LABOR AND EMPLOYMENT LAW UPDATE

YET ANOTHER DOOR IS OPENED BY U.S. SUPREME COURT FOR RETALIATION CLAIMANTS!

In less than three years, the U.S. Supreme Court has opened three doors which had been barriers for retaliation claimants:

DOOR NO. 1: Before June 26, 2006, many courts had limited the types of retaliatory conduct prohibited by Title VII of the Civil Rights Act ("Title VII"). *Burlington Northern & Santa Fe Rwy. Co. v. White* opened this door by including, as types of prohibited retaliation, conduct away from work and conduct which doesn't have an economic impact on an employee.

DOOR NO. 2: Before May 27, 2008, there was uncertainty as to whether retaliation was barred by the Civil Rights Act of 1866. *CBOCS, Inc. v. West* opened this door by clarifying that the Act outlaws retaliation against: (1) a person who complains of race discrimination against himself, and (2) a person (of any race) who complains of race discrimination against others.

DOOR NO. 3: Before January 26, 2009, many courts had limited the types of activities protected by Title VII from retaliation to "active, consistent opposing activities." *Crawford v. Metropolitan Govt. of Nashville and Davidson County, Tenn.*, opened this door by including more passive opposing activities within the scope of Title VII's protection.

The impact of the Supreme Court decisions has already been significant. Statistics are not yet available for 2008, but the Equal Employment Opportunity Commission ("EEOC") reported that retaliation complaints for 2007 were up 18% from the previous year. With the exception of race discrimination, more claims filed with the EEOC now allege retaliation than any other form of discrimination.

THE OPPOSITION CLAUSE: Title VII makes it unlawful to discriminate against any person who "has opposed any practice made an unlawful employment practice by the" Act. Title VII applies to employers with 15 or more employees.

THE CLOSED DOOR: Before January 26, 2009, some courts had limited protected opposition under Title VII to active and purposive activities such as:

1. Complaining to anyone (management, unions, other employees, or newspapers) about allegedly unlawful practices;
2. Refusing to obey an order because the worker thinks it is unlawful under Title VII; or
3. Opposing unlawful acts by persons other than the employer – e.g., former employers, union, and co-workers.

The door was closed by such courts to claiming more passive opposition as the basis for a retaliation claim.

VICKI CRAWFORD'S CASE: Ms. Crawford claimed that she was fired, in violation of Title VII, for opposing sexually discriminatory practices by an employee relations director. She spoke out about this discrimination not on her own initiative, but in answering questions directed to her by her employer during an internal investigation of rumors of sexual harassment by the employee relations director. The Sixth Circuit Court of Appeals found that Ms. Crawford could not prove a Title VII violation because she had not instigated or initiated any complaint, but had merely answered questions in a pending investigation initiated by someone else.

THE DOOR IS OPENED: In a unanimous ruling on January 26, 2009, the U.S. Supreme Court in *Crawford v. Metropolitan Govt. of Nashville and Davidson County, Tenn.* reversed the Sixth Circuit and found that Ms. Crawford had engaged in protected opposition under Title VII. Seven justices opined that Title VII protects both active and passive opposition.

HOW WIDE HAS THE DOOR BEEN OPENED? This was essentially the question posed by a concurring opinion by two justices. They expressed concern that the majority opinion opened the door to include not just passive opposition expressed directly to an employer but also passive opposition which can only be learned by an employer indirectly. Two hypothetical examples were used to illustrate this concern:

> EXAMPLE: "Suppose... that an employee alleges that he or she expressed opposition while informally chatting with a co-worker at the proverbial water cooler or in a workplace telephone conversation overheard by a co-worker."

> EXAMPLE: "... suppose that an employee alleges that such a conversation occurred after work at a restaurant or tavern frequented by co-workers or at a neighborhood picnic attended by a relative or friend of a supervisor."

Only further litigation will resolve the question of whether the door has been opened this wide.

OTHER ISSUES? Courts are already grappling with claims based upon ambiguous words or conduct alleged to be protected opposition under Title VII. These claims may be even more difficult to resolve where passive opposition is alleged.

OTHER DOORS? *Crawford* may have paved the way to opening other doors. Statutes with opposition clauses similar to Title VII include:

> AGE DISCRIMINATION IN EMPLOYMENT ACT, outlawing employment discrimination against persons over the age of 40.

> AMERICANS WITH DISABILITIES ACT, providing employment protections to persons with disabilities and persons known to have a relationship or association with a disabled person.

> FAMILY AND MEDICAL LAVE ACT, governing leave from employment for medical reasons, the birth or adoption of a child, and the care of a child, spouse, or parent who has a serious medical condition.

QUESTIONS: Questions regarding retaliation or any other labor and employment issues can be directed to Robert G. Chadwick, Jr. at Campbell & Chadwick, P.C.

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