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Employment Law for Employees

**Practical Tips On How To Protect Yourself In
the Work Place And On Your Way Out**



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Introduction

If you work for a company with more than 15 employees, this guide will help you understand and navigate the employment laws that may be applicable to your circumstances. For those of you working for smaller companies, you are not without recourse but the way you analyze your options will be different.

Most states apply the doctrine of “at will” employment which means that you can be fired for any reason or no reason as long as it is not a legally prohibited reason such as race, gender, age, disability, retaliation, wrongful termination, etc.

If you are looking at this guide, either you or someone you know is suffering from some form of negative treatment in the workplace. The negative treatment could be as a result of some discriminatory treatment, retaliation or simply because you have a personality conflict with your supervisor. The negative treatment could also be related to some perceived poor performance on your part.

As you go through this Guide, please bear in mind that not all negative treatment in the work place is actionable. The easiest way to explain this is that it isn't against the law for your boss to be a jerk and sometimes, what you are experiencing might just be that, stemming from a severe personality conflict or a case of bad management, neither of which is against the law. As you work through the analysis in this Guide, keep that question in the back of your mind - am I being treated badly because my boss (or other person mistreating you) is a jerk and treats everyone badly, or is there something about me in particular that he is targeting?

This Guide is meant to give you a general framework on how to think about your employment experience. It deals primarily with federal law and you should make sure that you seek legal counsel within your state to ensure that you are in the best possible position as you proceed. This Guide intends to give you enough information to determine whether you have the facts and circumstances necessary to make an appointment with an attorney. It will also



prompt you ask yourself some difficult questions so that you can make an informed decision about how to proceed. Suing your employer is a very personal and difficult process and you must be fully prepared for what lies ahead. While there are some areas of the law where you can “DIY”, this is not one of them. The information contained in this Guide is designed to give you an understanding of the legal process so that you are in a better position to intelligently discuss the issue with your attorney and make informed decisions about your case.

Common Employment Scenarios

Most employment situations you will encounter generally fall into three general categories:

1. Discrimination Cases/Disparate treatment cases.
2. Wrongful termination cases.
3. Retaliation cases.

Disparate Treatment/Discrimination Cases

Generally, discrimination cases arise from facts where the employee feels that he or she is being treated differently (worse) than other employees in the same department. Usually, the employee has a sense of why they are being treated differently and are able to clearly articulate how they are being treated differently. For instance, you may have worked at the company longer and have more educational and on-the-job experience and be qualified



for a promotion but another employee is promoted instead of you. That other employee, your “comparator”, may have fewer years at the company, be of a different race, gender, age or ability, have less impressive education or job experience and may be otherwise less qualified for the job.

The law only protects you in instances of discrimination or disparate treatment where the “comparator” is of a different category than you, i.e. of a different race, gender, national origin, age, ability etc. Unfortunately, the law cannot protect you against good ole’ fashioned nepotism, favoritism or corporate politics. If the disparate treatment is more about company politics rather than some legally protected reason, you are not going to find any recourse through the courts.

The disparate treatment you are experiencing must be related to your race, gender, national origin, age, disability or another statutorily protected reason. The key is to examine yourself, your comparator and the negative decision and ask yourself the following questions:

- a. Who are the actual players? Identify the pool of comparators and decision makers involved.
- b. Am I of a different race, gender, age etc. than the comparator-person who was treated better than me?
- c. Am I of a different race, gender, age etc. than the decision maker?
- d. What characteristics do the comparator and decision maker share?

These questions will help you decide if this is a case of discrimination or rather, are you just the victim of nepotism, favoritism, bad management or corporate politics.



Wrongful Termination/Whistleblower Cases

Generally, most states allow a claim, whether pursuant to a statute or common law, for wrongful termination. This claim is only applicable in limited circumstances and is not an easy one to make. You must have complained to someone in authority outside the company about something that the company or your supervisor is actually doing which violates a state or federal law.

For instance, if you work in a manufacturing facility and see that the company is not complying with OSHA rules or following GMP or SOPs which compromise the safety or quality of goods being sold to the public and you complain to a regulatory agency or someone outside the company and are subsequently fired or demoted, you may have a claim for wrongful termination. There is the possibility that you might have some protection in some limited circumstances where your complaint was made to someone *within* the company and you were then fired though this is a tougher claim to make.

In addition, you may have a claim for wrongful termination if you are fired upon returning from FMLA protected leave, a pregnancy, attending jury duty, filing a workers' compensation claim, etc. In some states, these are considered retaliation claims.

Retaliation Cases

The law will protect you from an employer who retaliates against you for exercising your legal rights. For example, if you complain to HR that your supervisor is discriminating against you because of your race or that he or she is breaking the law or asking you to break the law, and you then experience some negative treatment, you may have a claim for retaliation. In many instances, your claim for retaliation is far stronger than the underlying complaint. The law also protects you in instances where your employer treats you badly or fires you when you have filed a workers' compensation claim, attended jury duty, or engaged in other legally protected activities.



You may also have a claim for retaliation where your boss treats you badly after you complain to HR about some other discriminatory treatment against you or a co-worker. You might also find that you are being treated negatively upon returning from Family and Medical Leave Act (FMLA) leave or after having filed a workers' compensation claim or after having asked for a reasonable accommodation for your disability. These are all examples of instances where you might have a retaliation claim against your employer. Interestingly, in some instances, a retaliation claim might be stronger than your underlying discrimination case.

The Statute of Limitations

Generally, you have a two (2) year statute of limitations in actions where you have suffered some form of injury, meaning that your claim is no good after the 2 years is up. This limitations period applies in employment cases as well but only as to how far back you can go to claim damages.

In most instances, employment cases are also governed by a different, more onerous limitations period. The administrative agencies governing this area of the law, such as the Equal Employment Opportunity Commission ("EEOC") or your particular state's agency, will require that your claim against your employer be filed with that agency within 180 days of the date of the harmful event. This timeline may vary depending on the specifics of your actual claim.

You must file your claim FIRST with the appropriate administrative agency or you will not be allowed to bring this claim before the federal or state courts. This rule may differ depending on the state



in which you are filing, however, it is always applicable when filing a Title VII claim or an Equal Pay Act claim (discrimination based upon race or gender) in the federal courts.

CAUTION: You must act fast. These filing deadlines make the difference between having a case and waiving your claims forever.

The Employment Law Case

To maintain a case against an employer, you will have to prove the following elements:

1. You fall within a protected category (race, gender, age, disability, military service, marriage, etc.);
2. You are suffering some significant negative treatment;
3. Others who are similarly situated at not being treated the same way;
4. You have reasonable (provable) grounds to believe that you are being treated differently because of your membership in the protected category; and
5. You have suffered some actual damages as a result of the negative treatment, e.g. you have been fired, demoted, denied a promotion, lost tangible employment benefits, emotional distress etc.

This is called the plaintiff's *prima facie* case. Once you have proved these elements, the burden then shifts to the employer to show a legitimate business reason for the negative employment



decisions taken against you. Please beware that this is a very light burden for the employer to carry. The Employer need only demonstrate that you were demoted, terminated, denied promotion etc. because of your poor performance, because there was someone else more qualified, because of a personality conflict, the company's poor financial performance or other similar economic justifications or some other reason related to the company's business operations.

The burden then shifts back to the Plaintiff who must show that the reasons that the employer has offered are a mere pretext or cover-up for the actor's true discriminatory animus.

This analysis is generally used in cases brought under Title VII of the Civil Rights Act (alleging gender and race discrimination), the Americans With Disability Act, as amended, (alleging disability discrimination) and the Age Discrimination in Employment Act (alleging age discrimination). These are federal statutes that are applicable in every state.

State vs. Federal Court - Where to go?

All employment claims are very fact and time sensitive and if you believe that you have suffered some type of injustice in the work place which might fit into one of these categories, you should contact an attorney immediately.

One of the decisions your attorney will help you make is whether to file in state or federal court. This is largely decided by the laws which you are alleging have been violated. However, you will also



be guided by the types of damages you wish to recover against your employer.

If your company has 15 or more employees, you will have the option of suing under federal law whereas a company with less than 15 employees may only be sued under state law. This is a very state specific evaluation and you must make sure you are aware of these rules before proceeding.

In most instances, you will not be able to bring a case under both state and federal law. Your attorney will guide you on your particular state's laws that may provide similar or greater protections than the federal statutes. In some circumstances, state courts will permit you to recover counsel fees and costs while it is harder to do so in federal court. In other instances, you may recover punitive damages in federal court but will be barred from doing so in state court. These are important considerations when deciding which venue to bring your case in as your ultimate objective is to seek a money judgment against your employer.

Your Analysis

If you find yourself being picked on at work, you must ask yourself some difficult questions before assuming that you have a claim for employment discrimination. This will help you determine what your next step should be.

- a. What are my employer's reasons for treating me this way?
- b. What is the root reason for my conflict with my employer?



- c. Is the conflict limited to one particular individual?
- d. Is this individual in a supervisory position?
- e. Are other people who report to this individual also receiving this negative treatment?
- f. If others are being treated differently, why?
- g. What do I think the real reasons are for the negative treatment I am receiving?
- h. What am I going to be able to prove?
- i. How have I been damaged by the negative treatment?
- j. Do I feel strongly enough about the negative treatment to make a case of it?

Your answers to these questions may help you decide whether you would like to proceed against your employer. However, you should ask one final, difficult question. *Would an objective person (juror) find that this negative treatment was justified?*

If you have received negative performance evaluations or have been put on a performance improvement plan, you are going to have very little recourse against your employer unless you can demonstrate that the negative evaluations are completely unfounded and are a part of a pattern of discrimination. However, even if you have some negative evaluations, it doesn't mean that you aren't being discriminated against, it just means that this is an additional hurdle to your case.



What to do if you suspect that you are a victim of discrimination?

Consult your employee handbook. These are the employer's rules on how you should proceed when you are suffering from some form of discrimination and you must follow them precisely. This is to give the company a chance to correct the situation. In most corporations, you will be directed to contact your supervisor or a human resources (HR) representative who will take a written or verbal statement of the treatment you claim to be suffering.

Know with whom you are speaking. Make no mistake that the HR representative works for the company, is paid by the company and is not your advocate or your champion, regardless of how they position themselves. Take their advice with a pound of salt and verify everything. Confirm your discussions and understandings in writing with a copy to yourself. The HR representative's only job is to minimize the company's exposure to your claims, to make it appear that an investigation was done and to, in many cases, dismiss your complaints as being unfounded. Only in clearly egregious circumstances are you likely to see that HR or management actually took some action against the perpetrator.

Document everything. You must confirm your verbal discussions with HR or any company representative in writing. In court, you will need to prove that you sought the Company's assistance against the negative treatment and were rebuffed or that the company sided with the perpetrator. Avoid the "he said/she said" mess. Keep a journal of what you are suffering at work, who the witnesses are, their contact information, examples of how you have been treated differently, etc. If written at the time that the event happens, it is possible that these notes and journals may be admissible into evidence at trial in support of your claims.

Pay attention. When you start to suspect that something is amiss, pay attention to what is happening around you. If you suspect that you are being treated differently from others in the workplace keep



a journal detailing these disparities. You will need to testify to this disparate treatment during your case and you should not rely just on your memory to build your case. You will need to direct your attorney to specific instances of when you were treated differently from others and a journal will be a reliable and credible source of information and evidence to support your claims.

Stay out of trouble. Be aware that the minute your employer senses that you are alleging discrimination or thinking about bringing a claim, your performance will be scrutinized and the company will be looking for that “legitimate business reason” to justify the negative treatment you are complaining about. Unfortunately, that means that you will have to work extra hard to make sure you don’t give the company a reason to fire you or to justify denying you that promotion. It’s not fair but it is something you will have to deal with.

Don’t acknowledge negative evaluations. When confronted with a performance evaluation or improvement plan that you disagree with, don’t sign it. You always have the opportunity to write a rebuttal or refuse to sign it if the content is inaccurate or casts your performance in a false light. Make sure to journal/document the reasons for which you believe the evaluation is inaccurate. If you sign the negative evaluation, you are in effect agreeing that the statements contained in it are accurate and have waived your ability to challenge them, thereby giving your employer that “legitimate business reason” to terminate you.

Don’t use your email. Do not use your company email to communicate with your attorney, family, friends or co-workers about any of the details of your case. Your employer can and will be able to view all of these on their server. It is also important not to open personal email accounts on your work computer as it is possible for your employer to view that content as well. Be mindful of your company’s email policies as violations, no matter how small, can be grounds for a justifiable termination. Similarly, stay away from talking about the Company, your supervisor or co-workers on Facebook, Twitter etc.



File the administrative charges. Depending on what state you reside in, you may wish to file your charges under a federal statute such as Title VII. In this instance, you are required to file a charge with your local Equal Employment Opportunity Commission (EEOC) District office (see www.eeoc.gov) within 180 days of the discriminatory event. You have to be very careful of these timelines as you cannot recover damages for claims based on those events which fall outside the 180 day timeline. In essence, you are looking at a 180 day statute of limitations in these types of employment cases. If you miss this deadline and do not file your charge with the EEOC or your local labor/employment agency, in some states, you will not be permitted to bring this claim against your employer.

Don't sign anything. If you are called into the HR conference room and terminated, you will most likely be given a stack of paperwork. Those documents are likely to be a separation package and COBRA paperwork. You may be pressured to sign the separation documents at that meeting but you should refuse to do so. Buried in the numerous pages of the severance packet could be full and complete waivers of all of your claims against the company in exchange for a meager severance payment. If you sign the agreement and accept the severance payment, in most instances the waivers will be binding and you will be barred from bringing a claim against your employer. It is important that you understand what you are waiving before you sign anything and in some instances, it is possible for an attorney to negotiate additional rights and protections for you which were not contained in the original agreement.

Mitigate your damages. The law requires you to mitigate or lessen your damages. This means that you should look for a new job, claim benefits (e.g., unemployment) for which you are eligible, and make every effort to have the smallest possible amount of damages which are attributable to this employer. This may be extremely difficult, especially in a poor economy, but you have to try to find that next job, even though the prospects seem dire. More importantly, you will have to prove your efforts and should journal



these efforts as well. Keep print outs and detailed records of jobs that you have applied to, interviews and offers, if any.

Consult an attorney. Your employer will have an army, so don't go it alone.

The Employer's Argument

Despite the fact that employers don't have to justify or explain their reasons for termination, most do. Either before or after termination, they will provide a reason such as poor economic conditions, layoffs, your poor performance, job elimination, change in job requirements, etc. to justify removing you or demoting you from your position. In some instances, as your case unfolds, you will see the company float several different reasons for your termination. It's okay. Your case just got better.

If any one of these reasons doesn't sit well with you, pay close attention to the situation. Focus on what happens to your job responsibilities after they are taken away from you. Who is your replacement? In some instances, a company may simply rename your position and assign your responsibilities to another employee. In others, they will wait to replace you with someone outside the protected class. Paying attention to these details will shed light on your employer's true reasons for removing you from those responsibilities. Once again, keep a journal of these details so you can refresh your recollection during your court case.



What are your options if you don't want to go to court?

Even though you may have suffered some negative treatment in the work place that meets the requirements of the *prima facie* case, an attorney may advise you that the damages are not sufficient to warrant a federal or state court litigation.

Most employment law cases involve substantial expenses for depositions, electronic discovery and trial. In some instances, the expenses you will incur getting to trial may exceed the damages you may have suffered and for which the employer will be held liable. And, there is always the risk that a judge or jury will find that the employer did nothing wrong.

In such instances, you are not completely without recourse as an attorney will attempt to negotiate a separation package for you from your employer. If you are being treated negatively, most employers are happy to see you go and equally happy to pay you a smaller amount in settlement in exchange for a FULL and FINAL release of all of your claims against it. There are numerous other elements that your attorney will be able to negotiate on your behalf to protect you as you begin your search for a new job.

Beware that the releases are geared to waive absolutely every claim arising out of your employment relationship that you may have had, have now or will ever have against this employer, whether you know about the claim and whether it currently exists or may arise at some time in the future. Most releases are iron-clad and you will have very little opportunity to go back after having signed one.

Regardless of the monetary value of your settlement, you need to be psychologically prepared to bring closure to the situation. The end of employment relationships, especially long term ones, are fraught with hurt, betrayal and anxiety. The hope is that the settlement sum will help with the anxiety but dealing with the hurt and betrayal is something you have to handle on your own. It is



important that you realize this and deal with your feelings before signing on the dotted line.

Important Considerations

Before you go down the path of suing your employer, you should think about the following questions:

1. Are you ready, physically, emotionally and financially, for this fight?

Once your case has been filed in federal or state court, you must be prepared to relive the unpleasant events over and over again. You will have to tell your story several times to your attorney, to your employer's attorney(s) and to a judge and jury. Most likely, you will undergo many hours of depositions where you are questioned *ad nauseum* about the facts supporting your claims, witnesses, damages etc. In most instances, opposing counsel will be courteous to you but this won't change the fact that you are in an adversarial setting, which can be very stressful. This stress may have a physical and emotional effect on you.

You must also be financially ready for this fight. In some instances, your attorney may be charging you on an hourly basis, in others on a contingency basis, which means that the attorney will receive a percentage of what you recover. In other instances, you may be asked to pay for expenses up front or as they are incurred. These expenses are court filing fees and process server fees (\$300-600), deposition costs (\$2000-10,000 and up), trial preparation expenses including expert witnesses (could be more than \$5000). These expenses vary depending on the case and can stretch into the tens of thousands of dollars, especially if you have an expert witness testify on your behalf. Your attorney should give you an idea of



these expenses prior to the start of your case so you can be prepared and begin saving.

2. If you are still employed at the company, are you ready for what comes after suing your employer?

Suing your employer while you still work for them is an incredibly uncomfortable situation. While your employer is legally prohibited from mistreating you following the filing of your case, you will find discomfort in many subtle ways. Co-workers may be less inclined to socialize with you or to publicly support you, your work will be scrutinized, you may be treated coldly etc. It is very important that you weigh these considerations before you file suit, thereby making the best and most informed decision.

3. Consider how future employers will react to the news that you have sued your former employer.

When you go on job interviews, don't lead with the fact that you are suing your former employer. It won't go over well and you definitely won't get the job. If you have decided that the appropriate path forward is to sue your employer, in some circumstances, an attorney may be able to get your former employer to agree to provide a reference and not to disclose the pending litigation, in an effort to mitigate your damages. However, you must be prepared for the possibility that a future employer may discover that you have sued your old employer regardless of your efforts to keep it quiet. Court records are public documents and easily searchable on the internet. Employers are doing creative background checks on prospective employees which might reveal this information. Be prepared to handle the discussion should it arise. And more importantly, talk to your attorney about what you can and cannot say. If the matter was settled, you are most likely going to be bound by a confidentiality agreement which you must not risk breaching. If the litigation is ongoing, you should be equally discreet about your claims and case strategy.



Conclusion

The bottom-line is that discrimination and harassment happens in the work place every day. But not all instances of such mistreatment are actionable in court. Since this is a very fact specific analysis, you are safest when you consult an employment law attorney who can advise you on whether you have a case and what your next step should be. In most cases, you will have some form of recourse against mistreatment in the work place.

Resources

- a. Equal Employment Opportunity Commission
www.eeoc.gov
- b. Your state's Human Relations Agency or Labor Department.
- c. Contact local/county bar association for a referral to an attorney whose primary practice is in the field of employment law for employees.



About The Author



Ayesha Krishnan Hamilton, Esq. established the Hamilton Law Firm in 2005 in Lansdale, Pennsylvania. Ms. Hamilton is licensed to practice law in Pennsylvania, New Jersey and New York at both the state and federal level.

Ayesha Hamilton represents employees who have been the targets of work place discrimination based upon their sex, gender, race, age, or disability. Ayesha Hamilton also represents employees who have been fired or treated badly at work because of retaliation for making a complaint against the employer or those facing wrongful termination in violation of law and public policy.

Ayesha Hamilton helps you navigate the process of separation from your employer, by negotiating a separation or severance agreement, and providing advice and counsel on non-compete agreements and other employment restrictions. When an employer is not willing to negotiate a reasonable solution, Ayesha Hamilton will bring the matter to federal or state court for you to enforce the laws and your rights. Ms. Hamilton will also guide you through the process of filing your claim with the EEOC (U.S. Equal Employment Opportunity Commission) and the PHRC (Pa. Human Relations Commission).

Please visit the author's website at www.ayeshahamiltonlaw.com for more information or contact the author at <mailto:ahamilton@ayeshahamiltonlaw.com>

Testimonials

"Ayesha Hamilton is a brilliant attorney who helped me understand my rights and the details of my discrimination case against my employer in a very straight forward manner. She navigates through the complexities of the law in a swift, efficient manner and is a formidable presence in the face of opposing counsel."

-Ramona Broomer

“Ayesha has handled several matters for me and my wife in the past and I have never been associated with an attorney that listened to my concerns, addressed them, explained what my options were, and why, and then asked what I thought. Her understanding of Employee, Employer, and Business Law is extensive, and what she doesn’t know she fully researches to assure that you receive the best advice and representation. I have complete confidence in her opinions and will not consider making a move any more without consulting her first. I have read her Employment Guide, and can assure you this is great advice. I regret not having this type of information available years ago when I began my professional career.”

-Manfred Marotta

“Ayesha Hamilton’s direct approach to employment issues helps clarify if you have a potential case or not and what you should do about it. Her real world thinking and practical advice help navigate you through, at times, muddy water. As an employer, Ayesha has helped my company create a framework of communication and accountability not just for my employees, but for my company as well. Ms. Hamilton’s expertise and guidance is necessary in today’s competitive job market to both the employer and the employee.”

-Shirley Kalisky

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SkillBites provides concise and actionable information to help people gain more confidence, accomplish things better, be more effective and thus be more successful.