Blasting Through the Employer's Last Line of Defense—Motions in Limine

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By **Jeffrey Campolongo** | February 21, 2019

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Presenting an employment discrimination claim can be fraught with pitfalls and obstacles. Take, for example, the fact that an employee cannot even get to court without properly exhausting his administrative remedies. That means, making sure you get to the right agency within 180 days, completing the multitude of charge forms and intake questionnaires with little or no assistance from the agency itself. Then, the employee better be sure to check the correct boxes on the forms regarding the basis of discrimination. Heaven

forbid he leaves out a protected class or fails to check the retaliation box. Be sure not to check too many boxes, though, or else you risk making inconsistent claims that have different burdens of proof (but for causation, mixed motive and direct evidence all come to mind).

Congratulations on filing a charge. Next you need to ensure that the case does not get dismissed by the agency with a premature right to sue letter. That will only result in yet one more needless battle once your case is in court. If your client is one of the lucky few, the agency may actually do an investigation and issue findings within a year or two of the case being filed. Whatever the outcome at the administrative level, the employee will get his day in court, right?

Not so fast. You have 90 days to get the lawsuit filed in federal court or else you are out of time. The entire process thus far has been one administrative hurdle after another. Bear in mind, most cases filed with the Equal Employment Opportunity Commission (EEOC) and Pennsylvania Human Relations Commission (PHRC) are by unrepresented individuals with little or no familiarity with the process in the first place. Yet, the employee is charged with not missing a step, or risk dismissal.

Which brings us to federal court. Your client finally made it. Justice is just a few steps away. Or is it? Rest assured even the slightest transgression from any of the foregoing administrative requirements will yield a pro forma motion to dismiss. Fortunately, the existence of notice pleading, coupled with less stringent pleading requirements in civil rights cases means the lawsuit will likely proceed. In fact, it will proceed all the way up to the inevitable motion for summary judgment which is filed by employers in virtually every employment law case. Once the burden shifting analysis is done and pretext analyzed, your case is finally, finally ready for trial. Right?

Herein begins the tortuous process known as motions in limine. You have done everything under the sun to get the case ready for trial. You have defeated multiple motions to throw the case out. You have probably had to deal with the myriad of

discovery disputes and failed settlement attempts. The payoff for all that hard work is a date with suppression (and, sometimes, depression). Motions in limine are the last line of defense for employers who have been playing a full court press from day one.

A recent case from the Eastern District of Pennsylvania shed some interesting light on the use of motions in limine in employment cases. In *Flores v. Pennsylvania State Police*, No. 18-cv-0137 (E.D. Pa. Jan. 14, 2019), both sides filed motions in limine looking to preclude the other side from introducing prejudicial evidence. According to the opinion, Ashley Flores, a Hispanic woman of Puerto Rican descent, brought suit against the Pennsylvania State Police alleging sex and race discrimination, as well as retaliation. Flores alleged that the Pennsylvania State Police discriminated against her when it extended her probationary period of employment as a trooper and later fired her. The Pennsylvania State Police countered that Flores was fired for poor performance and for violating state police policies.

The plaintiff filed a motion in limine seeking to exclude evidence of administrative determination(s) while the defendant filed motions in limine to preclude evidence of claims not administratively exhausted and to preclude evidence of comments or conduct of a sexual nature. In her motion, the plaintiff sought to preclude evidence of the right to sue letter issued by the Department of Justice (DOJ) and its lack of findings, as well as any other agency notices or determinations, on the ground that they are not probative and are highly prejudicial. Notably, there were no findings of an investigation conducted by any agency, nor was there an evaluation on the merits of Flores' claims. The right to sue letter was issued upon request by the plaintiff's counsel and specifically stated that "this notice should not be taken to mean that the Department of Justice has made a judgment as to whether or not your case is meritorious."

The plaintiff argued that a jury could give weight to the DOJ's lack of findings regarding her case, which would unfairly prejudice her. The court concluded that the DOJ letter did not include any information that tends to prove or disprove any

element of the plaintiff's case or defendant's defense. According to the judge, the right to sue letter merely stated that the requisite amount of time had passed for plaintiff to bring suit, the DOJ chose not to bring suit, and plaintiff could institute her own suit. Courts routinely exclude EEOC right-to-sue letters on the ground that a jury could infer from the agency's decision not to bring suit that the agency did not see merit in the plaintiff's case. Such a result would be misleading and unduly prejudicial given that the right to sue letter is a procedural formality.

Turning to the defendant's motions, the defendant first argued that the plaintiff raised issues in her federal complaint that were not included in her EEOC charge. Specifically, the defendant argued that Flores' allegation that she received fewer midnight shifts than her Caucasian male coworkers was not in her EEOC charge and should be excluded. The plaintiff countered that her allegation of a disparity in midnight shifts was within the scope of her EEOC charge, especially given the fact that she specifically mentioned in her charge that females received different assignments based on gender. Moreover, the defendant failed to raise this substantive issue in a dispositive motion, the plaintiff argued. The court agreed that it would have been more appropriate for the defendant to have raised this issue in a dispositive motion.

Nevertheless, the court examined the scope of the EEOC charge and found that the exhaustion requirement regarding midnight shifts was indeed satisfied. The court wrote that "EEOC charges are most often drafted by one who is not well versed in the art of legal description," and, as such the "scope of the original charge should be liberally construed." The court offered further guidance in opining that a claimant need not list every example of discriminatory conduct to which she was allegedly subjected in her charge. As long as the conduct is within the scope of the investigation that reasonably could have been expected to grow from the charge, the evidence should not be excluded from trial.

Finally, the court considered defendant's motion to preclude evidence that Flores was regularly subjected to her male colleagues' inappropriate sexual comments about her body, requests to watch her work out or to send nude photos of herself, and descriptions of their sexual dreams about her. Since the plaintiff was not pursuing a hostile work environment, evidence of these comments would only serve to inflame the jury and unfairly prejudice the defendant, the Pennsylvania State Police argued in its motion. The court disagreed and relied on a line of cases that found that stray remarks by nondecisionmakers can still constitute evidence of the atmosphere in which the employment decision was carried out, and therefore can be relevant to the question of retaliation. At a minimum, such comments could "reflect … management's callous indifference to … and prejudice toward" the plaintiff, the court wrote.

Flores made it to the finish line. Not all employment law plaintiffs fare as well. While she was able to bob and weave long enough to get to a trial, aided by some powerful court rulings along the way, the road to get there was not easy. Fortunately, this court used a very common sense approach to deciding the motions in limine.

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