

EMPLOYMENT LAW 201: THE NEXT CUT

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Introduction

A few years ago, I taught a CLE course several times (including one to CABA) entitled, “A General Practitioner’s Guide to Issue-Spotting in Employment Law.” For any of you who were so unfortunate as to miss that scintillating series, I will have with me today extra copies of that earlier outline. It is a page-turner you won’t want to miss.

My earlier presentation offered a whirlwind tour of Employment Law 101, touching on the basics of antidiscrimination law, wage and hour law, non-competition agreements, and recurring tort claims. Today’s presentation will take a deeper cut on a few select employment-law topics. Hence my title – Employment Law 201: The Next Cut.

The first and probably most interesting part of the presentation today will be a case study about sexual harassment. I adapted this case study from a course on employment law I teach at the University of Virginia. As we dig more deeply into the problem, I will be giving you additional facts, at least if you ask the right questions. 13 years of law students have been chewing on this problem, with occasional updates through the years. I hope you will like it.

The second part of today will be far more prosaic. A slog, really, and I am only including it because it is timely. That’s right, you will hear a short lecture on mass layoffs! I hope you interrupt with questions, especially when I dig in on the intricacies of the Worker Adjustment and Retraining Notification Act.

The tough issue of absenteeism will be our third act. We will look at three vignettes present interesting questions of what happens when someone needs to miss work, and we will hash out as a group what the issues are. Again, as we look harder at these and ask the right questions, more information will come out, and we’ll see where that takes us.

The fourth part, one I’m keeping in reserve just in case we still have time and you need credit, is a discussion among us lawyers about venue for employment law cases. Often you have a choice of federal court vs. state court vs. arbitration. We’ll talk about the pros and cons of each.

PART ONE: A SEXUAL HARASSMENT CASE STUDY

DEBBIE COOK V. AMERICAHOUSE OF VIRGINIA, INC.

AmericaHouse of Virginia, Inc., is one of dozens of subsidiaries of AmericaHouse, Inc., a national retailer of mobile homes. Headquartered in Carbondale, Illinois, AmericaHouse, Inc., manufactures mobile homes in factories in several different American states as well as northern Mexico. AmericaHouse of Virginia, Inc., operates an AmericaHouse dealership, selling mobile-homes off its lot in the small town of Lovington in Nelson County, Virginia.

Debbie Cook works at the AmericaHouse dealership in Lovington. Debbie was hired by the site's general manager, Steve Neets, in January of 2009. Her personnel file reflects that her job title is "finance clerk." She is 20 years of age, has one child and is unmarried.

Steve Neets, the general manager of the Lovington dealership, began working at AmericaHouse as a sales representative ten years ago. He was promoted to assistant general manager in 2005 and to general manager in 2007. He is 36 years of age, is married with no kids.

Keith Watson is the Regional Manager for AmericaHouse's Southern District, which covers several states. Mr. Watson supervises general managers for AmericaHouse dealerships in those states, including Mr. Neets. Keith is 40 years of age and divorced with three children.

Yesterday, you received an email from Brian Boufarah, the General Counsel for AmericaHouse, Inc. Mr. Boufarah was a partner in your law firm until 2006. His email and the string of emails he forwarded are attached:

To: You
From: Boufarah@AmericaHouse.com
Date: Jan 22, 2012
Re: fwd:Fwd: sexual harassment situation

Hey, looks like we have a problem developing. I'd appreciate your advice. See the email string below. Can you deal with this asap? You'll probably want to talk to Watson and others. I can get anyone you need to a meeting. I can do a meeting myself, too, but I'm pretty busy with that consumer-rights class action crap out in California. Takes all my time, and I have to deal with L.A. lawyers to boot (you guys need to open up a California office). But looks like I might now have a reason to go to Virginia soon.

Thanks.

-Boof

Brian R. Boufarah, Esq.
General Counsel, AmericaHouse, Inc.

To: Boufarah@AmericaHouse.com
From: Watson@AmericaHouse.com
Date: January 21, 2012
Re: Fwd: sexual harassment situation

Boof:

An issue has popped up over in Lovington. Steve Neets is the gm there. He's got an employee named Debbie Cook. Debbie came to me around Christmas and made all kinds of allegations of harassment against Steve. She claims that he has groped her, has asked her to sleep with him, has sent her graphic emails at home, etc. She had hinted at something like this last summer, but she wasn't nearly so dramatic. Now, it's pretty clear she's mad. I went and asked Steve about it, and I even went light on what she was saying about him, and now he's going ballistic. See below. Any thoughts on how to handle? Thanks – never a dull moment!

-Keith
Keith R. Watson
Southern Regional Manager
AmericaHouse

To: Watson@AmericaHouse.com
From: StevieMustangMan@aol.com
Date: January 20, 2012
Re: sexual harassment situation

That is such horseshit. She's just pissed off because I'm not making her finance manager. I knew she'd always try to get me for that. Don't pay attention to her. She's probably leaving soon anyway. Her boyfriend just moved to Richmond and he's always having to give her money so she can buy crap for her kid. It'll be good riddance, believe me.

-Steve

To: StevieMustangMan@aol.com
From: Watson@AmericaHouse.com
Date: January 20, 2012
Re: sexual harassment situation

Steve, thanks for the info. Glad to hear it's going well.

Hey, Steve, unfortunately, I have to bring something up that's unpleasant. Debbie cornered me last month when I was in Lovington. She said something about you're getting a little fresh with her, maybe asking her out and stuff like that. Anything going on I should know about?

-Keith

Keith R. Watson
Southern Regional Manager
AmericaHouse

To: Watson@AmericaHouse.com
From: StevieMustangMan@aol.com
Date: January 13, 2012
Re:

Keith:

Good news! Already sold three of the new Blue Ridge model this month! You were definitely right that it would be a big seller. One guy was just here wanting to buy two for his kids to put on his farm. Also, Fred over at Amherst Mobile Delivery says they go in real easy. I think I'm going to try to get Fred to knock off a little on deliveries for us with the Blue Ridge. The Blue Ridge is gonna make us a ton of money this year!

Thanks,
Steve

Questions to discuss:

- Who should participate in the meeting with the client?
- What information should we attempt to obtain?
- What sort of legal issues could be lurking in these facts?
- At this early and preliminary stage, is there any advice that we should give to our client?
- May Ms. Cook assert a claim of sexual harassment?
- Do we have any defenses to Ms. Cook's potential claims?
- What should we do based on the information we collected?
- What discipline, if any, should we mete out?

PART TWO: A LECTURE ON LAYOFFS

Layoffs (a/k/a “reductions in force,” “reorganizations,” and the ever-lovable, “right-sizing”) have always been around at least since the Industrial Revolution, but we have just come through the four worst years in the labor market that I have ever seen. Many general practitioners have had long-time clients come to them with the figurative or literal pink slip in hand, having just been laid off. Others have small and medium-sized business clients who have no choice but to let go of groups of employees to make ends meet. Understanding the issues is the key to knowing what to tell them.

I. Important Laws

a. *WARN Act*

This is the big one. The Worker Adjustment and Retraining Notification Act of 1988 (WARN Act) is a federal law that requires many employers to provide 60 days advance notice of plant closings and mass layoffs of employees.

- i. It covers employers with 100+ employees.
- ii. A “plant closing” is a shutdown of a single site or operating unit at a site, if 50+ employees are lost over a 30-day period
- iii. A “mass layoff” is (a) not a plant closing, and (b) within a 30 day period a loss of (1) 33% of employees, and (2) 50 employees, *or* (iii) 500 employees.
- iv. Cannot do plant closing or mass layoff until 60 days after serving notice on employees or their union representative, the dislocated worker unit, and the local government head.
- v. Reduction of notice time if
 1. Employer trying to get capital that would have avoided or postponed layoff and employer thought notice would preclude the ability to get the capital
 2. Unforeseeable business circumstances
 3. Natural disaster
- vi. An employer who violates the WARN provisions is liable to each employee for an amount equal to back pay and benefits for the period of

the violation, up to 60 days. This may be reduced by the period of any notice that was given and any voluntary payments that the employer made to the employee, sometimes referred to as “pay in lieu of notice.” It does provide attorney’s fees.

b. ERISA

- i. The Employee Retirement Income Security Act (ERISA) is a federal law that governs employee benefits.
- ii. ERISA prohibits employers from selection people for layoff based on their use of benefits or to interfere with them. If those selected for layoff are disproportionately near a vesting date for retirement benefits, then a plaintiffs’ lawyer may well focus on that issue. If those selected for layoff disproportionately have large medical expenses that drive up health insurance, then a plaintiffs’ lawyer may investigate that.
- iii. Likewise, a severance plan may well be an ERISA-governed welfare benefit itself, and a good plaintiffs’ lawyer will focus on plan language to be sure her client is obtaining the severance to which she is entitled.

c. ADEA/OWBPA

- i. The Older Workers Benefit Protection Act (OWBPA) is an amendment to the Age Discrimination in Employment Act (ADEA). It governs what must be placed in releases, which often are part of layoffs as employers offer severance packages. The OWBPA was enacted to ensure that older employees terminated in a mass layoff are fully informed about their situation before waiving all rights they may have against their employer.
- ii. Some of the attributes of an OWBPA-compliant release are:
 1. The waiver must be written in a manner calculated to be understood by such individual, or by the average individual eligible to participate.
 2. The waiver must refer specifically to rights or claims arising under the ADEA.
 3. The individual must be advised in writing to consult with an attorney prior to executing the agreement.

4. The employer must be given at least 21 days to consider the agreement; but if the waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement.
5. The waiver must provide that for a period of at least seven days following the execution of the agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired.
6. If a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer must inform the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to-
 - a. any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and
 - b. the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational units who are not eligible or selected for the program.

II. Advising Employers on Handling Layoffs

- a. Tell them to comply with those laws I mention above. Seriously. They are sitting ducks for guys like me if they do not.
- b. Tell them to be both compassionate and smart. This means:
 - i. Give the bad news yourself. Do not delegate to someone else. Most employees want to hear from the president or, in a larger company, the highest-ranking manager with whom they have frequent contact.
 - ii. Deliver the message as respectfully and gently as possible. Then listen to the reactions.
 - iii. Seriously consider outplacement support. Everyone is scared. If they have some outplacement services available to them to gin up a resume or work on a contacts network, things are more likely to go smoothly.
 - iv. Be mindful that remaining employees will be upset, too. Let them know how the company is doing financially. Let them know whether further

layoffs are likely. Tell them how their jobs will change as they pick up the duties of those who are gone.

III. Thinking like a Plaintiffs' Lawyer

- a. Look for illegal motivations: A layoff due to lack of work, economic distress and the like are all legal, of course, but they are not an excuse for illegal bias in picking employees who will be laid off. Look for evidence of discrimination based on race, gender, age, use of FMLA leave, whistle blowing and so on.
- b. Look for contract rights. Scour individual employment contracts for a breach. Negotiate releases from restrictive covenants, particularly non-competition agreements.
- c. Review WARN, OWBPA and other statutory compliance.
- d. Hunt for dormant claims. FLSA compliance is one example. If an employee was not paid her overtime properly, turning down a weak severance in a release agreement and instead pursuing that claim may well be a good choice.

PART THREE: A TRIO OF ABSENTEEISM STORIES

To: Associate
From: Senior Partner
Re: Phone Calls

I need you to return three voicemail messages I received this morning. My assistant has transcribed them and attached them to this memo. Please return them today.

As you will note, all three voicemails are from clients with questions about absenteeism. The first voicemail is from Jack Fire, a relatively inexperienced HR representative for Freedom Lumber, which has a 200-employee facility in Madison County, Virginia.

The second voicemail is from Greg Forest, senior vice-president of Monroe Savings and Loan, a small financial institution in Charlottesville.

The third voicemail is from Frank Toad, the long-time Vice-President for Human Resources at Litmus Testing, International. Litmus is a political polling organization. They are headquartered in Alexandria, Virginia, but they have employees and facilities scattered throughout the United States.

Please be prepared to handle these phone calls yourself. Before you call them back, I want you to read 29 C.F.R. Part 825 and the EEOC's guidance on the interaction between the FMLA and the ADA.

Voicemail from Jack Fire

"This is Jack Fire at Freedom Lumber. I have a quick question for you. We have an employee who's been out with a back problem for something like 15 or 16 weeks, way over what the FMLA requires. His name is Fred Slaughter. Fred has used up all his vacation and sick leave already. I think he's just malingering, because last month my wife saw him working on cars at his side business, an auto-body repair business.

Anyway, I'm not about to question him now, because he's used up all of his FMLA leave, and he wasn't a very good employee. We want to hire someone to fill his job, and his supervisor is ready to let him go. I'd just like you to tell us how to get rid of someone after they've used up their FMLA leave."

Voicemail from Greg Forest

"This is Greg Forest. We met at the labor seminar your firm held for executives at the Boar's Head Inn last month. Something you mentioned at the seminar may have come up here. I hope you can help us.

One of our executive assistants, Jan Pieland, called in sick last Thursday, last Friday, and today, Monday. She didn't say why, but one of our other tellers said she thinks Jan has the flu.

Jan has truly been a pain in the neck. She calls in sick all the time, and she has no leave left. She's a real party girl. Frankly, I think she's an alcoholic, and she's probably just hung over. She's a distraction at work, and I've had enough.

At your seminar, you mentioned a law called FLSA, or something like that, which you said deals with sicknesses. You said that a person gets FLSA leave if she's out for more than three days. Tomorrow's the fourth day, so I want to get rid of her before the fourth day. Please call me to confirm that this is an appropriate action legally."

Voicemail from Frank Toad

"Hey, this is Frank from Litmus. I need your help with a problem.

Tammy Jamison is one of our Vice Presidents, one of our best. She manages our Rhode Island office. Her son was diagnosed with cancer three months ago. The doctors say his prognosis is good, but he has to do chemotherapy treatment, which he gets on Monday mornings. Tammy has been taking her son to the doctor for the treatment, and then she stays with him because he's sick the rest of the day and she has to take care of him. Basically, this means she's out every Monday, and sometimes Tuesday mornings, too, if he's still sick.

We've been okaying this, and she's been using her vacation and sick time to do it. Unfortunately, our CEO, Steve Lame, is starting to complain about her absences and her office's productivity. I think he's being a real jerk, but he's right, the office hasn't met its performance standards, and that's probably because Tammy isn't there as much as she should be. So, Steve directed me to call you to ask how we can get Tammy back to work. Steve thinks maybe we can make her hire a nanny to take care of her son on Mondays. And he also thinks that we can make Tammy take all her FMLA leave consecutively - no more of this day here, day there stuff. Can you please call me back with suggestions?"

PART FOUR: A PLAINTIFF’S LAWYER’S THOUGHTS ON VENUE IN AN EMPLOYMENT CASE – FEDERAL COURT, STATE COURT OR ARBITRATION

Plaintiffs’ employment lawyers spend much of our time considering how best to advocate for our clients. We think about how to approach potential witnesses. We sift through potential claims and review the most recent cases on those causes of action. We go to seminars on deposition technique and trial advocacy. We read the articles on mediation and settlement techniques. We do all the things we can to improve how we advocate for our clients, and that is a good thing.

The goal of this section, however, is not to consider how to advocate for our clients. Rather, the goal here is to think about where to advocate for our clients. The best jury argument ever crafted would mean little if there is no jury to hear it (as in an arbitration) or if the jury never is allowed to hear it (after a federal judge grants a Rule 56 motion in federal district court). Thus, thinking about where to advocate for our clients is indeed part of the consideration of how best to advocate for them.

I. Federal Court vs. Virginia State Court

a. Potential Advantages of State Court: The Big Four

- i. No *Iqbal*. *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937 (2009) is the questionable decision that tossed aside decades of notice pleading practice and invited a Rule 56-lite review of your case the day you file it, before you have the opportunity to conduct one minute of discovery. *Iqbal* is particularly harsh on plaintiffs’ employment lawyers, because unlike many cases, almost all of the evidence and witnesses belong to the other side, and practical considerations and ethics rules combine to strip us of much ability to gather this evidence outside of formal discovery. It also increases the likelihood that we will have two muscle-bound dispositive motions prior to in trial instead of just one, all in the name of somehow saving money. In state court, we do not have this mess.
- ii. Venue. Virginia’s venue rules are flexible. Lawyers can use Virginia’s permissive venue rules to choose to file where a defendant performs substantial business, where the tort occurred, or where a defendant resides. This often allows several choices, one of which may be excellent for your case. By comparison, the federal courts generally lock a lawyer into one particular division in that district, and the judges are likely to transfer *sua sponte* if a mistake is made. In most divisions in the federal courts, the

juries are drawn from a wide geographic area (often urban, suburban and rural) with people of different experiences, backgrounds, incomes, educations and so on. The diversity is nice, but as a practical matter it can cause the membership on your jury to vary tremendously, which in turn makes case valuation difficult.

- iii. Nonsuit. You have it in state court, and you do not in federal court. The nonsuit is a powerful tool. Cases sometimes go sideways. Experts fail to cooperate or self-destruct. Witnesses abruptly inform you of unavoidable vacation plans. Lawyers – ahem – sometimes have tough deadlines sneak up on them. It is a wonderful tool. State court lawyers miss it terribly when they are adrift in federal court.
- iv. Summary judgment. You have it in federal court, and you do not in state court. Many lawyers dwell on this advantage of state court for plaintiffs' lawyers, and indeed it is one. But I do not think it is an advantage for the reason many lawyers say. In reality, not many cases that are tossed on Rule 56 in federal court are winners before a jury in state court. There are a few and notable exceptions, but in the main, cases dismissed on Rule 56 in the federal system are not very strong.

The real advantage of the weak summary judgment motion in the state court system is that we generally do not have to defend against them in state court! By comparison, in federal court, we almost always have to defend against them. The federal procedure does not knock out many strong cases, but it adds about 80 hours of unnecessary discovery, brief writing and oral argument to a case.

b. Potential Advantages of Federal Court: The Big Four

- i. Attorney's fees. Fee-shifting provisions generally are found only in federal statutes, such as Title VII. If you elect to go to state court, you almost certainly have given up your federal claims to prevent removal on federal question jurisdiction. That in turn means you have given up your ability (usually) to seek attorney's fees following a victory in court.

One potential response to this concern is that few cases go to trial, hence it will be the rare case in which this lack of fee-shifting stings. A reply to this response, however, is that the settlement value of a federal case can

increase as the potential attorneys' fees award grows larger. In the final analysis, the possibility of a fees award is an advantage of federal court.

- ii. Speed. In some parts of Virginia, getting to trial in circuit court can be frustratingly slow. Not so in federal court. The rocket docket of the Eastern District of Virginia would never permit it, and even my own calmer Western District of Virginia can get cases to trial with satisfying swiftness. To be sure, there are times when speed is not on our side. But in the main, our clients want relief as soon as possible, and only the most complex employment cases need more than 6 months to discover when conducted diligently. I prefer speed in getting to trial, so I see this as an advantage to federal court.
- iii. Magistrate judges. I see federal magistrate judges as a federal-court advantage in two ways.

First, many federal magistrate judges are wonderful mediators, and they're free. I use them for this purpose with some frequency. To be sure, some private mediators are gems and are worth the cost. But if you have a smaller case – and many employment cases are, let's face it – the talent of a free magistrate can be a big advantage. True, the Virginia Supreme Court has established a form of mediation handled by a handful of retired circuit judges. While this program has potential, most retired circuit judges know less about employment law than active federal magistrate judges.

The second advantage of federal magistrate judges is their ability to referee discovery fights quickly. This advantage varies across the Commonwealth. In some parts of Virginia, circuit courts have motions days where discovery fights can get resolved. But in many jurisdictions, especially rural ones, it can be difficult to get a small but nevertheless important discovery dispute to court quickly. In the federal court system, my experience is that magistrates are freely available to make these decisions quickly, which both cuts down on the number of questionable discovery objections and resolves the objections that are made more quickly.

- iv. Substantive expertise. For a variety of reasons, the development of employment law in Virginia is stunted. By comparison, for years in the federal system, employment disputes have been a major portion of the civil docket. If you have a strong case, you want your judge to know it,

and you want your judge to have the substantive expertise necessary to handle it. Virginia law simply does not afford circuit judges much opportunity to work with employment law.

II. Court vs. Arbitration: The Three Big Differences

There obviously are important differences between resolving a case in court and resolving a case in arbitration. Those differences vary, however, in whether they are an advantage or disadvantage. I will address below the three main differences.

- a. Appeal rights. For all practical purposes, there is no realistic ability to appeal an adverse ruling in arbitration. Whether under Va. Code §8.01-581.010 (Virginia Uniform Arbitration Act) or 9 U.S.C. §10(a) (Federal Arbitration Act), courts generally are not willing to vacate a decision in arbitration. There are exceptions, but they are rare. The supposed policy reason behind this unwillingness is that liberal appellate rights would undermine the main goal of arbitration, which is to avoid long and expensive litigation. (Of course, lack of appellate review undermines confidence in the system, but that is beyond the scope of this outline.)
 - i. A lack of appeal rights is an advantage to a plaintiffs' lawyer when her case is shaky. If you have a shaky case in court, you generally have to convince a jury, a trial judge and an appellate panel. In arbitration, the first and only hurdle generally is the arbitrator.
 - ii. Concomitantly, a lack of appeal rights is a disadvantage if you get a raw deal in arbitration. There is a big talent drop-off from the best arbitrators to the worst. If you draw a bad one, you generally will be stuck with his or her decision without recourse to wiser heads. This can be frightening. Worse yet, arbitrators (even the bad ones) often know there is little appellate review of their decisions. Stated gently, we all tend to do our best work when we know it will be reviewed.
- b. Jury trial. Most employment claims will be decided by juries in court due to the Seventh Amendment and concomitant state constitutional provisions. No employment claims in arbitration get a jury. This universally is seen as a disadvantage for plaintiffs' lawyers, because juries are assumed to be plaintiff-friendly. This can be true, but wise plaintiffs' lawyers know this is not always true. And some of the best arbitrators I have seen came from the business world,

where they gained a healthy insight that not every executive in a corporation is as egalitarian and pleasant in private as s/he appears in court or in arbitration.

- c. Discovery. This varies among the arbitral systems. In FINRA arbitrations, for example (where you probably will spend time if you represent employees in the investment industry), discovery is very light and depositions extremely rare. By comparison, some arbitrators in the AAA system – which by rule leaves the extent of discovery almost entirely to the arbitrator’s discretion in employment cases – will allow significant discovery. In general, however, discovery in arbitration is less extensive than in litigation.

This typically is seen as a disadvantage to plaintiffs’ lawyers, and often, it is. Employers usually control the documents and employ the important witnesses. On the other hand, in litigation, large management firms can punish a small plaintiffs’ firm with heavily burdensome discovery, especially third-party discovery. For modest-sized cases, less discovery can have a silver lining.