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Re: Retaliation Law Update

Recent United States Supreme Court's decisions emphasize that employers must be careful dealing with employees who have filed discrimination charges. Employees claiming illegal discrimination frequently file follow-up charges alleging that the employer has taken adverse action against them as retaliation against the discrimination charge. While there often is no merit to the discrimination charge, it is not unusual for the employee to be able to identify actions taken or condoned by the employer after the filing of the charge that indicates illegal motive.

What Type of Activity is Protected from Retaliation?

In *Crawford v. Davidson County, Tenn.*, 555 U.S. ____ (2009) the Supreme court addressed whether participation in an internal investigation constitutes protected activity sufficient to support a claim of retaliation. In *Crawford*, the plaintiff was fired a few months after disclosing during an internal investigation a superior's alleged sexual harassment. The lower courts rejected the plaintiff's claim finding she did not actually oppose the discrimination since she did not "instigate or initiate the complaint." The Supreme Court found that the "opposition" clause reasonably covered instances where the employee responded to the employer's internal investigation.

The decision in *Crawford* confirms that 42 U. S. C. §2000e-3(a)¹ makes it unlawful for an employer to retaliate against an employee who: (1) initiates or participates in the employer's internal investigation process (2) engaging in any lawful activity that opposes unlawful discrimination² or (3) participates in a Title VII proceeding.

¹ 42 U.S.C. §2000e-3(a) states it is unlawful "for an employer to discriminate against any . . . employe[e]" who (1) "has opposed any practice made an unlawful employment practice by this subchapter"(opposition clause), or (2) "has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter" (participation clause)

² For example, an employee who pickets against his/her employer's alleged unlawful discrimination, but who was not involved in the investigation and did not participate in a Title VII proceeding may still be found to oppose the employer's actions and thus have a claim for retaliation if adverse action is taken against the employee. [EEOC's Compliance Manual Section 8, Chapter II, Part D.](#)

What Types of Actions Constitute Retaliation?

In *Burlington Northern & Sante Fe Railway Co. v. White*, 548 U.S. 53 (2006) the Supreme Court identified the baseline question as whether the particular employer action challenged by the employee as retaliatory might dissuade a “reasonable employee” from filing a discrimination charge. The test is case-specific and focuses on the effect the challenged action had on the employee claiming retaliation. As an example, the Court cited changing an employee’s shift. For the average worker, the change will have no bearing on his or her day-to-day life and, therefore, cannot have the effect of deterring the filing of a discrimination charge. But for a young mother dependent on childcare, a shift change could be a catastrophe and, consequently, would tend to show illegal retaliatory motive. Thus, any action taken by an employer which may dissuade the employee from engaging in protected activity may be considered retaliatory. Examples include, but are not limited to: firing, demotion, pay decreases, negative evaluations, shift changes, and job changes.

Conclusion

The Supreme Court’s decisions underscore the risk for employers because of: (1) the wide scope of employee conduct that may be protected from retaliation and (2) the actions which may now be determined to be actionable retaliation, (3) and the resulting difficulty for employers to identify such conduct and take preventative measures to guard against it. Now, more than ever, employers need to have effective procedures in place to process and manage discrimination charges.

Recommendation

- **Adopt:** Adopt procedures to investigate claims of retaliation. Confirm that employees are aware of the procedures.
- **Inform:** Instruct all employees that the employer is committed to preventing retaliation for legitimate protective activity and that those involved in protected activity (such as discrimination investigations) are not to be retaliated against. Inform all employees who are interviewed as part of an investigation that they must report any instance of suspected retaliation. Inform the employee of the employer’s system for making such a report. One way this can be done is by adopting an Anti-Retaliation Policy that all employees must sign in writing upon hire and again during any investigation.

- **Train:** Front-line supervisors must be trained to detect and prevent potentially punitive conduct, by them or others, which is arguably prompted by an employee's discrimination charge.
- **Follow Up:** Follow up with the employees participating in an investigation to ask whether he or she has experienced anything retaliatory, and if there is any question about the Employer's system for reporting such information.
- **Be Objective:** When circumstances seemingly call for discipline against an employee who has filed a discrimination charge or participated in protected activity, the process must allow for objective determination of whether the proposed action is based on an actual work rule violation, for which others have been disciplined, or on something else.
- **Document:** Most importantly, document every step of the process. Good documentation will be critical to defending the merit of discipline imposed after the filing of a discrimination charge. Live by the motto: document, document, document!
- **Discipline:** Inform all employees that violation of the Anti-Retaliation Policy may lead to discipline, including but not limited to discharge.