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# Corporations Seek Costs, Fees, Sanctions for Frivolous Lawsuits

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Employment lawyers frequently hear the frustrations of their corporate clients that plaintiffs suing the corporation have "nothing to lose." This article addresses how to change that.

## Seeking an Award of Costs

A prevailing corporate defendant can obtain reimbursement for litigation "costs." Under 28 U.S.C. § 1920, recoverable costs include fees for filing and service of process, court reporters' fees, copying fees, expert witness fees, deposition fees, and certain docket fees.

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At least some courts have held that the award of costs is mandatory; that is, the relative economic positions of the parties are irrelevant (*see Smith v. Southeastern Pa. Transp. Auth.*, 47 F.3d 97 (3d Cir. 1995)). Recoverable "costs," however, usually pale in comparison to incurred attorneys' fees.

## Seeking an Award of Fees

In the context of discrimination and related statutes, the leading case addressing a fee award to prevailing defendants is *Christiansburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412 (1978). Therein, the Supreme Court held that "a district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith."

The Supreme Court in *Hughes v. Rowe*, 449 U.S. 5, 14 (1980) (per curiam) reiterated this standard for civil rights actions. Although it reversed the lower court's award of attorneys' fees, it confirmed that such an award is appropriate if the plaintiff's action is "meritless in the sense that it is groundless or without foundation."

As most corporate counsel are aware, the Employee Retirement Income Security Act, which governs employee benefits litigation, has been a fertile ground for litigation.

ERISA also has a fee-shifting provision, 29 U.S.C. § 1132(g)(1), which is often interpreted as a "prevailing plaintiff" provision. The five-part test, which is set forth in *Hummell v. S.E. Rykoff & Co.*, 624 F.2d 446 (9th Cir. 1980), is much more employer-friendly than the standards under federal discrimination law. The court will consider:

- the degree of the plaintiff's culpability or bad faith;
- the ability of the plaintiff to satisfy an award of attorney's fees;
- whether an award of attorney's fees against the opposing parties would deter other persons acting under similar circumstances;
- whether the plaintiff had sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA itself; and
- the relative merits of the parties' positions.

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The five-part test was followed in *Cline v. Industrial Maintenance Engineering & Contracting Co.*, 200 F.3d 1223 (9th Cir. 2000), which denied the company's requests for attorneys' fees, and in *Ursic v. Bethlehem Mines*, 719 F.2d 670 (3d Cir. 1983), which allowed the plaintiffs' requests for attorneys' fees from the corporation.

## **Seeking Sanctions**

Another means to attempt to level the playing field is by seeking sanctions.

Federal Rule of Civil Procedure 11 and many parallel state rules require an attorney or a pro se litigant to certify to the best of that person's knowledge, information, and belief, formed after a reasonable inquiry, that: (1) a representation made to the court is not made for an improper purpose; (2) a legal contention is supported by existing law or a nonfrivolous argument for the extension, modification, or reversal of existing law, or the establishment of new law; and (3) all factual contentions (allegations and denials) have evidentiary support or are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

Under Rule 11, a court may award a variety of sanctions that are "sufficient to deter repetition" of conduct violative of the rule's proscriptions. Although a reimbursement of some or all fees is theoretically available as a Rule 11 penalty, such an award is not necessarily favored. Rather, the court may require the penalty to be paid to the court or impose non-monetary penalties. For example, in *Bergeron v. Northwest Publications Inc.*, 165 F.R.D. 518 (D. Minn. 1996), the court ordered plaintiff's counsel to take continuing legal education courses.

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Although rarely invoked, courts generally have inherent authority to issue sanctions. The U.S. Court of Appeals for the Second Circuit, in *White v. Raymark Industries Inc.*, 783 F.2d 1175 (4th Cir. 1986), held that "[t]here is no distinction between attorney and litigant abuses of the judicial process when applying the inherent power of the federal courts to penalize those responsible for the wrongful conduct. Indeed, the Supreme Court has cited the judicial inherent power to sanction litigants as authority for penalizing an attorney."

The following other mechanisms are also available for imposing costs or attorneys' fees on plaintiffs:

- 28 U.S.C. § 1927 provides that "[a]ny attorney or other person admitted to conduct cases ... who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."
- Federal Rule of Civil Procedure 37 provides that a party that incurs fees in connection with the filing of a successful motion to compel discovery is entitled to its fees and costs associated with so moving, if the refusal to provide the discovery was not "substantially justified." Most state rules of civil procedure have similar provisions.
- Under Federal Rule of Appellate Procedure 38, the federal appellate courts may "award just damages and single or double costs to the appellee" if the court determines an appeal to be frivolous.

## Practice Pointers

Courts generally are reluctant to allow defendants to seek awards of costs and attorneys' fees or to punish plaintiffs with sanctions. Nonetheless, a review of decisions reveals some practical steps to increase a corporate defendant's likelihood of obtaining costs, attorneys' fees, or sanctions:

**1. Put your adversary on written notice.** Place your adversary on notice of your intent to seek costs, attorneys' fees, or sanctions. The notice should explain the facts and cite the legal authority as to why a claim cannot prevail. For instance, in *Fernandez v. Galen Hospital Illinois Inc.*, N.D. Ill., No. 96C2578, 10/28/97, the court awarded fees to the defendant, emphasizing two letters sent by defense counsel to the plaintiff's attorney that cited legal authority demonstrating the frivolous nature of the plaintiff's suit. Also, in *Flaherty v. GAS Research Institute*, 31 F.3d 451 (7th Cir. 1994), the court sanctioned the plaintiff's counsel in an age discrimination lawsuit where defense counsel informed plaintiff's counsel of controlling authority clearly showing that the plaintiff's claim was without merit.

A classic example of the value of providing notice early and often is found in the recent decision of *Kirby v. General Electric Co.*, W.D.N.C., No. 5:98CV70-V, 3/21/00. There, a group of 53 named plaintiffs sued General Electric Co. under ERISA Section 510, 29 U.S.C. § 1140, alleging interference with the attainment of employee benefits. GE, believing the case to be patently frivolous, moved for summary judgment and, separately, sanctions. After granting summary judgment, a federal magistrate judge recommended an award of fees to GE in the amount of approximately \$70,000, with the plaintiffs' attorney to pay half.

The magistrate judge determined that the plaintiffs' and their attorney's pursuit of this action violated Rule 11, Section 1927 and, moreover, that sanctions also were authorized pursuant to the court's inherent authority to manage the judicial process. In making this recommendation, the magistrate judge emphasized the warning letters sent by GE's counsel.

**2. Be patient.** If possible, give the opposing party multiple chances to withdraw the action. Supplement your later notices with additional facts developed during discovery.

**3. Consider sanctions throughout the pretrial process.** On occasion, the availability of sanctions may not be readily apparent until after some discovery. Therefore, question witnesses in such a manner as to establish that sanctions are warranted. This is especially true when deposing the plaintiff regarding the factual underpinnings or lack thereof of his or her claim. In *Fernandez*, the court sanctioned the plaintiff's counsel when the defense counsel learned of factual deficiencies in the plaintiff's age discrimination lawsuit at her deposition.

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**Place your adversary on notice of your intent to seek fees.**

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**4. Follow the required motion procedures.** Litigation counsel must follow all required procedures. For example, Rule 11 requires a party seeking sanctions to serve its motion on the opposing party at least 21 days before filing it with the court. If the offending paper is withdrawn prior to the close of that 21 days, no fees will be granted. Other jurisdictions have different "notice and demand" prerequisites.

**5. Be reasonable in your request for relief.** Be careful about asking for too much. Courts generally are not inclined to go overboard. For example, in *Kirby*, the court recognized that it must consider the ability of a party to pay fees or other sanctions. The court recognized, however, that because there were 53 named plaintiffs, if the award were split among all plaintiffs, the amount of the award would not be devastating. In the more typical one or two plaintiff case, consider shaving down your request for fees and costs.