Second Circuit December 1, 2015 Semi Annual Meeting

By: Evan J. Spelfogel, Epstein Becker & Green, P.C. and Esther Y. Pak, Proskauer Rose, LLP

On Tuesday evening, December 1, 2015, the Second Circuit of the College of Labor & Employment Lawyers (New York, Connecticut, and invited Fellows from Northern New Jersey) convened its semi-annual meeting to discuss "Equal Employment Opportunity: The Latest Judicial, Administrative and Legislative Developments." The event was hosted by Fellow Kathleen M. McKenna and her Proskauer firm and moderated by Regional Program Chair for the College Evan J. Spelfogel of Epstein Becker & Green, P.C.

Guest Speakers included Kevin Berry, New York District Director of the United States Equal Employment Opportunity Commission (EEOC); Helen Diane Foster, Commissioner of the New York State Division on Human Rights (NYSDHR); and Carmelyn P. Malalis, Chair and Commissioner of the New York City Commission on Human Rights (NYCCHR). The event also featured as panelists Fellows Wayne Outten of Outten & Golden, LLP and Jill Rosenberg of Orrick, Herrington & Sutcliffe, LLP. Approximately forty-five Fellows and guests attended the event, joined by several others attending by telephone call-in.

College President-Elect Alan B. Epstein of Spector Gadon & Rosen welcomed the assemblage and presented opening remarks. He noted that the College had just turned twenty years old and that the practice of labor and employment law was one of the fastest growing practice areas today. He urged Fellows to encourage greater inclusion of minorities and women in the practice, to nominate worthy candidates among them for membership in the College and to help diversify the College in the years to come.

Following Epstein's opening remarks, Moderator Evan J. Spelfogel introduced topic and the Honored speakers and panelists for the evening.

Guest Speaker Kevin Berry of the EEOC summarized highlights from the EEOC's Fiscal Year 2015 Performance Report, including the EEOC's having secured more than $525 million for victims of discrimination throughout the Nation, through its concentration on systemic cases. He also noted that the Agency had become more effective through increased staffing (now up to 2,300 employees nationwide) and by emphasizing the EEOC's greatly expanded outreach efforts.

Berry also discussed two new recently published EEOC guidances on: (i) the consideration and use of arrest and conviction records in employment decisions, and (ii) pregnancy discrimination and related issues. With respect to arrest and conviction records, he noted that one in seventeen white men were expected to serve prison time during their lives, compared with one in six Hispanic men and one in three African-American men. As explained in the recent Guidance, the EEOC believes that an employer's otherwise neutral hiring process that includes criminal background checks not directly job related nor supported by clear business necessity has a disparate impact on applicants of protected classes. Berry pointed out that one of the ways in which an employer may satisfy the "job related and consistent with business necessity" defense is by developing a policy with a targeted screen that considers the nature of the crime, the time elapsed, and the nature of the job.

In addressing the EEOC guidance on pregnancy discrimination issues, Berry reminded Fellows that employers are required to treat pregnant employees the same as non-pregnant employees who are similar in their ability or inability to work. He also noted that employers must provide

parental leave to similarly situated male and female employees on the same terms. Finally, Berry addressed audience concerns regarding the EEOC's perceived lack of communication with private attorneys and regarding the time it takes for the agency to handle cases. He observed that while the EEOC makes an effort to look at each individual case and give it the appropriate attention it deserves, it must concentrate spending its limited resources on the cases that it deems to have merit.

Helen Diane Foster, Chair of the NY State Division of Human Rights observed that the New York State Human Rights Law was the oldest state Human Rights Law in the Nation. Foster explained that under Article 23-A of the Law, employers may not inquire concerning or take adverse employment action based on an applicant's prior arrests. As for prior convictions, Foster explained, the employer must comply with eight specified statutory factors including: (i) consideration of the specific duties and responsibilities of the prospective job, (ii) the bearing, if any, of the applicant's conviction history on her or his fitness or ability to perform the job's duties and responsibilities, and (iii) the time elapsed since the occurrence of the events that led to the applicant's criminal conviction. She said that NYSDHR expects employers to keep documentation to prove that they considered all eight Article 23-A factors. Foster also noted that employers may take an applicant's current pending arrest – an arrest not yet disposed of – into consideration when denying employment and may deny employment if an applicant makes a false representation about a previous conviction.

Guest Speaker Carmelyn Malalis, Chair of the City Human Rights Commission noted that her Commission has been understaffed for years and that its headcount has increased to 120 from 59 since she first took over the Agency nine months ago. She then explained the operations of her Commission, beginning with how a complaint gets processed and the role of the Law

Enforcement Bureau which investigates allegations, and makes a determination of whether the complaint has probable cause. The standard used by the Bureau in making that determination, she said, is whether a reasonable person, looking at the evidence as a whole, could reach the conclusion that it is more likely than not that the unlawful discriminatory practice was committed, she explained. If probable cause is found, it is referred to the Office of Administrative Trials and Hearings for a public hearing and for an administrative judge's recommendations as to liabilities, damages, and civil penalties. Malalis stated that once that recommendation comes back to the Commission, her office performs a *de novo* review of all evidence and argument that was presented before the ALJ, before making a final determination. She emphasized that the parties do not get another opportunity to argue the case at her level, and that her office will review only the arguments that were presented before the ALJ.

In addressing questions from Fellows about the Commission's jurisdiction, Malalis clarified that even if an employer is based in another state, the Commission has jurisdiction over the matter if the affected employees and the employer's discriminatory acts occurred within New York City.

When asked whether the increased number of staff members will help the Commission resolve matters more quickly, Malalis responded that the Commission, while still in the process of reconstructing, is striving to speed up the process. She also commented on some of the new challenges the Commission faces, such as the increasing number of complaints being filed and the Commission's recent focus on work that would have city-wide impact, which inevitably takes more time to review.

Fellow Jill Rosenberg opened with remarks on the U.S. Supreme Court's decision in *Mach Mining v. EEOC*. There, the Court held that while lower federal courts may review the EEOC's

conciliation attempts before filing suit, that review must be narrow and limited. Rosenberg asked EEOC Director Berry whether that decision has been helpful to the EEOC. Berry responded that the EEOC felt that *Mach Mining* "cleared the air" on issues regarding conciliation. He further explained that the EEOC now notes when conciliation efforts end and when it makes a proposal to the employer and the employer rejects that proposal, the EEOC feels satisfied that it has then tried everything possible and may make a decision to litigate or not without running afoul of Mach Mining.

In response to other questions from Fellows, Berry also emphasized that the EEOC's "sole interest" is in changing improper behavior and practices of employers, that is, in obtaining future compliance, so that the same types of cases do not come back. This, the EEOC refers to, as "targetable equitable relief."

Rosenberg further raised concerns that private attorneys have with the EEOC's perceived lack of cooperation during the investigation and conciliation process, including the EEOC's refusal to furnish necessary documents from the EEOC's files. She also inquired as to the scope of the EEOC's review of private settlement agreements between the parties. Berry responded that generally, the EEOC will not look at those agreements unless there is a huge red flag calling for the EEOC's attention. He emphasized that the EEOC is mainly concerned with settlement agreement provisions that would have a "chilling effect" on charging parties who wish to come forward. He also noted that the EEOC is currently in the process of creating guidance with sample language that parties may include in private settlement agreements.

Fellow Wayne Outten concentrated his remarks on the absence of the awarding of legal fees under the NY State Human Rights Law. He spoke briefly about repeated annual efforts to obtain

legislation that would allow successful parties to recover attorneys' fees at trial or in an administrative hearing. However, Outten noted, the recent amendment to the State Human Rights Law that allows for the recovery of attorneys' fees for gender-related discrimination cases may serve as a stepping stone for broader based legal fee awards. Outten also discussed the "interesting tradeoff" between speed and thoroughness in regards to the EEOC's efficiency in handling matters. He commented that speed is not always the optimal outcome for agencies dealing with backlogs of cases because often times, when agencies are encouraged to work on cases in a hastier manner, not enough time is spent on carefully examining the cases. He reminded Fellows that although some agencies have recently received increased funding, those agencies have been and continue to be severely underfunded and understaffed. He concluded his remarks highlighting the most common complaints private attorneys have about the EEOC – long delays in the EEOC's handling of cases and insufficient communication between the agency and private counsel.

All in attendance agreed that the common goal was to achieve discrimination free workplaces, though different constituencies might approach that goal from different perspectives.

We again expressed appreciation to our guest speakers and panelists, and to our host, Fellow Kathleen McKenna, her Proskauer firm and the entire Proskauer staff for providing the meeting facilities, the food and drink, and 3.5 CLE credits. The next Second Circuit meeting will be held on a date as yet unspecified in Mid May, 2016.

With best regards,

Evan J. Spelfogel, Regional Program Chair for the College, and Esther Y. Pak, assisting attorney.

For more information on the College of Labor and Employment Lawyers, you can visit its website at: http://www.laborandemploymentcollege.org/.