

Picking Good Cases

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I. One of the biggest challenges for the plaintiff's employment lawyer

lots of bad things happen to people at work

we can't help everyone

these cases are labor intensive, take a long time, can be expensive to litigate

opponent employers have money, resources and good lawyers

II. Evaluation is the key to our success: factors we must consider

1. The story
2. The law
3. The money
4. The jurisdiction

III The story: what happened to the plaintiff

1. Gut response: it's not right/it's not fair
2. Your conviction is important
3. A realistic evaluation of how the average juror will respond is important
4. A story needs action, characters including good guys and bad guys, a

motive that makes sense

- a. Action: cruelty in the method of termination, ignoring repeated complaints, retaliation
- b. A good guy plaintiff: not necessarily a perfect plaintiff
 - length of service
 - employee who has made a contribution to the employer's enterprise: evaluations, awards/commendations, accomplishments
 - impressive, admirable human being: tried to prevent what happened, took responsibility, lawsuit was last resort
 - strength of character, deserving
- c. A bad guy employer: facts that make it possible to focus attention on the employer's bad conduct
 - didn't follow own rules, policies, procedures
 - no warning, notice, opportunity to correct problems
 - no investigation - didn't get employee's side of the story
 - sham investigation
 - no genuine sanction of bad supervisor or manager
 - no plausible reason for the employer's conduct
- d. Other characters: you've got to have witness, are there any?
 - people who will say good things about the plaintiff
 - people who can corroborate some part of the plaintiff's story

- e. Motive: this becomes more and more important all the time
 - jurors are sophisticated, skeptical, searching for an explanation that makes sense
 - jurors know that discrimination is against the law and that big companies have policies and programs to keep it from occurring
 - jurors must understand how/why that this discrimination occurred
 - corporate profit
 - personal greed
 - personal gratification
 - personal bias/prejudice/preference of bad actor
 - company not really committed to avoid/correct bad conduct
 - effort to hide bad or illegal conduct
 - proof: pattern of conduct, treatment of comparables, statements
 - retaliation after a complaint: juries believe it happens

IV. The law is important too.

1. Claim preservation: time limits, charge, affidavits, investigators' notes
2. Summary judgment: what is the prima facie case, what are the legal standards?
3. Proving pretext: looking at the employer's own papers
 - inconsistencies are the best: position statement, performance evaluations, "attaboys"
4. Remember, some of these cases are just hard to win: ADA, age-based RIF, discharge for cause

V. The money: there's got to be enough at stake to make it worth your while and the client's

1. Look for economic loss: promo cases are tough, individual EPA claims
2. Don't forget pension loss, tax consequences, mitigation burden
3. Emotional distress: it's all about the plaintiff's life history. You may be able to deal with it, but you have got to know what it is.
4. Punitives: don't count them but look for involvement of top executives, company training and education about EEO
5. Think about whether you will need expert(s) and how much they will cost

VI. Jurisdiction

1. Which court is the best court in which to bring the case: judges, law, juries
 - federal vs. state
 - urban vs. rural
2. Diversity/removal issues
3. Opportunity issues

Remember, the best case is one where the jury will feel compelled to do the right thing because the employer did not!