

The New Illinois Right to Sue Law for Employment Discrimination

The Illinois Human Rights Act now provides for a right to a jury in the Illinois circuit court in employment discrimination cases. But with that new power comes a new set of tactical decisions for parties and practitioners. Here's a look at some of the most important issues.

By Stephen E. Balogh, Randall D. Schmidt and Lindsey Marcus

In its most recent term, the Illinois General Assembly approved, and the Governor signed, House Bill 1509,¹ which significantly amends the Illinois Human Rights Act (Act).² The amendments to the Act represent a major change in how the Illinois Department of Human Rights (department), the Illinois Human Rights Commission (commission), and the courts will enforce the Act's provisions banning discrimination in employment. The changes contained in HB 1509 apply to charges filed with the department on or after January 1, 2008.

The procedures under the Human Rights Act

The Act's procedures prior to HB 1509. Adopted in 1980, the Act authorized the creation of two administrative agencies to investigate and adjudicate charges of violation of the Act. The department investigates charges of discrimination to determine whether there is substantial evidence of a violation of the Act. If it finds substantial evidence of a violation, the matter proceeds to the commission, which is an adjudicative body.

Prior to HB 1509, the department had to complete its investigation within 365 days, although the parties could consent to extend this time.³ At the end of this investigatory period, one of three things happened:

First, if the department determined that there was no evidence of a violation, the complainant had the option of filing a request for review by the department's chief legal counsel.⁴

Second, if the department determined that there was substantial evidence of a violation, the department would file a complaint with the commission on the complainant's behalf.⁵

Third, if the department failed to complete its investigation within the requisite 365 days, the complainant could file a formal complaint with the commission within a 30-day window following day 365.⁶

Once a complaint was filed with the commission, it would set a hearing date for the complaint before an administrative law judge. Following a hear-

Stephen E. Balogh is a partner in the Rockford law firm of WilliamsMcCarthyLLP and a member of the ISBA Labor & Employment Law Section Council. Randall D. Schmidt, also a member of the council, is a clinical professor of law at the University of Chicago Law School. Lindsey Marcus is a third year law student at the University of Chicago Law School.

ing, the determination of the ALJ could be affirmed, reversed, or remanded by the commission itself, and was then subject to judicial review in the Illinois appellate court.⁷

There are a couple of other features of the Act that should be noted. First, until the 2007 amendments, the administrative process described above was the exclusive remedy for violation of the Act. In other words, complainants could not bring their claims of violation of the Act in either state or federal court.

Second, the Act's coverage is somewhat greater than the coverage of analogous federal anti-discrimination laws. The Act includes more protected categories than the federal anti-discrimination laws.

For example, like the federal laws, the Act prohibits discrimination based on race, color, religion, sex, and national origin.⁸ The Act, however, also prohibits discrimination on the basis of ancestry, age, disability, military status, sexual orientation, marital status, and unfavorable discharge from the military.⁹

In addition, the Act covers more employers than the federal anti-discrimination laws. As a general rule, an employer must have 15 or more employees to be covered under either the Act or the federal laws.¹⁰ The Act, however, also covers employers with only one employee in cases of sexual harassment and disability discrimination.¹¹

Finally, the remedies available under the Act are more limited than under the federal anti-discrimination laws. Both systems provide that successful employees are entitled to back pay, reinstatement, actual damages and attorneys' fees and costs.¹² Punitive damages, on the other hand, are available under the federal laws, but not under the Act.¹³

Key features of the new law. Under the amended Act, there will be substantial changes in the administrative processes used to investigate and adjudicate claims. The department will still have 365 days in which to investigate a new charge, after which one of three things will still happen. The complainant's options, however, are different in several major ways.

First, if the department finds that there is no substantial evidence of discrimination, the complainant will have two options:

- He or she may request a review of the department's findings by the commis-

sion (as opposed to the chief legal counsel, who was the reviewer previously) within 30 days, or

- he or she may file suit in the circuit court where the discrimination allegedly took place within 90 days.¹⁴

Second, if the department determines that there is substantial evidence of discrimination, the complainant will again have two options:

- He or she may request, within 14 days, that the director file a complaint with the commission on his or her behalf. If the complainant makes this request, the director must file that complaint within 90 days.

- He or she may file, within 90 days, a complainant in state court.¹⁵

Third, if the Department fails to issue a report from its investigation within 365 days, the complainant again has two options:

- He or she may file, within 90 days, his or her own complaint with the commission; or

- he or she may file a complaint in the appropriate circuit court.¹⁶

The above options are mutually exclusive. Thus, if a complainant chooses to pursue the case in the commission (either through a request for review or by the filing of a complaint with the commission), the complainant may not later file a complaint in state court.¹⁷

Several important features of the Act were not changed by the amendment. Notably, the coverage of the Act was not changed in terms of either protected categories or the coverage of small employers in sexual harassment and disability cases. Also, the amendment did not change the damages available to successful employees in either the commission or state court.¹⁸

Issues raised by the amended Act

The amendments represent a major change in how the department and commission will enforce the Act. The amended Act will also present complainants with more options of how and where they pursue their claims.

At the same time, the amended Act presents a new set of issues that need to be considered in these cases. While the following list is not exhaustive, it lays out some of the key strategic questions that attorneys and their clients will need to consider.

Pleading requirements – notice v. fact pleading. Pleading requirements dif-

fer under the federal, state, and commission rules.

The federal system allows notice pleadings. The federal rules require pleadings to contain “a short and plain statement of the claim showing that the pleader is entitled to relief.”¹⁹ In interpreting this standard in the context of an employment discrimination case, the United States Supreme Court has held that a heightened pleading requirement in Title VII cases was contrary to the federal rules’ liberal pleading requirements.²⁰

In a more recent case, *Bell Atlantic Corp v Twombly*, the United States Supreme Court held that a complaint under Section 1 of the Sherman Antitrust Act could not survive a motion to dismiss when the allegations did not contain facts that could be grounds for relief, i.e. the complaint must have more than “labels and conclusions.”²¹ Although it is not yet clear how applicable the *Twombly* standard will be to employment discrimination cases (or any non-antitrust cases for that matter), the Court made a point of saying that *Twombly* did not run counter to its holding in *Swierkiewicz v Sorema NA*. Thus, the Court apparently was suggesting that the traditional notice pleading requirements will remain the norm for federal employment discrimination cases.²²

Illinois is a fact-pleading state in which a plaintiff must set out in the complaint a “plain and concise statement of the pleaders’ cause of action.”²³ Illinois courts have consistently interpreted this to mean that the pleader must allege facts sufficient to support the cause of action.²⁴

Thus, under Illinois’ Civil Practice Act, notice pleading is insufficient.²⁵ Rather, to state a cause of action, a complaint must set forth a legally recognized claim as its basis for recovery and must plead facts that bring the claim within the legally recognized cause of action alleged. Moreover, the courts “must ignore ‘conclusions of law or conclusions of fact unsupported by allegations of specific facts upon which such conclusions rest.’”²⁶

The commission’s pleading requirements are not as stringent as those at the state court level. Under the Act, the complaint must state the nature of the violation substantially as alleged in the charge previously filed with the department and the relief sought by the complainant.²⁷

The Act requires that the charge filed with the department contain “such detail as to substantially apprise any party properly concerned as to the time, place, and facts surrounding the alleged civil rights violation.”²⁸

Motion practice – motions for summary judgment v. motions to dismiss.

Another issue to consider is the difference in motion practice under the federal and state systems.

It is well-known that in the federal system defendants routinely file motions for summary judgment, pursuant to FRCP 56, in employment discrimination cases. These motions are usually filed after all discovery has been completed.

In state court, on the other hand, motions to dismiss under 735 ILCS 5/2-615(a) are very common. The normal issue in a 2-615 motion to dismiss is whether the plaintiff has pled sufficient facts that, if proven, would entitle him or her to a favorable judgment.²⁹ Thus, in deciding these motions to dismiss, the court will look to see whether sufficient facts are contained in the complaint which, if established, would entitle the plaintiff to relief.³⁰

In the commission, motions to dismiss are rare. And although motions for summary decision are allowed, they are not filed as frequently as motions for summary judgment in federal court.³¹

Discovery issues – depositions v written discovery. A third important issue is the different discovery rules at the federal and state level.

Both the federal and state rules allow for depositions.³² The time limits on depositions, however, vary. At the federal level, depositions are generally limited to seven hours. In the state system, depositions are limited to three hours.³³

The commission, in contrast, has more restrictive discovery provisions. As a general rule, unless the parties agree or good cause is shown, depositions are not allowed.³⁴ Instead, the parties engage in more substantial written discovery in terms of both interrogatories and document requests. Unlike the federal and state system, which both limit the number of interrogatories that a party may serve, the commission’s rules contain no such limitation.³⁵

Special problems in dual jurisdiction cases

In addition to the issues enumerated

above, there are several special concerns related to what we might call “dual jurisdiction” classes of claims – i.e., those covered by both the Act and the federal anti-discrimination laws. The most common are claims of discrimination based on race, sex, age, disability, religion, and national origin.

Practical problems with joining federal and state claims – timing for filing suit. In dual jurisdiction cases, a charge of discrimination must be filed with both the department and the Equal Employment Opportunity Commission (EEOC). Under the provisions of Title VII, a plaintiff can file a complaint in federal court within 90 days of receipt of a notice of right to sue.

Similarly, under the amended Act, a plaintiff has 90 days after the department issues its determination to file a complaint in state court. Thus, if a plaintiff wishes to bring both federal and state claims in one complaint, he or she will have to coordinate the issuance of a notice of right-to-sue from the EEOC within the 90-day filing period allowed under the amended Act.

Risk of joining federal and state claims – removal to federal court. If a plaintiff files a complaint in state court that includes federal law claims and state law claims, the plaintiff risks having the case removed to federal district court. Removal of a case from state court is proper where the federal court has original jurisdiction.³⁶ A federal district court has original jurisdiction over a claim if the claim is based on “the Constitution, treaties or laws of the United States.”³⁷

Therefore, if a plaintiff includes federal claims based on Title VII or any other federal anti-discrimination law in his or her state court complaint, the plaintiff gives the defendant the option of removing the entire case to federal court. The defendant has 30 days from when it receives the pleading stating the federal claim to file a removal notice.³⁸

Risks of not joining federal and state claims – res judicata and waiver. A plaintiff may avoid the risk of having his or her state court case being removed to federal court by not including the federal claims in the complaint. That decision, however, raises two new concerns: the possibility that the plaintiff’s federal claims will be barred by res judicata, and the risk that plaintiff will be waiving his or her right to punitive damages.

Res judicata. If a plaintiff opts not to

join the federal claim to the state claim, he or she will likely be barred from filing a claim subsequently in federal court under the principle of res judicata. That is, in general, once a claim is adjudicated, it may not be litigated in another court if the facts constitute a single “transaction” from which the cause of action arose.

Therefore, a complainant who opts to bring only a state-law employment discrimination claim in state court will likely be precluded from bringing a subsequent employment discrimination claim based on federal law in federal court.³⁹

Potential waiver of punitive damages. The implications of the decision to forego joining a federal claim to the state claim are particularly important with respect to damages. Title VII provides for both actual and punitive damages (subject to limits on the amount) where an employer engages in unlawful intentional discrimination.⁴⁰

The Act, however, does not include punitive damages in the list of damages available to victims of discrimination.⁴¹ Thus, if a plaintiff fails to join his or her federal claims with the state claims, the right to punitive damages will probably be waived.

Conclusion

The amended Act will change the way attorneys handle employment discrimination claims in several ways. The new procedures should speed up the process because complainants will have more options of how their cases will proceed. Thus, it is unlikely that cases will linger for several years in the state system only to resurface in the federal system subsequently.

The amended Act, however, will force the parties and their attorneys to make tactical decisions about what forum – the commission, state court, or federal court – will be most favorable for their claims. ■

A plaintiff who does not include federal claims in his state complaint avoids removal but runs the risk that his federal claims will be barred by res judicata and that punitive damages will be waived.

The new procedures should speed up employment discrimination claims because complainants will have more options of how their cases will proceed.

1. PA 95-0243 (effective 1/1/08).
2. 775 ILCS 5/1-101 et seq.
3. 775 ILCS 5/7A-102 (C)(4).
4. *Id.*
5. 775 ILCS 5/7A-102(F)(2).
6. 775 ILCS 5/7A-102(G)(2).
7. 775 ILCS 5/8-111(A)(1).
8. See 775 ILCS 5/1-103(Q); 42 USC §2000e-2(a)(1).
9. 775 ILCS 5/1-103(Q).
10. 775 ILCS 5/2-101(B)(1)(a); 42 USC §2000e(b).
11. 775 ILCS 5/2-101(B)(1)(b).
12. 775 ILCS 5/8A-104; 42 USC §2000e-5(g)(1).
13. 42 USC §1981a.
14. 775 ILCS 5/7A-102(D)(3).
15. 775 ILCS 5/7A-102(D)(4).
16. 775 ILCS 5/7A-102(G)(2).
17. 775 ILCS 5/7A-102(D)(3), 5/7A-102(G)(2).
18. 775 ILCS 5/8-111(A)(4).
19. FRCP 8(a)(2).
20. *Swierkiewicz v Sorema NA*, 534 US 506 (2002).
21. 127 S Ct 1955, 1959 (2007).
22. *Id.* at 1973-1974, referring to *Swierkiewicz* (cited in note 20).
23. 735 ILCS 5/2-603.
24. See *Anderson v Vanden Dorpel*, 172 Ill 2d 399, 408, 667 NE2d 1296, 1300 (1996).
25. *Knox College v Celotex Corp*, 88 Ill 2d 407, 424, 430 NE2d 976, 984 (1981).
26. *Doyle v Sblensky*, 120 Ill App 3d 807, 811, 458 NE2d 1120, 1124 (1st D 1983), quoting *Pierce v Carpentier*, 20 Ill 2d 526, 531, 169 NE2d 747, 750 (1960).
27. 775 ILCS 5/7A-102(F)(1).
28. 775 ILCS 5/7A-102(A)(2).
29. *Hatch v Szymanski*, 325 Ill App 3d 736, 739, 759 NE2d 585, 588 (3d D 2001).
30. *Bryson v News America Publications, Inc*, 174 Ill 2d 77, 86, 672 NE2d 1207, 1214 (1996).
31. See 775 ILCS 5/8-106.1.
32. FRCP 30; SCR 206.
33. FRCP 30(d)(2); SCR 206(d).
34. 775 ILCS 5/8A-102(F).
35. 56 Ill Adm Code §5300.720.
36. 28 USC §1441(a).
37. 28 USC §1441(b).
38. 28 USC §1446(b).
39. See *Kremer v Chemical Construction Corp*, 456 US 461 (1982) (final state court judgments are entitled to full faith and credit in subsequent Title VII action).
40. 42 USC §1981a.
41. 775 ILCS 5/8A-104.