Crowell

Client Alert

California Employee Accused of Discrimination Barred from Proceeding With Own Discrimination and Defamation Claims

February 6, 2013

For years, lawyers who represent employers have counseled clients not to discuss the reasons for adverse actions taken against employees (*e.g.* reasons for termination) with individuals who do not have a need to know. The recent decision by the California Court of Appeal for the Sixth Appellate District in *McGrory v. Applied Signal Technology*, H036597 (January 24, 2013), serves as a reminder, highlighting the reasons that lawyers give such advice. The employer in *McGrory* engaged in a discussion about the plaintiff's discharge with one of the plaintiff's former co-workers, who later informed the plaintiff of that discussion. That led the plaintiff to file defamation and discrimination claims against the employer. Although the employer ultimately prevailed, its win came at a significant cost, *i.e.*, the expenditure of attorneys' fees and other costs of litigation.

John McGrory was a manager at Applied Signal Technology, Inc. He issued a verbal warning for poor work performance and a written performance improvement plan (PIP) to one of his subordinates, who responded by accusing Mr. McGrory of discrimination based on her gender and sexual orientation. At the company's request, an outside female attorney investigated the complaint against Mr. McGrory. The investigator concluded that Mr. McGrory had not discriminated against his subordinate. However, Mr. McGrory was not absolved of all wrongdoing. The investigator also concluded that Mr. McGrory had been untruthful and uncooperative during the investigation. This conclusion led to Mr. McGrory's discharge.

A day or two following Mr. McGrory's discharge, another of his subordinates, Irene Chen, spoke to the employer's Vice President of Human Resources about the discharge. According to Ms. Chen, she asked the VP if Mr. McGrory had enough warning before he was fired, and the VP responded that he did. She also asked if Mr. McGrory knew that he could get fired for not cooperating in the investigation, and the VP responded that Mr. McGrory should have known. Two or three days later, Ms. Chen told Mr. McGrory about her conversation with the VP, stating that the VP had told her that the "termination was preceded by a warning, that a manager should not have to be warned and that [Mr. McGrory] had brought the termination upon [himself] because he was uncooperative during the investigation."

Mr. McGrory sued, alleging claims for defamation and gender discrimination. As to the defamation claim, Mr. McGrory alleged that he had not been uncooperative during the investigation and that he had not been warned previously that his conduct could lead to termination. Litigation ensued. Depositions were taken. Money was spent. The employer eventually prevailed on summary judgment. The Court of Appeal affirmed the ruling in the employer's favor, concluding as to the defamation claim that the communication between Ms. Chen and the VP was protected by the qualified privilege embodied in California Civil Code Section 47(c), which section protects, *inter alia*, communications made without malice to a person interested in the subject of the communication, in response to that person's request. The Court of Appeal found that the privilege applied because no evidence

was presented showing that the VP had acted with malice. As to the discrimination claim, the Court of Appeal concluded that Mr. McGrory had failed to satisfy his ultimate burden of showing that his termination was motivated by his gender.

The employer in *McGrory* won the case and learned a valuable and expensive lesson in the process. Employers should refrain from engaging in any communication regarding employees' work performance, including reasons for a termination, demotion or other adverse employment action, unless that communication is necessary. By way of example, supervisors and managers should communicate with HR regarding employee performance issues, HR should record the reasons for termination or other adverse actions in the employee's personnel file, and the employer may respond completely and accurately to any claim for unemployment insurance benefits that a terminated employee may file. These communications are necessary to business operations or to the defense of legal claims. Conversely, employers should not divulge such information to curious co-employees, prospective future employers of a discharged employee, or anyone else who does not have a need to know. As the employer in *McGrory* learned, such communications may prove to be expensive, even when the employer's comments are truthful. To reduce the risk of potential litigation, employers should adopt a practice (a) to refrain from divulging unnecessarily information about their employees, and (b) to respond to outside inquiries made about employees by confirming only the dates of employment.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Kris D. Meade
Partner – Washington, D.C.
Phone: +1.202.624.2854
Email: kmeade@crowell.com