TIPS & STRATEGIES FOR PLAINTIFF EMPLOYMENT LAWYERS

By:
Nick Norris
WATSON & NORRIS, PLLC

Case Intake Tips

- Use a written questionnaire to get the basic facts
- Have a face to face initial interview (video conference if necessary)
- Get affidavits before filing
- Discuss settlement authority
- Require the client to pay some retainer if possible
- Do a google and facebook search on your client
- Discuss future expenses in the case (depos, copies, subpoenas)
- Discuss the merits of the case with other lawyers before pursuing it
- Provide written direction on preservation of evidence
- Always look for the overtime claim

Contract Provisions

FOR TERMINATED CLIENTS ACCEPTING REINSTATEMENT OR FOR EMPLOYED CLIENTS ACCEPTING PROMOTION : If reinstatement or promotion is accepted by the client, or ordered by the court, then the fee amounts above in the "whichever is more" categories shall include an amount of money represented by **six month's salary** (for reinstatement) or **six month's salary differential** (for promotion)

Contract Provisions

Client has the duty to disclose all relevant information that may effect the outcome of the claims pursued on behalf of Client. Client understands that intentional misrepresentation or intentional non-disclosure of relevant information to Watson & Norris, PLLC can cause loss in revenues to the firm. **Therefore, if Client intentionally misrepresents or intentionally does not disclose relevant information that may effect the outcome of the claims pursued on behalf of Client, then Client will be automatically liable to the firm for $10,000.00 in Liquidated damages.** An example of misrepresentation would be if Client has filed bankruptcy, and informs the firm that Client has not filed bankruptcy. An example of intentional non-disclosure would be if Client claimed a termination was based on discrimination, but intentionally did not disclose to the firm all of the poor performance problems that actually caused the termination.

Contract Provisions

This fee agreement is to prosecute the client's claims. However, **IF THE CLIENT IS SUED** pertaining to the client's employment conduct, then the law office shall be entitled to bill the client for any services and costs incurred in defending any suit or cross-claim or counterclaim brought in conjunction with, or separate from the matter described above at a reasonable hourly rate regardless of the outcome of the primary matter and in addition to any fees due under the contingency fee section, if the client wishes to retain the firm for the defense of such claims.

PRESERVATION AND PRODUCTION OF RELEVANT DOCUMENTS

As a plaintiff in a case, you have the duty to preserve relevant documents to your case. This means all relevant documents, and not just documents you think help your case. One type of relevant document we have seen defendants ask for more and more these days is Facebook pages. If you have a Facebook page we would highly recommend that you stop posting any public messages about anything on Facebook. Also, do not discuss the case with anyone through private messenger or your own private e-mails or text messages. These documents become discoverable in litigation. If you have a Facebook page you will also need to immediately download a copy of your Facebook page. You may not have to produce it to defendant in discovery, but downloading a copy preserves the Facebook page so the defendant cannot claim you later deleted information. Below is a link that explains how to download it.
https://www.facebook.com/help/131112897028467
If you have audio or video recordings that are relevant to your case do not delete or alter the original recordings from the device you recorded them on. You also need to keep the device your recorded them on, and then work with our office to make a copy of them. If you have any documents that you think are relevant to your case please go ahead and give them to our office when you sign your contract.
Finally, failing to follow these instructions can be fatal to your case. If the Court determines that you failed to preserve relevant documents, the Court could dismiss your case or instruct the jury to assume you destroyed information admitting your claim is not valid. If you have questions regarding preservation please call me or e-mail me with your questions.

CRIMINAL BACKGROUND CHECKS

FAIR CREDIT REPORTING ACT – 15 U.S.C. 1681 et. Seq.

1. Must provide written notice to the employee that the criminal background check might be used for decisions about their employment. The notice cannot be in the employment application.
2. Must get the employee or applicant's written permission to do the background check.
3. Must give the employee a copy of the criminal background check five (5) days before taking an adverse employment action
4. Must give the employee the name address and phone number of the consumer reporting company that supplied the criminal background check
5. Must notify the employee that the consumer reporting company did not make the decision to take an unfavorable action and it cannot give specific reasons for it.
6. Must notify the employee that they have the right to dispute the accuracy of the information in the background check with the consumer reporting company.

Tortious Interference with Business and/or Employment Relationship

To prove tortious interference, a plaintiff must prove that a defendant committed (1) "intentional and willful" acts; (2) "calculated to cause damages to the plaintiff in his lawful business;" (3) the acts "were done with the unlawful purpose of causing damage and loss, without right or justifiable cause on the part of the defendant; and" (4) "actual loss occurred." *See McKlemurry v. Thomas*, 2011 WL 3625188, *7 (S.D. Miss. 2009).

Being a party to the employment relationship is not enough to escape liability as the Fifth Circuit has held the person must also be acting in good faith. *Vaughan v. Carlock Nissan of Tupelo, Inc.*, 553 Fed. Appx. 438, 444 (5th Cir. 2014). So supervisors can be liable even if they had the authority to fire an employee. The exception to this rule is if the owner is the decisionmaker.

Federal Judiciary Pilot Program for Employment Cases

- Places additional requirements on what documents and information that both parties had to disclose in their initial disclosures (essentially required the parties to go ahead and produce and identify all the normal information and documents that each party would get in discovery and depositions)
- Put in place a model protective order at the beginning of the case

Found the following:
- discovery motions were nearly cut in half from 21% to 12%
- Motions for summary judgment were cut by more than half from 24% to 11%
- Increased chances that a case would settle from 65% to 78%
- Motions to dismiss were decreased to 24% from 31%

https://www.fjc.gov/content/pilot-project-regarding-initial-discovery-protocols-employment-cases-alleging-adverse-acti-0

Protecting Your Client From Retaliation in Discovery

The defendant shall not serve a subpoena upon plaintiff's current employer, to discover information about plaintiff's claims, without first providing plaintiff fourteen (14) days notice within which the parties may confer with the Magistrate Judge pursuant to Section 6.F.4. of this Order regarding entry of a protective order or order quashing such subpoena and a reasonable extension or enlargement of the discovery or other relevant deadline until after any motion for such relief is ruled upon. If the Court does not grant such an extension of the impacted deadline at the time of the parties' conference on the matter, the defendant may proceed with service of the subpoena. If the Court extends the deadline until after any such motion has been ruled upon, the defendant may not serve the subpoena until after the Court's ruling.

Requirement of Pre-Motion Conferences

Some federal courts around the country are requiring parties to request a conference with the court prior to even filing a motion for summary judgment. They can only file a dispositive motion if the Court gives them permission to after the conference. Courts are using these conferences to discuss settlement and to attempt to resolve issues without full briefs on the issue.

For example see Rule 6(b) of the Southern District of Texas
http://www.txs.uscourts.gov/sites/txs/files/jjhcp_0.pdf

Local Rule 37.2 Southern District of New York

Defendant's Cannot Require Broad Employment Authorizations

Reed v. Madison County, 2016 U.S. Dist. LEXIS 189314 (S.D. Miss. November 1, 2016)

- Defendant asserted personnel records could show whether plaintiff could show a prima facie case by determining whether plaintiff was qualified for the position. Court found Defendant had offered no reason to suspect plaintiff was not qualified as she worked for defendant for over 4 years.
- Defendant asserted personnel records could show lack of credibility. Court found this was merely a fishing expedition.
- Defendant argued it was relevant for its after acquired evidence defense; however, the Court found that was not adequate without some evidence to believe something negative likely existed
- Defendant argued it was relevant for emotional damages; however, the Court found past employment records were from too long ago to be likely relevant
- Defendant argued it could be used for economic damages; however, the Court found that this information could be retrieved through less intrusive means through the Plaintiff herself.

Experts Are Overrated

- No IME allowed when plaintiff is only claiming "garden variety" emotional distress for pain and suffering, embarrassment and humiliation LeFave v. Symbios, Inc., 2000 WL 1644154 (D. Colo. 2000).
- 5th Circuit allowed $210,000.00 for garden variety emotional distress for plaintiff that was complaining about not being promoted. Plaintiff had no treating physician or corroborating witness. Brown v. Miss. Dep't of Health, 2012 U.S. Dist. LEXIS 155195 *10-19 (S.D. Miss. October 30, 2012) affirmed 550 Fed. Appx. 228 (5th Cir. 2013).
- Employer cannot require through a HIPAA release that defense counsel be allowed to have private conversations with plaintiff's treating physicians. Patricia Saucier v. Lakeview Corporation; Civil Action No: 1:14-CV-249; Doc. 42

Getting Defendant's Attorney-Client Communications Prior To The Adverse Action

Sample Interrogatory: Please identify any legal advice Defendant received regarding terminating Plaintiff prior to the termination. Please include the date, whether it was oral or in writing, the identity of the individuals that were part of the conversation, and the content of that advice.

Several courts have held that the attorney client/attorney work product privilege is waived when the Plaintiff is alleging that Defendant acted in bad faith. Carson v. Lake County, 2016 WL 1567253 (N.D. Ill. April 19, 2016); United States v. KMart Corporation, 2017 WL 3034342 (S.D. Ill. July 17, 2107); Scott v. Chipotle Mexican Grill, Inc., 2014 U.S. Dist. LEXIS 175775 (S.D.N.Y. December 18, 2014); Edwards v. KB Home, 2015 U.S. Dist. LEXIS 93584 *10-14 (S.D.T.X. July 28, 2011) (Opinion by now 5th Circuit Justice Gregg Costa). Claiming it did not rely upon advice of counsel as a defense will not allow them to keep the privilege regarding these communications. Arista Records, LLC v. Lime Group, LLC, 2011 WL 1642434 *3 (S.D.N.Y. April 20, 2011).

In Gales v. Leaf River Cellulose, LLC, the district court allowed the defendant to waive its good faith defense in lieu of turning over the communications, which would mean elimination of defenses for liquidated damages under FMLA, FLSA and ADEA claim and could destroy an employer's legitimate non-discriminatory reason if it is based on good faith. Civil Action No. 3:16-CV-953 Doc. 53 (S.D. Miss. Nov. 8, 2017)

Failure to Mitigate Damages

To prove a failure to mitigate defense the Defendant must show (1) that there was substantially equivalent employment available, (2) Plaintiff failed to use reasonable diligence in seeking those position, and (3) the amount by which Plaintiff's damages were increased by his failure to take such reasonable actions. *See* Fifth Circuit Pattern Jury Instruction 11.14; *Sparks v. Griffin,* 460 F.2d 433, 443 (5th Cir. 1972).

- **Sample Interrogatory:** Please identify all similar positions that Defendant contends Plaintiff should have applied for that were available after Plaintiff's employment with Defendant. Please include the title of the position, the employer, the rate of pay, when the position was open, and how it was advertised.
- Courts have granted motions to eliminate this affirmative defense, and failure to look for work is no longer an easy out for defendants. Storr v. Alcorn State Univ., 2017 U.S. Dist. LEXIS 128079 *11-12 (S.D. Miss. August 11, 2017)

Using Criminal Cases to Prove Discriminatory or Retaliatory Intent

The rules of evidence "apply general to civil actions and proceeding [and] to criminal cases." Fed. R. Evid. 1101(b)

- District court has found that "straw that broke the camel's back" theory in criminal case could be used to show "but for" causation in FLSA retaliation case. Schaeffer v. Warren County, 2017 U.S. Dist. LEXIS 210496 *11 (S.D. Miss. June 1, 2017) citing Burrage v. U.S., 134 S.Ct. 881, 887 (2014).

Preventing the Striking of Affidavits Based on Them Being Contradictory To Depositions

- Plaintiff affidavits are regularly stricken in summary judgment responses for being contradictory to prior sworn testimony in their deposition. *S.W.S. Erectors, Inc. v. Infax, Inc.*, 72 F.3d 489, 495 (5th Cir. 1996).
- Plaintiff attorneys are attempting to counter this argument by preparing extremely detailed complaints, and having the plaintiff swear under oath by affidavit attached to the complaint that the specific facts sections of the complaint are true.
- This way a later deposition is contradictory to earlier sworn testimony and a later affidavit is merely confirming prior sworn testimony

Lee v Kansas City S. Ry. Co., 574 F.3d 253, 260 (5th Cir. 2009)

Employees that have different job duties, different supervisors, or work in different departments may not be considered similarly situated. However, those differences must account for the different treatment for the two employees to not be considered similarly situated.

Smith v. City of Martinville, 575 Fed. Appx. 435 (5th Cir., July 17, 2014)

Here, the plaintiff was a police official forced to resign at age 65 who claimed this policy was applied in a race and gender biased way. Other police department employees – dispatchers and a school crossing guard – were working after age 65. But the City naturally claimed these individuals were not similarly situated to the assistant chief who was the plaintiff. Case closed, right? No, not so fast.

"On the one hand, at the time Smith was forced to retire, Roy, Resweber, and Thierry – police dispatchers and a school-crossing guard – had different job duties within the police department than Smith – the assistant police chief, who, unlike the others, was required to perform active police functions and use a weapon. On the other hand, *all* employees of the police department – regardless of their duties or job descriptions – were subject to the policy by the terms of St. Martinville City Ordinance section 16.5-41."

Courts Do Not Have To Grant Motions For Summary Judgment Even When Employers Make Valid Arguments

As set forth above, the Plaintiff has presented circumstantial evidence of pretext to satisfy his burden to defeat the Defendant's Summary Judgment Motion. The Court should thus allow Plaintiff's claims to proceed to trial. "Even if the standards of Rule 56 are met, a court has discretion to deny a motion for summary judgment if it believes that 'the better course would be to proceed to a full trial.'" *Firman v. Life Ins. Co. of N. Am.*, 684 F.3d 533, 538 (5th Cir. 2012) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986)). In the current case, even if the standards of Rule 56 are met, the better course would be to proceed to a full trial where a jury can personally view the testimony of each witness to determine truthfulness. Moreover, there is zero likelihood of committing reversible error by denying the motion for summary judgment as the Supreme Court has made it clear a denial of a motion for summary judgment cannot be reviewed by an appellate court once there is a trial on the merits. *Ortiz v. Jordan*, 131 S. Ct. 884 (2011).

Splits in the Circuits That Should Be Raised

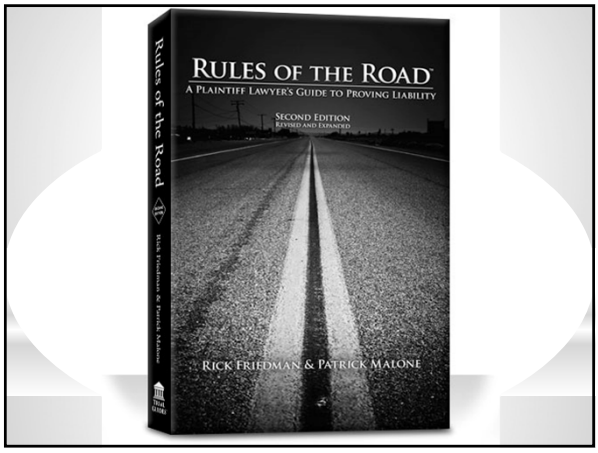
Whether a prima facie case is required when Defendant puts forward a legitimate non-discriminatory reason in its motion for summary judgment. Sixth, Seventh, Eighth, Eleventh and D.C. circuit courts have found that it is not required. Cline v. Catholic Diocese of Toledo, 206 F.3d 651, 662-3 (6th Cir. 2000); Lindemann v. Mobil Oil Corp., 141 F.3d 290, 296 (7th Cir. 1998); Riser v. Target Corp., 458 F.3d 817, 820-21 (8th Cir. 2006); Morrison v. City of Bainbridge, 432 Fed. App'x 877, 881 n.2 (11th Cir. 2011); Brady v. Office of the Sergeant at Arms, 520 F.3d 490, 493-4 (D.C. Cir. 2008). Fourth, Fifth and Tenth circuit courts have found that it is required. Pepper v. Precission Valve Corp., 526 F. App'x 335, 336 n. * (4th Cir. 2013); Hague v. Univ. of Tex. Health Sci. Ctr., 560 Fed. App'x 328, 335 n. 8 (5th Cir. 2014); Hinds v.Sprint/United Mgmt. Co., 523 F.3d 1187, 1202 n.12 (10th Cir. 2008). Other circuit continue to require it without ever addressing the conflict in Aikens. Cruz v. Mattis, 861 F.3d 22, 25 (1st Cir. 2017); Walsh v. N.Y. City Hous. Auth., 828 F.3d 70, 74-5 (2nd 2016); Collins v. Kimberly-Clark Pennsylvania, LLC, 2017 U.S. App. LEXIS 17784 *9 (3rd Cir. 2017); Blair v. Shulkin, 685 Fed. Appx. 587 (9th Cir. 2017).

Splits in the Circuits That Should Be Raised

Numerous courts have refused to use the "same actor" inference as it (1) violates the requirement to give all reasonable inferences to the plaintiff under F.R.C.P. Rule 56, (2) employer can change their mind over time and (3) an employer could discover it does not want to work with a particular protected class after hiring. Johnson v. Zema Systems Corp., 170 F.3d734, 745 (7th Cir. 1999); Carlton v. Mystic Transportation, Inc., 202 F.3d 129 (2d Cir. 2000); Ducharme v. Hall Signs, Inc., 2001 WL 1168160, *11 n.6 (S.D. Ind. Aug. 6, 2001) .

Splits in the Circuits That Should Be Raised

Whether an employee claiming retaliation under the ADEA is entitled to compensatory or punitive damages? Even though the damage statute for retaliation claims under the ADEA and FLSA are the exact same statute 29 U.S.C. 216(b), the 5th Circuit has held that a plaintiff can get compensatory damages for retaliation claims under the FLSA but not the ADEA. Vaughan v. Anderson Regional Medical Center, 843 F.3d 1055 (5th Cir. 2016). The 7th Circuit has held they are available in retaliation claims under the FLSA and ADEA. Moskowitz v. Trustees of Purdue Univ., 5 F.3d 279, 283 (7th Cir. 1993). The 6th, 9th has allowed compensatory damages in FLSA retaliation claims, but has not addressed ADEA retaliation claims. Moore v. Freeman, 355 F.3d 558 (6th Cir. 2004); Lambert v. Ackerly, 180 F.3d 997 (9th Cir. 1999). The EEOC also supports the position that compensatory damages should be allowed. EEOC Directive No. 915.
004, EEOC Enforcement Guidance on Retaliation and Related Issues, at n. 186 (Aug. 25, 2016), https://www.eeoc.gov/laws/guidance/retaliationguidance.cfm#_ftn186)



Rules of the Road

- An employer should not mislead or lie to the EEOC about why it terminated the plaintiff. (felony under 18 U.S.C. 1001)
- A reasonable employer should get the employee's side of the story prior to deciding to terminate the employee.