Episode 44: "Best Practices for Handling Discrimination Lawsuits in State Court, Part 2," 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, guys, welcome to "Best Practices for Handling Discrimination Lawsuits in State Court." This is part two. I am thrilled to announce that this week I am back with Mike Murphy to talk to us about the best practices for defending discrimination lawsuits in state court. As I mentioned last week, Mike is a partner in our Albany office and he is a very experienced litigator. He is the man for the job this week. So, Mike, welcome back.

[Mike]: Good to be back with you, Ari.

[Ari]: Absolutely. So last week, Mike, we left off, we were talking about, you know, in our fictional lawsuit, our chronological analysis, we assumed for the sake of our discussion that we had settled the case. We talked about settlement agreements and confidentiality agreements. But let's assume that we did not settle the case and we're kind of chugging along to the next phase of, you know, what happens when you're in state court and that's "discovery." So just briefly, Mike, can you tell our listeners what discovery is? What does that term mean in the legal world?

[Mike]: Discovery in the legal world means it's the opportunity for one side to find out about the other side's case and then later on in the discovery process to find out what non-parties may know about the case. So it involves exchanges of documents and data. It involves depositions. It sometimes involves viewing locations where events may have occurred. And then later in the process, it involves information regarding experts.

[Ari]: Right. So, Mike, this is a question that may be a little difficult to answer, but I think it's an important one to ask, especially for our listeners. What is the timeline in state court for this phase of the case? And by that I mean about how long does this take? Is this a quick process? Is this a longer process? What can you tell our listeners about the timeline for this phase of the case?

[Mike]: It is not a quick process it is a longer…

[Ari]: I kind of teed you up for that…

[Mike]: That part's not all that difficult to answer. It's a time-consuming process. And it can be a difficult process depending on how data is stored, how document- or data-intensive the case may be, whether there's lots of emails or other type of business communication, whether it's Slack or something else that needs to be accessed and evaluated. And so it can take a significant period of time. And one of the differences between state and federal court is generally that the federal court judges, through the magistrates, exercise more control over the—not only the timing, but the content of discovery—than state court judges tend to do, and they tend to pay more attention to the deadlines that are set in the docket than the state court judges often do.

[Ari]: Yes, I agree with that. And I think just by virtue of having a plan for all of that at the outset in the case in federal court, obviously we don't always have that in state court. And sometimes it'll take a number of months

to even... to get a scheduling order or what we call a scheduling order to kind of get a plan to finish discovery.

[Mike]: So and scheduling orders have become the norm in state court, which is consistent with federal court. But honoring those scheduling orders is not as much the norm in state court as it is in federal court.

[Ari]: I would agree with you, Mike. So one thing I wanted to touch on in one in this discovery phase of the case is when we talked about federal practice, we talked a little bit about this, a 30(b)(6) witness, which basically, as you and I know, is a witness who has been designated to basically testify on behalf of the company. Is there anything similar in state court that you're aware of or is it simply not as formal in terms of designating a witness on behalf of a company?

[Mike]: There is not an equivalent to the 30(b)(6) that creates this sort of risk and responsibility for a company to designate the appropriate person and make sure that person has the full and complete knowledge they need in order to be an effective and compliant 30(b)(6) witness. So that doesn't exist. There is a section of the CPLR, I think it's 3106, that allows a party to designate who a witness might be and to give some parameters for the testimony that will be taken from that witness. But it doesn't create the same sort of obligation as 30(b)(6) does.

[Ari]: Right. Yeah. And I think that's important. And I also think in state court, I mean, because there isn't the formality that you would see in federal court, you know, there can be testimony for more than one witness that would be binding on the company.

[Mike]: Right. That is true. And what ends up happening is that you then start pulling away more of the layers of the onion to get to more and more people to find out information.

[Ari]: Yes, exactly. So, Mike, I think that's a good overview generally of what discovery is. A couple of minutes ago, you mentioned experts. So I definitely want to talk about that because I think we need to kind of demystify what the expert witness is and what the role of the expert really is. But can you tell our listeners a little bit about why you would need an expert in defending a discrimination case? Or what kind of things will that expert typically give an opinion about?

[Mike]: So I think more frequently than any other area, we deal with experts both in defending the case and in attacking the plaintiff's case who are talking about damages, whether it's a mental health expert who's talking about counseling that they provided to a plaintiff in support of claims for damages, whether it is, in some instances, a mental health expert that's retained by the defense to talk about their own evaluation of the plaintiff and to talk about whether the alleged damages are, in fact, related to the trauma that the person claims they endured in a workplace setting, as opposed to many of the other causes of trauma and mental health issues that people come across in the course of their lives. We deal with experts a lot on the economic issues. So if it's a wage loss claim or a claim of lost opportunity for future earnings, we will hire an economist or a forensic accountant to evaluate tax returns, business records, those sorts of things. And those can get fairly complicated. For instance, if you're dealing with a claim of discrimination or loss of a job in a professional practice or in a highly compensated individual. So those are those are important experts in those contexts. Experts on the liability side. That is, was there discrimination? Was there a breach of contract? Did someone fail to pay what they were owed or what they owed their former employee in commissions or wages? Those tend to be less frequent. The place where you may see them some is if you're dealing with a larger group of plaintiffs, a class or collective action, or where you're having to evaluate whether there was some sort of systemic discrimination based upon a protected characteristic. But again, those are not as frequently as the damages experts.

[Ari]: Yes. So basically, you know, I think with employment discrimination cases, what makes them maybe distinct and a little more challenging is that there are so many different damages components or classifications that plaintiffs in these types of cases can try to recover.

[Mike]: I agree.

[Ari]: Yes. So do you think that, Mike, in your experience, is it more common for experts to be retained in federal cases versus state cases, or is it pretty consistent across the board? Or are there considerations between the two that make it more common in one as opposed to the other?

[Mike]: You know, we talked in the last episode about some of the different state court claims, whether it's, you know, commissions, breach of contract, failure to pay money that's been earned. And those tend to be liability or damages expert cases. So in some respects, those types of cases have experts more frequently in state court than you might see in federal court.

[Ari]: True.

[Mike]: So. Well.

[Ari]: And, Mike, I think this question kind of goes hand-in-hand with that, which is, you know, in federal court, you know, our listeners, if they've been following our discrimination segment path, have learned that you have the opportunity to depose each other's experts. Is that opportunity available in state practice as well?

[Mike]: In almost all situations, it is not available. It is still the Wild West as far as what you're going to get at a trial ...the state discovery rules provide for limited amounts of expert discovery. And some of this, you know, is dependent on where you are geographically in the state or who your judge might be. But the most bare bones (and it's still not infrequent) is you get disclosure regarding the name of the expert. The qualifications of the expert, the substance of the expert's testimony, and the basis for that testimony—without even necessarily seeing the expert's report.

[Ari]: Right.

[Mike]: And some judges require more information to be disclosed. They may require a report or an attorney or a party might see some value in providing the report to the other side. But there are plenty of instances where you show up at a trial and you're trying to get ready to cross-examine an expert. And you have their CV and you have about six or eight pages of description of what they might testify about. And you're going off of that.

[Ari]: Right. Which is truly the Wild West. And I definitely want to talk. We will definitely end our conversation today, Mike, talking about the trial. But before we get there, I think that was a good, good discussion of the role of the expert. One of the things I wanted to touch on is what we call the motion for summary judgment. So let's keep going on our path and we assume that we're done with the parties are done with what we call discovery. They've exchanged all the information they're going to exchange for now. And there's nothing really else to be done. All the witnesses have been deposed. All the documents have been exchanged. There comes a point in time where the parties can try to move to either win the case or dismiss the case. And that's what we call the motion for summary judgment. So I'm wondering, Mike, if you can tell our listeners just a little bit about what you think are the most important considerations when trying to decide whether or not as an employer, you want to move to dismiss the case and try to avoid a trial.

[Mike]: I think the most important consideration is the standard. And the standard that judges apply in state and federal court is fairly similar and to make it not a "legal" analysis, but maybe more of a layperson's analysis, the way I would look at it as you have a conversation and the conversation goes something like this: we know what the law as we know it, the standard is if everything the other side says is true and we're talking about representing the employer, if everything the plaintiff says is true, we are going to assume that they're correct about everything. Do they still have a case? Do they still meet the standard that's been established in the law for the case? And if the answer to that question is they probably don't have a case or they don't have a case, then you make the motion for summary judgment. But if the answer to the question is they may have

a case, the judge has to give them the benefit of the doubt in evaluating the facts that have been developed through discovery. And they may have a case, then the utility of a motion for summary judgment is limited. Now, if there's plenty of claims—and we've all gone through this before, where there's a claim of discrimination, and then on a couple of different levels, there's a claim of breach of contract or a whistleblower claim. And some of the claims, they may not have one, even if everything they say is true and others they may. It's still worth making the motion for summary judgment because you want to clean the case up. If you're going to get to a trial, you want to try the case on the fewest number of possible issues and eliminate the most risk of an adverse verdict.

[Ari]: Make sense. So I think as you talked about, Mike, it's probably worth underscoring for our listeners that it's not an easy task. It's not an easy standard to meet for the court to look at the motion and say, yeah, there's no way the other side could win. So you win.

[Mike]: Right, right. That's true.

[Ari]: So, Mike, let's assume that on the other side has moved for summary judgment. And the judge says, nope, you've got to try the case and we're at the trial. And I think the concept of a trial for any company, person, business that's been named in a lawsuit is definitely daunting or, you know, it's a little scary, which is understandable. I just I'm hoping you can shed some light on the trial process for our listeners. Not that we want to get too technical, as you said earlier. But first, before we get there, in your experience, do many cases of this type go to trial in state court, or is it most settle? What is in your experience, how what do you see.

[Mike]: Across the board, state and federal court, the vast majority of cases are settled before you get to a trial. And there are fewer trials now than there were five years ago, ten years ago.

[Ari]: Right. Just ...and I don't think the pandemic has helped that either.

[Mike]: The pandemic has not helped that. And one of the reasons the pandemic hasn't helped it is since there have been so few trials in the last few years...one of the things lawyers look at is what's happening in a jurisdiction, how are juries deciding cases? Who are your jurors? Who are the people you want on the jury? And we've lost two and a half years of sample size there because there have been... there's more trials now. There have not been many trials in the last couple of years. And I think another thing that has happened over the past several years is and I've seen this in some... the few cases that I have tried it and I've heard jury consultants talk about this is, you don't know who your jurors are anymore. A lot of people's attitudes have changed about a lot of things over the last several years. And people who I would look at as a juror who I you know, nothing is certain, but who you would feel fairly comfortable leaving on a jury or selecting for a jury. Some of those rules have been sort of tossed in the air and it's harder to figure out who your jurors are at the moment.

[Ari]: It's so true. Yeah, that's a really good point, Mike. And I also wanted to get your thoughts, you know, we talked on timeline, and I think this is important for our listeners, right? Because the longer a process is, the more time the parties invest, whether it's their time, paying us, paying other attorneys. What in your experience, is the average time from the time period a case is started until the time of trial? And I guess maybe with the pandemic the answer will be skewed, but generally. What are we talking a year, two years, three years, five years?

[Mike]: I think at the shortest reasonable timeline is two years. But in reality, it's going to be closer to three, maybe even more than three years. And some of that depends on, you know, expert testimony. Some of it depends on whether there's disputes about discovery because we do have disputes about discovery. We have disputes about whether documents should be turned over or not turned over. And those things slow a case down.

[Ari]: Yes.

[Mike]: But I think, you know, to be reasonable, you have to expect it's going to be three years.

[Ari]: Yes. We've had a good discussion, you know, of the overview of the process. And, you know, I want to talk a little bit about the trial. I think our listeners, if ... to our listeners, if you have watched any show, movie, any representation of what you think a trial may be on TV, some things ring true. And I think generally there's probably a level of understanding with... the witnesses testify, and a jury decides, you know, a set of questions that are predetermined. But I think what I'd rather have you talk about, as opposed to going through step by step the trial, is what you think are the most important things for employers to consider going into a trial, and during the trial.

[Mike]: I think the most important thing to consider is just your risk-reward. What risk tolerances do you have? And we talk about this all the time, and we try to give clients honest appraisals of the risk. I like trying lawsuits. If a client wants to try a lawsuit, that that makes me happy on a personal and professional level. But that doesn't necessarily reflect always the best decision on behalf of the client.

[Ari]: Right.

[Mike]: And so the tolerance for risk, the tolerance for a bad outcome and an understanding what a bad outcome looks like, what are the what are the parameters if it goes wrong? And also an understanding of what the good outcome looks like and whether it's worth it to expend time and resources and money to get that potential for a good outcome. So those are things that have to be considered before you get to trial. Things can happen in trial that change the dynamic. We've all seen things that happen that change, you know, expected outcomes. But you need to have this conversation before the trial starts to understand where you hope to end up and where you may end up.

[Ari]: Yes. And I think the reality of it, too, is juries are unpredictable. That piece that you see on TV or in movies is accurate, right? I mean, there's...Who can predict how six people from all different walks of life are going to respond to anything? Right.

[Mike]: You simply can't. And who can predict which people you're going to get to put in a jury box as well?

[Ari]: Very true.

[Mike]: And I mean, there's just strange variables, ok? If you're trying a case in the summer, you're going to have more students and teachers in your in your jury pool, than if you're trying a case in April. There's just different things like that. There's, you know, depending on the community you're in, there's going to be more or fewer professional people. There's going to be more or fewer retired people. There's going to be issues with respect to the, you know, the ethnic and gender and religious breakdown of a jury pool, the group of people that you're going to be looking at to possibly pick a jury. And you have to be aware of all of those things.

[Ari]: Yes. Yes. And it's a lot.

[Mike]: Yes.

[Ari]: Well, Mike, I think this has been a great discussion. I know it's been educational, and I think it's really given our listeners a good overview of what happens in a state's discrimination lawsuits. But before we break today, I did want to pick your brain on one more thing. I'm hoping you can tell our listeners what you think is the most important thing to keep in mind during this whole process of litigating a case in state court.

[Mike]: I think the most important thing is at the beginning to engage in an honest assessment and a process of setting goals and not losing sight of that, revisiting that because it's easy to get off of it. You get bogged down in whether it's, you know, how many thousand emails and, you know, native format or whatever it might be. But making a plan. Sticking with the plan. Not getting bogged down or getting knocked off of line. I think that's the most important thing.

[Ari]: Great advice, I think for this topic and generally. So. Great insights, Mike. Thank you so much for joining. I cannot tell you how much I appreciate it. I know our listeners appreciate it too.

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