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CLIENT UPDATE

"Manager Rule" Not the Rule in Fourth Circuit

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Plaintiffs in employment discrimination cases are increasingly confronting the "manager rule." This exception to Title VII's protection against discrimination or retaliation bars an employee from claiming that she engaged in a protected activity if she was acting within the scope of her employment.

Shlansky Law Group, LLP ("SLG") recently prevailed against a motion for summary judgment in which the defense argued vigorously that the "manager rule" barred the plaintiff's claim of retaliation under Title VII because the plaintiff was a manager acting within the scope of employment. *Toohey v. ManTech Int'l Corp.*, E.D. Va., C.A. No. 1:13-cv-1059-AJT/JFA. The U.S. District Court for the Eastern District of Virginia, where the appeals court has been silent on whether to adopt the "manager rule" in the Title VII context, held that even if the rule applied, it could not conclude that the plaintiff's actions were insufficient to gain the protection of Title VII.

Title VII makes it "an unlawful employment practice for an employer to discriminate against any of his employees . . . (1) because he has <u>opposed</u> any practice made an unlawful employment practice by [Title VII], or (2) because he has made a charge, testified, assisted, <u>or participated in</u> any manner in an investigation, proceeding, or hearing under [Title VII]." Courts generally recognize that this language protects an employee from discrimination or retaliation for opposing an "unlawful employment practice" or participating in a protected activity.

The "'manager rule' holds that a management employee that, in the course of her normal job performance, disagrees with or opposes the actions of an employer does not engage in 'protected activity.'" *Brush v. Sears Holding Corp.*, 2012 U.S. App. LEXIS 6145, at *14 (11th Cir. Mar. 26, 2012). Several courts have applied the "manager rule" in the context of Title VII or another statute like the Fair Labor Standards Act. *See, e.g., Claudio-Gotay v. Becton Dickinson Carbide, Ltd.*, 375 F.3d 99 (1st Cir. 2004) (applying "manager rule" under the Fair Labor Standards Act); *Hagan v. Echostar Satellite, LLC*, 529 F.3d 617 (5th Cir. 2008) (applying "manager rule" under the Fair Labor Standards Act); *EEOC v. HBE Corp.*, 135 F.3d 543 (8th Cir. 1998) (applying "manager rule" under Title VII); *McKenzie v. Renberg's Inc.*, 94 F.3d 1478 (10th Cir. 1996) (applying "manager rule" under the Fair Labor Standards Act). Others have yet to decide whether to adopt the "manager rule" or have rejected it. *Johnson v. University of Cincinnati*, 215

F.3d 561 (6th Cir. 2000); *Smith v. Secretary of the Navy*, 659 F.2d 1113 (D.C. Cir. 1981); *Howe v. Sears, Roebuck and Co.*, 2014 U.S. Dist. LEXIS 355 (W.D.WI. Jan. 3, 2014).

Notably, several courts that have applied the "manager rule" have done so either in the context of the Fair Labor Standards Act or another statute like the False Claims Act, and not Title VII. For example, in *Eberhardt v. Integrated Design & Constr., Inc.*, the Fourth Circuit applied reasoning similar to the manager rule, holding that "an employee tasked with the internal investigation of fraud against the government cannot bring a section 3730(h) action for retaliation unless the employee puts the employer on notice that a *qui tam* suit under section 3730 is a reasonable possibility." 167 F.3d 861, 868 (4th Cir. 1999). The Fourth Circuit reasoned that, otherwise, "the employee fails to put defendants on notice that she was acting in furtherance of an FCA action . . . ." *Id.* (internal citations omitted). While this suggests that the "manager rule" may be germane to cases outside of the Title VII or Fair Labor Standards Act context, in SLG's recent case, even though the Fourth Circuit had applied reasoning similar to that underlying the "manager rule" in the context of the False Claims Act, the "manager rule" was not held to apply in the Title VII context.

Thus, it remains somewhat unclear how far courts will take the "manager rule," and its application varies among the courts. This lack of clarity will continue until the Supreme Court decides whether the "manager rule" is consistent with the language of Title VII. As recently as 2013, the Supreme Court has declined to decide this issue. *Brush v. Sears Holding Corp.*, 133 S. Ct. 981 (2013) (denying certiorari).

What is clear is that the "manager rule" offers a potentially broad defense for employers, but it has limits. Courts generally take a case-specific approach to applying the "manager rule." In cases where the plaintiff works in human resources, it may be difficult to show that she was engaged in activity protected by Title VII if she was only carrying out the responsibilities of her job.

But the "manager rule" has also been applied – as its name suggests – against managers outside of the human resources department, because managers in all departments may be involved in identifying, reporting, or investigating claims of discrimination. In these cases, the focus on whether the plaintiff was only acting within the scope of his or her role becomes more acute.

A plaintiff subject to the "manager rule" must show that she "cross[ed] the line from being an employee 'performing her job . . . to an employee lodging a personal complaint.'" *Brush*, at *15. Merely relaying a subordinate employee's complaint may not cross the line. Nor in some cases does advising the company that it might be violating the law cross the line. Yet some courts have held that a general company policy requiring employees to report discrimination does not bring an employee within the limitations of the "manager rule." *Collazo v. Bristol-Myers Squibb Mfg., Inc.*, 617 F.3d 39, 49 (1st Cir. 2010). An employee's actions do not fall within the "manager rule" when she "take[s] action adverse to the company." *Id.* Of course, at least one court has held that an employee who steps too far across the line may place himself so adverse to the company's interest that he cannot claim the protection of Title VII. *Smith v. Singer Co.*, 650 F.2d 214 (9th Cir. 1981).

In SLG's recent case, the plaintiff was a departmental Vice President responsible for supervising several dozen employees. A subordinate employee had raised concerns of discrimination, and

after some initial investigation, the plaintiff brought the employee's concerns to the head of human resources, the general counsel, and the company's president. The plaintiff also wrote a letter indicating that she "had some concerns" and that it was in the company's interest to investigate the claims of discrimination. Without deciding whether the "manager rule" applied, the court held that "[e]ven if it were her job to report employee complaints, it was not her job to investigate or evaluate those complaints or weigh in on whether there existed unlawful employment practices . . . ." She crossed the threshold from simply doing her job to taking actions protected under Title VII.

While the precise location of that line is unclear, and depends on a case-specific review of the facts, this case shows that even a manager who has some responsibility for overseeing employees is not automatically blocked by the "manager rule" if she can show that she was not acting strictly within the scope of her role or responsibilities. It also confirms that taking action that is "adverse to the company" does not require taking action detrimental to the company or action that lacks professionalism and decorum.

The "manager rule" gives employers an increasingly-recognized defense against discrimination or retaliation claims based on facts that suggest the employee was doing his or her job. Employees are on notice that they must register some personal opposition to the employment practice at issue by participating in the identification or investigation of discrimination when it is not within their job description to do so, or expressing some disapproval of an employment practice. In courts that apply the "manager rule," it is often not enough for a plaintiff to relay only the complaint of another employee, especially if the plaintiff is a manager, who might be the first person to whom an employee's complaints are aired.

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