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## EMPLOYMENT LAW

# HR Employee's Knowledge of Complaints Was Not 'Protected Activity'

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*Special to the Legal*

When a human resources professional brings a discrimination claim, his former employer will be on high alert. But the recently decided case, *Grdinich v. Philadelphia Housing Authority*, No. 16-03070, 2017 U.S. Dist. LEXIS 74892 (E.D. Pa. May 17) (Pappert, J.), raises the question of whether every discussion by an HR professional in the workplace rises to the level of "protected activity" under the anti-discrimination laws.

### EEO OFFICER DISCUSSES COMPLAINTS WITH SUPERVISOR

Rosanna Grdinich was the Equal Employment Opportunity officer for the Housing Authority from approximately 1999 to 2008. She was responsible for fielding and investigating discrimination complaints from Philadelphia Housing Authority (PHA) employees. As part of Grdinich's job, in late summer, early fall 2008, she advised one of her supervisors, Carl Greene, that he was the subject of three anonymous phone complaints of harassment. Grdinich claims that Greene



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did not respond, but rather simply walked away from her and that this was the last direct communication that she had with him during her employment. Grdinich never opened an investigation into the anonymous calls because she subsequently learned that none of the three women were still employed by the PHA.

A few months later, Grdinich was transferred from her EEO position to a job with the PHA Police Department. The PHA never explained to Grdinich the reason for her transfer and her former EEO position remained unfilled. Although Grdinich believed that her

transfer and subsequent duties with the PHA Police Department were retaliatory for having advised Greene of the anonymous harassment complaints, she did not file any claim of discrimination. Grdinich was not re-hired for her former EEO position when the PHA sought to fill it in 2011.

### NOT RE-HIRED FOR FORMER POSITION

When the PHA posted for the EEO position in 2011, it included a requirement that the candidates have a bachelor's degree. Grdinich applied for the position even though she lacked such a degree. While the PHA hired an interim officer without a college degree, the ultimately successful candidate not only had a degree, but had worked at the Pennsylvania Human Relations Commission as a Human Relations representative for many years. The interim and ultimately successful candidates were African-American. Grdinich is Caucasian.

### NO PROTECTED ACTIVITY

Grdinich claimed that she was discriminatorily denied the open EEO position in 2011 in retaliation for

having advised Greene of the anonymous harassment complaints in 2008. She asserted that by virtue of being “an EEO officer, all of her activities constituted protected activity.” The court rejected this assertion.

Initially, the court observed that Title VII protects two classes of retaliation victims: “those who oppose discrimination made unlawful by Title VII (the ‘opposition clause’) and those who participate in certain Title VII proceedings (the ‘participation clause’).”

The court initially found that Grdinich’s action in advising Greene of the anonymous phone calls did not rise to the level of “opposition” necessary to constitute “protected activity” on the grounds that such “opposition” requires “at the very least, an informal protest of discriminatory employment practices.” The court specifically found that there was no evidence to suggest that “Grdinich expressed a belief that Greene had engaged in any form of employment discrimination. This does not constitute opposition under Title VII’s anti-retaliation provision.” The court explicitly rejected Grdinich’s contention that merely having advised Greene of the calls was protected activity, which would have resulted in a blanket protection for human resources professionals anytime they discussed any discrimination or harassment complaint.

## **‘PARTICIPATION’ REQUIRES EEOC CHARGE**

Grdinich’s behavior also did not rise to the level of “protected activity” under the “participation” clause because participation, in this context, “only protects an employee once an EEOC charge is filed.” The

court found that “participation in an employer’s internal, in-house investigation conducted apart from a formal charge with the EEOC, is not considered a protected activity under Title VII ... because the purpose of the participation clause is to protect access to the EEOC,” citing *Tuthill v. Consol Rail*, No. 96-6868, 1997 U.S. Dist. LEXIS 13304 (E.D. Pa. Aug. 26, 1997). Because, at most, Grdinich discussed an internal complaint regard-

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ing Greene, her discussion did not implicate Title VII as a matter of law. As such, the court granted summary judgment to the PHA on Grdinich’s claim of retaliatory failure-to-hire.

The court went on to note that even if Grdinich had successfully alleged “protected activity” under Title VII, she would not have been able to establish that PHA’s reasons for selecting other candidates was pretextual as a matter of law. The court noted that while three years (between the time she spoke to Greene and her application for the 2011 EEO officer opening) was well outside the timeframe that was unduly suggested of a retaliatory motive, it also noted that the mere passage of time “is not legally conclusive proof against retaliation.” In order to make such a link, however, the employee must show

an intervening pattern of antagonism sufficient to show a retaliatory motive. While Grdinich alleged a litany of allegedly antagonistic behaviors after being transferred to the PHA Police Department, she highlighted behaviors that occurred “within roughly six months of her 2008 conversation with Greene.” Her remaining timeline was vague, and, as such, the court found that she was unable to implicate retaliatory animus for a 2011 hiring decision.

The court also granted judgment to the PHA on Grdinich’s claim of race discrimination. While there were “stray remarks” by nondecision makers that Grdinich claimed to evidence discrimination, the alleged comments were temporally remote from the ultimate decision. The court further noted that “much of Grdinich’s testimony is based on her personal belief that race animated PHA’s decision ... something that is insufficient to carry her burden.”

Finally, the court granted summary judgment to the PHA on Grdinich’s claim that she was retaliated against in 2012 for her 2011 complaint to the PHRC.

Most importantly, the *Grdinich* case reinforces that HR professionals do not occupy a special place under the law based upon their workplace position. Not every investigation, and certainly not every communication by an HR professional, will rise to the level of “protected conduct” under the anti-discrimination laws. •