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Massachusetts Supreme Court Holds That "Self-Help Discovery" Is Protected Activity

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Verdrager v. *Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C.*, 474 Mass. 382 (2016)

Brief Summary

The Massachusetts Supreme Court held that it is "protected activity" (*i.e.*, conduct that an employee may engage in without fear of reprisal from his or her employer) for an employee to engage in "self-help discovery" by gathering evidence stored on an employer's computer system for use in a future employment discrimination lawsuit against the employer.

Complete Summary

Plaintiff worked as an associate attorney in defendant's Boston law office. During the plaintiff's employment, she complained to her superiors, and ultimately to the Massachusetts Commission Against Discrimination that she was being discriminated against on the basis of her gender. In anticipation of a possible lawsuit against the firm, the plaintiff, acting on the advice of her attorney, searched the publicly available section of firm's electronic document management system for documents in support of her discrimination claim. She eventually discovered a transcribed communication between the firm's senior management that the plaintiff considered to be a "smoking gun" with respect to the firm's discriminatory intent. The plaintiff provided the communication to her attorney. Upon learning of the search, the firm terminated plaintiff's employment, and she filed a lawsuit alleging gender discrimination and retaliation.

Thereafter, the firm filed a complaint against plaintiff with the Board of Bar Overseers. On review, the Board ultimately declined to find any ethical violation pursuant to Mass. R. Prof. C. 8.4(c) (dishonesty, fraud, deceit, or misrepresentation) or 8.4(h) (other conduct adversely reflecting on fitness to practice law) and dismissed the action. A single justice of the Supreme Court affirmed the dismissal, holding that where (i) the plaintiff did not act surreptitiously, invade anyone's privacy to obtain the documents, violate any consistently enforced firm policy or copy any confidential or privileged documents and (ii) the plaintiff's conduct was not clearly prohibited under Massachusetts law, there was no basis for imposing ethical sanctions. *See In Re: The Matter of the Discipline of an Attorney*, 2012 WL 6888081, at *3 (August 6, 2012).

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After the disciplinary proceeding concluded, the Supreme Judicial Court took the underlying discrimination case on direct appeal following summary judgment in the firm's favor. The court held that in certain circumstances "self-help discovery" may be "protected activity," but only if the employee's actions are "reasonable" based on a seven-factor balancing test that considers: (i) how the employee came to possess or access the document; (ii) the relevance of the document to the employee's discrimination claim as compared to the disruption caused to the employer's ordinary business; (iii) the strength of the employee's reason for copying the document rather than identifying it for discovery; (iv) whether the employee shared the document with anyone other than her attorney; (v) the sensitivity of the information contained in the document and the employer's interest in keeping the document confidential; (vi) whether the employee's disclosure violated a clearly identified privacy or confidentiality policy and (vii) the broad remedial purposes of the Massachusetts anti-discrimination laws.

Significance of Opinion

This case raises several important ethical considerations for practicing attorneys. Because the holding is expressly limited to employment discrimination claims, attorneys who copy and remove sensitive information in other contexts (*e.g.*, when leaving to join another firm) should not expect such conduct to be "protected activity" and should only do so if they have an independent legal justification.

Another important ethical consideration is whether a lawyer commits an ethical violation by counseling an employee to engage in self-help discovery in the first place. *Verdrager* leaves this question unanswered. Until further guidance is given, attorneys should first consider whether the employee's conduct is reasonable based on the factors set forth in *Verdrager* before advising clients to engage in self-help discovery. Attorneys should also consider whether such advice might potentially expose them to malpractice liability, in the event that it is later determined that the employee's actions were not "reasonable."

For more information, please contact Robert M. Buchholz or Terrence P. McAvoy.

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