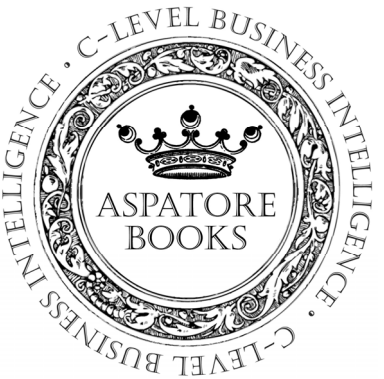
INSIDE THE MINDS

Employment Discrimination Lawsuits

Leading Lawyers on Developing Case Strategies, Evaluating Settlement Opportunities, and Identifying Litigation Best Practices



First Printing, 2008
10 9 8 7 6 5 4 3 2 1

Preparation and Management of Discrimination Suits

Jennifer C. Jauffret
Director
Richards, Layton & Finger

When you first have the opportunity to defend an employee discrimination suit, it may seem like a daunting task. But in reality, the defense of such matters differs little from other types of litigation. By using a step-by-step approach, you will greatly enhance your client's chances for success. The purpose of this chapter is to review those steps and provide advice to counsel who are new to this area of the law.

A Brief Look at the Substantive Law

This chapter is not intended as a discussion of the substantive law, since a discussion could reasonably consume volumes, not pages.[1] However, to provide some context for the discussion in this chapter, it is useful to briefly review the most important anti-discrimination laws. Typical employment discrimination suits arise under Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. §2000e, et seq.), the Americans with Disabilities Act of 1990 (42 U.S.C. §12101, et seq.), the Age Discrimination in Employment Act of 1967 (29 U.S.C. §621, et seq.), and the state counterparts to these laws. Title VII prohibits discrimination based on an individual's race, color, religion, sex, or national origin. The Americans with Disabilities Act prohibits discrimination against qualified individuals with disabilities. The Age Discrimination in Employment Act prohibits age discrimination against individuals age forty and over. The Pregnancy Discrimination Act is a 1978 amendment to Title VII of the Civil Rights Act, which prohibits discrimination based on pregnancy, childbirth, or related medical conditions. Race discrimination cases can also be brought under Section 1981 of the Civil Rights Act of 1866 (42 U.S.C. §1981, et seq.). Although Section 1981 does not contain the word "race," it has been construed to forbid all "racial" discrimination in the making of public contracts, which includes employment contracts and even at-will arrangements. State discrimination laws can and often do include a broader collection of protected classes than federal laws. For example, some states prohibit discrimination against familial status, marital status, or sexual orientation, which are not protected under federal law.

Employees who charge their employers with discrimination often feel that the employer punishes them for making such a charge. Such employees frequently

[1] The opinions expressed in this chapter are those of the author and not necessarily those of Richards, Layton & Finger or its clients.

assert a "retaliation claim" against their employer. Retaliation claims can and do go hand in hand with many discrimination claims. They can be brought under the statutes identified above, as well as particular anti-retaliation provisions in many other employment statutes, such as the Family and Medical Leave Act of 1993 and the Fair Labor Standards Act of 1938, as amended (29 U.S.C. §201, et seq.).

The primary discrimination and retaliation statutes have undergone few legislative changes. However, from time to time judicial opinions interpreting these statutes will yield new nuances to the statute or, in some instances, change the interpretation of a statute dramatically. For instance, in *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006), the Supreme Court significantly changed the definition of the term "adverse employment action" in the context of retaliation claims. As mentioned previously, a "retaliation claim" is one in which an employee claims the employer has retaliated against him or her for raising a claim of discrimination or other unlawful act by the employer. To establish a *prima facie* case of illegal retaliation, an employee must show adverse employment action by the employer, along with protected employee activity and a causal connection between the employee's protected activity and the employer's adverse employment action.

Prior to the holding in *Burlington Northern*, the existence of adverse employment action in retaliation cases usually turned on whether the employee had been terminated, passed over for a promotion, demoted, or faced some other disciplinary action that affected the terms and conditions of their employment. The *Burlington Northern* court expanded this definition, holding that a materially adverse employment action is any action that might have dissuaded a reasonable worker from making or supporting a charge of discrimination. This broadened definition can present challenges for employers who had taken a more narrow interpretation of the key term in the past.

Important Stages of a Discrimination Suit

The Initial Meeting with the Client

It is critical that you meet with your client as soon as possible after being retained. The first order of business is to learn about the employee's claim (if you have not already) and your client's response. Begin gathering

documents, including all relevant policies and procedures, as well as the claimant's personnel file. Now is the time to begin identifying all of the key people involved. Usually this will include the claimant and the supervisors, and it may include other employees. At this meeting, you should take steps to preserve relevant evidence. Those steps, discussed below, involve promptly identifying key players and sending them a litigation hold letter. Also, ascertain from your client whether there have been other allegations of discrimination lodged against the employer in the past. If so, determine the basis and outcome of these claims.

It is imperative that you and the client take appropriate steps to preserve all potentially relevant documents, both paper and electronic. The obligation to preserve documents arises when the client has reason to believe there may be a dispute. Since the client found it necessary to retain you, it is obvious the client believes a dispute is in the offing (or has already been filed), and thus this bridge has already been crossed. Therefore, preservation efforts need to start immediately. This process begins by identifying key individuals involved in the dispute and sending each a litigation hold letter. This letter should explain the need to save all paper and electronic documents that may be even remotely pertinent to the case. As you learn of new individuals who were involved in the events giving rise to the dispute, you must send a litigation hold letter to them as well. The initial litigation hold letter is not enough. You must also send periodic reminders to your client and key individuals of their obligation to preserve potentially relevant documents. Virtually all businesses delete electronic data pursuant to a document retention policy. Therefore, you must act quickly to alert, in writing, your client's information technology department not to delete any information relating to the key players during the pertinent period. Be sure your client preserves backup tapes and discs containing data and e-mails created during the pertinent time.[2]

Discrimination claims are sometimes covered by insurance. It is important that you explore very early with the client the possibility of insurance coverage and put carriers with potential coverage on written notice of the claim. Failure to do this may result in the forfeiture of coverage.

[2] See *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 432 (S.D.N.Y. 2004).

Many managers may be unfamiliar with the length of time it takes to resolve a case, the distraction that litigation will cause the client, and the potential for adverse publicity. Now is a good time to discuss these matters with them. Many, if not most, managers will ask you at the initial meeting, "What are our chances?" I never answer that question, because it is impossible to know at this stage. Instead, I explain the applicable law (including the facts the employee must prove) and tell them I will not be able to form an educated opinion until after I have had an opportunity to review documents and interview witnesses.

Understanding Your Client's Goals

From the start, you need to understand your client's goal in resolving the litigation. Does the client wish to resolve the matter quickly and quietly, or does it want to aggressively defend through trial? Most often, the client's goal lies somewhere in between. Often, I find that early in a case a client adamantly opposes settling and vows to fight to the bitter end. But the client's view may change drastically as the case progresses and legal fees mount, the inevitable distraction takes its toll, or unanticipated adverse evidence surfaces. Thus, not only is it important to discuss your client's goals early in the case, but it is perhaps even more important to regularly reassess them throughout the litigation process.

Your client's goal will affect your strategy. For example, when deposing an expert for the other side, I often do not bring to the expert's attention major flaws in their opinion, because I do not want the expert to correct those flaws before trial. However, if my client desires to settle, I may expose those flaws at the deposition to convince the plaintiff of the weakness in its case.

Fact Gathering

After the initial client meeting, it is time to begin intensive fact gathering. This process involves first collecting key documents and interviewing witnesses.

<u>Collecting Documents</u>

Usually your client will provide you with a contact person who can be of immense help in collecting documents. That person cannot be expected to know what documents you will need, so you will need to spell out as

specifically as possible what you are looking for. Tell your contact person that if there is any doubt whatsoever about whether a document should be provided to you, you will want to see it. You cannot rely exclusively on the contact person to provide you with documents. As you interview witnesses, you need to ask each witness about the existence of relevant documents and ask whether they are aware of anyone who may know of the existence of such documents.

Needless to say, I want a copy of the complete personnel file of the charging party (i.e., the employee who is claiming discrimination), as well as the personnel files of the individuals the charging party alleges treated them less favorably. In most instances, I will want the personnel files of all alleged comparators (i.e., those similarly situated to the charging party). The first thing I look for in the charging party's personnel file is prior disciplinary actions and warnings. I also review documentation regarding the hiring of the charging party and performance evaluations, including pay raises and promotions. If there are medical issues involved in the case, such as a claim under the Americans with Disabilities Act, I review the charging party's medical records, which are kept in a separate confidential file within the human resources office.

I look for information regarding whether the employee has ever complained internally or externally of discrimination, which should also be included in the file. One of the most damaging facts you can learn is that the employee previously complained of discrimination and that complaint was never addressed, or if it was addressed, no one informed the employee. A job description for each person involved and an organizational chart helps put things in perspective.

There are documents other than personnel files that are usually important. Access to the full employee handbook is essential. Often the client will suggest portions of the handbook that are relevant, and in the early stages of a case, I will rely upon those suggestions. It is necessary, however, for you to review the entire handbook at some time, lest your client has overlooked some key provision. Knowledge of your client's policies and procedures is imperative in defending against employee claims. For example, in a claim for harassment, you need to know everything about your client's policies on that matter. Is there a complaint procedure

included in the policy? If the employee never complained internally of harassment, despite the clear policy directive to do so, the employer may be able to take advantage of a related affirmative defense. Check for human resources records of discipline meted out by the manager involved in the matter. Managers may have different management styles and methods of discipline, but it is critical to know if the company and, more specifically, the relevant manager consistently follow the policy across the board. For discrimination to occur in the context of disparate treatment, a similarly situated employee must have been treated more favorably. It is arguable that because employees have different supervisors, they are not similarly situated, which then works in the employer's favor in disproving unequal treatment. It is worthwhile to note whether the policy makes room for exceptions or manager discretion.

It is also important to understand what sort of notice of the client's policies was given to employees. Proving that an employee had notice of a policy is important from a fairness perspective, even if it does not ultimately prove discrimination or a lack thereof. For most cases, I like to know when a particular policy went into effect and how the employees became aware of the policy. Was the policy in writing? Did the employee at issue sign off on receipt of the policy? A written acknowledgment from employees that they have received and reviewed the employee handbook or any changes thereto is always recommended and helpful for the employer in supporting its position.

The composition of the employee work force broken down by protected classes (e.g., race, gender, age) can be another useful indicator in proving or disproving a discrimination case. To effectively utilize these indicators, tailor the data to relate to specific cases. For instance, if the nature of the allegations relates to a promotion, I want to know how many other employees had been promoted in the relatively recent past by that supervisor, the department, and the employer as a whole. I can often show that a supervisor accused of discrimination has a very good track record in managing employees in the same protected class, which is extremely helpful in rebutting a discrimination claim. The data you collect may be inconclusive or not helpful to your case, but it is still necessary to go through this process.

Interviewing Witnesses

After reviewing the documents, data, and general responses from the client, it is time to interview the witnesses. Prior to interviewing any witnesses, I arrange the documents I have gathered in chronological order. This allows me to piece together the story they tell. After I have that story in mind, I can begin preparing questions for potential witnesses. Do not be surprised or discouraged if there are discrepancies between the documents and the information you gather during the interviews, and even between different employees. It is normal for people to perceive the same event differently, and memories can quickly fade. Thus, minor discrepancies are often innocent and can be explained.

Conduct in-person interviews whenever possible. An in-person meeting is preferable to a telephone interview, because it will allow you to better assess the potential witness's credibility. Once the interview begins, I always make my role clear to the witness. Often witnesses are unfamiliar with the legal process, and therefore they can be nervous, or even reticent to talk to me. I try to put them at ease and assure them that the employer will not discipline them for what they tell me. I prefer my early questions to be open-ended, as this type of question will usually provide me with more information than a close-ended question. For example, in the initial stages of the interview, "Tell me what you know about the relationship between John Doe and Mary Smith" will likely yield more information than "Did you ever see John Doe inappropriately touch Mary Smith?" Try not to interrupt during this part of the interview. Remember, the goal here is to get information. You can't do that when you, not the witness, are talking. After I have finished my open-ended questions, I usually recite back to the witness the story they have told me. There is a twofold purpose for this. First, it tells me whether I have understood the witness. Second, my recitation often prompts additional recollections by the witness. Once that is concluded, it is time to use closed-ended questions seeking clarification or particular details.

Notice that to this point I have not used any documents. This is because I do not want the witness to tailor, either consciously or subconsciously, their story to fit the documents. After exhausting the witness's recollections, I proceed to review relevant documents with the witness. These always include documents authored or received by the witness, and usually other

documents. When in doubt, show the document to the witness. You do not want to be surprised later that the witness knew something about it.

Immediately after the interview, I dictate a memo memorializing what I learned, my impressions of the witness, and the significance of what the witness has to say. It is a huge temptation to delay this memo, but I find that if I procrastinate, my interview notes become less clear and my recollection hazy. Thus, as difficult as it may sometimes be, try to write this memo promptly.

Often your client will have interviewed witnesses as part of its own investigation. There is usually little risk in relying upon these interviews early in the case, but as the case moves on you will need to interview all but the most tangential of these witnesses. There are several reasons why you must do so. You will find that in-house investigators may overlook matters key to your defense. At other times, new information may be developed that was not known to the investigators when they conducted the interview. Finally, you will need to form an impression of the witness's demeanor, which cannot be done based on an investigator's summary.

Beware of Red Flags

Throughout the process, look for red flags that may alert you to hidden (or not so hidden) problems. The following are classic red flags:

- Major inconsistencies between the documents or between the documents and potential testimony
- Sporadic or otherwise inconsistent applications of the relevant policy
- Failure by management to follow up on complaints by the charging party
- Absence of evidence that the charging party was made aware of the relevant policy
- Evidence that the policy was targeted at a particular group of individuals

Drafting the Position Statement

You should respond to the charge with an answer and position statement. In most state and all federal agency cases, you must serve and file a position statement if your client does not want to mediate the dispute, or if mediation is unsuccessful.

Your position statement should be an offensive, rather than defensive, document. Do not, therefore, allow the employee's charge to dictate the structure of your position statement. Rather, present the facts and arguments in the order most compelling for your client. In most instances, your client's position is best understood when it is presented as a chronological story of the events giving rise to the charge. Thus, I usually begin the drafting process by preparing a chronological outline of those events, and draft the factual narrative based on this outline. Place special emphasis in the position statement on the employee's poor performance or other reasons for the employer's decisions. The employee often omits this information in the charge, and it is worthwhile pointing out serious omissions by the employee in the position statement. The position statement should include relevant documents, but be sure to explain the relevance of these documents in the statement itself. A ream of documents attached to a position statement will receive little or no attention from the agency unless there is an explanation of why they are pertinent. It is permissible, and often a good idea, to use demonstrative exhibits. For example, a list showing the way a supervisor treated similarly situated employees in the past can be very persuasive.

Avoid any temptation to overstate your case in the position statement. Should the matter proceed to full-blown litigation, the plaintiff will undoubtedly bring to the attention of the judge or jury any misstatements or exaggerations contained in your position statement. Finally, do not hide from any warts in your case. Ignoring them will not make them go away, as the agency will surely spot them. It is far better to directly confront any weak spots in your case.

Employers can also provide the agency with contact information of key employer witnesses. To better control the process, I prefer to let the agency know the identity of the witnesses, and that I will make them available to

the agency for interview. Counsel for the employer should be present for all management interviews conducted by the agency. The agency has discretion on whether to contact any given witness, and they often will not contact all witnesses. Therefore, I recommend adding an affidavit from all your key witnesses stating they have reviewed the position statement, and agree with all areas of the statement within their knowledge and have no reason to doubt the other portions.

After submission, the agency usually sends notice of a preliminary finding and provides one or both sides with an opportunity to submit additional information in support or in defense of the claims at issue. If the agency asks for more information, promptly and thoroughly respond to its request, but never just turn over documents or data. Attach a letter explaining the data or documents and how they support your position.

Mediation and Settlement

After the employee files a charge with the Equal Employment Opportunity Commission (EEOC) or the state agency, both parties can agree to have the case mediated. Mediation at this stage can be particularly helpful for a variety of reasons. First and foremost, you may be able to resolve the case and save your client substantial legal fees. Second, settlement at the agency stage is often much less costly in terms of monetary payments to the charging party than it would be if the case were to proceed to active litigation. Indeed, there are times when the employee simply wants to be heard and is looking for non-monetary relief such as an apology or a letter of recommendation. Third, mediation minimizes adverse publicity for the client, as the mediation process is private and confidential. Fourth, successful mediation will minimize the work force disruption that is inevitably associated with mounting a full-scale defense. A side benefit of mediation is that you may gain insights into the plaintiff's theories. By the same token, of course, you will be providing similar information to the opposing side.

The motivations of clients involved in discrimination suits vary from case to case. Each employer is different, based on the size of the organization and the management level involved. Consistent among employers is the aversion to setting a bad precedent by settling a case, along with the desire

to keep the terms of settlement agreements confidential so as not to encourage other employees to file similar claims. Clients' concerns about setting bad precedent have some merit because, even with a confidentiality clause, settlement of a discrimination suit can leak. However, the cost of defending a discrimination suit can be disproportionate to the amount of money the employee may be seeking to settle the matter. Consider settlement options as a purely business decision, and do a cost and risk analysis to determine how to resolve the matter. To reduce the risk of disclosure of information concerning the settlement, it is important that settlement agreements, where allowed by applicable law, contain a provision that provides for liquidated damages as a penalty against employees for breaching the confidentiality provision.

Needless to say, your client will expect you to lay out your thoughts on its chances for success. I always begin this process by explaining the law to the client. Even if you are dealing with sophisticated businesspeople, do not assume they know the legal requirements related to discrimination allegations. Then I relate the evidence to the law. This can be tricky and can call for your most diplomatic style when senior management or human resources is accused of doing something improper. In this regard, I emphasize that I am not making personal judgments about them, but am only trying to predict the likely result if the litigation continues. I always put this analysis in writing. Occasionally managers do not like to hear bad news and may simply not hear what you are saying. If the case continues and an unfortunate result occurs, I want to be protected from any claim that I did not warn the client.

Raising the possibility of settlement, even when it may be very much in the client's overall best interest, can be a difficult situation for an attorney. Give the client all the options while explaining that, should it choose not to settle, you would aggressively defend the matter. You do not want to appear that you are just looking to close out files or that you do not believe in the client. Be open and honest with the client with regard to the strengths and weaknesses of the case. Certain weaknesses, such as lack of documentation, make settlement more desirable. Clients may find it hard to accept settlement because they feel it is an admission of liability. The settlement agreement should be structured so neither party is admitting any wrongdoing. Clients often worry about confidentiality, specifically that

other employees will find out the matter was settled. A confidentiality provision, as well as a non-disparagement provision, can be placed in the settlement agreement to keep the employee from discussing with third persons, particularly other employees, the issues related to the suit and the terms of the settlement, and to prohibit disparaging remarks by the employee about the employer. But because it can be hard to prove if and how others found out about a settlement, it can be a difficult provision to enforce. Throughout the case, counsel should memorialize their assessments of the case and settlement advice in writing.

Another issue that can arise during settlement that can be problematic for a client is whether to rehire the employee as a condition of settlement. Sometimes the employee is not looking for monetary compensation as much as they are looking for their job back. Rehires can be risky because of future potential retaliation claims. If the client were to rehire the employee and then try to discipline or terminate the employee in the future, he or she could claim the employer is retaliating against the employee because he or she filed a prior discrimination complaint. I often advise against rehiring because of this retaliation issue. Conversely, there is a distinct advantage to setting forth an offer of reemployment. If the employer sets forth an unconditional offer of reemployment on the same terms and conditions of prior employment, should the employee choose not to accept, the employee's damages are "cut off" as of that date. If you do not think the employee will accept an offer to return to work, this may be a calculated risk worth taking. Such an offer must be in writing and without conditions.

Another aspect of a settlement that can be hard for a client to accept is offering an apology. Sometimes being creative will work here. If it is important to a plaintiff, try to find a way for the client to apologize without admitting any wrongdoing. Often the employee wants to be heard and to feel that his or her points are valid. However, apologies can be dangerous if there is related litigation pending by that employee or another employee. As to other settlement issues, employers are often quite amenable to settlements regarding anti-discrimination training for managers and sometimes even for the entire work force. Employers are also amenable to discussing and considering outplacement services for the employee, drafting a neutral letter of reference, reimbursing for certification for course work that was already in progress prior to termination, and/or extending health

care coverage for a certain period. Consider what is important to that particular employee. For example, has the employee already secured new employment? If not, outplacement services may be valuable to the employee. Had the employee previously elected coverage under the client's health care plan but is now without insurance coverage because of a termination of employment? If so, offering reimbursement of the health care premium for a certain period may facilitate a settlement.

The Agency Determination

The agency will provide formal notice to the parties of whether there is merit to the charge—what is commonly referred to as a "cause" or "no cause" finding. Sometimes if the agency finds cause, there will be conciliation or another chance to mediate the matter. In some states, this is mandatory. Otherwise, wait for the agency to issue the right-to-sue letter. In most states, a right-to-sue notice must be issued by the state agency before the charging party can file suit in state court, and federal law provides that a right-to-sue letter from the EEOC is a prerequisite to filing suit in federal court.

Usually the employee files his or her charge simultaneously with the state agency and the EEOC. You may get the state's decision first, but if the employee wants to continue to pursue the case in federal court, he or she needs to either request a federal right-to-sue letter or wait for the EEOC to review and issue its own right-to-sue letter. If the matter has been pending for more than 180 days and the EEOC has not made a decision, the parties or counsel can request that the right-to-sue letter be issued prior to the conclusion of the investigation. As employer's counsel, I normally do not request such letters at any point, because claimants sometimes become disinterested as time passes. Also, whenever possible, I prefer to know the agency's opinion of the case before proceeding to litigation.

Commencement of the Suit

Once the employee receives the right-to-sue letter from the EEOC, they have ninety days to file a complaint in federal court. Similar limitations apply in most state proceedings. After a complaint is filed, you need to decide whether to respond with an answer or a motion to dismiss.

Typically, an answer is filed if the employee has filed a timely complaint with the court and is only alleging matters contained within the charge. There are occasions, however, when you should consider a motion to dismiss. For example, if the employee did not file the charge or complaint in a timely manner, or the plaintiff filed suit against a supervisor or manager in his or her individual capacity (since there usually is no individual liability for employees acting within the scope of their employment under the discrimination statutes), you will most likely have grounds for a successful motion to dismiss.

I advise sending the pertinent investigating agencies a Freedom of Information Act request after suit has been filed. This will enable you to obtain a copy of the agency's investigative file, which likely includes written statements by the plaintiff, that you would not have had access to previously.

The Scheduling Order

The next step involves developing the scheduling order with opposing counsel. The individual federal district courts have all adopted local rules, which you should consult when preparing the scheduling order. Further, many, if not most, judges have forms they prefer (or require) for scheduling orders. These are frequently posted on the court's Web site. In all cases, you and opposing counsel will need to negotiate the scope of discovery as well as key deadlines for the case. Before negotiating a scheduling order, identify key witnesses and decide which you will likely want to depose. You will usually want to depose the plaintiff and probably the witnesses the plaintiff has identified. Others, such as health care providers and family members, are sometimes deposed. I rarely depose my client's employees unless I have reason to believe they will be hostile or unavailable for trial. Keep in mind while planning discovery that the discovery process is expensive. It is important to involve the client in discovery decisions and obtain their input on whether the benefits of a particular deposition outweigh its costs.

Make sure you leave sufficient time in the scheduling order for consideration of a motion for summary judgment to be decided prior to trial. In the ideal world, you want to avoid your client being caught in the position of having to pay for trial preparation when there is a potentially

case dispositive motion for summary judgment pending. As a practical matter, this is often difficult to do. In any event, you should try, when permitted by the court, to build in at least several months between the filing of summary judgment briefs and the pre-trial conference with the court.

The Discovery Process

The next major phase is discovery, which includes written discovery, depositions, and sometimes a medical examination of the plaintiff. This is the stage where you gather information from the other side, and vice versa. First, you will need to serve some basic written discovery. This would include interrogatories, requests for production, and requests for admissions. Document requests should be as detailed as necessary to gather information about the plaintiff's claim. The key is to identify the documents to be produced with sufficient particularity. For example, a request for "all documents relevant to this suit" is not sufficiently precise and will not survive an objection from your opponent. On the other hand, a request for "all complaints made to your supervisor" is fine. Interrogatories are written questions that must be answered in writing and under oath by your opponent. This is an ideal vehicle for obtaining background information. I do not advise sending the plaintiff several detailed written interrogatories about the claims in advance, because the plaintiff's attorney usually prepares the document, and in my experience, you will only receive in response the attorney's characterization of the events, rather than that of the plaintiff. Once you have received the plaintiff's responses, you can subpoena records from relevant third parties, such as other employers and health care providers. You are also free to send follow-up requests for production and interrogatories, although all federal courts and most state courts limit the number of interrogatories you can serve. Armed with the information you have obtained, you can now prepare for depositions.

Whenever possible, the plaintiff's deposition should be taken prior to any depositions of the defense witnesses. This serves two purposes. First, it limits the ability of the employee to tailor his or her responses to other persons' recollections. Second, it provides you with some idea of where to focus preparation of your own witnesses. Also, this will give your witnesses time to go back to documents and other references to determine whether

they dispute the statements made by the employee and how they intend to prove such.

Make sure your own witnesses are thoroughly prepared. Explain to your witnesses the role of the court reporter, particularly the fact that the court reporter will transcribe every word that is spoken during the deposition. Give your witnesses a basic overview of the case and their role in telling your client's position. Show your witnesses, if appropriate, the key documents in the case. Remind your witnesses that the deposition proceeds in a question-and-answer format and that he or she should avoid being confrontational with the examiner. Perhaps most importantly, advise your witnesses to avoid volunteering information not called for by the question. Also, explain your role in the deposition and the purpose of objections. I also recommend having someone from the company attend all the depositions as the client representative.

In many cases, you will need an expert witness. In discrimination suits related to a disability, it is common to use experts, particularly medical experts who can help the jury understand the disability and whether it substantially limits a major life activity as required by the pertinent statute. Economists are often used as experts in discrimination suits to provide analysis on back and front pay and benefits. Defense counsel may also choose to utilize a labor market expert to try to show available jobs in the pertinent labor market that the plaintiff could have obtained if he or she had actively tried to mitigate damages. Whenever you plan to use an expert at trial, you and the expert will need to prepare a report and provide it to the other side. The contents of this report are set forth in Rule 26 of the Federal Rules of Civil Procedure, which is often supplemented by local rules. Suffice it to say that this report must be as complete as possible. Most judges take the point of view that the expert cannot offer opinions at trial that are not thoroughly and explicitly set out in his or her report.

Motions for Summary Judgment

At the conclusion of discovery, consider a motion for summary judgment. The rules allow the court to grant summary judgment, and thus terminate the case short of trial, when there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law based on the

undisputed facts. Typically, motions for summary judgment are accompanied by a brief and supported by deposition testimony, exhibits, and affidavits. The plaintiff will also have the opportunity to make similar filings in opposition to your motion. Almost all plaintiffs will focus their response on trying to show there is a genuine dispute of a material fact. The court will first scrutinize the record to determine whether there is a genuine dispute of any material fact. If it finds none, it will next determine whether, based on the undisputed facts, your client is entitled to judgment as a matter of law.

Summary judgment, in an appropriate case, can be an effective tool. But courts are often reluctant to grant these motions because appellate courts are famous for finding a genuine dispute of a material fact. Consequently, use this tool judiciously, but do not hesitate to use it when you feel you have a good case. A small minority of litigators advocate filing a motion for summary judgment in almost every case to "educate the judge." Do not fall into this trap. The judge will immediately recognize the motion for what it is, and you will have (1) incurred the judge's enmity, (2) wasted your client's money, and (3) provided a nice roadmap for your opponent.

Trial Preparation

The vast majority of employment cases never go to trial, because of a dispositive motion, dismissal for failure to prosecute, or settlement.[3] You cannot wait, however, to begin your trial preparation until you see whether the plaintiff's claim will be dismissed or settled. Rather, trial preparation begins almost from the day your client is served with the complaint. All successful litigators, including those who litigate employment discrimination cases, use some form of a trial notebook from the very start of a case. There are probably a thousand different ways to organize and maintain a trial notebook, but they all have at least a common thread—they all contain a section that lists the facts needed to be proven and, for each fact listed, an identification of which exhibits and witnesses will be used to prove that fact. For example, assume you had a case in which an employee was disciplined for abusing the policy on smoking breaks. In all likelihood, one

[3] With that said, however, according to recent federal judicial statistics, the highest percentage of cases that go to trial are classified as "civil rights—employment."

of the facts you would want to prove is that the plaintiff had notice of the policy. Your trial notebook may contain the notation that you will use (1) the written policy, (2) the testimony of the supervisor who distributed the policy, (3) the testimony of an employee similarly situated to the plaintiff, and (4) the testimony of the plaintiff to prove the plaintiff had knowledge of the policy. It is essential that you keep your trial notebook, in whatever form you use, up to date. All of us with busy practices are, when forced with pressing immediate demands, tempted to put off ongoing projects such as maintaining the trial notebook. But if you do, your trial notebook will quickly lose its utility and your defense will be awash in disorganization.

As trial approaches, you will need to prepare your direct and cross-examinations. Reference to your trial notebook will quickly enable you to identify the persons you will need to call as witnesses, and it will provide you with a list of the topics you will need to cover with each witness. Now that you have identified the witnesses you will call and the topics on which you will examine them, you are ready to prepare their examinations. I generally do not write out questions, because reading them will soon lull the jury or judge to sleep. Rather, I find that a two- or three-word phrase in an outline is sufficient to remind me of the question I want to ask, and it allows me to conduct a more natural, free-flowing examination. The one exception to my practice of not writing out questions is when it is important to have a question precisely worded. In those few instances, I will go ahead and write it out.

Be aware of the anxiety trial causes for most witnesses. You will find that few, if any, of your employee witnesses have ever testified in court, and many of them will have the jitters. To reduce this anxiety, I usually rehearse my direct examination with my witnesses. I make certain they understand that this is not so they learn a script, but rather so they have some idea what questions I will ask them. Aside from reducing anxiety, this process will confirm for you the employee's anticipated testimony. It is usually worthwhile to take the employees to the courtroom before trial so they can have some idea what to expect.

In addition to rehearsing your direct examinations, you should always rehearse your opening statement. I rehearse mine in front of non-lawyer

colleagues and ask them to critique me. The purpose is to see if they understand my client's story and theories. I try to avoid using lawyers in this exercise. All lawyers, myself included, sometimes lapse into legal jargon, and a lawyer "practice juror" may not pick up on this whereas a layperson will immediately spot it.

As part of your trial preparation, you may find it necessary to file one or more motions *in limine*. These motions, which are typically filed shortly before the pre-trial conference, usually seek to exclude evidence from trial. For example, if you believe your opponent will seek to introduce evidence of alleged discriminatory conduct that is unrelated to your case, you may want to file a motion *in limine* seeking to exclude it. Be aware that local rules or individual judges may limit the number and length of motions *in limine*.

Virtually all courts require the parties to submit a jointly prepared pre-trial order. Although the required contents of the pre-trial order vary from jurisdiction to jurisdiction, trials can be a logistical nightmare. Few employers can afford to have a handful of employees sit for hours in a courthouse waiting for their turn to testify. The best way to handle this is to have a client representative responsible for shuttling witnesses back and forth to the courtroom from your client's place of business. If you use such a system, do not wait until it is too late to summon a witness. Both judges and juries will resent you if you do not have a witness ready and they are forced to wait. Therefore, err on the side of having a witness wait too long in the courthouse hallway. You will also need a representative of the client to attend trial every day. It need not be someone who will actually testify. I usually use my primary client contact for this purpose.

Addressing Key Challenges

You Are Hired after the Agency's Determination of a Cause or No Cause Finding of Discrimination

It is more difficult to defend a discrimination suit if you have been hired after the agency determination. Frequently an unrepresented client's investigation during the agency stage is inadequate, which will require you to go through the time-consuming process of reinventing the wheel. Another problem arises when the client has made an ill-advised statement in its position statement. As

mentioned earlier, those statements can come back to haunt the client during the litigation. Finally, a ruling that there is cause by the agency will usually embolden the plaintiff and make settlement more difficult and costly.

You Are Faced with Discrimination Claims by Multiple Employees

Another type of discrimination suit that is difficult to handle is one in which there are allegations of a hostile work environment or harassment by not only the employee involved in the case, but by other employees with the same supervisor. Find out at the outset whether these employees have filed internal or external complaints, and take the necessary steps to capture all of the available information so you understand the full scope of the issue. If an internal investigation of discrimination was never conducted, it is imperative that the company investigate the matter to determine if any inappropriate behavior occurred or is still occurring. If so, the client should take steps to promptly rectify the problem. Often this calls for removing the alleged offending employee from the complainant's work environment. An employer is in a much better position to defend a case in which it took prompt remedial measures once it discovered discrimination, as opposed to letting the discrimination continue. Some employers make the mistake of changing the terms and/or conditions of the victim's employment in an attempt to rectify the situation. However, this can arguably be viewed as retaliation, giving rise to potential liability. Overall, knowing the complete scope of claims and potential exposure is necessary for all strategic decisions in these potentially multi-employee cases.

Documentation in a Litigation Context

Documentation is very important in any discrimination suit. A jury will probably understand why an employee does not document every action, but the same is not true for employers who do not. Employers are generally perceived as having more resources and sophistication than the employee, and thus, jurors are sometimes inclined to believe that "if it wasn't documented, it didn't happen." Many supervisors complain that they are just too busy to document every issue, and some think they will be able to remember events or specific conduct later if needed. But absent sufficient documentation, many jurors are more likely to believe the employee than the supervisor. Conversely,

if the supervisor is testifying from even a basic summary document about the incident, the supervisor's credibility is heightened.

Many small employers and their supervisors simply have not been trained to produce sufficient documentation, and even large employers with well-trained supervisors make mistakes. For instance, supervisors often begin to document an employee's policy violations only after the supervisor realizes termination may be unavoidable. If litigation ensues, the defense would be much better had the supervisor documented incidents from the beginning, in addition to coaching and counseling and offering training to the employee. It is also beneficial to have had the employee sign an acknowledgement form in regards to counseling or disciplinary warnings. A lack of sufficient documentation does not mean the employer should simply give up and automatically settle the case, but it is a red flag that the employer should consider in making strategic decisions about defending the case. It is also important that the supervisors consistently monitored, coached, and documented all of their employees' performance issues and did not focus solely on one or two "problem" employees. Otherwise, the unequal treatment is likely to be viewed as discriminatory.

Inaccurate documentation is worse than no documentation at all. To minimize inaccuracies, supervisors should be encouraged to proofread their documentation. Another source of trouble is sugarcoated reports of bad performance and exaggerated good performance. Most individuals dislike criticizing others, and thus some have a tendency to be less than accurate in their assessment of employee performance. Not only is this unfair to the employer when making salary and promotion decisions, but it can cause major legal problems when it becomes necessary to terminate or discipline the employee.

Preventing Future Litigation

It is important to help the client with preventative efforts for avoiding additional exposure in the future. Remind managers and supervisors that coaching, counseling, documenting, and other disciplinary steps need to be done on a consistent, timely, and thorough basis. Disciplinary decisions made in the heat of the moment often result in litigation, so it is important that a supervisor or manager cool off before disciplining an employee. The supervisor

or manager should consider how he or she has disciplined other employees for the same or similar violations in the past. He or she should also consult with human resources during this process, as appropriate. A manager should consider providing training whenever possible to assist the employee in improving behavior and/or performance. Further, knowing when and how to document discipline, employee-related investigations, and other employee issues are equally important for all managers and human resources employees.

Human resources employees need to be trained to audit the discipline process. They should have a firm grasp of employment laws and be looking for areas of inconsistency among the discipline administered by managers, and finding ways to resolve such inconsistencies. Sometimes it is a matter of working with senior management to change the culture of the employer so the human resources department is given more prominence and control in the discipline process. Managers and human resources employees who fail to report complaints of discrimination, fail to respond to complaints, or fail to document major discipline issues should themselves be disciplined.

Anti-harassment training should be conducted or updated as necessary with focus on the complaint procedure. Supervisors and managers should be familiar with the various discrimination laws, as well as federal employment laws such as the Fair Labor Standards Act and the Family Medical Leave Act. If managers understand these laws, they can apply them more uniformly. If a company's managers are weak in this area or just too busy, at least train them to spot and refer possible issues to human resources or senior management. In any event, you normally would not want the manager handling the investigation. You need a more objective person, because often the manager played a key role in the alleged discriminatory actions or was too close to the individuals accused of the discriminatory treatment.

You may also want to counsel your client to update its anti-discrimination policy. A discrimination policy should include prohibition against sexual harassment and discrimination and all other forms of harassment and discrimination based on all of the protected classes. The discrimination policy should contain a detailed but easily understood complaint procedure. It is also advisable that the complaint procedure have an appeal process. Employees should be given names and phone numbers of the individuals they should contact.

A Final Word

Defending against discrimination claims from the frivolous to the meritorious can be very rewarding. Remember that any case, no matter how small it may seem, can have a significant impact on the career (and livelihood) of the alleged wrongdoer. Thus, from that individual's perspective, there is no such thing as a small employee discrimination case. That should be your perspective as well.

Jennifer C Jauffret is a director and member of the litigation department and labor and employment group. Her current practice focuses on representing a wide variety of corporate and business clients in labor and employment issues in Delaware and Pennsylvania. Her practice includes appearances before state and federal agencies and courts. She also provides employment advice on major corporate transactions and on general employee issues such as non-compete agreements and discipline and termination situations. She trains both managers and employees regarding compliance with employment laws.

Ms. Jauffret is a member of the labor and employment sections of the Delaware and American Bar Associations. She is also a member of the corporate counsel section of the Delaware State Bar Association and the St. Thomas More Society. Currently she serves as a member of the board of directors of Catholic Charities and is vice chair of the Delaware Chamber of Commerce's employee relations. Her current pro bono activities include assisting non-profit agencies with employment and personnel matters, assisting domestic violence victims with obtaining protection from abuse orders, and being a guardian to abused or neglected children who are in the care of the Delaware Division of Family Services.

Ms. Jauffret earned her B.S. in government from Cornell University and her J.D., magna cum laude, from Villanova School of Law. She is admitted to practice in Delaware, Pennsylvania, the U.S. District Court for the District of Delaware, the U.S. District Court for the Eastern District of Pennsylvania, the Third Circuit Court of Appeals, and the U.S. Supreme Court.

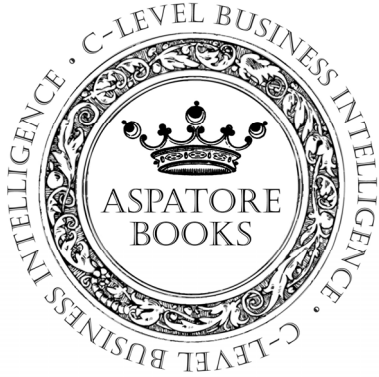
Acknowledgement: *The author thanks her colleague, Lori A. Brewington, Esquire for her invaluable assistance on this project.*

www.Aspatore.com

Aspatore Books is the largest and most exclusive publisher of C-Level executives (CEO, CFO, CTO, CMO, Partner) from the world's most respected companies and law firms. Aspatore annually publishes a select group of C-Level executives from the Global 1,000, top 250 law firms (Partners & Chairs), and other leading companies of all sizes. C-Level Business Intelligence™, as conceptualized and developed by Aspatore Books, provides professionals of all levels with proven business intelligence from industry insiders – direct and unfiltered insight from those who know it best – as opposed to third-party accounts offered by unknown authors and analysts. Aspatore Books is committed to publishing an innovative line of business and legal books, those which lay forth principles and offer insights that when employed, can have a direct financial impact on the reader's business objectives, whatever they may be. In essence, Aspatore publishes critical tools – need-to-read as opposed to nice-to-read books – for all business professionals.

Inside the Minds

The critically acclaimed *Inside the Minds* series provides readers of all levels with proven business intelligence from C-Level executives (CEO, CFO, CTO, CMO, Partner) from the world's most respected companies. Each chapter is comparable to a white paper or essay and is a future-oriented look at where an industry/profession/topic is heading and the most important issues for future success. Each author has been carefully chosen through an exhaustive selection process by the *Inside the Minds* editorial board to write a chapter for this book. *Inside the Minds* was conceived in order to give readers actual insights into the leading minds of business executives worldwide. Because so few books or other publications are actually written by executives in industry, *Inside the Minds* presents an unprecedented look at various industries and professions never before available.


C-LEVEL BUSINESS INTELLIGENCE •
C-LEVEL BUSINESS INTELLIGENCE •
ASPATORE
BOOKS