Sixth Circuit Finds that Verbal Demand to Supervisor to Cease Harassing Behavior is Protected Activity Under Title VII

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Most practitioners know that Title VII prohibits retaliation against any employee because he or she "opposed any practice made an unlawful employment practice [by the statute]." Title VII does not define "oppose," but the Supreme Court has held that it should have its ordinary meaning – "to resist or antagonize . . . ; to contend against; to confront; resist; withstand."

Courts have grappled with how liberally to apply what has been known as the "opposition" clause, and just last week the Sixth Circuit further expanded the concept .

In *EEOC v. New Breed Logistics*, the Sixth Circuit affirmed a jury's award of almost $1.5 million against an employer for violations of Title VII that included a finding that the employer retaliated against a former employees who had not made any complaint at all, but alleged she simply made verbal "demands" to a supervisor to cease his (allegedly) offensive conduct. The Sixth Circuit had previously found that Title VII "protects not only the filing of formal discrimination charges with the EEOC, but also complaints to management and less formal protests of discriminatory employment practices." However, it had never gone so far as to say that a verbal request to stop "harassment" was now protected activity.

The trial court had instructed the jury that protected conduct "can be as simple as telling a supervisor to stop" on the basis of two District Court decisions finding the same. The employer objected to that instruction, and appealed the verdict.

Relying on the expansive language of the opposition clause in Title VII, and Supreme Court precedent broadly interpreting that term, the Court found that "[i]f an employee demands that his/her supervisor stop engaging in this unlawful practice—i.e., resists or confronts the supervisor's unlawful harassment—the opposition clause's broad language confers protection to this conduct." In finding that this applied to the complaints at issue, the Court stated that "the language in the opposition clause does not specify to whom protected activity must be directed," and that it would be inequitable to require complaints to be made to a "particular official designated by the employer."

In so finding, the Court rejected Fifth Circuit precedent which held that such a situation would lead to every harassment claim "morphing" into a retaliation claim. This case, and another recent Second Circuit decision concerning oral complaints under the FLSA, demonstrate the importance of a robust

policy of complaint documentation to avoid the murky position an employer may find itself in when it must defend against claims of retaliation based upon oral complaints.

What does this mean for employers – undoubtedly more confusion. Now, a company cannot defend a retaliation claim by asserting that no complaint was made, or that an employee did not go to Human Resources and avail herself of the grievance process. A retaliation claim can potentially arise from anywhere, anytime an employee tells a manager to stop doing something she finds offensive. The possibility for employee abuse of this new broad definition of "opposition" is endless. Employers, especially those in the Sixth Circuit, should take note.