



Employment Law Update

Wait, that's Protected Activity? Managing Employee Protected Activity and Retaliation Claims

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What Is Protected Activity?

- Employment laws carve out specific conduct consistent with the goals of the act that is "protected."
 - For example, complaints about race discrimination are protected under Title VII.
 - Opposition to a work environment that is unsafe is protected under OSHA.
 - Complaints that an employer favors Bears fans over Packers fans is not protected under Title VII.
- Taking an adverse employment action against an employee because of that employee's protected activity is unlawful retaliation.
 - For example, terminating an employee due to his/her complaints regarding workplace safety violations.

What Is Protected Activity?

- Protected activity is not always easy to spot and can vary from law to law.
 - Court may infer notice of protected activity.
- This presentation will identify common incidents of protected activity in the workplace and how to recognize them.
 - Will not cover more nuanced whistleblower laws applicable to federal contractors and publicly held corporations.
- Will cover how to manage employees that have engaged in protected activity.

Why Does Protected Activity Matter?

- It is essential to recognize when it occurs and navigate employment decisions accordingly.
 - Ignorance of the law is not a defense to a retaliation claim.
 - Decision-maker's awareness of protected activity can transform an ordinary termination or job transfer into a complex litigation matter.
 - Termination due diligence should always ask whether the employee has engaged in protected activity recently.

Retaliation Statistics

- The EEOC reported 37,632 retaliation charges filed in FY20.
 - This was 55.8% of all EEOC charges filed.
- OSHA reported 2,539 OSH whistleblower retaliation complaints in FY20.
 - This is a 25% increase from prior year.

DOL, NLRB, and EEOC Joint Initiative

- Agencies announce a joint initiative aimed at working cooperatively to combat the dramatic rise in retaliation complaints.
 - Announced November 17, 2021.
 - Intend to work collaboratively and share information.

Title VII Anti-retaliation Protections

- "It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment ... because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this subchapter." 42 U.S.C. §2000e-3(a).
- Anti-retaliation provision applies to applicants, employees and former employees.

Title VII Protected Activity

- Internal complaint
- EEOC Charge
- Participate in investigation
- Speak out on behalf of another employee
- Request for accommodation (pregnancy or religious)
- Oppose an unlawful practice or policy

Adverse Employment Actions

- An adverse action may include:
 - Discipline
 - Discharge
 - Changes to working conditions, such as:
 - Transfer to an inconvenient location
 - Transfer to a different shift
 - Decrease (or increase) in responsibility
 - Refusal to award overtime

Adverse Employment Actions

An employer's action will be considered an ***adverse action*** if it is material to a ***reasonable employee*** such that it would ***dissuade*** him or her from making or supporting a charge of discrimination.

Proving a Retaliation Claim

- The employee participated in ***statutorily protected activity***.
- The employer was ***aware*** of the employee's participation in statutorily protected activity.
- The employee was subjected to a ***materially adverse action*** by the employer.
- There is a ***causal connection*** between the employee's protected activity and the employer's materially adverse action.

Is It Protected Activity?

Disgruntled employee is upset about not receiving a promotion and, believing that he was more qualified than the candidate who got the job, emails a five-page complaint letter to HR detailing all the ways he believes he was treated unfairly. The complaint letter makes the following claims:

- The promotion process was disorganized and incompetently managed with Disgruntled repeatedly learning about written submission deadlines and interviews at the last second, with little time to prepare. Had it been better organized, Disgruntled would have won the position with much better submissions.
 - What if Disgruntled alleges this was intentional and intended to favor successful candidate?
Does this change your answer?
- The successful candidate was not qualified for the job because she never obtained a college degree. Her lack of this essential qualification was ignored due to a need to improve diversity numbers in management.
 - What if this is incorrect and successful candidate in fact does have a degree? Does that change your answer?
- Successful candidate and the CEO go to the same church and this caused the CEO to favor the successful candidate.
- Successful candidate is a Bears fan, like the CEO, which is why she got the job. Disgruntled is a Packers fan and the CEO hates the Packers.

Elements of Protected Activity

- Does the complaint allege conduct that, if true, would violate Title VII or another law?
- Does the complainant have a good faith belief that he is opposing an unlawful practice?
- Is that belief objectively reasonable?
 - Employee need not be correct; merely requires a good faith belief.
 - This makes it easier to bring retaliation claims than discrimination claims.
- Is the employer on notice of the protected activity?
 - “To fall within the scope of the antiretaliation provision, a complaint must be sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the statute and a call for their protection.”

Is It Protected Activity?

Disgruntled employee, still upset about not getting that promotion to management, is livid with his Company's new policy requiring employees to be vaccinated or comply with workplace requirements to wear a mask at all times and submit a negative COVID test twice per week. The policy says no exceptions in bold print and underlined.

- Disgruntled calls HR and asks if he can obtain an exception to the vaccination requirement based on his religious belief, but HR says no. Is this protected activity?
- What if Disgruntled responds to this by sending HR a long letter citing to provisions from EEOC guidance that require employers to offer vaccination exemptions due to conflicting religious beliefs and tells HR they are violating Title VII?

Is it Protected Activity?

Now imagine the Company relied on their HR and Legal team to create the vaccination policy and nailed all the ADA and Title VII issues from the start, including the ability to request exemptions. Disgruntled, learning about the new policy, has zero interest in getting vaccinated to comply or wearing masks in the workplace, so he fills out the form requesting an exemption. Is it protected activity if Disgruntled:

- Applies for an exemption on the basis that a forced vaccination mandate is illegal and in violation of his constitutional rights and the Nuremberg convention?
- Applies for an exemption on the basis that personal liberty and freedom of choice are his core religious beliefs and any type of forced vaccination or forced medication violate these personal beliefs?

Is it Protected Activity?

What if Disgruntled seeks an exemption from both the vaccination and mask wearing requirement and the basis for the mask exemption request is that his religion (which he never identifies) prohibits him from wearing masks?

COVID Related Protected Activity

- Watch out for
 - Requests for accommodation based on a religious belief
 - Mask requirement
 - Vaccination
 - Remote work due to inability to get vaccinated due to religious belief
- A request for accommodation is protected activity the same as a complaint of discrimination.

Compensation Based Protected Activity

- FLSA and state laws governing minimum wage and overtime.
 - Complaints about violating minimum wage requirements.
 - Complaints about employment related costs being deducted from pay.
 - Complaints about unlawful deductions from pay.
 - Complaints that the overtime calculation was wrong.
 - Complaints claiming an employee is misclassified as exempt or as an independent contractor.
 - Complaints a supervisor is forcing employees to work off the clock or that an unpaid preliminary or post work activity should be compensable work.

Title VII and Equal Pay Act

Complaints that someone else is making more money for a similar job due to gender discrimination or another recognized protected category.

ADA 101

The Americans with Disabilities Act ("ADA") prohibits, among other things:

- Discrimination against a qualified individual with a disability ("QID") due to his/her disability.
- The failure to make reasonable accommodations for a QID.
- Medical and disability inquiries of applicants and employees, except as permitted by law.
- Using qualification standards, employment tests or other screening criteria that screen out or tend to screen out an individual with a disability.

Is It Protected Activity?

Company announces a new policy requiring all employees in public facing roles with serious medical conditions to advise HR of the same, so that these employees can be reassigned to positions where they will not come into contact with the public and, internally, only with vaccinated coworkers. Disgruntled immediately fires off an angry email to HR saying that he may (or may not) have such a serious health condition, but there is no way he's telling the Company about it because this invades his right to privacy regarding his health.

- Is this protected activity?
- What about if, instead of this policy, Disgruntled initiated this discussion by asking his manager if he could switch roles to a non-public facing one due to a health condition that has him scared about contracting COVID?
- What if Disgruntled asks to work remotely for health reasons and says nothing about what those health reasons are?

ADA Protected Activity

- Request for Accommodation
- Complaints of discrimination on account of disability
- Opposition to a disability inquiry
- Complaints regarding maintaining confidentiality of medical records
- Complaints regarding the application of screening criteria

OSHA

Section 11(c), 29 U.S.C. §660(c)(1), provides that no person shall discharge or in any manner discriminate against any employee because such employee has

- Filed any complaint under or related to the Act;
- Instituted or caused to be instituted any proceeding under or related to the Act;
- Testified or is about to testify in any proceeding under the Act or related to the Act; or
- Exercised on his own behalf or on behalf of others any right afforded by the Act.

OSHA

Under Section 11(c), a workplace complaint is protected if “it arises under or is related to a health or safety hazard” and is “made in good faith.”
See 29 C.F.R. § 1977.9; *Perez v. Renaissance Arts & Educ., Inc.*, 2013 WL 5487097, at *2 (M.D. Fla. Sept. 30, 2013).

Is It Protected Activity?

Disgruntled is becoming increasingly frustrated by his coworkers on the floor of the warehouse, many of whom refuse to wear masks, even though they must work in close proximity of each other and social distancing is not possible. Disgruntled has complained to his new supervisor, but no one is enforcing the mask rule. Even more frustrating for Disgruntled are the supervisors telling people with mild COVID symptoms to come to work anyways because of how short-staffed they are and threatening to terminate anyone with mild symptoms that tries to stay home on PTO. Disgruntled reports this to his manager's manager, but nothing changes. Increasingly frustrated, Disgruntled calls the Company's ethics hotline and leaves an anonymous complaint about all of this. Is any of this protected activity?

COVID Related Protected Activity

- Complaints regarding workplace safety
 - Employer not enforcing mask requirement
 - Employer not taking seriously quarantine and isolation requirements for individuals testing positive or exposed
 - Employer exposing employee to public or others without appropriate safety precautions or personal protective equipment

National Labor Relations Act

- Federal law that forbids employers from interfering with, restraining, or coercing employees in the exercise of rights relating to organizing, forming, joining or assisting a labor organization for collective bargaining purposes, or from working together to improve terms and conditions of employment.
- The Act is enforced by the National Labor Relations Board ("NLRB").
- The NLRA applies to both unionized and non-unionized workforces.

Protected, Concerted Activity

- Under the NLRA, employees may also engage in “concerted activities for the purpose of mutual aid or protection.”
 - Activity is "protected" when it is focused on wages, hours, and other terms and conditions of employment.
 - “Concerted” activity usually involves two or more employees, or one employee seeking to incite group action or acting on behalf of fellow employees.
- Employers are prohibited from taking adverse action against employees for engaging in protected, concerted activity.
- NLRB precedent flip-flops regularly based on partisan make-up of the Board.

Protected, Concerted Activity

- Concerted activity is action taken by:
 - a group of employees together;
 - one individual who is authorized to act on behalf of other employees; or
 - an individual who is attempting to induce other employees to engage in group activity.
- Activity is "protected" when it focuses on wages, hours, and other terms and conditions of employment.

Is It Protected Activity?

Disgruntled is so upset about how the Company is managing the warehouse floor during COVID that he takes pictures of all his coworkers in close proximity to each other without masks and posts the pictures on his Facebook account along with a rant that includes: "Look at this nonsense. F#! this Company and its complete disregard for its employees' health and safety! They'd be fine if we all died from COVID and would simply replace us as if nothing ever happened!"

- Is this protected activity?
- What if Disgruntled is Facebook friends with other coworkers?
- What if Disgruntled finished his rant by saying, "we should all call in sick to send a message that we're not going to accept these unsafe working conditions anymore!"
- What if the Company terminates Disgruntled for violating Company policy that prohibits taking pictures of the operation inside the building?

Online Complaints

- Social media posts can be protected, concerted activity.
- *Karl Knaux Motors, Inc.* (2011) - Car salesman making disparaging comments about his employer's customer event on social media engaged in protected activity because aspects of his complaint arguably addressed the impact the event has on salesman compensation.
 - It did not matter that no one else commented on the post.
- *Three D, LLC* (2014) – Bartender vented on Facebook about his employer's handling of tax withholdings: "Maybe someone should do the owners of Triple Play a favor and buy it from them. They can't even do the tax paperwork correctly!!! Now I OWE money ... Wtf!!!!" Subsequent comments sympathized with the original post or liked it. One subsequent comment was, "I owe too, such an #\$\$@!"

Online Complaints

- *Three D, LLC* - Liking a Facebook post complaining about an employer's practices related to tax withholdings can constitute protected activity if it is an expression of support for a coworker's complaint or protest.
- *Pier Sixty, LLC* (2015) – A server, after being singled out by a supervisor in a way he took objection to, posted on Facebook that the supervisor is a “NASTY M***** F***er” and a “LOSER!!!!,” stated “f*** his mother and his entire f***ing family,” and ended with “Vote YES for the UNION!!!!!!!!!!”
 - Posting was found to be protected, concerted activity and server's termination for profanity to be unlawful.

Complaints in Front of Coworkers

- *Allstate Maintenance, LLC* (2019) – Skycap did not engage in protected activity when he complained to his supervisor (in front of coworkers) about having to assist a group he believed was unlikely to tip. The Board determined this complaint was a “mere gripe” and not a complaint made on behalf of, or to induce action by, his coworkers.
 - Determined the complaint was not regarding a specific policy or practice, but, rather, a specific group's likelihood to tip.
 - Rejected prior precedent that complaints in a group setting are always protected, concerted activity.
 - Distinguished prior case where employee complained about new dress code policy during announcement of said policy with coworkers present and intent was to complain on behalf of workforce.

Investigations and Protected Activity

- Witness raises own complaints of discrimination during interview.
 - Can be related or unrelated to investigation scope.
- Coworker advocates for complainant or provides information in support of complainant.

Okay, it's Protected Activity, Now What?

- Include an anti-retaliation provision in your employee handbook and train employees on the policy.
- Give employees who engage in protected activity a copy of the policy and ask the employee to report any retaliatory behavior.
- Take complaints of retaliation seriously and investigate if necessary.

Employment Decision Best Practices

- Rely on legal counsel!!
- Document appropriately, consistently and uniformly.
- Control the narrative.
- Ensure the employee is being treated consistent with other similarly situated individuals.

Key Takeaways for Combative Employees

- Anti-retaliation does not require acceptance of rudeness, insubordination and disparagement.
- Document insubordination and conduct that violates Company policies and is unnecessary for complaint.

Questions?

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