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EEOC Oral Notice of Right to Sue May Be Valid

EMPLOYMENT LAW

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Special to the Legal

In *Ebbert v. DaimlerChrysler,* the 3rd U.S. Circuit Court of Appeals ruled that an employee's right to sue in a disability employment discrimination case could be triggered by oral, rather than written, notice, provided that the employer could demonstrate that a claimant received sufficient oral notice of rights from the EEOC. This is an important decision because when the notice is oral, it triggers a short, 90-day period to file suit. Although the court's reasoning is clear in *Ebbert*, the decision leaves unanswered questions about what constitutes sufficient legal notice.

In *Ebbert,* the plaintiff filed suit against her former employer under the Americans with Disabilities Act, alleging that she was denied reasonable accommodations. After investigating the charge of discrimination, the investigator for the Equal Employment Opportunity Commission contacted the claimant and stated that the charge was being dismissed and that the agency would issue a 90-day right-to-sue letter. The plaintiff never received the letter. As a result, the EEOC concluded that the case would be reopened for reasons other than the notice issue.

The EEOC mailed a second right-to-sue letter approximately six months later, but sent it to the wrong address. When this mistake was discovered, the EEOC mailed a third notice to the correct address. Upon receipt of that notice, the plaintiff filed what she believed was a timely action in federal court against her employer for alleged violations of the ADA.

The defendant discovered that the plaintiff had received oral notification and moved for summary judgment, alleging that the plaintiff's claims were time-barred. The defendant asserted that the plaintiff had received oral notice of her 90-day right to sue during her conversations with the EEOC investigator. These conversations, the defendant asserted, occurred more than five months prior to the filing of the lawsuit, thus making the claim untimely.

CHEVRON CASE GUIDANCE

The EEOC filed an amicus curiae brief in support of the plaintiff, arguing that its regulations required that a claimant's notice of right to sue be in writing, and that oral notice is insufficient. In evaluating this assertion, the 3rd Circuit considered whether the EEOC's regulations should be afforded deference under the standard articulated by the U.S. Supreme Court in *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.,* 467 U.S. 837 (1984). In *Chevron*, the court ruled that deference is appropriate for legislative regulations in which an agency "interprets" a statute or "fills in a gap," if Congress specifically delegates such authority to the agency. If the agency is merely implementing the statute without a clear congressional delegation of authority, agency deference is improper.

Before considering whether deference to the EEOC's regulations was appropriate, the 3rd Circuit examined whether the regulations specifically mandate that the 90-day notice be in writing. The court concluded that the EEOC's regulations were silent on this issue. Nonetheless, the court declined to apply *Chevron* for other reasons; namely, that the power to create such a rule, which would be binding on the courts, was beyond the authority given to the EEOC by Congress.

The court reasoned that the EEOC's authority was limited to its administrative investigations, and the agency could not dictate under what circumstances an untimely complaint should or should not be dismissed by a federal court. Such power, the court reasoned, was outside the scope of the EEOC's procedural regulations. Thus, the 3rd Circuit refused to defer to the EEOC because the court perceived that the EEOC was attempting to overstep its legislative grant of authority.

In fairness to the EEOC's position, the 3rd Circuit considered whether the agency's regulations should be afforded a lesser standard of deference in this instance, i.e., the court evaluated the sufficiency of the regulation based on the quality of the consideration and reasoning employed by the agency in promulgating the rule. The 3rd Circuit ultimately concluded, however, that very little, if any, deference should be afforded to

the EEOC's regulations, because they contain little indication that they were the product of deliberation or debate. The court opined that the regulation only "contemplates" that a 90-day notice be in writing but does not mandate it, concluding that "[b]ecause the statute does not say that notice must be in writing, we hold that oral notice can suffice to start the 90-day period." According to the court, permitting oral notification permits a fair balance between a defendant seeking swift prosecution and resolution of a claim and the need to provide a plaintiff with "adequate" opportunity to commence suit.

Nonetheless, with clear intent to afford some protection to EEOC claimants, the court did rule that oral notice must be the equivalent of written notification. To satisfy this requirement, complete disclosure of the 90-day notice must occur, including the date on which the notice starts to run. This fact, the court concluded, was absent from the record. The court noted that a defendant would have the burden of proving that the oral notice was "as comprehensive as the written version." Because, in this case, the defendant could not demonstrate that the plaintiff had complete notice of her rights — in particular, the date her limitations period commenced — the defendant failed to meet its burden of proof. For this reason, the grant of summary judgment was reversed.

POST-*EBBERT*

The decision in *Ebbert* may have far-reaching consequences for discrimination claimants. It leaves the EEOC and attorneys with many unanswered questions involving the practical application of the decision, such as what constitutes "complete notice" to a claimant and what proof sufficiently demonstrates that the oral notice in a particular case is as comprehensive as the written version. *Ebbert* also seems to impose a greater standard of care on the EEOC with regard to its obligation to inform claimants of their rights. The decision could have a chilling effect on investigators who may be reluctant to engage in oral conversations with claimants regarding the 90-day notice, for fear that such remarks could adversely prejudice a claimant's case. This may prompt the EEOC to consider new regulations to prevent any misunderstanding a claimant may have regarding her notice of rights. Time will tell whether the *Ebbert* decision created more issues than it resolved. •