Practice Notes: Attacking Pretext with An Aggressive Defense

Michael R. Miller

PITTSBURGH OFFICE
525 William Penn Place
Suite 3300
Pittsburgh, PA 15219
412-281-4256

HARRISBURG OFFICE
3510 Trindle Road
Camp Hill, PA 17011
717-975-8114

WESTERN PA OFFICE:
983 Third Street
Beaver, PA 15009
724-774-6000

SCRANTON OFFICE
220 Penn Avenue
Suite 305
Scranton, PA 18503
570-342-4231

MARGOLIS EDELSTEIN
Michael R. Miller, Esquire
170 S. Independence Mall West
The Curtis Center, Suite 400E
Philadelphia, PA 19106-3337
215-931-5808
FAX 215-922-1772
mmiller@margolisedelstein.com

CENTRAL PA OFFICE
P.O. Box 628
Hollidaysburg, PA 16648
814-695-5064

SOUTH JERSEY OFFICE
100 Century Parkway
Suite 200
Mount Laurel, NJ 08054
856-727-6000

NORTH JERSEY OFFICE
Connell Corporate Center
400 Connell Drive
Suite 5400
Berkeley Heights, NJ 07922
908-790-1401

DELAWARE OFFICE:
300 Delaware Avenue
Suite 800
Wilmington, DE 19806
302-888-1112

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Most employment claims use the same analysis and framework. The employee must first set forth a prima facie case, generally asserting he or she experienced an adverse employment action (termination, forced resignation, demotion, pay reduction, etc.) under circumstances suggesting a connection to a protected class or activity. The employer must then suggest a legitimate, non-discriminatory reason for its action.

To win his or her case, the employee must ultimately prove that the stated reason is false and a cover up for discrimination, a mere pretext. Must the employer sit by passively, waiting for the employee to fail in his or her burden? From my experience, employment claims are better defended by aggressively establishing the legitimate reason for the employer. If the legitimate reason is difficult to challenge, it should be much easier to defeat a discrimination case prior to trial. Developing such a defense requires hard work and diligence by the employer's attorney.

Quantitative over Qualitative

Employment decisions made with financial motivation are often easier to defend than those based on opinion evidence. Financial decisions can be explained in raw numbers. There is little room for opinion if the employer can show that a termination caused a bump in production or profitability. Generally, an employee must show more than an employer was wrong or mistaken in making a decision, evidence of an illicit motivation based on membership in a protected class must exist to discredit the employer. Even if an employee can show that a different decision would have increased profits while keeping his or her job, such evidence will likely be irrelevant.

Conversely, opinion-based decisions will face closer scrutiny. Triable issues of fact are oft created by reliance on witness credibility. Even if a supervisor testifies adequately at deposition, such can be cancelled out by a well-prepared employee at his or her deposition. Accordingly, where an opinion-based decision is the real reason for termination, it is often recommended to bolster the decision by demonstrating a quantitative effect. Did workshop production increase after the absentee employee was replaced? Was the employee replaced by someone who could do the same work at a cheaper rate? Such supplemental proof can help justify a decision based originally on supervisor opinion or negative performance review.

One recommended tactic is to have a neutral expert provide a liability opinion after analyzing the company books. If a forensic expert can confirm an increase in profitability directly related to the termination decision, it will be difficult for a plaintiff-employee to rebut such evidence. Such evidence may even be considered at time of summary judgment, especially where the plaintiff-employee failed to obtain a counter opinion from a different expert. As it is somewhat unusual for an employer in a discrimination suit to obtain a liability expert prior to trial, such may provide an edge in ultimately winning the case.

The Existence and Enforcement of Rules

Imagine playing a board game with no rules. Employee counsel welcomes such a scenario because it allows for an easier argument to prove an out-of-control workplace. It is now recommended that all employers, small or large, have some type of employee handbook or manual instructing employees about the basic rules of employment. Not only do such rules help supervisors maintain an organized workforce, it is often the first line of defense to a discrimination or retaliation claim. Indeed, I often first ask for the employer's handbook, guidelines and other rules when investigating a new claim.

Of course, having a rule book is of little use if there is evidence it is ignored or not consistently followed. Employee counsel will explore scenarios where the client has been treated differently than other employees outside the protected class. If there are no comparable examples, then employee counsel may present hypotheticals in deposition, attempting to obtain favorable testimony from an under prepared human resource representative. Fortunately, the converse holds true to benefit the defense. The defendant-employer should be seeking comparable examples of other employees who were treated similarly to the plaintiff-employee but also outside of the protected class. With significantly large companies, it is usually not too difficult to find comparable examples which benefit the defense. When being an investigation into a claim, it is therefore recommended that the defendant-employer generate a list of its employees who were discharged or disciplined for similar reasons as the plaintiff-employee.

Beware of Shifting Reasons

If there are two equally legitimate reasons for the termination, it is recommended to choose one and put all full efforts in establishing that defense. The doctrine of "shifting reasons" may inadvertently prove pretext if the employer's motivation for action changes or "shifts" over time. Such shift creates a credibility issue which may not be resolved prior to trial.

Granted, some dual justifications may dovetail into one legitimate reason for discharge. An employee who is consistently absent will likely always be a poor performer because he or she is never there. Yet, such a dual defense can become problematic when preparing key witnesses for depositions or trial, as they may become confused as to what truly was the motivating factor. This issue only exemplifies the need to conduct a full and complete investigation when accepting an employment discrimination case, as it is imperative to develop a simple, concrete reason as to why the employer acted as it did.

Be sure to explore whether there have been any quasi-judicial proceedings before you were retained to defend the case. Unemployment compensation and workers compensation proceedings usually take place before a lawsuit is filed, and an unprepared human resource representative may inadvertently bind the company to a reason for termination which is incomplete or misleading. An effort should be made to obtain the transcripts from such proceedings, which usually can be done by subpoena. Better practice would be to appear at these proceedings and prepare all witnesses to communicate the message at the hearing which will be consistent with defense of the lawsuit.

Recommended Best Practices

*Obtain all policies and procedures of the employer upon accepting the case.

*Ask for a list of any and all comparators who were treated similarly to the employee.

*Explore whether the decision improved bottom-line financials for the company.

*Subpoena any and all transcripts of quasi-judicial proceedings.

*Consider retaining a forensic expert to bolster the financial decision motivating the action.

If you require more information on this decision, or any aspect of Margolis Edelstein's Employment Law Practice, do not hesitate to contact Michael Miller at (215) 931-5808 or mmiller@margolisedelstein.com