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Employer Retaliation Claims Rise

EEOC Says 23% More Such Charges Were Filed by Workers in Fiscal 2008

By CARI TUNA

The Equal Employment Opportunity Commission last week sued Zachry Industrial Inc. for allegedly firing a female worker who complained about unequal access to bathrooms for women employees.

The agency charged the company with retaliating against the employee -- even though it didn't back up her discrimination claim.

The case comes amid a surge in complaints of retaliation to the EEOC. Claims including a retaliation charge rose 23% in the year ended Sept. 30, 2008, to 32,690 -- more than a third of all claims filed with the agency. Claims that didn't involve retaliation rose 12% in the same period.

Carolyn Wheeler, an EEOC assistant general counsel, says stamping out retaliation is the commission's top priority. Enforcement of antidiscrimination laws "depends totally on people coming to file complaints," she says. "If people don't feel free to do that, these laws don't get enforced."

EEOC officials and employment lawyers cite several reasons for the increase. Management-side attorneys say many complaints come from laid-off workers. Moreover, retaliation is often easier to prove than discrimination, particularly since a 2006 Supreme Court decision adopted a broader definition of retaliation than some courts had used.

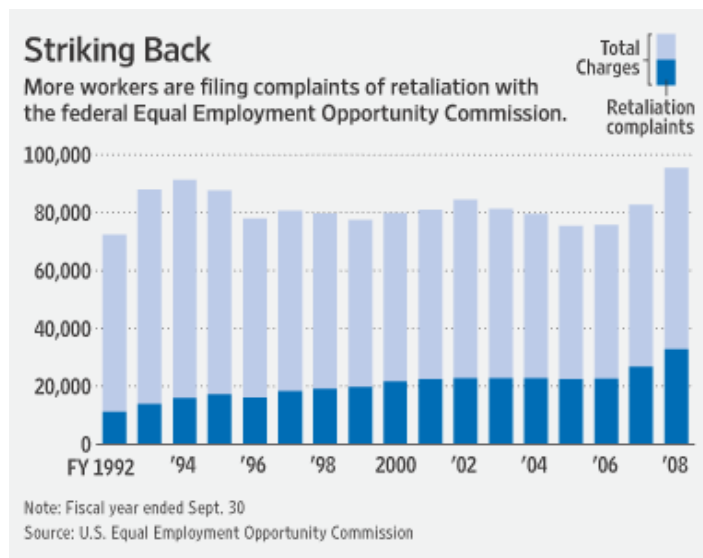
"Retaliation is really the No. 1 risk for employers today," says Joseph Beachboard, a management-side lawyer at Ogletree, Deakins, Nash, Smoak & Stewart PC. He says the number of lawsuits handled by his firm that include a retaliation claim jumped 21% so far this year, compared with last year.

Vincent Cino, national director of litigation for Jackson Lewis LLP, says roughly 70% of discrimination suits handled by his firm include a retaliation claim.

To be sure, many EEOC lawsuits charge both discrimination and retaliation. Last month, the agency sued the Adecco USA unit of staffing giant Adecco SA for failing to protect women employees from sexual harassment in a plastics plant to which they were assigned, and for firing a worker who complained to Adecco officials.

Bernadette Kenny, Adecco's chief career officer, says the company ended Veronica Jalpa's contract because she was frequently late to work, and that she never complained about harassment to the staffing firm. She says Adecco cooperated with the EEOC and is "disappointed" by the lawsuit. She says the company has a "zero tolerance" policy for discrimination and harassment. Ms. Jalpa couldn't be reached.

In the Zachry case, the EEOC is charging only retaliation, not discrimination. The agency says Zachry fired electrician



assistant Connie Beseda in New Braunfels, Texas, in April 2008, about three weeks after she complained to the agency that mobile toilets for female workers were less accessible than those for male workers.

According to the EEOC, Zachry says it fired Ms. Beseda for violating its safety policy by wearing ear studs at work. The commission says the company didn't typically enforce the no-jewelry policy and continued to punish Ms. Beseda by refusing to rehire her, despite a policy allowing workers terminated for safety violations to be reinstated after 30 days.

An EEOC spokeswoman says the agency didn't find enough evidence to support a discrimination

charge, but declined to discuss the case in more detail.

Zachry spokesman John Hornsby declined to comment on the lawsuit but said the company "is strongly committed to fairness and does not discriminate or retaliate in its employment practices."

Ms. Beseda couldn't be reached for comment.

Retaliation complaints have nearly tripled since 1992, when the EEOC began tracking the data. Official statistics for 2009 aren't yet available, but employment lawyers say the trend is accelerating in the recession, particularly among workers who have been laid off.

The EEOC last month sued Childress Engineering Services Inc. of Richardson, Texas, for allegedly retaliating against a female worker who complained in January 2008 about recurring sexually explicit and hostile remarks from male co-workers. The EEOC alleges that Jennifer Green was selected for layoff the following month because she was a whistleblower.

Durwood Crawford, a partner at Goins, Underkofler, Crawford & Langdon LLP who is representing Childress, says Ms. Green was one of four workers laid off because of a business downturn.

Ms. Green was selected because she was the newest employee in its retail-housing division, not in retaliation for her complaint, Mr. Crawford says, adding that Childress subsequently laid off several other employees.

An EEOC attorney representing Ms. Green says she has been out of work since the layoff.

Mr. Beachboard, the employment lawyer, says layoffs for business reasons generally are more defensible than individual firings, but don't make an employer immune from retaliation suits.

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