

## SUPREME COURT CLARIFIES RETALIATION PROTECTION

Employers know that the statutes which prohibit discrimination against employees also protect employees against retaliation. This protection extends to employees who “oppose any practice made unlawful” by Title VII, and any employee who has “made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing” regarding any practice potentially prohibited by Title VII.

The U.S. Supreme Court has clarified the extent of this statutory protection against retaliation in Crawford v. Metropolitan Government of Nashville, which was decided on January 26, 2009.<sup>1</sup> Ms. Crawford had cooperated in an internal investigation of sexual harassment just before her discharge. She did not make an internal complaint -- the human resources officer for the city was investigating rumors of inappropriate behavior by one of its supervisors. Ms. Crawford confirmed some of those rumors, and was discharged shortly thereafter. No formal charge of harassment was filed with the EEOC.

Even though Ms. Crawford did not initiate the complaint, the Court held that Ms. Crawford’s participation in the investigation by her employer was enough to provide her with protection for those who “oppose any practice” prohibited by Title VII. The Court specifically referenced the EEOC guideline which states that an employee’s communication to her employer a belief that the employer has engaged in a form of discrimination constitutes “opposition” to that activity.<sup>2</sup>

The Supreme Court recognized that employees may not report harassment if they fear retaliation. The Court discusses the incentives for an employer to investigate claims of harassment to avoid potential liability for a hostile work environment. The court specifically found that failing to protect employees who cooperate with an employer’s internal investigation would undermine the liability scheme set up by the Supreme Court when it allowed employers to avoid liability if they respond reasonably to a complaint of harassment.<sup>3</sup>

Given this decision, employers should ensure that their protections against retaliation protect more than just employees who make a formal complaint of harassment. Employers should extend that protection to employees who simply cooperate with an internal investigation.

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<sup>1</sup> No. 06-1595 (Jan. 26, 2009). Lower court decision at 211 Fed. Appx. 373 (6<sup>th</sup> Cir. 2006).

<sup>2</sup> 2 EEOC Compliance Manual §§ 8-II-B(1), (2), p. 614:0003 (Mar. 2003).

<sup>3</sup> This scheme was set up by the Supreme Court in Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998) and Faragher v. Boca Raton, 524 U.S. 775 (1998).