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Q&A With Morgan Lewis' Joseph Costello

Law360, New York (February 28, 2013, 1:38 PM ET) -- Joseph Costello represents employers in employment litigation matters and administrative agency proceedings and provides counseling in connection with human resources and benefit-related decisions.

Costello handles Employee Retirement Income Security Act class actions challenging the prudence of benefit plan investment decisions, legality of plan design decisions, and adequacy of fiduciary disclosures; employment discrimination cases under Title VII, the Age Discrimination in Employment Act and state law; whistleblower claims and related litigation; and trade secret and noncompete agreement disputes.

Q: What is the most challenging case you have worked on and what made it challenging?

A: Eighteen years is a long time for a typical employment case to run, but there was nothing typical about the In re Unisys Corp. Retiree Medical Benefits ERISA Litigation. Unisys had provided a generous medical benefit package to its retirees for many years but had to discontinue those benefits in the face of rising healthcare costs, changing accounting standards and a difficult business environment. That decision was met with several class action lawsuits, which were consolidated in the U.S. District Court for the Eastern District of Pennsylvania.

After two full trials, a successful motion to decertify and multiple appeals to the Third Circuit, Unisys prevailed on the class contractual vesting and estoppel claims covering more than 20,000 retirees based on the fact that it had repeatedly warned its employees in summary plan descriptions and other written communications that their retiree medical benefits could be modified or terminated at any time.

Nonetheless, some retirees were permitted to proceed with individual breach of fiduciary duty claims based on allegedly misleading oral communications and confusion regarding whether their benefits were subject to change. We prevailed on some of those individual claims, settled others and lost 12 of them at trial.

What made this litigation so challenging was the need to reconstruct the facts surrounding the company's communications to its employees over the course of three decades and to overcome the natural sympathy that the court had for the retirees. I did not enjoy losing those 12 individual claims, but it was important that we conveyed the message to plaintiffs' counsel that Unisys was not going to capitulate in the face of thousands of claims and that we were not afraid to go to trial. I think the courage of Unisys' in-house team is what enabled us to achieve the company's overall business objectives in the litigation.

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

A: In recent years, we have seen an increasing number of retaliation claims under ERISA, Title VII and the ADEA and an explosion in whistleblower claims under both federal and state law. While all of this statutory protection against employer retaliation is well-intentioned, it has created an unnecessarily complicated patchwork of procedural requirements, uncertainty as to what constitutes protected conduct and an opportunity for poorly performing employees to manufacture claims in an effort to head off legitimate performance management or disciplinary action.

Perhaps it is unlikely given the current political climate, but a legislative or regulatory effort to standardize the procedures and evidentiary framework for whistleblower and retaliation claims under federal law is the type of reform that could clarify the protections available to legitimate whistleblowers while, at the same time, providing employers with an efficient mechanism for seeking to dismiss frivolous claims.

Q: What is an important issue or case relevant to your practice area and why?

A: In Wiest v. Lynch, et. al. (no. 11-4257), the Third Circuit will have an opportunity to decide a critical issue related to the scope of whistleblower protection under the Sarbanes-Oxley Act (SOX). In Wiest, the district held that the alleged whistleblower failed to "plead facts reflecting [his] reasonable belief that his communications regarding the tax treatment of certain company expenses related — in any way, definitely and specifically, or otherwise — to shareholder fraud or a violation of one of the statutes or rules listed" in SOX Section 806.

That issue — the need to refer to shareholder fraud as opposed to generic wire or mail fraud — could be addressed in Wiest. Alternatively, the court could punt on the issue and decide the case on a number of procedural grounds. Either way, the question of what constitutes protected conduct under SOX will be a focus of decisions in this area for some time to come.

Q: Outside your own firm, name an attorney in your field who has impressed you and explain why.

A: For a significant portion of my legal career, Bob Eccles has been the premier ERISA litigator in the country. He has an encyclopedic knowledge of the case law and an ability to understand the practical implications of the most complex decisions. In addition to having a superb legal mind, Bob has always been generous with his time and willing to kick around theories and ideas, even with a competitor. I am not sure whether Bob is continuing to practice, but I have enormous respect for what he has been able to accomplish over the course of his career.

Q: What is a mistake you made early in your career and what did you learn from it?

A: It took me some time to recognize how much judges hate discovery disputes and that an attorney does a disservice to his or her clients by being overly aggressive in resisting or pursuing discovery. Early in my career, I recall asserting boilerplate relevance and burdensomeness objections to interrogatories and document requests in an ERISA case and getting the same objections fired back at me by opposing counsel in response to our discovery requests.

After a fruitless and contentious series of conferences between the parties, both sides filed motions to compel. The judge's reaction was essentially "a plague on both your houses," and he ordered production of all of the requested information. He also ripped counsel for both parties for the boilerplate objections.

Since that time, I have been much more thoughtful about discovery objections and much more willing to compromise in a discovery dispute. Going to the court should truly be a last resort.

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