CHRO Attorney Agrees Emphasis at Agency "Has Shifted From MAR to Mediation"

By Daniel Schwartz on December 23rd, 2011

Earlier this week, I wrote about the perception among some that the CHRO has been retaining more cases for investigation by letting more cases through the Merit Assessment Review. These cases that used to be dismissed — mainly "frivolous" ones as I've collectively termed them — mean more headaches for employers who have to spend time and money defending against them.

(To simplify the blog post for readers, I labelled all these cases that had been dismissed at MAR together as "frivolous" even though there are technically different reasons why the CHRO may dismiss a case on Merit Assessment Review, including that there is "no reasonable possibility" that an investigation will lead to a reasonable cause finding of discrimination.)

In response to my blog post, CHRO Principal Attorney Charles Krich crafted a reply. While it is attached to the original blog post, I thought it notable enough that it warranted its own blog post. While he indicated that there were no statistics yet available, he "would not be surprised if fewer cases are being dismissed for no reasonable possibility" under the Merit Assessment Review.

Here's his reply in full (my further comments are below):

Are you referring to cases dismissed as frivolous (Merit Assessment Standard 2) or for no reasonable possibility (Merit Assessment Standard 4)? Except for one region I would say that the Commission never dismissed that many as frivolous, and if reconsideration of those complaints dismissed as frivolous was requested they were usually granted. Merit Assessment Standard 2 mirrors the judicial standard for dismissing complaints as frivolous in federal court–and how many court cases are dismissed as being frivolous?

I would not be surprised if fewer cases are being dismissed for no reasonable possibility under Merit Assessment Standard 4 and I would guess the statistics will bear that out, but at this point we have a largely non-working computer system and cannot extract the data. We have not had a computer person in-house for nearly a year. DAS is now in charge of our information technology.

If I were an employer I definitely would not hold back presenting my company's case. I just did a legal review and was persuaded the original dismissal should stand because of a thorough response from the employer. If the response had been less detailed this complaint would have gone to investigation.

A well prepared response will reap benefits at mediation, could influence an early legal intervention decision and will structure the investigation to a degree. We have a situation now where an employer represented by a law firm has chosen not to comply with a Schedule A request – unless the information is provided I can see the agency bringing an enforcement action in Superior Court. That is

something we have not done in years, but it is something for employers to be aware of. We will go to court if we have to. We can also default employers for failing to respond to discovery.

Keep in mind that all cases retained at MAR do not necessarily to go a full investigation if mediation fails. A party or the Commission may request early legal intervention. One outcome of early legal intervention is that the Legal Division can make a recommendation that the complaint be dismissed or no reasonable cause found. I anticipate doing that in some cases here in Legal now. Obviously a comprehensive response will make that outcome more likely and a stingy response will make that outcome essentially impossible.

All cases are not created equal and just because the agency retains a complaint at MAR does not mean it is going to result in a cause finding.

I agree that the emphasis has shifted from MAR to mediation, but it is too early to tell what that is going to mean for parties or practitioners.

Charles Krich, Principal Attorney
Commission on Human Rights and Opportunities

Employers will have to decide what the proper response will be to this. Is it worth taking the time to craft, as the CHRO advocates, a “well prepared response”, in all cases? Or will a more concise (yet compliant) summary suffice, particularly if the case is likely to go to court anyways?

The CHRO is still parsing its way through the new procedures. For employers used to the way things used to run at the agency, Attorney Krich’s reply shows that it is not business as usual anymore. If you still need an update on the law, you can download the agency’s Powerpoint presentation here.

My thanks to Attorney Krich for his public response.