



TENTH CIRCUIT UPDATE: WINTER 2006

This bulletin provides an update of recent employment laws for employers in states served by the United States Court of Appeals for the Tenth Circuit including Colorado, Kansas, New Mexico, Oklahoma, Utah and Wyoming. Please contact us if you have any questions about these decisions or about their effects on your organization.

Plaintiff's Cooperation With EEOC Investigation A Prerequisite to Suit

The filing of an EEOC charge is often viewed as merely a stepping stone on the way to Federal Court. However, a recent case out of the Tenth Circuit destroys this notion for potential plaintiffs and provides employers with additional ammunition in defending against employees' discrimination claims.

In the case of *Shikles v. Sprint/United Management Co.*, 426 F.3d 1304 (10th Cir., October 20, 2005), Mr. Shikles and/or his attorney learned the hard way not to overlook the importance of the EEOC's investigation process. Shikles was employed in Sprint's billing department until he was terminated as part of a reduction in force. Shikles believed that his termination was a result of age discrimination, so he filed a charge of age discrimination with the Kansas Human Rights Commission. Under its work sharing agreement with the EEOC, the EEOC took responsibility for investigating Shikles's charge.

The EEOC contacted Shikles's attorney to set up a telephone interview with Shikles to obtain more details about his charge. Shikles and his attorney canceled three scheduled telephone interviews and Shikles ultimately failed to make himself available for the telephone interview. The EEOC requested documents from Shikles which Shikles failed to produce, nor did he provide the EEOC with any explanation as to why he could not produce them. Shikles's lawyer also repeatedly failed to respond to the investigator's efforts to contact him. In the end, Shikles provided the EEOC with no information other than that which was contained in his initial EEOC charge.

Not surprisingly, the EEOC dismissed Shikles's charge "because having been given 30 days in which to respond, [he] failed to provide information, failed to appear or be available for interviews/conferences, or otherwise failed to cooperate to the extent that it was not possible to resolve his charge." Shikles was provided a Notice of Right to Sue with this dismissal notice.

Of course, having received the Notice of Right to Sue, Shikles was finally spurred into action and sued Sprint in the United States District Court for the District of Kansas alleging that Sprint violated the Age Discrimination in Employment Act in terminating Shikles's employment. Sprint argued that Shikles's claim should be dismissed because he failed to exhaust his administrative remedies by not cooperating with the EEOC's investigation. Both the District Court and the Tenth Circuit Court of Appeals agreed. The District Court explained that allowing Shikles to proceed with his claim after failing to cooperate with the EEOC would "thwart the administrative process and turn the EEOC filing requirement into a mere formality." His failure to cooperate was determined to equate a failure to exhaust, and, therefore, his case was dismissed for lack of jurisdiction.

When a case is filed, the EEOC's investigative file should be obtained and reviewed for any evidence of a plaintiff's failure to cooperate with the EEOC's investigation. While we doubt that such a blatant disregard for the EEOC will be shown in many cases, where it does exist, the argument should be made that it constitutes a failure to exhaust administrative remedies, a jurisdictional prerequisite to the lawsuit.

Age Difference Of 5 Years Can be Significant In An Age Discrimination Case

In most discrimination cases, there is a clear difference between the plaintiff and the comparator. For example, in a sex case, a male plaintiff must compare himself to a female comparator, usually an obvious distinction. Age cases are not so clear cut. This is an important issue because a discrimination plaintiff can raise an inference of discrimination by showing that he or she was fired and replaced by someone outside the protected class or by showing that he or she was treated differently than a similarly situated employee outside the protected class. In an age claim, who is outside the

protected class? It is settled law that a plaintiff in an age case need not show that he or she was either replaced by or treated less favorably than someone under 40. But if both the plaintiff and the comparator are within the protected class, how much of an age difference is necessary to give rise to an inference of age discrimination?

In the case of *Whittington v. The Nordam Group, Inc.*, 429 F.3d 986 (10th Cir., November 29, 2005), Mr. Whittington's lawyers urged the Court to make a bright-line determination that an age difference of 5 years or less was insignificant for purposes of proving age bias. Without clarifying a difference becomes significant, the Court refused to make any firm rule in this regard stating, "We are not convinced that all five-year age differences are the same ... and will leave to the jury the evaluation of the evidence..." Although the court did not hold that a 5-year difference is insignificant as a matter of law in showing age bias, under the Court's reasoning, it remains possible to argue that a 5-year age difference, or any other particular age difference for that matter, is insignificant for purposes of establishing age bias *under the particular facts of the case*.

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