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Expanding Retaliation: Fourth Circuit Rejects "Manager Rule" in Title VII Cases

By Matthew J. Feery

After helping an employee report a complaint of harassment, a manager expresses concern over the company's handling of the situation and tells the employee the complaint is being mishandled. After the complaining employee files (and then settles) a Title VII against the company, the manager is fired for failing to take a "pro-employer" stance and act in the company's "best interests." Does the manager have a Title VII retaliation claim? That is the exact question recently decided by the United States Court of Appeal for the Fourth Circuit in *DeMasters v. Carilion Clinic*.

According to the complaint, which the court accepted as true for purposes of its review, J. Neil DeMasters began working as an employee assistance program consultant for Carilion in 2006. Two years later, DeMasters was consulted by an employee who complained that his supervisor was sexually harassing him. DeMasters relayed the substance of the complaint to human resources, which investigated the allegations and fired the supervisor. The employee was told the supervisor would never be back in the workplace, but a few days later the employee's department manager allowed the supervisor to return to collect belongings. The employee complained to DeMasters that he felt uncomfortable at work and that he was facing increasing hostility from the supervisor's allies and friends.

Upon learning this, DeMasters contacted HR to express his concern with how the situation was being handled, and HR confirmed it was aware the employee was being harassed by co-workers. DeMasters offered to coach the HR department on better

ways to handle harassment complaints. HR declined, stating it would handle the situation. However, the employee reported to DeMasters that the harassment continued to get worse on a daily basis. DeMasters then opined to the employee that the complaints were being mishandled by HR. With that, DeMasters stopped having contact with the complaining employee.

Two years later, however, the employee filed a Title VII claim, which was settled. A few weeks after the settlement, DeMasters was called into a meeting with corporate counsel, the vice president of HR, and his own department director. DeMasters was told that by not taking the "pro-employer side," he had put the company at risk of substantial liability. Two days later, DeMasters was fired for, among other reasons explained to him in writing, failing to act in the company's best interests and failing to protect the company.

DeMasters filed a Title VII retaliation claim, which was dismissed by the federal district court for two reasons. First, the district court found that when DeMasters' actions were examined individually, each action failed to constitute "protected activity" under Title VII. Second, even if he had engaged in protected activity, the "manager rule" prevented him from bringing a Title VII retaliation claim because he was acting within the scope of his job duties when reporting the complaints of the employee and discussing the matter with the company.

On appeal, the Fourth Circuit roundly rejected both aspects of the district court's reasoning. The appellate court found the district court's individualized assessment of DeMasters' actions to be "myopic." The correct approach, the appellate court counseled, was to examine the totality of the circumstances in a "holistic approach." As the court put it, just as a play cannot be understood on the basis of some of its scenes, so a discrimination claim cannot be understood without looking at the overall scenario. With this in mind, the Fourth Circuit had no difficulty finding DeMasters engaged in protected activity by complaining to the company that he felt the complaining employee was still being subjected to unlawful conduct.

The court then turned to the "manager rule," which finds its origin in the Fair Labor Standards Act ("FLSA") and requires an employee to "step outside" his role of representing the company in order to engage in protected activity. Under this theory, DeMasters' job duties required him to counsel the employee and relay complaints to HR, and therefore his actions were not protected activities.

The Fourth Circuit again roundly rejected the application of the "manager rule" to the Title VII context. The court first found that whatever statutory support the "manager rule" had in the FLSA context did not exist in the Title VII context because the statutory language of Title VII differs from the FLSA in important considerations.

The court then found that two separate Title VII concepts counseled against the "manager rule." First, under Fourth Circuit case law, an employer can escape Title VII liability if an employee's conduct at work is sufficiently insubordinate, disruptive, or nonproductive. If the "manager rule" requires an employee to step outside his job duties in order to engage in protected activities, then it would put an employee in the dilemma of needing to step outside their job duties to have Title VII's protections but then risk those same protections because stepping outside job duties could be seen as sufficiently insubordinate. Second, because Title VII offers employers the affirmative defense in certain harassment claims that complaining employees failed to follow the company's internal reporting procedures, implementing a "manager rule" that could discourage employees responsible for helping other employees, such as DeMasters, from reporting concerns of discrimination. Thus, the "manager rule" would prevent Title VII's overall goal of preventing and eliminating discrimination and harassment in the workplace.

The Fourth Circuit became just the second appellate court to look at and decide the "manager rule" question in the Title VII context in a published opinion. The Sixth Circuit similarly decided that it did not apply, but the Tenth and Eleventh Circuits have non-precedential opinions adopting the "manager rule" in the Title VII context. Continued split among the federal courts on this issue increases the likelihood the Supreme Court may one day decide the issue.

For employers, the case serves as another reminder that concerns and complaints expressed by managers in harassment claims should be taken seriously and that great care needs to be taken to ensure employees are not retaliated against. Courts and the EEOC have been taking an increasingly expanded view of what constitutes protected activity and retaliation, and employers not mindful of these developments ignore them at their peril.