

## 4th Circuit: It's OK to fire employee for false harassment report

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*We all know that an employer generally may not fire or otherwise take an adverse employment action against an employee for reporting sexual harassment at work. But does that prohibition apply when the employee is fired for making a false report? Is a false report protected by the law? Recently, the U.S. 4th Circuit Court of Appeals (whose rulings apply to all Virginia employers) answered those questions with a definitive "no."*

### **Facts**

Patricia Villa, who worked as a restaurant manager at the local restaurant chain CavaMezze Grill, LLC (referred to as "Cava" throughout this article), was approached by Judy Bonilla, a line-level employee she sometimes supervised. Bonilla told Villa that the company's general manager, Marcelo Butron, had offered her a raise in exchange for sex. Bonilla later left Cava. Villa suspected that another employee, Jessica Arias, had quit because of a similar offer. Villa conveyed her concerns to Rob Gresham, the company's director of operations, who conducted an investigation into the allegations.

As part of his investigation, Gresham interviewed Bonilla. When he asked her why she left Cava, she responded that she left for a better-paying job. When he asked whether she left because Butron told her that he would only give her a raise in exchange for sex, she denied that exchange had occurred. She also denied making the statements Villa had reported.

Gresham then spoke to Arias. During the conversation, Arias explained that she left Cava because she lives too far from the restaurant. When

asked specifically whether she left because Butron offered to give her a raise in exchange for sex, she laughed and denied that he had made such an offer. She also said that whoever told Gresham that was lying.

Gresham also spoke with Osmar Marinero, an employee who Villa said was present during her conversation with Bonilla. Marinero told Gresham that Bonilla left for more money, and he denied knowing anything about either Bonilla or Arias leaving because of sexual harassment by Butron.

Following his investigation, Gresham met with Villa. He explained that because both Bonilla and Arias denied that Butron offered them a raise in exchange for sex, he had determined that Villa made up the allegations against Butron. He then informed her that her employment was terminated because she made a false report. She told him she was sorry, but she didn't deny fabricating the report.

### **Former employee files suit**

Villa subsequently filed a complaint for unlawful retaliation with the Fairfax County Office of Human Rights and Equity Programs (OHREP) and the federal Equal Employment Opportunity Commission (EEOC). Before the OHREP completed its investigation of her complaint, she requested a right-to-sue letter so she could file a lawsuit in federal court. After she received the letter, she filed suit in Alexandria federal district court, alleging that her termination violated the prohibition on retaliation in Title VII of the Civil Rights Act of 1964.

The purpose of Title VII's antiretaliation provision is to protect an employee who reports a violation of the Act based on her reasonable belief that the

report is true. Liability under Title VII is based on an employer's motivation for taking the adverse employment action, and a finding of liability depends on the facts the decision maker perceives as true.

During the discovery phase of the lawsuit (the pretrial exchange of evidence), Bonilla was deposed (questioned under oath by attorneys for each party). In response to the deposition questioning, she testified that she had lied to Gresham and that she *had* told Villa that Butron offered to give her a raise for sex. However, she also admitted that Butron never actually made such an offer.

Given that testimony, Villa argued that she had acted in good faith when she made her complaint about Butron to Gresham, and her termination therefore constituted illegal retaliation. The district court disagreed and dismissed her case. Villa appealed the dismissal of her case to the 4th Circuit.

#### ***4th Circuit's decision***

The 4th Circuit rejected Villa's argument that her firing constituted unlawful retaliation. Even though Villa reported only what she knew to be true and Bonilla was the one who knowingly fabricated the story, the appeals court found that Title VII's antiretaliation provision doesn't protect knowingly false reporting of harassment, and in this case, Cava believed that Villa had knowingly falsely reported Butron's harassment. Accordingly, the court reasoned her firing wasn't unlawful retaliation.

As the court explained, "Because the statute's focus is the employer's subjective motivation for the action, the facts the decision maker actually perceived matter. If an employer, due to a genuine factual error, never realized that its employee engaged in protected conduct, it stands to reason that the employer did not act out of a desire to retaliate for conduct of which [it] was not aware."

Further, the court reaffirmed the long-held approach in the 4th Circuit that "when an employer articulates a [nondiscriminatory] reason for discharging [an employee], it is not our province to decide whether the reason was wise, fair, or even correct,

ultimately, so long as it truly was the reason for the . . . termination." That is because it is not the role of a court to sit "as a kind of super-personnel department weighing the prudence of employment decisions." *Villa v. CavaMezze Grill, LLC*, 858 F.3d 896 (4th Cir., June 7, 2017).

#### ***Bottom line***

Retaliation claims have become one of the most prevalent bases for EEOC charges. The 4th Circuit's decision in this case helps clarify that the law places limits on the scope of retaliation claims. False reports of sexual harassment or other types of discrimination are not protected by Title VII. As a result, firing an employee for making what you truly believe to be a false report doesn't violate Title VII.

But be careful when you take any adverse action against an employee for making a false report of discrimination or harassment. Make sure you conduct a thorough investigation before concluding a report was false. In this case, Villa didn't challenge the thoroughness of Cava's investigation of her report about Butron, and she conceded that the reason it gave for firing her wasn't a pretext, or excuse, to retaliate against her. In another situation, evidence of an obviously inadequate investigation into an employee's misconduct may show that the employer's contention that it fired the employee for making a false report was actually a pretext for taking a legally prohibited action.

Before you decide to discipline an employee for what you perceive to be a false report of discrimination or harassment, it's always wise to consult with experienced employment counsel. That way, you can ensure that you've covered all your bases and you're not setting yourself up for a retaliation lawsuit.

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