

HOW FAR WILL RETALIATION CLAIMS GROW?

This month I thought I would address retaliation claims as it appears that the United States Supreme Court has a third case pending before it that will more than likely be argued in October 2008, *Crawford v. Nashville and Davidson County*. The EEOC reported in 2007 that there were more retaliation claims filed than any other category of discrimination for the first time. Why is this important, because employers need to be aware that retaliation claims are getting much easier to prove despite what is perceived to be a conservative Supreme Court.

As an attorney who has practiced employment law now for just over 15 years, I can tell you first hand that from a Plaintiff's perspective, retaliation claims are the easiest to prove. Evidently, others have caught on to this fact and the courts appear to be making it even easier to establish a plaintiff's case.

We all know that the Wisconsin Fair Employment Act and its federal anti-discrimination counterparts include anti-retaliation provisions. After all, we all know that personnel handbooks must contain anti-retaliation provisions. The legislative history behind retaliation was that if employees were not protected after having blown the whistle against an employer for a discriminatory action, or one they in good faith believed to be discrimination, then how would the anti-discrimination laws be enforced?

A few years ago, I addressed the *Burlington Northern & Santa Fe Railroad Co. v. White*, case because the Supreme Court reviewed what a plaintiff must establish to prove retaliation. In this case, the Supreme Court broadened what an employee can allege as retaliation and no longer confined retaliation claims to being limited to discipline and termination actions. Less tangible acts, by way of example only, excluding an employee from social activities, could now constitute retaliation if the exclusion had a negative impact on the employee's job or career opportunities. The theory appears to be that employers are to treat any employee who participated in protected activity against the employer, absolutely the same as if it had never happened. In my experience however, the State Equal Rights Division has not given this latitude unless you can prove some tangible act of retaliation.

Now it appears that the US Supreme Court has again expanded the scope of retaliation claims against employers. In *Gomez-Perez v. Potter*, the Court determined that the anti-retaliation provisions in the Age Discrimination in Employment Act (ADEA) apply to federal employees despite the fact that the legislation does not specifically state this. The US Supreme Court in *COBCS v. Humphries*, that 42 U.S.C. sec. 1981 also prohibits retaliation against any employee exerting rights pursuant to that law. This ruling was handed down despite the fact that Section 1981 does not have an anti-retaliation provision. While these decisions may be surprising the

U.S. Court of Appeals had consistently agreed with this methodology prior to these formal decisions of the U.S. Supreme Court.

There is now a third employment retaliation claim currently pending before the US Supreme Court. This case will likely be heard later this fall 2008, *Crawford v. Nashville and Davidson County*. This case will now cause the Court to rule on what kinds of activities are to be considered “protected activities” in order to qualify for anti-retaliation protection. In this case, the employee is claiming retaliation for her involvement in an internal investigation relevant to a co-worker’s complaint of sexual misconduct. It should be noted that the District Court and the Sixth Circuit Court of Appeals both granted judgment against the employee; however, the EEOC is supporting the position of the employee.

At this point, I am providing all employers with a warning that we must all continue to remain sensitive to issues of retaliation whenever an employee has been involved in any complaint of discrimination, including but not limited to, whether the individual was a witness to such an internal investigation as this most definitely could be newly encompassed in retaliation claims. We must treat such employees as if the complaint or witness interview never happened.