Episode 36: "Best Practices for Defending Discrimination Lawsuits in Federal Court, Part 2," with Randy Oppenheimer

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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, everyone, welcome back. This is episode 36, "Best Practices for Defending Discrimination Lawsuits in Federal Court, Part Two." As I mentioned last episode, we're back in season two and I am here with Randy Oppenheimer. All right, Randy, last time we were together, we were talking about settlement conference, what it is. Some courts have it, some courts don't. Let's assume, you know, we're chugging along again in our in our discussion about federal lawsuits. Let's assume the parties participated in a settlement conference and it wasn't successful or maybe the parties didn't want to pursue that. So what is the next logical step in defending a federal discrimination claim in federal court?

[Randy]: Before a case is actually tried—prior to trial the lawyers for all parties engage in a process known as discovery to obtain all the information they can about their adversary's case. There are a number of tools that lawyers use to obtain that information. All of those tools are provided for in the procedural rules that we briefly referred to in the last podcast. So the first step is typically to send a written request to the adversary saying, please produce all of the information you have about the following contract, subject matter, a variety of things. A few dozen questions to cover the landscape and canvas for all of the information that might be relevant to claims. You can also send something called interrogatories; questions which require written answers. Sentences long, can be paragraphs long, can be pages long, where you're asking the other side to state in detail the answer to a particular question, or to describe in detail the answer to a particular question. The third tool that is most often used is a deposition notice in New York practice that was always referred to as an "examination before trial" or EBT; federal practice, it's referred to as a deposition or deposition notice. This is a simple form, a notice to your adversary that on a specified date, at a specified place, using a certain means, either a stenographer or a videographer or something else, you will be taking testimony under oath of a particular witness. And it is through this process of document production requests, interrogatories, and deposition notices that lawyers obtain information about their adversary's case. There may be several waves of these kinds of document requests, interrogatories, and depositions through whatever period of time has been allowed for discovery in the case. Discovery, as we talked about last session, is something that's managed by magistrate judges. And in a very early conference with the magistrate judge, there will be a scheduling order that's issued which tells the lawyers, get the work done, get your discovery done by a date certain.

[Ari]: Yes. And that's such a great overview, Randy, of the time frame and the tools that are relevant in terms of getting information from the other side. And one of the things I wanted to ask you about, Randy, and I think this is an important one, is interrogatories, because I think, you know, understandably, if you're a business owner, you're busy, you've been named in a lawsuit, your lawyer says, hey, please look at these interrogatories. Please review them. Why is...why are interrogatory so important? And why is it so important that what is contained in the interrogatory responses is accurate?

[Randy]: Interrogatories are testimony. They can be used as testimony at trial. So imagine yourself sitting at a you know, the table with your counsel and on one of those giant walls in the courtroom there is projected for the jury to see, your...the question (interrogatory means question) with your answer. That's is the equivalent of testimony. So what is said in an interrogative answer has to be very carefully crafted. An interesting issue associated with interrogatories, that is a strategic question for lawyers who are crafting the question is one, do I want to ask this interrogatory? It will focus my adversary on the subject matter I'm asking about, and so my adversary will be very keen on being very sure that the information is correct and that they have a comprehensive answer. Also, if depositions haven't been taken, it signals that this is a subject matter I'm interested in asking about, and my adversary may then use it as a tool to prepare a witness for the upcoming deposition. So there are some subjects that that lawyers will ask about in interrogatories and other subjects that they will leave for a deposition when the lawyer isn't there to intercept and in effect, write the answer. And that's who writes interrogatory answers; the lawyer will write them after conferring with the client, getting the information, and then share the what the lawyer has written of the draft with the client to say now, is this correct? Did I miss anything, did I misstate anything? Am I overstating something? Am I understating something? And once the client signs off on that and literally signs off under oath that the interrogatory is true to their best knowledge, they get sent out. So it's a product that's crafted by a lawyer with information provided by counsel that counsel, by the client, rather that constitutes testimony.

[Ari]: Yes. And that's so important. And we're "same braining" right now, Randy, because what I was going to ask you was how they're used in depositions. And I think you already answered that. And this is a perfect segue way, because one of the things I wanted to ask you about, and I think this is very important for our listeners, is the notion of a 30(b)(6) witness or what we call a 30(b)(6) deposition, because some of our listeners may know, when you are named in a in a lawsuit in federal court, there needs to be somebody who testifies on behalf of the company, essentially with respect to the allegations in the lawsuit. So can you educate our listeners a little bit about what we mean by this 30(b)(6) witness and basically why that's important?

[Randy]: Sure. Well, a witness is competent to testify about what the witness knows. The witness knows something because the witness saw it or said it or was otherwise involved in a process of perception or creation or something intimately involved and has firsthand knowledge of the information. That's where hearsay comes into. When someone's testifying about something they really don't have personal knowledge about. But what about these artificial "people"? I mean, a limited liability company, a corporation, they are artificial "persons" that are created by statute. They don't have a memory other than through the humans that talk for them.

[Ari]: Yes.

[Randy]: So in order to nail down what the institution, the company or the corporation knows about a particular matter, a lawyer will serve a 30(b)(6) deposition notice rather than just a regular deposition notice to obtain knowledge. So, for example, let's say you've had three different supervisors and some co-employees that have been identified by the plaintiff as witnesses to this particular event. Each of those supervisors may be questioned at a deposition about their own knowledge, personal knowledge and then the question is, well, who do we ask about the company's policies and procedures and historical information about things that have happened with others? We have to have a human do it. We might designate an HR person, an officer of the company, someone to talk. There are all kinds of strategic issues that we deal with relative to who we designate to talk for the company. Generally, I don't like designating a very senior person to talk for the company because that person can't, at a deposition say, I don't know the answer to that question, I've got to check with somebody. The president of the company or the chairman of the company, you're not going to have that liberty. So the more junior person can say, really, I didn't prepare for that and to answer your question, counsel, I'd have to confer with someone else or you'd have to ask

someone else that question. So there is a process on figuring out who you want to, as a defense lawyer, prepare and produces a 30(b)(6) witness. I say "prepare" because once a witness has been produced as a 30(b)(6) witness for a company, that witness has to testify as if that person is the company. Educate. They must educate themselves as to the subject matter and actually testify for the company. There's a tremendous amount of litigation over whether a 30(b)(6) witness was adequately prepared and effectively testified, because often they're just not adequately prepared and everyone has a waste of time when a witness hasn't been prepared to testify and just says, I don't know, I wasn't involved. I didn't study anything to prepare, etc.

[Ari]: Yes. And definitely, I think a fine line. And I wanted to clarify for our listeners, Randy, that the 30(b)(6) witness is somebody that the company designates, right?

[Randy]: Yes.

[Ari]: Not the plaintiff can't say, I want that person to testify on behalf of the company. The company is the one who designates the individual.

[Randy]: Well, the plaintiffs can and there may be a discussion about, you know, who the plaintiff is identified and whether that plaintiff identified the right witness or someone with the best knowledge or in the best position. But ultimately, it's the defense call.

[Ari]: Makes sense. Makes sense. So leaving depositions aside for a moment, Randy, one of the things I wanted to review with you today, and I think this is very important and you and I, I know have seen this come up in the cases we're working on together is the role of information that is submitted to the EEOC in the context of its investigation and responding to the charge of discrimination filed with the EEOC. You know, now we're in a federal lawsuit many times of years later. What is the role of that information or the documentation that was submitted to the EEOC in the course of its investigation, in the subsequent litigation?

[Randy]: The E in email stands for eternal.

[Ari]: Exactly.

[Randy]: And when that information is submitted to the EEOC, it constitutes proof. Let me be more specific in both the EEOC and in these state agencies, which, like the EEOC, investigate and process claims under equivalent state law respondents, employers put in position statements in addition to producing files. So you produce an employee's file, you produce coworker files. There may be all kinds of data. Tell me all the employees that you have who fit within a particular protected category and all the employees that have been terminated and what reasons they've been terminated for... all of that data. If it's company data and it's been submitted to the EEOC or the Division of Human Rights or whatever state agency you may be dealing with, it constitutes an admission that that is, you know, a business fact. And if you produce business records that are maintained in the ordinary course of business and it's the ordinary course of the company's business, to have such records, those will be proof against the company, and they will also be proof for the company, if they have very good information in them, which is what we hope for all the time. But yeah, that that information is just hard data. The issue that we sometimes see that causes us fits is that when the charge from the EEOC comes in or the Division of Human Rights or another state agency, many employers think, I can handle this. And without talking to counsel, they will respond to the EEOC with that sort of a casual idea that, well, this is just an investigatory agency. I'll tell them my story and here's why this employee got fired or here's why this employee didn't get a promotion, or here's why whatever it is that happened, happened, that letter is an admission—that letter constitutes testimony that can be used against you in the subsequent federal lawsuit. So not only is the EEOC taking that as your testimony, but it also could be used in court. And if you haven't done the kind

of thorough investigation that counsel will force you painfully to go through, or you haven't been critically attentive to every word that you're using in the way that your lawyer-wordsmiths are. There may be some loose language. There may be some omissions which will be very hard to address in a subsequent lawsuit. So, yeah, we are haunted sometimes by position statements that are drafted and submitted to these agencies.

[Ari]: Yes. And I think the lesson really is if you are an employer and you responded to a charge of discrimination and you provided that information to the EEOC, and maybe you did or didn't have counsel, that information, those documents don't just go away. You should assume that the plaintiff has gotten them and that they can be used as what we like to say, as a sword or a shield, I guess, in the federal lawsuit.

[Randy]: Yes. Absolutely. Absolutely.

[Ari]: Yes. Yes. And in this ties nicely with our segment with Maureen, because we went through, you know, what the EEOC is looking for and how important it is to be thorough in what you're providing. So I think this is a good period at the end of that sentence.

[Randy]: Yeah. And I'm sure you will have covered in connection with it podcast with Maureen that it's not a helpful or wise or strategically sound decision to give the EEOC nothing just to turtle or cave and say, I'm fighting you, I'm not going to help you. It is not going to work to your advantage to do so.

[Ari]: We definitely talked about that. Cooperation is key. It seems like this. So great. Thanks, Randy. I think let's transition a little bit. You know, one of the things I think that comes up a lot in employment discrimination cases in particular in court, is experts. So let's you know, let's kind of dig in. Let's talk experts.

[Randy]: Sure.

[Ari]: A lot of our clients hear this thrown around. If you're watching a lawyer movie or a show, you know, there's always involvement of an expert witness. But can you kind of just break that down and talk about why you would consider or need an expert witness in the context of defending a federal discrimination lawsuit?

[Randy]: A good expert is a professional communicator and the expert sitting on a witness stand turning to the jury and explaining in a very persuasive way, perhaps as a teacher might—in simple terms, what explains…how to put together the complicated pieces of proof that the jury has heard is a very effective way of communicating information. So, for example, in employment cases, when it comes to damages, plaintiff's counsel will always engage a damages expert to talk about what the plaintiff would have continued to earn had the employee-plaintiff continued to work and then projected off into a future for a number of years, dealing with a variety of other issues, including tax issues and discounts and complicated concepts, but make it seem like this plaintiff would have made a heck of a lot of money continuing to work for sometimes decades. So I the issue becomes for that kind of expert, does the defense engage an expert? And the answer is almost always "yes." But perhaps not testifying expert. In litigation, you must disclose during discovery the witnesses, the expert witnesses that you plan to use to testify at trial. But you don't need to disclose your consulting witnesses.

[Ari]: Yes.

[Randy]: And you use a consulting witness to analyze what the plaintiff's expert is saying. In federal court, you'll be able to take the deposition of the plaintiff's expert. You will have received a report that the plaintiff's expert has prepared. So working with your consulting expert, the defense can figure out what holes are there, if any, in this testimony, and how can we undermine this testimony. So damages expert is one. There are sometimes vocational experts that will testify.

[Ari]: Yes.

[Randy]: Where you have disability cases and the issue is, well, how long could this person work or what kind of job could this person have had? Or a defense employment case is mitigation of damages, which means after a plaintiff has left employment over which there's a lawsuit, did the plaintiff engage in sufficient efforts to obtain substitute subsequent employment? And there are experts who will say, yes, look what this plaintiff did. And then there are defense experts that you can find who can say, well, that plaintiff didn't do a tenth of what she should have done to find a job. And the only reason that she is not employed in a job paying more money, which of course, would cut off damages, is that she didn't try hard enough. So there are vocational experts that do that. And then, as you might imagine, as many professors are there, as in universities talking about subject matter, as varied as covered in universities, there are experts that can be found for every case and for every one that says black, there's another one that'll say white; or white, and the other one will say black, just on opposite sides of the spectrum.

[Ari]: Yes. And I think that's a good summary, a nice tight summary of why you might consider an expert. And I'm glad that you pointed out, Randy, that in federal court you can depose the parties, depose each other's experts, because as we'll talk about in a subsequent series, you know, in New York state court, at least that is not the case. So obviously

[Randy]: ...other than in the commercial part.

[Ari]: Correct.

[Randy]: But most cases in New York, all the slip and falls, the med mal, the employment cases typically, no.

[Randy]: Exactly.

[Ari]: So, Randy, I think let's assume for purposes of our discussion, the parties have gone through discovery. We've made decisions with respect to experts. In my mind, the next logical thing we're going to talk about is what we call in the business a summary judgment motion. Can you just educate our listeners a little bit about what it is? I will tell our listeners just first and foremost, that's happens when discovery is complete by and in large part mostly 100% complete, and now we're at the point where we need to make a determination on summary judgment. So, Randy, can you kind of educate our listeners what that means and you know, what the steps are basically.

[Randy]: Sure. A trial is about finding facts, right? The jury exists to sit there and listen to the proof and explore what is presented and determine what the facts are. That's the sole purpose of a jury. The court instructs the jury about what the law is, and then the jury is supposed to say, all right, we have found the facts. The judge has instructed us on the law. We go and we deliberate and we come to a conclusion on what the result or verdict should be in the case. Well, there are situations where the proof that has been produced in discovery—all of the documents, all of the interrogatory answers, all of the admissions, all of the deposition testimony—may establish that there are no questions of fact on the material subjects in the case, that there really can't be disputed. And when the weight of the evidence is just so demonstrable, so heavy in favor of one particular fact, that the conclusion that that fact is true is inescapable. And there's really no reason to have a trial on that fact, because that's what juries are supposed to do. But if it's inescapably true and there's no need for a jury,

well, what if all of the facts that are central to a cause of action—we talked about multiple elements of a cause of action early in, I think the last podcast—what if all those elements or one of the key elements is established in the defendant's defense? Why not make a motion to the court and say, "judge, there's no need for a trial here"? You can award summary judgment to us dismissing the case because the plaintiff cannot prove her case and the summary judgment motion is typically a massive motion because it's that point at which you're presenting all of this proof to establish there isn't a dispute over a material fact of the case. And obviously the person resisting summary judgment puts over, you know, puts in their papers all of the information which they say, wait a minute, there really is a dispute as to this material fact. And then the judge has to sort that out, decide, is there really a dispute over a material fact or not? If the judge decides there's no dispute about this, then she grants summary judgment. Case dismissed. No trial at that point. Now we're talking about appeals, but that's probably the subject of another podcast.

[Ari]: I agree, Randy. Okay. That's a...I think that's a great summary, Randy, of what summary judgment is and the point of it and what the if you're moving for summary judgment, you're really just looking to avoid a trial and that's it. And it's a perfect segue. I just want to transition to what I think is our last and final topic for our...this podcast in the segment, which is a trial. So let's assume we move for summary judgment or the other party has and the court has said this needs to go to a jury, I can't resolve on the record the issues before me. That's what the judge says. Let's talk trial. I want to know a few things from you in your experience with respect to how many cases go to trial and how long do you how long, Randy, in your experience, does it take to even get to this point?

[Randy]: Well, let me pick up the last one first. In the Western District, in federal court, we're talking about six years from filing a case to actual jury selection. Why? Well, there's a heavy criminal docket. It's a cross-border town. There are things that happen as a result of that. There are a lot of prisons in the vicinity of the or the jurisdiction of the court where there are cases that inmates bring and it's just a heavy docket. So criminal cases because of speedy trial rules and the rest get priority; civil cases sort of back burnered, long time here. Other courts, not so much. Some courts have "rocket dockets" where between the filing of a complaint and trial, it'll be less than a year. State court still several years between filing of a complaint and trial. So that's generally the timing that you're dealing with. And it's over that course of time that you're going through the discovery. At some point the court will determine that the case is ready for trial and actually schedule the trial.

[Ari]: Yes.

[Randy]: Scheduling orders will then be issued, which require the lawyers to do things to set up the trial in federal court. That means pre-marking all of the exhibits, agreeing on what exhibits will be entered into evidence, limiting and I mean limiting the number of exhibits over which you plan to argue about the evidentiary basis for; identifying who the witnesses are. Telling the court in summary fashion what you expect the witnesses to say, making motions to challenge the introduction of proof that you don't want the other side to be able to bring into court. Doing all of that activity, preparing witnesses, preparing witnesses, preparing witnesses. Did I say preparing witnesses? Huge amount of work to make sure that that this is all choreographed in a way that is effective and communicates in a way that the people can absorb the message that you're trying to send. And as to that message, very early on in the case, you will have developed with your counsel a theme for your case. And it's that theme that you will be trying through trial, hopefully, to get as a result that is fair and justified, although I can tell you that every judge I've ever spoken to, every court clerk I've ever spoken to, tells me they can never predict what a judge is going to do. And I think lawyers will admit the same thing. I mean, fully familiar with the proof, fully familiar with what happened in the courtroom, cannot predict what the jury is going to do.

[Ari]: So it sounds to me like you're saying, Randy, any time you're at the point where you're on the precipice of a trial, there's a good amount of risk involved.

[Randy]: Well, business folks like control. Everybody plans, you know, for, monthly financials, quarterly financials, annual financials, reports, R&D plans, everything is controlled. That's the whole nature of business: planning and shooting for profit and controlling expense. A jury trial is absolute chaos. We as lawyers, we go into jury trials thinking or trials to judges, arbitrations, any time you have a decision maker where you are not in control, when you're not negotiating something, you're having... you're asking someone based on your presentation of information to agree with you while somebody right next to you is screaming, don't believe him. Don't believe what he's saying.

[Ari]: Yes.

[Randy]: And so it is a chaotic environment. And the trial days are very long days. It's a very stressful environment. And frankly, because of that, most cases don't go to trial. If you've lost a motion to dismiss very early on in the case, if you haven't been able in a settlement conference to achieve a settlement, if you haven't been able to mediate a settlement through a mediation process, if you've lost your summary judgment motion, if you've spent this huge amount of money on your defense lawyer and now you're heading towards trial, the amount of risk you are dealing with is huge. And the question which you will face at every turn, every day is: should I settle the case? And often cases are not settled, typically because the plaintiff's demand is just a crazy demand that that either can't be afforded or justified. And somebody thinks that, look, I can't lose more than that, so I might as well try the case. Or there's just such a basic disagreement about what the facts are that they just can't come to agreement.

[Ari]: Yes. So, Randy, I think we're kind of nearing the end of our time together. I think you would agree with me that if we wanted to go into the details of a trial, we could talk for a very, very, very long time. But I think the reality is you're right. Trials are chaotic and they are rare, pretty rare, at least in my experience at this point. So while we're coming to a close, Randy, I wanted to ask one final question, which is: what is the most important thing for employers to keep in mind during this whole litigation process?

[Randy]: I wish you gave me sort of a Letterman top ten, because there's so many things to keep in mind. Decisions made in the very beginning of the process will haunt you or will be rewarded through the process. So I would say think long and hard about the team you engage to represent you in your lawsuit and what I say is find the lawyer who will take it personally. That lawyer will spend nights, weekends, holidays, thinking about your case and not billing you time for it. Get that lawyer, not somebody who's prepared to mail it in, that maybe you heard about and, you know, third-hand and really don't know much about. You want the hardest-working person who's really going to be there at your side, focused on protecting your interests.

[Ari]: Yes. Sage words of wisdom, as always, Randy. And I just want to say thank you so much for joining us. I think this has been a great overview of, you know, what businesses and employers should really be doing. And keeping in mind, if they are involved in a federal lawsuit. So I just want to say, Randy, thank you so much. I really enjoyed having you on.

[Randy]: My pleasure to have been here, Ari. Thank you for having me.

[Ari]: Absolutely. And to our listeners next segment, we're going to switch it up a bit. We are going to switch gears and we're going to be talking about the New York State Division of Human Rights—complaints filed with the Division. And the regional director, Debbie Kent, will actually be joining us for a couple episodes. You definitely don't want to miss it. Tune in.

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