Episode 43: "Best Practices for Handling Discrimination Lawsuits in State Court," With Michael Murphy

Speakers: Ari Kwiatkowski and Michael Murphy, Barclay Damon

[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 to "Best Practices for Handling Discrimination Lawsuits in State Court." I am thrilled today to introduce our guest, Barclay Damon partner, Mike Murphy. Mike is in our Albany office. He brings to the table decades of litigation experience in labor and employment matters, commercial litigation, and also constitutional issues. And Mike is one of our only attorneys at the firm who is a fellow of the American College of Trial Lawyers. So I know that we have the perfect guest to give our listeners a rundown on practice in state court. Mike, welcome.

[Mike]: Thanks, Ari. Appreciate the introduction.

[Ari]: Absolutely. So Mike and I talked a little bit about this offline, but I do ask that all of our guests share a fun fact about themselves, either their personal or professional lives. And Mike, you are no exception to this. So I will ask you, can you hit us with a fun fact about you.

[Mike]: Ari, I don't know whether it's a fun fact, but it was a fun trip. My wife, Debbie, and I just returned from Yosemite National Park in California. And we've been to a fair number of national parks throughout the country. But Yosemite is in a class by itself, so it's not a "fact," but I am now a card-carrying member of the Yosemite Chamber of Commerce. It's fantastic. Highly recommended.

[Ari]: That's great, Mike. And we should talk offline, because I don't know if I ever told you this. And to our listeners, Mike and I have worked together a bunch over the years, but I did a cross-country road trip right after I sat for the bar exam from...driving from Buffalo to California and my husband now, and I visited any national parks that we just happened upon. So we'll have to talk about that because there's a lot to see.

[Mike]: So they are national treasure. They really are.

[Ari]: Yes. And as much as I would love for this to be a national park or travel podcast, it is not. So let's kind of dig in and get to it. So Mike and to our listeners, you know, I wanted to just talk a little bit about where we've been and what we're talking about today. So in the episodes preceding today's episode, we talked with the Division of Human Rights. We had Debbie Kent, who, as you know, is the director out my way. And we also had Catherine Ostrowski Martin, who is an attorney with the Division of Human Rights and basically our guest from the division went through the complaint process, responding settlement conferences, you know, the whole gamut, essentially. And, you know, I wanted to pick up and kind of talk a little bit about state— lawsuits in state court. So can you just give a brief rundown, Mike, why would we be talking about state court? What is the difference between state and federal court and why in a discrimination suit would you be in court as opposed to at the division?

[Mike]: Okay. So I think when most lawyers and probably a lot of laypeople think about employment litigation, they probably think about the EEOC/the Division of Human Rights and federal court before they think of state court.

[Ari]: Agreed.

[Mike]: And so I think where you find yourself in state court cases is more frequently when there are some hybrid issues, when it may not necessarily just be a discrimination claim based upon gender or race or when any of those other protected classes, but when there's also some things added in related to, for instance, breach of contract, failure to pay wages. There's a lot of claims with respect to wages and commissions and those sorts of things that are governed by the New York State labor law. And then also because the division—the executive law that the Division of Human Rights operates under—has a slightly broader mandate than the federal statutes with respect to covered areas. That might be another reason that you're in state court. You know, I listened to your Debbie Kent interview, and at the beginning of her first interview, she had to actually look at a list to come up with all of the areas that are covered by the executive law in the state of New York. So it is broader than what you find you know, in Title VII, in some of those other federal statutes, age discrimination, for instance.

[Ari]: Yes. And that's a great point, Mike, because I think a majority, I would say, of the cases that I've handled in state court that involve discrimination claims, do have one of those other claims that you listed. For me, it's most commonly been breach of contract, where a plaintiff is alleging there was some sort of employment agreement. And that's a whole other set of issues which I'm sure we can talk for a whole episode about. But I'm glad you pointed that out and I think this is worth pointing out to Mike, because I talked a little bit about this with, you know, the local director for the EEOC who was on, in the federal context. But in state court, is it a prerequisite or a requirement that you have to file a complaint with the Division of Human Rights before you file a lawsuit?

[Mike]: No, no, it's not. And, in fact, if you file in the state Division of Human Rights, it's not impossible, but it's a little bit harder to get out of the Division of Human Rights and into court than if you are filing first with the EEOC. The EEOC gives away, you know, dismissals and right to sue letters like Halloween candy. It's a little bit more difficult with the Division of Human Rights.

[Ari]: Right. And so basically, Mike, unlike in federal practice or when you're in the federal world, if you file a complaint with the Division of Human Rights, can you later file a complaint in state court or what is the interplay...

[Mike]: You have to ask for a dismissal for administrative convenience. So it's something that has to be done. And, you know, it's generally permitted, but some of it depends on where you are in the process. And some of it depends on what the regional director thinks of the case or if you're in one of the special sections out of the Bronx, what their interests are in the matter.

[Ari]: Right. So kind of a less common route to take.

[Mike]: Absolutely. I think that the common route in New York, if you're interested in starting in state court, using the executive law, is you're going to go to state court first.

[Ari]: Makes sense. And I think just one of these other type of prerequisite issues, Mike, so, you know, in the legal world, we call it the statute of limitations, but can you educate our listeners a little bit about on how long employees have to file a lawsuit in state court, what that statute of limitations is? And in kind of the interplay with that and federal law, if any.

[Mike]: Right. So the state the state court statute of limitations have changed over the last several years. They've changed with the Division of Human Rights. It's sort of incrementally up to three years from a wide variety of cases, generally relating to, you know, sexual discrimination, gender-based discrimination, sexual harassment from one year. And when you're dealing with the...just going to the state court in the first instance, using the executive law, you have three years to do it. And so there's some additional time in state court beyond what you might have in federal court. And then, you know, there's the statutory claims that are generally three years that we were talking about: breach of contract claims in state court are six years. So there definitely are some different statute statutes limitations to deal with.

[Ari]: Yeah, I think that's important to to point out, Mike. So thank you for that. So, Mike, we talked about some of the preliminary issues, kind of got those out of the way. Let's dig into the meat of what we're here to talk about today. So an employer has been named in discrimination suit in state court and has been served with the complaint. What is the first thing the employer should do?

[Mike]: How many "first things" can I put on this list?

[Ari]: As many as you deem appropriate.

[Mike]: Okay. Well, you know, look, there's a couple of "first things," if you will. Obviously right away is making sure that litigation holds go out, that people are notified that that the proper people within the organization, if, in fact, it's an organization that's been sued, are notified; if there are individuals within the organization that are named as defendants, that immediate decisions are made about whether everybody's going to be on the same boat or in different boats. Right.

[Ari]: Right. Good point.

[Mike]: If you have EPL insurance, or directors and officers insurance, or errors and emissions insurance, make sure that you get to your broker as soon as possible and put the insurance carriers on notice.

[Ari]: Very important.

[Mike]: Yes, start gathering things up. Call your Barclay Damon lawyer, and get to work on putting together a defense in the case.

[Ari]: So, Mike, one thing I wanted to ask about, because I think this is a question that we get a lot, and I think it would be helpful for our listeners to get your thoughts on. So you mentioned, you know, if people are named individually in a lawsuit, what if somebody is named who is no longer with the company but was maybe with the company at the time the allegations took place? What do you think is best practice in terms of contacting that person, assuming they haven't been served independently, and is it a sooner-the-better kind of thing, or does it just depend on the relationship?

[Mike]: I think it does depend on the relationship, but generally it is better to do it as soon as possible, because even if the relationship has somehow fractured or isn't what you think it should be, letting someone find out that they're about to be sued by getting served during dinner as opposed to giving someone a call and giving them a heads up—not saying we're representing you; not saying we're on the same page, not making any representations of that part of that type, which is letting people know that something's coming, I think can probably buy some goodwill. And then you have time to determine whether the person was, you know, in a high enough up in the organization, in a policymaking position as opposed to someone who may have been in a subordinate position and is accused of some sort of misdeed and making determinations about whether there's common interest or not. I think it's also important with respect to the notice to the insurance carrier, because insurance carriers have to make note, make decisions about who would be covered by a policy. And then if they decide that someone is covered by a policy, then a coordinate decision has to be made by the insurance carrier, as well as counsel about whether there's common interest or not or whether there should be separate representation.

[Ari]: Yes, very important points. And I don't think that either you or me could underscore enough the importance of finding out if you have insurance coverage, if you're not sure. And making sure the insurance company knows because you don't want to be in a position where you could lose coverage because you delayed in telling the insurance company that there was a claim filed.

[Mike]: Right. And, Ari, is as we've been told and as we both know, there's things that you should say to people who are no longer in your organization. There's also a lot of things you shouldn't say to them until you have decisions made regarding what role the organization and/or the counsel for the organization are going to play in representing that person. And you do not want to create an impression on the part of your former employee that you are all on the same side before that determination is actually made.

[Ari]: Right. Exactly. Yep. Because as you point out, things happen. If there is a conflict, you need a different attorney maybe or a different attorney has to represent that person. And you don't want to get yourself in a bad spot in terms of making those types of representations.

[Mike]: Yes.

[Ari]: So, Mike, I think we'll kind of maybe just walk through this chronologically. So you and I know that there comes a point in time; the employer is served with the lawsuit and has to respond to the allegations in the complaint. And one of the things Randy Oppenheimer and I talked about in the context of federal practice was a motion to dismiss versus filing an answer to the allegations in the complaint. And I'm wondering if you could talk a little bit about the former or the motion to dismiss and just in your experience, what it is, how common, if it's a practical thing to do, if it's more strategic? What are your thoughts on the motion to dismiss, as we call it.

[Mike]: The motion to dismiss is a far less commonly used strategy in state court than it is in federal court.

[Ari]: Yes.

[Mike]: And some of that is because of the nature of the claims that we deal with in state court. Some of it, I think, is just the culture of the courts. Federal courts understand that there are going to be dispositive motions, that those motions may not relate to all claims in the case and but that the courts are still going to have to deal with them. And then put together a case management order, that sort of thing. State court judges just don't look at their cases the same way. They're not as willing to hold cases in abeyance while motions are pending. And so we just don't make those motions as frequently in state court as we do in federal court.

[Ari]: Right. And I would agree with that, particularly in the context of employment discrimination claims, which tend to be pretty factually specific, unless you're dealing with what we talked about before, like a statute of limitations issue or something that a judge could look at probably pretty quickly determine that dismissal is appropriate.

[Mike]: Right. And look, as employment litigators we're in all of these courts all of the time. So, you know, you and I both know that there's going to be you know, there's going to be questions asked about that. And we're going to have different answers dependent, to a significant degree, on which venue, in which forum, whether we're in state or federal court.

[Ari]: Exactly, and even which county, which judge, which is just a practicality of practicing in different areas.

[Mike]: And, you know, there are some counties, more and more counties now all the time in New York, where there's commercial divisions, sometimes these employment cases end up in commercial divisions. And those judges, I think, are more used to dealing with initial motions to dismiss than judges who are not in a commercial division in a county that doesn't have a commercial division.

[Ari]: Yes. So I think, you know, just an example that I'd like to get your thoughts on, Mike, which I came across pretty recently was—and I think this is kind of confusing for employers, understandably—you know, a plaintiff sues a discrimination case in federal court under one of the federal statutes and also claims, you know, along with that claims under the New York State Human Rights Law, which is pretty common because

as you and I know, the federal courts can entertain those claims. But I've had the situation where the court says, okay, we're going to dismiss these federal claims, but the state law claims... go litigate that in state court.

[Mike]: Right.

[Ari]: But the problem with that is, as you and I know, New York State pretty much follows the same standard as the federal laws by and in large part. So I've had this a few times over the last couple of years where we have to deal with the state law claims in state court. And that's the one instance or maybe one of the instances where a motion to dismiss could be appropriate because it's the same standard. If the federal court ruled on the merits of the case under the federal laws, for whatever reason, declined to exercise jurisdiction over the state claims. Right. That's the situation. I mean, I think I don't think it's a super common situation. But I'm curious your thoughts on that or if you've come across that more recently, because for me, it's happened in a couple of cases and it really is maybe just coincidence.

[Mike]: Yeah, it has happened to me. One of the problems I've found in defending those cases and then having them remanded to state court for the remaining state court claims is that some state court judges almost view the federal court decision, dismissing the federal claims as permission to go forward in state court and almost as, "Well, all right. They didn't dismiss the state court claims"... because some federal judges will do that. They will exercise their jurisdiction and dismiss state court claims. And so some of the state judges you deal with are looking at it saying, well, I'm not going to entertain a motion to dismiss here, Judge so-and-so and the whatever district court you might be in is has already looked at these issues and I want to get moving with the case.

[Ari]: Right? Yes, I agree with you. And I think it's just worth mentioning, because I think it is confusing if you're, you know, sitting on... you're on the side where you got this decision where the judge has dismissed the federal claims against you as a company, but you still got these other state law claims to deal with. And it sometimes just creates a bit of a headache, honestly, for everyone, right?

[Mike]: Yeah.

[Ari]: So, Mike, just kind of ticking along on our chronological timeline of litigating a case in state court. One of the things we talked about when we had our discussion about defending discrimination claims in federal court was the court's mediation system. And I'm talking about the federal court mediation system, which basically says unless you're in one of these few categories, you're going to have a settlement conference. And it's going to be pretty early on in the case. I think there have been some changes with this in state court. Can you talk about whether or not there's a state court equivalent in New York at this point, in terms of the mediation process?

[Mike]: And as with many of the differences between state and federal court, the answer with respect to state court is: it depends on where you are.

[Ari]: Correct.

[Mike]: Our federal courts are, I think, are far ahead of the state courts in many respects. But one of the respects they're at a of them is having a uniform and predictable ADR process.

[Ari]: Yep.

[Mike]: And having good and trained and reliable mediators or neutrals acting in the cases and a wide variety of people that we can choose from to get that job done. It ... going back to what we were talking about, a moment ago with commercial divisions, the commercial division judges tend to have some lawyers that they can call on—court attorneys or mediators—who've qualified to act as mediators in cases. In some counties, that's just not developed at all. Right.

[Ari]: Agreed.

[Mike]: So I think it's as you say, it's getting better, but there's a ways to go.

[Ari]: Right. Agree. And I think it even is you know, obviously, I think that this started in state court as a commercial division rule. You know, the whole notion of presumptive ADR going to us going it you know, some form of alternative dispute resolution early on and. I think it is supposed to be something that's in all Supreme Court parts, but I think you're 100% right, and it really varies depending on whether you're in the commercial division and what county you're really in, right, in state court.

[Mike]: So and, you know, you've referred to decades of practice before. And that's you know, I'm not sure whether that was a compliment or not. But one of the things that I think lawyers have been around for a while have seen is that the state court judges in many instances have abdicated the central role they used to play in getting cases settled. They just don't work at it as hard at the state court level as they once did. There are exceptions, but they're not getting in and devoting half days or days to settling cases. They just don't do that.

[Ari]: Yes. And it definitely was a compliment. But let the record reflect "the decades of experience" is a compliment.

[Mike]: Thank you.

[Ari]: Yes. So, Mike, just I want to kind of round out this episode and talk about the last topic for today, which is confidentiality in terms of settlement. So let's assume for purposes of our discussion that, you know, we... the parties have participated in a settlement conference and had an effective judge or neutral party who was able to mediate a successful settlement. So, you know, I think this is something that has changed over the last few years in terms of confidentiality in a settlement agreement in New York. Can you just kind of give our listeners a bit of a primer on that topic? Because I think it is a little bit confusing.

[Mike]: Okay. So, yes, it has changed. Yes, it has become more complicated. And it has changed actually in sort of in a couple of steps over the years. But where we are right now, as best I understand it and I was actually negotiating a case yesterday where we are putting a confidentiality clause into the settlement agreement, is that the... they have to be expressed as the preference of the plaintiff, it cannot be made a condition of the defendant. The defendant can't say "We are not settling this case unless we have a confidentiality clause." Now, to some extent, that's a legal fiction, because there's that little dance you can do to talk about, well, what we would like is a settlement that has confidentiality terms, and we would like you to agree to that. And we can construct the settlement so that the finances reflect some consideration. And then the plaintiff gets to say the magic words. "I would like the confidentiality agreement." And then the process that follows is it has to be in writing. It has to be under terms that are understood, common language, common English terms. If the plaintiff's primary language is not English, then the confidentiality clause and the terms of it have to be stated in writing in the primary language of the plaintiff.

[Ari]: Yes.

[Mike]: The plaintiff and their counsel then get 21 days to review the agreement before they can, before they are permitted to sign it. And I think the best practice is you have the agreement and then you have yet another document that says, "I've entered into this agreement. There is a confidentiality clause in my settlement agreement. I'm doing this willfully, knowingly. And it was my idea," something along those lines. Once you get that buttoned up, the plaintiff then has seven days to revoke the agreement. So for those of you who are listening to this or are familiar with the Age Discrimination in Employment Act, it's similar to that in some respects in that 21 days to review and the seven days to revoke. It also raises the question again regarding the value of confidentiality clauses.

[Ari]: Right.

[Mike]: And whether it's worth going through all of that for something that, at the end of the day, is difficult to enforce and hard to get any relief from if someone violates it. And in other words, someone once said to me, are they worth the powder it takes to blow them to hell? So I think, you know, parties still... employers still do like them. They still see value in them. And I'm not saying there's no value in them, but they're more and more difficult to put into place than they've ever been. And their utility is still open to some question.

[Ari]: Right. And I think especially because it may be even more so now, because most filings in state court and definitely in federal court are electronically available. So if the allegations are in the lawsuit and anybody can access a copy of the lawsuit, then it's kind of like, what is the goal and what are we trying to protect?

[Mike]: And you and I have read enough complaints to know that complaints are far more salacious than settlement agreements.

[Ari]: This is true. Yes. And sometimes the information contained in those complaints is far less accurate than the information, right?

[Mike]: Yes, exactly. Yeah.

[Ari]: Okay. Well, thanks so much, Mike. This has been a great, I think, first episode to our listeners. This is the first of two episodes where I will have Mike on talking about best practices for defending lawsuits in state court. So Mike will be back with us next week. Before we sign off, Mike, any famous last words? Anything that you want to add that you think that maybe we didn't cover in this initial discussion of practice?

[Mike]: Just the thing that you and I close every conversation with Ari.

[Ari] and [Mike]: Go Bills.

[Ari]: All right, Mike. Sounds good. Thank you so much. We'll talk next week.

[Mike]: Thank you, Ari.

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