Terminating Employees for Breach of a Confidentiality Policy may be Illegal

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It is not uncommon for employees to surreptitiously copy and remove documents from the workplace, or forward company information to their homes electronically, which they believe will support claims against their employer. Most companies have a policy protecting the removal, disclosure or improper use of business information, and they often terminate employees for violations of such policies. However, doing so, under the wrong circumstances, may constitute unlawful retaliation.

The U.S. Court of Appeals for the Sixth Circuit first addressed this issue in *Niswander v. The Cincinnati Insurance Company,* 529 F.3d 714 (2008). In this case, the plaintiff joined a class action against her employer, an insurance company, alleging sex discrimination and violations of the Equal Pay Act.

The attorneys for the plaintiff class action wrote letters to the class participants asking them to forward any documents that supported the discrimination claims. Niswander, who was a claims representative who worked from home, gathered up documents from her home office and sent them to the class action attorneys.

The documents produced reflected communications with Niswander's supervisors concerning her performance and disclosed personal information about policyholders. When the class action attorneys produced the documents in response to discovery requests, Niswander was terminated for violating the company's confidentiality policy.

Niswander sued, claiming she was unlawfully fired in retaliation for her participation in the class action. The lower court dismissed the case and Niswander appealed.

On appeal, the Sixth Circuit determined that the issue of first impression was “under what circumstances the delivery of confidential documents in violation of company policy is considered protected activity.” To resolve the issue, the court analyzed both participation and opposition activity, the latter receiving less protection under federal law.

The court found that participation during a civil rights lawsuit, i.e., giving testimony and producing documents, is afforded protection from retaliation. However, such was not the case here. The court found Niswander’s arguments that she had acquired the information during the course of her employment, and that she had innocently produced them in response to a letter sent by the class

action attorneys unconvincing.

The court found that the documents did not support the *pending* claims in the class action lawsuit, and she admitted that she did not believe that they would. Rather, Niswander testified that the documents supported her complaint that she was being retaliated against because she had joined the class action. That claim, however, had not been asserted prior to production. Therefore, Niswander's production of documents, unrelated to the pending claim, was not protected under the participation clause.

In analyzing oppositional activity, courts engage in a balancing of competing interests: here, the employer's legitimate need to protect confidential information and the employee's need to be protected against unlawful retaliation. Oppositional conduct, unlike participatory action, must be reasonable. The court adopted six factors to make this determination:

"(1) how the documents were obtained, (2) to whom the documents were produced, (3) the content of the documents, both in terms of the need to keep the information confidential and its relevance to the employee's claim of unlawful conduct, (4) why the documents were produced, including whether the production was in direct response to a discovery request, (5) the scope of the employer's privacy policy, and (6) the ability of the employee to preserve the evidence in a manner that does not violate the employer's privacy policy."

Applying these factors to the documents at issue, the court determined that, while Niswander searched for the documents during the course of her employment, and produced them to the attorneys in the class action, Niswander could have, in the alternative, documented her allegations of retaliation by taking notes of incidents that she believed were retaliatory, rather than disclosing confidential documents that she believed would later "jog her memory." Because the six factors did not support her position, the document production did not qualify for protection from retaliation.

Fortunately, this employer escaped liability because the information removed by the plaintiff did not directly support the civil rights claims in the class action. However, it is clear that employers are not free to terminate every employee who violates their confidentiality policies. Had different documents been removed by Niswander, or had she already asserted her retaliation claim, the termination of her employment may have been actionable.

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