A Timely Analysis of Legal Developments

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The U.S. Supreme Court rules that an employee's disclosure of allegedly illegal conduct in response to questions posed during an internal investigation is protected activity for purposes of Title VII's anti-retaliation provisions.

U.S. Supreme Court Expands Employee Protections Against Retaliation

By Gregory C. Keating and Amy E. Mendenhall

The United States Supreme Court recently held, in a unanimous opinion, that Title VII's anti-retaliation provisions protect employees who disclose allegations of unlawful conduct while being interviewed as part of an internal investigation conducted by the employer. In *Crawford v. Metropolitan Gov't of Nashville and Davidson County*, No. 06-1595 (Jan 26, 2009), the Court held that an employee need not initiate a complaint in order to have engaged in protected activity under Title VII. Rather, when an employee reports inappropriate behavior during an internal investigation, that report qualifies as protected opposition to the inappropriate conduct. *Crawford* is just the latest in a series of Supreme Court decisions that further expand the concept of actionable retaliation and will, undoubtedly, lead to further litigation in this red hot area.

Defining "Opposition" for Purposes of Title VII's Anti-Retaliation Provisions

In *Crawford*, a human resources officer for Crawford's employer, a governmental entity, investigated rumors that an employee relations director was engaging in sexually harassing behavior. As part of her investigation, the human resources officer questioned a coworker of the complainant, Vicky Crawford. In responding to questions about the alleged harasser's conduct, Crawford disclosed that the alleged harasser had sexually harassed Crawford in the past. Shortly after completing the investigation, Crawford's employer terminated her employment. The stated reason for termination was embezzlement, which Crawford denied. Crawford filed a lawsuit alleging retaliation based on her disclosure of harassment during the interview questioning.

An individual seeking to establish the first element of a retaliation case—*i.e.*, that he or she engaged in "protected activity"—can do so in one of two ways: (1) opposing an unlawful employment practice ("opposition"); and (2) making a charge, testifying, assisting, or participating in any manner in an investigation, proceeding or hearing under Title VII ("participation"). Crawford's employer argued that her statements about the alleged harasser did not qualify as either opposition or participation, a position with

which the two lower courts agreed. The United States Court of Appeals for the Sixth Circuit held that Title VII demands "active, consistent 'opposing' activities to warrant ... protection against retaliation" and that Crawford's conduct did not meet that standard because she never initiated a complaint prior to the investigation or took any further action after it.

The Supreme Court, ruling only on the issue of whether Crawford's conduct qualified as protected "opposition" under Title VII, unanimously reversed the Sixth Circuit. Writing for the Court, Justice David Souter explained that in the absence of a statutory definition, the word "oppose" should be given its ordinary meaning. The Court gleaned this ordinary meaning of "oppose" from a dictionary definition: "to resist or antagonize ... to contend against; to confront; resist; withstand." Most importantly, the Court stated that the ordinary meaning of "oppose" does not pertain only to conduct that is active and consistent, but goes further to include situations where an individual takes "no action at all to advance a position beyond disclosing it." Ultimately, the Court held that Crawford's conduct was opposition in this ordinary sense of the word, and, thus, a protected activity under Title VII. To find otherwise, according to the Court, would be to announce 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 her a question." The Court further explained that any time 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."

The Court rejected the employer's argument that a broader definition of "opposition" would discourage employers from conducting investigations into allegations of harassment. According to the Court, the affirmative defenses available to employers who exercise reasonable care to prevent and correct harassing conduct provide sufficient incentive to investigate allegations of unlawful behavior.

Justice Alito's Concurrence Limits the Scope of "Opposition"

Justice Alito wrote a concurring opinion, joined by Justice Thomas, in order to emphasize that the opposition clause does not protect an employee's *silent* opposition to alleged harassment or discrimination. Justice Alito expressed concern that language in the Court's opinion implicitly extends anti-retaliation protections to employees who silently oppose illegal conduct or whose disclosures to coworkers indirectly reach the employer. Instead of this broad interpretation of the opposition clause, Justice Alito stated his view that an employee's conduct must be "active and purposive" to qualify as opposition.

Implications for Employers

Retaliation charges are on the rise, making up more than 32% of all charges filed with the Equal Employment Opportunity Commission (EEOC) in FY 2007. This trend is almost certain to continue. Crawford not only expands the definition of "opposition," but also leaves open the question of whether water cooler comments regarding discrimination constitute actionable opposition. Combined with another recent Supreme Court decision, *Burlington Northern v. White*, which dramatically expanded the definition of "adverse action" for purposes of Title VII's anti-retaliation provisions, *Crawford* makes clear that the Supreme Court is fostering an expansive view of actionable retaliation. See Littler's June 2006 ASAP, *Supreme Court Broadens Employee Protection Against Unlawful Retaliation*.

While *Crawford* does not directly address the issue of "participation," it serves as an important reminder to employers to carefully manage the process of employee discipline. Managers and supervisors must be advised to communicate with the company's human resources personnel regarding discipline and termination decisions, as such decisionmakers could be unaware of an employee's participation in a recent investigation. Ongoing communication will help ensure that a manager is not taking action against an employee who recently participated in an internal investigation without appropriate consideration of all of the relevant facts and circumstances.

In addition, employers should be particularly vigilant in identifying potentially protected conduct, including disclosures made during internal investigations. Further, employers will need to ensure that procedures for documenting employee performance are followed closely, as such documentation may demonstrate performance problems that existed prior to any statements made by an employee in an investigative interview. Now is also a good time for employers to make sure they have up-to-date anti-retaliation policies and have

trained managers and supervisors on the duty to prevent and avoid retaliation.

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