

The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2021

PHILADELPHIA, THURSDAY, AUGUST 23, 2021

VOL 264 • NO. 37

An **ALM** Publication

EMPLOYMENT LAW

Potential Plaintiffs Should Be Referred to Employment Lawyers as Early as Possible

BY KASTURI SEN

Special to the Legal

As a nonemployment lawyer, if you have a client or friend come to you because they are facing a difficult work situation—their boss has been escalating a pattern of discrimination/harassment/criticism of their work, or failing to protect them from another coworker who is harassing them—now would be a good time to refer them to an employment attorney for a consultation. Too often, we receive referrals after the potential client has already been fired—they finally gathered the courage to complain to someone internally, an HR investigation ensued, no meaningful change resulted, and lo and behold, a few weeks or months later, the employee is fired, ostensibly for unrelated reasons. Or worse yet, the situation became too unbearable, the employee quit, and then came to us, having never complained to anyone about what the boss/co-worker was doing to them before quitting. Most employees go through this entire process without any legal counseling, which is unfortunate and can be easily remedied. Depending on the circumstances,



KASTURI SEN is a senior associate at Greenblatt, Pierce, Funt & Flores, where she serves as lead attorney on challenging race and sexual harassment cases, as well as age discrimination, FLSA and other workplace violations.

Contact her at k.sen@gpfflaw.com.

almost every employment law firm will do a single consultation at a reasonable hourly rate without seeking hefty retainers; or, sometimes for free.

It is true that until the employer takes a materially adverse employment action such as fire, demote, fail to promote, or change the job responsibilities/hours of the employee, there may not be much that a lawyer can do in terms of filing an administrative charge with the EEOC or other local agency, or proceeding with a lawsuit. However, if the employee is facing some form of harassment or discrimination at work, a lawyer can counsel them on whether it is a good idea for them to complain internally as a first step (it usually is), even though the employee might correctly foresee that such a complaint will trigger a HR investigation, which,

in turn, could precede a retaliatory adverse employment action and, in fact, sometimes set the stage for the employer to later justify that adverse action. This is still a process that will typically help the employee solidify their legal claim down the road. And while an employment lawyer usually cannot accompany the employee to the internal HR investigation, the lawyer can be critical in helping the employee understand what is at stake and address HR appropriately before they are fired.

Let me explain. For several potential employment claims, the employee has to complain to a higher-up in order to have a legal claim. In many cases, if the employer is not told of illegal workplace conduct, they can argue that they have no obligation to fix what they could not have reasonably known. Even when employees do complain, one of the things that I have encountered over and over again is that they are hesitant and often afraid to spell out that someone has been racist or sexist or some other “ist” toward them. Such a move might feel overly confrontational, especially if HR is friendly toward the manager subject to the complaint, such that accusing the manager seems nearly

tantamount to an attack on the HR personnel directly. Rather than call out workplace discrimination/harassment for what it is, employees thus tend to present their story in generalities, unwittingly framing them as issues of workplace fairness, which, in turn, very often translate for HR into perceived personality clashes. And, HR does not care about personality clashes, full stop. If an employee is not getting along with management, even if a manager is grossly unfair and sometimes a downright bully, HR might very well think it is the employee who is the one being insubordinate. Often my clients do not fully grasp this baseline fact. The problem is, if an employee talks to HR and does not raise the real issues of discrimination/harassment, this can be used not just to later undermine their credibility but, in many instances, to wholesale preclude the employee's future claims of harassment or discrimination when the employer does take material adverse action.

An employment lawyer can help walk the employee through how to accuse a manager of discriminatory conduct without alienating HR or making it seem like a personal attack on the manager. For example, I encourage clients to be extra polite, to be as specific as possible and to just state facts, i.e., state what the boss did, not who they are: "so and so white manager yelled at me in front of other coworkers on x date, and I felt humiliated. He raised his voice and said, "xyz." I was the only black employee on the floor at that time. I do not think that is an appropriate way to discipline any employee and goes against this company's policies. I believe he did that because of my

race—I have never seen him act this way to any white employees. This is not the first time he has done this to me or other employees of color. Here are some more examples." After detailing other examples, the employee could conclude with something like, "I hope you will take immediate steps to prevent any further harassment by this manager." Even with the most proactive of employees who actively Google anti-discrimi-

Lawyers should encourage potential employee-plaintiffs to seek legal help early, at the first sign of trouble, and well before they are fired.

nation laws while preparing for an HR interview, there is no substitute for legal counseling at this level of granularity.

This is not to say that consulting an employment lawyer prior to complaining or talking to HR will change the outcome of the HR investigation. It may, but more often, it may not. However, what the consultation will do is help the employee present their case in a way that will be useful in future litigation against the employer, if and when that time comes. The lawyer can also advise the employee on applicable statutes of limitations—several claims have surprisingly short statutes (e.g., 180 days under the Pennsylvania Human Relations Act to avail of uncapped compensatory and punitive damages and a longer back pay period than Title VII), and with some of the claims, a portion of

the underlying facts may constitute what courts would consider discrete acts that could become time barred quickly, even if intuition might suggest that the facts form part of a continuing pattern of discrimination such that the attendant claims should not be tolled until the final adverse act (such as getting fired). Finally, there are often significant material consequences to quitting rather than waiting to get fired—both financially and from a future litigation strategy perspective—in an ever-evolving and multifaceted web of federal and local laws (take for example, Biden's American Rescue Plan Act that mandates employers cover COBRA premiums for employees who lose their jobs between April 1 through Sept. 30—a substantial out-of-pocket expense for most employees, which disappears if you quit). The employment lawyer can flesh out the advantages and disadvantages of both options, depending on the specific circumstances of the employee. Thus, lawyers should encourage potential employee-plaintiffs to seek legal help early, at the first sign of trouble, and well before they are fired. •