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Two Key Developments in Employment Law: Speaking Out in Internal Investigation Protected Under Title VII and Lilly Ledbetter Fair Pay Act of 2009 Signed Into Law

1. U. S. Supreme Court: Speaking Out in Internal Investigation Protected Under Title VII

On January 26, 2009, the U. S. Supreme Court held unanimously that an employee who speaks out about discrimination during an employer's internal investigation of *another* employee's claims of sexual harassment is protected from retaliation under Title VII. Crawford v. Metro. Gov't. of Nashville & Davidson County, No. 06-1595, 2009 U.S. LEXIS 870 (January 26, 2009). The Court held that Title VII does not require 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." Id. at *11.

The Crawford decision clarifies the law on an important issue: that no matter how an employer learns of alleged harassment or discrimination in the workplace, the employee who raised the complaint or put the employer on notice is protected from retaliation. How and under what context the employee provides notice of such unlawful conduct is not relevant.

Key Facts and Points of Law

When her employer asked if she had witnessed sexual harassment committed by a supervisor and reported by another employee, Crawford volunteered that she, too, had been harassed. Crawford took no further action regarding the alleged harassment but merely cooperated with the internal investigation. Crawford was discharged 6 months later and filed suit claiming she was fired for reporting harassment. The Sixth Circuit Court of Appeals found that Crawford was not protected under Title VII's anti-retaliation provision as she did not actively and overtly complain on her own initiative, or file a charge or participate in an investigation stemming from an EEOC charge.

The U. S. Supreme Court reversed the Sixth Circuit's decision, holding that Title VII's anti-retaliation provision protects "an employee who speaks out about discrimination not on her own initiative, but in answering questions during an employer's internal investigation." Crawford, 2009 U.S. LEXIS 870 at *4. The Court found that "a person can 'oppose' by responding to someone else's question just as surely as by provoking the discussion." Id. at *11.

Implications for Employers

- Crawford brings uniformity within the circuits. Previously, the Sixth Circuit was alone in its view that opposition must be active, overt and on the employee's own initiative. The Third, Fifth, Seventh, Eighth and Eleventh Circuits have recognized protected activity in similar circumstances, and the law remains unchanged in these circuits. E.g., McDonnell v. Cisneros, 84 F.3d 256 (7th Cir. 1996) (employee fired for refusing to prevent subordinate from filing EEOC charge protected from retaliation under Title VII).

- It is now even more important than ever for employers to conduct proper and thorough internal investigations of alleged discrimination and harassment. New issues arising in the investigation also must be properly and thoroughly investigated. Employers should not be discouraged by the Crawford ruling from investigating workplace problems. Instead, this recent ruling reinforces the necessity to investigate, so that employers are better able to take remedial action and take advantage of the available defenses that minimize or avoid liability and damages.

- The Crawford decision continues the trend of several employee-friendly rulings from the U. S. Supreme Court in 2008, notwithstanding the Court's relatively conservative composition. Employers also should be aware of steps by the Legislative and Executive branches to expand the scope and protections of federal employment laws, including enactment of the Lilly Ledbetter Fair Pay Act of 2009 (described below), recently passed by Congress and signed by the President.

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2. Lilly Ledbetter Fair Pay Act of 2009 Signed Into Law

On January 29, 2009, President Barack Obama signed the Lilly Ledbetter Fair Pay Act of 2009 ("Ledbetter Act"), the first law enacted under the Obama administration. The Ledbetter Act eases the statute of limitations on pay discrimination claims by allowing an employee to file a charge within 180 days (or 300 days in states, such as Illinois, with local FEP agencies) of the date when the employee is affected by a discriminatory wage decision or practice, i.e., each time a paycheck is issued. The Ledbetter Act amends Title VII, as well as other federal employment discrimination statutes (including the ADEA, ADA and Rehabilitation Act), and takes effect retroactively, as if enacted on May 28, 2007.

The Ledbetter Act reverses the U. S. Supreme Court decision, Ledbetter v. Goodyear Tire & Rubber Co., 550 U. S. 618 (2007), which held that the deadline for bringing a claim of pay discrimination under Title VII begins to run when the employer makes an allegedly unlawful pay-setting decision, and does not restart each time the employer issues a paycheck. See, our June 2007 Client Alert at www.socw.com. Now, under the Ledbetter Act, the charge-filing deadline (180 or 300 days depending on jurisdiction) begins anew with the issuance of each discriminatory paycheck, and thus, subjects employers to claims that were previously time-barred.

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