DISCRIMINATION:
WAYS TO FIGHT BACK WHILE STILL EMPLOYED

By Joseph Posner
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As Robert Lewis points out in the June, 1997 AARP Bulletin, age discrimination is still with us and may even be increasing. So are other forms of discrimination. Can an employee who feels threatened fight back? Yes, but first, a reality check: neither an attorney nor anyone else can stop a company from firing someone. If a company wants to get rid of an individual, it will do so. Some people think that a lawyer's immediate intervention will save their jobs; most of the time these people are wrong. Usually an attorney cannot, for example, get a court order stopping someone's termination. Nor will a lawyer's letter to the company do much good; any such contact may only increase the pressure on the employee and give the company time both to build its defenses and to isolate information access to which the employee might have otherwise.

Nor can an attorney advise an employee whether to resign or to wait to be fired; that decision must be made by the employee in light of his/her employment prospects and other personal financial circumstances. No one can predict what effect a forced resignation (as opposed to a firing) might have on a future lawsuit.

But there are things that the employee can do to gather ammunition while still employed. Although the following suggestions will not apply in all instances, the reader may find them helpful.

Copy Everything in Sight (with some exceptions): This should include:

- All personnel practices.
- Procedures manuals which are applicable to termination.
- The individual's job description.
- The job description of anyone else concerned with the termination.
- All memos pertaining to the on-going trouble (such as poor evaluations, critical letters, and the like).
- Employee handbooks.
- Sales or other performance figures where applicable.
- Everything else which could be of possible relevance to the potential case.

WARNING:

Employees should be cautioned not to copy materials which might be protected in some way, such as classified defense documents, medical records, other employees' personnel records and other items which are obviously confidential. Nor should an employee tape conversations surreptitiously; in some states this could constitute a violation of both civil and criminal privacy laws.

Keep a diary. The diary is a document that must be kept at home, to prevent its falling into the hands of the employer in the event that the employee's desk is rifled. Each page should be labeled at the top "For legal consultation and analysis purposes". The diary should be chronological, going back to the start of the

trouble, to the present, by date, detailing events, names, documents, and so forth. Once brought up to date, the diary should continue to be kept, with detailed entries each day something significant takes place. This is much easier for the employee to do as it happens, while events are still on-going, than later. Make special notes of any remarks showing bias i.e., "This place is getting too bald and grey" or "Young blood is what we need" or "Send all those Mexicans back where they came from." This diary can be a tremendous asset for an attorney in evaluating the case.

Inspect the personnel file. Many states have laws allowing workers to see their personnel files even after termination. For example, California Labor Code 1198.5 specifies that an employee is entitled to inspect such personnel files which are used or have been used to determine that employee's qualifications for employment, promotion, additional compensation, termination, or other disciplinary action at reasonable times and intervals. The company is not required to let the employee make photocopies of the file, but the employee should try to do so. In any event, the employee should make a complete list of each document in the file as of the date of inspection, a description of the document (i.e., "memo: Jones to Smith, 2/4/92, re: Absences of Brown:). He should also make complete notes on (a) anything which is detrimental, (b) anything which is complimentary, (c) anything which is not there but should be, and (d) anything which is there which shouldn't be.

One colleague advises numbering the pages of the personnel file sequentially in indelible ink, with the numbers being placed

through the words of some pre-existing text on the page, as a deterrent to an employer's removing items from the file later. If the employer tries to white out the number, it most likely will white out part of the pre-existing text as well, and so will disclose whether the page has been altered.

If the employee disagrees with anything in the personnel file, send a memo to the file. Often, critical evaluations of the employee are in the employee's file, but no one has ever bothered to tell the employee. Upon discovering these negative evaluations, the employee should send her own memo countering the false charges to the personnel file, with a copy to the supervisor and to the personnel director. If possible try to get someone in the personnel department to sign a receipt for such a copy.

Memo any refusals to carry out orders or any unjust criticisms back to the person from whom the orders or criticisms came. One strategy used by employers to justify termination is to give an employee contradictory orders or orders which are impossible to carry out. The employee should not rely on a verbal refusal to the supervisor. Instead, she should send a memo in writing to the supervisor, stating what the orders are and why they cannot or should not carried out. (Example -- "On February 2, 1997, you asked me to put pressure on our dealers in order to get them to agree to sell our products at our recommended prices. I think that this order carries dangers of price fixing in it, and I cannot comply with the order because to do so might put both me and the company in danger of violating the law.") The same applies to

any unjust criticisms. Obviously, insofar as possible the employee should try to be exemplary even though she knows she is in danger so as not to give the employer any more ammunition.

Gather names, home addresses, and telephone numbers of potential witnesses. Once out of the company, the employee will find it much more difficult to obtain this information than while she is still there. Witnesses might include those who are direct observers of what happened to the employee, those who have been the victim of similar misconduct and others who have been fired in the recent past. And don't forget - someone who is still there today and thus is afraid to testify may not be there in six months.

Prepare a resume and start it circulating. The employee should do this now, while he or she is still employed. The employee should keep a careful record of every single contact, whether by a resume sent to a blind box number, an application made to a company, a telephone call made to a headhunter, an inquiry made to a social friend at a party, or whatever. Such a record can be kept in a simple notebook by date, company and/or individual contacted, and, if available, title of job opening.

Challenge the reasons for the termination. If the termination takes place, the employee should challenge the reasons being given to him. Often employers will give the employee a false or non-existing reason for termination. The employee should ask for justification. The employee should ask who approved the termination, who agreed, or who recommended it. The employee should express his feeling on what the real reason was. That is,

the employee should say to the employer "I do not think that that is the real reason; I think the real reason you are terminating me is because you want to get rid of the older people." The employee should watch carefully the reactions of the company officials. If the employee has not seen the personnel file up to that time, he should ask to see it immediately, before going any further.

Under no circumstances should the employee threaten litigation or indicate that he or she will consult an attorney. This is the dropping of the proverbial red flag in front of the bull and will most likely result in a complete shutdown on any further information.

Do not sign anything containing the words of a release. Employers have been known to print or type general releases on the back of final checks. In California, this is illegal under Labor Code 206.5. If such a final check is given, the employee should not cash it, but should make a photocopy of same and take the original check to the state labor enforcement agency, which will advise on cashing the check.

Nowadays, sophisticated employers often try to have an employee sign a severance or separation agreement containing the words of a general release. As stated in the opening paragraphs of this article, it is almost impossible for an attorney to make a quick decision on whether the proposed agreement is fair to the employee. Proper analysis of a potential discrimination case takes time and may not be able to be done in the short time limit given by most employers to sign such agreements. The employee must be

most careful to see that he does not waive any future right of action against the employer

If the employee is forced to resign, she must make sure that she makes a record of her termination being involuntary. In some cases, the employer does not fire the employee outright, but makes it so difficult for the employee that finally the employee cannot take it any longer and is forced to resign to keep mental sanity. In this event, the employee must make it absolutely clear that the "resignation" is not voluntary. She can do this by sending a short written memo to the company President, with copies to the Personnel Director, the personnel file and anyone else who might be appropriate, essentially as follows:

"I am resigning my position from the XYZ Corporation effective June 11, 1997. I am doing this because Brown and Smith have harassed me for the past two years. I have complained, but nothing has been done. I have tried to do my job as best as I could but I cannot take it any longer."

The exact language, of course, will have to be tailored to the individual circumstances.

WARNING:

The courts in many states have made it much tougher for someone who resigns and then sues. And, the employee must make this decision on his own; only he knows his financial position, prospects for reemployment, possible effects on the family and so forth. A lawyer has neither the power nor sufficient information to make that decision, and lawyers should avoid doing so.

Apply for unemployment insurance benefits immediately. The employee should not wait on this but should go to Unemployment as soon as possible after the firing. The employee should give Unemployment what the person thinks is the true reason for the firing, as opposed to that reason which the employer gives. In many states, Unemployment will contact the employer in order to verify, and sometimes there are very interesting employer replies. If the employee does not get his benefits, i.e., if he is denied his benefits for any reason, he should file an immediate appeal, in person.

Do not go on medical leave and/or file a workers compensation claim. In some instances, employees believe that if they go on a medical or disability leave they enhance their case. There is a common misconception among employees that an individual cannot be fired if he or she is on disability. In many instances, this belief is simply not true. An employee who goes on leave or disability cannot expect an employer to hold a job for him or her indefinitely. Although some companies have a policy of keeping jobs open for a given period of time to those on leave, and under some circumstances may be forced to do so by state or federal family leave laws, this step should be avoided. At some point, the employer is going to have to fill the position and then it becomes a highly disputed matter on whether the employee was actually fired or whether he or she resigned or just what did happen. Basically, the employee should continue on the job as long as he or she is able to take the pressure, while considering the other steps

mentioned in this article.

Nor should the employee file a workers compensation claim. The interplay between workers compensation claims and discrimination cases is extremely complex and has not been defined fully by the courts. Suffice it to say that an employee who files a workers compensation claim either pre-firing or even post-firing before an attorney has a chance to analyze a potential discrimination claim stands a chance of confusing the issues in the discrimination claim, to say the very least.

Do not mention that an attorney may be consulted and do not make any threats. The employee should tell no one he may consult an attorney. He should never make any threats to his employer, nor to his coworkers. He should attempt to keep his cool under all circumstances. As difficult as this may be, keeping a lid on can be vitally important later at the time of a lawsuit.

Think carefully before complaining to a state or federal anti-discrimination agency. While in theory the employee has the right to do so while still employed, an agency complaint often increases the pressure from the company and accelerates the firing. Often it is better to wait until the employee has left, voluntary or otherwise, and has consulted an attorney. Agency rules are often complex and the quality of staff varies widely. There may be significant differences between federal and state law. An experienced attorney can advise here.

Caveat

The above suggestions are only that. Not all of the

suggestions will be applicable to all situations and it is up to the employee to decide which of these suggestions should be used. Obviously, these suggestions do not cover every possible scenario; rather, they are typical and taken from experience with cases generally and are provided only as a guideline. Used wisely, though, these suggestions may give the employee ammunition to fight back.