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Recent Developments in Sexual Harassment
Prevention & Defense Against Claims for Retaliation

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Recent Developments in Sexual Harassment

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[Note: The Personnel Section Workshop at the 2008 IMLA Annual Conference in Las Vegas included an Update on Retaliation in Sexual Harassment, focusing primarily on Federal Circuit Court decisions arising under matters discussed in *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006). Even though the issue of retaliation was so recently reviewed at a Personnel Section workshop, new decisions by the Supreme Court of the United States (SCOTUS) and the apparent continuing proliferation of retaliation charges[1] suggest that this topic is appropriate again for examination and discussion. Following discussion of recent developments in this subject, this paper suggests means by which Local Government Counsel may seek to heighten employer protections against liability, including training and review of policies. The latter topic also serves to supplement the other topic presented at this IMLA Mid-Year Seminar Personnel Section Workshop, Doug Haney's segment on *Effective Review of Personnel Handbooks*.]

I. Introduction and Background. Sexual harassment law, in both the public and private sector, continues to be a developing and active body of law. While statutory changes appear to have been limited, at least on the federal level[2], courts have continued to define and refine concepts inherent in the prevention and remedy of discrimination based on sex or gender. From decisions outlining the basic parameters of employer liability to the decision establishing retaliation as a separate violation of Title VI[3], the United States Supreme Court has played an active and, now, primary role in developing the contours of employer responsibility and accountability for sexual harassment that occurs in or is related to the workplace.

II. The Basic Framework for Employer Liability for Sexual Harassment.

(a) General Responsibility and Liability for Supervisor Harassment.

Employers are liable for sexual harassment if they knew or should have known it was occurring and failed to take reasonable actions to prevent or remedy its occurrence.[4] The doctrine was refined with particular regard for supervisor harassment in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. Boca Raton*, 524 U.S. 775 (1998) resulting in the now well-known *Ellerth-Faragher* doctrine.[5]

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[1] In Fiscal Year 2007, EEOC received 12,510 charges of sexual harassment, resolved 11,592 charges and recovered $49.9 million in "benefits" for charging parties and other individuals (not including monetary compensation awarded though litigation). In that same year, EEOC received 26,663 charges of retaliation discrimination based on all statues enforced by EEOC (not just sexual harassment). It resolved 22,265 charges resulting in "benefits" of $124 million. [Source: EEOC website: www.eeoc.gov].

[2] Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* See legislative history of Title VII as set forth on EEOC website at www.eeoc.gov/policy/vii.html. The most recent statutory change to Title VII was enacted as part of the *Lilly Ledbetter Fair Pay Act of 2009* (Pub.L. 111-2), intended to extend the time frames during which charges of gender discrimination based on wages may be filed.

[3] *Burlington Northern*, supra.

[4] *E.g., Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) upholding liability under EEOC guidelines for both "quid pro quo" and hostile environment harassment resulting in discriminatory treatment under Title VII.

[5] Employers may be "subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with . . . authority over the employee. . . . Although there is no affirmative defense if the hostile environment 'culminates in a tangible employment action' against the

During 2008 and earlier this year, SCOTUS has continued its development of the law. These most recent rulings have reinforced and strengthened employee protections against employer retaliation. Thus, SCOTUS, in 2008, ruled that implied causes of action with regard to retaliation exist (1) under section 1981 of the Civil Rights Act[6] and (2) under the Age Discrimination in Employment Act.[7]

Coupled with pro-employee legislation enacted early in the current session of Congress[8] and those which are proposed and may be enacted during this session of Congress, employee avenues for redress of perceived employer wrongdoing can be expected to expand on multiple fronts.

These developments also must be viewed in light of the 2009 *Crawford* decision[9] expanding protection for employees in sexual harassment cases to include those who participate in investigations about allegations of sexual harassment.

After examining aspects of these developments, this paper will seek to provide guidance for employers and their legal advisors as to preventive and remedial steps that may (or more properly, must) be taken to address this expanding exposure to employment practices claims.

The basic formulation arising from cases interpreting Title VI can be summarized (at some risk of oversimplification) as follows:

In general, employers are held accountable for sexual harassment occurring in, or related to, the workplace only when the employer (a) knew or should have known that sexual harassment was occurring and (b) failed to act reasonably to prevent harassment from occurring or to remedy it when it occurred.[10] Employers, however, may face a burden higher than this traditional negligence standard when harassment is committed by a supervisor. When that situation arises, an employer's liability is generally consistent with that in the "normal" context so long as the harassment is not accompanied by economic consequences.[11] An employer also may be able to assert protection resulting from an employee's failure to complain or to utilize an effective remedial system put into place by the employer. In an instance when discrimination by a supervisor is accompanied by economic consequences, exemplified by decisions involving factors such as hiring, firing, promotion, wages or other benefits, an employer faces strict liability.[12]

That general framework has remained pretty much intact for ten years since the court clarified the old distinction between "hostile workplace" and "*quid pro quo*" harassment and seemingly replaced them with the descriptive terms of "environmental harassment" and

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employee . . . the employer does have a defense 'when no tangible employment action is taken' if it 'exercised reasonable care to prevent and correct promptly any' discriminatory conduct and 'the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." Cited and quoted in *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*, 553 U.S. __ (January 26, 2009), hereafter *Crawford.*

[6] *CBOCS West v. Humphries*, 553 U.S. ___ (2008).

[7] *Gomez-Perez v. Potter, 553 U.S.* ___ (2008).

[8] *Lilly Ledbetter Fair Pay Act of 2009* (supra at note 2), which amends wage disparity law to expand the window during which wage discrimination claims under the federal Equal Pay Act may be filed.

[9] Supra, note 5.

[10] The so-called *Ellerth-Faragher* rule as mentioned in note 5.

[11] Environmental harassment, also known as hostile environment.

[12] Economic harassment, also known as *quid pro quo* harassment.

"economic harassment." The present day distinctions may be more semantic than legal, as many commentators, practitioners, human resources personnel, and even judges, continue to employ the older descriptive terms.

(b) Expanded Scope of Retaliation Claims. That said, the more recent cases, exemplified by the *Burlington Northern* retaliation case, have been concerned with the prong of the discrimination/harassment violation that addresses employer and workplace response to harassment claims. In elevating retaliation to a new and distinct status,[13] SCOTUS fired what might be called a warning shot, advising employers to take seriously obligations to prevent workplace retaliation as well as the perhaps more readily obvious requirement for employers themselves to avoid retaliation.

III. Harassment Update 2009: Warning Shots Now Hit Home. Two new decisions, announced shortly after the beginning of 2009, now serve to reinforce the expanding views of SCOTUS on liability for harassment and retaliation.

The first of these[14] dealt with harassment outside of the workplace – in the form of sexual harassment of students and a school organization's responsibility associated therewith. Though it is not a direct application of workforce harassment and arose under Title IX, not Title VII, its importance for municipal public employers (e.g., children participating in a municipally sponsored recreation program) should not be underestimated.

The second case, *Crawford (supra* note 5), directly involves a form of reputed retaliation by a municipal government that should sound warnings to ensure that government supervisors, managers, and officials understand the manner in which retaliatory actions will be viewed.

In 2002, the Metropolitan Government of Nashville and Davidson County (Metro) began an internal investigation regarding sexual harassment rumors involving its employment relations director. As a part of an investigation into a sexual harassment complaint involving another employee, a Metro human resources officer asked Vickie Crawford (a thirty-year employee) if she had observed any inappropriate behavior on the part of the director. Crawford responded with allegations of several instances during which the Director was described as acting inappropriately toward her (Crawford). Two other employees reported similar conduct towards them. Metro took no action against the Director, instead firing Crawford and her co-accusers shortly after the investigation was completed. Crawford was charged with embezzlement. In turn, Crawford filed a charge of Title VII violation with the EEOC, followed by litigation in U.S. District Court. An appeal to SCOTUS followed the Circuit Court's affirmance of the District Court's grant of summary judgment to Metro. Its ruling asserted that Title VII's retaliation provisions (the opposition and participation clauses) did not apply where Crawford did not instigate or initiate a complaint and where her participation in an internal investigation was not pursuant to an EEOC proceeding.

Justice Souter, writing for the majority, first noted that Title VII's language barring retaliation against an employee has two prongs. These provisions protect employees by barring retaliation against an employee who:

(1) "opposes" any practice made unlawful by law, or

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[13] No change occurred in applicable statutes or administrative regulations. The Court "simply" took a deeper look at the existing wording of Title VII, finding that the statutory wording on discrimination and harassment differed in a meaningful way from the language employed with regard to retaliation.

[14] *Fitzgerald v. Barnstable School Committee*, 553 U.S. ___ (January 21, 2009).

(2) has made a charge, testified, assisted or participated in any manner in an investigation, hearing or proceeding under the law.

The first prong is referred to as the "opposition clause," while the latter is called the "participation clause." Crawford accused Metro of violating both clauses.

The District Court held that Crawford could not use the opposition clause because she "merely answered questions by investigators in an already-pending internal investigation, initiated by someone else," not Crawford. The Court also ruled she could not use the participation clause because Sixth Circuit precedent confined the use of that clause to internal investigations by employers where formal EEOC proceedings were pending.

Crawford appealed the decision to the Circuit Court, which agreed with the lower court on both issues, adding that Crawford did not claim to have "instigated or initiated any complaint prior to her participation in the investigation, nor did she take any further action following the investigation and prior to her firing."

Because this ruling by the Sixth Circuit conflicted with rulings from other Circuits, the Supreme Court agreed to accept Crawford's appeal and resolve how these matters should be addressed. It issued its opinion on January 26, 2009.

Justice Souter first examined the opposition clause in detail, including a review of dictionary definitions of the word "oppose." He concluded that the use of the word in the context of Title VII does not require the employee to act in such a formal manner as the District and Circuit courts required. It is sufficient, he states, for an employee to indicate "opposition" by communicating a belief to her employer that there has been discrimination and such a communication, according to EEOC guidelines, "virtually always constitutes the employee's opposition to the activity." He noted that exceptions to this rule might exist (as where an employee describes a supervisor's racist joke as "hilarious,") but that was not the case here. The Circuit Court would have required something beyond merely responding to the employer's questions, demanding some form of action. Souter agreed that such action would solidify an employee's position as actually constituting opposition. However, he then asserted such active assertion is not required by the law, as it should be interpreted so as to prevent the "freakish" rule that protects 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."

The Court said the bar for employers was raised substantially under the *Ellerth-Faragher* standard when supervisor harassment is involved, so that employers have a strong inducement to "ferret out" and put a stop to discriminatory activity. Thus, Souter concluded that the Sixth Circuit rule would undermine that high *Ellerth-Faragher* standard and void Title VII's primary objective to avoid harm to employees. A contrary rule as posited by Metro and the Sixth Circuit would encourage employees to keep quiet about Title VII offenses out of fear of being penalized for their opposition without any recourse or remedy. In support of that contention, Souter cited a law review study[15] which pointed out that fear of "retaliation is the leading reason why people stay silent instead of voicing their concerns about bias and discrimination."

As the majority here found a basis to overturn the Circuit Court, the opinion does not address the "participation" prong argument raised by Crawford. Instead, it remanded the case for

[15] Brake, *Retaliation*, 90 Minn. L. Rev. 18 (2005).

further action, at which time the lower court will have the opportunity to address Metro's defenses (aside from the scope of the retaliation clauses) which were raised in the lower court.[16]

Justice Alito, joined by Justice Thomas, concurred in the decision and the general reasoning of Justice Souter. His concurring opinion, however, said that the scope of the decision should have been limited, expressly, to situations in which the employee testifies in an internal investigation or engages in similar conduct. Alito expresses reservations about the scope of the word "opposition" unless it is limited to some form of "active and purposive conduct." For example, he says, the majority's view might be construed as extending to "silent opposition." This more expansive view of opposition would have important practical implications such as opening the door for a retaliation claim by someone who never actually said a word of opposition to their employer. He gives, as an example, an employee "informally chatting with a co-worker at the proverbial water cooler or in a workplace telephone conversation that is overheard by a co-worker."

Of course, to prevail on such a retaliation claim the employee must prove some connection between the opposition and the alleged adverse consequences. Alito noted, though, that the connection required in some courts can be as simple as demonstrating that the action occurred shortly after the employee's protected activity. In concluding, Alito cited the number of EEOC cases which have "proliferated" in recent years and the likelihood that an expansive view of the majority opinion would accelerate that trend. He concludes by asserting that the potentially expansive view was not inherent in the majority opinion, and he cautions that the opinion is limited to this type of situation in which the employee did actually participate in an internal investigation.

IV. Conclusion and Guidance. Certainly, employers have long been cautioned that there should be no such thing as an "informal" complaint of sexual harassment. In other words, employers should treat seriously any allegation of sexual harassment or claim of prohibited discriminatory treatment. This prudent course of action applies even if the employee were to say something like "I really don't want to cause a problem and I don't want to institute a formal complaint, but I just want you to know about . . . ."

A logical reading of *Crawford* would deem such a statement as being made for the purpose of opposing the alleged harassment. Thus, any disciplinary action or even something that the employee perceives as being adverse might be construed as being retaliatory. Though an employer might eventually prevail in situations in which the employee's discipline is justified by the employee's work record, failure to respond to the mention of harassment in these situations will create the risk of a claim being filed which will require, at a minimum, time, expense and effort to mount a defense. Life being the uncertainty that it is, there is also no guarantee that a work-related justification for action would overcome a retaliation charge at trial.

In summary, employers should review employment policies and handbooks to ensure that sexual harassment and equal employment opportunity statements include language reflecting a commitment to preventing and remedying problems, and to ensure that reporting, investigation, and remedial procedures are meaningful, effective and designed to lead to timely and responsive action. Of course, all such policies and practices now routinely should include affirmative statements that protect employees from retaliation for both opposing sexual harassment and for

[16] Though not cited in the opinion, presumably these include the defense that her employment record justified termination. That defense, in turn, is subject to rebuttal that employment-related reasons were pretext for a retaliatory discharge.

participating in investigative proceedings. Statements of "zero tolerance" may be reinforced with the notion (particularly made known to supervisors) that all complaints will be taken seriously.

At the 2008 Annual Conference Personnel Section Workshop, the power point presentation on this topic of retaliation concluded with a series of slides captioned Lessons Learned. A recap of those slides is a fitting conclusion to this analysis.

Lesson #1 Retaliation Claims Are Here to Stay!

- Retaliation is involved in more than half the cases recently filed with EEOC.
- Retaliation is the new "cottage industry" for employment plaintiff lawyers.

Lesson #2 Revise Employer Policies to Specifically Address Retaliation!

- But, remember that Burlington Northern had an exemplary policy in place.
- Therefore, accompany policy revision/adoption with training and education for current and new employees, particularly supervisors, and don't forget officials.
- But, (see *Burlington Northern/White* case again) training is not enough.

Lesson #3 Ensure that Your Client "Engages Mind Before Acting!"

- Uses a discipline/discharge checklist.
- Is aware of protected classes and employees with records of complaints or participation in investigations.
- Understands why employers need to act.
- Does not create false reasons for acting.

Lesson #4 Documentation! Ensure that Municipal Employers Understand:

- Failure to document is not limited to harassment and retaliation.
- Consequences of lack of documentation are magnified in harassment/retaliation arena.
- Understand that documentation includes what employees, supervisors, witnesses, say and don't say.
- Understand that words used to document have meaning and connotation, too.

Lesson #5 Be Aware of Employee's Record Before Acting!

- Again, understand the reason for action.
- Is the record pretense or reality?
- Why act now, and not previously?

Lesson #6 Timeliness!

- Deliberate action is important, but so is timeliness.
- Retaliation can be about perception, and delay in acting can be (will be) perceived as failure to act.
- Timeliness is a 2-way street, so provide guidance on reporting requirements, and enforce them (or use waivers/exceptions) with some justifiable degree of consistency.