

THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

Trials & TRIBULATIONS

Supreme Court offers glimmer of hope to defendants in Title VII cases

Employers who have found themselves mired in lengthy and costly discrimination lawsuits brought under fee-shifting statutes such as Title VII (42 U.S.C. §§ 2000e, *et. seq.*), can now take comfort in the fact that it may be slightly easier to win attorneys' fees in frivolous cases or in cases which are clearly barred, for example, by the statute of limitations.

On May 19, 2016, in a unanimous decision, the United States Supreme Court determined that the fee-shifting provisions of Title VII, and other fee-shifting statutes, do not require that a defendant obtain a decision "on the merits" to achieve "prevailing party" status; rather, a defendant may be awarded attorneys' fees "even if the court's final judgment rejects the plaintiff's claim for a nonmerits reason." *CRST Van Expedited, Inc. v. E.E.O.C.*, 578 U.S. ___ (2016), No. 14-1375, 2016 WL 2903425 (hereinafter "*CRST*").

The Court thus settled an issue on which the Courts of Appeals diverged, in favor of a lower bar for defendants to recover attorneys' fees. The Supreme Court's decision is a win for defendants who often expend a great deal of money litigating claims which are subject to dismissal for a variety of reasons, even if the case is not ultimately decided on the merits.

Of course, to recover fees in Title VII cases, the court must also determine that the "claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." *Christiansburg Garment Co. v. E.E.O.C.*, 434 U.S. 412, 422 (1978). In that regard, *CRST* also highlights an issue that has been a hot topic of Title VII litigation recently – the Equal Employment



By **MARY E. SHEPARD**
Daily Record
Columnist

Opportunity Commission's ("EEOC") obligation to conduct a pre-suit investigation and to conciliate.

In *CRST* the District Court, which dismissed all of the EEOC's claims for a variety of reasons, granted the defendant attorneys' fees, holding that the EEOC had unreasonably pursued certain claims for which it had

wholly failed to conduct a pre-suit investigation. *CRST*, 2016 WL 2903425, at *6.

The EEOC had attempted to bootstrap the claims of 67 women who alleged that they were sexually harassed while employed by defendant *CRST Van Expedited, Inc.* ("*CRST Van*"), a trucking company – claims that the EEOC had not investigated prior to filing a lawsuit against the company – with the claim of one individual whose EEOC complaint the agency had investigated.

Although courts are limited in their review of the EEOC's pre-suit investigation and conciliation efforts (*see Mach Mining, LLC v. E.E.O.C.*, 135 S. Ct. 1645 (2015) (judicial review of EEOC conciliation efforts is narrow); *E.E.O.C. v. Sterling Jewelers Inc.*, 801 F.3d 96, 102 (2d Cir. 2015), *petition for cert. filed*, (U.S. April 29, 2016) (No. 15-1329) (judicial review of EEOC's duty to engage in a pre-suit investigation is limited)), the District Court highlighted that "the case at bar is one of those exceptionally rare...cases in which the record shows that the EEOC did not

conduct *any* investigation of the specific allegations of the allegedly aggrieved persons for whom it seeks relief at trial before filing the Complaint." *E.E.O.C. v. CRST Van Expedited, Inc.*, No. 07-CV-95-LRR, 2009 WL 2524402, at *16 (N.D. Iowa Aug. 13, 2009) (emphasis in original).

The Eighth Circuit Court of Appeals affirmed the District Court's finding that the EEOC had engaged in unreasonable litigation tactics, holding: [W]hile we recognize that the EEOC enjoys significant latitude to investigate claims of discrimination, and to allege claims in federal court based on the results of its investigations, we find a clear and important distinction between facts gathered during the scope of an investigation and facts gathered during the discovery phase of an already-filed lawsuit. Where the scope of its pre-litigation efforts are limited—in terms of geography, number of claimants, or nature of claims—the EEOC may not use discovery in the resulting lawsuit as a fishing expedition to uncover more violations.

E.E.O.C. v. CRST Van Expedited, Inc., 679 F.3d 657, 675 (8th Cir. 2012) (internal citations and quotations omitted). Nevertheless, although the Eighth Circuit affirmed this finding, it ultimately reversed the District Court's dismissal of the claims relating to two individual women. *Id.* For that reason, the Eighth Circuit held that *CRST Van* was no longer a "prevailing party," because there were "live claims"; therefore, it reversed the award of attorneys' fees. *Id.*

Thereafter, the EEOC withdrew its claim relating to one individual and settled with *CRST Van* with respect to the other

Continued on next page

Continued from previous page

individual. *CRST*, at *7. *CRST Van* then again moved for an award of attorneys' fees in the amount of \$4 million. The District Court granted the motion, finding, in relevant part, that the dismissal of the claims related to the 67 women for whom the EEOC did not conduct a pre-suit investigation was sufficient to render *CRST* a prevailing party.

The Eighth Circuit again reversed, finding that the determination regarding the EEOC's failure to conduct a pre-suit investigation of some of its claims was not a determination "on the merits" and, therefore, *CRST Van* was not a prevailing party. *Id.* at *8. *CRST* appealed.

The question presented to the Supreme Court was: Whether a dismissal of a Title VII case, based on the Equal Employment Opportunity Commission's total failure to satisfy its pre-suit investigation, reasonable cause, and conciliation obligations,

can form the basis of an attorney's fee award to the defendant under 42 U.S.C. § 2000e-5(k)?

Brief for Petitioner, 2016 WL 322579. The Supreme Court unanimously answered in the affirmative.

For this reason, the decision has been viewed as a signal to the EEOC to ensure that it conducts the requisite pre-suit investigation and conciliation pursuant to Title VII, or it may be subject to large fee awards – a win for defendants to the extent that conciliation may curb costs in cases which often involve lengthy and expensive discovery.

The defense bar, of course, also hopes that *CRST* will discourage the EEOC from pursuing frivolous cases. The agency has been criticized in recent years for bringing purposefully frivolous litigation. *See, e.g.,* United States Senate Committee on Health, Education, Labor and Pensions, November 24, 2014 Minority Staff Report, *EEOC: An Agency on the Wrong Track?*

Litigation Failures, Misfocused Priorities, and Lack of Transparency Raise Concerns about Important Anti-Discrimination Agency, <http://www.help.senate.gov/imo/media/doc/FINAL%20EEOC%20Report%20with%20Appendix.pdf>.

The EEOC, for its part, has rejected the claim that it has pursued frivolous litigation. *See, e.g.,* May 19, 2015 Hearing Testimony and Statement of P. David Lopez, General Counsel of the Equal Employment Opportunity Commission, www.eeoc.gov/eeoc/legislative/hearings.cfm.

Time will tell whether this ruling will have an impact on the EEOC's pre-litigation practices. In the meantime, defendants finding themselves in frivolous Title VII litigation have a glimmer of hope that recovering attorneys' fees may be slightly easier.

Mary E. "Molly" Shepard is an associate at The Wolford Law Firm LLP, where she practices in the areas of commercial and employment litigation.