



Court Limits EEOC's Quest to Pursue Nationwide Class Action Against Dillard's

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In *Equal Employment Opportunity Commission v. Dillard's Inc., et al*, No. 08-CV-1780, the Southern District of California prevented the Equal Employment Opportunity Commission ("EEOC") from pursuing a nationwide class action against Dillard's based on information uncovered during the discovery phase of litigation arising out of an EEOC Charge involving one Dillard's store in El Centro, California.

The complaint, filed September 29, 2008, alleges that, since 2005, Dillard's unlawfully subjected former employees Corina Scott and Brittany Rios Kim, along with other similarly-situated individuals, to unlawful employment practices by requiring the disclosure of confidential medical information and interfering with their rights under the Americans with Disabilities Act. The complaint does not refer to Dillard's national presence and does not identify any individuals other than Scott and Rios Kim or the substantive or geographic scope of Dillard's employment practices.

During the Spring of 2005, Rios Kim, who worked in Dillard's El Centro store, called in sick. Shortly thereafter, she was informed by Dillard's that company policy required her doctor's note to state the nature of her illness requiring her absence from work or the absence would be unexcused. When Rios Kim subsequently missed work between May 31 and June 13, 2005, she submitted two additional doctors' notes, neither of which disclosed the nature of her illness. On June 13, 2005, Rios Kim was terminated for unexcused absences. The complaint further alleges that, on June 6, 2006, Dillard's discharged Scott in retaliation for opposing its policy requiring disclosure of the nature of her medical condition and for refusing to disclose her medical condition after the doctor's note she provided following her absences in May and June 2006 did not disclose the nature of her illness.

The Notice of Charge of Discrimination issued by the EEOC on behalf of Scott sought a position statement from Dillard's, but did not request specific information or documents. Dillard's submitted a position statement and produced excerpts from Scott's personnel file, a list of El Centro store associates who had been discharged for excessive absenteeism or job abandonment between January 1, 2006 and July 1, 2006, and the El Centro store's attendance policy instructing that, for health-related absences to be excused, the employee was required to present a physician's note identifying the nature

of the employee's illness. The EEOC's subsequent request for information sought termination documents for the 32 El Centro store associates previously identified by Dillard's and inquired as to whether the store's policy on doctor's notes was a companywide policy. Dillard's produced responsive documents and responded that the policy on doctor's notes was companywide. The EEOC sought no further information.

During the litigation pending in the Southern District of California, the EEOC served written discovery requests that were nationwide in scope. On April 1, 2011, Dillard's moved to preclude the EEOC from pursuing claims on behalf of all persons other than Scott, arguing that the EEOC lacked "unfettered authority to pursue relief against an employer merely because an individual charge of discrimination has been filed." Dillard's also argued that the claims on behalf of Rios Kim were barred by the statute of limitations because she did not file her EEOC Charge within 300 days of her termination.

On July 14, 2011, the court granted in part and denied in part Dillard's motion to preclude claims. It agreed that Rios Kim's claims were time barred and that the EEOC could not pursue a nationwide class action where "the EEOC provided no affirmative indication during its investigation or conciliation efforts that its allegations might result in nationwide claims on behalf of current and former Dillard's employees." However, the court permitted the EEOC to go forward with claims on behalf of similarly situated current and former employees of the El Centro store, finding the scope of the EEOC's pre-litigation efforts were sufficient to put Dillard's on notice of possible claims on behalf of current and former employees of that store.

In reaching its conclusion, the court recognized that "[t]he EEOC may seek relief on behalf of individuals beyond the charging parties and for alleged wrongdoing beyond those originally charged; however, the EEOC must discover such individuals and wrongdoing *during the course of its investigation*." The court explicitly rejected the EEOC's argument that it should be permitted to pursue a nationwide class action because its pre-litigation investigation included an inquiry to Dillard's headquarters in Arkansas regarding whether the policy in question was "company-wide." In the court's view, this inquiry did not provide sufficient notice of the potential for claims from a nationwide class because Dillard's is a national employer, and its individual facilities "do not share common management." Moreover, "[w]here the scope of the EEOC's pre-litigation efforts are limited - in terms of geography, number of claimants, or nature of claims - the EEOC may not use discovery in the resulting lawsuit as a fishing expedition to uncover more violations."

The court's ruling in *EEOC v. Dillard's* will likely encourage the EEOC to expand the scope of its investigations where an individual charge challenges a company-wide policy for employers with nationwide (or even regional) operations. Courts have recently taken a broad view of the EEOC's subpoena power to collect information in an investigation that goes beyond the four corners of the charge in an effort to find evidence of illegal employment practices. For example, in *EEOC v. Minolta Business Solutions USA, Inc.*, No. 10-1239 (7th Cir. Apr. 29, 2011), the Seventh Circuit found that the EEOC had the power to issue a broad subpoena regarding a company's hiring practices in investigating a single charging party's claim that he was terminated on the basis of race.

Considering the trend toward expansive EEOC investigations and the reasoning outlined in *Dillard's*, employers defending charges of discrimination brought by a single employee or group of employees

from a single facility should closely scrutinize the EEOC's requests for information and limit the scope of information provided to documents and evidence relevant to the individual claim(s) specifically identified in the charge at issue so that the EEOC will not use the voluntary disclosure of company wide information against the employer at a later stage of the investigation or litigation. Where applicable, if charges involve multiple facilities, an employer responding to an EEOC request for information should highlight the fact that individual facilities do not share common management.

For more information about this topic, please contact the author or any member of the Williams Mullen Labor & Employment Team.

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