

Client Alert



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February 2009

U.S. Supreme Court Clarifies Anti-Retaliation Protection

On January 26, 2009, the U.S. Supreme Court issued a unanimous decision that extends anti-retaliation protection to employees who, in response to questions posed during an employer's internal investigation, disclose information regarding inappropriate conduct that may constitute unlawful discrimination, such as sexually harassing behavior. In *Crawford v. Metropolitan Gov't of Nashville*, No. 06-1595, the Supreme Court held that the anti-retaliation provision in Title VII protects an employee who reports sexual harassment while cooperating with an employer's internal investigation, even if the employee did *not* initiate that investigation and never filed a formal charge of harassment.

Background

The Metropolitan Government of Nashville and Davidson County, Tennessee ("Metro") was investigating rumors of sexual harassment by the Metro School District's employee relations director, Gene Hughes, when a human resources officer asked Vicky Crawford whether she had witnessed any "inappropriate behavior." In response, Crawford described several instances of sexually harassing behavior, including Hughes repeatedly "put[ting] his crotch up to [her] window." Soon after the investigation was finished, Metro terminated Crawford and two other employees who reported being sexually harassed by Hughes. Crawford filed a charge of a Title VII violation with the EEOC, and then filed suit in the United States District Court for the Middle District of Tennessee.

Title VII provides that it is "an unlawful employment practice for an employer to discriminate against any of his employees . . . [1] because he has opposed any practice made an unlawful employment practice by this subchapter, or [2] because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a). The first clause is known as the "opposition clause," and the second is known as the "participation clause." Crawford alleged that Metro violated both clauses of the anti-retaliation provision.

The District Court granted summary judgment for Metro, holding that Crawford could not satisfy the opposition clause because she had not "instigated or initiated any complaint," but had "merely answered questions by investigators in an already-pending internal investigation, initiated by someone else." The District Court also held that Crawford could not satisfy the participation clause because precedent in that federal circuit confined the participation clause's protections only to investigations that occur pursuant to a pending EEOC charge.

The United States Court of Appeals for the Sixth Circuit affirmed the District Court's decision, holding that the opposition clause "demands active, consistent 'opposing' activities to warrant . . . protection against retaliation." The Court of Appeals also affirmed the District Court's holding that an employer only violates the participation clause when an investigation is conducted pursuant to a pending EEOC charge. The Supreme Court granted *certiorari* to resolve a conflict as to the scope and meaning of Title VII's anti-retaliation provision.

The Supreme Court's Decision

The Supreme Court reversed, holding that Title VII's anti-retaliation protection extends to an employee who speaks out about discrimination in answer to her employer's questions even though that employee took

no other action opposing discrimination. The term “oppose” is not defined by the statute, but the high Court found that 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.” The Court cited approvingly to the EEOC Compliance Manual: “When an employee communicates to her employer a belief that the employer has engaged in . . . a form of employment discrimination, that communication virtually always constitutes the employee’s *opposition* to the activity.” Because the Court found that Crawford’s conduct was covered by the opposition clause, it did not reach the question whether the Sixth Circuit also misread the participation clause.

The Court parried concerns that its interpretation of Title VII’s anti-retaliation provision, arguably, lowered the bar for filing such claims and would dissuade employers from carrying out internal discrimination investigations. As our readers know, the Supreme Court created an affirmative defense in *Burlington Industries, Inc. v. Ellerth* and *Faragher v. Boca Raton*, which provides a strong inducement to employers to investigate discrimination. The *Faragher/ Ellerth* affirmative defense provides that an employer may avoid liability for harassment when no tangible employment action was taken (*e.g.*, termination), if the employer can show (1) it exercised reasonable care to prevent and correct promptly any discriminatory conduct, and (2) the aggrieved employee unreasonably failed to take advantage of the employer’s preventive or corrective measures. The Court explained that a contrary holding to the one it reached would actually undermine the *Faragher/ Ellerth* scheme, reasoning, “If it were clear law that an employee who reported discrimination in answering an employer’s questions could be penalized with no remedy, prudent employees would have a good reason to keep quiet about Title VII offenses against themselves or against others.” Moreover, because the affirmative defense offers employers a strong inducement to conduct investigations and ferret out discrimination, the Court was unpersuaded that its ruling would undercut the *Faragher/ Ellerth* scheme.

Justice Alito, joined by Justice Thomas, concurred with the Court’s judgment, pointing out that the Court’s holding does not “extend beyond employees who testify in internal investigations or engage in analogous purposive conduct.”

Implications for Employers

Employers have long been on guard with respect to potential claims of retaliation. Justice Alito pointed out in his concurrence that between 1992 and 2007 retaliation charges filed with the EEOC have doubled. However, it is our experience that the Supreme Court was correct in its belief that the affirmative defense created by *Ellerth* and *Faragher* remains a strong incentive for employers to conduct internal investigations of discrimination, and its decision in *Crawford* will not, in our view, discourage employers from conducting those investigations.

Employers should take this opportunity to remind supervisors and managers of their responsibilities under anti-discrimination and anti-retaliation policies and laws. It is essential that employers train managers and supervisors in documenting employee conduct and recording objective business reasons for taking any employment action. Accordingly, supervisors/managers at all levels should be reminded that an employee who opposes discrimination in the workplace – by reporting discrimination or disclosing it during an internal investigation – should not be the subject of disciplinary action based solely on his/her opposition conduct alone. Moreover, given the new expanded reach of retaliation claims, human resources professionals must be particularly alert to preventing retaliation when reviewing all potentially adverse employment actions (*e.g.*, failure to promote, reductions in force).

As always, if you have any questions regarding this Client Alert, please contact your Proskauer relationship attorney or any of the attorneys listed below.

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Special thanks to associate, Rebecca Berkebile, Esq. for her contribution in drafting this Client Alert.

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