



AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

AFGE

PROUD TO MAKE AMERICA WORK

THE EEO Advocate

A Newsletter for Litigators

SPRING 2009

SPOTLIGHT – HIGH COURT AFFIRMS – “OPPOSITION” NEED NOT BE “ACTIVE”

If you get called as a witness during an informal investigation into discrimination, and supply evidence against your Agency, you are protected from reprisal – even when you merely answered questions and did not initiate or encourage your co-worker to file the complaint.

That was the Supreme Court’s ruling earlier this year in *Crawford v. City of Nashville*, 128 S. Ct. 846 (January 26, 2009). Under employment law, employers may not retaliate against any employee, “(1) because he has opposed any practice made an unlawful employment practice by this subchapter [i.e. discrimination], or (2) because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.” 42 U.S.C. § 2000e-3(a). The first is known as the “opposition clause,” and the second as the “participation clause.”

The *Crawford* case began in 2002, when the City of Nashville began looking into rumors of sexual harassment by the Metro School District’s employee relations director. The City did so, on its own initiative without any specific complaint or grievance filed about the alleged harassment.

The City appointed a human resources officer to investigate the rumors, and the officer asked employee Crawford if she had ever witnessed “inappropriate behavior” on the part of the director. In response to this employer-led inquiry, Crawford described several instances in which the director sexually harassed her.

The City of Nashville took no action against the subject director, but fired Crawford soon thereafter, on the alleged basis that she had embezzled money. Crawford filed an EEOC charge alleging retaliation for opposition and participation. Crawford’s case was appealed to U.S. District Court.

The District Court dismissed Crawford’s case, finding that Crawford had not “opposed” discrimination under the law. Crawford had not “instigated or initiated

any complaint,” but had “merely answered questions by investigators in an already-pending internal investigation, initiated by someone else,” the District Court said.

The District Court further found that Crawford had not “participated” in “an employer’s internal investigation ... pursuant to a pending EEOC charge,” because no charge had actually been filed and the Agency was merely conducting an informal inquiry.

The U.S. Court of Appeals for the Sixth Circuit agreed with the District Court on both counts. The Circuit Court reasoned that a holding to the contrary would lower the bar for retaliation claims and discourage employers from looking into rumors of discrimination.

Crawford appealed to the U.S. Supreme Court. The Supreme Court reversed, holding that Crawford’s activity satisfied the opposition clause, but never reaching the issue of whether Crawford’s activity could have satisfied the participation clause.

The Supreme Court reasoned that there is “no reason to doubt that a person can ‘oppose’ by responding to someone else’s question just as surely as by provoking the discussion, and 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 her boss asks a question.” 128 S. Ct. at 851.

The Supreme Court also disagreed with the Circuit Court’s concern about discouraging employers from looking into rumors of discrimination, noting the protection that the High Court has already given to employers who exercise reasonable care to prevent and promptly correct discrimination in the workplace. The Supreme Court cited to its decisions in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. Boca Raton*, 524 U.S. 775 (1998). Those decisions insulate employers from vicarious liability for harassment in the workplace where (1) the harassment

(Continued on page 2)

HIGH COURT AFFIRMS - “OPPOSITION” NEED NOT BE “ACTIVE” *cont.*)

does not culminate in a tangible personnel action, (2) the employer had an effective anti-harassment policy in place, and (3) the employer promptly responds and corrects harassment when it learns about it.

WHAT DOES THIS MEAN?

EEOC has long recognized that opposing discrimination is protected even when it is passive. The Supreme Court's decision affirms EEOC's position on this and ensures that EEOC will not have to retreat from this.

WHAT SHOULD YOU DO?

If you represent members in management-conducted informal inquiries into discrimination issues, including sexual harassment rumors, know that your members are protected if they supply information! The fact they do not initiate the complaint is irrelevant, as long as they supply information that substantiates the rumors.

hand prior to the hearing stage.

If you have not made any amendments to your complaint and it has been over 180 days then you have the right to request a hearing. 29 CFR 1614.108(g). You should send a request for a hearing to your Agency EEO office and the supervisory administrative judge at the EEOC district office in your area. You may find the appropriate EEOC office at <http://www.eeoc.gov/offices.html>. Once an AJ has been assigned to your case he/she will direct the agency to produce the report of investigation (ROI) within 15 days. If the agency is still not responsive you can request the AJ order sanctions against the agency.

In a recent win for a member represented by AFGE's Women's and Fair Practices Departments, a motion for sanctions was filed to the EEOC AJ against Court Services and Offender Supervision Agency for its failure to produce an ROI of the member's allegations of discrimination. The AJ found that the Agency's delay in producing the ROI more than 200 days after his Order to produce the complaint file constituted an egregious abuse of the EEO process. The AJ ordered a default judgment in the member's favor as a sanction.

Representation Corner Q&A

QUESTION

It's been over nine months and the Agency has not completed an investigation of my EEO complaint, what can I do?

ANSWER

You can request a hearing from the EEOC.

The most important step you can take to move your case along is to get an EEOC administrative judge (AJ) involved. Unfortunately, waiting for the Agency to hold itself accountable for an investigation of allegations of discrimination against itself is often an exercise in futility.

The Agency is required to conduct an impartial and appropriate investigation of the complaint within 180 days of the filing of the complaint unless the parties agree in writing to extend the time period. When a complaint has been amended, the Agency shall complete its investigation within the earlier of 180 days after the last amendment to the complaint or 360 days after the filing of the original complaint. There is an exception to this rule; the complainant may request a hearing from an administrative judge on the consolidated complaints any time after 180 days from the date of the first filed complaint. 29 CFR 1614.106(e) (2). Although you are able to request a hearing after 180 days, if you have made amendments to your complaint it may be in your best interest to wait until those additional issues are investigated. By waiting you allow the agency to show its

WHAT DOES THIS MEAN?

While it is rare that an AJ will order a default judgment as a sanction, he/she may order other appropriate sanctions that will compel the Agency to produce the ROI.

WHAT SHOULD YOU DO?

As a representative, if the Agency has failed to produce a report of investigation in a timely manner, follow the steps mentioned above.

Work Incomplete Agency Investigations to Your Favor!

The Commission provided helpful guidance on appealing a Final Agency Decision (FAD) in *McDaniel v. Veterans Affairs*, EEOC Appeal No. 0120070869 (May 22, 2008), 108 FEOR 428.

This case illustrates a good principle of how you can use an Agency's failure to properly investigate the complaint against it. The *McDaniel* employee was not selected for a position she applied for and believed her non-selection was discriminatory. *McDaniel* alleged in her affidavit that she was better-qualified than the selectee. The Agency issued *McDaniel* a Report of Investigation (ROI) and gave *McDaniel* her right to

(Continued on page 3)

request a hearing or Final Agency Decision (FAD) based on the ROI. McDaniel requested a FAD.

The Agency issued a FAD with a finding of no discrimination. McDaniel appealed to EEOC's Office of Federal Operations (OFO), which reversed the Agency's decision.

In reversing, OFO noted the Agency's ROI had insufficient evidence on issues critical to the case, including obvious information about the selection process and the relative qualifications of the applicants.

OFO held the void in the record against the Agency. It drew an adverse inference that the employee could have proved what she alleged had the record been complete: that she was better-qualified than the selectee. The OFO actually held it would draw an adverse inference that an Agency's reason is pretext where it doesn't provide obvious and critical evidence to analyzing the case.

WHAT DOES THIS MEAN?

The Women's and Fair Practices Departments usually do not encourage employees to ask for FADs. However, it is likely in *McDaniel* that had the case gone to hearing, the judge would have said the employee needed to seek discovery of the items, and would have been reluctant to draw such an adverse inference. This appeal with an incomplete ROI really requires an agency's office of civil rights to do a proper investigation and be careful in rendering its FADs!

WHAT SHOULD YOU DO?

As a representative, note that sometimes employees do not want to go through with a hearing, or simply miss their deadline to do so. In those situations, it's nice to know that there may yet be a remedy on OFO appeal: to point out gaps in the agency's record. When faced with a pending FAD, make sure the ROI is sufficient to constitute an impartial and complete record.

employers and health insurers based on an individual's genetic information.

This act bans the use of genetic test information in determining health care coverage or employment. Genetic test means an analysis of human DNA, RNA, chromosomes, proteins, or metabolites that detects genotypes, mutations, or chromosomal changes.

An individual should be able to find out whether they are genetically predisposed to get breast cancer, diabetes or sickle cell anemia without insurance companies or employers using the information against them. In the past, several insurance companies denied coverage to African Americans who carried the sickle cell anemia gene. In another instance, Burlington Northern and Santa Fe Railway Company paid employees to settle a lawsuit in which workers claimed the company sought to administer genetic tests without their knowledge after they had submitted work-related injury claims.

The EEOC is charged with issuing regulations by May 21, 2009, implementing Title II of GINA, which prohibits the use of genetic information in employment, prohibits the intentional acquisition of genetic information about applicants and employees, and imposes strict confidentiality requirements. This act expands EEOC's jurisdiction in its mission to enforce equal opportunity in the workplace for everyone.

EEOC issued a 60-day Notice of Proposed Rule Making on February 25, 2009, urging public comment. HYPERLINK "<http://www.eeoc.gov>" www.eeoc.gov

WHAT DOES THIS MEAN?

Title II of GINA will prohibit employers from hiring, firing, promoting or placing employees based on genetic information. In the past, employees have passed up genetic testing that could benefit their health because of the fear the results could be used against them.

However, researchers can and have come up with early, lifesaving therapy for many diseases with hereditary links such as breast cancer, diabetes, prostate cancer, heart disease, etc. through increased genetic testing, leading to preventive treatment and lower medical costs.

WHAT SHOULD YOU DO?

Representatives should ensure that members know they are protected by law and no longer need to be afraid that they will be denied health insurance or fired from a job because of a genetic test.

EEOC Charged With Implementing Employment Provisions of the Genetic Information Non-Discrimination Act of 2008 (GINA)

The Genetic Information Non-Discrimination Act of 2008 (GINA) was signed into law on May 21, 2008 (Public Law No: 110-233). It prohibits discrimination by

WFP's EEOC Campaign Continues

On February 9, 2009, the Women's and Fair Practices Departments and EEOC Council 216 continued our fight for EEOC funding by hosting a workshop at AFGE's Legislative Conference called, *Yes We Can Eliminate Discrimination: Revitalizing the EEOC*.

The panelists emphasized the fact that EEOC's lack of funding ensures that employment discrimination will continue to affect all employees whether they work in the private or federal sector. In fiscal year 2008, EEOC received more than 95,000 charges of discrimination. This is the greatest number of charges filed in one year in the history of EEOC. EEOC faces a backlog of more than 73,000 cases and its workforce has decreased by about 25% since 2001; it is the result of inadequate staffing and is a 35% jump since last year. This backlog represents thousands of American people who will not have their cases processed timely or be protected against discrimination at the workplace while their cases linger. The panelists explained the public waits, on average, 229 days for help on their charges with fewer frontline EEOC employees available to do the work.

AFGE remains committed to stamping out discrimination, promoting the work and unity of the civil rights and labor movement, and revitalizing the EEOC. We need your help: stay active and engaged to revitalize the EEOC!!

Yes We Can – Eliminate Discrimination!

The EEO Advocate is a publication with the specific purpose of providing information on, and insight into, recent court decisions, legal strategies, and emerging issues that will impact the field of employment and civil rights laws. Furthermore, in our pursuit to protect employees' rights, we want to provide a forum where AFGE representatives and litigators will receive an acknowledgment for their continued effort in combating employment discrimination, by allowing them the opportunity to publicize their recent victories and for others to learn about strategies that have been successful.

If you have any local victories that will strengthen AFGE's legal posture and ability to fight for civil, human, women's, and workers' rights, SEND THEM IN. We are looking for legal issues that are educational and of interest to our members and cases that are precedent setting achievements. Please submit a summary of your case to us at eeo@afge.org. It's time for you to be recognized and acknowledged for your skills, knowledge, and hard earned victory and at the same time help educate your brothers and sisters!

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