The Law Offices of Douglas F. Walters, APC

The Employment Law Newsletter

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Cases To Watch

- Alvarado v. Dart Container Corp. of CA
- Dynamex Operations West, Inc. v. Superior Court

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Thinking about Suing your Employer? Here are some things to Consider First! By Ryan J. Carlson

Before filing any lawsuit – personal injury, medical malpractice, defamation, wrongful termination, etc. – it is always wise to take a step back and think about some of the more practical considerations that should be taken into account before you even think about speaking with an attorney. While the considerations listed below can be molded and applied to fit the facts of just about any type of lawsuit, this volume of The Employment Law Newsletter will focus primarily on, you guessed it, lawsuits filed by employees.

Factor #1: Do you really want to get yourself involved with a lawsuit? A lawsuit is a slow moving beast with many horns, and filing one will undoubtedly involve an emotional rollercoaster. Every case is different, but it is not unusual for a lawsuit to last two or more years from the time it is filed to the time it is resolved, and that does not factor in any time it may take for your case to be resolved on appeal.

During the course of the case, there is a chance that facts about you which you would typically not disclose will be made public. You may also have to involve someone who is close to you, or who does not want to be involved in a lawsuit. The disclosure of these facts and involvement of these persons is sometimes necessary to properly work your case, but they will definitely contribute to that emotional rollercoaster.

Your personal involvement at various times is also vital to your lawsuit's success. There will be "homework." This means you may have to answer long and tedious lists of questions, compile stacks and stacks of documents, or miss work and other important events to meet with your attorneys or go to court. You may be thinking, "isn't that my lawyer's job?" In a way, yes it is – but that information and those documents have to come from somewhere, right? Since you are the primary source of all this information, you must be ready to spend the time

Employment Law

Insurance Law

Personal Injury

and effort to share it. Doing so is the only way to set yourself and your attorney up with the best case possible.

Factor #2: Being a horrible boss is not illegal. Were you subjected to unfair treatment, or unlawful treatment? After deciding that you are ready to brave the legal elements, you should ask yourself the one question that every employment lawyer wishes you had considered before picking up the phone to call them: was I subjected to unfair treatment, or was I subjected to unlawful treatment?

Common examples of individual instances of unfair treatment include, but are not limited to: not receiving a requested shift off, being scheduled for an undesirable shift, being disciplined or scolded because your boss simply does not like you, or, if you are an at-will employee, being fired for a ridiculous reason or no reason at all.

On the other hand, common examples of unlawful treatment include, but are not limited to: being fired because you are a certain race, gender or nationality, not receiving reasonable workplace accommodations for an injury or disability, being fired for refusing your employer's instruction to violate the law, not being paid minimum wage, or being purposely classified by your employer as an independent contractor when you are actually performing the duties of an employee.

Being able to make the distinction between unlawful and unfair conduct before consulting with an attorney will save both you and the attorney a great deal of time.

Factor #3: What do you really want out of your lawsuit? What sort of "relief" are you after? Many people automatically associate winning a lawsuit with winning a lot of money, but in an employment setting those two do not always go hand in hand. If you succeed, your claim may not provide for an award of monetary damages; you may be suing for reinstatement into a certain position (injunctive relief) or for the court to make a final decision as to your employment rights (declaratory relief). Each legal claim involves its own distinct "remedy" if successfully proven, and the remedy you really want may not always be available depending on your individual set of circumstances. Discussing the potentially applicable remedies with an attorney is one of the first things you will want to do upon deciding that you were treated unlawfully and are ready to file a lawsuit.

Factor #4: If you are suing for monetary damages, how much is your claim really worth "soaking wet?" Assuming monetary damages are available based on the claim you wish to pursue, those damages may be so low that it is simply not worth pursuing a lawsuit. Consider the following two employees suing their employer of one year for back pay under a theory of retaliation: Derrick is a part-time hourly employee with a high school diploma earning minimum wage; Sally is a full-time salaried employee with a doctorate degree earning six figures. Whose claim for retaliation would be worth the most "soaking wet" (a term we use to say "at the very most" or "best case scenario")?

Notwithstanding any other sources of recovery or damages, Derrick's damages for back pay would probably be significantly lower than Sally's. When Derrick gets his check

for winning and factors in filing costs, expert costs, discovery costs, and his attorney's fees (usually anywhere between 33% - 40% unless your claims allow for recovery of attorney's fees), Derrick may only see a few thousand dollars after everything is said and done… and that is only if he wins! Is it worth spending a year or more of your life to collect, say, $5,000? You could probably spend the same amount of time and stress lining up a better job and moving on with your life.

Factor #5: What is your current employment situation? Are you still employed with the company you are suing? One of the most common questions we face from people thinking about suing their current employer is "will I be fired/retaliated against if I file a lawsuit against my current employer?" Unfortunately, you always run that risk. Your employer may use one of your previous, otherwise innocent mistakes at the workplace, or may amplify the negative effect of something that is otherwise mundane, as pretext to fire you, and unfortunately sometimes it works.

However, the law allows an employee to introduce "temporal proximity" evidence to prove that the employee's protected activity (like filing a lawsuit against your employer) caused the employer to take the adverse employment action (termination / discharge / suspension / discipline / etc). Evidence of "temporal proximity" is evidence of the passage of time between when the employee engages in the protected activity and when the employer takes the adverse employment action. No specific amount of time has been held to satisfy the causation element based on temporal proximity, but generally speaking, the less time between the two events, the more suggestive it is of retaliatory motives on the part of your employer.

While there is no way to guarantee that one's termination was retaliatory if he or she was terminated within a very short time of engaging in a protected activity, we always tell our clients to come back and speak to us ASAP if they are fired by the employer they are suing shortly after the employer catches wind of the lawsuit.

On the other hand, keep in mind the possibility of potential future employers finding out about the lawsuit – after all, it *can* become public record. If you were truly wronged, then the vindication of your rights probably should not be considered or held against you by any prospective employer. However, you always want to be careful not to develop a reputation in the local job market as a whistleblower!

Factor #6: Speaking of timing, are there time limits governing your claims? You have probably heard of the term "statute of limitations." This is where that term comes into play. Every legal claim is governed by a statute of limitations, meaning it must be brought within a specific time or else it is lost, or "forfeited." Some claims are governed by two-year statutes, some are governed by up to four-year statutes. Others, especially those against public and government entities, may be governed by a one-year statute.

Knowing how much time you have before your respective statute of limitations lapses, is vital. Any good attorney will usually start an initial consultation off by asking you when you were fired (or when you experienced the conduct for which you wish to

sue) and for whom you worked. One of the primary reasons for this is to gauge whether or not there are any approaching filing deadlines, and/or whether your statute of limitations is about to expire.

Regardless of the applicable statute(s) of limitations, it is always wisest to act immediately or very quickly so as to avoid forfeiting any of your rights.

Factor #7: Are there pre-filing requirements you must satisfy before moving forward with a lawsuit? In California there are a variety of agencies and organizations which are tasked with handling and sometimes resolving certain disputes before they reach the courts. Filing your claim with, and presenting your claims to, these agencies is often a prerequisite you must satisfy before you are allowed to file a lawsuit in court. This procedure is commonly referred to as "exhausting your administrative remedies." For example, if you allege that your employer unlawfully deducted a portion of your wages from your paycheck, you must first present your claim to, and wait for a response from, the California Labor and Workforce Development Agency before suing your employer.

Another example of a pre-filing requirement which must be satisfied arises when you are suing a public entity (defined as the state, the Regents of the University of California, the Trustees of the California State University and the California State University, a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the State). In such circumstances, you must present your claims to the entity you wish to sue, and they must accept (assume liability for) or reject (deny) your claim before you are entitled to proceed in court.

Perhaps the most basic and popular form of a pre-filing requirement is exhaustion of your employer's dispute resolution procedure. These procedures are often outlined in your employment contract or employee handbook/manual, and employers love to use the employee's failure to exhaust them as a defense to any lawsuit.

Attorneys are often willing to represent you at these pre-filing levels, so be sure to discuss that possibility if the exhaustion of administrative remedies is a prerequisite to filing your lawsuit.

Factor #8: Are you bound by an arbitration agreement? Most (smart) employers make their employees sign contracts governing their employment, and in most of those contracts is an arbitration agreement. Arbitration is a form of "alternative dispute resolution" in which the parties present their case to a neutral arbitrator who, after hearing arguments and being presented with evidence, issues a decision as to the merits of the case. Arbitration can be quicker and easier than litigating in court, but it has its ups and downs.

If you are in fact bound by an arbitration agreement, that does not mean you have no case; it just means that your case will be approached in a different way. Each agreement to arbitrate is different and provides employees with a variety of rights and obligations. If

you signed one of these agreements, you will definitely want to mention that to your attorney during your initial consultation.

Factor #9: Will you be able to collect on any judgment entered in your favor? A judgment against your employer (or anyone) is only as good as the piece of paper on which it is written. This is perhaps one of the most important factors which must be considered before filing any lawsuit. Yes you were legally wronged, yes you are entitled to monetary damages, yes you filed a lawsuit, and yes you received a judgment in your favor - you won. That means you are getting paid, right? Wrong.

When you win and the court enters a judgment in your favor, the games may just be beginning if the opposing party is unable to pay that judgment. A judgment is not the actual check; receiving a judgment does not put money in your pocket or pay your attorney; and collecting on a judgment is not always as easy as simply requesting payment. If the party against whom the judgment is entered is unable to pay, you, as the "judgment creditor," may be straight up out of luck. Obviously its inability to pay will negatively affect the party's reputation and/or standing to do business (they may have to file bankruptcy or go out of business), but that does not guarantee that you will be paid.

With this in mind, consider who you are suing. While it may be possible to enforce and collect that billion dollar judgment against "ABC Conglomerate Inc.," it probably will not be as easy, or it may even be impossible, to do so with the local "Mom & Pop Shop, LLC." You may still wish to sue your employer, but based on their perceived ability to pay any potential judgment entered in your favor, you may want/have to switch up the legal theories and/or amount of damages you wish to pursue.

Factor #10: Are you trying to right a wrong, or are you just trying to win some money? All too often, people file a lawsuit because they know they are entitled to money, and not because they are trying to achieve justice. Perhaps this is why we Americans have such a litigious reputation outside of the United States.

Here is some food for thought: if you are filing a lawsuit and no one's livelihood was truly damaged, negatively affected, placed into jeopardy, or ruined, you *may* be suing for all the wrong reasons. Ask yourself, "did the conduct about which I am complaining actually harm me or another person, or am I just using someone's petty, legal wrongdoing as a way of getting paid?" Do not be a whistleblower just because you stand to gain from someone else's trivial wrongdoing; do it to correct an injustice, or to right an egregious wrong. Companies mean well. They really do. For whatever reason though, those intentions do not always trickle down to all of the companies' employees.

When you have truly been subjected to unlawful treatment and your livelihood has been negatively affected, and whistleblowing is therefore necessary, do not take "no" for an answer from human resources. Reach out to an attorney. They will gladly help you think through all of the considerations discussed above, and they will be your biggest advocate in your fight to achieve the justice you deserve.