

Litigation gets personal

More executives sued personally for workplace actions.

By Tresa Baldas
STAFF REPORTER

EMPLOYMENT LAW is getting personal.

An increasing number of executives, managers and other company leaders are being sued personally for their work-related decisions.

Labor and employment attorneys note that the increase in personal lawsuits has put upper management on edge, many fearing that every time they make a decision involving salary, leaves of absence or benefit issues, they could be sued.

Recent court decisions have added to this fear.

In June, the 1st U.S. Circuit Court of Appeals ruled that a hotel president was personally liable for multiple wage-hour violations. The court found that he "was not just any employee with some supervisory control," but that he "had ultimate control over the business's day-to-day operations," and was "instrumental in 'causing' the corporation to violate the FLSA [Fair Standards and Labor Act]." *Chao v. Hotel Oasis Inc.*, No. 06-1021.

In September, the 5th Circuit established new law by holding that a public supervisor can be held personally liable for retaliation against an employee. The case involved a woman who claimed her boss retaliated against her, refused to grant her leave under the Family Medical Leave Act and fired her. *Modica v. Taylor*, No. 05-50075.

And in 2006, a federal judge allowed a suit



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to proceed against ex-Environmental Protection Agency chief Christine Todd Whitman personally for allegedly misleading New York residents and workers by saying that the air quality was safe enough for people to return after the attacks of Sept. 11, 2001. The case is on appeal. *Benzman v. Whitman*, No. 04-CV-1888 (S.D.N.Y.).

In the initial ruling, U.S. District Judge Deborah Batts said that if the suit's claims are true, "Whitman's deliberate and misleading statements made to the press, where she reassured the public that the air was safe to breathe around lower Manhattan and Brooklyn, and that there would be no health risk presented to those returning to those areas, shock the conscience."

'Striking fear'

What's driving these lawsuits?

"State laws are constantly being broadened and liberally construed by the

courts to allow for potential lawsuits against individuals," said Thomas Lewis, chairman of the employment litigation group at Stark & Stark in Lawrenceville, N.J. In the last five years, Lewis has seen a 50% increase in his own practice defending executives in personal lawsuits.

"[Plaintiffs' attorneys'] desire is to strike fear into the executive to try and force a settlement," he said.

Plaintiffs' attorneys don't see it that way. "Sometimes you've got to hit the executive between the eyes with a lawsuit," said S. David Worhatch, an employee rights

attorney in Stow, Ohio, who is currently handling a half-dozen employment-related lawsuits targeting individuals directly.

As a former in-house counsel to a number of Ohio companies, Worhatch said he too often has seen executives accused of wrongdoing try to hide behind the corporate name and let the general counsel do all their defensive work. Now a plaintiffs' attorney, Worhatch believes that it is crucial plaintiffs have the legal remedy to sue supervisors directly and hold them accountable for egregious conduct that harms employees.

"Individuals will think twice before engaging in such conduct if they realize they can be personally exposed to liability," he said. "An individual should not be able to hide behind a corporate banner."

Ginger McRae, an employment law expert who testifies in employment lawsuits and

consults businesses on employment practices, said that “I would be alarmed if I were a [human resources] professional, probably more so for executives. I think that anyone in management is pretty vulnerable these days. I’ve seen a number of lawsuits where people are being sued.”

McRae noted that “[i]n the past few years, I’ve definitely seen more of a trend to this, and definitely in the state cases where there are state tort claims. That is where the plaintiffs’ lawyers really have the most freedom to name who they want.”

Plaintiffs’ attorneys note that state courts are easier venues in which to try personal lawsuits, largely because state discrimination and employment laws are looser than federal ones and allow for individuals to be held personally liable for various workplace violations.

According to both defense and plaintiffs’ lawyers, several federal laws that have been interpreted to hold decision-makers personally responsible include the Fair Labor Standards Act, the Equal Pay Act and the Family and Medical Leave Act.

However, discrimination laws under Title VII of the Civil Rights Act of 1964, which covers sex, race and gender discrimination, hold that one cannot sue an individual, only an employer.

In many personal lawsuits, a company’s attorneys will step in to divert the liability from the individuals and ultimately try to get them dropped from the suit. But, sometimes, sued executives want to use their own private lawyers.

There are also situations in which a company may choose not to defend an individual because of public relations concerns and instead will terminate the person, forcing him to hire his own lawyer.

Whether it’s state or federal, the trend continues. Alan Crone of Crone & Mason in Memphis, Tenn., who represents mostly employees in labor and employment matters, noted that it wasn’t until recently that Tennessee expanded its laws to allow for plaintiffs to go after supervisors in employment-related lawsuits.

Tennessee is an employment-at-will state, which means an employee can be fired at any time for any reason. But in 2002, the

Tennessee Supreme Court announced a new tort in a case that involved a supervisor accused of discrimination. The court held that, under certain circumstances, the supervisor could be held liable for discriminatory practices. *Trau-Med of America Inc. v. All State Insurance Co.*, 71 S.W.3d 691, 703 (Tenn. 2002).

“Now you’ve got more plaintiffs’ lawyers realizing that that’s an option, and it’s working,” Crone said.

Plaintiffs’ attorney Broadus Spivey of Spivey & Grigg in Austin, Texas, can attest to that. “In Texas, there’s no shield from liability,” said Spivey, who is currently handling five lawsuits where he is suing both the employer and managers over workplace decisions.

Most recently, Spivey settled a personal lawsuit in which he sought to hold a minister accountable for the actions of a counselor who allegedly took advantage of a widow he counseled to start a relationship with her. The minister was liable, Spivey alleged, because he had hired the counselor, failed to do a background check on him and should have known he was a potential risk. *Darling v. First United Methodist Church of Mineola*, No. 2005-067 (Wood Co., Texas, Dist. Ct.).

It’s no lay-up

But plaintiffs’ attorneys looking for an easy fight may be mistaken. Corporate America is armed and ready to fight back.

“They’re not an easy target,” said Roy A. Ginsburg of Dorsey & Whitney’s Minneapolis office, who represents management in employment law litigation.

Ginsburg, who has settled a number of cases on behalf of managers being sued personally, noted that going after executives in a lawsuit can be disadvantageous. It involves more money, more time—and more lawyers fighting back.

“Sometimes you sit down with the plaintiff’s counsel and say, ‘Look, is this really the way you want to go?’” he said. “For example, if a plaintiffs’ lawyer names a corporation and three individual defendants, everyone of those people is going to have separate counsel. They will be serving discovery requests. And there will be four

lawyers sitting across the table from you in court.”

And those lawyers, he added, could put up a tough fight.

“It’ll up the ante in litigation. It’s going to cost more time and money,” he said. “And are you going to be able to settle the case as easily, or is this the case where someone is going to want to be vindicated?”


Mary Birk, a partner in the Denver office of Baker Hostetler who represents management in employment matters, said personal lawsuits have become a growing concern for employers. She personally has handled about a dozen such lawsuits in recent years, with charges ranging from wrongful termination to sexual harassment.

In many cases, Birk noted, defense counsel have been successful at getting individuals dropped from employment lawsuits. That’s generally done by showing that a supervisor was acting in his or her professional capacity when the alleged wrongdoing took place, and that he or she didn’t take an action that was outside the scope of employment duties.

Still, she added, that process takes time and costs money.

“We often see where it takes us a while to get the individual manager or executive out [of the suit]. It does cause a lot of anxiety and concern by those people,” Birk said. “It’s personally traumatic, frankly.”

Meanwhile, Stark & Stark’s Lewis offered advice on how to avoid a personal lawsuit. He said the best preventative measure an executive can take is to make sure to act within the scope of his or her employment when making decisions such as terminating or reprimanding an employee. He especially cautions them against making the “knee-jerk reaction” of firing a difficult employee on the spot.

“What oftentimes happens is where an executive might get upset with an employee and say, ‘We’re getting rid of you right now,’” he said. “When that happens is typically when problems follow.” 

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