

Stealing or Retaliation?

05/01/17

You just found out that your employee has been forwarding multiple documents, including those on which she is not currently working, to her personal email. Further, those documents contain information that you believe is company confidential and proprietary, and the employee just recently lodged a discrimination claim against the company. Should you terminate the employee? Should you let her continue to forward these company documents to her personal email? If you terminate her, she might add a retaliation count to the lists of claims against you. On the other hand, if you do not terminate her, she has suffered no consequences for what you feel is behavior equivalent to stealing.

This is a tough situation and requires a legal analysis. Courts look at a six (6) factor balancing test to determine whether terminating an employee in this situation is justified or constitutes retaliation. One of the factors that courts look at to justify termination of the employee is the existence of a company policy against similar activity. As an employer, to ensure that you are not caught in a lurch, make sure that your employee handbook contains a clear policy on company confidential and private information, including specific mention of materials considered confidential and/or proprietary and the disciplinary consequences, including possible termination, for violating the policy. Although in the absence of having a policy like the aforementioned, the courts will look to the common law to determine the responsibilities of an employee toward an employer regarding confidential and proprietary information, but it is better to have it spelled out in an employee handbook.

Having a policy regarding confidential and proprietary information does not insulate an employer from a claim of retaliation by the employee, although it certainly helps. The courts consider how the employee came into possession of the confidential and proprietary information. If she came across the information when she was performing her daily job responsibilities, then the analysis tips toward a court finding retaliation. If, however, she accessed documents which she would not come across in her daily job duties, the analysis tips toward a court finding a legitimate non-retaliatory termination. What the employee did with the documents is also important to know. If she just provided the documents to her attorney, the analysis again tips toward retaliation. If she provided them to other employees and those who have no need for them, the analysis tips toward finding a legitimate non-retaliatory termination. Also considered is the importance of the document(s). Are they “smoking gun” document(s) which hurt any defense the employer has against her discrimination claims? If so, that element favors a finding of retaliation by the employer. If the document(s) contain proprietary and confidential information that is really not relevant to her claims, but invade the employer’s or other employees’ interests, such as documentation regarding a trade secret or social security numbers of employees, the balance tilts toward a court finding that termination of the employee was justified. Whether the employee’s actions disrupted the employer’s business is also a factor that courts consider. Finally, the employee’s reason for taking the document(s) is important. Did she have a fear that the document would be destroyed or buried? Did she believe the employer would “bury” the document? If these fears and beliefs are not legitimate, then the analysis tilts toward a finding of the employer being able to legitimately terminate the employee.

The above situation is fraught with legal consequences and it is inadvisable for an employer to terminate an employee in such a situation without first fully analyzing the legal factors. However, putting a written policy in place concerning confidential and proprietary information is a prophylactic action that an employer can take now, before such a situation occurs.

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