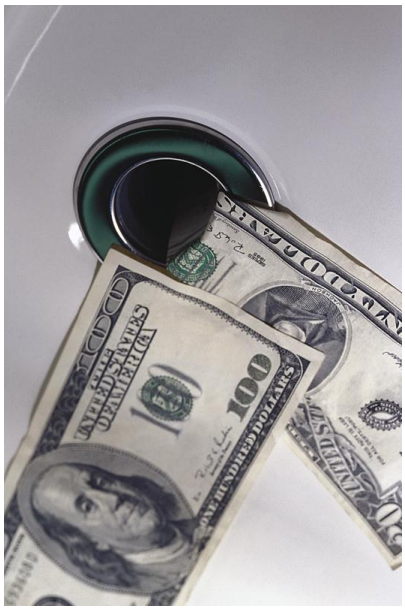
Employers, don't try to dismiss that lawsuit before its time.

By Robin E. Shea on October 07, 2011

Human Resources and in-house counsel, please consider this a legal "consumer report." Remember - we offer a "no legalese" guarantee, *or your money back!*

My fellow employment lawyers, is that Rule 12(b)(6) motion really necessary?

I've spent this week reviewing federal and state labor and employment law decisions for a Bar Association program I'll be presenting at the end of the month. I have been astounded at the number of motions to dismiss that don't seem to have achieved anything for the employer except an unnecessary bill.



So, for you employers out there, here is a summary of the two main types of pretrial dismissals, including the advantages and disadvantages, compared with trial.

I'll follow up with another post on why I think the 12(b)(6) motion to dismiss is often a ripoff* for the client.

**Please realize that I am not accusing any lawyer or firm of dishonesty or unethical behavior. When I say "ripoff," I mean it in the sense that parking garage fees in New York City are a ripoff. In other words, too much for what you get, even if legal and fully disclosed in advance.*

There are generally two opportunities for a defendant to get a lawsuit thrown out before it goes to trial. (I'm oversimplifying a bit.) The earliest opportunity comes right after the lawsuit is filed. This early motion to dismiss is called a "Rule 12(b)(6)" motion because that is the name of the Rule of Civil Procedure that allows defendants to do this. From now on, I'll refer to it as a "motion to dismiss."

Nice Work If You Can Get It - the Motion to Dismiss

What it is. The gist of a motion to dismiss is this: "Your honor, even if everything the plaintiff says in the lawsuit is true, he has not accused our client of doing anything for which the law provides a remedy."

Here's an example. I sue you, and in my lawsuit, I accuse you of giving me a dirty look. Maybe you didn't give me a dirty look, or maybe you did. Even if you did, I can't sue you for that. (At least, not this week.) So, your lawyer would file a motion to dismiss my lawsuit on the ground that I had "failed to state a claim for which relief may be granted."

The upside. If you win (and you would, in this extreme example), the case is over* and you got out of it for a relative song because you didn't have to go through discovery and motions and a big trial. :-)

**Subject to the plaintiff's right of appeal.*

The downside. Because a motion to dismiss is filed so early, the court has to accept everything the plaintiff says as true and pretty much has to give the plaintiff the benefit of the doubt on everything. If the statute of limitations hasn't run out, and maybe even if it has, the judge will give the plaintiff "leave to amend," which lets the plaintiff rewrite the lawsuit so that it states a claim. Usually the judge will dismiss some of the plaintiff's claims but leave others in the case, which means that the motion didn't end the lawsuit. If the defendant loses on its motion to dismiss, in whole or in part, the case goes back for litigation, including discovery, summary judgment, and trial, with all the associated time, expense, and hassle. So the defendant may have incurred significant legal fees and caused delay for very little, if any, benefit. :-(

Summary Judgment - the Old Reliable

What it is. A motion for summary judgment is filed later, after both sides have filed their pleadings with the court, and after the parties have engaged in discovery (depositions, written questions and requests for documents, and that kind of stuff).

Here's an example. I sue you and say you discriminated against me because I'm an over-40 female. Age and sex discrimination are clearly illegal, so my lawsuit has alleged some illegal conduct on your part, unlike my "dirty look" lawsuit. (A little more than that may be required, but that's a topic for another post.) You take my deposition, and in my deposition I admit that my boss asked me to catch up on my filing and that I told him to take a long walk off a short pier but using significantly more colorful language that I can't include in a family blog. I was fired that afternoon for insubordination and abusive language.

You can't say that my lawsuit fails to state a claim because it does, but you can file a motion for summary judgment.

The upside. On a motion for summary judgment, you can present to the court my deposition testimony, your witnesses' testimony, and other evidence to show that "there is no genuine issue of material fact" that I was discharged for a perfectly legitimate reason. The court will still have to side with the "non-moving party" (in this example, me) on any *disputed* fact, but it can accept *undisputed* facts that are in your favor, and even your evidence where I said, "I don't know" or *"no me recuerdo."* The court doesn't make any judgments about who is more "believable."

Your chances of success on summary judgment are dramatically greater than on a motion to dismiss because you can actually tell a little of your side of the story. If you lose, you go on to trial, but if you

win, the case is over.* The court will not give the plaintiff a chance to rewrite her lawsuit at this late stage. And the court will frequently throw out the whole enchilada, too, instead of just a few claims. :-)

**Subject to the plaintiff's right of appeal.*

The downside. You have to go through the time, expense and hassle of the discovery process before you file. :-(

The Dreaded Trial

Aiiiieeeeeeeeee! Noooooooooooooooo . . .

What it is. I assume you know what a "trial" is.

Here's an example. I sue for age and sex discrimination, and you take my deposition. I say that I heard the CEO say, "I do not want any old biddies over 40 working in this company, and I vow with every fiber of my being to get rid of them all, no matter what it takes." The CEO and 50 bishops deny that he ever said this, and they all insist that I was fired for being a mediocre performer. I do indeed have some lackluster performance reviews.

Here we have a major "material fact dispute," right? If I'm telling the truth, the CEO has *admitted* to age and sex discrimination. If he's he's telling the truth, then he hasn't, and he has every right to fire a mediocre performer, as long as he isn't doing it for an illegal reason.

So, with this fact dispute, the court cannot grant your motion to dismiss, and it can't grant your motion for summary judgment, either. This is what trials are for.

The upside. (Trying hard here!) At trial, you will have the chance to tell your side of the story, including the parts where I disagree with you. The judge or a jury will decide whom they believe.

The downside. At trial, I get to tell my side of the story, including the parts where you disagree with me. The judge or a jury will decide whom they believe. For me (the hypothetical plaintiff), that's ok. If I lose, I'm no worse off than I was before, especially if my lawyer represented me on a contingent fee basis (you don't pay *unless we win!*). But for you (the defendant employer), a lot is at stake. A trial is a gamble. You have to worry about, not only the facts, but also how I will come across to a jury as well as how your folks will. In this lousy economy, will the jury side with your CEO?

True story - years ago, we had a witness, a genuinely nice guy, who was despised by the jury because he was squinting during his testimony, which made him look dishonest. In fact, he was squinting because he was wearing new "hard" contact lenses. (I told you this was years ago.) At trial, you have to worry about things like this. At summary judgment, you don't because everything is submitted "on paper" (actually, electronically), possibly with some live arguments by the lawyers.

In addition, a trial is the most time-consuming, expensive hassle of them all, even if you win in the end.

So, now that you've read that, you may be wondering, Then what's so bad about a motion to dismiss, which will give us one more opportunity to avoid trial?

Great question, but a topic for another post. To be continued . . .