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EEOC Cases of 2011

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The EEOC promised to file bigger, higher-profile cases in 2011. It did just that, with a second straight year of a record number of systemic investigations and class-like federal court filings. Indeed, for the last five years, the EEOC's public strategy has been to further its agenda through prosecution of large-scale cases that will attract media attention, with the hope that this brand of high-stakes litigation will channel employers' behavior. To that end, 2011 saw a mixture of judicial rulings in EEOC cases that range from refreshingly employer-friendly decisions to those that sent chills through the employer community.

This article describes the authors' picks for the five of the most intriguing EEOC-related decisions handed down this past year.

1. *EEOC v. Bloomberg L.P.*

The first case, *EEOC v. Bloomberg L.P.*, 778 F. Supp. 2d 458 (S.D.N.Y. 2011), was decided by the U.S. District Court of the Southern District of New York, where Judge Loretta Preska put a resounding end to nearly four years of contentious litigation, holding that the EEOC's case was so riddled with problems that the employer should not face a trial on the alleged pattern or practice of discrimination. First and most importantly, the court found that the EEOC did not have the numbers to back up its claims of a widespread pattern of disadvantaging Bloomberg's pregnant or recently pregnant employees. Despite the instructions in the EEOC's own compliance manual that statistical evidence is "extremely important" in a pattern or practice claim, the EEOC here argued that statistical evidence was not legally required and therefore having none should not hurt its case. In rejecting the EEOC's position, the court reasoned that a lack of statistics may not be fatal, but that its absence was "severely damaging," and required the EEOC to provide significant anecdotal evidence. Id. at 479. But the EEOC did not have the anecdotal goods either. The court held that the EEOC's anecdotal evidence came from just a fraction of the women it claimed were victims, and even that evidence was, at best, a mixed bag and "insufficient to demonstrate a pattern or practice." Id. at 470. Ultimately, the court held that the EEOC's nonexistent statistical case — coupled with nebulous and downright unpersuasive anecdotal evidence — was not enough to move the case to an expensive and time-consuming trial.

A grant of summary judgment is rare in such a case. EEOC v. Bloomberg is a case study where a massive claim brought by the government was found so wanting as to be booted out of the courthouse for lack of proof, earning it a spot on this Top Five List.

2. *EEOC v. JBS USA, LLC*

Next is a somewhat complicated case from the U.S. District Court for the District of Colorado. *EEOC v. JBS*, Case No. 10-CV-02103 (D. Colo. Aug. 8, 2011), offers a mixed

opinion on the applicability of the bifurcation model first articulated in the U.S. Supreme Court case of International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977). The court in *EEOC v. JBS* applied a version of the familiar Teamsters model to some of the EEOC's discrimination claims, but questioned its utility for pattern or practice harassment claims. Under the Teamsters model, a prima facie showing of a pattern or practice of discrimination creates an early presumption that the employer violated the law for a broad class of alleged victims. It is potentially difficult to un-ring that bell at Phase II during the individual damages/remedies stage. The court held that it would apply the Teamsters model to the EEOC's religious accommodation, retaliation, and disparate treatment claims. Id. at *16-19. On the other hand, the court held that the bifurcation model simply broke down for a pattern or practice harassment claim, concluding that hostile work environment claims were too individualized to decide on a class-wide basis. Id. Importantly, the court held that the EEOC could not seek punitive or compensatory damages for individuals pursuant to its pattern or practice claims, noting that the statute's plain language did not authorize those damages in a Section 707 claim. Id. at *16. Claims for those damages must come, if at all, in the more individualized Phase II damages proceedings. Id. at *18.

The impact of a successful pattern or practice finding is enormous, but the standard for demonstrating a pattern or practice in Phase I is high, and cases like *EEOC v. JBS* show that judges can and do narrow the bifurcated Teamsters framework only to those claims truly susceptible to class treatment. By virtue of the novel bifurcation issues examined in this decision, the case also garners a spot on the Top Five List.

3. *EEOC v. Freeman*

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 Section 706 of Title VII that applies to private litigants (and which frames any Title VII lawsuit as limited to events occurring within 300 days preceding the filing on an EEOC charge with the Commission). Typically, the EEOC argues that the date from which it can sue an employer goes back to the start of the allegedly illegal pattern or practice (e.g., a discriminatory practice of denying promotions to female employees) irrespective of when a charging party filed an administrative charge. In *EEOC v. Freeman*, Case No. 09-CV-2573 (D. Md. Jan. 31, 2011), the employer moved for partial summary judgment, contending that, for claims that were not part of the original charge, the 300 days should run — not from the date of the original charge — but from the date that the EEOC notified the company that it was expanding its investigation to encompass new claims. The court agreed, holding that the "relevant date" for purposes of the 300-day time bar is the "date of notice" of the new charges. Id. at *14-17.

The EEOC's view of the 300-day rule inevitably expands the parameters of its typical case, and sweeps in large numbers of claimants for whom the Commission seeks damages, raising the stakes for employers in this type of litigation. The EEOC has a mixed track record of success in convincing federal courts to adopt its view of the statute of limitations issue. *EEOC v. Freeman* flatly rejects the Commission's position, and gives employers additional ammunition when confronted by broad class periods in pattern or practice litigation brought by the EEOC. Due to its importance to employers, this case would make the Top Five List in almost any year.

4. *EEOC v. AutoZone, Inc.*

EEOC v. AutoZone, Case No. 07-CV-1154 (C.D. Ill. Nov. 8, 2011), shows the unique risk factors in EEOC litigation, whereby a trial loss inevitably translates into injunctive relief on top of a jury's verdict of monetary damages. In this case, the EEOC claimed the employer violated the Americans With Disabilities Act (ADA) by failing to accommodate an employee's disability at its Macomb, IL, facility. The EEOC asserted that AutoZone forced one of its sales managers to perform jobs that violated his medical restrictions, and that he ultimately experienced additional back and neck impairments. A jury found against the employer, and awarded lost wages, compensatory and punitive damages. The EEOC then sought a post-trial injunction against the company, designed to keep the employer from engaging in similar conduct in the future. The court agreed with the EEOC's injunctive relief requests in part, and in its order found that "the conduct of the defendant's managerial employees at the highest level was clearly an intentional violation of the ADA" and was concerned with the "possibility of future infractions." Id. at *40-42. The court entered an injunction covering all of AutoZone's stores in Central Illinois, requiring the company to report all requests for accommodations by employees to the EEOC for three years, and to maintain certain company records for four years, including how AutoZone responded to each request for a reasonable accommodation. Finally, the order granted access to the EEOC to view any such records on 48 hours' notice. Id. at *41-42.

The court's post-trial order in *EEOC v. AutoZone* is a cautionary tale for employers. Given the breadth of the injunctive relief order, the ruling also garners a spot on the Top Five List.

5. *EEOC o/b/o Serrano, et al. v. Cintas Corp.*

The final spot on the list is a sanctions case that was welcomed by all employers facing the EEOC's sometimes overzealous tactics. One of the "Top Five" cases in 2010, *EEOC o/b/o Serrano, et al. v. Cintas*, Case Nos. 04-CV-40132;06-CV-12311 (E.D. Mich. Aug. 4, 2011), heated up again in 2011 with a decision by Judge Sean Cox from the U.S. District Court for the Eastern District of Michigan to award Cintas over $2,638,443 in attorneys' fees and costs. The ruling is a resounding defeat for the EEOC's systemic litigation program, and is yet another in a recent series of setbacks for the EEOC in the courthouse. Employers facing systemic EEOC cases that ultimately go nowhere will obviously applaud this fee and cost award, even if it was only half of what the company sought in fees.

As the top sanction award of 2011, it was pretty easy to put *EEOC o/b/o Serrano, et al. v. Cintas Corp.* back on the Top Five List. EEOC-initiated pattern or practice cases are incredibly time consuming and expensive, and even more problematic when grafted to private-plaintiff class actions like those faced by Cintas. The good news is, based on cases like this, employers have ammunition to make the government think twice about bringing and/or continuing to prosecute facially meritless claims.

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