

Employment retaliation was the subject of [my posts](#) right before the holiday weekend. I return to continue discussing the anti-retaliation statute in Title VII. This is the employment retaliation law addressed by the United States Sixth Circuit Court of Appeals in the interesting and important Niswander v. Cincinnati Insurance Co. case.

The facts are interesting because they begin with such a common transaction. The employee, Niswander, sued her employer for paying her less than male employees. The employer, Cincinnati Insurance, used the court rules to have the employee turn over documents she had to the employer. The employee provided to her lawyer a wide range of documents, including documents not within the scope of the employer's request. The employee's lawyer gave the employer's lawyers the documents requested, and erred on the side of cooperation by resolving doubts about what should be produced in favor of producing.

Then the facts take a twist. Employee gets fired for violating company policy prohibiting disclosure of confidential company documents. And the question is: Did the employer violate the law against retaliation under Title VII?

The law is interesting because the court had never before addressed the question of whether producing confidential information that an employer said could not be disclosed could be an activity protected against retaliation under Title VII. Under Title VII, two kinds of conduct are identified as protected activity: "Opposition" and "Participation." The relevant part of Title VII prohibits retaliation against an employee "because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."

Perhaps the most important difference between "opposition" and "participation" conduct is that courts have held that participation conduct is more broadly protected than opposition conduct. For example, the Title VII retaliation law protection for "participation" covers "any manner" of participation in a Title VII proceeding. But the courts have uniformly held that Title VII retaliation law for opposition is limited to opposition done in a "reasonable manner." Now, however, the Niswander court limits the meaning of participating "in any manner." The court has held that when participation involves disclosure of confidential information, the "participation" must be reasonable. In the court's words: "The analysis of a participation claim does not generally require a finding of reasonableness, as opposed to the requirement that oppositional conduct be reasonable. But when confidential information is at issue, a reasonableness requirement is

appropriate." This is a new restriction on the scope of Title VII's participation clause protection.

The court applied a six factor test to determine whether the employee had acted reasonably in producing the confidential documents to her lawyer. The six factors are:

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 employee's claim of unlawful conduct,
4. why the documents were produced, including whether the production was in direct response to a discovery request,
5. the scope of the employer's privacy policy, and
6. the ability of the employee to preserve the evidence in a manner that does not violate the employer's privacy policy.

Applying these six factors, the court held that Kathy Niswander had not acted reasonably in giving all of her documents to her lawyers. So the court ruled that she was not protected against retaliation under either the participation or opposition clause. This is a clear victory for employers in Ohio, Kentucky, Michigan, and Tennessee - the states governed under Sixth Circuit law.

But employers should not race to follow Cincinnati Insurance Co.'s lead. Application of the six factors is complex, and employers should certainly seek legal counsel for advice on applying the factors. Moreover, the Niswander decision conflicts with many other legal principles and precedents. Given these conflicts, some modification of the decision in the future by another court would not be surprising.

More on this fascinating decision another day....