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Fifth Circuit Sides with EEOC in Title VII Discriminatory Hiring Case

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The Equal Opportunity Employment Commission (EEOC) has claimed another victory in its nationwide class suit against Bass Pro, delivering what could be troubling news for employers. The Fifth Circuit Court of Appeals gave the greenlight to the EEOC's hybrid claim under Title VII, giving the agency broad authority to pick and choose which legal mechanisms best serve its objectives in seeking both monetary and injunctive relief in discrimination claims.

Back Up – What are § 706 and § 707 Claims?

Traditionally, the EEOC uses two avenues to sue employers for alleged discrimination under Title VII – § 706 and § 707. Under § 706, the EEOC steps into the shoes of the employees and sues on the employees' behalf. Section 706 authorizes the recovery of individualized compensatory and punitive damages. Conversely, the EEOC traditionally brings claims of systematic discrimination or a "pattern or practice" of discrimination under § 707. Cases brought under § 707 are brought in the EEOC's name, and the express language of the statute authorizes only equitable relief and damages such as back pay – not individualized compensatory or punitive damages.

Courts generally apply the *Teamsters* method of proof to § 707 claims. The *Teamsters* burden-shifting framework requires a showing by the EEOC that discrimination is the employer's "standard operating procedure." If the EEOC meets this burden, a presumption arises that all individuals in the class were discriminated against. Employers must then rebut individual claims. Obviously, a class-wide presumption of discrimination is not favorable to employers.

Procedural Background of *Bass Pro*

In *Bass Pro*, the EEOC brought a hybrid claim in which it attempted to apply the *Teamsters* framework to its § 706 claim (under which it can recover compensatory and punitive damages). Bass Pro vigorously challenged the EEOC's ability to apply this framework to its § 706 claim, but in July 2014, the district court sided with the EEOC and ruled that the Commission could do just that. Bass Pro sought interlocutory appeal to the Fifth Circuit.

In June 2016, Bass Pro again suffered defeat when a three-member panel of the Fifth Circuit sided with the EEOC and held that the EEOC may bring pattern or practice claims under § 706 and recover compensatory and punitive damages. Bass Pro sought relief from the panel's decision and filed a petition for rehearing en banc.

Rehearing Denied

The Fifth Circuit deadlocked on whether to grant Bass Pro's petition for rehearing en banc, and the 7-7 split resulted in the denial of the petition.

Judge Jolly (joined by Judges Jones, Smith, Clement, Owen and Elrod) dissented. The dissent first clarified that their disagreement with the panel was not about whether the EEOC had the authority to bring its massive pattern or practice suit – which involves more than 50,000 aggrieved applicants – under § 707. Instead, the

dissent explained that its disagreement centered on the EEOC's ability to also bring a pattern or practice case under § 706 to recover individualized punitive and compensatory damages.

The dissent made three main points: (1) the plain language and legislative history of Title VII forbids § 706 pattern or practice suits and the panel's holding to the contrary rendered § 707 meaningless; (2) allowing the EEOC to pursue pattern or practice claims for individualized compensatory and punitive damages under § 706 poses "insurmountable manageability concerns;" and (3) pattern or practice claims for individualized compensatory and punitive damages runs afoul of the Seventh Amendment, which guarantees that in claims of damages one jury will not reexamine the findings of another.

The dissent's contentious opinion prompted a response from the panel, which zealously defended its position. Judge Higginbotham (writing on behalf of the panel) opined that "Bass Pro's argument rests upon a fundamental premise: that the EEOC's enforcement authority and choice of remedies is tethered to the individuals for whose benefit it seeks relief. That premise is false." The panel dismissed Bass Pro's manageability concerns and stated that its "claim that this suit cannot be tried is not a statement of fact but an advocate's prayer. Seeking to limit its exposure to liability, Bass Pro asks us to shut down this lawsuit before it even gets off the ground."

The dissent got the last word when Judge Jones (joined by Judges Smith and Owen) issued a short opinion concurring in the dissent to observe that Judge Higginbotham's unusual "full throated 'response'" is not binding precedent.

Implications for Employers

While it is easy to get bogged down in the legalese and technicalities of statutory interpretation involved in this case, the bottom line is that the Fifth Circuit's ruling is certainly bad news for employers. The opinion gives the EEOC broad authority to seek both monetary and injunctive relief under § 706 and § 707 and pick and choose which mechanisms best suit their objectives. However, employers may be encouraged by the multiple zealous opinions written in this case, knowing that there are many judges that believe the EEOC should not be able to fuse its rights under § 706 and § 707 as they have done in *Bass Pro*. Hopefully for employers, more favorable opinions will come from other circuits in the future.