Supreme Court Expands Scope of Title VII’s Retaliation Provisions . . . Again

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Continuing a string of recent Supreme Court victories for plaintiffs in retaliation cases, a unanimous Court has held that Title VII’s anti-retaliation provision protects employees who “oppose” discrimination merely by answering questions during an internal harassment investigation initiated by the complaints of a different employee. Crawford v. Metropolitan Gov’t of Nashville & Davidson County, Tenn., 555 U.S. ___ (Jan. 26, 2009). This interpretation of Title VII’s retaliation protections expands the definition of what it means to “oppose” workplace discrimination, covering not only those who initiate internal investigations by complaining that they have been mistreated but also those who are drawn into such investigations as witnesses. The case makes it even more imperative that employers have properly drawn and disseminated internal complaint reporting procedures, and that they effectively train managers on the requirements of those policies to ensure that employee complaints of workplace discrimination are appropriately addressed and that any adverse employment actions taken against those involved in employer investigations are fully vetted.

Cooperation with Internal Investigations Yields Protection

The Crawford case began when an employee of a local government complained that she had been the victim of sexually harassing conduct by a program director. During the resulting investigation, a human resources officer asked the petitioner, Crawford, whether she had witnessed “inappropriate behavior” by the director. Answering yes, Crawford described various lewd and offensive conduct in which the director had engaged. At the conclusion of the investigation, the employer did not punish the alleged harasser, but it did fire Crawford and two other participants in the investigation, accusing Crawford of embezzling funds. Crawford then filed a charge with the Equal Employment Opportunity Commission (“EEOC”), followed by her suit in federal court.

The district court granted the employer’s motion for summary judgment, and that decision was affirmed by the Sixth Circuit. Both courts held that the “opposition” clause in Title VII’s anti-retaliation provision “demands active, consistent ‘opposing’ activities to warrant . . . protection against retaliation.”

The Supreme Court, however, reversed in a unanimous decision by Justice Souter. First, the Court found that the term “oppose” is more elastic than the lower courts had suggested:

[A] person can ‘oppose’ by responding to someone else’s question just as surely as by provoking the discussion, and nothing in [Title VII] 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.

Moreover, the Court held, a more restrictive
reading of the term would leave employees at
risk simply for cooperating with employer
complaint processes which are central to Title
VII’s enforcement scheme. Internal complaint
procedures cannot be expected to function
effectively, the Court observed, if the employees
cooperating in those investigations must do so
only at their peril.

**Practical Considerations**

The result in *Crawford* was not unexpected by
most observers, but it nonetheless could
complicate employer efforts to comply with Title
VII. The first lesson of *Crawford* stems from the
extremely unhelpful fact that while the accuser
was not punished, three of the cooperating
witnesses were disciplined. It is possible, of
course, that all three witnesses engaged in
serious misconduct (and that the alleged
harasser did not), but the impression left by
these facts would make for a very difficult trial.
Employers must make discipline decisions in
such circumstances carefully, fully cognizant of
the material risks such actions entail, and with
the full participation of human resources and
company counsel.

The case also highlights the central problem
inherent in all retaliation cases. Even managers
with the very best of intentions find it extremely
difficult to treat someone “the same” after they
have accused management of bias. Once it
becomes known that an employee has raised
allegations of misconduct or, after *Crawford*, has
participated in an investigation, human nature
suggests that even the most professional
managers will have to work hard to ensure that
it will be “business as usual.”

Thus, it is imperative that human resources take
every reasonable measure to ensure the
confidentiality of investigations, and must be
blunt with those involved about their
responsibilities, both to keep the investigation
confidential and to refrain from any action that
could be considered retaliation (and remember,
retaliation claims can be built on actions that fall
short of the sort of “adverse employment
actions” that are necessary for discrimination
claims). Employers should take immediate steps
to ensure that their complaint procedures spell
out these employee obligations clearly and
unambiguously, and that managers are fully
trained on how to handle such situations. At a
minimum, managers must be trained to
encourage employees to report instances of
discrimination directly to human resources
professionals, so that human resources becomes
involved at the inception of the process and can
monitor subsequent management actions.
Additionally, managers should be trained that,
when they become aware of employee
complaints, they must immediately inform
human resources, regardless of the context in
which they have learned of the employee’s
complaints. The human resources department
should be the central repository for all reports of
discrimination so that trained professionals are
aware at all times of which employees are
currently protected by Title VII’s anti-retaliation
provisions.
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