

First Wednesday

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A Monthly Discussion of Employment Law Issues and Other Hot Topics for Management

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Important Trends in Federal Employment Law

This issue will focus on three important developments in federal employment law. Due to the complex set of employment laws we have in California, we can lose sight of changes in federal laws regulating the workplace. In California, employers must comply with both California and federal law, always keeping an eye toward applying the most employee-favorable law, and sometimes both sets of laws, to a specific situation.

Most recently, the President, United States Supreme Court and Congress have been active in the employment law arena. The High Court decided nine labor and employment cases in its last term, including issues of age discrimination, retaliation and public sector employment. Last week, President Obama signed his first bill into law, an employment law bill known as the Lilly Ledbetter Fair Pay Restoration Act of 2009. As a result of these developments, and given the current economy, we will likely see more wrongful termination, compensation and retaliation claims brought forth. Employers must continue to apply best preventative strategies to avoid lawsuits and claims.

U.S. Supreme Court Expands Sexual Harassment Retaliation Liability

In January 2009, the U.S. Supreme Court decided *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*. Federal law forbids retaliation by employers against employees who report workplace race or gender discrimination (including sexual harassment). The issue in *Crawford* was whether this protection extends to an employee who speaks out about discrimination, not on her own initiative, but in answering questions during an employer's internal investigation. The Court held that the protection is extended. The employee, Ms. Crawford, spoke out about being sexually harassed when answering questions in an internal investigation. The Court found such activity protected under the law forbidding retaliation and stated that nothing in the law "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."

Consider the reported facts of this case. Vicky Crawford had been a Metro School District employee for 30 years. In 2002, Metro began looking into rumors of sexual harassment by its employee relations director, Gene Hughes. Note that it was not Crawford who brought the allegations forward because, if it was, this would have been a simple case not worthy of Supreme Court review. Instead, Crawford became involved when a Metro human resources officer asked her whether she had witnessed “inappropriate behavior” on the part of Hughes. Crawford described several instances of Hughes’ sexually harassing behavior toward her. Two other employees also claimed they were sexually harassed by Hughes. While Metro took no action against Hughes, it fired Crawford and the two others soon after finishing the investigation, saying in Crawford’s case that it was for embezzlement. Crawford, however, claimed that Metro was retaliating for her discussion of Hughes’ inappropriate behavior. She filed a charge of discrimination with the EEOC, followed by a lawsuit.

Under federal law, the Title VII anti-retaliation provision has two clauses, making it unlawful for an employer to discriminate: (1) because he/she has opposed any practice made an unlawful employment practice by this subchapter, or (2) because he/she has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter. The first part is known as the “opposition clause,” the other as the “participation clause,” and Crawford accused Metro of violating both. The Supreme Court decided the case based on the opposition clause ruling that, even though she did not instigate or initiate the complaint, which would have been a clear “opposition,” her responding to the employer’s questions and giving a disapproving account of sexually obnoxious behavior toward her would qualify as opposition under the dictionary definition of the term “oppose.” Thus, her case was allowed to proceed to a jury trial on the theory that her responses so antagonized her employer to the point of firing her (retaliating) on a false pretense.

The *Crawford* case was decided on summary judgment, and does not include any facts regarding the purported embezzlement, and we don’t know how the case will ultimately resolve. Also, because the Court held that Crawford’s conduct was covered by the “opposition clause,” the Court did not decide her argument that it was covered by the “participation clause” as well.

The lessons of this case are: (1) since anyone participating in an investigation is potentially protected, employers must be careful to avoid retaliatory conduct against a broader group of potential claimants, and (2) if there are performance or misconduct issues, such as embezzlement, those should be well-documented and handled at the earliest time, so as to keep those issues well separated from discrimination claims and investigations that may arise later.

Retaliation Liability on the Rise

It is clear from the *Crawford* case that retaliation liability is on the rise. Retaliation claims filed at the EEOC have increased greatly over the last ten years. While total charges filed grew by just over 2%, retaliation claims grew by more than one-third. Consider that, even if the underlying charges of harassment or discrimination are weak, the employee making the claim, or participating in the investigation of the claim, might still bring a retaliation claim based on the employer’s response to the claim and treatment of the players involved.

Even the alleged perpetrator deserves fair treatment. Here is an example of what some experts consider the “perversion” of a retaliation claim. In *Merritt v. Dillard Paper Company*, a 1997 case from the 11th Federal Appellate Circuit, which covers Alabama, Georgia and Florida, an employee brought suit, claiming he was retaliated against because he was fired after admitting in a deposition that he had sexually harassed another employee. The 11th Circuit held that, under Title VII, the harasser could not be fired for truthfully testifying in his deposition since he was, after all, “participating” in a proceeding under federal anti-retaliation law.

Lilly Ledbetter and Fair Pay for All

On January 29, 2009, President Obama signed his first bill into law. This law is known as the Lilly Ledbetter Fair Pay Restoration Act, and has the effect of overturning a hotly-contested 2007 U.S. Supreme Court decision known as *Ledbetter v. Goodyear Tire & Rubber Company*.

The new Ledbetter law amends Title VII of the Civil Rights Act of 1964, the Americans With Disabilities Act of 1990, the Rehabilitation Act of 1973, and the Age Discrimination In Employment Act of 1967 to provide that the time within which a claimant may file a charge starts when: (1) a discriminatory compensation decision or other practice is adopted; (2) an individual becomes

subject to the decision or practice; or (3) an individual is affected by an application of a discriminatory compensation decision or practice (including each time wages, benefits, or other compensation is paid). In other words, the claims filing deadline restarts each time an employee receives a paycheck based on an allegedly discriminatory compensation decision.

Ms. Ledbetter lost her case at the United States Supreme Court because she was allegedly underpaid for all of her 20 years at Goodyear. Not until July 1998 did she file a charge with the EEOC alleging a Fair Pay Act violation claiming she was discriminated against based on gender because she was paid less than her male co-workers. A jury awarded her \$223,776 in back pay, \$4,662 for mental anguish and over \$3.2 million in punitive damages. Goodyear appealed on the basis that her pay was the result of long-past compensation decisions that she could not challenge, as they fell well outside Title VII's 180-day time deadline. The Supreme Court agreed with Goodyear, holding that a pay-setting decision, like a termination or demotion, triggers the charge-filing time period. The Court rejected Ledbetter's argument that each paycheck was a continuing violation of Title VII.

Congress acted to overturn this case precedent by enacting new legislation, which President Obama has signed. A new statute of limitations begins each time the employee receives a paycheck based on a discriminatory compensation decision. The new law is broader in other respects, and is retroactive to May 28, 2007 (the day before the *Ledbetter* case was published) and applies to all pay discrimination claims pending since that date.

Based on the above, and considering that tremulous times leave employees fewer options to "move forward" in their careers, it is more important than ever that employers make certain their employment practices comply with federal law and applicable state law.

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