



ANATOMY OF A HR LAWSUIT

Presented by:

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Employment Litigation Trends

- EEOC and State Agency Charges:
 - Farm workers are filing charges of discrimination, harassment, and retaliation in increasing numbers.
 - Backed by farmworker justice groups – motivated by promises of \$ and false belief on the part of foreign workers (legal and illegal) that filing a charge/lawsuit will keep them in the country.

Employment Litigation Trends

- EEOC Litigation
 - What areas have been points of interest of late?
 - Harassment – Hostile Work Environment
 - Retaliation
 - Discrimination – National Origin
 - Increases in lawsuits regarding disability, pregnancy, and religious discrimination

Employment Litigation Trends

- EEOC Litigation: \$42.4 million in recovery in FY 2017
- 184 merit lawsuits filed in FY 2017
 - individuals; with multiple “victims”; systemic suits

Employment Litigation Trends in Agriculture

- U.S. workers filing race discrimination claims based on race/national origin – favoring Hispanic workers.
- Harassment based on sex and national origin – always includes retaliation
- ADA – Accommodation issues

Meet Joe

- Joe is a packing house supervisor who started as a field laborer and has been working on the farm for five years.
- You believe that Joe is of Hispanic origin, but do not know where he is originally from or his exact nationality.
- Joe's wife also works on the farm as a laborer. She is the only female employee on the farm. A few months ago, she complained that male employees were making inappropriate comments to her. You investigated and the employees denied it so you did nothing further.
- Joe complained after that he thought your investigation was ineffective. A few weeks later, you moved him back to field supervisor to replace an employee who quit.

Meet Joe

- Joe's performance has fallen off in the last few months and he has seemed to develop a poor attitude and has been regularly late without calling. He always has an excuse like his mother is sick, traffic, etc., His issues have not warranted a formal write-up.
- One day you are checking Facebook and see pictures of Joe at a Farmworker Justice rally with the comment "Enough is Enough! Time to fight for our Rights!" Two co-workers "liked" the picture.
- You've had enough. The next day you terminate Joe for excessive absenteeism/tardiness.
- The next day, his wife resigns saying she doesn't feel safe without her husband there to protect her against her harassers.
- **Is that the end of the story?**

What Does Joe Do Now?

- He is embarrassed by the termination
- He has no money
- He has no prospects
- He can now become a martyr for “the cause.”

What Does Joe Do Now?



FARMWORKER JUSTICE

Potential Claims

- What are his potential claims?
- What are her potential claims?

Potential Claims

- Unemployment Compensation
- Wrongful Termination
 - Disability
 - Race / National Origin
 - FMLA
 - Retaliation
 - Gender
- First Amendment / Invasion of Privacy

Unemployment Compensation

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

Social Media

- Can Joe claim that you violated his right to privacy?
- Are his social media comments “private” or otherwise protected speech?

Wrongful Termination

- But my farm is in an “at will” state?
- If you are Joe (or worse yet, Joe’s attorney), what things do you start looking for to build your case?
- If you are the Farm, what things do you start to do to build your defense?
- What about the stated termination reason; is that going to cause any problems for the Company down the road in litigation?

Wrongful Termination

- National Origin/Retaliation
 - Was Joe terminated for excessive absenteeism?
 - Was Joe terminated for poor performance?
 - Do we have documentation?
 - How were other employees treated with similar performance/misconduct?
- FMLA / State Leave Laws
 - Were Joe's absences protected?

Anatomy of a Lawsuit

1. Demand Letter

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

2. EEOC (how soon must he file?)

- Charge of Discrimination
- Employer Response (usually due one month after charge)
 - Mediation?
 - Statement of Position?

Anatomy of a Lawsuit

2. EEOC (continued)

- EEOC Investigation (approximately 8-16 months)
 - Document Requests (ie, *free discovery*):
 - Jane's Personnel File
 - Other Employees' Personnel Files
 - EEO Data
 - HR Policies
 - On-Site Interviews:
 - HR
 - Owner/Executives
 - Other Employees

Anatomy of a Lawsuit

2. EEOC (continued)

- “Cause” or “No Cause” Determination
 - If “Cause,” conciliation
 - Pay or Else
- “Right to Sue” Letter

Anatomy of a Lawsuit

3. Lawsuit

- February 6, 2018: Complaint Filed in State Court
- March 6, 2018: Remove to Federal Court
- March 20, 2018: File Answer
- April 30, 2018: File Initial Disclosures
- April 30, 2018: Receive/Serve Written Discovery
 - Document Requests:
 - What do you think they ask for?



Anatomy of a Lawsuit

3. Lawsuit

Document Requests:

- Everything you already produced to the EEOC, plus
- Joe's entire e-mail/text history
- Your entire e-mail/text history
- Any other emails/texts about Joe
- Prior litigation or EEOC charges
- Financial information



Anatomy of a Lawsuit

3. Lawsuit (continued)

- May 30, 2018: Serve Document Production
- June 1, 2018: Discovery Fights
- June 7, 2018: Discovery Fights
- June 14, 2018: More Discovery Fights
- June 21, 2018: Motions/Conference with Judge About Discovery
- August 1, 2018: Serve More Document Production
- August 15, 2018: Discovery Fights
- Sept. 1, 2018: Plaintiff's Deposition



Anatomy of a Lawsuit

3. Lawsuit (continued)

- Sept. 10-30, 2018: Defendants' Depositions
 - Depositions:
 - You
 - Other Employees
- Oct. 1-10, 2018: Discovery Fights
- Oct. 15, 2018: Mediation
- Oct. 15-30, 2018: More discovery Fights



Anatomy of a Lawsuit

4. Lawsuit (continued)

- Nov. 30, 2018: Motion for Summary Judgment
- April 30, 2019: Order on Motion for Summary Judgment
- July 2019: Trial



How To Avoid A Lawsuit

- What actions can/should you take?

How To Avoid A Lawsuit

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



Final Questions

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