Massachusetts Employers: Protect Your Documents

"SELF-HELP DISCOVERY" IN DISCRIMINATION CASES MAY BE ON THE WAY

Insights
6.06.16

An important new Supreme Judicial Court decision has paved the way for Massachusetts employees pursuing certain discrimination claims to engage in what the court has dubbed "self-help discovery." This new variant of "discovery" would permit employees, in certain circumstances, to lawfully take and disclose confidential employer documents before a lawsuit has even begun. This ruling emphasizes the importance of maintaining appropriate security for sensitive documents, including firewalls and other technological barriers.

Employer Learns The Hard Way: "Nothing Is Private"
The case, *Verdrager v. Mintz Levin,* involved a sex discrimination claim filed by a former associate attorney against her law firm. The evidence showed that Mintz Levin encouraged employees to save "almost all" documents to the firm's Electronic Information System, making them available to any other employee at the firm. While the firm's Acceptable Use Policy provided that personal use of the system was permitted, it stated that "employees should do so with the full understanding that **nothing** is **private**."

In February 2007, Verdrager filed an internal complaint alleging that she was the victim of gender discrimination. She claimed that a recent setback at work, putting a promotion to partnership further out of reach, was unfairly based on her sex. She cited other incidents including inappropriate sexually charged comments from male superiors. An internal investigation conducted by the firm dismissed her complaint, concluding that no discriminatory conduct had taken place.

A few months later in May 2007, working on a research project, Verdrager found a number of documents on the firm's system that discussed gender discrimination at the firm and forwarded them to herself and then to her attorney. They included internal confidential memos, "talking points" about her case against the firm, and transcripts of voice mails between managing members of the firm discussing such things as attorney behavior in light of the gender discrimination claims.

Soon thereafter, in December 2007, Verdrager filed a discrimination claim with the Massachusetts Commission Against Discrimination (MCAD), but continued to work at the firm. She also continued to conduct additional searches of the EIS and discovered additional damaging documents that bolstered her gender discrimination claim. When the firm eventually discovered that Verdrager had

performed searches on the firm's system related to her litigation in November 2008, it terminated her employment.

Verdrager then filed another MCAD claim against the firm alleging that by terminating her employment the firm had not only discriminated against her on the basis of her gender, but had also retaliated against her for having filed her first complaint with the state agency.

The parties filed cross-motions for the summary judgment and the firm prevailed in a 2013 decision, but the Supreme Judicial Court (SJC) reversed the decision. On May 31, 2016, the court reinstated the claims and granted Verdrager the opportunity to bring her case before a jury. In its opinion, the SJC addressed the "novel" issue of whether an employee can lawfully take and disclose employer documents prior to the normal discovery process in litigation.

Seven-Factor "Totality Of The Circumstances" Test

The SJC concluded that "self-help discovery" might constitute protected activity under General Laws Chapter 151B, "but only if the employee's actions are reasonable in the totality of the circumstances." The court went on to set forth a "nuanced" seven-factor test seeking to strike a balance between the rights of employees and employers' legitimate interest in the integrity and confidentiality of their documents, requiring an analysis of:

- how the employee came to have possession of, or access to, the document;
- the balance of the relevance of the document to the employee's case versus the disruption to the employer's business;
- the strength of the employee's expressed reason for copying the document rather than simply obtaining it through litigation;
- whether the employee shared it with other employees;
- the employer's interest in keeping the document confidential;
- whether the employee violated a clear company policy; and
- "the broad remedial purposes the Legislature has advanced through our laws against discrimination."

The SJC declined to apply the rule to the facts at issue and decided Verdrager's retaliation claim on other grounds, instructing the trial court to sort out the self-help discovery matter using the above standard.

Employers Must Protect Confidential Documents

This ruling sends a strong message to Massachusetts employers: you should review your practices for keeping confidential documents, including documents related to litigation, away from would-be plaintiff employees. Otherwise, employees may be able to access and use your confidential information to develop litigation against you, even while they are still employed.

To the extent confidential documents are maintained electronically, those documents should only be available to trusted employees on a need-to-know basis. If you learn that an employee is attempting to access confidential information unrelated to their job function, you should move quickly to document the employee's activity and stop any further access. Finally, before disciplining or terminating the employee for these searches, you should contact your employment counsel to plan your approach.

If you have any questions about this decision or how it may affect your business, please contact your Fisher Phillips attorney or one of the attorneys in our Boston office at 617.722.0044.

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