

## Prior Protected Activity Did Not Immunize Employee From Later Bad Acts

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An employee who breaks company policies may be disciplined even though that employee previously engaged in protected activity. This proposition may sound uncontroversial, but some bad-acting employees do try and shield themselves from discipline by pointing to earlier instances of protected activity. They may argue that subsequent discipline, while ostensibly based on legitimate reasons, is in fact retaliatory. Some employees may strategically engage in so-called protected activity solely for the purpose of preempting discipline they see coming. In *Musolf v. J.C. Penney Co.*, a case recently decided by the Eighth Circuit, an employee seemingly tried both tactics. Neither, in the end, proved successful. In *Musolf*, the plaintiff, Loralie Ann Musolf, worked for J.C. Penney as a loss prevention specialist. In 2010, she reported to J.C. Penney's management that a co-worker had been sexually harassing her. Following Musolf's report, the harassment ceased. Several months later, Musolf's supervisor began to suspect that Musolf had stolen company documents, and, as a result, recommended that Musolf be terminated. After being confronted with the theft allegations, Musolf e-mailed a district manager to complain that the co-worker that Musolf had previously accused of harassment had not been properly punished. While it is unclear whether Musolf received a response to her e-mail, J.C. Penney did terminate Musolf shortly thereafter for Musolf's misappropriation of company documents. Musolf subsequently brought a lawsuit against J.C. Penney, alleging that the company had unlawfully retaliated against her for reporting sexual harassment and for expressing her belief that the alleged-harasser had not been adequately punished. In affirming summary judgment for the employee, the Eighth Circuit reasoned that though the plaintiff had engaged in protected activity by reporting harassment, she had failed to establish that she was terminated in retaliation for that protected activity. The court paid special attention to the fact that seven months had passed between the time Musolf reported the harassment and the time she was terminated. This time lag, according to the court, was "insufficient to show, and in fact weaken[ed] the showing of the required causal link." Moreover, the fact that Musolf received praise for her work and a raise after reporting the alleged harassment demonstrated to the court a lack of retaliatory motive. While the *Musolf* case illustrates a fairly common fact pattern, it still offers a few basic reminders: **First, though an employee cannot be disciplined for engaging in protected activity, an employee who engages in protected activity can be disciplined.** There was no dispute that Musolf, by reporting her co-worker's alleged harassment, had engaged in legitimate protected activity. This did not, however, immunize her from being discharged for stealing company documents. The take-away is that an employer may discipline an employee for violating company policies even though the employee had previously engaged in protected activity. Employers should nonetheless be aware that such action could provide an unhappy employee with ammunition in a later retaliation claim, and have strong support for the real reason for the discipline. **Second, the time gap**

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***between the protected activity and the adverse employment action matters.*** An employee will have difficulty showing the necessary causal link when a significant amount of time passes between the protected activity and the adverse employment action. The adverse employment action against Musolf occurred seven months after she engaged in protected activity. The court found this gap large enough to refute causation. ***Third, courts will be disinclined to allow an employee to insulate themselves from discipline by engaging in sham-protected activity.*** Though it did not expressly say so, the court seemed to believe that Musolf's act of e-mailing a district manager about harassment that allegedly occurred months earlier was nothing more than attempt to avoid being disciplined. As such, it gave short shrift to the notion that she was terminated in retaliation for this e-mail. The court also noted that Musolf's supervisor had recommended her termination *before* Musolf actually contacted her district manager, which also belied any causal link.