OCAHO Rejects Iqbal/Twombly Pleading Standard

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The Office of the Chief Administrative Hearing Officer is the administrative tribunal established by Congress to hear complaints filed by the government in matters arising under the employer sanctions and antidiscrimination provisions of the Immigration Reform and Control Act of 1986, as amended (?IRCA?). In a recent decision denying an employer?s motion to dismiss the discrimination complaint filed by the Office of Special Counsel for Immigration Related Discrimination (?OSC?), the administrative law judge held, in a case of first impression, that the government is not required to meet the heightened pleading standard adopted by the U.S. Supreme Court in matters before the federal district courts. *U.S. v. Mar-Jac Poultry, Inc.*, 10 OCAHO 1148 (March 15, 2012). As a result, employers who are sued before OCAHO will be obliged to submit to harassing discovery and motion practice by the government regardless of the bare bones allegations contained in the government?s pleadings. In the context of pattern and practice discrimination cases, this means that the government need only allege that the employer maintained a facially discriminatory practice requiring applicants and employees to present particular documents for review as a condition of hire or employment.

The *Mar-Jac Poultry* decision contains other negative ramifications for employers under investigation by OSC. Mar-Jac challenged OSC?s authority to sue on behalf of an individual in temporary protected status for document abuse discrimination. In a 2002 OCAHO decision, the court held that, under the 1996 amendments to OCAHO, document abuse was converted to a subset of employment discrimination on the basis of citizenship status ? a provision limiting protection to U.S. citizens, permanent residents, refugees and asylees. *Ordina-Mendez v. Sugar Creek Packing Co.*, 9 OCAHO 1085 (2002). In earlier document abuse cases, OCAHO judges had uniformly held that all work authorized individuals are protected from being required to produce more or different documents than required to satisfy the Form I-9 employment verification provisions of IRCA. In *Mar-Jac Poultry*, the ALJ refused to follow *Sugar Creek Packing* and followed earlier precedent extending protection to all authorized workers.

The ALJ also rejected *Mar-Jac?s* challenge to OSC?s authority to conduct broad-based investigations of employer compliance with the IRCA non-discrimination rules based upon an isolated complaint and no evidence that any qualified applicant suffered economic injury. As the ALJ observed, the statute confers authority upon OSC to broaden the scope of an existing investigation beyond the allegations made in a particular charge on its own initiative where it believes a pattern or practice of discrimination exists. Even if OSC finds the original charge to lack merit, it may prosecute the employer for discrimination against other employees based on the results of its investigation.

Practical Advice

Where an employer is found liable for pattern and practice document abuse discrimination, it is subject to civil money penalties of up to $1100 for each violation ? even in the absence of proof of economic harm to any applicant or employee. Where one or more protected individuals suffer economic injury, the employer also can be assessed compensatory and economic damages necessary to render the individuals whole.

In pre-litigation settlement agreements in such cases, OSC frequently extracts significant penalties and requirements. For example, in a recent document abuse settlement with Onward Health care, a staffing company doing business in Connecticut, the company agreed to pay $100,000 in civil penalties, to change its internal policies and manuals to reflect IRCA?s protections, and to be subject to reporting and compliance monitoring requirements for a period of three years. OSC has extracted similar settlements against other employers in the health care industry over the past two years, and it continues to target employers in that industry for increased scrutiny.

As a practical matter, the best course of action for avoiding document abuse liability is to undertake routine and ongoing, privileged internal audits to ensure that all hiring policies and procedures are compliant with IRCA requirements, both with respect to I-9 procedures and immigration-related discrimination issues. Where errors are discovered, prompt corrective action should be taken and documented and preserved for a future potential government audit or investigation.

Should an employer receive notice of either an I-9 audit or an OSC investigation, the prudent course of action is to engage counsel familiar with the history and development of agency law and policy at the earliest possible date. Fumbling along without adequate representation can exacerbate the original exposure by a broadening of the agency?s investigation. To some extent, this explains what happened in *Mar-Jac Poultry*, where a human resource officer made damaging admissions to an OSC attorney early on in the investigation of an individual charge of discrimination.

If you have additional questions regarding IRCA compliance, government investigations or OCAHO hearings, please contact any member of our immigration worksite enforcement team.

Related People

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