CONDUCTING A POST-MORTEM ANALYSIS ON A WRONGFUL DISCHARGE CASE – A REALLY GOOD IDEA

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When the case is over - because it settled, or was dismissed on summary judgment or tried to a jury and all appeals have been exhausted - a "post-mortem" examination can be an effective and useful tool for the employment litigator. Plaintiffs and defense counsel can benefit from 20/20 hindsight to further understand what worked and what didn't, how certain facts or documents or witnesses played compared with what they anticipated. Were there opportunities lost? Could counsel have communicated better with the client? Were the legal services provided efficiently? Plaintiffs' attorneys can use these lessons to improve screening and initial evaluation skills. For defense counsel it may be an opportunity to provide follow up advice to educate the company about their policies, training or decision-making. In fact, it would be a good investment for the company to retain its attorneys to perform such an evaluation[1].

While every case is, of course, unique there are some common themes/problems (depending on one's perspective) in wrongful discharge cases. Factors explored here are timing, consistency, performance documentation, electronically stored information (email!), training and policies, terrible witnesses, and settlement evaluation.

Timing

Temporal proximity between protected conduct and an adverse employment decision is often the element on which a retaliation claim is won or lost. Timing is also a critical element in a discrimination case. Whether representing the plaintiff or defendant, ask why the decision to discharge was made when it was. The answer may be clear cut; it may suggest pretext.

[1] "It's Not Over – Even When It's Over" is an article written by employment attorney Jathan W. Janove, published in the February 2004 issue of HR Magazine describing for human resources managers the "invaluable lessons by conducting an employment litigation post-mortem."

Consistency

Many cases are won or lost on the issue of the employer's treatment of similarly situated employees who are not in the plaintiff's protected class. Firing the plaintiff for conduct for which others are merely disciplined creates a permissible inference of discriminatory motive that the employer may or may not be able to explain away. Consistency can also play a less direct role such as when a jury – or judge – feel the employee was not treated fairly.

Performance Documentation

The prevalence of "grade inflation" in employee performance evaluations can create opportunities for a plaintiff's attorney and a major headache for defense counsel. It is not unusual for the company culture to develop such that a mid-scale "satisfactory" or "good" or "within acceptable limits" on a performance review is a sign of real problems. Yet it's very difficult to explain to a jury that "performs all aspects of the job in an acceptable fashion" is really code for must improve or be discharged. Similarly, raises, bonuses, or awards in close proximity to a discharge for performance reasons can appear inconsistent or problematic.

Electronically Stored Information

Dealing with ESI is the legal challenge of the 21st century. Employment litigators are faced with such issues as convincing clients that a perfunctory review of email is not sufficient, that deleted items can usually be recovered and that metadata may provide information that hurts the credibility of a careless or untruthful witness. For defense counsel, it is critical to get early access to this data in order to better evaluate the impact before discovery is underway. For plaintiff's counsel, don't overlook that the discharged employee may have relevant email or documents residing on the employer's server or a personal computer. Both parties should be persistent in discovering electronic information.

An article in the Kansas Bar Journal[2] provides attorneys with some practical advice for dealing with the challenges of ESI, based on case law and the revised Federal Rules of Civil Procedure. Summarizing, attorneys

[2] *"Byte" Me! Protecting Your Backside in an Electronic Discovery World (Not Just for Litigators)*; by Kathy Perkins & Dave Deppe, The Journal of the Kansas Bar Association, March 2007.

should educate themselves and their clients on the law and consequences of failure to preserve electronic evidence; issue litigation-hold instructions routinely but tailored to the specific client and matter; expect to exercise persistence in getting clients to cooperate fully; beware of metadata; be creative but practical in conducting discovery into ESI; and take steps to protect confidential information.

Training & Policies

Internal employer policies and training should be a dynamic on-going process aimed at legal compliance and communicating expectations to employees. Old policies that have been forgotten or simply aren't followed can become a thorn in the side of a defendant employer and a gold mine for a plaintiff. Other common factors affecting the outcome of wrongful discharge disputes include ineffective or outdated training sessions and failing to keep records of who attended or what was covered.

Counsel should ensure that management employees have reviewed relevant policies and refreshed their memories about any training sessions they attended.

People Who Are Terrible Witnesses (or Lie)

Good witness preparation serves a number of functions. It educates the witness and improves the quality of testimony, aids the lawyer's factual development of the case, helps identify poor witnesses, ones who think they can outsmart the opposing counsel, or, unfortunately, ones who plan to lie or shade information. For the most part, individuals called as witnesses in depositions or at trial in employment cases are not experienced at testifying. Many are nervous or concerned. Preparation is going to involve not only making sure they are up to speed on the facts at issue, but also understand the process, their role and the rules. Videotaping or role playing may be extremely helpful tools.

Unfortunately, it can be difficult to get a client to commit to pay for the preparation time or for an individual to take that much time away from other work demands. Upper level executives – whose testimony will bind the company and may have the greatest impact on the outcome of the case – are often the hardest to convince to take that time. Counsel need to impress upon the client the importance of the investment in preparation.

Settlement Evaluation

An honest look back at the direct and indirect costs involved in litigation may reveal that an early, rejected, demand from the plaintiff or offer from the defendant would really have been a better deal than the end result. There is no crystal ball that can provide perfect predictions but attorneys can do a better job evaluating cases and settlement proposals.

So how do you get that "better" early settlement? Attorneys should take a step out of an advocacy mode to perform a more realistic assessment of good and bad facts – and communicate this assessment to the client. What are the costs associated with continuing to litigate based on principle? Even if settlement isn't reached early, an informed client is less likely to be surprised. Another option is to consider voluntary mediation, or more genuine participation in a court-ordered process. Parties and their attorneys often miss an opportunity to get the greatest possible benefit from a mediator who can help with difficult personalities, assess credibility, or provide creative options for resolution and not just shuffling offers back and forth.

Conclusion

An honest assessment of a wrongful discharge case "post-mortem" can be a very revealing and rewarding process. Attorneys who undertake this sometimes self critical journey can gain insights about their own judgment and about patterns and trends and practices that simply aren't serving the clients very well.