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Bias lawsuit? Instead of settling or litigating, move to dismiss

Does this sound familiar? An employee you fired for cause is either unable or unwilling to accept responsibility for poor performance and files a lawsuit claiming unlawful discrimination.

The pending litigation forces the employer into a sticky dilemma—either:

- Pay a settlement to avoid the exorbitant costs of discovery, subsequent legal motions and a potential trial
- Decide to pay the exorbitant costs of discovery, subsequent legal motions and a trial in hopes of winning the case—several years down the road.

Employees' simple arguments

This no-win scenario has become all too common. Until recently, the predicament facing employers has largely been a function of how easy it is for employees to patch together a complaint. Indeed, forcing an employer into time-consuming and expensive discrimination litigation has been merely a matter of asserting a false syllogism:

1. I am a member of a protected class (as is literally everyone)
2. I was terminated from my job
3. Therefore, I was terminated from my job because I am a member of a protected class.

Fortunately, however, two recent cases from federal courts in New York may signal the emergence of a more favorable view of motions to dismiss in employment discrimination cases. It's a trend that may help employers avoid the difficult choice between settling early or enduring the expense of prolonged litigation.

Motivated by animus?

In *Zucker v. Five Towns College* (No. 09-cv-4884, U.S. District Court, E.D. New York, 2010) the plaintiff was a 69-year-old college admissions recruiter. After the college terminated Sheldon Zucker, he sued, alleging unlawful age discrimination under the Age Discrimination in Employment Act (ADEA).

The college asked the court to toss out Zucker's claims by filing a motion to dismiss. Zucker tried to avoid dismissal by arguing that the mere fact that his replacement was younger than him was sufficient to entitle him to discovery.

Citing the college's arguments, U.S. District Judge Joanna Seybert rejected Zucker's argument. She held that, in order to survive a motion to dismiss, a plaintiff is required to plead concrete facts demonstrating that the employment decision was motivated by discriminatory animus, as opposed to what could be a whole array of legitimate considerations.

Seybert also held that being replaced by someone outside of the plaintiff's protected class does not, standing alone, salvage a claim. She wrote:

> *[I]f such barebones allegations sufficed to state a claim, then any time an ADEA-covered employer terminated an employee over age forty, the employer would be unable to replace that employee with someone younger without exposing itself to potential liability for age discrimination. And Defendants similarly argue, correctly noting that every employee is a member of multiple protected classes. Thus, unless a terminated employee is being replaced by a virtual clone, his/her replacement will almost certainly be outside of one of the Plaintiff's protected classes (e.g., could be younger and/or a different gender, race, religion, national origin). The Court agrees with this reasoning. And the Court has no desire to abrogate [Federal Rule of Civil Procedure] 8's gatekeeping function in employment discrimination cases, enabling nearly every fired employee to subject his employer to burdensome, expensive discovery.*

Protected status not enough

More recently, and relying on the *Zucker* decision, Judge Colleen McMahon in the Southern District of New York granted a motion to dismiss a race discrimination claim involving a 47-year-old black woman from Nigeria.

In *Ochei v. Mary Manning Walsh Nursing Home* (No. 10-cv-02548, U.S. District Court, S.D. New York, 2011) McMahon specifically rejected the "false syllogism" that a decision to terminate someone's employment necessarily flows from his or her protected class. Rather, according to McMahon, the complaint must plead specific facts demonstrating the causal connection between the adverse action and the protected class:

> *Where there is no reason to suspect that an employer's actions had anything to do with membership in a protected class, other than Plaintiff's bald assertion that she was a member of such a class, and the people who made decisions about her employment were not, no claim is stated.*

Lesson learned

These two decisions should make employers think twice before either settling or opting to litigate discrimination lawsuits. Working with your attorney, always weigh the option of filing a motion to dismiss the case. It may not be possible in all cases, but it is a legitimate strategy that courts are willing to consider.

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