



906: Evaluating a Discrimination/Employment Termination Lawsuit

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Faculty Biographies

Catherine F. Duclos

Catherine Fitzgerald Duclos is currently deputy general counsel for Thomson Inc. based in Indianapolis. Thomson, along with its subsidiaries, is a leading manufacturer of consumer electronics, including TVs, video cameras, cable modems, telephones, audio products, DVD players, and professional video equipment. Its products, which are sold in more than 100 countries, include such brands as RCA, GE, Jensen, and Technicolor. Thomson has over 70,000 employees worldwide.

Prior to this position, Ms. Duclos, along with several other attorneys, opened a practice representing individuals in employment litigation. Before this, she joined the labor and employment law firm of Fisher & Phillips in Atlanta where she focused her practice on representing employers in discrimination and wage & hour litigation.

Ms. Duclos received a BS from Indiana University School of Business and a JD, *cum laude*, from Indiana University School of Law.

Jonathan Gentin

Jonathan Gentin is senior counsel for Hyperion Solutions Corporation in Sunnyvale, California. His areas of responsibility embrace labor and employment, intellectual property, licensing, litigation, general business counseling, and corporate compliance.

Prior to joining Hyperion, Mr. Gentin practiced with law firms in San Francisco and Washington, DC. He is admitted to the Patent Bar and enjoyed a federal district court clerkship before joining the private sector.

He serves respectively as cochair of ACCA's Labor and Employment Committee and chair of the Pro Bono Committee of ACCA's San Francisco Bay Area Chapter. He volunteers at the East San Jose Community Law Center.

Mr. Gentin received his undergraduate degree from Brown University and is a graduate of Emory University School of Law, where he was articles editor of the law review.

Roy S. Ginsburg

Roy S. Ginsburg is associate general counsel at Merrill Corporation, the St. Paul-based printing and document management company. He conducts employment law and harassment awareness training programs, as well as seminars for attorneys in private practice on how to develop client relationships professionally and ethically.

He began his career in private practice at the Dorsey & Whitney law firm. More recently, he has held a variety of in-house employment law counsel positions.

As a member of the Hennepin County Ethics Committee, Mr. Ginsburg investigates ethics complaints filed against attorneys. He is participating on two Minnesota State Bar Association Task Forces. One addresses the ABA Model Rules of Professional Conduct and the other Business Law Pro Bono. He is also the former president of ACCA's Minnesota Chapter.

Mr. Ginsburg received his BS from Cornell University and his JD from the University of Wisconsin. While attending law school, he was an editor on the *Wisconsin Law Review*. After graduation, he clerked for Justice Donald Steinmetz of the Wisconsin Supreme Court.

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MANAGING AND EVALUATING AN EMPLOYMENT LAWSUIT: DOS AND DON'TS

DO:

- 1) Identify the client(s) and meet face-to-face with client(s) as soon as possible to discuss case and answer questions
 - Lawsuit should not come as surprise and you, client(s) and HR should already be prepared for lawsuit
 - One of "clients" should be businessperson who controls cost center from which settlement or judgment monies might come
 - Explain litigation process and time commitment
 - Solicit ideas or feedback on case strategy
 - Manage client expectations
 - If covered by insurance, determine carrier's role and prepare for change in dynamics
- 2) Regularly inform client(s) of case developments and obtain their buy-in on important decisions
 - We have ethical duty to fully inform clients
 - Clients don't like surprises (neither do you enjoy surprises from outside counsel)
 - Consider e-mailing weekly case updates
- 3) Partner with HR
 - Establish internal teamwork from the start
 - HR can fill-in important gaps and help improve internal processes
 - Ensure you, HR, and client(s) are always on same wavelength
- 4) Fully investigate all facts surrounding case
 - Perhaps most critical "do". Without understanding facts, you cannot evaluate case, assess risk, or properly advise clients
 - To the extent investigation is handled in-house: interview all pertinent witnesses, carefully study personnel file (especially performance evaluations), and follow-up as required
 - Any need for employee discipline? Any whistleblower implications?

- Distinguish between facts you know and those that need proving
 - Explain to client how facts can change
- 5) Understand why plaintiff filed suit
- What are plaintiff's motivations for filing suit? Was suit triggered by raw emotions? Was plaintiff mismanaged and/or mistreated?
 - Does plaintiff have litigation track record?
 - Who is driving suit? Plaintiff or his/her lawyer?
- 6) Select appropriate outside counsel based on budget considerations and nature of case
- Meet face-to-face with outside counsel to set ground rules and expectations
 - Insurance Carrier may restrict your choice
 - Obtain outside counsel's candid assessment (should be more objective than your own)
 - Request detailed budget (usually received as part of "beauty contest")
 - Include outside counsel when carrying bad news
- 7) Bone-up on latest case developments
- Can you talk intelligibly about case law with outside counsel?
 - What recent legislation or court decisions might impact case?
- 8) Educate yourself about relevant forum and assigned adjudicator
- What is Judge's track record on employment cases?
 - Which claims are likely to survive summary judgment?
 - What timeline should client(s) anticipate? Is timeline consistent with case strategy?
- 9) Consider early mediation, particularly if case has merit and issues can be narrowed
- Most often, mediation is best vehicle to reach cost-effective case resolution
 - Carefully assess timing. Are the parties emotionally ready?
 - Ensure you have top-notch mediator with employment law background that won't simply "split the baby"
 - Ensure you're not part of same "cast" involving same outside counsel and same mediator
 - Bring client(s) to mediation and allow plaintiff to tell his/her story

10) Perform post-mortem and implement necessary remedial measures

- Could better management have prevented case?
- How have you learned from mistakes and what will you do differently next time?
- Solicit feedback from client(s) and HR

DON'T:

- 1) Ignore prospective plaintiff's pre-suit grievances
 - Much cheaper and effective to resolve problems prior to litigation
 - Treat prospective plaintiff like all employees: with dignity and respect
 - Prospective plaintiffs like to know they're receiving attention
- 2) Ignore plaintiff's counsel
 - Regardless of whether plaintiff counsel's communications are channeled through you or outside counsel: accord plaintiff's counsel same courtesy and respect you deserve
 - Share relevant information up-front rather than waiting for formal discovery/trial
- 3) Underestimate the parties' emotions
 - Emotions are almost always at the root of employment litigation
 - Understand your client's emotions: should you be a bulldog, a cheerleader, or a chicken little?
- 4) Think you can prevent lawsuit from being filed
 - You cannot stop an adamant plaintiff but you can help control the litigation
- 5) Allow day-to-day business to suffer from litigation
 - If plaintiff is current employee, formulate game plan that minimizes business disruption and risk of retaliation
- 6) Forget about precedent
 - Is your approach to the case (e.g. "litigate to the finish") consistent with prior case precedent?
 - Are you setting proper precedent for future?
 - Should you settle for nuisance value? What is nuisance value?
- 7) Underestimate a jury's negative perception of corporate America

HOW DID I GET HERE?!

TOP TEN EMPLOYER MISTAKES THAT LEAD TO LITIGATION

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1. Failure to Regulate Email and Internet Use

- Employers should have a written policy stating that the computer system, including all email and files, is company property and subject to monitoring and inspection.
- The policy should identify prohibited uses of system such as accessing, downloading or sharing pornographic pictures or text.
- The policy should also prohibit sharing of copyrighted and licensed materials/programs.
- Consider implementing a record retention policy that provides for a routine purging of email.

The word 'TIP' is written in large, hollow, outlined letters. The 'T' has a horizontal top bar and a vertical stem. The 'I' is a simple vertical rectangle. The 'P' has a vertical stem and a curved top that tapers to a point.

Pornographic pictures, which can now be easily downloaded and exchanged by employees through email, are fuel for hostile work environment sexual harassment charges. Include a discussion of the email/internet policy in anti-harassment policies and training. Discipline employees for policy violations.

2. Underestimating the Risk of Wage-Hour Claims

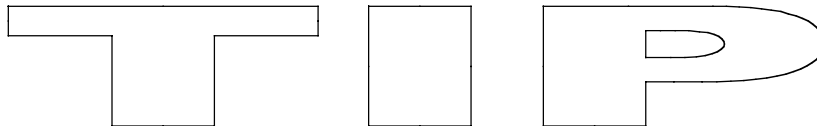
- All “salaried” employees are *not* exempt.
- Deductions from the pay of exempt employees based on quality or quantity of work may destroy exempt status (look for disciplinary suspensions, docking for missed days or any deduction for a partial day missed).
- Check deductions from pay of non-exempt employees for compliance with federal and state minimum wage and overtime requirements (look for deductions for uniforms, tools, breakage).
- Look for off-the-clock work (donning safety equipment, pre-shift preparation).
- Comply with wage payment laws for payment of accrued vacation and payroll deductions.

TIPS

- Allowing non-exempt employees to eat lunch at their desks may seem innocent but invariably, these employees will engage in some work activity during that time (answering the phone, opening mail, answering questions).
- Management incentives targeted at reducing overtime often result in off-the-clock work. Make sure managers understand that cost savings must be achieved by legitimate reductions of hours. Punish violators.

3. Failure to Prevent, Stop or Investigate Workplace Harassment

- Update anti-harassment policies.
- Prohibit harassment on all prohibited bases – not just sexual harassment.
- Provide more than one avenue for complaints.
- Make sure the policy is adequately distributed.
- Make sure supervisors know what to do if an employee raises an issue.
- Investigate every complaint.
- Document each investigation and the outcome.
- Do not promise that complaints will be “confidential.”
- Act promptly.
- Take action to stop the harassing behavior in accordance with the severity of the conduct.
- Monitor for potential retaliation and/or continued harassment.



Requiring a complainant to produce witnesses or documents that support his or her allegations is an unreasonable standard. Harassment, particularly sexual harassment often occurs with no witnesses other than the harasser and the victim. Employers must be prepared to make credibility determinations.

4. Dishonesty

- Employers who create a culture of openness and trust are more likely to generate employee loyalty.
- Distrust breeds disloyalty, fear and litigation – employers who lose the trust of their employees may never regain it.
- Performance reviews/discussions require for honesty – sometimes brutal honesty.
- Juries hate dishonesty. One lie can turn an otherwise defensible case into a “dog.”

TIP

Never lie to an employee about the reasons for his/her layoff or termination (e.g., “this is for purely budgetary reasons” “this has nothing to do with your performance”) – your words will come back to haunt you as evidence of pretext.

5. Poor Hiring Procedures and Decisions

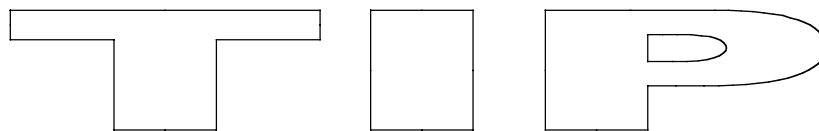
- Require every applicant to complete an application form (resumes are insufficient).
- Train interviewers to look for the “red flags” on the application (scratch-outs, victim-like reasons for leaving former employers).
- Check references.
- Conduct criminal background checks (in compliance with state and federal laws).
- Comply with the Fair Credit Reporting Act for background checks.

TIPS

- It is a poor (and often lazy) manager that fills an opening with any “warm” body available. It’s better to have an opening than to be stuck with the wrong fit or (worse yet) a lawsuit.
- Teach managers that employment lawsuits are not abstract concepts – they are people who walk into your organization and get hired. They often have a spotty employment history, a bad attitude and a poor work ethic. It’s up to your interviewers to identify these people.

6. Failure To Manage Major Events (e.g., Plant Closure or RIF)

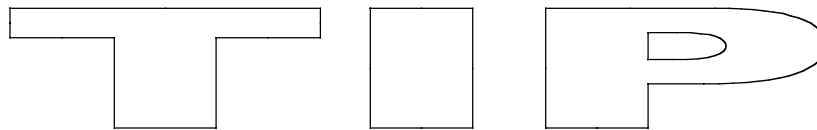
- Make communications part of the game plan (“Talking Points” for communicators, “Q&A’s” for managers, general announcement, handouts, “holding statement” for the press).
- Make and follow a reasonable timetable.
- Provide training for communicators (those who will notify employees).
- Retain outplacement assistance for employees.
- Have EAP on site.
- Prepare personalized information packets for laid off employees (benefits, release agreement, severance plan, instructions, outplacement assistance, etc.).
- Anticipate increased/bogus workers compensation claims (consider an audit).
- Prepare a security plan, including personal security for key personnel.
- Recover access cards, keys, remote computer access codes, etc.
- Prepare for press inquires (never let the press take the Company by surprise).



Don't ignore the “survivors.” Anticipate low morale. Plan communications before, during and after major events. Choose words carefully – particularly when discussing former employees. Survivors make great witnesses and “informants” for the plaintiff.

7. Focusing on People Rather Than Organizational Structure

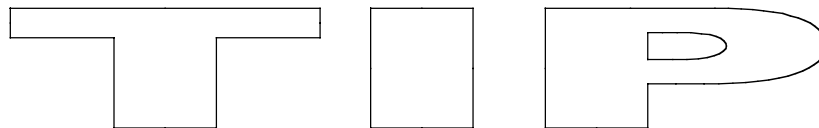
- Layoff selections based on skills rather than people are easier to defend.
- Prepare an organization plan ***before*** making layoff decisions.
- Identify skills (not people) needed to complete the new organization ***before*** making layoff decisions.
- Use these skills to identify specific selection criteria ***before*** making layoff decisions.
- Apply selection criteria to layoff decisions.
- Document this process.



Force HR and managers to defend termination and layoff decisions; challenge decisions that do not appear to fit the stated termination reasons or selection criteria.

8. Inadequate or Poorly Planned Communications

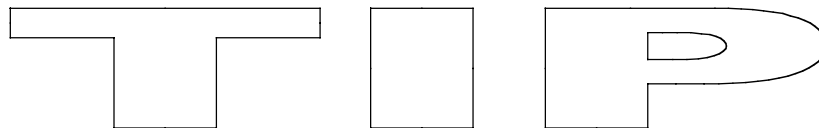
- Communicate performance problems and expectations to employees (a jury never likes to hear that an employee was not given a chance to perform).
- Communicate as early as possible – particularly regarding unpleasant topics.
- Communicate through someone trusted by employees (might not be HR).
- Make courtesy calls to union officials shortly before general announcements.
- Assume that all written communications will be available to the press.
- Provide “WARN” notices if required.
- Consider WARN-type notices even if not legally required.



If employees feel they cannot trust the Company as a source of honest and accurate information, they will turn to others, such as lawyers and unions.

9. Poor Documentation

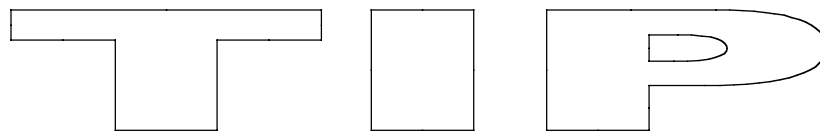
- Document performance issues.
- Document performance and misconduct discussions with employees.
- Document employee complaints and (more important) the Company's response.
- Document disciplinary actions.
- Document layoff selection procedures, selections and disparate impact reviews.
- Document bonus, incentive, retention, severance, commission, incentive and all other compensation agreements or programs.



Inflated performance evaluations are the biggest obstacle to defending performance-based terminations.

10. Inadequate Legal Review

- Review layoff selections for potential disparate impact.
- Look for “hidden” risks (FMLA, ADA accommodations, concerted activity and other potential retaliation issues).
- Consider whether “decision” or “effects” bargaining with Union is legally required for a RIF or closure.
- Consider whether WARN is applicable to closure or layoff.



When considering whether the WARN Act applies to closures and layoffs, remember to look backward and forward 90 days to see if other layoffs will trigger notice requirement.