Employee's Self-Help Discovery May Be Protected Activity Under Massachusetts Anti-Retaliation Law

Written by Michael L. Rosen, Christopher Feudo

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On May 31, 2016, the Supreme Judicial Court of Massachusetts held in *Verdrager v. Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C.* that an employee's accessing, copying and forwarding of an employer's confidential documents may constitute protected activity under the Massachusetts anti-retaliation statute, G.L. c. 151B, § 4, if the employee's actions are "reasonable in the totality of the circumstances." Accordingly, an employee who searches for, copies, and shares with her attorney her employer's confidential business records to bolster her discrimination claim against her employer may be protected from discipline under Massachusetts law.

The SJC's ruling stems from a lawsuit brought against a Boston law firm, Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C., by one of its former attorneys. After the firm "stepped back" the plaintiff's seniority by two years and reduced her salary, purportedly due to her mixed reviews, her low utilization by the firm's more senior attorneys, and her high billing rate, the plaintiff retained an attorney in contemplation of pursuing a discrimination complaint against the firm. Several months later, the plaintiff discovered on the firm's document management system an internal memorandum discussing issues of gender discrimination at the firm. Thereafter, the plaintiff, on instructions from her attorney, searched the firm's system on several occasions for documents related to her case or gender discrimination at the firm, forwarded dozens of documents to her personal e-mail address, and shared two such documents with her attorney. The plaintiff then filed a complaint with the Massachusetts Commission Against Discrimination (MCAD) claiming that her step-back was a result of gender discrimination.

After filing her claim, she searched the firm's system again and discovered transcripts of voicemails left for the firm's chairman that she copied and forwarded to her attorney. Many of these messages were from clients or potential clients and concerned matters protected by attorney-client confidentiality and privilege. After the plaintiff showed one of the firm's members a transcript of the chairman's voicemail messages copied from the system, the firm investigated and discovered the plaintiff's searches of the system related to her discrimination claim. Upon learning of the searches, the firm terminated the plaintiff's employment. In response, the plaintiff filed a second MCAD complaint, claiming that her termination was the result of unlawful gender discrimination and retaliation.

The plaintiff sued the firm and certain of its members in Superior Court for, among other things, gender discrimination and retaliation in violation of Massachusetts law. Prior to trial, the parties both moved for summary judgment, and the court granted the defendants' motion, dismissing the plaintiff's claims. On appeal, the plaintiff argued, among other things, that the dismissal of her retaliation claim was improper because her acts of self-help discovery (i.e. accessing, copying, and forwarding confidential documents in pursuit of her discrimination claim) constituted protected activity under G.L. c. 151B. She argued, therefore, that her termination for having engaged in that conduct was unlawful retaliation.

The SJC overturned the dismissal of the plaintiff's discrimination and retaliation claims, finding that she had presented evidence from which a reasonable jury could infer that her step-back and termination were the result of unlawful discrimination and retaliation. Accordingly, the SJC did not need to address whether the plaintiff's self-help discovery constituted protected activity. Nevertheless, without passing judgment on the plaintiff's conduct, the SJC held that an employee's self-help discovery **may** constitute protected activity in certain circumstances, but only if the employee's actions are "reasonable in the totality of the circumstances."

The SJC explained that, in determining whether an employee's acts of self-help discovery are reasonable, the analysis should first focus on whether the material obtained would have been discoverable under the Massachusetts Rules of Civil Procedure, reasoning that self-help discovery should not allow an employee to obtain more than what he or she would be entitled to receive through the litigation process.

Even if the material would have been discoverable, the SJC opined, the employee's methods must still be reasonable under the totality of the circumstances. To make that determination, the SJC adopted a seven-factor test for courts to apply. The factors to be considered include:

1. How the employee came to have possession of, or access to, the document (i.e. did the employee rummage through files or snoop around offices to find the document?);
2. The relevance of the document compared to the disruption caused to the employer's business by the employee's actions;
3. The strength of the employee's expressed reason for copying the document;
4. What the employee did with the document (i.e. did he or she disseminate it to individuals other than his or her attorney?);
5. The employer's interest in keeping the document secret;
6. Whether there was a clearly identified company policy on privacy or confidentiality that the employee's disclosure violated; and
7. The broad remedial purposes of Massachusetts anti-discrimination law, which is to play a "decisive role" in close cases.

The SJC viewed its ruling as striking a balance between employers' interests in maintaining order in the workplace and protecting confidential business and client information, and employees' need to be protected from retaliation.

The decision – one of several pro-employee decisions issued by the SJC in recent years – is significant for Massachusetts employers for two reasons in particular. First, it demonstrates how broadly Massachusetts courts interpret G.L. c. 151B's anti-retaliation provision. Even in an instance of what might be considered to be clear employee misconduct, a Massachusetts employer should assess whether the employee has a basis to claim that her conduct constitutes protected activity.

Second, the decision is a wake-up call to employers on matters of data security and protection of confidential information. The SJC's decision signals that documents stored on an employer's server or document management system that can be readily accessed by employees are fair game for self-help discovery. Thus, employers should ensure that confidential documents are stored with appropriate security measures that an employee would need to unreasonably subvert to access the documents. Moreover, Massachusetts employers should consider adopting and/or revising their acceptable use and confidentiality policies to ensure that clear limits are set on the use of the company's confidential information and unauthorized disclosure of such information is prohibited. Finally, employers should consider implementing measures that would allow them to flag the unauthorized accessing and/or forwarding of confidential company documents before widespread unauthorized disclosure of such documents occurs.

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