

CHAPTER 6

Discovery

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§ 6.01 Introduction—The Importance of the Discovery Process

Discovery is as critical to employment litigation as to any other type of litigation. In many cases, direct evidence is lacking. Defendants and their agents, at least today with the significant publicity

regarding discrimination laws and litigation, are more cautious and guarded about comments, and about reducing damaging statements to writing. On the contrary, if anything, employers today are so guarded and fearful about what is said and what is written, they sometimes overcompensate by not saying enough. Nevertheless, there are those cases, albeit isolated, where direct evidence exists. However, even in those cases, there are rarely witnesses to statements. Thus, for the majority of plaintiffs who must depend upon circumstantial evidence, including statistical evidence that has come to have great significance in employment litigation, discovery is absolutely critical and conducting well-thought-out discovery is an essential element to successful litigation in this area.

Too many plaintiffs' attorneys give short shrift to discovery, hastily throwing together interrogatories because this is the one of the least costly forms of discovery.¹ This author, an attorney concentrating on the defense of employers, very rarely uses interrogatories. On the contrary, requests for production of documents are much more favored. The primary reason for shying away from interrogatories is that most plaintiffs (and defendants, in fact), can become very creative about avoiding giving actual answers to interrogatories. It is very difficult to craft precise, unequivocal questions and ask enough at the same time. The pat objections available—"overly broad, unduly vague and burdensome" or "beyond the proper scope of discovery"—often result in the sender getting no information at all, while the responding party contends it has complied. This leads to extended motion practice. Thus, after obtaining the pertinent documents by way of simple requests for production (explored below), the better route is to ask all questions at a deposition. During a deposition, the questioner can quickly spot how the deponent is getting around giving a real answer, and thereafter immediately fix the question to get the real answer. This is quite impossible with written interrogatories.

Nevertheless, interrogatories do serve a real purpose where simple, straightforward facts must be established, and only to save time at a deposition—never to substitute for one. For example, if the party

¹ This is not intended to suggest that defense attorneys are "better" at discovery. On the contrary, many defense attorneys show their haste in providing answers to written discovery—interrogatories or requests for production—that are not the product of real thought or due diligence with the client to ensure responses are thorough and complete. This statement is made in simple recognition of the fact that many plaintiffs' attorneys, working on a contingency fee basis, are fronting costs for deposition transcripts and court reporter fees. Naturally, it is more common for plaintiffs' attorneys to utilize this form of paper discovery to minimize such costs.

serving interrogatories finds it useful and a time saver to ask things like dates of employment, titles, functions or facts concerning prior or subsequent employment, such answers can serve as a guide for the deposition. Accordingly, samples are provided in the following section. It cannot be emphasized enough that in employment cases, interrogatories should never substitute for needed depositions, and absolutely never as a substitute for the plaintiff's or critical defense witnesses' depositions. In addition to the reasons already discussed, depositions are also necessary so that both parties can assess the demeanor, including credibility, of the other party's witnesses. Such factors will prove critical to both sides later in assessing weaknesses and strengths at a potential trial. For these reasons, the author does not offer samples wherein substantive questions are asked, as this would be like a doctor recommending a treatment he or she does not agree with simply because some doctors use it.

Requests for production, although still difficult to make precise while being thorough, are easier for both sides to utilize. Samples of specific requests, with further explanation, appear in the following section.

Most important, we will explore the format for depositions, paying particular attention to party depositions, but including discussion of third-party and expert witness depositions. Significant discussion of the most common forms of motion practice in connection with discovery disputes is also included in this chapter.

§ 6.02 Interrogatories and Requests for Production

While other forms of written discovery exist, e.g., requests to admit and motions for physical or psychological examination of the plaintiff; the following are the two forms of written discovery most often used in employment litigation.

[1]—Interrogatories

As litigators all know, “interrogatories”¹ are written questions served on the opposing party and are to be answered, under oath, by the party served. To repeat: in employment cases, interrogatories should never be used as a substitute for depositions of significant witnesses. Interrogatories should never take the place of any party deposition.

Examples of appropriate interrogatories:

1. What was your first date of employment with the defendant, ABC, Inc.?
2. What was the position you held upon hire?
3. What was your last date of employment with ABC, Inc.?

With respect to a question like this, be careful not to ask when the employee was “terminated” or when she “resigned.” Even though the employer may have taken a position that the plaintiff employee resigned, this may be an issue at the very heart of the case. So, for example, if that plaintiff is alleging constructive discharge, the questioner will invite an objection to the question because of the use of the word “resign” in lieu of an answer. Result(wasted paper and time asking the question at all.

4. Are you currently employed?
5. Where are you currently employed?
6. When did you commence employment with your current employer?
7. When did you accept an offer of employment with your current employer?
8. Who extended the offer to you (names and titles)?
9. What is your current salary or hourly rate?

¹ Interrogatories are covered by Federal Rule of Civil Procedure 33. Consult local rules for each state since they often differ from the federal rules. Also, even in the federal courts, rules can vary from state to state, and even from judge to judge. Be sure to always check the rules in the location where your action is pending.

These types of questions can save time by assisting the defendant in obtaining information regarding subsequent employment—for purposes of mitigation of damages, for example. Note how restricted and simple the questions are. Again, lawyers have this almost overwhelming need to sound “scholarly”; they therefore use legalese in interrogatories, or make the questions lengthy and complicated. Fight this natural temptation. The more words and the more complicated the words, the more openings for legitimate objections, thus preventing the questioner from obtaining the answers she or he seeks.

Interrogatories can also be useful in homing in on the identities of potential witnesses. For example, one could ask the witness to identify by name and title each employee who supervised plaintiff during her employment or the names and titles of every member of the Human Resources Department with knowledge of the plaintiff’s internal complaint of sexual harassment made on June 20, 1999. While these questions help in preparing a case, they should nevertheless be asked again at pertinent depositions to ensure that there were no word ambiguities that allowed for gaps in disclosure.

There are a variety of standard objections for the party providing responses to interrogatories. Now, the questioner can see exactly why this form of paper discovery is not favored.

When answering interrogatories, always review the question to determine whether the following standard types of objections are appropriate:

1. This interrogatory is overly broad, vague and ambiguous;
2. This interrogatory requests overly burdensome production;
3. This interrogatory concerns information beyond the proper scope of discovery herein; or
4. An objection that encompasses all of the above.

Also, watch for interrogatories that seek privileged information, i.e., information covered by the attorney/client communication or work product privileges.

As soon as the recipient sees words like “all,” “every” or “each,” the antennae should rise. For example, an interrogatory that requests the “names of every employee who worked in the XYZ Department,” without a time frame provided or a definition of “worked” (such as people assigned to that department or anyone who ever performed any function, including people who simply chipped in when someone was sick), should be met with an objection. To reduce the number of potential discovery disputes, most parties responding to an interrogatory such as this one would object, but add “notwithstanding this

objection, and without waiver of the same, Defendant submits that the following employees were assigned to the XYZ Department during the Plaintiff's employment."² However, the questioner can never depend on the responding party being helpful to avoid disputes. On the contrary, the questioner should presume the responding party will seek every way possible to avoid providing a substantive answer.³

[2]—Requests for Production

Requests for production in employment actions are, as in every other type of action, written statements that request tangible information in all forms—documents, recordings or other materials. The definition section in employment cases thus will not vary materially from the definition of “documents” or “materials,” or other terms used in other types of actions. The definition of “all corporate parties” should include the parents, subsidiaries, affiliates, predecessors and successors in interest of that corporate party. This ensures that the author of the requests does not fall into a trap because all too often that author assumes a corporate entity employed the plaintiff when, in fact, it is another related entity.

The following types of documents and materials are most commonly sought in employment actions by way of requests for production:

- (1) personnel files of the plaintiff and employees who took any subject adverse employment action;
- (2) documents that reflect the earnings of the plaintiff since he or she left defendant's employ (for purposes of establishing mitigation of damages);

² In particular for defense attorneys who are too often accused of being obstructive and withholding critical information under the guise of legitimate objections, this method of objecting, but still providing some information that the party answering has to concede would be “fair game,” is the preferred route. In the event of motion practice, it would establish good faith that pertinent discovery was provided and not totally withheld on the basis of an objection such as “overly broad” or “vague.” Obviously, this “partial production” style does not apply where the objection is privilege-based, or for more significant objections based on privacy considerations, for example.

³ It should nevertheless be emphasized that federal courts do not favor this type of discovery practice. Therefore, to those responding parties with this agenda, be wary (federal judges in particular become distressed when they see this obvious pattern. Accordingly, the responding parties should also be comfortable that they have raised legitimate objections and provided some answers wherever possible while preserving that objection.

(3) notes of managers, human resources personnel, et al. regarding the plaintiff, his or her performance, warnings or other discipline administered, and investigations of plaintiff's complaint, where applicable;⁴

(4) witness statements or notes; and

(5) where appropriate and relevant, statistical data reflecting hiring and termination, promotions and/or salary levels.

Particularly where statistical data is requested, the requesting party will usually be inclined to ask for significant amounts of data, and compensate toward the overinclusive side. This is where responding parties can do the most damage with objections. However, generally, the defendant will have to be diligent to ensure that responses are made in good faith and are complete, while, at the same time, ensuring the plaintiff's requests are not overly burdensome and beyond the proper scope of discovery.

For example, corporate defendants with parents, subsidiaries, related companies and/or affiliates should be mindful to determine whether the request reaches into the data of companies that had no relation to the plaintiff. In general, the rule of thumb this author follows is that the relevant data runs with the decision-makers involved with your particular plaintiff. For example, if the issue is a termination due to a reduction in force, the court will tend to find relevant, and therefore discoverable, data reflecting termination decisions made by common individuals, whether or not affecting employees in departments or divisions other than that of the plaintiff. While the defendant certainly can assert the "overly broad and unduly burdensome" type of objection in any event, the defendant needs to be prepared with common decision-makers to demonstrate the validity of such an objection if challenged.

Personnel files and other confidential information concerning employees other than the plaintiff also may call for an objection. For example, the personnel file of every witness is not as pertinent as the personnel file of the manager who is accused of sexual harassment (absolutely relevant) or the manager who made the termination decision. In the latter case, the defendant may be successful in asserting

⁴ It has been consistently held that, contrary to the longstanding notion that notes of internal complaint investigations may constitute work product where guided by attorneys, or even conducted by attorneys, such investigative notes or other documents are discoverable, especially where the defendant intends to rely on the conduct of the investigation as part of its defense. See, e.g., *Roadway Package System, Inc.*, 185 F.R.D. 19 (N.D.N.Y.).

that the entire personnel file is not pertinent—perhaps only the performance appraisals or any warnings contained therein will be needed to satisfy the requesting party without divulging other sensitive types of information in those files.

The responding party should be cautious in asserting work product privileges, since certain documents may actually be helpful in the event of a trial. For example, if a manager consulted with the legal department (or outside counsel), and reduced the conversation to notes, such notes would be covered by the attorney/client communication privilege and would not be disclosed. On the other hand, if the notes contain not the content of the communication, but the manager’s thought processes as a result of that communication, the responding party should not be overly restrictive as to the definition of attorney work product to automatically conclude the privilege can be invoked. Each circumstance must be carefully analyzed to determine the applicability of the privilege.

The following are examples of Defendant’s requests for production of documents:

**[a]—Defendant’s Request for Production in Race
Discrimination Case**

The following is a request for production in a race discrimination case filed in the federal district court:

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

THOMAS SMITH,	:	
Plaintiff	:	Civil Action No.
	:	
v.	:	
ABC, INC.,	:	
	:	
	:	FEBRUARY 29, 2000
Defendant	:	

**DEFENDANT’S FIRST REQUEST FOR PRODUCTION OF
DOCUMENTS**

PLEASE TAKE NOTICE that, pursuant to Rules 26 and 34 of the Federal Rules of Civil Procedure, the Defendant, ABC, INC. (“ABC”), requests that the Plaintiff, THOMAS SMITH, produce and permit Defendant to inspect and copy documents in his possession, custody or control as described herein, or in the possession, custody

or control of his attorneys, agents or assigns, within the time prescribed by the Federal Rules of Civil Procedure, and in accordance with the definitions and instructions below.

Plaintiff is further requested to serve upon Defendant's attorneys, also within the time prescribed by said Rules, a written response to this request, which shall state, with respect to each category of documents or any part thereof, whether inspection will be permitted as requested or will be objected to, in which event the reasons for the objections shall be stated.

DEFINITIONS

A. In responding to this request, all requested documents in your "possession, custody or control" are to be produced. This includes documents in the possession, custody or control of your attorneys or their investigators or of any third party or parties to whom you have surrendered possession, custody or control, or who, acting in your behalf, have obtained possession, custody or control, or who, upon your request, would surrender possession, custody or control to you.

B. As used herein, the term "document" includes, without limitation, the original or any copies, regardless of origin or location, of any correspondence, book, pamphlet, periodical, letter, calendar or diary entry, memorandum, message, telegram, cable, report, record, study, stenographic or handwritten note, working paper or draft, invoice, voucher, check, statement, chart, graph, map, diagram, blueprint, table, index, picture, voice recording, tape, microfilm, tape data sheet or data processing card or disk or any other written, typed, printed, recorded, transcribed, punched, taped, filmed, photographed or graphic matter, however produced or reproduced, to which you have or have had access, and copies of reproductions of any of the above that differ in any respect from the original, such as copies containing marginal notations or other variations, and all other records or writings, however produced or reproduced, to which you have or have had access. Designated documents are to be interpreted as including all attachments, exhibits, enclosures, appendices and other documents that relate to or refer to such designated documents. The enumeration of various specific items as included within the definition of the word "documents" shall not be taken to limit the generality of this word, and the requests herein are directed and intended to obtain all "documents" in the broadest and most comprehensive sense and meaning of this word.

C. The terms "and" and "or" shall be construed disjunctively or conjunctively, the singular shall be deemed to include the plural, and

words of one gender shall include the other gender, all as necessary to make the request inclusive rather than exclusive.

D. As used herein, the term “concerning” means constituting, containing, evidencing, describing, referencing to or relating to.

E. The term “ABC” or “Defendant” shall refer to the Defendant named in this action, its parent companies, subsidiaries, predecessors and successors in interest, affiliates, divisions, officers, directors, employees, contractors, agents or assigns.

F. “Smith” shall mean Plaintiff Thomas Smith or any individual acting on his behalf or in concert with him, including his attorneys.

INSTRUCTIONS

A. Each request herein for documents to be produced, whether memoranda, reports, letters or other documents of any description, contemplates production of the document in its entirety.

B. This request shall be deemed continuing so as to require further and supplemental production if you discover, receive or generate additional documents responsive to the specific requests set out below between the time of original production and the time of trial.

C. With respect to any document withheld on the ground of privilege, you are to provide the following information separately as to each: type of document (e.g., memorandum, letter, recording); number of pages; general description of the subject matter; author; recipient(s) or addressee(s); date; attachments, exhibits or appendices; the identity of each person who has received a copy or whom you believe received a copy thereof; current custodian; nature of the privilege asserted.

SPECIFIC DOCUMENT REQUESTS

REQUEST NO. 1

All documents concerning your job functions, job assignments, training, status, salary, bonuses, benefits and other terms and conditions of your employment with respect to all positions held while employed with Defendant.

REQUEST NO. 2

All documents concerning work you have performed or were responsible for performing while employed with Defendant until your departure from your employment, including but not limited to, work

records, work product, status reports, procedural or employee manuals, reports, memoranda to or from higher supervision, and memoranda to or from co-workers.

REQUEST NO. 3

All documents concerning evaluations of your performance while employed with Defendant until your separation from employment, including, but not limited to, evaluations, self-evaluations, merit reviews, salary or performance reviews, promotions, transfers, ratings, and letters of commendation, praise or criticism.

REQUEST NO. 4

All documents concerning any disciplinary action of any nature taken against you at any time during your employment with Defendant.

REQUEST NO. 5

All documents concerning any requests for or discussions relative to your duties, job functions, evaluations and the like, made by you at any time during your employment with Defendant.

REQUEST NO. 6

All documents concerning Defendant's alleged history of differential or disparate treatment of you and/or any other employees on the basis of race or color. [Insert protected category.]

REQUEST NO. 7

All documents concerning any complaint or grievance, oral or written, made by you or on your behalf to any employee or representative of Defendant, including, but not limited to any complaint made regarding alleged discrimination based on race or color, or concerning any other alleged unfair, unlawful or retaliatory treatment accorded you by Defendant, its employees or agents, at any time during your employment.

REQUEST NO. 8

All documents concerning conversations or other communications between you and any current or former employees, officers, representatives, attorneys or agents of Defendant or any third party(ies), concerning any and all claims raised by you in this action or in the

charge filed with the Connecticut Commission on Human Rights and Opportunities (“CCHRO”) and/or the Equal Employment Opportunity Commission (“EEOC”), or otherwise concerning your employment with and/or separation from Defendant.

REQUEST NO. 9

All documents concerning grievances, charges or complaints regarding your employment with Defendant, including, but not limited to, documents filed with or received from the CCHRO, EEOC, the federal or state Department of Labor, or any other governmental agency, court or administrative tribunal.

REQUEST NO. 10

All documents concerning statements by any witnesses to any meeting, discussion, conversation or other verbal communication or to any conduct described in your Complaint that you contend is probative of any of your claims.

REQUEST NO. 11

All documents concerning your claims for monetary damages, including, but not limited to, documents that establish or tend to establish the amount of damages you claim for back pay, lost bonuses or other benefits, other compensatory damages, the costs and disbursements of this action, and attorneys’ fees.

REQUEST NO. 12

All documents concerning your claim of physical, mental and/or emotional injuries sustained as a result of any alleged treatment you received during your employment with Defendant, or in connection with your separation from that employment, and any and all damages you claim resulted or will result therefrom.

REQUEST NO. 13

All documents, calendars, daily planners, diaries or other memoranda reflecting your activities and/or working hours during your employment with the Defendant.

REQUEST NO. 14

All documents that reflect any criminal convictions, arrests or indictments in which you are named as a Defendant, alone or with others, occurring during the years of your employment with the Defendant.

REQUEST NO. 15

All documents not previously requested above concerning any and all claims of monetary loss or damage that you assert or intend to assert arising from your employment with or separation from the Defendant.

REQUEST NO. 16

All documents concerning your efforts to obtain employment or otherwise secure income after your separation from Defendant up to present time, and all such materials reflecting the results of such efforts, including, but not limited to:

- a. correspondence between you, your representatives or agents, and employment agencies;
- b. resumes, applications or background information forms, whether submitted to an employment agency or a potential employer;
- c. correspondence between you, your representatives or agents, and potential employers;
- d. contracts of employment;
- e. offers of employment;
- f. rejections of applications for employment;
- g. income tax returns for the year of your termination and for each year thereafter, including federal, state and local returns;
- h. W-2 forms received by you for the year of your termination and for each year thereafter;
- i. unemployment insurance applications and benefit receipt stubs; and
- j. all other documents concerning your efforts to secure, or your receipt of, income, whether taxable or nontaxable.

REQUEST NO. 17

Plaintiff is asked to execute Authorizations for Defendant to receive copies of all medical and/or psychiatric records of Plaintiff for the past five (5) years. Plaintiff is asked to execute such Authorizations for each physician, psychiatrist, psychologist, social worker or other medical or psychiatric personnel who has examined or treated Plaintiff the last five (5) years.

Dated this 29th day of February 2000.

THE DEFENDANT, ABC, INC.

[b]—Defendants’ Request for Production in Sexual Harassment or Retaliation Case

The following is a request for production in a claim of sexual harassment and retaliation filed in the New York State Supreme Court:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----- X
KAREN SMITH, :
: Index No.: 00C/
: :
: :
: :
: JANUARY 12, 2001
: :
: :
: :

Plaintiff,

-against-

ABC, INC., AND THOMAS JONES
Defendant. :
----- X

DEFENDANTS’ FIRST REQUEST FOR PRODUCTION OF DOCUMENTS

PLEASE TAKE NOTICE that, pursuant to CPLR 3120, the Defendant, ABC, INC. (“ABC”), requests that the Plaintiff, KAREN SMITH, produce and permit Defendant to inspect and copy documents in her possession, custody or control as described herein, or in the possession, custody or control of her attorneys, agents or assigns, within the time prescribed by the CPLR and in accordance with the definitions and instructions below.

Plaintiff is further requested to serve upon Defendant’s attorneys, also within the time prescribed by said Rules, a written response to this request, which shall state, with respect to each category of documents or any part thereof, whether inspection will be permitted as requested or will be objected to, in which event the reasons for the objections shall be stated.

DEFINITIONS

A. In responding to this request, all requested documents in your “possession, custody or control” are to be produced. This includes documents in the possession, custody or control of your attorneys or their investigators or of any third party or parties to whom you have surrendered possession, custody or control, or who, acting in your behalf, have obtained possession, custody or control, or who, upon your request, would surrender possession, custody or control to you.

B. As used herein, the term “document” includes, without limitation, the original or any copies, regardless of origin or location, of any correspondence, book, pamphlet, periodical, letter, calendar or diary entry, memorandum, message, telegram, cable, report, record, study, stenographic or handwritten note, working paper or draft, invoice, voucher, check, statement, chart, graph, map, diagram, blueprint, table, index, picture, voice recording, tape, microfilm, tape data sheet or data processing card or disk, or any other written, typed, printed, recorded, transcribed, punched, taped, filmed, photographed or graphic matter, however produced or reproduced, to which you have or have had access, and copies of reproductions of any of the above that differ in any respect from the original, such as copies containing marginal notations or other variations, and all other records or writings, however produced or reproduced, to which you have or have had access. Designated documents are to be interpreted as including all attachments, exhibits, enclosures, appendices and other documents that relate to or refer to such designated documents. The enumeration of various specific items as included within the definition of the word “documents” shall not be taken to limit the generality of this word, and the requests herein are directed and intended to obtain all “documents” in the broadest and most comprehensive sense and meaning of this word.

C. The terms “and” and “or” shall be construed disjunctively or conjunctively, the singular shall be deemed to include the plural, and words of one gender shall include the other gender, all as necessary to make the request inclusive rather than exclusive.

D. As used herein, the term “concerning” means constituting, containing, evidencing, describing, referencing to or relating to.

E. The term “ABC” shall mean the Defendant, ABC, Inc., its parent companies, subsidiaries, affiliates, divisions, officers, directors, employees, contractors, agents or assigns.

F. “Jones” shall refer to the individual Defendant, Thomas Jones, his agents, attorneys, representatives, or anyone acting on his behalf or in concert with him.

G. The term “Smith” shall mean the Plaintiff, Karen Smith, her agents, attorneys, representatives, or anyone acting on her behalf or in concert with her.

INSTRUCTIONS

A. Each request herein for documents to be produced, whether memoranda, reports, letters or other documents of any description, contemplates production of the document in its entirety.

B. This request shall be deemed continuing so as to require further and supplemental production if you discover, receive or generate additional documents responsive to the specific requests set out below between the time of original production and the time of trial.

C. With respect to any document withheld on the ground of privilege, you are to provide the following information separately as to each: type of document (e.g., memorandum, letter, recording); number of pages; general description of the subject matter; author; recipient(s) or addressee(s); date; attachments, exhibits or appendices; the identity of each person who has received a copy or whom you believe received a copy thereof; current custodian; nature of the privilege asserted.

SPECIFIC DOCUMENT REQUESTS

REQUEST NO. 1

All documents concerning Smith’s job functions, job assignments, training, status, salary, bonuses, benefits and other terms and conditions of her employment with respect to all positions held while employed by ABC.

REQUEST NO. 2

All documents concerning work Smith performed or was responsible for performing while employed by ABC until her departure, including but not limited to, work records, work product, status reports, procedural or employee manuals, reports, memoranda to or from higher supervision, and memoranda to or from co-workers.

REQUEST NO. 3

All documents concerning evaluations of Smith’s performance while employed by ABC until her departure, including, but not limited to, evaluations, self-evaluations, merit reviews, salary or performance reviews, promotions, transfers, ratings, and letters of commendation, praise or criticism.

REQUEST NO. 4

All documents concerning any disciplinary action of any nature taken against Smith at any time during her employment with ABC, including, without limitation, the termination of her employment.

REQUEST NO. 5

All documents concerning any discussions relative to Jones at any time during Smith's employment with ABC.

REQUEST NO. 6

All documents concerning Jones' alleged sexual harassment of Smith and any other employees and contractors of ABC, past or present.

REQUEST NO. 7

All documents concerning any complaint or grievance, oral or written, made by Smith or on her behalf to any employee, agent or representative of ABC.

REQUEST NO. 8

All documents concerning conversations or other communications between Smith and any current or former employees, officers, representatives, attorneys or agents of ABC concerning any and all claims raised by her in this action or otherwise concerning her departure from ABC.

REQUEST NO. 9

All documents concerning grievances, charges or complaints regarding Smith's employment with ABC, including, but not limited to, documents filed with or received from the New York State Division on Human Rights and Opportunities, the Equal Employment Opportunity Commission, the federal or state Department of Labor, or any other governmental agency, court or administrative tribunal.

REQUEST NO. 10

All documents concerning statements by any witnesses to any meeting, discussion, conversation or other verbal communication or to any conduct described in the Complaint that is probative of Smith's claims of sexual harassment and retaliation.

REQUEST NO. 11

All documents concerning Smith's claims for monetary damages, including, but not limited to, documents that establish or tend to establish the amount of damages she claims for back pay, lost bonuses or other benefits, other compensatory damages, the costs and disbursements of this action, and attorneys' fees.

REQUEST NO. 12

All documents concerning Smith's claim of mental and/or emotional injuries sustained as a result of any alleged treatment she received during her employment with ABC, and any and all damages she claims resulted or will result therefrom.

REQUEST NO. 13

All documents not previously requested above concerning any and all claims of monetary loss or damage that Smith asserts or intends to assert arising from her employment with, or separation from, ABC.

REQUEST NO. 14

All documents concerning Smith's efforts to obtain employment or otherwise secure income after her separation from ABC up to the present time, and all such materials reflecting the results of such efforts, including, but not limited to:

- a. correspondence between Smith, her representatives or agents, and employment agencies;
- b. resumes, applications or background information forms, whether submitted to an employment agency or a potential employer;
- c. correspondence between Smith, her representatives or agents, and potential employers;
- d. contracts of employment;
- e. offers of employment;
- f. rejection of applications for employment;
- g. income tax returns for the year of Smith's termination and for each year thereafter, including federal, state and local returns;
- h. W-2 forms received by Smith for the year of her termination from ABC and for each year thereafter;
- i. unemployment insurance applications and benefit receipt stubs; and
- j. all other documents concerning Smith's efforts to secure, or her receipt of, income, whether taxable or nontaxable.

REQUEST NO. 15

Smith is asked to execute Authorizations for Defendant to receive copies of any psychiatric records of Smith for the past five (5) years. Smith is asked to execute such Authorizations for each physician, psychiatrist, psychologist, social worker, or other such personnel who has examined or treated Smith during the last five (5) years.

REQUEST NO. 16

Copies of any diaries, calendars, appointment books, notes and the like reflecting or referring to the period of Smith's employment with ABC.

REQUEST NO. 17

Copies of all communications to and from any third party, except Smith's attorneys, concerning, referring or relating to any and all claims raised in this lawsuit and Smith's claims regarding Jones, or any other ABC employee, past or present.

REQUEST NO. 18

Copies of any statements from any witness or potential witness concerning any claim or defense raised in this lawsuit.

[c]—Plaintiffs' Requests for Production

Interestingly, plaintiffs will request a significant amount of the same information as defendants request. Plaintiffs should request (with the proper description) their complete personnel files, payroll and benefit records, notes or memoranda by management (which are not always included in personnel files), copies of the complaints the plaintiff may have filed internally where applicable, copies of investigative notes, copies of warnings provided to any person who was the subject of the complaint, copies of personnel files of persons accused and complaints made by other employees concerning the persons accused. Requests should also be made for employee handbooks or manuals and relevant complaint policies or other internal memoranda reflecting relevant policies, guidelines or procedures that were in effect at any time during the plaintiff's employment.

Requests for statistical data should be carefully tailored to avoid objections. Tailoring includes ensuring a relevant time frame and definition of the "defendant" where a company is the defendant. A good general rule (depending on the nature of the litigation) would be to request data covering two years prior to the plaintiff's hire and one

year after her termination. Data requested (with this “tailoring” in mind) should include data reflecting complaints of the same nature and how they were handled; documents concerning other civil actions or administrative charges concerning similar types of complaints; data concerning hiring and terminations of employees in the same protected classification as the plaintiff; where hiring and/or promotion is the issue, data concerning individuals applying for the particular position(s) and individuals selected; and where disability is the issue, data concerning reasonable accommodations of other disabled employees. Again, this is just a sampling of the most common types of statistical production requested in employment actions.

The following are examples of the type of requests that should be included in plaintiffs’ requests for production:

- (1) A copy of Plaintiff’s complete personnel file.
- (2) Documents that refer to the benefits to which Plaintiff was entitled at any time during her employment, including, without limitation, documents reflecting group health and dental insurance, life insurance and eligibility for bonus consideration.
- (3) Documents reflecting the functions that Plaintiff was responsible for performing, including any job description, for all positions held during her employment.
- (4) Copies of all performance appraisals, formal or informal, and documents reflecting, referring to or otherwise concerning Plaintiff’s performance at any time during her employment.
- (5) Copies of all employee handbooks or manuals in effect during Plaintiff’s employment.
- (6) A copy of any agreements or contracts between Plaintiff and Defendant.

The following requests for production are typical of those made in connection with sexual harassment claims:

- (1) A copy of any inter-office memoranda or other written communications made by Plaintiff to her supervisor, Robert X, concerning, referring or relating to her complaint concerning David Y at any time during her employment.
- (2) Copies of all notes, memoranda or other documents concerning, referring or relating to Plaintiff’s internal complaint of sexual harassment by David Y.
- (3) Copies of all notes, memoranda or other documents concerning, referring or relating to the investigation, interviews or other inquiry by Defendant concerning the Plaintiff’s internal complaint regarding David Y.

(4) A copy of Plaintiff's internal complaint against David Y and her subsequent memoranda to Sharon S of the Human Resources Department concerning that complaint.

The following requests for production are typical of those made in connection with discrimination claims involving hiring or promotion:

(1) Provide documents that reflect the identities and titles of all persons hired by ABC Co. for its Widget Division during the period from 1998 to the date of Defendant's responses to this request.

(2) For each individual identified above, provide documents that reflect that individual's race and/or ethnic origin to the extent such information is maintained by ABC Co.

(3) For each individual identified above, provide documents that reflect whether that individual remains in the employ of ABC Co., and, if not, the date of termination, whether voluntary or involuntary, and the reason for termination.

(4) For each individual identified above, provide documents that reflect any complaints of discrimination that were made by such individual, whether internally or externally, the dates of such complaints and the nature of the discrimination asserted.

Obviously, not every company will maintain data in such a sophisticated manner as is presumed by these requests. Thus, the plaintiff must take into account her defendant, and tailor requests accordingly. As a last resort, the plaintiff's attorney should not discount the value of taking the depositions of employees in management and/or the human resources department to track the information and then request personnel files or other documents concerning individuals whose identities are divulged during those depositions.

Such a request can also be made in the form of interrogatories. Again, be cautious since interrogatories should not substitute for production requests or depositions. Interrogatories and requests for production should complement one another.

Generally, responses to paper discovery should be timed so that they are received, providing for some possibility that extensions will be requested, prior to commencing depositions.