Employment Edge 94th Edition--U.S. Supreme Court Rejects Employer’s Argument and Confirms Broad Scope of Title VII Antiretaliation Provision

January 30, 2009

A recent U.S. Supreme Court case confirms that employees are protected from retaliation under Title VII if they speak out about discrimination for the first time during an employer's internal investigation. On January 26, 2009, the U.S. Supreme Court reinstated a previously dismissed Title VII retaliation claim of an employee who alleged that she was fired because she had disclosed that she had been subject to inappropriate conduct by a manager during the employer's internal investigation of another employee's complaint of sexual harassment. Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee, No. 06 1595. This ruling makes clear that the provision of Title VII that bars employers from discriminating against employees because they have "opposed any practice" that is made unlawful by Title VII encompasses employees who inform the employer of potentially discriminatory behavior even though they never make their own complaint of discrimination.

In the Court's opinion, Justice Souter noted that the term "oppose" is not defined by Title VII and therefore is to be given its ordinary meaning. The Court held that the term would naturally be used to refer to "someone who has taken no action at all to advance a position beyond disclosing it."

While protecting the rights of employees who participate in internal investigations, the Court underscored the importance for employers of conducting thorough internal investigations in response to employee complaints of harassment or discrimination. The employer in Crawford had argued that the Court should not broadly read the term "oppose" in Title VII's anti-retaliation provision, because doing so would create an incentive for employers to avoid looking into questions about possible discrimination. The Court responded to this argument by noting that the employer "underestimate[d] the incentive to enquire that follows from our decisions in Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998), and Faragher v. Boca Raton, 524 U.S. 775 (1988)." Under these cases, an employer is strictly liable for a manager's harassing conduct unless the conduct does not culminate in a tangible employment action against the employee and the employer "exercised reasonable care to prevent and correct promptly any" discriminatory conduct and "the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." Based on these decisions, the Crawford Court concluded,

"Employers are thus subject to a strong inducement to ferret out and put a stop to any discriminatory activity in their operations as a way to break the circuit of imputed liability." The Court also remarked that if the employer's argument were adopted and an employee who reported discrimination in answering an employer's questions could lawfully be penalized with no remedy, "prudent employees would have a good reason to keep quiet about Title VII offenses against themselves or against others."

While the result in Crawford is not surprising-most employers likely have been operating on the premise that employees who are interviewed by the employer in the course of its investigation of a discrimination complaint are protected by the anti-retaliation provision-Crawford serves as a reminder that even persons who themselves never make any complaint of discrimination can later bring a retaliation lawsuit if they are mistreated by the employer because of their disclosure of information in the course of an employer's investigation of another complaint.

Retaliation lawsuits have become more prevalent in the last few years, and no change to this trend is expected. Employers are well-advised to take thoughtful preventive measures to help lessen the risk associated with retaliation claims. The following suggestions may reduce the risk, not only by putting employees on notice that they are prohibited from retaliating against others in the workplace, but also by encouraging employees to report retaliation concerns early so that the employer can address them before a lawsuit is brought.

1. Adopt and Communicate Antiretaliation Policies.

Employers should adopt and communicate clear written policies stating that the organization will not tolerate unlawful retaliation and establishing a procedure for employees to report any concerns of retaliation.

2. Conduct Training.

Employers should train supervisors on how to spot protected activity and how to respond to employee complaints to ensure that complaints are forwarded to the appropriate people for prompt investigation and response. Supervisors should be made aware of the types of protected activities that create non-retaliation obligations so that they know when an employee has engaged in protected activity that could give rise to a retaliation claim. Finally, supervisors should be trained on the type of conduct that could give rise to a retaliation claim so that they know not to engage or to let others engage in conduct that could put the company at risk.

3. Encourage and Be Welcoming of Complaints.

Employees should be encouraged to report concerns or complaints so that they can be addressed early. In addition, an employer who welcomes complaints and acts appropriately in response is less likely to appear capable of retaliation.

4. Investigate and Respond to All Complaints Promptly.

An employer should treat all complaints seriously and professionally, even complaints that do not appear to rise to the level of stating a legal violation. A good faith complaint, even if it proves to be meritless, still gives the employee protected status that makes retaliation unlawful.

5. Be Consistent in the Treatment of Employees.

Employers can reduce the risk of a retaliation claim by ensuring that an employee who has engaged in protected activity is treated the same as employees who have not engaged in such activity.

6. Give Accurate Performance Appraisals.

Employers should train managers to provide timely, accurate, and straightforward performance appraisals. If legitimate performance issues exist, performance appraisals should accurately set forth those issues in a professional manner so that the employee can attempt to improve and the employer can safely rely on the performance review in defending a retaliation or other employment law claim. Managers should be encouraged to keep notes of conversations with an employee regarding the employee's performance. These notes and performance appraisals can be used to demonstrate that a performance issue existed before an employee reported discrimination or other unlawful conduct.

7. Dot Your "I's" and Cross Your "T's" Before Taking Any Negative Action.

An employer should be cautious about taking adverse action against an employee who has engaged in protected activity. Before taking such action, the employer should be confident that the action is well-justified, appears to be fair, and is based entirely on legitimate reasons unrelated to the employee's protected activity. In addition, adverse actions that closely follow an employee's protected complaint or activity are more likely to provide a basis for a retaliation claim, and therefore employers should carefully consider the timing of any proposed adverse action against a protected employee.

8. Consider a Second Review of Personnel Decision.

In some situations, it may be appropriate to create a system of "checks and balance" by having personnel decisions regarding a protected employee reviewed by a higher level supervisor, a Human Resources person, or a lawyer for the company.

9. Don't Report Protected Activity to Other Employers.

Employers should not tell other employers, including prospective employers, about an employee's protected activity. If a report of past protected activity made by one employer to another results in failure to hire or any other adverse employment action, both involved employers could be charged with retaliation.

If you have any questions about this article, please contact Carl Crosby Lehmann or another member of the Gray Plant Mooty Employment Law practice group.

This article is provided for general informational purposes only and should not be construed as legal advice or legal opinion on any specific facts or circumstances. You are urged to consult a lawyer concerning any specific legal questions you may have.