Massachusetts High Court Paves Way for Employees to Engage in 'Self-Help' Discovery

By Brian E. Lewis

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The highest court in Massachusetts has ruled that, in certain instances, an employee can access and obtain an employer's records in order to support a claim of employment discrimination. *Verdrager v. Mintz Levin*, No. SJC-11901 (May 31, 2016).

According to the Massachusetts Supreme Judicial Court, employers must balance the efficiency of document sharing with their employees with the risk that employees will conduct their own self-help-discovery before and after initiating litigation.

Background

The plaintiff, a former associate at the defendant law firm, alleged that she was subjected to gender discrimination and unlawful retaliation. While still employed at the law firm (and after filing a claim of discrimination with the Massachusetts Commission Against Discrimination ("MCAD")), the plaintiff accessed the firm's document management system, searching for documents and communications that could support her discrimination claim. She accessed and forwarded dozens of documents to her personal email account, even sharing some with her attorney. The law firm terminated the plaintiff, contending that she unlawfully accessed law firm documents.

Self-Help Discovery

The plaintiff alleged that she was discriminated against based on her gender and that the firm fired her in retaliation for filing her MCAD complaint. In ruling that the plaintiff's claims can proceed to a jury, the SJC also ruled on whether her "self-help" discovery could be considered "protected activity" under the state's anti-retaliation laws. The SJC held that, in certain instances, this form of "self-help discovery" may constitute protected activity.

The SJC explained that a court must consider the "totality of the circumstances" to determine whether the plaintiff's actions could be protected activity. It said that courts must consider the following seven factors:

1. how the employee came to have possession of, or access to, the document;
2. a balancing of the relevance of the documents to the employee's suit with the disruption caused to the employer's ordinary business by the access;
3. the strength of the employee's expressed reason for copying the document rather than obtaining it through pre-trial discovery;
4. whether the employee shared the document only with her attorney or also with other employees;
5. the strength of the employer's interest in keeping the document confidential;
6. whether the employee violated "a clearly identified company policy on privacy or confidentiality"; and
7. and the broad remedial purposes of the anti-discrimination laws.

The Court did not apply the above analysis to the plaintiff's actions, instead remanding the task for a jury to consider.

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Following the Court's decision, in at least some circumstances, an employee may access company databases and records to support claims of discrimination. Companies, therefore, should review their practices, policies, and procedures with respect to the safe-guarding, storage, and maintenance of confidential documents. As has long been the case, employers are well-served by ensuring that employees generally are given access only to those documents they need to perform their jobs.

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Jackson Lewis attorneys are available to discuss these issues and other workplace matters.

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