

## Chapter 2

# Client Intake And Investigation of Claims

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## I. INITIAL CLIENT INTERVIEW

### §2:10 Telephone Interview

During initial telephone interviews with potential age discrimination clients, your goal is to quickly screen out those people who clearly do not have a claim from those whom you will be interested in talking to in person. The vast majority of people who call do not understand that they are employees-at-will and can be terminated for no reason at all. They usually perceive their termination as being unfair and do not understand that “unfair” is quite different from “illegal.” It is essential that your telephone interview, which will most likely be for free, quickly elicit the information that will eliminate these people. You do not want your practice to turn into a not-for-profit unemployment hotline. With that in mind, pay particular attention to claims of “personality conflicts” or other legal reasons why an employer may have terminated your potential client.

It can be helpful to ask the following questions during the interview:

- Who referred you to me?
- What can you tell me about your employer?
  - Identity?
  - Other discrimination cases against employer?

Be careful here. Such information can be very misleading. Often the worst clients are those who come armed with many cases against the employer, none of which have anything to do with the client’s claims.

- What steps have you taken in response to being discharged, disciplined, and so forth?
- Have you filed a discrimination claim with the EEOC or a state agency

(such as the Human Resources Commission)?

Be alert for possible statute of limitations issues (*see* §2:20).

- Would you please bring the following material and information when you come to see me?
- Documents
  - Performance evaluations
  - Copies of charges previously and currently filed with EEOC or state agency
  - Income tax returns
  - Any severance agreement offered by the company
  - Memos from the company concerning the job or the layoff that you believe are relevant
  - Employee handbook
  - Job descriptions
  - Organization charts
  - Annual reports
  - 10(k) forms
  - Diaries, notes, tapes documenting discriminatory incidents
  - Fringe benefit documents
  - Witness names, addresses, telephone numbers
  - Chronologies of discriminatory events

During the telephone interview, determine whether the person has a good attitude and can present the case in an organized and articulate manner. Someone with a poor attitude or someone who cannot articulate the claim well may prove hard to work with and may do poorly on the witness stand.

If you decide that a person has a claim that you want to examine further, explain to them that regardless of whether or not you

agree to take the case, an in-person interview will require a consultation fee. This is important for two reasons. First, some lawyers forget that their practice is also a business. As opposed to personal injury practice, where it is usually clear that a person needs representation, in age discrimination cases, due to the intricacies in the law, a person's claim may not be clear at all. Determining the best course requires your expertise and advice and you should be paid for that. Second, requiring a fee is a good way of identifying serious clients. Paying a consultation fee shows a certain commitment on the part of the client. If a client cannot afford a consultation fee, you can always make an adjustment later. However, in general, clients who are not willing to pay a fee for consulting with you are more concerned with getting something for nothing and are usually trouble. If a client will not meet with you for fear of paying a consultation fee, it is generally better to move on to the next client.

After the interview, ask other members of your firm what they know about the employer. This may help you get a fuller picture and spot possible conflict issues.

### §2:20 In-Person Interview

During this interview, gather more information and flesh out whatever made you interested enough to invite the person in for a consultation. At this stage, you have three goals:

1. Evaluate the client and see if he or she is someone you can work with and someone who will make a good impression in court.
2. Determine whether age was a determinative factor in terminating the client (as opposed to any other nondiscriminatory reason).

3. Decide whether or not the client's claims deserve a significant amount of your time and resources.

Consider asking these questions to help you accomplish your goals:

#### **General Client Information**

- Have you spoken to any other lawyers before contacting me?

If so, this may indicate that there are problems with the case or the client, especially if well respected attorneys have rejected the case. It may also indicate that the client is attempting to play one attorney against another in a bidding war for the client's case.

- Would you like me to explain how you can pay me for my services?
  - Explain contingency fee or whatever fee arrangement you will use.
  - Is the person willing to pay you a retainer against costs?

If not, and he or she wants to see you on strictly a contingent-fee basis, he or she may become unmanageable and may not appreciate that your time has monetary value.

- Is the person willing to pay an initial intake or consultation fee?

You may choose not to charge a fee if you do not take the case but if the person is not even willing to pay a nominal consultation fee up front, he or she probably has no regard for the value of your time. It is good practice to work this question into the telephone interview since it can be used to screen out some clients.

- Have you ever been involved in any litigation of any kind at any time?

A litigious person may not be the best client for purposes of bringing an age discrimination claim.

- Have you filed a previous claim of discrimination, retaliation or any employment-related tort or claim?
- Do you understand that it is very important that you tell me the truth?

Make it clear that you will not tolerate lying and that you will drop the client if he or she is untruthful or omits important details.

- Do you understand the tax aspects of civil rights damages and settlement awards?

Mention that attorney fees get double-taxed, once to the attorney directly and once to the client (subject to the alternative minimum tax requirements of the Internal Revenue Code). *See* §2:70 for further tax discussion.

- What is your family and economic situation?

It is important to understand the person's family and economic situation. Sometimes you can learn that a spouse is the driving force behind the person seeing you. On the other hand, a spouse can be completely against seeking legal action. Either situation could lead to a troubling relationship with your client. In addition, specific illness or other financial pressures, such as children entering college, could have a tremendous effect on whether a client would want to settle quickly or commit to a lengthy litigation process.

- Do you understand what you face in being a litigant? Explain that:
  - Litigation is a long, frustrating, and expensive process

- There are going to be lulls when nothing gets done
- The defendant may: attempt to stonewall the claim, attack the client's performance, try to make the client upset, try to put the client on the defensive.
- The client must be committed to the process and not let emotions take control.
- Litigation is like a bucking bronco that needs to be tamed. The defendant is the bronco and the client is the cowboy. The defendant will keep bucking and attempt to throw the client off the horse. The client must hang on and take everything that is dished out. If they cannot, they will fall off the horse and lose. If they can stay on the horse, the defendant may eventually be tamed and make a reasonable settlement offer. Clients understand this analogy and through the course of the litigation, whenever they get upset about something, you can remind them to stay on the horse.
- What do you expect to get out of this?
 

Frequently clients will have unrealistic expectations. They often bring in newspaper articles that describe someone recovering \$10 million in a discrimination suit. While it is not good for you to predict what the client is going to recover, it is very important to lower the client's expectations. One good technique is to tell the client that the reason that a large verdict is in the newspaper is because it is so unusual it has become news. Verdicts against plaintiffs or verdicts for small amounts are not newsworthy. Those are the everyday occurrence, not the \$10 million verdict. It can also be

effective to look at the article and point out several things that make the client's case different.

It is also very important to talk about settlement and find out how reasonable the client is going to be. If the client wants nothing less than to bankrupt the employer, you do not want that client. Some clients will say that their suit is a matter of principle and is not about money. Tell this type of client that our justice system is based on giving people money damages. While being principled is nice, the client must be willing to walk away from the case for a certain amount of money and accept the fact that the defendant probably will not apologize. If a client can not accept this, reject the case.

It can also be good practice to ask the client, "How much money will you accept right now to walk away from the case?" The client's number is usually too high. If so, ask if they would take slightly less. If they say "yes," keep lowering the amount until they say "no" or are unsure. Then ask them to think about what amount would be their emotional bottom line. This is the amount that they will take but will not feel completely satisfied. That number usually goes down also during the litigation, but it is very important to get the client to understand that cases generally settle and that compromises need to be made.

### **General Employer Information**

- Is the employer a federal, state or private employer?

Public employees, particularly federal employees, have different prerequisites before an age discrimination

complaint may be filed. For example, a federal employee must go through the EEOC process, whereas many state and private employees can go straight to court under state law. Federal employees must also follow a certain conciliation process at the EEOC which is not required for state or private employees.

- Employees of state entities can no longer bring individual suits for damages after *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), but may bring suits for injunctive relief or rely on EEOC litigation against the states as employers.
- How many employees does employer have?

An employer is not covered by the ADEA unless the employer is a "person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." 29 U.S.C.A. § 630(c).

In counting the number of employees that an employer has, look at the company's entire payroll regardless of whether people are being paid or not. *Walters v. Metropolitan Educational Enterprises, Inc.*, 519 U.S. 202 (1997). This is called the "payroll counting method." Thus, part-time workers, non-salaried workers and/or people on disability will be counted toward the employer's minimum number of employees in order to meet the definition under the ADEA.

- Is the employer a subsidiary of another company? If so, what is the parent company?

A parent corporation may not be held liable for age discrimination unless the plaintiff shows that the parent, rather than the subsidiary for whom the plaintiff works, is the “employer” for ADEA purposes. Courts consider various factors in determining whether a parent corporation may be held liable for the acts of a subsidiary. These include interrelation of operations, common management, and financial control. *See Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1362 n.2 (10th Cir. 1993); *Trevino v. Celanese Corp.*, 701 F.2d 397, 404 (5th Cir. 1983).

- What is employer’s history with respect to age discrimination?
- Has employer ever been sued for discrimination before?

Take with a grain of salt anything said by your potential client about past claims of discrimination against the employer. The amount of misinformation received by an apparent victim of discrimination can be considerable. You will often hear that the employer suffered terrible defeats when the client has very little reliable information. One of the most common claims of a potential client is that the employer has a reputation for settling every claim. This is almost always untrue. Employers are usually more adamant about fighting discrimination claims than other types of claims.

- If so, what was the outcome?

### **Employee’s Employment History and Evidence of Age Discrimination**

- Who hired you?
- Were there any documents exchanged during hiring?

- Was there a hiring letter?
- Was there a written employment contract?
- Were there any promises, oral or written, made at the time of hiring?
  - If so, were the promises fulfilled?
- Were there any promises of employment or job security?
- Who were your supervisors?

The majority of federal courts have held that the ADEA does not provide a basis for relief against supervisors in their individual capacities, unless they qualify as “employers.” *See Stults v. Conoco Inc.*, 76 F.3d 651, 655 (5th Cir. 1996). The Supreme Court has not addressed the issue,

- How long did you work for the company?

Long-term employees generally never lose on the issue of their job performance. On the other hand, short-term employees have more problems with performance issues (unless there was a recent change in management) and can also have problems with the fact that they may have already been older when they were hired.

- What was your job progression at the company?
- What was your position at the time of your discharge, discipline, etc.?
- Who disciplined, discharged, you?
- What was the true reason you believe you were disciplined, discharged, not promoted, etc.?

## Practice Tip

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If the client cannot tell you why he or she suffered an adverse employment decision, how can you be expected to prove anything to anyone on the client's behalf? Show such clients the door. Do not prime them on the elements of proof needed to prove an age discrimination claim. This may cause them to mislead the next lawyer into taking their case.

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- When did the alleged discriminatory act(s) occur?
- When did you first know of the adverse decision?
- How old were you when the act(s) occurred?

Over 40? If not, the claim is not covered by ADEA. However, relevant state law may cover it. For example, The New Jersey Law Against Discrimination, N.J.S.A 10:5-1 et seq., covers age claims for anyone over the age of 18.

- Was there an employee handbook?
  - If so, do you have copies of all handbooks that were in use during employment?
- Was there a grievance procedure and was it used in your case? Was there a policy of progressive discipline? If so, was it followed?
- What was the reason or reasons for the adverse decision according to the employer?
- Was there any retaliation for asserting a claim or claiming discrimination?
- Did another employee replace you?
- If so, what is the name of the employee who replaced you?

- How old was that employee at the time of replacement?

## Practice Tip

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Determine whether there is large age disparity between the client and the replacement individual under *O'Connor v. Consolidated Coin Operators*, 513 U.S. 308 (1996). The *O'Connor* court unanimously rejected the Fourth Circuit's per se rule that an ADEA plaintiff proceeding under the *McDonnell Douglas* pretext method of proof must prove that he or she was replaced by someone outside the protected group (i.e., under age 40). In *O'Connor's* case, the plaintiff was age 56 and the replacement's age was 40. The opinion notes that the replacement should be "substantially younger." *Id.* at 313.

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The *O'Connor* age gap was 16 years. Appellate courts have begun to interpret *O'Connor* by attempting to quantify the age gap, sometimes with inconsistent results:

- 5 year disparity not enough: *Schlitz v. Burlington Northern Railroad*, 115 F.3d 1407, 1413 (8th Cir. 1997). *Accord Bennington v. Caterpillar Inc.*, 275 F.3d 654, 659 (7th Cir. 2001), affirming summary judgment granted to ADEA employer because a five-year difference in ages between plaintiff and his comparator, by itself, "is not substantial enough to set forth a *prima facie* age discrimination case."
- Replacement can be older: *Greene v. Safeway Stores, Inc.*, 98 F.3d 554, 559 (10th Cir. 1996)
- Do you think your employer was planning to get rid of you? Why?

- Did your employer take you out of a position where you had many people reporting to you, and place you in a position where few, if any, people reported to you?
- Did your employer make comments that suggest age-based stereotyping?

Because of the Supreme Court's recent decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 82 FEP Cases 1748 (2000), age based comments by managers, and even those who are not plaintiff's direct managers, are highly relevant in demonstrating "pretext."

The Supreme Court responded by deciding the case of *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097 (2000). What is important to remember about the *Reeves* case is that it reiterates that pretext plus is not the standard, and it effectively killed the "stray remarks" doctrine. Every plaintiffs' lawyer should refer to *Reeves* in response to motions for summary judgment. The *Reeves* case makes all remarks relevant, regardless of who made them, and regardless of when the remarks were made. The Court returned the law to the state it was in before the pretext plus theory gathered momentum in the late 1980's, early 1990's. See, e.g., *Wilhelm v. Blue Bell, Inc.*, 773 F.2d 1429, 1433-35 (4<sup>th</sup> Cir. 1985) (discussing the probative value of remarks made in an age discrimination case). See Chapter 7, *infra*.

Examples of the kinds of remarks that were found to be relevant in the *Wilhelm* case which under *Reeves* are once again relevant in proving an age discrimination claim include:

- "Eventually Blue Bell is going to have \$15,000-a-year college boys for salesmen.... Blue Bell cannot stand these five and six

percent commission rates; so, in time they will have all young college guys on a salary, being paid expenses and going around taking inventory in Blue Bell accounts."

- "Older people tend to become complacent whereas younger people generally have more drive and ambition."
- "Younger salesmen do a much better job than older salesmen."
- "My God, [are] you old guys still around? I thought we got rid of you at the last sales meeting."

Other examples include:

- "You can't teach an old dog new tricks"
- "We need new blood in this department"
- "Grandpa"
- References to "invigorating" the department
- References to any of the younger replacements as "go-getters" or anything that implies that the younger people are "full of energy" while the older people are "tired"
- Any questions concerning when the employee is going to retire
- Any assumptions that the older employee can't learn new processes or technology, such as computers
- If so, who made the comments?
- When were they made?
- Who witnessed them?
- Have you been treated differently than the younger employees in similar situations? For example, have you been shut out of staff meetings or have younger employees been allowed to

go to training or seminars while you have been denied permission to do so?

- Has anyone else experienced similar acts of age discrimination?
  - If so, have they filed charges or a lawsuit?
 

Do they have attorneys? Might they be interested in a multiple plaintiff action? A class action?
- Do you have any witnesses who will speak or testify, on the record?
 

The case may be the greatest case in the world but if there are not any corroborating witnesses, it will be difficult to prove. Look for at least two good witnesses besides the Plaintiff. Lacking corroborating witnesses, you may need to attack the subjective criteria used and show how it was manipulated. Statistical evidence can also be helpful.
- Do you have any documents relevant to the claim? If so, how were the documents obtained?

There may be an after-acquired evidence problem if the documents were surreptitiously obtained or if retention of the documents may give the defense grounds for limiting or cutting off damages under *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995).

- Are you aware of any company policies concerning the retention or obtaining of documents? Under the after-acquired evidence rule, the company must affirmatively show that it would have terminated the employee if it had known how the employee obtained the documents.

- How personable or articulate are the people who made the decision to terminate, not promote, you, etc?

## Practice Tip

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During the interview, also determine whether your potential client is personable, articulate, and reasonable. Generally the jury will like the person who is more able to articulate their position. While this is important, judge whether you will be able to work with the client and whether you like the client yourself. Do not, under any circumstances, take a client you hate or suspect is going to be unreasonable, simply because the facts sound good or because you need the money. Almost always, this mistake (which is made by every attorney at one time or another) will come back to haunt you. You may end up spending far too much time on the case. The client may refuse to settle. And you will become miserable. It is almost never worth taking a case under these circumstances and, no, you are not the one attorney that will be able to handle the situation where others have failed.

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## Damages

- What was your salary at termination?
- When was your last raise? How much was it?
- Did you take any actions in reliance on any representations made by the employer?
- Are you eligible for a defined benefit plan, defined contribution plan, 401(k) plan, or any other fringe benefits?
- Are you still employed by the company?

If “yes,” damages are problematic because the ADEA does not permit compensatory or punitive damages like Title VII does (up to \$300,000). It only allows for economic damages, liquidated damages and attorney fees. If there are no economic damages it is problematic because you then can only recover attorney fees. Liquidated damages allow the court to double the damages if the employer acted “willfully.” Again this is irrelevant if the economic damages are zero.

### Practice Tip

Many states do not have this restriction on damages. It is therefore very important to check the state statutes to see if it is more advantageous to file your claim in state court.

*Note:* a current employee may have settlement leverage that a terminated employee does not. The company may be willing to pay to get the employee out of the company.

- Have you suffered any emotional distress? If so, who can testify to the before and after?

The “before and after” refers to someone, preferably a friend with close contact or an articulate relative, who can testify to how your behavior changed after the discrimination occurred. However, under the ADEA there are no emotional damages. So this type of testimony is relatively unimportant. The one exception under the ADEA would be to get in evidence of psychological distress if you have a mitigation problem. It is very important, if emotional distress is a big issue in your case, to find a state

claim that will allow for such damages. Many states treat age discrimination as they would treat any other Title VII claim and will allow for emotional distress damages. For example, in New Jersey, the full panoply of damages are allowable including unlimited punitive damages.

- Is the client’s employment relationship covered by *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 114 L. Ed. 2d 26, 111 S. Ct. 1647 (1991)?

*Gilmer* states that if someone has signed an agreement to arbitrate employment disputes, even if no dispute exists at the time of the signing of the agreement, that person loses his or her right to a jury trial and must arbitrate. It is distinguished from *Alexander v. Gardner-Denver*, 415 U.S. 36, 39 L. Ed. 2d 147, 94 S. Ct. 1011 (1974) which states that an employee does not have to arbitrate discrimination claims if the agreement to arbitrate was part of a collective bargaining agreement.

- Are there any arbitration clauses or provisions:
  - In a company handbook?
  - In a union collective bargaining agreement?
  - By operation of law (such as in the Securities industry under a U-4)?

If so, the claim may be compelled into arbitration and if so, its value may be compromised.

- Are there any arbitration clauses or provisions in an employment agreement you signed?
- Have you attempted to mitigate your damages?