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Texas Judge Denies NAACP Bid To Intervene In EEOC Case

By **Braden Campbell**

Law360, New York (August 24, 2017, 4:45 PM EDT) -- A Texas federal judge on Wednesday denied a bid by the NAACP Legal Defense Fund and other groups to intervene in the state's challenge of U.S. Equal Employment Opportunity Commission guidance on the use of criminal background checks in hiring, rejecting their claim that the Trump administration would cede the case.

In a one-page order, U.S. District Judge Sam Cummings denied the groups' motion to intervene "for the reasons aptly argued by the parties in their responses," which include the EEOC's claim that it has and will continue to "vigorously litigate" the dispute.

Judge Cummings also noted that the proposed intervenors filed a belated motion and did not include a pleading, but he said they could move to join the case as amici curiae.

The state of Texas **filed suit** in the Northern District of Texas in November 2013 seeking a judgment blocking enforcement of EEOC guidance urging businesses to use a **case-by-case approach** to criminal background checks to avoid disparate impact discrimination against groups protected by Title VII of the Civil Rights Act. The state also asked for declaratory judgment that various state policies barring the hire of convicted felons are legal and for an injunction blocking the EEOC from issuing right-to-sue letters consistent with the interpretation of Title VII laid out in the guidance.

Judge Cummings said in August 2014 that Texas lacked standing to sue over the guidance because the guidance hadn't been enforced against it, and he **dismissed the suit**. But a split Fifth Circuit panel **revived the case** in June 2016, saying that Texas was affected by the guidance as an employer bound by Title VII.

The NAACP Legal Defense Fund, the National Employment Law Project and attorneys with Cloutman & Cloutman LLP and Levy Ratner PC moved in August for the court to let Beverly Harrison, a Texas woman who was fired from her job as a Dallas County Schools crossing guard because of a decades-old conviction, and the Texas State Conference of the NAACP join the suit.

They argued that they should be allowed to intervene because the Trump administration has shown that it might not "vigorously defend" the guidance. They also argued that they have standing as parties directly affected by background check policies discussed in the guidance, and that their intervention motion was timely despite coming nearly four years after the suit was filed because Judge Cummings earlier denied a motion to intervene when he dismissed the suit.

The U.S. Department of Justice, arguing on behalf of the EEOC, and the state of Texas filed

memoranda Monday in opposition to the parties' intervention motion.

The DOJ said the groups' claim that it would concede the suit is based on speculation, pointing out that it recently sought to amend the briefing schedule and to serve Texas with various requests. The agency also notes that the EEOC has an interest in defending its own guidance.

The state of Texas attacked the groups' power to intervene in its memo, arguing that their motion was too late and that they lack an interest in the case.

NAACP LDF senior counsel Leah Aden said Thursday that the group is disappointed with the decision but would continue to monitor whether the DOJ stands by its pledge to defend the guidance, saying that under President Donald Trump, it "has changed litigation positions and walked away from defending civil rights" in other matters. She added that the group is considering how to proceed, arguing that Harrison and the Texas NAACP "provide a needed and distinct perspective" on the importance of the guidance.

A representative for the state of Texas declined to comment Thursday. A representative of the EEOC did not respond to a request for comment.

The groups asking to intervene are represented by Edward B. Cloutman of Cloutman & Cloutman LLP; Samuel Spital, Leah C. Aden, Natasha Merle, Nana Wilberforce and Coty Montag of the NAACP Legal Defense Fund; Robert Stroup and Dana Lossia of Levy Ratner PC; and Beth Avery of the National Employment Law Project.

Texas is represented by Jeffrey Mateer, Brantley D. Starr, Ken Paxton, Michael C. Toth, Austin R. Nimocks and David J. Hacker of the state attorney general's office.

The EEOC is represented by Chad A. Readler, John R. Parker, Joshua E. Gardner, Justin M. Sandberg and James R. Powers of the DOJ.

The case is Texas v. EEOC et al., case number 5:13-cv-00255, in the U.S. District Court for the Northern District of Texas.

--Additional reporting by Jess Krochtengel. Editing by Sara Ziegler.

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