

What is Employment Litigation Like?

Before you can decide whether to file a lawsuit, you need to understand your options and the relative pros and cons of each. This requires at least a basic understanding of how litigation works. When litigation is the preferable or only option, our experience is that the clients who are the most satisfied are those who are informed of the process and who have realistic expectations.

What potential clients *think* they know about litigation sometimes comes from movies and television shows where a conflict erupts and is resolved in very short order, but with lots of drama (usually centered on the lawyers and not the litigants). As effective as litigation can be, it is not a quick process and it typically involves little drama.

First, Understand What Your Claims Would Be and What Relief They Provide

Most of this piece is devoted to the process of pre-litigation and litigation. Before you decide to sue someone, however, it also is important to understand the substantive nature of your legal claims and what relief they may provide. Without an understanding of the remedies available in litigation, it is impossible to assess whether litigation will help you achieve your goals.

A lawsuit cannot simply seek recovery for any harm you feel that you incurred from the wrongdoing of the other side. Lawsuits must be presented in terms of *causes of action* or *claims* that are recognized in the law as being grounds to sue. Claims or causes of action are made up of specific *elements* (a set of facts) that must be proven in order to win. These elements are established in the law, and the number of claims or causes of action recognized in the law are specific and limited. They do not begin to cover all of the perceived injustice that occurs in the workplace.

When wrongdoing involves a recognized legal claim or cause of action, lawyers and judges refer to it as being *actionable*. In the employment context, for example, there is no claim simply for "unfair termination" or "favoritism by a supervisor." These are not considered to be actionable. "Wrongful discharge in violation of public policy," and "discrimination on the basis of gender," however, are examples of specific, recognized claims that are actionable if there is sufficient evidence to support each element of the claim.

Once you understand what legal claims can be raised, you should next make sure you understand what damages you may obtain through those claims. Not all legal claims provide a remedy for all of the harm caused. For example, when an employer unjustifiably withholds wages owed, the Payment of Wages Law provides for recovery of those wages, interest, and possibly attorney fees and treble (triple) damages. But that particular claim does not provide relief for the

emotional distress that often accompanies the economic hardship of not being paid. And while everyone hears about (and wants to collect) "punitive damages," not every legal claim provides for them. Before deciding to file suit, you should have a good understanding as to: (1) what specific legal claims are going to be raised; (2) what kind of relief those claims may provide; and (3) the likelihood of obtaining those forms of relief.

Can You Go Directly to Court?

You cannot always immediately file employment cases in court. Employment cases proceed on different paths depending on the nature of the claims. Some employment disputes can begin with a lawsuit, and others must first be presented to a government agency.

Claims of discrimination or retaliation based on age, sex, religion, or national origin, for example, must first be presented through a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"). Claims of race discrimination or retaliation may go through the EEOC, but also may proceed directly to court. Unfortunately, discrimination claims at the EEOC move very slowly. Age discrimination claims can proceed to court after they have been pending at the EEOC for 60 days. For other types of discrimination cases before the EEOC, you cannot sue in court until the EEOC concludes an investigation, makes a determination, and issues a Notice of Right to Sue.

Other types of employment claims, such as wage and hour disputes, claims arising under state law, and claims under the Family and Medical Leave Act ("FMLA"), may proceed immediately to court.

Differences Between State and Federal Court

Once a case can be presented to a court, the next major factor that will impact the length of litigation is whether the case proceeds in state court or federal court. Employment cases can be filed in federal court (or a defendant can have them transferred from state court to federal court) if you either: (1) raise a claim based on federal law; or (2) the defendants in the case are all citizens of a state other than your state and the amount you are seeking is greater than \$75,000. For example, if you sue an employer for age discrimination, which is based on a federal statute, the case typically will end up in federal court. If, however, you sue a local company for failure to pay commissions (typically a state law claim), your case will more likely end up in state court.

The procedure for cases in federal court is governed by a scheduling order under which deadlines are set for various aspects of the case. The deadlines are established by the court and the attorneys based on such factors as the complexity of the case and the amount of *discovery* (explained below) that must

be conducted. Cases in state court usually do not have a scheduling order. They eventually are called for trial in the order in which they were filed.

Starting the Lawsuit

Regardless of whether the case is in state or federal court, a case begins with the filing and service of the *complaint* by the plaintiff. A complaint: (1) summarizes the underlying facts of the dispute; (2) sets out the specific causes of action (explained above) upon which the suit is based; and (3) identifies the type (and sometimes amount) of damages sought.

Once a defendant is served with a complaint, it must file a response with the court. Defendants respond by filing an *answer* (responding to each paragraph of a complaint) and/or a *motion to dismiss* one or more of the claims. The time for responding to a complaint is either twenty days (federal court) or thirty days (state court). It is customary, however, to extend this deadline.

Discovery

After the pleadings (the complaint and the answer) are finalized, the parties engage in *discovery*. Discovery is the process by which parties obtain information and evidence from each other. Discovery also can be obtained from third parties (persons and entities that are not part of the lawsuit) through the subpoena process. The parties serve each other with *interrogatories*, which are written questions to be answered by the opposing party. Parties also serve each other with *requests for production* to obtain copies of documents that pertain to the case. Perhaps the most important aspect of discovery is the taking of *depositions*. A deposition is simply where attorneys question witnesses under oath before a court reporter, usually in a conference room at the office of one of the attorneys. The testimony provided during these sessions is used to present motions to the court and to prepare for trial.

The discovery process can seem like an eternity. It is common for litigants to become impatient and frustrated during this phase of litigation. One comment litigants often make after the case is pending for some time is that the lawyers are "just dragging everything out." That is not what is going on. Cases have to wait their turn in line with all of the other cases with which the court is dealing. Your case will not be tried any sooner if your attorney chooses to not engage in detailed discovery. But without discovery, the chances of prevailing decrease significantly for the plaintiff.

Many clients also have reported that they have been told "the company has lots of lawyers and they will just smother us in court." This does not happen. It simply does not matter how many lawyers a company chooses to pay. We have had cases with numerous lawyers representing the other side, and we have had the same type of case where only one lawyer represents the other side (often

more effectively than when a team of lawyers is used). The only real difference is the amount of money the company spends. Perhaps spending large amounts on a defense "team" impresses them or gives them comfort, but it's nothing for you to worry about in terms of whether you should sue. It certainly has no impact on whether you actually prevail.

Motions

After discovery, many defendants will bring a *summary judgment motion*, arguing that the evidence obtained during discovery does not show that the plaintiff's rights were violated as to some or all of the claims. In federal court, this typically involves the filing of extensive legal *briefs* (documents reciting the evidence and applicable law for the court). These motions can take up to six months to resolve. The wait associated with this process also is particularly aggravating for plaintiffs, who understandably wonder why they have to wait so long when it would be quicker to simply try the case. To understand why, you have to understand litigation from the court's perspective.

Your case is one of many pending before the court. There are, unfortunately, too many pending cases that do not merit a trial and should never have been filed. This is either because the law does not provide a remedy for a particular situation or because, even when there is a legal right at issue, there is not enough evidence to support a claim. When a judge decides to schedule a trial, it requires the time and undivided attention not only of the judge (who has to stop work on other cases), but also of his or her law clerk, personnel from the clerk of court's office, a court reporter, court security officers, and twelve jurors, who have to disrupt their own lives. A court is not going to schedule a trial, incur all of this expense, and inconvenience all of these people just because somebody filed a lawsuit and wants a jury to hear his or her story. The judge must be convinced that there are real legal rights at issue and that there is enough evidence to warrant a trial. The purpose of pre-trial motions is to weed out cases and claims that lack merit. While that may appear to slow things down, the process actually clears the way for the trial of cases and claims that involve legitimate disputes.

Mediation

Another stop along the way is *mediation*. Mediation is a settlement conference attended by the parties and their attorneys. Mediation is conducted by a neutral mediator (often another lawyer with expertise in the area but no connection to the case or parties). Parties are required to mediate almost all cases, although when they do so is a decision they make jointly depending on whether they believe that early or later mediation is in their best interest. Mediation has become extremely popular with litigants. When the parties prepare well and are realistic, mediation resolves most cases.

Trial: Some Realities

When cases do not resolve and all motions have been ruled on, the case is finally ready for trial. Although this is the part of the case with which most everyone has some familiarity, civil trials typically are very different from what most litigants expect. Television and the movies would have you believe that litigation involves dramatic and unpredictable trial testimony before a packed courtroom, concluding with the suspenseful reading of a verdict accompanied by a dramatic musical background and a throng of cameras and reporters screaming questions to the victorious plaintiff. Such depictions of trial make for good drama, but they are completely unrealistic.

First, rarely are there big surprises at trial in terms of the evidence. Trial testimony is usually predictable because, during discovery (described above), the parties already have taken sworn depositions of the key witnesses and know what they are going to say. Nobody, except the jury, goes to a trial to find out for the first time what the witnesses are going to say. Likewise, the parties have already exchanged all of the relevant documents in discovery and pre-marked them as exhibits so each party already knows the evidence the other party will present. In fact, the whole purpose of discovery is to avoid a "trial by ambush" like those depicted on television and in the movies.

Second, courtrooms are rarely packed. As deeply committed as you are to your cause, civil litigation rarely draws the interest of the general public. The only people typically in the courtroom at the end of a trial are the parties, the jury, the court staff, and perhaps a few friends and family members.

Third, the media rarely attend civil trials and often do not report on verdicts. Many potential clients have told us that "the company will never let this go to court because of all of the negative publicity." The cases reported on in the media actually represent a very small percentage of the cases actually tried to a verdict. It also is important for clients to understand that we do not seek publicity for our cases. Lawyers who grandstand in the media often are only promoting themselves. Our sole focus is on obtaining a just result for the client.

While this may all sound very drab and uneventful, the good news is that the litigation process, while lengthy, works very well. Discovery allows all parties to fully understand the evidence before trial so that they can assess whether a voluntary resolution is in their best interest. And when cases do not settle, juries usually do an exceptional job of sorting through conflicting testimony and determining the truth of a matter. If your case has legal merit and the truth is on your side, litigation can provide relief that sometimes cannot be obtained any other way. But it does take a long time, is not particularly glamorous, and it is not a likely source of fame.

Conclusion

The vast amount of time and money spent on litigation is spent on processes about which potential clients are largely unaware when they first contact a lawyer. Lawsuits take time, and for good reason. Understanding the process will help you to assess your options.

We hope this information is helpful in explaining the process of litigation and in addressing some of the typical concerns you may have about it. We would be happy to review how this information pertains to your particular situation so that you can make the best decision for you.