Delaware Employment Law Letter

A monthly survey of employment law developments in DELAWARE

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Vol. 11, No. 7
July 2006

TERMINATION

Final bell rings on pro-choice Catholic schoolteacher's lawsuit

by Scott A. Holt and Michael P. Stafford

The Equal Employment Opportunity Commission (EEOC) recently reported that retaliation charges have doubled in the past decade and now make up 25 percent of all EEOC charges. But employees don't get to a jury unless they can present a minimally sufficient case of retaliation. To do that, an employee first must show that she engaged in what's known as "protected activity." Protected activity can encompass opposing illegal activity (including prohibited discrimination under federal or Delaware discrimination laws), participating in a proceeding involving allegations of illegal conduct, whistleblowing, or claiming an employment-related benefit.

Both Delaware's discrimination law and Title VII of the Civil Rights Act of 1964 protect employees from retaliation for engaging in two types of protected activity. The protection extends to employees who oppose practices made illegal by the discrimination laws (known as the "opposition clause") and those who have "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under" it (known as the "participation clause"). Opposition conduct is protected when an employee opposes an employer practice, term, or condition of employment that's made illegal by the discrimination laws.

The Third U.S. Circuit Court of Appeals (which covers Delaware) recently affirmed the dismissal of a lawsuit by a Catholic schoolteacher who maintained that she was discharged in retaliation for signing a pro-choice advertisement that ran in the Wilmington News Journal. The teacher made a novel claim that her signing of the

ad constituted protected activity.

Pro-choice, no diocese

Michele Curay-Cramer was a teacher at the Ursuline Academy, a private Catholic school, which operates under the vigilance of the Catholic diocese. She taught religion and English classes. On the 30th anniversary of the U.S. Supreme Court's *Roe v. Wade* decision, she signed a pro-choice advertisement that ran in the *Wilmington News Journal*. Significantly, the advertisement didn't mention Ursuline or refer to any allegedly discriminatory employment practices.

Ursuline immediately became aware of Curay-Cramer's actions and — believing them to be contrary to the Catholic Church's teachings and incompatible with her position as a Catholic schoolteacher — decided to fire her. She met with school officials and was given the opportunity to resign voluntarily. The school gave her the weekend to "think it over."

When Curay-Cramer met with school officials again the following Monday, she, for the first time, claimed that she was protesting certain allegedly discriminatory employment practices and that it therefore would be illegal for her to be fired. The school, however, stuck by its decision to dismiss her.

What's choice got to do with it?

After Curay-Cramer's firing, she sued Ursuline, alleging that she had been fired in retaliation for protected activity in violation of Title VII. The essence of her claim was that she had opposed illegal employment policies and practices. She argued that Title VII's opposition clause protected employees who support abortion rights from retaliation by their employers.

The district court dismissed Curay-Cramer's case, and the Third Circuit upheld the decision. The court found that she didn't engage in protected activity when she signed the pro-choice advertisement. In the court's view, "basic pro-choice advocacy doesn't constitute opposition to an illegal employment practice." In other words, to be protected oppositional activity, the employee's conduct must identify both the employer and the allegedly unlawful employment practice "at least by context."

Of crucial importance is the message that the employee is conveying. In Curay- Cramer's case, nothing in the ad identified Ursuline or any employment practices. Mere general complaints of unfair treatment or "public protests or expressions of belief" aren't protected activity "absent some perceptible connection to the employer's alleged illegal employment practice."

The pro-choice advertisement stated that the right to an abortion was

"under attack" and urged all "Delawareans and elected officials at every level to be vigilant in the fight to ensure that women now and in the future have the right to choose." The ad, however, didn't mention any allegedly illegal employment practices, discrimination, or employers.

In addition, there was "no context from which one could reasonably conclude that Curay-Cramer's signature at the bottom of the advertisement was in response to Ursuline's alleged illegal policy or practice." Moreover, her own subjective intent in signing the ad was irrelevant. Therefore, in the court's view, it couldn't constitute protected oppositional activity.

In addition, Curay-Cramer's complaints of discriminatory employment practices — made during her meetings with school officials — didn't show that her firing was retaliatory:

> [A]n employer need not refrain from carrying out a previously reached employment decision because an employee subsequently claims to be engaging in protected activity.

The court noted that Curay-Cramer's own complaint made it obvious that the school contemplated firing her from the moment it became aware of the advertisement. Employees can't "insulate [themselves] from **termination** by covering [themselves] in the cloak of Title VII's opposition protections *after* committing nonprotected conduct that was the basis for the decision to terminate."

Lesson for Delaware employers

Every HR professional who has been breathing for any part of the past five years knows that retaliation claims can present enormous problems for employers. But remember that not every retaliation claim by an employee is actionable (or pursuable in court). As the Third Circuit explained, mere general complaints of unfair treatment or "public protests or expressions of belief" aren't ordinarily considered "protected activity."

Another lesson from this decision is that timing is crucial! Employees can't scuttle predetermined disciplinary actions, including firings, by later engaging in protected activity.

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