Frivolous and Bad Faith Claims: Defense Strategies in Employment Litigation

A Lexis Practice Advisor® Practice Note by
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This practice note provides guidance on defending frivolous and bad faith claims in employment actions. While this practice note generally covers federal employment law claims, many of the strategies discussed below also apply to state employment law claims. When handling employment law claims in state court be sure to check the applicable state laws and rules.

This practice note specifically addresses the following key issues concerning frivolous and bad faith claims in employment litigation:

- Determining If a Claim Is Frivolous or in Bad Faith
- Motion Practice against Frivolous Lawsuits
- Additional Strategies Available against Serial Frivolous Filers
- Alternative Dispute Resolution
- Settlement
- Attorney's Fees and Costs
- Dealing with Frivolous Appeals

Be mindful that frivolous and bad faith claims present particular challenges. On the one hand, if an employee lawsuit becomes public, there is a risk of reputational harm and damage even where the allegations are clearly unfounded. On the other hand, employers that wish to quickly settle employee complaints regardless of the lack of merit of the underlying allegations to avoid litigation can unwittingly be creating an incentive for other employees to file similar suits. Even claims that are on their face patently frivolous and completely lacking in evidentiary support will incur legal fees to defend. Finally, an award of sanctions and damages could be a Pyrrhic victory if a bad-faith plaintiff does not have the resources to pay.

For more guidance on bad faith and frivolous claims, see Rule 11 Sanctions Fundamentals (Federal) and Motion for Rule 11 Sanctions: Making the Motion and Appealing an Adverse Ruling (Federal). Also see 2 Moore's Federal Practice - Civil § 11.01 et seq., Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions (Fed. R. Civ. P. 11 and non-Rule 11 Sanctions).

DETERMINING IF A CLAIM IS FRIVOLOUS OR IN BAD FAITH

As soon as an employer becomes aware of an employee complaint, it should begin an investigation into the facts, including by conducting interviews and reviewing pertinent documents and communications. This initial inquiry should extend to identifying any facts that could support characterization of the claim as frivolous or in bad faith.

Be aware that a likelihood that the employee's claims will ultimately fail on the merits is, in itself, not enough to make the claim frivolous or in bad faith. "A complaint . . . is frivolous where it lacks and arguable basis either in law or fact." Neitze v. Williams, 490 U.S. 319, 325 (1989). Put another way, an action is frivolous when either "(1) the factual contentions are clearly baseless, such as when allegations are the product of delusion or fantasy; or (2) the claim is based on an indisputably meritless legal theory." Livingston v. Adirondack Beverage Co., 141 F.3d 434, 437 (2d Cir. 1998) (quoting Neitze, 491 U.S. at 327). Similarly, a bad faith claim is one filed for an "improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." Morley v. Ciba-Geigy Corp., 66 F.3d 21, 24 (2d Cir. 1995).

Courts have concluded that claims are frivolous or in bad faith in several situations:

- **Where the plaintiff filed a claim based on false allegations.** See Murphy v. Board of Educ. of Rochester City School Dist., 420 F. Supp. 2d 131, 135 (W.D.N.Y. 2006) (awarding attorney's fees to defendant and finding that the "plaintiff brought and pursued this litigation in bad faith, for the improper purpose of attacking the District and school administrators about matters that had nothing to do with the original basis for this lawsuit, i.e., plaintiff's transfer from one school to another without loss of pay or benefits").
- **Where plaintiff failed to allege facts sufficient to support their claim.** See Seils v. Rochester City School District, 192 F. Supp. 2d 100, 105 (W.D.N.Y. 2002) ("This is not the first time that I have admonished plaintiffs' counsel in this case for her failure to specify the relevance of materials on which she has sought to rely. . . . While, as a general proposition, it is important to submit the necessary evidence, in this case, much of what has been submitted is either redundant, irrelevant, speculative, conclusory, or all of the above.").
- **Where plaintiff filed claims under an inapplicable statute.** See Lucas v. Apple Food Serv. of New York, LLC, 2015 U.S. Dist. LEXIS 145477, at *5, *11 (E.D.N.Y. Oct. 27, 2015) (a 24-year old plaintiff brought suit for age discrimination under the ADEA, which only covers employees aged 40 or older).
- **Where plaintiff knew facts that would defeat the claim at the time of filing.** See Fleming v. MaxMara USA, Inc., 644 F. Supp. 2d 247, 261–62 (E.D.N.Y. 2009), aff'd 371 Fed. Appx. 115 (2d Cir. 2010) (granting summary judgment for defendant employer where plaintiff was aware prior to filing that she had been replaced by a member of her protected class and alleged no other facts to establish a prima facie case of discrimination under Title VII).
- **Where, in the context of a class action, plaintiff failed to adequately investigate the individual claims to support the class action.** See E.E.O.C. v. CRST Van Expedited, Inc., 679 F.3d 657, 676 (8th Cir. 2012) (The Equal Employment Opportunity Commission (EEOC) "did not investigate the specific allegations of any of the 67 allegedly aggrieved persons [, i.e., the class members,] until after the Complaint was filed." and was "us[ing] discovery in the resulting lawsuit as a fishing expedition to uncover more violations.").

MOTION PRACTICE AGAINST FRIVOLOUS LAWSUITS

An employer faced with a frivolous lawsuit may move to dismiss the complaint under Federal Rule of Civil Procedure 12(b) (Rule 12(b)(6)). While frivolity and bad faith are not themselves specified grounds for dismissal of claims under Rule 12(b), frivolous or bad faith claims may be susceptible to challenge under Rule 12(b)(6) for failure to state a claim on which relief can be granted, or under Rule 12(b)(1) for lack of subject matter jurisdiction.

A successful motion to dismiss under Rule 12 allows an employer to dispose of a frivolous lawsuit before spending significant time and resources defending the claim. However, there are significant hurdles to making a successful motion. Foremost, it is difficult to prove that a claim is frivolous or filed in bad faith on a motion to dismiss because the court must accept all factual allegations in the complaint as true and view all the alleged facts in a light most favorable to the plaintiff. If some claims survive the initial motion to dismiss, the plaintiff may file an amended complaint that the plaintiff has improved by incorporating the arguments made during the dismissal proceedings. In the event that the court dismisses all claims without prejudice, the plaintiff may opt to refile in federal court, or file similar claims in state court, using the ruling on the motion to dismiss as a guide to strengthen his or her pleadings.

A pending motion to dismiss will not automatically stay discovery, so an employer should file a simultaneous motion to stay discovery while the motion to dismiss is pending. This will help to avoid, or at least delay, the expense of discovery and prevent the plaintiff from using discovery as an opportunity to gather evidence to file an amended complaint while the motion to dismiss is pending.

Motion to Dismiss under Rule 12(b)(6) for Failure to State a Claim

In general, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)). However, an employment discrimination complaint "must contain only a short and plain statement of the claim showing that the pleader is entitled to relief." Swierkiewicz v. Sorema N. A., 534 U.S. 506, 508 (2002). The Supreme Court has declined to revisit Swierkiewicz and has applied its standard as good law after Twombly and Iqbal. See, e.g., Johnson v. City of Shelby, Miss., 135 S.Ct. 346, 347 (2014) (citing Swierkeiwicz for the assertion that "imposing a 'heightened pleading standard in employment discrimination cases conflicts with Federal Rule of Civil Procedure 8(a)(2)'"); Skinner v. Switzer, 562 U.S. 521, 530 (2011) (assessing "whether [plaintiff's] complaint was sufficient to cross the federal court's threshold" under Swierkeiwicz); see also Thai v. Cayre Group, Ltd., 726 F. Supp .2d 323, 329 (S.D.N.Y. 2010) ("Reconciling Swierkiewicz, Twombly, and Iqbal, a complaint need not establish a prima facie case of employment discrimination to survive a motion to dismiss; however, 'the claim must be facially plausible, and must give fair notice to the defendants of the basis for the claim.'") (citations omitted).

Disparate impact claims that rely on statistical evidence to prove discrimination are subject to a higher standard. The plaintiff must "allege facts at the pleading stage or produce statistical evidence demonstrating a causal connection [to] make out a prima facie case of disparate impact" to survive dismissal. Tex. Dep't of Housing and Community Affairs v. Inclusive Communities Project, Inc., 135 S.Ct. 2507, 2523 (2015).

Due to the relatively relaxed pleading standard for Title VII and other discrimination claims, it may be difficult to show that claims are frivolous at the pleading stage. An employer's motion to dismiss for failure to state a claim may succeed if the plaintiff's claims have no factual support or legal basis. Courts have granted employers' motions to dismiss under Rule 12(b)(6) where a plaintiff's complaint includes insufficient facts. See, e.g., Edwards v. N.Y. State Unified Ct. Syst., 2012 U.S. Dist. LEXIS 172207, at *11 (S.D.N.Y. Nov. 20, 2012) (granting employer's motion to dismiss pro se litigant's Title VII claims for failure to state a claim because (1) the majority of the facts alleged were time barred because they occurred 300 days before plaintiff's EEOC claim was filed; and (2) for those timely incidents, the Plaintiff "fail[ed] to allege facts that suggest adverse action" and the complaint "fails to link the alleged discriminatory conduct to a protected characteristic and therefore does not state a plausible discrimination claim"); Rose v. Goldman, Sachs & Co., Inc., 163 F. Supp. 2d 238, 242 (S.D.N.Y. 2001) (granting employer's motion to dismiss Title VII, state, and local claims and finding that "Plaintiff has provided no specific factual allegations to enable the Court to evaluate her information and belief assertions that male

employees of Defendant performing 'substantially equal work' were treated preferentially"); Ortega v. New York City Off-Track Betting Corp., 1999 U.S. Dist. LEXIS 7948 (S.D.N.Y. May 24, 1999) (granting employer's motion to dismiss federal and state discrimination claims in part and finding with regard to plaintiff's Title VII hostile work environment claims that "these facts fail to support plaintiff's claim that the actions taken by defendant created an atmosphere that was abusive or hostile because of plaintiff's race, ethnicity, or sex (i.e., that the alleged hostile environment was created by race-related, ethnicity-related, or sex-related conduct on the part of defendant")).

Courts also have granted employers' motions to dismiss under Rule 12(b)(6) where a plaintiff's complaint includes only conclusory or speculative allegations, see Dean v. Westchester Cty. Dist. Atty's Office, 119 F. Supp. 2d 424, 429 (S.D.N.Y. 2000) ("[P]laintiff's claim [for disparate treatment] must be dismissed because the general, conclusory allegations concerning the harassment of her and the treatment of similarly situated white, male employees fails to create an inference of discrimination"); Rose v. Goldman, Sachs & Co., Inc., 163 F. Supp. 2d 238, 242 (S.D.N.Y. 2001) (granting employer's motion to dismiss equal pay claims and explaining that "Plaintiff's amended complaint contains nothing more than bald assertions that she and male employees of Defendant received disparate wages for substantially equal jobs under similar working conditions. The Court finds that such allegations are too conclusory to state a claim under the Equal Pay Act or the New York State Equal Pay Law."); Edwards v. N.Y. State Unified Ct. Syst., 2012 U.S. Dist. LEXIS 172207, at *11 (S.D.N.Y. Nov. 20, 2012) (granting employer's motion to dismiss pro se litigant's Title VII claims for failure to state a claim because (1) the majority of the facts alleged were time barred because they occurred 300 days before plaintiff's EEOC claim was filed; and (2) for those timely incidents, the Plaintiff "fail[ed] to allege facts that suggest adverse action" and the complaint "fails to link the alleged discriminatory conduct to a protected characteristic and therefore does not state a plausible discrimination claim").

For more guidance on Rule 12(b)(6), see Motion to Dismiss for Failure to State a Claim: Making the Motion (Federal). Also see 2 Moore's Federal Practice - Civil § 12.34—Failure to State Claim - Rule 12(b)(6) Motion.

Motion to Dismiss under Rule 12(b)(1) for Lack of Subject Matter Jurisdiction

An employer also may make a motion to dismiss based on a lack of subject matter jurisdiction, or the court itself may dismiss sua sponte at any time in the litigation of there is a lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1); 28 U.S.C. § 1331. "[A] suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous." Bell v. Hood, 327 U.S. 678, 682–83 (1946). The Court must dismiss claims if it finds it lacks subject matter jurisdiction over them "at any time," even after trial. Fed. R. Civ. P. 12(h)(3).

On a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), "the court may consider matters outside the pleadings, such as affidavits, documents, deposition testimony. . . . The court generally is prohibited from considering such matters on a motion to dismiss for failure to state a claim upon which relief can be granted." Dillard v. Runyon, 928 F. Supp. 1316, 1322 (S.D.N.Y. 1996).

An employer's motion to dismiss for lack of subject matter jurisdiction may succeed if the plaintiff's failure to state a claim under the relevant federal statute is sufficiently obvious to the court, see Darden v. DaimlerChrysler N. Am. Holding Corp., 191 F. Supp. 2d 382, 389 (S.D.N.Y. 2002) (granting several defendants' motions to dismiss employee's racial and age discrimination claims under Fed. R. Civ. P. 12(b)(1) where plaintiff failed to name these entities in the charge he filed with the EEOC, as courts lack jurisdiction to hear a civil action against a party that was not already named in an EEOC charge and plaintiff's claims did not qualify for any exception to this requirement); Dillard v. Runyon, 928 F. Supp. 1316, 1318 (S.D.N.Y. 1996) (granting employer's motion to dismiss

under Fed. R. Civ. P. 12(b)(1) where former employee's failure to exhaust administrative remedies, including a requirement that an employee consult with a counselor at the agency's EEOC office within 45 days of alleged discriminatory act, which precluded her from bringing suit); Hu v. Skadden, Arps, Slate, Meagher & Flom LLP, 76 F. Supp. 2d 476, 477 (S.D.N.Y. 1999) (granting employer's motion to dismiss under Fed. R. Civ. P. 12(b)(1) and finding that, as plaintiff was a Chinese citizen applying for employment in China, "[e]mployment of a foreign national outside of the United States falls beyond the scope of the ADEA. As such Hu's discrimination claim fails to state any claim colorable under federal law. Thus, the court must now dismiss the claim for lack of subject matter jurisdiction.").

Under federal employment statutes, employers generally must employ a sufficient number of people to be subject to liability. See *42* U.S.C. § 2000e(b) (codifying the numerosity requirement of Title VII by defining "employer" as an entity with "fifteen or more employees"). However, the Supreme Court has found the Title VII numerosity requirement is not jurisdictional; thus, such arguments are waivable and you should raise them on a Rule 12(b)(6) motion, not Rule 12(b)(1). Arbaugh v. Y & H Corp., 546 U.S. 500, 516 (2006) ("[T]he threshold number of employees for application of Title VII is an element of a plaintiff's claim for relief, not a jurisdictional issue.").

For more guidance on Rule 12(b)(1), see Motion to Dismiss for Lack of Subject Matter Jurisdiction: Making the Motion (Federal). Also see 2 Moore's Federal Practice - Civil § 12.30—Lack of Subject-Matter Jurisdiction.

Dismissal under 28 U.S.C. § 1915(e)(2)(b)(i)-(ii) If Plaintiff Filed in Forma Pauperis

If the plaintiff filed a frivolous or bad faith claim in forma pauperis to excuse the filing fee, the court may decide to dismiss sua sponte under an exception to the in forma pauperis statute (28 U.S.C. § 1915). "Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that . . . the action or appeal . . . (i) is frivolous or malicious; or (ii) fails to state a claim on which relief may be granted." 28 U.S.C. § 1915(e)(2)(B)(i)–(ii). Courts routinely use this provision to dismiss claims as frivolous or for failure to state a claim. See, e.g., Iotova v. Patel, 293 F. Supp. 3d 484, 487–88 (S.D.N.Y. 2018) (where previous Florida action had been dismissed with prejudice under in forma pauperis statute 28 U.S.C. § 1915(e)(2)(B) for being frivolous and for failure to state a claim, subsequent New York action must be dismissed under the same provision for res judicata); McCormick v. Jackson, 2008 U.S. Dist. LEXIS 64181, at *3 (S.D.N.Y. Aug. 20, 2008) ("An action is 'frivolous' if, among other things, 'the factual contentions are clearly baseless, such as when allegations are the product of delusion or fantasy, or the facts alleged "rise to the level of the irrational or the wholly incredible,"'"; here plaintiff's claims of a "videotape-related conspiracy [against employer] clearly fit these descriptions" and must be dismissed because "[o]n its face, the Complaint borders on the incomprehensible and may well fail to state any claim in any cognizable fashion.") (citations omitted); Augustus v. AHRC Nassau, 2013 U.S. Dist. LEXIS 165240, at *7 (E.D.N.Y. Nov. 20, 2013) (dismissing plaintiff's claims under 28 U.S.C. § 1915(e)(2)(b)(i)–(ii) and as barred by the doctrine of res judicata and stating "Plaintiff's claim is at most a state law tort claim; the Court cannot, even giving the broadest interpretation to the pleading, ascertain any valid basis for the exercise of this Court's jurisdiction over plaintiff's claim. Therefore, plaintiff fails to state a claim against all of the defendants and the complaint against them is dismissed.").

Many in forma pauperis employment claims are filed by pro se plaintiffs. Courts hold pro se plaintiffs' pleadings to less strict standards than those drafted by counsel, so facial deficiencies with the pleadings may not be enough to garner dismissal. See LeSane v. Hall's Sec. Analyst, Inc., 239 F.3d 206, 209 (2d Cir. 2001) ("[P]ro se plaintiffs should be granted special leniency regarding procedural matters."); McKoy v. Potter, 2009 U.S. Dist. LEXIS 39623, at *10 (S.D.N.Y. 2009) ("A pro se complaint is reviewed under a more lenient standard than that applied to 'formal pleadings drafted by lawyers.' Plaintiffs' pro se pleadings 'must be read liberally and should be interpreted "to raise the strongest arguments that they suggest."'") (internal citations omitted). A court also has the

option to dismiss the claim without prejudice, so as to allow the plaintiff to seek counsel and/or to file an amended complaint, with the result that a dismissal on this ground may not completely dispose of the action.

For more information on dismissing in forma pauperis complaints, see 2 Moore's Federal Practice - Civil § 12.34—Failure to State Claim - Rule 12(b)(6) Motion, subsection [7], Frivolous or Meritless In Forma Pauperis Complaints.

Motion to Strike under Rule 12(f)

An employer may make a motion to strike all or part of a plaintiff-employee's pleadings under Fed. R. Civ. P. 12(f). "[T]he court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). The court may strike the pleading sua sponte, or upon motion of a party made before responding (or, if a response is not allowed, within 21 days after being served). Id. "[B]ecause the motion to strike under [Rule] 12(f) is such a drastic device, courts view it with disfavor and grant the motion infrequently." McDonald v. General Mills, Inc., 387 F. Supp. 24, 40 (E.D. Cal. 1974).

In the context of an employment law claim, defendants most often seek to strike allegedly irrelevant material from the complaint. See Malekpour v. LaHood, 2012 U.S. Dist. LEXIS 170756, at *2 (N.D. Ill. 2012) (granting motion to strike Federal Torts Claims Act allegations from plaintiff's third amended complaint as preempted by Title VII, which provides the sole remedy for claims of discrimination in federal employment). Courts may grant a motion to strike a particular claim, but allow the plaintiff to retain parts of their pleadings that recite allegations relating to these claims as evidence of other discriminatory acts. See Scharp v. Legacy Health Sys., 2007 U.S. Dist. LEXIS 17217, at *11–17 (D. Or. 2007) (granting motion to strike plaintiff's claims that fell outside of the statute of limitations but permitting the plaintiff to use allegations of prior discriminatory acts as background evidence in support of timely claims).

You may also use a motion to strike at later points in litigation to strike evidence proffered in support of summary judgment or in preparation for trial. See Smith v. Kempthorne, 2008 U.S. Dist. LEXIS 129084, at *4 (D. Wyo. Apr. 9, 2008) (granting in part and denying in part defendant's motion to strike as in admissible enumerated paragraphs of witness and expert declarations offered in support of plaintiff's motion for summary judgment on Title VII claims).

Due to the targeted nature of a motion to strike it is unlikely to dispose of a frivolous action, but such a motion can be helpful to narrow the claims at issue.

For more guidance on motions to strike under Fed. R. Civ. P. 12(f), see Motion to Strike: Making the Motion (Federal). Also see 2 Moore's Federal Practice - Civil § 12.37—Motion to Strike.

Answering the Complaint and Potentially Asserting Counterclaims

If the court does not grant the employer's initial motion to dismiss, the employer must answer the complaint. At the answering stage, an employer may opt to assert counterclaims against the employee, with the most common being breach of the employment contract, breach of a restrictive covenant (such as a non-compete clause), theft or misappropriating trade secrets, and claims for repayment or return of company property.

There are both benefits and risks to pursuing this approach. The key benefit to raising a counterclaim is that it provides leverage for the employer in court and in settlement negotiations. Where the facts support a counterclaim, it may be strategically useful to raise that counterclaim because it shifts some of the risk of loss in the litigation to the employee, who may be liable to the employer for damages and possibly attorney's fees if

the counterclaim is successful. If the employee-plaintiff has engaged in bad conduct, a counterclaim may bring these facts that would not otherwise be relevant to the claims at hand before the court, and eventually a jury. A counterclaim also may create leverage for the employer in settlement negotiations. Offering to drop a meritorious counterclaim in exchange for the employee dropping his or her primary lawsuit is valuable consideration that can reduce or even eliminate the amount of money paid in a final settlement agreement.

An employer considering bringing counterclaims also must be cognizant of the risks. First, the counterclaims may be subject to a motion to dismiss under Rule 12. Any potential counterclaim must fall under the court's jurisdiction to satisfy Rule 12(b)(1), and the employer must state sufficient facts to state a claim to avoid dismissal under Rule 12(b)(6). Second, employee-plaintiffs may challenge counterclaims themselves as frivolous or in bad faith. Just as a primary claim may be subject to sanctions under Rule 11, a counterclaim that lacks merit or that a defendant-employer asserts for an improper purpose may expose the filer to sanctions.

Before asserting a counterclaim, establish that there is a sound factual basis for the counterclaim, and that the court has jurisdiction to hear the counterclaim. This will limit the risk of (1) counterclaim being dismissed or (2) the imposition of sanctions by the court against the employer and/or you.

In the employment law context, there is the further consideration that both a plaintiff and a court may view a counterclaim as retaliation on the part of the employer and such retaliation may become a salient fact that the plaintiff can cite in support of his or her primary case. Federal law protects employees from retaliation when employees complain about workplace discrimination or harassment—even if the claim turns out to be unfounded—as long as the complaint was made in good faith. In the litigation context, the plaintiff may characterize any non-meritorious counterclaims as retaliation and may successfully move for sanctions. Permissive counterclaims, or counterclaims based on the plaintiff's filing of the complaint, are most vulnerable to this characterization.

Accordingly, while an employer facing frivolous claims that is concerned about its reputation may be tempted to bring counterclaims in tort, such as defamation, malicious prosecution, and abuse of process, these types of claims invite additional risks. Each claim, at its core, is based on the fact that the employee filed the underlying suit, under the theory that the plaintiff is defaming or harassing the employer by suing. Filing a counterclaim premised on the employee's lawsuit risks supporting the employee's claims of retaliation, and a plaintiff may cite the frivolous counterclaim in support of his or her motion for sanctions. See, e.g., Jacques v. DiMarzio, Inc., 216 F. Supp. 2d 139, 142–45 (E.D.N.Y. 2002) (dismissing employer's counterclaim sua sponte because it did not raise a colorable claim under New York law and imposing $1,000 sanction on the employer under Rule 11).

A Rule 11 motion for sanctions, addressed in the subsection directly below, may be a more appropriate vehicle to litigate bad conduct by the plaintiff during the course of litigation, and may be more likely to succeed than a malicious prosecution or abuse of process counterclaim.

Finally, be aware that even a meritorious counterclaim will increase the legal costs and the time needed to complete motion practice.

For more guidance on strategies for asserting counterclaims in employment litigation, see Counterclaims or Separate Lawsuits against Plaintiff Employees.

Rule 11 Sanctions

Rule 11 of the Federal Rules of Civil Procedure requires an attorney or an unrepresented party to sign each pleading and motion submitted to the court. "By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances . . . it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation." Fed. R. Civ. P. 11(b)(1). If a pleading, motion or other paper violates Rule 11 the court "shall impose" an "appropriate sanction," which may include costs and attorney's fees.

A defendant-employer can move for sanctions against a plaintiff's attorney for filing a frivolous employment claim under Fed. R. Civ. P. 11(c)(2). "[W]here it is patently clear that a claim has absolutely no chance of success under the existing precedents, and where no reasonable argument can be advanced to extend, modify or reverse the law as it stands, Rule 11 has been violated." Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 265 (2d Cir. 1985). A party must file a Rule 11 motion "separately from any other motion" and must "describe the specific conduct" that violates the Rule. Fed. R. Civ. P. 11(c)(2). Before filing a Rule 11 motion, the filing party must serve the motion to the challenged party and give them 21 days to correct or withdraw the challenged paper, claim, defense, contention, or denial. Id.

In the employment context, courts have granted Rule 11 sanctions against plaintiff-employees and their attorneys in the following situations:

- **Where the cause of action was "objectively unreasonable."** See, e.g., LaVigna v. WABC Television, Inc., 159 F.R.D. 432, 435 (S.D.N.Y. 1995) (imposing a $250 fine and requirement to take continuing legal education classes on attorney for filing a claim under Title VII's anti-retaliation provision where "there is no hint of an underlying Title VII claim—not even a bare allegation of impermissible discrimination based on race, color, nation origin, religion, or sex").
- **Where the plaintiff's claims were time-barred.** See, e.g., Jackson v. Hall Cty Gov't, Ga., 568 Fed. Appx. 676, 679 (11th Cir. 2014) (affirming Rule 11 sanctions for $12,000 after plaintiff's attorney "re-fil[ed] the time barred Title VII claim, because his theory that the 90–day statute of limitations was tolled . . . whether held in good faith or not, is clearly foreclosed by our existing case law.").
- **Where the plaintiff's attorney failed to conduct a reasonable inquiry into the allegations contained in the complaint.** See, e.g., Gambello v. Time Warner Communs., Inc., 186 F. Supp. 2d 209, 229 (E.D.N.Y. 2002) (granting employer's motion for sanctions against employee's attorneys and ordering firm to pay a $1,000 fine where "a reasonable inquiry conducted prior to filing the Amended complaint would have shown that [plaintiff's allegations] lacked evidentiary support").
- **Where plaintiff brought the action to harass the employer, which is an "improper purpose" under Rule 11.** Smith v. Prudential Ins. Co. of Am., 2000 U.S. Dist. LEXIS 6003, at *17–18 (N.D. Ill. Apr. 28, 2000) (granting Rule 11 sanctions where deposition testimony and court submissions revealed that the plaintiff's "true motivations" were to harass the defendant employer).

Rule 11 and Pro Se Plaintiffs

A court will generally tolerate conduct from pro se plaintiffs that would result in sanctions if that party was represented. The advisory committee to Rule 11 notes "[a]lthough the standard is the same for unrepresented parties, who are obliged themselves to sign the pleadings, the court has sufficient discretion to take account of the special circumstances that often arise in pro se situations." However, sanctions may still be possible under Rule 11(c)(5)(A). See, e.g., Buczek v. Giglio, 2017 U.S. Dist. LEXIS 73589, at *7 (W.D.N.Y. May 15, 2017) (denying

Defendants' Motion for Sanctions under Rule 11 but noting that Rule 11 permits the imposition of sanctions against pro se litigants); Colliton v. Cravath, Swaine & Moore LLP, 2008 U.S. Dist. LEXIS 74388, at *36–37 (S.D.N.Y. Sept. 23, 2008) (granting defendant's motion for sanctions under Fed. R. Civ. P. 11 against pro se litigant relating to ERISA and contract claims brought against former employer because "all the considerations that would lead a court to impose sanctions are all present here. . . . [The Court] advised [Plaintiff] of his obligations under Rule 11. Despite this warning, [Plaintiff]—a former attorney—has filed an amended complaint consisting of self-contradictory allegations without legal or factual support. Further, [Plaintiff] has harassed [Employer] and threatened the firm and its clients with further frivolous litigation unless they settle this case.") Note that in Colliton the court may have felt comfortable imposing Rule 11 sanctions in because the pro se plaintiff was a disbarred attorney.

For additional detailed guidance on Rule 11, see Rule 11 Sanctions Fundamentals (Federal) and Motion for Rule 11 Sanctions: Making the Motion and Appealing an Adverse Ruling (Federal). Also see 2 Moore's Federal Practice - Civil § 11.01 et seq., Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions (Fed. R. Civ. P. 11 and non-Rule 11 Sanctions).

Rule 56(h) Sanctions

Rule 56(h) of the Federal Rules of Civil Procedure (Rule 56(h)) also provides for sanctions against attorneys when "an affidavit or declaration under this rule is submitted in bad faith or solely for delay." Fed. R. Civ. P. 56(h). Rule 56(h) is limited to affidavits and declarations submitted in support of a summary judgment motion, not the substantive motion itself. The rule was implemented to prevent parties from submitting a "sham affidavit" to manufacture issues of fact and thereby defeat summary judgment. See Perma Research & Dev. Co. v. Singer Co., 410 F.2d 572, 578 (2d Cir. 1969). At the summary judgment stage, Rule 56(h) may provide an additional ground for an employer's sanctions motion in some circumstances.

ADDITIONAL STRATEGIES AVAILABLE AGAINST SERIAL FRIVOLOUS FILERS

Some plaintiffs file multiple frivolous claims against the same employer, including duplicative claims seeking to relitigate prior claims that were resolved or dismissed. Other plaintiffs repeatedly file different but still frivolous claims. The end result is that the employer incurs legal fees each time the plaintiff files a new suit. Moreover, sanctions are not always a reliable or successful deterrent, particularly where the plaintiff is judgment proof. If faced with a harassing plaintiff who files multiple frivolous claims or litigations, consider seeking a prefiling injunction, sanctions against the serial-filing plaintiff or their attorney, and asserting claim and issue preclusion as grounds for dismissal or as an affirmative defense.

Prefiling Injunction

An employer may request a prefiling injunction against future duplicative filings or refiling of previously litigated issues as part of a Rule 11 motion. Additionally, a court could impose a prefiling injunction on its own initiative, pursuant to Rule 11(c), which provides that "[o]n its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b)," which in turn requires that pleadings have no improper purpose, such as harassment, to cause needless delay or costs. The All Writs Act, which states that federal courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law," provides additional authority for a federal court to issue a prefiling injunction against a serial frivolous filer. 28 U.S.C. § 1651(a).

In considering whether to issue a prefiling injunction, courts consider:

(1) the litigant's history of litigation and in particular whether it entailed vexatious, harassing or duplicative lawsuits; (2) the litigant's motive in pursuing the litigation, e.g., does the litigant have an objective good faith expectation of prevailing; (3) whether the litigant is represented by counsel; (4) whether the litigant has caused needless expense to other parties or has posed an unnecessary burden on the courts and their personnel; and (5) whether other sanctions would be adequate to protect the courts and other parties. Ultimately, the question the court must answer is whether a litigant who has a history of vexatious litigation is likely to continue to abuse the judicial process and harass other parties.

McKoy v. Potter, 2009 U.S. Dist. LEXIS 39623, at *17 (S.D.N.Y. 2009) (quoting Safir v. United States Lines, Inc., 792 F.2d 19, 24 (2d Cir. 1986)). An injunction may be warranted where the plaintiff has "objective basis to fear—and to seek an injunction barring—further harassing and baseless litigation from plaintiff." Id. (granting prefiling injunction where plaintiff had brought four previous actions against the same defendant, the first dismissed on the merits and the next three dismissed on res judicata grounds); see also Malley v. New York City Bd. of Educ., 112 F.3d 69, 69 (2d Cir. 1997) (per curiam) (granting injunction where "[plaintiff] has filed repetitive actions concerning his discharge as a New York City school teacher and revocation of his teaching license . . . [and] [t]hese actions have just as repetitively been dismissed on statute of limitations and res judicata grounds"); Lacy v. Principi, 317 F. Supp. 2d 444, 449–50 (S.D.N.Y. 2004) (granting injunction after plaintiff brought and lost three actions against employer VA Medical Center).

Issue Preclusion and Res Judicata

Repetitive claims in the employment law context are subject to the affirmative defense of issue preclusion, which potentially applies when an issue of fact (not law) has been addressed and resolved in a final judgment on the merits. Issue preclusion prevents a party from litigating the same issue more than once. To prove that the defense applies, an employer must show that there was prior litigation in which the identical issue was brought before court, the issue was actually litigated, and the party subject to the defense had a "full and fair opportunity" to litigate the issue in the prior proceeding. See Mejia v. N.Y.C. Health & Hosps. Corp., 622 Fed. Appx. 70, 71 (2d Cir. 2015) (affirming dismissal of plaintiff's ADA claim as barred by collateral estoppel because a prior state court action determined that plaintiff's dismissal was not arbitrary or capricious).

Similarly, res judicata bars claims that already were or could have been brought in a prior litigation. An employer asserting a res judicata defense must show that the claim in the current lawsuit is based upon the same facts at issue in the prior action and the parties are identical or in privity with respect to the claim at issue. See, e.g., Cieszkowska v. Gray Line N.Y., 295 F.3d 204, 205–06 (2d. Cir 2002) (affirming district court's dismissal of former employee's second complaint, which alleged national origin discrimination, as barred by res judicata because "the factual predicates of plaintiff's allegations in the first and second complaints involve the same events concerning her employment, pay history, and termination" and "[a]lthough she raises a new legal theory in her second complaint, namely her claim of discrimination on the basis of nation origin, [plaintiff] could have brought that cause of action in her prior action"); Monclova v. City of New York, 2017 U.S. Dist. LEXIS 218039, at *55 (E.D.N.Y. Mar. 31, 2017), aff'd 726 Fed. Appx. 83 (2d Cir. 2018) ("[Prior] judgment precludes plaintiff's claims, which all rise out of the same alleged retaliation-based factual grouping as the earlier litigated claims.").

Notably, res judicata applies even if the second claim is based upon a different theory or cause of action as the previous claim, or if the plaintiff brings the second claim in a different forum. See, e.g., Iotova v. Patel, 293 F. Supp. 3d 484, 487–88 (S.D.N.Y. 2018) (where there was a previous action that a Florida court had dismissed with prejudice under in forma pauperis statute 28 U.S.C. § 1915(e)(2)(B) for being frivolous and for failure to state a claim, a New York court dismissed a subsequent action by the same plaintiffs with the same claims as barred by the doctrine of res judicata).

ALTERNATIVE DISPUTE RESOLUTION

Alternative dispute resolution (ADR) may offer a cost-effective path to resolve a frivolous employment claim. The two most common forms of ADR are mediation and arbitration.

Arbitration is frequently employed in labor disputes, and the American Arbitration Association has published a guide on ADR practices specific to employment cases. See American Arbitration Association, Employment Arbitration Rules and Mediation Procedures. In arbitration, the parties agree for their dispute to be heard in front of an arbitrator or a panel of arbitrators. The parties present their arguments at an arbitration hearing using an abbreviated trial format, with limited discovery and simplified evidentiary rules. The arbitrators deliberate and issue a written decision. These arbitration awards are not part of the public record. Arbitration awards are binding on the parties, but the parties may appeal them. See Hall Street Associates, L.L.C. v. Mattel, Inc., 552 U.S. 576, 590 (2008) (explaining that parties to an arbitration may appeal (1) under the statutory grounds set forth in the Federal Arbitration Act and (2) under state statutory or common law).

In mediation, the parties work with a trained mediator and attempt to reach a settlement agreement that both parties can accept. If both parties cannot agree, they may choose to reject settlement and proceed with litigation. For guidance on employment mediations, see Mediating Employment Disputes.

ADR offers several potential benefits to an employer facing a frivolous employment claim. Critically, the process is private, which allows the employer to limit reputational risk. Also, keeping the process confidential may lessen incentives for other employees to file claims, which will address the employer's concern that they are rewarding bad faith or frivolous claims. Mediation and arbitration also offer cost savings compared to traditional litigation motion practice.

If the employee's contract included an arbitration clause, then the employer can move to compel arbitration of the employee's claims under the Federal Arbitration Act. There is a strong presumption in favor of enforcing an arbitration clause in a contract, and there is no exception for employment contracts or for employment claims governed by federal statute. The Supreme Court addressed this issue and found that a mandatory arbitration clause in an employment contract was enforceable. Justice Gorsuch wrote for the majority: "The parties before us contracted for arbitration. They proceeded to specify the rules that would govern their arbitrations, indicating their intention to use individualized rather than class or collective action procedures. And this much the Arbitration Act seems to protect pretty absolutely." Epic Systems Corp. v. Lewis, 138 S. Ct. 1612, 1621 (2018). For more information on compelling arbitration and class action waivers, see Arbitration Agreement and Class Action Waiver Enforcement in Employment Litigation.

If there is no arbitration clause in the employment contract, the court may recommend the dispute to arbitration, or in some instances compel arbitration. See, e.g., E.D.N.Y. Local Rule 83.7(d)(1) (requiring "compulsory arbitration [in] all civil cases . . . wherein money damages only are being sought in an amount not in excess of $150,000.00 exclusive of interest and costs.").

SETTLEMENT

In many cases, the fastest way for an employer to resolve frivolous claims is to negotiate a settlement agreement with the plaintiff. There are benefits and risks to settling a frivolous claim, although you can mitigate some of the disadvantages with a well-crafted settlement agreement.

Advantages of Settling Frivolous Claims

The main advantage of settlement is to control costs. The client's cost-benefit calculation should weigh not just the settlement amount paid to the plaintiff, but all expected and potential costs, including:

- The anticipated cost of defending the claim, including attorney's fees
- The likelihood of obtaining a dismissal or other favorable outcome at court or in arbitration
- The likelihood of the plaintiff paying the employer's attorney's fees and costs if the employer prevails on the merits
- The potential cost of public relations and reputational harm that the employer could suffer if the frivolous claims are made public –and–
- The cost of nonmonetary resolutions that might be required, including changes to the employer's hiring and other business practices

Other advantages of settlement include confidentiality. The terms of the settlement agreement can include non-disclosure provisions that will prevent other employees from knowing the terms of the settlement and prevent any reputational harm or risk if the case is not already public. Settlement also offers a definite resolution. That is, the case ends when the settlement is signed and there is no risk of an unfavorable outcome. As another benefit, there are no precedential decisions that future litigants could use to guide their own employment claims.

Disadvantages and Risks of Settling Frivolous Claims

An employer may be reluctant to settle frivolous claims because it doesn't want to reward the plaintiff on principle. It may want to fight the claims to clear the employer's name. An employer may believe that others may view a settlement as an admission of guilt. It may also be concerned about other employees filing claims in search of an easy settlement. You can mitigate some of these risks by negotiating for nondisclosure provisions in the settlement agreement.

There are also procedural risks. A court may interpret a settlement offer as an admission that the plaintiff's claims had merit. This interpretation could prevent a court from finding that the claims were frivolous and preclude an award of attorney's fees that a prevailing defendant might receive under various employment statutes.

Finally, there is a risk that the settlement negotiations may fail if the parties cannot reach an agreement. Make the most of settlement negotiations by reaching out to the plaintiff's attorney (or plaintiff, if pro se) early in the process to find out exactly what the plaintiff wants. This can be a starting point to see if settlement negotiations are worth pursuing.

The risk that negotiations will fall apart can be greater when negotiating with pro se plaintiffs. A pro se plaintiff may have unrealistic expectations about the strength of their claims and how much money they can expect to recover. Take care to explain all various processes and to draft any settlement agreement in plain language. Consider engaging a mediator or involving the court in the process by asking the judge to participate as a neutral party to explain issues. Also prepare an analysis of counterclaims or facts that support a motion to dismiss or motion for sanctions before settlement negotiations. Leverage any viable arguments to obtain a more favorable settlement.

For more information on negotiating and drafting settlement agreements in employment litigation, see Settlement Agreements: Initial Assessment, Drafting, and Negotiating Techniques (Pro-Employer). Also see Social Media and Settlement and Separation Agreements: Reining in the Impulse to "Share", Taxation and Reporting of Settlement Payments in Employment-Related Lawsuits, Settlements and Resolutions of FLSA Claims and Potential FLSA Violations, Settlements of FLSA Section 216(b) Wage and Hour Collective Actions, Settlements of FRCP Rule 23 Wage and Hour Class Actions, and Hybrid Wage and Hour Section 216(b) FLSA Collective and Rule 23 Class Actions.

For an annotated settlement agreement, see Settlement Agreement and Release of Claims (Single-Plaintiff Employment Dispute). Also see Settlement Agreement (Hybrid Wage and Hour FRCP 23 Class Action and FLSA Section 216(b) Collective Action), Settlement Agreement (FLSA Section 216(b) Wage and Hour Collective Action), Settlement Agreement (FRCP Rule 23 Wage and Hour Class Action), Settlement Agreement (Employment Discrimination Class Action), and Settlement Agreement (Employment Discrimination Collective Action) (ADEA).

ATTORNEY'S FEES AND COSTS

Under the Federal Rules of Civil Procedure, a prevailing employer may recover attorney's fees and reasonable costs. Fed. R. Civ. P. 54(d). "A favorable ruling on the merits is not a necessary predicate to find that a defendant has prevailed." CRST Van Expedited, Inc. v. E.E.O.C., 136 S.Ct. 1642, 1646 (2016). Defendant-employers can recover if they achieve a substantive disposition on the merits, including summary judgment or a verdict at trial, or a procedural determination such as dismissal for lack of jurisdiction or mootness. Id.

Several federal employment statutes also provide for the prevailing party to recover attorney's fees, including Title VII which states that "the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs." (42 U.S.C. § 2000e-5(k)). Other federal statutes with similar fee-shifting provisions include the ADA (42 U.S.C. § 12117(a)), Title II of GINA (42 U.S.C. § 2000ff-6), and Sections 1981 and 1983 (42 U.S.C. § 1988(b)).

Some federal statutes require a higher standard. Under the Equal Pay Act, the attorney's fees are governed by the Fair Labor Standards Act, which has been found by some courts to require bad faith by the losing party for the prevailing party to recover attorney's fees. 29. U.S.C. §§ 206(d), 216(b). Attorney's fees under the ADEA are not addressed by statute, but some courts have held that attorney's fees are available if the plaintiff litigated in bad faith. See, e.g., Wastak v. Lehigh Valley Health Network, 333 F.3d 120, 133 (3d Cir. 2003).

Note that the Family Medical Leave Act (FMLA) and Uniformed Services Employment and Reemployment Rights Act (USERRA) do not permit the recovery of attorney's fees. However, attorney's fees may still be available as sanctions under Rule 11.

Factors for awarding attorney's fees include when the court has found that the plaintiff's action was frivolous, unreasonable, or without foundation. Christiansburg Garment Co. v. E.E.O.C., 434 U.S. 412, 421 (1978). Although a court does not require a showing of bad faith, there is a stronger likelihood for prevailing on a fee claim if a court finds that the plaintiff brought a claim in bad faith or continued a claim in bad faith. Id.

Courts impose a high bar for awarding attorney's fees to prevailing defendant-employers for federal claims due to equitable considerations, to avoid deterring plaintiffs with meritorious claims. As the Supreme Court explained in the Title VII context, "[t]here are at least two strong equitable considerations favoring an attorney's fee award to a prevailing [] plaintiff that are wholly absent in the case of a [] defendant," (1) "the plaintiff is Congress' chosen instrument to vindicate a policy that Congress considered of the highest priority," and (2) "when a district court

awards counsel fees to a prevailing plaintiff, it is awarding them against a violator of federal law." Christiansburg Garment Co. 434 U.S. at 412–13. However, these equitable considerations will not prevent a court from awarding attorney's fees "when the court in the exercise of its discretion has found that the plaintiff's action was frivolous, unreasonable, or without foundation." Id.

If the court finds that only some claims are frivolous, it has discretion to award partial attorney's fees. See Hensley v. Eckerhart, 461 U.S. 424, 435 n. 10 (1983). However, if the meritorious and frivolous claims are "sufficiently intertwined" then the defendants will not recover. See, e.g., Fleming v. MaxMara USA, Inc., 2010 U.S. Dist. LEXIS 39108, at *41 (E.D.N.Y. Apr. 21, 2010) (citing Colombrito v. Kelly, 764 F.2d 122, 132 (2d Cir. 1985)); see also Murphy v. Board of Educ. of Rochester City School Dist., 420 F. Supp. 2d 131, 135 (W.D.N.Y. 2006) (granting attorney's fees to the defendant employer after finding that "plaintiff brought and pursued this litigation in bad faith, for the improper purpose of attacking the District and school administrators about matters that had nothing to do with the original basis for this lawsuit, i.e., plaintiff's transfer from one school to another without loss of pay or benefits").

DEALING WITH FRIVOLOUS APPEALS

After a court dismisses a frivolous employment claim, the plaintiff may opt to pursue an appeal. In defending against a frivolous appeal, take additional steps pursuant to the Federal Rules of Appellate Procedure to protect an employer's interests at the appellate level.

Requesting a Bond

Before the appeal is heard, you may request on behalf of the appellee-employer that the district court impose a bond to ensure payment of the costs of appeal if the decision is affirmed. Appellate Rule 7 states that "[i]n a civil case, the district court may require an appellant to file a bond or provide other security in any form and amount necessary to ensure payment of costs on appeal." Fed. R. App. P. 7. In anticipation of moving for costs and damages to be awarded after the judgment is upheld on appeal, you can move on behalf of the appellee-employer for the district court to impose such a bond to cover part of the employer's eventual recovery. When determining whether a bond is appropriate, courts consider the following factors: "(1) the appellant's financial ability to post a bond, (2) the risk that the appellant would not pay appellee's costs if the appeal loses, (3) the merits of the appeal, and (4) whether the appellant has shown any bad faith or vexatious conduct." Decurtis v. Upward Bound Int'l, Inc., 2013 U.S. Dist. LEXIS 91258, at *5 (S.D.N.Y. June 3, 2013) (citation omitted). However, "a demonstration of 'bad faith' or even 'vexatious conduct' is not required for a bond to be awarded." Stillman v. InService America Inc., 838 F. Supp. 2d 138, 140 (S.D.N.Y. 2011) (citations omitted). If the court orders a bond, it will conduct a fact-intensive inquiry to determine a reasonable cost estimate before setting the bond amount. See Decurtis, 2013 U.S. Dist. LEXIS 91258, at *4, *16–20 (estimating costs and calculating reasonable hourly rates for attorney and paralegal services to determine a bond amount of approximately 50% of the total requested by appellees). For the purposes of Appellate Rule 7, costs may include "anticipated appellate attorney's fees if the statute governing the underlying cause of action defines 'costs' to include fees." Watson v. E.S. Sutton, Inc., 2006 U.S. Dist. LEXIS 88415, at *2 (S.D.N.Y. Dec. 6, 2006) (citations omitted).

Moving for Costs, Damages, and Sanctions

If the appellate court affirms the district court's judgment in favor of the employer, the defendant employer may move for the court to award costs and damages on three grounds. First, 28 U.S.C. § 1912 gives the appellate court discretion to award "just damages for [] delay," and "single or double costs" to the appellee in the event that a judgment is affirmed. Second, Appellate Rule 38 allows for an award of "just damages and single or double costs to the appellee" if "a court of appeals determines that an appeal is frivolous." Fed. R. App. P. 38. Third, you can seek sanctions against employees' attorneys under 28 U.S.C. § 1927, which states that "[a]ny attorney

. . . 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 attorney's fees reasonably incurred because of such conduct." The plaintiff-appellant may be directly liable under § 1912 and Appellate Rule 38, while a court levies § 1927 sanctions only against attorneys. Appellate Rule 38 further requires notice, in the form of "a separately filed motion or notice from the court," which allows the appellant "reasonable opportunity to respond." Fed. R. App. P. 38. "The standard for the imposition of such a penalty is where the appeal taken is found to be groundless, without foundation, and without merit, even though appellant did not bring it in bad faith." In re Drexel Burnham Lambert Group Inc., 995 F.2d 1138, 1147 (2d Cir. 1993).

Consider bringing motions for costs and damages under both Appellate Rule 38 and § 1912. Courts will generally handle the motions in tandem. Courts may award damages and costs for a § 1912 motion without a finding that the appeal was frivolous. See Advisory Committee's note to Appellate Rule 38 (1967) (distinguishing motions brought under 28 U.S.C. § 1912 and the appellate rule). In practice, however, courts have denied motions styled § 1912 motions when they have found that the appellant's actions are not frivolous. See, e.g., White v. White Rose Food, a Div. of DiGiorgio Corp., 128 F.3d 110, 117 (2d Cir. 1997) (denying motion for costs and damages under 28 U.S.C. § 1912 and Appellate Rule 38 after finding the inclusion of moving party on appeal was "not frivolous"). Even if a court finds an appeal to be frivolous, it may be reluctant to impose costs or sanctions on the plaintiff or plaintiff's attorney. See, e.g., Mudholkar v. Univ. of Rochester, 261 Fed. Appx. 320, 323 (2d Cir. 2008) (although the Second Circuit found the plaintiff's claim "was frivolous, as is the appeal of the district court's dismissal of that claim" the court merely "warned [the plaintiff and his attorney] that that the pursuit of such frivolous claims in the future may expose them to sanctions" under Appellate Rule 38 and § 1927) (emphasis added).

Appellate courts have found that sanctions against employee-plaintiffs and their attorneys for filing frivolous appeals were appropriate in some circumstances. See, e.g., Bruno v. Metro. Transp. Auth., 344 Fed. Appx. 634, 636 (2d Cir. 2009) (inviting defendant-appellee to apply for damages under Appellate Rule 38 where plaintiff brought an employment claim he admitted at oral argument was barred by general release he signed in a previous lawsuit in the absence of fraud); Granger v. Christian Health Ministries, 66 Fed. Appx. 526, 526 (5th Cir. 2003) (granting costs and attorney's fees to appellee where "the record contains abundant evidence demonstrating [Defendant's] non-discriminatory reasons for [Plaintiff's] termination" and "[Plaintiff's] appellate brief is devoid of any discussion regarding whether similarly situated individuals were treated favorably and whether [Defendant's] proffered reasons were pretexts for discrimination").

Nonmonetary Sanctions

Appellate courts may also impose nonmonetary sanctions, including a prefiling injunction, under Appellate Rule 38. See, e.g., Jennings v. City of Indianapolis, 637 Fed. Appx. 216, 218 (7th Cir. 2016) (issuing an order to show cause why the court should not impose sanctions under Appellate Rule 38 against pro se plaintiff after the appellate court had dismissed six previous appeals of plaintiff's employment discrimination claims for lack of jurisdiction; the appellate court later issued an order barring the plaintiff from filing litigation in any court in the Seventh Circuit until plaintiff had paid all fees owed to the district and appellate court). For more information on frivolous appeals in federal court, see 21 Moore's Federal Practice - Civil § 338.01 et seq., Frivolous Appeal–Damages and Costs.

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Ellen Holloman is a partner in Cadwalader's Global Litigation Group. She focuses her practice on representing financial institutions, corporations and individuals in civil litigation, and related regulatory enforcement proceedings and corporate internal investigations. She has significant experience in securities litigation, including derivative and class action litigation, in contract and post-acquisition disputes, and employment-related claims, including for enforcement of non-compete, non-disclosure and confidentiality agreements. Ellen regularly advises companies, boards, special committees and investors in connection with corporate governance matters, including takeover defense and activist contests. She also frequently handles litigation arising from bankruptcy and financial restructuring matters, and has represented creditors and secured and unsecured debtors in complex Chapter 11 bankruptcy cases and out-of-court restructurings across a wide range of industries, including financial services, energy, shipping, licensing and apparel.

Ellen has represented clients as plaintiffs and defendants in federal and state courts and in arbitrations around the world. She has first and second chair trial experience, has argued motions in federal and state court, and participated in over one hundred depositions. Recently, she served as lead litigation counsel on behalf of a debtor licensing company in a three week trial that resulted in findings of fraud, breach of fiduciary duty, breach of contract, aiding and abetting and unjust enrichment against the former principal of the debtor and a publicly-held company.

Ellen has extensive experience with cross border civil litigation and international law enforcement, including obtaining overseas discovery under the Hague Convention and investigations under the Foreign Corrupt Practices Act. She also has experience with Constitutional law matters, particularly First and Eighth Amendment jurisprudence.

In addition to her civil litigation experience, Ellen also has significant experience with white-collar criminal defense matters, and has represented clients responding to regulatory inquires, requests and enforcement proceedings initiated by the U.S. Department of Justice, Securities and Exchange Commission, Federal Trade Commission, Federal Reserve, Federal Energy Regulatory Commission, Consumer Financial Protection Bureau, National Association of Securities Dealers, FINRA, Internal Revenue Service, the Office of the New York State Attorney General, New York Stock Exchange, European Commission, and the UK Serious Frauds Office, among others.

Ellen is active in pro bono engagements. Recently, she obtained a full pardon for a Vietnam War-era veteran, who overcame a 30-year period of addiction and homelessness, only to find that a decades-old felony conviction—for "trespassing" while sheltering in an abandoned building in the New England winter—was an obstacle to obtaining gainful employment. Working with the NAACP's Legal Defense Fund, Ellen authored an amicus curiae brief on behalf of several elite private research universities in Fisher v. University of Texas. Her work was cited by the court. She also has served as amicus counsel for a citizens tax advocacy group in a challenge to the New York State property tax system. The New York City Bar Association awarded her the Thurgood Marshall Award in recognition of her public service to post-conviction inmates who are under sentence of capital punishment.

Ellen serves on the Board of Trustees for the Center for Employment Opportunities, a non-profit organization dedicated to assisting men and women with criminal convictions with finding employment. She is a member of the Governance and Audit Committees. She also serves on the Board of the New York Lawyers for the Public Interest, and is a member of the Development Committee. She is a soror of the Alpha Kappa Alpha sorority.

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