Study defines when disclosing a whistle-blower's identity, like in an email, becomes retaliation

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Under the law, whistle-blowers are supposed to be protected from direct reprisals on the job, including discrimination. But what if they and their actions becomes the subject of a widely distributed email? Is that a form of retaliation?

Two professors at Indiana University's Kelley School of Business set out to answer that question and determine when public disclosure of the whistle-blower's identity—like in an email—is sufficient to support such a claim, in a paper that has been accepted for publication in *North Carolina Law Review*.

"When someone makes a complaint of discrimination that's covered by federal anti-discrimination laws, you're automatically cloaked in protection from retaliatory actions that could come in response," said Jamie Prenkert, associate professor of business law at the IU Kelley School of Business Bloomington and the study's lead author. "But what can be retaliatory is a broad-ranging continuum of actions that the courts don't specifically define."

Prenkert, who also is a Weimer Faculty Fellow, noted that simply the possibility of being publicly identified as a complainant is enough to discourage someone from becoming a whistle-blower. But Title VII of the Civil Rights Act of 1964, existing case law and EEOC regulatory documents provide little guidance on the use of email and similar,

immediate forms of communication.

"It doesn't even provide a framework for how to consider these issues," he said. "To the extent that they've come up, the courts have been inconsistent and not made these determinations in a coherent way. The outcomes are fairly consistent, but the reasoning is not consistent, which is always a problem in the law."

The courts have been inclined to put a stop to retaliation so that employees who blow the whistle on discriminatory practices are not threatened or prevented from doing so, said Julie Manning Magid, associate professor of business law at the IU Kelley School of Business Indianapolis.

"There's a lot of research about whistle-blowers—why people blow the whistle, what influences them—and anonymity is one reason to decide to blow the whistle," Magid said.

Allison Fetter-Harrott, an assistant professor of political science at Franklin College, also was a co-author on the study.

In their paper, the professors discuss social science literature and analogous cases regarding when parties to litigation can remain anonymous to come up with a framework for defining retaliatory disclosure.

Also at the heart of their paper was a 2007 case involving Belmont Abbey College, a Catholic institution in North Carolina, and eight of its faculty members. When Belmont Abbey College chose to exclude contraceptives from its employee health care coverage, the faculty members filed a complaint with the U.S. Equal Employment Opportunity Commission, claiming religious and gender discrimination.

The college's president reacted by sending a mass email to faculty, students and staff detailing the complaint and identifying the faculty members, which resulted in an additional EEOC complaint against the college of retaliation.

In July 2009, the EEOC found reasonable cause to believe Belmont Abbey had discriminated against the charging parties based on gender but found "no cause" supporting the religious discrimination charge. Separately, the EEOC indicated that the president's email constituted cause to find retaliation and was "intended to produce a 'chilling effect' on the campus and to create an environment where faculty and staff would hesitate before filing complaints against the college."

"Belmont Abbey did not discriminate against its employees based on religion, as the EEOC determined, despite outrage among many that might suggest otherwise," the professors wrote. "However, in publicly disclosing the names of the eight faculty members who sought to utilize the process established for asserting employee rights against discrimination, the college may have sought to discourage other employees from taking similar actions.

"The facts of Belmont Abbey demonstrate a doctrinal gap in the competing interests of employers and employees."

While public disclosures can discourage employees from exercising rights established under Title VII, the authors also noted the need for a balance that includes the interests of employers in appropriate disclosures.

"We recommend a standard for retaliatory disclosure that considers disclosure an adverse action unless a 'need to know' defense exists," they said.

The authors noted that disclosure of very personal information, such as an employee's allegation of sexual harassment, may be retaliatory, as well as when the disclosure will directly lead to threats and punitive actions from co-workers or the community. An employee's vulnerability within an organization also should be a factor.

The form and tone of the disclosure is another consideration. Unlike in the Belmont Abbey case, sometimes word may get out inadvertently, because one of the parties involved does not keep the matter confidential.

The paper, which was chosen as the best paper of 2012 by the Pacific Southwest Academy of Legal Studies in Business, noted that companies do maintain a right to disclose that there are employee complaints in order to report the matter to shareholders or expose a perceived injustice.

"It was an interesting case," Magid said. "We've adopted what we hope to be a balanced approach in order to understand the employer's interest in furthering their ability for communication, transparency and work-related issues while recognizing an employee's legal rights. It really has important implications, and I'm glad we were able to present a new way of approaching it."

More information: "Retaliatory Disclosure: When Identifying the Complainant Is an Adverse Action," *North Carolina Law Review*.

Provided by Indiana University

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