QUARTERLY BYTES

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Employment Discrimination Lawsuits: Timeliness is Key

Filing a charge with the Equal Employment Opportunity Commission (EEOC) is a necessary prerequisite to a federal lawsuit by an employee against his or her employer for allegations of discrimination. But simply filing a charge with the EEOC is not enough – the charge must be *timely* filed and any subsequent lawsuit must also be timely before the employee may proceed with his or her discrimination claim in court.

Because Alabama does not have a state agency with the authority to adjudicate discrimination charges, a federal statute requires any charge of discrimination to be filed with the EEOC within 180 days from the date on which the allegedly discriminatory employment practice occurred. Employment practices typically must be discrete acts, such as terminations, failures to promote, denials of transfer, or refusals to hire. The United States Supreme Court has determined that a discrete discriminatory act "occur[s] on the day that it happen[s]." If an employee does not file a charge of discrimination with the EEOC within 180 days of the allegedly discriminatory act, then that act cannot form the basis of a civil lawsuit because it is time-barred.

Additionally, if an employee does file a timely charge of discrimination with the EEOC, any subsequent lawsuit must also be timely filed. After receiving an employee's charge of discrimination and conducting an investigation, the EEOC will issue a right-to-sue letter (unless the EEOC refers the case for further proceedings). This right-to-sue letter triggers another time period within which the employee must act. The employee has 90 days to file a lawsuit from the date he or she *receives* the right-to-sue letter. If the date of receipt is unknown or in dispute, courts will presume that the employee received the right-to-sue letter three days after mailing by the EEOC. Receipt of the letter by the employee's attorney or agent generally triggers the 90-day time period as well. But any lawsuit filed outside the 90-day time frame is subject to dismissal. Likewise, any lawsuit filed before an employee receives a right-to-sue letter may also be subject to dismissal, particularly if the employee failed to even request a right-to-sue letter from the EEOC.

In short, particular attention must be paid to the dates on which events occurred as an untimely-filed lawsuit or one based on a late-filed EEOC charge may be dismissed by the courts.

Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101(2002).

LITIGATION SPOTLIGHT

The Alabama Litigation Accountability Act

Enacted to limit the number of meritless lawsuits, the Alabama Litigation Accountability Act (ALAA) specifically allows for sanctions against parties and their attorneys in specific situations. The ALAA mandates courts enter sanctions of reasonable attorneys' fees and costs against any party or attorney, or both, who has brought a civil action or asserted a claim (or defense) that the court determines to be without substantial justification.

Although there are several procedural steps necessary to obtain a valid award under the ALAA, the biggest hurdle to overcome is establishing that the claim at issue is without substantial justification. By definition, "without substantial justification" means the claim is frivolous; groundless in fact or in law; vexatious; or interposed for any improper purpose, including causing unnecessary delay or increasing the cost of litigation. The act itself includes several factors for courts to consider: the efforts made to determine the validity of the claim before and after it was asserted; the availability of facts to assist in determining the claim's validity; the relative financial position of the parties; the existence of bad faith or improper purpose; whether dispositive facts were reasonably in conflict; the extent to which the parties prevailed; whether the party or attorney asserted the claim in a good-faith attempt to establish a new theory of law; the amount or conditions of any offers of judgment; the extent to which a reasonable effort was made that all parties sued were proper parties owing a legal duty; and the efforts made to reduce the number of parties in an action after it was brought.

Once it is determined that a particular case is appropriate for a request for sanctions under the ALAA, it becomes necessary to raise that issue with the court *before* a final judgment is entered. This may be done through a counterclaim, a separate motion, or as part of a motion for summary judgment. However, case law is clear that if the request for sanctions is made *after* the court issues a final order, that court loses its jurisdiction over any ALAA request, unless it expressly reserves otherwise. This requirement places the burden on litigants to keep the ALAA request fresh in the court's mind so that it will be decided while the court retains jurisdiction over the case.

Another procedural hurdle involves specific findings the court must make on the record in relation to an ALAA request. To be valid, any award under the ALAA must include: (1) an express determination that the claim is without substantial justification; (2) the ground or grounds upon which the court relied in making that determination; and (3) the legal or evidentiary support for that determination. Undoubtedly, the burden to make a specific and appropriate record is on the court for this particular step; however, litigants should frame their requests in a way that reminds the court of its obligations under the ALAA. This will help ensure an award will survive appellate review.

Casey v. McConnell, 975 So. 2d 384(Ala. Civ. App. 2007).

Williams v. Board of Water and Sewer Com'rs of City of Prichard, 763 So. 2d 938(Ala. 1999).

HR CORNER

OFCCP Announce New Case Enforcement Procedures

On December 16, 2010, the Office of Federal Contract Compliance Programs (OFCCP) issued a transmittal detailing new active case enforcement procedures. Such procedures govern OFCCP's compliance evaluations for affirmative action programs (AAP). These procedures became effective January 1, 2011.

As it has done in the past, OFCCP will continue to use the Federal Contractor Selection System to choose those contractors for which it will schedule audits. OFCCP will pass these names to its local offices to perform reviews in "strict sequential order," which implies that the local offices cannot selectively determine which contractors they would like to audit in which order. The new procedures note that, for each contractor selected, the OFCCP will also determine the applicable level of review between four options: full compliance review; off-site review of records; compliance check; or focused review.

The compliance review entails the most thorough audit. These new procedures specifically state that, for each compliance review, OFCCP will contact the local Equal Employment Opportunity Commission (EEOC) office to determine the number, nature, and status of all EEOC charges filed against the contractor under review. A full desk audit is also included with each compliance review, as is a review of the contractor's compliance history for the last three years. This includes coordination with other local department of labor offices, including local wage and hour divisions.

Compliance checks, off-site records reviews, and focused reviews involve much less stringent audit procedures. Compliance checks include a review of the contractor's recordkeeping procedures. Focused reviews are on-site reviews that are tailored to one (or more) aspects of the AAP or other employment practices. Off-site record reviews are an off-site review of the AAP and its supporting documentation to determine compliance with Executive Order 11246.

For "quality control" purposes, the OFCCP specifically states that it will perform full compliance reviews, including on-site visits, for every twenty-fifth contractor selected for review.

Most importantly, the new procedures discuss OFCCP's revised indicators for class or pattern discrimination. Previously, OFCCP directives indicated that "patterns" of discrimination resulted from discrimination effecting ten "victims." Now, OFCCP has lowered this threshold to evidence of discrimination effecting two or more victims. In addition, the OFCCP specifically notes that indicators of discrimination will include not only AAP violations, but also indicators of non-compliance with other labor and employment laws administered by other federal agencies. Specifically, OFCCP notes as an example: "a contractor with a history of recordkeeping violations under [the Department of Labor's Wage and Hour Division] and [the Occupational and Safety Health Administration] may indicate that potential violation of OFCCP's recordkeeping requirements."

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OFCCP Announce New Case Enforcement Procedures…*continued*

Contractors are encouraged to review their AAP policies and procedures and to self-audit their programs for compliance. Furthermore, a review of all record-keeping requirements, including OFCCP records and all other required employment records, is warranted. These new procedures indicate enhanced efforts at the OFCCP to find new investigatory procedures for reviewing all employment requirements for contractors and could bring a significant change to standard audit practices.

PROTECTIVE MEASURES

"You're Not From Around Here, Are You?" Limits to *In Personam* Jurisdiction Remain

In recent years, courts have been reluctant to acknowledge limits to their jurisdiction over out-of-state defendants. The Alabama Supreme Court recently acknowledged that those limits do still exist. See Ex parte Dragomir, 2010 WL 5130024 (Ala. Dec. 17, 2010). In Dragomir, plaintiff James Pike, an Alabama resident, sued Cristian Dragomir, a Michigan resident, in Tallapoosa County, Alabama Circuit Court, for injuries arising out of an accident that occurred in Iowa. Years earlier, Dragomir had lived in Alabama, and he still had some sporadic contact with Alabama. Additionally, Dragomir's employer had an office in Trussville, Alabama, and that office approved Dragomir's hiring. He also submitted his driver logs to the office in Trussville. Nevertheless, the Alabama Supreme Court ruled his current contacts with Alabama were not sufficient for an Alabama court to have jurisdiction over him for the accident. In short, the Alabama Supreme Court has reestablished to some degree the concept of a limit to *in personam* jurisdiction which should be helpful in defending out-of-state defendants, particularly when the incident at issue does not relate to, or did not occur in, Alabama.

FEES & BURGESS, P.C. — Calendar of Events

FEES & BURGESS, P.C., is proud to present, or participate in the presentation of, the following upcoming seminars:

April 14, 2011, Las Vegas, NV (In conjunction with IPC APEX EXPO)

Special Session: Contracting with the Customer: What the EMS Executive Needs to Know

This unique workshop presented by Jeffrey Roth and Allen Anderson of FEES & BURGESS, P.C., addresses the specific issues EMS companies face while contracting. Participants will be led through the contracting lifecycle between an electronic manufacturing services (EMS) provider and its customer, starting with the initial engagement and signing of a nondisclosure agreement, through the bid process and formal contract negotiation, to resolution of disputes under the applicable contract(s).

If you would like more information on these and more seminars, please go to www.feesburgess.com.

Seminars

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A Recession Era Guide to Collecting on Construction Contracts

Conducting Effective Workplace Investigations

Construction Contracting

Contingent Employees and Labor Outsourcing

Diversity Training

Elements of an Electrical Manufacturing Services Contract

Employment Law Survival Training for Managers

Family Medical Leave Act

Hiring and Firing

Immigration Compliance

Incoterms ® 2010

Indemnity and Limitation of Liability Contract Clauses

International Contracting

Limiting Liability for Sexual Harassment

Managing Gender identity Issues in the Workplace

Negotiation and Resolution of Federal Contract Claims

Privacy in the Workplace

Reducing Employee Benefits Costs for Alabama Businesses

Reducing Risk in Purchasing Terms and Conditions

Reduction in Workforce Strategies

Retaliation and Whistleblowers

Uniform Commercial Code: Primer to Articles 1, 2, and 2A

Violence in the Workplace

Wage and Hour Issues/Fair Labor Standards Act

Americans with Disabilities Act Managing

Employee Use of Internet and E-mail in the Workplace

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