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EMPLOYMENT LAW

Detrimental Impact of Proposed Discovery Limits on Employees

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Fewer depositions, reduced number of interrogatories, less requests for admissions and a proportionality requirement in discovery. This could be the new face of discovery under proposed rule changes to the Federal Rules of Civil Procedure. In addition to the judicially-crafted substantive barriers to success, the inherent disadvantages as a plaintiff, and the lack of professional diversity in the judiciary, proposed changes to the Federal Rules of Civil Procedure approved by the Advisory Committee on Civil Rules in April appear to ensure an even greater employer success rate in the federal courts.

The proposed rule changes would cut the number of depositions in half from 10 to five and reduce the maximum deposition time from seven hours to six. In employment cases, this is of great advantage to the defendant. The critical witnesses in an employment case most often remain employed by the defendant; thus, the only feasible way to try to get good information from them prior to trial is through a deposition. In the vast majority of employment cases, there are more than five witnesses identified in the employer's initial disclosures alone, not to mention the inevitable corporate designee pursuant to Rule 30(b)(6). By reducing the number of depositions, plaintiffs are without adequate means of preparing for trial or summary judgment and the proverbial ball is put squarely in the employer's court. The U.S. Court of Appeals for the Second Circuit has stressed in *Gray v. Board of Higher Education, City of New York*, 692 F.2d 901, 905-06 (2d Cir. 1983), that "if unable to engage in discovery, [plaintiff] cannot prove intent, and without proof of intent, he has no case."

Furthermore, crafty defense counsel can take further advantage of the limited scope of discovery by identifying a large number of witnesses and forcing the plaintiff to either risk wasted depositions or relying on the even reduced number of interrogatories to identify the most useful witnesses. As the number of written discovery requests is being shortened, this also works to the defendant's advantage. For example, plaintiffs in employment cases often use requests for admissions to simplify the process of authenticating documents that are in the possession and control of the employer. One can easily envision a scenario where a need to authenticate a single threaded email chain could require five or six requests to admit alone. The limitation on requests for admissions would also significantly impact the parties' ability to reduce the issues for trial. The two purposes of a request for admission are to allow elimination of contested issues from a case prior to trial and to avoid including extraneous evidence regarding issues not in dispute and that can be developed by the process provided for in Rule 36, as in *Hurt v. Coyne Cylinder*, 124 F.R.D. 614 (W.D. Tenn. 1989). In fact, requests for admissions are similar in nature to a pretrial order, which narrows issues and eliminates those issues with which there is no dispute, as in *In re Carousel Candy*, 38 B.R. 927 (Bankr. E.D.N.Y. 1984). Thus, reducing the

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number of Rule 36 requests would actually have the unintended effect of expanding litigation.

Perhaps even riskier to plaintiffs is the proposed proportionality principle. The proposal is to replace the requirement that discovery requests be "reasonably calculated to lead to the discovery of admissible evidence," with limiting discovery to only that which is itself relevant and admissible evidence, and to that which is "proportional" to the reasonable needs of the case. In theory, this makes sense as a means of limiting extensive and expensive discovery. The reality, however, is that judges are being authorized to use their own discretion in deciding how much discovery a case should warrant. Thus, a judge is free to decide that a discrimination case with what is perceived as a limited wage loss or a less-than-shocking fact pattern does not justify increased discovery despite it being necessary for the plaintiff to prosecute his or her case.

The Equal Employment Opportunity Commission (EEOC) examined this proportionality requirement in a March 2 letter to the advisory committee, and offered the following insight: "By definition, standard limitations are set without regard to the information requirements of any particular case, and thus would be 'proportionate to the needs of the case' only by chance. ... But why should all cases be subject to limits designed for those not requiring extensive factual development?"

According to the National Employment Lawyers Association's February 2012 report on professional diversity in the judiciary, "Judicial Hostility to Workers' Rights: The Case for Professional Diversity on the Federal Bench," "significant research confirms that plaintiffs bringing employment discrimination claims are far less likely to prevail than plaintiffs in non-employment cases." Thus, allowing judicial discretion regarding proportionality is dangerous. "The tasks involved in judging — understanding the evidence, interpreting the precedents, applying the latter to the former — are complex and subtle. Put simply, they require the use of personal judgment," the report said.

According to the NELA report, there is a lack of professional diversity amongst the judiciary. Overall, federal judges do not have substantial backgrounds in working with nonprofit organizations or labor unions, enforcing civil rights, or representing low-income individuals. "Judges tend to have experience in defending civil lawsuits, criminal prosecution, as academics or state court judges and, in general, with serving large institutional actors rather than individual clients," the report said. The lack of personal experience working with employment law plaintiffs, and even worse the experience in defending against seemingly small plaintiffs' claims, can certainly influence a judge's decision about the extent of discovery necessary for a particular case.

At a Philadelphia Bar Association meeting earlier this month, advisory committee member U.S. District Judge Gene E.K. Pratter of the Eastern District of Pennsylvania explained that the proposed rule changes are meant to resolve the problems of district judges not enforcing pretrial orders and attorneys not abiding by initial disclosure requirements. Yet, requiring parties to petition to the court for leave to go beyond these bare-minimum discovery rules or to justify or counter discovery requests actually creates more work and expense for the attorneys and judges. Further, while the root of the purported discovery problems seems to rest in the failure of judicial enforcement and supervision, the proposed changes do not actually address those problems.

Courts have already created substantive means of discrediting plaintiffs' employment discrimination cases. They discount the importance of discriminatory comments in the workplace by referring to them as "stray remarks." They relieve employers from liability when they believe evidence showed decisions were made based upon "business judgment." Some federal courts have dismissed plaintiffs' testimony altogether as being "self-serving witnesses." "In many ways, the federal bench has rewritten procedural and substantive rules applicable only in employment cases that result in the disproportionate dismissal of workplace discrimination cases," the NELA report said.

Some statistics to think about:

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• Employment cases (primarily filed under code No. 442, "civil rights: jobs" or "employment" on the civil cover sheet) comprise one of the largest single categories of federal civil cases. (See volume 3 of *Harvard Law & Policy Review*.)

• In the district courts, between 1979 and 2006, employees' win rate in all phases of employment discrimination cases was 15 percent, compared with 51 percent for non-employment discrimination cases, according to the NELA report, citing volume 3 of *Harvard Law & Policy Review*.

• In the U.S. courts of appeals, the difference between employees' and employers' success is similarly remarkable. Employers (41.1 percent) are five times as likely as employees (8.72 percent) to win their appeals.

Clearly, employment plaintiffs do not have high success rates in federal court from the outset. While this article focuses on the impact on employment law plaintiffs, the proposed changes to the rules surely pose similar problems in other practice areas.

Employment law plaintiffs begin with an evidentiary disadvantage. In many cases, the only evidence to support the plaintiff, beyond his or her own testimony, is in the hands of the employer. Fair and diligent discovery is therefore necessary for the plaintiff to develop a case and to properly prepare for trial, often most importantly by deposing employee witnesses. Cutting the available discovery methods in half is a significant threat to the viability and success of even the best of cases. •

Jefrey Campolongo *is the founder of the Law Office of Jeffrey Campolongo, which, for over a decade, has been devoted to counseling employees, working professionals and small businesses in employment discrimination and human resource matters. The law office also counsels aspiring and established artists and entertainers regarding various legal issues arising in the entertainment and media industries.*