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Q&A With Epstein Becker's David Garland

Law360, New York (May 10, 2013, 1:02 PM ET) -- David W. Garland leads Epstein Becker & Green PC's national labor and employment practice. Garland defends clients in employment discrimination, wrongful discharge and other employment-related litigation, including cases involving allegations of sexual harassment; discrimination; alleged violations of family leave; whistleblowing, equal pay and other statutes; contract, public policy and tort claims; wage and hour; and noncompete agreements.

Q: What is the most challenging case you have worked on and what made it challenging?

A: Because of my extensive experience trying employment cases before juries, I am frequently called upon by clients to represent them when it becomes apparent that the case will be going to trial, and their current counsel has not had comparable trial experience. That means that when I enter the case, I have not had the opportunity to craft case strategy from the beginning, and I have missed the chance to ensure that necessary discovery for trial has been completed.

All too often, counsel without sufficient trial experience cannot think ahead as to how the case will actually play out in the courtroom and what is needed to bring about a winning outcome at that stage of the case. Entering the lawsuit in that posture presents many challenges. I have tried a retaliation case where during discovery the parties failed to determine when the employer made the termination decision — obviously a critical point in such a case. I have tried an age discrimination case where the counsel mistakenly took discovery as it was an Equal Pay Act case instead. And, I have had other similar experiences.

But I would say that perhaps the most challenging trial was in a case where I was retained after the close of discovery, and the employer's decision-makers had not been deposed. That would not have been a problem if I could have called them as witnesses at trial as they could have explained their reasoning and the timing of their decision. But they were no longer within the court's subpoena power and refused to appear at the trial voluntarily.

Thus, I faced a situation where the plaintiff alleged that the employer terminated her employment because it had learned of her heart condition, i.e., it discharged her employment because of a disability. The timing of the termination and the employer's becoming aware of the heart condition could not have been worse. The plaintiff collapsed at work, was out for 10 days, and on the day that she returned to work, the employer terminated her employment. If that was not bad enough, the plaintiff had worked for the employer for about 20 years — and the rationale for the employment decision had not been documented. If a case should have been settled, this was it — but the parties were too far apart, and the case had to be tried.

Fortunately, I had one witness — a former employee subject to subpoena compelling her to appear at trial. Although the witness was not involved in the termination decision, she had been told before the plaintiff's collapse that she would be taking over the plaintiff's duties. She also had taken certain steps to prepare for taking over those duties — so she could testify why she was taking those steps. Of course, the plaintiff's attorney objected to this testimony as inadmissible hearsay, but it fell within an exception to the hearsay rule.

The testimony placed the termination decision before the plaintiff's collapse and before the employer learned of the plaintiff's medical condition — the most critical issue in the case. Thus, the plaintiff's disability could not have been the motivating factor in the discharge decision. The jury returned a verdict in the employer's favor in less than an hour.

Q: What aspects of your practice area are in need of reform and why?

A: In many states, having a trial date scheduled does not mean that the court will actually start the trial on the assigned date — or even a few months of the assigned trial date. But the parties must prepare for the initial trial date as if it is real in case the court is ready to go forward. The result is that clients end up spending money unnecessarily because some of the witness preparation done for the initial date must be redone later to refresh the witnesses' recollection. I would like to see more states follow the federal system, where more often than not, the trial actually begins on the day that it is scheduled.

Q: What is an important issue or case relevant to your practice area and why?

A: A few years ago, I never would have said that the composition of the National Labor Relations Board was an issue important to my practice — which largely focuses on nonunionized employees. But that has changed. The board has recently issued decisions that affect all employers, even those without any union employees. Board action focused on social media, employee handbooks and internal investigations has an impact on all employers.

But the recent Noel Canning decision in the D.C. Circuit Court of Appeals means that there will be a great deal of uncertainty involving much of the board's activity over the last year and going forward until the issue is resolved in the U.S. Supreme Court.

Q: Outside your own firm, name an attorney in your field who has impressed you and explain why.

A: Mike Reiss is a partner in the Seattle office of Davis Wright Tremaine. I first met Mike about 15 years ago at a meeting of the American Employment Law Council. Mike was an incredibly knowledgeable and thoughtful management-side lawyer who also tried cases — and a real leader in the labor and employment bar on the management side.

His approach to cases mirrored my own. For example, we have both used in limine motions to whittle away at the evidence that a plaintiff might present to the jury. Additionally, Mike and I use both make extensive use of graphics to try a case. Starting with the opening statement, graphics can simply [be] the case for the jury — literally drawing a picture of the case which is easy to follow and understand. Mike has shared with me some of the graphics from his cases, and I have utilized in my own practice what I have learned from Mike.

Q: What is a mistake you made early in your career and what did you learn from it?

A: At the beginning of your career, there is a temptation to show the other side or the court how smart that you think you are. And the way to do that is to talk — which can lead to too much talking. To show your brilliance, you may make an objection at a deposition or at trial because you want to show your mastery of the rules. But not all objections are smart or necessary.

Just because the evidence may be the result of a leading question or inadmissible hearsay, an objection should not always be made. It can leave a bad impression with the jury or the court — and sometimes may also educate the other side to your disadvantage. I know that I fell into the trap early on in my career, and there are times that I say to myself even today, "Don't say anything now" — so that I resist the temptation to speak when it will accomplish no good.

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