Your Monthly Legal Update – February 2009

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SUPREME COURT DECISION EXPANDING "PROTECTED ACTIVITY"

Well, this month's decision as to what to write about for this legal update was a no brainer when a significant decision was handed down by the United States Supreme Court on January 26, 2009, *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee, (*Case No.06-1595**,** decided January 26, 2009 by the United States Supreme Court). Why is this case significant? It is significant because it has expanded how an employee can prove that they have participated in "protected activity" in order to make a claim of retaliation against any employer pursuant to Title VII.

In this case, a female employee was called in for questioning by an employer regarding rumors of sexual harassment against a male employee. This investigation was initiated by the employer in response to the rumors. When the female employee was questioned, she did report that she had been sexually harassed by this male employee at issue. Specifically, she reported that Hughes (the male employee at issue) had grabbed his crotch in front of her saying "you know what's up", she reported Hughes repeatedly putting his crotch up against her window, and on one occasion Hughes grabbed her head and pulled it to his crotch. The employer took no action against the male alleged to have committed the sexual harassment against this female employee but did subsequently terminate the female employee alleging embezzlement. It is also important to note that the female employee, Crawford, had been employed with this employer for 30 years. The female employee, Crawford, proceeded to file a claim of retaliation against the employer regarding her termination, asserting that her report of sexual harassment during the employer's own investigation was participation in protected activity. It is my sincere hope that everyone reading this, sees that this employer could have done much better in this scenario.

The employer filed for Summary Judgment (dismissal) against Crawford in the trial court alleging that Crawford's claim failed because she had not filed her own complaint of sexual harassment and that her internal investigatory interview did not constitute opposition that was active or consistent enough to be considered "protected activity" consistent with the requirements of Title VII. The internal investigatory interview was found not to be in relation to any EEOC complaint filed by Crawford (remember the investigatory interview was initiated by the employer) and thus the trial court deemed the interview as not significant enough to amount to participation in protected activity. The Sixth Circuit Court of Appeals agreed with the trial court and this conclusion.

The United States Supreme Court granted cert (meaning it granted review). Justice Souter wrote the majority opinion of the Court, there is an additional concurring opinion written by Justice Alito and joined by Justice Thomas. The Court's official majority published decision overturned the Sixth Circuit and strongly opposed the prior decisions dismissing this case as follows:

> That aside, we find it hard to see why the Sixth Circuit's rule would not itself largely undermine the *Ellerth-Faragher* scheme, along with the statute's "`primary objective'" of "avoid[ing] harm" to employees. *Faragher, supra,* at 806 (quoting *Albemarle Paper Co*. v. *Moody,* 422 U. S. 405, 417 (1975)). If it were clear law that an employee who reported discrimination in answering an employer's questions could be penalized with no remedy, prudent employees would have a good reason to

> keep quiet about Title VII offenses against themselves or against others. This is no imaginary horrible given the documented indications that "[f]ear of retaliation is the leading reason why people stay silent instead of voicing their concerns about bias and discrimination." Brake, Retaliation, 90 Minn. L. Rev. 18, 20 (2005); see also *id.,* at 37, and n. 58 (compiling studies). The appeals court's rule would thus create a real dilemma for any knowledgeable employee in a hostile work environment if the boss took steps to assure a defense under our cases. If the employee reported discrimination in response to the enquiries, the employer might well be free to penalize her for speaking up. But if she kept quiet about the discrimination and later filed a Title VII claim, the employer might well escape liability, arguing that it "exercised reasonable care to prevent and correct [any discrimination] promptly" but "the plaintiff employee unreasonably failed to take advantage of . . . preventive or corrective opportunities provided by the employer." *Ellerth, supra,* at 765. Nothing in the statute's text or our precedent supports this catch-22.[3]

Therefore, the Court concluded that an employee who reports discriminatory conduct in an investigatory interview conducted by an employer is participating in protected activity.

What does this mean for all of us? This decision should have no impact on what we as good employers have long been doing regarding claims of discrimination that are presented to us. It has always been good common sense to take any information that is received by any employee in any forum, document, email or discussion that has to do with inappropriate conduct and to deal with it appropriately. If an employer hears rumors of sexual harassment, then an appropriate investigation should be conducted. If an employee in this investigatory process reports incidents of totally inappropriate behavior then the employer better look further and properly deal with identifying and remediating the abusive behavior. I cannot imagine any member of this organization who was presented with these facts to have conducted themselves in a similar way. This decision clarifies a wayward decision from another Circuit that defied common sense.

PASSAGE OF LILLY LEDBETTER FAIR PAY ACT

Bottom line of this Act is that now an employee can timely file a discriminatory wage claim within 180 days of each and every paycheck found to be in violation. This was an action of Congress to overturn a United States Supreme Court decision that required the initial pay act violation to be within the 180 statute of limitation deadline.

Yes, the political winds are changing but the good employers with good employment practices will keep doing what they have always done and they will be fine.