WHAT, RETALIATION? U.S. SUPREME COURT EXPANDS ANTI-RETALIATION RULES

By: Philip H. Hilder
Scott L. Mullins
Hilder & Associates, P.C.
819 Lovett Blvd.
Houston, Texas 77006-3905
713-655-9111

On January 26, 2009, the U.S. Supreme Court in *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*[1] interpreted Title VII's[2] anti-retaliation protections to include an employee that first reported discrimination in answering questions during the employer's internal investigation. Thus, an employee can show that she opposes employment actions made illegal by Title VII without having to instigate or initiate a complaint to management.[3] Additionally, an employee does not have to be a victim of the discriminatory action that she reports because *Crawford* and Title VII also protect an employee that reports discrimination affecting a co-worker.[4]

Although *Crawford* arises in the context of sexual discrimination under Title VII, it is important to recognize that other whistleblower cases often track Title VII precedent.[5] Notably, there are over 30 federal laws that protect whistleblowers, including those reporting violations related to tax,[6] securities,[7] airlines,[8] mining,[9] banking,[10] and the environment.[11] Since internal investigations are often launched in these other industries, the reach of *Crawford* could be broad.

This comment discusses *Crawford* and the potential consequences it could have on employers conducting internal investigations. It also provides a snapshot of federal anti-retaliation rules, what constitutes "retaliation" and "adverse employment action," and provides some guidance that attorneys should consider when conducting internal investigations.

SUPREME COURT'S DECISION IN *CRAWFORD V. METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE*

In 2002, the Metropolitan Government of Nashville and Davidson County, Tennessee ("Metro") launched an internal investigation into rumors of sexual harassment by the Metro School District's employee relations director, Gene Hughes. One of the employees interviewed, Vicky Crawford, was asked by an investigator whether she witnessed Hughes' "inappropriate behavior." Crawford replied that she had and detailed Hughes' conduct, including grabbing his crotch and saying "you know what's up," and putting his crotch against her window. Although two other employees admitted to investigators that Hughes sexually harassed them, Metro fired Crawford[12] and these two other accusers; Hughes was retained. Crawford filed a charge with the Equal Opportunity Commission (EEOC) claiming that Metro retaliated against her for reporting Hughes' harassment. She followed her EEOC claim with a suit to the United States District Court for the Middle District of Tennessee.

Crawford accused Metro of violating Title VII's two anti-retaliation provisions, which prohibit an employer from discriminating against any employee that has (1) opposed any practice made unlawful by Title VII and (2) participated in any manner in an investigation, proceeding, or

hearing under Title VII.[13] As short hand, one is the "opposition clause," the other is the "participation clause."

The District Court granted summary judgment for Metro finding that Crawford had not appropriately "opposed" the harassment because she "merely answered questions in an already-pending internal investigation, initiated by someone else" and did not "instigate or initiate" any compliant.[14] Her claim under the participation clause did not apply, since Crawford's report was made during an internal investigation into rumors, not pursuant to a pending EEOC charge.

The Sixth Circuit Court of Appeals affirmed on the same grounds, holding that the opposition clause demands "active" and "consistent" opposition to warrant protection against retaliation. The issue before the U.S. Supreme Court was whether the protections afforded under Title VII's opposition clause extends to an employee that speaks out not on her initiative, but in answering questions during an employer's internal investigation. The Court, in a 9-0 decision held that it does.[15]

Since "oppose" is not defined in Title VII, the Supreme Court gave "oppose" its ordinary definition, meaning to "resist or antagonize; to contend against; to confront; withstand."[16] The Court found that a person does not have to be "consistent and active" to "oppose" something. To illustrate, the Court offered that persons may oppose capital punishment without taking to the streets or writing letters. The Court noted that "opposition" would include an employee that "stood pat" and refused to follow a supervisor's order to fire someone for discriminatory reasons.

Metro and its *amici* warned that defining *opposition* without the "active" and "consistent" components could lower the bar for retaliation claims and thereby dissuade employers from conducting internal investigations. The Court found this position unconvincing, since an employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with authority over the employee.[17] The Court emphasized that employers should "ferret out and put a stop to any activity in their operations as a way to break the circuit of imputed liability." The Court noted that an employer has an affirmative defense to a violation of Title VII, provided the employer (1) does not retaliate against an employee for opposing the discriminatory practice or for participating in a pending investigation, (2) takes prompt and reasonable measures to prevent and correct discriminatory conduct, and (3) the plaintiff-employee unreasonably fails to take advantage of the remedial opportunities.[18]

The Court found that Crawford's conduct was covered by the opposition clause and remanded the case to the District Court. The Court did not address Metro's other defenses to the charge of retaliation.

FEDERAL RETALIATION LAWS

As discussed in the introduction, there are over 30 federal laws that protect employee whistleblowers from employer retaliation.[19] Of these 30 whistleblower laws, the Department of Labor, Occupational Safety & Health Administration, enforces 17 such laws.[20] Although it is important to look at the specific rules applicable to the situation or industry, "almost all whistleblower laws follow the same standard scheme."[21] The standard scheme for various federal whistleblower statutes requires the plaintiff-employee to show that:

- The plaintiff-employee engaged in a protected activity;

- The respondent-employer knew or suspected, actually or constructively, that the plaintiff-employee engaged in protected activity;
- The plaintiff-employee suffered an unfavorable personnel action; and
- The circumstances were sufficient to raise the inference that the protected activity was a motivating factor in the unfavorable action.[22]

RETALIATION, KNOW IT

Retaliation claims have reportedly doubled in the past decade and comprise approximately one-quarter (25%) of all EEOC claims.[23] Although there has been a rise in number of retaliation filings, the chances of employees being successful appears slim. At least one recent study of Sarbanes-Oxley whistleblower cases[24] reported that the employee win rate is 6.5%, when a full administrative hearing is held and an Administrative Law Judge ("ALJ") makes the determination.[25]

The increase in retaliation signals that employers must understand what constitutes *retaliation*. *Retaliation* occurs when an employee's protected activity becomes a motivating factor in the employer's decision to take an action that is materially adverse to the employee.[26] Once that nexus is found, there is retaliation. Significantly, the anti-relation provisions of Title VII, as interpreted by the U.S. Supreme Court – and which may be adhered to in other whistleblower contexts[27] – "extends beyond workplace-related or employment related retaliatory acts or harm."[28]

Adverse employment action has been defined as any act that is "reasonably likely to deter employees from making protected disclosures."[29] Thus, the phrase includes a catalogue of actions, such as: firing, transferring, demoting, reassigning, suspending or refusing to rehire, moving offices, revoking parking privileges, negative performance reviews, denying overtime pay.[30]

Interestingly, not all adverse employment actions are prohibited; for example, the majority of courts have found that Title VII does not prohibit an employer from retaliating against the third-party associate of a whistleblower.[31] Thus, in *EEOC v. Bojangles Restaurants*, a former employee threatened to file an EEOC charge against his former employer, Bojangles.[32] Since the company could not retaliate against him due to his "former" status, the company decided to not re-hire the former employee's fiancé, who inquired into returning to work after maternity leave.[33] The court found that the fiancé was not afforded protections from retaliation under Title VII. In *Pittman v. Siemens*, a Sarbanes-Oxley case, the ALJ determined that the anti-retaliation protections did not extend to a lawsuit for slander filed against a former employee because the suit was filed *after* the employee left the company.[34]

CRAWFORD MAY EXTEND TO OTHER ANTI-RETALIATION CONTEXTS

Whistleblower retaliation protections have been modeled after Title VII.[35] Likewise, whistleblower litigation has closely tracked Title VI jurisprudence.[36] Considering the influence of Title VII case law, *Crawford* – given time – could spread its wings over the gamut of the whistleblower litigation.

As is, *Crawford* expands the class of employees that are protected from retaliation to include employees that speak out about alleged discrimination (and, likely, other unlawful workplace activity), not through their own initiative, but during an internal investigation.[37] Accordingly, Metro and its *amici* argued that this approach could have a cooling effect on employers launching internal investigations into various federal violations since responsive employees could end up being improperly protected from removal, demotion, salary freezes, and other adverse employment actions. Moreover, should an employee make disclosures about unlawful activity, the employer may feel obligated to muzzle the scope of that employee's performance review and blunt what could be legitimate criticism. Yet, under *Ellerth* and *Faragher*, employers may be vicariously liable for failing to diligently investigating and ferreting out workplace discrimination.[38] In some ways, employers may feel like they are in a catch-22; the Court sees no competing policies.[39]

STEPS EMPLOYERS SHOULD TAKE TO LIMIT LIABILITY

Over the past decade, the U.S. Supreme Court has expanded the anti-retaliation protections accorded whistleblowers while exposing employers to greater liability for failing to stem unlawful retaliation. In *Ellerth*, 524 U.S. 724 (1998), the Court held that an employer is subject to vicarious liability for an actionable hostile environment created by a supervisor with immediate or successively higher authority over the employee; in *Burlington N. & Santa Fe Ry. Co v. White*, 126 S.Ct. 2405, 2414 (2006), the Court expanded anti-retaliation rules to cover actions and harms that occur outside the workplace; in *Crawford*, the Court broadened the anti-retaliation protections to include an employee that first reported discrimination in answering questions during the employer's internal investigation.

Due to the expansive protections accorded whistleblowers, employers should:

- Know the federal whistleblower law that is relevant to the industry and situation;
- Continue to educate employees about anti-discrimination, anti-harassment policies;
- Educate supervisors and/or management about what constitutes an "adverse employment action";
- Notify employees who to contact to report unlawful activities;
- Ensure that the immediate supervisor has knowledge of the employee's report and take corrective or preventive measures to curb retaliatory actions;
- Conduct reasonable and prompt internal investigations.

CONCLUSION

Whether *Crawford* will touch non-discrimination contexts is an open question, especially since Sarbanes-Oxley whistleblower claims are subject to arbitration.[40] What is clear, however,

is that employers are laying off huge numbers of blue and white collar workers due to the current economic crisis[41] and it is implied that the number of employees filing charges will likely increase. In light of the current economic climate and the Court's vigil over employer retaliation, companies should take extra measures to avoid liability.

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[1] *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*, 55 U.S. _ (2009) (slip opinion).
[2] 42 U.S.C. §2000e, *et. seq*. (2000 ed. and Supp V.)
[3] See *Crawford supra* note 1.
[4] See *Crawford supra* note 1, 55 U.S. _, at n.3 ("employees will often face retaliation not for opposing discrimination they themselves face, but for reporting discriminations suffered by others").
[5] Daniel P. Westman & Nancy M. Modesitt, *Whistle-Blowing: The Law of Retaliatory Discharge*, (2d ed. Supp 2006) (providing that courts should look to Title VII case law to interpret other whistleblower protection laws).
[6] See 26 U.S.C. §7623(b).
[7] See Sarbanes-Oxley Act of 2002, 18 U.S.C. §1514A.
[8] See 49 U.S.C. §42121 (2000).
[9] See 30 U.S.C. §815(c) (2000).
[10] See 12 U.S.C. §1831j (2000) (for FDIC-insured bank employees).
[11] See 15 U.S.C. §2622 (2000) (toxic substances); 33 U.S.C. §1367 (2000) (water pollution); 42 U.S.C. §5851 (2000) (nuclear energy); 42 U.S.C. §7622 (2000) (air pollution).
[12] See *Crawford supra* note 1. Metro's offered justification for terminating Crawford was embezzlement.
[13] See 42 U.S.C. §2000e-3(a).
[14] See *Crawford supra* note 1. Metro suggested that it was unclear whether Crawford actually opposed Hughes' conduct because her responses to him were somewhat vague; she flipped Hughes "the bird" and told him to "bite her."
[15] *Id*., Justice Alito filed and Justice Thomas concurred in the judgment.
[16] *Id*., citing Webster's New International Dictionary 1710 (2d ed. 1958).
[17] *Id*., citing *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. Boca Raton*, 524 U.S. 775 (1998) (quotation marks omitted).
[18] *Id*., citing *Ellerth*, 524 U.S.., at 765 (quotation marks omitted).

[19] Robert Johnson, *Whistling While You Work: Expanding Whistleblower Laws to Include Non-Workplace-Related Retaliation After Burlington Northern v. White*, 42 U. Rich. L. Rev. 1337, at 1347 (May 2008).
[20] The complete list of seventeen statutes is available on DOL's website, the Whistleblower Protection Program, available at: http://osha.gov/dep/oia/whistleblower/index.html (last visited March 12, 2009).
[21] See Johnson *supra* note 19.
[22] See 72 Fed. Reg. at 44,964, *Procedures for Handling Retaliation Complaints*; see also, Johnson *supra*, note 19, at 1349 (noting that these common elements apply to all federal whistleblower laws).
[23] Alex B. Long, *The Troublemaker's Friend: Retaliation Against Third parties and the Right of Association in the Workplace*, 59 Fla. L. Rev. 931, at 935 (December 2007) (this article discusses whether Title VII, §704(a) prohibits employers from retaliating against third-parties).
[24] See 29 C.F.R. §1980, included *infra*, (setting forth the procedures for handling a retaliation complaint under the Sarbanes-Oxley Act of 2002).
[25] Richard Moberly, *Unfilled Expectations: An Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win*, 49 Wm. & Mary L. Rev. 65, at 91 (2007).
[26] See 72 Fed. Reg. at 44,964 *supra* note 22. See also *Burlington N. & Santa Fe Ry. Co v. White*, 126 S.Ct. 2405, 2414 (2006) ("[w]e also conclude that the [anti-retaliation provision of Title VII] covers those [ ] employer actions that would have been materially adverse to a reasonable employee or job applicant.").
[27] See Steve Kardell, *Protection Against Workplace Retaliation Expanded,* Executive Legal Advisor Journal - Labor Employment, at 16 (July/August 2006).
[28] See *Burlington N. & Santa Fe Ry. Co v. White*, 126 S.Ct. 2405, 2414 (2006).
[29] See *Halloum v. Intel Corp.*, Case No. 2003-SOX-0007, at 15-16 (ALJ March 4, 2004), available at http://www.oalj.dol.gov/DMSEARCH/CASEDETAILS.CFM?CaseId=217736.
[30] See Johnson, at 1349-50, *supra* note 19.
[31] See Long, at 933 n.10, *supra* note 23: ("Numerous courts have held that employers are generally not prohibited from taking action against a third party. See *Bell v. Safety Grooving & Grinding, LP*, No. 03-3902, 107 F. App'x. 607, 609-10 (6th Cir. 2004); *Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 564 (3d Cir. 2002); *Smith v. Riceland Foods, Inc.*, 151 F.3d 813, 819 (8th Cir. 1998); *Holt v. JTM Indus., Inc.*, 89 F.3d 1224, 1226 (5th Cir. 1996); *Washco v. Fed. Express Corp.*, 402 F. Supp. 2d 547, 556 (E.D. Pa. 2005); *Singh v. Green Thumb Landscaping, Inc.*, 390 F. Supp. 2d 1129, 1138 (M.D. Fla. 2005); *Higgins v. TJX Co.*, 328 F. Supp. 2d 122, 124 (D. Me. 2004); *Sukenic v. Maricopa County*, No. Civ. 02-02438, 2004 WL 3522690, at 12 (D. Ariz. Jan. 7, 2004); *EEOC v. Bojangles Rests., Inc.*, 284 F. Supp. 2d at 327; *Horizon Holdings, LLC v. Genmar Holdings, Inc.*, 241 F. Supp. 2d 1123, 1143 (D. Kan. 2002)").
[32] *EEOC v. Bojangles Rests., Inc.*, 284 F.Supp.2d 320, 324 (M.D.N.C. 2003).
[33] *Id.*, at 324-325.
[34] See *Pittman*, Case NO. 2007-SOX-0015, at 6 (ALJ July 26, 2007), available at http://www.oalj.dol.gov/DMSSEARCH/CASEDETAILS.CFM?Case=232183.
[35] See Johnson, at 1351 *infra* note 19.
[36] *Id.*
[37] *Crawford* also clarifies that employees are protected from retaliation if they oppose a supervisor's order to participate in an employment action that has a discriminatory purpose.

[38] See *Ellerth supra* note 17.
[39] *Crawford supra* note 1 ("Nothing in this statute's text or our precedent supports this catch-22").
[40] See *Boss v. Salomon Smith Barney Inc.*, 263 F.Supp.2d 684, 685 (S..D.N.Y. 2003) (nothing in the text or legislative history of Sarbanes-Oxley evinces an intent to preempt the Federal Arbitration Act).
[41] Steve Lohr, *Piecemeal Lay Offs Avoid Warning Laws*, New York Times (March 5, 2009); see also R.M. Schneiderman, *Economic Round Up, The Unemployment Rate*, New York Times (March 6, 2009) (noting the unemployment rate is 8.1% and the economy shed 651,000 jobs in February 2009).