

Commencing the Lawsuit

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I. CASE EVALUATION: “TO TAKE, OR NOT TO TAKE?”¹

MAINTAINING A SUCCESSFUL plaintiff’s employment litigation practice requires patience, skill, courage, tenacity, and meticulous planning. Each phase of the litigation process, from the initial client interview to post-trial appellate argument, offers both opportunities for success and risk of failure. However, no aspect of the litigation process has as much long-term impact on the probability of success as the initial case evaluation.

Counsel can reduce the element of surprise and the possibility of failure with a thorough and effective case selection process. Given the substantial risk and expense involved in litigation, especially for the sole practitioner, counsel must carefully select only those cases that have a high probability of surviving the rigors and pitfalls of litigation. Investing a substantial amount of time and effort into case evaluation can make a critical difference.

A. *How Strong Is the Plaintiff’s Case?*

The case evaluation process begins with the initial interview. Counsel should create an environment that encourages open and honest communication without fear of judgment. It is best to meet with the prospective client in a quiet, private place and to allow no interruptions. No third parties, including spouses, significant others, family members, friends, or friendly witnesses, should be present. Regardless of how supportive third parties may be, they make it more difficult for a prospective client to be forthright and put confidential attorney-client communications at risk of disclosure. This is especially true for the prospective sexual harassment plaintiff, who usually suffers from an overwhelming sense of shame and self-blame. Out of fear of loss of love and of being judged, the prospective client may withhold critical information that might otherwise be disclosed in the absence of loved ones. Therefore, the security of a private, confidential interview is essential.

Before conducting the initial interview, counsel should ask the prospective plaintiff to prepare a written chronology of events and to submit it in advance of the interview. This simple request will enable counsel to conduct a more thorough and focused interview and to assess the prospective plaintiff’s ability to clearly and succinctly tell his or her story. A rambling, poorly written chronology may be indicative of a prospective plaintiff who does not possess the communication skills necessary for litigation. It also may be a sign that the

1. See Preliminary Investigation, Chapter 13, “Professionalism and Ethics.”

prospective client is suffering from debilitating symptoms that affect his or her cognitive skills. However, the fact that a prospective plaintiff may not be able to communicate effectively in writing should not deter counsel from considering the case for litigation. Rather, counsel should proceed with the interview and pinpoint the underlying cause before making a final decision.

Moreover, the written chronology serves the purpose of documenting events for future use in the litigation. Counsel should instruct the client to address the chronology “to my attorney” and to not disclose it to anyone other than counsel in order to preserve attorney-client privilege.

During the initial interview, counsel must explore facts relating to both liability and damages. In all cases, counsel should obtain the following information regarding the prospective plaintiff’s employment with the company in question:

1. date and circumstances of hire;
2. documentation regarding hiring, including any employment agreement, offer and acceptance letters, job descriptions, résumés, and applications;
3. salary and salary increases;
4. a history of positions held including promotions, demotions, transfers, etc.;
5. representations made by employer;
6. witnesses to employer’s representations and other material events;
7. employee handbooks, personnel policy manuals, and affirmative action plans;
8. performance-related documents including evaluations, disciplinary memos, awards, and commendations;
9. facts relating to discharge, failure to hire, failure to promote, or other potential unlawful acts including dates, identity of decision makers, reason(s) given, content of conversations, and persons present;
10. complaints to higher management;
11. grievances;
12. whether administrative complaints and/or claims, such as Equal Employment Opportunity Commission (EEOC) charges or claims for unemployment benefits, disability, or worker’s compensation have been filed;
13. client’s post-employment job-seeking activities or mitigation of damages; and
14. journals, calendars, and/or diaries.

If state or federal law provides the prospective plaintiff with the right to review his or her personnel file, counsel should insist that the file be reviewed. Even if not legally required to provide review, an employer may allow review upon request. If copies cannot be made, then the prospective plaintiff should be instructed to create a written inventory of the documents contained in the personnel file at the time of review, if possible. Reviewing the employee's personnel file before litigation is filed enables counsel to determine whether any relevant documents not provided directly to the employee have been included in his or her personnel file. It also allows counsel to create a record of the contents of the personnel file as of a certain date, which can be helpful if additional documents mysteriously show up in the file or disappear from it.

Counsel should take special care when advising a prospective client who is still employed by the prospective defendant. An employee must still perform lawful and appropriate tasks. An administrative charge of discrimination or a demand letter may make the prospective client vulnerable to retaliatory or whistleblower discharge. Counsel must therefore explain the possible consequences of claims or litigation in the workplace, and should instruct prospective clients how to properly behave in their workplaces.

Counsel must also explore the prospective plaintiff's prior employment history, including prior job applications and résumés. The defense typically conducts a thorough investigation of plaintiff's employment record, searching for evidence of a history of dismissals, performance-related problems, or résumé fraud, all of which could trigger an after-acquired evidence defense. (See Chapter 7, "Special Evidentiary Concerns.") Preparing in advance for these types of defenses by obtaining this information during the initial interview will facilitate early identification of potential vulnerabilities.

Any prior history of complaints of discrimination or other unlawful conduct should also be examined, given that the defense typically uses this type of evidence to prove that the plaintiff engages in a pattern of bringing unfounded complaints or to establish alternative sources of emotional distress. This type of information almost always becomes the subject of discovery disputes and motions in limine. Therefore, its potential impact should be considered and evaluated before litigation is filed.

All prior litigation involving the prospective client must also be identified. Routine pre-trial investigations by defense counsel include a search of court files to locate other past or pending litigation with the prospective client as a party. If the prospective plaintiff has been a party to a lawsuit, counsel should inquire as to the nature of the litigation, the time period during which the litigation was

active, the manner in which the litigation was resolved, and the availability of any court records related to the litigation. Counsel should be sure to identify other litigation similar to that being contemplated, as well as any litigation that involved the disclosure of private information, such as a marital dissolution or bankruptcy proceedings. Again, by taking these precautionary measures, counsel can assess whether any evidence is available to support a defense portrayal of the plaintiff as litigious and experienced in abusing the legal system.

Once all such documents and information within the client's possession have been obtained, counsel should identify those documents that are not in the client's possession that will corroborate plaintiff's claims, as well as those that the defense will likely obtain during discovery. These records may include administrative agency files (i.e., files from the EEOC or state equivalent); union grievances; unemployment benefits claim records; disability benefits applications and supporting records; and worker's compensation files, including depositions and mental exam records. If available, counsel should obtain copies of these documents and review them before making a final decision.

In cases with potential claims for emotional distress damages, it is critical that counsel obtain copies of the prospective client's medical and psychological records. At the very least, counsel should procure all such records for treatment received during and after the prospective plaintiff's employment. Given the frequency with which defense counsel seek medical and psychological records for substantial periods of time before the prospective plaintiff's employment began, the time frame should be expanded to include pre-employment treatment records as well. By seeing these records before deciding to take a case, counsel can assess what impact they may have on the case. Medical and psychological records often contain references to the prospective client's employment experiences that could be helpful to his or her case. They also typically include private, personal information that the defense will inevitably use to attempt to establish alternative sources of emotional distress. Obtaining these documents before the defense subpoenas them will also permit counsel to take all necessary precautions to protect from disclosure of any privileged or private information that is outside the scope of permissible discovery.

Once all potentially relevant documents have been identified, counsel should focus on identifying potential third-party witnesses. It is not enough to rely on the prospective plaintiff's hope that third-party witnesses, especially those who remain employed by the potential defendant employer, will provide useful information. Due to the fear and risk of retaliation, third-party witnesses are usually reluctant to become involved. Therefore, counsel should make

efforts to contact all potential third-party witnesses and interview them as early as possible. When conducting pre-litigation interviews of third-party witnesses, counsel should carefully consider the ethical rules regarding ex parte contacts with witnesses such as current and former employees of opposing parties. (See Chapter 13, “Professionalism and Ethics,” regarding witness interviews/ex parte contacts.)

The prospective plaintiff should not be the one to interview or speak to the prospective witnesses, other than to obtain their permission to provide their names and phone numbers to counsel. It is best for counsel, a private investigator, or a paralegal to conduct the interviews. Once counsel has interviewed a third-party witness who has provided useful information, counsel should attempt to obtain a sworn declaration or signed statement.

Finally, counsel must review the applicable law and assess the probability of success. One easy way to analyze and test the legal theories of a potential new case is to review the jury instructions. If jury instructions are not available on a particular theory, then counsel should review the lead cases that discuss the elements of proof and possible defenses. Once all available information and documents have been obtained and reviewed and all applicable theories considered, counsel is ready to decide whether to file a lawsuit.

B. *What Are the Plaintiff's Damages?*

Given the ever-rising costs and inherent risks of litigation, only those cases with the potential for substantial recovery of damages should be the subject of a lawsuit. Assessing the potential value of a case is one of the most challenging tasks of the case evaluation process. It involves both objective, quantifiable methods and subjective, intangible elements.

1. Economic Damages

The logical starting place for any damages evaluation in an employment case is lost earnings. Tangible hard-dollar economic damages, such as past and future lost earnings and benefits, offer one method of objective quantification of the plaintiff's damages. However, even this seemingly objective method also has its subjective elements. Counsel should begin by exploring all possible sources of lost earnings and benefits including salary/wages; periodic raises; car allowances; merit increases; stock options; pension contributions; and medical, disability, and life insurance. Ordinarily, the amount the plaintiff earned and the benefits received are not disputed. The controversial and more difficult factors are (1) the length of time before the plaintiff becomes

re-employed in a position with a comparable salary and (2) how far out courts will be willing to allow future or front pay.²

The client will be able to provide much of the information necessary to assist counsel in making a sound and reasonable estimate of the future lost earnings at stake. Your client's work history is one of the key factors to be considered. The length of employment at each job, the financial health of the industry, and the economic climate will all have an impact on a prospective plaintiff's ability to find new employment. Each case must be valued on its own particular facts, taking into account age, education, experience, and the state of the industry and the economy. If finances permit, an economist can assist in evaluating the past and future lost earnings and benefits. By investing in a lost earnings analysis early on, counsel can take the guesswork out of the process.

To assist in defending against a claim that the plaintiff failed to mitigate his or her damages, it is a good idea to instruct the client early on to be meticulous keeping records of his or her re-employment efforts. All classified newspaper advertisements and correspondence sent to or received from prospective employers should be maintained. Juries are often suspicious of plaintiffs who remain unemployed for any significant period of time. Any doubts or suspicions about the plaintiff's diligence may be confirmed if the plaintiff has no written record of efforts to find work. A journal or diary of leads and contacts made will go a long way in substantiating the plaintiff's testimony regarding his or her diligence in pursuing other employment.

2. Emotional and/or Compensatory Damages

Once past and future lost earnings have been estimated, counsel must determine whether the client is legally entitled to emotional distress damages, as well as the preliminary value of such damages. While no formula exists for assigning a value to this elusive component of damages, counsel should not underestimate its potential value. A number of factors must be considered when determining whether a prospective plaintiff has a viable claim for emotional distress damages. First, counsel must evaluate the incidents giving rise to the claim for emotional distress to determine whether they are of the type that one

2. *Compare* Diggs v. Pepsi Cola Metropolitan Bottling Co., 742 F.2d 916 (6th Cir. 1988) (46-year-old awarded front pay until retirement age) *with* Williams v. Pharmacia Ophthalmics, Inc., 926 F. Supp. 791, 797 (N.D. Ind. 1996) (17 years of front pay held to be excessive). *Compare* Donlin v. Philips Lighting North Am. Corp., 581 F.3d 73, 88 (3d Cir. 2009) (affirming award of front page for 10 years) *with* Downey v. Strain, 510 F.3d 534, 544 (5th Cir. 2007) (affirming district court's reduction of front page from 5 years to 2 years because of speculative nature of front pay).

would ordinarily expect to cause substantial emotional and mental suffering. For example, few would dispute the fact that a rape causes substantial emotional distress. Similarly, if a sexual harassment case involves physical touching of intimate body parts over an extended period of time, then it is highly likely that mental suffering resulted.

On the other hand, if the alleged incidents of sexual conduct involve only comments over a short period of time, it will be much more difficult to persuade a trier of fact that such conduct caused severe emotional distress. In another context, if a prospective client is a long-term employee who invested a substantial portion of his or her work life to a company only to be fired for discriminatory reasons, one would expect that client to suffer substantial pain and suffering. Conversely, a short-term employee may not have as strong a claim, depending on the circumstances of the termination.

After obtaining this information, you should consult experienced counsel in your local jurisdiction as to the value of your emotional damage claim. While some practitioners prefer to use a percentage of the potential lost earnings as a guide, this approach may result in underestimating the value of the claim, especially for a low wage earner. Thus, scanning employment jury verdict reports and reviewing published post-trial and appellate decisions will also be helpful in determining the value of your client's emotional damage claims.

Assuming the facts lend themselves to developing a substantial emotional distress claim, counsel must then determine what evidence is available to prove the claim. One obvious and material consideration is the plaintiff. Often employees who have suffered deep emotional trauma are not able to articulate their painful experiences, particularly in a public forum. It is critical to carefully assess a prospective client's ability and willingness to be vulnerable and to expose his or her wounds. The ability to express such pain must be evident at the initial interview. A tight-lipped plaintiff will usually undercut counsel's ability to recover substantial damages for emotional distress.

Third-party witnesses, particularly family, friends, and co-workers who were close to the prospective plaintiff before and after the precipitating trauma, should be interviewed. They often can be quite helpful in corroborating the plaintiff's experiences as well as emotional suffering. Often it is more effective to have third-party witnesses testify regarding a plaintiff's emotional distress rather than a forensic mental health expert. Given a jury's inherent suspicion of mental health professionals, third-party lay witnesses who can effectively describe a plaintiff's suffering are invaluable.

Additionally, a plaintiff who sought psychological treatment lends necessary credibility to an emotional distress claim. Opposing counsel, judges, and

juries all expect that the plaintiff will have sought treatment if the psychological injury is portrayed as a serious one. If a prospective plaintiff has received psychological counseling, counsel should obtain all treatment records and speak directly to the treating therapist to explore any possible alternative sources of emotional distress. It is best to evaluate as soon as possible what other possible sources of distress may arise during discovery.

It is critical that counsel advise and emotionally prepare the prospective plaintiff for the inevitable intrusion into his or her private life during discovery. Few employees anticipate that their medical and psychological histories will be the subject of discovery during litigation.

Finally, it is always difficult at the case selection phase to make a judgment on a case's potential for a punitive damage award. Given the heavy burden that plaintiffs must bear in order to be entitled to a punitive damage award, counsel should carefully review the applicable law in the area and refrain from making any early judgments about the value of any potential punitive damage claim.

C. Does the Plaintiff Make a Good, Appealing Witness?

Determining how good a witness a prospective plaintiff will be is one of the most critical assessments counsel must make when evaluating a potential new case for litigation. Counsel must assess whether a prospective client will make an appealing witness based on a limited amount of face-to-face interaction. Strong facts alone will not assure that a prospective client will make an appealing witness. Nor does the fact that a prospective client is highly educated and sophisticated necessarily mean that he or she will make an appealing witness.

Given that counsel must evaluate a client's appeal and character for honesty early on in the attorney-client relationship, it is essential to pay close attention to gut feelings and instincts. Often, counsel's first impressions prove to be one of the most accurate measures of a client's appeal. A judge or a jury may have the very same first impressions of your prospective client, which will inevitably affect the outcome of the case.

1. Is the Plaintiff a Good Storyteller?

Regardless of the type of case or damages sought, a plaintiff must possess the basic qualities of a good storyteller. Ideally, those qualities include a likeable personality; an ability to fully describe events, thoughts, and feelings in an intelligent and emotionally compelling fashion; and the capacity to maintain a sense of humor, regardless of the circumstances. Given the primary role

of the plaintiff in the litigation process and the substantial amount of information that must be digested by the trier of fact in a relatively short period of time, a good plaintiff must also be able to tell his or her story with sufficient detail without being long winded.

2. Is the Plaintiff Capable of Demonstrating His or Her Emotional Damages?

As made clear in the earlier discussion of emotional distress damages, the plaintiff's storytelling ability must be coupled with a willingness and capacity to be emotionally vulnerable in a public forum. Regardless of whether damages for pain and suffering are sought, presenting a vulnerable and emotionally expressive plaintiff will contribute to greater understanding, compassion, and empathy from the trier of fact.

If damages for pain and suffering are sought, then it becomes absolutely critical that a plaintiff possess the ability to fully describe his or her emotional trauma. This is a particularly difficult task when any of the alleged wrongdoers are present. Therefore, if the plaintiff has difficulty showing his or her emotions in the privacy of counsel's office, then it is highly unlikely, although not impossible, that he or she could do so in a public forum in the presence of the alleged wrongdoers. Without compelling testimony from the plaintiff concerning the emotional and psychological harm he or she has suffered, it is virtually impossible to obtain a significant emotional distress award.

3. Is the Plaintiff Intelligent?

The plaintiff also must be intelligent enough to understand legal theories and to withstand a vigorous cross-examination. A plaintiff's educational level is not necessarily indicative of his or her intelligence. An intelligent, well-spoken, uneducated plaintiff may make as good, and sometimes a better witness than the highly educated, sophisticated plaintiff, who may appear arrogant or distant. It will suffice for the plaintiff to be intelligent enough to understand the basic theories of the case and your instructions.

4. Does the Plaintiff Have an Appealing Demeanor?

An appealing plaintiff is one who appears honest, reliable, confident, and open. Plaintiffs who are prone to express anger, bitterness, and hostility will rarely make a good impression in any context. Confidence and assertiveness are qualities that must be assessed along with the plaintiff's other personality characteristics. If the plaintiff's confidence is coupled with arrogance and a sense of entitlement, then it is not likely that a trier of fact will empathize or be willing to award substantial damages. On the other hand, if a plaintiff is not

assertive or confident enough to hold his or her own during cross-examination, then he or she will not make a good witness and will be easily manipulated by opposing counsel.

D. Is the Employer Financially Solvent?

No matter how strong a case may appear on its merits, counsel must assess the financial solvency of the employer. Only if it is probable that the plaintiff can collect on a judgment should litigation be considered. During the initial client interview, counsel should attempt to obtain all financial information within the knowledge or possession of the prospective client. Often, clients have copies of the company's annual financial reports or knowledge regarding the company's current financial status. (If the client possesses financial documents, counsel should carefully assess the applicability of the after-acquired evidence doctrine. Counsel for the employer will more likely than not claim that the prospective client had no right to remove such confidential documents and would have been summarily fired for such conduct. See Chapter 7, "Special Evidentiary Concerns," regarding After-Acquired Evidence, and Chapter 6, "Pre-trial Motions," regarding the same.)

In addition to finding out what the client knows, counsel should obtain any financial information that is a matter of public record. Private investigators and other services usually offer basic financial histories on a company at a reasonable cost. Counsel should always be sure to explore any hint of a potential bankruptcy filing. A visit to the public library or an online search to review any articles regarding the company in question may also reveal useful information. News of layoffs, restructuring, profit margin, expansion, or other such developments will help counsel determine the question of solvency.

II. DRAFTING THE COMPLAINT: THE THEME OF THE CASE

Once counsel has completed the pre-litigation investigation and decided to take a case, the complaint must be drafted. The complaint should be much more than simply a recitation of the necessary elements of each applicable theory. It should be based on a theme and include as much detail as necessary to both tell a compelling story and successfully defeat any responsive pleadings such as motions to strike, motions for judgment on the pleadings, and motions to dismiss.³

3. See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) for the standard regarding federal pleading requirements. The Court stated that while a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds for his or her entitlement requires more than a formulaic recitation of the elements of a cause of action.

The theme of the case should be developed as early as the initial interview. Often, upon hearing a story for the very first time, several possible themes arise. It is a good idea to capture these possible themes early on and develop one or more of them as discovery proceeds in a case. The drafting of the complaint offers a good starting point for the development of a theme. The theme is the thread that weaves together each of the pieces of the story that will ultimately be presented to the trier of fact. A compelling theme will fortify the chances of success on the merits as well as contribute to a substantial verdict.

During the initial interview, counsel should calculate the applicable statute of limitations. All timely theories of liability should be considered; however, counsel should analyze whether pleading all potential causes of action are necessary in order to prevail, keeping in mind the discovery demands and motion practice that multiple causes of action will generate, as well as analyze whether a shotgun approach is advisable. In addition, all viable defendants should be named, including individual wrongdoers and supervisors, when appropriate, if the law allows for personal liability.

III. VENUE AND FORUM

Prior to making any decision regarding the appropriate forum and venue for a case, counsel should thoroughly investigate all possible theories and remedies under both federal and state law. Any procedural differences between federal and state law should also be considered, including the right to a jury trial, the right to reasonable discovery, and trial-setting schedules. In order to determine proper venue, jurisdiction, parties, and applicable theories, counsel must obtain the following information regarding the employer: name, address, state of incorporation, principal place of business, number of employees, type of business, and organizational structure.

When deciding whether to file in state or federal court, counsel should consider the following factors:

1. the applicable burden of proof under each legal theory;
2. the availability of emotional distress and punitive damages and attorneys' fees;
3. the right to a jury trial;
4. the requirement of a unanimous verdict;
5. the community from which the potential jurors are selected;
6. the trial judges available and their attitudes towards employment cases;

7. procedural differences, including the code of civil procedure and the local rules of court;
8. counsel's familiarity and experience with the court system; and
9. the state and federal appellate courts' judicial philosophies towards employment cases.

If counsel decides to file in state court, any possibility of removal to federal court by the defendants should be considered.

If counsel has a choice of venue, careful consideration should be given to the community from which the jury will be selected and the available trial judges. The prospective client's race, gender, profession, and class should also be considered when determining the appropriate venue.

IV. RELIEF

All possible forms of relief should be requested in the complaint, including past and future lost earnings, emotional distress and punitive damages, pre-judgment interest, attorneys' fees, and costs. The appropriate standard for each form of relief requested should be properly pled in the body of the complaint. Injunctive relief should also be requested, particularly where the plaintiff remains employed by the defendant employer. For example, in a sexual harassment or retaliation case, counsel may wish to seek an injunction prohibiting the employer from engaging in further unlawful acts.

Reinstatement is also typically an available form of injunctive relief that should be considered if the plaintiff is willing to return. If the plaintiff has not obtained other comparable employment and is emotionally prepared to return to work, reinstatement should be requested when available. However, the practical reality is that few employees choose to return due to fear of retaliation.

APPENDIXES*

- 1-A. EMPLOYMENT DISCRIMINATION QUESTIONNAIRE
- 1-B. CHECKLIST OF CLAIMS
- 1-C. SAMPLE COMPLAINTS
 - 1. GENERAL ALLEGATIONS
 - 2. SEXUAL HARASSMENT AND RETALIATION, AGAINST ALL DEFENDANTS
 - 3. DISCRIMINATION ON THE BASIS OF DISABILITY, AGAINST ALL DEFENDANTS
 - 4. DISCRIMINATION BASED ON RACE OR NATIONAL ORIGIN, AGAINST ALL DEFENDANTS
 - 5. ASSAULT, AGAINST ALL DEFENDANTS
 - 6. BATTERY, AGAINST ALL DEFENDANTS

*See also the following forms at the end of Chapter 13, "Professionalism and Ethics": Potential Client Cover Sheet, Initial Consultation Confirmation Letter, Consultation Follow-up Letter with Fee Agreement, Disclosure Statement, Contingent Fee Agreement, and Hourly Rate Fee Agreement.

Appendix 1-A: Employment Discrimination Questionnaire

Client Intake Form*

Referred by: _____ Date: _____

Referred to: JWG: GDS: CPL: CAR: FIRM:

PERSONAL INFORMATION

Name: _____

Address: _____

Work Phone: _____ Mobile Phone: _____

Home Phone: _____ Email Address: _____

Best Time to Call Back: _____

EMPLOYMENT INFORMATION

Name of Employer: _____

Work Location: _____

Job Title: _____ Compensation: _____

Date of Hire: _____ Full Time: Part Time:

DISCRIMINATION OR HARASSMENT

Age: Ancestry: Civil Union Status:

Color: Disability: Domestic Partner Status:

Gender: Gender Identity: Genetic Traits:

Marital Status: Military Status: National Origin:

Nationality: Pregnancy: Race:

Religion: Sexual Orientation:

*Thanks to the Firm of Green, Savits & Lenzo, LLC for the use of the Intake Form and Client Consultation Questionnaire.

RETALIATION

- Discrimination Complaint:
- Family and Medical Leave:
- Whistleblower Activity:
- Workers' Compensation:

BREACH OF CONTRACT

- Individual Employment Contract:
- Union Collective Bargaining Agreement:
- Employee Handbook:

WRONGFUL CONDUCT

- Terminated: Yes: No: When Notified about Termination
Decision: _____
- Demoted: Yes: No: When Notified about Demotion
Decision: _____
- Failure to Promote: Yes: No: When Notified about Promotion
Decision: _____
- Failure to Hire: Yes: No: When Notified about Hiring
Decision: _____
- Compensation Issue: Yes: No: When Notified about Compensation
Decision: _____
- Harassment: Yes: No:
- Other Wrongful Conduct: _____

COMMUNICATION WITH CLIENT:

Date: _____ Time: _____ Conversation: _____ Voice Mail: _____ No Answer: _____

Date: _____ Time: _____ Conversation: _____ Voice Mail: _____ No Answer: _____

Attorney Notes:

CLIENT CONSULTATION QUESTIONNAIRE

PLEASE PRINT

Date: _____ SS#: _____ - _____ - _____

Name: _____

Address: _____

Work Phone: _____ Home Phone: _____ Fax: _____

Mobile Phone: _____ Beeper: _____ E-mail: _____

Who referred you to this law firm? _____

Were you referred to a particular lawyer in the firm? Yes _____ No _____

Who? _____

Were there any other factors that assisted you in choosing our firm, such as an advertisement, website, or news coverage? _____

Employer with whom you have a legal problem: _____

Work location: _____

How long were you (or have you been) employed by this employer? _____

Specific date of hire: _____

Have you been (and if so, when):

1. Terminated? _____ Date Notified: _____ Effective Date: _____

2. Demoted? _____ Date Notified: _____ Effective Date: _____

3. Denied Promotion? _____ Date Notified: _____ Effective Date: _____

4. Refused a job for which you applied? _____

Date Notified: _____ Effective Date: _____

5. Other _____

What was the stated reason?

What is the name of the person who notified you of the adverse decision?

What is this person's position? _____

Who do you think really made the decision? _____

What do you think is the biggest real reason for that decision?

What is your age? _____ Date of birth? _____

What was your compensation? _____

What was your job title (or what job were you seeking)? _____

If you were fired, how much severance pay (if any) were you offered or given?

Have you signed a release or waiver? _____

Were you replaced, and if so, by whom? _____

Have you found other employment?

1. Yes (if so, please state your compensation) _____
2. No, but expect to soon _____
3. No, and do not expect to soon _____

Do you believe that your employer or supervisor discriminated against you or harassed you on the basis of any of the following characteristics (yes, no, or maybe)?

Age: _____

Ancestry: _____

Civil Union Status: _____

Color: _____

Disability: _____

Domestic Partnership Status: _____

Gender: _____

Gender Identity: _____

Genetic Traits: _____
Marital Status: _____
Military Service: _____
Nationality: _____
National Origin: _____
Pregnancy: _____
Race: _____
Religion: _____
Sexual Orientation: _____

Do you believe that your employer or supervisor retaliated against you because you engaged in any of the following activities (yes, no, or maybe)?

Objecting to unlawful discrimination in the workplace: _____
Objecting to or refusing to perform an unlawful act
in the workplace: _____
Seeking family or medical leave: _____
Seeking workers' compensation for a workplace injury: _____

Are you claiming that you were subjected to a hostile work environment? _____

If yes, indicate the exact date of the last act of harassment. _____

Do you believe that your employer breached a contract that it had with you?

Briefly describe your main complaint: _____

What do you want to accomplish through an attorney? _____

Date (if any) of United States Equal Employment Opportunity Commission ("EEOC") charge: _____

Date (if any) of _____ Division on Civil Rights (“DCR”) charge: _____

Date (if applicable) of Determination Letter from EEOC or DCR: _____

Have you been fired from any other jobs? Yes _____ No _____ If yes, set forth why you believe you were fired and what reasons your employer gave.

Is there any part of your résumé or prior employment applications that may not be considered true? If yes, please explain:

Are you aware of any kind of deadline with respect to your need for legal advice or representation? If so, please explain briefly:

Signature: _____ Date: _____

Appendix 1-B: Checklist of Claims

1. Statutory

- (a) Discrimination: sex; pregnancy; age; race; color; national origin; religion; sexual orientation; veteran's status; marital status; physical, mental, or perceived handicap; genetic traits
- (b) Illegal retaliation claims under anti-reprisal statutes
- (c) Whistleblower claims
- (d) Equal pay claims
- (e) Jury duty
- (f) Filing worker's compensation claims
- (g) Wage and hour claims
- (h) Union organizing
- (i) Worker Adjustment Retraining & Notification Act (plant closing law)
- (j) Employee Retirement Income Security Act (ERISA) benefit claims
- (k) Family leave (state and/or federal)

2. Common law claims

- (a) Employer handbooks and/or implied contracts
- (b) Employment agreements
- (c) Oral promises and/or promissory estoppel
- (d) Covenant of good faith and fair dealing
- (e) Intentional infliction of emotional distress
- (f) Public policy and retaliatory discharge
- (g) Intentional interference with current or prospective contractual relationship
- (h) Defamation (libel and slander)

3. Federal constitutional claims (42 U.S.C. §§ 1983 and/or *Bivens* claims)

- (a) First Amendment (public employment only)
- (b) Due process
- (c) Equal protection

4. State constitutional claims

Appendix 1-C: Sample Complaints

1. CAUSE OF ACTION: GENERAL ALLEGATIONS

COURT OF THE [STATE] OF
FOR THE [COUNTY] OF

) CASE NO.
)
Plaintiff,)
)
v.)
)
Defendants.)
)

GENERAL ALLEGATIONS

- 1. (hereinafter "Ms. or Mr." or "Plaintiff") is an individual who is and at all times relevant herein was, a resident of the County of, State of.
2. Plaintiff is informed and believes, and based thereon alleges, that defendant (hereinafter "") was and is a corporation doing business in County, State of. Defendant employs [more than] employees [and is engaged in interstate commerce/is an employer within the meaning of (statute).]
3. Plaintiff is informed and believes, and based thereon alleges, that defendant (hereinafter "") was and is an individual residing in County. At all times relevant herein, was a supervisor, managerial employee or agent of defendant.
4. Plaintiff does not know the true names and capacities of the defendants sued herein as DOES 1 through, inclusive, and will amend this Complaint to state the true names and capacities of such fictitiously named defendants when such information is ascertained.

5. Plaintiff is informed and believes and based thereon alleges that each defendant is the agent, servant, employee, successor in interest, co-conspirator, and/or alter ego of every other defendant, and that, in doing the acts alleged herein, each defendant acted as the agent of and with the consent, knowledge, authorization and/or ratification of every other defendant herein.

6. Plaintiff is informed and believes and based thereon alleges that each defendant was in some manner intentionally and/or negligently and legally responsible for the events and happenings alleged in this Complaint and for plaintiff's injuries and damages.

2. CAUSE OF ACTION: SEXUAL HARASSMENT AND RETALIATION, AGAINST ALL DEFENDANTS

1. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through _____, inclusive, and incorporates the same by reference as though set forth fully herein.
2. Defendants, including defendant _____ through its agent or supervisor, defendant _____ engaged in a pattern and practice of unlawful sexual harassment by subjecting plaintiff to unwelcome sexual harassment, including but not limited to, requests for sexual favors, sexual advances and physical sexual harassment, in violation of [applicable code].
3. The above-described unwelcome sexual harassment created an intimidating, oppressive, hostile and offensive work environment which interfered with plaintiff's emotional well-being and his/her ability to perform his/her work.
4. Defendant _____ at all times relevant hereto had actual and constructive knowledge of the conduct described in paragraph ____.
5. Defendant _____ failed to take all reasonable steps to prevent sexual harassment from occurring, and to protect plaintiff from sexual harassment and retaliation.
6. Defendant _____ violated [applicable code] by failing to adequately supervise, control or discipline and/or otherwise penalize the conduct, acts and failures to act of defendant _____ as described in paragraph ____.
7. Defendant _____ engaged in unlawful retaliation against plaintiff by terminating plaintiff because he/she [opposed practices forbidden by applicable code].
8. As a result of the hostile and offensive work environment maintained by defendant and defendant _____'s failure to protect plaintiff from further harassment and retaliation, plaintiff was forced to resign his/her employment.
9. Plaintiff is informed and believes, and based thereon alleges, that in addition to the practices enumerated above, defendants, and each of them, have engaged in discriminatory practices against him/her which are not yet fully known. At such time as said discriminatory practices become known to him/her plaintiff will seek leave of court to amend this Complaint in that regard.

10. Plaintiff has filed charges of discrimination with [applicable administrative agency], a true and correct copy of which is attached hereto as Exhibit ____ and incorporated herein by reference. Within one year of the filing of this Complaint, [administrative agency] has issued a Right to Sue Notice authorizing this lawsuit, a true and correct copy of which is attached hereto as Exhibit ____, and incorporated herein by reference. Plaintiff has exhausted his/her administrative remedies.

11. As a direct and proximate result of defendants' actions, plaintiff has suffered and will continue to suffer emotional distress, consisting of outrage, shock and humiliation, reasonably occurring and likely to occur based on sexual harassment and retaliation he/she experienced and the employer's failure to take prompt and appropriate remedial action; and he/she has suffered and will continue to suffer a loss of earnings and other employment benefits and job opportunities. Plaintiff is thereby entitled to general and compensatory damages in amounts to be proven at trial.

12. Plaintiff is informed and believes and based thereon alleges that the outrageous conduct of defendant _____ described above was malicious and oppressive, and done with a conscious disregard of plaintiff's rights, and with the intent to injure plaintiff. Because defendant _____ acted in his/her capacity as the managing agent of defendant _____ and because defendant _____ ratified defendant _____'s conduct by doing nothing despite its knowledge of defendant _____'s unlawful conduct, plaintiff is entitled to punitive damages from defendants _____, and DOES 1 through _____.

13. As a further direct and proximate result of defendants' prayer, violation of [applicable code], as heretofore described, plaintiff has been compelled to retain the services of counsel in an effort to enforce the terms and conditions of the employment relationship with defendants and has thereby incurred, and will continue to incur, legal fees and costs. Plaintiff requests that attorney's fees be awarded pursuant to [applicable code].

WHEREFORE, Plaintiff demands judgment as follows:

1. For compensatory damages and general damages according to proof at trial;
2. For attorneys' fees pursuant to statute and costs of suit;
3. Prejudgment interest on all amounts claimed; and
4. Such other and further relief as the Court deems just and proper.

Date: _____ [FIRM]

By: _____
[Name]

Attorneys for Plaintiff

3. CAUSE OF ACTION: DISCRIMINATION ON THE BASIS OF DISABILITY, AGAINST ALL DEFENDANTS

1. Plaintiff repeats and realleges the allegations of paragraphs 1 through ____, inclusive, and incorporates the same by reference as though set forth fully herein.

2. Plaintiff was terminated as of _____, 20__ on the basis of his/her disability, _____, in violation of [applicable code].

3. Plaintiff's termination constituted a failure to accommodate his/her disability as required by [applicable code], insofar as he/she is able to perform all of the essential functions of his/her job with reasonable accommodation. Reasonable accommodation would require the company only to _____.

4. Plaintiff is informed and believes, and based thereon alleges, that in addition to the practices enumerated above, defendants, and each of them, have engaged in discriminatory practices against him/her which are not yet fully known. At such time as said discriminatory practices become known to him/her plaintiff will seek leave of court to amend this Complaint in that regard.

5. Plaintiff has filed charges of discrimination with [applicable administrative agency], a true and correct copy of which is attached hereto as Exhibit ____ and incorporated herein by reference. Within one year of the filing of this Complaint, [administrative agency] has issued a Right to Sue Notice authorizing this lawsuit, a true and correct copy of which is attached hereto as Exhibit ____, and incorporated herein by reference. Plaintiff has exhausted his/her administrative remedies.

6. As a direct and proximate result of defendants' actions, plaintiff has suffered and will continue to suffer pain and suffering, and extreme and severe mental anguish and emotional distress; he/she has incurred and will continue to incur medical expenses for treatment by psychotherapists and other health professionals and for other incidental expenses; and he/she has suffered and will continue to suffer a loss of earnings and other employment benefits and job opportunities. Plaintiff is thereby entitled to general and compensatory damages in amounts to be proven at trial.

7. Plaintiff is informed and believes and based thereon alleges that the outrageous conduct of defendant _____, as described above, was malicious and oppressive, and done with a conscious disregard of plaintiff's rights

and with the intent to injure plaintiff. Because defendant _____ acted in his/her capacity as the managing agent of defendant _____ and because defendant _____ ratified defendant _____'s conduct by doing nothing despite their knowledge of defendant _____'s unlawful conduct, plaintiff is entitled to punitive damages from defendants _____, _____ and DOES 1 through _____, individually.

8. As a further direct and proximate result of defendants' violation of [applicable code], as heretofore described, plaintiff has been compelled to retain the services of counsel in an effort to enforce the terms and conditions of the employment relationship with defendants and has thereby incurred, and will continue to incur, legal fees and costs. Plaintiff requests that attorney's fees be awarded pursuant to [applicable code].

4. CAUSE OF ACTION: DISCRIMINATION BASED ON RACE OR NATIONAL ORIGIN, AGAINST ALL DEFENDANTS

1. Plaintiff repeats and realleges the allegations of paragraphs 1 through ____, inclusive, and incorporates the same by reference as though set forth fully herein.

2. Defendants, and each of them, including defendant _____ through its agent or supervisor, defendant _____, engaged in a pattern and practice of unlawful discrimination on the basis of race or national origin by denying plaintiff promotions, fair salary increases and subjecting him/her to an arbitrary layoff and discharge, on the basis of his/her race and/or national origin in violation of [applicable code].

3. Defendant _____ at all times relevant hereto had actual and constructive knowledge of the conduct described in paragraph ____.

4. Defendant _____ failed to take all reasonable steps to prevent the discrimination based on race or national origin from occurring.

5. Defendant _____ violated [applicable code] by failing to adequately supervise, control, or discipline and/or otherwise penalize the conduct, acts, and failures to act of defendant _____ as described in paragraph ____.

6. Plaintiff has filed a charge of discrimination on the basis of race or national origin in employment with [applicable administrative agency], a true and correct copy of which is attached hereto as Exhibit ____ and incorporated herein by reference. Within one year of the filing of this Complaint, [administrative agency] issued a right to sue notice authorizing this lawsuit, a true and correct copy of which is attached hereto as Exhibit ____, and incorporated herein by reference. Plaintiff has exhausted his/her administrative remedies.

7. As a direct and proximate result of defendants' actions, plaintiff has suffered and will continue to suffer pain and suffering, and extreme and severe mental anguish and emotional distress; he/she has incurred and will continue to incur medical expenses for treatment by psychotherapists and other health professionals and for other incidental expenses; and he/she has suffered and will continue to suffer a loss of earnings and other employment benefits and job opportunities. Plaintiff is thereby entitled to general and compensatory damages in amounts to be proven at trial.

8. As a further direct and proximate result of defendants' violation of [applicable code] plaintiff has been compelled to retain the services of counsel in an effort to enforce the terms and conditions of the employment relationship with defendants and has thereby incurred, and will continue to incur, legal fees and costs. Plaintiff requests that attorney's fees be awarded pursuant to [applicable code].

9. Plaintiff is informed and believes and based thereon alleges that the outrageous conduct of defendant _____ described above was malicious and oppressive, and done with a conscious disregard of plaintiff's rights, and with the intent to injure plaintiff. Because defendant acted in his/her capacity as the managing agent of defendant _____ and because defendant _____ ratified defendant _____'s conduct by doing nothing despite its knowledge of defendant _____'s unlawful conduct, plaintiff is entitled to punitive damages from defendants _____, _____ and DOES 1 through ____.

**5. CAUSE OF ACTION: ASSAULT,
AGAINST ALL DEFENDANTS**

1. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through _____, inclusive, and incorporates the same by reference as though set forth fully herein.

2. Defendant _____'s conduct as described above, caused plaintiff to constantly be apprehensive that defendant _____ would subject him/her to intentional invasions of his/her right to be free from offensive and harmful conduct and demonstrated that at all times material herein, defendant had a present ability to subject him/her to an intentional offensive and harmful touching.

3. As a direct and proximate result of defendants' actions, plaintiff has suffered and will continue to suffer pain and suffering, and extreme and severe mental anguish and emotional distress; he/she has incurred and will continue to incur medical expenses for treatment by psychotherapists and other health professionals and for other incidental expenses; and he/she has suffered and will continue to suffer a loss of earnings and other employment benefits and job opportunities. Plaintiff is thereby entitled to general and compensatory damages in amounts to be proven at trial.

4. Plaintiff is informed and believes and based thereon alleges that the outrageous conduct of defendant _____ as described above was malicious and oppressive, and done with a conscious disregard of plaintiff's rights, and with the intent to injure plaintiff. Because defendant _____ acted in his/her capacity as the managing agent of defendant _____ and because defendant _____ ratified defendant _____'s conduct by doing nothing despite its knowledge of defendant _____'s unlawful conduct, plaintiff is entitled to punitive damages from defendants _____, and DOES 1 through _____, individually.

**6. CAUSE OF ACTION: BATTERY,
AGAINST ALL DEFENDANTS**

1. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through ____, inclusive, and incorporates the same by reference as though set forth fully herein.

2. As described more fully above, defendant _____ subjected plaintiff to repeated, nonconsensual and intentional invasions of his/her right to be free from offensive and harmful physical contact.

3. As a direct and proximate result of defendants' actions, plaintiff has suffered and will continue to suffer pain and suffering, and extreme and severe mental anguish and emotional distress; he/she has incurred and will continue to incur medical expenses for treatment by psychotherapists and other health professionals and for other incidental expenses; and he/she has suffered and will continue to suffer a loss of earnings and other employment benefits and job opportunities. Plaintiff is thereby entitled to general and compensatory damages in amounts to be proven at trial.

4. Plaintiff is informed and believes and based thereon alleges that the outrageous conduct of defendant _____, as described above, was malicious and oppressive, and done with a conscious disregard of plaintiff's rights and with the intent to injure plaintiff. Because defendant _____ acted in his/her capacity as the managing agent of defendant _____ and because defendant _____ ratified defendant _____'s conduct by doing nothing despite their knowledge of defendant _____'s unlawful conduct, plaintiff is entitled to punitive damages from defendants _____, and DOES 1 through ____, individually.