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EMPLOYEES INVOLVED IN INTERNAL INVESTIGATIONS OF DISCRIMINATION ARE PROTECTED FROM RETALIATION

Sarah A. Kelly • 215.665.5536 • *skelly@cozen.com*

In a case which follows the adage that bad facts make bad law, the United States Supreme Court has held that an employee who responded to an employer's questions in an internal investigation of a complaint of employment discrimination is protected by the anti-retaliation provisions of Title VII of the 1964 Civil Rights Act. The virtually unanimous decision (all Justices concurred in the judgment; but Justice Alito filed a concurring opinion in which Justice Thomas joined), came in *Crawford v. Metropolitan Government of Nashville and Davidson County Tennessee,* decided on January 26, 2009. Vicky Crawford complained that, in the course of her employer's investigation into rumors of sexual harassment supposedly perpetrated by its employee relations director Dr. Hughes, another human resources officer asked Crawford whether she had witnessed any "inappropriate behavior." Crawford responded by describing several incidents of misconduct by Dr. Hughes, saying that, among other things, he had grabbed his crotch in her presence, and grabbed her head and pulled it towards his crotch. The employer apparently took no action against Hughes, but after completing its investigation, fired Crawford and two other employees who had been questioned in the investigation and who had accused Hughes of inappropriate conduct.

Crawford sued under Title VII's anti-retaliation provision. At her trial, and on appeal, both the district court and then the Court of Appeals for the Sixth Circuit found that Crawford could not satisfy the requirements for protection under the "opposition" clause of Title VII's anti-retaliation provision, because she had not instigated or initiated the internal harassment complaint, but merely answered questions put to her in an already-pending investigation initiated by another employee. The lower courts also held that to be protected under the "participation" clause of Title VII's anti-retaliation provision, the employer's internal investigation would have to have been in response to a pending EEOC charge. Because no EEOC charge was pending when Crawford participated in the employer's internal investigation, the district court and the Sixth Circuit Court of Appeals held that the requirements of the participation clause of Title VII's anti-retaliation provision were not satisfied. The Supreme Court did not reach or decide the question of whether protection from retaliation under the participation clause requires there to be a pending EEOC charge.

The Supreme Court specifically found that Crawford's behavior should be characterized as opposing discrimination. "The anti-retaliation provision extends to an employee who speaks out about discrimination not on her own initiative, but in answering questions during an employer's internal investigation." Because Crawford had opposed discrimination, she was protected from retaliation by Title VII. To find otherwise, the Court said would require "a freakish rule" protecting an employee who reported discrimination on her own initiative, but not one who reported the same discrimination in the same words in response to a question. The Court suggested in its opinion that there might be exceptions to Title VII protection, such as an employee who describes a supervisor's racist joke as hilarious, but that these would be "eccentric" cases.

Even before the Supreme Court's decision, cases decided by federal courts in other areas of the nation would have permitted Crawford's claim to go forward. Employer groups were hoping for a rule which would draw a clearer line limiting Title VII's anti-retaliation provision only to the employee who made

the internal complaint. Given this decision, however, each case will turn on individual facts, and employers will have to assume the likelihood that any and every employee contacted during an internal complaint investigation will be able to assert a retaliation claim.

Lawyers in our Labor and Employment Law Practice Group continue to follow developments under the employment discrimination laws. If you have any questions regarding issues under these laws, please contact Sarah A. Kelly (skelly@cozen.com or 215.665.5536) or another attorney in our Labor and Employment Law Practice Group.