Practical Explanation of EEOC Developments and Cases

Insights
4.20.16

Employers have become accustom to the periodic unfounded EEOC charges and may not treat them as seriously as a retaliation claim or litigation. However, the EEOC continues to change its procedures in ways which makes it more burdensome for employers to respond and may require employers to obtain more legal guidance.

This week a number of EEOC directors told employers that they had been instructed not to grant extensions on responses to charges and the only potential exception was where the respondent had elected mediation, but the EEOC had been unable to contact the Charging Party. Some of these directors have commented that even then, the maximum extension would be only two weeks. One assumes that such an approach is intended to force employers to more seriously consider mediation. We'll see if it indeed becomes more difficult to obtain extensions.

OSHA Whistleblower investigators have long provided Complainants with the Employer's Position Statement and the EEOC now provides the Statement of Position, along with exhibits and data, to the Charging Party.

> **Action Points:** ***Employers will have to evaluate whether to provide certain information in the initial Statement of Position. Most importantly, employers must take steps to ensure that the Position Statement is accurate. If the HR Director relies upon a supervisor's report of what a coworker said, there is a chance that the employer will unintentionally provide inaccurate facts, which make the employer look dishonest. Employers need to think very carefully whether to attach affidavits or sworn statements to the Position Statement, and how to protect witnesses and confidential business materials.***

The EEOC is expanding its subpoena power. A recent 7th Circuit Court Decision enforced a subpoena to an employer accused of age-discrimination, which required the employer to provide names of all clients at 62 offices, as well as all employees placed with those clients. The employer objected and pointed out that the subpoena went far beyond the scope of the charge, would involve over 22,000 clients, and could damage the employer's relationship with those clients. The court held that the EEOC could *"investigate merely on suspicion that the laws is being violated, or even just because it wants assurance that it is not."* The Court even opine that the EEOC could *"investigate on suspicion that the ADEA is being violated, without the necessity of bringing a charge."*

EEO and other Employer Pitfalls (and Successes)

Scruggs v. Pulaski City (8th Cir. 4/1/16) An Arkansas employer won summary judgment on a juvenile detention officer's discrimination and retaliation claims based on a 25-pound lifting restriction. The Court held that the ADA doesn't require employer to disregard work restrictions imposed by the employee's treating physician in favor of opinion of different doctor potentially lifting those restrictions. The Court also held that unreasonable accommodation requests aren't "protected activity" for purposes of anti-retaliation law.

Agee v. Mercedes-Benz International (11th Cir. 3/30/16). An automaker terminated an employee who was medically restricted from working more than 40 hours per week. The court recognized that the ability to work mandatory overtime can be an essential job function for ADA purposes. **This case was VERY fact-specific and a Court could easily go the other way.** Mercedes contended that the ability to work mandatory overtime as part of a flexible schedule was an essential function of all assembly plant jobs. The court agreed, based on evidence that the job description required *"flexibility in moving between different job assignments and work schedules."* The employee alsocompleted an application stating that "business needs" may require overtime. The Employee Handbook set an expectation for employees *"to work a reasonable amount of overtime as required for production schedules and as a condition of initial and continued employment*." **Perhaps most importantly,** Mercedes introduced evidence that plant employees worked an average of three hours of overtime per week, or 156 hours per year. It's important to note that many employers in other business settings would not have been able to show the undue hardship of accommodating the employee by excusing her from overtime.

Another case shows the importance of your **written job description**. An Oregon ADA-case has been allowed to proceed where a Sales Rep claimed that driving was not an essential function in the job and that if it is essential, providing a driver is a reasonable accommodation.

> **Action Point:** ***The employers had accurate and effective job descriptions, could defend their choice of essential functions and went through the required individualized interactive process with the employee.***

In contrast, in **Hugh v Boeing Co**. (March 2016), the U.S. District Court for the Western District of Washington found that the employer did not engage in the necessary interactive process and did not take reasonable measures to accommodate her Asperger's Syndrome where the record showed the employee repeatedly engaged in obstructive and uncooperative behavior in response to Boeing's proposed accommodations. From an excellent article and analysis in the National Law Review:

> ***After a bench trial, the court held Huge's failure to engage in the interactive process in good faith defeated her failure to accommodate claim. The court noted that, "the interactive process requires communication and good-faith exploration of possible accommodations between employer and employee and neither side can delay or obstruct the process." Applying this standard, the court found that Boeing attempted in good faith to provide Huge with reasonable***

found that Boeing attempted in good faith to provide Huge with reasonable accommodations, including written instructions, unpaid leave, and job coaches. Further, the court cited Boeing's patient and thoughtful approach to Huge's numerous requests.

In contrast, the court found that Huge did not exercise good faith in the interactive process. In making this determination, the court cited her contradictory requests, her refusal to submit to an independent medical examination, and the fact that, upon her return to Boeing from medical leave, she spent the majority of her time attempting to marshal evidence for a lawsuit instead of performing her work-related tasks. Finally, the court concluded that Huge's failure to engage in good faith in the interactive process discharged Boeing from its obligation to provide her with a reasonable accommodation.

Walker v. NF Chipola, LLC (N.D. Fla 3/28/16). The employer made an all too common mistake when it assumed that because FMLA only required 12 weeks of leave, the employer had no duty to provide further leave once the FMLA leave was exhausted**.** The FMLA does not replace or preempt the ADA and the employer still had to determine if additional leave constituted an undue hardship under the ADA. Rarely is up to six or even 12 months of unpaid leave with no guarantee of return found to be an undue hardship under the ADA.

Deets v. MTA (7th Cir. 2016). Watch what you say during layoffs. This linked Article discusses a recent case in which the 7th Circuit allowed a white construction worker to take his race discrimination claim to trial. When the employee asked why he was being laid off, the project superintendent told him that his "minority numbers" were not right." The bridge project received federal assistance and sought to meet had to meet a federally mandated goal for participation by minorities (14.7%) and women (6.9%).

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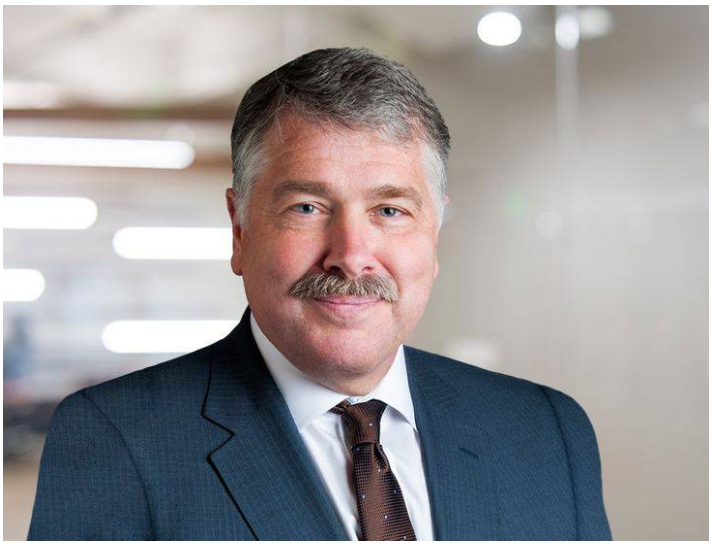

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