

# EMPLOYMENT LITIGATION

The recent explosion of employment-related lawsuits has greatly affected the employee-employer relationship, which is constantly evolving as new employment laws are enacted and new cases make their way through the courts and administrative agencies. The need for the involvement of experienced legal counsel from the outset of an employee complaint is critical to a successful defense. Your best defense may hinge on the management of an employee complaint at the very point in time when it is made.

Hodgson Russ's employment litigation attorneys generally represent management only, providing experienced counsel on every aspect of the employment relationship. We are here when you need us in a crisis, and we are here to guide you with developing employment programs to help avoid a crisis. Hodgson Russ lawyers are experienced in the defense of employment-related claims and have the resources, determination, and creativity demanded in employment litigation situations. When Hodgson Russ clients become involved in employment disputes, our number one priority is to protect clients' legal rights and commercial interests.

Our attorneys regularly appear in state and federal courts as well as in alternative dispute resolution forums such as mediation and arbitration. Our litigators have the depth of experience garnered from years of representing clients in contested proceedings, including administrative hearings, trials, motions, and appeals.

Efficient means and effective representation characterize our relationships with our employer clients. In the interest of instituting programs to avoid litigation, Hodgson Russ's employment litigation attorneys provide counseling and conducts equal employment opportunity compliance programs, seminars, and other educational offerings to assist clients in assessing potential risks and legal exposures before disputes. These services allow clients to evaluate, manage, and head off situations that might result in litigation.

Hodgson Russ represents clients before courts and administrative agencies in disputes with current and former employees. Examples include:

- Employment discrimination litigation in state and federal court pertaining to race, sex, sexual harassment, sexual orientation, religion, national origin, age, color, disability, alienate, and any other legally protected category
- Employment discrimination claims at state and federal administrative agencies
- Misclassification of worker claims
- Non-competition agreement claims

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## Professionals

### Attorneys

Carmine Castellano  
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Emily Florczak  
Rob Fluskey  
Cheyenne Freely  
Peter Godfrey  
John Godwin  
Thomas Grenke  
Julia Hilliker  
Charles H. Kaplan  
Joshua Levitt  
Ryan Lucinski  
Christopher Massaroni  
Elizabeth McPhail  
Kinsey O'Brien  
Matthew Parker  
Adam Perry  
Hugh Russ III  
Peter Sahasrabudhe  
Christian Soller

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- Theft of trade secret claims
- Equal Pay Act claims
- Family and Medical Leave Act claims
- Employee Retirement Income Security Act (ERISA) claims
- State law tort claims (e.g., defamation, intentional infliction of emotional distress, assault and battery)
- Federal and state civil rights laws claims
- Breach of contract claims
- Payment of wage claims    Hodgson Russ has been awarded a prestigious “Best Law Firms” Metropolitan Tier 2 ranking by *Best Lawyers/U.S. News & World Report* in the Litigation - Labor & Employment category.

Michael Zahler

### Experience

Hodgson Russ reversed on appeal an approximately \$3 million judgment in a municipal labor dispute and obtained dismissal of the pleadings of a multimillion-dollar collective action against a municipality under New York State insurance laws. The case involved the use of five insurance tax proceeds.

In *Maraschiello v. City of Buffalo*, Hodgson Russ obtained summary judgment and successfully defended an appeal before the U.S. Court of Appeals for the Second Circuit. The plaintiff was next in line for promotion on the civil service eligible list for police inspector. After he lost his opportunity for promotion, he sued claiming reverse discrimination. In forcefully rejecting the plaintiff’s contention that Buffalo acted for impermissible race-based reasons in discarding civil service exam results, the Second Circuit emphasized that Buffalo’s “problem was the test itself, rather than with a particular set of results.” The Second Circuit’s decision has broad significance for municipalities and other employers nationally as it makes clear that employers retain substantial discretion to design and implement new employment procedures for purposes of complying with Title VII and other anti-discrimination law, despite claims by majority plaintiffs that such compliance efforts constitute reverse discrimination.

Hodgson Russ successfully defended the City of Buffalo's use of employment promotional exams against two federal putative class-action challenges by a group of African-American firefighters. After a bench trial, the district court ruled that the examinations were valid, non-discriminatory selection devices that were job related and consistent with business necessity, even though they statistically favored non-minority candidates. A Hodgson Russ attorney successfully briefed and argued the

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appeal in the U.S. Court of Appeals for the Second Circuit, which affirmed the district court's ruling.

Lead counsel for employer in a discrimination and retaliation case brought under the Americans With Disability Act, where the plaintiff alleged that her height was a disability, that her employer failed to accommodate the disability and that her employment was terminated for requesting an accommodation. Case ended when the Court of Appeals for the Second Circuit confirmed dismissal of the plaintiff's claims.

A Hodgson Russ team, which included Adam W. Perry and Michael B. Risman, secured for Hodgson Russ clients the City of Buffalo, Mayor Byron Brown, and Buffalo Police Commissioner Daniel Derenda the dismissal of a First Amendment retaliation lawsuit brought by former police detective Dennis Delano. After making public comments to a news reporter and releasing evidence related to the 1993 murder of 13-year-old Buffalo resident Crystallyn Girard, Delano was brought up on disciplinary charges and later suspended for 60 days at the recommendation of an independent hearing officer. According to the Buffalo Police Department, Delano's actions violated numerous departmental regulations and were in direct violation of orders from his superiors. Delano, however, asserted that the suspension was in retaliation for his exercising his right to free speech under the First Amendment. Chief U.S. District Judge William M. Skretny dismissed the civil lawsuit in August 2014 on the grounds that Delano's conduct amounted to insubordination, which outweighed the value of his speech. Judge Skretny's ruling was informed by the decision handed down by the U.S. Court of Appeals for the Second Circuit in *Sacha v. Sedita*, another First Amendment retaliation case successfully handled by a Hodgson Russ team at the district court and on appeal in defense of Sacha's claims against Erie County District Attorney Frank A. Sedita, III. In the decision, the Second Circuit ruled that an assistant district attorney's public statement expressing criticism of his office "was sufficiently disruptive to justify terminating his employment." Judge Skretny agreed with the *Sacha* precedent, stating that "no matter the merits of his motivation," Delano's action "had the potential to cause a disruption significant enough to impair 'discipline by superiors' and 'harmony among co-workers.'"

In *M.O.C.H.A. Society, Inc. v. City of Buffalo* (2013), the U.S. Court of Appeals for the Second Circuit affirmed the district court's ruling in favor of Hodgson Russ's client, the City of Buffalo, that evidence did not support the plaintiffs' challenge to the Buffalo Fire Department's drug testing policy.

The U.S. Court of Appeals for the Second Circuit affirmed the dismissal of First Amendment retaliation and New York State whistleblower claims made by Mark Sacha, a former assistant district attorney fired by Erie County District Attorney Frank A. Sedita, III. Sacha's lawsuit was previously dismissed by U.S. Chief District Court Judge William M. Skretny. Sacha appealed Judge Skretny's ruling, claiming he was fired in retaliation for alleging that District Attorney Sedita and his predecessor, District Attorney Frank J. Clark, were corrupt. The court found Sacha's speech while employed as an assistant district attorney was so potentially disruptive to the Erie County District Attorney's Office as to justify terminating his employment. The court also stated, "We have considered Sacha's remaining arguments and find they are without merit." Partner Adam W. Perry led the Hodgson Russ defense team.

In *Foley v. City of Buffalo*, Hodgson Russ obtained the dismissal on the pleadings of a federal lawsuit alleging that our municipal client had systematically denied members of a 700-strong municipal fire department overtime pay, thus avoiding for the client potential damages in excess of \$10 million.

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Hodgson Russ has defended various regional corporations in employment discrimination matters pending in the U.S. District Court for the Western District of New York. Causes of action pending in the litigations include the Fair Labor Standards Act, Title VII, Age Discrimination in Employment Act, Americans with Disabilities Act, and New York State Human Rights Law claims.

Secured favorable jury verdict in Suffolk County Supreme Court in a Labor Law 240 trial involving a plaintiff who was injured in a construction accident.

Obtained favorable settlement for a retired architect client from his former employer for breaching the governing Buy-Sell Agreement.

A Hodgson Russ team led by Patrick Hines, Ryan Lucinski, and Emily Florczak secured victory for a publicly-traded company in a lengthy jury trial in New York state court. The case arose out of a love triangle among current and former company employees, where an employee was accused of harassing and stalking an ex-girlfriend and her boyfriend-turned-husband at work and off hours with the use of company equipment. The plaintiffs sued our client under a number of tort theories, all but one of which were dismissed on summary judgment and on appeal. Plaintiffs' negligent retention claim remained for trial. In short, plaintiffs claimed that our employer client acted negligently in supervising and retaining the allegedly-offending employee, and that it failed to adequately investigate plaintiffs' complaints of harassment, all of which caused them harm. Plaintiffs sought compensatory damages for emotional distress and punitive damages. After four weeks of proof, which included testimony from 15 lay and expert witnesses, the jury took 45 minutes to return a unanimous verdict in favor of our client. The jury did find that the allegedly harassing employee (now deceased) acted negligently, but his estate is judgment proof.

When a sales manager gave two weeks notice to end his employment with a wholesale supplier of paper products in New York State, his employer monitored his computer use and searched his home, resulting in a lawsuit commenced against him and his new employer and colleagues seeking seven-figure damages and equitable relief under conversion of property, misappropriation of trade secrets, breach of fiduciary duty, tortious interference with contractual and business relationships, and unfair competition theories of liability. At the close of discovery, Hodgson Russ partner Christian J. Soller successfully moved for summary judgment on behalf of the former employee as well as his new employer and colleagues, resulting in the dismissal of the complaint on the basis that any information taken was either returned or too easily ascertainable to warrant protection and result in any competitive disadvantage to the plaintiff company.

A Hodgson Russ team led by Ryan Lucinski successfully defended a major construction company, a municipality, and a school district in a lawsuit filed by a union carpenter who fell on "black ice" on a construction site and allegedly sustained career-ending injuries. The plaintiff contended that the defendants were negligent and violated Labor Law § 241(6). At trial, Ryan was able to exclude the testimony of plaintiff's meteorologist and counter with evidence of weather reports that refuted the alleged icy condition at the time of incident. After two weeks of proof, the jury returned a unanimous no-cause verdict in favor of our clients.

Secured nominal settlement for a Fortune 1000 client in a high exposure Labor Law 240 case that ultimately settled globally for approximately \$7 million, involving a young and catastrophically injured plaintiff.

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For two years, Hodgson Russ attorneys Ryan K. Cummings and Hugh M. Russ, III pursued an appeal that sought to narrow the application of New York Labor Law § 240(1) across the state. The New York State Court of Appeals issued its decision in *Holly v. County of Chautauqua and E.E. Austin & Son, Inc.* In its decision, the court returned to the true intent of New York Labor Law § 240(1) and, by doing so, began to limit the statute's far-ranging impact on owners of construction projects and their contractors throughout New York State.

Secured summary judgment for large construction management company client in a Labor Law 240 case involving a young, catastrophically injured plaintiff that was ultimately tried in New York County Supreme Court and yielded a jury verdict of approximately \$26 million.

In *Piccone v. Town of Webster*, Hodgson Russ obtained summary judgment dismissing the complaint on behalf of a municipal defendant against allegations of employment discrimination and harassment based on gender, age, national origin, and ethnicity in violation of the U.S. Constitution's Equal Protection Clause and New York State Human Rights Law. The case turned on extensive e-mail, the content of which the plaintiff alleged was offensive. Hodgson Russ attorney Joshua Feinstein was able to undermine the plaintiff's claim and obtain summary judgment by having her admit that she voluntarily engaged in the e-mail exchanges.

Attorneys from Hodgson Russ LLP, led by Hugh M. Russ, III and Julia M. Hilliker, secured a victory on behalf of client Portville Central School District at the New York State Court of Appeals. The Court of Appeals is New York State's highest court. The decision, which protects the school district's statutory right to terminate a non-tenured administrator at any point during a statutorily mandated three-year probationary period, constitutes a victory for all districts and school boards statewide.

Warded off summary judgment to plaintiff in a Labor Law 240 case pending in Orange County arising from plaintiff's fall from a ladder on a construction site, where the Court was persuaded that plaintiff's own conduct may have been the sole proximate cause of his accident and injuries.

### **In the News**

Judge Ends Historic Desegregation Order for Buffalo Firefighters  
*Buffalo News*, February 9, 2019

Award to 12 Buffalo Firefighters Reversed  
*Buffalo News*, February 18, 2015

Circuit Upholds Drug Testing of Buffalo Firefighters  
*New York Law Journal*, July 5, 2013

Buffalo Firefighters Push 2nd Circ. To Reopen Race Bias Suit  
*Law360*, May 20, 2013

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Absence of Local Data Found to Be Not Fatal to Promotional Tests

*New York Law Journal*, July 31, 2012

2nd Circuit Rebuffs Challenge to Buffalo Firefighter Test

*Thomson Reuters News & Insight*, July 30, 2012

No Uptick Yet in ADA Litigation

*Buffalo Law Journal*, July 30, 2009

### **Press Releases**

Three Hodgson Russ Attorneys Ranked in 2022 Edition of New York Metro Super Lawyers

September 29, 2022

Hodgson Russ Partner Hugh M. Russ, III Honored with Bar Association of Erie County's Award of Merit

September 26, 2022

Labor and Employment Attorney Charles H. Kaplan Joins Hodgson Russ

*Hodgson Russ Press Release*, March 24, 2020

Hodgson Russ Attorneys Secure Dismissal of First Amendment Retaliation Lawsuit Related to High-Profile Murder Case

*Press Release*, September 4, 2014

### **Publications**

Employees Enjoy a Private Right of Action Under Changes to New York City Earned Safe and Sick Time Act

*Hodgson Russ Labor & Employment Alert*, March 7, 2024

New York Employment Law

*New York Law Journal*, October 7, 2020

Governor Cuomo Issues Executive Order Mandating Post-Travel Quarantine

*Hodgson Russ Labor & Employment Alert*, June 29, 2020

Impact of Supreme Court Decision on Public Sector Union Membership

*Labor & Employment Alert*, June 28, 2018

2nd Circuit Court of Appeals Rules that Title VII of the Civil Right Act of 1964 Protects Against Discrimination on the Basis of Sexual Orientation

*Labor & Employment and Employment Litigation Alert*, February 27, 2018

Courts, Employers Ponder Restrictive Covenants

*Buffalo Law Journal*, April 8, 2015

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U.S. Supreme Court to Address the Pregnancy Discrimination Act, Even as EEOC Issues Its Own Guidance on the Same Subject

*Employers' Advisor*, August 12, 2014

Independent Contractor Relationships

*Saratoga Business Journal*, February 6, 2014

Non-Compete Agreements: When Do Companies Need Them?

*IndustryWeek*, September 6, 2012

Uncertainty in the Pharmaceutical Industry: FLSA Classification of Pharmaceutical Sales Representatives to Be Determined

*The Voice, a publication of the DRI*, March 16, 2012

## **Presentations & Events**

Kinsey O'Brien, Thomas Grenke Speak On Transparency in Job Postings

March 15, 2023

What Employers Need to Know about Reopening the Workplace

May 15, 2020

Labor & Employment Seminar

Offices of Hodgson Russ LLP, New York, NY, December 12, 2019

Labor & Employment Seminar

The Century House, Latham, NY, December 5, 2019

25th Annual Labor & Employment Conference

Buffalo Niagara Marriott, Amherst, NY, November 14, 2019

Municipal Law Seminar

Buffalo, NY, May 16, 2013

16th Annual Labor & Employment Conference

Amherst, NY, November 4, 2010