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Don't Shoot the HR Messenger

By: Richard Birdsall, J.D.
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Serving a company as an employee assistant program consultant (EAP), which could be viewed as an HR function, can often be a conflicting and thankless task. You are the PB&J between two slices of bread – the employees and the administration. The employees don't trust you because they view you as an administration lackey. The administration doesn't trust you because they sometimes question where your loyalty lies – you are either with them or against them.

So, what happens when someone calls you to report alleged sexual harassment with subsequent reports of retaliation and you conclude, to the chagrin of the administration, that the complaint is justified? In this instance, the EAP consultant passed the information through to the company HR department and advocated a solution to the alleged retaliation by coworkers. The consultant advised the employee that the facts of his case did meet the criteria of sexual harassment and that the employer was mishandling the matter.

The employee sued and reached a settlement with the company. Shortly thereafter, and after five years of employment, an employee assistance program consultant was fired for acting "contrary to this employer's best interests," "failing to take the pro-employer side," and leaving his employer "in a compromised position," as a result of his support of a fellow employee's sexual harassment complaint and his criticism of the way the employer handled the investigation.

The consultant sued claiming that he was engaging in protected activity and was fired in violation of Title VII's so-called "Opposition Clause", which forbids retaliation against an employee who "oppose[s] any practice made an unlawful employment practice by this subchapter." (42 U.S.C. § 2000e-3(a)).

The U.S. Court of Appeals for the Fourth Circuit concluded that the EAP consultant's activity Constituted opposition to discriminatory activity in violation of Title VII. The appellate court cited cases noting:

> "[When an employee communicates to [his] employer a belief that the employer has engaged in…a form of employment discrimination, that communication virtually always constitutes the employee's opposition to the activity."
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> Oppositional conduct also includes, "voicing one's opinions in order to bring attention to an employer's discriminatory activities."
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> " . . . even non-verbal conduct may constitute protected activity."
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> " . . . protected activity includes complaining about unlawful practices to a manager, the union, or other employees."

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Ultimately, " . . . the touchstone is whether the plaintiff's course of conduct as a whole :

(1) Communicates to [the] employer a belief that the employer has engaged in . . . a form of employment discrimination; and,

(2) Concerns subject matter that is actually unlawful under Title VII or that the employee reasonably believes it to be unlawful."

Shooting the messenger doesn't solve the problem, it only compounds it.
(See J. Neil DeMasters v. Carilion Clinic, et al. (4th Cir., No. 13-2278, Aug. 10, 2015.)

About the Author

Richard Birdsall, B.A., J.D.

Richard brings with him 20 years of trial experience representing the California Department of Transportation and its engineers; three years in the legal field of environmental remediation; nine years of criminal investigation experience; and, two years conducting investigations for the Alaska State Commission for Human Rights.

Now, a senior consultant for The Growth Company, Richard uses his broad experience conducting training in management and human relations, investigation, risk assessment, team building, mediation and alternative dispute resolution. He is particularly adept ferreting out troublesome HR problems and then finding creative ways to solve them.

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