

WINTER 2026 CLE SERIES ON CIVIL RIGHTS: TACTICAL CONSIDERATIONS

Forum Selection, Discovery & Damages Strategy

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Today's Roadmap:

- I. Plaintiff's Evaluation of a Case
- II. Defendant's Evaluation of a Complaint
- III. All Things Discovery
- IV. Damages Considerations

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Plaintiff's Evaluation of a Case

What Makes a Case "Good" or "Bad"

Employment-at-Will Doctrine

- Employees may be terminated for any reason or no reason
- Limitation: the reason cannot be unlawful
- Distinction between fairness and legality

Common Misperceptions

- Direct evidence is rare
- Plaintiffs do not need to prove hatred or evil intent
- The legal question: was a statutory boundary crossed?

Transition

- Employment law regulates statutory obligations, not general morality
- Cases fall into predictable categories once understood

Key Principle

- Personal beliefs ≠ compliance
- Legal issue: failure to take prompt corrective action

Categories

- a. Unfair — But Usually Not Unlawful
- b. Cases That Tend to Have Traction
- c. Clean Disparate Treatment Cases

Unfair — But Not Always Unlawful

“But My Mom Thinks I’m Awesome”

- Subjective performance disputes
- Business judgment deference
- Summary judgment risk

“They Fired Me Because I Am a ___”

- Protected class status alone is insufficient
- No comments, comparators, timing, or protected activity

“Your Boss Is a Jerk”

- Personality conflicts / abrasive management styles
- Title VII is not a civility code

“I’m Being Harassed (Not Really)”

- Annoying or immature coworkers
- Must be tied to a protected characteristic
- Severe or pervasive requirement

Failure to Hire Cases

- No employment history with employer
- Limited damages exposure
- “Better candidate” defense
- Strong only with direct evidence or comparators

Cases That Are More Straightforward

“You Should Have Kept Your Mouth Shut” — Retaliation

- Close temporal proximity
- Escalation after protected complaint
- Motive often clearer than animus

“Ignorance Is Not Bliss” — ADA / FMLA

- Failure to engage in interactive process
- Counting protected leave
- Compliance-based analysis

“Pervs and Comedians” — Sexual Harassment

- Power imbalance
- Explicit or repeated conduct
- Employer obligation to act promptly

Clean Disparate Treatment Cases

- Discriminatory comments by decision-makers
- Strong comparator evidence
- Same supervisor / same conduct / different outcome

How to Decide Where to File

Administrative Exhaustion

- Most cases include RICHR/EEOC exhaustion requirements
- Section 1981, Rehab Act, RI Whistleblower Act, RICRA — no exhaustion required
- Considerations: pressure, timing, information, claim strength

Clearcut Cases

- Might want to go straight to court

Filing with RICHR

- Investigation process helpful
- Position statement helpful
- Optional free mediation
- Probably cause determination helpful

Downside to Full Commission Hearing

- No jury
- No punitive damages

Federal Court

- Cases move quicker
- Judges more familiar with employment law
- Same judge beginning to end
- More rigorous MSJ practice — cuts both ways
- Structured scheduling orders

State Court

- Jury pool
- Broader discovery / less familiarity with standards
- Cases may take longer — trial calendar years
- Judges rotate — less consistency
- All state claims without supplemental jurisdiction issues
- Avoid Twombly/Iqbal (notice pleading)

Forum Selection — Additional Considerations

Retaliation

- RI Whistleblower Act: treble actual damages for retaliation
- No administrative exhaustion — straight to court
- Increased damages beyond Title VII/ADA/FEPA retaliation alone

Removal and Appeal

- Defendant may remove if federal claim and/or diversity
- Federal — First Circuit: well-developed employment law
- State — smaller body of case law, cuts both ways

Employer Size

- Small employer (4–14): no Title VII/ADA/ADEA, FEPA covers 4+
- RIWPA applies to all employers, covers independent contractors
- Collections problem: small employer, no individual liability, no insurance

Claims Against the State

- Federal court: may dismiss based on immunity
- ADA Title I: sovereign immunity bars money damages in federal court (11th Amendment)
- Section 504 Rehab Act: if agency receives federal funds, waives immunity
- Separate FEPA/CRPD claims in state court

Langley v. DOC (D.R.I. Aug. 6, 2024)

- FEPA dismissed — 11th Amendment bars FEPA against state in federal court
- Court: FEPA directs suit to superior court (§ 28-5-24.1)
- If suing state: FEPA must go to state court
- FEPA/RICRA/Whistleblower in state court, or parallel filings

Confidentiality

- Federal: PACER makes everything publicly searchable
- State: less online visibility

Defendant's Evaluation of a Complaint

Defendants' Evaluation of a Civil Rights Complaint

- Service
 - Waiver
- Who is being sued (individual vs. entity liability)
 - Supervisory liability limits
- Statute of limitations
- Affirmative defenses (including those applicable to State)
 - Failure to exhaust administrative remedies
 - Immunities
- Talk to your client re: admissions / denials / evidence
- Evaluate exposure early
 - State is self-insured (affects dynamics of case/settlement)
- Defendant's theme / theory

All Things Discovery

Discovery: Scope & ESI

What is discoverable (Fed. R. Civ. P. 26(b)(1)):

Any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues, the amount in controversy, relative access to information, the parties' resources, the importance of discovery in resolving the issues, and whether burden outweighs likely benefit.

Fed. R. Civ. P. 37(e) — Failure to Preserve ESI:

- Upon finding prejudice: order measures no greater than necessary to cure
- Upon finding intent to deprive, court may:
 - Presume lost information was unfavorable
 - Instruct jury it may or must presume unfavorable
 - Dismiss the action or enter default judgment

Seminal case on pitfalls of discovery: DR Distributors, LLC v. 21 Century Smoking, Inc., 513 F. Supp. 3d 839 (N.D. Ill. 2021)

Discovery: Cooperation

NAME OF THE DISCOVERY GAME IS COOPERATION!

Fed. R. Civ. P. 26(f)(1):

Parties must confer as soon as practicable — and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b).

LR Cv 26(a):

Within 14 days of answer/pleading.

Courts prefer cooperation over discovery motions.

Vital role of protective orders.

Defendants' Discovery Considerations

- Documentation of actions taken
- Witness evaluation
- Evidence / Spoliation concerns
- Third-Party Personnel Files
- Experts



<https://youtu.be/V3GbCByGltU?si=0k5v8oZWmsOLaFu0>

III.C. Plaintiff's Discovery — Comparators & Pretext

Liberal Discovery Standard

- Courts favor "broad access to employers' records" — *Wards Cove Packing co. v. Atoni*, 490 U.S. 642 (1989)
- "Unnecessary discovery limitations to be avoided" — *Chan v. NYU* (S.D.N.Y. 2004)

Comparator Evidence

- How employer treated similarly situated employees outside plaintiff's protected class
- Request personnel files, disciplinary records, promotion histories, performance reviews
- "Similarly situated" is a factual question for MSJ/trial — not discovery-stage gatekeeping
- Discovery standard: relevance and proportionality, not admissibility
- "Me too" evidence, other complaints, prior lawsuits, RICHHR charges — all discoverable

Evidence of Pretext

- Decision-making process: who, when, what info, what documented
- Drafts of termination letters, PIPs, performance reviews
- Timing changes, post-hoc justifications, shifting explanations
- Depose the actual decision-maker — not just HR
- Prior complaints against same supervisor (any protected class)
- Internal investigation files, HR logs, ethics hotline records
- Privilege vs. business record fights
- Written policies vs. actual application (gap = discrimination)
- Document metadata: when created vs. when supposedly drafted
- Workforce demographic data for promotion/hiring/pay cases
- Temporal Proximity
- Inconsistencies

Damages Considerations

Limitations on Damages

- Title VII limitations (statutory caps based on employer size)
- Duty for plaintiff to mitigate damages
- Emotional distress damages: evidentiary burdens
 - Garden variety emotional distress — defendant does not get medicals; limits what plaintiff can present.
- Expert use: when it helps, when it prices a case out

Plaintiff's Damages Considerations

Federal Caps

- Title VII & ADA: \$50K–\$300K combined comp/punitive based on employer size
- Back pay and front pay NOT subject to caps
- ADEA: NO compensatory or punitive damages at all
 - Only liquidated damages (2x back pay) for willful violations

Section 1981 (Race)

- No damages cap under federal law
- For race/ethnicity/ancestry discrimination cases: uncapped damages on both federal and state side

State Law — No Caps

- FEPA: Compensatory and punitive damages with no cap
 - Punitive requires malice, ill will, or reckless indifference
- RICRA: Compensatory and punitive, no cap
 - No administrative exhaustion required
 - Three-year SOL (vs. 300 days federal / 1 year FEPA)

Bottom Line

- State claim under FEPA or RICRA removes the federal damages ceiling entirely
- Assert state law claims alongside federal claims

Questions & Discussion

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