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Labor and Employment Law Notes

CERTAIN EMPLOYMENT LAW-RELATED FEDERAL SUITS DROPPED IN 2008 AND THE ILLINOIS AND UNITED STATES SUPREME COURTS ISSUED PRO-EMPLOYEE DECISIONS EARLY IN 2009

A. CERTAIN EMPLOYMENT LAW-RELATED FEDERAL SUITS DROPPED IN 2008

Certain employment law-related federal lawsuit filings dropped ten percent last year compared to 2007, with all major kinds of employment lawsuits except for Employment Retirement Income Security Act suits showing significant decline. Lawsuits filed pursuant to the Fair Labor Standards Act dropped the most, from 7,310 suits filed in 2007 to 5,393 lawsuits filed in 2008, a drop of 26.2 percent. Nineteen and a half percent fewer suits were filed into the Labor-Management Reporting and Disclosure Act (LMRA) and 9.8 percent fewer suits were failed under the Railroad Labor Act. Labor-Management Relations Act filings fell 2.6 percent. Suits under all other employment laws rose 7.7 percent.

The overall decline in employment suits is part of a longer trend going back to at least 2004. Geographically, private employment suits in 2008 were concentrated in courts such as the Northern District of Illinois, with 1,427 suits. The second largest number of employment suits filed in 2008 occurred in the Southern District of Florida with 1,119. The United States Appellate Court had 1,470 civil rights suits over employment matters pending in September of 2008 as compared to 1,630 the year before. One hundred twenty-four LMRA suits were pending last September compared to 132 in 2007. The number of pending cases in appellate courts for all other employment cases actually rose during that same time frame. Most of the appellate court matters have arisen from district courts, although some stem from administrative proceedings.

B. *BLOUNT V. STROUD* CONFIRMS ILLINOIS HUMAN RIGHTS ACT PERMITTING DIRECT ACTION IN CIRCUIT COURT AND STATE COURTS FOR CIVIL RIGHTS VIOLATIONS

In *Blount v. Stroud*, the Illinois Supreme Court held that an employee can bring an employment discrimination claim under the Federal Civil Rights Act of 1866 42 USC § 1981- under which employees can sue for race discrimination, harassment and retaliation. The critical part of the holding in *Blount* is not whether such an action be filed, but that it can be filed

directly in Illinois state court. In permitting this option, the court rejected well established precedent prohibiting this direct access to state court for most employment discrimination claims. Prior to *Blount*, the Illinois Appellate Court routinely rejected attempts for plaintiffs to bring their federal discrimination claims in state court based on the pre-January 2008 version of the Illinois Human Rights Act ("the Act"), providing that state courts had no jurisdiction over "civil rights violations" except as the Act provided. The prior version of the Act was intended to prevent direct access to the state courts for redress of civil rights violations through administrative channels and an ultimate decision by the Illinois Human Rights Commission (IHRC).

As discussed in prior newsletters, employers and their insurers now need to be aware of the expanded litigation options for an employee pursuing a civil rights claim, including federal discrimination claims. In *Blount*, the plaintiff sued their employer alleging retaliation under §1981 and retaliatory discharge, an Illinois common law tort claim. She did so without seeking recourse through the Illinois Department of Human Rights and the Illinois Human Rights Commission. She filed a lawsuit directly in the Circuit Court of Cook County, Illinois. Plaintiff's case proceeded to trial and she received verdicts in her favor. The Illinois Appellate Court reversed, holding that the Act's jurisdictional limitation provision "deprives Illinois Circuit Court of subject matter jurisdiction over all civil rights claims, regardless of whether they are brought under state or federal law." The Illinois Supreme Court reversed the Illinois Appellate Court holding that the Circuit Court had proper jurisdiction over Blount's claims. As for the §1981 claim, the court determined that the Acts jurisdictional limitation, that civil rights violations cannot be heard in state court except as provided by the Act (requiring that it adheres to the IDHR's and IHRC's administrative procedure), is inapplicable to federal claims.

The Illinois Supreme Court reasoned that the Act is addressing only those civil rights violations defined by The Act, not claims under federal law. Moreover, because the IDHR and IHRC do not have authority to process federal claims, the jurisdictional limitation provision cannot possibly be addressing federal claims. Because Illinois circuit courts are courts of "general jurisdiction" and the Act's jurisdictional limit does not apply to federal discrimination claims, the circuit court properly heard Blount's §1981 claim. As for the retaliatory discharge claim, the court determined that it was also properly before the court because there was an independent basis for imposing liability on the defendant that did not depend on the Act. When the plaintiff's claim can be construed as retaliation for opposing unlawful discrimination (a violation under the Act), the claim also can be established independently as a retaliatory discharge claim under the Illinois public policy, by a discharge of an employee for her refusal to purger herself. The Illinois Supreme Court determined that the plaintiff's retaliatory discharge claim was not "inextricability linked" to the Act and thus did not trigger the Act's jurisdictional limitation.

Employers and their insurers must be aware that in Illinois employees are not limited to pursuing their claims through administrative channels, and ultimate hearing and adjudication by the IDHR commission. Changes to the Act now make access to the state courts in Illinois an ever-increasing occurrence for claims filed pursuant to the Act or claims filed pursuant to federal law. The employees will not be limited to filing an IDHR charge but can file a lawsuit directly in circuit court with a request for a jury trial based on the common law claims. Employers are not dealing with a slow and settlement-oriented IDHR process but a trial court docket involving

discovery, filing deadlines, and a possible sympathetic jury not limited in the amount it can award for punitive damages. The decision in *Blount* confirms that an employee may bring an employment discrimination claim based on federal law directly in Illinois state courts.

For claims based on §1981, there is no requirement that the plaintiff follow any administrative procedures, i.e., Title VII, The Age Discrimination and Employment Act and the Americans with Disabilities Act. An employee can go directly to state court. Employees have the alternative of brining their federal claims in federal court, but whether they do so depends on the state in which they are suing. For example, most plaintiffs in California would rather file their employment discrimination claims in state court while in Illinois it is historically more of advantageous to bring employment claims in federal court. Generally, it is more difficult for employers to defeat a discrimination claim on summary judgment in state court as opposed to federal court. Also, state court juries tend to be more sympathetic to employees and award higher money judgments for damages than do their counterparts in federal court.

C. IN ILLINOIS A BORROWED EMPLOYEE MAY MAINTAIN CAUSE OF ACTION FOR RETALIATORY DISCHARGE AGAINST A BORROWING EMPLOYER

In *Hester v. Gilster–Mary Lee Corporation*, the Illinois Appellate Court held that a borrowed employee may maintain a cause of action for retaliatory discharged against a borrowing employer based upon an allegation that the employee was discharged for engaging in activities protected by the Workers' Compensation Act. In this decision by the Fifth District, it also joined the First District in determining that a cause of action for retaliatory discharge may be maintained for the discharge of an employee for testifying in a co-worker's workers' compensation claim hearing. The appellate court held that the plaintiff's amended complaint stated a cause of action for retaliatory discharge and that the circuit court erred in granting the defendant's motion for involuntary dismissal. In *Hester*, the plaintiff filed an amended complaint for retaliatory discharge alleging she had been assigned to work at Gilster by her employer, Mann Power, Inc. (Mann Power), an employment agency, and that Gilster was her "de facto employer." The plaintiff alleged that during the entire time she was assigned to work at Gilster, they set her daily hours, work schedule, hourly wage, job assignments and her work place. Plaintiff alleged that while she was assigned to work at Gilster, no one from Mann Power supervised her work in any way, and that she would work "side-by-side" with regular Gilster employees with no distinction between them and herself or other workers from Mann Power.

Plaintiff alleges that while she was working for Gilster, Mann Power had offered her no other employment opportunities and she believed that future employers would be likely to seek references from Gilster. In its motion to dismiss the complaint, the defendant alleged that the plaintiff was merely assigned to work at Gilster by Mann Power. They argued that the allegation defeated the plaintiff's claim for retaliatory discharge because she admitted that Gilster was not her employer. Defendant also pointed out that plaintiff had alleged that it had informed her that it would not be using her services, and that if she wanted other employment she would have to return to Mann Power, Inc. The defendant claims that this allegation coupled with the allegation plaintiff was unable to find work for more than a week, prevented it from proving that the defendant had discharged her.

The appellate court first determined that an action for retaliatory discharge exists for a borrowed employee, an issue of first impression in Illinois. The appellate court determined that Illinois public policy protects workers from discharge for testifying in a co-worker's worker's compensation claim hearing. In so holding, the court found that the plaintiff had stated a cause of action for retaliatory discharge because there is a clear public policy favoring the prompt and efficient resolution of workers' compensation cases. The law would be "feeble indeed" if it allowed an employer to fire an employee in retaliation for exercising her right and obligation to testify in another employee's workers compensation case.