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Q&A With Troutman Sanders' Rebecca Shanlever

Law360, New York (April 19, 2013, 1:39 PM ET) -- Rebecca Shanlever is a partner with Troutman Sanders LLP in the firm's Atlanta office, where she is a member of the labor and employment practice group and serves on the diversity, pro bono and recruiting committees. Shanlever works with clients to avoid disputes and when litigation arises, to resolve or try their cases effectively. She litigates a wide variety of employment matters, defending discrimination, harassment, retaliation and related lawsuits and handling disputes over employee nondisclosure and noncompetition agreements.

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

A: A hotly contested dispute over a client's decision to hire an executive from a competitor. The executive's former employer had insisted on a noncompetition agreement that was too broad and unenforceable in Georgia. As often happens in these cases, after we filed a declaratory judgment action here, the former employer sued us in another state, where at least portions of the agreement likely would have been upheld.

So we were litigating in two states, with a former employer who felt betrayed by the executive and was furious that the agreement (which had been prepared by its counsel in this case) was not enforceable in the state where the executive lived and worked. Whoever described these kinds of cases as "business divorces" was exactly right. Despite our efforts to resolve the case early on, this employer took a scorched earth approach to the litigation and spared no expense. In addition to the emotions behind the case, it presented jurisdictional and procedural challenges at every turn.

The case was like a law school exam question, covering everything from the first-filed rule and personal jurisdiction to choice of law and indispensable parties. One additional challenge was overcoming an early ruling in our case here that the noncompetition agreement, which had been signed in 2008, could be enforced based on Georgia's new law on restrictive covenants.

We filed a motion for reconsideration (one of two I have ever submitted), and the court overturned its prior decision and held that the noncompetition agreement was unenforceable as a matter of law. The other court transferred the former employer's case to Georgia, and we settled the entire case on very favorable terms.

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

A: The fee-shifting provisions of the Fair Labor Standards Act, Title VII and other anti-discrimination laws. When an employee wins, the employer has to foot the bill for her attorney's fees, which usually dwarf the employee's recovery. But an employer who successfully defends a case cannot recover fees except in very rare instances. Many first-time defendants are shocked to learn that this is the process. The potential liability for the

plaintiff's fees forces some employers to settle cases that have little merit.

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

A: The use of criminal background and credit checks to screen applicants (and in some cases, current employees). The Equal Employment Opportunity Commission's position is that using criminal and credit history to make employment decisions has a disparate impact on minority groups. So unless the employer conducts an individualized assessment for each person excluded by the screen and determines that the policy as applied to that individual is job-related and necessary for the business, using the screen is discriminatory.

That kind of individualized assessment is simply not workable for many employers. For now, this position is simply the EEOC's authority, but the agency has filed lawsuits against employers who use criminal background and credit checks, and the courts in those cases will be making law that all employers will have to follow or risk liability.

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

A: Mack Binion in Mobile. Mack is a real trial attorney with a well-deserved reputation as a zealous advocate for his clients. He's got a knack for cutting straight to the real issue in a case, particularly where there are "he said, she said" factual disputes like in sexual harassment matters. Everyone knows Mack, and when you go into a Mobile courtroom with him, you are glad he's on your side.

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

A: I had not read the local rules in a federal court in another state, which had its own rule — different from F.R.C.P. 6(d) — about additional time to respond when you are served by mail. This court counted the three additional days at the beginning of the response period, instead of at the end. In our case, the difference meant that I served our discovery responses a day late.

It ended up not being an issue, but I sweated over it for days. Even now, I make sure I know the local rules and each judge's standing orders — including here in the Northern District of Georgia, where I practice regularly. And I tell every new lawyer who works with me that she is responsible for knowing them too.

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