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High Court Fee Ruling May Put Onus On EEOC To Conciliate

By **Vin Gurrieri**

Law360, New York (May 19, 2016, 9:45 PM ET) -- The U.S. Supreme Court ruled Thursday that businesses sued by the U.S. Equal Employment Opportunity Commission for discrimination don't necessarily have to win on the merits to chase fees, a finding management-side attorneys say could force the agency to try harder to settle claims before filing lawsuits.

In a unanimous ruling penned by Justice Anthony Kennedy, the high court vacated the Eighth Circuit's decision that trucking company CRST Van Expedited Inc. was not entitled to nearly $5 million in fees from the EEOC in the agency's unsuccessful suit alleging widespread sexual harassment.

The justices found that a defendant doesn't need to obtain a favorable judgment on the merits of a Title VII claim to be a prevailing party, saying the Eighth Circuit incorrectly reached that conclusion in its ruling upending the trial court's fee award against the EEOC.

Littler Mendelson PC shareholder Kevin M. Kraham said the Supreme Court was clear in its message that a favorable ruling on the merits is not required before a defendant can be a prevailing party and pursue fees.

"The answer was a clear, 'no.' Full stop, period," Kraham said. "Here, a win is a win, no matter how a win occurred. It was a wake-up call to the commission to afford parties a meaningful opportunity to resolve disputes."

But Debra Katz of Katz Marshall & Banks LLP, a Washington, D.C-based employment and whistleblower boutique that represents plaintiffs, had a different interpretation of the ruling, saying it was an isolated example of the EEOC not fulfilling its conciliation obligations and not indicative of the agency's practices.

Katz said the high court's ruling will have "almost no effect on anything."

"The situation the EEOC found itself in this case hasn't occurred before, and I don't imagine it will come up again," Katz said. "I see it as a one-off case. It'll have no significant effect on the EEOC in any way."

In Title VII cases, defendants are rarely entitled to attorneys' fees. Such instances only occur when defendants are found to be the prevailing parties, and the court finds that the plaintiff's case was frivolous.

The high court's standard for such awards is spelled out in a 1988 decision called Christiansburg

Garment Co. v. EEOC, which held that a district court may award fees to a "prevailing" defendant if it finds the action was "frivolous, unreasonable or without foundation."

The high court has never spelled out a precise test to determine when a defendant is a prevailing party, but Justice Kennedy said that "common sense undermines the notion that a defendant cannot 'prevail' unless the relevant disposition is on the merits."

"The defendant has fulfilled its primary objective whenever the plaintiff's challenge is rebuffed, irrespective of the precise reason for the court's decision," Justice Kennedy wrote. "The defendant may prevail even if the court's final judgment rejects the plaintiff's claim for a nonmerits reason."

The court also pointed out that "there is no indication" that Congress, when it wrote Title VII, intended for defendants to only be eligible to recover attorneys' fees when courts dispose of claims on the merits.

Miriam R. Nemetz, a partner in Mayer Brown LLP's Supreme Court and appellate practice, said the message of the case is that merits don't matter when it comes to defendants seeking fees.

"If the decision had gone the other way, it would have plainly removed the threat of fees," Nemetz said. "This decision does the opposite. It's fair to say it is a step toward giving teeth to [the] conciliation [process]."

The decadelong dispute between the EEOC and CRST dates back to 2007, when the agency accused the Iowa-based company of creating a hostile work environment by subjecting about 270 women to sexual harassment in its new-driver training program.

In 2012, the Eighth Circuit approved the dismissal of the bulk of the EEOC's suit, in part agreeing with the district court that the agency had failed to reasonably investigate or conciliate 67 women's claims in good faith. The appellate court later upended the trial court's fee award after finding that the dismissal didn't constitute a ruling on the merits, and thus, CRST was not a "prevailing party" on those claims.

But by precluding CRST from recovering attorneys' fees when the EEOC's claims had been dismissed because the agency failed to satisfy its presuit obligations, the Eighth Circuit's ruling conflicted with precedent in three other circuit courts, the high court said.

However, the justices still declined to rule on whether the EEOC could avoid paying fees in this case in part because the Eighth Circuit hasn't yet decided whether the EEOC's action was frivolous.

This ruling will likely encourage the EEOC to be more upfront with employers during the conciliation process by sharing more information about the number and identity of alleged discrimination victims instead of fishing for potential victims after lawsuits have been filed, according to Gerald Maatman, a partner at Seyfarth Shaw LLP.

There is a lot of angst among employers when they receive a notice that the EEOC is conducting an investigation, he said. The agency often makes take-it-or-leave-it offers without sharing details and giving employers an opportunity to make a reasoned decision over whether to settle, something that happened in the CRST case.

"This ruling says fees can be theoretically imposed against the commission if it loses a case it shouldn't have brought," Maatman said. "It will have a significant impact on the EEOC's investigation and

conciliation process. Both sides have to know what's at issue."

But Aaron B. Maduff of Maduff & Maduff LLC, a plaintiffs firm in Chicago, said the high court's ruling won't change the EEOC's conciliation efforts, which he says the agency conducts carefully, and may only affect the way it approaches individual claims and pattern-or-practice claims.

"The EEOC is always very careful about these things," Maduff said. "The appearance in this case is that something is troubling the courts about the agency pursuing the case without [properly] pursuing conciliation."

However, any purported misconduct by the agency during the conciliation process "is not a Christianburg issue," and the ruling conflates Christianburg's standard on frivolousness with misconduct, Maduff noted. That conflation is a "big win" for employers, he said.

Katz, for one, acknowledged that the EEOC "somewhat jumped the gun" by bringing a lawsuit in this case without having fully investigated certain claims and "didn't go through all the steps it needed to conciliate." But when the case is remanded, she doesn't believe the Eighth Circuit, under the Christianburg standard, will uphold the fee award against the agency.

"On remand, [CRST] has a pretty hard burden to show that the EEOC behaved in a frivolous manner," Katz said.

CRST is represented by Paul M. Smith, John H. Mathias Jr. and James T. Malysiak of Jenner & Block LLP.

The EEOC is represented by Donald B. Verrilli and Brian Fletcher of the U.S. Department of Justice and P. David Lopez, Jennifer S. Goldstein and Susan R. Oxford of the EEOC.

The case is CRST Van Expedited Inc. v. Equal Employment Opportunity Commission, case number 14-1375, in the Supreme Court of the United States.

--Editing by Christine Chun and Aaron Pelc.
