Former Employees Can Sue for Post-Employment Retaliation

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On August 18, 2010, a Florida appeals court ruled that a former employee could sue her former employer for retaliation based upon alleged adverse actions taken by the employer six months after she resigned. The court held that the retaliation provisions of Title VII of the Federal Civil Rights Act (Title VII) protects former employees in the same way it protects current employees. Gates v. Gadsen County School Board, Case No. 1D09-3636.

Ms. Gates was a teacher employed by the Gadsen County School Board for thirty years. In addition to teaching, she also volunteered in the School District mentoring program. In 2004, Ms. Gates filed a lawsuit against the School Board alleging discrimination under Title VII and resigned from her teaching position. Six months later, the School Board prohibited her from continuing in her volunteer position with the mentoring program. As a result, Ms. Gates filed a second suit claiming that the School Board retaliated against her for filing the initial suit by preventing her from volunteering.

Title VII makes it “an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment... because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII].” 42 U.S.C. § 2000e-3. Based upon its reading of this provision, the trial court determined that Ms. Gates was not covered by Title VII because she was a volunteer, not an employee, at the time the School Board took the alleged adverse action.
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However, the appeals court reversed this decision. It determined that, while Title VII does not protect volunteers, it does protect “former employees” and held that Ms. Gate was a former employee when the School Board took the alleged adverse action. In support of its conclusion, the court cited to the U.S. Supreme Court’s opinion in Robinson v. Shell Oil Company, 519 U.S. 337 (1997) (holding that because the term “employees,” as used in Title VII, includes former employees, a former employee may sue a former employer for “allegedly retaliatory postemployment actions”).

Given that the appeal court’s opinion is one of first impression in Florida, it is likely that the School Board will seek a rehearing or appeal the decision to the Florida Supreme Court. In the meantime, however, the court’s holding leaves employers with a number of questions. First, while the court noted that the School Board took the alleged adverse action within six months of her resignation, it did not state how long, after resignation or termination, an individual is considered a “former employee” under Title VII.

The Court also did not specifically address the School Board’s argument that prohibiting Ms. Gates from volunteering was not an adverse “employment” action since it only impacted her status as a volunteer. Accordingly, it is unclear what types of post-employment actions may constitute adverse employment actions that could result in liability for employers under Title VII. Examples of adverse post-employment actions may include negative references, reports, or claims to government entities that may impact a former employee’s licensure or certification and negative adjustments to pending severance or bonus payments.

Based upon this court’s holding, employers are advised to be cautious when taking any action against a former employee. Such actions must have a legitimate non-discriminatory basis. While the amount of time between an employee’s protected activity and alleged retaliatory conduct remains relevant to a retaliation claim, employers need to remember that Title VII and the Florida Civil Rights Act protect individuals even after their employment ends.
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