Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Q&A With Reed Smith's Sara Begley

Law360, New York (February 27, 2013, 2:56 PM ET) -- Sara Begley's practice at Reed Smith LLP includes counseling employers on the scope of employment issues and litigating cases involving race, age, disability, gender discrimination, sexual harassment, retaliation and individual and collective/class wage and hour litigation under the Fair Labor Standards Act and analogous state laws. Additionally, she represents employers in Sarbanes-Oxley Act and state law whistleblower claims, and a significant portion of her practice also involves trade secret and restrictive covenant litigation.

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

A: Among the most challenging cases I have handled, several were early in my career and were class action and multiplaintiff discrimination cases alleging hostile work environment based on the actions of co-workers. In these cases, I encountered serious, and frankly, shocking allegations of objectively offensive conduct, including racial epithets, nooses and racially charged pictures.

Such allegations of purported conduct go to the very heart of what anti-discrimination laws seek to eradicate in the workplace, and yet, employers are not — and should not — be held accountable for the often concealed misconduct of co-workers, where the employers have fully complied with the law and have taken all appropriate affirmative steps to prohibit the conduct. These cases are emotionally charged, and defending the employer typically requires working with witnesses who are not usually aligned with management, or in the case of union co-workers, witnesses who are often adverse to the employer.

To obtain summary judgment or efficient and favorable resolution in these cases, I had to gain the cooperation of such witnesses, and often their own counsel. This cooperation made it possible for me to build winning, legal defenses that — despite the egregious allegations — liability could not be imputed to the employers because the employers had fulfilled all of their obligations under the law and therefore should not have been held accountable for the misconduct of workers.

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

A: The regulatory framework for a few of the most heavily litigated employment laws (FLSA, Family and Medical Leave Act and Americans with Disabilities Act) is often conflicting and open to widely varying interpretation. The rules make up a complex web of interconnecting, sometimes contradictory, instructions that still require judgment calls to be made by employers that will later be examined by the courts.

Often, the litigation positions taken by regulatory agencies like the U.S. Department of Labor and the Equal Employment Opportunity Commission are inconsistent with the agency's own guidance and existing court decisions. Even the most diligent employers and human resources professionals cannot

keep up to date with new rules. Reform of these laws and regulations to provide clear guidance is as unlikely as similar reform of the tax code, so employers need to continue to be vigilant in auditing their pay, leave and accommodation policies, including with the assistance and guidance of outside counsel.

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

A: Since Burlington Northern & Santa Fe (BNSF) Railway Company v. White, 548 U.S. 53 (2006) was decided, retaliation claims have spiraled out of control. Even actions an employer takes to ensure retaliation does not occur are being interpreted as potentially "materially adverse" and permitted to go forward, beyond summary judgment, as the basis of a retaliation claim.

Employers often find themselves in a "damned if they do, damned if they don't" situation with respect to any interaction with employees once the employee has engaged in any protected activity. The broad availability of this claim has required a painstaking analysis by employers, and often consulting outside counsel, on an ongoing basis of anything and everything relating to a complaining employee — not just an analysis of what actions are being taken with respect to the employee but also a searching analysis of how the actions might possibly appear to an agency investigator, judge or jury.

This kind of artificial standard often paralyzes employers in a way that the law surely doesn't intend and often gives employees a "get out of jail free" card from discipline for misconduct or performance issues.

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

A: Thomas P. Murphy of Hunton & Williams' Mclean, Va., office, is one of the best labor and employment lawyers I've come across in my career. He treats his co-counsel and his adversaries alike with dignity and respect. He is smart, results-oriented, a phenomenal trial attorney and litigator, with integrity through and through. The combination of deft skill, his generosity of spirit and support of fellow lawyers is rare and greatly appreciated by those coming up in the profession. Tom has always taken the time to work with and mentor junior lawyers.

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

A: Early in my career, around my third or fourth year of practice, I was representing a city government official in an age discrimination case that we settled favorably for my client. As many settlement agreements do, this one included a confidentiality provision protecting the terms of the settlement from public disclosure. However, I had delegated to a more junior associate, the task of notifying the court that the case had settled. Instead, the associate mistakenly filed the confidential settlement agreement with the clerk of court after business hours.

As soon as she realized the error, she informed me, and I immediately informed the client, also letting him know that we would attempt to rectify this error as soon as the court opened the following morning. Unfortunately, the preeminent local legal publication picked up on the filing, and by morning press, the headlines ran with news of this — formerly — confidential settlement.

Fortunately, a senior judge in the district court took responsibility for making the agreement public, on the basis that a settlement involving a public official and taxpayer dollars should be public. My client was ecstatic as he had never wanted the confidentiality provision. The end result of this mistake was a net positive for me as my client was pleased as was the judge.

However, I learned an important lesson without actually incurring any detriment — that every delegated task, no matter how seemingly simple or minor, needs to be closely monitored and that mistakes need to be recognized and reported to the client, with a plan of action to rectify them, immediately upon learning of them.

The opinions expressed are those of the author and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.