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Supreme Court Clarifies the Circumstances in Which Employers May Be Liable for Retaliation Under Title VII

In *Crawford v. Metropolitan Govt. of Nashville and Davidson County, Tennessee*, No. 06-1595, the United States Supreme Court recently resolved a conflict among lower federal courts concerning the types of employee conduct that can trigger protection from retaliation under Title VII of the Civil Rights Act of 1964. With seven Justices joining the majority opinion and the two remaining Justices concurring, the Court held that an employee who answers a question about a fellow employee’s improper conduct during an internal sexual harassment investigation is engaging in “protected activity” under Title VII. The Court rejected the U.S. Court of Appeals for the Sixth Circuit’s determination that answering questions during an internal investigation was not protected because it was not “active” opposition to unlawful conduct.

Title VII Retaliation Claims

Title VII, in addition to prohibiting discrimination, protects employees from various forms of retaliation. Specifically, Title VII’s “opposition clause” prohibits retaliation against an employee because he or she has opposed any practice made unlawful by Title VII, and the statute’s “participation clause” prohibits retaliation against an employee because he or she has “made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing” under Title VII. The scope of this anti-retaliation protection has been the subject of much litigation over recent years.

Crawford’s Actions and the Lower Court Rulings

Plaintiff Vicky Crawford was a 30-year employee of Defendant Metropolitan Government of Nashville (Metro), and the head of its payroll division. Metro interviewed Crawford as part of its internal investigation of allegations of sexual harassment by Metro’s director of employee relations. During her interview, Crawford stated that she and other employees had also been sexually harassed by the accused employee. Crawford had never before disclosed these allegations to her superiors. Nor did she follow-up on the allegations after her interview. And Metro took no action against the alleged harasser as a result of Crawford’s disclosures.

The *Crawford* decision clarifies the scope of retaliation claims under the opposition clause, and expands that scope in the Sixth Circuit and those other circuits where active opposition previously had been required. Now all federal courts must apply the Court’s expansive interpretation of Title VII retaliation rights as set forth in *Crawford*.

Metro subsequently terminated Crawford's employment. According to Metro, it had discovered evidence during the internal investigation of the harassment complaint that suggested possible financial improprieties in the payroll division. Metro asserted that it therefore conducted a separate internal investigation into that issue, concluded that Crawford had embezzled funds, and terminated her employment for that reason.

After exhausting her administrative remedies, Crawford sued Metro in federal court claiming that Metro's stated reason for her discharge was false and that the real reason for her termination was unlawful retaliation for her protected activity under Title VII. In particular, she claimed that her participation in the internal sexual harassment investigation was protected conduct under Title VII's participation clause and that the statements she made during her interview were protected conduct under the statute's opposition clause.

The trial court rejected Crawford's claim under Title VII's opposition clause, concluding that the opposition clause requires overt, active opposition to unlawful conduct and that Crawford's conduct (that is, merely answering questions as a part of an interview and neither initiating any complaint before being interviewed nor pursuing her own complaint after the interview) was passive and therefore insufficient to qualify as legally protected opposition. The trial court rejected Crawford's participation clause claim based on earlier Sixth Circuit decisions that held that participation in an employer's internal investigation is protected only where the investigation is conducted pursuant to a pending EEOC investigation of a charge of discrimination.

The Sixth Circuit affirmed the trial court's holdings, and Crawford sought Supreme Court review. The Supreme Court agreed to hear the case because the Sixth Circuit's decision conflicted with the decisions of other federal appellate courts, particularly with respect to the "opposition clause."

Supreme Court's Ruling in *Crawford* Clarifies the Scope of Title VII Retaliation Rights

The Court overturned the Sixth Circuit's decision, basing its decision solely on its review and analysis of Title VII's opposition clause and choosing not to reach the question of whether Crawford's statements made during the internal investigation amounted to protected conduct under the statute's participation clause. The Supreme Court rejected the lower courts' narrow interpretation of the opposition clause, holding that Crawford's statements made during Metro's internal investigation of another employee's sexual harassment complaint were protected under Title VII's opposition clause.

In reaching this conclusion, the Court held that the term "oppose" bears its "ordinary meaning." That is, the term means "to resist or antagonize...; to contend against; to confront; resist; withstand." According to the Court, "[t]he statement Crawford says she gave to [the human resources officer] is...covered by the opposition clause, as an ostensibly disapproving account of sexually obnoxious behavior toward her by a fellow employee, an answer she says antagonized her employer to the point of sacking her on a false pretense." In his concurring opinion, Justice Alito underscored his understanding that "the Court's holding does not and should not extend beyond employees who testify in internal investigations or engage in analogous purposive conduct." Justice Alito also observed that "it is questionable whether silent opposition is covered by the opposition clause."

The Court rejected Metro's argument that employers will be less likely to raise questions about possible discrimination during internal investigations if a retaliation claim can be made so easily. The Court found this argument "unconvincing," noting that employers already have "a strong inducement to ferret out and put a stop to any discriminatory activity in their operations as a way to break the circuit of imputed liability."

The Supreme Court's decision may have created uncertainty concerning a different aspect of opposition clause claims. Before *Crawford*, several courts had concluded that an employee's opposition is only protected under Title VII if a reasonable person would have believed that the conduct about which the employee complained was unlawful. See, e.g., *Clover v. Total Syst. Servs., Inc.*, 176 F.3d 1346 (11th Cir. 1999) (internal complaint that older boss was engaging in flirtatious behavior with 17-year-old subordinate not protected activity, because reasonable person would not believe such flirtation was unlawful). The Supreme Court in *Crawford* did not directly address this issue. In a footnote, however, it characterized the alleged harasser's conduct, as revealed by Crawford during the internal investigation, as "gross clowning." This footnote arguably leaves open the possibility that opposition to conduct similar to that reported by Crawford would be sufficient to meet the reasonable person standard under *Clover* and similar cases. Thus, it would not be surprising if plaintiffs in future cases will cite *Crawford* to argue that opposition is protected even where the reasonable person standard is not met or to argue that relatively innocuous conduct is sufficient to meet that standard.

The Bottom Line for Employers

The *Crawford* decision clarifies the scope of retaliation claims under the opposition clause, and expands that scope in the Sixth Circuit and those other circuits where active opposition previously had been required. Now all federal courts must apply the Court's expansive interpretation of Title VII retaliation rights as set forth in *Crawford*.

As a result of *Crawford*, employers must take even greater care in recognizing, investigating, and documenting discrimination complaints. Employers also must be even more diligent in ensuring that terminations and other adverse employment decisions are based on legitimate, nondiscriminatory and non-retaliatory reasons, and that such decisions are properly documented. In cases where an employer is contemplating disciplining an employee who has disclosed alleged discrimination or harassment, it is well-advised to delegate the discipline decision to someone who has no knowledge of the disclosure of alleged discrimination or harassment. In so doing, the employer can better establish that the decision was free from any possible retaliatory motive because the decision-maker was unaware of any protected conduct.

Finally, while *Crawford* was decided under Title VII, given the close parallels between Title VII and other federal and state discrimination statutes, employers should assume that its rationale also applies to claims under those other statutes.

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