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The Sixth Circuit Finds Complaints to Harassing Supervisor Constitute Protected Activity Under Title VII

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A recent U.S. Court of Appeals for the Sixth Circuit ("Sixth Circuit") decision could have major implications for employers within its jurisdiction. In *EEOC v. New Breed Logistics*, No. 13-6250, 2015 U.S. App. LEXIS 6650, the court declined to reconsider a holding that "a demand that a supervisor ceases his/her harassing conduct constitutes protected activity under Title VII in the retaliation context."

By way of brief background, Title VII of the Civil Rights Act of 1964 ("Title VII") prohibits employers from discriminating against employees on the basis of sex, race, color, national origin, and religion. Title VII further prohibits employers from retaliating against individuals who file a charge of discrimination, complain to their employer about discrimination on the job, or participate in an employment investigation or lawsuit. (These actions are collectively referred to as "protected activity" under Title VII.)

In *New Breed Logistics*, three former employees of the supply-chain logistics company claimed that they had engaged in protected activity by telling their supervisor to stop making advances and sexual comments towards them. The three women accused their supervisor of repeatedly making sexual comments, which were sometimes accompanied by physical contact. The complainants further alleged that shortly after voicing their complaints to the same supervisor, they were terminated. As a result, the Equal Employment Opportunity Commission ("EEOC") filed a sexual harassment and retaliation lawsuit against New Breed under Title VII.

Following a jury trial, New Breed was found liable, and the employees were awarded compensatory and punitive damages totaling over $1.5 million. The employer moved for a new trial and to have the damages award set aside. The district court denied those motions, and New Breed appealed.

The Sixth Circuit affirmed the denial of New Breed's motions and affirmed the verdict. New Breed moved for an en banc hearing, arguing that the Sixth Circuit's decision conflicted with the Fifth Circuit, which held that an oral rejection to a harassing supervisor did not constitute protected activity. Additionally, New Breed argued that an employer should not have to face a retaliation claim if the only person that received the complaint was the alleged harasser. Ultimately, the Sixth Circuit denied the motion for rehearing on the grounds that the employer's issues were fully considered in the lower court's original decision.

In sum, the Sixth Circuit's decision makes it clear that employee complaints of sexual harassment need not be directed to a particular supervisor or manager. In fact, complaints made only to the alleged harasser will be deemed protected activity under Title VII and termination as a result of the complaint could land employers in sexual harassment and/or retaliation lawsuit. Fortunately, there are ways for employers to mitigate liability in some cases. Employers should ensure that written policies are up to date and made available to all employees. They should also ensure that proper, timely and thorough investigations are performed when there are complaints of workplace harassment and they should follow up with measures reasonably calculated to mitigate any harm done to the complaining employee.

If you or your institution has any questions or concerns regarding related issues, please contact James G. Ryan at jryan@cullenanddykman.com or at 516-357-3750.

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