

About the Employment Legal Process

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I. DO I EVEN HAVE A CASE?

The administrative and legal process in employment cases is such a mystery. It can be very intimidating to the average person. It can leave you feeling alone and on the edge. But you are not alone.

Most people believe that once a lawsuit is filed, the next step is the trial. Not true! This is a myth generated by television and reinforced on an almost daily basis.

The reality is far different than what entertainment programming would have us believe. Indeed, litigation is not for the faint-hearted. It is often a lengthy process, and one in which many emotions are attached - especially if you have worked hard and dedicated yourself to your job and career, which so many wronged workers have. You must also think of the possible toll not only on you, but on your family, as well.

On the other hand, it takes a brave person to stand up for his or her rights, and to tell the bad employer, "You do not have a right to do this to me." Pursuing your rights to a final outcome can give you a sense of closure, sometimes a true sense of vindication. It also can deter a bad employer from harming other employees in the future.

It's important to remember, though, that litigation should not be used as a way of "revenge." If you have lost your job but have another job as good or better, you should really consider whether the costs and time involved in litigation are for you. Sometimes it's best to just move on with life.

TIP:

A good employment lawyer also acts as counselor, and can help you with these difficult decisions -- which may impact not only you, but also your family.

II. ADMINISTRATIVE CLAIMS - TO DO, OR NOT TO DO

A. Filing a Charge of Discrimination

Initially, you may consider filing a charge of discrimination with an administrative agency, such as the EEOC (Equal Employment Opportunity Commission) or the OCRC (Ohio Civil Rights Commission). There are some advantages to doing so, such as: 1) it doesn't cost anything to file, 2) it may provide "free discovery" if you later file litigation; and 3) often, the employer

(mistakenly) fails to have experienced employment counsel at this stage. On the other hand, there are some disadvantages.

First, you MUST first file an EEOC charge to preserve certain claims in federal court, including age, disability, sex, and some race claims. The charge must be filed within 300 days (in Ohio) of notice of the last or most recent discriminatory act. This preserves any federal claim you might later assert.

Second, EEOC/OCRC investigators are generally swamped with charges, and sometimes cannot devote sufficient time to investigating them, resulting in an adverse decision, even though your case may be viable. In a June 17 article in the Chicago Tribune, it was reported that due to drastic funding cuts, "the EEOC backlog rose 12 percent between 2004 and 2005, reaching 33,562 last year. The EEOC has lost 20 percent of its staff since 2001, when a hiring freeze was instituted, and it now faces budget reductions, with the Bush administration proposing to cut the agency's budget by \$4 million in 2007. All things considered, the EEOC's case backlog is expected to grow to nearly 48,000 by 2007."

Third, the EEOC and OCRC are generally limited in the types of remedies they can get for you (known as "make--whole" remedies, such as backpay). You generally cannot get compensatory damages, punitive damages, and the like.

Keep in mind that filing administrative charges with the EEOC or OCRC may have an adverse impact on later litigation, especially on state age-discrimination claims. On the other hand, if you intend to file a federal discrimination action, in most cases you are required to first file a claim with the EEOC (known as an indirect action) in order to preserve a federal direct action in federal court. It truly is a minefield. See our page on legal claims for more information on administrative charges, including deadlines.

WARNING

If you intend to file a state claim of age discrimination, always state on the EEOC charge that you are electing NOT to file with the OCRC. Otherwise, you will forfeit your right to go to state court. This snafu only affects age and not other claims.

Please seek information from an employment lawyer or administrative counselor prior to filing a charge! In many cases, an employment lawyer can file and represent you at these administrative actions for a lesser fee than that charged in litigation. It has been our experience that the EEOC/OCRC administrative case investigators devote more time and attention to charges that are filed by, and persons who are represented by, an attorney. Once the EEOC or OCRC has concluded its investigation, it will either issue a finding of probable cause or no probable cause (or it may state that it cannot proceed due to lack of time). If probable cause of discrimination is found, the agency will either schedule a conciliation or settlement attempt (often rejected by the employer). If a NPC is found, the agency will issue a "Right-to-Sue" letter, which allows 90 days from the date of receipt of the letter for the employee to file a federal discrimination claim.

If you are a federal employee, the deadline is shorter.

Note: Discrimination claims in state court are not affected by, and do not require, a right-to-sue letter or preliminary charge with either the EEOC or the OCRC. A state court has jurisdiction to hear both state and federal claims; federal courts have direct jurisdiction over federal and constitutional claims, and can elect to exercise supplemental jurisdiction over state claims.

Beware the procedural pitfalls: it's nice to combine actions for costs sake. However, federal claims filed in state court with state claims are subject to "removal" to federal court (including the state claims). On the other hand, because a federal court has "limited jurisdiction" over state claims, it may not elect to hear them, even if they are removed from state court and viable. (Yes, a mine-field!) State courts obey a body of different employment law than federal, although it tends to track federal employment and procedural law. Federal juries must give a unanimous verdict (in civil litigation, generally 8/8 jurors). State juries in Ohio can return a winning verdict of a majority (generally 6/8).

Instructions, EEOC Filing FAQs: http://www.eeoc.gov/charge/overview_charge_filing.html

III. WHAT ABOUT LITIGATION?

A. The Initial Consultation

When you contact a lawyer, you will generally be interviewed over the phone to determine whether a consultation with an attorney should be scheduled. This is called the "case intake." You may then be scheduled for a face-to-face consultation. At the consultation, you and the lawyer will discuss your situation and the lawyer will review any documents you have related to your potential claims. The initial consultation will generally last 1-2 hours. The lawyer will then counsel you on options and give his or her opinion as to the strengths and weaknesses of your case.

You can assist this process by checking the employer's website. Many will have a "client information form" or "intake sheet" that you can download, fill in and send back. **See Home Page.** Many of these sheets ask questions that may seem personal. This is normal and is required to get a true sense of your situation. As noted elsewhere, if litigation does go forward there will be a "discovery" period where the defendant wants personal information you're required to give, such as income tax returns, medical records (limited to job-relatedness or damages), social security number, police record, and other information. The lawyer is required by law to keep any information provided in a client information sheet confidential and privileged, forever.

It's important to note that just because one lawyer does not think you have a good case, this does not mean that another lawyer might find that you do. Lawyers, like anyone, can sometimes miss a potential claim. In employment litigation, especially, the law is constantly changing. In addition, some lawyers are simply not as creative or experienced enough to spot a potential case.

On the other hand, trust your common sense. If you are advised by one lawyer that your case is weak, and another lawyer tells you it's a multi-million-dollar winner, this should send up a red flag.

In fact, it's our opinion that no self-respecting lawyer will guarantee that you will win or that any case is worth "a million dollars." There are simply too many factors that go into litigation to warrant guarantees.

B. Preparation for Your Consultation

The initial consultation is one of the most crucial parts of the entire process. The meeting will be very involved and last approximately one to two hours. Your entire case, employment history, and discussion of potential claims, possible avenues, etc., will be explored. You want to be active during the consultation. Be prepared to be direct. Don't be afraid to ask questions. This is really key in employment cases. Employment is one of the most complicated areas of the law. In fact, it is so complicated that it is one of the few areas of the law that the State of Ohio has authorized lawyers to be "certified specialists." The lawyer you choose should really know his or her stuff.

TIP:

One of the questions you want to ask a potential employment lawyer is whether he or she is a certified specialist, and his or her experience in employment law.

Most importantly, you must be totally honest with the attorney. He or she is not your judge, but your advocate. In addition, anything you tell the lawyer in consultation is protected by attorney-client privilege, meaning that the lawyer cannot divulge it to anyone else. But the lawyer must have all the information relevant to the case to do the best job for you. If you withhold important information, have faith that it will come out later - often publicly introduced by the other side. In addition, most lawyers will withdraw from a case (demanding fees to date) where it is learned that a client lied or withheld vital information. However, experienced lawyers can often keep damaging or very sensitive information out of reach of the other side.

When you consult with an employment attorney, try to have your documents already organized, preferably in a three-ring binder. Organization can be either chronological or by subject, depending upon the nature of the claims. For example, for harassment claims, chronological order would be best since it is necessary to prove that the harassment was severe or pervasive. For discharge cases, all documents leading up to and including the discharge should be grouped together.

Keep in mind that just because you are scheduled for a consultation does not mean that the law firm will take your case - though it is an indication that your case appears to have merit. For example, if your potential damages are nominal, it is unrealistic and not beneficial to either you or the attorney to file a lawsuit. The same is true if the employer is so small that even if an award were achieved that the likelihood of collection is minimal. In addition, if it is determined by the lawyer that the employer had good grounds for the termination, or there are problems in proving a case (often through no fault of your own), the case probably should not be filed. These are just

some of the factors that go into your decision to file a case, or the law firm's decision to accept a case.

On the other hand, most lawyers, are generally willing to write a letter or pursue a charge in lieu of litigation for a smaller fee, if it is determined that litigation may not be the best alternative. The employment lawyer is there to be your counselor and help you choose which is the best way to deal with your employment predicament.

At the end of the consultation, you and the consulting attorney will have reached some decisions about what to do next. Sometimes (particularly if you are still working), the attorney will request that you get additional information, and give you other advice, then schedule you to return at a later date (generally for no additional fee). If both you and the lawyer or law firm decide to enter an attorney-client relationship, the "business end" will also be dealt with at the consultation: the fee and cost agreement.

C. The Fee/Cost Agreement

a. Attorney Fees

Unless you are merely requesting a letter or administrative representation, most employment cases will be taken on a "contingency" arrangement. This means that you pay very little up front, and do not owe any other attorney fees unless you prevail in your case. (Note: This does not include costs of litigation, for which the client is generally responsible.)

Most employment lawyers will require an initial fee retainer to get the case initially filed and going. The retainer helps offset the lawyer's huge overhead costs and the sheer length that employment cases -- which tend to be complex - take to prosecute to trial or settlement. Most retainers are refundable if you prevail over a certain set amount. See Thompson & Bishop's Fee Structure, Home Page.

b. The Fee Agreement

All contingency fee agreements in Ohio must be written and signed by both parties. If the lawyer wants you to do a contingency on a "hand-shake" deal, go elsewhere; this simply is not permitted. In addition, the agreement will likely be several pages in length, spelling out items such as basis for withdrawal, how fees are calculated, which claims are covered by the agreement, what protections the client has, schedule for records destruction after completion of the case, etc. Don't shy away from a detailed agreement; often it is required to comply with law and may provide as many protections for you as for your lawyer. The single-sheet agreement is likely inadequate to address the potential issues that may arise in the litigation process.

Be sure to read the agreement closely, and don't be afraid to ask for clarification on any issues. It is often a good idea to take the fee agreement home and go over it with your spouse or family, particularly if you are unsure of anything pertaining to a potential suit. Steer clear of any lawyer

who tries to force you into signing an agreement before you are ready, or an agreement that has no real substance to it.

TIP:

Ask the lawyer at the initial consultation to give you a rough estimate of the costs, method of payment, and whether credit cards are accepted.

c. Litigation/Administrative Costs

Most employment lawyers will request a cost-retainer fee against which such costs of litigation will be billed. Unlike what is often portrayed in TV commercials, in Ohio, a lawyer cannot ethically pay the litigation costs because he or she cannot take a business interest in your litigation. However, a good lawyer knows how to keep such costs to a minimum and can work with you on streamlining the case.

D. Filing the Lawsuit

A lawsuit is initiated by filing a complaint with the clerk of courts. This is called a pleading, and sets out some of the factual bases underlying your claims, as well as the applicable laws and statutes under

which your claims fall. Any time a complaint is filed, filing fees must be paid at that time to the clerk of the court. The person/entity filing the complaint is called as the "plaintiff;" the person/entity being sued is called the "defendant." The burden of proof as to any claim is almost always upon the plaintiff.

After the complaint is filed, the defendant has a certain period of time to respond by filing an answer. This is a pleading where the defendant either admits or denies the factual allegations and sets out any affirmative defenses it might have. Affirmative defenses are those defenses where the defendant -- not the plaintiff -- has the burden of proof.

It generally takes about 2-3 months for all the pleadings to be filed.

E. The Status Conference

Once the pleadings are all filed, the Court will schedule a status conference. (Some courts move more rapidly than other ones - those with especially heavy dockets, for example.) This conference may take a while, and you are generally required to be present. The judge will probably invite you and the other side into his or her chambers (a pleasant room, rather than a large, intimidating courtroom). The judge will ask about each side's case and try to get a feel for it. Don't be surprised if the judge brings up the issue of settlement at that time. A good court will

always be ready to discuss and even push settlement with the parties, both early and throughout the course of the case.

F. Discovery and the Long, Long Wait

One of the biggest problems both plaintiffs and defendants have is that there are long periods of silence, when it seems no one is working on the case. Waiting for that trial, or for a ruling, can seem like it lasts forever. This is the nature of employment litigation: it tends to have "ups," where there is a flurry of

activity, and it tends to have "downs," where nothing seems to be happening. This is typical, though sometimes difficult to endure, especially where you have a lot of emotional and/or monetary worries

associated with it (e.g., you still can't get another job). Try to be patient; don't call the lawyer constantly to check on the status. A good lawyer will immediately apprise you of any developments in your case.

TIP:

Many court dockets are online, so you can track where the case stands.

Once the pleadings have been filed, the long, and often difficult discovery process begins. Discovery is where the parties obtain more information about the claims and the defenses. This is where things like interrogatories, requests for production of documents, requests for admission and depositions occur. Depending upon the complexity of the case and/or the court, the discovery period can last a few short months to over a year. Parties may get into fights that require court intervention about what is "discoverable" and what is not. It is all part of the trial process.

During discovery, you will be deposed by the other side, and so will many of your witnesses. In addition, your lawyer will want to take depositions of the other party and his/her/its witnesses. This can be costly, but a good lawyer can generally streamline depositions and other discovery costs.

If you are interested in seeing a deposition of defendants on behalf of a plaintiff, you can access some video depositions at <http://www.pleban.org>; click on "DEFENDANTS." (The tapes take a minute or so to load; beginnings of the depositions cover preliminary things, then move to the heart of the case.) The case is *Karen Pleban v. Lori Kokowski* and other defendants of Lorain County, including the Commissioners. (The case has since settled.) You are being routed to Ms. Pleban's website. The records are public records of public officials, which are also on file in federal court.

This gives an idea of what a deposition -- and for that matter, cross-examination at trial -- is like. (Don't worry about your own deposition! The same skill will go into preparation for your deposition. Your prep will be both thorough and lengthy. You will know exactly what to do and how to act. The trick to a deposition is to tell the truth. Simple.)

COMING SOON: "Preparing for your deposition; a step-by-step guide."

G. Summary Judgment: Attempted End-Run

Once discovery has been completed, the employer ordinarily files what is known as a motion for summary judgment. This is an attempt to get your case thrown out by the judge and escape going to trial. However, employees can also use such motions to narrow issues or have the employer found liable as a matter of law.

The motion for summary judgment is accompanied by evidence, such as deposition transcripts, documents and affidavits (sworn, written declarations of witnesses or parties). This is why good discovery is so all-important. The party at whom the motion is targeted (the employee, generally) must then respond to the motion, with the same type of evidence. This is why good discovery is so vital.

TIP:

The more experienced and successful your lawyer is in this area, the more likely the judge will be familiar with the lawyer and his or her knowledge and reputation

If the court denies the motion, the case is set for trial. If the motion is granted, the next step for the plaintiff is appeal. As with the discovery period, it often takes a court a long time to rule on the motion. Keep in mind that many more cases are dismissed on summary judgment than get to trial. Therefore, having an experienced lawyer provides you additional protection from dismissal.

H. What We've All Waited for: The Trial

If the case is not otherwise dismissed or summary judgment granted, then it's on to trial! (Finally!) Trial is not the show that we have become accustomed to seeing in the media. Trials can last anywhere from a few days to several weeks, depending upon the claims and their complexity. Trial work is an art-form and no two trials are the same, just as no two cases are the same. It involves a great deal of preparation, long hours, stress, and constant review of evidence. The lawyer will work extensively with you and potential witnesses. Documents and evidence will be viewed and reviewed several times. You will need to devote significant time before trial to ensure that the best evidence and story are put forward to the jury. A good lawyer will ensure that you are well-prepared and "ready to face the enemy."

Be aware, as well, that both trials and preparations for trial can be very taxing emotionally - and physically. You have waited perhaps a year and a half, or even longer, for the case to get this far. For much of the litigation period so far, you have been waiting. . . waiting. . . It seems like it may never end. Suddenly, your case springs to life before trial. It is exciting, but can also be emotionally draining. You want to have all the emotional support you can get at this stage.

Regardless, trials always have uncertain results; nothing is certain once a case goes to trial. In addition, even if you win, the other party may appeal, dragging the case out even further and risking a reversal. This is why most strong cases settle before trial. (Note: this is not necessarily the case with public employers.).

How your case goes depends much more upon the jury pool from which the jury is selected than people realize. Our experience is that most juries take their jobs very seriously and will try to do the right thing, and apply the law without bias. Keep in mind, however, that jurors are people and carry inward biases and beliefs that may influence them without their even being aware of it. If you have a decent jury pool, an experienced lawyer will make full use of "voir dire" (questioning the jury prior to trial) to try to ferret out people with adverse biases.

Additional considerations in how the case comes out are what the judge decides to let the jury see and hear; some relevant evidence will likely be kept out for one reason or another. Most judges try hard to be fair. But, just as with juries, they, too, are people with inner beliefs and personal views of the world and the legal system.

In order to win in federal court, you must obtain a unanimous jury verdict (generally 8 jurors). In Ohio courts, 6 out of 8 jurors must agree to reach a verdict.

I. Post-trial and Appeal

Trial usually is not the end of the matter. After the trial, the losing party will file a series of motions, seeking dismissal by the court - notwithstanding the jury's verdict - or a new trial based on allegations that there were errors in the trial itself. This may take another several months.

Depending on the judge's ruling, a party may file an appeal of the case. The appeal generally requires a separate fee retainer - flat rate. Your attorney may work out a payment schedule or permit credit-card payment. After a lengthy period and several briefs by the opposing parties, the appeal will be scheduled for oral argument, where the lawyers argue your case in front of a 3-judge panel of appellate judges. Both federal and state judges tend to be distinguished former legal-practitioners or lower-court judges, who are well-versed in the law. (There are exceptions to every rule, of course.) We encourage clients to attend the oral arguments. It not only looks to the judges like you're interested in your case, it also gives them a face to go with the facts, and gives you a sense of the process in action. Most plaintiffs find the oral argument to be interesting and well worth attending.

Following oral argument, you will have another long waiting period while the judges decide your case (among hundreds of others - hence, the wait). They will issue a written decision. Some courts permit a petition for re-hearing (e.g., our federal Sixth Circuit), some do not.

Following the appeal, the losing party may choose to try to appeal to the highest court (state: Ohio Supreme Court; federal: Supreme Court of the United States). Needless to say, it is very difficult to get a case heard in these hallowed courts. They will only grant "*certiorari*" (agreement to hear the case) in extraordinary circumstances, such as where the issue is of great public interest, a pressing issue, or if there are conflicting decisions of law within the court's jurisdiction. Most cases just don't fit the certiorari bill. However, with fair winds and good lawyers, some do – and you will be making history.

III. CONCLUSION

While the legal process may seem daunting, it need not be. The key is to have a good case and an experienced lawyer. This can take you a long way in the process of pursuing your rights through litigation or administrative avenues.

May the wind be always at your back!