Labor Letter

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"If They Hate You, They Must Hate Me Too"

By Greg Ballew (Kansas City)

On February 9, 2012, the U.S. Court of Appeals for the 5th Circuit addressed the issue of whether alleged harassment toward African-American employees could support the claim that there was a hostile work environment for two Hispanic employees. The court concluded it could not in the particular case before it, stating that "if the evidence of the workplace environment for the employees of plaintiff's race does not show frequent, severe and pervasive hostility, then evidence of hostility towards a different racial group is not much support for the plaintiff's claim."

Thus, the Fifth Circuit affirmed a federal district court's summary judgment order in favor of the employer on two Hispanic employees' hostile work environment claims, finding the evidence of alleged harassment against the Hispanic employees insufficiently frequent, severe or pervasive. However, the Fifth Circuit noted, "whether that conclusion is always correct, we need not decide." *Hernandez, et. al. v. Yellow Transportation, Inc.*

Facts

Two Hispanic employees at a trucking terminal brought claims of race discrimination and retaliation, including hostile work environment harassment claims. The claims also included a claim by a Caucasian employee that his association with African-American and Hispanic employees resulted in a hostile work environment and retaliation against him.

One Hispanic employee claimed that he was called a racially derogatory term on one occasion and once saw a poster or letter that was derogatory about Hispanics. Another Hispanic employee claimed that he once heard Mexicans referred to in a derogatory manner over a company radio and had seen a derogatory posting or drawing. The Hispanic employees also attempted to rely on evidence of alleged harassment against African-Americans in support of their hostile work environment claims.

The district court granted summary judgment to the employer on all of the claims brought by three plaintiffs. In doing so, the district court held that examples of harassment toward African-American employees could not support the claim that there was a hostile work environment for the two Hispanic employees.

The 5th Circuit's Decision

On appeal, the two Hispanic employees claimed that the district court erred by refusing to consider all of the evidence of harassment, including harassment allegedly suffered by African-Americans and instances of non-race-based harassment. The 5th Circuit noted that whether the rejection of that evidence was proper was the key appellate issue on these claims.

Race-based harassment affects the employment relationship when it is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. An employer is liable for harassment by a co-worker where it knows or should have known of the harassment and fails to take prompt corrective action. A wide range of behaviors can make a workplace uncivil, but an employee must show that the conduct was based on his or her race.

The 5th Circuit noted that it has held in the context of a sex discrimination claim that harassment of women other than the plaintiff *is* relevant to a hostile work environment claim, but noted that it was still an unanswered question "whether evidence of harassment towards African-American employees can help support claims of a hostile work environment towards Hispanic employees." In the case before it, the 5th Circuit agreed with the district court that the evidence offered of an alleged hostile work environment for African-American employees could not transform what was an otherwise insufficient case of a hostile work environment by two Hispanic employees into one that could survive summary judgment.

What It Means For Employers

For some purposes, an employee has been allowed to introduce evidence of discrimination against others. For example, a woman who herself was not the object of harassment might have a harassment claim if she was forced to work in an atmosphere in which such harassment was pervasive. But when a plaintiff's claims of alleged harassment against his or her own protected class (in this case, race) are not frequent, severe, or pervasive to support a hostile work environment claim, reliance on harassment against another protected race is not sufficient to allow the case to survive summary judgment, at least under the 5th Circuit's opinion.

The decision is precedent only in the states of Texas, Louisiana, and Mississippi, although it may be persuasive to other Courts of Appeals. In addition, the court was careful to state that it was not deciding whether its conclusion "was always correct," leaving open the possibility that where the evidence of harassment against a plaintiff's own protected class is sufficiently severe or pervasive, evidence of discrimination against another protected class might be relevant.

The bottom line is that employers should continue to take appropriate corrective action against employees who engage in discriminatory behavior or remarks against any race regardless of who was present when the behavior or remarks occurred.

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As The Economy Struggles, EEOC Charges Increase

By Robert McCalla (New Orleans)

The cataclysmic effects of the longest and deepest recession since the 1929 depression will significantly change many aspects of our society for generations. The devastating impact of the recession on large segments of the workforce can be counted as one of the more significant effects. While it remains to be seen how the recession will change the psyche of this generation over the long term, one objective measure showing one aspect of the change is the large increase in EEOC charges as the economy nose dived.

While the correlation between the downward slope of the economy and the rise in the EEOC charges is significant and telling, the precise cause-and-effect relationship is less apparent. Start with the correlation: the downward spiral of the economy began in December of 2007. The recession continued to deepen during 2008 and then crashed after Lehman Brothers filed for bankruptcy on September 15, 2008. The economy continues to struggle even today.

As shown on the following chart published by the EEOC in its Performance and Accountability Report for FY 2011, [1]the number of EEOC charges jumped from 75,768 charges in FY 2006 to 99,947 charges in FY 2011.

2006	75,758
2007	82,792
2008	95,402
2009	93,277
2010	99,922
2011	99,947

While the precise causes of the correlation between volume of EEOC charges and the declining economy cannot be determined with any exactitude, we can assume a lot of the increase is due simply to the fact that during this period there was a meteoric increase in the number of employees who were experiencing negative employment actions such as terminations, layoffs, decreased wages because of lower pay rates or fewer hours, and decreased benefits. For example, because of layoffs and terminations, the unemployment rate rose 4.5%.

The severity of the adverse job actions was vividly characterized by the Department of Labor Statistics in its December, 2010 Summary: "The unemployment rate increased more sharply and the employment-population ratio decreased more precipitously during the 2007-09 recession than in any of the other post WWII recessions." The number of employees filing charges was undoubtedly exacerbated by the difficulty terminated employees were having finding new employment. The Bureau of Labor Statistics reports that the median number of weeks jobseekers had been unemployed increased from five weeks in 2007 to ten weeks in 2010.

Analyzing The Numbers

While all categories of EEOC charges increased during the period FY 2007 through FY 2011, higher increases were observed in five categories: race discrimination charges increased by 4,882 to a total of 35,395; sex discrimination charges increased 3,708 to a total of 28,534; age discrimination charges increased by 4,362 to a total of 23,465; disability discrimination charges increased by 8,008 to a total of 25,742; and retaliation charges increased by a whopping 10,671 to a total of 37,334.

It's likely that some of the increased number of disability discrimination charges were caused by the amendments to the Americans with Disabilities Act which became effective in January, 2009 and which greatly expanded the definition of disability. It's also likely that the increased number of retaliation charges was simply a product of the overall increase in the number of EEOC charges, thereby increasing the potential number of times employees felt they had suffered retaliation because they filed a charge.

Employers have increasingly experienced the fallout from this increase in EEOC charges – more investigators and investigations; more systematic enforcement proceedings involving larger groups of employees; and more litigation. Among other things, this increased level of activity is encouraged by the rapidly increasing budgets for the EEOC. In FY 2009 they received additional appropriations of $14.6 million. In FY 2010 the agency received additional appropriations of $23.4 million. This has permitted the EEOC to go on a hiring spree and to devote even more efforts to systematic investigations involving much larger numbers of employees.

In FY 2011, the EEOC was working on 580 systemic investigations involving more than 2,067 charges. As the EEOC noted in its FY 2011 Performance and Accountability Report "the agency places a high priority on issues that impact large numbers of job seekers, and employees. The Commission therefore devoted resources to investigating and litigating cases of systemic discrimination as a top agency priority.…"

Our Advice

What should an employer do in these difficult times? It is even more important now to manage the human resources aspects of your business and to devote enough time and attention to the effort to ensure it's being done properly. This includes proper training of your supervisors, prior review and complete documentation of the circumstances involving adverse employment actions, and ensuring consistency of treatment among the employees and managers.

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[1]The EEOC's fiscal year begins on October 1 and ends on September 30.

Why Mediation Is A Preferred Method Of Resolving Disputes

By D. Albert Brannen (Atlanta)

Mediation is a helpful process for resolving many types of disputes. With its increased use over the past few decades, mediation has proven to be especially beneficial in resolving emotionally-charged disputes in employment and domestic matters. Let's take a closer look at what it is, and why it works.

The Basics

Mediation is basically a structured settlement process facilitated by a neutral third party who engages in "shuttle diplomacy." Mediation works best with a trained mediator who has some subject matter expertise. Of course, the process works only if the parties have a good faith commitment to exploring their respective interests and patience to work through the process. In such cases, mediation can be amazingly successful.

Regardless of whether the underlying dispute is over domestic relations, employment, or other legal disputes, mediation has certain universal advantages. For purposes of alliteration, we'll label these advantages as "The Six Cs:" 1) choices; 2) control, 3) confidentiality, 4) cost, 5) calendar time, and 6) closure.

Choices

The parties involved have choices that don't exist in traditional adversarial litigation such as the place, date, time and ground rules, as well as selection of the mediator. The parties also may leave the mediation at any time if they are not satisfied with the process and even resume the process at a later date. Finally, participants also can fashion remedies or compromises that may not be available in litigation.

Control

The number of choices in mediation results in the parties having more control over the process and outcome. Most important of all, the parties can decide if they want to settle or not. In other words, a mediator is not empowered to unilaterally impose a remedy upon a party as a judge or an arbitrator may do.

Confidentiality

Absent a special sealing process, court records are open to the public. Thus, allegations of a complaint can be seen by competitors, creditors, customers, employees, even journalists and other parties not involved in the litigation. For example, sexual harassment allegations or offensive remarks by an executive may become news themselves.

As every lawyer knows, there are (at least) two sides to every story and what may be written in a complaint does not always turn out to be true. But the damage from allegations that become public may be irreparable. Mediation may be successful in keeping such allegations private, which alone may make it an attractive alternative.

Cost

Mediation can potentially cost far less than litigation. Especially if the parties get together early, they can engage in effective risk assessment of their respective cases. Full discovery is not necessary for the parties to get a good feel for the likely outcome of a claim.

Sometimes, plaintiffs come to a mediation guarded because they believe the defense is just trying to get information to defend the claim (and to defeat the plaintiff). But there are ways that the parties can effectively share enough information to let the other side properly assess their risk of liability and possible damages. Following discussion of the merits of a case, the parties may decide that it's best to pay to make the case go away or to withdraw the claims – before each "racks up" tens of thousands of dollars in discovery costs, attorneys' fees, and related costs only to have a judge or jury rule against one of the parties.

In many cases, free mediation is offered by a government agency such as the Equal Employment Opportunity Commission or state or federal court. Where offered, such free mediation services should be considered.

Calendar Time

State and federal cases can take years to be processed through the judicial system — especially in these tough economic times, with budgetary limitations on courts and an overwhelming caseload. When parties agree to mediate, they can get their "day in court" much sooner. In some cases, such as when backpay may be accumulating, there is an economic value to resolving the case sooner.

Closure

When the parties to a dispute agree at mediation to resolve their differences, they get closure. They know that they can move forward without the cost, disruption and distraction that can come while a legal claim is pending. The ideal mediation result leaves all parties unhappy to some extent, but they should feel that they got a better deal than they could have if they received an adverse result imposed on them by a court.

Mediation may not be appropriate in every situation but it has significant advantages for the parties to a dispute. It has a proven track record of helping short-circuit the adversarial litigation process. Any party in a legal dispute should seriously consider engaging in this process before submitting to the judgment of a court.

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OSHA's Twin Sister Is In Your Backyard

By Matthew Korn (Columbia) [1]

You would be hard-pressed to find someone who has not heard of OSHA. OSHA's presence is felt by employers across broad segments of American industry, from construction to food service. What many people don't realize, however, is the pervasiveness of OSHA's (older) sister agency, the Mine Safety and Health Administration, or MSHA.

Formerly known as the Bureau of Mines, MSHA has been in existence since 1910, when there were more than 2,000 mine fatalities annually. Congress created the current enforcement scheme with the Federal Mine Safety and Health Act of 1977 (the Mine Act). After four major mining accidents in 2006, Congress passed the Mine Improvement and New Emergency Response Act, drastically increasing MSHA penalties associated with health and safety violations.

Are You Subject To MSHA?

MSHA's title can be misleading; the agency's jurisdiction is far more expansive than many people realize. In addition to the obvious industries that are affected – coal mining, quarries, and other mineral extraction, including sand and gravel pits, limestone, gold, etc. – MSHA's reach extends to related industries including construction, trucking, blasting, milling, manufacturing and supply, engineering firms, and many more. Even the person who restocks the vending machine at the mine site must be given some minimal safety training.

Geographically, MSHA's presence can be felt in every state. Mine operators and industry service providers are typically subject to both federal and state regulation. And of course many mines employ hundreds of workers, subjecting mine owners to a variety of labor and employment concerns.

Expect An Inspection

Armed with the Mine Act and a thick book of regulations, federal inspectors conduct warrantless inspections of every mine in America. In fact, unlike OSHA, MSHA inspectors are required to inspect every inch of surface mines twice a year and underground mines every quarter. For some large underground mines, this means having at least one federal inspector in the mine every day.

MSHA inspections include examination of training records, "preshift" and "onshift" inspection reports required by the Mine Act, and thorough inspection of every piece of equipment on mine property. MSHA inspectors have the authority to cite safety violations to the mine operator and to any independent contractors on the property – often, inspectors are instructed to issue the same citation to both companies, which is permitted by the Mine Act.

MSHA's authority differs from OSHA in another very significant respect. In all cases where an MSHA inspector identifies what is believed to be a safety violation, the company is required to "fix" the cited safety issue *before* being given the opportunity to contest the violation. This sometimes involves purchasing expensive equipment or undergoing significant repairs. And if the company does not comply with the inspector's orders within a "reasonable time" it is subject to further violations and penalties.

MSHA inspectors also have the authority to shut down certain areas of the mine, or the entire mine, all before the operator has an opportunity to challenge the inspector's determination. Despite the availability of "expedited hearings," these powers can prove extremely costly for affected companies.

Full Speed Ahead!

And MSHA is not slowing down. In fact, the Assistant Secretary of Labor for MSHA, Joe Main, formerly with the United Mine Workers of America, recently released the third phase of a campaign to target certain health and safety standards for increased enforcement. MSHA's "Rules to Live By III: Preventing Common Mining Deaths," identifies 14 safety standards – eight in coal mining and six in metal and nonmetal mining – that MSHA cited as contributing to a significant number of fatal accidents over the past decade.

By April 1, 2012, federal inspectors will be trained to "increase scrutiny" and "carefully evaluate" violations of these standards, which will inevitably lead to higher penalties and more litigation. This campaign is just one tool the government is using to regulate the mining industry.

Over the past several years, the government has bombarded the mining industry with increased regulation. Tactics have included the implementation of a "pattern or practice" standard to identify repeat offenders, monthly "impact inspections" that blitz mine operators with as many as six inspectors entering the mine at once, issuance of "flagrant" violations up to $220,000 per citation, and an injunction to shut down a mine permanently. Notably, a West Virginia coal company recently paid over $200 million to settle civil and criminal liabilities, amounting to the largest penalties in MSHA's history.

MSHA's authority and penalty structure can be disastrous for mines of all sizes. Employers subject to MSHA regulations can be found everywhere, including right in your backyard. If you would like to discuss MSHA regulations further, or the mining industry generally, we would be happy to speak with you.

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[1] Before joining Fisher & Phillips, Matthew Korn litigated more than 150 cases on behalf of MSHA as an attorney with the U.S. Department of Labor, Office of the Solicitor. Each of his cases involved technical mining and engineering concepts, industry terminology, and complex regulations. Matthew was part of the Mine Safety and Health Litigation Backlog Project, an effort by the government to clear a backlog of more than 10,000 cases before Administrative Law Judges at the Federal Mine Safety and Health Review Commission (FMSHRC). This backlog was created, and continues to exist, as a result of increased government enforcement, increased civil penalties, and an increased contest rate.

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