Texas Roadhouse Age Bias Case Ends In Mistrial

By **Brian Amaral**

Law360, Boston (February 3, 2017, 2:06 PM EST) -- The government's landmark age bias case against Texas Roadhouse ended in a mistrial Friday in Massachusetts federal court after a jury said three times that it could not come to a unanimous decision.

U.S. District Judge Denise Casper, who had prodded the eight jurors Thursday and Friday to reexamine their positions, granted Texas Roadhouse's mistrial motion and sent the jurors and attorneys home at 2 p.m. after three weeks of testimony and almost a week of deliberations over age bias claims against a restaurant chain known for long waits.

"I think it's clear after conscientious attempts the jury is unable to reach a unanimous verdict," Judge Casper told attorneys for Texas Roadhouse and the Equal Employment Opportunity Commission. "As a result of that, there is manifest necessity to declare a mistrial."

The case is now in limbo, even more so because of intervening world events: Halfway through the trial, President Donald Trump was inaugurated. Though he has yet to shake up the EEOC, he nominated fast-food executive Andrew Puzder to be his labor secretary, a sign that enforcement priorities may shift under Trump's watch.

EEOC attorney Markus Penzel asked for a re-trial as soon as possible on claims that the restaurant summarily rejected older candidates for jobs like server and bartender at its roughly 400 restaurants nationwide.

And Judge Casper told the attorneys to set down mid-May in their calendars, but she also urged them to come to a resolution after having seen the trial and spoken to the jurors.

The age discrimination case is unique for its novel use of the Age Discrimination in Employment Act as a sort of de facto collective action on behalf of 11 named claimants and, down the road, potentially hundreds more who were allegedly rejected for jobs based on their ages.

Judge Casper is considering Texas Roadhouse's motion to ditch the case entirely because, in the restaurant chain's view, the EEOC can't bring these so-called pattern or practice of discrimination cases under the Age Discrimination in Employment Act. More briefing will come on that issue, and Judge Casper said she'll likely ask the decision-makers from both sides to be in attendance.

What's not clear is who the decision-maker for the EEOC is right now, beyond an acting general counsel.

The EEOC website lists the general counsel position as "vacant."

The eight-member jury appears to have left the courthouse with great haste after the mistrial was declared, so they could not be reached for comment about their deadlock. Judge Casper lauded them for their attention to the case, and from the tenor of their final note, it appeared they were split roughly down the middle.

Judge Casper had given them a so-called Allen charge on Thursday, imploring them to come to a decision. She did so again Friday morning, but told them it would be up to them to decide if they could come to a unanimous decision. Given the choice, they deliberated for another five hours, but still couldn't come to a decision.

The note said that there were two sides of the jury, "each of which has come to different conscientious convictions," and would not budge.

"While Texas Roadhouse supports the EEOC's mission, we believe its case against us was misguided and built on faulty statistics, which was why we chose to litigate this case," restaurant spokesman Travis Doster said in an email. "We appreciate the jury's time and attention the past three weeks. We plan to continue to defend our brand."

EEOC spokeswoman Christine Saah Nazer said in an email, "We are disappointed that the jury remained deadlocked and that a mistrial was declared today. Nevertheless, we fully believe in our case, and intend to try this matter again starting on the new trial date just set by Judge Casper, May 15, 2017."

According to the EEOC's case, only 1.6 percent of people hired for front-of-house positions like busser, server, bartender and host at the restaurant were over the age of 40, protected by the Age Discrimination in Employment Act. The chances of that happening without age bias was one in 781 billion, the EEOC's expert said.

The commission also put unsuccessful applicants on the stand who said they were asked by Texas Roadhouse managers whether they would be able to work with younger applicants; some unsuccessful older applicants said they were told that Texas Roadhouse preferred to hire young.

One current human resources employee even testified that her boss admitted age discrimination, saying, "Did we do it? Of course we did it."

But Texas Roadhouse says that the ADEA can't be used at all the way the government is using it. The restaurant chain also poked holes in individual witnesses' stories, saying that it was impossible for managers to have worn khakis, as one had testified. Jeans are the standard Texas Roadhouse uniform.

Its own expert testified that the number of older applicants who got jobs at the restaurant was about what is to be expected, given that older applicants who are on a lower economic trajectory tend not to have certain qualities that employers look for. Texas Roadhouse limits its servers to three tables at a time, in part to turn them over more quickly.

The EEOC is represented in-house by Markus Penzel, Sara Smolik, Elizabeth Fox-Solomon and Loretta Medina.

Texas Roadhouse is represented by Christopher J. DeGroff, Rebecca P. DeGroff, Daniel B. Klein and

Michael D. Fleischer of Seyfarth Shaw LLP, and Katherine L.I. Hacker, Rebecca Weinstein Bacon, Eric Olson and Brian Swanson of Bartlit Beck Herman Palenchar & Scott LLP.

The case is Equal Employment Opportunity Commission v. Texas Roadhouse Inc. et al., case number 1:11-cv-11732, in the U.S. District Court for the District of Massachusetts.

--Editing by Jack Karp.