SEWARD & KISSEL LLP

Employment Law Newsletter

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This edition of Seward & Kissel's Employment Law Newsletter reviews a significant decision by the United States Supreme Court regarding the scope of an employee's protection from retaliation for complaining about discrimination. In addition, given the challenging economic climate, we have prepared guidelines for employers who are considering a reduction in force as a cost saving measure. Finally, we include a brief reminder that now is a good time to review employment policies and update employee handbooks.

The United States Supreme Court Rules That Employees Are Protected From Retaliation For Opposing Discrimination During Employer-Initiated Investigations

On January 26, 2009, the United States Supreme Court unanimously ruled in Crawford v. Metro Gov't of Nashville, 129 S. Ct. 846 (2009) that employees are protected from retaliation under Title VII of the Civil Rights Act of 1964, as amended, when reporting incidents of harassment while cooperating with an employer-initiated internal investigation. This ruling has implications for employers conducting internal investigations of harassment where complaint procedures are meant to insulate them from, not expand on, liability for workplace harassment. While Title VII applies to employers with 15 or more employees, it is advisable for even small employers subject to state and local laws to be aware of this decision and to conform their policies and practices in dealing with employee complaints of discrimination.

About The Case

In *Crawford*, the plaintiff, Vicky Crawford, a payroll coordinator of the defendant school district for more than 30 years, participated in an internal investigation initiated by the defendant in response to allegations of sexual harassment perpetrated by the plaintiff's supervisor, Dr. Gene Hughes, who was the employee relations director. Ms. Crawford had not originally reported any harassment, but she reported certain incidents of sexual harassment involving her supervisor while cooperating with the defendant's investigation, including:

- Answering Ms. Crawford by grabbing his crotch and saying "you know what's up?";

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Planning and Implementing a Reduction in Force – Guidelines for Employers

In this challenging economic climate, many employers are seeking to cut costs by restructuring their workforces and conducting layoffs known as reductions in force ("RIF"). When implemented correctly, a RIF can be an effective cost saving tool used to reduce an employer's payroll and eliminate extraneous personnel. However, a RIF also can potentially result in employee disputes that are a burden on the employer's time and resources. This article outlines some guidance for employers for planning a successful RIF while minimizing the risk of litigation.

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Reminder: Employee Handbooks

Employers know that having an employee handbook is an important human resources tool. An employee handbook provides guidance and clarity on employer practices and policies such as vacation and other time off, expense reimbursement, dress code, smoking, maternity leave and standards of behavior. An employee handbook also is a legal document that, when drafted properly, can provide many benefits in employee relations and help avoid employee disputes. For example, a policy against discrimination and harassment and a corresponding complaint procedure can be a defense to certain discrimination claims. However, laws change and policies become outdated. Take a moment to review your current handbook and consider what changes need to be made. If you do not have one in place, consider whether now is the time to adopt one.

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- Pressing his crotch up to her office window; and
- Entering Ms. Crawford's office at least once and pressing her head into his crotch.

According to Ms. Crawford, at least two other employees interviewed during the investigation reported incidents involving Dr. Hughes. All three of the employees, including Ms. Crawford, expressed fear of retaliation and termination for their participation in the investigation.

Ultimately, the defendant concluded that the supervisor "had engaged in inappropriate and unprofessional behavior, though not to the extent of Crawford's allegations." 211 Fed. Appx. 373, 375 (6th Cir. 2006). The defendant did not make any finding of harassment because the supervisor denied all allegations and there was no evidence corroborating the allegations. The defendant recommended training and education for the entire staff but no disciplinary action against the supervisor.

Following the end of the investigation, the defendant began investigating the employees who reported incidents of sexual harassment. Ms. Crawford was placed on leave while the defendant investigated alleged payroll irregularities, and her employment was formally terminated a couple of months later for embezzlement. The employment of the other two employees was terminated as well.

Ms. Crawford sued for retaliation under Title VII, arguing that she was fired not because of embezzlement, but because of the allegations she made during her employer's investigation.

The District Court granted, and the Sixth Circuit affirmed, summary judgment for the defendant on the grounds that Ms. Crawford's participation in an employer-initiated investigation before an EEOC charge was filed was neither "opposition" nor "participation" for purposes of the anti-retaliation provision of Title VII, and therefore not protected.

In rejecting Ms. Crawford's argument that she had "opposed" her supervisor's sexual harassment, the Sixth Circuit held that Ms. Crawford's cooperation with the defendant's investigation, resulting in independent allegations of sexual harassment, did not rise to the level of "active, consistent" or "overt" opposition required for protection under Title VII. The Court distinguished Ms. Crawford's responses to questions posed to her during the investigation (responses that included "unfavorable information" about her supervisor) from the types of opposition previously recognized by the courts, such as filing independent complaints or refusing to follow orders relating to unlawful employment practices.

The majority of the Sixth Circuit's decision focused not on a discussion of the opposition clause, but of the participation clause – specifically, that the protections afforded thereunder did not apply to Ms. Crawford because Ms. Crawford's "participation in an internal investigation initiated by [the defendant] in the absence of any pending EEOC charge is not a protected activity under the participation clause." *Id*. The Sixth Circuit refused to broaden application of the participation clause, emphasizing concern that such an expansion would endanger employer initiated investigations due to the potential for additional liability.

> By protecting only participation in investigations that occur relative to EEOC proceedings, the participation clause prevents the burden of Title VII from falling on an employer who proactively chooses to launch an internal investigation. Expanding the purview of the participation clause to cover such investigations would simultaneously discourage them.

211 Fed. Appx. at 377. In so holding, the Sixth Circuit relied heavily on other decisions requiring a pending EEOC charge prior to affording protection.

The Supreme Court Reverses

On January 26, 2009, in a unanimous opinion written by Justice Souter (with a concurrence by Justice Alito, joined by Justice Thomas), the Supreme Court overturned the Sixth Circuit decision and ruled that employees are protected against retaliation for complaints or allegations of harassment they report while cooperating with an employer-initiated investigation.

Title VII prohibits employers from discriminating or retaliating against an employee who has either *opposed* or *participated* in certain proceedings related to an unlawful employment practice:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment…because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

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42 U.S.C. § 2000e-3(a).

Noting that the term "oppose" was undefined in the statute, the Supreme Court defined it using its ordinary meaning of "'resist or antagonize…; to contend against; to confront; resist; withstand.'" 129 S. Ct. at 850 (*quoting* Webster's New International Dictionary 1710 (2d ed. 1958)). According to the Court, Ms. Crawford's statements in the course of the investigation squarely fit into this definition "as an ostensibly disapproving account of sexually obnoxious behavior toward her by a fellow employee, an answer she says antagonized her employer to the point of sacking her on false pretenses." *Id*. at 851.

The Supreme Court expressly rejected the Sixth Circuit's requirement of "active, consistent" opposition, explaining:

> 'Oppose' goes beyond 'active, consistent' behavior in ordinary discourse, where we would naturally use the word to speak of someone who has taken no action at all to advance a position beyond disclosing it…There is, then, no reason to doubt that a person can 'oppose' by responding to someone else's question just as surely as by provoking the discussion, and nothing in the statute 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.

Id. at 5-6. Justice Alito, in his concurring opinion, emphasized the limitation of this analysis by noting that the application of the opposition clause should not be further expanded to cover incidents reported to colleagues and only indirectly to the employer.

The Supreme Court expressly rejected the defendant's argument that providing retaliation protection for employees who participate in employer investigations would result in employers being less likely to investigate claims of discrimination. Pointing to *Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742 (1998) and *Faragher v. Boca Raton,* 524 U.S. 775 (1998), the Supreme Court noted that employers are afforded an affirmative defense to their liability if they can show they exercised "reasonable care" to prevent and correct alleged discriminatory conduct and it was the employee who chose not to take advantage of the protective measures afforded by the employer. The Supreme Court in *Crawford* doubted an employer would risk the viability of this defense on the chance that an employee would raise a discrimination claim related to an internal investigation. 129 S. Ct. at 851. The Supreme Court similarly noted that the Sixth Circuit's decision undermined the *Faragher-Ellerth* defense:

> 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…preventative or corrective opportunities provided by the employer.'

Id. at 862 (citations omitted).

The Supreme Court never reached the question of whether Ms. Crawford would have protections from retaliation under Title VII for "participating" in "an investigation, proceeding, or hearing under this subchapter." Below, the Sixth Circuit held that under the "participation" clause a pending EEOC charge was necessary prior to affording retaliation protection under Title VII. By not reaching this question, the Supreme Court leaves open the question as to what constitutes an "investigation" under "this subchapter", an issue that similarly has not been squarely addressed by the lower federal courts. *See, e.g., Correa v. Mana Products, Inc.,* 550 F. Supp. 2d 319, 329 (S.D.N.Y. 2008) (stating that currently Second Circuit analyzes internal investigations under opposition clause, not participation clause).

What This Means For Employers

The Court's decision reaffirms the importance of a thorough complaint procedure and resulting investigation of any allegations of discrimination and harassment. This decision should not alter the way in which employers currently conduct their internal investigations; it underscores the need to take every allegation seriously, regardless of the context. Employers must be careful to evaluate all allegations, even those that may seem innocuous and arise pursuant to an investigation already in progress.

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Preliminary Steps – Identifying Positions for Elimination

The first step in the RIF process is determining which positions to select for layoff, which requires an employer to analyze its work force to determine where cuts may be made. To conduct a proper analysis, the employer must have a clear understanding of its work force and of the duties associated with each position. By performing this exercise, the employer can best determine which positions are redundant and may be eliminated. Of course, there may be alternatives to the elimination of positions, such as furloughs and across the board reductions in pay. However, those alternatives are less attractive if an employer has made a judgment that its current level of staffing will not be needed for the foreseeable future or such an exercise may not result in sufficient cost savings. Employers should take these possible alternatives seriously, however, because becoming short staffed could prove to be far worse than having too many employees at a given moment in time.

Assuming that a RIF is the most attractive option, once positions slated for elimination have been identified, the employer must next review its selections to ensure that there is no disparate impact on any protected class of individuals. If a disparate impact is found, employers should then consider whether the selection of these individuals can be supported by a legitimate, non-discriminatory reason, which is the primary defense an employer has to a charge of discrimination.

It helps employers avoid charges of discrimination by using objective criteria when selecting which positions to eliminate. For example, eliminating all positions in a department that is no longer necessary because of the future direction of the business, eliminating employees with the least seniority or eliminating sales employees who have not met concrete goals, are all objective reasons for layoff that an employer can justify. Conversely, basing layoffs on criteria such as individual performance, particularly if performance history is not well documented, is riskier and more difficult to justify from a legal standpoint in the event the employer's motives are attacked.

Another consideration of which employers should be mindful is whether any of the individuals selected for layoff have recently complained about discrimination or their work environment. If an individual who has complained is laid off shortly thereafter, the employer may find itself in the position of defending against a claim of retaliation.

Additionally, when selecting positions for elimination, an employer must review any contractual obligations that might be triggered in the event of termination of employment. For example, an employer should review whether an employee has a right to payment of a guaranteed bonus or deferred compensation in the event of termination in a layoff.

Finally, employers should be cognizant of any special immigration rules or regulations that may apply to a terminated employee with a work visa, including regulations relating to employees in H-1B status.

Questions regarding exposure for possible discrimination charges or contractual liability are best reviewed with the assistance of counsel who can bring experience and perspective to the decision-making process and help avoid, rather than exacerbate, additional legal problems.

Severance and Releases

When conducting a RIF, it may be advisable to offer severance to departing employees in exchange for a release of claims in favor of the employer. Severance can take different forms, such as advance notice, a lump sum payment or salary continuation. Payments that the employee might otherwise be entitled to by virtue of the employer's policies, such as payment for accrued but unused vacation days and vested deferred compensation, are not adequate consideration to support a release of claims. If an employer has a severance plan in place, that plan will provide the standards for determining severance payments. If a severance plan is not in place, it would be advisable to review severance amounts with counsel. Of course, a severance plan can be prepared for the RIF itself and provide transparency to effected employees on how amounts were calculated, provide comfort that these payments were objectively calculated and a process and procedure for challenging severance payments.

While obtaining releases from departing employees is one of the most effective tools an employer has in defending against potential claims, counsel should be involved in drafting the release agreements to ensure that they are in compliance with all applicable laws. Employers are cautioned against dusting off an old release agreement prepared for a different situation, or finding a form of

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agreement on the Internet, as very often the employer will later discover that the release agreement was either inadequate for the situation at hand or that it contained illegal or unenforceable terms, and as such, portions of, or the entire release, may be invalid. In this regard, employers must be aware of laws that apply to a select group of employees, such as the Age Discrimination in Employment Act ("ADEA") and the Older Workers' Benefits Protection Act ("OWBPA"), which require that certain, specific provisions be included in the release agreements for employers with more than 20 employees.

Finally, it is important to understand what types of post-employment obligations an employee may have to the employer and to ensure those restrictions are included in the termination documentation. For example, any confidentiality, non-solicitation or non-competition restrictions should be addressed in separation agreements unless they are waived as part of the consideration for a release. Other provisions, such as non-disparagement of the employer and a requirement that the employee cooperate with the employer in any future litigation that related to the terminated employee's service, are advisable given the circumstances.

WARN Acts

Another consideration that arises in the RIF scenario is the mandatory notice that an employer must provide to its employees prior to a "mass layoff" or "plant closing." Depending on the number of employees that an employer has and the number selected for layoff, an employer may need to adhere to the notice periods set forth in the Federal Worker Adjustment and Retraining Notification Act ("WARN"). Although the federal WARN Act has been in existence since 1988, many states, including New York and New Jersey, have recently passed their own WARN Acts which differ from and are in many respects more restrictive than the federal WARN Act, and must also be complied with. The New York WARN Act applies to employers with 50 or more full time employees and the federal WARN Act applies to employers with 100 or more full time employees.

Continuation Of Medical Insurance

Employers must also be mindful of their obligations under the federal Consolidated Omnibus Reconciliation Act of 1985 ("COBRA") or state laws mandating continuation of group health coverage, including the newly enacted American Recovery and Reinvestment Act of 2009 which provides a federal subsidy for COBRA premiums. Prior to conducting a RIF, employers should contact their medical plan provider or third party administrator to determine who will be responsible for providing the required notices and forms to employees.

Conclusion

When carefully undertaken a RIF can target inefficiencies in a company's workforce and be an effective cost-reducing tool for employers. A RIF implemented for cost saving measures is a legitimate business reason and a defense to claims of discrimination. However, as with the termination of employment of an individual employee, employers should consult with counsel prior to conducting a RIF to ensure that all necessary precautions are taken to avoid claims of disparate treatment, discriminatory selection process or contractual claims. True to the old adage "an ounce of prevention is worth a pound of cure," a modest investment of time consulting with counsel to ensure that a RIF is being implemented prudently could save significant time and resources down the road.

Seward & Kissel has extensive experience in the employment field. Our attorneys handle all types of employment disputes in federal and state courts and also represent clients in proceedings before administrative and regulatory agencies, including the EEOC and state divisions of human rights, and in arbitrations before the arbitration tribunals, such as the Financial Industry Regulatory Authority ("FINRA"), the American Arbitration Association ("AAA") and JAMS. We also regularly counsel clients with respect to employment issues. Our primary clients in the employment area are financial institutions and investment fund managers. We advise our clients on all facets of employer-employee relations, including pre-employment inquiries, negotiating of employment and executive compensation agreements, non-competition agreements (and related contractual issues), issues that arise from hiring decisions, the application of discrimination laws, harassment complaints, the scope and enforcement of restrictive covenants, the employee's duty of loyalty, whistleblower claims, equal employment opportunity matters, staff reductions, employment terminations, assembling business teams and compensation matters. We develop employee handbooks, manuals and other employment policies and procedures. Together with our Taxation and Employee Benefits practice, we handle executive compensation matters both for management and executives, including incentive and deferred compensation arrangements, stock options, employee stock ownership plans and benefits issues. Seward & Kissel is a leading adviser with respect to the particular employment issues investment fund managers encounter, including those that are building their businesses and others that are established. We offer seasoned counsel with judgment and perspective in employment matters.

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