Session One

Capitalizing on An Employer’s Missteps:
What a Plaintiff’s Lawyer Looks for When A Fired Worker Walks in the Door

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Why does this matter?

➢ Customary mistakes made by employers that pique a plaintiff lawyer’s interest.

➢ No two cases are alike but there are specific things that help to give cases “sizzle.”

➢ Hope to help employers anticipate potential vulnerabilities and easily deal with them before there is legal trouble.
WHAT MISTAKES GET THE ATTENTION OF A PLAINTIFF’S LAWYER?

INVESTIGATION ISSUES:

● Does the HR process seem to be one the employee is comfortable using?

➢ No connection to the harasser and no excuses at the time of reporting.
  ○ If not, the employee will seek counsel first.

● The threshold for a quality investigation under *Vance v. Ball State University*, 133 S. Ct. 2434 (2013) is low. Investigate claims in a thorough expeditious and objective way.

● Circle back and respond to the complaining employee.
Typically, plaintiffs want to keep their jobs as their employment is tied to financial stability, health benefits, and housing (sometimes).

Many times, NOT coming forward is an unacceptable option for employees when:

- Their compensation is effected;
- They are worn down under the pressure of the harassment;
- Employees will report harassment to protect their good name and their mobility potential.
NOT FOLLOWING UP:

- HR does not have to say *exactly* what was done in the investigation; but, it must say there is to be no retaliation.

- Employers should not assume an employee attaining counsel means that they want to sue —employees need advice (especially if they feel they are not hearing from HR).

- Doubtful a plaintiff’s attorney will tell the employee to quit a job and stop their income and benefits without suggesting meaningful solutions first.
Lawyer’s insight: The victim is reporting it because it has escalated to the point that they feel they have no choice.

Lawyer’s insight: We want the employee to keep working.
WHAT MAKES A HARASSMENT CASE SIZZLE?

GOOD, JUICY EVIDENCE!

Recordings:

- Recording conversations is legal in Virginia according to Virginia Code § 19.2-62, which states: “It shall not be a criminal offense under this chapter for a person to intercept a wire, electronic or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.”

- Hard to argue with this evidence.
Pictures help a case for the same reason that recordings do—they freeze images in time, and photographs do not lie.

These days, people routinely take and send pictures through text and picture messaging on their cell phones.

There is no better proof of sexual harassment than disturbing unsolicited sexual images sent to your client with accompanying incriminating statements.
EMAILS AND TEXT MESSAGES

- People text.
- Fear of discovery of the company phones.
Lawyer’s insight: Typically, plaintiffs’ attorneys are not actively advising plaintiffs to record, but many of them do so instinctively.

Lawyer’s insight: Suggestive, inappropriate messages/photos will keep the jury awake and engaged.
EMPLOYERS MAKE MISTAKES BY

Retaliating:

- No matter what the circumstances of the case are - there is something that the employer could have done to make the employee feel more supported.

- Retaliation cases are a lot easier for plaintiffs than discrimination or harassment.
The plaintiff does not have to be correct about the underlying conduct complained of – they can be wrong.

Keep in mind, retaliation is easier to win.
Not Engaging the Employee/Plaintiff

- No slow responses.
- Ask the employee what they want, but do not depend on them for the solution.
- When it comes to advising plaintiffs, we will advise the client to remain cooperative, reasonable, and open to creative solutions.
CHARACTERISTICS OF A GOOD PLAINTIFF

MEASURABLE PERFORMANCE GOALS

- Sales, quotas, and measurements *the employer* put forth.
- Stellar performers.
- Likewise, productive plaintiffs that have been following the company’s policies and procedures with no history of employment issues will help to win over a jury.
FRIENDS FROM THE OFFICE

- Assume we spoke to your employees.
- Normally, if the attorney is talking to the witness before a case starts, they may not want to use their names.
- They want to be a plaintiff too.
A NOTABLE DEFENDANT

- Defendants that give harassment cases the most pizzazz are ones that have influential positions and names.

- Going up against someone who has a larger than life persona will attract more attention; it may also be more fiscally rewarding, if the plaintiff wins in court.
Lawyer’s Light Bulb Moment:

 Sometimes the plaintiff has a resolution they want – and it may resolve the entire matter.
Time for Those Final Light Bulb Moments!

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