Individual Liability for Discrimination Claims: Employment Defense Attorneys May Become More Popular

By Eric Kendall Banks

Last month, I spoke on changes in employment laws at a summit that was sponsored by the Kansas City Department of Human Relations and the NAACP. Many members of the audience questioned why an employment *defense* attorney was addressing *their* group. However, they quickly realized the importance of my message after I began explaining that everyone in the room who worked as a supervisor risked being found individually liable for discriminatory conduct.

Most states have enacted their own statutes aimed at preventing discriminatory behavior in the workplace. Many such state statutes, unlike their federal counterparts, allow individual liability. More and more, plaintiffs suing employers for employment discrimination also sue, individually, their supervisors, co-employees, company officers and even directors. Plaintiffs may do so for a variety of reasons, including to "divide and conquer" or to defeat diversity jurisdiction.

Earlier this year, Missouri joined states which allow individual liability. In *Hill v. Ford, et al.* (SC88981) the Missouri Supreme Court ruled *en banc* that the Missouri Human Rights Act ("the Act") contains a broad definition of "employer." The Court said the Act is intended to reach not just the corporate or public employer but any person acting directly in the interest of the employer. It said a supervisory employee clearly falls into this category and supervisors may be individually liable for discriminatory conduct.

Individual liability is not a new danger. Individuals, especially supervisors or managers, have previously run the risk of facing liability when accused of committing an intentional tort. Assault, battery, libel, slander, defamation, and negligent infliction of mental distress are a few of the theories employees have used to attempt to recover monetary damages from co-workers.

Individuals face less risk of individual liability under federal laws prohibiting discriminatory conduct. Title VII provides that private employers, governmental agencies, and their agents are persons under the Act. This has been interpreted to mean that the actions of those who control the operation of a business will bind the principal. Most federal courts have held that inclusion of the word "agents" in the statutory language was only intended to create respondent superior liability for the employer, and that the initial structure of Title VII demonstrates that Congress did not intend to hold agents individually liable for Title VII violations.

There are two principal arguments supporting no individual liability under Title VII. Congress exempted small entities from coverage under Title VII, arguably because of their limited resources, so it is unlikely that it intended to allow liability to run against individual employees. And, courts have reasoned that since the only remedies originally available under Title VII, back pay, reinstatement, and other types of equitable relief, are those that an employer, not an individual, would generally provide, Congress must have not contemplated that agents could be sued in their individual capacity. The issue of whether supervisors meet Title VII's

definition of "employer" is now settled. Every Circuit that has ruled on the question has held that the language regarding "agent" in the statute was only intended to impose respondent superior liability on the employing entity.

One would not expect to see the "individual liability" inquiry making popular media headlines . . . until "Mammygate." The "Mammygate" lawsuit was filed by a former employer against Kansas City, Missouri, the Mayor and Ms. Squitiro. The Plaintiff claimed the racial harassment she suffered included Ms. Squitiro referring to her as "Mammy." Ms. Squitiro filed a motion to dismiss that argued she could not be individually liable under the Missouri Human Rights Act. Not only was she not an employer as defined by the Act, she was not even an employee of Kansas City, Missouri. The Court found Ms. Squitiro's volunteer status to lack legal relevancy and allowed the lawsuit against her to proceed. [1]

Employment defense attorneys may soon find ourselves more popular than ever at cocktail parties, softball games, or even NAACP summits. We cannot simply be viewed as apologists or shrills for management now that individuals are increasingly found to be liable under many state laws. Now more than ever, wise employers, and supervisors, should not make any major employment decision without first consulting their attorneys at Kutak Rock LLP.

[1] This lawsuit was reported in the Wall Street Journal and the First Family discussed it while being interviewed on Good Morning America.