THE LUTI LAW FIRM

THE PLAINTIFF'S EMPLOYMENT CASE: GETTING THE DISCOVERY YOU NEED

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Employment cases are fact and document intensive. Thus, from a defense perspective, they are tailor-made for summary judgment motions. It's imperative that – as the Plaintiff's lawyer – you have the facts and evidence to defeat these motions and get to trial. Employment discrimination cases are excellent examples of why the discovery process is so crucial to civil litigation. A plaintiff, in many cases, would be unable to substantiate his or her claim without evidence that is in the hands of the defendant. In a discrimination case, the employee may be able to obtain copies of records showing that the employer consistently hired or promoted less-qualified employees based on discriminatory criteria. The records may also be able to show that employees from protected classes were systematically overlooked for promotions or raises, or were terminated without cause. Evidence of this nature is required in order to prove an employment discrimination case. Accordingly, getting the discovery you need starts from the beginning.

Informal Discovery: Can Your Client Give You Direction On What To Look For?

The first place to start is your client. Frequently, the best discovery is free and your client has access to it. Your client can help you by providing you information on what to ask for, such as employee handbooks, relevant emails, and documentation that could prove extremely valuable in the event that items "disappear" once you start demanding them from the employer. Discuss with your client what discovery they can provide from their own sources, what documents which they do not have access to exist and who has access to those documents, before you engage in depositions and motions to compel.

It is axiomatic that many potential clients bring documents proving their claims to intake interviews. Often these include not only their own performance evaluations and disciplinary record, but also sales figures, financial data, emails relating to work for clients and other work product. It is important however, to realize that self-help discovery (i.e., your client taking stuff with them as they leave) can be problematic. While documents relating solely to their status as employees, like performance evaluations and discipline, may be permissible to retain, documents related to work assignments and performance on company accounts will typically constitute property of the employer which cannot be removed and retained to

support a planned lawsuit. As a general rule, employees can't take documents with them on their way out the door to support planned litigation against their former employer. This is because "*everything* that an employee acquires by virtue of his or her employment belongs to the employer "whether acquired lawfully or unlawfully, or during or after the ... employment." *Cal. Lab. Code. § 2860*. The cases are also pretty clear on this. *See, e.g.*, *Bedwell v. Fish & Richardson P.C***.** 2007 WL 4258323 (S.D.Cal.,2007); *Pillsbury, Madison & Sutro v. Schectman,* (1997) 55 Cal.App.4th 1279; *Conn v. Superior Court* (1987) 196 Cal.App.3d 774.

One case, however, permitted a former employee to retain documents taken from the employer. *Church of Scientology v. Armstrong* (1991) 232 Cal.App.3d 1060. In *Church of Scientology,* the court found the defendant was privileged or justified (see Rest.2d Torts, § 261) when he delivered the organization's documents to his attorney because "he believed that his life, physical and mental well-being, as well as that of his wife ... were threatened" by the organization. Id. at 1073. The court recognized "Armstrong's defense was predicated on his claim that he reasonably believed the Church intended to cause him harm, and that he could prevent the apprehended harm only by taking the documents, even though the taking resulted in harm to the Church." (*Ibid.*).

Send Out An Evidence Preservation Letter

The goal of the preservation letter is, of course, to remind opponents to preserve evidence, to be sure the evidence doesn't disappear. But, the preservation letter also serves as the linchpin of a subsequent claim for spoliation, helping to establish bad faith and conscious disregard of the duty to preserve relevant evidence. The more effectively you give notice and convey what must be retained--including methodologies for preservation and consequences of failure--the greater the likelihood your opponent will be punished for destruction of evidence.

A preservation letter should seek to halt routine business practices geared to the destruction of potential evidence. It might call for an end to server backup tape rotation (as appropriate), electronic data shredding, scheduled destruction of back up media, reimaging of drives, drive hardware exchanges, sale, gift or destruction of computer systems and, (especially if you know computer forensics may come into play) disk defragmentation and maintenance routines. A lot of digital evidence disappears because of a lack of communication or of individual initiative. Thus, it is important that you highlight the need to effectively communicate retention obligations to those with hands-on access to systems, and suggest steps to forestall personal deletion of emails.

Electronic Discovery

Computer files, including electronic mail messages, can be critical for meeting the plaintiff's burden of proving discrimination, retaliation, or a hostile workplace environment. Today, computer records--especially electronic mail--often provide explicit evidence of exactly who said what, when, and to whom. Instead of making a global request for all computer records, precisely define the search requests. Narrowing the parameters will be more likely to lead directly to relevant materials and will make it less likely that the opposing parties will file a motion for a protective order or seek sanctions for discovery abuse.

First, as noted above, interviews with the client and the client's witnesses will often highlight relevant electronic records that are likely to contain probative evidence. This will allow the discovery requests to focus on records by or about specified individuals during a fixed time period and that contain certain words or phrases. Even if the plaintiff has furnished copies of e-mail messages or other computer records, their value will be higher if they can be produced and authenticated directly by the employer.

The Client Personnel File

Normally, the plaintiff often has not seen the entire personnel file (which should include all documents relating to the employee) before litigation begins. It is essential that this is asked for. Labor code section 1198.5 provides every employer shall permit an employee to inspect such personnel files which are used or have been used to determine an employee's qualifications for employment, promotion, additional compensation, or termination, or other disciplinary action.

The Depositions

Depositions are crucial and often result in helpful admissions. You must have a thorough knowledge of the case, including the underlying facts and the legal issues involved. Whether the deponent is a party or an independent witness, you should carefully investigate what part the deponent has played in the case and the specific information, knowledge and evidence he or she has. It may also be helpful to discuss the deponent with your client, if your client is familiar with the individual. Your client may provide insight into the deponent's personality, strengths, weaknesses and expected testimony.

When sending out your written discovery requests, be sure to send along a notice of deposition directed to the defendant PMKs and harassers for a deposition more than thirty days out (to ensure that the defendant responds to the first round of discovery requests before the deposition). There are no hard-and-fast rules that govern which party gets to depose whom in what

order. Nevertheless, the "first in time, first in line" argument is generally accepted by judges.

"Me Too" Evidence

"Me too" evidence is powerful. One component of a plaintiff's *prima facie* case of discrimination may turn on a showing that non-members of the relevant protected class were treated more favorably. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). As a consequence, the plaintiff can bolster his or her *prima facie* case by proving that "similarly situated" comparators (*i.e.,* those outside the relevant protected class) were provided preferential treatment. It is here where the identification of such "similarly situated" comparators during discovery becomes important to formulating an effective argument to defeat summary judgment argument. Most often, in identifying comparators, courts will look to peers of the plaintiff who: (1) performed essentially the same duties; (2) reported to the same supervisor; and (3) engaged in the same type of conduct giving rise to the adverse employment action at issue.

Employer Initiated Investigations As A Defense To Employment Discrimination

One of the important components of employment discrimination claims is the fact that employer had knowledge of the harassment. Defendant employers typically attempt to defend this by asserting that they took prompt remedial action reasonably calculated to end the harassment. Thus a defense is for the employer to assert it made an investigation and took appropriate action to resolve any claim of discrimination.

If, however, the employer/defendant hopes to prevail by showing that it investigated employee's complaint and took appropriate action from its findings, it has just put the adequacy of the investigation directly at issue. In this situation, California Courts have held the attorney client privilege and work product doctrine are waived. The California Supreme Court held a waiver is established by showing "the client has put the otherwise privileged communication directly at issue and that disclosure is essential for a fair adjudication of the action. *Southern Cal. Gas Co. v. Public Utilities Com*. (1990) 50 Cal. 3d 31, 40. The Appeals Court in Wellpoint stated more plainly; "[The employer/defendant] cannot have it both ways. If it chooses this course, it does so with the understanding that the attorney client privilege and work product doctrine are thereby waived." *Wellpoint v. Superior Court, supra*. 59 Cal. App. 4th 128.

Third Party Discovery

Though time and money constraints may make it difficult, do not automatically disregard the benefits of looking elsewhere for information relating to the defendant employer. Indeed, information obtained from various outside sources

may reveal additional helpful facts when preparing a case for trial or opposing summary judgment (especially if you can obtain some damaging information prior the pmk's deposition).

Financial Discovery Of The Defendant Employer

Most FEHA cases have a punitive damage component. Predictably, defendants fight giving financial information until well into the trial – if the punitive damage allegations remain in the case. The Court may at any time enter an order permitting the discovery otherwise prohibited by Civil Code §3294 if the Court finds, on the basis of the supporting and opposing affidavits presented, that the plaintiff has established that there is a substantial probability that the plaintiff will prevail on the claim pursuant to §3294. Civil Code §3295(c). In making this determination, the court must weigh the evidence presented by both sides, but this weighing is not the traditional fact-finding process and shall not be considered to be a determination on the merits of the claim or any defense thereto. *Id.* at 759; *Guardado v. Superior Court* (2008) 163 Cal.App.4th 91, 98. Rather, the court is simply to determine whether there is a "strong likelihood" or whether it is "very likely" that the plaintiff will prevail on her claim for punitive damages against the Defendants. *Jabro*, 95 Cal.App.4th at 758; *Guardado*, 163 Cal.App.4th at 98. Section 3295(c) only requires a hearing should the court deem it necessary. Accordingly, one need not wait until the end of the general damages phase of a trial to start pushing for financial discovery – particularly in a case in which punitive damages are expected.

Conclusion

Prosecuting plaintiff employment cases can be, and should be, fun. It is not often a lawyer really gets to obtain justice for a regular person whose civil rights have been violated at trial. Getting discovery to get you there is the first step.

Anthony Luti is a founding member of The Luti Law Firm, where his practice focuses on Labor and Employment And Civil Rights Trial work. He has obtained millions of dollars in settlements, verdicts, judgments and awards for his clients. In 2012, he was awarded Trial Lawyer of the Year by The Private Defenders Criminal Bar Association. He was nominated by his peers in 2008 as Trial Attorney of the Year by the Consumer Attorneys Association of Los Angeles. Mr. Luti is a lifetime member of the Million Dollar Advocates Forum. The Million Dollar Advocates Forum is the most prestigious group of trial lawyers in the United States. Membership is limited to attorneys who have won million and multi-million dollar verdicts and settlements. There are only 3000 attorneys nationwide who have been acknowledged to join this exclusive group of advocates. Similarly, Mr Luti is a Platinum Member of the Verdict Club. Platinum Membership is limited to attorneys who have obtained jury verdicts in excess of $1,000,000. Membership in The Verdict Club is coveted and reserved for only those lawyers who have a reputation of extraordinary verdicts.