



EMPLOYER MAY NOT RETALIATE AGAINST EMPLOYEES FOR THEIR PARTICIPATION IN INTERNAL DISCRIMINATION INVESTIGATIONS



Fred Bissenger

"In Crawford v. Metropolitan Government of Nashville, 105 FEP Cases 353 (U.S. 2009), the Court addresses the question of whether this protection extends to an employee who speaks out about discrimination, not on her own initiative, but in answering questions during an employer's internal investigation."

Employers are keenly aware that Title VII, as well as most civil rights laws, forbid retaliation by employers against employees who "oppose" workplace discrimination. In *Crawford v. Metropolitan Government of Nashville*, 105 FEP Cases 353 (U.S. 2009), the Court addresses the question of whether this protection extends to an employee who speaks out about discrimination, not on her own initiative, but in answering questions during an employer's internal investigation. The lower court had found that plaintiff had not "instigated or initiated" any complaint as part of her interview, and thus merely providing unfavorable information about a manager in an internal interview "is not the kind of overt opposition that we have held is required for protection under Title VII," but the U.S. Supreme Court reverses and finds otherwise.

In making its ruling, the Court cites an EEOC guideline: "When an employee communicates to her employer the belief that the employer has engaged in . . . a form of employment discrimination, that communication virtually always constitutes the employee's opposition to the activity." The Court finds that the plaintiff's answers to questions during the internal investigation were an "ostensibly disapproving account of sexually obnoxious behavior toward her by a fellow employee," and thus the opposition clause protected the plaintiff against retaliation.

In a concurring opinion, two justices generally agree with the Court's reasoning, but felt it prudent to emphasize their understanding that the Court's holding does not and should not extend beyond employees who testify in internal investigations or engage in analogous purposeful conduct. These two justices state that it is questionable whether silent opposition is covered by the opposition clause, and expressed concern that an expansive interpretation of the clause could open the door to retaliation claims by employees who never expressed a word of opposition to their employers.

In presenting its defense, the employer had argued that the Court's holding will discourage employers from conducting an expansive investigation for fear that other employees, in the course of that investigation, may voice complaints of discriminatory conduct, and subsequently accuse their employer of retaliation. The Court's opinion rejects the argument, citing the fact that employers have far more to gain from conducting an internal investigation, because the employer's exercise of reasonable care to prevent and correct promptly any discriminatory conduct may be a defense. Because of the strong incentive for employers to have the benefit of this affirmative defense, the Court dismisses the possibility that an employer might diminish the attractiveness of internal investigations.

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PRESIDENT OBAMA SIGNS FIRST LAW: THE "LILLY LEDBETTER" ACT AN EVERGREEN STATUTE OF LIMITATIONS FOR DISCRIMINATORY PAY CLAIMS



Mary Allen

"The "Lilly Ledbetter Act," as it is known, provides that, for victims of pay discrimination, a new statute of limitations period begins to run with each paycheck."

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had resulted in lower pay throughout her employment, and lower pension benefits once she retired.

The Ledbetter Fair Pay Act treats each paycheck as a new violation, not just the original discriminatory pay decision. Calculations to determine the amount of lost pay and benefits will go back over the entire period of time elapsed since the initial discriminatory compensation decision, but a plaintiff will only be able to recover damages for the 2 year period before the charge was filed.

For example, if a pay decision in 1989 results in Jane earning 10% less that year than comparable male employees, and Jane sues in 2009, the amount of lost pay and benefits will be calculated based on the effect, over 20 years, of the 1989 decision – including intermediate increases in pay and benefits -- although her recovery will be limited to the last 2 years before filing. This can make a big difference where pension benefits are calculated based on most recent years' earnings. At the very least, this Act will be a bonanza for econometric experts.

The law applies to claims pending as of the date of the Supreme Court's decision – May 28, 2007 – and applies to charges made under Title VII, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and the Rehabilitation Act.

Employers should periodically review payroll records to ensure that when employees of different race, color, religion, age, sex, or national origin, or employees with and without disabilities, are performing the same job, there is no difference in their pay that cannot be explained by neutral factors such as seniority or differing duties.

On Thursday, January 29, 2009, President Obama signed his first piece of legislation. The "Lilly Ledbetter Act," as it is known, provides that, for victims of pay discrimination, a new statute of limitations period begins to run with each paycheck. This law was designed to overturn a 5-4 decision by the Supreme Court in 2007 which had thrown out Ms. Ledbetter's claim against her employer because it had not been filed within 180 days of the initial discriminatory decision.

Ms. Ledbetter had worked for the same employer for almost two decades when she discovered that she was being paid less than similarly situated male supervisors. Her lawsuit claimed that the original decision to pay her less

CHANGES IN E-VERIFY, I-9'S, AND OTHER IMMIGRATION ENFORCEMENT PLANS



Jerry Pinn

“The effective date of the rule has been postponed twice, in order to give the new Administration “an opportunity to review the rule prior to its widespread implementation.”

Changes in E-Verify and other immigration developments seem to be coming “fast and furious.” In 2008 a number of laws, executive orders, and regulations were promulgated dealing with the use of E-Verify. On June 6, President Bush issued an amendment to Executive Order No. 12,989 requiring federal government contractors to verify the work authorization for all existing personnel and all new hires assigned to perform work on future federal contracts through E-Verify. Under the final rule that resulted, beginning May 21, 2009, E-Verify will be required for all federal contractors, regardless of size, holding a contract with a period of performance longer than 120 days and a value above \$100,000, subject to certain exceptions such as commercially available off-the-shelf items, which generally include all foodstuffs. Subcontractors will be required to participate in E-Verify if they provide services or construction with a value of more than \$3,000. The rule is currently being challenged in court by the U.S. Chamber of Commerce, a suit which basically contends that the requirements imposed by the Executive Order and regulation are “illegal and must be set aside,” because they violate the Illegal Immigration Reform & Immigrant Responsibility Act’s express statutory prohibition against requiring participation in the program. The effective date of the rule has been postponed twice, in order to give the new Administration “an opportunity to review the rule prior to its widespread implementation.” Additionally, some 15 states now require certain employers to participate and comply, in some manner, with a federal work authorization program like E-Verify.

During 2008, the Department of Homeland Security (DHS) reports a number of improvements were made in E-Verify, and a number of additional enhancements to the E-Verify and I-9 employment verifications programs are planned for 2009. The new Department of Homeland Security Secretary, Janet Napolitano, announced on January 30, 2009 an “action directive” on immigration calling for a review of a number of current programs, including E-Verify. The action directive outlined questions relating to the status of E-Verify that should be addressed in a report due the latter part of February. The Department acknowledges that E-Verify has been criticized for errors such as false negatives for persons who are authorized to work, but who receive a tentative non-confirmation from the system, and for false positives where unauthorized aliens receive a confirmation because they have stolen the identity of an unauthorized worker.

The directive also calls for an analysis of the status of employer monitoring and compliance efforts, including the possibility that DHS may expand monitoring to include electronic detections of suspicious patterns relating to data entered into the E-Verify system. Also, DHS has established a verification unit to make sure employers are using E-Verify properly, in view of an earlier report indicating that a majority of employers are using E-Verify inappropriately and potentially illegally. DHS expects this unit to perform compliance reviews, mostly by reviewing the electronic data submitted to the E-Verify program, to make sure employers are not abusing the system. For example, an employer could be flagged for scrutiny if it had 50,000 employees, but verified only a handful of them. In addition, the agency might scrutinize a situation where one Social Security number was associated with multiple employees.

The use of E-Verify has even become an issue in the new economic stimulus package, as earlier provisions mandated E-Verify use for federal contractors that receive funds under the bill. It appears, however, that the final stimulus bill will not include this provision.

DHS officials have declined to comment specifically on the future of worksite enforcement operations, but DHS Secretary Napolitano has expressed her support for actions that focus on unscrupulous employers rather than just rounding up

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**“EMPLOYER MAY NOT
RETALIATE”
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Editor’s Note – In light of the emphasis and broad interpretation placed by the courts on prohibitions against “retaliation” against an employee for protected activity, the Court’s ruling is not surprising. The bottom line of the ruling is that any contemplated adverse action against employees who reveal wrongdoing during an internal discrimination or harassment investigation,

should be reviewed closely before it is put into effect. Some commentators have suggested that employers in some situations might consider increasing reliance on documentation in internal investigations, and/or excluding certain “problematic” employees, those who have disciplinary records or for whom future discipline is likely, from the interview process, so that they cannot claim they have a retaliation claim. The editor agrees with the Court’s overall observation, however, that completion of an adequate internal investigation is more important than the possibility that some employee interviewed will later claim “retaliation” because they present adverse information to the company.

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**“CHANGES IN E-VERIFY”
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undocumented workers. Many commentators outside the government believe that there will be a decline in worksite raids, but an increase in I-9 audits, which could have serious consequences. In addition to the possibility that forced employee terminations or even criminal actions could result from an I-9 audit, ICE has recently begun a new program of requiring employers to

immediately correct deficient I-9 forms found in the audits, resulting in the possibility of severe fines if errors are made and not corrected promptly.

Another issue pertains to the use of the new I-9 form, as the new form was initially mandated for use on February 2, 2009, but the effective date of the new I-9 form has been delayed for 60 days, until at least April 3, 2009. The delay is designed to provide DHS with an opportunity for further consideration of the rule and allow the public additional time to submit comments. Consequently, employers should continue to use the current I-9 form with a revision date 6/6/07 instead of the new form I-9 with a revision date 2/2/09. Employers who are already using the new form should stop using it and continue using the current form with a revision date 6/6/07 until the effective date of the rule requiring the new I-9 form.

Save the Date

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