

Labor and Employment Practice Update

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Eighth Circuit Court Of Appeals Affirms Dismissal Of EEOC's Class Action Sexual Harassment Case Against CRST Van Expedited, Inc. Based on EEOC's Failure to Fulfill its Pre-Suit Obligations under Title VII

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On February 22, 2012, the Eighth Circuit Court of Appeals affirmed the district court's dismissal of all class member claims that had survived the summary judgment motions filed by Jenner & Block for firm client CRST Van Expedited, Inc. (CRST) in a sweeping sexual harassment class action brought against CRST by the Equal Employment Opportunity Commission (EEOC). See Nos. 09-3764, 09-3765, 10-1682, 2012 WL 555510 (8th Cir. Feb. 22, 2012). The Court of Appeals held that the EEOC had failed to satisfy the statutory obligations Congress imposed on it before it could file suit against an employer: to conduct a reasonable investigation of a charge of discrimination or harassment; to make a determination whether the charge was supported by reasonable cause; and to attempt in good faith to resolve the charge through conciliation. Instead, EEOC filed suit and used the court's discovery process to locate potential class members. The ruling enforces Congress's goal of not embroiling employers in costly and disruptive litigation unless the EEOC has determined that its claims are supported by good cause and cannot be settled.

In September 2007, EEOC sued CRST, one of the country's largest interstate trucking companies, on behalf of the named class member, Monika Starke, and a "class of similarly situated female employees,"

alleging that CRST violated Section 706 of Title VII by tolerating severe and pervasive sexual harassment of its female drivers. EEOC also alleged during the course of the litigation that CRST violated Title VII by maintaining a pattern or practice of tolerating sexual harassment.

EEOC's case began with a charge filed by former CRST driver Monika Starke, who alleged that she had been sexually harassed by two male lead or training drivers. EEOC engaged in a limited investigation of Starke's claim, but nevertheless found reasonable cause for pursuing a claim on behalf of a class of similarly situated but unidentified current and former CRST female drivers. When EEOC filed suit, its complaint identified only Starke as a class member, even though CRST had provided EEOC with contact information for all female drivers who began working at CRST after January 1, 2005 and had provided EEOC with information concerning four other female drivers who had filed sexual harassment charges against CRST. (Starke subsequently intervened to assert her own claim, but also remained in the EEOC's class.)

After filing suit, EEOC sent thousands of letters to current and former CRST female drivers in an attempt to locate additional class members. Because it was facing a moving target of class

members that could continue indefinitely, in August 2008 CRST asked the district court to set a date by which the EEOC needed to identify all class members. The court set an October 15, 2008 deadline and EEOC identified the bulk of the approximately 270 class members on the very eve of that deadline. The court ordered EEOC to make each of these class members available for deposition by January 15, 2009, and as a discovery sanction, each class member who was not so presented for deposition by that date would not be allowed to testify at trial and EEOC would be barred from seeking relief on her behalf in the lawsuit.

Following the close of discovery, in which it took approximately 150 class member depositions, CRST moved for summary judgment with respect to EEOC's pattern and practice allegations and also with respect to many of the class members' individual claims. CRST argued as to some claims that, based on the class members' deposition testimony, they had not been subjected to severe or pervasive harassment; as to a few that their allegations were time-barred; and as to many that CRST could not be held vicariously liable for harassment by its lead drivers because they were not "supervisors" for purposes of Title VII and either the class members had failed to timely report harassment to CRST or CRST had taken prompt and appropriate action to stop the alleged harassment. CRST also moved for summary judgment with respect to a few class members on grounds of judicial estoppel, as they had failed to disclose their claims as assets when they filed for bankruptcy.

The district court granted CRST's summary judgment motion on the EEOC's core pattern and practice claim, a ruling that the EEOC did not appeal. The district court also granted summary judgment to CRST as to all but 67 of the EEOC's individual claims on various grounds: as time-barred, not supported by evidence showing severe or pervasive harassment, or because CRST could not be held vicariously liable for the alleged harassment as its lead drivers were not supervisors for purposes of Title VII and the class members either failed to

timely report the harassment to CRST or CRST responded promptly and effectively when it received their complaints. The district court also held that judicial estoppel barred EEOC from pursuing three class members' claims (as well as Monika Starke's claim in intervention), based on their failure to disclose their Title VII claims as assets in their bankruptcy filings.

After the district court ruled on the other summary judgment motions, CRST sought dismissal of the remaining 67 class members' claims on the ground that EEOC had failed to fulfill its Title VII pre-suit obligations, imposed by Congress, to investigate, find reasonable cause, and conciliate each class member's claim before filing suit.

The district court awarded CRST more than \$4.4 million in attorneys' fees as the prevailing party. The award was largely based on the EEOC's failure to reasonably investigate and conciliate its claims against CRST before filing suit. EEOC appealed the district court's rulings with respect to 107 of the class members.

In its February 22 opinion, a split Eighth Circuit held that the district court did not err in finding that the EEOC failed to satisfy its statutory obligations to investigate and conciliate 67 of the class members' claims. In reaching this decision, the Court found that EEOC did not attempt to ascertain the size of the class until after it filed the lawsuit and thus did not reasonably investigate, determine whether the claims were supported by reasonable cause, or provide CRST with an opportunity to conciliate these claims prior to litigation. Rather, the record confirmed "that the EEOC wholly failed to satisfy its statutory pre-suit obligations as to these 67 women, thus we cannot conclude that the district court abused its discretion in dismissing the EEOC's suit."

While the Eighth Circuit agreed that three of the class members' failure to disclose their claims in their bankruptcy filings barred them from seeking relief in this litigation, the Court concluded that the doctrine of judicial estoppel did not extend to the EEOC. Thus, finding that the claims of two of the

three women were properly dismissed on other grounds, the Court reversed the district court's grant of summary judgment with respect to EEOC's right to bring suit in its own name on behalf of Starke, the named class member, but affirmed the dismissal of her claim in intervention.

With the exception of one class member, Tillie Jones, the Eighth Circuit also concluded that the district court did not err in dismissing the remainder of the class member claims on summary judgment because they did not allege severe or pervasive harassment and/or CRST could not be held vicariously liable for the alleged harassment because the lead drivers are not supervisors for purposes of Title VII and the class members either did not timely report the alleged harassment or CRST

promptly and effectively remedied the harassment upon receiving their complaints. Because it had vacated the dismissal of two of the class member claims, the Court also vacated the district court's fee award, without prejudice to CRST's ability to seek attorneys' fees upon the conclusion of the case.

With respect to the two revived claims, Tillie Jones's claim should be dismissed on remand because the EEOC did not satisfy its pre-suit requirements before asserting a claim on her behalf in the lawsuit. Monika Starke's claim presents the unusual situation of EEOC pursuing a class member's claim even though the class member had intervened in her own right, Labor and but had her claim dismissed on summary judgment, with that dismissal affirmed on appeal.

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