

[Home](#) > [Workplace Privacy](#) > Sixth Circuit Applies Balancing Test In Retaliation Case Involving an Employee's Disclosure of Confidential Documents

[Sixth Circuit Applies Balancing Test In Retaliation Case Involving an Employee's Disclosure of Confidential Documents](#)

Posted on July 1, 2008 by

- [Print](#)
- [Comments](#)
- [Trackbacks](#)

A recent Sixth Circuit decision addressed the issue of whether the disclosure of confidential, proprietary documents by an employee to her attorneys constitutes a protected activity for which the employee cannot be terminated or otherwise disciplined. In 2000, numerous individuals filed a class action against the Cincinnati Insurance Company (CIC), alleging that CIC had discriminated against women in violation of the Equal Pay Act (EPA). Kathy Niswander, a claims manager at CIC, was one of the plaintiffs in the class action.

In order to respond to CIC's discovery requests, the plaintiffs' attorneys asked each of the plaintiffs, including Ms. Niswander, to send them any documents in their possession that related to the case or that might support their discrimination claims. In response, Ms. Niswander sent the attorneys any documents she had that could potentially be relevant, but she also submitted confidential claim-file documents that did not contain any information relevant to the alleged discrimination.

The plaintiffs' lawyers produced the documents submitted by Ms. Niswander to CIC's attorneys. CIC believed that Ms. Niswander's conduct in delivering the documents to her attorneys violated the company's Privacy Policy and its Code of Conduct, each of which prohibited the disclosure of confidential information, including personal information about policyholders. CIC decided to terminate Ms. Niswander because of her disclosure of the documents to her attorneys.

Ms. Niswander then filed a separate suit against CIC, alleging retaliation under the EPA and Title VII. She argued that she could not be terminated for delivering the documents to her attorneys in the class action because the documents were requested by her attorneys, who needed them in order to respond to CIC's discovery requests. CIC argued that because the confidential documents were not relevant to the EPA claims at issue in the class action, her breach of the company's policies was a legitimate ground for her termination.

The district court granted CIC's motion for summary judgment. Ms. Niswander then appealed the decision to the Sixth Circuit Court of Appeals, which recently [affirmed](#) the judgment. The court noted that the anti-retaliation provisions of Title VII prohibit an employer from discriminating against an employee because the employee engaged in a protected activity. Thus, in order to prove a claim of retaliation, a plaintiff must first show that he or she engaged in a protected activity.

The court first had to decide whether Ms. Niswander's delivery of the documents to her lawyers constituted either participation in the class action lawsuit or opposition to unlawful conduct by CIC. If it were either participation or opposition under Title VII, the court stated that a balancing test would then have to be applied to determine whether her disclosure was a protected activity for which she could not be fired.

The court found that her disclosure did not constitute participation in the underlying lawsuit, noting that while providing *relevant* documents during the discovery process might constitute participation, the provision of *irrelevant*, confidential information cannot be viewed as participating in the proceeding. The court then looked at whether Ms. Niswander's delivery of the documents constituted

opposition to unlawful conduct by CIC. Finding that it could be viewed as opposition, the court applied a balancing test to weigh the employer's need to protect its confidential business and client information against the employee's need to be properly safeguarded against retaliatory actions. The court noted that the ultimate question under the balancing test is whether the employee's dissemination of confidential documents was reasonable under the circumstances. The court looked at the following six factors:

1. how the documents were obtained;
2. to whom the documents were produced;
3. the content of the documents, both in terms of the need to keep the information confidential and its relevance to the employer's claim of unlawful conduct;
4. why the documents were produced;
5. the scope of the employer's privacy policy; and
6. the ability of the employee to preserve the evidence in a manner that did not violate the employer's privacy policy.

Finding that the only two factors that even arguably weighed in Ms. Niswander's favor were numbers 1 and 2, the court found that her delivery of the confidential documents to her attorneys did not qualify as a protected activity. The court thus held that she did not meet her burden to show that the company had retaliated against her. Therefore, the disclosure of confidential, proprietary documents by an employee to her attorneys does not constitute a protected activity where the documents are irrelevant to the claims asserted in the underlying litigation.

Tags: [Workplace Privacy](#), [sixth circuit](#), [workplace privacy](#)

Trackbacks (0)

Comments (0)