WRONGFUL DISCHARGE CLAIMS: CRITICAL THINGS EVERY PARALEGAL NEEDS TO KNOW

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Wrongful Discharge Claims: Critical Things Every Paralegal Needs to Know

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A case comes in the door….

 › Jill was fired from her job as a Production Manager at a factory.

 › She calls very upset. She reports that her boss is a “bigot” and “can’t work with anyone who is even the least bit different than he is.” She says there was no “just cause” for her termination.

 › She reports that she was a “permanent employee” but they fired her because she “stood up to his bullying” when he was cursing at an Asian employee, and calling him rude and “racist” terms.
The case comes in the door....

- Jill says her boss has used these terms before. She has seen emails he has sent around that he thought were “funny.” She says he often says that people are “too sensitive these days” and all they want to talk about is how “certain lives matter.”

- She further states that she has been there for six years and she was “guaranteed” a job “for as long as she wanted it” by the company’s owner.

The case comes in the door....

- Jill says she is owed production bonuses that have not been paid and she thinks this is her boss’ way of taking those from her.

- She wants her job back.

- Or she wants to sue her boss and the company to “teach them a lesson.”
And now the fun begins…

- What are the potential causes of action here?
- What other information do you need from Jill?
- What other evidence should you be asking her to gather?
- What information should you be gathering?
Employment At Will

- General Rule in Most States
  - Rebuttable presumption of at will if no definite duration

- Employee’s Right: Leave At Any Time
  - For any reason, or no reason at all, no notice

- Employer’s Right: Fire At Any Time
  - For any LAWFUL reason, or no reason at all, no notice required by law (except with certain organized layoffs – WARN ACT or state WARN)

Exceptions to Employment at Will

- Employment Contracts (Beware "offer letters")
- Collective Bargaining Agreements
- Handbooks and Policies Enforced as Contracts
- Employer Past Practices
- Promissory Estoppel – specific promises
- Unlawful Discrimination or Harassment
- Public Policy exceptions
Other Potential Causes of Action

- Wage and Hour Law
- Conversion
- Intentional Infliction of Emotional Distress
- Negligent Infliction of Emotional Distress
- Breach of Covenant of Good Faith and Fair Dealing

Federal Laws Prohibiting Employer Discrimination Based On:

- Title VII and PDA
  - Race, Color, National Origin
  - Sex, Pregnancy and Religion
- ADA, ADEA, FMLA, NLRA
  - Disability, Age (40+ Fed), use of FMLA, Section 7 Rights (NLRA)
- GINA, USERRA, IRCA
  - Genetic Information, Citizenship Status
  - Military Obligation or Veteran Status
Vermont Laws Prohibiting Employer Discrimination Based On:

- Race, Color, National Origin
- Sex, Pregnancy, Religion, Disability, Age (18+), HIV+ status
- Place of Birth, Ancestry
- Gender Identity, Sexual Orientation
- Use of Parental/Family Leave, Earned Sick Leave or Nursing Mother rights
- Request for Flexible Work Arrangements
- Credit History; Ban the Box (criminal HX); Workers’ Compensation History or Use
- Need for Health Insurance

Laws Prohibiting Employer Discrimination

- Federal laws apply in all states
- Each state may also have separate anti-discrimination laws
- Certain municipalities and cities across the country also have developed their own laws against discrimination
Employees are protected from adverse action based on their participation in legally protected activities.

*What does this mean?*
Discrimination laws provide that employees cannot be terminated, disciplined or otherwise have their employment materially altered based on their participation in certain activities.

By law, employees are protected from retaliation for:

- Making or filing a complaint pursuant to state and federal anti-discrimination statutes;
- Requesting an accommodation for a disability or for religious purposes;
- Participating in an internal or external investigatory process relating to complaints of discrimination or harassment.
Retaliation

Other examples of law that include anti-retaliation provisions:

- Exercising rights under state and family leave laws;
- Utilizing rights under Vermont’s nursing mother’s law or Vermont’s flexible work arrangements law; and
- Inquiring about or discussing wages in the workplace

Retaliation involves changing any term or condition of employment because of the employee’s participation in protected activity

- Examples of retaliation include failure to hire or promote, discharge or demotion, subjecting employee to further harassment based on involvement
Retaliation

Retaliation can also include materially adverse conduct that would “dissuade” an employee from participation in protected conduct. Examples include:

- Intimidation or harassment based on protected activity;
- Changes in scheduling or shifts tied to engaging in protected activity;
- Threats of changes in terms or conditions of workplace or threats of disciplinary action for participation in protected activity

Often can be easier to prove than the underlying claim itself

Example: a potential client claims he was treated differently based on his sex by his supervisor, and fired after writing a letter to HR complaining of this different treatment.

The potential client brings in an email response from HR stating that “this complaint is the last straw with all your whining – you are done!”
Retaliation

- Can you prove that the client was treated differently based on sex?
- Can you prove they were fired as a result of complaining about this treatment?
- Two separate claims!

State and Federal Anti-discrimination statutes apply to all aspects of employment:

- Hiring
- Treatment
- Evaluations
- Wages
- Promotions
- Discipline
- Termination
Under federal law, managers cannot be held personally liable for unlawful discrimination.

But in some states, individual managers can be held personally liable for damages in discrimination cases.

If a management level employee is accused of unlawful discrimination or harassment, the employer is not automatically required by Vermont or federal statute to provide legal defense.
Create a Roadmap for Discovery

- Once you have identified the causes of action or the defenses available in your case – create an outline of EACH ELEMENT of each cause of action or defense.
  
  Example: Promissory Estoppel
  
  Promise of a specific nature
  Upon which the Plaintiff
  Reasonably Relied
  Breach
  Damages caused by breach

Create a Roadmap for Discovery

- Find recent cases that show the elements.
  
  Read the cases to see how the elements were proven (witnesses, documents, admissions, etc.)
  
  Focus all of your discovery requests on evidence that will prove or disprove the elements of each cause of action.
Discovery Tools

- Use Requests to Admit and Interrogatories that track the critical facts for each potential cause of action or defense.

- Make sure you comply with any requirements to notify other employees if you request their personnel files. Example: 12 V.S.A. 1691a (2016)

- Do not waste interrogatories – they are limited under federal law and may be under relevant state law.

Discovery Tools

- Focus Interrogatories on identifying documents, information or witnesses.

- Do not just give the other side a chance to create issues of fact with interrogatory responses.

- Document Requests – they may be limited – keep your focus on critical documents that relate directly to elements of causes of action or defenses.
Relevant Employment Documents to Gather

- Personnel file of client (or complaining employee if representing company)
- Any termination documentation
- Payroll records or check stubs
- Any correspondence to or from client/complaining employee/employer/coworkers
- Relevant employee handbooks or other policies
- Any contracts, offer letters, or other potentially binding documents

Relevant Information to Gather

- Identity of other employees/witnesses
- Any witness statements
- Length of employment, positions held, supervisors in various roles
- Significant dates: hire, dates of protected activities, dates of adverse actions, including discipline and/or termination
- Comparables- aware of any employees treated in the same manner? Any employees treated differently? Same “protected class”? 
Other Relevant Information to Preserve

- Email correspondence
- Text messages – work phone? Private phone?
- Audio files
- Video files
- Social Media
  - Facebook, Twitter, Snapchat, Youtube, Periscope, Instagram, Linkedin
  - If it’s out there, assume someone can and will find it!

Social Media

- Don’t wait for the opposing party to find it first!
- Conduct social media searches and discuss with clients with any posts, messages, videos, “likes” or other communications that may be detrimental to your case
- Assume that any contradictory communications will be brought up at deposition or other proceeding
Social Media – Example

- You are representing Jill. She tells you she does not maintain a Facebook account.
- Upon searching, you find a profile containing her picture and “Jill Marie” with no last name.
- “Jill Marie” has posted numerous public links to her wall of numerous jokes that make fun of and demean people of color.
- Do these posts pose a challenge to your case?
- Why or Why not?
- What do you do next?

Witness Interviews

- In Jill’s case, who would be relevant witnesses?
  - Former boss
  - Owner of company
  - Coworkers with knowledge of supervisor’s jokes
  - HR/payroll
**Witness Interviews**

- After identifying key witnesses, determine whether you can/should speak with them.

- If represent employer, consider:
  - Non-retaliation – Represented by counsel?
  - Confidentiality
  - Section 7 rights

- If representing employee, consider:
  - Can I speak with witness?
  - Are they members of management?
  - Does corporate attorney/client privilege apply to them?
  - Are they independently represented by counsel?

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**Key Takeaways**

- Employment cases are complex.

- Numerous legal claims can be wrapped up in the label of “Wrongful Termination.”

- Focus your discovery and witness interviews on the elements of each cause of action or defense.

- This means – do your legal research FIRST.
Key Takeaways

› Collect all potentially relevant communications—these matter!
   ◦ Send a Litigation Hold Letter to relevant witnesses, including your client.

› Identify key documents and secure them – Litigation Hold.

› Determine which witnesses can, and should, be interviewed.

› Organize proof by elements of cause of action or defense.

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