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Employment Litigaton: Building Your Case

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All too frequently, employment attorneys fail to counsel their clients with respect to documentary and evidentiary issues until after the client has been served with an employment discrimination complaint in a federal action. Counsel who act proactively, however, can assist their clients both in adopting and following policies and procedures that are likely to create favorable and admissible evidence long before a legal claim is ever asserted. There are many steps along the road to the filing of a complaint which present both employer and employee alike opportunities to "build their case." This article discusses some, but by no means all, such opportunities.

Personnel Files

Often, evidentiary issues in employment discrimination cases revolve around items in the plaintiff's personnel file, such as performance evaluations, documentation of disciplinary action and workplace complaints by other employees. While such items are frequently vulnerable to challenge under the hearsay rule, some exceptions to the hearsay rule may be applicable to render them admissible. Counsel familiar with the parameters of these exceptions can assist their clients in developing favorable procedures for maintaining personnel files.

First, documents in an employee's personnel file may be admissible under the "business records" exception to the hearsay rule. To qualify as a "business record," a document must: (1) be made in the regular course of business; (2) be kept in the regular course of business; (3) be made in response to a regular practice of the business; and (4) be made at or near the time by someone with knowledge or from information submitted from someone with knowledge.[1]

The determination of whether a document satisfies the "business records" exception is fact-based. For example, a document seemingly made and kept in the ordinary course of business, and marked "to file" may be deemed inadmissible if the court finds that it is not the type of document that the employer created with the kind of regularity or routine that gives "business records" their inherent reliability.[2] Thus, without establishing proper procedures for creating and maintaining employee files as "business records," and routinely following these procedures, an employer will not be able to successfully argue that a document that would otherwise be excluded as hearsay should be treated as a "business record" because it was placed in an employee's personnel file. Additionally, even if performance evaluations and other documents in a personnel file are properly created and maintained as "business records," employers should be aware that, if these documents contain hearsay within hearsay or other indicia of unreliability, they still may not be admissible.[3]

A document from a personnel file may also escape exclusion as hearsay if it is offered, not for the truth of its contents, but instead to demonstrate an employer's knowledge and motivation at the time of an adverse employment action against a plaintiff. For example, where a plaintiff claims that he or she was discriminated against based on membership in a protected class, the employer has the burden to establish a legitimate, non-discriminatory reason for its actions. Very recently, the U.S. Court of Appeals for the Second Circuit, in affirming a district court's consideration of workplace complaints and negative performance evaluations against an employee in this context, reaffirmed that "in a discrimination case, we are decidedly not interested in the truth of the allegations against plaintiff. We are interested in what motivated the employer; the factual validity of the underlying imputation against the employee is not at issue."[4] Thus, the court found that the documents were properly considered with respect to the employer's motivation and its proffered non-discriminatory reason for its conduct.

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Depending on how they are created and maintained, and the purpose for which they are offered, contents of an employee's personnel files can either be useful evidence, or inadmissible hearsay.

EEOC Proceedings

It may be tempting for both sides to an employment discrimination case to view proceedings before the Equal Employment

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Opportunity Commission (EEOC), or similar state anti-discrimination agencies, as nothing more than a technical hurdle to an employee acquiring his or her admittance ticket to the federal courts. Before paying short-shrift to their submissions in such administrative proceedings, however, employers and employees should give consideration to the evidentiary ramifications of both their submissions to the agency and the ultimate determination that the agency will issue.

It is well-established in the Second Circuit that findings by the EEOC or other similar administrative agencies fall within the "public records" exception to the hearsay rule, and that the decision whether to admit into evidence such findings is left to the sound discretion of the trial court.[5] In making this decision, the district court is guided by Federal Rule of Evidence 403, and weighs the probative value of the agency findings against the danger that their admission would result in unfair prejudice. Thus, EEOC findings that are well-reasoned and fact-based will usually be admitted into evidence, whereas determinations that are conclusory and lack substantive analysis usually will not.[6] While parties cannot dictate the type of findings an agency will issue, their level of cooperation and participation certainly will impact whether the agency is likely to issue findings of the admissible type or not.

Aside from the issue of admissibility of the agency's determination, sometimes there are issues as to whether certain submissions made to the EEOC or other agency during the course of the agency's investigation of a complaint should be admissible in a subsequent lawsuit. Generally, statements made to administrative agencies by non-parties are considered hearsay, while statements by parties may qualify as admissions and thus be admissible.[7]

Additionally, as was demonstrated by the recent Second Circuit decision in *Kwan v. The Andalex Group*,[8] submissions made by a party to the EEOC may be relevant for purposes other than the truth of the matter asserted therein, and thus, fall outside of the hearsay rule. *Kwan* involved an appeal from a judgment dismissing, inter alia, claims for hostile work environment and retaliation under Title VII. The Second Circuit affirmed the district court's dismissal of the hostile work environment claim, but reversed with respect to dismissal of the retaliation cause of action. In so doing, the court held that there was an issue of fact as to whether the employer's proffered non-discriminatory reason for plaintiff's discharge was a pretext for prohibited retaliation.

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The Second Circuit's decision in this regard was premised on the fact that the employer offered a different non-discriminatory explanation for the plaintiff's termination to the district court than it had offered in its position statement to the EEOC. The court found that "Andalex's inconsistent and contradictory explanations for the plaintiff's termination, combined with the close temporal proximity between the [protected activity] and Kwan's termination, are sufficient to create a genuine dispute of material fact as to whether Kwan's [] complaint of gender discrimination was a but-for cause of the plaintiff's termination." Thus, the court held that the employer's position statement was admissible for the non-hearsay purpose of demonstrating the employer's change of story.

Accordingly, in approaching EEOC proceedings, employees and employers should be aware that their submissions to the agency, as well as the agency's ultimate determination, may prove to be either useful evidence or come back to haunt them in a subsequent federal case.

Other Proceedings

In addition to proceedings before the EEOC and state anti-discrimination agencies, evidentiary issues can arise concerning other administrative proceedings, such as submissions and findings with respect to an employee's eligibility for unemployment or Workers' Compensation benefits. Generally, determinations with respect to claims for unemployment or Workers' Compensation are not admissible in a subsequent federal employment discrimination action, because eligibility for those benefits is based upon different standards than a determination of whether there has been a violation of an anti-discrimination statute. Thus, admission of such evidence poses a substantial risk of unfair prejudice with little probative value.[9]

However, evidence of an employee's claim for such benefits, the employer's response to same, and determination with respect to eligibility for the benefits, has been held to be admissible where it has independent relevance with respect to the employer's claimed discriminatory or retaliatory intent.[10] Accordingly, parties to an employment dispute should be aware that it is possible that their submissions with respect to these benefit claims could be considered in a subsequent discrimination case.

Conclusion

Given the opportunities prior to commencement of litigation to shape evidence that may be considered by a court in a discrimination lawsuit, employment law counsel should not be reactive and merely marshal relevant evidence after their client retains them to commence or defend against a federal lawsuit. Rather, counsel should be proactive, both in terms of counseling employer clients with respect to their policies and procedures, and making sure that documentation created and issued with respect to specific employees is of the type and substance likely to be admitted as favorable evidence in the event that the employment relationship results in a judicial claim of discrimination.

1. *U.S. v. Meda*, 2012 U.S.Dist.LEXIS 16091, **11-12 (E.D. Mi. Feb. 9, 2012).
2. *Pierce v. The Atchinson Topeka, Santa Fe Railway Co.*, 110 F.3d 431, 444 (7th Cir. 1997).
3. *Meda*, 2012 U.S.Dist.LEXIS 16901 at *12.
4. *Wolf v. Time Warner*, 2013 U.S.App.LEXIS 25181, **3-4 (2d Cir. Dec. 19, 2013) (citations and quotations omitted).
5. *Estate of Hamilton v. City of New York*, 627 F.3d 50, 54 (2d Cir. 2010); *Paolitto v. John Brown E.&C., Inc.*, 151 F.3d 60, 64 (2d Cir. 1998).
6. *Chisholm v. Memorial Sloan-Kettering*, 2011 U.S.Dist. LEXIS 53243, *5 (S.D.N.Y. May 13, 2011).
7. *Keene v. Hartford Hospital*, 208 F.Supp.2d 238, 243 (D. Conn. 2002).
8. 737 F.3d 834 (2013).
9. *Flick v. Aurora Equipment Co.*, 2004 U.S.Dist.LEXIS 4304, **11013 (E.D. Pa. Jan 15, 2004); *Morales v. N.Y.S. Dept. of Labor*, 2012 U.S.Dist.LEXIS 92075, *3 (N.D.N.Y. July 3, 2012).
10. *Layman v. Alloway Stamping & Machine Co.*, 98 Fed. Appx 369 (6th Cir. 2004); Flick, 2004 U.S.Dist.LEXIS 4304 at **12-13.