

## Appellate Law

# Getting to the Substance

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Federal appellate courts have recently created or deepened conflicts of authority on important questions relating to sovereign immunity, employment law and civil and appellate procedure. Although the cases raise different points of substantive law, the theme common to all is the rejection of procedural arguments that would prevent courts from addressing the substantive merits of a plaintiff's claims.

### Sovereign Immunity

In *Marceau v. Blackfeet Housing Authority*, 455 F.3d 974 (9th Cir. 2006), a group of Native American homeowners and lessees sued the Department of Housing and Urban Development and the Blackfeet Housing Authority (a tribal housing authority) for alleged shoddy and health-hazardous construction of their homes. Under a HUD program designed to assist low-income Native Americans to build homes, the Blackfeet Tribe established the Blackfeet Housing Authority to assist HUD in the building process. Under the Supreme Court's decision in *Kiowa Tribe of Okla. v. Mfg. Techs. Inc.*, 523 U.S. 751 (1998), a Native American tribe and its subdivisions enjoy sovereign immunity from suit unless the tribe or Congress waives that immunity.

In its enabling ordinance, the Blackfeet Housing authority provided "irrevocable consent to allowing the Authority to sue and be sued its corporate name, upon any contract, claim or obligation arising out of its activities ... and hereby authorizes the Authority

to agree by contract to waive any immunity from suit which it might otherwise have."

Because this language is derived from HUD's model ordinance and is present in the enabling ordinances of many other tribal housing authorities, the circuit courts have interpreted it in several cases. The 8th Circuit generally has held that such a clause is sufficient alone to waive immunity, although in one seemingly aberrant case, *Dillon v. Yankton Sioux Housing Authority*, 144 F.3d 581 (8th Cir. 1998), the court required an express contractual waiver of immunity in addition to the ordinance. In *Garcia v. Akwesasne Hous. Auth.*, 268 F.3d 76 (2nd Cir. 2001), the 2nd Circuit held that such a clause waives immunity only in tribal courts, not in federal courts. In *Marceau*, the 9th Circuit found that this clause was sufficient to waive the authority's immunity in federal court, joining the majority of precedent in the 8th Circuit but splitting with the 2nd Circuit.

### Employment Law

Before initiating a Title VII discrimination suit, a private employee must file a charge with the Equal Employment Opportunity Commission, giving the commission an opportunity to investigate the charge, and must wait to receive notification that the commission does not intend to sue. 42 U.S.C. Section 2000e-5. The commission's regulations also require the complainant to cooperate in the investigation of the charge. 29 C.F.R. Section 1601.15(c).

The 10th Circuit has held that failure to cooperate in good faith bars a complainant from suing under Title VII once the commission

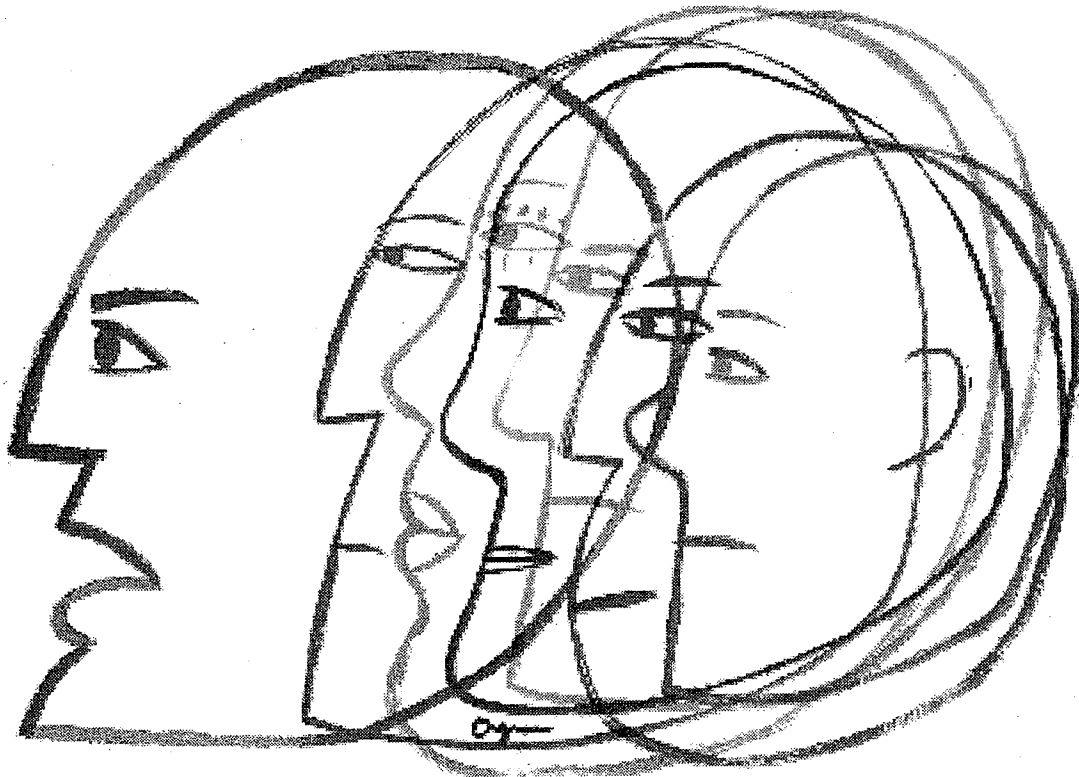
has declined to pursue the claim. *Shikles v. Sprint/United Mgmt. Co.*, 426 F.3d 1304 (2005) ("[W]e and other courts have ruled that a claimant must cooperate with the EEOC in order to exhaust his or her administrative remedies under Title VII").

In *Doe v. Dairy*, 456 F.3d 704 (7th Cir. 2006), the 7th Circuit rejected the 10th Circuit's rule as inconsistent with the language of Title VII and with a recent statement by the Supreme Court that Title VII does not "make reference to the concept of exhaustion" (citing *Woodford v. Ngo*, 126 S.Ct. 2378 (2006)).

Although acknowledging that the absence of a noncooperation bar to suit would give Title VII plaintiffs "less incentive to cooperate with the Commission," the 7th Circuit noted that there was no evidence of such a problem and that, contrary to advocating for such a bar, the EEOC "has expressed its disagreement with the Tenth Circuit's position in a series of amicus curiae briefs."

### Civil Procedure: Removal

The federal removal statute, 28 U.S.C. Section 1441, allows a defendant to remove an action over which there is federal jurisdiction from state court to federal court. Where federal jurisdiction is based on diversity of citizenship, however, an action "shall be removable only if none of the ... defendants is a citizen of the State in which such action is brought." 28 U.S.C. Section 1441(b). The courts have split over whether violation of this "forum defendant rule" is a procedural defect in the removal process which must be raised within 30 days of removal (see 28 U.S.C. Section 1447(c)) or whether it is a non-waivable jurisdictional defect that requires remand to the state court even if the plaintiff does not object



within the 30-day window. In *Lively v. Wild Oats Markets Inc.*, 456 F.3d 933 (9th Cir. 2006), the 9th Circuit joined eight other circuit courts in holding that the forum defendant rule is a procedural requirement whose violation is waivable and therefore that a violation of the rule cannot be the basis for a remand if it comes to the court's attention after the 30-day window has passed. Only the 8th Circuit has reached the opposite result, holding that the forum defendant rule is a non-waivable jurisdictional provision because, as removal jurisdiction is a creation of statute, a violation of its statutory requirements deprives the court of subject-matter jurisdiction. *Hurt v. Dow Chem. Co.*, 963 F.2d 1142 (1992).

#### Final Judgment Rule

Federal Rule of Civil Procedure 58 specifies that "every judgment ... must be set forth on a separate document." Federal Rule of Civil Procedure 58(a)(1). Typically, this document is a short judgment separate from an order or opinion containing detailed facts and analysis. Under Federal Rule of Appellate Procedure 4(a)(7)(A)(ii), "if Federal Rule of Civil Procedure 58(a)(1) requires a separate document" of judgment, then an appealing party must file its appeal before the earlier of 30 days after the separate document is entered or when 180 days have run from the entry of an order in the docket if no separate document is entered.

At issue in *In re Cendant Corp. Securities Litigation*, 454 F.3d 235 (3rd Cir. 2006), was whether a district court's order was a "separate document" that started the appeals clock running. In holding that the district court's titling of the document at issue "an order ... does not mean that it fails to satisfy the separate document requirement," the 3rd Circuit joined the District of Columbia Circuit but split with the 2nd Circuit. In *Kanematsu-Gosho Ltd. v. M/T Messiniaki Aigli*, 805 F.2d 49 (2nd Cir. 1986), the 2nd Circuit held that a document must be titled as a judgment in order to satisfy Rule 58. The 3rd Circuit, instead, examined the substance of the order. First, the court found the document at issue was self-contained.

In so doing, the court disavowed an aberrant case from the 9th Circuit that held that "one document, by definition, cannot ... constitute a separate document." *Miller v. Marriott International*, 300 F.3d 1061 (9th Cir. 2002) (creating an intracircuit split with previous 9th Circuit case law). Second, the 3rd Circuit found that the order directed the relief granted.

The court concluded the order was not a separate document because of its lengthy discussion of the facts and procedural history of the case. The appeal at issue was timely filed in the 180-day period (since no separate document had ever issued).

These cases raise just a few of the

procedural issues on which the federal appellate courts have split. Although such procedural questions may not garner as much attention as the underlying substantive law, the recent cases are a reminder of the importance of such procedural issues and of courts' struggles to resolve them.

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