Employment

VOLUME 23 ★ ISSUE 8 ★ NOVEMBER 18, 2008

Expert Analysis

2008 Developments In Illinois Employment Discrimination Law

By Alan W. Nicgorski, Esq., and John B. Thornton, Esq.

Scandaglia & Ryan

Two developments in employment discrimination law in 2008 may impact Illinois employers in 2009 and beyond: revisions to the Illinois Human Rights Act, 775 Ill. Comp. Stat. 5/2-101, that took effect at the beginning of the year and that now permit complaints brought under the statute to be heard in state court; and a recent U.S. Supreme Court decision that has strengthened the hand of plaintiffs bringing retaliation claims.

This article discusses both developments, includes summaries of the consequences of the changes and provides recommended best practices to help employers minimize their exposure to employment discrimination litigation.

The Illinois Human Rights Act Is Amended to Permit Discrimination Suits in State Court

On Jan. 1, 2008, Public Act 95-0243, the amendment to the IHRA, took effect, opening the door for employment discrimination plaintiffs to seek state court jury trials. It is expected that plaintiffs will begin filing these state court actions toward the end of 2008, and many more will be filed in 2009.

The state statute now allows employees to file suit in state courts once administrative options are exhausted.

Previously, an employee's exclusive remedy for alleged violations of the IHRA was administrative. Thus, under the old regime (which still governs all claims filed with the Department of Human Rights before Jan. 1, 2008), an employee who chose to proceed exclusively under state law had no access to a jury trial.

THOMSON WEST

For claims brought after Jan. 1, 2008, employees still must begin by bringing a "charge" to the DHR within 180 days of the alleged adverse employment action for investigation and a determination as to whether there is substantial evidence of a civil rights violation. However, the IHRA now allows employees the option to file a complaint in the state courts once they have followed the prescribed administrative procedures. Specifically, the law provides:

- If the DHR finds substantial evidence of a violation: Complainants have 14 days to ask the DHR in writing to file a complaint for them with the Illinois Human Rights Commission or 90 days to file a civil action in the circuit court in the county in which the civil rights violation allegedly was committed;
- If the DHR finds no substantial evidence of a violation and dismisses the charge: Complainants have 30 days to ask the commission to review the dismissal order or 90 days to file a civil action in the circuit court in the county in which the civil rights violation allegedly was committed.
- If the DHR has made no determination within a year after the charge was filed: Complainants have 90 days to file their own complaint with the commission or to file a civil action in the circuit court in the county in which the civil rights violation allegedly was committed.

Disadvantages to employers of state court filings:

- More frivolous claims are likely to be filed.
- More cases likely to go to trial.
- More extensive discovery means increased litigation costs.
- Lack of damages cap means awards to plaintiffs may be higher.

Consequences of the IHRA Revisions

As shown above, complainants have new access to state courts for claims under the IHRA, which differs somewhat in scope from Title VII, 42 U.S.C. § 2000e, the federal anti-discrimination statute under which plaintiffs sue in federal court. As a result, certain claims now can be brought in state court that previously could only be brought before the Illinois Human Rights Commission.

The Illinois Human Rights Act covers classes that do not fall under Title VII: sexual orientation, marital status and a broader set of disabilities.

The IHRA is broader in scope than Title VII. It covers certain protected classes that are not covered under the federal statute: sexual orientation, marital status, and a broader set of disabilities. Therefore, claims solely based on these categories may now be brought in a court of law.

For sexual harassment claims or claims based on a physical or mental handicap unrelated to ability, the employer need only have one employee under the IHRA. Other IHRA claims and all Title VII claims apply only to employers with 15 or more employees (unless the claim is age-related, in which case the Age Discrimination and Employment Act, 29 U.S.C. § 620, minimum of 20 employees applies).

Therefore, for example, a sexual harassment complainant who works for a small business with 10 employees now has access to a court of law for the first time.

In addition, there are numerous reasons why a plaintiff (or plaintiff's attorney) would find it preferable to litigate in a state court rather than a federal court or an administrative agency, and these advantages likely will increase the costs of businesses having to defend discrimination suits in those courts.

First, because plaintiffs can file suit in state court even when the DHR finds a lack of substantial evidence, more frivolous claims are likely to be filed.

©2008 Thomson Reuters/West

Second, because state courts are less likely to dismiss ases or grant summary judgment, and courts in certain counties (such as Cook, Madison and St. Clair) are seen as typically favoring plaintiffs, more cases are likely to go to trial.

Third, there is more extensive discovery allowed in state courts than before the Human Rights Commission, so litigation costs will increase.

Finally, because of the IHRA's lack of a consequential damages cap and the unpredictable nature of juries, awards to plaintiffs may be much higher in state court. Moreover, while the law is new and there are few state court precedents, there is an increased chance of unpredictable and inconsistent verdicts.

Recommendations for Illinois Employers

Because the 2008 amendments to the IHRA are likely to increase an employer's exposure to unfavorable and potentially expensive verdicts, employers should keep the following in mind:

- Companies with written employment agreements may want to consider including language in the agreement stating that employment-related disputes are subject to mandatory arbitration to reduce the possibility of litigating in state court; and
- It is more important than ever for employers to maintain and consistently implement proper employment policies and procedures, and to communicate those policies and procedures clearly and understandably to all employees.

It is unwise for employers to rely exclusively on "lawyer language" buried deep in an employee handbook. For example, an employer may consider putting signs in break rooms or other appropriate areas telling employees with complaints about the workplace to call a certain number.

Because the cost of litigating employment discrimination claims likely will increase, the best policy is to follow practices that make such claims less likely in the first place.

Because employers' odds of obtaining summary judgment in state court are likely to be lower, employers should litigate state court claims from the outset by bearing in mind that they may well face a jury trial. Therefore, they should have possible trial themes in mind from the outset, and conduct discovery accordingly.

Employers should work with counsel from the outset of litigation to make a realistic assessment of the plaintiff's potential damages and their own exposure. If a company would not want the claim to go to a jury, it is prudent to consider settling at an early stage before large expenses have been incurred and the parties' positions have hardened.

U.S. Supreme Court Holds That Employees May Bring Retaliation Claims Under 42 U.S.C. § 1981

In *CBOCS West Inc. v. Humphries,* 128 S. Ct. 1951 (May 27, 2008), the Supreme Court held that employees who claim they were terminated because they complained to their employer about race discrimination in the workplace may bring a claim for such "retaliation" under Section 1981 of the Civil Rights Act of 1866, 42 U.S.C. § 1981.

> *The CBOCS West decision confirms that smaller employers who are exempt from Title VII may be subject to retaliation claims under § 1981.*

The court reached this ruling in a 7-2 decision despite the fact that Section 1981 does not expressly provide for such claims.

The practical impact of the *CBOCS West* decision appears to be minimal for two reasons. First, the federal appeals courts, including the 7th Circuit, had uniformly held that such retaliation claims were cognizable under Section 1981. Thus, the Supreme Court's decision represents an affirmation of (as opposed to a departure from) existing law.

Second, regardless of the court's decision regarding Section 1981, most employers would continue to be subject to retaliation claims under Title VII of the

©2008 Thomson Reuters/West

Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a), which explicitly provides for such claims.

Nonetheless, the *CBOCS West* decision does confirm that smaller employers (those with fewer than 15 employees) who are exempt from Title VII may be subject to retaliation claims under Section 1981. In addition, employees who fail to follow the rigorous procedural requirements of Title VII nonetheless can bring a retaliation claim under Section 1981. Thus, the *CBOCS West* decision is likely to accelerate the existing trend toward the increased use of retaliation claims in employment discrimination cases.

Accordingly, the decision serves as a useful reminder that to minimize the risk of retaliation claims employers should adopt policies and procedures that go beyond merely following the letter of the law:

- Employers should proactively seek to avoid giving even the impression of possible retaliation against workers who bring or support discrimination claims. For example, if a complainant who has brought a discrimination claim remains employed with the respondent employer, the company should consider circulating a memo to managers after the filing of the discrimination claim stating that the complainant has a right to bring such a claim; that the complainant is not to be treated differently as a result of making the claim; and that managers and co-workers must not harass the complainant for bringing the claim; and
- It is a best practice to have an extensive and detailed "paper trail" in connection with all terminations or negative job actions. This particularly applies to actions taken against complainants or employees who have threatened to bring discrimination claims.

If a company must discipline or terminate such an employee, it must also create and keep documents that show that the action was taken in accordance with a regular, systematic and step-by-step procedure that has been previously explained to all employees and is consistently followed by the company.

Similarly, if the employee's behavior warrants immediate termination, the documents should specify that and give the reason for the policy as it relates to that particular behavior. The documents should demonstrate that immediate termination was warranted, that it was in keeping with the company's employment policies, and that the company followed all of its regular procedures in terminating the employee.

By taking these steps, employers will improve their ability to show that their actions were not retaliatory but instead were consistent with pre-existing policies and unrelated to the employee's complaints about discrimination.

©2008 Thomson Reuters/West

Alan Nicgorski, a partner at **Scandaglia & Ryan**, is an accomplished litigator with experience in all areas of commercial litigation, including labor and employment issues, patent, trademark and copyright infringement, trade secret misappropriation, antitrust, breach of fiduciary duty, energy law, business torts and contracts. Mr. Nicgorski also counsels corporate and individual clients in employment matters and transactions involving licensing and competition-related issues.

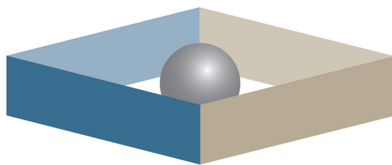
Mr. Nicgorski is a contributing author to "Model Jury Instructions: Copyright, Trademark and Trade Dress Litigation," published by the ABA Section of Litigation (May 2008).

During the 1997 – 1998 term, he served as a law clerk to the Honorable Kenneth F. Ripple of the United States Court of Appeals for the Seventh Circuit. He graduated with honors from the Northwestern University School of Law in 1997, where he served as the Coordinating Articles Editor for the *Northwestern University Law Review*. He was a finalist for the Best Brief Award in the school's annual moot court competition and a member of the Order of the Coif. Mr. Nicgorski received his undergraduate degree, with honors, from the University of Notre Dame in 1994 (B.A., Liberal Studies).

John Thornton, an associate at **Scandaglia & Ryan**, represents clients in a wide range of complex commercial litigation matters, involving contract disputes, employment litigation, commercial real estate litigation, insurance coverage, trade secrets, restrictive covenants, breaches of fiduciary duty, bankruptcy, patent infringement, SEC, FTC, and FCC investigations, and telecommunications law. He also has counseled clients on enterprise-wide records management programs and electronic communications policies, and he has spoken on topics related to e-discovery, records retention, preliminary injunctions and temporary restraining orders, and trade secrets.

Mr. Thornton is the co-author of several articles, including "Winning the Battle of the Forms," *Illinois Bar Journal* (July 2008) and "Record Retention and Litigation Holds for Financial Institutions," *The Review of Banking & Financial Services* (June 2006). He has also contributed to "Temporary Restraining Orders and Preliminary Injunctions," Chapter 9 of the *Illinois Institute for Continuing Legal Education's Business & Commercial Litigation*, 2007 edition.

In 2002, Mr. Thornton graduated from Northwestern University School of Law, where he was Senior Editor at the *Journal of International Law and Business*. He earned a B.A. in English, *magna cum laude*, from the University of Notre Dame in 1981, and he received an M.A. in Applied Linguistics at the University of Illinois at Chicago under a University Fellowship in 1983. Mr. Thornton taught English as a Second Language (ESL) at the University of Illinois at Chicago for more than 14 years, and he also taught ESL to refugees.



SCANDAGLIA & RYAN

©2008 Thomson Reuters/West. This publication was created to provide you with accurate and authoritative information concerning the subject matter covered, however it may not necessarily have been prepared by persons licensed to practice law in a particular jurisdiction. The publisher is not engaged in rendering legal or other professional advice, and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional.

For authorization to photocopy, please contact the Copyright Clearance Center at 222 Rosewood Drive, Danvers, MA 01923, USA (978) 750-8400; fax (978) 646-8600 or West's Copyright Services at 610 Opperman Drive, Eagan, MN 55123, fax (651) 687-7551. Please outline the specific material involved, the number of copies you wish to distribute and the purpose or format of the use.

For subscription information, please visit www.West.Thomson.com.