What are lawsuits like?

What potential clients *think* they know about litigation sometimes comes from movies and television shows where a conflict erupts and is resolved in very short order, but with lots of drama (usually centered on the lawyers and not the litigants). Understanding how litigation actually works is important for clients either making the decision as to whether to file a lawsuit, or those trying to determine how best to respond when a lawsuit is being threatened or has been filed against them.

Do Employment Cases Start in Court?

Employment cases proceed on different paths depending on the nature of the claims. Some employment disputes can begin with a lawsuit, while others must first be presented to a government agency.

Claims of discrimination or retaliation based on age, sex, religion, or national origin, for example, must first be presented through a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"). Claims of race discrimination or race-based retaliation may go through the EEOC, but they also may proceed directly to court. Unfortunately, discrimination claims at the EEOC move very slowly. Age discrimination claims can proceed to court after they have been pending at the EEOC for 60 days. For other types of discrimination cases before the EEOC, a charging party cannot sue in court until he or she has the right to obtain a Notice of Right to Sue, which typically requires waiting at least 180 days.

Other types of employment claims, such as wage and hour disputes, claims arising under state law, and claims under the Family and Medical Leave Act ("FMLA"), may proceed immediately to court.

Differences Between State and Federal Court

Once a case can be presented to a court, the next major factor that will impact the length of litigation is whether the case proceeds in state court or federal court. Employment cases can be filed in federal court (or a defendant can have them transferred from state court to federal court) if they: (1) state one or more claims based on federal law; or (2) the defendants in the case are all citizens of a state other than the state of the plaintiff(s) and the amount at issue is greater than $75,000. For example, if an employee sues an employer for age discrimination, which is based on a federal statute, the case typically will end up in federal court. If, however, the employee sues a local (South Carolina) company for failure to pay commissions (typically a state law claim), the case will more likely end up in state court.

The procedure for cases in federal court is governed by a scheduling order under which deadlines are set for various aspects of the case. The deadlines are established by the court and the attorneys based on such factors as the complexity of the case and the amount of *discovery* (explained below) that must be conducted. Cases in state court usually do not have a scheduling order. They eventually are called for trial roughly in the order in which they were filed.

Starting the Lawsuit

Regardless of whether the case is in state or federal court, a case begins with the filing and service of the *complaint* by the plaintiff. A complaint: (1) summarizes the underlying facts of the dispute; (2) sets out the specific causes of action (claims) upon which the suit is based; and (3) identifies the type (and sometimes amount) of damages sought. Once the case is filed, it must be served on the defendant(s), which is accomplished in various ways depending on the defendant.

Once a defendant is served with a complaint, it must file a response with the court. Defendants respond by filing an *answer* (responding to each paragraph of a complaint by admitting or denying the allegations) and/or a *motion to dismiss* one or more of the claims. The time for responding to a complaint is either twenty days (federal court) or thirty days (state court). It is customary, however, for the lawyers to extend this deadline.

Discovery

After the pleadings (the complaint and the answer) are finalized, the parties engage in *discovery*. (Discovery in state court can begin immediately, but rarely much happens before the defendant responds to the complaint).

Discovery is the process by which parties obtain information and evidence from each other. Discovery also can be obtained from third parties (persons and entities that are not part of the lawsuit) through the subpoena process. The parties serve each other with *interrogatories*, which are written questions to be answered by the opposing party. Parties also serve each other with *requests for production* to obtain copies of documents and other things that pertain to the case. Perhaps the most important aspect of discovery is the taking of *depositions*. A deposition is simply where attorneys question the other party and other witnesses under oath before a court reporter, usually in a conference room at the office of one of the attorneys. The testimony provided during these sessions is used to present motions to the court and to prepare for trial.

The discovery process can seem like an eternity. It is common for litigants to become impatient and frustrated during this phase of litigation. One concern that litigants express is that the lawyers are “just dragging everything out.” That is not what is going on. Cases must wait their turn in line with all of the other cases

with which the court is dealing. Your case will not be tried any sooner if your attorney chooses to not engage in detailed discovery. But without discovery, the chances of prevailing decrease significantly. It is very important during this process for each party to obtain the information necessary to make or defend against the claims.

Motions

After discovery, many defendants will bring a *summary judgment motion*, arguing that the evidence obtained during discovery does not show that the plaintiff's rights were violated. In federal court, this typically involves the filing of extensive legal *briefs* (documents reciting the evidence and applicable law for the court). These motions can take up to six months to resolve.

A court will dismiss a claim, or an entire case, on a motion for summary judgment if either: (1) the law does not provide a remedy for a particular situation; or (2) there is not enough evidence to support a claim. An example of the first situation would be where a plaintiff complains that the employer fired her for absenteeism when she needed a medical leave. If the employer in that case only has ten employees, then neither of the laws that typically govern such disputes (the Americans with Disabilities Act or the Family and Medical Leave Act) would apply. An example of the second situation might be where the plaintiff claims that he was harassed on the basis of his religion, however, the evidence in discovery did not establish that any conduct at the work place was sufficiently severe or pervasive under the law to state a claim.

If the judge determines that there is a legal remedy available and that sufficient evidence exists, the judge sets the case for trial. Setting a case for trial is a serious matter for the court as it requires the time and undivided attention not only of the judge (who has to stop work on other cases), but also of his or her law clerk, personnel from the clerk of court's office, a court reporter, court security officers, and twelve jurors, who are all compelled to attend the trial. A court is not going to schedule a trial, incur these expenses, and inconvenience jurors just because somebody filed a lawsuit and wants a jury to hear his or her story. The judge must be convinced that there are legal rights at issue and that there is enough evidence to warrant a trial. In short, the purpose of pre-trial motions is to weed out cases and claims that lack merit.

Mediation

Another stop along the way is *mediation*. Mediation is a settlement conference attended by the parties and their attorneys. Mediation is conducted by a neutral mediator (often another lawyer with expertise in the area but no connection to the case or parties). Parties are required to mediate almost all cases, although when they do so is decided on jointly by the lawyers. Mediation has become extremely

popular with litigants. When the parties prepare well and are realistic about their options, mediation resolves most cases.

Trial: Some Realities

When cases do not resolve and all motions have been ruled on, the case is finally ready for trial. Although this is the part of the case with which most everyone has some familiarity, civil trials typically are very different from what most litigants expect. Television and the movies would have you believe that litigation involves dramatic and unpredictable trial testimony before a packed courtroom, concluding with the suspenseful reading of a verdict accompanied by a dramatic symphonic crescendos in the musical background and a throng of cameras and reporters screaming questions to the victorious party. Such depictions of trial make for good drama, but they are completely unrealistic.

First, rarely are there big surprises at trial in terms of the evidence. Trial testimony is usually predictable because, during discovery (described above), the parties already have taken sworn depositions of the key witnesses and generally know what they are going to say. Nobody, except the jury, goes to a trial to find out for the first time what the witnesses are going to say. Likewise, the parties have already exchanged all relevant documents in discovery and pre-marked them as exhibits, so each party already knows the evidence the other party will present. In fact, the whole purpose of discovery is to avoid a "trial by ambush" like those depicted on television and in the movies.

Second, courtrooms are rarely packed. As deeply committed as you are to your cause, civil litigation rarely draws any interest from the general public. The only people typically in the courtroom at the end of a trial are the parties, the jury, the court staff, and perhaps a few friends and family members.

Third, the media rarely attend civil trials and often do not report on verdicts. Many potential plaintiffs have told us that “the company will never let this go to court because of all of the negative publicity.” The cases reported on in the media represent a very small percentage of the cases actually tried to a verdict.

While this may all sound very drab and uneventful, the good news is that the litigation process, while lengthy, works very well. Discovery allows all parties to fully understand the evidence before trial so that they can assess whether a voluntary resolution is in their best interest. And when cases do not settle, juries usually do an exceptional job of sorting through conflicting testimony and determining the truth of a matter.

Conclusion

The vast amount of time and money spent on litigation is spent on processes about which potential clients are largely unaware when they first contact a

lawyer. Lawsuits take time, and for good reason. Understanding the process will help you to assess your options.

We hope this information is helpful in explaining the process of litigation and in addressing some of the typical concerns you may have about it. We would be happy to review how this information pertains to your particular situation so that you can make the best decision for you either as to whether you should pursue litigation, or what the best options are in the event that you have been sued.