

First Circuit Decision Serves as Important Reminder That Engaging In Protected Activity Does Not Immunize Employees From Discipline

By RIW on October 8, 2026

A recent First Circuit Court of Appeals decision underscores that legitimate workplace discipline, performance management, and personnel decisions may proceed *even after* an employee engages in protected activity. The key is to, among other things, be consistent, adhere to lawful workplace policies—and when in litigation, trial strategies should be developed early.

Key Takeaways

- Requesting reasonable accommodations or reporting alleged discriminatory treatment (i.e., engaging in protected activity) does not immunize an employee from legitimate workplace discipline—so long as that discipline is not a pretext for retaliation.
- Employers should ensure that personnel decisions are grounded in, and consistent with, lawful workplace policies.
- Employers should develop a trial strategy early and tailor discovery requests to their defenses.
- Once discovery is closed, parties wishing to obtain additional discovery must establish that they have “good cause” to do so. With that backdrop in mind: don’t wait and be sure to obtain all the discovery you need to prove your case.

Plaintiff’s Employment Background

In *Hernandez v. Blanche*, the plaintiff worked for the Drug Enforcement Agency (DEA). She provided administrative support to members of the leadership team and eventually became the Secretary to the Assistant Special Agent in Charge. In this role, she supported her direct supervisor Assistant Special Agent in Charge Dave E. Joseph (“Joseph”). For a period of time, Special Agent in Charge Matthew Donahue (“Donahue”) was her second supervisor.

In September 2016, after suffering a bone fracture in her foot, Hernandez requested several reasonable accommodations. Certain requests were approved, and others were denied. Thereafter, her relationship with her supervisors deteriorated and a series of complaints were filed.

By way of example:

- November 2016: Hernandez filed a complaint against Joseph and Donahue with the DEA’s Equal Employment Opportunity Office (EEO), alleging disability and national-origin discrimination.
- June 2017: Hernandez learned that DEA agents (excluding Joseph and Donahue) filed an

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EEO complaint against her.

- Shortly thereafter, Hernandez filed a second complaint with the DOJ's Office of Inspector General (OIG) in which she alleged that Joseph retaliated against her by proxy through the DEA agents who filed an EEO complaint against her.
- Hernandez filed a third complaint in which she alleged sexual harassment following a verbal altercation with a DEA Agent.
- October 2017: Donahue revoked Hernandez's permit to perform outside employment, allegedly because of a concern that it interfered with her availability to perform her job duties. Hernandez continued with the outside employment nonetheless (selling baked goods to local businesses) and was suspended for eight days and told that "any further infraction will result in more severe disciplinary action."

Then, in November 2017, Hernandez went out on medical leave. Donahue instructed her to communicate with Joseph regarding her leave status either in person or via phone.

In January 2018, Hernandez returned to work.

After the initial litigation ensued (as discussed below), Hernandez was terminated from federal service for: (1) insubordination because she allegedly refused to communicate with Joseph either in person or by phone as instructed by Donahue, and (2) lack of candor because she did not candidly answer questions during an investigation.

Hernandez appealed her termination to the Merit Systems Protection Board (the Board), alleging that her termination was retaliatory—but her removal from federal service was affirmed.

Litigation

Despite an arduous attempt to challenge the employment decisions throughout the litigation, alleging claims of discrimination and retaliation, among others, Hernandez did not prevail.

Hernandez filed her initial suit, alleging claims for sex, national origin and disability discrimination, and retaliation. The DEA prevailed at summary judgment as the court found that there was insufficient evidence to support Hernandez's claims.

Then, in a second lawsuit in which Hernandez sought judicial review of the Board's decision affirming her termination, the DEA prevailed once again at summary judgment as the court held that Hernandez failed to establish a *prima facie* case of retaliation—and even if she had done so, she failed to prove that the DEA's reason for termination was pretextual. On appeal, the decision was affirmed.

As to the retaliation claim, the First Circuit found that Hernandez failed to produce evidence that the DEA's stated reasons for her termination were pretextual. In doing so, the First Circuit reiterated the *McDonnell-Douglas* burden shifting framework, which establishes the burden of proof for the employer and the employee in these types of cases. To get past the summary judgment stage, there must be sufficient evidence to create a genuine issue as to whether retaliation was the real motive underlying the dismissal. Hernandez failed to meet her burden.

The DEA had articulated a legitimate, non-retaliatory reason for its termination decision—specifically, charges of insubordination and lack of candor. Hernandez's contention to the contrary was deemed insufficient. First, the court underscored the fact that Hernandez failed to offer any evidence that the instructions she refused to follow underlying her charge of insubordination were "illegal, unreasonable, arbitrary, or applied

selectively to her[.]” Second, the court emphasized that employers may in fact enforce nondiscriminatory workplace rules, even when an employee had previously engaged in protected activity.

Discovery Motions & Dispute

When the DEA moved for summary judgment, Hernandez sought leave to obtain additional discovery^[1] that she allegedly needed to oppose the DEA's motion and support her retaliation claim and demonstrate evidence of pretext.^[2] The request was denied, and Hernandez appealed after the DEA prevailed at summary judgment.

Once again on appeal, Hernandez did not prevail. In finding that Hernandez failed to establish “good cause,” the court highlighted that Hernandez had not conferred with the DEA in good faith to obtain the information at issue and she failed to demonstrate good cause because she could not show that she was not afforded a full and fair opportunity to obtain the relevant facts earlier in her case.

Conclusion

This First Circuit Court of Appeals decision emphasizes that an employee's protected activity does *not* render an employer powerless to enforce nondiscriminatory workplace policies and engage in legitimate workplace discipline. It further reinforces the importance of developing a discovery strategy early when litigating retaliation claims as an employer may be able to defeat such claims at summary judgment where the employee lacks sufficient evidence to create a genuine issue of material fact as to whether retaliation was the true motivation for the termination or disciplinary action.

^[1] Rule 56(d) serves as a “safety valve” for claimants who are genuinely in need of further time to marshal facts essential to justify opposing summary judgment. A party seeking additional discovery to oppose summary judgment must specifically explain what information they need, why it is relevant, and why they did not obtain it earlier. The court may consider the timing of the request, compliance with local rules, and whether there is good cause to delay summary judgment to allow the additional discovery.

^[2] This included copies of forms for all new hires, transfers, retirements, resignations, and personnel in her division from August 2015 through August 2020; copies of all EEO complaints filed against her supervisors; and copies of any complaints filed against her supervisors with the OIG between January 2016 and August 2020.

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