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5-27-1990

## **The Cost of Suing a Former Employee**

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*Legal Issues*


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# The Cost of Suing A Former Employer

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*After many years and at great expense, some aggrieved employees are righting old wrongs*

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BY DEBORAH L. JACOBS

Elizabeth Layman was 41 years old when Xerox Corp. eliminated her \$60,000-a-year job as marketing manager in the company's Dallas office. Ms. Layman, a Xerox employee for seven years, had been promised a transfer to California. But after she sold her home and made other preparations to move, Xerox reneged on the offer. While it moved younger male co-workers to other desirable jobs, the company assigned Ms. Layman to a spot for which she was overqualified. When her efforts to remedy the problem proved futile, she filed a suit against Xerox, alleging sex and age discrimination, breach of contract, and other claims.

Six years after the trouble began, Ms. Layman won a jury verdict of more than \$9 million. The Federal district court jury in Dallas found in January that Xerox committed fraud against Ms. Layman when the company induced her to transfer to California, then refused to give her a comparable job. In accordance with the verdict, the jury awarded her \$284,000 in actual damages and \$8.75 million in punitive damages. Her fight continues, however, since Xerox has challenged the verdict and made a motion for a new trial.

Even if she ultimately wins, Elizabeth Layman, 47, has spent more than \$55,000 in legal fees and immeasurable time and energy on the case.

"There's nothing in my personal or work life that's not part of the public record," says Ms. Layman, who was on the witness stand for more than two weeks and saw everything from her income tax statements to her telephone bills introduced into evidence.

Suing the boss can be a costly, time-consuming, emotionally draining process. But a growing number of employees such as Ms. Layman are taking their battles to court, complaining of sex, race or age discrimination, sexual harassment and other wrongs. At a minimum, they have the satisfaction of a day in court and seeing company officials held accountable for their actions. Many set loftier goals of establishing a precedent, deterring similar action and serving as an example for other employees.

"The message going out was you have to sleep

with your boss to get ahead," says Catherine Broderick, a staff attorney at the Securities and Exchange Commission who spent four years fighting a sexual harassment case against the agency. "If nobody does anything about it, it just keeps going on." Ms. Broderick's 1988 victory in the case yielded a retroactive promotion and an award of approximately \$128,430, which she finished collecting last year. That sum, representing back pay with interest, is based on the difference between her salary at the time she brought the suit, and what she would have earned with timely promotions.

The downside, as Ms. Broderick's case illustrates, is that litigation can take years to complete. Although lawyers estimate that approximately 90% of employment cases settle, that may not happen until several years into the case. Before they're through, employees may have spent tens or even

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## Suing the boss can be a costly, time-consuming, emotionally draining process

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hundreds of thousands of dollars in lawyers' fees, recoverable only after a victory. They also must cope with the emotional ups and downs of litigation, retaliation by employers (which may itself be the basis of a legal claim) and the isolation that comes from being labeled a troublemaker.

Those who win may wind up back to work with the very people whose conduct led to the lawsuit. Another consideration: In a tight job market, bringing a suit could spell career suicide, leaving you stranded if you lose the case or end up with a small award. "By the time my clients get to court their injuries are irreparable," says Joseph Golden, a partner in the Southfield, Mich., firm of Sommers, Schwartz, Silver & Schwartz. "Jury verdicts don't make them whole."

To be sure, standing up for your rights doesn't always lead to a lawsuit. Two years ago, for exam-

ple, the New York City Law Department adopted a policy which retroactively penalized women lawyers for taking a maternity leave. One woman prepared to file a lawsuit, another filed an administrative complaint, and several more reported the story to the press. Within six months, the office decided to drop the objectionable provision.

Statistics on employee lawsuits are kept by individual courts, rather than by a centralized source, but labor lawyers say the number is rising. More than 25,000 claims for wrongful discharge are pending in state and federal courts, according to a study conducted last year for the Bureau of National Affairs, a private information service based in Washington, D.C. The report estimates that the number of wrongful discharge cases doubled between 1982 and 1987. Lawyers attribute the increase to the litigious spirit of our society, greater public awareness of employee rights and reports of large verdicts such as Ms. Layman's, which is much higher than most. The average age discrimination verdict is \$722,294, according to the BNA study, while the average verdict in a sex-discrimination or harassment case is \$475,181.

### Consider the Pros and Cons

Although the potential gain is substantial, litigation requires carefully weighing the risks and benefits. "You should not file suit unless you're prepared to go through several years of struggle," says Paul H. Tobias, a partner at Tobias & Kraus and chairman of the Plaintiffs Employment Lawyers Association in Cincinnati, an affiliation of lawyers who specialize in employment law. "Litigation is about blood, sweat, money and tears." Three things contribute to a good case, he says: a "terrible cruel injustice" that can be proved through witnesses or documents, a sound legal theory and large damages.

More difficult to measure is the potential effect on your career. Ms. Broderick, who applied for approximately 100 jobs within the SEC during an eight-year period, was rejected for all of them. Ms. Layman, now a third-year student at St. Mary's University School of Law in San Antonio, interviewed for jobs inside and outside Xerox but had no offers. "You're certainly not a very popular employment choice when you're suing the company," she says.

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## The cost of suing

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In fact, some outplacement firms refuse to work with a terminated employee who has a pending dispute, partly because it poses a conflict of interest. "Individuals become known as litigious. That makes a hiring corporation very uneasy, and it makes our job much more difficult," says John Poynton, an outplacement counselor and vice president with Executive Assets Corp. in Chicago. Moreover, he notes, "Every person I've witnessed who is engaged in litigation has utilized 100% of his or her limited resources to address that issue, and doesn't have the reserves left over to engage in the full-time effort of finding a new position." Mr. Poynton says his firm suspends working with employees until they have resolved their legal disputes with the company.

Before you take the plunge and bring a lawsuit, arm yourself "with all available information," including names of possible witnesses, leads to former employees who may have had similar problems, and background about pending lawsuits, advises attorney Joseph Golden. Make notes about the facts of your case while they're fresh in your mind. If you're still with the company, talk to allies and mentors, keep daily notes about new developments and answer any negative reviews in writing. At a minimum, this material will help a lawyer advise you about the merits of your claim. But try not to do this work on company time or you might be accused of shirking your job responsibilities.

Ms. Layman's detailed records, including more than 500 pages of notes, letters and copies of her work assignments helped win the case by showing she was treated differently from other employees, says her lawyer, Richard H. Ihfe, who has his own firm in San Antonio. "In a swearing match, unless the facts are so egregious one way or the other, most juries will go in favor of the employer," says Mr. Ihfe.

### An Expensive Endeavor

Those who pursue their cases in court soon find it a costly proposition. Lawyers' fees range from \$75 per hour at the low end of the scale, to \$200 per hour or more at the high end. Just paying court stenographers to prepare deposition transcripts can run \$1,000 a day. And though lawyers sometimes offer flexible fee arrangements, they rarely take employment discrimination cases on a straight contingency basis (agreeing to be paid a fixed percentage only if the client wins).

Ms. Layman, who became a full-time student while her suit against Xerox was pending, has worked two jobs throughout the case to pay her

legal bills. She says she paid Mr. Ihfe \$20,000 at the start of the case, she covers all monthly expenses, and she has agreed to give him a 30% contingency fee if she wins.

In the course of her battle against the SEC, Ms. Broderick says she spent up to one-fourth of her take-home salary on legal fees—borrowing money, selling some of her possessions and living without air conditioning to pay her bills. "You're putting everything on the line," says Ms. Broderick, who declines to disclose her fee arrangement with her attorney. "You're in a battle for your life."

Given the costs, hourly employees, who tend to earn less than salaried professionals, may have a more difficult time suing. For starters, their smaller paychecks make it harder for them to shoulder the costs of litigation. And even if they win, back-pay awards tend to be proportionately lower than those of professionals. These employees may benefit from a class action suite—a case brought by one or

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## Don't file suit 'unless you're prepared to go through several years of struggle'

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several individuals on behalf of others with the same legal claim.

During the past five to 10 years, there has been a decline in class action litigation, however, as courts more strictly apply the rules for bringing these cases. In a sense, this gives nonprofessionals less clout with their employers, says New York City attorney Emily Bass. While in the past employers might have worried about the possibility of a class action, today they are "willing to do battle and fight individual cases with all the resources at their disposal," she says.

The process of bringing a suit is much more taxing for the employee than it is for the company. Ms. Broderick, who was subjected to five days of depositions and approximately seven hours on the witness stand, blames the suit for the breakup of a relationship with the man she wanted to marry. The SEC rebutted her claims of sexual harassment by arguing that her performance was somehow substandard, a defense that lawyers say is typical. The commission also subpoenaed medical records back to 1975 (when Ms. Broderick was in law school). She thinks the commission was looking for evidence

that she had sought psychiatric treatment to prove she was paranoid.

Ann Hopkins, who filed a sex-discrimination case against Price Waterhouse & Co. after she was denied partnership in 1983, has seen her performance appraisals produced as evidence in trial and appellate courts. In those that were fatal to Ms. Hopkins' candidacy, Price Waterhouse partners described her as macho, harsh and aggressive, speculating that she "may have overcompensated for being a woman." One male supporter advised her "to walk more femininely, dress more femininely, wear makeup, have her hair styled and wear jewelry."

The Supreme Court, in an opinion that established the burdens of proof in her case, last year reversed a lower court's judgment against Price Waterhouse and remanded the case for further proceedings. A Federal district court judge in Washington, D.C., in a May 14, 1990, opinion, said he will order Price Waterhouse to make Hopkins a partner effective July 1.

In accordance with the decision of Judge Gerhard A. Gesell, Ms. Hopkins will receive a back-pay award of approximately \$400,000 and go back to work with the partners who seven years ago declined to admit her to their ranks. Ms. Hopkins, 46, now a budget examiner for the World Bank, says she doesn't worry about potential job tensions. "I made a contribution before I left and I can make a contribution now," she says. "I don't see a problem."

Those who stay on the job while they sue the boss complain about ostracism from colleagues. Ms. Broderick says many of her co-workers at the SEC didn't talk to her while her lawsuit was pending. And Ms. Layman says she received few work assignments during her last year at Xerox. Several friends at the company asked her not to call them as they wanted to be supportive, but were afraid of reprisals.

Unfortunately, there are few formal support systems for employees contemplating or involved in litigation, leaving them to rely chiefly on friends and family as morale boosters. Ms. Hopkins found an unexpected source of strength in Elizabeth Hishon, a lawyer who fought a battle similar to hers all the way to the Supreme Court after she was denied partnership at the Atlanta law firm of King & Spalding. Initially, Ms. Hopkins called Ms. Hishon to congratulate her on her Supreme Court victory, but the two women subsequently became friends.

"It certainly gave me a sense of being something other than a Lone Ranger to know that someone else had been through these kinds of processes," says Ms. Hopkins. "It's not fun being on the leading edge."