

# EMPLOYMENT LAW

## A L E R T

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## Supreme Court Expands Reach of Anti-Retaliation Provision of Title VII

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On January 26, 2009, the U.S. Supreme Court held in *Crawford v. Metro. Gov't of Nashville & Davison County, Tenn.* that an employee may bring a Title VII retaliation claim who did not complain about unlawful discrimination until questioned during an investigation in connection with another employee's report of such discrimination.

Nashville Metro government ("Metro") began investigating alleged sexual harassment on the part of Gene Hughes, a Metro school district official. Veronica Frazier, a human resources officer, questioned a number of Metro employees regarding the sexual harassment rumors, including Vicky Crawford. During her interview, Crawford informed Frazier that Hughes had made inappropriate sexual comments and contact with her on several occasions. No disciplinary action was taken against Hughes. However, Crawford was fired a few months after the investigation.

Title VII prohibits employers from retaliating against employees who report discrimination or harassment in the workplace. The anti-retaliation provision has two clauses: the opposition clause and the participation clause. The opposition clause prohibits retaliation against an employee that has "opposed" unlawful discrimination, and the participation clause prohibits retaliation against an employee because she has "made a charge, testified, assisted, or participated" in an "investigation, proceeding, or hearing under this subchapter." The participation clause has been interpreted to mean that the employee's conduct must be in connection with an EEOC charge in order to be protected.

The U.S. District Court for the Middle District of Tennessee and the Sixth Circuit both held that by merely responding to an employer's questioning during an internal investigation, an employee does not gain protection under the opposition clause of Title VII's anti-retaliation provision. The district court stated that Crawford did not engage in opposition because she never "instigated or initiated any complaint." Similarly, the Sixth Circuit stated that an employee must engage in "active, consistent 'opposing' activities" in order to fall under opposition clause protection. Both courts also held that Crawford's activities were not protected under the participation clause because the internal investigation that she participated in was not pursuant to a pending EEOC charge.

The Supreme Court disagreed with the lower courts. Focusing on the opposition clause, the Court explained that Title VII protects not only those employees who report discrimination on their own, but also those who report it when questioned by their employers. The Court stated that because Title VII does not define the term “oppose,” it must be given its ordinary meaning. Under such interpretation, the Court explained that an employee’s communication with her employer regarding alleged discrimination is a form of resistance or “opposition”. Thus, the Court held that an employee gains opposition clause protection by reporting discrimination in response to an employer’s questioning. Because the Court found that Crawford’s activity constitutes opposition, it did not address whether such activity is protected under the participation clause.

With the Court’s decision in *Crawford*, employers must now keep in mind that in addition to those employees who report unlawful discrimination, any employee who is questioned by the employer and complains of unlawful discrimination during an investigation of another employee’s report of discrimination has also gained anti-retaliation protection under Title VII.

If you have any questions about this alert, please call one of our labor attorneys listed below.

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