

## **ISBA adopts resolution requesting modifications to Department of Human Rights' procedures expanding upon the federal injunction affirmed by Seventh Circuit in Cooper v. Salazar**

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### A. The District Court's Decision (Cooper v. Bombella):

On January 29, 1999, Judge Milton Shadur of the Northern District of Illinois, issued an injunction against the Illinois Department of Human Rights in the case of Ricky Cooper v. Rosemary Bombella, Director, Illinois Department of Human Rights. *Cooper v. Bombella*, 34 F.Supp.2d 693 (N.D.Ill. 1999). Plaintiffs asserted that recent changes to the Department's administrative process violated their 14<sup>th</sup> Amendment rights to due process. Plaintiffs sought a preliminary injunction preventing the Department from continuing to rely upon three procedural rules, which had been instituted by the Department. The rule changes Cooper sought to enjoin the Department from implementing were as follows: (1) allowing its investigators to make credibility determinations (with claimants having no right to confront and cross examine adverse witnesses in the investigator's proceedings); (2) denying claimants access to investigative files; and (3) denying claimants access to witness statements. *Cooper v. Bombella*, 34 F.Supp.2d at 696.

In making a determination as to whether or not a preliminary injunction should issue, Judge Shadur reviewed the standards for preliminary injunctive relief which are as follows: (1) a likelihood of success on the merits; (2) the inadequacy of a remedy at law; (3) irreparable harm to plaintiffs if the preliminary injunction were to be denied; (4) the balancing of harm if the injunction were wrongfully denied against the harm to the Department if the injunction were wrongfully granted; and (5) the absence of disservice to the public interest if the preliminary injunction is granted. *Cooper*, 34 F.2d at 698.

In discussing the "likelihood of success on the merits" requirement, Judge Shadur held that the plaintiffs clearly had a property interest in the underlying claim of discrimination which is protected by the due process clause. Citing the case of *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), the Court held that even at a preliminary investigative stage, complainants have a right to core procedural due process requirements – notice and an opportunity to be heard – in an appropriately informal form. *Cooper*, 34 F.Supp.2d, at 698.

The Court further held that plaintiff's contention that denial of access to the investigative files and notes about witness statements during the preparation of an administrative appeal met the threshold of "likelihood of success" standard as the opportunity to respond to evidence is a basic component of procedural due process.

Plaintiff further argued that credibility determination should only be made when certain procedural safeguards are in place to protect the interests of accuracy. In particular, the plaintiff alleged that a credibility determination could only be resolved after a full evidentiary hearing that includes cross-examination. *Cooper*, 34 F.Supp.2d at 699.

The District Court concluded that providing fair procedures to those who believe that they face discrimination in the work place is within the “public interest”. As a result, the Court issued the following preliminary injunction:

(1) The Department of Human Rights is ordered to provide access to claimants’ investigative files, including notes about witness statements, to claimants who are pursuing requests for review, but to withhold sensitive material as outlined in the pre-1997 regulation (2 Ill.Admin.Cod § 926.210); and

(2) The Department’s investigators are precluded from relying on their assessments of the credibility of witnesses in fashioning their reports and their recommendations as to whether or not there is substantial evidence that discrimination occurred.

#### B. The Seventh Circuit’s Affirmation (Cooper v. Salazar):

The Director of the Illinois Department of Human Rights appealed Judge Shadur’s preliminary injunction to the Seventh Circuit Court of Appeals which issued a decision on November 15, 1999. *Cooper v. Salazar*, 196 F.3d 809 (7<sup>th</sup> Cir., 1999). The Seventh Circuit held as an initial matter that Plaintiff’s property interest in their discrimination claims is “substantial”. *Cooper*, 196 F.3d at 814. The Seventh Circuit determined that there is a “procedural floor below which even informal proceedings cannot go. This is especially true where the informal process results in a final dismissal of the plaintiff’s claim”. *Cooper*, 196 F.3d at 814. The Seventh Circuit determined that confrontation and cross examination are important procedural safeguards, especially where factual determinations are made. This requirement is triggered where the function of the proceeding is to adjudicate rather than merely investigate. The Seventh Circuit held that the record was not clear as to whether or not the Department’s function is solely “investigatory” as that term has been used in the due process context. In that context, an agency is investigatory only where it “does not and cannot take any affirmative action which will affect the individual’s legal rights”. *Hannah v. Larche*, 363 U.S. 420, 441 (1960). The Seventh Circuit stated that at least on the surface, the Department’s dismissal of a claim acts as a final disposition on the merits subject only to appeal, which is similar to a court’s dismissal of a claim on summary judgment which is plainly an adjudicatory act. *Cooper*, 196 F.3d at 815.

As to the issue of file review, the Department of Human Rights argued that Complainant’s access to the investigator’s report, notes they are permitted to take during the fact finding conference and Respondent’s reply to their allegations of discrimination are sufficient for purposes of appeal to the Chief Legal Counsel. The Department argued that Complainants have full access to the file before their appeal to the Illinois Appellate Court. The Seventh Circuit noted that the standard of review for the Illinois Appellate Court is highly differential. *Folbert v. Department of Human Rights*, 303 Ill.App.3d 13, 707 N.E.2d 590, 598-99 (Ill.App. 1999). The Seventh Circuit thus concluded that a lack of access to information that may be necessary to prepare for the initial appeal may result in an erroneous dismissal of the claim therefore establishing Plaintiff’s element of a likelihood of success on the merits. The Seventh Circuit further concluded that the issuance of a preliminary injunction prevents irreparable harm as an appeal to the Illinois Appellate Court is an inadequate remedy as such a review is highly differential. *Cooper*, 196 F.3d at 817.

### C. The Litigation Status:

After the Seventh Circuit affirmed Judge Shadur's preliminary injunction, the parties have engaged in discovery. Plaintiffs are represented by Randall D. Schmidt, Clinical Professor of Law, Edwin F. Mandel Legal Aid Clinic, University of Chicago School of Law (e-mail: randall\_schmidt@law.uchicago.edu). Professor Schmidt indicates that the parties' intend to conclude discovery in January, 2001 and subsequently file cross-motions for summary judgment. Professor Schmidt will present additional legal arguments which include the potential conflict caused by the Department's Chief Legal Counsel being responsible for reviewing appeals made to the determinations by the Department's investigators. Professor Schmidt believes that upon appeal to the Chief Legal Counsel, the Chief Legal Counsel may vacate a dismissal only so that the investigator can subsequently rewrite the report dismissing a charge to the satisfaction of the Chief Legal Counsel. Professor Schmidt reasonably suspects that the Chief Legal Counsel provides the investigator with information outlining the report's deficiencies and an indication is what is necessary to provide a sustainable report. The investigator then performs only those functions as directed by the Chief Legal Counsel and subsequently issues a second order of dismissal in compliance with the Chief Legal Counsel's direction and advise. If appealed again, the Chief Legal Counsel will then sustain the investigator's order of dismissal. The complainant is then left only with the prospect of appealing to the Appellate Court which is highly discretionary. In Professor Schmidt's opinion, the entire process is unfair and "broken beyond repair".

### D. The ISBA Resolution:

On June 25, 1999, the Illinois State Bar Association Labor and Employment Law Section Council approved the following proposals regarding fact-finding conferences and related procedural processes at the Illinois Department of Human Rights.

A. The Section Council requests that all fact-finding conferences held by the Illinois Department of Human Rights be memorialized by either: 1) auditory recording device; or, 2) certified court reporter. Such memorializations shall be made available for transcription.

B. The Council requests that any persons giving testimony at a fact-finding conference before the Illinois Department of Human Rights be required, prior to providing such testimony, to swear upon his/her oath or affirmation that the testimony he/she shall provide is truthful, under penalty of perjury.

C. If a party to a fact-finding conference before the Illinois Department of Human Rights is represented by an attorney, the Council requests that the attorney have the right to examine all witnesses, object to questions raised and explain facts and circumstances.. The foregoing rights shall be subject, however, to reasonable time, place and manner restrictions imposed by the Illinois Department of Human Rights.

D. The Council requests that a party to a proceeding before the Illinois Department of Human Rights shall, within a reasonable time prior to the fact-finding conference,

provide all other parties to the action with copies of all documents submitted to the Department, answers to the IDHR questionnaire, supporting briefs and any exhibits intended to be used during the fact-finding conference.

On September 17, 1999, the Section Council's resolution was presented to the ISBA Board of Governors who unanimously approved and adopted the Section Council's resolution.

E. The ISBA Labor And Employment Law Section Council Seeks Input From It's Members On Their Experiences With The Illinois Department Of Human Rights:

The Section Council has communicated with the Department of Human Rights Director regarding the ISBA's position that the existing procedural framework does not comport with due process. The Director has taken a defiant position and claims a lack of awareness to the perception that attorneys practicing in this field are disgruntled with the existing Department's process. The ISBA Labor and Employment Law Section Council seeks input from attorneys practicing in this field as to their experience at the Department of Human Rights.

Should you wish to provide commentary or anecdotal evidence on this issue, please e-mail the author at [grgaffney@aol.com](mailto:grgaffney@aol.com) or mail to: Glenn R. Gaffney, 1771 Bloomingdale Road, Glendale Heights, Illinois 60139; or fax to 630/462-7698. Thank you in advance for your important contribution.