PERSPECTIVES

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Retaliation Protections Expanded Again: More Fuel for the Fire

by JILL R. JENSEN-WELCH

For the fifth time in five years, the United States Supreme Court expanded employee protection against retaliation in *Crawford v. Metropolitan Government of Nashville & Davidson County, Tennessee*. Issued on January 26, 2009, the decision requires a broad reading of the term "oppose," as contained within Title VII's retaliation provisions.

Case Facts

Dr. Gene Hughes was hired by the Nashville Metropolitan Government ("Metro") in the fall of 2001 as the employee relations director for the city's schools. By May 2002, several employees had voiced concerns about his inappropriate sexual behavior. Although Hughes would normally investigate reports of harassment, the investigation was assigned to Veronica Frazier, the assistant director of human resources, instead. Frazier interviewed several employees who worked with Hughes, including Vicky Crawford, an employee with 30 years of service. Although Crawford was not one of the employees who had reported Hughes' conduct, when questioned by Frazier, Crawford shared that Hughes had sexually harassed her. Specifically, Crawford said:

- On numerous occasions, Hughes asked to see Crawford's breasts.
- When Crawford said, "Hey Dr. Hughes, what's up?" he grabbed his crotch and said, "You know what's up."
- Hughes put his crotch up to a window and asked to see Crawford's breasts.
- Once, when Hughes came into Crawford's office, she asked what she could do for him and he grabbed her head and pulled it to his crotch.

The investigation also revealed that Crawford sometimes responded defensively to Hughes by telling him he was "inappropriate," telling him to "bite me," and by flipping him the bird. In the end, Frazier concluded that although Hughes had engaged in inappropriate and unprofessional behavior, it was not to the extent alleged by Crawford. Hughes was not disciplined, but training was recommended for the staff in his office. Immediately after the investigation, three employees who had been interviewed—including Crawford—were subjected to investigations into *their* behavior, and all three were promptly discharged. Crawford was accused of embezzlement and drug use, which she says was ultimately held to be unfounded. Crawford sued Metro for retaliation under Title VII.

The Opposition and Participation Clauses

Employers cannot retaliate against employees who engage in protected activities. The anti-retaliation provisions of Title VII are contained in two clauses that define the parameters of protected activities. Under the opposition clause, it is unlawful for an employer to discriminate against an employee because she has "opposed" any unlawful employment practice under Title VII. Under the participation clause it is unlawful for an employer to discriminate against an employee because she "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" under Title VII.

Crawford alleged that her termination was retaliatory under both clauses because she (1) opposed sexual harassment by reporting Hughes' behavior to Frazier during the investigatory interview, and (2) participated in the internal investigation into Hughes' sexual harassment. In a motion for summary judgment Metro argued Crawford had not engaged in any protected activity. It contended Crawford had not "opposed" sexual harassment because she never filed her own complaint, and only answered questions in an investigation of a complaint initiated by another employee. Metro's position was that oppositional protected activity only applied when an employee actively instigated or initiated the complaint. In addition, Metro felt Crawford's defensive responses to Hughes made it unclear whether she was opposing his conduct as truly offensive, or whether she gave as good as she got. Metro also argued that participation in an internal investigation (without a pending external agency charge of discrimination) did not qualify as protected activity under the participation clause of Title VII.

The Middle District Court of Tennessee agreed with Metro, granting its motion for summary judgment. The Sixth Circuit Court of Appeals affirmed summary judgment for Metro. The Supreme Court reversed, holding that Crawford was protected from retaliation under the opposition clause. The question of whether Crawford was also protected under the participation clause was not reached.

The Supreme Court's Reasoning

The Court's decision relied on the ordinary meaning of the word "oppose" and EEOC guidelines that said opposition includes communication of a belief that discrimination had occurred. In what is sure to become a famous quote, the Court said:

> There is, then, 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.

Metro argued that a broad definition of "oppose" would make employers less likely to investigate internal reports of discrimination because anyone interviewed could claim retaliation for any later adverse action. The Court was unconvinced, stating that the *Ellerth/Faragher* affirmative defense provided employers with "strong inducement to ferret out and put a stop to any discriminatory activity in their operations." [The *Ellerth/Faragher* defense allows employers to escape liability for a supervisor's harassment when no tangible employment action was taken, and the employer exercised reasonable care to prevent and promptly correct discrimination, but the employee unreasonably failed to take advantage of the employer's preventive or corrective opportunities.] Accepting Metro's argument would mean that an employee who fearfully keeps quiet when questioned in a harassment investigation initiated by another employee could lose her own later claim of harassment when her employer uses that silence to shield itself from liability via the *Ellerth/Faragher* defense. The Court refused to put employees in that "catch-22."

The judgment of the Court was unanimous. However, Justices Alito and Thomas issued a concurring opinion stating their belief that neither silent opposition, nor employee concerns not made directly to management, should qualify for protection under the opposition clause. The concurrence attempted to limit the majority opinion, out of concern that the Court might accelerate the trend of increasing retaliation claims at the EEOC (which had doubled from 1992 to 2007).

The Trend to Expand Retaliation Protection

Justice Alito's and Justice Thomas' concern that the Court may be contributing to the growth of retaliation claims has legs. The *Crawford* decision continues a recent trend within the Supreme Court's jurisprudence to expand retaliation protections of employees.

- In *Jackson v. Birmingham Board of Education*, 544, U.S. 167 (2005) the Court held that a high school teacher and coach could bring a claim for retaliation under Title IX after he was relieved from coaching duties and subjected to negative evaluations following a complaint that funding and equipment/facilities access within the school's athletic programs were gender-biased.
- In *Burlington Northern & Santa Fe Railway v. White*, 548 U.S. 53 (2006) the Court held that retaliation is any materially adverse action that might dissuade a reasonable employee from making or supporting a claim of discrimination, including non-employment-related adverse actions taken by an employer.
- In *Gomez-Perez v. Potter*, 128 S. Ct. 1931 (2008) the Court held that federal government employees could bring claims of retaliation under the Age Discrimination in Employment Act, even though the statute does not expressly provide for such, because retaliation is a form of prohibited age discrimination.
- In *CBOCS West, Inc. v. Humphries*, 128 S. Ct. 1951 (2008) the Court held that claims of retaliation are permitted under 42 U.S.C. Section 1981, even though the statute does not expressly provide for such, because retaliation is a form of race discrimination prohibited by Section 1981.

Reaction to *Crawford*

The *Crawford* decision appears to correct an odd decision from the Sixth Circuit more than it breaks new ground in retaliation law. Although the judgment was not surprising, the Court's opinion is still of interest. As the fifth decision in as many years, it clarifies a trend to expand the reach of retaliation. The language chosen by the Court (i.e., "freakish") expresses frustration with attempts to limit retaliation protection, and hence the protections provided by the underlying laws.

The decision reinforces employer best practices. First, reports of possible discrimination should be promptly and thoroughly investigated. This corrects problems, prevents further problems, reduces and cuts-off liability, and helps maintain productive and positive working environments. Second, employees who report behavior that might be discriminatory—no matter the means or form of the report, or to whom it is made—are protected from retaliation. This protection should be (a) expressed in discrimination, harassment, retaliation, complaint, and investigation policies, (b) a standard notice to those participating in investigations, and (c) covered fully within related training programs.

Although Title VII is 45 years old this year, charges of discrimination are still common. Employment claims of all types tend to increase in times of widespread and deep recessions where cost-saving adverse employment actions increase sharply, money and

credit are scarce, and the focus is on survival rather than prosperity. It seems inevitable that the fire of discrimination complaints will continue to rage through the workplace. Be warned that failing to prevent retaliation will be like throwing gasoline on those flames.

If you have questions regarding discrimination or retaliation claims, please contact a member of the Firm's Employment and Labor Law Group or the Dickinson attorney with whom you normally work.

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