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EEOC Announces Enforcement Statistics and Priorities

Written by: Paul R. Monsees

Last week, the EEOC released final statistics for the fiscal year ended September 30, 2011 and has issued a draft strategic plan that highlights a particular emphasis on pursuing systemic bias cases. Employers can take note of emerging trends regarding EEOC workplace enforcement efforts from these announcements.

The January 24, 2012 press release, Private Sector Bias Charges Hit All-Time High (http://tinyurl.com/843jtev), reflected another increase in the number of employment discrimination charges received by the EEOC to 99,947. Retaliation once again led the pack as the most frequently asserted complaint in more than 37 percent of those claims. It was the ninth consecutive year that the percentage of retaliation claims has increased compared to, for example, race claims (which have remained relatively constant over that period) and gender claims (which have declined slightly). The EEOC filed 300 lawsuits in FY 2011, an increase of more than 10 percent over the prior year, but reduced the number of case filings from five years ago by more than 100.

In its draft Strategic Plan for 2012-2016 (http://tinyurl.com/6n6rghd) released on January 18, 2012, the EEOC announced that it will emphasize pursuit of systemic discrimination, which it describes as "pattern or practice, policy and/or class cases where the alleged discrimination has a broad impact on an industry, profession, company, or geographic area." EEOC statistics reflect that 23 systemic discrimination cases were filed in FY 2011, an increase over last year, and that nearly 600 investigations were underway.

Where might the EEOC's focus on systemic bias be concentrated? Recent enforcement efforts have included pursuit of allegations of gender-based harassment against a Texas restaurant chain, a Michigan engineering firm for issues concerning age, and an international beverage company that the agency accused of race discrimination in hiring. The EEOC also has held public meetings in recent months about hiring practices it believes create discriminatory barriers to hiring, including screening candidates based on arrest and conviction records, credit history, or unemployment status. For additional information, please see "Not Hiring the Unemployed: Is There a Disparate Impact on Minorities?" in the March 21, 2011 edition of Foley's *Legal News: Employment Law Update* (http://tinyurl.com/7vnn5yz). Another public meeting is being scheduled next month regarding pregnancy and caregiver discrimination. In his State of the Union Address, President Obama also placed great emphasis on employment concerns, especially equal pay, and creating job opportunities for returning veterans. Based on these public statements, there is fertile ground for the EEOC to select hot-button issues in pursuit of its strategic goal.

Budget cuts for FY 2012 may impact enforcement efforts, but the EEOC seems poised to challenge what it perceives as widespread bias in hiring and pay practices. In this election year, with both parties emphasizing job creation and reducing unacceptably high unemployment rates, employers should continually examine their policies and practices to ensure that there is no disproportionate impact on any protected group.

Union Must Prove Changed Circumstances to Overcome Bargaining Impasse

Written by: Sharon K. Mollman Elliott

On January 20, 2012, a federal court slapped down the NLRB for insisting that an employer must "test the Union's stated willingness to move" (http://tinyurl.com/7qahopv) after impasse is reached. The Board had ruled that an employer committed unfair labor practices when it declared an impasse and implemented a unilateral wage increase because "there was at least professed flexibility" (http://tinyurl.com/7qg5p4p) over the sticking point of health insurance. The Court of Appeals for the D.C. Circuit, however, set aside the Board's ruling of no impasse, finding that it was not supported by substantial evidence.

Indeed, the Board itself noted that the parties had "remained steadfastly fixed in their respective positions" throughout their six months of negotiations. Its finding of no impasse was based not on the parties' lengthy bargaining history, but on the union's last-minute statement that if the employer was unwilling to change its position, the union would have to "look for other health insurance." When the employer declared its "last and best final offer," the union protested that they were not at impasse and that there was still "wiggle room." From this, the Board found no impasse.

The Court of Appeals, however, disagreed, noting the vagueness of the union's comments. The court held that "to the extent that a proposal may be inferred" from vague suggestions about looking for other health insurance, it was "emphatically rejected" by the employer's declaration of its "last and best final offer." The court also noted that the union's claim of "wiggle room" came too late, after an impasse had already been reached. An impasse can only be broken by substantial evidence of a change in circumstance, and "bare assertions of flexibility" and "generalized promises of new proposals" do not establish a change in the party's negotiating position.

The court's decision reinforces the need for the Board to consider the parties' bargaining history in determining impasse and to require the party denying impasse to prove changed circumstances.

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