The Top Five Most Intriguing Recent Decisions in EEOC Cases

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This article describes a short list of the five most intriguing EEOC-related decisions handed down in 2012.

The Equal Employment Opportunity Commission's (EEOC) Performance and Accountability Report (PAR) reported a striking drop in the number of lawsuits the EEOC filed in fiscal year (FY) 2012. The PAR noted that the EEOC only filed 122 lawsuits in FY 2012, down from 261 merits lawsuits in FY 2011. This precipitous drop in the total cases filed, however, did not affect the EEOC's bottom line of systemic discrimination lawsuits. In furtherance of its strategic objectives, the EEOC continued its ever-increasing focus on pursuing large-scale, high-impact, and high-profile cases with the hope that this brand of high-stakes litigation will channel employers' behavior. To that end, the EEOC reported that by the end of FY 2012, systemic suits accounted for 20 percent of all of the EEOC's active merits suits, the largest proportion on the EEOC's active docket since it began tracking in FY 2006.

This article discusses five substantive trends in the EEOC's 2012 litigation:

1. A rush on ADA cases;
2. Subpoena enforcement actions;
3. A focus on workplace harassment cases;
4. Attacking novel theories—expanding coverage of existing laws; and
5. Rulings that apply § 706's limitation period to EEOC pattern or practice allegations brought under § 707 of Title VII.

With this retrospective in mind, following is a short list of the five most intriguing EEOC-related decisions handed down in 2012.

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EEOC V. INTERSTATE DISTRIBUTOR CO.[1]

The EEOC's Strategic Enforcement Plan (SEP) makes clear that the EEOC is going to "gear up" the investigation and subsequent litigation in the Americans with Disabilities Act (ADA). In FY 2012, the EEOC built significant momentum toward achieving this goal, and made sure that its focus on ADA claims would not go unnoticed by employers. Among these significant settlements included approval of a $4.85 million consent decree in *EEOC v. Interstate Distributor Co.* Judge Brooke Jackson of the U.S. District Court for the District of Colorado put an end to the litigation just one month after the EEOC filed its disability discrimination lawsuit. The parties negotiated a consent decree, and Judge Jackson approved the monetary payment to the class of alleged victims that provided them with back pay and compensatory damages. In terms of equitable relief, the consent decree includes injunctions prohibiting the defendant from further discrimination or retaliation based on disability. For the next three years, the defendant must provide periodic training on the ADA to its employees in efforts to prevent such discrimination. Additionally, every six months the defendant must provide the EEOC with information relating to terminations of employees, FMLA extensions, employees' requests for accommodations, and disability complaints.

The EEOC's $4.85 million consent decree is nothing to sneeze at. This is a big settlement for the EEOC and a reminder to employers to review their ADA-related policies and consider whether they are over restrictive. This case also provides insight on settlements that seek quick relief. While it can take years to obtain a final resolution through settlement or trial, the parties disposed of the EEOC's claims in record time—one month.

EEOC V. McLANE COMPANY, INC.[2]

Next, we turn to subpoena enforcement. Increasingly, the EEOC resorts to its subpoena power to launch broad-scale discovery in its investigations. In 2012, even though the total number of EEOC cases shrunk by half, the number of subpoena actions stayed roughly the same as last year. In 2012, the EEOC reported that it filed 33 subpoena/"other" actions. Courts gave the EEOC continued to give considerable latitude with respect to the breadth of the information the agency could obtain, even with respect to seemingly focused charges of discrimination. On the bright side for employers, a handful of courts issued rulings that limited or denied EEOC subpoenas.

Employers should tuck *EEOC v. McLane Company, Inc.* away for future use in confronting aggressive EEOC subpoenas. In *EEOC v. McLane Company, Inc.*, the U.S. District Court for the District of Arizona denied the EEOC's application to enforce portions of an administrative subpoena on the grounds that: (i) the EEOC did not have jurisdiction

to investigate a generalized charge of discrimination that is not tied to a specific aggrieved party; and (ii) some of the EEOC's information requests were overbroad and irrelevant to the underlying charge. The court reasoned "[t]o ignore the plain language of the statute and to allow the EEOC to investigate a generalized charge of discrimination that is untethered to any aggrieved person would invite the oft-cited 'fishing expedition' to become a full-blown harvest operation."[3]

The ruling in *EEOC v. McLane Company, Inc.* confirms that the EEOC's investigative powers are not unlimited and the EEOC does not have unbridled reign to seek any and all information from an employer merely because a charge of discrimination was filed against it. This case is a rare gem and can be used as ammunition for employers facing broad information requests in investigation of pattern or practice claims.

EEOC V. YELLOW TRANSPORTATION, INC. AND YRC, INC.[4]

In the EEOC's first draft of its SEP, the Commission telegraphed that it was increasingly focused on preventing, and when necessary, litigating workplace harassment allegations. The EEOC's warning was no bluff: the EEOC filed a series of race and sex harassment lawsuits in 2012. Indeed, we saw a notable case concerning race harassment in *EEOC v. Yellow Transportation, Inc. and YRC, Inc.* In this somewhat complicated case from the U.S. District Court for the Northern District of Illinois, the EEOC secured approval of $11 million consent decree in its largest settlement of 2012. The EEOC alleged a pattern or practice lawsuit involving allegations of systemic race discrimination. The consent decree resolved two lawsuits (including a private plaintiff class action brought by 14 workers who also intervened in the EEOC's lawsuit) that had been consolidated for purposes of settlement negotiations. The EEOC and a class of African-American workers employed by Yellow Transportation, Inc. and YRC, Inc. alleged that the companies discriminated against workers at their Chicago Ridge facility and subjected them to multiple incidents of hangman's nooses and racist graffiti, comments, and cartoons. The EEOC also claimed that Yellow Transportation and YRC subjected African-American employees to harsher discipline and scrutiny than their white counterparts and gave them more difficult and time-consuming work assignments.

Two years ago, the EEOC secured a $10 million consent decree with YRC and Roadway Express stemming from the EEOC's claims that African-American employees at the companies' Chicago Heights and Elk Grove Village, Illinois facilities were subjected to a racially hostile working environment and race discrimination. The consent decree, however, did not end the litigation in store for YRC. Although it resolved the EEOC's discrimination charges at the Chicago Heights and Elk Grove facilities, the settlement did not address pending charges against the company's Chicago Ridge facility. To that end Magistrate Judge Cox entered a joint motion for preliminary approval of the $11 million

consent decree, which provides significant monetary relief to the class of allegedly aggrieved victims, and payment of $1.1 million in attorneys' fees and costs to private class counsel.

The EEOC's $11 million settlement—or looking at it in context, the $21 million settlement with the defendants involving its three Illinois facilities—underscores the Commission's goals for prosecuting large-scale systemic harassment litigation. The defendants' payout of $21 million in the last two years reminds employers not to tread lightly on the EEOC's goals to attack race and sex harassment involving groups that it has called "underserved"—young, uneducated, and/or non-English speaking employees.

EEOC V. HOUSTON FUNDING II, LTD.[5]

This next case was an issue of first impression. The ruling in *EEOC v. Houston Funding II, Ltd., et al.* is believed to be the first decision on the issue of whether lactation is a form of sex discrimination covered by Title VII. In this unusual case, the EEOC alleged that an employer unlawfully discriminated against a worker on the basis of her sex because she wanted to express breast-milk while at work. In a terse, three-page decision, the court rejected the EEOC's claim out of hand. The court reasoned that even assuming that the "real reason" the worker was fired was because she wanted to pump breast-milk at work, "firing someone because of lactation or breast-pumping is not sex discrimination" because "lactation is not pregnancy, childbirth, or a related medical condition."[6]

EEOC v. Houston showcases another of the EEOC's stated goals from its SEP, namely addressing emerging and developing legal issues. The court's decision makes clear that expressing breast-milk is not protected under federal anti-discrimination laws and is yet another example of overreaching by the EEOC. The Commission, not apt to "give up" on this front, hosted a meeting on February 15, 2012 at its headquarters on a range of issues relative to pregnancy discrimination. Clearly, these issues remain front and center on the EEOC's radar.

EEOC V. GLOBAL HORIZONS, INC., ET AL.[7]

The final case manifests an issue that the EEOC feverishly battled over in 2012. Since the inception of its systemic litigation program in 2006, the EEOC has maintained that it is unencumbered by the 300-day statute of limitations in § 706 of Title VII that applies to private litigants (which frames any Title VII lawsuit as limited to events occurring within 300 days preceding the filing on an EEOC charge with the EEOC). Typically, the EEOC argues that it can sue an employer for alleged violations going back to the start of the allegedly illegal pattern or practice (*e.g.*, a discriminatory practice of denying promotions to female employees)

irrespective of the date when a charging party filed his or her EEOC administrative charge.

Last year, we selected *EEOC v. Freeman*[8] as one of the top cases of 2011, and noted that in 2011 the EEOC had a mixed track record of success in convincing federal courts to adopt its view of the statute of limitations issue. By the year-end of 2012, however, a wave of similar decisions make clear that a clear trend in federal courts emerged that finds § 706's 300-day limitations period is applicable to the EEOC's pattern or practice allegations. *EEOC v. Global Horizons, Inc.* was included as one of the top five most intriguing cases in 2012 because this employer-friendly decision struck at the heart of the EEOC's attempt to litigate its case unrestrained by any statute of limitations. In this case, the EEOC alleged that Global Horizons, with the help of the agricultural companies and farms with it contracted, engaged in a litany of unlawful and potentially criminal acts, including human trafficking, confiscation of passports, the provision of substandard housing, and wage-and-hour violations. The U.S. District Court for the Eastern District of Washington imposed § 706's 300-day limitations period on the EEOC's pattern or practice claims and barred the EEOC from seeking relief for employment practices occurring more than 300 days before the filing of the underlying administrative charge.

This ruling punctuates a trend of judicial intolerance for the EEOC's attempts to litigate broad pattern or practice claims without adherence to any statute of limitations. Only two years ago, federal courts were split on the issue of whether the charge-filing period of § 706 applies to pattern or practice cases brought by the EEOC under § 707. The decided tide of decisions addressing this issue now flow in favor of employers. Employers can confidently argue that Title VII's language implicates and requires that Title VII's language implicates and requires that § 707 allegations comply with § 706's 300-day limitations period. Finally, *EEOC v. Global Horizons, Inc.* is particularly interesting because it illuminates the EEOC's foray into human trafficking issues.

NOTES

1. Case No. 12-CV-02591 (D. Col. Nov. 8, 2012).
2. 2012 U.S. Dist. LEXIS 164920 (D. Ariz. Nov. 19, 2012).
3. *Id.* at *10.
4. Case No. 09-CV-7693 (N.D. Ill. June 28, 2012).
5. 2012 U.S. Dist. LEXIS 13644 (S.D. Tex. Feb. 2, 2012).
6. *Id.* at *2.
7. 2012 U.S. Dist. LEXIS 105993 (E.D. Wash. July 27, 2012).
8. 2011 U.S. Dist. LEXIS 8718 (D. Md. Jan. 31, 2011).