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Top 10 Damage Traps For Lawyers Bringing Employment Law Cases

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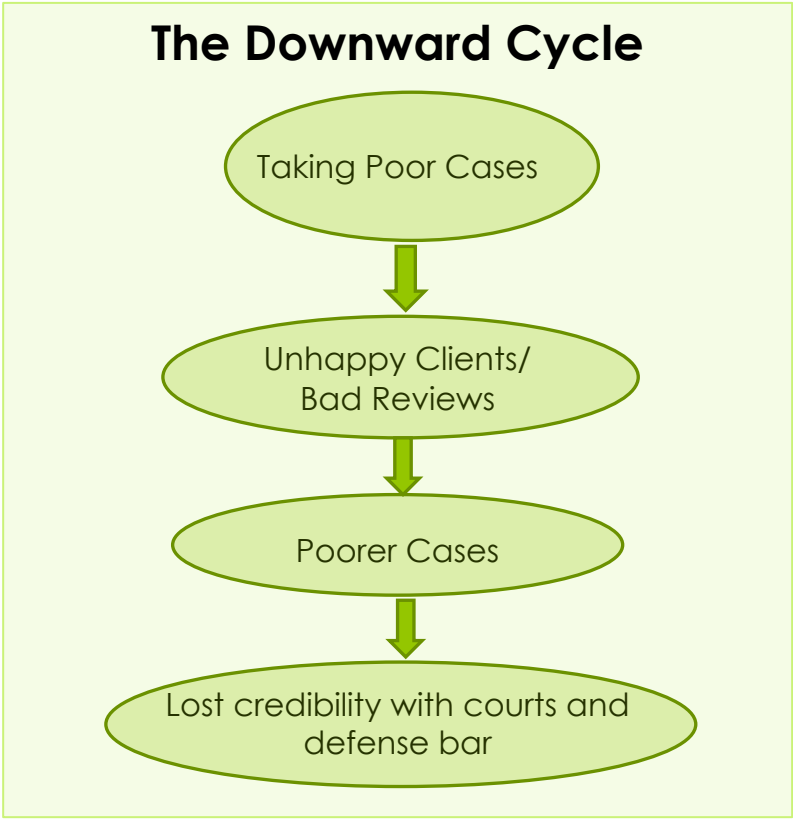
Trap 1: "Winging" The Law

- Know the controlling case law inside and out
- You can't get damages if you can't get to a jury
- Don't take cases that are grist for the summary judgment mill, or cases just to settle for nuisance value



Bottom Line: Avoid The Downward Cycle

Trap 2: Not Vetting Your Client

- Likeable plaintiffs are critical, but don't fall in love too soon
- Be curious. Pay close attention to problem areas

Common Problem Areas

- Criminal records
- Bankruptcy
- Social Media
- Prior employment history
- Prior Suits
- Arbitration agreement
- Mitigation efforts

Bottom Line: Trust Your Instincts

Trap 3: Failing To Investigate Key Facts

- Thoroughly interview your client early, and ask the tough questions early and often
- Never rely on your client's word for it; gather as much evidence as you can before you take on the case
- Stay away from liars
- Strongly consider filing a verified petition or complaint

Gather As Much Of The Following As You Can:

- Text messages
- E-mails
- Audio recordings
- Witness names and numbers
- Affidavits and declarations
- Public information

Bottom Line: Trust But Verify

Trap 4: Sloppy Letters and Pleadings

- You only get once chance to make a first impression
- To get paid, you need be taken seriously
- This is a key separator to the employer's in-house counsel, outside counsel, courts, mediators, etc.

Keys To Effective Presentations

- Lay Out The Facts Logically
- Evidence over "chest beating"
- Show command of the relevant liability and damages law

Bottom Line: Get The Employer's Attention To Get Paid

Trap 5: Blowing Off Discovery

- Send case-specific discovery, and follow up if objections are improper
- Answer discovery properly
- Thoroughly prepare your client for deposition
- If you treat cases like commoditized goods, you will get commoditized settlements

Discovery Tips

- Read the Answer and relevant documents, e.g. Position Statement before preparing discovery questions
- Fully test the employer's assertions through discovery
- Read the documents sent to you in discovery, and prepare "key" documents
- Take Depositions of key witnesses

Bottom Line: Do Not Take A Case If You Cannot Work It Up Properly

Trap 6: Ignoring Damage Limitations

Each Law Is Different

- Title VII and TCHRA have no liability for companies with fewer than 15 employees. There is a sliding scale of caps on compensatory/punitive damages, which caps out at $300,000 for companies with 501 or more employees.
- 42 U.S.C. § 1981 has no 15-employee requirement but no damage caps
- FMLA has no liability for companies with fewer than 50 employees in a 75-mile radius.
- ADEA only applies to employers with 20 employees
- Plaintiffs in ADEA/FMLA cases are entitled, at best, to lost pay, liquidated damages equal to lost pay, and reasonable attorneys' fees. Plaintiffs in age discrimination cases under TCHRA can get emotional distress/punitive damages (subject to cap)
- For the FLSA, maximum damages are unpaid overtime for 2-3 years, liquidated damages in an amount equal to unpaid overtime, and reasonable attorneys' fees. There are multiple ways to calculate overtime pay which require spending time with the regulations
- Attorneys' fees are not recoverable in worker's compensation retaliation cases and Sabine Pilot cases
- To get punitive damages in *Sabine Pilot* cases, the plaintiff must show specific intent to cause harm to the plaintiff apart from the termination itself.

Bottom Line: Know The Case's Damages Limitations

Trap 7: Avoiding Lost Pay Problems

- Lost pay = back pay and front pay, which are equitable remedies
- Back pay measured from the adverse action until the date of trial; left to discretion of court but submitted to jury
- Front pay is invoked when reinstatement is impractical; is determined by the trial court; is not liquidated under liquidation statutes; usually 2-3 years, although there are cases with higher awards depending on circumstances. Put evidence before the jury

Issues In Lost Pay

- Subsequent sources of income are discoverable and can serve as a credit to the employer.
- Subsequent employment is almost always an issue in discrimination/retaliation cases.
  - Tell your client to work hard to find subsequent employment
  - Your client's claims of attempts to find subsequent work can be objectively verified
  - Your client's obligation is to "use reasonable diligence to attain substantially *similar* employment and, thereby, mitigate damages." *Patterson v. PHP*, 90 F.3d 927, 936 (5th Cir. 1996). Not any kind of employment.
  - Burden on employer to prove work was available and employee did not exercise reasonable diligence to obtain it. *West v. Nabors Drilling USA, Inc.*, 330 F.3d 379, 393 (5th Cir.2003).

Bottom Line: Lost Pay Is Heavily Litigated And Cannot Be Dodged By Either You Or Your Client

Trap 8: Relying On Compensatory Damages

- Available Under Title VII and TCHRA for "emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses"
- Except in rare circumstances, Defendants typically no not give high value to compensatory damages in settlement negotiations

Beware of Case Law

- In *Miller v. Raytheon Co.*, 716 F.3d 138 (5th Cir. 2013), the Fifth Circuit held that the district court's 100k award to the plaintiff for compensatory damages was unsustainable because:

  > "[H]e presented no expert medical or psychological testimony of the extent of his mental anguish. While Miller testified that he suffered chest pain, back pain, sleep disturbances, he also admitted that he did not take any over-the-counter pain or sleep medications. Nor did Miller seek the assistance of any health care professional or counselor."

- Inform your client about how to prove compensatory damages, and that notes from mental health professionals are discoverable
- Think about waiving this claim at trial and telling the jury that your client is not seeking mental anguish.

Bottom Line: Don't Rely On A Compensatory Damage Award When Evaluating Your Case

Trap 9: Not Knowing How To Prove Punitives

- A plaintiff may recover punitive damages if the defendant acted "with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1).
- The availability of punitive damages turns on the defendant's state of mind, not the nature of the defendant's egregious conduct. *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 535 (1999).
- You must show that the "malfeasing agent served in a 'managerial capacity' and committed the wrong while 'acting in the scope of employment.'" *Rubinstein v. Adm'rs of the Tulane Educ. Fund*, 218 F.3d 392, 405 (5th Cir.2000).

The Kolstad Trap

- In Kolstad, the Supreme Court held that "an employer may not be vicariously liable for the discriminatory employment decision of managerial agents where these decisions are contrary to the employer's good-faith efforts to comply with Title VII." Kolstad, 527 U.S. at 545.
  - It's an affirmative defense; make sure it was pleaded
  - Do discovery on training of managerial agents on relevant policies
  - Link decision to a "managerial agent"
  - Gert "managerial agent" to admit that, if discrimination/retaliation occurred, that it violated the anti-discrimination/anti-retaliation policies.

Bottom Line: Pay Attention To How You Prove Punitives

Trap 10: Not Setting Client Expectations

- Explain to your client the laws on damages as applicable to the case
- Never set unrealistic expectations
- Explain settlement demands
- Under-Promise and Over-Deliver

Mediation Tips

- Prepare beforehand.
- Be impressive in your presentation – in full command of the facts, the law, and put on a polished, powerful, yet professional, presentation. You are being evaluated as an advocate.
- Don't rely on your mediator to do your hard work. The more the mediator is in your room working on your client, the more your client is the problem. Solve problems with your client before mediation.
- Be reasonable and professional at all times
- Never beg. It's okay if a case does not settle.
- Handle problems at the courthouse. If it turns out you took a bad case, that's not on the employer; that's on you and/or your client.

Bottom Line: Treat Mediation Seriously, And Maximize Your Chances Of Success

Bonus Trap 1: Failing To Record Your Time

- You are going to have to prove up attorneys' fees
- In federal court, this is typically done post-trial in a fee application under the *Lodestar* method
- In state court, testimony is usually given at trial and attorneys must produce "sufficient evidence" in support of fees.
- "Sufficient evidence" includes"(1) particular services performed, (2) who performed those services, (3) approximately when the services were performed, (4) the reasonable amount of time required to perform the services, and (5) the reasonable hourly rate for each person performing such services." *Rohrmoos v. UTSW*, 578 S.W.3d 469, 498 (Tex. 2019).

Attorneys' Fees Tips

- Track your time contemporaneously in tenths of an hour
- Be prepared to produce billing records and give a deposition on your fees
- Don't lie in a fee petition; it's under oath
- Get an expert to testify as to reasonableness in state court

Bottom Line: Track Your Time And Be Honest

Bonus Trap 2: Don't Be Scared

- Don't be afraid to try good cases to get full value
- Losing is part of being a trial lawyer and there is no shame in losing
- Winning verdicts, however, is how you get better cases in the future and higher future settlements
- Be prepared to try a case at least a month in advance. Start with the jury charge.

How To Sustain Success

- Do the right thing, every time, no matter what, irrespective of any financial consequences to you, or anything else.
- Give every courtesy. Expect none in return.
- Don't demonize others, whine incessantly, and file antagonistic briefs
- Don't settle because you need the money
- Effectuate transformative change in deserving persons' lives. That feeling truly is incredibly rewarding.

Bottom Line: Your Reputation Is All You Have

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