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U.S. Supreme Court Broadens Definition of Retaliation

The U.S. Supreme Court unanimously held that employees who voluntarily cooperate with an employer's internal investigations are protected by the anti-retaliation provisions of Title VII of the Civil Rights Act of 1964, even if the employee didn't initiate the investigation and did not file a formal charge.

In *Crawford v. Metropolitan Government of Nashville & Davidson City*, Vicky Crawford was asked by a human resources officer of the Metro School District, where Ms. Crawford had worked for 30 years, if she had witnessed any "inappropriate behavior" by Gene Hughes, the school district's employee relations director. Although Crawford had never reported any harassment, she described several instances of sexually harassing behavior toward her by Hughes. Two other employees also reported being harassed by Hughes. The school district took no action against Hughes, however, but within a few months fired Crawford and the two other employees who had reported harassment. The district claimed that Crawford had been fired for embezzlement, although no charges were filed against her.

Crawford claimed she was fired in retaliation for the statements she made during the investigation and filed suit against the school district. The federal trial court and appellate court each held that Crawford's conduct was not covered by either the opposition or participation clauses of the anti-retaliation provisions of Title VII. The Sixth Circuit stated that simply answering questions during an investigation was not sufficient to constitute opposition of discrimination or participation in an investigation, both of which are protected by Title VII. The court also found that because Crawford did not file a formal charge of discrimination with the Equal Employment Opportunity Commission (EEOC), she had not "participated" in an investigation under Title VII.

The Supreme Court disagreed, holding that Crawford's actions satisfied the requirements of the "opposition" clause, notwithstanding the fact she had not filed a formal complaint. The court noted that an employee may oppose a supervisor's action without taking aggressive action to complain about it or stop it, and that Crawford's response to the human resource officer's question and her description of her discomfort with Hughes' actions was clearly a form of opposition. The Court declined to rule on whether or not her claim was protected by the "participation" clause, in light of its decision that she met the requirements of the "opposition" clause.

Massachusetts Court Limits Employers' Ability to Enforce Personal Appearance Policy

A recent decision by the Massachusetts Supreme Judicial Court substantially restricts the ability of employers to enforce workplace personal appearance or grooming policies where the policy conflicts with an employee's religious beliefs.

In *Brown v. F.L. Roberts & Co., Inc.*, 425 Mass. 674 (2008), the employer maintained a policy requiring all employees who had customer contact to be clean-shaven and to keep their hair "clean, combed and neatly trimmed." Plaintiff Brown, a Rastafarian, notified his manager that his religion prohibited him from shaving or cutting his hair. Relying on federal law, the company refused to make any exceptions to the grooming policy and the plaintiff was reassigned to a position that did not involve customer contact.

Federal and state law both require an employer to reasonably accommodate an employee's bona fide religious beliefs, unless the employer can demonstrate that the accommodation would be an undue hardship. An undue hardship typically is viewed as one that would force the employer to incur more than a minimal cost. One of the leading federal cases from the First Circuit (which includes Massachusetts) also concluded that an undue hardship could include potential harm to a company's "public image." Under federal law, an employer has discretion in determining whether an accommodation would negatively affect its public image, and thereby has considerable discretion in denying requests for exceptions to these policies.

According to the Brown decision, however, under Massachusetts state law, an employer must have specific proof that an exception to a personal appearance policy would cause real, tangible harm to the company's business or image. The threshold for establishing this harm is high. In Brown, the court refused to find that the employer has met this burden even though the employer provided evidence that approximately 12 customers commented negatively on employees' facial hair, and that the company's profitability actually increased after institution of the personal appearance policy.

Court Finds Employment At-Will After Expiration of Contract Term

In *Goldman v. White Plains Center for Nursing Care, LLC*, the New York Court of Appeals recently declined to extend the plaintiff's written employment contract for a successive term, even though she continued to work after the contract's stated expiration date. In 1990, the plaintiff, Lorraine Goldman, entered into a two-year written employment agreement to become the administrative director of two skilled nursing facilities. The employment agreement provided that negotiations for renewal were to be made within nine months before the contract term expired and that expiration of the contract released the employer of all obligations and responsibilities in connection therewith. The contract also contained a clause acknowledging that the contract encompassed the entire understanding of the parties and could only be modified in a writing signed by the parties. Ms. Goldman's two-year contract term expired without modification of the original contract and without negotiations for renewal. She continued to be employed in the same position for over 12 years after the expiration of her original contract term. In 2004, the skilled nursing facilities were sold and Ms. Goldman's employment was terminated.

Ms. Goldman sued the company for breach of contract, claiming that her continued employment after the expiration of the original contract term demonstrated that "the parties intended to renew the contract for successive one-year terms." In support of her argument, Ms. Goldman relied on a 19th Century common law theory supporting an inference of an intent to renew for a successive one-year term when an employee continues working past the expiration of the original contract term. Ms. Goldman prevailed at trial and the company appealed. Applying basic contract law principles, the Appellate Division concluded that the express language of the employment contract was controlling and that it would be inconsistent with those terms to imply any arrangement after the two-year period.

The New York Court of Appeals agreed, stating, "A fundamental tenet of contract law is that agreements are construed in accordance with the intent of the parties and the best evidence of the parties' intent is what they express in their written contract." Because the employment contract was clear and unambiguous as to (1) a contract term of two years; (2) the process for negotiating successive terms; and (3) the contract encompassing the entire understanding of the parties, the Court concluded it had no reason to look "outside the four corners of the document." The Court also noted that implying additional terms would be inconsistent with the longstanding employment-at-will doctrine, which allows either employer or employee to terminate an employment relationship at any time, absent an agreement for a specified term.

Lilly Ledbetter Fair Pay Act is First Legislation Signed by President Obama

On January 29, 2009, President Obama signed into law the Lilly Ledbetter Fair Pay Act. The legislation effectively reverses a 2007 ruling by the United States Supreme Court and provides workers with additional time to file charges of pay discrimination. In *Ledbetter v. Goodyear Tire & Rubber Co.*, the Supreme Court held that Ms. Ledbetter waited too long to

bring a claim of gender discrimination since she had been paid less than her male counterparts for the vast majority of her 19-year career. Under Title VII of the Civil Rights Act of 1964, as amended, employees have 180 days to bring a charge of discrimination. The Supreme Court held that an employee was required to file a discrimination charge within 180 days of the initial decision to pay a worker less than another for doing the same job, and that each allegedly discriminatory paycheck did not restart the statute of limitations as had been routinely held by the courts.

The new legislation makes it clear that each paycheck received does reset the 180-day limit to file a charge. As such, it provides employers with the incentive to correct discriminatory pay practices in order to ensure that employees are being compensated fairly. Employees who bring a charge of discrimination may recover back pay for no more than two years, regardless of the length of discrimination alleged. Although the Supreme Court case that provided the impetus for the legislation was based on gender discrimination, the Act applies to all forms of workplace discrimination, including, race, religion, national origin, disability and age.

New York Enacts State Version of WARN Act

Governor David Patterson recently signed into law the New York State Worker Adjustment and Retraining Notification Act.

The requirements imposed by the new legislation are in addition to those currently imposed by the federal WARN Act. While similar in scope to the federal law, the NY Warn Act lowers the threshold for affected employees and increases the required notice period. Under federal law, employers of 100 or more employees are required to provide 60 days of advance notice to employees affected by a plant closing or mass layoff, as well as notice to state and municipal leaders. By contrast, the NY WARN Act is applicable to employers with 50 or more employees and these employers are required to provide 90 days of advance written notice of mass layoffs, plant closings or relocations. The NY WARN Act defines a mass layoff as an action that results in employment losses during a 30-day period affecting at least 25 full-time employees representing at least 33% of the workforce, or at least 250 full-time employees. A relocation is defined as involving a removal of all or substantially all of the industrial or commercial operations of an employer to another location at least 50 miles away, regardless of whether there are any employment losses. Under the statute, notice must be given to affected workers, the New York State Department of Labor (NYS DOL) and local workforce investment boards. Employers are exempt from the notice requirements if the need for notification was not reasonably foreseeable at the time the notice was required; the employer was actively seeking capital or business when the notice was required and such capital or business, if obtained, would have enabled the employer to avoid or postpone the relocation or layoff; the closing or layoff was due to a natural disaster; the operation being closed was a temporary facility or project closed upon completion of the project; or if the action constitutes a strike or lockout.

Under the NY WARN Act, employers who violate the act must provide back pay and the cost of benefits (including medical expenses incurred by an affected employee that would have been covered under a benefit plan) for the period of the employer's violation, up to a maximum of 60 calendar days, to each terminated employee who lost his or her employment without receiving the required notification. Employers are also liable to pay civil penalties of not more than $500 for each day of violation.

Employers Required to Use Revised Version of I-9 Beginning February 2, 2009

The U.S. Citizenship and Immigration Services (USCIS) announced on December 15, 2008, that it submitted an interim final rule to the Federal Register revising form I-9 used in the employment verification process. The interim final rule makes the following changes to current I-9 rules:

- Specifies that expired documents are no longer considered acceptable for proof of identification or work authorization;

- Eliminates three more documents from List A (Temporary Resident Card, and older versions of the Employment Authorization Card / Document);
- Adds foreign passports containing special machine-readable visas for certain citizens of the Federated States of Micronesia (FSM) and the Republic of the Marshall Islands (RMI) to List A;
- Adds the new U.S. Passport Card to List A; and
- Revises the employee attestation section of the form.

Employers who do not begin using the new I-9 form by February 2, 2009 may be subject to fines.

New York Employers Subject to New Obligations Regarding Use of Applicant's Criminal History

New York recently enacted three pieces of legislation aimed at enhancing employment opportunities for individuals with prior criminal convictions, as well as providing some protection for employers against claims of negligent hiring. The new laws relate to Article 23-A of New York's Correction Law, which requires employers to consider and balance a number of factors before terminating or refusing to hire individuals with a prior criminal conviction. Article 23-A does not apply where there is a specific legal prohibition on hiring applicants with a criminal history.

Effective February, 2009, employers are required, as part of their background check process, to provide a copy of Article 23-A to individuals subject to background checks. Employers also are required to post a copy of Article 23-A of the Correction Law in a visually conspicuous manner in the workplace.

Additionally, the New York State Human Rights Law has been amended to protect New York employers from negligent hiring claims in the event that an employee with a criminal conviction causes harm in the workplace. Under the amendment, if an employer has evaluated an applicant's criminal history in accordance with the Article 23-A factors and decided in good faith to hire the individual, then the employer is afforded a rebuttable presumption that information regarding the individual's criminal background should be excluded from evidence in a negligent hiring claim.

Failure to Provide Interpreter Violated ADA

A physician was found to have violated the federal Americans with Disabilities Act (ADA) and the New Jersey Law Against Discrimination (LAD) by failing to provide a deaf patient with an interpreter, and was ordered to pay $400,000, including $200,000 in punitive damages, to the plaintiff. The plaintiff had lupus, a chronic inflammatory disease, and her primary care physician referred her to a rheumatologist, Dr. Robert Fogari, for treatment. The plaintiff was deaf and had poor communication skills, including a limited ability to use written English. During the medical visits, Fogari sometimes would exchange written notes with Gerena's partner, who had better written English skills than Gerena, or communicate through the couple's 9-year-old daughter.

The plaintiff asserted that she repeatedly asked Fogari to hire an American Sign Language interpreter in order to help her communicate during her medical visits. She even gave him an interpreter's business card and had the interpreter call the doctor to explain the law to him. Fogari, a solo practitioner, claimed he could not afford the $150 to $200 per visit an interpreter would charge when he was being reimbursed only $49 per visit by the plaintiff's medical insurer. The plaintiff continued her treatment with Dr. Fogari for nearly two years without the use of an interpreter and claimed that she continued to see him because she was referred to him by her primary care physician and because of her anxiety over her worsening symptoms. Even so, she claimed she was deprived of the opportunity to participate in and understand her medical situation and the treatment she was receiving, as well as any risks, and alternatives that might be available to her. After the plaintiff repeatedly requested an interpreter, Dr. Fogari told her to go to another physician. She sued the doctor

for violations of the ADA and the New Jersey LAD, and the jury awarded her $400,000, including $200,000 as punitive damages.

The court relied on *Borngesser v. Jersey Shore Medical Center*, 340 N.J. Super. 369 (App. Div. 2001), in considering when a hospital or doctor must provide "auxiliary aids and services" to a patient. The court required a fact-sensitive inquiry to differentiate between critical points in treatment and routine care. The court found that "auxiliary aids and services," such as interpreters, video displays and note takers, are necessary to enable "effective communication" during critical points when, for example, taking a patient's medical history, explaining a course of treatment and obtaining informed consent, but might not be necessary for routine care, such as taking a blood-pressure reading.