

Alleged Employee Misconduct: Employer Claims and Counterclaims

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1. The Contours of Protected Activity

- a. The removal of documents and electronically stored information (ESI) from the workplace by employees is increasingly a major problem for employers.
 - i. *With Mass Layoffs Comes the Potential for Mass Misappropriation*, Posting of Kurt Kappes & Jim McNairy to Trading Secrets Law Blog (Feb. 10, 2009, 17:52 EST), available at <http://www.tradesecretslaw.com/2009/02/articles/tradesecrets/with-mass-layoffs-comes-the-potential-for-mass-misappropriation/>.
 - ii. Michelle Goodman, *Stealing a Slice of the Company Pie*, ABCNews.com, Jan. 22, 2009, available at <http://abcnews.go.com/Business/Economy/Story?id=6699815&page=1>.
 - iii. Tracy L. Coenen, *Fraud and the Economy: Correlation or Coincidence?*, Wisconsin L. J., Jan. 16, 2009, available at http://www.sequence-inc.com/index.php?option=com_content&view=article&id=301:fraud-and-the-economy-correlation-or-coincidence&catid=15:recent-articles-a-press&Itemid=64.
 - iv. *Keep Your Documents Close and Your Flash Drives Closer*, Posting of Chad Wiener to E-Discovery Bytes (Feb. 4, 2009, 11:30 EST), available at <http://ediscovery.quarles.com/2009/02/articles/corporate-record-retention/keep-your-documents-close-and-your-flash-drives-closer/>.
 - v. *Niswander v. The Cincinnati Ins. Co.*, 529 F.3d 714 (6th Cir. 2008) (majority sets forth a six-factor balancing test for determining whether employee's delivery of confidential documents to her attorney was reasonable).

2. Courts Reject Plaintiffs' Efforts to Characterize Alleged Misconduct as Protected Activity

- a. *Niswander v. Cincinnati Ins. Co.*, 529 F.3d 714, 717 (6th Cir. 2008) (employee who worked at home on her home computer and had access to confidential files

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did not engage in protected activity when she copied these confidential files and gave them to her attorney in furtherance of a pending class action lawsuit to which she had opted in).

- b. *Laughlin v. Metro. Washington Airports Auth.*, 149 F. 3d, 253, 256, 260 (4th Cir. 1998) (no protected activity where plaintiff copied a disseminated a document she saw on her supervisor's desk "[d]uring the course of her regular duties" and where documents available in discovery).
- c. *O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 763-64 (9th Cir. 1996) (no protected activity where employee rummaged through supervisor's desk, copied documents, and gave copies to co-worker in anticipation of a future lawsuit against employer).
- d. *Jeffries v. Harris County Comty. Action Ass'n*, 615 F.2d 1025, 1036 (5th Cir. 1980) (plaintiff's copying of a confidential document was not protected even where she came across in the document in the course of her job duties as secretary).
 - i. *Jeffries*, 615 F.2d at 1036 ("surreptitious copying and dissemination" of personnel records not protected in absence of showing they would have otherwise been destroyed).
- e. *Hochstadt v. Worcester Found. for Experimental Biology*, 545 F.2d 222, 234 (1st Cir. 1976) ("serious acts of disloyalty" not protected under Title VII).
- f. *Hodgson v. Texaco, Inc.*, 440 F.2d 662, 663 (5th Cir. 1971) ("employee's appropriation of records without permission for purposes of using them in a suit against the company" not protected under Fair Labor Standards Act irrespective of admissibility of records in court proceedings).
- g. *Harris v. Richland Comty. Health Care Ass'n, Inc.*, 2009 U.S. Dist. LEXIS 83832 (D.S.C. Sept. 14, 2009) (rejecting plaintiff's retaliation claim because her termination was based upon her unauthorized disclosure of other employees' confidential employment records to a state agency because "Harris had access to these files only because of her official position [as COO] with RCHCA. Second, Harris's access and permitted use of the documents was strictly limited by a written confidentiality policy of which Harris was aware and which did not allow for the particular use she made of the documents. Thus, in including these confidential documents in her SCHAC charge, Harris took advantage of her special position of trust with the employer and violated a clear and unlawful confidentiality policy designed for the protection of other employees.").

- h. *Watkins v. Ford Motor Co.*, 2005 U.S. Dist. LEXIS 33140 (S.D. Ohio Dec. 15, 2005) (“[I]f the Court were to adopt plaintiff’s argument that such conduct is protected activity, plaintiffs everywhere would be entitled, under the umbrella of protected activity, to steal company information and, so long as they give the information to their lawyer, not only be able to avoid disciplinary action by their employer, but also be empowered to successfully maintain a claim against their employer if adverse action is taken for the misconduct.”).
- i. *JDS Uniphase Corp. v. Jennings*, 473 F. Supp. 2d 697, 704 (E.D. Va. 2007) (“Orally transmitting arguably confidential information to a lawyer with an eye to suing the company is quite different from physically carting away stacks of documents, disks, or computers belonging to the business without authorization to do so and in contravention of a confidentiality agreement.”).
 - i. *Jennings*, 473 F. Supp. 2d at 702 (the anti-retaliation provisions under Sarbanes-Oxley cannot be read “to authorize disgruntled employees to pilfer a wheel barrow full of an employer’s proprietary documents in violation of their [duty of loyalty or confidentiality agreements] merely because it might help them blow the whistle on an employer’s violations of law, real or imagined. Endorsing such theft or conversion would effectively invalidate [the duty of loyalty and] most confidentiality agreements, as employees would feel free to haul away proprietary documents, computers, or hard drives, in contravention of their confidentiality agreements [or duty], knowing they could later argue they needed the documents to pursue suits against employers under a variety of statutes protecting employees from retaliation” [for opposing discriminatory practices or participating in such actions]).
 - ii. *Jennings*, 473 F. Supp. 2d at 704 (an employee “should not engage in self-help by wrongfully retaining an employer’s documents; but instead the employee should file suit and seek the documents” in question through appropriate discovery channels).
- j. *Bonger v. Am. Water Works*, 789 F. Supp. 1102, 1107 (D. Colo. 1992) (Human Resources Director’s “unauthorized copying and distribution” of personnel files to lawyer not justified by fact that she did it in connection with claim of discrimination under Title VII).
- k. *Baker v. Georgia Power Co.*, 27 F.E.P. Cases 1301 (N.D. Ga. April 30, 1981) (retaliation claim dismissed where plaintiff, a general clerk who had access to defendant’s internal files containing salary and benefit information on defendant’s

employees, “covertly obtained information on employees holding jobs similar to hers and had sent such information to a Justice Department attorney as well as to her private attorney.”).

- l. *Baker*, 27 F.E.P. Cases at 1302 (“unauthorized disclosure” of confidential personnel information to attorney in connection with claim of discrimination not justified in the absence of showing that information not available “through normal discovery methods”).
- m. *Fox Searchlight Pictures, Inc. v. Paladino*, 106 Cal. Rptr. 2d 906, 921 (Cal. Ct. App. 2001) (concluding, *inter alia*, that the plaintiff’s disclosure of her former employer’s confidential information to her attorney was “not a public disclosure” because her attorneys were “themselves bound by the rules of confidentiality and the attorney-client privilege”).

3. **Disloyalty Causes Loss of SERP Benefits**

- a. In *Whitescarver v. Sabin Robbins Paper Co.*, 2008 U.S. App. LEXIS 22944 (6th Cir. 2008) (unpublished), the former president of a company was denied SERP benefits by reason of his “disloyalty.” The case arose because the former president of a paper company asserted that he had been wrongly denied approximately \$300,000 in plan benefits when the company terminated his employment, ostensibly “for cause.” Under the plan, which was a SERP, benefits were payable only if the executive were involuntarily terminated without cause.
- b. It was discovered that the executive had changed the billing on his company-issued cell phone, so bills and call details were mailed to his home instead of to the company’s offices. An examination of his cell phone bills reflected prohibited contact with company employees, vendors, and customers. When the company asked for billing detail, the executive refused. Later, the executive was terminated for “cause”, including “disloyalty.”

4. **Company Attempts Unsuccessfully to Recover Payments to the Beneficiary of a Deceased Executive**

- a. In *Miniace v. Pacific Maritime Assoc.*, 424 F. Supp. 2d 1168 (N.D. Cal. 2006), where the former CEO had approved compensation and benefits for himself, including a split dollar insurance program, without properly informing the company’s board of directors, the company made various claims for equitable relief under ERISA section 502(a)(3), in an attempt to recover the benefit payments under that program made to a surviving spouse. While the court held that the CEO had breached corporate fiduciary duties, the court held that it did not

constitute a breach of ERISA fiduciary duty, and thus the surviving spouse retained the benefits.

5. **Forfeiture of Non-Qualified Benefits for Violating a Non-Compete**

- a. In *Violette v. Ajilon Finance*, 2005 WL 2416986 (D.N.J. 2005), the court held that it was unreasonable to deny non-qualified deferred compensation benefits for violation of a non-compete where the executive had the burden of proving that he / she had not been in competition with the employer.

6. **Spoilation of Evidence**

- a. Several jurisdictions have recognized a tort claim cause of action for spoliation of evidence. *See, e.g., Nye v. CSX Transp., Inc.*, 437 F.3d 556, 569 (6th Cir. 2006) (*quoting Smith v. Howard Johnson Co.*, 615 N.E.2d 1037 (Ohio 1993)).
- b. Thus, if an employee should destroy evidence relevant to the employee's claims against the employer, there could be a counterclaim in tort for spoliation.

7. **Employer Claim for Contribution from Employee**

- a. While the Supreme Court in *Northwest Airlines, Inc. v. Transport Workers Union of America, AFL-CIO*, 451 U.S. 77 (1981), in a unanimous opinion written by Justice Stevens, held that there was no right to contribution under either the Equal Pay Act or Title VII, it is an open question in many jurisdictions as to whether a right of contribution might be recognized under the state or local anti-discrimination statute.
- b. In *Donajkowski v. Alpena Power Co.*, 596 N.W.2d 574 (Mich. 1999), the Michigan Supreme Court concluded that the employer had a right to seek contribution from the union. *See also Rodolico v. Unisys Corp.*, 189 F.R.D. 245 (E.D.N.Y. 1999) (holding that the employer had a right to seek contribution under the New York Human Rights Law against the union).
- c. Given the fact that some state and local jurisdictions have held that individuals are suable under the state or local anti-discrimination statute (e.g., [cite the definitive D.C. Court of Appeals opinions – there are two of them]), an employer might argue that it has a right to seek contribution against an individual who harassed / discriminated against another employee.

8. **Retaliation—Counterclaims**

- a. An issue that has arisen with some frequency recently is whether an employer's counterclaims against the employee are actionable retaliation.
- b. *Gross v. Akin, Gump, Straus, Hauer & Feld, LLP*, 2009 U.S. Dist. LEXIS 16427 (D.D.C. Mar. 3, 2009).
 - i. Plaintiff employee sued Defendant for age discrimination.
 - ii. During discovery, employer found information to support counterclaim.
 - iii. Plaintiff counterclaims for retaliation based on exercise of rights under the ADEA and DC HRA.
 - iv. Court dismisses employee's counterclaim, holding that counterclaim is not actionable under *Burlington Northern* because:
 1. Plaintiff was not an employee of Defendant when Defendant filed the counterclaim,
 2. Counterclaim could not actually dissuade Plaintiff from filing his claim, and
 3. Rule 13 of the Federal Rules of Civil Procedures required Defendant to file counterclaim in this case.
- c. In *Darveau v. Detecon, Inc.*, 515 F.3d 334, 343 (4th Cir. 2008), the court held that "filing a lawsuit alleging fraud with a retaliatory motive and without a reasonable basis in fact or law" constitutes adverse employment action required to support a claim of retaliation for bringing a suit under the FLSA against an employer.
- d. In *Hernandez v. Crawford Bldg. Material Co.*, 321 F.3d 528, 532 (5th Cir. 2003), plaintiff sued for race discrimination and employer counterclaimed for theft, employee counterclaimed for retaliation based on employer's counterclaim and trial judge dismisses employee's counterclaim for lack of lack of proof.
- e. Fifth Circuit reverses and dismisses, noting that district courts in other circuits have held that filing a suit or counterclaim can support a lawsuit premised on a theory of retaliatory employment action. See *Beckham v. Grand Affair of N.C., Inc.*, 671 F. Supp. 415, 419 (W.D.N.C. 1987); *EEOC v. Va. Carolina Veneer Corp.*, 495 F. Supp. 775 (W.D. Va. 1980).
- f. In *Timmerman v. U.S. Bank, N.A.*, 483 F.3d 1106 (10th Cir. 2007), the court that a meritorious counterclaim, based on plaintiff's directing bank funds to her own account, would not support a retaliation claim, relying on *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 743 (1983) (refusing to enjoin a "well founded lawsuit . . . even if it would not have been commenced but for plaintiff's desire to retaliate against [defendant] for exercising [his/her] rights").
- g. In *Walsh v. Irvin Stern's Costumes*, No. 05-2515, 2006 WL 2380379 (E.D. Pa. Aug. 15, 2006), the court held that threatening to accuse plaintiff of a crime is an adverse employment action.

- h. In *Zakzrewska v. New School*, 543 F. Supp. 2d 185 (S.D.N.Y. 2008), plaintiff, in a discrimination case, sought to amend her complaint to add a retaliation claim because she learned in discovery that Defendant had been covertly monitoring her personal e-mails. Court allowed the amendment on grounds that a jury might conclude that such activity (even if unknown to plaintiff at the time of the monitoring) might persuade a reasonable person not to file a discrimination complaint.
- i. In evaluating whether a claim by an employer against an employee constitutes actionable retaliation, the courts often look to the *Noerr-Pennington* doctrine. *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 511 (1972); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

9. **Counterclaim Against In-House Counsel for Using Confidential Information in Claims Against Company**

- a. In *Keller v. Loews Corp.*, 2010 N.Y. App. Div. LEXIS 199 (N.Y. App. Div. Jan. 12, 2010), the appeals panel held that a counterclaim could proceed against a former in-house attorney who claimed he was fired because he was Jewish. The employer counterclaimed, contending that the lawyer had improperly disclosed confidential information in his court complaint. The appellate division found that there was a factual issue as to whether certain allegations in the complaint were based on confidential information the lawyer possessed as the company's tax counsel.

10. **Sanctioning for Document Removal**

- a. In *Weaver v. Zenimax Media Inc.*, 923 A.2d 1032 (Md. Ct. Spec. App. 2007), the Court held that "it is within the discretion of the Circuit Court to sanction an offending party [for improper conduct associated with pre-litigation gathering of evidence] as necessary to remedy prejudice to the other side or to safeguard the Court's ability to properly adjudicate the case.

11. **Other Issues**

- a. Misappropriation of Trade Secrets / Trade Secrets Act
- b. Contribution
- c. Breach of Fiduciary Duty
- d. Breach of Contractual Confidentiality Agreement
- e. Enforcement of Contractual Clawbacks
- f. Conversion
- g. Trover and Replevin
- h. Defamation

- i. Cyberlibel
- j. Trade Libel
- k. Computer Trespass
- l. Surreptitious Recording / Violation of Wiretap Statutes
- m. Indemnification for Claims Arising Out of Employee Conduct