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ROUGH JUSTICE

WORKERS ARE SUING THEIR EMPLOYERS IN GROWING NUMBERS, BUT MANY HAVE CAUSE TO REGRET IT

By Brian Moore
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To complain to HR about a sex-crazed supervisor is human. To sue the company that won't do a thing about Boss Perv is divine.

Or so many employees think. But while legal action taken by workers against current and former employers is a fertile field for attorneys, it's rarely a primrose path for plaintiffs, experts say.

What seemed like a good idea at the time – sue the bastards! – often becomes an endless nightmare of unexpected personal and professional problems, which can include retribution from an employer, giant legal bills, professional black-balling and a D-Day-like invasion of privacy. And that's true whether a case is a legal gold mine driven by godly righteousness or a meritless action generated by spite.

“When you make the decision to sue, you feel so strongly that you're right and that I deserve this money,” says Phyllis, whose husband is mired in a lawsuit with a former employer over unpaid commissions. “You feel like it's a slam dunk.”

But given all the couple has gone through, including 60 grand in legal fees and some marital woes, she's not sure she'd do it again - even though she's convinced her husband was in the right.

“I just don't think it's worth the stress,” she says.

Such worries aren't putting much of a dent in the number of employee lawsuits. Last year, almost 83,000 discrimination claims were filed with the US Equal Employment Opportunity Commission (EEOC). It's the largest one-year jump since 1993 – a period during which overall claims have more than doubled.

Suits alleging religious discrimination, “family responsibilities” discrimination (aimed at those whose familial duties may interfere with work) and underpayment of wages are among those that have seen a spike. And in the slumping economy, employment lawyers say they expect to see a sharp increase in employee-generated suits.

But a large number of those plaintiffs are likely to reach the same verdict as Phyllis, says Ronald Shechtman, managing partner at Pryor Cashman LLP in Manhattan.

“Many employees read stories and hear tales, and they have a vision of a great pay day and an employer capitulating,” he says. But “they often get what they don’t expect.”

For starters, among the things they’ll likely get is a vigorous defense, because large employers want to send a message to other workers, while smaller firms fight back out of “a sense of outrage,” says Shechtman.

Mara Levin, a partner at Herrick, Feinstein LLP in Manhattan who represents employers, says one of her firm’s clients spent a small fortune defending a racial discrimination lawsuit it could have settled for a fraction of that. An employee – “a really good Catholic girl,” says Levin - accidentally walked in on a male and female employee who were together in an empty office. She said the two were examining each other’s briefs; the couple said the man was consoling the woman.

When the firm fired the alleged lovebirds, the couple filed suit, contending they were canned because the male employee was black. The firm shelled out \$250,000 in legal costs – and prevailed.

The message sent? “If you’re going to have sex on the premises, you will be fired,” says Levin.

The merits of a plaintiff’s suit notwithstanding, there are plenty of perfectly legal ways a defendant can fight back. Sexual harassment suits are notorious for hardball tactics, according to Paul Lopez, a partner at the Florida firm Tripp Scott, who says employees filing such suits are “potentially opening a Pandora’s box on their personal life” and notes that any “skeletons in the closet” or suggestions of past “kinkiness” can be brought into play.

“You say you were offended by this sort of conduct in the workplace. Let’s see how offended you were by this thing in the past,” he says, describing defendants’ tactics. “It’s not a fun process.”

Less salacious actions can likewise bring on unwanted scrutiny. Which means that before filing suit, plaintiffs had better be sure there’s no monkey business on their company computer, warns Ken Springer, president of the investigating and consulting firm Corporate Resolutions. And that’s true whether it’s private e-mail, pornography or evidence that the worker has been downloading proprietary information with a thumb drive or running a side business on company time.

If a plaintiff fudged a resume or a job application, that can come back to haunt him as well.

“If they’ve lied on a resume, what makes you think they didn’t lie on this action?” asks Springer.

THE SCARLET LETTER

Employers can take aim at employees who sue in ways other than digging through their dirty laundry – one being on-the-job retaliation for those who still work for the company they’re suing. Although the law forbids it, there’s a chance that a company will take a swing anyway, with actions including firing or demoting the employee, denying bonuses and various forms of ostracism.

Retaliation claims more than doubled between 1992 and 2007, according to the EEOC. And while it’s more common at smaller firms, vengeance can rear its ugly head at larger firms as well, notes Justin M. Swartz, a partner at Outten & Golden LLP.

“Even the bigger, more sophisticated companies can’t always control their low-level management,” he says.

Even if the plaintiff has quit, filing suit can create a “T for troublemaker” reputation that can make it difficult for him or her to find work at other firms in the same industry.

“If they’re intending to stay in the industry, they have to be worried about an unspoken alliance. They’re going to be blackballed,” says Lopez. “You better be damn sure of your standing in the industry.”

A former HR exec agrees.

“When a reference check is done and a lawsuit surfaces, they’re going to find a reason to knock the person out of the box,” says Barbara Poole, who now runs employaid.com, an online resource site for corporate employees.

Poole advises plaintiffs who are looking for a new job to be up-front with potential employers about their legal actions. It’s better to put a positive spin on the matter – “I want to work here because my research shows that this company treats employees with respect and pays them accordingly” – than to have HR discover it independently.

A FULL-TIME JOB

And by the way, if a plaintiff has left the job, he or she will be looking for another, not lying on the couch sipping adult beverages while his lawyer puts together an instant retirement package. The law requires it, on the grounds that since economic loss is a factor in a suit, workers “have a duty to mitigate their losses,” says Manhattan attorney Mark Risk, who represents employees.

Even if a plaintiff weren’t required to hit the pavement, taking legal action isn’t a passive process. Plaintiffs generally have to bust some butt to provide evidence backing up their claims.

“Typically, the case never looks better than when an intelligent client presents his case in your office,” says Orange County, Calif., attorney Richard Bridgford of Bridgford & Gleason. “Thereafter, it’s a series of hurdles.”

Those hurdles can include helping to piece together whatever documentary evidence there is, testifying at grueling depositions where opposing counsel tries to rip open a few new ones, and putting up with a flurry of motions, delays and other legal tactics that can drag a case out for years.

And even if a plaintiff finds an attorney willing to work on a contingency basis, he’s still often responsible for certain legal expenses that can run into thousands of dollars, such as paying for a court reporter during a deposition.

All these obstacles aside though, there’s never a shortage of people willing to take their work issues to court, which means employment lawyers’ caseloads are unlikely to decline any time soon. Phyllis, the woman who’s had second thoughts about her husband’s ongoing legal dispute, says she recently talked to a friend who’d been fired from a job despite a signed contract. Phyllis counseled patience, but she’s not sure if the advice registered.

“I hear it in her voice – that ‘I’m right and they’re wrong,’” she says. “They go in with rose-colored glasses. It’s just not that cut and dried.”