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Lynn D. Feiger

Leslie M. Lawson

EVALUATION OF AN EMPLOYMENT DISCRIMINATION CASE: THE PLAINTIFF'S PERSPECTIVE

LYNN D. FEIGER* AND LESLIE M. LAWSON**

INTRODUCTION

Employment discrimination litigation has attracted many lawyers in the past ten years. The attraction stemmed from the 1972 amendment of Title VII of the 1964 Civil Rights Act[1] which allowed private actions to enforce employee rights. A fact which is not so obvious is that many lawyers representing employees find themselves trapped in the pitfalls of this type of litigation and never litigate more than one case. This article is designed to give lawyers who do not specialize in employment discrimination practical advice on the evaluation and selection for litigation of cases brought by employees.

At the outset of an employment discrimination case, the lawyer must generally determine:

(a) what remedies are available;
(b) the client's potential damages and other remedies;
(c) what action has been or should have been taken by the client with regard to governmental agencies, unions, or the employer's internal grievance procedure;
(d) the current status of the law on the particular acts of discrimination complained of;
(e) the client's financial status;
(f) whether a class action is appropriate;
(g) his own ability and the ability of his office to handle extensive federal litigation; and
(h) whether the various costs of litigation outweigh the benefits.

This article will address several aspects of this initial determination. The first section deals with remedies and damages. The

* Partner, Feiger and Lawson; Fellow, American Academy of Matrimonial Lawyers; J.D. University of Southern California School of Law, 1974; Member, Colorado, Denver and California Bar Associations; Member, Colorado Women's Bar Association.

** Partner, Feiger and Lawson; Instructor, University of Denver College of Law; J.D. University of Wyoming College of Law, 1972; Member, Colorado and Denver Bar Associations; Member, Colorado Women's Bar Association; Judge Carrigan's Advisory Committee, 1981; Former trial attorney with Equal Employment Opportunity Commission.

1. Title VII of the 1964 Civil Rights Act, as amended, 42 U.S.C. § 2000e-2 (1976). [hereinafter cited as Title VII].

second section discusses case evaluation in the client interview, investigation, and discovery stages of litigation.

REMEDIES

Historically, employers have had the right to hire and fire at will.[2] This right has been limited since the late 1960's by civil rights legislation as well as a developing body of case law which applies constitutional provisions and post-Civil War legislation to employment discrimination.[3] The key piece of employment legislation is Title VII of the 1964 Civil Rights Act. The majority of the employment discrimination law developed under Title VII because it had the broadest application of all equal employment legislation. Title VII governs both public and private employers who employ fifteen or more persons and prohibits discrimination in employment on the basis of race, sex, creed, color or national origin.[4] Title VII also grants employees the right to bring an action in federal court to enforce their rights under Title VII.[5] Title VII litigation is the focus of this article as it is a model which can be followed in all employment discrimination litigation.

There are several other remedies with which employment discrimination lawyers should become familiar. Only with a mental checklist of these remedies can an attorney identify all the potential issues and potential remedies in an initial interview. Most of these remedies are generally, like Title VII, litigated exclusively in federal court.

Two amendments to the Fair Labor Standards Act[6] are designed to eliminate forms of employment discrimination. The Equal Pay Act of 1963[7] prohibits sex discrimination in the payment of wages for equal work on jobs performed under similar conditions and requiring equal skill, effort, and responsibility.

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2. The employer's right is generally recognized where no contract prescribes the duration of the employment. *See generally*, L.S. Platt, *Rethinking the Right of Employers to Terminate At-Will Employees*, 15 J. MAR. L. REV. 633 (1982); LABETT, COMMENTARIES ON THE LAW OF MASTER AND SERVANT § 149 (2d ed. 1913).

3. *See e.g.*, Carlson v. Green, 446 U.S. 14 (1980); Owen v. Independence, Miss., 445 U.S. 684 (1980); Davis v. Passman, 442 U.S. 228 (1979); Monell v. Department of Soc. Services, 436 U.S. 658 (1978); Bivens v. Six Unknown Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

4. 42 U.S.C. §§ 2000e(b)-e-2 (1976).

5. 42 U.S.C. §§ 2000e-5(f)—(i) (1976).

6. The Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219, as amended (1970).

7. The Equal Pay Act of 1963, 29 U.S.C. § 206d (1970).

The Age Discrimination in Employment Act[8] prohibits discrimination against persons between ages forty and seventy on the basis of their age.

Two pieces of post-Civil War legislation have been increasingly used in the last ten years to remedy employment discrimination. The Civil Rights Act of 1866[9] was adopted by Congress to implement the provisions of the thirteenth amendment to the United States Constitution which freed the slaves. The courts have since interpreted this law to apply to discrimination against blacks and other nonwhites, but not to discrimination based on sex. This law has also been interpreted to apply to private as well as public employers.

The Civil Rights Act of 1871[10] has been judicially interpreted to prohibit employment discrimination on the basis of race, sex, and national origin where the discrimination results from state action; it is usually inapplicable to private employers. This statute does not provide for any substantive rights. Rather, it enables a person to bring an action seeking redress for deprivation of rights provided under other federal laws or the Constitution. The Civil Rights Act of 1871 also provides redress for a conspiracy by private or public persons to deprive individuals of the free exercise of their rights and privileges under the United States Constitution.[11]

This summary of remedies is not exhaustive but addresses the major federal remedies. In addition, a lawyer practicing in this area should become familiar with the federal laws relating to federal contractors and state law relating to employment discrimination, workmen's compensation, and contract and tort claims.

Damages and Attorneys' Fees

In general, a successful plaintiff in a Title VII action can anticipate obtaining damages for back pay and attorney fees. Title VII provides solely for an equitable remedy, thereby precluding a jury trial and punitive or compensatory damages. The Civil Rights Act of 1866 and Civil Rights Act of 1871, however, provide for both equitable and legal relief, thereby enabling an employee to request a jury trial and claim punitive and compensatory damages. Punitive and compensatory damage awards are not common in employment discrimination cases because factu-

8. Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634, as amended (1970).

9. 42 U.S.C. § 1981 (1976).

10. *Id.* § 1983.

11. *Id.* § 1985.

ally, cases seldom rise to the level of vicious or outrageous behavior which would inspire a judge or jury to award large amounts of compensatory damages or any amount of punitive damages.

The Equal Pay Act[12] and the Age Discrimination in Employment Act[13] provide for potential awards of back pay plus an equal amount in liquidated damages. A few courts interpret the Age Discrimination in Employment Act to allow awards of compenstory and punitive damages,[14] but the majority view is to the contrary.[15] Both equal pay and age discrimination cases may be tried to a jury.

Several factors work together to restrict recovery amounts for plaintiffs in discrimination cases. First, the primary remedy, back pay, is computed by subtracting earned income from income an employee would have earned in the absence of discrimination. Since plaintiffs are required to mitigate their damages, recoverable damages are often disappointingly small in relation to either the plaintiff's injury, or the attorney fees and costs incurred. Second, the doctrine of constructive discharge[16] makes it difficult for clients, who quit their jobs as a result of unfair treatment, to prove subsequent back pay damages. Third, differing, and sometimes quite restrictive, statutes of limitation apply to different discrimination statutes which significantly impact the time period for which damages are recoverable.[17] Finally,

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12. Equal Pay Act of 1963, 29 U.S.C. § 216b (1976).

13. Age Discrimination in Employment Act of 1967, 29 U.S.C. § 626b (1976).

14. *See* Wise v. Olan Mills, Inc., 485 F. Supp. 542 (D.C. 1980); Flynn v. Morgan Guar. Trust Co., 463 F. Supp. 676 (E.D.N.Y. 1979); Hassan v. Delta Ortho Medical Group, 476 F. Supp. 1063 (E.D. Cal. 1979); Kennedy v. Mountain States Tel. & Tel. Co., 449 F. Supp. 1008 (D.C. 1978); Bertrand v. Orkin Exterminating Co., 419 F. Supp. 1123, *aff'd* 432 F. Supp. 952 (W.D. Ill. 1977).

15. Kelly v. American Standard, Inc., 640 F.2d 974 (9th Cir. 1981); Walker v. Pettit Const. Co., 605 F.2d 128 (4th Cir. 1979); Slatin v. Stanford Research Inst., 590 F.2d 1292 (4th Cir. 1979); Vazquez v. Eastern Airlines, Inc., 579 F.2d 107 (1st Cir. 1978); Dean v. American Sec. Ins. Co., 559 F.2d 1036 (5th Cir. 1977) *cert. denied*, 434 U.S. 1066 (1978); Rogers v. Exxon Research & Eng'r Co., 550 F.2d 834 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978); Hannon v. Continental Nat'l Bank, 427 F. Supp. 215 (D.C. Colo. 1977).

16. A constructive discharge occurs when an employee is forced to terminate his or her employment because of intolerable working conditions or because he or she will be terminated otherwise. Young v. Southwestern Sav. & Loan Assoc., 509 F.2d 140 (5th Cir. 1975); Muller v. United States Steel Corp., 509 F.2d 923 (10th Cir.), *cert. denied*, 423 U.S. 825 (1975).

17. *See* 42 U.S.C. § 2000e—5(e) (1976) (the statute of limitations for filing a Title VII Complaint is 180 days); 42 U.S.C. § 2000e—5(f)(1) (1976) (90 days notice required to give rise to the right to sue); Portal to Portal Pay Act of 1947, 29 U.S.C. § 255, as amended (1974) (statute of limitations for the Age Discrimination Act and Equal Pay Act is two years). *See, e.g.*, Davis v. United States Steel Supply, 581 F.2d 335 (3d Cir. 1978); Zuniga v. AMFAC Foods, Inc., 580 F.2d 380 (10th Cir. 1978).

attorney fee awards and cost awards by conservative courts are often disappointingly small or totally unrecoverable.

Title VII class actions may also be the basis for such injunctive relief as the imposition of affirmative action requirements on the employers; however, the costs to the plaintiffs are significantly greater. The most effective method of litigating class actions is to bifurcate the action and have separate trials; one on liability and one on damages. If plaintiffs are successful in the liability suit, the damage stage becomes a series of "mini-trials" where individual class members are required to prove actual back pay damages in order to recover.[18] Furthermore, the plaintiffs are generally required to design an affirmative action proposal to assist the court in granting the necessary injunctive relief. Therefore, although the potential effect and total damages may be much greater in a class action, the plaintiffs and attorneys may pay a high price to achieve such a result.

In sexual harassment cases and in cases involving other estreme types of discrimination, the attorney should consider tort remedies as a means of securing more adequate damages for the client. Some federal courts are willing to take pendent jurisdiction over tort claims brought in connection with employment discrimination cases if the same fact-pattern is involved in both cases.[19] Certainly the possibility of characterizing damages as "compensatory," and therefore nontaxable, rather than as back pay which is taxable as income, may provide additional leverage in settlement negotiations and is a good reason for including tort claims if warranted by the facts.

An initial attraction of employment discrimination cases to plaintiffs' lawyers is the potential for court awards of attorney fees.[20] Lawyers who have lost cases, or who have received unrealistic awards of fees when they have won, may feel they succumbed to the siren's song. Many employment discrimination cases are analogized to complex corporate litigation which at times requires an extraordinary number of hours to prepare. The plaintiff's lawyer, however, is not representing a corpora-

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18. For a more in-depth explanation *see* Petway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974); Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364 (5th Cir. 1974); Bing v. Roadway Express, Inc., 485 F.2d 441 (5th Cir. 1973); United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973). *See also*, Edwards, *The Back Pay Remedy in Title VII Class Actions: Problems of Procedure*, 8 GA. L. REV. 781 (1974).

19. Western Elec. Co. v. Kyriazi, 461 F. Supp. 894 (D.C.N.J. 1978).

20. *See* 42 U.S.C. 2000e—5(k) (1976) (Title VII attorney's fees provision); 29 U.S.C. § 2166 (1970) (Equal Pay Act's attorney's fees provision); 29 U.S.C. § 626b (1970) (Age Discrimination Act's attorney's fees provision). *See also* 42 U.S.C. § 1988 (1976) as amended by Civil Rights Attorney's Fee Act of 1976.

tion. He or she is representing an individual who is having employment, and therefore financial, difficulties. To undertake the case on a traditional contingent fee basis may appear to be the solution, but may be a mistake instead. Back pay awards are small, and a percentage of that small amount will in no way adequately compensate the lawyer. The better solution is to design a fee agreement providing for ultimate compensation on an hourly rate basis, with the client paying either an initial retainer or set monthly payments to offset the financial burden on the attorney while the case is pending. The fee agreement should further provide that the balance of the fee will be paid from a court award if the litigation is successful, or from any settlement amount if a settlement is reached. If the award or settlement amount is insufficient to cover the entire amount of attorney fees incurred, the lawyer may require the client to pay an additional amount from a damage award. The courts have taken various approaches to the fee question, but in general, a criterion has been established which results in awards substantially below the fee request.[21]

Only if the lawyer believes the chances for success are excellent should the fee agreement provide that the fees beyond the initial retainer or monthly payments be contingent on winning. Otherwise, the client should be required to pay all fees in any event, even though the client may only be able to do so by making payments over a long period of time. If the client does not feel financially, as well as morally, invested in the case, the lawyer will find the great financial strain of these cases to be his or her burden, rather than the client's, in considering settlement possibilities.

EVALUATION AT DIFFERENT STAGES OF THE EMPLOYMENT DISCRIMINATION CASE

The Client Interview

In the first interview with an employment discrimination client, the lawyer can usually determine whether the individual is complaining about illegal discrimination, or simply about an unjust, but not illegal, employment situation. Once the attorney determines that the client is complaining about unlawful discrimination, he or she can begin an evaluation of the merits of the case and can make recommendations for further action. In listening to the client's story, the attorney should be particularly alert for the following:

21. The criterion referred to was developed in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974).

1. Is there a smoking gun, *i.e.*, a statement which reveals the employer's discriminatory intent or some other direct, irrefutable evidence of discriminatory motive?
2. Is there evidence available from past evaluations or other employees which will show that the client is a competent employee?
3. Is there a similarly situated non-minority employee who is less or equally qualified and yet is treated more favorably?
4. What impression does the client make? Does the client appear truthful? Does the client's story appear consistent? Does he or she appear to be a competent, organized person? Does he or she appear to have overreacted to a relatively minor incident? Does he or she appear to have a personality problem which may have resulted in the adverse action complained about?
5. Is there statistical evidence that the disadvantaged group to which the client belongs is underrepresented in all or some job categories?
6. Does the case have the potential for significant damages which, from a financial standpoint, justifies the client's incurring significant attorney fees and costs in proceeding further?

The attorney should also obtain precise information about the procedural status of the case, and especially, about applicable deadlines for filing discrimination complaints with the Equal Employment Opportunity Commission.

The attorney should be wary of the client who has difficulty describing exactly how he or she has been discriminated against. A client who comes with myriad papers and a box of documents may indicate that the complete facts are too long and complicated to relate. In such instances, the case may in fact be too long and complicated to litigate. A client who has fought the company for years and has filed dozens of separate grievances often has a case that does not make for good litigation because it is messy, intricate, and involved. No judge or jury will have the patience for it. In such cases the client has made a career of fighting the employer, and the original discrimination issues or retaliation issues are lost in the battle. Moreover, where the employer's defense for failing to promote or for firing an employee involves attitude, any evidence that the employee has fought back following the discrimination can be used as evidence of a poor attitude.

At the close of the interview, the attorney should advise the client about the merits of the case. If the case appears to merit it, the attorney should discuss the fees that will be involved in a further investigation and analysis of the case. This phase of the case should be undertaken only on an hourly basis in order to discourage clients who are not sufficiently invested in pursuing their civil rights to incur expense.

If the client's case does not merit retaining an attorney, or the client does not have the funds to retain an attorney, the cli-

ent may be advised to file an EEOC or State Civil Rights charge[22] on his own. More often, employment counseling and alternative strategies for problem solving should be suggested, as a charge of employment discrimination may serve to further polarize and erode the employment situation. Such alternative strategies may include:

1. showing clients how to best protect themselves with respect to performance evaluations and internal company documentation;
2. asking clients to consider the possibility of looking for work elsewhere or transferring to a different department;
3. exploring techniques with the client that will allow him or her to be more assertive in a way which is less threatening to the employer and which does not permit him or her to be victimized;
4. counseling the overly assertive or overly defensive client to lower his or her expectations and to take a more conciliatory path; and
5. advising the client to delay any action until a later time.

Investigation

An exhaustive in-depth interview of the client is the best way to begin. After the interview, the client should be practically prepared to testify at trial. At a minimum, the attorney ought to be cognizant of the client's problems in handling his or her decisions relating to the employment situation involved in the litigation.

The attorney should then consider representing the client at the administrative level. For example, the client may file a charge of employment discrimination with either the Equal Employment Opportunity Commission or a comparable state agency. These agencies normally conduct informal conferences to gather facts and attempt to resolve claims as an initial step. Often such representation gives the attorney the opportunity to observe the key witnesses on the other side, their potential defenses and their demeanor.

The attorney needs to investigate the case by conventional means as well, *e.g.*, further interviews with the client and prospective witnesses; review of documents. Witnesses should be encouraged to talk freely. Key witnesses should be interviewed in person, but telephone calls are a suitable way to begin.

Following the investigation, the attorney should carefully outline the strengths and weaknesses of the case from the standpoint of prevailing at trial. The client should be apprised

22. Most states have their own civil rights administrative agencies. Beyond this, the practitioner should know that in Title VII states, plaintiffs *must* exhaust their administrative remedies first. *See* 42 U.S.C. 2000e—5 (1976); *see also* 1 EMPL. PRAC. GUIDE (CCH) ¶ 1919 (1981).

of the realistic amount of damages which she or he can hope to recover if successful and the estimated attorney fees and costs. If the case is not strong enough to justify litigation at this point, settlement should again be pursued.

Discovery

Once the litigation decision is made and a complaint is filed, the attorney has the opportunity to do formal discovery and obtain additional information to permit reevaluation of the case. A discovery plan is an effective device for both planning and evaluating the case in litigation. A simple discovery plan may include sheets containing a column for all the necessary elements in a complaint, a second column for the defendant's answers to each of these elements and any affirmative defenses that the defendant may have, a third column for the evidence and discovery necessary to prove each element of the plaintiff's case, and a final column outlining legal issues and required research.

Each contested element of the *prima facie* case and/or the affirmative defenses can then be carefully analyzed in terms of the existing law and facts and the future tasks required from the attorney. The discovery plan enables the attorney to plan depositions, frame specific discovery requests, and determine future research needs with the elements of the cause of action and the contested issues clearly in mind. The plan should include the evidence that will form the *prima facie* case, where that evidence will come from, the anticipated defenses and evidence, and impeachment and rebuttal evidence.

After the discovery plan is completed, the attorney should draft interrogatories and requests for production of documents. The interrogatories are most useful in pinning down basic background information about the company's practices and policies. Generally with respect to the key contested events, it is more useful to rely on depositions rather than interrogatories. In the deposition, the witness must answer spontaneously and the answer is not filtered through an attorney who carefully drafts a defendant's response to interrogatories. Complicated interrogatories may also be of assistance to the defendant insofar as they force the defense to prepare its case more fully.

Requests for production of documents are important as it is essential to acquire and review such key documents as relevant company policies and personnel files. Often the defendant, in responding to a request for production of documents, will simply open its files and require plaintiff's counsel to review the documents in person. This can be very helpful if the attorney can get the necessary paralegal assistance to do the job prop-

erly; it frequently gives access to documents which the defendant's counsel would not have permitted had he carefully gone through the documents in advance. Documents are primarily important for the following reasons in an employment discrimination case:

1. obtaining comparative data about the plaintiff's performance and treatment by the company relative to other comparable employees who do not belong to the disadvantaged group;
2. refuting the defendant's articulated reason for the discriminatory act against the plaintiff; and
3. obtaining statistical data about the relative treatment of individuals in the disadvantaged group and other non-disadvantaged company employees.

The most important discovery device is the deposition. Depositions are most useful against the anticipated key defense witnesses because the depositions serve to fix the testimony of these individuals or, alternatively, to provide useful data for effective cross-examination. In addition, the depositions help pinpoint the defendant's articulated reasons for the alleged discriminatory act. The plaintiff then can focus on those reasons in preparing rebuttal to show that they are specious. Often the depositions of these witnesses, and the deposition of one's own client by the opposing side, give the most useful information to the attorney in assessing the strength of the case and the advisability of settlement.

A key time for reevaluating one's case comes following the deposition of the plaintiff and the defendant's key witness or witnesses. Plaintiffs often behave quite differently during their depositions than in the more comfortable environment of their attorney's office. Often psychological conflicts are more apparent in a deposition. The client's behavior at the deposition is often similar to his or her performance as an employee. A client's own contribution to a bad employment situation may become evident when he or she reacts suspiciously to the defendant's attorney, is passive or meek at the deposition, or is combative.

If, after the defendant's key witnesses are deposed, the attorney is convinced both that the plaintiff is a strong, credible witness, and that the case is strong, he or she may continue. If, on the other hand, the attorney concludes that the court could believe the plaintiff, but still find for the defendant, caution is advised. In this situation, it is not sufficient simply to have a strong witness as a plaintiff. Unless the defendant's witnesses are clearly impeachable or unconvincing at trial, the plaintiff is likely to lose the case.

CONCLUSION

The foregoing recommendations should provide a methodology for attorneys who are unfamiliar with employmemt discrimination litigation. The most common mistake attorneys make in such cases is their failure to accurately evaluate the likelihood and amount of recovery. Careful consideration of these factors should facilitate the litigation process.