

Don't Make a Habit of it, but Sometimes, Ignorance IS Bliss

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As a general rule, of course, Human Resources Departments and company management want to be – and should be – well-informed about issues in the workplace, including employees unhappy enough to have raised claims of discrimination or harassment. If key people at the company are unaware of such complaints, the employer might leave itself open to charges of sloppiness, indifference, or even tolerance of harassing or discriminatory conduct. ***But is it ever better not to know about an employee's complaint?***

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Two recent cases illustrate how ignorance can sometimes be bliss in employment litigation. When the employer is accused of retaliation, *i.e.*, firing an employee *because* of his or her complaint, the employer may have a defense if the decision-maker did not know anything about the complaint, because the employer cannot retaliate based on something it does not know.

Summary judgment based on lack of knowledge

In both *McKnight v. Aimbridge Employee Service Corp.*, Case No. 16-3776 (3rd Cir. October 26, 2017) and *Esler v. City of Denton, Texas*, Case No. 02-17-200003-CV (Tex. App. October 26, 2017), an employee complained of discrimination or harassment and was shortly fired thereafter. The employee then sued for both the original discrimination or harassment and retaliatory discharge, but in each case the retaliation claim was dismissed because the person making the termination decision had no knowledge of the discrimination or harassment complaint.

Jamie McKnight was an African American food service worker at a hotel managed by Aimbridge. He felt that he was denied training opportunities and a desirable transfer because of his race, so he complained to the hotel's general manager about discrimination and also filed a charge with the EEOC. He was given a negative evaluation, put on a development plan, and eventually terminated. But the Aimbridge supervisors who took these actions against McKnight were different individuals from the

general manager to whom he had complained. At summary judgment, McKnight was unable to provide any evidence that the decision makers knew about his earlier discrimination complaints. In the absence of substantial, credible evidence to prove knowledge, the court held that McKnight could not possibly prove that the **reason** for his termination was his discrimination complaint. Summary judgment was granted.

Wander Esker was a duty officer in the Denton, Texas police department. She complained to an HR employee that a co-worker had sent her inappropriate text messages and had tried to kiss her, but Esker refused to give details or disclose the name of the offending co-worker. The HR employee informed her that he needed more information in order to help. At about the same time, Esker's supervisor noticed that she had apparently stolen a toy donated to the Police Department's annual toy drive. He began monitoring her more closely and learned that she was claiming to have worked many hours when she was not at her desk. Esker claimed that the hours reporting discrepancies were an honest mistake, but the Police Department investigation concluded otherwise, and she was terminated. She claimed both sex discrimination and retaliation. Once again, the employee's retaliation claim failed because the individuals to whom she had complained (two people in the HR department) were not the individuals who decided to terminate her. Esker was terminated by the Chief of Police. Even when she met with the Chief to discuss her termination, she did not bring up her harassment complaints in that meeting. Esker admitted in her testimony that she had no evidence that the Chief was aware of her harassment complaints. Because she was unable to provide evidence that the actual decision maker knew of her earlier complaints, and her retaliation claim was dismissed on summary judgment.

Points to remember

The cases illustrate the following key points:

- **Identify the decision maker:** both employers were able to prevail because they could clearly identify which individual or individuals had made the termination decision. In any case in which there is a claim of discrimination or retaliation, the focus will be on the decision maker, and the employer must be clear as to who that person is.
- **From the employee's perspective, follow through on complaints:** Ms. Esker raised a complaint about sexual harassment, but refused to provide details or identify the individual involved. HR specifically told her that it could not do an investigation without more information, but she still declined to provide any. While it is not entirely clear from the case what would have happened had she provided more information, it is likely that a more thorough investigation into her complaint would have had a higher profile within the company, perhaps negating the defense that the Chief was unaware of it.
- **Summary judgment is time to "put up or shut up":** whatever the specific issues are on a summary judgment motion, courts expect both parties to provide actual evidence in support of their position, not mere speculation or argument. The courts in both *Esker* and *McKnight* recognized the speculative possibility that the decision maker knew of the complaint, but they based their decision on the lack of actual **evidence** to that effect.