EMPLOYMENT LAW IS FUN (UNLESS YOU'RE THE EMPLOYEE): MY MOST FASCINATING EMPLOYMENT CASES

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ABSTRACT

This piece discusses the most interesting 12 employment cases handled by a plaintiff's employment attorney and employment law professor over a 35-year timespan. Not intended to be a scholarly piece, it is rather a description and explanation of actual cases that reflect the stresses and oddities that can permeate workplaces. In addition to the factual descriptions of the cases, the article includes explanation of the various laws and legal principles available to employees who confront legal challenges within the workplace.

The cases discussed herein include cases of traditional types of race, sex, age, and disability discrimination outlawed under Title VII, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Family Medical Leave Act, but also includes cases focusing upon less well-known causes of action available to employees, such as retaliatory discharge, promissory estoppel, and fraudulent misrepresentation.

Keywords: Employment Discrimination, Title VII, The Age Discrimination in Employment Act, The Americans with Disabilities Act, The Family Medical Leave Act, Sexual Harassment, Race Discrimination, Disability Discrimination, Retaliatory Discharge, Promissory Estoppel, Fraudulent Misrepresentation.

INTRODUCTION

What the Heck Really Happened?

Janet Thompson was a young African American woman teaching at a private school in Nevada. She was originally from the Chicago area and had many relatives and friends in Chicago. One day she saw an opening for a private school teacher in Chicago and she applied. She held a number of conversations with school officials, and here is where the stories diverged dramatically. Janet's story: She was interviewed a few times online, then was hired and given a fall start date. She then got rid of her apartment and arranged to have all of her belongings sent to Chicago where she rented an apartment near the school. When she arrived on the first day, she admits that something did not feel right. They seemed rather surprised to see her. Then they said something about enrollment not being what they had hoped and that she'd spend the day shadowing another teacher in her classroom. At the end of the day, they told Janet that they would contact her when her own classroom would be available. Days went by (Yamada, 2010). Then a few weeks. Eventually they stopped returning Janet's messages. Finally, she received a return call and was told that there would be no job. We filed suit on a variety of legal theories. After all, Janet had given up a job, relocated to Chicago, and was now unemployed and broke. Here is the school's version of events: We never hired Janet. In fact, that visit to our school was supposed to BE the job interview. We would never hire anyone based on a few online conversations. Also, we saw when we met her that Janet had facial piercings and tattoos. Those just would not fit our

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image with the conservative parents who sent their children to our school. Additionally, we learned that Janet was planning to return to Chicago in any event because she had applied to take courses at a Chicago-area college. So, what the heck really happened? Who was telling the truth? We located the teacher with whom Janet had spent that first day. That teacher said that Janet did not have any facial piercings and that he did not see any tattoos – but an examination of Janet's Facebook page showed piercings and tattoos. And Janet told us that she always removed the piercings while at work and always had her tattoos covered. Was Janet thinking of a return to Chicago anyway? Yes, she admits. And when she was offered the job, she thought it was the perfect chance to return to Chicago and attend college. But she said she would not have done it if it wasn't for the job offer. You may ask- where is the legal claim here? After all, these were just words. The general rule is employment-at-will. Companies can hire or not hire or terminate employees for any reason at all – so long as it is not an illegal reason such as discrimination. Good question! And I have had to persuade several Judges who were unfamiliar with such claims. The law varies from State to State but some states (such as Illinois), are particularly strong on the theories of "promissory estoppel" and "fraudulent misrepresentation." Promissory estoppel means that a party cannot make a promise (even just an oral promise) that causes the other party to rely upon it to their detriment. Fraudulent misrepresentation means that a party has intentionally misled another party into acting in reliance. So, a good defense to the latter claim is: "hey, we weren't lying when we offered the job. Conditions changed." So how do employees win such a claim so easily? It's those employers! Nine times out of ten, the employer denies even making the promise. When they are disbelieved, it becomes impossible for them to just flip their defense to a "conditions changed" defense (Hyde, 1993). I have always been amazed at lawyers who argue to a jury in the alternative. "Our client never said that! But even if he did, we have other defences." Jurors do not buy that legal sleight of hand. I found this case to be absolutely fascinating. Finally on the morning of trial, the school made a settlement offer and Janet accepted (all the while still insisting that Janet's version of events was fiction and theirs was the truth)! Will anyone ever know which was true? No, but that is what makes this area of the law so compelling.

WILL SEXUAL HARASSMENT IN WORKPLACES EVER END?

Sexual harassment alone could keep plaintiff employment lawyers in business. If someone had suggested this many decades after the Anita Hill testimony and the Clarence Thomas hearings that we would still be experiencing this proliferation of sexual harassment, few would have believed it. After all, it has been decades now since companies instituted mandatory sex harassment prevention training. The word has been out for a long time. So why does it persist? There are quite a few theories. One is that it's about power. Another is that it's about human nature. The one I gravitate toward is the erroneous belief that employees cannot win so-called "he said/she said" cases. Put differently, how can anyone win a case where it is just one (or more) person's word against another? Don't you need recordings, videos? No. As a famous trial lawyer I used to work for said, "The truth is whatever a jury decides to believe. That makes it proof." Lisa Benedetti was a smart and beautiful law student who had a lucrative part time job at a prominent Wrigley Field- area bar in Chicago. It is one of those many establishments that became popular and profitable after the area around the stadium became "Wrigleyville" – a destination in and of itself. This bar knew the type of atmosphere it wanted. Serving primarily a clientele of young males, it created a particularly revealing uniform for its all-female waitstaff – tight-fitting tops and super short shorts. The waitstaff, including Lisa, experienced the sexual harassment from two

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directions. Male coworkers were verbal about the appearance of the waitresses and did not hesitate to lay hands on them. A rub or slap on the butt was commonplace as they left the kitchen area carrying trays of snacks and drinks. But the bar also encouraged harassment by the male clientele. One group of frequent patrons took a particular interest in Lisa and always wanted her to serve as their waitress. In the course of things, they would make lascivious comments about her and did not hesitate to touch, often rubbing her bare legs or bottom as she worked their table. They were generous tippers and loyal bar patrons. Although Lisa was a beautiful young woman, she was not the stereotype skinny beauty. She had an athletic build and gained weight while working at the bar. At one point she asked for a larger uniform size, but it was declined by her manager (Sternlight, 2019), who offered the opinion that she was even sexier in an outfit that was so tight. Lisa finally raised concerns to management, both about the coworkers and the aggressive customers, however management brushed them off. As one manager put it, "Hey, this isn't some conservative accounting firm—it's an entertainment venue similar in some says to a Hooter's. One can expect the same standards of decorum in an environment such as this." That point is one that Courts have indeed wrestled with over the years. Is there one standard of acceptable behaviour in workplaces when it comes to sexual harassment or does the law need to take the character of that particular workplace into account? The premise was that a woman working at a bar or at a low-wage physical job cannot expect the same standards as someone employed at a conservative law firm. (Well, actually – bad example. Some of the worst sexual harassment has been known to occur in law firms. Go figure). Those Courts that have rejected that "sliding scale" approach argue that there must be one consistent nationwide standard for sexual harassment in workplaces. Otherwise, low paid, less educated employees are destined to have to work with sexual harassment while better-paid, highly skilled employees do not. But of course, after we filed suit, the bar employed the typical sexual harassment defenses. "Hey, what did you expect? If a woman is dressed skimpily, she is more likely to receive comments about her body. Doesn't she "assume the risk" by taking such a job? And what do we have to do with customers who harass an employee?" The case finally got as far as Lisa's deposition. At one point, the defense lawyer marked a copy of Playboy magazine as an exhibit, plopped it down in front of Lisa and asked her if she recognized it. "Referring you to page 34, are those three nude photographs of you?" This, of course, was big news to me. "Yes" she said. "Those are photos of me." If someone had told me this was anything other than a once-in-forever event I would not have believed them. But some legal research led me to find that Lisa was not the first sexual harassment plaintiff to have posed nude, or worked in a strip club, or done some work as a prostitute. Again, the bar's point was – how can a woman who is willing to pose nude for the world complain about sex harassment at work? Put a bit more objectively – the typical defense argument is that because sexual harassment is about "unwanted" sexual attention – won't proof that a woman likes to display her body tend to undercut a claim that she is offended by sexual attention from co-workers and strangers? Well, the case finally did reach a settlement prior to trial and Lisa went on to be a highly successful lawyer. I'll have to locate her one of these days and ask if she handled any sexual harassment cases.

DO EMPLOYERS REALLY HATE OLD PEOPLE?

Some types of discrimination are purely irrational. Based solely on hatred or prejudice, such as race and national origin. But others have an economic component that put them into a somewhat different category. For example, cases involved the disabled or employees with a disability or medical issue or the perception by employers that women of child-bearing age are unreliable. And age discrimination is one the best examples of that type

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of discrimination. The fact is, older employees who have been with an employer for a long time tend to be higher salaried because of raises over the years. And the pension or 401(k) contributions for such employees tend to be costlier. And they tend to use the medical coverage more liberally than younger employees (Hepple, 2013). This all makes them expensive employees. So – even where an older employee is a better employee than a young person that the company could hire to replace them, maybe the older employee isn't THAT much better. And the younger employee will likely improve his or her performance as they gain experience in the job. Makes economic sense (Barnard, 2014). The problem is most Courts view it as illegal – holding that wage discrimination is age discrimination. This is especially true with companies and government agencies that utilize "step" pay structures. A good example is teachers. Tony McGee, after 30 years with a suburban Chicago school district, was near the top of the pay scale, earning about $125,000 per year. And while Tony was still a good teacher, he was not displaying the high-energy level of his younger years. As the District put it, Tony was starting to "phone it in." The reality is that the district could hire two young teachers straight out of college for less than they were paying Tony, so they did. After years of solid performance evaluations, Tony's reviews became more critical and negative. Here are the problems that employers who take this seemingly reasonable approach can run into. First, jurors view age as almost universally worthy of protection. Even a jury of younger folks is sitting there thinking "Wow, what if my company does this to me someday? Where will I find a new job at age 65?" As a former boss of mine once opined, "If a juror is Black now, he's never going to be Black. If he's not a woman now, he's never going to be a woman (absent some funky operation). But if the juror is lucky, he or she is going to be old someday." Second, the performance evaluation standards must be consistently applied regardless of age. In our case, the reviews of two newbie teachers had comments such as "Doing great work considering it is only his second year of teaching." Whereas for Tony it was "Should be doing even better given his many years of experience." One stroke of luck I had which helped lead to a huge monetary verdict for Tony: His Principal tried to raise the notion that the students did not think much of Tony. So, on the next-tolast day of trial, Tony suggested to me that I contact a former student to see if the student would come to Court and testify. He did. Jurors told us afterward that the student's glowing remarks went a long way toward finding that the District had indeed discriminated against Tony.

THE WORKPLACE IS A BAD PLACE TO FIND DATES

Few events within a workplace are as likely to cause legal issues as consensual sexual relationships with co-workers. Especially when one of the participants is the boss and owner of the company! But surveys tell us that the workplace is one of the most common places – if not the most common place – to find a relationship. Of course, there is nothing illegal about dating co-workers – even where the participants are in a supervisor-supervisee relationship. But a common scenario is when one of the parties wants out of the relationship. What then? Sexual harassment by its definition is restricted to non-consensual relationships. The sexual attention must be "unwelcomed" before it is illegal. But where one of the participants wants to terminate the relationship, is there any room for ambiguity in the law or must the other party cease all sexually motivated conduct immediately? For example, is it so unreasonable that the "jilted" party might continue to make attempts to rekindle the relationship? To continue to make sexually related comments or engage in touching? That is a tough one under the law because typically these situations are messy ones. Sarah Simmons was engaged in a fully consensual relationship with her married boss, who owned the company. To celebrate her birthday one year, the boss arranged a party at the office. He ordered gifts, cake,

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drinks, and serenaders to come into the office and celebrate the occasion. At one point, the boss engaged Sarah in front of everyone in a passionate embrace that included a lengthy kiss. One of the employees who knew the boss's wife decided to tell her about it. The wife was incensed and demanded that Sarah be fired immediately – so she was. That is when Sarah contacted our office wondering if she had any legal rights (Leonard, 1985). More alarming, Sarah rightly believed, was that she had a few times noticed her boss following her as she drove her car around her neighbourhood. We issued a "demand letter" and soon the company's attorney and I were engaged in a series of back-and-forth settlement proposals. We finally reached a monetary agreement, drew up the paperwork, and sent it to the parties to sign. Oddly, days, and then a few weeks went by, and neither party was returning the settlement agreement to the lawyers. We kept following up with no response. Finally, we learned the reason why. Sarah told me that once again she was driving near her home and saw the boss following her. This time, she pulled over. So did he and within a few minutes they were making out passionately in the back seat of his SUV. "I love him! I will always love him" she told me. And she related that they had torn up the written settlement agreement and instead he promised to cover her rent for six months and pay her money to tide her over until she could find a new job. All's well that ends well? The opposing lawyer and I didn't know whether to be happy for them or furious. Or maybe just swear off "consensual relationship" cases?

THE MOST COMPLICATED SIMPLE STATUTE EVER?

When Congress passed the Family Medical Leave Act (the "FMLA") it sounded so simple. Basically, if you work for a company with 50 or more employees and have worked there for at least one year, you are entitled to up to 12 weeks off without pay and guaranteed that you may return to your job if you suffer from a "serious medical condition." What could be more clear? The reality is that the FMLA has become a nightmare for employers. When I speak at seminars for HR people, the topic invariably shifts to the FMLA. The complexity was enhanced by a series of court decisions that basically ruled that an employee need not necessarily ask for or fill out FMLA paperwork- or even mention the turfman (nor even specifically mention that he or she was suffering from a medical condition) in order to gain the Act's protections. One decision in particular, really opened the door for employees in FMLA claims. The supervisors of a long-term employee who had performed well for many years, noticed that something had changed. He appeared disheveled and because his output was deteriorating, they installed a video camera to record him while at work and saw that he frequently dozed off for considerable periods of time. When they fired him, an enterprising plaintiff's employment lawyer threatened and then brought an FMLA suit against the company. The Court surprised just about everyone by ruling that the change in the employee's appearance and demeanor was sufficient to put the company on notice that maybe he had a significant medical condition and would be eligible for FMLA (Kenner, 2002). Put differently, what the supervisors saw was tantamount to an employee asking the company for FMLA leave. Thus, reasoned the Court, the company had a duty to hand him the FMLA paperwork and invite him to apply for it prior to firing him. Wow! Employees have been enjoying a somewhat similar advantage under Court interpretations of the so-called duty of employers to "reasonably accommodate" medical conditions that are covered by the Americans With Disabilities Act ("ADA"). Again, it is not always essential that the employee actually request time off or a reduced schedule due to medical issues. It is enough if such should be obvious to the employer. Philip Matland came to our office because he had been suffering from depression and anxiety. The conditions would flare up occasionally to the

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point that they seriously impacted his ability to keep up with the workflow. After a few warning notices, Philip became concerned about keeping his job, told his supervisor about his medical issues, and asked for some time off either under the FMLA or as an accommodation under the ADA. While he was awaiting a response, the company announced that it was firing Philip. Its defense to the suit was that – yes, we are aware that he probably qualified under the FMLA and ADA and that he had in fact requested them – but we can prove that a final decision to fire Philip had already been made, although not yet communicated to Philip. And because, they argued, what is illegal in employment cases is whether a decision had been made to fire someone; not whether they deserved to be fired. The defense struck me as one of those "too cute by half" legal distinctions that creative lawyers are known to come up with. Why should it matter that the company had already made, but not yet communicated a decision to fire him? Now that they know his medical condition and are aware of his request, why not just reverse the decision to fire? Not too many court decisions out there on this but I was lucky enough to find one that ruled that even where the firing had already been communicated to the employee, it still violated the FMLA because it could have reversed its decision once it found out the facts. Makes sense to me!

WHY ON EARTH DID IT TAKE SO LONG FOR THIS RACE DISRIMINATION CASE TO SETTLE?

Sometimes you just can't figure out why, in an "iffy" case, a company will throw money at you right away; and in a super strong case – they show no interest in settlement? I guess it is like anything else – decisions are not always economically rational. Humans being humans, sometimes other factors matter. Sometimes it is the "principle" of the thing. One of my favorite Federal Judges used to say that anytime a party uses the phrase "principle of the thing" it will add two hours to a settlement conference. Here is one where I was anticipating that the company would send a huge settlement check immediately after our demand letter – but I was mistaken. Stephen Baxter was the only African American at a managerial level in a large company. He had been with them for a few years and received outstanding performance appraisals. Stephen began inquiring about and applying for promotions with no success. Stephen's immediate supervisor could have been sent from central casting. Picture an overweight Southerner with a classic Southern accent. Stephen began pestering the supervisor "Chuck" about promotion but was getting nowhere. Finally, in a conversation in which Stephen was being persistent, Chuck paused and said "Look, in this corporation you are nothing more than a small black ant on the ass of an enormous white elephant." Not surprisingly, relations between them took a severe turn for the worse and Stephen was fired not long afterward. Now, as a plaintiff's employment lawyer, my first thought was "how quick can they send me a big fat check? A week maybe?" Wrong. The company attorneys advised me that it had little or no interest in settlement. Couldn't get him to tell me why not. So, we did the only thing you can do at that point – file a lawsuit, serve written discovery, and take depositions (Landes, 1968). That whole process, of course, took up about one year, as is typical. And while Chuck denied ever making such a remark at his deposition, I could not believe that the company would want to put this dude in front of a jury. As is typical with many judges, before they block off a week of their calendars to try a case, they insist on meeting with the lawyers for a settlement conference, whether the lawyers want one or not. At the conference, I made my arguments to the Judge and the defense lawyer made his. Then the Judge talked with me privately for a while, then with their lawyer. When we reconvened, the defense lawyer offered a settlement of $100,000. What??? No one goes from zero, zero, zero to a six-figure settlement. We accepted and the case settled. But this one was driving me

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absolutely nuts. I HAD to know – why would a company go from one year of zero to $100,000? The defense lawyer seemed like a decent and knowledgeable guy. I called him and told him I HAD to know what the heck had happened – and he told me. He said that Chuck steadfastly denied ever making such a racist remark to Stephen. Even though some at the company had doubts because of other statements they had heard him make over the years, Chuck simply insisted that he had never and would never say such a thing. And the CEO made a decision: "Chuck, we're going to stand behind you on this. There will be no settlement. I promise." Then the company spends what – $75,000 or so on litigating this case for a year because they had decided to stand behind Chuck. But as the trial drew near, and at the lawyer's advice, the CEO changed course. Apparently, at the prospect of the disruption of a week-long trial that would include evidence of a number of Chuck's racially inappropriate remarks, the CEO said "Chuck, we love you, but we have to settle this case!" What surprised me the most about all this was the prospect that a Fortune 100 company could be immobilized by loyalty to one guy. They didn't teach us that in law school or at seminars about valuing and settling lawsuits. But it is a reality and not all that rare.

HOW COULD AN EMPLOYEE POSSIBLY LOSE THIS CASE?

One reality that trial lawyers discover is that you win cases you should not have won and lose some cases (hopefully not many) that sounded impossible to lose. This is one of my best examples of the latter. Vivian Hastings had a long career with a large Board of Education. Many decades of good service. When Vivian reached age 65, her supervisor began making some inquiries as to whether retirement was in her plans. "Nope", said Vivian. "I'm in good shape, I still like the job, and I have bills to pay." It was not more than a few months later that Vivian was informed that her job (along with approximately 30 jobs through the agency) was being eliminated and that she would be terminated. I took the case because I liked the fact that her supervisor had asked her about retirement and, as I said in a previous chapter, there is a great temptation among employers to target their older employees whenever they have cutbacks or reductions-in-force due to the higher salaries, higher pension contributions, and increased use of the medical insurance that are often typical of older employees. In the course of pre-trial discovery – getting ahold of the recent hirings and firings by the School Board – that I was certain I had found my bonanza. Contemporaneously with Vivian's firing, the Board had posted new job openings for the exact same job and job title that Vivian held. And not only had they posted these openings, they in fact hired two – not one but two – young employees in their 20s into Vivian's old job. One of those "just send me a very large check" type cases. Well, wrong again. No settlement offer at all despite these facts that were absolutely awful for the School Board. The trial went well for us. No surprises and not much defense as to why they fire Vivian shortly after encouraging her to retire and why they suddenly needed two new employees to fill a job that was supposedly being eliminated (Djankov & Ramalho, 2009). I made my closing argument. Then the Board's attorney made hers. She said something like (and I'm pretty close here), "Ladies and gentlemen, we are a big, fat, bloated, inefficient bureaucracy. We are so messed up that often one hand doesn't know what the other hand is doing. So, imagine – here we are eliminating Vivian's job while someone else is posting the job and hiring two new employees to fill it. Now this is all pretty shameful, but it is NOT illegal, and it is NOT age discrimination." The jury did not deliberate for long when they returned to state their verdict in favor of the School Board. As is common, the Judge invited us to speak with the jurors after they were dismissed. (This is always interesting. So often the jurors were influenced by something that neither lawyer thought was important). Well, the first juror with whom I spoke said to me "Yup, we

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thought that they are a big, fat, bloated, inefficient bureaucracy that barely knows what it is doing. They didn't have the capability to discriminate on the basis of age." Took some guts on the part of the defense lawyer to make that argument, I believe. I congratulated her on pulling it off and selling it to the jury.

THE WORST DECISION EVER!

Okay, maybe I am exaggerating a bit. I have discussed how you win cases you did not think possible, and you lose cases that are open-and-shut victories. This is my example of the worst Court decision I have ever received. The case was not tried before a jury, but by an Administrative Law Judge. I cannot, to this day, imagine what she was thinking. Janet Baron was a security guard for a State facility. It is a truism in the area of employment litigation that State, County, and City agencies are far more reluctant to settle cases, regardless of the facts or the cost. After all, it is the taxpayers' money funding the in-house lawyers who work for these agencies. The impact of this upon the employees is that employment lawyers are far less willing to take cases against government agencies on a contingency basis, where the lawyer takes a percentage – usually 1/3 of the verdict or settlement – if they prevail. Most employees cannot afford hourly charges by an attorney, even when the rates are far under the $400-$500 common on the defense side. This was not a high-risk facility. Janet's job, which she handled capably for about two decades, entailed making rounds of the facility a few times per day, coordinating deliveries, and filling out reports. But Janet began to experience pain and discomfort. Medical tests revealed that she needed a hip replacement. When she returned from the surgery, Janet presented to her supervisors her doctor recommended accommodations. Basically, she sought to reduce somewhat the number of times that she needed to make physical rounds of the large facility and to take on more administrative work in its place. Sounds reasonable (Stone, 2000). Also, she requested use of one of the handicapped parking spaces that the facility provided for employees and visitors. Sounds like a no-brainer. You can imagine Janet's surprise when, upon arriving back at work for the first time after the surgery, she found that they had relocated her office from an easy-to-reach first floor location to a third-floor location reachable only by steep stairs. No elevators. After struggling her way up the stairs for the first time, Janet asked why on earth they needed to relocate her office. "Oh, we just did", said her supervisor. "We moved a bunch of employees around to make things more efficient." And in response to Janet's requested accommodations of a reduction in the number of physical sweeps of the facility and the handicapped parking space, the supervisor responded simply, "No." The essence of disability discrimination law is the clear duty of employers to provide "reasonable accommodations" for employees suffering from medical issues. An array of court decisions has required employers to trim back some job duties, provide shorter hours, allow time off for follow-up medical visits, etc. Is this "fair" to other employees who are often called upon to do more because a disabled coworker is bring accommodated? Well, we could debate that. But the fact is that Congress and the Courts have decided that employers need to work with disabled employees in order to allow them to remain gainfully employed (Estlund, 2018). Janet continued to complain. She went to the human resources department and made her case there, to no avail. And simultaneously, the criticism of her work by her supervisors intensified. Now, instead of glowing performance appraisals, there began a steady stream of write-ups and warnings. Finally, the agency decided it had enough of Janet and her complaints and fired her. Janet came to me and, even though I was well aware of the reluctance of State government agencies to settle cases, this one was "open and shut" I believed. This would be the exception. Wrong! The in-house lawyer for the agency told me "Sue us." So, we did. And we went through the lengthy

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process of pre-trial discovery and trial. I was stunned when the Judge issued her written decision in favor of the State agency. And was further stunned when an appeal of that ruling failed. The Worst Decision I Have Ever Encountered In My Career!

BUT THEN YOU WIN A CASE LIKE THIS ONE!

So far all of my whining (like about the last case), the amazing thing about litigation is that you win some case that you had no right to win (and, in fact, what were you even thinking when you took the case?) But this one was a long time ago when I did not have tons of potential clients calling me every week, so my case selection options were a bit more limited. Worse, it was a case against a government agency, as I just ranted about in the previous chapter. And ironically – for reasons to be explained – it ended up being a huge verdict for plaintiff with a bad case. Samantha Wilkins was a middle-aged African American prison guard. Not that race relations are much better today – but I think it was more overt a few decades ago, in that your bigots had a good deal less hesitation to express their opinions openly. So, Samantha – like many Black employees – was expected to endure a steady stream of so-called "humor" from her bosses and co-workers. They were always quick to tell a story about some African American they knew who was, allegedly, stupid, incompetent, lazy, you name it. Money was tight for Samantha, so at times she held down two jobs, which made her tired and sleepy some days while on the job at the prison. In fact, her supervisors teased her about they would see that she had "nodded off" while on duty. Well, what is about the worst thing that can happen in a prison, short of brutality or suicide? It's when a prisoner escapes. But it happens. So one day, while Samantha was sound asleep while sitting at a location that would have probably prevented this from occurring, a prisoner escaped! It happens. So, uh, what was I thinking taking this case and especially against a government agency with an in-house legal staff which would have zero interest in trying to settle it even if the facts were not so bad for Samantha? The plaintiff attorney's best friend in employment litigation is pre-trial discovery. That is where you get to ask the employer to give you all sorts of stuff – to answer tons of written questions, to produce documents and personnel files of other employees, to come to depositions and be asked every question that the employee's lawyer can think of for hours. But it is the period where cases are normally won and lost. Sometimes, as pre-trial discovery goes along, the lawyer sees that his or her case is weaker than they thought. Other times, they see it much stronger than believed. Well, as luck would have it for Samantha, falling asleep on duty was not a terribly rare occurrence at the prison. Employees were often found asleep and often written up for it (Dau-Schmidt, 2001). And occasionally prisoners escaped (although not necessarily because anyone was asleep). So, we were able to present evidence of a number of Caucasian prison guards found to be asleep who were not fired. And we were able to find evidence of Caucasian prison guards guilty of all sorts of dereliction of duty, including not breaking up fights among prisoners that led to injuries. Suddenly, Samantha did not look like the prison's worst employee. The Judge agreed (I didn't think we would want a jury for this one!) But here is why things got even better for Samantha. One of the bedrock principles of employment law is "mitigation of damages." That is, a plaintiff must prove that after losing their job, they engaged in determined efforts to find new employment. Thus, their awardable damages in these cases is generally all amounts they would have earned between their firing and the trial, minus all amounts that they have earned from subsequent employment (or could have earned had they exercised "reasonable diligence" to find new employment). It's math. However, an important principle of the mitigation of damages doctrine is that a terminated employee needs to search for or accept only comparable employment within the employee's geographic region. A bricklayer need

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not apply for jobs as a shelf stocker at Wal-Mart (Parker, 1995). A Chicago resident need not apply for jobs in Omaha. And frankly, there are not all that many prison guard job openings existing within the greater Chicago area at any one time. But Samantha applied for all of them and did not get any of them. And the case was particularly slow to get to trial. So, by the time of trial, Samantha had accumulated about four years' worth of lost wages. Then the defense appealed, tacking another two years of lost wages onto what she won when the Court upheld the verdict in her favour. Six years of lost wages! Plus, Samantha got to keep all of it because the Court awarded attorney fees to our office separately. So, the next time you hear a plaintiff's attorney whining about how tough their life is, consider this one!

I'LL TAKE A "HE SAID/SHE SAID" CASE ANYTIME

One often hears people say disparagingly, "Hey, it's just a "he said/she said" case. Where is the proof?" The issue arises frequently in sexual harassment cases because it is rarely (although sometimes) practiced in public in front of witnesses. But jurors decide what is true and what is not in the same ways that they decide to believe or disbelieve anything. If a neighbour tells you a story, you choose to believe it or doubt it. And you apply the normal mechanisms that allow you to make judgments about whether the story is accurate. Caitlyn Gallagher was a young Administrative Assistant at a small company. After she turned a memo that contained a significant error into her supervisor, he was irate with her. She said "Oh, I'm so sorry. Maybe I deserve a spanking." She admits making that remark, but says it was meant as a joke. She further stated that her supervisor seemed taken aback by the remark. The supervisor, however, denied that he had ever heard Caitlyn say such a thing. About one month later, Caitlyn again made a significant error. Her supervisor told her to stay late after the others had gone home. When the office was empty except for the two of them, he told her to enter his office. "I'm going to take you up on that offer to receive a spanking." He went to the window and disengaged the plastic rod that opened or closed the blinds. He told her to take down her slacks and get across his lap. Caitlyn was shocked but complied. He then proceeded to vigorously spank her buttocks with the plastic rod, giving her (as best she could recall in her state of shock) about 25 swats that he required her to count out loud as she was receiving them. He then allowed her to stand up, pull up her slacks, and leave for the day. Caitlyn began a job search immediately. She had some interviews but had yet to receive an offer when- about one month later- her supervisor again directed her to remain late so that he could administer another spanking. The previous incident had been so traumatic for her that this time she refused, gathered her belongings, and left the office forever. So how does one ever prove this? It's a typical "he said/she said" case. But as I mention above, we all bring our intuition and judgment to whether to believe or disbelieve something that we are told. One element of that judgment is the degree of detail, and Caitlyn provided much detail about her workplace spanking. The oddity of the supervisor's taking down the plastic rod from the window blinds, I believe, lent credibility to Caitlyn's story. One would have to be Stephen King to have invented such an odd detail. The company worried that a jury would totally believe Caitlyn and settled the case (Stone, 2006). Why? Because a jury would apply the normal gut feelings and mechanisms that they use each and every day in deciding what to believe and what to doubt. The truth is that there has never been a requirement under the law to have a corroborating witness. And many employees who live in States that outlaw taping a conversation without the other party's consent could not use the recording to prove their case in any event. But in addition to gut feeling, jurors also use (and are permitted and encouraged to use) inference to make decisions, just as we all do every day. If we wake up and see our front yard covered with snow, we don't go around trying to find someone who actually saw it

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snowing. We are certain that it snowed. And that is enough proof to find an employer liable for sexual harassment and even to find a criminal defendant guilty of having committed a crime. One more reason that plaintiff-side employment lawyers love "he said/she said" cases: A common defense tactic is to ask the Court to throw out the case without trial, arguing that there is no "genuine issue of material fact" to be tried by a jury. It is called a Summary Judgment motion. Put differently, the argument is that – even if a plaintiff proved everything he or she is claiming it would not be a violation of the law. So, therefore, a trial would be a waste of everyone's time. But anytime a plaintiff is saying things that could conceivably be true, the case must be tried, and a jury must decide whom to believe.

WHY FIRE THE EMPLOYEE WHEN YOU CAN JUST BORE THEM TO DEATH?

An issue that frequently arises in employment cases is "constructive discharge." That is when an employer does not actually fire an employee but does something else that induces the employee to quit instead. It is similar to the doctrine of "constructive eviction" in landlord/tenant cases. Maybe the landlord did not actually evict the tenant, but if it provided no heat during a Chicago winter, it may as well have evicted the tenant. In the area of employment law, the test for "constructive discharge" is rather high. Courts ask whether a reasonable employee would continue to work under some condition that is intolerable. Common examples are on-going sexual harassment, demotions, or pay cuts. Margaret McCoy worked for a few decades as an administrator at a large hospital. She always received good performance evaluations and knew her job well. The job was very much part of her personal identity. On Margaret's 65th birthday, the supervisor surprised Margaret with a birthday party! But amidst the cake and refreshments, he kept referring to it as her "retirement" party and asking when her last day would be. And he had apparently suggested this to her coworkers because they kept approaching her at the party congratulating her on her upcoming retirement (Leonard, 1990). To say Margaret was surprised would be an understatement. After the party, she explained to the supervisor that she had no retirement plans. She said that she loved the job and was planning on at least five more years in her role with the hospital. He seemed disappointed. Well, a couple of weeks later, after Margaret had made no moves toward retirement, the supervisor had a surprise announcement for her – the hospital had hired her replacement and assigned all of Margaret's job duties to the new person. But he hastened to add, this does not mean that she needed to leave. He explained that she was welcome to continue coming to work every day. So she did. But it quickly became apparent that Margaret no longer had any job duties! They were all taken over by the new person. But she still had her office and her computer and remained on the payroll. This was driving Margaret crazy because, as I say, this job that she had held for decades was extremely important to her and big part of her identity. So, she began pestering her supervisor about duties that she could assume. He would just chuckle and say that they really did not need her to do anything. So, Margaret made the rounds of co-workers- asking if anyone needed help with any of their work. But aside from a few times when a coworker gave her a task, she had nothing to do. Margaret explained to me that she would arrive at work each morning, go to her office, turn on her computer, and just read or surf the Internet. She would take a lunch break and then return to do the same each afternoon. Finally, Margaret retired. She said in the lawsuit that it was far too draining and humiliating to have absolutely no job duties. But I was not so sure that this was enough to meet the law's high threshold for "constructive discharge." After all, we needed to show that conditions were so intolerable that no reasonable employee would remain. The defense moved for "summary judgment", arguing to the Judge that this simply was not enough to be a "constructive discharge" under the law's

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heavy standard. But the Judge disagreed and denied their motion, setting the case for a jury trial, at which point the hospital settled the case with us. Whose brilliant idea was this? Well, the defense lawyer explained to me that after the supervisor went to speak to the head of Human Resources asking if he could force Margaret to retire, the advice he received was, no – that would be a pretty clear violation of the Age Discrimination in Employment Act. So, he got the clever idea of simply removing all of her responsibilities but allowing her to come to work every day. I have to admire creativity!

I REPRESENTED A CAT AT A TRIAL

I have saved my favourite trial story for last. I represented a cat at a trial… Well, okay I didn't actually represent the cat, but rather his owner. Reggie the Cat is a large Maine Coon who belonged to a friend of one of my sons. Although Reggie spent the vast majority of his time indoors, he, like many cats, would bolt outside to explore now and then. These escapes were facilitated by the fact that Reggie's home was sort of an artists' commune, where folks would come and go frequently. Well, one evening, Reggie slipped out and this time did not return shortly. While searching the neighborhood and putting up "Lost Cat" signs, Reggie's owner was contacted by a shelter (Befort, 2001). Someone had found Reggie (who was "chipped") and the chip information identified the organization from which Reggie was originally adopted five years earlier. When the owner contacted the adoption center, she was surprised to find that they refused to return Reggie! The owner of the agency (someone you would not like!), told Reggie's owner that, at the time of adoption, she had signed an agreement that Reggie would never be permitted outside. So they were not going to give back Reggie. I do not recall how the case got the media attention that it did, but there was plenty of time. Aside from several new stories – USA Today columnist Rex Huppke wrote a column about Reggie. In it, he said "Last time I counted, there were 5 million stray cats in Chicago. And every one of them would love to be Reggie." His column implored the agency to give Reggie back to his loving owner. When attempts to negotiate with the agency got us nowhere, there remained just one option: file a lawsuit demanding the return of Reggie. This got even more media attention and some contacts and financial help offers from a few celebrities. I have decided not to identify those great folks here, but suffice to say that one of them has had some unpleasant dealings with Donald Trump. Imagine – just one degree of separation between Donald Trump and Reggie the Cat! Reggie's owner had not seen Reggie since the evening that he escaped. So, the first thing we did was obtain a court order that the owner could visit Reggie at least once per week while the suit was awaiting trial. The agency would deliver Reggie in an Uber (so that no one could trace any license plates) to a neutral location and Reggie's owner got to reunite with Reggie and play with him for about one hour per week. Finally, the case made it to trial. The courtroom was packed because so many people had heard or read about the case.

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FIGURE 1
A CAT AT A TRIAL

In retrospect, I should have asked the Judge's okay to let Reggie attend and wander around the courtroom. After a trial of a few days, the Judge told us he was ready to announce his decision. We all waited with great anxiety for him to return to the courtroom and give us his decision. Well, the Judge found in favor of Reggie and ordered his return! A large, tough looking bailiff began to sob with joy. Spectators hugged one another. Was the strangest experience I had ever had in a courtroom (Stone, 2000).

CONCLUSION

When we were finally entering the judgment, the Judge jokingly suggested that maybe we should dip Reggie's paw in ink and have him sign off on it as well. Reggie's liberation received additional media attention, including the presence of reporters at a huge "Welcome home, Reggie" party. Reggie declined to be interviewed by the press at his welcome home party! My greatest experience as a lawyer and the case of which I am proudest!

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