

Title VII's Retaliation Clause Protects Employee Who Discloses Unlawful Conduct in Response to Employer's Internal Investigation

by **Peter M. Stein** and **Dean R. Singewald II**

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On January 26, 2009, the United States Supreme Court expanded the scope of the protection of Title VII of the Civil Rights Act of 1964 ("Title VII") forbidding retaliation by employers against employees who report workplace race or gender discrimination. (*Crawford v. Metro. Gov't of Nashville and Davidson County*, No. 06-1595, January 26, 2009). In a unanimous decision, the Court held that the "opposition clause" of the Title VII anti-retaliation provision protects an employee who speaks out about unlawful discrimination in answering questions during an employer's internal investigation. With the potential for an increase in retaliation claims stemming from this decision, employers need to be vigilant during any investigation of claims of unlawful discriminatory conduct to identify any additional claims revealed by employees, to investigate those claims, and to take steps to protect those employees who answer questions during an internal investigation from retaliation.

I. Background

Plaintiff/Petitioner Vicky Crawford ("Crawford") claimed her employer, Defendant/Respondent Metropolitan Government of Nashville and Davidson County, Tennessee ("Metro"), terminated her employment in retaliation for her disclosure of several instances of sexually harassing behavior when asked if she had witnessed "inappropriate behavior" during Metro's investigation of rumors of sexual harassment by a Metro employee. Crawford, a thirty-year employee of Metro, had not complained of the sexually harassing behavior that led to the investigation, but she disclosed that she had been subjected to the behavior when prompted during the investigation. No corrective action was taken against the employee.

Crawford filed a charge alleging a Title VII violation with the Equal Employment Opportunity Commission (EEOC), and thereafter initiated suit in federal court in Tennessee. Crawford accused Metro of violating both the "opposition clause"¹ and the "participation clause"² of the Title VII anti-retaliation provision.

¹ The "opposition clause" makes it "an unlawful employment practice for an employer to discriminate against any of his employees ... because he has opposed any practice made an unlawful employment practice by [Title VII]." 42 U.S.C. §2000e-3(a).

² The "participation clause" makes it "an unlawful employment practice for an employer to discriminate against any of his employees ... because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]." 42 U.S.C. §2000e-3(a).

The District Court granted Metro summary judgment, holding that Crawford's claim failed under both clauses of the anti-retaliation provision. It reasoned that the opposition clause provided no protection to Crawford, because she had not "instigated or initiated any complaint," but rather had "answered questions by investigators in an already-pending internal investigation, initiated by someone else." The participation clause likewise provided no protection, because Sixth Circuit precedent limited the clause to protecting "an employee's participation in an employer's internal investigation ... where that investigation occurs pursuant to a pending EEOC charge." The Court of Appeals affirmed the lower court's decision on the same grounds, and specifically held that the opposition clause "demands active, consistent 'opposing' activities to warrant ... protection against retaliation." Because the Sixth Circuit's decision conflicted with those of other Circuits, the Court granted Crawford's petition for certiorari.

II. The Court's Decision

The Court, in an opinion written by Justice David Souter, began by addressing whether the opposition clause protects an employee who discloses unlawful discrimination, not on her own initiative, but in responding to questions during an employer's internal investigation.³ Under the opposition clause, it is unlawful for an employer to discriminate against an employee because the employee has "opposed" any practice made unlawful by Title VII. The term "oppose" is undefined by the statute, and thus carries its ordinary meaning. The Court concluded that Crawford's response when questioned about witnessing an employee's inappropriate behavior was protected by the opposition clause, as "an ostensibly disapproving account of sexually obnoxious behavior toward her by a fellow employee." Indicating that the term "oppose" goes beyond "active, consistent" behavior in ordinary discourse, the Court explained:

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.

In reaching its decision, the Court found unconvincing Metro's argument that employers would have less incentive to be proactive in investigating possible discrimination in the workplace if the Court expanded the protection of the anti-retaliation provision. The Court reasoned that the attraction of an *Ellerth-Faragher* affirmative defense—that an employer is vicariously liable for workplace discrimination under certain circumstances, unless the employer can show that it has "exercised reasonable care to prevent and correct promptly any" discriminatory conduct and that the employee "unreasonably failed to take advantage of preventive or corrective opportunities provided by the employer"—provides a strong incentive to employers to ferret out and put a stop to any discriminatory activity in their operations. Such incentive the Court believes will not be diminished by its ruling.

In the concurring opinion written by Justice Samuel Alito, and joined by Justice Clarence

³ Chief Justice John Roberts, and Justices John Paul Stevens, Anthony Scalia, Anthony Kennedy, Ruth Bader Ginsburg, and Stephen Breyer joined in the opinion of the Court, with Justices Samuel Alito and Clarence Thomas filing an opinion concurring in the judgment.

Thomas, Justice Alito cautioned that the Court's opinion should not be seen as granting Title VII protection to "silent opposition" to unlawful workplace discrimination. Rather, he views the Court's opinion as limited to circumstances where a employee's "opposition" occurs during an internal investigation into unlawful discrimination or other "analogous purposive conduct."

Because the Court concluded that Crawford's conduct was covered by the opposition clause, it did not reach her argument regarding the participation clause.

III. Recommendations for Employers

As a result of the *Crawford* decision, the potential exists for an increase in the number of retaliation claims brought against employers. Employers are strongly encouraged to immediately revisit their investigation practices to ensure appropriate procedures are in place to investigate all claims of unlawful discriminatory conduct in the workplace and to prevent retaliation from occurring against those employees making the claims. Employers need to be vigilant during any investigation of such conduct to identify any additional claims revealed by employees during the investigation. Any such additional claims need to be independently investigated, and the employees making the claims should be protected from retaliation.

The *Crawford* decision makes clear that the anti-retaliation provision of Title VII extends to an employee who speaks out about unlawful workplace discrimination not on his or her own initiative, but in answering questions during an employer's internal investigation. As your company moves forward, particular care should be committed to assessing its investigation practices and procedures.

For more information about this Client Alert, please contact:

Peter M. Stein
Stamford
203-326-7420
PStein@ebglaw.com

Dean R. Singewald II
Stamford
203-326-7410
Dsingewald@ebglaw.com

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