A Timely Analysis of Legal Developments

ASAP®

In This Issue:

August 2011

In *EEOC v. Bloomberg L.P.* a New York federal district court recently held that the EEOC failed to present sufficient evidence to support its claim that Bloomberg engaged in a pattern or practice of pregnancy discrimination. The judge in that case found that the anecdotal evidence put forth by the EEOC was insufficient, particularly in light of the reliable statistical evidence Bloomberg presented to the contrary.

"'J'accuse!' is not enough in court": Court Dismisses EEOC's Systemic Allegations as Unsupported by Reliable and Persuasive Evidence

By Sue Douglas and Meredith Shoop

After four years of litigation, the U.S. District Court for the Southern District of New York ruled on August 16, 2011, that the Equal Employment Opportunity Commission (EEOC) failed to present sufficient evidence to support its claim that business news giant Bloomberg L.P. engaged in a pattern or practice of pregnancy discrimination. Granting summary judgment to Bloomberg on the EEOC's class allegations, Judge Loretta A. Preska ruled the EEOC's anecdotal evidence was insufficient to demonstrate that discrimination was Bloomberg's standard operating procedure, particularly in light of the reliable statistical evidence Bloomberg presented to the contrary.

The EEOC brought the case on behalf of a class of approximately 600 women who took maternity leave during the 6-year period prior to filing. It alleged that Bloomberg engaged in a pattern or practice of discrimination against pregnant employees or those who had recently returned from maternity leave, treating them less favorably than other employees by reducing their pay, demoting them in title or number of direct reports, reducing their responsibilities, excluding them from management meetings, and subjecting them to stereotypes about female caregivers.

Bloomberg, which employs more than 10,000 employees, openly admits it is a demanding place to work. The Company's "Code of Standards" advises employees, Bloomberg "is your livelihood and your first obligation." Thus, it is undisputed that employees who take leave from work receive smaller pay increases and fewer promotions. However, as Judge Preska noted, Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978, does not require that pregnant employees be given more favorable treatment than others, only that they be treated the same as all other employees with similar ability or inability to work.

The Court's Analysis

Setting the tone for the opinion from the outset, Judge Preska noted in her introductory remarks that, "'J'accuse!' is not enough in court. Evidence is required." In fact, earlier in the case, when the EEOC attempted to introduce statistical evidence of pregnancy discrimination at Bloomberg, the court determined its expert failed to provide a relevant and reliable analysis. Rather than comparing "apples to apples" by examining

women who took maternity leave in relation to other employees who took leave of similar duration, the EEOC's expert compared the compensation and career advancement of maternity leave takers with that of non-leave takers. As such, the EEOC's expert report was ruled inadmissible.

As a result of the earlier ruling, when Bloomberg filed its motion for summary dismissal, the EEOC had no statistical evidence to support its pattern or practice allegations. Instead, to support its case, it relied exclusively on anecdotal evidence of disparate treatment of 78 individual claimants. Reviewing that anecdotal evidence, Judge Preska found it inadequate to raise a genuine issue for a jury. The court noted that statistical evidence is generally critical to proving a pattern or practice of discrimination, with anecdotal evidence serving to provide concrete examples of broad discrimination demonstrated by the statistics. There are exceptions to this general rule, where the number of employees at issue is small, the defendant employs no members of the protected class, or direct evidence of a discriminatory policy is present. None of these additional factors was present in the Bloomberg case. Thus, without statistical evidence, the EEOC's anecdotal evidence needed to be compelling to establish its case.

Assessing the anecdotal evidence submitted by the EEOC in light of this standard, Judge Preska found it to be insufficient and unpersuasive for three reasons. First, at best, the evidence demonstrated that only 12.9% of the possible claimants had a potential claim of discriminatory treatment – thus indicating discrimination was not Bloomberg's "standard operating procedure." Second, the EEOC continued to compare claimants to all other Bloomberg employees rather than those employees who took non-pregnancy or maternity-related leave for similar periods of time. Judge Preska found such a comparison failed to compare "apples to apples" and, therefore, could not demonstrate unlawful discrimination. Third, the anecdotal evidence presented failed even to demonstrate that the individual claimants in question were subjected to discrimination. For instance, although the EEOC alleged Bloomberg "repeatedly decreased" one claimant's compensation once it became aware of her pregnancy, the evidence demonstrated that the claimant's pay actually increased. The Judge noted numerous other inconsistencies between the EEOC's assertions and the anecdotal evidence provided in an attempt to support them.

Given the inadequacy of the EEOC's evidence, along with the credible and relevant statistical analysis provided by Bloomberg's experts, which affirmatively demonstrated class members were treated no worse than other employees who took similar periods of leave, the court dismissed the EEOC's pattern or practice claim. Summing up the law on pregnancy discrimination in light of the evidence presented by EEOC in the case, Judge Preska noted that the Pregnancy Discrimination Act does not mandate "work-life balance," or require employers to "treat pregnant women and mothers better or more leniently than others." The law merely requires that they be treated no worse – that all employees be held to the same standards. Thus, she reasoned, Bloomberg is legally entitled to impose consequences on employees who choose family over work, and the EEOC's lawsuit, which amounted to a judgment that Bloomberg does not provide its employees with sufficient work-life balance, amounted to a policy debate which was outside of the court's role in applying the law.

Implications

This decision reinforces some very fundamental principles that apply to pattern or practice claims brought by the EEOC as well as private plaintiffs. Lines of attack include, among others, the quality of the statistical analysis, the comparison group used to establish differential treatment, and the sufficiency of the anecdotal evidence assembled to support assertions of individual instances of discrimination. The case also underscores the importance of investing in well-reasoned and credible statistical analysis to support an employer's defense. Employers should be mindful of these approaches not only when confronted with a pattern or practice lawsuit, but upon the first inkling that the EEOC is contemplating a systemic investigation into an employer's practices.

Sue Douglas is Office Managing Shareholder, and Meredith Shoop is an Associate, in Littler Mendelson's Cleveland office. If you would like further information, please contact your Littler attorney at 1.888.Littler or info@littler.com, Ms. Douglas at sdouglas@littler.com, or Ms. Shoop at mshoop@littler.com.