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EEOC Complaints Remain Flat, but More Suits Filed

By Mark Friedman - 1/11/2010

The number of discrimination complaints that Arkansans filed with the Equal Employment Opportunity Commission remained flat in 2009, while the number of complaints nationally dipped for the first time in four years.

However, the number of lawsuits the EEOC has subsequently filed against companies in Arkansas is on the rise, said EEOC Regional Attorney Faye Williams of Memphis, who covers Arkansas, Tennessee and parts of Mississippi.

"We are filing more lawsuits now than we've ever filed," she said.

Since Aug. 17, the EEOC has filed five lawsuits in U.S. District Courts in Arkansas.

While some attorneys said proving a discrimination lawsuit could be difficult, a successful verdict could be worth more than \$1 million.

At the end of October, a federal court jury in Jonesboro awarded six black employees of Nucor-Yamato Steel Co. of Charlotte, N.C., \$1.2 million in a race discrimination case. The black employees had worked at Nucor's Blytheville steel plant, where there was evidence of lynching re-enactments and portrayals of black employees as monkeys.

In December, the EEOC won a \$1.1 million verdict against Whirlpool Corp. of Benton Harbor, Mich., for a former employee at its LeVergne, Tenn., plant in a race and sex discrimination case.

"Anytime you get in front of a jury, especially in this economy, the jury is likely to be sympathetic to an employee who has a valid claim," said Byron Freeland, a senior member of the labor and employment practice at Mitchell Williams Selig Gates & Woodyard PLLC of Little Rock.

Last week, the EEOC reported that it had received 93,277 complaints during the federal fiscal year that ended Sept. 30, a decrease of 2.23 percent from the previous year. Even with the decline, it's still the second-highest number of complaints on record.

In Arkansas, 1,585 complaints were filed in EEOC offices for the fiscal year that ended Sept. 30, four more than in the previous year, according to EEOC statistics provided last week to *Arkansas Business*.

"The latest data tell us that, as the first decade of the 21st century comes to a close, the Commission's work is far from finished," EEOC Acting Chairman Stuart J. Ishimaru said in a statement last week. "Equal employment opportunity remains elusive for far too many workers."

Typically, the EEOC, employer and employee attempt to iron out the problem through mediation. But if that doesn't work, the EEOC or the employee, alleging civil rights violations, could haul the employer into court.

Williams said the number of complaints had been rising over the years. For the 2005 and 2006 fiscal years, the EEOC received about 75,000 complaints of discrimination. The number jumped to 82,800 in fiscal 2007.

The EEOC has been conducting more outreach programs so that people are aware of their rights, which might contribute to the increase, Williams said.

Also, the recession could have resulted in people filing more EEOC complaints.

"You've got more people getting fired and laid off ... just because of the economy," said attorney Lucien Gillham with Herrill & Sutter PLLC of Benton, who has handled discrimination lawsuits for plaintiffs. "And of course, a lot of people that get picked for that are going to be people who have an illness or a disability. ... I also would also guess that you're going to see a lot of older folks getting fired."

Claims Process

An employee who thinks that he has been discriminated against has 180 days to file a claim with the EEOC, said William Cash, supervisory trial attorney for the EEOC's Little Rock area office.

From there, the EEOC will review the complaint and ask the employer for a response. In most cases, the employer and claimant agree to attend a voluntary mediation program, which typically is successful, Cash said.

The mediation program might have prevented a number of lawsuits from being filed, Freeland said. "I think a lot of people have filed meritless [claims] and they're never getting filed in court," he said.

But if the EEOC determines that discrimination has taken place, it will step in to attempt to stop it. If the discrimination doesn't end, however, then the EEOC will consider filing a lawsuit on behalf of the employee or other workers.

If the EEOC investigates and can't find enough evidence to show a violation has occurred, it issues the employee a right-to-sue letter and he has 90 days in which to file his own lawsuit, if he chooses.

Gillham said that in most of the discrimination lawsuits filed in federal court, the EEOC wasn't able to prove discrimination.

"Most of my living is made off of cases that the EEOC says they couldn't find any discrimination," he said.

Difficult to Prove

Discrimination laws have been on the books for years, and the Civil Rights Act dates back to 1964.

"Most folks know that you don't sit there and say this or that racist thing when firing somebody," Gillham said. "And so that makes it a little bit harder to prove discrimination."

He also said he thought judges had grown tougher on employees claiming discrimination by dismissing many discrimination lawsuits before they even get to a jury.

"As the late [U.S. District Court Judge] George Howard would say, 'Very few employers get up and say, 'I'm firing you because you're black or because you're a woman,'" said Robert Newcomb, an attorney who practices labor law in Little Rock.

Freeland also said he had noticed judges dismissing cases before they reach a jury.

"They've held plaintiffs to pretty high standards," he said. "They scrutinize the complaint to see if they comply with the law, more so in the early stages than they used to."

Gillham said he was passing on cases that he would have taken years ago because of the higher level of proof now needed to get in front of a jury. For example, at one time, if an employee was called by a racial slur in front of a supervisor, "I would probably consider that sufficient notice to the company there was a hostile work environment, and I would have taken the case," Gillham said.

But the 8th U.S. Circuit Court of Appeals has ruled that such an act may not be sufficient notice, he said. The judges might require the employee to have made a formal complaint, he said.

"It's ridiculous because the company knows," Gillham said. "And the company has an obligation to correct hostile work environments, but that's what the appellate-level judges have done."

Cash, the attorney with the EEOC, said proving a sexual harassment case also can be difficult because there might not be any witnesses. Women who believe they were fired or not hired because they were pregnant also have an uphill battle proving their case, said Freeland.

"Almost every business can show that they've had numerous people who were pregnant and allowed to come back to work and been treated very well," Freeland said. "So it's a really tough claim to show."

The people who have been fired or laid off might feel that they were treated unfairly, but proving that they were discriminated against is another hurdle, said Robert Newcomb, a Little Rock attorney who practices labor law.

Newcomb said that someone might be treated unfairly, but there's no legal case unless he can show that he was treated unfairly because of his gender, race, religion or age.

"I can fire you in Arkansas because I believe you use roll-on deodorant," he said. "And that's not illegal, even if in fact you use spray deodorant."

Equal Employment Opportunity Commission Pending Cases in Arkansas

Here are some of the lawsuits the Equal Employment Opportunity Commission has pending in federal courts in Arkansas:

- **Rock-Tenn Co.** of Conway. The EEOC is suing on behalf of Cynthia Brown and other female former employees who allegedly were discriminated against by being subjected to sexual harassment. The EEOC said in the lawsuit filed Sept. 24, 2008, that a co-worker caused the inappropriate sexual "actions, overtures, and behavior." Rock-Tenn knew or should have known the harassment was occurring and failed to take proper action against the harasser, the lawsuit said. The EEOC said Brown was forced to resign because of the ongoing sexual harassment. Rock-Tenn has denied the allegations in its court filings.
- **The ServiceMaster Co.**, which does business as **Terminix**. The EEOC said in the Aug. 17 lawsuit that the Terminix office in McGehee forced Heather White on medical leave and fired her because she was pregnant. An attorney for Terminix said in court filings that the case was in settlement talks. Terminix hasn't filed an answer, and an attorney for the company didn't return a call for comment.
- **Starbucks Corp.** of Seattle. The EEOC said in a lawsuit filed Sept. 2 that it was suing Starbucks for a violation of the Americans With Disabilities Act of 1990. The EEOC said that Starbucks Store 11743 in Russellville failed to hire Chuck Hannay, a qualified individual with a disability, because of his disability. Starbucks has denied the allegation in its answer to the lawsuit.
- **Presbyterian Village Inc.** of Little Rock. The EEOC charged that Presbyterian Village discriminated against David Few because of his disability. In the lawsuit filed Sept. 24, the EEOC said Presbyterian Village removed the accommodation it had provided to Few and then retaliated against him when he complained. Presbyterian Village in its court filings denied that it discriminated against Few, failed to accommodate him or retaliated against him.

- **Complete Vacuum & Rental Inc.** The EEOC charged that in Complete Vacuum's Quitman office, Gary Brewer and other black employees were subjected to racial harassment and unfair work assignments because they were black. The EEOC also said in its lawsuit, filed Sept. 30, that the company fired Brewer because of his race and in retaliation for his complaints of racial harassment. In its court filings, Complete Vacuum denies that it discriminated against Brewer or others.

- **Delta Family Health & Fitness for Children Inc.** of Hamburg. The EEOC charges in the lawsuit filed Dec. 29 that Delta Family Health retaliated against Tara Daigle by firing her after she complained of sexual harassment. The EEOC also said that Delta Family fired Trenia Martin in retaliation because Daigle named her as a witness to the harassment. In addition, the EEOC said Delta Family fired two employees who complained to the EEOC that they were paid less because they were black women. Delta Family declined to comment on the lawsuit.

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