

A Seasoned Trial Lawyer Weighs In On What Employers Must Do In Today's Litigious Times

[Donald S. Prophete](#) is a named partner in [Constangy, Brooks, Smith & Prophete, LLP](#). He represents clients in complex and multi-plaintiff race employment discrimination cases and has handled many high-profile and high-damage cases in the sports, military contractor and retail industries. In January 2008, the U. S. Commission on Civil Rights, in conjunction with the White House, appointed Don to serve as chairman of the Advisory Committee to the Commission, for a two-year term. In January 2002, President George W. Bush announced his intention to nominate Don to be general counsel of the Equal Employment Opportunity Commission (EEOC). While honored, Don ultimately withdrew his name from consideration to remain in Kansas City.



Don will be joining his colleagues and attendees at the [HR Specialist Summit](#) in Las Vegas in September.

Jathan Janove: Don, reflecting on your long career in representing employers in labor and employment disputes, is there a case that especially stands out in your memory?

Don Prophete: There is one I find particularly memorable because of the level of sheer misconduct by opposing counsel in fabricating alleged discriminatory acts. I represented a very large manufacturer who was sued by a group of 38 plaintiffs alleging race discrimination and a racially hostile work environment, which allegedly included pervasive use of nooses and the “N-word” on its plant shops.

Because of the number of plaintiffs, this ended up being an absolutely massive case. When I met with the company’s general counsel, I was immediately struck by his unequivocal refusal to believe that any of the facts alleged could have taken place in this company. I was taken aback at how forceful the GC was in denying that the culture of the company would ever allow such conduct to exist.

However, as my team and I delved deeply into investigating the claims, it became clear that the GC’s faith was completely warranted. This company had implemented a state of the art compliance program meant to prevent this type of conduct at the company. They not only created this program, they were devoted to its application and trained consistently on the company’s expected code of conduct. As a result, the company fermented an incredibly healthy workplace that simply could not support the egregious type of behavior alleged by the plaintiffs.

By the end of the case, it became clear at the time that the Plaintiff’s counsel had recruited claimants to the lawsuit in exchange for a promise of tens of millions of dollars in damages. During the defense of the case, the plaintiffs could barely keep their facts straight and in fact contradicted each other on most facts. The entire case was a complete fabrication.

Jathan: What did you learn from this case?

This case was important to me because it reminded me not to allow myself to be jaded by the mere fact that 38 plaintiffs had signed their name to a lawsuit against an employer. It also reinforced that employers who establish strong compliance programs at their facilities are in the very best position to defeat these types of completely fabricated claims, no matter the number of plaintiffs involved.

Jathan: For employers desiring to stay litigation-free, what are the top five do's?

Don:

- (1) Invest meaningfully in strong compliance programs;
- (2) Value these programs and train employees on compliance;
- (3) Investigate thoroughly all claims of discrimination;
- (4) Retain very detailed records of all investigations; and
- (5) Have an independent ethics line to further amplify the enforcement of their compliance policies.

Jathan: From an employer's perspective, what's the best way to select, work with and maximize benefit from labor & employer counsel?

Don: Having previously served as in-house Director of Labor and Employment Law for a very large telecom company, I can speak to this point from personal experience. Employers should pick counsel who are knowledgeable of employment law, but most importantly counsel who understand their culture and can properly represent the company within the parameters of that company's culture.

Jathan: Don, do you have any other thoughts or suggestions to share with our readers?

Don: I would recommend that all employers regularly take the time to evaluate their existing compliance programs to ensure that they focus on best practices and that they are being enforced in a way to avoid liability.