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# Anatomy Of A Lawsuit

***Presented by:***

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# Employment Litigation Trends

- EEOC Charges in Georgia:
  - Almost 6,000 in FY 2013 (6% of total U.S. charges)
  - Race: 42%
  - Retaliation: 35%
  - Sex: 31%
  - Disability: 22%
  - Age: 19%
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  - up from 122 in FY 2012
  - 89 filed on behalf of individuals; 21 with multiple [under 20] “victims”; 21 systemic suits
- Increases in lawsuits regarding disability, pregnancy, and religious discrimination



# Employment Litigation Trends

- Over 50,000 FLSA lawsuits filed since 2000
- The trend continues upward
- Both individual and “collective” actions



# Meet Jane

- Jane is an African-American Assistant Teacher paid a \$15,000 annual salary.
- Jane is late to work and rarely calls to let you know in advance.
- Jane always has an excuse – car problems, lack of childcare, surgery, sick mother, etc.
- Jane is disorganized in the classroom. While she hasn't done anything that specifically warrants a write-up, she is losing control of the children and seems distracted by her personal problems.



# Meet Jane



- One day, you are checking Facebook and see pictures of Jane at a bar with the comment “School’s Out – Time to Get Drunk!” Two co-workers “liked” the picture and Jane made the additional comment, “They work me too hard, I need to get my drink on!”
- You’ve had enough. The next day, you terminate Jane for excessive absenteeism.
- ***Is that the end of the story with Jane?***

# What Does Jane Do Now?

- She is embarrassed by the Facebook post
- She is embarrassed by the termination
- She has no money
- She has no prospects
- She watches TV



# What Does Jane Do Now?



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# Potential Claims

- Unemployment Compensation
- NLRB Charge
- Wrongful Termination
  - Disability
  - Gender
  - Race
  - FMLA
- Wage-Hour Claim

# Unemployment Compensation

- An individual is disqualified from unemployment benefits if he/she “has been discharged or suspended from work with the most recent employer for failure to obey orders, rules, or instructions.” O.C.G.A. 34-8-194(2)(B)(i).
- An individual is not disqualified from unemployment benefits if the individual “made a good faith effort to perform the duties for which hired but was simply unable to do so” and “the individual did not intentionally fail or consciously neglect to perform his or her job duties.” O.C.G.A. 34-8-194(2)(b)(I).

# Unemployment Compensation

- Do you contest Jane's application for unemployment?
- What are the considerations?

# NLRB Charge

- If employees are discussing terms and/or conditions of employment they may be engaging in concerted protected activity, and discipline may not be appropriate
- Applies to both union and non-union employees
- Damages include back pay and reinstatement



# Wrongful Termination

- Disability/Gender/Race
  - Was Jane terminated for excessive absenteeism?
  - Was Jane terminated for poor performance?
  - Do we have documentation?
  - How were other employees treated with similar performance/misconduct?
- FMLA
  - Were Jane's absences protected?



# Wage-Hour

- Jane is paid \$15,000 per year.
- Jane claims that she worked 45 hours per week with no overtime.
- Is Jane exempt from overtime?



# Anatomy Of A Lawsuit

## 1. Demand Letter

- “We are willing to resolve this matter for the very reasonable amount of \$2,500,000 or else we will take you to court and tell our story to CNN”
- “You are on notice to preserve all documents, e-mails, etc.”
- Attorney’s fees start



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2. EEOC charge (must be filed within 180 days of termination)
  - Charge of Discrimination
  - Employer Response
    - Mediation?
    - Statement of Position?

# Anatomy Of A Lawsuit

## 2. EEOC charge (continued)

- EEOC investigation (approximately 8-16 months)
  - Document Requests (ie, *free discovery*):
    - Jane's personnel file
    - Other teachers' personnel files
    - EEO data
    - HR policies
  - On-site interviews:
    - Owner
    - Teachers
    - HR

# Anatomy Of A Lawsuit

## 2. EEOC charge (continued)

- “Cause” or “No Cause” determination
- Conciliation
  - Pay or else
- “Right to Sue” letter

# Anatomy Of A Lawsuit

## 3. Lawsuit

- February 6, 2016: Complaint filed in state court
- March 6, 2016: Remove to federal court
- March 20, 2016: File answer
- April 30, 2016: File initial disclosures
- April 30, 2016: Receive/serve written discovery
  - Document requests:
    - Everything you already produced to the EEOC, plus
    - Jane's entire e-mail history
    - Your entire e-mail history
    - Any other emails about Jane
    - Any other litigation/EEOC charges you've had in the past

# Anatomy Of A Lawsuit

## 3. Lawsuit (continued)

- May 30, 2016: Serve document production
- June 1, 2016: Fight with opposing counsel about discovery
- June 7, 2016: Fight with opposing counsel about discovery
- June 14, 2016: Fight with opposing counsel about discovery
- June 21, 2016: Motions/conference with judge about discovery
- August 1, 2016: Serve more document production
- August 15, 2016: Fight with opposing counsel about discovery
- Sept. 1, 2016: Plaintiff's deposition

# Anatomy Of A Lawsuit

## 3. Lawsuit (continued)

- Sept. 10-30, 2016: Defendants' depositions
  - Depositions:
    - You/Owner
    - Other teachers
    - Other parents
- Oct. 1-10, 2016: Fight with opposing counsel about discovery
- Oct. 15, 2016: Mediation
- Oct. 15-30, 2016: Fight with Opposing Counsel About Discovery

# Anatomy Of A Lawsuit

## 4. Lawsuit (continued)

- Nov. 30, 2016: Motion for Summary Judgment
- April 30, 2017: Order on Motion for Summary Judgment



# Anatomy Of A Lawsuit

- . Lawsuit (continued)
  - July 2017: Trial
    - 4 days
    - Numerous witnesses
    - Business disrupted
    - Publicity
    - More legal fees

# How To Avoid A Lawsuit

- Document misconduct and poor performance
- When in doubt about the appropriate disciplinary action, suspend and investigate
- Treat the employee with respect when terminating him/her
- Consider whether to contest unemployment claims
- Seek preventive advice

# High Risk Terminations

- Lack of documentation
- Long-term employees
- Problem employee
- Protected categories
- Timing problems
- No “trigger” event

# Final Questions

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