

LAWBEAT

Equal Treatment?

Study shows a wide gap between worker, employer wins in job bias appeals

BY SUSAN MANDEL

Plaintiffs lawyers admit it's tough to beat employers in discrimination cases. But even some of them are surprised by a study that shows plaintiffs fare worse in federal appellate job bias cases than in any other kind of civil case.

Federal appeals courts reversed nearly 44 percent of plaintiffs' victories in employment discrimination cases between 1988 and 1997, according to a study that Cornell University Law School professors Theodore Eisenberg and Stewart J. Schwab released in July.

The courts reversed fewer than 6 percent of employers' victories during the same period. That plaintiff-defense disparity was greater than in any of 24 other categories of civil cases.

"I would have thought that employment discrimination cases would have lower reversal rates than other categories of cases," Schwab says. "Most employment cases are very fact-intensive, with the central question being, 'What was going on in the employer's mind? Was it the race or sex or disability of the worker, or was it some other reason for not hiring them, firing them or whatever?'"

In general, Schwab adds, appellate courts are reluctant to tamper with a trial court's factual findings.

Possible Explanations

Professor John Donahue of Stanford University Law School thinks the disparity might be because of uncertainty over how to interpret the 1990 Americans With Disabilities Act.

"When a law is passed, it's very vague, and nobody knows what the standards are, [so] there are going to be a lot of reversals," he says.

Eisenberg and Schwab didn't investigate why employers fare better than workers on appeal, but Schwab rejects Donahue's theory. He says uncertainty about the ADA shouldn't have favored one side over the other.

Others point to politics. Former President Reagan's appellate appointees have been found to be more hostile toward plaintiffs in discrimination cases than other presidents' appointees, says Rick Rossein, a professor at City University of New York law school.

Atlanta defense attorney Hunter Hughes says the findings do not prove anything. "You need to look at the underlying cases ... to be able to determine whether two cases that are similarly positioned for a plaintiff and a defendant are treated differently by the courts," says Hughes, who represents employers in discrimination cases.

"I've never observed that the appeals courts favor one side over the other," he notes.

Overall, the courts reversed about 33 percent of plaintiffs' wins in all categories, compared to only 12 percent of defense wins, according to the study, "Double Standard on Appeal: An Empirical Analysis of Employment Discrimination Cases in the U.S. Courts of Appeals."

The study was based on data from the Administrative Office of the U.S. Courts. Verdicts that were vacated, remanded, or affirmed in part and reversed in part were counted as reversals. The government data combined race, sex and age discrimination claims with disability claims filed under the ADA.

The study found similar disparities in all 12 federal circuit courts.

The greatest gap was in the 5th U.S. Circuit Court of Appeals based in New Orleans. That court reversed more than 60 percent of plaintiffs' victories but only 4 percent of defense wins.

"The effect of these decisions ... is to devalue these crucial anti-discrimination statutes and to encourage employers not to take these laws seriously," says Washington, D.C., attorney Cyrus Mehri. Mehri and another prominent plaintiffs attorney, Los Angeles-based Johnnie Cochran, funded the study.

Lawsuits Keep Coming

Despite obstacles, the practice area doesn't appear to be shrinking. Membership in the National Employment Lawyers Association, a plaintiffs lawyers group, has remained steady at around 3,000 for the past several years.

And there's still a boom in employment discrimination filings. Federal district court filings totaled 21,032 in fiscal 2000, up from 8,413 a decade earlier, according to the Bureau of Justice Statistics.

The current economic downturn should only increase filings because "layoffs are one of the prime engines for employment discrimination cases," Donahue says.

Plaintiffs attorney Gary Phelan of West Hartford, Conn., says neither the economy nor the federal courts will affect that number, for one reason:

"There's been no decline in the amount of discrimination that is happening in the workplace."