The foibles of employment law practice

A Top 10 of contingency-case consultation concerns for the terminated employee

By Pieter Bogaards

In my nascent days of law practice, when I was fresh from clerking with the Department of Fair Employment & Housing and filled with righteous indignation at the unjust plight of my beleaguered clients, there was nary a case I would not take, or wrong I would not strive to right. However, over 20 years later and with the benefit of more practical experience, I have found that there are limits to what is practical – for both the lawyer and the client.

There is a balance where a significant part of evaluating a client's case also requires one to *value* the client's case. In fairness, I have taken to advising clients that if I am not willing to take their case on contingency, they may not want to pay me an hourly fee, since my decision will tell the client a great deal about my belief in their prospects for an *economical* success. And success means something more than a Pyrrhic victory. The following is a personal thumbnail list which, partly tongue in cheek, provides a somewhat random and basic checklist for client intake for potential employment law contingency representation.

Fortunately, not all employment work is contingency. A significant portion of the practice involves providing mediation services, reviewing and negotiating employment contracts, severance agreements, and advising employees on impasses in the employment relationship. The objective is avoiding or resolving disputes. Generally, this is successful.

However, there are those cases where an employee cannot resolve a dispute short of litigation and does not have the resources to pay an hourly fee. For the plaintiff-side employment lawyer, the client is almost by definition, unemployed. Or at least *under*employed, having scrambled for a new job to avoid the potential for bankruptcy or homelessness that confronts even wealthy clients who have designed a lifestyle contingent on the timely arrival of each paycheck. Those who have lost their primary source of income rarely have the resources to then take on the added costs and emotional upheaval of litigation, even when they have meritorious cases.

It is critical, for the sake of the client, and your own practice, to carefully screen cases.

As with any Top 10 list, the following is necessarily incomplete. There are

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many more factors that go into case evaluation, and other laws specifically governing various areas of the employment relationship. The last few years have seen sea-changes in employment law from the good – Private Attorney General Act (PAGA), *Martinez, Pineda, Murphy*; to the bad – *Dukes, Concepcion*; to the uncertain – *Brinker*. The foundations of employment practice have been roiling the last few years and a grasp on issues of arbitration, class-action certification and statutes of limitations must be updated, understood and applied. This is not a comprehensive analysis of developing employment law, but instead a few recurring basics that merit consideration, based on frequent client statements, such as:

1.) "It's the principle of the thing."

However much a client may proclaim at the outset, that they are pursuing a principle, by the end it usually comes down to the principal. Generally, courts can only grant relief in the form of money. How much can be awarded is based on the familiar formulas for calculating special, general and the elusive punitive damages. This is one of the most important aspects of employment case analysis. The employee is often indignant and angry. Losing one's job is an insult to one's self worth and pride. But there may be little concrete economic value in pride or self-esteem depending upon how egregious the employer's behavior can be proven to be. Lost wages are more easily calculable. Have the client focus on the economic value of his or her case, and note that emotional satisfaction is rarely found in the courtroom. Providing them with a paperback copy of Bleak House by Charles Dickens may be helpful in this regard.

Once they are focused on the economic value of their case, you may need to dissuade them from believing that every employment case will assure a multi-million dollar verdict, such as they may have read about in a sensationalist headline. I refer to this as the "Dolan Effect." Sure, it can happen, with outstanding lawyering, that plaintiffs who never lost a day's work, saw a psychiatrist or took a pill could get $60 million in general and punitive damages. Such awards are not unknown, deserved and hard-earned when they happen, but not common either.

Moreover, a client has the legal obligation, as well as a personal need, to mitigate damages by seeking new employment. As usual, what is best for the client, such as finding new, comparably paid employment to support self and family, is the worst thing for the value of his or her case. Therefore it may be one difficult year before it can be determined if there are damages sufficient to justify the stress, time and expense demanded of litigation. I usually use a motorcycle accident analogy. If you are a young neurosurgeon responsibly riding a motorcycle at a reasonable rate of speed, who is hit head-on by a swerving and errant FedEx truck, which is heavily insured, it sounds like a great case, so far. But if by some miracle you are able to roll away, and the worst you suffer is some scuffed leathers, the most you may recover is the value of your mangled bike. On the other hand, if you are rendered comatose and left on life-support, that is great for your case, though not good for you. Clients have to be advised to take the new job, since that is best for them.

These factors need to be explained to the client. Unlike a personal injury claim or other litigation, suing an employer can haunt an employee's career aspirations for years to come. Not only is there personal strain, there is the potential for it jeopardizing future employment opportunities. It does not look good on a resume, and is something prospective employers can discover in the public record. Even though this may give rise to a new claim, that is little solace to the unemployed already embroiled in a lawsuit. One must counsel clients about these negative aspects of litigation. You do not want to have to address it for the first time when the aggressive defense counsel subpoenas the employment records of a current employer. You may defeat the subpoena, but the damage has been done – which I suspect was the point anyway.

2.) "They had no reason to fire me!"

Usually, the employer does not require a reason. This is an "At-Will" state. It is written into the Labor Code. The employer could be as arbitrary as deciding that he will terminate all employees whose name begins with "C." Note that this is not the same if the employer were to decide to terminate all employees whose names end in a vowel, since this would likely have a disparate impact on certain groups based on race or nationality. Employees are often shocked to hear this news.

Though the employer generally does not require a reason, termination cannot be for prescribed improper reasons, which generally break down into the following bases for a claim:

• ***Breach of contract:*** This is increasingly rare, since most employers reiterate "at-will" language in all documents and issue employee handbooks that declare "this is not a contract." Exceptions exist for executive or professional staff, and in a recent case for a client who worked for a Dutch company where such expatriate contracts are more common. In negotiating employment contracts for specialized personnel, try to include a "for cause" provision (and avoid arbitration clauses.)

• ***Breach of implied contract* (*Covenant of Good Faith*):** Employment lawyers are wary of these cases in light of the long established *Foley*, *Guz* and *Asmus* decisions. The concept is not dead, but is difficult to resurrect in a case where an employee does not have a 20-year employment history (increasingly rare in the more mobile employment market of the last two decades) and there is a well documented pattern of personnel practices to support the claimed implied contract terms.

• ***Discrimination:*** Based on race, sex, pregnancy, nationality, religion, disability or sexual preference. Still alive and well in prescribed circumstances. The greatest difficulty is in proving disparate impact or a pattern of discrimination. The recent *Harris* case has set a new standard

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requiring that the plaintiff first establish that discrimination was a "***substantial*** motivating factor" in the termination, which is a phrase that has yet to be refined in application (not remote or trivial?). One should seek injunctive and/or declaratory relief, to allow for attorneys' fees in the event that substantial motivating factor is established but the employer can establish a defense that it would have terminated the employee anyway.

• ***Whistleblower or retaliation:*** Violation of a stated public policy is increasingly viable. The violation must be grounded in statute or the constitution (though cases have expanded the claim to include regulatory infractions.) Even in-house attorneys may state a claim. Plaintiffs have increasingly successfully based such claims on violations of the Wage & Hour laws, for an employer's failure to comply with the rules[1] (e.g. improperly labeling "non-exempt" employees as "exempt.") Other employment laws, such as the Worker's Compensation laws, the California Family Rights Act and the Federal Family Medical Leave Acts, Title VII and the California Fair Employment & Housing Act provide independent statutory grounds for actions taken in retaliation for an employee's efforts to enforce these laws. In many cases attorneys' fees and costs may be awarded.

3.) "My boss harassed me."

This is a touchy one, literally and figuratively. Employees often come in and are justly upset about a boss who berates and insults them before other employees. They claim to be harassed, but do not appreciate the narrow legal application for this term. The atmosphere at the office may be "hostile" but not in the legal sense. Upon further inquiry it comes out that the boss is an "equal opportunity jerk." He berates and insults everyone, regardless of race, gender or national origin. Though there may be grounds for defamation, there is not for an employment claim.

The harassment must be related to plaintiff's protected class. Though this is most frequently applied to gender discrimination cases, it may also apply for race, religion, etc. Unfortunately, the only sure resolution for an unpleasant employment atmosphere may be to seek a new job. There are legislative efforts to prevent workplace bullying, by the boss or co-workers, but for now only schools are protected.

4.) "I won an award against my last employer."

This is a Red Flag. Plaintiff's employment practice does not lend itself to repeat business. If a recurring client base was your intention, you should have chosen tax law. If a client comes to you with *another* claim of wrongful termination, be concerned. A pattern may be developing, and it will not benefit your client. Be further concerned if he or she has not gone back to the first attorney who so successfully represented him or her in the first case.

5.) "My attorney doesn't understand my case."

There are many variations of this one. It may even come as a referral by prior counsel, accompanied by profuse flattery of your legal expertise and acumen. Be wary. There may be valid reasons for changing counsel (conflicts, scheduling problems, etc.). And no-one can question that you are the best in your field and a consummate employment lawyer. But accepting those givens, there is the possibility that the case is now at a difficult juncture that you cannot salvage, or the client is temperamental and difficult. Do not invite this pattern to continue. The next attorney to hear the client's complaint could be a malpractice attorney, about you. Try to assess if the client's dissatisfaction is situational, psychological, or unmerited.

6.) "My employer is violating the law."

These can be very interesting cases, but be careful. It will require an understanding of employment law, and a willingness to come up to speed on the law that the employer is accused of violating. If the employee accuses the employer of violating the Insurance Code, for example, prepare to retain expert counsel on the subject, or stay up reading in the relevant area of law. Understand that this is now an insurance law case, with a veneer of employment law. It is critical to know whether there is a valid violation, or just bad business practices. Too often I hear the litany of complaints about how badly an employer is running their business, but it is not in itself a violation of law to run one's business into the ground. There is a difference between mere incompetence and legal violations.

The next question for the client is whether he or she ever reported the infractions to the employer or any government agency. If the client says that he did, "right after they fired me," then there is no claim for retaliation.

The employer must be motivated by retaliation against the whistleblower. Too often clients have reported infractions only after the employment relationship ended. Even if the employer was motivated by the anticipation that the employee might report an infraction, but no internal grievance was made, then there may not be a claim. If employees contact you with such a quandary prior to termination, advise them of the law on retaliation claims and the need for a record.

7.) "I never had sexual relations with that woman."

The lying client. No less a problem in employment law than in any other area. It came up for me once when representing a former supervisor who was accused of fraternizing with a female subordinate. The employer's investigative report failed to come up with any evidence of the alleged "fraternization," and the client denied it. Only after eight months of work did he admit to the relationship, in a break during his deposition when the queries were edging close to the truth. It was effectively the end of his case, and the waste of a lot of hard work as we rushed into a much lower settlement than I had anticipated without the "after-acquired" revelation.

The lesson is to be candid and frank with your clients. Employment cases

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often turn on subtle facts (more subtle than the obvious example above) which clients do not appreciate. We must confirm the significance for them, and the effect it will have on their own investment of time and energy in the case. Clients may be ashamed or embarrassed to relay such matters, even to their attorney – or in the above case, afraid that the information might get out to the co-worker's gun-toting CHP husband. But they will be obligated to reveal these matters in discovery, or someone else may disclose the inconvenient facts for them. A stern discussion regarding the obligation for disclosure in litigation, and the penalties for perjury, as well as the sanctity of the attorney-client relationship for what is shared with you, is best held at the outset of representation.

8.) "I am an independent contractor" or "I work for a small employer."

And therefore no employee-related laws pertain to the client. Go back to the "breach of contract" analysis and see if the independent contractor has any contract claims. However, even if the termination of the contract was for discriminatory reasons, no employment claims exist. Check the Unruh Act for any claims thereunder, but the Fair Employment & Housing Act ("FEHA") will be unavailing.

These laws also are limited in application to small employers. Coverage require varying minimum employees, such as 5 (FEHA[2]), 15 (Title VII, ADA) or even 50 (FMLA). Small employers may be able to discriminate at will. Cases have even held that a public policy claim cannot stand against a small employer, since the statutory schemes do not extend our anti-discrimination laws to smaller employers. However, there is the concept of an "integrated enterprise" and one must inquire whether the owners of the small shop with just four employees may own other stores which may be aggregated to produce the threshold number of employees. This is an involved but useful test in many circumstances.[3]

9.) "The employer failed to accommodate my disability."

These are challenging cases in a developing area of law. You may prefer to forego ADA causes of action in favor of the California FEHA claims. California law does not define "disability" as narrowly. The ADA still requires a "substantial" limitation of a major life activity, even though the 2009 ADAAA changed, or clarified, the law to no longer require consideration of mitigating factors such as prosthetic devices and medications to preclude a client from being deemed "disabled." Episodic disabilities such as epilepsy also now qualify under the ADA. The FEHA does not require a "substantial" limitation and also will not take into consideration mitigating factors. Even with the changes, the FEHA is still seen as more enlightened in its inclusion of people with disabilities since it prohibits discrimination on the basis of "physical disability" or "mental disability" as defined in the Act *or* on the basis of any other condition covered as a "disability" under the ADA. If you ever had a reason to not subject yourself to the procedural and unanimous jury pitfalls of federal court, you can now justify the omission of a federal question such as the ADA.

You will need to assess the nature of the disability before you can establish whether the employer failed to accommodate it. Plan to consult a doctor early on. One attorney tells the story of having retained a doctor that had assured her that her client could perform the essential functions of a physical job, only to be stunned when the doctor testified that the client could not possibly lift as much, for as long, as required by the position. A vocational rehabilitation specialist or occupational therapist should also be consulted. They are trained to compare the disability to the real-world work demands of a given job. As much as lawyers and doctors may attempt to convey omnipotence, frankly, this is usually beyond our training and experience. As the saying goes, the practice of law does not sharpen the mind as much as narrow it. Use the experts.

Review whether the employer knew there was a disability. This is less important for visible or known disabilities, such as a client in a wheelchair or one who returns from cancer treatments, but important for those who have unseen physical or mental disabilities or medical conditions which may require accommodation. If the client still works for the employer, be sure to initiate the "interactive process" to inform the employer of both the disability and the need for accommodation to avoid any credible "we did not know, she never said anything" defense.

10.) "I was terminated 13 months ago."

The FEHA and federal claims require an employee to file a complaint within one year and 300 days respectively[4]. The PAGA SOL is one year and requires specific notice by certified mail to the LWDA and employer. Clients sometimes come in just days before, or days after, the deadlines to file a complaint of discrimination. It can be too little, too late. There is an obligation to exhaust administrative remedies for many statutory causes of action. If one year and a day have passed, and no complaint has been filed with the appropriate administrative agency to preserve the claim, then the essential claims may be lost. There is also a two-year deadline, from the date of the "adverse employment action" to file a claim based on wrongful termination in violation of public policy, so retaliation claims will also be lost even though filing with the FEHA or EEOC is not required.

There may still be statutory (three years), contract (two or four years) or fraud in the inducement (three years) claims that have survived, but such may be more difficult to prove and may not include claims for attorneys' fees in the event of a successful conclusion.

Employment law is a challenging field and meritorious cases abound. As in any area of practice, it benefits from experience. Experience suggests always

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advising a client regarding the statutory deadlines in their cases, as well as recommending seeking another opinion from employment counsel. It can be too easy to omit a relevant area of arcane but significant law, and too easy to immerse yourself in a meritorious, but unprofitable case.


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Pieter Bogaards has extensive experience in both mediating and litigating employment cases, including representing employees in claims for wrongful termination, discrimination, harassment, breach of contract, retaliation and wage and hour violations. As a law student he had the privilege to clerk for Prudence Kay Poppinck, author of the Poppinck Act. He received his J.D. from the University of San Francisco School of Law 1982. Prior to law school, he received a Master's in Rehabilitation Counseling, working with the Independent Living Project, an agency devoted to enhancing access and "habilitation" for the disabled.

Endnotes

[1] Recent decisions (e.g. *Dukes*) have made it more difficult for attorneys to certify a class of claimants, particularly in federal court. Be wary of CAFA for any class action with a value exceeding $5 million. You could find yourself unwillingly removed to a hostile forum. As a result, these cases may return to smaller firms. Please note that such claims do not rely on an employee's termination, they are designed for enforcement during employment.

[2] Except for harassment claims, which require just one employee.

[3] It should be noted that you should also not take the client's assumption that they are an independent contractor at face value either. The client may believe he is, and been told he is, and even have a contract stating that he is, but if he is working under the direction of someone else, at their place of business, with their tools and the hours they set, they are likely employees. Misclassification is one of the most rampant abuses in the employment field. For this issue see the *Martinez* case, which broadens the definition of "employer" to include joint employers, or those who "suffer or permit" work to occur, and negatively refers to sham arrangements such as routing employees through temporary service companies.

[4] With variations in-between if the EEOC case is filed first, a work-shear agreement is in place, and whether either agency actually conducts an investigation rather than simply issues a right-to-sue letter. Do not accept an RTS letter unless you are also prepared to file, as you may have shortened your filing period.

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