



# Supreme Court Expands Scope of Title VII Retaliation Claims

Insights

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Today the Supreme Court handed down a decision in *Crawford v. Metropolitan Govt. of Nashville* expanding the types of employee conduct that can trigger protection under Title VII.

As a result of this decision, employees may now claim that they engaged in legally protected activity, even when they made no complaint, but merely answered questions as part of an internal company investigation into another employee's discrimination complaint. Combined with the low standard the Court announced last year for the types of employer conduct that can be deemed unlawful retaliation, the growth of Title VII retaliation lawsuits will continue unabated.

## The Extent of Legal Protection

As many employers have learned the hard way, Title VII not only prohibits discrimination, it also enables employees to sue if they believe they were retaliated against in two specific areas: "opposing" perceived discrimination or harassment, or "participating" in another employee's complaint. Just how broad this protection is has been the subject of extensive litigation over the years.

There is no question that employees' explicit complaints to their immediate supervisors about harassment constitute protected "opposition," to discrimination. Similarly, filing a charge with the Equal Employment Opportunity Commission (EEOC) clearly constitutes protected "participation" in an investigation. But many situations are far less clear.

Consequently, whether an employee's particular complaint or actions amount to "opposition" or "participation" has been the subject of countless lawsuits. Exacerbating the problem is that different courts have applied different standards (or no standards at all) to determine whether particular conduct qualifies as legally protected "opposition" or "participation."

## Witness Interview Turns Into Lawsuit

Vicky Crawford headed the Payroll Division of the Metropolitan Government of Nashville, Tennessee (Metro). When Metro's director of employee relations was accused by another employee of sexual harassment, Metro began an investigation that included interviewing Ms. Crawford and others as potential witnesses. During her interview, Crawford alleged that she and other workers had also been sexually harassed by the accused. Crawford had never before complained to her superiors about these allegations, and never followed up on the allegations after her interview.

As Metro continued its investigation, it uncovered evidence that led it to believe that Ms. Crawford had mishandled employee contributions to retirement plans and payments to insurance companies, and failed to file Metro's tax returns on time. As a result, Metro eventually charged Crawford with misconduct, suspended her, and held an internal hearing about her performance. Crawford presented little defense or explanation in response to the charges, and was ultimately terminated.

Crawford then filed a complaint with the EEOC alleging that Metro's stated reasons for the termination were false, and that it had actually terminated her in retaliation for her participation in the sexual harassment investigation the year prior. The EEOC investigated her claim, but did not conclude that any of her rights were violated.

Crawford then sued Metro, again claiming that she was terminated in retaliation for participating in the sexual harassment investigation. In addition, she alleged that her statements in the interview amounted to legally protected "opposition" to her own harassment. She lost again. Both the trial court and the U.S. Court of Appeals for the 6th Circuit concluded that Title VII's "opposition" clause requires overt, active opposition to unlawful conduct. Because Crawford merely answered questions as part of an interview, and did not initiate any complaint prior to being interviewed nor even pursue her complaints after the interview, the courts deemed her actions passive and insufficient to qualify as legally protected opposition.

With respect to her claim under the "participation" clause, the lower courts held that her participation in Metro's internal investigation did not constitute protected "participation" under Title VII. The courts ruled that the participation clause is only triggered where the company's investigation is undertaken in response to a pending EEOC charge, or where the employee otherwise participates in the EEOC complaint process. Interviews resulting solely from internal harassment complaints when there is no pending EEOC charge do not trigger protection under the law.

After losing at the EEOC, the trial court and the Court of Appeals levels, Ms. Crawford appealed to the U.S. Supreme Court.

### **Supreme Court Sets a Low Bar for "Opposition"**

Today, by a 9-0 vote, the Court found in favor of Crawford, ruling that her statements during Metro's investigation of another employee's harassment complaint were protected under Title VII's "opposition" clause.

According to the Court, the term "oppose" means "to resist or antagonize"; to contend against; to confront; resist; withstand." The Court went on to adopt a nearly per se rule that "[w]hen 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." Crawford's conduct fell within this liberal standard and, as a result, her case was sent back to the trial court for continued litigation.

Because the Court overturned the lower court's decision based solely on its analysis of the "opposition" clause, it chose not to reach the question of whether Crawford's responses to her employer's questioning were protected under the statute's "participation" clause. Nevertheless, it seems clear that an employee's responses to questions as part of an employer's internal investigation are sufficient to garner protection under Title VII.

### **What This Means for Your Business**

*Crawford* continues the Court's broad interpretation of Title VII retaliation rights. In 2006, the Court addressed the types of employer conduct that can qualify as retaliatory, holding that seemingly innocuous, non-work actions (e.g. not being invited to lunch) may constitute unlawful retaliation in some cases. In 2008, the Court concluded that, contrary to the plain language of the Age Discrimination in Employment Act and Section 1981, both statutes allowed employees to sue for perceived retaliation. Today the Court addressed the type of employee activity that can give rise to a retaliation claim, holding that even passive, internal complaints about perceived discrimination can be protected under the statute.

*Crawford's* low threshold opens the door to even more retaliation lawsuits. In fact, one Justice noted in a concurring opinion that "[t]he number of retaliation claims filed with the EEOC has proliferated in recent years." "An expansive interpretation of opposition conduct would likely cause this trend to accelerate." Unfortunately, courts will now have to grapple with the question of whether particular fact patterns satisfy the standard announced in *Crawford*. But with the bar set so low, even passive informal complaints may be sufficient.

As a result, employers must be even more vigilant about recognizing, and promptly and thoroughly investigating, discrimination complaints. Regardless of whether complaints are written or verbal, made actively or passively, or made in the context of a formal agency charge or simply as an internal company matter, the most efficient means to minimize the risk of liability is to conduct prompt and thorough investigations.

The Court's decision makes clear that investigations into alleged discrimination may open the door to lawsuits by those who are interviewed. Although this is unfortunate, it would be wrong to skip or minimize investigations. Failing to properly investigate might destroy valuable defenses and increase potential liability. Rather, the key to legally protecting your business remains the same: train those who conduct investigations to recognize witness statements that might qualify as "opposition," and investigate such matters fully regardless of the context in which they come up.

For more information call any Fisher Phillips attorney.

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