the EEOC for delaying discovery of text messages and social media account information belonging to the charging parties. The EEOC represented that its IT personnel would gather the data, but then reneged on that representation. It also reneged on an agreement allowing a social media questionnaire to be sent to the charging parties.

In EEOC v. McLane Co., No. 12-02469 (D. Ariz. Nov. 19, 2012), the charging party filed a sex discrimination charge, followed by a disability discrimination charge that made only a "blanket assertion" that a return to work physical violated the Americans with Disabilities Act ("ADA"). The court found that the EEOC overreached is subpoena enforcement powers when it sought broad information intended to expand the case into an ADA claim. It concluded that the EEOC did not have jurisdiction to investigate alleged ADA violations because the charging party did not mention in her charge a single instance of disability discrimination or allege that she was subjected to such discrimination. To hold otherwise, the court reasoned, would "invite the oft-cited 'fishing expedition' to become a full blown harvest operation."

Case New Holland Inc. v. EEOC, et al., No. 13-cv-01176 (D.D.C. Aug. 1, 2013). In this case, CNH sought declaratory and injunctive relief after the EEOC sent, without any advance notice, an email to 1,300 CNH employees (including over 200 managers) asking them to respond to a poorly written questionnaire as part of a nationwide investigation into whether CNH or any of its 43 affiliated entities engaged in age discrimination. The questionnaire followed CNH's production of over 600 MB of data in response to the EEOC's request for all HRIS information regarding over 10,000 employees, and 1.5 years of no activity by the EEOC.

The EEOC has a noble and important mission and the tactics of some EEOC representatives do not reflect the practices of all EEOC representatives. But there can be no question that greater supervision and accountability is in order. A cornucopia of case law has developed over the course of the last year that provides employers with a greater basis to fend off overreaching EEOC tactics. To be sure, in the

words of Magistrate Judge Walter E. Johnson, “The federal courts stand as a bulwark to protect this nation’s citizens from powerful government agencies that seek to run roughshod over their rights.” EEOC v. HomeNurse Inc., No. 13-cv-02927 (N.D. Ga. Sept. 30, 2013).

—By Charles F. Knapp, Faegre Baker Daniels LLP

Charles Knapp is a partner at the firm's Minneapolis office.

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