

Employment MVP: Akin Gump's Donald Livingston

By **Vin Gurrieri**

Law360, New York (December 3, 2015, 11:41 AM ET) -- Akin Gump Strauss Hauer & Feld LLP's Donald R. Livingston, a former U.S. Equal Employment Opportunity Commission general counsel, flexed his employment law muscles this past year by helping his client, an event marketing company, beat back the agency's challenge to its hiring practices, earning him a place on Law360 list of employment MVPs for 2015.

Livingston, a Washington D.C.-based partner in Akin Gump's employment group, scored a major victory when he convinced the Fourth Circuit in February to uphold the dismissal of the EEOC's suit challenging event promoter Freeman's use of various background checks that purportedly had an unlawful disparate impact on black applicants and other groups of job applicants.

"It's a great time to be litigating against the EEOC," Livingston said. "It is in its most experimental period, seeing how far [it] can stretch statutes. As the EEOC pursues new interpretations of statutes and makes novel arguments, there is an opportunity for defense lawyers to convince courts to restrict statutes to the intent of the drafters."

In a terse opinion, the Fourth Circuit backed U.S. District Judge Roger Titus' decision to toss the suit against Livingston's client after concluding that an analysis by EEOC expert Kevin Murphy had a "mind-boggling number of errors" and was "utterly unreliable."

The agency had initially filed its case in 2009 following a racial discrimination charge from applicant Katrina Vaughn, who said Freeman had denied her a job after pulling up her credit report. The agency claimed in its suit that the company's use of credit history as a hiring criterion had a disparate impact on black applicants and that its use of criminal history had a disproportionate impact on black applicants and male applicants.

But in dismissing the case in August 2013, Judge Titus said the EEOC needed to rely on "something more, far more" to justify a disparate impact claim based on criminal history and credit checks.

MVP

EMPLOYMENT



Donald Livingston
Akin Gump

In reflecting on the case, Livingston noted that he and his team didn't give the EEOC an opportunity to correct errors in the expert's report that would normally be highlighted during deposition, opting instead to immediately attack the report in court once its flaws were apparent.

"We didn't do the dance; and because we didn't [do it], the EEOC didn't have a chance to massage or improve the report before we attacked it," Livingston said.

Ultimately, Livingston says the case's biggest impact may be that it provides defense counsel with "greater confidence ... to defend a case in circumstances where an expert report is flawed from the beginning."

In addition to the ruling by the Fourth Circuit, Livingston also recovered about \$1 million in attorneys' fees for Freeman that the company incurred defending against the EEOC's claims, a rare occurrence in Title VII cases.

As part of his September order awarding fees to Freeman, Judge Titus excoriated the EEOC for continuing on with the case as long as it did.

Quoting lyrics from famed country singer Kenny Rogers' classic track titled "The Gambler," Titus said the EEOC didn't heed the song's advice that "you've got to know when to hold 'em. Know when to fold 'em. Know when to walk away" once Freeman revealed the "inexplicably shoddy work" by the agency's expert.

"Instead of folding, the EEOC went all in and defended its expert through extensive briefing in this court and on appeal," the judge said. "Like the unwise gambler, it did so at its peril."

Livingston meanwhile, says simply of the award that "it's always nice to be able to give a client back a million dollars in attorneys' fees."

The Freeman case was not the only high-profile success this past year for Livingston, who has now been at Akin Gump for nearly 23 years and served as co-chair of the firm's employment practice for several years of that tenure.

In February, the Third Circuit ruled in favor of Livingston's client Allstate Insurance Co., saying the insurance company didn't violate anti-retaliation laws when it offered thousands of terminated employees an opportunity to work as independent contractors in exchange for signing releases of potential legal claims.

Of his recent successes, Livingston is quick to praise the work done by his colleagues, naming in particular the work done by Hyland Hunt and John Koerner in the Freeman case — work that Livingston says was "absolutely critical" to the successful outcome.

"Every time I say 'I' I really mean 'we,'" Livingston said. "They're team successes and team victories."

Livingston, who earned his law degree from the University of Georgia School of Law in 1977, spent the first decade of his career at a firm that exclusively represented labor unions.

He then went to the EEOC to work as an assistant with colleague Charles Shanor, who became the

agency's general counsel in early 1987.

Livingston eventually went on to succeed Shanor as EEOC general counsel on an interim basis in June 1990. He was eventually nominated for the position by President George H.W. Bush and later won Senate confirmation.

The Akin Gump attorney says that his wide range of experience representing plaintiffs and defendants in employment cases as well as labor unions and the U.S. government gives him a “broad perspective” that has been helpful in litigating cases.

In particular, Livingston says his time at the EEOC has given him “a pretty sound understanding” of what is important in a case, what provisions may or may not be negotiable in settlement discussions with the agency and knowledge about how decisions are made.

Drawing on those experiences, Livingston authored a treatise titled “EEOC Litigation and Charge Resolution,” with a second edition recently published, offering advice for legal practitioners on how to effectively handle the agency's investigations, conciliation efforts and related litigation.

But despite his personal successes, Livingston still remains altruistic, saying his major goal is to see that lawyers he has worked with and mentored “can be the next Law360 MVP.”

“I would like to contribute to success for lawyers that have to some degree entrusted me with their careers,” he says.

--Additional reporting by Matthew Bultman and Aaron Vehling. Editing by Rebecca Flanagan.