

AUGUST 08, 2013

“TAKE YOUR PROPOSAL AND SHOVE IT - AND FIRE ME - AND I’LL SEE YOU IN COURT”

When this statement was made by an employee during an EEOC mediation the employer was shocked to say the least. Shocked and shaken by the employee’s outburst, the employer fired the angry employee within the hour. True to his word, the employee then filed a federal law suit for retaliation for participating in the EEOC’s proceeding. Was this firing unlawful retaliation?

FIRED FOR MISCONDUCT OR WAS IT RETALIATION?

The Court **held** that the firing was *not* unlawful retaliation. Title VII of the Civil Rights Act only bans an employer’s retaliation that is “because a person has opposed any practice made an unlawful employment practice, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing”. In this case, the employee stormed into the caucus room of the employer’s representatives during the EEOC mediation and said loudly: “*You can take your proposal and shove it up your ass and fire me and I’ll see you in court.*” The Seventh Circuit, expressing judicial intolerance of employee misconduct in this context, made the tongue-in-cheek comment that the employer simply “accepted the employee’s counterproposal” when it fired him.

The Court said that it could not see why misconduct during mediation should be consequence-free. In ruling that the employee’s conduct was not protected by the anti-retaliation provisions of Title VII, the Court said that allowing a sanction against a person whose misconduct wrecks a mediation will actually promote the goals of Title VII. Regardless of what the employee said, it was the employee who sabotaged the mediation session by barging into the other side’s caucus room. In the Court’s view, mediation would be less useful, and serious claims of discrimination therefore would be harder to vindicate, if people could with impunity ignore the structure established by the mediator.

MISCONDUCT NEED NOT BE TOLERATED

It is important to note that Title VII doesn’t forbid *all* responses to the filing of charges and the procedures to resolve them. It only forbids an employer’s response that would reasonably dissuade a reasonable worker from making or supporting a charge of discrimination. Egregious conduct during mediation wouldn’t have that effect, the court reasoned. Further, the Court said that an employee’s egregious conduct that occurs *outside* of the mediation context is also unprotected. For example, egregious conduct that occurs during an employer’s internal investigation of a discrimination charge would not insulate an employee from being discharged for conduct that, if it occurred outside an investigation, would warrant termination. The Court said that lies and defamation uttered by an employee during an investigation are not protected. In this case there was no dispute that employer would have fired the employee if he had barged into his supervisor’s office in violation of instructions and said what he said. Accordingly, the employer was entitled to fire someone who did the same thing in EEOC mediation.

BUT BE CAREFUL ...

This is a good case for employers under Title VII. It provides some comfort that they need not tolerate misconduct from an employee who has initiated a complaint of discrimination or is participating in an internal investigation or an EEOC proceeding. But that comfort comes only from Title VII law.

The National Labor Relations Act’s protections for workers who challenge an employer’s practices – even with coarse and abusive language – are generally protected when engaging in such conduct so long as there is no threat of or actual violence. It is always prudent to consider the context as well as all of the facts and circumstances before taking adverse action against an employee who has filed a formal charge, voiced a complaint or is part of an investigation. Employee conduct that is not protected by some laws may be protected by others. Be careful.

Reference: **Benes v. A. B. Data, Ltd.**, (7th Cir. No. 13-1166, July 26, 2013)

If you have any questions, please contact Steve Lyman at slyman@hallrender.com or your regular Hall Render attorney.