The Legal Intelligencer

Employment Law

It's Not Wise to Sue Your Employee After Discrimination Charges Are Filed

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In the employment law world, sometimes we get to review some truly head-scratching decisions by employers. Two recent cases settled by the Equal Employment Opportunity Commission (EEOC) provide a road map on what not to do when an employee engages in protected activity. It is no secret that retaliation claims constitute the fastest growing, as well as the largest number of charges filed with the EEOC. In 2015, nearly half of all charges filed with the commission included allegations of unlawful retaliation. So it would make sense for an employer to be alert and avoid putting itself in an indefensible situation.

Unfortunately, that was not the case for Hobson Bearing International, Inc., of Diamond, Missouri. Hobson, a bearing manufacturer, was accused of violating the Equal Pay Act (EPA) by employee Tera Lopez, a former project manager of the company. Lopez first filed a discrimination charge against Hobson with the EEOC in 2015. After an investigation, on Oct. 20, 2015, the commission issued a dismissal and notice of rights indicating that "this does not certify that the respondent is in compliance with the statutes." Less than three weeks later, on Nov. 9, 2015, Hobson sent a strong message to Lopez and anyone else who dared to file a charge of discrimination against the company. Hobson actually sued Lopez for malicious prosecution. The lawsuit was captioned *Hobson International v. Lopez*, 15AO-CC000256, and filed in the Circuit Court of Jasper County, Missouri.

The lawsuit alleged that Lopez maliciously filed the EEOC charge to harass Hobson and receive financial gain; that Hobson was compelled to defend the charge at great expense"; and that "at great taxpayer expense, the government closed its case stating it did not find a violation of the statutes under the Equal Pay Act ..." The lawsuit was not merely ceremonious for Hobson, the company actively litigated the lawsuit for over four months, including taking Lopez's deposition, and propagating discovery requests.

The commission interceded and notified Hobson that it was investigating the retaliatory lawsuit as a violation of the EPA's anti-retaliation provisions investigation and simultaneously served Hobson with a Request for Information (RFI) pursuant to its investigatory powers. Hobson, undeterred,

maintained its good faith belief the charge was "false," and continued to actively litigate the lawsuit against Lopez. Hobson, on the advice of its then-counsel, did not believe it was acting in a retaliatory manner when it filed a malicious prosecution case against Lopez for asserting her rights under the EPA.

After receiving Hobson's position statement and response to the RFI, the commission issued its determination that Hobson retaliated against Lopez in violation of the EPA's anti-retaliation provision. On March 21, 2016, the commission filed a federal lawsuit against Hobson accusing the company of unlawful retaliation, in *Equal Employment Opportunity Commission v. Hobson Bearing International,* W.D. Mo., Civil Action No. 3:16-cv-05034-SWH).

On Aug. 25, 2016, Chief U.S. Magistrate Judge Sarah W. Hays of the Western District of Missouri, entered a consent order against Hobson finding that its action of filing the lawsuit because Lopez filed a charge of discrimination with the commission pursuant to the EPA violated 29 U.S.C. Section 215(a)(3), which prohibits "discriminating against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to [chapter 8 of the FLSA, which includes the EPA], or has testified or is about to testify in any such proceeding ..." Hays awarded Lopez $37,500 in damages and ordered Hobson to completely dismiss its lawsuit against Lopez and not file any other lawsuit or pursue counterclaims against her based on the allegations in the charge she filed with EEOC. Hays cited cases holding that an absolute privilege - attached to the filing of the charges with the EEOC, reasoning that "the importance of maintaining free access to the commission is so great that the truth or falsity of a charge, may not be considered in providing protection to a person for filing a charge."

A second example of how not to handle an internal complaint of harassment comes by way of *Equal Employment Opportunity Commission v. Guardsmark,* E.D. Mich., Case No. 2:13-CV-15229. According to the lawsuit filed by the EEOC, the employer, Guardsmark, LLC terminated employee Christopher Smith, in retaliation for his role in a female co-worker's sexual harassment complaint. Smith worked as a security guard for Guardsmark at General Dynamic's Warren, Michigan facility. Per the federal complaint, on a number of occasions, Smith observed a co-worker using the security cameras to zoom in on women's private parts. Smith complained to the co-worker to no avail. Thereafter, on or about June 4, 2012, Smith informed a female victim, who complained. Just two days later, on June 6, 2012, Guardsmark removed Smith from his position at General Dynamics and essentially discharged him by failing to reassign him to another position.

After several years of litigation, the EEOC entered into a consent decree, signed by U.S. District Judge Victoria A. Roberts of the Eastern District of Michigan, ordering Guardsmark to pay $115,000 to Smith. Among the other relief imposed on Guardsmark, the company was ordered to post and provide notice to all employees of their right to be free of discrimination, harassment and retaliation; the company was to receive training on sexual harassment and retaliation by the EEOC; and the company was required to report its compliance to the EEOC for a period of one year.

The foregoing cases emphasize the lengths courts will go to to enforce anti-retaliation provisions. The EEOC has a strong interest in ensuring that employees will not be deterred from lawfully complaining about discrimination, harassment or unequal treatment. The courts appear to be very cognizant of the chilling and intimidating effect of suing an employee for filing a charge, or firing an employee for assisting a co-worker's complaint. In both instances, the employers attempted to shield their retaliatory motives by claiming to rely on "advice of counsel" or that they "acted in good

faith." It is hard to imagine a bigger indication of bad faith than when an employer admits it took action against an employee just because she had the audacity to speak up for herself, or worse, to speak up for others. •

Jeffrey Campolongo is the founder of the Law Office of Jeffrey Campolongo, which, for over a decade, has been devoted to counseling employees, working professionals and small businesses in employment discrimination and human resource matters. The law office also counsels aspiring and established artists and entertainers regarding various legal issues arising in the entertainment and media industries.
