Thursday, September 25, 2008 / Number 187 / $1.00

THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

Discrimination suits declining

By ELIZABETH STULL
elizabeth.stull@nydailyrecord.com

A study by two Cornell University law professors published in the Harvard Law and Policy Review shows a dramatic decline in the number of employment discrimination cases filed in federal court.

According to the article by professors Kevin M. Clermont and Stewart J. Schwab, "Employment Discrimination in Federal Court: From Bad to Worse?", the number of federal employment discrimination cases filed has dropped by almost 41 percent in the past five years.

In 2001, such cases represented the largest share of the federal civil cases, at nearly 10 percent of the docket. By 2006, they had fallen to 6 percent of the total docket. In 2007, there were fewer cases than in 1999.

Clermont and Schwab suggest that discouragement among plaintiffs and their attorneys accounts for the change.

Some Rochester area employment attorneys said the findings are not surprising — but they disagree on just what's driving the numbers. Some predict increased filings due to economic conditions and new amendments to the Americans with Disabilities Act (ADA).

Plaintiffs appeal 10 times as frequently as defendants, yet when defendants appeal they are roughly five times as likely to have a trial court loss reversed, according to Clermont and Schwab.

Employment discrimination cases exploded in the 1990s, increasing 286 percent — from 8,303 to 23,722 cases terminated — between 1991 and 1998, according to the article. It cites the Civil Rights Act of 1991, the ADA of 1991, and the Family and Medical Leave Act (FMLA) of 1993.

But the number of federal cases has been dropping steadily since 2001.

See **DISCRIMINATION** *page 7*

Discrimination suits in decline

DISCRIMINATION *from page 1*

"It is not necessarily that plaintiffs' chances have taken a dive in recent years," the authors conclude. "Rather, there could be a growing awareness, especially with the prolonged lack of success on appeal, that employment discrimination plaintiffs have too tough a row to hoe."

The steepest declines have been in the 11th Circuit, followed by the Fifth, Fourth, Eighth and Sixth Circuits.

Scott Piper, of Rochester-based Piper Schultz LLP, said the study "seems fairly accurate." Piper said his firm, which primarily represents employers, handles many such cases.

More sophisticated employers

"I think HR — the company's [human resources] people are getting more and more sophisticated, and that really helps when it comes to defending employment discrimination litigation. They are better prepared," Piper said.

Documenting employee performance or misconduct and using progressive discipline for uncooperative employees are practices that make it easier for employers to prove a legitimate, non-discriminatory reason for termination.

Piper said he often resolves cases for employers at the agency level, through the state and federal Equal Employment Opportunity Commissions (EEOCs), without going to court.

To charge an employer in federal court, an employee must obtain a 'right to sue' letter from the EEOC – a step that proves fatal to many discrimination cases.

"Employers create and control most of the information needed to determine whether there has been unlawful discrimination," said Steven V. Modica, of Modica & Associates. "For example, employers create personnel files and can decide what goes in and what does not."

Plaintiff's attorney Nelson Thomas, of Dolan, Thomas & Solomon LLP, said courts are looking more for direct evidence of discrimination and relying less on circumstantial evidence.

"Employers are hiding discrimination more effectively now than they have in the past," Thomas said. "And unless it's overt, [courts are] less willing to look to see if it's there. I think the country as a whole has just become more conservative. Judges are balancing the cost between interfering with potentially legitimate employment decisions that an employer has made, versus ferreting out discrimination."

Laws and Leadership

"It's always been difficult to prevail on these cases, said Jules Smith, of Blitman & King LLP, a member of the plaintiff's bar who also represents unions.

"Lawyers I know who do a lot of this kind of work are reevaluating bringing ADA cases because the new law will make it easier," Smith said.

The ADA currently requires an employee's physical disability to affect a major life activity, but proposed amendments mirror state law by requiring an employee to show only a medically diagnosed disability and the ability to perform essential job functions.

"The new ADA legislation is very dramatic and expansive," Thomas agreed.

"I suspect that if Obama wins the election, we're going to see an increased emphasis on protecting employees as opposed to protecting employers," he also said.

At the state level, leadership changes at the Division of Human Rights led to procedural changes making the agency slightly more plaintiff-friendly, Piper said.

"They have been much more liberal in issuing probable cause findings than the EEOC," he said.

Judges who previously defended employers might "better relate to the frustrations of employers," Modica said, while praising local judges for their fairness.

Modica also said lawyers who feed on an entitlement mentality among employees undermine legitimate discrimination cases before judges and juries.

"Where so much hinges on how you view the facts, as well as the totality of the circumstances, you can't help — particularly in close cases — being influenced by your outlook on life," Thomas said.

DISPLAY 6: NUMBERS AND WIN RATES, EMPLOYMENT DISCRIMINATION CASES BY TYPE, FISCAL 1998–2006, U.S. DISTRICT COURTS.

Type	*Number*	*Win Rate*
Title VII	64,122	10.88
ADA	8,240	9.12
§ 1983	8,342	11.24
ADEA	7,105	11.67
§ 1981	4,457	10.96
FMLA	1,503	19.55
Total	93,769	10.90

Clermont and Schwab Note: "This table of AO data shows the predominance of Title VII cases in code #442 cases, as well as the similarity of outcomes in the different types of discrimination cases. We discuss win rates infra Part II.C. Only since fiscal year 998 did the Administrative Office enter the title and section of the U.S. Code on which each case is brought, so our breakdown by type of discrimination can only begin then. Moreover, because the data go only through fiscal year 2006, the data from the last three months of calendar year 2006 are not included. Finally, the entries for title and section are poor, so we have discarded an almost equal number of missing or nonsensical entries."

Business cycles

Clermont and Schwab report states that cases tend to spike six months behind national unemployment numbers, but local attorneys disagree on the true impact of the national economy.

"I suspect that the downturn in charges may be because of a reduction in ... employment," Smith said. "There's not as much economic activity as there has been. After the people have been out of the workforce, there's less activity."

Thomas took the opposite view.

"Often cases are counter-cyclical," he said. "If the economy's doing well, fewer people are fired or demoted; however, when the economy starts going badly, employers start firing people."

Thomas cited EEOC discrimination filings for the first quarter of 2008, up 21 percent over the same period last year.