



HUMAN RELATIONSHIP FAILURES: **UNDERSTANDING YOUR EXPOSURES TO** **EMPLOYMENT LITIGATION**

By Catherine A. Asaro

If the adage “employees are every company’s greatest asset” holds true, doesn’t it make sense for employers to make it a priority to provide them with a safe, congenial, and productive work environment? Many would agree that boosting employee morale generally translates into greater profits for the company. Then, why are employment-related claims on the rise? And, why are there so many multi-million dollar settlements and verdicts in these cases?

Recently, there have been a few major employment litigation cases with noteworthy settlements. In one case a large aerospace company agreed to pay \$72.5 million in settlement of a sex discrimination lawsuit as well as agreed to make changes to its hiring, pay, promotion practices and method of investigating employee complaints. Of that total amount, approximately \$15 million will be deducted to cover attorneys’ fees and other legal costs. According to the plaintiffs’ lead attorney nearly 60% of female employees filed claims.

Also, this year a very popular retail clothing company was ordered to pay \$40 million to minority workers who alleged discrimination of which nearly \$10 million was paid out in attorney’s fees.

Last May, 2004, a California jury awarded \$19,014,000¹ to an employee who sued her employer for wrongful discharge as a result of being harassed by her supervisor due to excessive absences related to a medical condition.

With the expansion of employment law issues and the broadening definition of discrimination, every employer should take into consideration the possibility that they may become the target of legal action not only from a current employee but a past or even a prospective one. Moreover, employers should be aware that the costs involved in defending against such a lawsuit can be quite exorbitant. A proactive management team should consider setting up preventative measures to recognize the early warning signs of trouble to avoid these situations. By implementing swift and efficient steps to resolve the problem you may be able to prevent protracted and expensive litigation. Developing policies and procedures that ensure objectivity in employment practices are a good start. Once these policies and procedures are in place, monitoring them for effectiveness and updating them based on workplace demographics is crucial to their continued success.

¹ Of that amount \$15,000,000 was awarded by the jury for punitive damages.

In this paper, we will evaluate the trends, discuss some major issues impacting employment litigation, and explore some ways for you to protect your company from exposure to the employment-related claims.

I. U.S. Workforce Speaks Out

As of July, 2005, statistics from the U.S. Census Bureau revealed that the U.S. labor force is comprised of 149.6 million people.² Of that number, about 28% work in excess of 40 hours a week with 8% working in excess of 60 hours a week. With employees spending so many hours on the job, their expectations of their workplace environment is changing.

Employment-related lawsuits are the fastest growing civil cases in the U.S. with nearly a quarter of all litigation in federal court involving employment disputes and an even higher percentage of these cases in state court. It is estimated that between 1969 and 1994 the number of employment discrimination claims increased by 2,200%.³ The surge in employment related litigation can be traced back to 1990's with the enactment of the Americans with Disabilities Act of 1990, The Civil Rights Act of 1991, and the Family Medical Leave Act of 1993, all of which heightened awareness of wrongful employment practices, enhanced employee's rights and created new grounds for employers to be sued. According to the EEOC, from 1992 to 2003, the number of sexual harassment charges filed with the agency increased about 69%. Given the trends, it is

evident that employees have no problem letting their employers know when they feel they have been mistreated.

In 2004, the EEOC collected a record \$415 million, up \$30 million from 2003, from employers that allegedly violated workplace discrimination laws ranging from race, sex, age, and disability. Of that amount, \$251.7 million was attributable to benefits collected through administrative action and \$163.7 million from the agency's litigation activity. In 2004, the EEOC filed 414 lawsuits of which 378 were direct suits against employers with 73.8% of which were filed under the Civil Rights Act of 1964.⁴

II. Employment Class Actions are on the Rise

Aside from defending against a lawsuit from one disgruntled employee, companies have to consider the prospect of defending against a class action. Class actions have proven to be expensive problems that hurt bottom line profits. Over the past 10 years, employment class action litigation has steadily increased with class allegations of discrimination in hiring, compensation, promotions and layoffs.

Approximately, one out of every three lawsuits filed by the EEOC is a class action. In 2004, the EEOC filed 143 class suits on behalf of multiple alleged victims of discrimination. One such high profile lawsuit that settled in 2004 was against one of Wall Street's premier investment banking and brokerage firms for \$54 million with approximately

² Statistic includes works age 16 and over.

³ Boyd A. Byers, *Mandatory Arbitration of Employment Disputes*, 67 J. Kan. B.A. 18.

⁴ 10.6% were filed under the Age Discrimination in Employment Act (ADEA), 11% under the American Disabilities Act (ADA),

\$2 million apportioned to diversity programs to enhance the compensation and promotional opportunities for female employees. The lawsuit was brought by a class of females from a specific division who alleged discrimination in violation of Title VII of the 1964 Civil Rights Act regarding promotions, wages, and terms and condition of employment.

In 2004, in what is shaping up to be the first billion dollar employment discrimination case, a U.S. District Court Judge granted certification to the largest U.S. civil rights class. It began as a lawsuit filed by 6 female employees that has grown into a class of approximately 1.6 million current and former female employees claiming systematic bias against female employees in promotions and pay stores nationwide. The anticipated costs of defending an action of this magnitude are easily projected as a few million.

III. Managing Human Resources

Everyday human resource departments are faced with the challenge of listening to countless grievances, sorting out the hurt feelings from those which could give rise to a real problem and coming up with an acceptable solution. It is no small task for human resource personnel to dig all the way down to find the root cause of a problem, albeit a possible discriminatory practice, and implement a firm yet “fair” solution to eradicate a potentially explosive situation. Moreover, there is an alarming trend based on the increasing number of lawsuits filed against supervisory employees including Human Resource personnel and officers making it even more important for them

to be sensitive in dealing with these issues.

Standing in the shoes of the aggrieved employee to determine what they perceive to be an equitable solution is the real challenge. What one may consider reasonable another may find objectionable and what one finds equitable another may find offensive. Even the Courts are having difficulty agreeing on the interpretation of employment issues on topics involving disparate impact and disparate treatment.⁵ So what can an employer do to protect itself from employment claims?

When it comes to a company’s “human resources” there are no easy answers that will make everybody happy, but there are many cost-effective ways for employers to minimize their liability. The most important first step is recognizing that you are not immune from an employment-related claim. Many employers do not realize or believe they are at risk and it is those companies that may be in for a rude awakening. In 2004, the Equal Employment Opportunity Commission (EEOC) handled nearly 80,000 charges.⁶ According to the Chubb 2004 Private Co. Risk Survey, 44% of executives at privately held companies believe that it is likely that an employee or former employee will sue their company in the year ahead, and 50% believe it is likely that an employee will file a complaint with the EEOC.

⁵ See *Raytheon Co v. Hernandez*, 540 U.S. 44, 298 F.3d 1030 (2003).

⁶ U.S. Equal Employment Opportunity Commission, Charge Statistics, www.eeoc.gov/stats/charges.html

IV. Minimizing Exposure

It is important for companies to take proactive steps to minimize their exposure to employment litigation. By instituting zero-tolerance policies for wrongdoing, effectively training management and staff, efficiently handling claims, and strictly enforcing these policies are some steps in the right direction. There are a number of other cost-effective ways for companies to take steps to lower their employment liability exposures. Companies should consider an additional investment of time and energy in the following areas:

- Conducting risk assessments to identify potential issues
- Evaluating and updating corporate risk management strategies
- Holding seminars on diversity training for management
- Working with human resources to educate employees on company hiring, discipline, review, and termination policies
- Auditing enforcement and effectiveness of employment policies and procedures
- Assisting in claims control and handling

Another way to minimize costs associated with defending employment litigation is by purchasing a stand-alone Employment Practice Liability Insurance (EPLI) policy. A relatively new coverage introduced about 20 years ago, EPLI policies cover claims against the company, its directors, officers, employees.⁷ EPLI insures against liability arising from employment practices and can help eliminate the high cost of employment

practice claims. Most EPLI policies cover violations of Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, most other federal or state anti-discrimination laws as well as some state contract and tort laws. These policies will provide coverage for costs of settlements and jury awards, attorney fees and other costs associated with defending claims.

Before purchasing an EPLI policy, it would be wise for you to consult with a knowledgeable broker. There are several factors to consider in determining what type of EPLI policy is right for your company. We can educate you on the wide ranging scope of coverages available, limitations on types of damages covered, policy restrictions on claims investigation, market trends, and cost. We can conduct a risk analysis based on your company's history with employment claims to point out factors important to underwriters as well as areas needing improvement. We will find the most comprehensive coverage available in the markets to suit your needs, recommend limits and negotiate key policy terms. For instance, a stand-alone EPLI policy may better suit your needs as opposed to an EPLI policy written as an endorsement to a D&O policy as a stand-alone policy will not erode the limits of the D&O policy.

Recognizing that employment-related claims are a real exposure and assessing the impact a discrimination or harassment lawsuit could have on your company's reputation and overall employee morale are vital to your company's health and continued growth. Taking the time to explore your options with a knowledgeable broker will reduce

⁷ Some EPLI policies cover subsidiaries.

your chances of being hit with a lawsuit and should be considered time well spent.

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