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Telling Harasser to Stop Is Protected Activity under Title VII

By Chris McFadden

A recent federal appellate decision, [*EEOC v. New Breed Logistics*](#), affirmed a \$1.5 million jury verdict for four employees who had experienced or witnessed harassment and were subsequently terminated. In doing so, the United States Court of Appeals for the Sixth Circuit (which covers Kentucky, Michigan, Ohio, and Tennessee) found that workers who complain directly to a harasser by telling that person to stop have engaged in a protected activity that shields them from retaliation under Title VII. The case also reminds employers about the importance of educating temporary workers about their anti-discrimination and anti-harassment policies.

New Breed, a supply-chain logistics company, staffed its warehouse in Memphis with approximately 80% temporary employees. New Breed did not provide these employees with its handbook containing anti-harassment policies.

The four employees at issue, three women (two of whom were temporary employees) and one man, worked in the facility's receiving department and were supervised by James Calhoun. The female employees testified that Calhoun would make repeated sexual comments daily and made unwanted physical contact with one of the women. The women told Calhoun to stop and leave them alone. The male employee, who had witnessed Calhoun's conduct, told Calhoun "calm down on making them comments because I don't believe them women was liking that."

One of the female employees was terminated with Calhoun's involvement a week after she complained to Calhoun about his harassment. Following an anonymous complaint to the company hotline about Calhoun by another of the female employees, each of the remaining employees was terminated within a short span, all with Calhoun's involvement. Calhoun cited performance issues as the basis for each of the terminations.

Title VII prohibits employers from retaliating against employees who oppose unlawful discriminatory practices such as harassment. In upholding the trial court's finding of retaliation, the appellate court construed the term "opposition" broadly, so as to include resisting or confronting a supervisor's harassing conduct by telling him to stop. The Sixth Circuit rejected the idea that opposition requires complaining to particular designated officials only.

While the ruling conflicts with a case from Fifth Circuit law (which covers Louisiana, Mississippi, and Texas) and at least one federal district court decision, the Sixth Circuit noted that merely complaining to the harasser, with nothing more, does not automatically morph a harassment claim into a retaliation claim. Rather, a retaliation claim still requires a materially adverse action, such as termination, to follow the complaint.

The court also upheld the jury's award of punitive damages in part because it found that New Breed did not make good-faith efforts to prevent sexual harassment and retaliation. In making that determination, the court focused on New Breed's failure to effectively publicize and enforce its policy. Even though 80% of its workforce was temporary employees, New Breed distributed its handbook and policies only to its permanent employees. Further, after the anonymous complaint was received, the only action New Breed took was to interview Calhoun to inquire as to the truth of the allegations. Eventually, a Human Resources representative interviewed others, but failed to talk with anyone in Calhoun's department, the caller who made the complaint, or the witness identified in the complaint.

This case illustrates at least two important points. First, make sure all of your employees, regardless of full-time/part-time or permanent/temporary status, understand your anti-discrimination and anti-retaliation policies. They should receive and acknowledge handbooks and/or policies that outline the multiple avenues available to report and remedy discriminatory or harassing conduct. Second, all managers should be aware that if they receive a complaint, they are obligated to bring it to Human Resources' attention. Further, complaints of harassment and discrimination should be fully investigated. Taking these steps may help you avoid liability or at least help limit damages should improper conduct occur.

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