Employment Law

Employees With Duty to Report Bias Protected From Retaliation

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A recent decision from the U.S. Court of Appeals for the Fourth Circuit reminded this writer that you could still learn something new about the law every day. Even in an area that you are a supposed expert. This time, it was a decision regarding the so-called "manager rule," a principle applied in some circuits in the context of retaliation claims under the Fair Labor Standards Act (FLSA). The rule had been extended to retaliation claims under Title VII. For managers, human resources professionals and the like, in order to engage in protected activity and garner protection from retaliation, the rule required the employee to "step outside his or her role of representing the company."

The "manager rule," which I never even heard of in almost 20 years of practicing employment law, purports to address a concern that, if counseling and communicating complaints are part of a manager's regular duties, then "nearly every activity in the normal course of a manager's job would potentially be protected activity," and "an otherwise typical at-will employment relationship could quickly degrade into a litigation minefield," according to *Hagan v. Echostar Satellite*, 529 F.3d 617, 628 (5th Cir. 2008).

This seem like a very counterintuitive maxim, yet there are examples of courts that held the "manager rule" to be a valid defense to a Title VII retaliation claim. Well, not anymore, at least not in the Fourth Circuit. A panel of judges from our own Third Circuit made up the appellate panel that held the proper test for analyzing oppositional conduct requires consideration of the employee's course of conduct as a whole and that the "manager rule" has no place in Title VII jurisprudence, in *DeMasters v. Carilion Clinic*, No. 13-2278 (4th Cir. Aug. 10, 2015). The published opinion indicated that all members of the Fourth Circuit were recused in the case, though no reason for the recusal was offered. It has been speculated that the reason for recusal is because Judge G. Steven Agee, who sits on the Fourth Circuit, is married to Nancy Howell Agee, the CEO of the defendant, Carilion Clinic.

According to the opinion, appellant J. Neil DeMasters, employed in the Employee Assistance Program (EAP) in Carilion's behavioral health unit, was allegedly fired for acting "'contrary to his

employer's best interests,' failing to take the 'pro-employer side,' and leaving his employer 'in a compromised position,' as a result of his support of a fellow employee's sexual harassment complaint and his criticism of the way the employer had handled the investigation." The fellow employee, referred to as John Doe throughout the opinion, sought counseling and guidance from DeMasters because Doe's department manager had been sexually harassing him for several months, including allegations that the manager "masturbated in front of him twice on hospital grounds, asked Doe for oral sex, and asked Doe to display his genitals." DeMasters helped Doe initiate a sexual harassment complaint, which eventually led to the firing of the alleged harasser.

In the face of what Doe believed was an increasingly hostile environment, he sought further advice from DeMasters. DeMasters consulted with his EAP colleagues who agreed that DeMasters should contact Carilion's HR department to offer suggestions on how it might better handle the situation. DeMasters offered to coach the HR department, but the HR representative declined, according to the opinion. Doe reported to DeMasters that his co-workers' behavior was getting worse, that he was dissatisfied with management's reaction to his complaint, and that he feared his harasser would come looking for him with a gun. DeMasters offered his opinion to Doe that management and the HR department were mishandling Doe's complaints, for which DeMasters once again reached out to HR to say that he felt Carilion was not handling the situation properly. DeMasters had little contact after that until he learned that Doe and Carilion reached a settlement of Doe's harassment lawsuit.

Within a few weeks of Doe's settlement, the opinion goes on to say, DeMasters was hailed into a meeting with several key players at Carilion and was terminated for his role in counseling Doe. DeMasters was told that he was being terminated for failing to take the "pro-employer side," not acting in his employer's best interests, leaving Carilion "in a compromised position" and placing the "entire operation at risk." All this because of DeMasters' support of Doe's sexual harassment complaint and DeMasters' criticism of the way Carilion handled it. DeMasters' EAP supervisor also told him that the employer was "angry at having to settle Doe's discrimination lawsuit and Carilion was looking to 'throw somebody under the bus.'"

DeMasters brought suit under Title VII, claiming that he was terminated for engaging in protected activity, including opposing an unlawful employment practice. The lower court dismissed the complaint on the grounds that no individual activity in which DeMasters engaged by itself constituted protected oppositional conduct. Further, application of the "manager rule" acted to prevent an employee whose job responsibilities included reporting discrimination claims from seeking protection under Title VII's anti-retaliation provision. A harsh result, indeed. The Third Circuit panel (applying Fourth Circuit precedent), however, said "not so fast."

Citing case law and the statute itself, the panel explained that nothing in the language of Title VII's "opposition clause" nor in its interpretation by the courts supports a myopic analysis under which an employee's opposition must be evaluated as a series of discrete acts. Relying on the Third Circuit's precedent in *Moore v. City of Philadelphia,* 461 F.3d 331, 346 (3d Cir. 2006), the panel observed in a similar context that "these determinations depend on the totality of the circumstances, as [a] play cannot be understood on the basis of some of its scenes but only on its entire performance, and similarly, a discrimination analysis must concentrate not on individual incidents, but on the overall scenario."

Of significant note was the court's elevation of retaliation claims over even race, gender or ethnic-

based discrimination claims under Title VII because of the greater need to protect victims of retaliation in order for there to be effective enforcement of grievances. Examining the course of a plaintiff's conduct through a "panoramic lens" so as to understand the individual scenes in their broader context is mandated by the statute and the case law, the panel wrote.

On the issue of the "manager rule," the court pointed out that there is nothing in the statute conditioning an employee's protection on the employee's job description. The categories of employees best able to assist employees with discrimination claims, i.e., the personnel that make up EAP, HR and legal departments, would receive no protection from Title VII were they to oppose discrimination targeted at the employees they are duty-bound to protect, the panel wrote.

The *DeMasters* decision is quite consistent with existing and emerging precedent concerning the scope of protected activity. (See e.g., *Littlejohn v. City of New York*, No. 14-1395-cv (2d Cir. Aug. 3, 2015) (an employee—even one whose job responsibilities involve investigating complaints of discrimination—who actively supports other employees in asserting their Title VII rights or personally complains or is critical about the discriminatory employment practices of his or her employer, has engaged in a protected activity under Title VII's opposition clause).) This decision just goes to show that little-known nuances of discrimination law like the "manager rule" can devolve into a litigation minefield, even for those of us who study these issues regularly. It pays to stay on top of these trends.

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