BUTZEL LONG
ATTORNEYS AND COUNSELORS

Labor and Employment E-news

February 19, 2009

Supreme Court Expands Title VII's Reach

In a unanimous decision issued on January 26, 2009 in the case of *Crawford v. Metropolitan Government of Nashville*, the United States Supreme Court significantly expanded the scope of Title VII's retaliation provision. As a result, employers will be more vulnerable to retaliation claims brought under the Act. Specifically, the Court in *Crawford* held that Title VII's prohibition on retaliation not only protects those who themselves complain to the employer or the EEOC that they are victims of discrimination or harassing conduct, but also those who have no complaints about their own treatment but simply provide information to an employer during the course of the employer's internal investigation regarding such conduct. Importantly, because of *Crawford*, employers need to take steps to protect employees who participate in its internal investigations of alleged discrimination.

Facts and Background

Ms. Crawford alleged that her employer terminated her because she disclosed sexually inappropriate conduct while participating in her employer's internal investigation into rumors of sexual harassment brought by another employee. While being interviewed during that investigation, Crawford described conduct that she believed constituted sexual harassment. Two other employees provided similar information. All three of these employees were terminated. After her termination, Crawford sued alleging that her employer violated Title VII's anti-retaliation provisions. The trial and Court of Appeals found in favor of the employer, each holding that Title VII's anti-retaliation provision only protects plaintiffs who, unlike Crawford, instigate or initiate complaints.

The Supreme Court's Opinion

Title VII protects employees involved in investigations in two ways. One is via the "opposition clause" which makes it unlawful to discriminate against an employee because she has opposed an unlawful employment law practice. The other is via the "participation clause" which makes it unlawful to discriminate against an employee because she has made a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing under Title VII. This case implicated the opposition clause.

In a decision written by Justice Souter, the Court wasted no time in overturning the lower courts'

limiting treatment of Title VII's opposition clause. Specifically, the Court stated that Crawford's response to her employer's questions were in opposition to her employer's conduct even if she did not initiate or instigate the complaint or the questioning, because it was a disapproving account of the conduct. The Court stated: "When an employee communicates a belief that the employer has engaged in employment discrimination, that communication constitutes the employee's opposition to such activity." In short, the Court held that an individual can oppose conduct by initiating a discussion *or* by responding to a question.

Significantly, while reaching its conclusion, the Court rejected the employer's contention that employers will be less likely to conduct internal investigations in the face of such a holding. Rather, the Court stated that, even under its holding, employers will still investigate complaints because reasonable investigations provide employers with a way to avoid liability.

What Should Employers Do?

Crawford reminds all employers that they must frequently revisit their investigation procedures because many retaliation claims arise from poorly conducted investigations. Specifically, because of *Crawford*, employers must make sure that protections exist for employees who confirm allegations of sexually inappropriate conduct when questioned during an internal investigation. In addition, employers must also make certain that any adverse action taken with respect to any employee who provided any information alleging discriminatory conduct is taken for, and supported by, a legitimate, non-retaliatory reason, and that the participation in the investigation is not a factor in the decision.

If you have any questions regarding this statute, please contact the author of this E-News bulletin as indicated below, or your Butzel Long attorney, or any member of Butzel Long's Labor and Employment Law Practice Group.

Robert A. Boonin
boonin@butzel.com
734 213 3601