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EMPLOYMENT LAW

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Recouping Costs

A prevailing employer in a discrimination case may be able to recover fees and costs

As some companies operating in New Jersey know, the financial cost of successfully defending a discrimination or wrongful termination lawsuit can be substantial. To get to the summary judgment stage, an employer could spend as much as \$30,000 to \$50,000 in attorneys' fees, and possibly more. If a trial occurs, the costs are even higher. And while dismissal of a complaint is always welcome, that result may be bittersweet, given the monetary and other costs involved to secure it. An employer, however, may be able to recoup its costs from an unsuccessful plaintiff. This article explores one avenue that may accomplish that objective, where plaintiff has brought a claim under Title VII, 42 U.S.C. § 1981 et seq., or the Americans with Disabilities Act.

Title VII, 42 U.S.C. § 1988(b), and the ADA provide that a court, in its discretion, may award reasonable attorneys' fees to the prevailing party. 42 U.S.C. § 2000e-5(k); 42 U.S.C. § 1988(b); 42 U.S.C. § 12205. In *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978), the Supreme Court held that "a district court may in

its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." This same standard has been held applicable to cases brought under the ADA and Sections 1981, 1981a, 1982, 1983, 1985, and 1986 of the Civil Rights Act.

What does it mean for a case to be frivolous, unreasonable, or without foundation? "[F]rivolous, unreasonable, or without foundation," in this context, implies 'groundless ... rather than simply that the plaintiff has ultimately lost his case.'" *EEOC v. L.B. Foster Co.*, 123 F.3d 746, 751 (3d Cir. 1997) (citation omitted). Stated somewhat differently, a trial court's findings that a plaintiff's claims were "utterly without basis in law or in fact" and that preliminary investigation would have shown that to plaintiff and his attorney as they prepared the case were sufficient to justify an award under the *Christiansburg* standard.

In deciding whether to award fees to a prevailing defendant under Title VII, federal courts in New Jersey examine several factors, including if: (i) the plaintiff established a prima facie case, (ii) the defendant offered to settle, and (iii) the trial court dismissed the case before or after a trial on the merits. Other factors that courts may consider include whether the issue in the case is one of first impression and whether the controversy is based upon a real threat of injury to the plaintiff. While subjective bad faith is not a prerequisite to an

award, it is an aggravating factor in the fee award determination. *EEOC v. L.B. Foster Co.*, 123 F.3d 746, 751 (3d Cir. 1997); *Smith v. Continental Ins. Corp.*, 747 F. Supp. 275, 284 (D.N.J. 1990), *aff'd*, 941 F.2d 1203 (3d Cir. 1991).

Employers must be mindful of several facts in evaluating whether to pursue fees from an unsuccessful plaintiff. First, determinations are made on a case-by-case basis. *Moran v. Southern Reg'l High Sch. Dist. Bd. of Edu.*, 2006 WL 932339 at *4 (D.N.J. Apr. 11, 2006). Thus, what succeeded in one action may not succeed in another, given factual differences among cases. Second, courts considering such motions by employers are cautioned to "resist the understandable temptation to engage in post hoc reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation." *Christiansburg*, 434 U.S. at 421-22. Or as the Seventh Circuit explained, "There is a significant difference between making a weak argument with little chance of success ... and making a frivolous argument with no chance of success ... [I]t is only the latter that permits defendants to recover attorney's fees." *Khan v. Gallitano*, 180 F.3d 829, 837 (7th Cir. 1999). Third, as a general rule fee-shifting in favor of prevailing defendants is not routine and is not to be used sparingly. *Veneziano v. Long Island Pipe Fabrication & Supply Corp.*, 238 F. Supp. 2d 683, 688 (D.N.J. 2002), *aff'd* in part, dismissed in part, 79 Fed. Appx. 506 (3d Cir. 2003).

Though certainly difficult, obtain-

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ing an award of attorneys' fees against an unsuccessful plaintiff is by no means impossible, even where a case is dismissed on summary judgment. As District Judge Chesler held in *Moran*, "To determine whether fees are appropriate after a summary judgment motion, courts generally consider whether...there was at least *some* basis in law for the plaintiff to bring the suit." Or as the Court remarked in *Stefanoni v. Board of Chosen Freeholders*, 180 F. Supp. 2d 623, 628 (D.N.J. 2002), *aff'd*, 65 Fed. Appx. 783 (3d Cir. 2003), "In determining whether a suit is frivolous, 'a district court must focus on the question whether the case is so lacking in arguable merit as to be groundless or without foundation rather than whether the claim was ultimately successful.'" (citation omitted).

Consider a few examples. In *Boehler v. Middletown Township*, 1991 WL 49748 (D.N.J. Mar. 27, 1991), Judge Fisher, after denying summary judgment and dismissing plaintiff's civil rights claim following a bench trial, ruled that defendants had proved that plaintiff's action was frivolous. Among the court's findings: plaintiff was unable to provide any evidence at trial in support of his claims; plaintiff only offered his own testimony to support his claims, even though there was directly contradictory testimony from several witnesses; and despite his actions being groundless, plaintiff forced the case to trial. Defendants were awarded more than \$39,000 in fees and costs pursuant to 42 U.S.C. § 1988.

In *Stefanoni*, the court awarded defendants fees and costs after dismissing plaintiffs' Title VII claims on summary judgment. The court noted that plaintiffs failed to establish a prima facie case of sexual harassment or retaliation. The court also observed that plaintiffs

made settling the case impossible by refusing to negotiate from their initial settlement demand of one million dollars. Further, plaintiffs' claims did not survive summary judgment. Two additional factors influenced the outcome. First, once one of the plaintiffs complained of sexual harassment, the attorney general's office conducted a thorough examination of the evidence and determined that her allegations lacked credibility and were unsubstantiated and legally insufficient. Second, a county hearing officer, after an administrative hearing, sustained charges of misconduct upon which plaintiffs' terminations were based. According to the court, "[t]hese decisions made plaintiffs aware of the factual and legal infirmities of all their claims prior to bringing suit..." Ultimately, defendants were awarded more than \$90,000.

Employers should not deceive themselves into thinking that a victory on motion or at trial will translate into a fee award. Consider the case of *Baxter v. AT&T Communications*, 1989 WL 121058 (D.N.J. Sept. 5, 1989). There, defendant obtained summary judgment after the court found that plaintiff had not proffered "one shred of evidence" to support his claims. Defendant had also made two settlement offers, both of which were rejected. These facts led the court to conclude that "at least from the time plaintiff's deposition was taken, plaintiff and his counsel should have been aware that plaintiff could not demonstrate sufficient facts to carry plaintiff's burden of proving a prima facie case of race discrimination."

For three reasons, however, the *Baxter* court chose not to award fees. First, it found that plaintiff brought and pursued the action in good faith. Second, the court considered plaintiff's limited financial resources and ability to pay.

Third, the court expressed concern over the "chilling" effect any award may have on future litigants.

Baxter is one of many cases where defendants were unsuccessful in motions for an award of fees. The reasons why a court may deny the motion are varied. Success on a motion for fees is by no means a certainty, nor is it, unfortunately, easily predictable, even after dismissal of an employee's Title VII, Section 1981, or ADA case at summary judgment or trial. Under the rights set of facts, courts, however, do grant such motions and award prevailing defendants their fees — and sometimes significant amounts. *Moran v. Southern Reg'l High Sch. Dist. Bd. of Edu.*, 2006 WL 932339 at *4 (D.N.J. Apr. 11, 2006); *Stefanoni v. Board of Chosen Freeholders*, 180 F. Supp. 2d 623, 628 (D.N.J. 2002), *aff'd*, 65 Fed. Appx. 783 (3d Cir. 2003).

Before filing such a motion, a host of questions should be asked. Did plaintiff establish a prima case of discrimination? Was plaintiff able to adduce any evidence to support his or her claims? Did defendant move for summary judgment? If not, why not? Was plaintiff's settlement posture reasonable or did that force the litigation to proceed unnecessarily? Did plaintiff commence the action in good faith and could he or she afford an award of fees if assessed? Does the employer want to incur additional fees in preparing a motion, with no guarantee of success?

Depending upon the answers to these questions, and given the right circumstances, an employer may be willing to take its chances on such a motion, not only for the potential recovery that may result, but also for the message it sends to other potential plaintiffs. ■