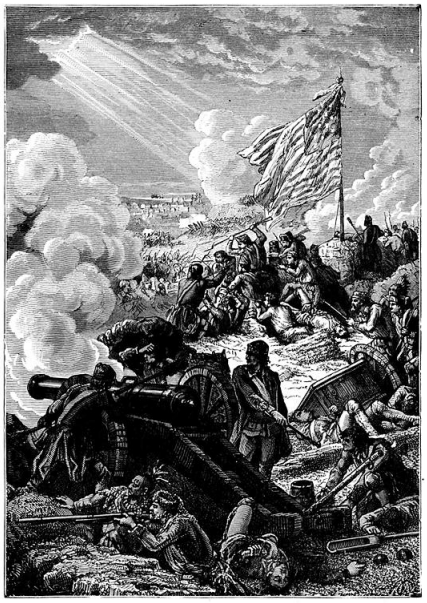
5 Reasons For Employers To "Hold Their Fire" On Dismissal Of Employment Suits

By Robin E. Shea on October 14, 2011

As they said at Bunker Hill, "Don't fire until you see the whites of their eyes!"

Last week, I wrote about early motions to dismiss employment lawsuits under Rule 12(b)(6) and questioned whether they were always the best strategy for the employer. Most of last week's post simply described the differences between a motion to dismiss, a motion for summary judgment, and a trial, as background for the benefit of our readers who are not lawyers.

As noted in a comment by Philip Miles of Lawffice Space (great blog, by the way, and well worth a visit), there is no question that a judicious motion to dismiss an employment lawsuit *may* be a good idea. If it works, of course, it is by far the least expensive option because it allows you to end the lawsuit at the earliest possible point. (Big "if," unfortunately, but we can dream, can't we?)



I'd give a motion to dismiss serious consideration in these circumstances:

*****As Philip points out, even if you can't get the entire lawsuit thrown out, **you can narrow the case down to the "real" issues by getting the "trash" claims dismissed.** Plaintiffs often throw the kitchen sink at the defendant, and a "surgical" motion to dismiss will allow everyone to focus on the part of the lawsuit that is serious.

*****Sometimes it will be crystal clear from the allegations of the complaint that **the claim is baloney** ("I was fired because I'm a woman. I got caught stealing, but males who didn't steal were not terminated") **or is outside the statute of limitations** ("Twenty years ago, the company fired me because of my race"). Why don't we get lawsuits like this more often?

*****Sometimes it's a good strategy for **pragmatic reasons** -- maybe your case has some problems (for example, hostile witnesses, lack of documentation, or poor handling of the situation that led to the lawsuit), and it's worth trying an early motion to dismiss to avoid all that.

*****Or maybe **you just want the plaintiff's lawyer to know that your company isn't an easy mark** for lawsuits and that she'll have to work for her money. You need to be careful about this motive, though -- you may be opening yourself up to sanctions if you don't have a strong legal ground for the motion.

In short, I'm not 100% opposed to a motion to dismiss, and I have been known to file them occasionally myself. That having been said, I think defense lawyers frequently overuse them, and I'd like to give you five reasons why an early motion to dismiss is not always in your best interests as an employer.

Reason No. 1 - You may "make bad law." A real-life example will illustrate what I mean. My state of North Carolina, like many other states, recognizes a claim for "public policy" wrongful discharge but takes a fairly limited view of what a protected "public policy" is. Among other reasons, you can't fire an employee for refusing to commit perjury, or for a discriminatory/retaliatory reason, or for filing a workers' compensation claim, or a truck driver for refusing to falsify his driving logs.

In a real lawsuit decided last fall, a landscape architect claimed that his ex-employer fired him because he made complaints about the employer's lack of compliance with state laws requiring that projects be certified by a real landscape architect. The architect/plaintiff claimed that his ex-employer's refusal to comply created public safety issues, as well as cost overruns and delays on multiple projects, and he gave specifics. The employer filed a motion to dismiss on the ground that North Carolina didn't recognize a "public policy" discharge claim on these grounds.

Well, guess what? *It does now.* A federal district court found that our state courts would indeed recognize such a claim. (Link is to the magistrate's recommendation, but the judge adopted the recommendation.) Of course, I have no idea what evidence the employer would have been able to present in its own behalf because a motion to dismiss is filed before the development of evidence. Maybe this motion to dismiss was the best in a set of bad options. But there is also no question that we now have a new cause of action for wrongful discharge that we didn't used to have . . . all because of this motion to dismiss.

Reason No. 2 - Your motion may "coach" the plaintiff about how to say it better next time. Let's say the plaintiff, who is African-American, alleges, "The company discriminated against me because of my color and national origin in violation of Title VII of the Civil Rights Act of 1964." Let's say there is no factual allegation that her "color" played any role in her termination, and because she's American, she doesn't have a national origin claim. Should you file a motion to dismiss? I wouldn't, because your motion will teach her (or her attorney) that she needs to use the buzzword "race" instead of "color" or "national origin" in the future.

Reason No. 3 - Even if your motion is granted, the judge will probably give the plaintiff "leave to amend." Sad but true. As I said last week, if you wait and win on a motion for summary judgment, the case is over subject only to the plaintiff's right of appeal. But if you win on a motion to dismiss, chances are very good that the judge will simply let the plaintiff rewrite his complaint and file it again. (Also, your motion will have taught him how to make it "stick" this time. *See* Reason No. 2.)

Reason No. 4 - An overly aggressive motion to dismiss will tick off the judge. You certainly don't want the judge to be mad at you, and in my experience, judges can't stand a bully. They especially don't like to see big law firms hassling small practitioners, or -- heaven forbid -- plaintiffs who are representing themselves. If you have a really well-founded motion to dismiss, go for it, but if it's borderline and the other side is a "small lawyer" or *pro se* plaintiff, I'd back off. Instead, be nice, and wait for summary judgment.

Reason No. 5 - It's often an exercise in futility and a waste of money. (See all of the above.) PS - Judges don't like wasting time on unnecessary motions any more than they like bullies.

Here are some specific instances in which I would *not* recommend filing an early motion to dismiss an employment lawsuit:

***Where the plaintiff did a poor job articulating her allegations, *but everyone knows what she meant* and she has a valid claim.**

***Where the plaintiff is *pro se*. Period.** (OK, maybe if the lawsuit is totally incoherent, but otherwise . . .) Dude, be nice. Let him have his day in court.

***Where you have a "home run" case, but you need a little bit of evidence to get wood on the ball.** If you need evidence, that's summary judgment, not a motion to dismiss.

***Where you can get one or two claims dismissed, but many more claims will have to remain in the lawsuit.** This is a matter of economics -- if the valid claims significantly outnumber the "trash" claims, it's probably going to be easier and cheaper for the client to dispose of everything on summary judgment.

***Where you only "probably" have a statute of limitations defense.** For example, the federal anti-discrimination laws require that you file suit no later than 90 days after receipt of the EEOC's dismissal of the charge. Let's say the lawsuit is filed on day 93 after the date of dismissal. Don't waste your time with a motion to dismiss the federal claims on grounds of untimeliness - the plaintiff will simply respond with the claim that she didn't receive the notice until day 95, and you won't be able to disprove it. The time runs from date of *receipt*, not date of issuance. (*See also* Reason No. 2, above, about educating your opponent.)

Wish I'd thought of that - On a completely unrelated note, blogger Jon Hyman had a fantastic post this week about an Employer's Bill of Rights. Please read it - you won't be sorry!