

Employment Law Newsletter

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New Law Allows Jury Trials in Illinois State Discrimination Claims

Effective January 1, 2008, complainants filing charges under the Illinois Human Rights Act ["Act"] will be permitted to have their employment discrimination claims heard by a jury in the state courts. Previously, complainants within the state system were limited to administrative trials before the Illinois Human Rights Commission. This amendment to the Illinois Human Rights Act is unquestionably one-sided in favor of the employee. The overall impact on employers is likely to be an increase in the duration of claims, added costs in defending state employment discrimination claims, and almost certainly the imposition of higher awards at the hands of state court juries.

Under the amendments to the Act, the employee must still commence a claim in the state system by filing a charge with the Illinois Human Rights Commission. However, the statute provides three avenues where the employee and not the employer can file a complaint in the state court for a determination for his/her claim by either the court or a jury.

These three avenues are as follows:

1. If the Department dismisses the charge for lack of substantial evidence, the employee may either seek review of that decision with the commission or file a civil suit in the state court.
2. If the Department determines that there is substantial evidence of discrimination, the employee may ask the department to file a complaint with the Human Rights Commission. Alternatively, the employee again has the option of filing a complaint in the state court.
3. If the Department does not conclude its investigation of the employee's complaint within 365 days of its filing (or extensions agreed to by both the employee and employers), the employee can file his/her own complaint with the either the Commission or in the state court.

Thus, whether the Department finds that the employee's case either has merit or lacks merit (or makes no determination at all within a year), the employee has a right to initiate a complaint for discrimination in the state circuit courts.

As noted above, this is a wholly employer-oriented change in the law. As an example, at the present time, if the commission determines that there is no merit to an employee's claim for discrimination, that claim is effectively terminated. Under the new law, the claim will not only live on but will permit the employee to have that type of

claim adjudicated by a court and jury. Also, court discrimination filings will be subjected to the broad scope of full discovery rules of the circuit courts, which will necessarily increase the time, costs and attorney's fees required by both management and counsel to defend the claim.

It is a near-certainty that most state court judges will have little or no experience in dealing with discrimination claims. For comparative purposes, most Federal District Judges have substantial experience with these claims, as they are filed in large numbers in the Federal trial courts. Similarly, it is notoriously difficult to obtain summary judgment for any defendant in the state system. By way of additional reference, employers can and do win a substantial portion of discrimination cases filed in Federal Court at the pre-trial stage.

Finally, most anticipate that nearly all discrimination cases filed with the state court will also contain a request for a trial by jury. Jury verdicts and employment and employment-related cases in the state system have proven to be not only erratic, but often excessive. A recent employment case in the Illinois circuit court imposed a \$2.8 million dollar verdict against the employer. Fortunately, the Illinois Appellate Court reversed this judgment.

Practical Items to Consider:

- In some cases filed in the State Court system, there may be grounds to remove the case to the federal system under either federal question or diversity jurisdiction.
- In those few cases where the employee might not file a jury demand, the employer is entitled to do so.
- The mandatory mediation and arbitration provisions within the state courts may result in some early resolutions and a reduction in the usual protracted state court litigation system.
- The employees' decision to pursue remedies either with the commission or with the court is irrevocable; the employee cannot switch from one to the other after the initial choice is made.
- Once the complaint is filed, the Department of Human Rights must immediately cease its investigation and dismiss all charges. This may benefit the employer in terms of ongoing investigation, which it might otherwise be able to pursue.

In a very interesting provision, the amendment provides: "Upon the finding of a civil rights violation, the Circuit Court or jury may award any of the remedies set forth in Section 8A-104."

Those remedies include:

- The entry of a cease and desist order;
- Actual damages;
- Hiring, reinstatement, promotion, back pay, infringe benefits;
- Restoration to or admission into programs;
- Admission to public accommodations; and last
- Attorneys' fees.

In the overwhelming majority of cases heard by a jury, the jury is permitted only to award money damages. In very few instances is a jury permitted to "award" equitable remedies such as reinstatement and desists orders. Courts may well hold that a jury can decide whether discrimination exists, and award certain damages, leaving the trial judge to decide the other remedies available. This provision obviously will be the subject of judicial review and clarification as litigation under the amendments moves forward within the courts.

Recent Successful Results

We continue to obtain favorable results for our employer clients in multiple venues.

Dawn Cassie recently won summary judgment for an employer and supervisor who had been sued for race discrimination and retaliation under both Title VII and Section 1981. The decision was reported in a 20-page opinion by Judge Leinenweber of the U.S. District Court for the Northern District of Illinois.

In the case, the plaintiff was the only African-American salesman on staff. He argued that he had sufficient evidence to sustain his retaliation claims because immediately before he was terminated, he claims he complained to his supervisor about singling him out because he was African-American. The plaintiff made his complaint about being singled out while being reprimanded for arriving 45 minutes late to work, after already having been counseled for tardiness in the past. The confrontation between the plaintiff and the supervisor became heated. Even though the details of this conversation were disputed, the court still granted summary judgment to the employer, holding that plaintiff failed in his burden of establishing that he reasonably believed in good faith that he was opposing a discriminatory action. Even if the plaintiff had shown a reasonable belief of discrimination, the court held that the plaintiff's complaint itself was an unreasonable response to the supervisor's questioning. The court held that even when an employee engages in opposition, "an employer's decision to discipline that employee does not violate anti-retaliation laws where the form of opposition is unreasonable."

On the discrimination claims, the court held that plaintiff failed to point to a "similarly situated" employee who was in fact treated more favorably than the plaintiff. It was undisputed in the case that a white salesman had been counseled for his tardiness along with the plaintiff. Also, the court addressed plaintiff's evidence of other "bits and pieces" of discriminatory motive and "suspicious timing" evidence, both of which the courts recognize may constitute circumstantial evidence of discriminatory motive. The court held that the plaintiff's expression of irritation at being reprimanded and plaintiff's accusation that the supervisor was "riding him", all made in the middle of the employer's place of business, could reasonably be seen as insubordination. Any claims of race-tinged comments occurred months prior, and there was therefore no causal link between the alleged comments and any adverse employment action.

Practice Tip: These "heat of the moment" types of firings should try to be avoided, but if they do occur, the employer will have to show that the termination was reasonable in light of the employee's conduct. Such cases will have to be vigorously defended, but can get to the point of summary judgment in favor of the employer where the supervisor's actions were reasonable, and the employer has a history of treating similarly situated employees equally.

In a recent Illinois Department of Labor case, **Yvonne O'Connor** represented an employer who was sued by a former employee claiming unpaid vacation time. He later amended this claim to allege that he was treated as an exempt employee for purposes of benefits when he should not have been classified as an exempt employee.

The claimant argued that because he had to perform some manual tasks (largely due to his own negligence in supervision and scheduling of his department), that this would take him out of the "administrative exempt" category.

On behalf of the employer, Yvonne O'Connor argued that the employee's primary functions involved hiring/firing and supervision, as well as evaluation of his department employees and that any manual aspect to his job were his own doing, not the result of any design by the company. Key to the company argument was a relocation agreement entered into with the former employee that provided him with a company condominium and relocation reimbursements – items not provided to manual labor/non-exempt positions.

Once evidence on these arguments was submitted by us to the Illinois Department of Labor, the investigation was closed with a finding that the employee was properly categorized as exempt and without an award of unpaid vacation benefits.

Cary Schwimmer obtained dismissal on summary judgment of an Americans with Disabilities Act and FMLA suit in federal court in Des Moines, Iowa. The plaintiff, a factory worker, was diagnosed with Clinically Isolated Syndrome, also known as possible Multiple Sclerosis. The plaintiff's doctor gave her numerous work restrictions, including a standing limitation, no overtime, and the plaintiff basically determined when her symptoms prevented her from doing the job to which she was assigned. The plaintiff claimed she was later terminated because of a disability and in retaliation for using intermittent FMLA leave to attend doctor's appointments and to leave work or stay home when she felt she needed to.

The court held that, despite her diagnosis, the plaintiff did not have a disability. The court found that the plaintiff was not substantially limited in any major life activity, because she engaged in many normal daily activities such as driving and caring for herself and her children, and because her description of how her medical condition physically affected her did not show that her condition was disabling. The court also found that there was no reasonable accommodation for the plaintiff's many work restrictions. Finally, the court found no evidence that the company had retaliated against the plaintiff for using FMLA leave.

On behalf of clients in Illinois and Indiana, **Storrs Downey** has recently obtained dismissals of race and ethnic discrimination claims filed before the Illinois Department of Human Rights and Indianapolis branch of the EEOC, respectively.

The firm has successfully represented various clients, including a Florida-based client, in several cases where a former employer of the client's new employee sued for an alleged breach of a non-compete provision in an employment agreement. The firm has regularly counseled clients with respect to hiring new line employees and executives, who are subject to restrictive covenants.

Seminars and Speaking Engagements

Cary Schwimmer will be speaking in Playa del Carmen, Mexico in February before the American Bar Association's Subcommittee on Alternative Dispute Resolution in Labor and Employment Law. Cary will discuss privacy issues in mediations and arbitrations, including the risks to employers who turn over medical and other private information about their employees.

Storrs Downey presented the topic of "An Employer's Rights and Obligations Associated with Firing Injured Workers" in September 2007 before HR representatives, risk managers and several employer representatives in Toledo, Ohio at the TAHRA monthly roundtable.

Storrs also presented a seminar to over 30 HR representatives, risk managers and other management personnel from a manufacturing company in Illinois this summer on the topic "Employment Hiring Practices and Claims Investigations".

We will keep you apprised of future employment seminars we are conducting.

Our Employment Law Department

In addition to an active employment practice in Illinois, we also represent employers in several other states including, but not limited to, Indiana, Wisconsin, Tennessee and Florida, the latter two locations being headed by Cary Schwimmer and Phil Engel, respectively.

Our employment practice includes Title VII, unemployment and wage claims, OSHA matters, collective bargaining and all other union-related issues and workers' compensation defense.

Should you have any questions at any time on any employment-related issues in your state(s), please do not hesitate to contact Storrs W. Downey at 312-377-1501, sdowney@brycedowney.com, or any other member of our team.

BryceDowney is a firm of experienced business counselors and accomplished trial lawyers who deliver service, success and satisfaction. We exceed clients' expectations every day while providing the highest caliber of service in a wide range of practice areas. With offices in Chicago, Oak Brook, Memphis and Atlanta and attorneys licensed in multiple states, BryceDowney is able to serve its clients' needs with a regional concentration while maintaining a national practice. Our practice areas include:

- Appellate Advocacy
- Commercial Litigation
- Business Organization and Operation
- Commercial Transactions
- Complex Litigation
- Construction Law
- Creditor/Debtor
- E-Commerce
- Employment
- Environmental Law
- Estate Planning and Administration
- General Counseling
- Insurance Coverage
- Integrated Legal
- Intellectual Property
- International Transactions
- Labor
- Patent
- Personal Injury
- Premises Liability
- Products Liability
- Property Damage
- Real Estate
- Subrogation
- Toxic Tort
- Transportation and Commercial Vehicle Accidents
- Workers' Compensation

The attorneys at BryceDowney constantly strive to keep you updated regarding the latest developments in Employment law in Illinois, Indiana and other states. If you would like more information on any of the topics discussed above, or have any questions regarding these issues, please contact Storrs W. Downey at 312.377.1501 or sdowney@brycedowney.com, or any member of our Employment Law team. © Copyright 2007 by BryceDowney, LLC, all rights reserved. Reproduction in any other publication or quotation is forbidden without express written permission of copyright owner.