

TOP TEN WAYS TO LOSE AN EMPLOYMENT CASE

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When I graduated from law school in 1977, we did not have a state sexual harassment statute and the many discrimination laws we have today in Louisiana. (Gosh, I sound ancient!) We had the federal Title VII of the 1964 Civil Rights Act (42 USC §2000e et al) prohibiting classifications or adverse employment actions base on race, color, national origin, sex and religious preference. But we did not have the comparative set of state causes of action we do today. I had extensive experience doing many police procedures civil rights cases and when the new Louisiana anti-discrimination statues came into effect, I was asked to take a few of these cases. It was not much different than handling police civil rights cases, (except the defendant did not carry a firearm!), and many of the basic problems had to be overcome to win. These cases are much tougher to handle due to the complex fact issues and constantly changing law arising out of new Supreme Court decisions. I really enjoyed waiting for each new decision that generally expanded remedies to employees.

Over more than 32 years of handling civil rights cases I thought I would share with you my top ten ways to lose an employment case. Besides being a catchy title for this article, it will be of use to you in screening the cases your select. The list is not exclusive as there are many more defenses available to an employer, but these are my top ones that you want to be aware of.

1. FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

Before filing suit on a statutory employment discrimination claim, under state or Federal law the aggrieved employer must exhaust all his/her administrative remedies. The employee must file a sworn complaint with the EEOC and check off the box to simultaneously file a discrimination claim with the Louisiana Commission for Human Rights. This must be done within 300 days of the event in Louisiana. It must be filed with the EEOC office timely and contain a sufficient statement to describe all claims. Then a right to sue letter must be obtained from the EEOC and this pled in the suit. An employee can ask for a right to sue letter to be issued immediately and the EEOC will do so. It is critical that ALL the causes of action must be listed or they can be waived and lost. If there is a sexual harassment and retaliation claim, both those boxes must be checked and there is not a valid retaliation claim. The EEOC person usually types up the form and the employee usually has no attorney to guide him or her. Thus a big problem is that all the possible causes of action are not checked, all facts are not listed and described in detail and listed, leading to dismissal of those causes of action later. You could file in state court for state causes of action only but why would you not go through the process of filing with the EEOC and making the employer file a response? Extra info never hurts. Then you can file a FOIA request to get that response after a right to sue letter is issued by the EEOC and get that response within the 90 day window to file suit after a right to sue letter is issued. Reviewing the employer's response may be illuminating and is always helpful.

2. FAILURE TO FILE FOR WRONGFUL DISCHARGE TIMELY

For a termination claim, the date of termination is not usually the date the cause of action begins. Usually, there is some definite notice of the termination. The cause of action accrues, and prescription begins to run on that date—not date of actual termination or last day worked. Remember the 300 EEOC deadline for filing a sworn EEOC claim will also run from the earlier date, so lawyer beware! *Smith v. United Parcel Service of America, Inc.* 65 F3d 266, 268 (2nd Cir. 1995).

Compare this to a constructive discharge claim where the cause of action period is from date of the employee's resignation, date of constructive discharge. Only the employee can know when the atmosphere at work is too intolerable that they had to quit so actually date of resignation governs here. *Flaherty v Metromail Corp.*, 235 F3d 133, (2nd Cir. 2000)

3. FAILURE TO FILE AN ADDITIONAL EEOC CLAIM OF RETALIATION AFTER THE INTIAL EEOC CLAIM IS FILED

An employee often files an initial claim timely with EEOC. Then the employee is later retaliated against. No retaliation box was checked on the original claim at the time it is filed. Usually a series of retaliation later occurs. But the employee may fail to file an additional retaliation complaint. Before any claim is filed under Title VII, it must be filed in a sworn complaint with EEOC. Often an additional EEOC sworn complaint is not filed and then suit is filed for the Title VII complaint and retaliation. The retaliation claim will then be dismissed due to failure to file one with EEOC.

4. FAILURE TO INCLUDE STATE CAUSES OF ACTIONS AS BACK UP CLAIMS

I am surprised many attorneys do not watch for basic state causes of action and include those in federal court complaints. You never know what a judge or jury will do. Always include basic pendant state causes of action timely. Such state causes of action like, assault, battery, intentional infliction of mental distress, malicious prosecution, false arrest and defamation may save your case from utter defeat. You could be unsuccessful on your federal claim and still win on your state claims. Put state discrimination claims in. I was speaking with a defense attorney who defended a §1981 Civil Rights claim and won that, but the plaintiff hit a big award on a state malicious prosecution claim. The jury did not buy the race motive in the §1981 federal race claim, but punished the defendant employer for mistreatment thru false criminal prosecution of the employee. Always include state causes of action as your parachute.

5. FAILURE TO PRESERVE BY TIMELY FILING STATE CLAIMS

To preserve your state claims you generally must file them in a court within one year. You may not hear from the EEOC and receive a right to sue letter within a year and lose the state claims that prescribe in one year. Watch that one-year prescriptive period on those state claims! Ask for a right to sue letter from the EEOC within the one year to file your suit with federal and state claims within one year.

6. LOSING ALL WAGE LOSS DAMAGES DUE TAKING DOCUMENTS DUE TO THE AFTER-ACQUIRED EVIDENCE DOCTRINE

Often a employee will crank up a copy machine in the middle of the night when the office is bare of employees and proceed to copy all e-mails and letters in restricted areas that the employee did not have any access to normally. Then they show up at your office with a suitcase of papers showing the discrimination or sexual harassment and

retaliation for complaining about it. They may have even have a copy of the investigation from the defense counsel. They may have letters marked "attorney client privileged" on them. They may just download gigabytes of data onto a portable hard drive. The potential client wants to prove they were wronged and offers your clear proof in basically stolen documents. This is a disaster in the making! First, you as attorney may be in trouble and removed from the case if you view such records. Or it may lead to a bar complaint. Secondly, the employees claim may be dismissed or damages reduced under the doctrine that the employee violated rules of employment that if the employer knew he did so would lead to their being fired. Even when the employee's misconduct does not bar recovery under the doctrine of unclean hands, it may limit remedies otherwise available under federal and state discrimination law. *McKennon v. Nashville Banner Publishing Co.*, 513 US at 360, 115 S.Ct. at 866.

7. HAVING AN EMPLOYEE'S CLAIMS BARRED BY EMPLOYEE MISCONDUCT UNDER THE AFTER ACQUIRED EVIDENCE DOCTRINE

An employee is fired for an unlawful cause like discrimination. But then is it learned the employee did one of the following: 1. Resume fraud. 2. Falsification of records 3. Stealing confidential employer data 4. Failure to report a DWI or felony conviction 5. Falsification of academic credentials or work experience. (I actually had a client "forget" a federal bank robbery felony conviction.)

Depending on the type of claim it may be barred totally by the above. On a contract claim, resume fraud may bar the entire claim. On a discrimination claim it may not totally bar it but may reduce future loss wage damages for example.

8. RES JUDICATA, PRECLUSION AND COLLATERAL ESTOPPLE

Under this doctrine a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. *Migra v. Warren City School District Board of Education*, 465 U.S. 75, 104 S. Ct. 892

A finding of an administrative agency acting in a judicial capacity in resolving disputed claims before it in which the parties have the full opportunity to litigate may bar a similar suit. See *United States v. Utah Const. & Mining Co.*, 86 S. Ct. 1545, 1560.

State or federal administrative proceedings may also bar other claims. *University of Tennessee v. Elliott*, 106 S. Ct. 3220, 3226. This does not apply to state employment compensation proceedings generally but as long as state unemployment benefits proceedings satisfy federal due process requirements, there is no constitutional bar to applying collateral estoppel in such proceedings. *Shields v. Bellsouth Advertising and Publishing Co., Inc.* 228 F3d 1284, (11th Cir. 2000)

9. EMPLOYEE FORGETS HE/SHE SIGNED AN ARBITRATION AGREEMENT

I am never surprised when an employee swears he/she never signed an arbitration agreement-then one pops up! (I then feel sick...) Then an exception of prematurity and motion for stay is filed. (Maybe it's just me but I feel having to litigate in an arbitration with a typical AAA arbitrator that wears a bow tie with a picture of the Republican Convention in New Orleans in the hallway of his office is like going to a street gang AK47s gunfight and I only have a .22 caliber derringer.) Usually the employee is given a stack of papers and told to sign them to be hired. In the two inch stack of papers is a binding arbitration agreement they sign, totally unaware of what it is. Maybe they sign the receipt for the employee manual that describes an arbitration agreement for all claims

that arise out of employment. Unless there is a contractual defense such as consent, mistake, error, fraud or a statute that bars the agreement, (like the recently signed Franken amendment that bars sexual harassment and assault claims going to arbitration for government contractors), the employee's suit will be dismissed as premature and sent to arbitration. The chances of success and substantial damages in arbitration with no jury, is greatly reduced.

10. FAILURE TO GET STATEMENTS FROM CO-WORKERS BEFORE AN EEOC CLAIM IS SENT TO THE EMPLOYER OR SUIT IS FILED

Nothing is harder to win than a "he said- she said" swearing discrimination contest with no corroborating or independent evidence of the claim. (Like the Black Plague and Swine Flu they are to be avoided at all costs.) Always get simple handwritten signed statements, then detailed recorded statements over the phone, transcribe them and get those signed then follow up with declarations under penalty of perjury and/or notarized affidavits for use in surviving summary judgment that is sure to be filed. This is a lot of work but it will pay off handsomely. I cannot tell you how many cases were saved by my having recordings or signed statements of scared employees who are single parents that may try to change their testimony under pressure of company attorneys or bosses for fear of losing their jobs if they testify for the employee. Your statements will stop this from happening.

Always get statements before suit is filed. After suit is filed you will probably be barred from getting such information except from ex-employees. Such measures will save you from being Rule 11 sanctioned too.

There is my list of my top ten ways to lose an employment case. Hopefully you can avoid most of these by careful screening and planning with this knowledge in mind.