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HR and Benefits Update

Strengthen Investigation & Employment Practices to Minimize Potential Exposure to Retaliation Claims in Light Of Recent Supreme Court Retaliation Decision

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Businesses that fire or discipline employees increasingly face retaliation claims by disgruntled workers claiming the protection of nondiscrimination and other federal and state whistleblower and anti-retaliation laws.

The U.S. Supreme Court's recent decision in *Crawford v. Metropolitan Gov't of Nashville and Davidson County*, No. 06-1595, highlights the need for employers to exercise constant vigilance to potential retaliation claims and the need to act to avoid retaliating, or appearing to retaliate against employees when conducting internal investigations, terminations, promotions or other workforce management activities. While the decision specifically addressed retaliation under Title VII, the use of similar language in other federal laws regulating business conducting - including those covered by the Federal Sentencing Guidelines - makes it likely that the decision has much broader implications.

Technically, the *Crawford* decision specifically applied to retaliation under Title VII of the Civil Rights Act of 1964 (Title VII) in the context of a sexual harassment complaint investigation. However, businesses should anticipate that creative plaintiffs and their legal counsel soon will ask courts to apply *Crawford* holding beyond sexual harassment to reach to claims brought by employees claiming injury in retaliation for statements made in relation to investigation of other federal statutes prohibiting retaliation. A host of federal and state employment and other laws prohibit businesses from retaliating against employees for reporting possible prohibited conduct or seeking to exercise certain rights legally protected rights. Because many of these statutes use the same or similar language to the anti-retaliation provisions of Title VII, share the same or similar purpose, or both, businesses should anticipate that certain courts will be inclined to view the *Crawford* rationale, if not its holding, as applicable to retaliation claims under certain of these other federal statutory prohibitions. Accordingly, pending further guidance, most businesses interested in minimizing exposures to retaliation claims will want to design and administer investigations to avoid the impression of illegal retaliation against witnesses in sexual harassment investigations as other investigations where similar anti-retaliation provisions may apply. Accordingly, most U.S. businesses will treat *Crawford* as having potential implications both in relation to sexual harassment and other investigations under Title VII as well as investigations conducted other federal laws containing similar anti-retaliation provisions.

The *Crawford* Decision

In its February 2, 2009 unanimous *Crawford* decision, the Supreme Court ruled that the anti-retaliation provisions of Title VII protect employees against retaliation for giving a "disapproving account" of unlawful behavior when responding to questions asked during the employer's investigation of a sexual harassment discrimination, even if the employee took no further overt action to complain about, seek to remedy or stop the misconduct.

Vicky Crawford sued the employer under Title VII's anti-retaliation provision, which prohibits an employer from terminating a worker because she "has opposed any practice made an unlawful employment

practice" under Title VII. The *Crawford* case arose from statements Ms. Crawford made in response questions addressed to her as part of her employer's investigation of sexual harassment rumors. Asked if she had witnessed any inappropriate behavior by a supervisor, Ms. Crawford told the employer about a series of harassing acts by the supervisor toward herself. Besides reporting her experience in reply to employer questions during the investigation, however, Ms. Crawford did not file a sexual harassment complaint or otherwise report her alleged sexual harassment experience to the employer. Following the interview, the employer did not discipline the supervisor. However, the employer subsequently fired Ms. Crawford and two other employees who also reported being harassed by the supervisor. As part of its defense, the employer argued that Ms. Crawford's report during the course of the investigation did not qualify as "opposition" prohibited under Title VII.

The question before the Supreme Court was whether simply disclosing an act of harassment in answer to a question constitutes "oppos[ing]" an unlawful practice, or whether – as the court of appeals had held – opposition within the meaning of the provisions requires something more assertive.

Applying the ordinary meaning of "oppose," the Supreme Court unanimously found that "When an employee communicates to her employer a belief that the employer has engaged in . . . employment discrimination, that communication virtually always constitutes the employee's opposition to the activity." Accordingly, the Supreme Court ruled that protected opposition under Title VII includes giving a "disapproving account" of unlawful behavior, even if the employee takes no further action on her own to seek to stop or remedy the conduct.

Explaining its conclusions, the Supreme Court stated that a contrary rule that would require a worker to engage in "active, consistent" behavior in order to engage in protected opposition would be inconsistent with common usage. For example, the Court explained, one can "oppose capital punishment" without doing anything active to end it. The Supreme Court rejected as "freakish" an interpretation of "opposition" that would protect 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."

While concurring in the unanimous opinion, Justices Alito and Thomas cautioned against reading that opinion too broadly. Their opinion clarifies that in their view, covered opposition must be "active and purposive" to qualify as protected. Consequently, they warned that the Court's opinion should not be read to suggest that Title VII protects merely opposing a practice in principle (like opposing capital punishment) without taking any action at all to express that opposition.

Other Broader Potential Implications and Lessons from *Crawford*

Although the report by Ms. Crawford involved her notification to the employer that she too may have been sexually harassed, the implications of the *Crawford* decision reach more broadly.

Crawford specifically construed the anti-retaliation provisions of 42 U. S. C. §2000e–3(a), which makes it unlawful "for an employer to discriminate against any . . . employe[e]" who (1) "has opposed any practice made an unlawful employment practice by this subchapter", or (2) "has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter". This provision of Title VII and other equal employment opportunity laws, as well as the Family & Medical Leave Act and various other employment laws commonly contain similar prohibitions against an employer or business discriminating against protected persons for opposing unlawful practices or making charges, testifying, assisting or participating in investigation of practices prohibited under the applicable employment law. Consequently, there exists a significant probability that courts will apply the *Crawford* holding to retaliation claims brought by employees for testimony or other participation in investigation in other equal employment opportunity charges under Title VII and other employment laws.

It also is possible that employees ask the courts to extend the holding of *Crawford* to retaliation claims brought by employees claiming to have been retaliated against for participating in the investigation of or expressing opposition to illegal practices under a wide range of other statutes. Beyond the employment context, many other federal laws incorporate similar prohibitions against employer discrimination against

employees for opposing practices made unlawful under their provisions or providing testimony or participating in investigations of potential violations of their provisions. For example, in connection with its criminal prohibition of major fraud against the United States, paragraph (h) of 18 U.S.C § 1031 creates a right for individuals discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by an employer because of lawful acts done by the employee on behalf of the employee or others "in furtherance of a prosecution under this section (including investigation for, initiation of, testimony for, or assistance in such prosecution)" to recover for job and seniority reinstatement, two times the amount of back pay, interest, litigation costs and reasonable attorneys fees and other special damages.

Given these similarities, pending further guidance, U.S. businesses generally will want to exercise sensitivity when dealing with employees who express opposition, testify or otherwise participate in investigations or prosecutions of potential violations under Title VII and other federal laws that contain the same or similar anti-retaliation provisions.

Read from this perspective, the *Crawford* decision highlights the advisability for businesses not to overlook the potential significance of the statements and conduct by employees involved in any internal investigation, performance, or other activity that might later form the basis of a retaliation complaint.

Businesses generally should listen carefully when conducting investigations, employee counseling and discipline meetings, and exit interviews with an eye out for the need to investigate potential legal violations, defend against retaliation charges, or both.

Although businesses should continue to require employees to report known or suspected discrimination or other prohibited conduct in accordance with a specified formal procedure, the *Crawford* decision reminds businesses not to overestimate the protection afforded by the establishment of formal reporting procedures.

Crawford also highlights the need for businesses to be careful to investigate and properly respond to new charges of discrimination or other potential legal or policy violations that may be uncovered in the course of an investigation, disciplinary meeting or exist interview.

Additionally, businesses also should seek to evaluate the potential implications of their dealings with employees who previously have made charges, participated in investigations, or claimed other protected rights such as taking a protected leave or the like.

Likewise, as in the defense of other employment claims, *Crawford* also reflects the value and importance of businesses appropriately documenting performance concerns relating to a specific employee and legitimate business challenges motivating employment actions as they arise, in the event that it subsequently becomes necessary to present evidence of a valid performance or business justification to defend against allegations by an employee claiming to have been discharged or otherwise discriminated against in retaliation for engaging in protected conduct under Title VII or other similar federal anti-retaliation laws.

Finally, businesses should keep in mind the potential value of strong documentation. When seeking to defend against claims of discrimination or retaliation, the strength of the employer's documentation often can play a significant role in the cost and ease of defense of the claim or charge. Businesses should work to prepare and retain documentation of allegations, investigations and determinations regarding both employee performance and discipline, as well as the handling of alleged violations of equal employment opportunity or other laws. Documentation should be prepared and retained on a systematic basis with an eye to strengthening the organization's ability to prevent and defend against charges that the organization violated the core obligations under the applicable law as well as to defend employment decisions involving employees who may be in a position to assert retaliation claims.

The importance of good investigation and documentation practices takes on particular importance in the current tough economic environment. While retaliation claims have been rising for many years, the recent economic downturn is fueling an increase in the number of employees seeking to claim protection in the tightening economy based on retaliation or other employment law protections. Workforce dissention and changes in personnel also can complicate further the ability to defend these claims just as the Department of Labor and other federal regulators are turning up the enforcement heat. As a result, appropriate investigation and documentation procedures are particularly important in the current environment.

Curran Tomko Tarski LLP Attorneys Can Help

If your business needs assistance auditing, updating or defending its human resources, corporate ethics, and compliance practices, or responding to employment related or other charges or suits, please contact Curran Tomko Tarski LLP Labor and Employment Practice Chair, Cynthia Marcotte Stamer, at cstamer@cttlegal.com, (214) 270-2402, or your favorite Curran Tomko Tarski LLP attorney.

The author of this article, Curran Tomko Tarski LLP Labor and Employment Practice Group Chair, Cynthia Marcotte Stamer, and other members of Curran Tomko Tarski LLP are experienced with assisting employers and others about compliance with federal and state equal employment opportunity and other labor and employment, compensation and employee benefit compliance and risk management concerns, as well as advising and defending employers against federal and state employment discrimination and other labor and employment, compensation, and employee benefit related audits, investigations and litigation, charges, audits, claims and investigations.

Board Certified in Labor and Employment Law by the Texas Board of Legal Specialization, Ms. Stamer has advised and represented employers on wage and hour and a diverse range of other labor and employment, compensation, employee benefit and other personnel and staffing matters for more than 20 years. Ms. Stamer also speaks and writes extensively on these and other related matters. See here for additional information about Ms. Stamer and her experience, here to review other recent updates, here for other articles and publications, and review selected training and presentations here or contact Ms. Stamer directly.

For additional information about the experience and services of Ms. Stamer and other members of the Curran Tomko Tarksi LLP team, see here.

Other Helpful Resources & Information

If you or someone else you know would like to receive future updates about developments on these and other concerns, please be sure that we have your current contact information – including your preferred e-mail – by creating or updating your profile here or e-mailing this information to cstamer@cttlegal.com or registering to participate in the distribution of these and other updates on our CTT HR & Employee Benefits Update distributions in blog form via RSS feed here. You also may be interested in staying abreast of emerging internal controls and compliance challenges by reviewing and registering for our Corporate Compliance, Risk Management & Internal Controls distributions. For important information concerning this communication click here. If you do not wish to receive these updates in the future, send an e-mail with the word “Remove” in the Subject to support@cttlegal.com.