Delaware Employment Law Letter

A monthly survey of employment law developments in DELAWARE

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Vol. 11, No. 3
March 2006

EMPLOYER RETALIATION

When complaining alone isn't enough

by Michael P. Stafford

In a recent case, the Third U.S. Circuit Court of Appeals (which covers Delaware) held that an employee's filing of an Equal Employment Opportunity Commission (EEOC) charge based on complaints of unfair treatment wasn't protected activity under ***Title VII*** *of the Civil Rights Act of 1964 because the employee didn't claim that he was being discriminated against based on any characteristic protected by the statute. As a result, the EEOC charge wasn't covered by the "participation clause" of* ***Title VII****, which prohibits retaliation against employees for protected activity.*

Background

Title VII protects employees from retaliation for engaging in protected activity. That protection extends to employees who oppose practices made illegal by **Title VII** (the "opposition clause") and to those who have "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under" it (the "participation clause").

Understanding the distinction between the two clauses is crucial because the protections provided by the former are broader than those of the latter. Under the opposition clause, employees are protected from retaliation merely *if* they're opposing practices or policies prohibited by **Title VII**.

Jailhouse blues

In this case, a former correctional officer at a county jail sued,

claiming that he had been retaliated against for filing a discrimination charge with the EEOC. The employee's charge alleged that his employer had "discriminated against [him] because of whistleblowing, in violation of [his] Civil Rights, and invasion of privacy."

After the employee filed the charge, his employer fired him for gross insubordination. He then filed a second discrimination charge with the EEOC alleging that the employer had retaliated against him for filing his earlier charge. The decision to fire him was ultimately changed to a temporary suspension without pay. He never returned to work, however.

After the EEOC issued a "no-cause" determination on both of the employee's charges, he sued. In his lawsuit, he claimed that following the filing of his initial EEOC charge, he was subjected to unwarranted criticism, the cancellation of a previously scheduled vacation, and unwarranted disciplinary action in retaliation.

The magic words

The district court found that the employee hadn't engaged in protected activity, and the employee appealed. The appeals court agreed with the district court. Specifically, it found that general complaints of "unfair treatment" by employees aren't protected activity under **Title VII**.

The court reasoned that when the employee filed a charge with the EEOC, he alleged only unspecified civil rights violations, which amounted to general complaints of unfair treatment. He didn't allege that he was being discriminated against based on race, color, religion, sex, or national origin — the characteristics that are protected by **Title VII**. Without such an allegation, his EEOC charge wasn't protected activity under **Title VII**. *Slagle v. County of Clarion,* 2006 U.S. App. LEXIS 678 (3d Cir., Jan. 12, 2006).

Bottom line

Before taking significant disciplinary action or firing an employee, you should be aware of whether the employee has complained of any type of unlawful activity. Not all complaints qualify as protected activity under **Title VII,** however. General complaints of unfair treatment are *not* protected activity *unless* the employee alleges that the unfair treatment occurred because of a trait protected by **Title VII**. If the employee does claim that he has been discriminated against based on race, color, religion, sex, or national origin, his complaint will be covered by the participation clause of **Title VII**.

solutions to individual problems but rather to provide information about current developments in Delaware employment law. Questions about individual problems should be addressed to the employment law attorney of your choice.