Walking the Tightrope

The Discoverability and Admissibility of Plaintiff's Prior Complaints of Discrimination Against Non-Party Employers

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When an employer is sued for employment discrimination and is facing trial, one common evidentiary fight is whether the employer will be permitted to introduce evidence of other claims of discrimination or harassment that the plaintiff has made against former or subsequent employers. Taking discovery from a plaintiff concerning other claims is essential, and it requires careful attention during the discovery phase. Such evidence can bear fruit in several crucial areas of the defense, including attacking front pay and back pay (i.e., attacking the employability of the plaintiff), establishing an after-acquired evidence defense, raising mitigation of damages, and in rare instances, demonstrating a plaintiff's propensity for making false claims.

Given the likelihood of pretrial motions seeking to exclude such evidence, defense counsel must begin to plan early to anticipate how those motions will shape up in the future. Checking the (as we like to call it) "frequent flyer" status of a plaintiff is essential. As discussed below, a defense attorney who wants to have that evidence admitted often walks a tightrope, and he or she must avoid broad and unfocused attempts to get this evidence admitted through general allegations of "relevance." Counsel must carefully explain the limited purposes for which the information would be admitted and tie it directly to the claims and defenses raised in the action.

Discoverability of Other Claims and Techniques for Securing That Information Early

In some circumstances, discrimination lawsuits against prior or subsequent employers are admissible evidence, and when admissible, this evidence can be highly advantageous to the defense.

In our experience, frequently, a plaintiff who sues a former or existing employer for discrimination or harassment will have made similar claims in the past against other, previous employers. And sometimes, the plaintiff will have sued subsequent employers. Recently, we had a case where the plaintiff went through five employers in five years. In another recent whistleblower case, a plaintiff made a claim for back pay and front pay, arguing that she was unable to secure employment at the same rate of pay that she enjoyed with our client. She claimed that she was employed after her termination by our client, but she could only secure part-time work, due to the lack of full-time nursing positions. When pressed during her deposition about her current employment status, she then testified that she was out on maternity leave from her current employer. Yet a docket search, conducted in advance of her deposition, showed that she had—*just days before*—sued her new employer for discrimination and claimed to have been terminated unlawfully. Had the case gone to trial, the evidence of the other lawsuit would likely have been admissible on several issues, including her lack of credibility,

her evasiveness about her efforts to mitigate her alleged damages, and the obvious causation issues that arise when a plaintiff sues two employers at the same time for emotional distress.

Pre-trial discovery of other claims can be obtained from several sources:

- interrogatories and document demands served on the plaintiff;
- state and federal docket searches and internet searches; and
- subpoenas issued to former employers, and possibly, subsequent employers

A form interrogatory to a plaintiff seeking this information might look like this:

> State whether you have ever filed or been named as a party to any Complaint or other pleading in any other federal, state, or local court and/or administrative agency (other than the Complaint in this case), and if you have, then for each such Complaint or initial pleading:
>
> a. Identify and attach a copy of such Complaint or initial pleading;
>
> b. Identify the name and location of such agency or court in which such Complaint or initial pleading was filed, and state the date of filing and docket/index/case number;
>
> c. State the date and describe the nature of each allegedly wrongful act alleged in each such Complaint or initial pleading;
>
> d. State the date, author, and content of all statements which you or anyone or your behalf submitted to such agency or court, and identify and attach copies of each statement which was in writing; and
>
> e. State the present status of each Complaint or initial pleading and, if it has been disposed of, state its manner of disposition.

Occasionally, a plaintiff will seek to quash subpoenas issued to prior and current employers. The results are highly fact specific, and they are mixed. For instance, in *Cornell v. Jim Hawk Truck Trailer*, 298 F.R.D. 403 (N.D. Iowa 2014), where an employer in a sexual harassment case subpoenaed the plaintiff's current and former employers, the court's decision shows why the subpoenas must be carefully drafted to seek relevant information. The court ruled that the employer could legitimately seek all W-2 forms and records of earnings and compensation, benefits records, and any and all personnel records, applications, resumes, job descriptions, and the like.

The court analyzed in detail whether performance evaluations and disciplinary reports from former or subsequent employers were discoverable. The employer in *Cornell* claimed that the plaintiff was incapable of performing the accounting-related tasks for which she was hired, and therefore, the employer sought performance-related documents from these other employers to see if the plaintiff had a similar issue when she worked for other employers. The court found that performance evaluations were discoverable. However, the court refused to allow discovery of disciplinary records from former employers because the employer seeking those records failed to articulate any factual basis for them. For instance, there was no claim that the employee was fired for theft, insubordination, or some other disciplinary problem, and so the court disallowed discovery of disciplinary records from former employers.

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However, the court allowed disciplinary records from *subsequent* employers: "There is no dispute that Cornell's earnings after being discharged are relevant to the issue of damages in this case. Evidence suggesting that Cornell failed to act reasonably to mitigate her damages is also relevant." *Id*. at 407.

In *Graham v. Casey's General Stores*, 206 F.R.D. 251 (S.D. Ind. 2002), an assistant manager of a store claimed disability discrimination and retaliation for filing worker's compensation claims. The employer served subpoenas on prior and subsequent employers, seeking a broad swath of materials, including medical records, prior complaints, and personnel records. The court granted the plaintiff's motion to quash insofar as it found that the request for medical records was overbroad and should have been directed at medical providers. The court also granted the motion to quash to the extent that the subpoenas sought earnings information because the plaintiff had signed a tax information authorization from the Internal Revenue Service.

Ultimately, the court in *Graham* held that the employer was permitted to seek production of the plaintiff's personnel and employment files from her prior employer as her failure to disclose a conviction, if true, bore on her claims to back pay, front pay, and her credibility in general. *Id*. at 255.

In sum, subpoenas to prior and current employers have the strong potential of being challenged by motion, so defense counsel must be ready to explain the rationale for the subpoenas. Those subpoenas must be narrowly tailored to fit the claims and defenses in the case.

Admissibility of Other Claims Evidence

As with the question of the discoverability of other claims evidence, the question of its admissibility is fact driven, and the results are mixed. In the federal courts, the starting point for any analysis of whether an employee's prior or subsequent claim against another employer is admissible is to review Federal Rule of Evidence (FRE) 404(b):

1. **Prohibited Uses**. Evidence of a crime, wrong or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
2. **Permitted Uses; Notice in a Criminal Case**. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. . . .

In this sense, where defense counsel approaches the admissibility question by arguing that termination of an employee by a prior employer, and a related lawsuit, are somehow evidence of that employee's "propensity to make up claims," the results are relatively predictable. As early as 1988, the Second Circuit ruled in *Outley v. City of New York*, 837 F.2d 587 (2d Cir. 1988), that only where a party can show that the other party engaged in fraudulent filings of prior claims can counsel use the existence of such claims to paint the picture of a litigant as litigious or as a "perpetual litigant." *Id*. at 591–92.

Proving that the prior claim was fraudulently filed seems an impossible burden in all but the most extreme situations. *Gastineau v. Fleet Mortgage Corp*., 137 F.3d 490 (7th Cir. 1998), seems to fit that "unicorn" description. In *Gastineau*, a male loan originator claimed that a female co-worker sexually harassed him

and refused to process his loans unless he had a sexual relationship with her. One of the central issues in the case was whether a certain internal memorandum corroborating complaints by the plaintiff was legitimate, or a forgery. In discovery, the employer learned of claims against a prior employer, and that there was a similar issue with an allegedly forged document in that case, as well. At trial in the case, the court allowed the employer to bring up this evidence of the lawsuit against the prior employer and to raise the question for the jury of whether the employee's intent and motive was to use fraudulent means to pursue claims against his employers. *Id*. at 493.

The court recognized a four-part test to determine whether evidence of prior acts is admissible:

1. the evidence must be directed toward establishing something at issue other than a party's propensity to commit the act charged;
2. the other act must be similar enough and close enough in time to be relevant to the matter at issue;
3. the evidence must be such that the jury could find that the act occurred and the party in question committed it; and
4. the prejudicial effect of the evidence must not substantially outweigh its probative value.

Id. at 494–95.

Importantly, the court in *Gastineau* also recognized other ways that the evidence could come in. It permitted the employer to explore evidence at trial of three lawsuits the plaintiff had pursued against his prior employers. The plaintiff was claiming emotional distress, yet he failed to tell his expert that he had claimed emotional distress in these prior lawsuits, so it bore on the causation of any alleged emotional distress, as well as the credibility of the plaintiff, and the validity of the expert opinions. Such evidence of prior claims was also important to understanding why his co-worker, whom he alleged had harassed him, had taken such careful notes in a diary of the things that occurred as they were occurring. *Id*. at 495.

The Seventh Circuit's decision in *Mathis v. Phillips Chevrolet*, 269 F.3d 771 (7th Cir. 2001), shows that the rule outlined in *Gastineau* is not without its limitations. There, a jury had awarded a verdict of $50,000 to an age discrimination plaintiff, and the appeals court affirmed the lower court's decision to bar evidence that the plaintiff had filed suit against six other employers. The appeals court ruled that the evidence of these prior lawsuits could not be used to show the litigiousness of the plaintiff, but they could be admitted under FRE 404(b) to show "a plan, scheme or modus operandi." Ultimately, the court ruled that given the extensive proof that might come in from examining the other litigation, the lower court had properly concluded that the potential prejudice outweighed any limited probative value.

More recently, in *Arizona Dep't of Law, Civil Rights Div. v. ASARCO, L.L.C.*, an employer argued that since the plaintiff in a hostile work environment case was required to prove that her working environment was both subjectively and objectively abusive, the employer was entitled to show that she made the same claims against a prior employer in response to similar issues that were raised about her poor work performance. 844 F. Supp. 2d 957 (D. Ariz. 2011) (reversed on other grounds). The court rejected this argument. The court

also ruled that since it was only one prior employer with which the employee had a problem, this would not qualify as a "pattern" or meet the "modus operandi" line of cases.

The Third Circuit's decision in *Barbee v. Se. Pa. Transp. Auth.*, 323 Fed. Appx. 159 (3d Cir. 2009), demonstrates why interrogatories and questions at deposition about prior suits are an important part of the arsenal of a defense attorney. There, the record showed that the plaintiff in that age and race discrimination case had previously filed twenty-four civil lawsuits. When he was questioned about the details of those cases, he was evasive and untruthful. At a later trial, the district court allowed the existence of those cases to be shown to the jury for the limited purpose of attacking the plaintiff's credibility, rather than to show a propensity to file civil lawsuits. *Id*. at 162. Compare *Yates v. Sweet Potato Enterprises, Inc*., 2013 WL 4067783, at *3 (N.D. Cal. 2013) (permitting evidence of prior-filed lawsuits where the plaintiff was evasive).

More recently, a district court in New York ruled that in a future trial of discrimination claims, the employer (a school district) would be allowed to put in evidence of the plaintiff's termination by a prior employer and lawsuit against that employer, given that they would bear on her credibility. *See Altman v. New Rochelle Pub. Sch. Dist*., 2017 WL 66326 (S.D.N.Y. 2017).

Conclusion

A good defense attorney should start to ferret out "other claims" information from the moment he or she begins to defend against a claim. While there are limited circumstances where claims against prior employers are admissible, defense counsel should work diligently to determine whether they can meet one of the exceptions to the general rule that such evidence is inadmissible. Whether defense counsel can walk across the chasm on that tightrope and get the evidence admitted, will necessarily depend on the unique facts of each case.

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