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Phone: +1 212 537 6331 | Fax: +1 212 537 6371 | customerservice@portfoliomedia.com

Q&A With Foley & Lardner's John F. Birmingham Jr.

Law360, New York (June 05, 2009) -- John F. Birmingham Jr. is a partner in the Detroit office of Foley & Lardner LLP and chair of the firm's labor and employment practice. He is also a member of the information technology and outsourcing; privacy, security and information management; and immigration, nationality and consular law services practices, as well as the automotive industry team.

Birmingham concentrates on class actions, noncompetition and trade secrets matters, employment-related litigation and labor law. He regularly counsels clients on an array of labor and employment issues and develops problem prevention and resolution strategies.

Q: What is the most challenging case you've worked on, and why?

A: I've had a number of challenging situations — like when my Italian witness spoke in paragraphs and my interpreter translated them into one word answers before the jury or when my key witness became so flustered during cross-examination that she stated that a chart we both created was completely wrong (we ultimately prevailed in both cases) — but the toughest matter I handled was an 11 plaintiff race harassment and discrimination case a few years ago.

The lead plaintiff was a union steward who filed dozens of grievances on her own behalf. The grievances became her allegations in the lawsuit and necessitated a three-day deposition during which even more allegations were made.

She remained employed during the course of the case and new allegations of "retaliation" needed to be addressed on a regular basis including the defense of a restraining order action that she filed against her supervisor.

Many of the comments and actions relied upon allegedly occurred several years prior to the action and each plaintiff asserted that they were damaged because they heard the comments repeated by others.

Many of our key witnesses no longer worked at the plant. Plaintiffs were represented by a very good, aggressive plaintiff's firm. All of these factors made this case quite an interesting challenge.

We were able to negotiate moving the case from a jurisdiction where a jury had awarded $21 million to a single plaintiff in a harassment case, to an arbitration panel. After exhaustive discovery, motion practice and painstaking negotiations, we were able to satisfactorily resolve the matter on the eve of arbitration.

Q: What accomplishment as an attorney are you most proud of?

A: The most satisfaction comes when a great result is obtained through a team effort with the client, experts and law firm colleagues.

We had that situation in a case where plaintiffs sought certification of a nationwide class asserting that the company's promotion system discriminated against employees on the basis of age. The trial court judge we drew previously had certified a case involving similar facts.

We were able to show, through discovery and motion practice, that individual issues predominated over common questions and that class certification was not appropriate. I also learned through this case to remain open-minded about what a judge will do and this judge, to her credit, was willing to be persuaded despite her earlier ruling.

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

A: I could pick on the old stand-by, the FMLA, but the new regulations at least try to address the difficulties with complying with this statute.

Instead, despite what the Supreme Court held in Smith v. City of Jackson, I would eliminate the application of the disparate impact theory to age cases. The rationale underlying the disparate impact theory does not make sense in the age discrimination area, especially in 2009.

The disparate impact theory was developed in the Griggs decision to prevent an employer from maintaining policies that operate to freeze the status quo of prior discriminatory employment practices. This rationale does not exist in the age area. "Older" workers, who were once "younger" workers, have not experienced "lifelong" discrimination.

Also, in the age context, the statistics are not reliable evidence of discrimination. The statistics can be manipulated because of the imprecise definition of the protected class (e.g. a statistician can look at the effect on 48-62 year olds). The impact of a neutral policy will never be perfectly distributed across age groups, for reasons unrelated to discrimination.

For example, decisions made on the basis of seniority will always benefit “older” workers while those based on pay/cost-saving typically will be detrimental to older employees. Especially when the protected class starts at age 40 — a “younger” point in a person’s career in 2009 than in 1967 when the ADEA was enacted — placing the burden on employers to justify the use of neutral factors, when there are bad statistics, is a misplaced and costly exercise.

It also is illogical to employ a different standard for collective actions under the ADEA and the FLSA than we use for class actions in other cases involving employment-relevant laws.

The Rule 23 standard should be applied to all employment cases, as the conditional certification standard is too lenient and encourages costly collective actions where individual issues predominate.

Q: Where do you see the next wave of cases in your practice area coming from?

A: The combination of a Democratic Congress and administration and the pent-up demand for statutory and regulatory action should increase activity across the board.

On a short-term horizon, ADA filings should increase as the amendments were designed to make it easier to establish that you are “disabled.” It is likely that sexual orientation will be added as a protected class under federal law.

The continuing advancement in technology and its misuse is fertile ground for privacy-based actions. Both federal law (see e.g. Genetic Information Non-Discrimination Act of 2008) and state legislation (see e.g. laws regulating the use of social security numbers) have addressed this area and we can expect more regulation governing employee privacy rights.

New variations of ERISA-based class actions, as well as wage and hour collective actions, will arise and multiply.

Finally, I expect federal agencies such as the EEOC and Department of Labor to be more aggressive in their enforcement activities. The EEOC has stated that it intends to pursue its systemic initiative in earnest, which likely will lead to more pattern and practice claims.

Q: Outside your own law firm, name one lawyer who’s impressed you and tell us why.

A: My labor law professor in law school, professor Ted St. Antoine, made a strong impression on me.

He brought labor law to life without taking sides. Maybe more importantly, he treated students with dignity and respect, traits sometimes lacking in the profession.

Q: What advice would you give to a young lawyer interested in getting into your practice area?

A: Make sure that your temperament and interests are aligned with L&E practice. You must be a problem-solver capable of giving quick, practical and specific advice.

Especially in this area, clients have little tolerance for counselors who refuse to make concrete recommendations. Then, you must be willing to litigate to prove you and/or your clients are right.

You cannot be afraid of a good fight where there is likely to be strong emotions on both sides. You have to understand people and business, so get a lot of experience with both.

Read extensively as it will make you a better writer and that is the most important skill, especially at the onset. Get as much experience as you can as early as possible. And remember, employment lawyers might not make the most money, but we have the best stories.