



Florida EMPLOYMENT

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Law Letter

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LITIGATION

Even when you win, you don't really win!

How much does it cost to defend yourself against an employee's lawsuit? Investment company Morgan Stanley's answer to that question was \$165,000. Let's take a look at what led to that startling discovery.

RIF challenged

Fifty-nine-year-old Theodore R. Vaughan was part of a reduction in force (RIF) in November 2002 that affected some 1,000 brokers at Morgan Stanley. Under the RIF, brokers with less than two years of experience were exempt from being laid off. Vaughan fell into a group of brokers who had more than eight years of experience and were expected to generate annual fees of at least \$120,000. Because he generated only \$90,970 in annual fees, he was selected for the RIF and fired.

Vaughan sued his former employer, claiming age discrimination. After pretrial fact-finding was conducted, Morgan Stanley asked the federal court in Orlando to dismiss his claims. The court found that Vaughan hadn't produced enough evidence to show he had been discriminated against even though he had established that two younger brokers were hired to replace him at the Winter Park office. He also claimed that his branch manager had remarked, "[It's] tough getting old," but the court dismissed that comment as a "stray remark" that wasn't uttered close enough to his discharge to be a factor.

Vaughan also argued that Morgan Stanley's RIF had a disparate impact on older financial advisers. That claim was dismissed at the time he made it, however, because the U.S. Supreme Court hadn't yet ruled on the viability of disparate impact claims under the Age Discrimination in Employment Act (ADEA). That ruling finally came last

March, when the Court overturned an Eleventh U.S. Circuit Court of Appeals precedent and found that the ADEA *does* authorize a disparate impact theory of liability. (The Eleventh Circuit is the federal appellate court for Florida employers. For more on that case, see "Supreme Court broadens age discrimination claims," *Florida Employment Law Letter*, May 2005, p. 3.) Unfortunately for Vaughan, the Court's decision came too late — the Orlando federal court had already dismissed his claims.

Win some, lose some

After it succeeded in getting Vaughan's claims dismissed, Morgan Stanley asked the court for \$165,000 in

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attorneys' fees because it was "the prevailing party" in a discrimination lawsuit. Magistrate Judge David A. Baker denied the company's request, and that decision was affirmed by the district court. Judge Baker cited what's known as the "American Rule," which provides that unless a law states otherwise, each party must pay its own attorneys' fees. In contrast, under the "British Rule," the loser pays, which is one reason there's much less litigation in England than there is here.

When a U.S. company prevails in an employee discrimination lawsuit, it must do more than merely win the suit to collect its attorneys' fees. A court may award fees only if the employer can show that its former employee's action was "frivolous, unreasonable or without foundation, even though [it wasn't filed] in subjective bad faith." Judge Baker noted that in deciding whether to assess attorneys' fees against an employee who loses his case, a court must examine three issues:

- (1) whether the employee established a minimally sufficient case;
- (2) whether the employer offered to settle the lawsuit; and

- (3) whether the trial court dismissed the case before trial or held a full-blown trial on the merits.

The court found that Morgan Stanley's arguments in favor of dismissal were persuasive and did, in fact, succeed. Yet Vaughan's claims weren't completely without foundation. Consequently, his former employer wasn't entitled to attorneys' fees. *Theodore R. Vaughan v. Morgan Stanley D.W., Inc. f/k/a Dean Witter Reynolds, Inc.*, Case No. 603-CV-1511-ORL-18-DAB (M.D. Fla., May 24, 2005).

Comment

As you can see, Florida courts follow a very high standard when deciding whether to award attorneys' fees to an employer that prevails in a discrimination lawsuit. Very rarely will a company meet that standard. This case gives you an inside look at the cost of litigation. It appears to have been a fairly straightforward ADEA RIF lawsuit involving a single employee. Even so, Morgan Stanley paid its attorneys \$165,000 to defend it. And that figure doesn't include the time company officials spent attending depositions and meeting with lawyers to prepare that defense.

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