

ELLEN S. SIMON

Step No. 1: Know your client well

ATTORNEY: *Ellen S. Simon, 49*
 FIRM: *Cleveland's The Simon Law Firm*
 CASE: *Fredrickson v. Olsten Health Services Inc., No. 98CV1937 (Cl. C.P., Mahoning Co., Ohio)*

IN EMPLOYMENT litigation, a plaintiff's attorney has to spend a significant amount of time with a prospective client—even before filing any claim—to get a feel for whether they would be sympathetic to a jury," says Ellen S. Simon.

"The plaintiff is what the case is all about," she says. "The plaintiff will be on the stand for a long time, so you have to ask, 'Is she believable? Is she credible? How has her life been affected by the loss of her job?' You have to get to know them just the way the jury will."

Some cases, she says, "are factually more compelling than others," but her "gut reaction" to the potential client is a major factor in deciding whether to take a case. Part of this reaction is based on the client's behavior with members of Simon's office staff. "If they're not polite to your office people, or not nice, the chance is that they were not polite and not nice to their co-workers."

Simon has developed a reputation as one of the nation's top plaintiffs' lawyers in employment civil rights matters.

Several of her cases have been groundbreaking, including a decision by the Ohio Supreme Court upholding a verdict on same-sex harassment.

Simon has nearly always represented plaintiffs, predominantly in personal injury matters at the beginning of her career. She was the first woman in Ohio to win a million-dollar verdict, for instance. But today 100% of her practice is in employment civil rights litigation.

In her biggest win to date, Simon represented Donna Fredrickson, who had worked at Olsten Health Services for more than 13 years. In 1997, Olsten merged its Youngstown and Warren, Ohio branches. Fredrickson, then 68, was the manager of the Youngstown branch. Olsten eliminated her position and named the Warren manager, who was 46 years old, as manager for the merged branch.

Fredrickson asked to be given another job in the company, but "she was given no options," Simon reports. "Younger women were given new positions that Donna Fredrickson was qualified to hold, but she was forced into retirement."

In 1998, Fredrickson sued Olsten Health Services and its then-parent Olsten Corp., charging age discrimination. But, Simon says, the discrimination "was not that the manager who got the job was younger, but that Fredrickson was terminated because of her age" and that she was "not transferred or given one of these newly created positions, even though younger, less qualified people were."

In any employment case, says Simon, the first step is acquiring docu-



EMPLOYMENT WARRIOR: "The plaintiff is what the case is all about," says Ellen S. Simon. "You have to ask, 'Is she believable? Is she credible?'"

TRIAL TIPS

- Get to know your client before filing.
- Prove employment cases through documents.
- Make sure to call co-workers first at trial.

ments about the plaintiff and other employees at the company. "These cases are proven in the documents because without documents, it's just one person's word against another."

If the termination is for cause, she says, she looks at what the company has done previously to employees who have broken rules.

"You look at if other people have done worse and were not fired, or if anyone has been fired for this before," she says.

If it's a sex discrimination case, she says, "get the personnel records of

the employees, find out who the men are, what education levels they have, how much money they're making."

In this case, she sought personnel files, including applications and résumés of the employees who were retained or hired after Fredrickson was terminated.

In an age discrimination case, Simon says, the age of the plaintiff is not necessarily a plus. In this action, it could backfire, she says, if the jurors believed that "she should be retired at age 68, that there was nothing wrong with forcing her out and giving her job to other people."

Simon also was worried some prospective jurors would believe that "she didn't need to work, or didn't want to work, or that she wouldn't be working for a long time."

"You have to confront this age bias in jury selection," she says. "I asked the jurors if there was a situation where they had to select between two employees, one who was 46 and the other 68, which one would they choose. If the juror responded, 'I'd have to look at the track records' or 'I'd want more information,' that's someone you want."

Simon's approach to her opening statement is unlike many other attorneys', who outline their openings but speak extemporaneously.

"My openings are totally scripted, rehearsed and planned," she says. "It's not spontaneous."

"The opening is your greatest opportunity to persuade the jury. The plaintiff goes first, and if you understand the principles of primacy, the person who goes first has an advantage. People form their beliefs on what they hear first."

Don't ramble

She says, "The opening can't be rambling. You can't go off on tangents. You don't want to waste people's time."

During the opening, she says, "I intersperse lots of visuals" because many people learn visually. In this case, one of the chief visual props was a time line.

"The time line was in court all the time," she says. "I was always referring to it." It was a passive witness for the plaintiff, but also a way to focus the jury on the story she was telling.

Although her client was the key to winning, she didn't call Fredrickson as her first witness. Instead, Simon began with Fredrickson's co-workers, the people who would vouch for the plaintiff's performance and corroborate her claims.

Simon did not call her client first for tactical reasons, she says. "You have to warm up with the background information and establish the points on your time line."

Fredrickson's appearance posed a problem, Simon says.

"She looked like she wasn't suffering," she says. "She would not express hardship. She looks well-to-do, even though she wasn't."

But Simon elicited evidence of injury. Fredrickson had been earning \$50,000 a year at the end of her time at Olsten. After her dismissal, "she was not able to get work and eventually took a job selling clothes at a department store for \$9 an hour."

Confronting the company

Simon called representatives from Olsten, including three supervisors, in the plaintiff's portion of the case. She confronted them with records and documents, but, she believes, the most effective question was at the start of her examination of Susan Allen, the Olsten vice president who decided to terminate Fredrickson's employment.

Allen took the stand right after Fredrickson, who had endured an aggressive and potentially withering cross but "showed that she was intelligent, able and competent. I was thinking, 'Why wouldn't this company want her?'"

She said to Allen, "You saw Donna testify, isn't she intelligent and competent—good enough to be working for Olsten?"

The witness "was totally unprepared for the question," Simon says. "The cross had proved our case."

On Nov. 22, a Youngstown jury awarded Fredrickson \$30.675 million, including \$30 million in punitive damages.

On May 17, the defendant's post-trial motions for new trial, a judgment notwithstanding the verdict and remittitur were denied. Olsten has indicated that it will appeal. ■