Bombshell: what a movie can tell us about case selection in employment cases

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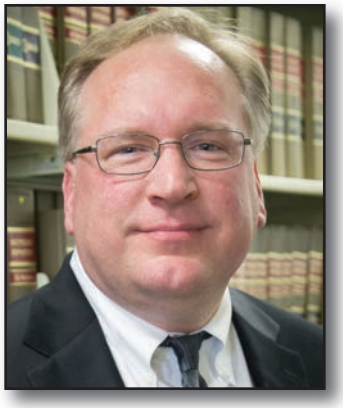

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During the COVID-19 crisis, many of us have been streaming more movies at home. Recently, I watched the 2019 movie *Bombshell*, which depicts Roger Ailes' dethroning as CEO of Fox News. In 2016, former Fox News anchor Gretchen Carlson sued Ailes for sexual harassment, claiming she had been terminated from employment because she rejected Ailes' sexual advances. Ailes vigorously denied the charges.

Ultimately, other women, including Fox News star Megyn Kelly, came forward with their own harassment stories. Ailes resigned from Fox News, and Carlson settled her case.

As an attorney representing employees, I found *Bombshell* to be not only entertaining, but also a look into some of the factors that employment lawyers consider when selecting cases. Employment cases are difficult to prove, as defendants often withhold information, and many employees' cases are dismissed at the summary judgment stage.

Case selection criteria are vital for attorneys representing employees. Here are eight common selection factors that *Bombshell* highlights:

1. The potential client has solid evidence.

In the best employment cases, plaintiffs have sufficient evidence that the employer's stated nondiscriminatory reason for an adverse employment action is false or "pretextual," such that a jury may infer that the employer's real reason is an illegal one. Evidence of pretext is sufficient if reasonable people might reach differing conclusions. *See Burton v. Freescale Semiconductor, Inc.,* 798 F.3d 222, 233 (5th Cir. 2015).

Better yet is an employee who has direct evidence of discrimination that proves the discrimination without the need for an inference. *See West v. Nabors Drilling USA, Inc.*, 330 F.3d 379, 384 n. 3 (5th Cir.2003) ("Direct evidence is evidence that, if believed, proves the fact of discriminatory animus without inference or presumption."). Without direct evidence or a showing of pretext based on circumstantial evidence, an employee will likely lose at the summary judgment stage.

In *Bombshell*, Gretchen Carlson's lawyers suggest that, rather than quit, she stay at Fox News to gather more evidence. After Roger Ailes issues his stream of denials, Carlson's lawyers inform Ailes' counsel that Carlson is in possession of a year's worth of audio recordings of Ailes that purportedly document the harassment.

Emails, text messages, and audio recordings are some of the types of concrete evidence that a plaintiff employment attorney hopes to see when evaluating a potential case.

2. The potential client has a good performance history.

Aside from audio recordings, which, depending on content, may constitute direct evidence of discrimination, Carlson also had a history of good performance followed by a demotion, which consisted of being moved to an afternoon "dead zone" time slot. *See, e.g., Ridout v. JBS USA, LLC*, 716 F.3d 1079, 1084 (8th Cir. 2013) (strong evidence of positive performance may provide sufficient evidence of pretext if reason for adverse action is performance).

Ailes knew that Carlson's ratings would suffer in her new time slot, and he was setting her up to fail. *See Humphries v. CBOCS W.*, 474 F.3d 387, 407 (7th Cir. 2007) (evidence of a setup can support inference that claimed terminable offense "was a fabrication to justify firing.")

3. The company conducted a flawed investigation.

Instead of interviewing women company-wide to find out whether Ailes was a serial sexual harasser, Fox News initially limited the investigation to Carlson and a small number of women on her team. In other words, the employer intentionally limited the investigation to avoid finding other victims of sexual harassment.

A flawed or sham investigation is evidence of pretext. *See, e.g., Trujillo v. PacifiCorp*, 524 F.3d 1149, 1160 (10th Cir. 2008) (employer failed to interview key witnesses).

4. There is a history of stereotypical comments in the workplace.

Ailes and other high-level Fox executives had a history of stereotypical comments or demands. According to *Bombshell*, this conduct included insisting that female anchors show their legs on camera and wear revealing clothing.

Ailes allegedly required women to show their legs during the interview process. When female candidates balked, Ailes would pressure them, stating, "It's a visual medium!" S*ee, e.g., Laxton v. Gap, Inc*. 333 F.3d 572, 583 (5th Cir. 2003) (an oral statement exhibiting discriminatory animus may be used to demonstrate pretext); *Pye v. Nu Aire, Inc.*, 641 F.3d 1011, 1019 (8th Cir. 2011) (pretext can be shown through biased comments by a decision-maker).

5. There are other victims.

Gretchen Carlson's lawyers were able to point to the existence of other victims as evidence of pretext. *See, e.g., Goldsmith v. Bagby Elevator Co.*, 513 F.3d 1261, 1285-86 (11th Cir. 2008) (discrimination against other employees may be used to show intent to discriminate). Nevertheless, Carlson had to wait for current Fox employees to come forward.

Often prospective clients are certain that a coworker will vouch for their story, but if that coworker is still employed at the company, they are often reluctant to risk losing their livelihood. Former employees are sometimes a more reliable source of evidence, and in Carlson's case, the first wave of additional victims were women who were not current Fox News employees but who had experienced Ailes' harassment.

6. A supervisor is the harasser.

If your potential client has a sexual harassment claim like Carlson, the harasser's position in the company is important. Employers may be strictly liable for harassment and adverse employment actions committed by their managers and supervisory-level employees, such as Ailes, unless an affirmative defense applies. If the harasser is a non-supervisory coworker, the employee must proceed under a negligence theory.

In general, in a good case, the employee will follow company procedure in reporting the harassment. If the employee doesn't do so, then the employer may argue that it had no opportunity to take corrective action and should not be held liable. *See Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2439 (2013).

7. The prospective client understands and accepts what she is up against.

In *Bombshell*, Carlson's attorneys explain the negative aspects of litigation, including the likelihood that Fox News would attack her personally. Carlson replies that she wants to make sure Ailes can no longer sexually harass other women.

The ideal client in an employment case is someone who understands the downsides of litigating but who wants to be a plaintiff to protect others from experiencing the same thing.

8. There is no mandatory arbitration agreement.

Always ask the potential client whether she signed a mandatory arbitration agreement. While not a case killer, these controversial agreements have become commonplace and restrict plaintiffs from accessing their right to a jury trial.

There is an inherent repeat-customer bias in employment arbitration, and defense firms tend to be an arbitration firm's repeat customers. Also, the factor that drives full compensation settlements in employment cases is a trial date with a jury. Frequently, employees are not sure whether they signed a mandatory arbitration agreement because such agreements are usually part of the onboarding process, which means the agreement is buried in the paperwork that an employee is required to sign when beginning a job.

If there is a mandatory arbitration agreement, get creative and look for a way out of it. Gretchen Carlson had a mandatory arbitration agreement with Fox News, so her lawyers sued Roger Ailes directly in a New Jersey state court to avoid arbitration. The last thing either Fox or Ailes wanted was a public airing of Carlson's evidence before a jury.

It's been said that movies are mirrors of society. As you look for the selection criteria I outline in this article, remember that *Bombshell* mirrors not only the Me Too movement against sexual harassment, but it also depicts plaintiff employment lawyers doing what they do best — advocating for justice in the workplace. Enjoy the show!