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EEOC To Get More Aggressive In 2010, Lawyers Say

By **Shannon Henson**

Law360, New York (January 20, 2010) -- While the U.S. Equal Employment Opportunity Commission brought in less settlement money in fiscal year 2009 than the prior year, lawyers predict a newly cashed-up commission will pick up the pace in 2010.

According to attorneys, the EEOC will continue to file suits in the cases it thinks have the most merit and will impact the largest number of people, but more federal funding will allow the agency to bring more cases this year.

In December, the U.S. House of Representatives passed an appropriations bill that added \$23 million the EEOC's budget for the 2010 fiscal year.

“The encouraging thing is that as they have gotten more funds, they have hired more attorneys and been able to do more enforcement,” said David R. Cashdan, an attorney at Cashdan & Kane PLLC.

“I expect that with more money being channeled toward them that we will see a higher incidence of litigation in the next year,” Cashdan said.

According to figures released earlier in January, the EEOC netted \$82.1 million in litigation settlements in fiscal year 2009, which ended Sept. 30.

The commission won more money in settlements in fiscal year 2008, when it netted \$102.2 million, but the drop in monetary amounts is likely traced to the recession, attorneys said.

“That's not to say there weren't some large settlements in 2009, but the economy has put pressures on all sectors,” said Dennis Brown, a shareholder at Littler Mendelson PC.

Settlements in lawsuits alleging Title VII violations or discrimination based on race, religion, sex or national origin made up the bulk of the deals, netting \$64.9 million in fiscal year 2009, the EEOC said.

To resolve lawsuits alleging violations of the Americans with Disabilities Act of 1990, companies and individuals paid out about \$9.5 million in fiscal year 2009 — a sizable spike from \$3.6 million in fiscal year 2008.

Meanwhile, another \$6.7 million was forked over to settle allegations of violations of the Age Discrimination in Employment Act of 1967, the EEOC said.

When looking at settlements announcements issued by the commission in 2009, sex and race discrimination deals, in particular, seem to have brought in the highest amount of cash.

Lynne Bernabei, a partner at Bernabei & Wachtel PLLC, said sex discrimination settlements led the pack because they are among the easiest cases to win.

“I think [the EEOC] tends to go for those cases where they think the courts will be hospitable,” Bernabei said. “Or at least, the ones where the courts are not hostile to the claims.”

While settlements in such cases already make up much of the settlement pie, attorneys predicted that the EEOC will file even more sex bias lawsuits in 2010.

Brown predicted that sex discrimination claims will rise as a result of the enactment of the Lilly Ledbetter Fair Pay Act of 2009, which stipulates that the 180-day statute of limitations for filing a pay discrimination lawsuit resets with each new discriminatory paycheck.

The law, while specifically affecting equal pay, will likely lead to claims where a worker alleges they would have been paid more if not for their sex, he said.

Ron Chapman Jr., a shareholder at Ogletree Deakins Nash Smoak & Stewart PC, said the EEOC seemed to be focusing on the areas it felt were previously overlooked — namely sex, religious and disability discrimination.

Disability discrimination will be of particular interest to the commission going forward, given the enactment of the Americans with Disabilities Act Amendments Act, Chapman predicted. The law, which broadened the scope of the term disability, went into effect in January 2009.

The EEOC will be “eager to establish case law and broaden the scope of the law,” Chapman said.

While noting that the commission rarely brings lawsuits alleging retaliation because the claims are so individualized, he said the EEOC will also likely file more retaliation charges in the future.

“The legal burden is somewhat less for retaliation than it is for discrimination,” Chapman said. “And more and more, you see retaliation thrown in with other types of discrimination.”

Brown echoed that sentiment, calling retaliation a “huge and growing industry.” The claims, he said, are easy to bring and difficult for employers to defend against.

The general counsel's office of the EEOC is interested in cases that are “somewhat on the cutting edge,” specifically those cases that give “employers and employees guidance and recognition of the multiple and varied faces of unlawful discrimination,” Cashdan said.

Bernabei, however, said she hoped the EEOC will be willing to take bigger risks given the commission's greater resources.

“It would be great if the EEOC got out in front on national origin cases, maybe in communities that aren't necessarily sympathetic,” Bernabei said. “They could move the envelope in the community.”

--Additional reporting by Erin Fuchs

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