What Is the Duty Speech Doctrine and How Does It Affect Whistleblower Protections?

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It is beyond dispute that employees who blow the whistle on unlawful conduct should be protected from retaliatory personnel actions. Because these workers often risk their careers to shed light on matters affecting the public interest, a legal system that permitted employers to silence whistleblowers could cause substantial harm to the nation.

But does this analysis change when it is the employee’s very job to identify and investigate his employer’s unlawful conduct? Should the fact that the employee is duty-bound to raise complaints somehow exclude that employee from the protection of whistleblower statutes?

These questions have been litigated extensively by parties asserting and defending against a variety of anti-retaliation claims. The resulting jurisprudence has generated the contours of the so-called “duty speech” doctrine. The doctrine – which is also referred to as the “manager rule” or the “step outside” doctrine – is particularly prevalent in cases involving employees who work in internal compliance or human resources roles, as those employees are often responsible for investigating an employer’s unlawful conduct.

The duty speech doctrine holds that an employee who merely discharges her investigatory job duties does not engage in protected conduct within the meaning of anti-retaliation prohibitions. Instead, that employee must show she “stepped outside” of her normal job duties by taking some unusual or atypical action to report or oppose unlawful activity. By stepping outside of her normal role, the employee effectively places her employer “on notice” that she has engaged in protected conduct.

**Duty Speech Doctrine in Title VII Claims**

The manager rule was first introduced in the context of retaliation claims under the Fair Labor Standards Act (FLSA). See McKenzie v. Renberg’s Inc., 94 F.3d 1478, 1486 (10th Cir. 1996) (holding that under the rule, an employee must “step outside his or her role of representing the company” in order to engage in protected activity). A number of courts later imported the rule into their analysis of retaliation claims under Title VII of the Civil Rights Act of 1964. See, e.g., Brush v. Sears Holdings Corp., 466 F. App’x 781, 787 (11th Cir. 2012); Weeks v. Kansas, 503 F. App’x 640, 642 (10th Cir. 2012); Collazo v. Bristol-Myers Squibb Mfg., Inc., 617 F.3d 39, 49 (1st Cir. 2010) (assuming, without deciding that the manager rule applied to Title VII cases); EEOC v. HBE Corp., 135 F.3d 543, 554 (8th Cir. 1998) (applying the manager rule but finding the plaintiff stepped outside his managerial role).

More recently, prominent federal appellate courts have rejected the manager rule when analyzing Title VII retaliation claims. In DeMasters v. Carilion Clinic, 796 F.3d 409 (4th Cir. 2015), the U.S. Court of Appeals for the Fourth Circuit reversed a trial court that had dismissed a Title VII retaliation claim due to the manager rule.

The plaintiff (DeMasters) worked as a consultant for Carilion’s employee assistance program (EAP). In his role as an EAP consultant, DeMasters assisted a Carilion employee (Doe) who had complained
about sexual harassment and later sued Carilion for sexual harassment. After the company settled the case, DeMasters’ supervisors interrogated him about his support for Doe’s allegations and fired DeMasters two days later. DeMasters sued Carilion under Title VII’s anti-retaliation provision, alleging that the company had violated his rights by retaliating against him for opposing Carilion’s unlawful conduct (i.e., the sexual harassing behavior of a Carilion manager). The trial court dismissed DeMasters’ claim, reasoning in part that the manager rule barred DeMasters from predicking his retaliation claim on his exercise of job duties. *DeMasters v. Carilion Clinic*, No. 7:12-CV-580, 2013 WL 5274505, at *8–9 (W.D. Va. Sept. 17, 2013).

DeMasters appealed the trial court decision to the Fourth Circuit. Following a lengthy analysis of the manager rule, the Fourth Circuit parted ways with the trial court and declined to extend the doctrine to Title VII claims, holding that “the ‘manager rule’ has no place in Title VII enforcement.” *DeMasters*, 796 F.3d at 424. The Fourth Circuit found that DeMasters’s claim was not defeated by the fact that his protected activity occurred within his role as an EAP consultant. The U.S. Court of Appeals for the Second Circuit held similarly in a 2015 case, holding that the “[t]he manager rule’s focus on an employee’s job duties, rather than the oppositional nature of the employee’s complaints or criticisms, is inapposite in the context of Title VII retaliation claims.” *Littlejohn v. City of New York*, 795 F.3d 297, 317 n.16 (2d Cir. 2015).

**Duty Speech Doctrine in SOX Whistleblower Cases**

Whistleblowers and their advocates should be mindful of these appellate court decisions in Title VII retaliation cases, as courts and the U.S. Department of Labor (DOL) frequently rely on Title VII jurisprudence in construing whistleblower anti-retaliation protections. See, e.g., *Sylvester v. Parexel International LLC*, ARB Case No. 07-123, 2011 WL 2165854, at *27 (ARB May 25, 2011) (elements of SOX protected activity were derived from Title VII retaliation precedent); *Moore v. California Inst. of Tech. Jet Propulsion Lab.*, 275 F.3d 838, 848 (9th Cir. 2002) (applying Title VII standard for adverse actions to FCA claims). The decline of the manager rule in the Title VII context may indicate a similar trend that the “duty speech” doctrine will fade away in the whistleblower retaliation context.

The DOL has made clear that the duty speech doctrine does not apply to SOX whistleblower retaliation claims. In 2010, the DOL found that SOX’s whistleblower provision does not “indicate that an employee’s report or complaint about a potential violation must involve actions outside the complainant’s assigned duties.” *Robinson v. Morgan-Stanley*, ARB Case No. 07-070, 2010 WL 2148577, at *9 (ARB Jan. 10, 2010). Two federal district courts have subsequently deferred to the DOL’s interpretation of SOX by declining to apply the duty speech doctrine to SOX retaliation claims. See *Yang v. Navigators Grp., Inc.*, 18 F. Supp. 3d 519, 530 (S.D.N.Y. 2014) (noting that the Labor Department “has made clear that an employee may engage in protected activity even where the employee is discharging her duties,” and deferring to the agency’s determination); *Barker v. UBS AG*, 888 F. Supp. 2d 291, 297 (D. Conn. 2012) (“The ARB, however, has made clear that an employee may engage in protected activity even where the employee is discharging her duties.”).

Federal appellate courts have not yet addressed the duty speech doctrine in the SOX whistleblower context. But the deference courts owe to the reasonable interpretation of the Labor Department, combined with the persuasive holdings of federal courts in the context of Title VII retaliation claims, should prompt federal appellate courts to decline to apply the manager rule to SOX retaliation claims.

**Compliance and HR Personnel Deserve Protections**

Whistleblowers perform a critical public service by investigating and opposing unlawful conduct. Employees in corporate compliance and/or HR functions often are uniquely positioned to root out employer misconduct and force senior management to correct and disclose those problems. It is
therefore imperative that compliance and HR professionals enjoy the same whistleblower protections as those working in other corporate functions. Courts have increasingly recognized this commonsense conclusion, and the growing rejection of the duty speech doctrine is an encouraging sign for workers everywhere.