Human Resource Executive Online

When HR Sues

Battling litigation by employees is difficult enough, but the task is made more difficult when the plaintiff is, or was, one of the company's HR professionals. HR leaders should make sure their organizations follow basic rules to prevent problems from escalating -- noting that even if litigation does occur, such practices will serve as good defenses in court.

December 8, 2011
By Tom Starner

Being sued by an employee for any number of reasons is bad enough, but when the employee/plaintiff comes from the human resource department, the sting can be especially nasty. And, as some employers have discovered, HR professionals have a distinct advantage in the courtroom.

Of course, say employment-law attorneys, organizations should never really let issues escalate that far in the first place.

In a recent case involving pay parity, a federal court in Philadelphia approved a consent decree requiring Amtrak to pay Sarah Davidson, an HR director at Amtrak, $171,483 in back pay, damages and attorney's fees. Amtrak also agreed to raise Davidson's annual salary by $16,505.

The problem developed in 2007, when Amtrak underwent a reorganization, according to news reports. In a nutshell, Davidson believed a male co-worker was unfairly being paid more than her, so after failing to get results internally, she filed a claim with the U.S. Equal Employment Opportunity Commission.

Interestingly, for eight years in her Amtrak career, she had managed EEOC discrimination complaints for the transportation company.

Other cases also illustrate the problems facing companies when HR is involved in litigation -- on the plaintiff's side.

In *Quinlan vs. Curtiss-Wright Corp.*, the Supreme Court of New Jersey earlier this year held that an employee's unauthorized taking of an employer's confidential documents -- in this case, an HR professional took the documents -- can constitute protected activity when the documents are used in support of a discrimination claim.

In the case, which initially resulted in a $10.6 million judgment against the employer, Joyce Quinlan, the HR director, used the documents to show she was discriminated against regarding a promotion. When that fact came out in discovery, the employer fired her for stealing the documents, so she also sued for retaliation. (She had signed a confidentiality agreement regarding documents, which contained some personal employee information, when she began working in HR.)

The jury ruled in Quinlan's favor, but an appeals court threw out the verdict and sent the case back for a new trial. In February, the New Jersey Supreme Court ruled she did not violate the confidentiality agreement in this specific case, so she will get a new trial and can use the documents to make her case.

In another case, a marketing employee at the law firm of SmithAmundsen in Chicago filed suit against her former employer for pregnancy discrimination, retaliation and other violations -- claiming she was told by her HR director that she should file suit, according to news reports.

Lisa Makowski claims the HR director, Molly O'Gara, told her she was being terminated for taking medical leave because of her pregnancy, that another employee had been treated similarly, and that "it might be a good idea to speak with a lawyer," according to reports. O'Gara denied the allegation in court.

A trial on that litigation is pending.

"It is very important for employers to realize that HR professionals have that inside track," says Jason Tremblay, a partner at Arnstein & Lehr in Chicago, and author of *Employment Law Toolkit -- How to Protect Your Business From Liability and Comply With State and Federal Employment Laws*.

"Many HR professionals within most companies know everything," he says. "Some may only do interviews or have limited knowledge. But many know the reasons decisions are made, the economics involved, and know the comparables in terms of compensation."

On the other hand, Tremblay adds, no matter who is suing their employer, the information can be obtained through the typical discovery process, so in a sense, HR employees are not in an unduly favorable position.

"But HR staff will know if certain things are true or not, so they can be one step ahead of the rest of the workforce," he says. "They tend to ... know what information is important and HR directors or other high-level HR employees know the settlement amounts in older cases. A regular employee will not know that, so it puts someone from HR in a strategic position to negotiate a severance package, for example."

Tremblay adds that in a jury trial, an HR professional, by the very nature of their jobs, may have an "aura of credibility" that would not apply to regular employees.

"It can cut both ways, but it's not a situation that you want in a trial," he says.

Greg Grant , chair of the employment law practice at Shulman Rogers, near Washington, says one thing top HR executives can do to reduce damages in such situations is organize the HR staff so their exposure to all of the company's alleged/actual HR-related issues is limited.

Specifically, staff can be structured or designated to handle only certain kinds of issues, i.e., one dealing with Title VII discrimination and related complaints/investigations/claims; another with employee classification, such as exempt/non-exempt or employee/independent contractor-related issues/concerns/investigations and/or claims.

"Not only will this encourage specialties -- promoting enhanced study, training and capabilities in these critical areas -- but it is also a natural way to maintain confidentiality within the HR staff," Grant says.

In addition, he says, high-level HR executives may, from time-to-time, need to refrain from disclosing certain issues or concerns being dealt with at a high-level within the company.

"Again, [HR executives should be] leading by example [to show those in the HR function] that it is critical not to gossip or unnecessarily share the details of many of the confidential issues and concerns handled by HR," he says.

Grant says companies should make sure all employees, including HR staff, are well aware of the rules (i.e., company policies and procedures), and make sure to apply and enforce those rules consistently and fairly.

"By doing so, you will remove most of the surprises and significantly limit a company's exposure both to baseless employee claims and from either the threat of or actual claim by an HR staff member to exposure any "skeletons" [i.e., past/current practices to the contrary]," he says.

Mike Hawkins, a partner in the labor and employment department at Dinsmore & Shohl in Cincinnati, says he has handled a number of these types of cases.

Two varieties seem prevalent, he says. In one, a senior executive harasses or perpetrates illegal conduct against a direct report from HR. In the other, an executive might make stereotypical comments involving race, age or gender during meetings with senior staff, including HR. Those comments get passed along to others and then, when an adverse action is taken, someone uses one of those comments when pursuing litigation.

For example, Hawkins says, an executive might say something as innocent as "We need some younger ideas in this company," and that can turn into an age-discrimination claim when someone 60 years of age or older is laid off.

"The key focus should be on having effective HR practices in place that demonstrate compliance with Title VII," he says. "There must also be an effective complaint process in place, so an employee can get access to someone with authority to properly investigate the situation and remedy it internally. That often will avoid the employee going to a lawyer or the EEOC to obtain redress or compliance with the law."

Most of all, he says, executives must avoid illegal or stereotypical comments in meetings or emails. They should also receive preventive training on EEO issues.

"My experience is that many executives don't even know all the details of their own policies and procedures," he says, adding that if an HR employee has a complaint and it is about the behavior of the top executive, they must have a process to go to the board of directors, if necessary.

"Businesses must take a proactive and preventive approach to this issue, which adds significant risk to the employer," he says. "The old adage of 'loose lips sink ships' has great application here."

Arnstein & Lehr's Tremblay offers these tips for staying out of court when it comes to HR professionals or any other employee:

* Make sure company policies are clear and understandable. This way both employees and management know how they are expected to conduct themselves. It also makes it difficult for employees and management alike to manipulate the system to their benefit.

* Make sure that management treats similar situations in a similar fashion. Therefore, all things being equal, two employees who commit the same infraction (e.g., same supervisor, relatively same disciplinary history, etc.) should be treated or disciplined similarly. When that doesn't happen, HR professionals will know about it and it could lead to claims of discrimination or unlawful treatment.

* Conduct regular internal pay and other audits to ensure company policies and pay practices are appropriate and being implemented in a fair fashion. This will help avoid situations such as the Amtrak case.

* There also should be checks and balances over HR actions, so that one HR professional is not the only person involved in hiring, firing and other personnel decisions. There needs to be some oversight to ensure that appropriate and consistent employment decisions are being made.

* All employees, including management and HR staff, should acknowledge receipt of company policies and agree to abide by them. Many companies tend to overlook that management-level employees are subject to the same rules (and perhaps more) than lower-level employees, and it is important to make sure that managers and senior-level employees are held to the same standards as other employees.

"Following those basic concepts won't stop you from getting sued -- by an HR professional or any other employee -- but they will provide an employer with a good defense," Tremblay says. "You can have great policies, but they are only as good as your implementation."