KATZ, MARSHALL & BANKS, LLP

When Is Opposition to Discrimination Not Protected Conduct?

By Carolyn Wheeler
April 7, 2021

An employer unlawfully retaliates against an employee when it takes an adverse action against her because she engaged in protected conduct. Under the anti-discrimination laws, an adverse action is anything that would tend to deter people from complaining about illegal conduct, such as putting an employee on a performance improvement plan, transferring her to a job she finds less desirable, or firing her. Establishing that an employee engaged in protected conduct is often quite straightforward, but there are some common pitfalls and gray areas in the law, where the way an employee expresses her objections to conduct she thinks is illegal, or the measures she takes to oppose it, may forfeit the protection of the anti-retaliation provisions.

What is opposition conduct in a retaliation case?

The easy cases typically involve complaining about discrimination (on the basis of race, color, religion, sex, national origin, age, disability, or genetics) against the employee or others in the workplace; threatening to file a complaint about such discrimination; participating in an investigation of discrimination or harassment; resisting harassment (for example by telling a supervisor making sexual advances to leave her alone); intervening to protect others from harassing behavior; refusing to carry out an order reasonably believed to be illegal or discriminatory; requesting accommodation for a disability or for religious practices; or complaining that pay policies are discriminatory on some prohibited basis. This is not an exhaustive list but the key to demonstrating protected opposition conduct is that the employee must refer specifically to conduct illegal under one of the discrimination statutes. So, for example, complaining about unfair pay is not protected, while an employee's complaining that she is being paid less than male employees because of her sex is protected opposition to discrimination.

What opposition conduct is not considered protected?

There are situations in which an employee has a reasonable basis for complaining about discriminatory or harassing conduct but does so in a way that provides the employer with a shield from a claim of retaliation. An employee's actions that are not protected as opposition include actions that interfere with the employee's job performance enough to make her ineffective at doing her job, or unlawful activities such as acts or threats of violence. For example, in a recent case, an employee complained repeatedly that the N-word was scratched into an elevator and two swastikas were drawn on the wall of a storage room in his workplace, and this graffiti remained in place for months; he was subsequently fired. He lost his retaliation case because the court found that he was fired, not because he complained

about his racially hostile environment, but because of his insubordination, citing behavior which included cursing at his supervisor, threatening him, and hitting the wall. *See Collier v. Dallas County Hospital District*, 827 Fed. Appx. 373 (5th Cir. Sep. 30, 2020). Even expressing rude and derogatory comments about a superior by calling him a "pussy" in a text message, or characterizing other superiors as "members of the mafia" can support the conclusion that the employee was fired for unprofessional and disruptive conduct, not for protected opposition to illegal practices. *See Botta v. PwC*, No. 3:18-cv-02615 (N.D. Cal.) (SEC whistleblower case; trial testimony 2/24/2021).

There are other instances in which it is difficult to draw the line between protected conduct and conduct the courts consider to be beyond the pale of reasonable opposition to illegal discrimination.

Taking or using confidential documents that help to prove the employee's complaint.

Example: An employee finds a document that explains the basis for establishing employees' compensation and it shows that women are paid significantly less than men in the company. She signed an agreement when she was hired that stated she would not share any confidential company information or trade secrets with anyone. Should she give this document to her lawyer to help prove her claim of sex discrimination in compensation?

Generally, an employee who steals confidential company documents, even documents that may evidence discrimination, has not engaged in protected activity that will support a retaliation claim if she is discharged for that theft.

But if an employee innocently acquired the document by discovering it in her computer, or because it was mistakenly attached to an internal memorandum that circulated to her, or she found it in the copy room, the employee has not stolen the document. The employee still has an obligation to safeguard her employer's confidential information, so her decision to provide this document to an attorney for use in a potential case against her employer could create problems. If her employer learns that she has taken confidential information, it can demand the return of the document and may fire the employee if it views this as a serious breach of its rules.

When the employee argues that her termination was in retaliation for her protected conduct, courts employ a balancing test to decide whether her taking and using confidential information was protected opposition activity. The factors the courts consider are how the document was acquired, to whom the document was given, the contents of the document, the reason for producing the document, the scope of the employer's privacy or confidentiality policy, and whether the information could have been preserved without sharing the document. Although in this example, the document was innocently acquired, shared only with the employee's attorney, and contained extremely relevant information, the other factors may weigh against the employee. She was not legally compelled to produce the document, but rather gave it voluntarily to her attorney; she knew the scope of her employer's policy on confidential information meant she should not share such information; and she could have given her attorney a summary of the information without giving him the document, and then her attorney could have requested it in discovery. For an example of a

court explaining and applying these factors, *see Johnson v. Portfolio Recovery Associates, LLC*, 682 F.Supp.2d 560 (E.D. Va. 2009).

Threatening legal action

Example: An employee complains to his employer that its leave policy, which allows more parental leave for women than for men, discriminates on the basis of sex. The employee says he will sue his employer and that the publicity about this policy will be very embarrassing for the firm, which holds itself out as a progressive and family-friendly company.

Although stating an intention to pursue legal action is classic protected opposition conduct, sometimes the way that intention is expressed may backfire in a retaliation case. In a pending case against Jones Day, the plaintiffs, Mark Savignac and Julie Sheketoff argued that the firm's acknowledgement that it fired Mr. Savignac for the way he complained about the family leave policy provided direct evidence of its retaliatory motive, and sought judgment in their favor on that aspect of their case. Jones Day staved off that motion by arguing that it did not fire him for complaining but for writing a "threatening email" that promised legal action and damage to the firm's reputation if he did not get his way. The email said he would file suit over the leave policy and "the matter will be decided in the D.C. Circuit and in the court of public opinion." Jones Day argued that Mr. Savignac's conduct was unprofessional and disruptive and the retaliation provision is not intended to "immunize insubordinate, disruptive, or nonproductive behavior." *See Laughlin v. Metro. Wash. Airports Auth.*, 149 F.3d 253, 260 (4th Cir. 1998). Although this issue has not been resolved, the facts provide an important reminder that an employee should choose his words carefully when describing steps he will take to protect his rights.

Encouraging others to take legal action

Example: A human resources manager responsible for investigating allegations of discrimination and harassment and then making recommendations about how to resolve conflicts, gives the name of a plaintiffs' lawyer to an employee who had complained about gender and race based discrimination, and encouraged her to pursue legal action against their employer.

In this situation, the court noted that someone not in the HR department could provide such encouragement and advice to a co-worker and that conduct would be absolutely protected. But because of this employee's responsibilities in HR, her efforts to "recruit" an employee to sue the company conflicted with her performance of her job duties and made her ineffective in that position. *See Gogel v. Kia Manufacturing of Georgia, Inc.*, 967 F.3d 1121 (11th Cir. 2020). The court emphasized that the plaintiff's job required that she work within the employer's established procedures to resolve employee complaints, and that encouraging another employee to abandon those procedures and pursue litigation was fundamentally at odds with her own job responsibilities, which meant Kia could no longer trust her to do the job for which she was hired.

A somewhat similar case illustrates the type of conduct an employee with HR responsibilities can take to support and encourage aggrieved employees without losing the protections of the anti-retaliation provisions. In *DeMasters v. Carilion Clinic*, 796 F.3d 409 (4th Cir. 2015),

the plaintiff was an employee assistance counselor who helped an employee pursue his complaints of egregious sexual harassment by forwarding his internal complaint to the appropriate HR individuals and then telling HR managers they were mishandling the complaints. When the disgruntled employee sued Carilion, the company fired Mr. DeMasters and said he had failed to perform his job in a manner consistent with the best interests of Carilion, and that he had made statements to the aggrieved employee that could have led him to believe he should sue. The Fourth Circuit concluded that DeMasters' conduct was protected, but notably there was no evidence that he had actively encouraged the harassed employee to sue.

Conclusion

The courts come to sometimes contradictory conclusions about whether an individual's opposition to unlawful discrimination or harassment is sufficiently reasonable to be protected under the anti-retaliation provisions. Anyone uncertain about how to make internal complaints or otherwise protect herself or others from unlawful treatment should consult an employment lawyer to get advice about the best way to proceed both to remedy the underlying discrimination and to be protected from unlawful retaliation for those efforts.