

The countersuit: How to fire back at frivolous lawsuits

When a disgruntled employee files a meritless lawsuit against your company, don't just defend yourself. Call his bluff by filing a cross-complaint against the worker and his attorney, suggests Arthur Silbergeld, a partner in the Los Angeles office of Proskauer Rose.

"I just find more and more intolerable the number of frivolous lawsuits that are filed," said Silbergeld. Since 1999, he's won attorney fees in three judgments for his clients, with the largest award of \$153,000 ordered by an arbitrator. Silbergeld says other workers have paid his clients to settle the lawsuits originally filed by the workers themselves.

High court defines 'frivolous'

An employee who wins a Title VII case against a company is usually awarded attorney fees too. After all, the company has violated a federal law. American common law also allows courts to order those who act in bad faith to pay the attorney fees of their opponents.

But in 1978, the U.S. Supreme Court laid down the law on when workers filing flimsy Title VII lawsuits should be forced to pay the company's legal fees. In *Christiansburg Garment Co. v. Equal Employment Opportunity Commission* (434 U.S. 412), the justices said a court can order a worker to pay the employer's attorney fees when his lawsuit is "frivolous, unreasonable or without foundation."

The fact that the employer wins doesn't necessarily mean that the case was frivolous. But if a worker continues to push his case after it's clear that the charges are groundless, he can be ordered to pay your costs.

How to respond

After you investigate an employee's bias claim, decide whether to settle upfront or to see the case all the way to the end, says Silbergeld. Don't spend \$30,000 on pretrial work and then decide to settle.

"If you settle a lot of cases, I think that encourages other employees to make similar claims," Silbergeld observed.

He asks his corporate clients for a commitment at the beginning of a case: If the company prevails, he is authorized to go after the worker for the costs associated with the frivolous lawsuit. Then he puts the worker's attorney on notice with a warning letter.

During depositions, Silbergeld always asks the employee whether he realizes that he could be ordered to pay the employer's costs and attorney fees.

"Invariably, I get a look of shock because they haven't been told that," Silbergeld said.

Of course, there is a potential downside to playing hardball. The employee is likely to tell co-workers that the company wronged him and is now threatening to sue. That can damage your good will with other workers.

Also, an employer who intends to take a hard line against frivolous suits needs to make that position very clear with the carrier of its employment practices liability insurance (EPLI). Otherwise, a carrier might settle a case out from under the employer.

"The carrier may have a bit of an incentive to settle and then just raise the rate," Silbergeld warned, adding that the best EPLI insurers won't do that.

Case study: Caught red-handed

Sometimes, you don't need to file a cross-complaint to prove your point, just do your homework.

Case in point: A worker had filed a claim against his company and was in depositions with the company's lawyer. The worker, on about his fourth marriage, had made what was supposed to be an out-of-state sales trip six months before he was fired.

But the company had evidence that he had instead visited an old girlfriend 500 miles from where he said he was. The trip had been charged on his corporate card and the rental car left at the airport.

When the employee was shown this information during the deposition, he quickly dropped his case and paid the \$250 for the court reporter's fee.

Put lawsuit-happy worker on notice

If you're a corporate client of attorney Arthur Silbergeld facing an apparently groundless case, Silbergeld pens a letter to the worker's attorney that outlines the facts, including the reasons that the case lacks merit.

The letter explains that you have no intention of settling and that if you prevail, the worker could be ordered to pay your legal fees and costs.

The letter then explains that your attorney has authorization to take legal action to recoup costs and fees if you win. It says, "This point is made for information that we hope you will communicate to your client, and not made as a threat or to appear to be bullying."