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INFORMATION ABOUT CLIENT REPRESENTATION

Thank you for considering retaining the Law Office of Jillian T. Weiss, P.C.

This information sheet is specifically designed for potential clients who are considering an action against their employer for discrimination based on sex and gender identity or expression. This type of lawsuit is the primary mission of this law office. You will learn how to obtain representation with this office and the general nature of the legal process if you decide to move forward with your case.

OBTAINING REPRESENTATION WITH THIS OFFICE

The first step in obtaining representation with this office is to have a brief discussion about your case with an attorney from this firm. If both parties are interested in working together, a written retainer agreement is sent to you for consideration. Until that agreement is signed, this office does not represent you.

You will have an intake interview, which takes about one to two hours. The intake interview is based on a 16 page questionnaire developed by this firm based on experience in representing transgender clients in employment litigation.

The reason the questionnaire is so long is that employment discrimination generally is a complex field, requiring proof of many issues. Employment discrimination actions based on sex and gender identity or expression is an especially complex field of the law. Statistics show that only about 5% - 15% of employment discrimination plaintiffs prove their cases. Since most employees who experience discrimination do not have the funds to support paying attorney fees, this office takes cases on a contingency basis, meaning that you pay no fee unless we collect money from your employer. Since litigation expenses in these cases can run up to $20,000 or more, and involve hundreds of hours of work, it is imperative that this office have all of the information necessary to decide the viability of the case.

The retainer agreement spells out what the law office will do for you. As mentioned, this office offers a contingency retainer, in which the fee is 1/3 of the amount recovered, plus litigation expenses paid by the firm. In signing the retainer, you also agree to other commitments, such as notifying the office of changes of telephone or address, cooperating with requests for information, restricting your public comments on the case, and permitting the firm to make public comments for you. You also agree not to file any claims or charges with any government agency or court without permission of this office.

THE LITIGATION PROCESS

Dealing with the Human Resources Officer

Prior to any filing with an administrative agency or court, and prior to retaining this office, your dealings with the Human Resources officers of your employer are extremely important. Federal law prohibits employment discrimination based on sex, which has been interpreted by the EEOC and some federal courts to mean gender identity or expression, as in transgender identity, or non-standard gender, and as in stereotyping someone as "gay." If you work for a public employer, sexual orientation and gender identity may be prohibited grounds of discrimination as found by some federal courts under the U.S. Constitution. A number of state and city laws also prohibit employment discrimination on these bases. Most large companies also don't allow that kind of behavior and say so in their policies.

If you believe you have been subjected to employment discrimination, and you are still working for the employer, it may be useful to file an internal report with the Human Resources Officer or the person designated in your employee handbook, if any. An employer that has not been notified in writing of a discriminatory event by a manager may argue that it is not liable, because it had no notice of the event. However, you should note that reporting employment discrimination has been known to result in retaliation by some employers. Therefore, you should weigh the benefits and risks of reporting, and decide based on what is best for you.

Such reports usually state the approximate date and time of any discriminatory or harassing events, a clear description of what was said or done by whom, the names, titles and contact information of the perpetrators, and the names, titles and contact information of any witnesses. You should consider reporting past incidents not previously reported. If there are no witnesses to a discriminatory event, an employer may consider such reports as "unsubstantiated." However, a record of such reports over time may, even without witnesses, support an employment discrimination lawsuit.

The decision to make a report or not is a personal decision, because it has both benefits and risks. Making reports may increase harassment or retaliation, but may also decrease them if the perpetrators face a realistic chance of discipline from the employer. Making reports can also induce an employer to look for a reason to discipline or terminate you, such as work rule violations or work performance problems. At the same time, you must be careful to be accurate in your reporting. Making a false report can be a reason to discipline or terminate you. However, without any reports, your case can be more difficult to substantiate.

This office may be able to provide an informal review of your report to HR, if you request it, to ensure that it is clear and concise. However, we do not provide legal representation prior to filing a complaint with a governmental agency or court. We will not conduct any investigation of the facts or circumstances or a review of the law of your jurisdiction in connection with such informal letter-writing assistance. You must weigh the benefits and risks of submitting a written report of discrimination to your employer.

Filing a complaint with a governmental agency

The process generally requires filing with an administrative agency, such as the Federal Equal Employment Opportunity Commission ("EEOC"), or a similar state or municipal agency, though some states and municipalities permit a lawsuit in court without such a filing. The discussion here will speak in terms of the EEOC, but may apply to a state or municipal matter. It is at this stage that this office normally becomes involved.

There is a time limitation on bringing a formal complaint about discrimination or harassment of between 180 and 300 days in the federal system, depending on the state. State laws may permit more or less time. If there is continuous harassment, some courts may permit going back further. Nonetheless, you have to make your decision to report to HR and to file a formal complaint with a government agency or court within a relatively short period of time. The decision to report or not is a personal decision, but it is fundamental to any employment discrimination action you may later file.

If there is not much time left on the statute of limitations, the complaint should be filed as soon as possible to preserve your claim. However, if there is sufficient time, it may be worthwhile for your attorney to send a demand letter to the employer that spells out the type of evidence you have, without revealing too many details. Some settlement-minded employers will agree to settle the case at this stage.

While the EEOC process is designed for a non-lawyer to be able to file a complaint, and you can do it on your own without a lawyer, this office strongly recommends hiring an attorney to navigate the process for you. The EEOC and most state agencies are severely understaffed. Their investigators are overburdened with cases. While they are highly trained in investigations, keep in mind that there is a defense attorney providing the investigator with the employer's point of view that no actionable discrimination or harassment occurred. There are many ways to create an effective defense of which non-lawyers are unaware, and which must be guarded against in making your statement to the EEOC. The EEOC only finds reasonable cause to believe that discrimination or harassment occurred in about 5% of cases.

The EEOC may call for voluntary mediation prior to investigating, meaning a sit down with the employer's lawyer and officials, and discussing whether things can be worked out between the parties. Scheduling and going through the mediation process can take several months. Unless the evidence of discrimination or harassment is unusually clear, employers are reluctant to make any monetary offer, and may even resist requests such as changing shifts or jobs. It might be just as useful, and quite time-saving, to send a demand letter to the employer, detailing the type of evidence you have, without revealing too many details, to find out whether the employer is settlement-minded.

After filing, the EEOC solicits a response from the employer, and requests a written rebuttal from this firm. This phase usually takes about 2-4 months. The EEOC then investigates, seeking evidence of discrimination. This phase usually takes another 3-6 months. The EEOC then writes a decision finding reasonable cause to believe that

discrimination has occurred, or a decision finding no reasonable cause. The total time to this point is usually about a year, though it can take two years or more in some cases.

If the EEOC finds reasonable cause, it will try to settle the case. If it cannot, it may litigate the case on your behalf, which happens in very few cases. If it decides not to litigate on your behalf, as is usually the case, it issues a Right To Sue letter, which allows 90 days to file the suit in federal court, a time limitation which is very strictly observed.

Filing with a court

There is a general course to litigation, although each case is individual and may follow a different path from that described here. When your complaint is filed in federal court, the employer has 30 days to answer the points raised in your complaint. Then there is a period of "discovery," during which requests for information and documents are sent by both sides. Depositions are taken, which refers to an interview by an attorney of a witness in front of a court reporter, who types everything said in the deposition. You should expect to be deposed. We will prepare for the deposition by telephone conference, which takes about 1-2 hours. This process, from complaint to the end of discovery, usually takes 6-12 months.

Alternatively, instead of answering the complaint, the employer may file a "Motion to Dismiss." A motion is a request directed to the court. In the case of a Motion to Dismiss, the request is that your case be dismissed for lack of evidence or other legal reasons. The judge is required to decide whether your case stays in court or is thrown out of court after hearing from all parties. This process usually takes an additional 4-8 months. If your case is dismissed, you may appeal to a higher court to show some legal error made by the lower court. If your case is not dismissed, you proceed to the discovery phase discussed above.

After discovery, the employer usually makes a Motion for Summary Judgment. This is a request that the judge make a judgment in the employer's favor without a trial. The employer must show that, even if the employee wins all factual disputes, there is not enough evidence for a reasonable jury to decide in favor of the employee. This process usually takes another 4-8 months.

If you lose the Motion for Summary Judgment, then the case is generally over. You may then proceed to the appeals court. The appeals court asks for written briefs from the attorneys on the question of whether the trial court made some legal error that requires reversal. The appeals process takes about 1-2 years. Either party can appeal again to the United States Supreme Court, but that court takes very few cases, and as a practical matter, the lower appeals court is the court of final review.

If, however, you prevail on the motion for summary judgment, then trial preparation begins, and the trial is usually scheduled to occur within another 3-6 months. Delays are not uncommon, however, depending on the assigned judge's schedule. An employment discrimination trial usually requires a week or so of trial time, which may be interrupted by other matters before the judge. If it is a jury trial, the jury renders its verdict, and the losing party often makes a motion to the Court to reconsider the jury verdict based on the evidence presented. The losing party can also appeal the verdict, which generally takes 1-2 years.

Either party can appeal again to the United States Supreme Court, but that court takes very few cases, and as a practical matter, the lower appeals court is the court of final review. The appeals court may send the case back to the trial court for a new trial.

GENERAL OBSERVATIONS

Filing a claim of employment discrimination is a serious matter. It can be very beneficial, as it may vindicate your rights, provide changes to discriminatory work conditions, create policy changes at the employer to prevent future occurrences, and may result in monetary damages for the emotional distress and financial losses that you incurred as a result of the discriminatory conduct. However, despite media reports of million-dollar verdicts by plaintiffs, such verdicts are relatively rare in the employment discrimination context. In addition, it may take years of time and effort on your part, as well as the emotional costs of having to reiterate the events over and over again for various levels of legal review, and the uncertainty of victory. It should not be undertaken lightly, or with an unrealistic view of the anticipated results. Should you decide to move forward after serious consideration of the benefits and risks, we are happy to review your case.

DISCLAIMERS

It is important to note that before you sign the retainer agreement, this firm does not represent you. Comments made during pre-retainer discussions are not intended as legal advice. This document is not intended as legal advice, but as general guidance.

Jillian T. Weiss, the principal attorney of this office, is admitted to practice law in New York and New Jersey only. While the United States Equal Opportunity Commission permits representation by out-of-state attorneys, any statements in reference to laws or legal requirements outside of the states listed are not intended as legal advice unless and until representation by this firm is accepted by a court or government agency operating in your state. Consult an attorney admitted to practice in your state for qualified legal advice. Statements made by this firm prior to a signed, written retainer agreement are not intended as legal advice or to create an attorney-client relationship.

If, after the EEOC process, the case goes to federal court, this firm is able to represent you in any federal court in any state with permission of the court.

This office uses email for your convenience, but you should note that email is inherently insecure, with significant risk of third-party interception. If you prefer not to take the risk, please let this office know in writing, and we will use fax or mail for all communications. Email, including personal email accessed via the web, created or viewed through employer-provided systems, including smartphones, can be viewed by the employer. You should not receive or send email about your employment discrimination matter through employer-provided computers or smartphones. See ABA Opinion No. 11-459.