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Labor Law Bulletin

Supreme Court Protects Witnesses Who Corroborate Discrimination During Internal EEO Investigation

Continuing a trend toward protecting employees from employer retaliation, the U.S. Supreme Court unanimously decided that reporting discriminatory behavior during an employer's internal investigation is protected conduct within the meaning of Title VII's prohibition on retaliation. *Crawford v. Metropolitan Government of Nashville*, No. 06-1595 (Jan. 26, 2009).

During the course of an internal investigation into rumors that a manager was engaging in sexually offensive behavior, Crawford and other employees were interviewed. In response to questions Crawford stated that the manager had engaged in sexually inappropriate behavior toward her. After she and two other accusers were terminated, Crawford brought suit alleging she was fired in retaliation for the information she provided during the investigation.

The district and appellate courts granted summary judgment to the employer on Crawford's retaliation claim, holding that the passive act of answering questions during an investigation does not constitute protected activity under either the "opposition clause" (making it unlawful to retaliate against an employee "because he has opposed" an unlawful employment practice) or the "participation clause" (making it unlawful to retaliate against an employee who "has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" under Title VII). The employer argued, and the lower courts agreed, that passive disclosure of information in response to questions is not opposition to unlawful conduct.

A unanimous Supreme Court disagreed, stating that nothing in Title VII "requires a freakish rule protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when her boss asks a question." Simply disclosing offensive conduct, stated the Court, implies opposition to such conduct in most cases. Not surprisingly, the Court rejected the employer's strained argument that protecting witnesses who disclose discriminatory practices will discourage employers from conducting internal investigations in the first place. The Court did not reach the issue of whether participation in an employer's internal investigation is protected under the "participation clause."

The outcome in *Crawford* is not surprising. In the last three years the Supreme Court consistently has expanded the protection against retaliation. The Court adopted a relatively low standard for stating a Title VII retaliation claim in its 2006 *Burlington Northern* decision, it ruled that employees could bring retaliation claims under Section 1981 in its 2008 *CBOCS West* decision, and it allowed federal employees to sue for retaliation under ADEA in its 2008 *Gomez-Perez* decision. At the same time the number of EEOC charges alleging retaliation showed the largest year-to-year increase (18 percent) of all EEOC filings in 2007, and retaliation claims now account for about 30 percent of all EEOC charges.

Retaliation claims continue to present a high risk to employers having to take adverse action against employees who have made internal or external EEO complaints and, now, against employees who have corroborated discrimination during an investigation. With proper policies, training and preparation, the risk can be mitigated. We encourage you to contact Bruce R. Alper (312-609-7890) or Christopher Nybo (312-609-7729) with any questions.

Annual Employment Law Seminar

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8:00 a.m.

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May 7, 2009

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