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Supreme Court Clarifies Reach of Title VII's Anti-Retaliation Provision

In a unanimous decision, the United States Supreme Court ruled this week that employees who speak out about discrimination and harassment during employer-initiated internal investigations are protected under the anti-retaliation provision of Title VII of the Civil Rights Act.

The *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee* ("Crawford") decision extends retaliation claims to third party witnesses interviewed in the course of internal investigations, even those who have not actively come forward to allege discrimination and who have not participated in any proceedings under Title VII.

I. The Facts of *Crawford*

Vicky Crawford, a former employee of the Metro School District for Nashville and Davidson County, Tennessee ("Metro"), brought a Title VII retaliation lawsuit against her employer, when she was fired after participating in an internal investigation into allegations of sexual harassment by Metro's Employee Relations Director. Crawford did not instigate or initiate the internal probing. During the investigation, however, Crawford confirmed second-hand allegations by discussing specific incidents of sexual harassment.

Shortly after the internal investigation, Crawford was terminated on charges of embezzlement, which were later found to be unfounded. Other female employees who were interviewed during the investigation were similarly discharged. Crawford filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") and brought suit alleging retaliation under Title VII.

II. Title VII's Anti-Retaliation Provision and the Procedural History of *Crawford*

Title VII's anti-retaliation provision makes it unlawful for employers to discriminate against any employee who (1) "has opposed any practice made an unlawful employment practice" by Title VII (the "opposition clause"), or (2) "has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" related to Title VII (the "participation clause"). See 42 U.S.C §2000(e)—3(a).

In *Crawford*, the United States District Court for the Middle District of Tennessee held that a formal complaint must be filed with the EEOC before an employee can claim protection under the opposition clause of Title VII's anti-retaliation provision. Thus, Crawford could not challenge her termination because she had not "instigated or initiated" a complaint, but had "merely answered questions by investigators in an already-pending internal investigation, initiated by someone else."

The Sixth Circuit Court of Appeals affirmed on the same grounds, holding that, unless the employee has participated in an EEOC investigation or engaged in persistent oppositional behavior, Title VII does not cover employee participation in an employer-initiated internal investigation. Crawford appealed to the U.S. Supreme Court arguing that such participation is covered under Title VII.

III. The Supreme Court's Broader Interpretation of Anti-Retaliation Set Forth in *Crawford*

In reversing the Sixth Circuit's ruling, the Supreme Court held that Title VII protection does extend to an employee who speaks out about discrimination "not on her own initiative, but in answering questions during an employer's internal investigation." Thus, employees in Crawford's situation are shielded under the opposition clause.

The Court rejected the Sixth Circuit's notion that Title VII's anti-retaliation provision requires "active, consistent" opposition. Delivering the opinion for the Court, Justice David Souter held that "a person can 'oppose' by responding to someone else's questions just as surely as by provoking the discussion." The Court reasoned that if "an employee reporting discrimination in answer to an employer's questions could be penalized with no remedy, prudent employees would have a good reason to keep quiet about Title VII offenses."

The Court did not address whether Crawford's conduct was also protected under the participation clause of Title VII's anti-retaliation provision.

IV. The Implications of *Crawford* for Employers

Under *Crawford*, employees who merely cooperate with their employers' internal investigation of discrimination are protected against retaliation. A Title VII cause of action for third party witnesses could create a potential increase in retaliation lawsuits. Employers now face a risk in having "collateral" retaliation claims arise from their own internal investigation of discrimination and harassment.

In order to protect themselves from retaliation claims, employers should properly document allegations of similar unlawful treatment raised by employees during internal investigations. Any new claims or confirmation of unlawful discrimination or harassment (i.e., "me too") should be treated as separate complaints subject to independent investigation and protection from retaliation.

To read the full text of the decision in *Crawford*, please visit: <http://www.supremecourtus.gov/opinions/08pdf/06-1595.pdf>.

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