

## Eighth Circuit Largely Sides with CRST Van Expedited in EEOC Action

On February 22, 2012, the Eighth Circuit Court of Appeals ruled on the EEOC's appeal challenging the Northern District of Iowa's series of rulings in the EEOC's attempted class sex harassment action against CRST Van Expedited, Inc. *EEOC v. CRST Van Expedited, Inc.*, Nos. 09-3764/09-3765/10-1682 (8th Cir. Feb. 22, 2012). The resulting decision has the potential to dramatically restrict the EEOC's aggressive pursuit of class-type sexual harassment litigation on behalf of "allegedly aggrieved persons" under Section 706 of the Civil Rights Act of 1964 without the filing of a Commissioner's charge or establishing a triable case of pattern or practice discrimination under Section 707.

### Background and the District Court

In this case, the EEOC initially investigated a single charge of discrimination from a truck driver trainee alleging sexual harassment by her two driver-trainers. The EEOC's investigation focused almost exclusively on this trainee and the two driver-trainers. The EEOC ultimately asked for contact information of all of the Company's dispatchers and female drivers since January 1, 2005, but it does not seem to have conducted any further investigation using those data. The EEOC then issued a determination finding reasonable cause that a class of employees had been discriminated against and invited CRST to engage in conciliation. The EEOC declined to inform CRST of the size of the class or its members, effectively asking CRST to discover the identities on its own. Conciliation failed and the EEOC sued on behalf of the initial claimant and a class of "similarly situated employees". Through discovery, the EEOC elicited participation of members of a "class," which continued to expand. For almost two years, the EEOC refused to identify members of the "class", and the fluctuating size presented CRST with a "constantly moving target," eventually numbering 270. Once CRST succeeded in obtaining an order precluding the EEOC from adding any further members to the "class", accomplished in part by precluding claims or testimony from any of the "claimants" the EEOC was unable to produce for deposition, the district court, on a number of grounds, eventually dismissed all of the EEOC's claims.

The EEOC appealed most of the district court's decisions to the Eighth Circuit, but it declined to appeal two key rulings. First, after assuming that the EEOC had constructively amended its complaint to include a pattern or practice claim under Section 707, the district court dismissed the EEOC's pattern or practice claim because the number of claims identified by the EEOC was not sufficiently large to make out a pattern or practice claim (incidence of sexual harassment was only 5.4 percent of female drivers, 2.7 percent of female/male driver teams, 0.8 percent of trips taken, 0.9 percent of days driven, or 0.8 percent of miles driven). Second, the EEOC declined to appeal the district court's ruling that, absent a viable pattern or practice claim under Section 707, the EEOC did not have the power under Section 706 to revive stale claims—those arising more than 300 days prior to the filing of the jurisdictional charge.



## **Appeal to the Eighth Circuit**

On appeal, the Eighth Circuit upheld the majority of the district court's rulings, affirming dismissal of all but two claims of sexual harassment.

### *Section 706's Pre-Suit Requirements*

Under Section 706, the EEOC is required to investigate, evaluate and determine the viability of a claim before filing suit, but here the EEOC "sued first and asked questions later." The EEOC has the power to expand harassment cases to individuals and wrongdoing uncovered during a reasonable investigation of the original claimant's charge. However, the Eighth Circuit found that the EEOC failed to investigate, determine or attempt to conciliate the allegations of 67 of its individual "claimants" that had only been uncovered during discovery of the already-filed lawsuit and not during the EEOC's pre-litigation investigation. The court distinguished between "facts gathered during the scope of an investigation and facts gathered during the discovery phase of an already-filed lawsuit" and determined that the EEOC may not use discovery as a fishing expedition to uncover additional claims for which it has not first followed the "integrated, multistep enforcement procedure" required by Section 706. See *Occidental Life Ins. Co., of Cal. v. EEOC*, 432 U.S. 355, 359 (1977). Because the EEOC failed to satisfy its Section 706 obligations as to these claims, the Eighth Circuit found that the district court did not abuse its discretion in dismissing these claims. This decision by the Eighth Circuit has the potential to greatly restrain the EEOC's ability to file open-ended class-type litigation in the harassment context.

### *Lead Drivers Were Not Supervisors - CRST Not Vicariously Liable*

The Eighth Circuit also concurred with the district court that CRST was not vicariously liable for any harassment perpetrated by its lead drivers because the lead drivers were not supervisors under Title VII. CRST can only be held vicariously liable for sexual harassment committed by supervisory employees. To be a supervisor, the "harasser must have had the power to take tangible employment action against the victim, such as the authority to hire, fire, promote, or reassign to significantly different duties." *Weyers v. Lear Operations Corp.*, 359 F.3d 1049, 1057 (8th Cir. 2004). Here, the lead drivers only (1) dictated minor aspects of the trainee drivers' work experience and (2) issued non-binding recommendations to superiors regarding whether CRST should upgrade trainees to full-driver status. The lead drivers had no power to take away or assign additional duties. The Eighth Circuit upheld the district court's ruling that the lead drivers' activities were insufficient to qualify the lead drivers as supervisors over the trainees. Thus, CRST was not vicariously liable for any sexual harassment committed by the lead drivers.

### *Dismissal on the Merits*

The Eighth Circuit upheld summary judgment granted by the district court against others of the EEOC's individual "claimants" for three reasons: (1) complaints of harassment were neither severe nor pervasive; (2) the EEOC failed to show that CRST knew or should have known of the harassment; and (3) CRST took prompt and effective remedial action in response to allegations of sexual harassment.

### *EEOC's Failure to Present Claimants to CRST for Deposition*

The district court, in closing down the EEOC's open-ended effort to continue to add "claimants" to the "class", had also issued a discovery sanction barring 99 women from testifying at trial and preventing the EEOC from seeking relief on their behalf because the EEOC failed to present them to CRST for deposition as the court directed. The Eighth Circuit confirmed this ruling of the district court that the EEOC must make individual claimants available to the employer-defendant for deposition or the EEOC would be barred from using their testimony or advocating on their behalf.

### *Award of Attorneys' Fees*

Because the Eighth Circuit reinstated two of the EEOC's claims on behalf of individuals by reversing two of the district court's orders, CRST is no longer a "prevailing" defendant as the EEOC still maintains live claims against it. Therefore, the Eighth Circuit vacated, without prejudice, the district court's award of \$4,467,442.90 in attorneys' fees and expenses.

### **Conclusion**

The Eighth Circuit's decision deals a heavy blow to the EEOC's aggressive practices regarding class-type harassment actions. As *EEOC v. CRST Van Expedited, Inc.* currently stands, the Eighth Circuit and the Northern District of Iowa have effectively (1) constrained the EEOC's ability to maintain pattern or practice harassment claims under Section 706; (2) prevented the EEOC from reviving stale claims in the absence of a pattern or practice Section 707 action; and (3) required the EEOC to investigate, evaluate, and attempt to conciliate each Section 706 claim individually prior to bringing suit rather than alleging a broad claim and filling in the details of individual claims through discovery.