

Discrimination Complaint Filed with Local Agency Constituted a "Claim" Made Prior to EPL Policy Period

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The United States District Court for the Southern District of Florida, applying California law, has held that an employee's sexual harassment complaint, which the employee filed with a local agency, constituted a "claim" as defined by an employment practices liability policy. Because the claim was made prior to the relevant policy's inception, the court determined that there was no coverage for the claim or for multiple other discrimination complaints that arose out of interrelated wrongful employment practices. *KB Home v. St. Paul Mercury Ins. Co.*, 2008 WL 5263420 (S.D. Fla. Dec. 17, 2008).

The insurer issued a claims-made employment practices liability insurance policy to the policyholder for the period from April 15, 2006, to April 15, 2007. Prior to the inception of the policy, on March 7, 2006, an employee of the insured filed a discrimination complaint against the insured with the Broward County Civil Rights Division (the "Division"). Among other things, the complaint included allegations of sexual harassment. On March 13, 2006, the insured received notice of the complaint from the Division, along with a letter stating that the Division would be forwarding the charge to the Equal Employment Opportunity Commission (EEOC) for further processing because the alleged issues were outside of the Division's jurisdiction. In May 2006, the EEOC sent the insured a copy of the EEOC Notice of Discrimination regarding the employee. Subsequent to the initial complaint, three other employees filed discrimination complaints against the insured, two of which involved the same event in which the sexual harassment alleged in the initial complaint occurred.

The insured sought coverage under the employment practices liability policy for all four of the discrimination claims. The insurer denied coverage for the first employee's complaint and asserted that the complaint was a claim made prior to the policy period (*i.e.*, when the insured received notice of the employee's complaint from the Division). The insurer also denied coverage for the other three complaints pursuant to the policy's related claims provision, which stated that all claims arising out of the same or interrelated wrongful employment practices are deemed one claim made on the date that the earliest claim was made.

The policyholder settled the discrimination actions and filed suit against the insurer, seeking a ruling that the four claims were not related and that all four claims were made during the policy period. The insured

contended that the Division's letter regarding the first employee's complaint was not a claim under the policy because it was not the initiation of a governmental or administrative proceeding.

The court held that the filing of the first employee's charge with the Division constituted a claim under the policy and, therefore, that the claim predated the policy and was not covered. In reaching this conclusion, the court noted that the policy defined a claim as "an administrative or arbitration proceeding against any Insured commenced by the Insured's receipt of a complaint, notice of charges, arbitration petition, formal investigative order or similar document," and that the insured received notice of the charge on March 13, 2006, through the Division's correspondence. The court rejected the insured's argument that the Division's lack of jurisdiction to investigate and handle the complaint somehow negated the insured's receipt of the discrimination charge.

The court further held that the policy provision regarding interrelated wrongful employment practices, defined as practices that have "as a common nexus any fact, circumstance, situation, event, transaction, cause or series of related facts, circumstances, situations, events, transactions or causes," was unambiguous. Based on this policy definition, the court concluded that the two subsequent complaints based on sexual discrimination at the same event complained of by the first employee were interrelated with the first employee's complaint. With respect to the remaining complaint, however, the court concluded that it was not interrelated with the first employee's claim because it involved alleged discrimination during a different time frame and did not otherwise include any fact in common with the initial complaint. In doing so, the court rejected the insurer's assertion that interrelatedness sufficiently could be established by showing a workplace culture "infused with sexual harassment."

Finally, the court addressed the insured's argument that, in making the interrelatedness determination, the court was limited to reviewing the employee's charging documents. The court rejected this contention, emphasizing that the policy language required it to look at all of the relevant facts underlying the discrimination claims, including facts developed by the insurer during discovery.