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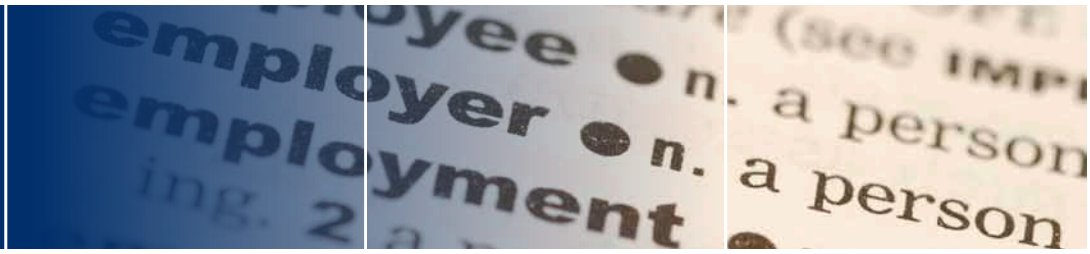

NEWSLETTER
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The Impact of Federal-State "Worksharing Agreements"

An Example of How They May Provide a Defense in States with Fair Employment Practices Statutes, Such as the New Jersey Law Against Discrimination

A New Jersey decision issued earlier this year highlights the importance of a little-known but highly effective employer defense to claims brought under the New Jersey Law Against Discrimination. In *Cornacchiulo v. Alternative Inv. Solutions, Inc.*, 2013 N.J. Super. Unpub. LEXIS 194 (App. Div. Jan. 23, 2013), the Appellate Division upheld dismissal of a discrimination complaint based on the existence of a so-called "Worksharing Agreement" between the federal Equal Employment Opportunity Commission and the New Jersey Division on Civil Rights. Understanding such agreements and their potential legal effect can result in a winning argument for employers and dismissal of claims of discrimination at the very outset of civil litigation, avoiding costly discovery.

The key to understanding how to use Worksharing Agreements as an effective defense first requires familiarity with the significant differences between the structures created by federal and New Jersey state law to process discrimination claims at the administrative (pre-court) level. *Continued*

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Differences in Federal versus State Charge-Filing Requirements and the Effects of Agency Action

The United States Equal Employment Opportunity Commission (EEOC) accepts charges of employment discrimination brought under a variety of federal statutes. After an investigation, the EEOC issues a finding of probable cause or no probable cause, accompanied in either case by a "right to sue" (RTS) letter.[1] The issuance of a RTS letter is a prerequisite to filing a civil action in court under federal anti-discrimination statutes (e.g., Title VII, ADA, ADEA). However, a finding of no probable cause made by the EEOC does not bar that civil action.

The procedure under New Jersey state law is significantly different. In contrast to the federal approach, in New Jersey a claimant seeking relief under the New Jersey Law Against Discrimination (NJLAD) is not required to exhaust administrative remedies prior to commencing an action in court. Thus, the claimant may, but need not, file a charge of discrimination with the New Jersey Division on Civil Rights (DCR, the state counterpart to the EEOC). However, if the claimant chooses to file a charge and the DCR issues a determination of no probable cause, resort to a civil action is *barred.* The claimant must instead appeal the no probable cause determination to the New Jersey Appellate Division. That court will affirm the DCR determination if it is supported by substantial credible evidence. *E.g., L.W. ex rel. L.G. v. Toms River Regional Schools Bd. of Educ.*, 381 N.J. Super. 465, 489-490 (App. Div. 2005) (citations omitted), *modified on other grounds*, 189 N.J. 381 (2007).

Though not required to proceed under the NJLAD, there are benefits to a party filing his or her charge of discrimination administratively with the DCR.

- There is no filing fee (in either the DCR or EEOC).
- A lawyer is not required. Whether filed with the EEOC or DCR, agency representatives will interview the charging party, assist him or her in drafting the charge (called a Verified Complaint in the DCR), take care of serving the charge upon the employer, and require the employer to answer the charge and produce evidence in support of the challenged employment decision.
- An investigator will be assigned to process the charge, assess the evidence and render a decision as to whether there is sufficient evidence to credit the claim.
- Mediation services are available in each forum.

Moreover, if the DCR finds probable cause to credit the allegations, it will assign a Deputy Attorney General to prosecute the case against the employer before an Administrative Law Judge. Again, the charging party avoids the cost of retaining his or her own attorney while seeking relief.

The Effect of "Dual Filing"

Many charges of alleged discrimination are dual filed, meaning that the charging party wishes his or her charge to be filed with the EEOC *and* the DCR. Regardless of which office (EEOC or DCR) the complaining party first approaches, both agencies will ask the party if he or she wishes to file with its sister agency. The party's choice is registered by checking a box on an intake form.

There are advantages to dual filing arising from the relatively short time limit for filing with the DCR as well as federal law restricting the EEOC's ability to start processing a charge when a state fair employment practices agency (such as the DCR) is available.

First, a party has only 180 days to file a charge with the DCR. Missing that relatively short deadline should result in dismissal of the charge. By contrast, federal law provides

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[1] The exact language currently used by the EEOC is: "Based upon its investigation, the EEOC is unable to conclude that the information obtained establishes violations of the statutes. This does not certify that the respondent is in compliance with the statutes…"

that charges may be filed with the EEOC at any time within *300* days after the challenged employment action *if* the EEOC office is located in a state – such as New Jersey – that has an agency (referred to as a "state FEP agency") that also handles discrimination charges, and the charge is dual filed with the state FEP agency. That substantial additional time may save an otherwise stale charge, at least for the purposes of federal law. There is, however, a "catch."

Historically, before the EEOC can formally accept the charge for filing, it must provide the state FEP agency (in New Jersey, the DCR) with an initial opportunity to process the charge. Specifically, the EEOC must defer its own processing for 60 days. Within that time, of course, the 300-day federal charge filing period may expire. In addition, it makes no sense for the state FEP agency to expend its own limited resources exercising its right to process a charge that has already been presented to the EEOC, and which is waiting for word from the state agency on what it intends to do with the charge.

The United States Supreme Court addressed this issue in *Mohasco Corp. v. Silver*, 447 U.S. 807 (1980). The Court held that if the state FEP agency waives its federal statutory right to process the charge first, the EEOC may immediately accept the charge for filing. This is where Worksharing Agreements come into play.

Worksharing Agreements

Worksharing Agreements are commonly entered into by the EEOC and state FEP agencies, such as the DCR.[2] Under the typical agreement, the state FEP automatically waives its right to process a charge first filed with the EEOC. As described, this allows the EEOC immediately to start its investigation, and preserves the 300-day charge filing deadline, to the benefit of the charging party. Worksharing Agreements also promote efficient and expeditious handling of cases, while avoiding the waste of having two different agencies investigating the same charge. *EEOC v. Commercial Office Products Co.*, 486 U.S. 107 (1988) (discussing the benefits of Worksharing Agreements).

Consistent with the goal of avoiding duplication of work, the EEOC-DCR Worksharing Agreement provides that each agency will normally adopt the finding on the charge made by the agency that actually has investigated it. This is where the employer defense highlighted above comes into play.

How an EEOC Finding Can Preclude a Civil Action under NJ State Law

As noted, an EEOC finding of no probable cause does not bar a civil action brought under federal anti-discrimination law. By virtue of the EEOC-DCR Worksharing Agreement, however, the DCR has committed itself to normally accepting the decision made by the EEOC. Thus, once the DCR adopts an EEOC finding of no probable cause determination as its own, the effect is the same as if the DCR had issued the decision. Understanding the result reveals the defense at issue.

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[2] Worksharing Agreements are described in EEOC Regulations at 29 CFR §§ 1601.13(a)(4)(ii) and 1626.10(c). The FY 2012 EEOC/FEPA Model Worksharing Agreement is found at *http://www.eeoc.gov/employees/fepa_wsa_2012.cfm.*

As shown above, New Jersey state law precludes the filing of a civil action under the NJLAD once a no probable cause determination has been made. Due to the operation of the Worksharing Agreement, then, a decision by a federal agency (EEOC) that has no preclusive effect under federal law *has* just such a result for the purposes of a claim under state law (the NJLAD). While perhaps surprising at first glance, the result makes perfect sense as a matter of public policy, because to allow a different result would undermine the effectiveness of the Worksharing Agreement by forcing the DCR to ignore the EEOC's investigatory work and conduct its own investigation.[3]

There are of course plaintiffs who would prefer to have a second chance to pursue litigation even after receiving a no probable cause finding that should be binding. The New Jersey Appellate Division recently faced such an effort.

In *Cornacchiulo v. Alternative Inv. Solutions, Inc*., the Court rejected an effort by the plaintiff to pursue a claim under the NJLAD after the DCR had adopted the EEOC's finding of no probable cause on the plaintiff's administrative charge. In its opinion (the second issued in appeals brought by the same plaintiff), the Court expressly rejected what it correctly saw an effort to undermine Worksharing Agreements.

In *Cornacchiulo*, the plaintiff had chosen to dual-file his alleged disability discrimination charge. The DCR advised him by letter that pursuant to the Worksharing Agreement, the EEOC would take the lead in processing the charge. The DCR further advised:

> Once the Equal Employment Opportunity Commission has made a determination concerning that charge and closes its file, the Division on Civil Rights ordinarily adopts the EEOC's determination. However, upon application, and for good cause shown, the Division on Civil Rights will review a no reasonable cause determination by the EEOC to ensure that it comports with standards under the Law Against Discrimination.

After investigation, the EEOC issued a letter stating that it had examined plaintiff's claims and was "unable to conclude that the information establishes a violation of federal law …." The EEOC provided a RTS letter, notified the plaintiff of his right to file a claim under federal law within 90 days and closed its file.

The plaintiff decided not to file a federal claim. Instead, on April 8, 2011, he filed a complaint in the state Superior Court, claiming violation by defendant of the NJLAD.

On April 29, 2011, the NJDCR issued a letter that stated: "Please be advised that the Equal Employment Opportunity Commission (EEOC) has informed the Division on Civil Rights of the closing of its file on the above reference[d] charge. Therefore, a determination has been made and the Division on Civil [R]ights is closing its file on the same basis." Based on that determination, the employer filed a motion to dismiss the plaintiff's NJLAD civil action. The trial court granted the motion, which the Appellate Division upheld on appeal. *Cornacchiulo v. Alternative Inv. Solutions, L.L.C.*, 2012 N.J. Super. Unpub. LEXIS 1415 (App. Div. June 19, 2012).

The plaintiff tried again, challenging the DCR's decision as set forth in its April 29, 2011, letter adopting the EEOC's determination pursuant to the Worksharing Agreement. That led to his second appeal.

On that appeal, the plaintiff asserted that he was somehow confused by the arrangement between the EEOC and DCR. He also complained that the NJDCR had never conducted any investigation of his claim of discrimination, as required by state regulations. N.J.A.C. 13:4-1.1, *et seq*. In fact, it was undisputed that the DCR had closed its file without an independent inquiry into the facts underlying the claim. The reason, of course, was the Worksharing Agreement designed precisely to avoid such redundant effort.

The Appellate Division once again turned back the plaintiff's assault on the Worksharing Agreement. The Court held that the DCR was not required to perform its own investigation because the *EEOC had already done so,* pursuant to the Worksharing Agreement. The Court observed that the plaintiff's position "amounts to an attack on the entire worksharing agreement." Having already –

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[3] One also can imagine that the EEOC would not appreciate its own work being routinely ignored by state FEP agencies such as the DCR, and might be reluctant to continue expending its own limited resources on processing charges on behalf of the FEP agency.

in its decision on the first appeal – noted the important beneficial effects of Worksharing Agreements,[4] the Court rejected the plaintiff's latest appeal, upholding dismissal of his NJLAD case based on the EEOC's finding of no probable cause.

Importance of Understanding Worksharing Agreements

Both of the Cornacchiulo opinions highlight the importance to employers of understanding how Worksharing Agreements operate. Well-informed, well-advised employers can take full advantage of such agreements to turn back attempts by plaintiffs to enjoy their benefits without being bound by an adverse result, even one issued by the EEOC that normally would have no preclusive effect.

Employers should vigorously defend against EEOC charges, seeking the issuance of a no probable cause determination and then making certain that the DCR is aware of, and thus adopts, the EEOC decision. This will prevent a plaintiff from gaining the unfair advantage of a second chance to litigate a charge that already has been found to be meritless.

While this analysis focuses on New Jersey's FEP statue, employers should be aware of the specifics of the FEP statutes and Worksharing Agreements in any state in which they have employees, as those provisions may well provide similar valuable defenses.

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4 *Cornacchiulo*, 2012 N.J. Super. Unpub. LEXIS 1415 at 10 ("[T]he exception that plaintiff seeks from application of the statute may have unintended negative consequences on the ability of the federal and state governments to engage in worksharing agreements for purposes of efficiency and cost-savings, and it might potentially affect the viability of dual charges that are filed only before one agency or the other.").

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