



JUNE 2009

PILCHAK COHEN & TICE, P.C.
THE EMPLOYERS LAWYERS

WORKPLACE CHRONICLE

U.S. SUPREME COURT EXTENDS TITLE VII RETALIATION COVERAGE

By Rhonda Armstrong

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Recent Victories for Our Clients

PCT successfully tried a jury trial in Oakland County Circuit Court. Plaintiff, a former Executive Vice President, claimed his former employer breached his employment contract when it refused to pay him a six-figure bonus and similar big severance. The executive, who was highly compensated, asserted his termination had been without cause and he was entitled to several hundred thousand dollars in damages. He claimed the company's CEO was vindictive, spiteful and retaliated to deny him "fair" compensation. The jury was not convinced. Motivation or fairness aside, the jury agreed that the contract was not breached. Post employment compensation was discretionary and not contractual. Additionally, had the outcome been different, actual attorney fees could have been due as well. Our client early on resolved to take a principled stand and was vindicated.



The United States Supreme Court recently decided *Crawford v. Metropolitan Gov't of Nashville and Davidson County*, 129 S. Ct. 846 (Jan. 26, 2009), a decision that broadens Title VII's retaliation protection. Title VII contains two anti-retaliation clauses, making it unlawful to discriminate against an employee: (1) because he/she opposes illegal practices (commonly referenced as the "opposition clause"), or (2) because he/she has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the subchapter (commonly referenced as the "participation clause"). **The Supreme Court held that Title VII's opposition clause protects an employee who merely speaks out about discrimination during an employer's internal investigation (even though the employee herself did not initiate any complaint).** This decision follows a prior Supreme Court decision, *Burlington Northern v. White*, 548 US 53 (2006), that also broadened the scope of actionable Title VII retaliation (see Summer 2006 PCT Chronicle).

In *Crawford*, a human resource (HR) officer commenced a harassment investigation after hearing rumors of misconduct. In doing so, the HR officer met with Ms. Crawford and asked whether she had witnessed improper conduct by a coworker. Crawford cited several instances of inappropriate behavior. Shortly thereafter, Crawford was fired for embezzlement. The Sixth Circuit held that Crawford was not protected by Title VII's opposition clause since she did not initiate or instigate the complaint. The Supreme Court, however, reversed. In its reasoning, the Supreme Court looked to the dictionary definition of "oppose" (as it is not defined by Title VII) – "to resist or antagonize...; to contend against;

to confront; resist; withstand" and found Crawford's reports to be "resist[ant]" or "antagoni[stic]" within the dictionary definition. The Court stated "nothing in the statute requires a freakish rule of protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in some words when her boss asks a question."

This case expands the scope of events that may now be actionable under theories of retaliation in a climate where retaliation claims are already on the rise. According to EEOC Charge Statistics, last year (2008) retaliation claims under all statutes comprised 34.3% of the EEOC's total charges – an increase from 32.3% in the prior year (2007). It is unclear what other circumstances may be deemed actionable under Title VII as the Court acknowledged that not *all* employee reports will support a retaliation claim. Where the line will be drawn will be up to the lower courts. However, the Crawford case provides yet another example.



In light of the above, employers should recognize that employees who provide information in investigations have "protected" status. Likewise, employees who speak to or provide statements to the EEOC/Michigan

Department of Civil Rights, or testify in depositions in discrimination litigation are also "protected." Often, those who are most eager to help a discrimination claimant are not "enamored" with the employer themselves, possibly because they are on "thin ice" for performance or attendance reasons. Accordingly, adverse decisions regarding those who have participated in investigations should be made carefully, and reviewed with counsel.



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- I-9 Forms
- Policy—Wage Deductions
- Relief of Charge
- Sample CCW Memo
- Sample Certification for Users of Consumer Report
- Severance Agreement and Release of Claims
- Severance Agreement and Release of Claims (In Compliance With Older Worker Benefit Protection Act)
- Social Security Privacy Policy
- WH Forms (under FMLA guidelines) 380-E, 380-F, 381, 382, 384, 385
- Workplace Violence—Risk Factor Checklist

ADA AMENDMENT ACT - RECENT SIXTH CIRCUIT CASE CONFIRMS EMPLOYEES ENJOY BROADER PROTECTION

In February, the Sixth Circuit recently addressed its first case under the ADA Amendments Act (“ADAAA”), which amended the Americans with Disabilities Act (“ADA”). The ADA prohibits discrimination against persons with disabilities, and also requires covered employers to extend reasonable accommodations to disabled individuals unless they can prove undue hardship. As PCT summarized in its October/November 2008 issue, *Bad News! The Pendulum Has Officially Started To Swing Back*, the ADAAA reversed prior court cases which held, among other things, that mitigating measures could be considered when assessing whether an employee is “disabled,” and that such findings should now be “in favor of broad coverage” for employees. The ADAAA was enacted on September 25, 2008, and did not become effective until January 1, 2009. In PCT’s first article, we predicted that courts could conceivably apply the more “employee-friendly” definition of “disability” to situations arising prior to 2009. The case of *Jenkins v. National Bd. of Medical Examiners*, 2009 U.S. App. LEXIS 2660; 2009 FED App. 0117N (6th Cir. 2009), confirms what PCT predicted.

In *Jenkins*, a third year medical student sought an injunction after his request to be allowed additional time to take a medical licensing test was denied. Plaintiff, Kirk Jenkins, was diagnosed with a reading disorder at an early age and had previously been given accommodations at earlier stages of his education. The licensing board, argued that the ADAAA could not sup-



port the employee’s claim, relying on a line of cases from other circuits holding that the new definition would not apply in cases where the litigation was underway before the effective date of the ADAAA. The Sixth Circuit, however, vacated the district court’s ruling in the licensing board’s favor and distinguished the line of cases on the basis that employees in *those* cases sought damages, whereas the plaintiff in the *instant* case sought injunctive and prospective relief for a future accommodation. In its reasoning, the Sixth Circuit stated “Congress made clear that it intends for the ADAAA to give broad protection to persons with disabilities” and that “[i]t can be said...the categorical threshold scope of the ADA’s coverage has been broadened.”

The above decision serves as confirmation that the new definition of “disability” is more “employee-friendly.” The above case can almost certainly support an employee’s argument that the new definition should apply to any cases seeking injunctive relief (e.g., requiring the employer to offer a reasonable accommodation versus the payment of damages for discrimination), even if filed before the effective date. It remains to be seen, however, as to what other contexts courts will apply the new definition. Conceivably, the above-rationale could also support an employee argument that he/she is *now* entitled to an accommodation (as now covered under the broader ADAAA definition), even though the employer may have previously denied an accommodation request, had a legally sufficient basis to do so, and the employee has not made a renewed request. If these circumstances exist, employers should consult with their legal counsel to minimize the risk that any employment decision will subject them to liability. ❖

THE U.S. HOUSE PASSES THE PAYCHECK FAIRNESS ACT

By John Schwartz

In the wake of the Lilly Ledbetter Fair Pay Act, the House has passed the proposed Paycheck Fairness Act by an even stronger bipartisan vote (256-163) than the Ledbetter bill (247-171). The Paycheck Fairness bill is currently is awaiting Senate consideration.

If signed into law, the Paycheck Fairness Act would expand available remedies by making compensatory and punitive damages available in Equal Pay Act cases, and authorize class actions. The bill also adds non-retaliation requirements, increases penalties for violations of the Act, and authorizes the Labor Secretary to seek additional compensatory or punitive damages. The bill also places the burden on the employer to prove that unequal pay decisions are job-related and due to business necessity, and not discriminatory. ❖

THE FTC's "RED FLAGS RULE": WHAT YOU NEED TO DO TO COMPLY

By John Schwartz

In an effort to curb identify theft in credit transactions, Congress enacted the Fair and Accurate Credit Transactions Act ("FACTA") in 2003. The "Red Flags Rule" is the product of regulations issued by the Federal Trade Commission (FTC) in response to the FACTA. The regulations require that any business that may provide credit to customers, clients, or patients take certain steps to guard against identify theft, which include developing and maintaining a written policy in accordance with the Rule, appointing a leader responsible for implementing and administering the program, and training staff members to carry out the program.

The purpose of the program is to establish procedures to detect patterns, practices and other specific activities (i.e., "Red Flags") that could indicate identify theft and to mitigate the harmful effects of such theft.

The penalties for non-compliance can be significant. First, the FTC may seek up to \$2,500 for each independent violation; second, the State of Michigan may bring an enforcement action and seek up to \$1,000 in



penalties for each violation; third, each customer, client, or patient is able to recover their actual damages incurred if his identify is stolen via your business, if your business has not followed the Red Flags Rule.

Is your business required to comply?

The "Red Flags Rule" applies to "*financial institutions*" and "*creditors*" who maintain "*covered accounts*." A "financial institution" is a bank, savings and loan, credit union, or other entity that holds a "transaction account" belonging to a consumer. A "transaction account" is an account that allows the owner to make payments or transfers. Examples include checking accounts, savings accounts that permit automatic transfers, and share draft accounts. Another example would be a brokerage account that allows consumers to write checks.

The definition of a "creditor" is broad and includes anyone who regularly allows a purchaser of goods or service to defer payment. The deferred payment creates an account (i.e., an account receivable). Some examples of creditors are finance companies, automobile dealers, medical/dental practices, mortgage brokers, utilities, and telecommunications companies. Even if you're a non-profit or government agency, you still may be a creditor if you accept deferred payments, including insurance payments, for goods or services. However, simply accepting credit cards as a form of payment does not make you a creditor under the Rule.

If you determine you're a financial institution or a creditor, the next step is to see if you have "covered accounts." There are two types of covered accounts. One is an account used mostly for personal, family, or household purposes that involves multiple payments or transactions. Examples include credit card accounts, mortgage loans, car loans, margin accounts, cell phone accounts, utility accounts, and checking or savings accounts.

The other "covered account" is one for which there is a foreseeable risk of identity theft. For example, one type of account that should be considered for coverage because it may be vulnerable to identity theft is a *small business or sole proprietorship account*. In determining whether you have such an account, consider the risks associated with how the accounts may be opened or accessed (i.e. what type of interaction and documentation is required) as well as your experience with identity theft.

If your business or organization is a financial institution or creditor, but does not have any covered accounts, you don't need a program. But if you have covered accounts, you must develop a written program or policy to identify and address the red flags that could indicate identity theft.

Have questions about how you can comply with the Rule? Give us a call. You can also find a free "Red Flags Rule" sample policy on our website.

www.mi-employmentlaw.com ❖

KRUSTY KRAB PREVAILS IN WAGE CLAIM BY MEDIA STAR

By William Pilchak

In a mock trial held as part of PC&T's first Annual Law Day program for Will Rogers Elementary School, SpongeBob Square Pants failed to obtain a jury verdict against the Krusty Krab Restaurant owned by Mr. Krabs. The jury found that SpongeBob had simply donated his time on weekends performing chores.

President Dwight Eisenhower designated May 1 each year as "Law Day" in 1958. This year's theme, established by the American Bar Association, was the 200th Anniver-

sary of the birth of Abraham Lincoln. Thirty students walked two blocks from Will Rogers Elementary, of the Pontiac School District, for a pizza lunch and to hear a program on law, leadership and education. Attorneys from PC&T presented a slide show program illustrating how many of the Presidents overcame childhoods of poverty and hardship to become president. Additionally, members of the firm illustrated how they also overcame obstacles in their lifetime. Naturally, PC&T noted how the election of the first African American president signified

that all doors are open to the children who attended. To inspire the students to achieve academically, each was provided an illustrated children's dictionary and encouraged to learn one new word each day.

A key theme of the event was identifying the emerging strengths of the students, and how that can lead to success down the road. Judge Preston Thomas, Chief Judge of the 50th District Court in Pontiac, not only presided over the mock trial, but also gave a

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Mock Trial

stirring presentation on how one becomes a leader through self-discipline and community support.

PC&T has pledged continuing support to Will Rogers Elementary, by holding an annual Law Day presentation. In addition, PC&T has created an annual competitive scholarship of at least \$1000, for a former Will Rogers student, now ready to attend college in the fall. ❖

Right:
Plaintiff Sponge-Bob (William Pilchak) and his attorney Rhonda Armstrong prepare for trial against defendant Mr. Krabs (Robert Tice) and attorney John Schwartz.



Left:
Plaintiff's witness Patrick Star (Daniel Cohen) provides testimony on SpongeBob working extra weekends at the Krusty Krab while Judge Preston Thomas presides.