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U.S. Supreme Court Broadens Definition of Retaliation

On January 26, 2009, the United States Supreme Court issued its decision in a closely watched case that has broadened the definition of retaliation under Title VII. In *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee* the Court found that an individual who spoke out about discrimination not on her own initiative, but in response to an internal investigation, was still engaged in "opposition" under Title VII, and thus entitled to coverage under its anti-retaliation provision. The decision is cause for some concern by employers who already are confronting an increased number of retaliation claims.

Barbara A. Lee

The Rising Number of Retaliation Claims

Claims filed by employees asserting that they were retaliated against for filing discrimination complaints or for simply complaining about alleged workplace discrimination have skyrocketed in the past decade. According to the EEOC, the number of discrimination claims filed with the agency in the decade between 1997 and 2007 increased by 2.6 percent, yet the number of retaliation claims filed during that decade increased by a whopping 46.5 percent. In 2007, one-third of all claims filed with the EEOC were for retaliation—the second largest category of claims (after race discrimination). Similar trends have occurred in the courts and at state civil rights agencies. Furthermore, the outcome of cases at both the state and federal level shows that juries are more likely to find that an employer retaliated against an employee than that the employer engaged in discriminatory behavior. Amid this boom in retaliation claims and increased plaintiff success in court, the U.S. Supreme Court has expanded the definition of "retaliation" under Title VII of the Civil Rights Act of 1964 to include employees who do not complain of harassment themselves, but who participate in an internal investigation and report harassing behavior directed at themselves or others.

This expansion occurred in two cases—one in 2006, and the other in January of 2009. In 2006, the U.S. Supreme Court ruled that an employee who was transferred to a less desirable job after complaining of discrimination could state a claim for retaliation, even if the new job had the same pay and benefits (*Burlington Northern v. White*). In that case, the Court explained that Title VII's language prohibiting retaliation did not limit the definition of retaliation to compensation or terms and conditions of employment. If the employer's response to a complaint of discrimination was "materially adverse" to an employee—such as changing the work schedule of a single mother such that it made it difficult for her to arrange for child care—such an action could constitute retaliation.

The Facts of *Crawford*

The Court examined the concept of retaliation more recently in *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*. In *Crawford*, a human resources officer of the Metro School District asked Vicky Crawford, who had worked for the school district for 30 years, if she had witnessed any "inappropriate behavior" by Gene Hughes, the school district's employee relations director. Crawford had not reported any harassment, but in response to the request, described several

instances of harassing behavior toward her by Hughes. Two other employees also reported being harassed by Hughes. The school district took no action against Hughes, but fired Crawford and the two other employees who had reported harassment. The district asserted that Crawford had been fired for embezzlement, although no charges were filed against her.

Title VII prohibits two forms of retaliation: "opposing a practice made an unlawful practice" (the "opposition clause") and retaliation resulting from the individual's participation "in any manner in an investigation, proceeding, or hearing" (the "participation clause"). Crawford accused the school district of violating both clauses.

The trial court awarded summary judgment to the school district, and the U.S. Court of Appeals for the Sixth Circuit affirmed. Both courts ruled that, because she had not filed a complaint of discrimination, but had merely answered questions during the internal investigation of Hughes' behavior, she had not engaged in behavior meeting the requirements of the opposition clause. And because no charge had been filed with the EEOC, the lower courts ruled that Crawford did not meet the requirements of the "participation" clause. The U.S. Supreme Court rejected that reasoning.

The Supreme Court's Decision

Justice Souter, writing for seven of the nine Justices, found that Crawford's actions satisfied the requirements of the "opposition" clause, even though she had not filed a formal complaint. He noted that an employee may oppose a supervisor's action without taking aggressive action to complain about it or stop it. Crawford's response to the management employee's question and her description of her discomfort with Hughes' actions was clearly a form of opposition, according to the Court.

Justice Souter then turned to the policy justification for an expansive definition of "opposition." He explained that employers who wish to respond appropriately to complaints (or rumors) of sexual harassment need to "ferret out and put a stop to any discriminatory activity" in order to avoid liability under the nondiscrimination laws. Indeed, the Court ruled in 1998 in *Burlington Industries v. Ellerth* and *Faragher v. Boca Raton* that an employer who responded promptly and effectively to complaints of discrimination could assert an "affirmative defense" to a subsequent claim of discrimination (unless some "tangible employment action" had been taken against the employee). Justice Souter explained that the approach of the lower courts in *Crawford* would undermine the rulings in *Ellerth* and *Faragher*, and would discourage employees from coming forward or from participating in an employer's internal investigation. If an employee could only claim retaliation after filing a formal complaint of discrimination, said Justice Souter, "prudent employees would have a good reason to keep quiet about Title VII offenses against themselves or against others." Noting that the fear of retaliation is the primary reason that employees do not complain about or report harassment, Justice Souter said that denying employees a remedy for retaliation would force them to file an external charge of harassment without going through the internal complaint process, which would limit the employee's ability to recover against an employer for harassment because, under *Faragher/Ellerth*, the employee "unreasonably failed to take advantage of . . . preventive or corrective opportunities provided by the employer." That, said Justice Souter, was an unacceptable "catch-22" situation that neither Title VII nor previous Court rulings supported.

Although Crawford had also stated a claim under the "participation" clause, the Court declined to reach that issue because she had satisfied the requirements of the "opposition" clause.

Justices Alito and Thomas filed a concurring opinion, agreeing that Title VII's opposition clause prohibits retaliation against an employee who participates in an internal investigation of alleged harassment. These Justices would limit the ruling to "purposive conduct" such as participating in such investigations, and rejected the majority's conclusion that "silent opposition" would be sufficient to trigger protection under the opposition clause. They noted that extending protection against retaliation to employee who "never expressed a word of opposition to their employers" would allow an employee whose complaint to a peer was overheard by a management employee to claim retaliation if some negative action ensued, thus stimulating even

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more retaliation claims than the already high proportion of such claims.

The Implications of *Crawford* For Employers

Crawford and its predecessor, *Burlington Northern*, highlight the seriousness of dealing with potential retaliation claims. When an employee complains of discrimination or harassment, particularly by a supervisor or manager, it is not unusual for that supervisor or manager to be angry, hurt, or perhaps vindictive. Even if an employer determines that a complaint of discrimination or harassment is trivial or exaggerated, retaliating against the complaining employee may be found to be unlawful, particularly if the alleged retaliation occurred shortly after the employee either complained of discrimination or harassment, or participated in an internal investigation of alleged inappropriate behavior.

Employers need to train their supervisors and managers to avoid actions that could be viewed as potentially retaliatory, particularly during the pendency of either an internal investigation or a charge filed with a state or federal civil rights agency. Decisions to discipline, transfer, or take other actions that the complaining employee may view as "materially adverse" should be reviewed by a higher level manager, or the human resources manager, or both. While the potential of a retaliation claim should not insulate an employee with performance or behavior problems, it should be considered as the employer determines how to deal with the employee in light of the potential for a future retaliation claim.

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Barbara A. Lee, Counsel 973.520.2308 blee@eapdlaw.com