

“Protected Activity” under Title VII

Details

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In a very interesting decision, the Tenth Circuit Court of Appeals (which covers states in the Rocky Mountain region) concluded that participation by an employee in an EEOC investigation or proceeding deserves the broadest possible protection even when the participation involves disclosure of what would otherwise be privileged and confidential information.

Background

Bernadine Vaughn (Vaughn) filed an EEOC charge against Epworth Villa, a not-for-profit continuing care retirement community, alleging that Epworth Villa discriminated against her based upon her age (49) and her race (black). Vaughn alleged that the discrimination occurred when she was disciplined for making errors with respect to a patient’s medical records, while a younger, white employee was not disciplined for making similar errors.

At the heart of this matter was the action that Vaughn took to bolster her discrimination claims. Vaughn provided the EEOC with several pages of unredacted medical records concerning an Epworth Villa patient. These records provided identification of the patient as well as the patient’s complete medical record. Vaughn asserted that these records demonstrated errors similar to those for which she had been disciplined, but because the errors were committed by a younger, white employee, that employee had not been disciplined for the same conduct.

More than a year after this disclosure was made to the EEOC, Epworth Villa discovered it. Epworth Villa also reported this conduct to the Oklahoma Department of Health, which directed Epworth Villa to open an investigation. Vaughn ultimately admitted that she had copied and released the unredacted medical records and that one of her responsibilities at Epworth Villa was “practicing confidentiality concerning residents’ records, care and activities.”

Shortly after making its report, Epworth Villa terminated Vaughn’s employment “because she, without authorization and against policy and procedure, copied and removed from the property confidential documents and then disclosed those documents to a third party.” In addition, the Department of Health determined that Vaughn had violated the law when she copied the records without permission.

Vaughn’s Challenge

Vaughn then filed suit against Epworth Villa claiming that her termination was in retaliation for her participation in the EEOC process. The district court threw out her claims prior to trial, reasoning that she could not establish the three necessary elements to prove retaliation. Those elements required that Vaughn establish that she engaged in protected activity, that she suffered an adverse employment action, and that there was a causal connection between the protected activity and the adverse action. Although it was undisputed that Vaughn's termination constituted an adverse action and that it was premised on her disclosure of unredacted medical records to the EEOC, Vaughn and Epworth Villa disagreed over whether her disclosure of these records constituted a "protected activity". Ultimately, the district court concluded that Vaughn's copying and disclosure of confidential personal health information was not "protected activity" and, accordingly, threw out Vaughn's case.

Things Are Not What They Always Seem

Vaughn appealed the dismissal of her action to the Tenth Circuit. The appeals court disagreed with the conclusion that Vaughn's activities were not "protected." The court emphasized that one of the clauses in Title VII's anti-retaliation section is characterized as the "participation clause". This particular clause provides that an employer may not retaliate against an employee because the employee has **participated in any manner** in an investigation, proceeding or hearing under Title VII. The court went on to explain that this language had to be interpreted in the broadest possible way to provide the most protection for those people participating in EEOC actions. In an interesting observation, the appeals court stated, "We fail to see how this language places the kind of obligation on the employee that the district court here imposed – the obligation to resort only to honest and loyal conduct in advancing a claim unless the employee proves that it is necessary to resort to other means."

The appeals court therefore ruled that the disclosure of unredacted medical records was protected even though the Department of Health had earlier concluded that the conduct was unlawful. In so ruling, the court nonetheless left open the possibility that fraudulent activity by an employee might not be "protected."

Yet Another Surprise

After concluding that Vaughn's conduct was protected, the appeals court analyzed whether or not Epworth Villa's termination of her employment was unlawful. Epworth Villa had asserted that it terminated Vaughn because she violated the organization's policies and procedures regarding confidentiality when she disclosed the unredacted records without authorization to do so. Vaughn claimed that she should not have been terminated and that Epworth Villa's reasons for doing so were unsubstantiated because (1) Epworth Villa was not required to terminate her for her disclosure, (2) Epworth Villa had difficulties in the general management of its records and (3) another employee had committed similar offenses and not been terminated.

The appeals court quickly rejected Vaughn's first argument, explaining that Epworth Villa's termination decision was not unreasonable under the circumstances (even if its decision was not required by policies or rules.) Although another employee had taken other types of records from Epworth Villa and not been terminated for doing so, the court easily distinguished Vaughn's behavior as she not only took unauthorized records but disclosed them to a third party. As to Epworth Villa's difficulty in managing its records, the court found no basis in that argument to treat Epworth Villa's termination decision as unlawful. In sum, the appeals court upheld the dismissal of Vaughn's retaliation claims. *Bernadine R. Vaughn v. Epworth Villa*, United State Ct of Appeals, 10th Cir., No.07-6005.

Lessons Learned

This decision underscores that the participation clause of Title VII will be interpreted as broadly as possible. Accordingly, actions by employees as they participate in EEOC proceedings, even when those actions may appear egregious on the surface, may nonetheless be considered "protected activity." Once an activity is considered protected, an employer will be required to provide a legitimate and facially nonretaliatory reason for its adverse action. This legitimate and nonretaliatory reason will be much easier to demonstrate if it is premised upon well-documented rules, regulations or policies of the employer.

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