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To Avoid Becoming EEOC Statistic, Plan Ahead

Thursday, Mar 27, 2008 --- The economic woes dominating the headlines provide plenty of tough issues for employers. The federal Equal Employment Opportunity Commission has added one more item for concern – the level of discrimination charges.

Private-sector discrimination charge filings with the EEOC jumped 9% in the last fiscal year (2007), the largest annual increase since the early 1990s. The total number of charges, just fewer than 83,000, represents the largest number of charges filed since 1992.

Charges increased between 2006 and 2007 in nearly every major protected category. Yet some areas did rise faster than others. For example, the largest percentage increase came in the areas of pregnancy discrimination (up 14%) and retaliation (up 18%). Indeed, retaliation claims have doubled since 1992.

Even sexual harassment charges increased last year, the first annual increase in that category since 2000. Disability claims, which had hovered around 15,000 per year, shot up to nearly 18,000 last year – the highest level since 1998. Race and national origin charges also reached their highest levels in a decade.[1]

The monetary relief recovered by the EEOC multiplied as well, mirroring the rise in charges. The EEOC collected $345 million last year, up 26% from 2006. Most of this money ($274 million) was obtained through the administrative enforcement process, including mediation.

Why the Increase?

There is no single answer as to why the overall number of charges increased in 2007. EEOC Commission Chairwoman Naomi C. Earp opines that "corporate America needs to do a better job of proactively preventing discrimination and addressing complaints promptly and effectively."[2]

Economists have discerned that the numbers of job discrimination claims often swell as the economy shrinks.[3] It should also be noted that the EEOC has focused on more subtle types of discrimination and areas not traditionally associated with federal anti-discrimination laws, such as issues related to employees with "caregiver" responsibilities.[4]

This new focus broadens the actions that could be subject to a charge (or at least leads employees to believe so).

Harassment v. Discrimination – Lessons for Employers

A close look at the number of discrimination and sexual harassment charges provides an important lesson for employers.

Since 2005, the overall number of discrimination charges has increased 5%, while during that same period the number of harassment claims has generally decreased 5% (although such claims did rise last year). In particular industries, the decrease in harassment claims has been even more dramatic. For example, sexual harassment claims have dropped 51% since 1997, at least in some locals.[5]

One prevalent explanation for the difference is that many employers take more steps to address sexual harassment than they do to address discrimination. Most employers promulgate detailed policies dealing with harassment, while equal employment policies remain quite general. Most supervisors (and many employees) must take training programs dedicated to preventing harassment, while the broader issue of anti-discrimination is an "add-on" topic during such training, if it is covered at all.

The reasons for the different approaches to sexual harassment mostly likely stem from the publicity sexual harassment receives from both the media and the legal community. Sexual harassment has been front page news since Anita Hill's testimony at the 1991 confirmation hearings of Supreme Court Justice Clarence Thomas.

That year also saw Congress amend the Civil Rights Act to provide for damages in employment discrimination cases. Then, the U.S. Supreme Court decisions in the joint cases of Faragher/Ellerth created an affirmative defense to liability for those organizations that conducted harassment training and took other proactive steps to prevent or correct harassment.[6]

The adoption of a mandatory sexual harassment training law by the nation's most populous state, California, made such training a necessity for many employers nationwide.

Whatever the reason for the extra effort, it seems to have paid off for employers. Many scholars give sexual harassment training at least partial credit for causing the decline in claims.[7] Indeed, sexual harassment claims filed at the EEOC peaked in 1997 – the year the Supreme Court's creation of the affirmative defense spurred employers to make sexual harassment training common.

One broad-based study indicates that if employers were as proactive in the area of discrimination prevention as for harassment prevention, then overall EEOC claims might also drop.

After implementing a series of comprehensive classroom employment law training programs run by Littler Mendelson, the state of Washington realized a 37% decrease in employment law-related claims. This saved the state an

estimated $2 million per year.

These facts comport with the experiences of human resources professionals nationwide. Eighty two percent of those surveyed found employment law training to be effective or extremely effective in reducing litigation.[8]

Even if a drop in claims did not occur after training, such efforts would help employers avoid punitive damages in federal discrimination litigation pursuant to the U.S. Supreme Court's decision in Kolstad.[9]

Thus, prudent employers will want to consider the following:

--Review or examine general EEO policies to make sure that they have the same specificity as harassment policies;

--Ensure that supervisors receive anti-discrimination training with similar emphasis as anti-harassment training;

--Make compliance with equal employment policies part of every supervisors evaluation process;

--Focus training and compliance efforts on those areas where charges are increasing.

The recent upturn in discrimination charges provides a challenge to every employer. If the correlation between poor economic conditions and claims is correct, then more challenges are ahead.

Yet, employers are not helpless. There is strong evidence that the more proactive employer can stave off claims, reduce costs, and increase morale and productivity.

--By David Goldman, Littler Mendelson

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1. "Job Bias Charges Rise 9% In 2007, EEOC Reports," EEOC Press Release, March 5, 2008, www.eeoc.gov/press/3-5-08.html.

2. Id.

3 "Job-bias Complaints Against Private Firms Jump," Seattle Post-Intelligencer, March 5, 2008, seattlepi.nwsource.com/business/353883_jobdiscrimination06.html.

4. See, e.g., "Enforcement Guidance: Unlawful Disparate Treatment Of Workers With Caregiving Responsibilities," EEOC, May 23, 2007; "EEOC To Launch E-RACE Initiative," EEOC Press Release, Feb. 22, 2007.

5. “Sexual Harassment Training May Be Paying Off” San Francisco Chronicle, Sept. 5, 2006.

6. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998); Faragher v. City of Boca Raton, 524 U.S. 775 (1998).

7. “Sexual Harassment Training May Be Paying Off,” supra note 5.

8. Susan R. Hobbs, “Training Cures Managers’ Ignorance; Helps Prevent Suits,” Daily Lab. Rep. (BNA), June 12, 2001, at C-1.

9. Kolstad v. American Dental Assn., 532 U.S. 598 (2001)(holding that where an employer has undertaken good faith efforts to comply with Title VII – e.g., preparing and implementing written anti-harassment and discrimination policies, and educating employees on harassment and discrimination issues – the employer will not be liable for punitive damages bases on the discriminatory employment decisions of its managers when those decisions are contrary to the employer’s policies).

