EPSTEIN BECKER GREEN | CLIENT ALERT

U.S. Supreme Court Considers Title VII Protection For Employee Cooperation in Internal Investigations

by Kathleen Williams and Corey Perman

October 2008

On October 8, 2008, the United States Supreme Court heard argument in *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee ("Metro").* This case addresses whether employees who cooperate with an internal investigation of alleged sexual harassment, in the absence of an EEOC charge or even an internal complaint, are protected against retaliation under Title VII of the 1964 Civil Rights Act ("Title VII"). To the extent the Court were to reverse the underlying Sixth Circuit opinion and broaden the scope of the retaliation provisions under Title VII, there will be an expanded class of employees who will be able to assert a prima facie case of retaliation, as detailed below.

Title VII's Retaliation Provisions

This case arises under the retaliation provisions of Title VII, which are similar to those under the Age Discrimination in Employment Act and the Americans With Disabilities Act. Section 704 of Title VII prohibits retaliation against an employee:

> because [the employee] has opposed any practice made an unlawful employment practice *by this subchapter*, ["*the Opposition Clause*"], or
>
> because [the employee] has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing *under this subchapter* ["*the Participation Clause*"].
>
> 42 U.S.C. § 2000e-3(a). *See Crawford*, 2006 WL 3307507 **1 (6th Cir. Nov. 14, 2006).

Background of the Case

Vicky Crawford, a 30-year employee of Metro, was discharged from her Payroll Coordinator position following an internal investigation into irregularities within the payroll division, including failure to pay garnishments to the courts, failure to make annuity payments, and late

federal tax filings. She challenged her discharge as retaliatory under Title VII, alleging it was motivated by her participation in an internal investigation conducted by Metro several months prior to her discharge.

The underlying investigation began in May 2002, when an attorney with the Metro legal department opened an investigation into the behavior of a newly hired Director of Employee Relations, Dr. Gene Hughes, after hearing informally that people had expressed concern about his behavior. As part of the investigation, many employees were interviewed. Crawford told investigators that Hughes "had sexually harassed her and other employees" on multiple occasions. 2006 WL 3307507 at **1. She described "repeated instances of offensive, objectionable, and unwelcome conduct" by Hughes. Specifically, Crawford stated that Hughes grabbed his crotch in her presence, that he had asked to see her breasts and that, on one occasion, he "grabbed her head and pulled it to his crotch." *Id.* Crawford claims that her sexual harassment allegations were corroborated by two other female employees.

Metro's investigators concluded that Hughes had "engaged in inappropriate and unprofessional behavior, though not to the extent of Crawford's allegations," *id.*, and recommended training and education for the staff but no discipline of Hughes. *Id.* Nonetheless, Crawford alleges that she and two other female employees who were interviewed were subsequently investigated on other grounds and ultimately discharged.

Following her termination, Crawford filed a lawsuit alleging that she had been dismissed in retaliation for what she told investigators about Hughes. The Western District of Tennessee dismissed Crawford's complaint, holding that Crawford had failed to allege that she had engaged in protected activity under Title VII and therefore could not establish a *prima facie* case of retaliation. *See* 2005 WL 6011557 (M.D. Tenn. Jan. 6, 2005).

Sixth Circuit Decision

The U.S. Court of Appeals for the Sixth Circuit affirmed the district court ruling that Crawford had not engaged in protected activity under either the Opposition Clause or the Participation Clause of Title VII. The Court used the widely accepted standard of proof for retaliation: "[i]n order to establish a claim for retaliation, Plaintiff must show that (1) she engaged in protected activity; (2) Metro knew that she engaged in this protected activity; (3) Metro subsequently took an employment action adverse to Plaintiff; and (4) a causal connection between the protected activity and the adverse

employment action exists." 2006 WL 3307507 at **2. The Sixth Circuit analyzed only the first prong of this test, finding as a matter of law that Crawford had not engaged in protected activity under either clause, and thus failed to establish a *prima facie* case.

Opposition Clause. The Sixth Circuit affirmed that Crawford had not engaged in protected activity under the Opposition Clause, relying on prior Sixth Circuit precedent that opposition means: (a) complaining to anyone (management, unions or newspapers) about unlawful practices; (b) refusing to obey an order because the worker thinks it is unlawful under Title VII; or (c) opposing unlawful acts by persons other than the employer—*e.g.,* former employers, unions and co-workers—*and* that it requires "active, consistent, opposing activities" in order to warrant protections against retaliation. Because Crawford merely supplied information in response to questions to her, and did not instigate or initiate any

complaint, the Sixth Circuit found she had not engaged in the kind of overt opposition required by Title VII.

Participation Clause. The Sixth Circuit further held that an employee's participation in an internal investigation initiated by an employer in the absence of any pending EEOC charge does not constitute protected activity under the Participation Clause. It relied on prior Sixth, Eighth, Ninth and Eleventh Circuit precedent. Because the investigation was informal and not prompted by a formal EEOC charge, the Participation Clause was not invoked. In so holding, the Court rejected Crawford's policy argument that the Supreme Court's decision in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), creating an affirmative defense for employers who investigate and resolve sexual harassment complaints, encourages and perhaps actually *requires* investigations in the absence of formal complaints, and thus also should insulate employees who participate in such early stage investigations.

Supreme Court Oral Argument

The Supreme Court heard oral argument on October 8, 2008. The range of questions suggests that the Court may be particularly focused on the Opposition Clause, and that there may be a general willingness on the Court's part to test the outer boundaries of the Opposition Clause. Specifically, there were many questions by the Justices with regard to how direct, how active, and how specific an employee's opposition must be in order to become "protected activity." In particular, Justices Scalia, Roberts and Souter engaged counsel repeatedly over the potential overreaching from broadly interpreting the "Opposition Clause". Justice Souter remarked, "Anybody who thinks sexual harassment is bad and later gets fired can claim retaliation under the statute if it turns out just as a matter of good luck that somebody was being sexually harassed unbeknownst to the speaker."

Supporting Crawford, the Department of Justice as amicus noted that the EEOC's current position on this issue is that an employer's initiation of an investigation into alleged discrimination "is sufficient to demonstrate the reasonableness of the

employee's belief that by providing information relevant to the inquiry she is opposing an employment practice made unlawful by Title VII." Crawford's attorneys argued that witnesses and victims will refuse to cooperate with employer harassment investigations if they risk being fired for what they say.

In response, Metro argued that Crawford was a passive participant who only provided Metro's investigator with a disclosure of information about Hughes' behavior, but not an actual request that something be done about it. Counsel thus argued that Crawford failed to express, either during or after her interview, active "opposition" to the behavior as required by the Opposition Clause.

Significance

The Courts that have examined the limits of the Participation Clause have held that it applies only in the context of a statutory charge and investigation. Though the Government's position before the Supreme Court is that the Participation Clause protects Crawford, EEOC's own Compliance Manual is to the contrary, stating that the Participation Clause applies to individuals challenging employment discrimination under the statutes enforced by EEOC in

EEOC proceedings, in state administrative proceedings, as well as in federal court proceedings, and to individuals who testify or otherwise participate in such proceedings. See EEOC Compliance Manual, Section 8-3. Courts also generally have acknowledged it has broader reach and applicability than the Opposition Clause, with some courts applying it in circumstances to afford protection even where the underlying charge may be malicious, defamatory, or bad faith. Thus, to the extent the Court expands the reach of the Participation Clause, the danger is that an employer's right to discipline or discharge an employee for bad faith, false or malicious complaints could be compromised.

Though the Opposition Clause sets a lower threshold, it does require that an employee "convey to the employer his or her concern that the employer has engaged in a practice made unlawful" by Title VII. *See Hinds v. Sprint United Mgmt. Co*., 2008 WL 1795059 at *11 (10th Cir. Apr. 22, 2008). Case law examining the issue has required a showing of active opposition, as opposed to mere disclosure, though there is some split of authority on this issue. To the extent the Court reverses the Sixth Circuit on this issue, and finds that passive sharing of information becomes "opposition," the danger is that an employer may react by limiting the scope of relevant investigations.

For more information about this Client Alert, please contact:

Kathleen Williams
Washington, DC
202-861-1871
kwilliams@ebglaw.com

Corey Perman
Chicago, IL
312-499-1462
cperman@ebglaw.com

* * *