Episode 35: "Best Practices for Defending Discrimination Lawsuits in Federal Court, with Randy Oppenheimer"

Speakers: Ari Kwiatowski, Barclay Damon
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[Ari Kwiatkowski]: Hi, everyone, this is a Barclay Damon live broadcast where we discuss all things L&E, labor and employment. I'm Ari. Let's dig in.

[Ari]: Hey, guys, welcome to episode 35, "Best Practices for Defending Discrimination Lawsuits in Federal Court." As I just mentioned, this is season two. Like the 1994 Buffalo Bills, we're back. Deal with it, America. I am thrilled to kick off season two by welcoming Randy Oppenheimer to the podcast. Randy is a partner in our Buffalo office. He brings to the table decades and years of representing employers in complex commercial labor, employment, and other litigation matters before state and federal courts. And I work with Randy quite often. I have the privilege of saying that he is one of my mentors. He's one of my absolute favorites. With that, Randy, welcome to the podcast.

[Randy]: I'm flattered, and thank you for having me on the podcast.

[Ari]: Absolutely. Thank you for joining. And Randy, you may know this, our listeners know this. Every time we have a guest on the podcast, I ask them to share a fun or interesting fact about their professional or personal lives, not to put any pressure on you. Most people go...Interesting fact about their personal lives so we can get to know you a little better. So, I'm going to put you on the spot and I'm going to ask you to oblige me in that.

[Randy]: Most people think that lawyers don't have interesting aspects of their lives, but we're going to prove them wrong.

[Ari]: One podcast episode at a time.

[Randy]: A fun fact. Well, the most outrageous probably is that for many decades I have collected Pez dispensers.

[Ari]: Okay. I didn't know that about you. Yeah.

[Randy]: That's pretty unusual Yeah, well, I don't have them displayed in my office, although at one point I had thousands of them and they were all over the house.

[Ari]: So, Randy, what's your most favorite Pez dispenser that you've collected?

[Randy]: The...probably the something called "the arithmetic," which was, as you pulled the slide of the dispenser up and down, it would actually do some computations. There were little windows in the sleeve. Pretty clever.

[Randy]: Maybe better than at math than me.

[Randy]: That's why I'm not a CPA.

[Ari]: There you go. Well, thanks for sharing, Randy. You know, before we dig in, let's just talk a little bit about, you know, for our listeners, since this is our first episode of season two, where we were and where we're at, where we're going. The last segment before our break, Maureen Kielt, who as you know, Randy, is the director of the Buffalo Local Office for the EEOC, was on and she basically talks soup to nuts about what happens when a charge is received at the EEOC all the way through the conciliation process and the right to sue letter. So we're picking up right where we left off with you, Randy, talking about lawsuits in federal court. I thought a good way to kick off the episode would be to ask you, you know, I think a lot of our listeners know that there's state court. There's federal court. Could you shed a little light on why we would be in federal court, and kind of what the difference is?

[Randy]: Sure. I'll first say something about the federal court system. So like state systems, New York, and the other state systems throughout the country, there are three main levels in the courts. There is the district court level, which is the trial court. There are the circuit courts, which are the first level of appeal in the federal courts. And then, of course, there's the Supreme Court of the United States, the final level of appeal in the federal system. There are about a hundred...less than 100 district courts around the country. The country is divided up into geographical areas, and those 94 or so district courts funnel in to 13 circuit courts. And then, of course, into the one Supreme Court. That's the federal system. That's how it's structured. In the federal courts, there are two kinds of judges. There is the Article III judge, the district court judge. That is a person who would be nominated by the president and then confirmed by the Senate. That person holds their job as district court judge for life as long as they don't engage in what the statute calls "bad behavior," or they only hold their position as long as they engage in good behavior.

[Ari]: Yes.

[Randy]: They can be impeached, and that's the only way to remove a federal court judge. The other judges in the federal system are magistrate judges. Magistrate judges assist the district court judges. They're really selected by the district court judges. They hold their position for about 13 years, I think. And those are the two judges that would sit in any particular district court. Where we are, in Buffalo and in the Rochester area, it's the Western District of New York. Then there's another court, the Northern District of New York. Downstate, there's the Eastern District and the Southern District. Some states have one district court for the entire state. Really depends on how populated, how many cases are going to funnel into the court. That's the system. In terms of the cases that go into the federal system. To have a federal case, the court must have what's known as "subject matter jurisdiction." The court has subject matter jurisdiction over matters involving the Constitution and matters which arise under federal statutes. So, for example, discrimination laws, Title VII, the Age Discrimination Employment Act, things like that. Section 1983 actions. Those are all separate statutes which provide for jurisdiction. Also, there is jurisdiction over cases involving citizens of different states, where the amount in controversy exceeds $75,000. Unless one of those jurisdictional prerequisites exist, you won't be in federal court. Now cases sometimes get commenced in state court. For example, someone can commence a discrimination case in a state court, and often a defendant will remove that case, in effect, bring it out of the state court system and plug it into the federal court system. And there are many reasons why defense lawyers sometimes like to do that.

[Ari]: Yes. Good points, Randy. And thanks for breaking that down. I remember way back when I started practicing, you know, I would see magistrate judge, district judge and, you know, clients would be like, well what's the difference? That's a great question because it is a little bit confusing unless you have that framework and that background. So I'm glad you clarified.

[Randy]: Well, one of the things—let me add this, one of the things…magistrates in most of the time in the civil cases, they are supervising discovery. And I hope we'll talk about discovery during this session. But the rest of the time, magistrate judges are handling the routine criminal processing that occurs in the federal system. And the federal judges or the district court judges are really spending their time dealing with trials.

[Ari]: Yes, that makes sense, Randy. So, you know, we talked at the end of season one with Maureen Kielt and she went through, you know, what happens with the charge, responding, conciliation process, whether it fails, whether it's successful, if it fails and there's a right to sue letter issued. And I think that's really how our clients, who are defending employment discrimination lawsuits, find themselves in court. That letter has been issued. The time has passed and they've been sued. So my first question to you, Randy, is in your opinion, what is the first thing an employer or business should do if they become aware that they have been named in a lawsuit in federal court?

[Randy]: Well, first thing is, I think maybe…take a deep breath and get a hold of the anger that will in most cases be triggered.

[Ari]: Good point.

[Randy]: I mean, it's a nasty thing to be to be sued. And many, many defendants feel that they've been unjustly sued. And it's going to be an expensive process and distracting from the time that folks would be spending on business. So often the immediate reaction is anger. And so the first thing is to just say, all right, I'm in business, I have a target on my back because I'm in business and I'm successful. Let me take a deep breath. After doing that, two things I think should be the next things to occur. One, call counsel and if counsel doesn't advise this, then in addition, call your insurance agent.

[Ari]: Yes.

[Randy]: There may be insurance that is available to defend the case. And prompt notice to the insurance company is going to be important in order to preserve whatever insurance the company may have. The policy of insurance may allow the company to select its own counsel, and the policy may provide that the insurance company selects counsel. But those are two very early things that should be done. Talk to counsel and talk to your insurance agent.

[Ari]: Yes, I think talking to an insurance agent is such an important point, Randy, because even in the few years of the period of time I've been practicing, it seems like more and more clients do have insurance coverage for these types of claims. And as you point out, if you don't notify your agent, then you can lose out on that coverage. So I'm really glad you brought that up.

[Randy]: Absolutely, I can tell you 20 years ago, few employers had what's known as EPLI coverage. Today, many employers do.

[Ari]: Yes. So, Randy, really briefly, you know, I think as lawyers, one of the first things we do when a client has retained us to represent them is in a discrimination lawsuit, is send what we in the business call a litigation hold letter or a letter about preservation of evidence. Can you shed a little light on what we mean by litigation hold letter and how you know the importance are what employers should do and businesses should do about preserving evidence as soon as they're named in a lawsuit or they become aware of that?

[Randy]: Absolutely. A litigation hold letter is essentially a written directive advising custodians of certain documents and electronically stored information to stop any destruction process that might automatically apply to those records. And in general, to preserve records. We call those litigation hold letters, litigation hold notices; both the same thing. The concept is that once you know or have a reasonable basis to suspect that you are being sued, relevant evidence must be preserved. Absolutely must be preserved. The failure to preserve evidence, even innocent destruction of evidence for failure to issue a litigation hold can result in some significant negative consequences in a litigation...destruction of documents, even inadvertent destruction is known as spoliation. And spoliation is a bad thing. The consequence of a court finding of spoliation can be varied in severity. The worst consequence could be that any facts that would be in your favor, the favor of the company or person who has spoliated the documents will be found against you. So if the document didn't hurt you and you destroyed it, the conclusion can be reached that—and a jury could be instructed that you can take as an inference—that the document would have been favorable to the plaintiff, for example.

[Ari]: Right.

[Randy]: And there are various other draconian remedies. For example, your pleading could be struck. So if you've answered the complaint, your pleading could be struck and the default judgment could be entered against you if there were a significant spoliation event such that most records were destroyed. So there's no advantage, zero advantage—and significant disadvantage—to not taking immediate steps to make sure that all evidence, potential evidence is preserved. What are we talking about? Paper records and the nightmare: electronic records. Electronic records consist of voicemail, text messages, and everything on the drive, on the laptop and on the server, and even on cell phones that the employees use, thumb drives...electronic documentation is now a huge expense in the discovery process.

[Ari]: Right. So and if an employer gets a litigation hold letter or a litigation hold notice, what we were just discussing, what should the employer do in terms of getting that message out to their employees? Right, because if we're sending it to, you know, our client contact, whoever that may be, that that information needs to be passed along to everyone, right?

[Randy]: Absolutely. So the first thing is to identify who might have relevant documents erring on the side of being conservative in that assessment and enlisting the help of other people who may have more information than the person who received notice of the lawsuit. So a broad communication announcing that there's been a need or there's been an event which requires that we gather, collect, preserve the following information that may be pertaining to a contract that may be pertaining to a particular company, may be pertaining to a particular employee, whatever the matter is, and then canvasing the enterprise to determine who might have been involved at any time in the process, which relates to the particular subject matter. And then once you identify those folks, then you have to identify what kind of documents are in the universe that they all have been living in, electronic and paper, and then doing whatever you need to do with the IT folks you have on staff. Or if you don't have sophisticated folks that have done that before talking with your counsel about using an outside vendor to help you preserve that.

[Ari]: Yes, very, all very, very, very important things to consider, Randy. So, you know, we talked you've been named, you're taking a breath, you're contacting counsel, hopefully. You're getting this directive to preserve evidence. So let's kind of get into the meat of it a little bit. One thing that I think you and I definitely wanted to talk about was the ADR process or, you know, as we know in the business, "alternative dispute resolution," if you have an agreement that calls for ADR, how does that work in conjunction with a federal lawsuit? Can you shed a little light on that?

[Randy]: Sure. Well, the first step would be, let's say you're dealing with an employment agreement. Maybe you have an executive, and the executive has commenced the case and you find yourself in court. Got to look at the agreement. Maybe there's an arbitration clause in that document. If you've got an arbitration clause, then there probably are good reasons to assert that the Federal Court does not have jurisdiction and to immediately move for a stay or dismissal of the federal case so that you can take the case to arbitration. So you start there the...what might exist internally with respect to the events in dispute that might produce a jurisdictional defense that would drive you to ADR, meaning arbitration typically, or perhaps mediation. Often we see in agreements now a multi-step process of alternative dispute resolution, where the first step is discussion between executives. The second step is mediation. Third step is arbitration. So yeah, that could be that before you're even pursuing the process in the federal court, you're dealing with ADR. Could be.

[Ari]: Right. So I guess our recommendation is if this involves an employee that had an employment agreement, make sure you are reviewing the agreement and see if it includes an arbitration clause.

[Randy]: Absolutely. Yeah, I think so.

[Ari]: All good preliminary stuff. But let's talk about, you've been sued, you're named as a defendant. You went through all the preliminary things we talked about. What's the next step? What are we looking at?

[Randy]: Well, strategically, you're working with counsel. Let's assume that you've hired your own counsel. You've signed an engagement letter with counsel. It sets forth your arrangement with your counsel. You want to get an idea of what this is going to cost. You want to talk to your counsel about establishing a budget for the case. And so, you know going in, what you're looking at. These cases can be horrifically expensive to defend. And I think you want to know very quickly as a business person if it's going to cost you $50,000, $100,000, $500,000 to defend the case right up front. So that would be the next step. Your lawyer has looked at the complaint and given you a budget on the process. That will drive a strategy. One of the options after receiving a complaint is to either answer it, which is filing a piece of paper which mirrors the allegations in the complaint and denies them or denies knowledge about them or challenges some or maybe not all of them, and then sets forth some affirmative defenses. The complaint fails to state a cause of action. It's barred by a statute of limitations or some other defense that may be out there. The alternative is to not answer, but actually make an application to the court through a motion to dismiss the complaint. And that often is a process which is pursued. There are strategic reasons why you might want to do it or might not want to do it, and those are often a discussion with a client who's got that choice.

[Ari]: Right. And, Randy, you and I have worked on many of these motions together. And I think one of the questions that I get a lot is, you know, Ari, we have this document that says what the plaintiff is alleging just isn't true. Can't we just get rid of the lawsuit? Can we just get it dismissed now? So I think it's kind of worth, Randy, us just diving a little bit into, you know, what that motion might look like and the burden that you have as the party moving to dismiss, and just more broadly, what is the likelihood of success? Because I think understandably, clients, business owners are frustrated. You know, the contract says this or, no, here's a performance improvement plan that the guy, you know, the plaintiff signed. And he said, if I don't come to work on time, I know I'm going to get terminated. But it's not quite that easy, right?

[Randy]: Not that easy. It's the price of living in a free society where there are constitutional guarantees of... and statutory guarantees, of trial by jury. So once someone pleads claims that entitle them to a trial and a jury trial, there's no magic way of just waving a document around and saying, but look, this person signed this, or this is the history. There are rules of procedure that lawyers spend a lot of time in law school learning about and practicing. Lawyers also spend a lot of time dealing with and continually learning about. One of those rules deals with motions to dismiss and working on a motion to dismiss the...it's a very early application to the court to stop a case.

[Ari]: Yes.

[Randy]: The kinds of issues that can be raised in that motion are very limited. So, for example, if someone you don't know, have never met, never had a transaction with sues you, over some imaginary thing that never happened. That would be a great opportunity for a motion to dismiss. It was just no basis in the complaint whatsoever. Motion to dismiss. Otherwise, the motion to dismiss is just testing the legal sufficiency of the complaint. Did the plaintiff plead what the law says a plaintiff must plead in order to state a claim in the complaint? That's all that we're generally dealing with in motions to dismiss...there are some exceptions, but generally it's an attack on the face of the pleading alone, looking at the face of the pleading, has the plaintiff said enough?

[Ari]: Right? So not "can the plaintiff prove it," but "has the plaintiff pled it"?

[Randy]: Exactly right. Was the lawyer clever enough to write down on a piece of paper everything the lawyer needed to do to state a claim? And there each claim has certain elements. That's what lawyers learn about in law school. If a claim has four or five elements to it that must be pled, different sentences that must be stated in the complaint and a lawyer only states four of them, now you have a defective claim. A motion to dismiss would be an appropriate way to attack it. The strategic issue on a motion to dismiss is this: If as a defendant you attack the pleading, you will be doing that in a way which educates your plaintiff on how to do it right.

[Ari]: Right.

[Randy]: And so very early on in the case, you would be writing, in effect, a road map for the plaintiff on how to plead and prove what elements they need to prove their case. It's a strategic decision. It's a discussion with a client on the pluses and minuses of doing it. Obviously, you don't want to make a motion to dismiss if there's not a high likelihood of success.

[Ari]: Right. Makes total sense, Randy. So for purposes of our discussion, we'll keep chugging along on the path of a federal lawsuit. And although if it's you and me, this normally wouldn't happen. But if we make a motion to dismiss and we're...and the motion's denied and we have to continue with our next step in the lawsuit, and I think this will be probably our last topic for today. You know, usually I know that the court will schedule a conference with the parties to talk about a few things. And one of those may be a settlement conference. So can you tell our listeners or educate our listeners a little bit about what happens next if maybe you answered and didn't make a motion to dismiss or you made a motion to dismiss and it wasn't successful, just the next step in the process.

[Randy]: Well, one of the significant differences that we see in federal practice versus state practice, is how actively the court and the federal court manages its docket, its list of cases it has.

[Ari]: Yes.

[Randy]: So right after a case is filed, the court is communicating with the lawyers for the parties to file an answer or a motion to dismiss. The magistrate judge will hold a conference to schedule a variety of things in the case. In some courts, there's something called annexed mediation, where the parties with their lawyers must choose a mediator to sit down with and talk about whether or not it's possible to settle the case before going through the long, drawn-out process of litigation. Right now, in federal court here in Buffalo, between the time of filing a case and jury selection, we're talking about six years, right? Six years before the plaintiff's going to see a jury if they can make it through all of the motions that the defense is going to make. So very early on, there may be a mediation where an independent mediator, someone without a dog in the fight, helps the parties decide whether they want to choose a different path and maybe negotiate a resolution of the dispute with that mediator's help. Some courts don't have annexed mediation and the magistrate herself or himself will hold conferences with counsel and say, can we settle this thing? Has the plaintiff made a demand was the defendant made an offer, how far apart are you? Is there a possibility of bridging that that gap?

[Ari]: Great point, Randy. And I think, you know, for this episode, we're going to stop there for today. We'll pick up where we left off next week. We'll talk a little bit about settlement conferences and then we'll really get into the meat of it, which is the discovery process. So Randy, before we sign off for today's episode, anything you think we missed or anything else you want to share with our listeners.

[Randy]: It's a very deep ocean that we're in. But I think we did a good job of covering the water.

[Ari]: Yes, I agree. Thanks so much, Randy. To our listeners. We will pick back up where we left off next week. Tune in.

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