

EMPLOYMENT LAW: Should you take the case?

More trial lawyers are receiving inquiries concerning possible employment discrimination. Many trial lawyers who have focused their practice on more traditional personal injury cases in the past are finding satisfaction in trying employment cases.

The trial of a discrimination case and a personal injury case is strikingly similar. One key difference, however, is the presence of a villain. In the typical personal injury case, an individual made a mistake. The defendant was negligent. A duty was breached.

In a discrimination case, on the other hand, you will often have an abuser of power, a sexual predator, or a bigot. These villains provide jury appeal; a call to the jury to do the right thing. Jurors rarely identify with villains. They do not invoke notions of fair play. As a result, a great theme develops and a good story about injustice waits to unfold.

Otherwise, the roadmap to the jury is no different than that for any tort case. The case, of course, should support the cost of litigation and a reasonable recovery for the client. It should also be analyzed to determine if it is legally tenable.

Remember, in New Jersey, there is no such thing as a cause of action for wrongful discharge. Employees do not have an inherent right to be discharged only for good cause. Employees are “at-will” unless they are in a trade union or under contract. There is a presumption, however, against construing a contract to provide a right to reasonable discharge. Bernard v. IMI Systems, Inc., 131 N.J. 91 (1993).

You may become convinced that the defendant’s behavior supports a legally actionable and valuable retaliation or sexual harassment claim. Should you take the case? Not necessarily. First, just as in a tort case, you should consider whether you can meet the procedural requirements.

If a LAD suit is contemplated, a two-year statute of limitations governs and is applied prospectively from July 27, 1993, the date on which the New Jersey Supreme Court decided Montello v. Haynes, 133 N.J. 282, 298 (1993). LAD actions arising before July 27, 1993 are governed by a six-year statute of limitations. Id. If an employee elects to file a charge with the Division on Civil Rights, instead of going to Court, there is 180-day statute of limitations.

Under Title VII, your client must first file a complaint with the EEOC within 300 days of the act at issue. You can proceed with a lawsuit if the agency does not resolve the case within a specified time and gives your client a “right to sue.” Title VII has no tolling or discovery provisions. If your client missed the 300-day deadline, generally, proceeding further will be pointless.

Clearly, to succeed in this practice, one must carefully select cases.

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When an employment case is successfully litigated, there is at least the prospect of a separate award of attorneys' fees and litigation expenses. Such separate awards, which are based by law on hourly fees, can sometimes vastly exceed the damage recovery for the client. This circumstance and all the rules which have grown up to govern the computation of attorneys' fee awards, create a unique set of special challenges for the employment law litigator. These difficulties can arise at any stage from early settlement negotiations through final prosecution of an attorneys' fee application after a successful trial. A special retainer agreement for such cases can help attorneys to solve many of these problems.

A retainer agreement in employment law cases should guarantee that the attorney who wins the case will get paid at least as much as if they had taken it under a standard personal-injury contingent fee arrangement and more if their time investment justifies it.

Certainly, a sound and comprehensive retainer agreement can assist in insuring the economic viability of an employment practice only if its lawyers select their cases judiciously, litigate them excellently, and settle them wisely.

The Retainer Agreement should:

- Identify the parties to the Agreement.
- Limit the duration of the attorneys' obligation to represent the client by setting forth an end point, such as the successful negotiation of reinstatement to client's former position, or, the entry of judgment by the court.
- Set forth the client's duties and warn about the prospect of sanctions for frivolous actions.
- Address the attorney and client's right to withdraw from the case and terms for withdrawal before the end point, including the attorneys' right to be paid.
- Set forth the payment obligations of the client before the case is finished and regardless of the outcome.
- Contain an optional "win-or-lose" retainer fee.
- Set forth clearly the terms of the attorneys' fees upon settlement or successful adjudication of the client's claims and acknowledge the attorneys' willingness to represent the client at the attorneys' regular hourly rates if the client were willing and able to proceed under such an arrangement, memorialize the client's financial inability and decision to proceed under a contingent fee agreement.
- Contain a provision which requires the attorney and client to disregard any division in a settlement offer between attorneys fees and damages and to treat such an offer as a single sum of money to be divided, if accepted, according to the agreement.
- Provide for the computation of the attorney fee entitling the attorney to the greater of an hourly fee in a contingent case or a standard personal injury type contingent fee.
- Provide for a contingency enhancement.
- Contain an assignment of the client's right to recover attorney's fees from the defendants. (This right belongs to the client).

- Create an attorneys' lien.
- Set forth the attorney's right to veto a settlement which does not insure receipt of a reasonable hourly fee unless client makes reasonable alternative arrangements to pay the attorneys' fees and expenses.
- Conclude the agreement with a signature line for attorney and client.