PUBLICATION

U.S. Supreme Court Reverses Sixth Circuit, Opening the Door for More Retaliation Claims

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In a unanimous decision handed down on January 26, 2009, the United States Supreme Court reversed the Sixth Circuit Court of Appeals in a retaliation case that originated in Nashville, Tennessee, paving the way for investigation witnesses to make claims of retaliation if they are subject to adverse employment action during or after an investigation.

In *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*, Ms. Crawford claimed she was fired after she told investigators conducting an internal investigation into another claim of inappropriate conduct or harassment in the workplace that she had been treated inappropriately as well. Ms. Crawford was interviewed during an internal investigation into rumors of sexual harassment by the Metro School District employee relations director, Gene Hughes. During the interview, Ms. Crawford was asked if she had witnessed any inappropriate behavior on the part of Mr. Hughes. Ms. Crawford described several instances of sexually harassing behavior toward her, including one instance where Mr. Hughes had grabbed her head and pulled it toward his crotch.

The Metro School District, however, took no action against Mr. Hughes. Instead, the Metro School District fired Ms. Crawford, a 30-year employee, allegedly for embezzlement. In addition, the employer fired two other accusers, and all of the terminations occurred soon after completing the investigation. Ms. Crawford claimed that the Metro School District had retaliated against her for reporting Mr. Hughes' behavior and filed a charge with the Equal Employment Opportunity Commission (EEOC), followed by an action in the United States District Court for the Middle District of Tennessee. The District Court dismissed Ms. Crawford's action, finding that she was merely answering questions by investigators in an already pending internal investigation initiated by someone else, and was not engaged in protected activity under the Civil Rights Act of 1964, as she claimed. The Sixth Circuit upheld the dismissal of Ms. Crawford's action. The Sixth Circuit found that, in addition to the reasoning relied upon by the District Court, the internal investigation was not conducted as part of a pending EEOC charge.

The U.S. Supreme Court, on the other hand, sided with Ms. Crawford and found that the protections of the Civil Rights Act of 1964 did, in fact, apply to employees who simply cooperate in an internal investigation rather than filing a formal complaint with the employer or a charge with the EEOC. More specifically, the Court found that the anti-retaliation provision's protection extends to an employee who speaks out about discrimination not on her own initiative, but in answering questions during an employer's internal investigation. The Metro School District had argued, unconvincingly to the Court, that employers would be less likely to raise questions about possible discrimination if a retaliation charge that results from an internal investigation was permitted. The Court disagreed, finding that employers already have a strong incentive to find and address discriminatory conduct in the workplace as a result of the Court's decisions in *Burlington Industries/Ellerth* and *Faragher* in 1998. The Court reasoned that following the Sixth Circuit's logic could actually undermine the *Ellerth/Faragher* scheme as well as the Act's primary objective of "avoiding harm" to employees.

The Court's decision is not surprising, especially considering the facts of the case. However, it is certainly possible that this decision will lead to a new wave of retaliation claims. So what can employers do to protect themselves? It is clear that employers should continue conducting internal investigations into reports or

observations of inappropriate conduct or discrimination in the workplace. However, when conducting internal investigations post-Crawford, employers may want to carefully consider which employees are interviewed. The investigators need to identify employees that may have relevant information, but they would be well advised to avoid going on a fishing expedition and interviewing every employee. If one of the possible witnesses is an employee with disciplinary issues or who is about to be terminated, the investigator should exercise particular care when deciding whether and how to conduct the interview. Finally, it is important that any decision made to terminate a witness/employee's relationship with the company is well documented. The employer should be mindful as to whether the employee who is being terminated has made any allegations of inappropriate conduct, regardless of whether the employee made an express complaint or charge of harassment or discrimination.

The Court's decision has opened the door for investigation witnesses to make claims of retaliation if they are subject to adverse employment action during or after an investigation. This significantly broadens the scope of retaliation law as we have come to know it, and employers should keep this in mind any time an investigation is taking place.