

**PREPARATION OF THE COMPLAINT AND THE ANSWER:**  
**AVOIDING/EXPLOITING PLEADING PITFALLS**

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1. THE CLIENT INTERVIEW/INVESTIGATION: THE CRUCIAL FIRST STEP

At the beginning of the process, nothing can be more crucial to counsel than to assemble as much information as possible. Meeting(s) with the client and its knowledgeable representatives, if applicable, reviewing documents, interviewing witnesses and investigating other facts which may be relevant is essential.

1. FROM THE PLAINTIFF'S PERSPECTIVE

1. Who, What, Where, When and (if possible) Why?

The plaintiff will come to counsel with a description of the manner in which he has been mistreated by his present or past employer. He may not have any idea as to whether the perceived wrong is actionable. He may be highly emotional.

Counsel's first role will be to ascertain exactly what happened, who was involved, where the events in question took place, whether this activity was an isolated incident or part of a regular procedure, and, if possible, what the plaintiff believes to be the employer's motivation. A thorough understanding of the underlying facts, at this early stage, is especially important.

2. Can We Identify Supporting and/or Independent Witnesses?

Some acts of workplace misconduct (for example, *quid pro quo* sexual harassment) are unlikely to have been witnessed by anyone other than the victim and the perpetrator. Facts related to other kinds of actions (for example, discipline and discharge procedures, in general and as implemented with respect to the plaintiff) may be known to large numbers of people. Counsel should attempt to learn as soon as possible whether there are any witnesses to the events in question, what the loyalties of the witnesses may be, whether a particular witness will support or contradict your client and whether the witness is willing to come

forward voluntarily. Whenever possible, interview important witnesses before you begin drafting.

3. Are There Similarly Situated Victims? Pattern and Practice?

A class action may be appropriate if there are persons who have been mistreated in a manner similar to the treatment given to the plaintiff. Even if a class action would not be appropriate, the availability of persons who were also treated wrongfully can be powerful supporting evidence. Find and interview such people.

4. What Kind of Documentary Evidence Exists and Where Is It Located?

When conflicting evidence is presented, the trier of fact is more likely to believe the testimony which is supported by documentary evidence. Find out what documents are relevant, whether they are in the possession of your client, and, if not, in whose possession they are maintained. Do not overlook evidence which was generated and/or stored electronically – the fact that the document was probably deleted is not necessarily dispositive, as the use of the “delete” function does not always mean that the document cannot be retrieved.

5. What Are the Damages?

The amount and type of remedy, and the likelihood of achieving the remedy, are also important early considerations. The potential amount of damages may effect your choice of forum (for example, consider the jurisdictional amount requirement in federal court). The need for an equitable remedy, if applicable, would also have a significant effect upon the manner in which you plead your case. Non-economic factors (such as the investment of time and emotion which will be required of your client) should also be discussed with your client and considered at this stage.

2. FROM THE DEFENDANT'S PERSPECTIVE

1. What Do We Think Happened? Who, What, Where, When and Why?

Your first indication that there is a problem is likely to come when your client delivers a copy of the Complaint to you. At that point, you should go through the same process as is described in Section I A above, but from the defendant's point of view.

2. What Level of Management Was Involved?

It is important to determine, as early as possible, the level of management against whom the charges are levied, level of management which was involved in the decision-making process, and the level of management with which you will be

working in the defense of the matter. A related issue is the extent of corporate resources which the client is willing to commit to the defense of this case.

3. Are There Any Overriding Corporate Considerations?

The very fact of litigation, and the need to defend the case, makes the matter important to the defendant. However, there may be corporate considerations beyond the four corners of this case which need to be considered, and, if so, counsel needs to determine what they are at the earliest possible time. For example, a claim of unpaid overtime under the Fair Labor Standards Act by a lone customer service representative at a small facility may involve relatively insignificant dollars. However, the identical position may be held by a large number of employees at other, larger facilities of the corporation and its related entities. As a result, overall corporate needs may make it important to fully litigate a case which might otherwise be settled quickly and inexpensively.

3. REMEMBER RULE 11 AND/OR ITS STATE LAW EQUIVALENT

Under this Rule, counsel certifies, in essence, that a reasonable investigation has been undertaken, and that the factual and legal allegations made are not unwarranted. At a minimum, counsel should be sure that the standards set forth in this Rule have been met before any pleading is circulated.

2. IDENTIFICATION OF THE PARTIES: IN THE PLEADINGS AND IN FACT

1. FROM THE PLAINTIFF'S PERSPECTIVE

1. The Employer

In most circumstances, the identification of the corporate-employer-defendant is obvious. However, note common employer and joint employer possibilities, especially in the employee leasing context.

2. The Supervisor(s); Does It Help Us to Name Individuals?

Corporations act by and through their employees and agents. Should the employee or agent involved be named as a defendant? Consider the advantages (for example, additional potential sources of damages, the possibility of playing one against the other, etc.) and the disadvantages (for example, additional adversaries bringing additional lawyers and other resources to bear against the plaintiff, etc.).

3. The Deep Pocket: Parent and Affiliated Companies? Insurers?

The defendant may not be the only source of remedy. If the defendant is a subsidiary of a larger entity, it may be possible to pierce the corporate veil. Employment practices or other forms of liability insurance may be involved. Consider these possibilities.

## 2. FROM THE DEFENDANT'S PERSPECTIVE

### 1. Joint Representation: Yes, No or Maybe?

If there are multiple defendants, can one law firm represent all of them? Should the same law firm represent all of them? Balance the advantages of lower cost and centralized control, on the one hand, against the advantages of more bodies and minds on the defense side on the other hand. Be mindful of the existence of actual and/or potential conflicts of interest, and the related ethical rules.

### 2. Is There a Third Party Defendant? Do We Want Him/It in the Case?

Is there another person or entity who may be liable for all or part of the plaintiff's claims? If so, does it make sense to bring him into the litigation (if the plaintiff has not already done so) pursuant to Rule 14?

## 3. CHOOSING THE APPROPRIATE CAUSES OF ACTION

### 1. FROM THE PLAINTIFF'S PERSPECTIVE

There are more than a dozen federal statutes which provide relief to employees for workplace misconduct. Virtually every state has enacted employment legislation which could give rise to a cause of action. In addition, there are numerous causes of action sounding in tort which have been used by employees and former employees against an employer or former employer.

An important task of plaintiff's counsel is to evaluate the information presented to him by his client and determine which cause or causes of action to include in a complaint. Multiple causes of action, sometimes mutually exclusive as a matter of fact, are often alleged in the plaintiff's complaint.

Counsel should analyze the essential elements of each cause of action which is factually supportable. Then, assuming the existence of facts sufficient to avoid implicating Rule 11, counsel might consider, as to each possible claim, among other things, applicable burdens of proof, available remedies, the effect upon the defendant of the allegation (for example, the embarrassment attendant to the filing of a sexual harassment or RICO claim), etc.

2. FROM THE DEFENDANT'S PERSPECTIVE

Ordinarily, the defendant has little to say about the nature of the claims being made against him. However, on occasion, the plaintiff will open settlement discussions prior to the filing of a lawsuit, and will provide the defendant with a draft of the complaint the plaintiff intends to file. The nature of the proposed allegations may have an impact on those discussions.

4. SELECTION OF THE FORUM

1. FROM THE PLAINTIFF'S PERSPECTIVE

Counsel should evaluate whether it is in its client's interest to file the lawsuit in federal court or in state court, or (if applicable) in an alternate dispute resolution ("ADR") forum such as arbitration.

While the nature of the cause of action will have an impact on forum selection, a federal court will have pendent jurisdiction over state law claims, if it chooses to exercise that jurisdiction, and a state court will have concurrent jurisdiction over some federal causes of action.

2. FROM THE DEFENDANT'S PERSPECTIVE

The plaintiff will have selected the forum when it filed the lawsuit. Typically, there will be multiple causes of action. If the lawsuit has been filed in state court but includes one or more claims of which the federal district courts have original jurisdiction, defense counsel may want to consider removing the matter to federal court, pursuant to 28 U.S.C. Section 1441 *et seq.* If the federal jurisdiction is based upon a federal question, removal may be accomplished without regard to the citizenship or residence of the parties. If some of the claims set forth in the complaint would not ordinarily be removable, the federal court may elect to determine all of the issues or remand the issues in which state law claims predominate, in its discretion.

If there is an applicable arbitration clause, the defendant should consider moving to stay the judicial proceedings, pending arbitration.

5. HOW DO I PLEAD THEE; LET ME COUNT THE WAYS

1. FROM THE PLAINTIFF'S PERSPECTIVE

1. Rule 8(a)(1): "short and plain statement"

The rules of procedure only require a short and plain statement of the jurisdictional grounds for the lawsuit, and a short and plain statement of the claim, showing that the pleader is entitled to relief, as well as a demand for the relief sought. We have a system of notice pleading, except as set forth to the contrary in Rule 9. However, Rule 12 provides that a defendant may move to dismiss or for judgment on the pleadings under certain circumstances. As a result, counsel should draft the complaint with sufficient particularity to avoid dismissal, or judgment for the defense, pursuant to Rule 12.

2. Meeting the Requirements of Rule 12

Rules 12(b) (1) through (5) and (7) address the selection of the defendant and the court's jurisdiction over the subject matter and over the person of the defendant, venue, and sufficiency and service of process. While important, ordinary diligence should avoid problems in these areas.

Most Rule 12(b) claims arise under Rule 12(b)(6), which provides for a motion to dismiss for failure to state a claim upon which relief can be granted. These claims can usually be avoided if the complaint sets forth facts sufficient to address the essential elements of each cause of action. While this should be obvious, in recent years courts have granted defense motions to dismiss for failure to state a claim upon which relief can be granted in the following kinds of employment law cases:

- ◆ In a case alleging race and national origin discrimination under Title VII of the Civil Rights Act of 1964 ("Title VII") and the New York State Human Rights Law, the plaintiff failed to allege that the harassment she experienced was based upon race or national origin. *Amna v. Montefiore Medical Center et al.*, 189 F. 3d 460, 1999 WL 627626 (2<sup>nd</sup> Cir. (N.Y.))
- ◆ On the basis of *res judicata*, in a case brought under Title VII alleging national origin discrimination, where a previous lawsuit alleging a violation of the Family and Medical Leave Act ("FMLA") on the basis of the same underlying facts had already been dismissed with prejudice. *Satterfield v. Olsten Kimberly Quality Care*, 2000 WL 94055 (10<sup>th</sup> Cir. (Okla))

- ◆ In a case under Title VII in which the plaintiff had failed to allege the filing of a charge of discrimination with the EEOC. *Reddy v. Loma Linda Community Hospital*, 194 F. 3d 1318, 1999 WL 728572 (9<sup>th</sup> Cir. (Cal.))
- ◆ In a case in which the U.S. Supreme Court determined that the question of whether an individual has a “disability” under the Americans With Disabilities Act (“ADA”) must be based upon a view of a person in his corrected state (i.e., that whether a person with impaired vision is disabled must be measured on his ability to see with corrective lenses); the trial court had granted a motion to dismiss because the plaintiffs did not so allege, and because they did not allege that they were “regarded as” disabled by the employer. *Sutton v. United Air Lines, Inc.*, 119 S. Ct. 2139 (1999)
- ◆ In a claim brought under the ADA and FMLA, where the plaintiff did not allege the filing of a charge with the EEOC, and in which the plaintiff’s allegation that he was an eligible employee as defined in the FMLA was merely conclusory and did not set forth any facts relative to the definition of an eligible employee. *Spurluk v. Nynex*, 949 F. Supp 1022 (W.D. New York 1966)
- ◆ In a case brought under the Age Discrimination in Employment Act (“ADEA”) and various state statutes, the court granted a motion under Rule 12(b)(6) because the plaintiff was not an “employee” as defined in the Act. *Mangram v. General Motors Corporation*, 108 F. 3d 61 (4<sup>th</sup> Cir. 1997)

In deciding these cases, the courts recognize that we have a liberal system of notice pleading. The court must take all facts alleged in the complaint to be true, and draw all reasonable inferences in favor of the plaintiff. Then, it is only proper to grant a motion to dismiss for failure to state a claim if it is clear that the plaintiff can prove no set of facts to support his claim. Nevertheless, as indicated above, the courts will grant 12(b)(6) motions when the facts necessary to support the essential elements of a cause of action have not been set out in the complaint.

## B. FROM THE DEFENDANT'S PERSPECTIVE

### 1. Consider the Ultimate Result

Defendants can win a motion to dismiss under appropriate circumstances, such as those described above. However, when considering whether to use the resources necessary to pursue such a motion, the defendant should consider what the ultimate result is likely to be. Often, when a court grants a motion to dismiss, it does so either without prejudice or with leave to amend the complaint. This was the case in several of the cases described above (i.e., *Reddy*, *Spurluk* [final

*dismissal of ADA claim, but with leave to amend the FMLA claim], Mangram [final dismissal as to ADEA claim, without prejudice as to state law claims], etc.).*

2. Plead Them or Lose Them

Be sure to note Rule 8(c) re: affirmative defenses, and Rule 12(h), pursuant to which certain claims must be made or will be waived.

3. Should You Include a Counterclaim?

Defense counsel should also consider whether the defendant has any viable counterclaims against the plaintiff, whether they are compulsory or permissive under Rule 13, and whether, as a matter of strategy, such claims should be made in this litigation. In the typical employment case, the jury's initial sympathies lie with the plaintiff, and part of the job of defense counsel is to convince the jury that the employer acted appropriately when it took the action in question in the litigation. That job becomes even more difficult when the employer, in addition to having the burden of justifying its action, also has to convince the jury to order the "little guy" employee to pay money to the "fat cat" employer, at a time when the plaintiff is out of work. Considerable thought should be had before a counterclaim against the plaintiff is added by the employer.