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*Employment Lawsuits, Including Claims for Wrongful Discharge,
Discrimination, Harassment and Class Action Certification*

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Glossary

ADA Americans with Disabilities Act of 1990, 42 USC 12101-12213¹; 29 CFR 1630.1-1630.16 and 1630.1641.² The ADA covers most private employers with 15 or more employees, most government agencies, and unions. It prohibits discrimination and harassment against the disabled. The ADA requires reasonable accommodations to allow disabled workers to perform the essential functions of a job. A disability is a mental or physical condition serious enough to “substantially limit” a “major life activity.” 42 USC 12112(a). Each of those phrases is a term of art, about which there is often much litigation. When deciding if an individual is disabled, the courts consider look at the mitigating factors. *Sutton v. United Air Lines Inc.*, 527 U.S. 471 (1999).³ For example, an individual is not considered disabled if his vision is corrected by eyeglasses, or his hearing by hearing aids, etc. While alcoholism and addiction can be disabilities, the ADA does not protect on the job use of illegal drugs or alcohol.

ADEA Age Discrimination in Employment Act of 1967, 29 USC 621-634; 59 CFR 1625-27. The ADEA covers most private employers with 20 or more employees, most government agencies and unions with 25 or more employees. It prohibits

¹ Statutes are cited in this format. Here, for example, this citation means the actual text of the ADA can be found in the United States Code (“USC”) in volume 42 at sections 12101 through 12213. As a result of the vagaries of system used for statutory coding, the section numbers (example, 12101) are read as “twelve thousand one hundred one,” but not written with a comma as they normally would be otherwise (example, 12,101).

² Regulations are cited in this format. Here, for example, this citation means the actual regulations implementing the ADA can be found in the Code of Federal Regulations (“CFR”) in volume 29, part 1630, sections 1 through 16 and section 164142. Like the statutory coding system, the regulatory coding system does not insert a comma in “164142” as normally one would otherwise.

³ Court decisions are cited in this format. Here, for example, this citation means that the plaintiff’s last name was Sutton, and the defendant was United Air Lines, Inc. The case can be found in volume 527 of the United States Supreme Court’s books of published cases (“U.S.”) at page 471. The case was decided in 1999. Legal cases can be located on-line and in any of the many local law libraries.

discrimination and harassment against workers over 40 years of age. The ADEA does not protect workers younger than 40.

Answer An Answer is one of two Pleadings that start a lawsuit. The Answer is the Pleading filed by the defendant. In employment litigation, that most often means it is the pleading filed by the former employer.

Complaint A Complaint is one of two Pleadings that start a lawsuit. The Complaint is the Pleading filed by the plaintiff. In employment litigation, that most often means it is the pleading filed by the former employee.

Discovery Discovery is the formal process by which information is requested and obtained in a lawsuit. The most common kinds of Discovery are Interrogatories (written questions that the opposing party answers in writing), Requests for Admission (like Interrogatories, but the questions ask the opposing party only to admit or deny a certain fact), and Depositions (a verbal question-answer interview of a witness, under oath, that is transcribed by a court reporter). Generally, all Discovery is confidential, unless attached to a public filing or presented in a public hearing. Discovery is usually not filed with the courts. Discovery is governed by Fed. R. Civ. P. 26-37.⁴

EEO Equal Employment Opportunity. The EEO laws include the ADA, ADEA and Title VII.

EEOC Equal Employment Opportunity Commission. The EEOC is the federal agency that oversees administration of the EEO laws. In Colorado, its state sister agency is the CCRD (Colorado Civil Rights Division).

⁴ Legal rules are cited in this format. Here, for example, this citation means that these are Federal Rules of Civil Procedure and the rules are 26 through 37. Federal Rules of Civil Procedure can be located on-line or at any of the many local law libraries.

Motion The courts consider lawsuits according to formal sets of rules, called Rules of Civil Procedure. Motions are the most common way that litigants can ask the court to rule on something short of a trial. Motions are submitted, usually, in writing. There are many kinds of Motions. The three most common in employment litigation are Motions to Dismiss, Motions for Protective Orders, and Motions for Summary Judgment.

Motion to Dismiss A Motion to Dismiss is one of the common kinds of Motions in employment litigation. A defendant can file a Motion to Dismiss, instead of an Answer, when responding to the Complaint. A Motion to Dismiss asks the court to assume that the Complaint's allegations are true, then argues that even if they are true, for some legal reason, the Plaintiff's claims should be dismissed. A Motion to Dismiss does not challenge the plaintiff's credibility. Instead, it challenges the legal sufficiency of the plaintiff's allegations. Motions to Dismiss are generally governed by Fed. R. Civ. P. 12.

Motion for Protective Order A Motion for Protective Order is another common Motion in employment litigation. It asks the Court to issue a Protective Order. Either party can file such a Motion.

Motion for Summary Judgment Motions for Summary Judgment are also common in employment litigation. Like a Motion to Dismiss, a Motion for Summary Judgment challenges the legal sufficiency of the plaintiff's case. Unlike a Motion to Dismiss, a Motion for Summary Judgment is not limited to sufficiency of the plaintiff's allegations in her Complaint. Instead, a Motion for Summary Judgment is usually filed after Discovery, when both sides feel they know each other's evidence. A Motion for Summary Judgment challenges the legal sufficiency of the Plaintiff's evidence. Motions for Summary Judgment are governed by Fed. R. Civ. P. 56.

Pleadings Pleadings are the legal filings that commence a lawsuit. Typically, they consist of a Complaint filed by the Plaintiff, which sets forth his claims, then an Answer filed by the Defendant, which sets forth his defenses. Pleadings are governed by Fed. R. Civ. P. 7-15.

Protected Class Each of the EEO laws protect different classes of workers. For example, the ADA's protected class consists of disabled workers.

Protective Order Generally, any court filing becomes a matter of public record. It is not uncommon in employment litigation that either side might feel some of their evidence should remain confidential. According to strict rules, the court can enter a Protective Order, which preserves the confidentiality of certain information. The most common reason for issuing Protective Order is to protect information that is personally confidential or a business' "trade secret or other confidential research, development, or commercial information," quoting Fed. R. Civ. P. 26(c).

Settlement Conference In an effort to help the parties reach an amicable resolution short of trial, they can participate in a Settlement Conference. Settlement Conferences are sometimes conducted through the courts and sometimes, if the parties choose, through private mediators. Wherever they are conducted, they are generally confidential.

Title VII Title VII of the Civil Rights Act of 1964, 42 USC 2000e-2000h-4; 29 CFR 1600-1610. Title VII covers most private employers with 15 or more employees, most government agencies, and unions. It prohibits discrimination and harassment against employees "because of ... race, color, religion, sex, or national origin," quoting sec. 2000e-2(a) of Title VII.

The Process Of Litigation

EEOC Charge

As a prerequisite to filing a lawsuit, most of the EEO laws require the plaintiff to file, first, a charge with the EEOC. The charge is a written form, on which the plaintiff writes a very brief summary of why she feels there has been Discrimination or Harassment.

The EEOC investigates the charge. The scope of a typical EEOC investigation can range from reviewing documents submitted by both sides to interviewing witnesses.

At the conclusion of its investigation, the EEOC can determine that there is probable cause to believe a violation may have occurred. Or, the EEOC can conclude that probable cause has not been established. The EEOC can also terminate its involvement for other reasons, such as the plaintiff's refusal to cooperate.

Once the EEOC's involvement is concluded, the plaintiff usually has 90 days to file a lawsuit in court.

The EEOC file is not a public record.

Pleadings

If the plaintiff chooses to file a lawsuit, he does so by filing a Complaint with the court. Most of the EEO laws permit filings in either state or federal court. In Colorado, employment litigation most often involves questions of federal law. Therefore, employment lawsuits are typically litigated in federal court. Here, in Colorado, that means the United States District Court for the District of Colorado.

Readers might be interested to know that other states, such as California, have adopted EEO laws that are more favorable to

plaintiffs than even federal law. There, most employment litigation takes place in state court, not federal court.

Service

Once the Complaint has been filed, the plaintiff must serve the defendant. Service is governed by Fed. R. Civ. P. 4.

Service puts the defendant under the jurisdiction of the Court, permitting the Court to enter orders affecting the defendant. Service also triggers the defendant's obligation to file an Answer, or at the Defendant's option, a Motion to Dismiss.

Discovery

After the defendant has filed its Answer, a case is said to be "at issue." Discovery commences. This is the formal process in which information is exchanged by both sides. It is designed to avoid trial by ambush.

Motions

At any stage in the process, either party may file a Motion. The three most common motions in employment litigation are Motions to Dismiss, Motions for Protective Orders, and Motions for Summary Judgment. Generally, all Motions are public filings.

Trial

At some point in the process of preparing the case for trial, the parties typically will participate in a Settlement Conference. If they settle their dispute, the case is dismissed. If not, and if the Defendant has been unable to dismiss the case by Motion, the case will proceed to trial. The purpose of trial is to decide the facts.

During this entire process, including trial, the judge determines the law applicable to the case. But, if either party has requested a jury, then only a jury can decide what the facts are in the case. If neither party has requested a jury, then the judge sits as factfinder and decides both the facts and the law.

Trial is the actual hearing in which evidence and testimony are heard. At the conclusion of trial, the factfinder -- whether jury or judge – decides the facts, in other words, what really happened. To help the jury do that, the judge first instructs the jury on the law. After being instructed on the law, the jury is excused and considers the evidence it has heard in light of the judge’s instructions of law. That process of consideration is called “deliberation.” Jury deliberations are not public.

Form jury instructions have been published in a number of different books. They can be handy summaries of the law. Readers should be aware, though, that not all form jury instructions are accurate, up to date, or appropriate for each case’s unique facts.

Courtroom Mechanics

Generally, hearings are open to the public. Occasionally, highly publicized cases result in attendance that overflows logistical capacities. Reporters should contact the clerk of the court to determine specifics in such cases.

Similarly, court filings are open to the public. Generally, court filings are available for review at the courthouse. Also, an increasing number of court filings are available from on-line electronic sources.

Reporters should remember that not all court functions and paperwork are public. Some matters are conducted in private. Common examples in employment cases are settlement conferences. Settlement conferences are not hearings, and are not open to the public. Furthermore, any information provided as part of settlement offers is confidential pursuant to Fed. R. Evid. 408.⁵ Likewise, cases will sometimes involve matters that are subject to Protective Orders.

Courtroom etiquette for attendees at hearings is not to disturb court proceedings.

⁵ “Federal Rules of Evidence.”

Various courts have different rules regarding the use and possession of recording devices inside of a courtroom. Generally they are not permitted. Again, specific court clerks should be contacted for further information.

Appeals

Appeals are also governed by formal rules, the Federal Rules of Appellate Procedure. Generally, appeals must be filed within 30 days of the entry of judgment by the lower court. Fed. R. App. 4(a) (1)(A).

In federal court, in Colorado, appeals are heard by the Tenth Circuit of the United States Circuit Court of Appeals.

Claims

Plaintiffs can file a number of claims related to their employment. Trying to list them all would be outside the scope of this paper. The following are some of the most common claims asserted in employment lawsuits.

EEO Claims - Discrimination

The EEO laws are among the most complex of civil laws. There are both federal and state EEO laws. As a general rule, an employer commits unlawful discrimination if it undertakes an "employment practice" against its employee because of that employee's membership in a Protected Class.

The requirement for an employment practice means that the EEO laws do not prohibit insignificant actions at work. Generally, to violate an EEO law, an employer must do something that affects the employee's "compensation, terms, conditions, or privileges of employment," quoting Title VII, sec. 2000e-2(a). Most often, plaintiffs claim that their discharge was the employment practice. It is also possible to base a claim on a demotion, cut in pay, etc.

How a plaintiff goes about proving discrimination is a topic beyond the scope of this paper. In short, a plaintiff can use either direct or indirect evidence. Direct evidence would include a comment, for example, by a supervisor that the reason he is firing the plaintiff is specifically because of his Protected Class. Indirect, a/k/a circumstantial, evidence can also be used. Common examples of circumstantial evidence might include proof that similarly situated employees outside of the protected class were treated more favorably or that the supervisor made derogatory comments in general about the Protected Class. From evidence like that, a factfinder could infer that the real reason was discrimination. It is also possible for a Plaintiff to use statistics as evidence of discrimination.

In the end though, it is the Plaintiff's burden to prove discrimination. The Supreme Court has summarized the Plaintiff's

burden, as follows: "The ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination." *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133, 153 (2000).

EEO Claims - Harassment

Harassment is considered to be one form of discrimination. To be illegal, a plaintiff must prove that the harassment occurred because of her Protected Class.

While harassment can be unlawful, simple unfairness and rudeness are not. In passing the EEO laws, Congress did not require that everyone behave politely at work.

Drawing the line between unlawful harassment and merely rude behavior can be difficult. The Supreme Court has said that the line is crossed when the harassment is "sufficiently severe or pervasive to alter the conditions of employment." *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986) (internal quotation marks omitted); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993) ("[T]he very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their . . . gender . . . offends Title VII's broad rule of workplace equality."); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. Boca Raton*, 524 U.S. 775 (1998).

If the Plaintiff proves "severe or pervasive" harassment, he is said to have proven a "hostile work environment."

A hostile work environment is not the only kind of harassment claim available. A plaintiff can also show what is called "quid pro quo" harassment. Quid pro quo harassment includes situations when a job benefit (such as a promotion, raise, etc.) is traded for sexual favors.

EEO Claims - Retaliation

The EEO laws also prohibit retaliation. If an employee files a charge with the EEOC, an employer cannot undertake an "employment practice" against that employee (example: employment termination) because she filed the charge.

Express Contract Claims

Express contract claims exist in the relatively unusual situation where an employee had an express contract for employment. Express contracts do not have to be in writing.

Implied Contract and Promissory Estoppel Claims

Implied contract and promissory estoppel claims are related to each other. In some ways, one could argue that the difference between them is simply an artifact of the way courts in old England decided cases.

Originally, there were courts "at law" and courts "in equity." Both were authorized to enforce a promise. Courts in America now sit both at law and in equity, so there is no longer a distinction between the two kinds of courts. However the distinction between the two kinds of claims persists.

Both claims are used to enforce a promise. Implied contract claims are usually decided by a jury; whereas, promissory estoppel claims are decided by a judge. Typically, plaintiffs allege both claims as opposite sides of the same coin.

Both claims require that the plaintiff prove the defendant actually made a promise and that the plaintiff then accepted that promise and relied on it. In the employment context, the promises most often at issue are statements in employee handbooks. Frequently, plaintiffs try to prove that a promise to follow progressive discipline (warnings before firing) was made in the handbook. They then try to use both claims to enforce that promise, saying they should not have been fired for whatever they

allegedly did; they should have received progressive discipline instead. That is just one example of a promissory estoppel claim.

Outrageous Conduct Claims

Outrageous conduct claims are asserted to recover for the intentional infliction of emotional distress. Here in Colorado, practitioners usually call this kind of claim "outrageous conduct." In other jurisdictions, it is often called by the acronym "IIED." Both phrases refer to the same kind of claim.

The core of an outrageous conduct claim is the allegation that the defendant did something to the plaintiff that was so bad it would make an average member of the community shout, "That's outrageous!" *Rugg v. McCarty*, 476 P.2d 753, 756 (Colo. 1970).

The plaintiff is required to prove that the defendant's conduct was "so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Coors Brewing Co. v. Floyd*, 978 P.2d 663, 666 (Colo. 1970).

Merely firing the Plaintiff, even firing him without a good reason, is not outrageous. *Bigby v. Big 3 Supply Co.*, 937 P.2d 794 (Colo.App. 1996). That is true even if the employer knew that firing the employee would inflict emotional distress. *Id.* However, the circumstances surrounding a termination may sustain a finding of outrageous conduct. *Archer v. Farmer Bros.*, 70 P.3d 495 (Colo. App. 2002)

Defenses

Most commonly, the employer's chief defense is to deny the allegations of wrongdoing.

In addition, there are often "affirmative" defenses asserted. An affirmative defense is a defense that is asserted in addition to denying the plaintiff's allegations. It is almost like a "King's X," as if the defendant was saying, "I didn't do it, and even if I did, it wouldn't have been illegal because"

The law recognizes many different affirmative defenses. The following are some of the most common in employment cases.

At-Will Employment

Technically, this is not an affirmative defense. It is a way of denying the plaintiff's allegation that he had some expectation of continued employment. But since it is often pled (or listed in the Answer) as an affirmative defense, this paper discusses it here.

At-will employment means that the employee was able to quit or be discharged at any time, with or without notice, with or without reason, but not for an illegal reason (such as a discriminatory motive). In Colorado, the law presumes at-will employment.

Terminating an employee in violation of the EEO laws would be an example of an impermissible, illegal reason. Therefore at-will employment is not a defense to a discrimination claim. Even at-will employees are protected by the EEO laws.

Legitimate Business Reason

Again, technically, this is not an affirmative defense. It is a way of denying the plaintiff's allegation that the employer acted for an unlawful motive. The employer is saying, "I didn't fire you because of your race, I fired you because of a legitimate business reason, specifically you"

Two of the most common legitimate business reasons are poor job performance and poor attendance, but it is generally within an employer's business judgment to decide what is and is not sufficient to warrant discharge.

That can lead to controversy. For example, the parties often litigate over the sufficiency of an employer's reason if the reason was simply personal animosity. An example of personal animosity would be, "I didn't fire you because of your race, I fired you because I just don't like you."

It might be surprising to readers, but there are some reasons that are generally considered sufficient, which some might think would be questionable. Such reasons include favoritism and nepotism. Neither federal nor state law prevents employers from playing favorites or preferring their family members.

Statutes of Limitation

All of these claims have different statutes of limitation. Some are very complex, not just a certain number of years after discharge for example. This is a topic outside of this paper's reach. But it is sufficient to note that there is substantial litigation over statutes of limitation in employment cases.

Remedies

Analytically, contract claims provide the simplest range of remedies. The employee is entitled to recover only damages reasonably anticipated in the contract. That usually means back pay and front pay within the contract term. It may mean other benefits outlined in the contract, such as stock options, vacation days, health insurance, etc.

Tort claims, such as outrageous conduct, provide the additional ability to recover compensation for mental anguish.

EEO claims provide even more remedies. An aggrieved plaintiff may obtain back pay as well as reinstatement. If reinstatement is determined not to be practical, then limited front pay can be awarded. Remedies may also include emotional distress damages, punitive damages, and an award of attorney fees. Some statutes also provide for liquidated damages against employers.

Class Action Certification

An increasing number of employment cases assert class-action claims. If a plaintiff succeeds in having a case certified as a class action, it is generally considered that his case will be much more valuable. Class actions are much more expensive for employers to defend; therefore, as a practical reality, they are more likely to settle. Additionally, class actions can involve many more plaintiffs; therefore, damages are multiplicative.

In some states, such as California, class-action litigation is becoming common. Here, in Colorado, it remains relatively rare.

Plaintiffs cannot simply decide for themselves to file a class action lawsuit. A judge must certify the case as a class action. To be certified, the plaintiff must prove that the number of claimants is so large it would be impractical to litigate the case as anything but a class action. The plaintiff must also prove that there are common legal and factual issues in each of the claims, and that her own claims are typical of the group's. Finally, the plaintiff must prove that she and her attorney are up to the task of litigating class action. Class action certifications are governed by Fed. R. Civ. P. 23.

In cases where the plaintiff seeks class certification, the request is usually litigated early in the case.

Contact Information

For further information, journalists can contact any of the following:

- Bill C. Berger, Esq., Stettner Miller, PC, 303-534-0273, 1050 17th St., Suite 700, Denver, CO 80204, bberger@stetmil.com

- Paula Greisen, Esq., King & Greisen, LLP, 303-298-9878, 1670 York Street, Denver, CO 80206, greisen@kinggreisen.com

- Court files at the United States District Court for the District of Colorado are open to the public and may be examined at the Main Clerk's Office at Alfred A. Arraj United States Courthouse, Room A105, 901 19th Street, Denver, CO 80294-3589; Civil Division 303-844-3433; Criminal Division 303-844-2115; CVB/Petty Offense 303-844-5475.

- Court files at state courts, such as the District Court for the City and County of Denver, are open to the public and may be examined at the Main Clerk's Office for the specific county. The address and phone numbers for each courthouse can be obtained at the court's website at www.courts.state.co.us.

- Court files at the Tenth Circuit of the United States Circuit Court of Appeals are open to the public and may be examined at the Main Clerk's Office at Byron White U.S. Courthouse, 1823 Stout Street, Denver, CO 80257; 303-844-3157 (to speak to an operator, press 0 when the automated attendant answers).

- Court files at the Supreme Court of Colorado are open to the public and may be examined at the Main Clerk's Office at 2 East 14th Avenue, Fourth Floor, Denver, CO 80203; 303-837-3790.

- Court files at the Colorado Court of Appeals are open to the public and may be examined at the Main Clerk's Office at 2 East 14th Avenue, Third Floor, Denver, CO 80203; 303-837-3785.

- Files of the EEOC and its Colorado sister agency, the Colorado Civil Rights Division, are generally not public and are generally not open to public examination.