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Sun Tzu — And the Art of Defending an Employment Discrimination Claim

Sun Tzu's seminal work "The Art of War" has long been required reading in leading business schools. As a definitive work on strategy, the impact of "The Art of War" crosses a great many sectors. In its most basic sense, Sun Tzu has a great deal of wisdom to offer anyone charged with motivating a workforce, changing a culture, achieving collective goals, and negotiating with and/or defeating hostiles.

This leads us to the Art of War's relevance to litigation, and in particular, employment litigation. Of course, we do not equate the trials and tribulations of employment litigation with the sacrifice and horrors of actual war, but we use Sun Tzu merely as a guide to the importance of strategy in litigation. As we are all keenly aware, profligate employment claims bring with them attendant legal fees, *in terrorem* settlements, potential runaway juries, and loss of time and energy. For every in-house counsel and human resources executive overseeing such claims, reference to this ancient text can serve as a valuable guidepost to effectively manage the case from the proverbial "General's" chair.

Sun Tzu: Now the general who wins a battle makes many calculations in his temple ere the battle is fought. The general who loses a battle makes but few calculations beforehand.

Strategy is an often overlooked complement to litigation defense. Each case is different, making rote defenses unacceptable. At the very outset of the case, the "General" needs to know: what is our strategic plan for confronting this particular case, *before this particular judge*, on these unique facts.

Sun Tzu: What the ancients called a clever fighter is one who not only wins, but excels in winning with ease.

Winning with "ease" in employment cases means winning pre-trial and preferably pre-discovery. Consequently, a threshold question is: do we have a motion to dismiss?

Courts have become far more accepting of dismissing complaints that are based solely on conclusory allegations. *See, e.g., Zucker v. Five Towns College*, 2010 WL 3310698 (E.D.N.Y. 2010) (granting motion to dismiss, finding that allegations concerning plaintiff's satisfactory work performance, termination, and much younger replacement do not — by themselves — suffice to plead an age discrimination claim). If a motion to dismiss is available, it could save discovery costs or possibly paying an *in terrorem* settlement to avoid those discovery costs. An ill-conceived motion to dismiss, however, only runs up unnecessary costs and, in the view of the deciding judge, may undermine the credibility of any subsequent motion for summary judgment. Dig down deep into the case law to find cases within the jurisdiction in which complaints with similar factual allegations have been dismissed.

Sun Tzu: There is no instance of a country having benefited from prolonged warfare.

Winning after expensive discovery and an expensive trial is not, in Sun Tzu's philosophy, truly "winning." This brings us to the concept of a "reasonable" settlement. Often times, there is a fear that if we settle, every terminated employee will believe they can exact a payout upon the mere presentation of a complaint, even if that complaint is utterly specious. On the flip side, standing on principle and "fighting to the death" is expensive and time-consuming.

Perhaps the most important thing to consider with such a conundrum is: who is our judge? Some judges have no problem granting pre-trial motions to dismiss or for summary judgment. Other judges virtually never grant a pre-trial motion. Knowing this at the outset is critical. Even if standing on principle is important, if you know that winning the case will in all likelihood require the cost of a full blown trial, settling at the inception of the case for less than the defense costs to win at trial (and taking away the risk of losing at trial and paying prevailing party fees) may be the better part of valor.

Sun Tzu: Hence to fight and conquer in all your battles is not supreme excellence; supreme excellence consists in breaking the enemy's resistance without fighting.

At first blush, this sounds vastly easier said than done. But, one way to subdue an enemy in employment cases is to make the enemy defend against a counterclaim. In our experience, viable counterclaims are often overlooked. Enter the "faithless servant" doctrine. If a former employee plaintiff has been terminated for misconduct, that employee may be subject to a claw-back of all of the compensation he/she was paid during the period of such misconduct. The possibility of not only losing the employment claim but also having to forfeit back already received compensation dramatically changes the leverage in terms of settlement or making the plaintiff simply go away. *See, e.g., William Floyd Union Free Sch. Dist. v. Wright*, 61 A.D.3d 856, 877 N.Y.S.2d 395 (2d Dep't 2009) (affirming grant of summary judgment which required employees to forfeit all compensation during the period of their disloyalty and to forfeit all forms of deferred compensation).

Sun Tzu: If we do not wish to fight, we can prevent the enemy from engaging us even though the lines of our encampment be merely traced out on the ground. All we need do is to throw something odd and unaccountable in his way.

Something "odd and unaccountable" in the eyes of a plaintiff, and most particularly in the eyes of a plaintiff's lawyer, is the possibility of fee-shifting not just against the plaintiff, but also against the plaintiff's lawyer. The availability of prevailing party fees to the plaintiff creates a Damoclean incentive to settle. Little known, however, is that in some cases the threat of fees against the plaintiff, and more specifically the plaintiff's lawyer, can quickly level that playing field.

A hidden gem in federal law allows for full fee-shifting against a plaintiff's lawyer who has been put on notice that the plaintiff's complaint is frivolous. 28 U.S.C. §1927. While a plaintiff's lawyer may initially laugh off such a threat, do not hesitate to send the lawyer a case where a substantial fee shift was imposed. *See, e.g., Capone v. Patchogue-Medford Union Free Sch. Dist.*, 2006 U.S. Dist. LEXIS 96016 (E.D.N.Y. 2006) (imposing full fee-shifting against plaintiff's counsel in employment case). When done right (notice, etc.), a fee-shifting claim can be a potent weapon in an employer's self-defense arsenal.

Conclusion

Litigation is about strategy — playing offense when available, breaking the enemy when possible, and avoiding a prolonged fight. There is no one rote method of responding to an employment discrimination claim. In-house counsel and human resources executives should be provided by their counsel with a full range of options and facts to support those options, particularly as to whether the current case — as assigned to a specific judge — ought to be quietly and quickly settled or vigorously litigated.

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