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www.hrwebstore.com newsletter@management-advantage.com 925-671-0404

SUPREME COURT ADDRESSES RETALIATION UNDER TITLE VII

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On January 26, 2009, the U.S. Supreme Court issued its opinion in the case of Crawford *v*. Metropolitan Government of Nashville and Davidson County, Tennessee. It involved a woman named Vicky S. Crawford

You will find the complete opinion at
http://www.supremecourtus.gov/opinions/08pdf/06-1595.pdf

In 2002, the Metropolitan Government of Nashville and Davidson County, Tennessee (Metro), began looking into rumors of sexual harassment by the Metro School District's employee relations director. A Metro human resources officer, asked Vicky Crawford, a 30-year Metro employee, whether she had witnessed "inappropriate behavior" on the part of the ER Director. Crawford described several instances of sexually harassing behavior: Once the Director had answered her greeting, "'Hey [Director's name], what's up?,'" by grabbing his crotch and saying "'[Y]ou know what's up'"; he had repeatedly "'put his crotch up to[her] window'"; and on one occasion he had entered her office and "'grabbed her head and pulled it to his crotch,'" Two other employees also reported being sexually harassed by the ER Director. Although Metro took no action against the Director, it did fire Crawford and the two other accusers soon after finishing the investigation, saying in Crawford's case that it was for embezzlement. Crawford claimed Metro was retaliating for her report of the Director's behavior and filed a charge of a Title VII violation with the Equal Employment Opportunity Commission (EEOC), followed by this suit in the United States District Court for the Middle District of Tennessee.

The District Court said Crawford's statements were not protected as they would have been if she had initiated a complaint, because they were in response to questions about rumors of sexual harassment in the workplace.

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The Sixth Circuit Court of Appeals affirmed on the same grounds, holding that the opposition clause of Title VII "'demands active, consistent "opposing" activities to warrant . . . protection against retaliation.'"

In its Opinion, the U.S. Supreme Court has said, "The anti-retaliation provision's 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. Because 'oppose' is undefined by statute, it carries its ordinary dictionary meaning of resisting or contending against. Crawford's statement is thus covered by the opposition clause, as an ostensibly disapproving account of [the ER Director's] sexually obnoxious behavior toward her. 'Oppose' goes beyond 'active, consistent' behavior in ordinary discourse, and may be used to speak of someone who has taken no action at all to advance a position beyond disclosing it. Thus, a person can 'oppose' by responding to someone else's questions just as surely as by provoking the discussion. 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 asked a question."

Any objection to harassing behavior can constitute a complaint that in turn prohibits retaliation against the person objecting.

So, what is an employer to do?

Simply said, it would be wise to train your managers to 1) avoid being a sexual harasser (or any other type of harasser, for that matter); 2) recognize that any mention of objectionable behavior, especially in light of descriptions of that behavior such as in Crawford's case, should be taken seriously and assumed to constitute a complaint of harassment. Taking retaliatory action against an employee who has brought a complaint under Title VII is not only unwise for an employer, but could be catastrophic in financial and public relations terms.

Some states like California require periodic management training on the subject of preventing sexual harassment. Being sure to incorporate this latest Supreme Court opinion into that training is essential. **Just because someone has not filed a formal charge with the EEOC is no reason to discount the complaint.**

Other U.S. Supreme Court cases on the subject of Sexual Harassment include:

- *Meritor Savings Bank v. Vinson* (1986)
- *Faragher v. City of Boca Raton* (1998)
- *Burlington Industries, Inc. v. Ellerth* (1998)
- *Oncale v. Sundowner Offshore Services* (1998)

Put a note on your calendar to follow up with your management attorney to discuss this latest case and get some legal guidance.

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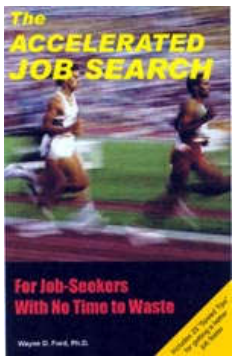

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☑ **Obama Appoints Ishimaru Acting EEOC Chair**

On January 23, 2009, President Obama appointed Stuart J. Ishimaru as Acting Chairman of the EEOC and Christine M. Griffin as Acting Vice Chair. Ishimaru, whose term expires on July 1, 2012, has been a Commissioner since November 2003. Ms. Griffin was sworn in as an EEOC Commissioner on January 3, 2006, to serve the remainder of a five-year term expiring July 1, 2009. Ishimaru succeeds Naomi C. Earp, whose term as a Commissioner expires on July 1, 2010. One of the five Commission seats remains vacant.
http://www.eeoc.gov/press/1-23-09.html

☑ **Top 50 Private Employers from CAREERS & the disABLED**

Once again, CAREERS & the disABLED magazine has published its survey results from its readers. Among private sector employers here are the top 20: General Electric, John Deere, Caterpillar, 3M, Raytheon, Lockheed Martin, Boeing, DuPont, Procter & Gamble, BAE Systems, AT&T, Microsoft, Northrop Grumman, Darden Restaurants, General Motors, IBM, Ernst & Young, Kaiser Permanente, The Hartford Financial Services, CVS/Pharmacy. Among the public sector (government) employers the top 10 were: Department of Homeland Security, Central Intelligence Agency, Postal Service, Department of Defense, General Services Administration, Internal Revenue Service, Securities & Exchange Commission, EEOC, NASA, Department of Labor.
[Equal Opportunity Publications, http://www.eop.com]

Paycheck Fairness Act Passed By House – Now in Senate

The U.S. House of Representatives has passed HR 11 and HR 12. They contain two major pieces of employment law. First, the ***Lilly Ledbetter Fair Pay Act of 2009*** (HR 11) will restart the clock each time an illegal discriminatory decision is made or acted upon. So, any compensation decision that is later determined to be illegally discriminatory won't time out if it is shown to be implemented with every pay check issued an employee. HR 12 is called the ***Paycheck Fairness Act*** and will amend the *Fair Labor Standards Act of 1938*. It's provisions include: 1) Limiting "factors other than sex" in legitimate wage differentials to bona *fide factors* such as education, training or experience. 2) Making employers who violate sex discrimination prohibitions liable in a civil action for either compensatory or (except for the federal government) punitive damages. 3) States that any action brought to enforce the prohibition against sex discrimination may be maintained as a class action in which individuals may be joined as party plaintiffs without their written consent. 4) Authorizes the Secretary of Labor (Secretary) to seek additional compensatory or punitive damages in a sex discrimination action. 5) Requires the Equal Employment Opportunity Commission (EEOC) and the Office of Federal Contract Compliance Programs to train EEOC employees and affected individuals and entities on matters involving wage discrimination. Both bills now rest with the Senate awaiting action.

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The Management Advantage, Inc.
PO Box 3708
Walnut Creek, CA 94598
925-671-0404

www.hrwebstore.com
Editor: William H. Truesdell, SPHR
billt@management-advantage.com