



Conducting Harassment Investigations Following the U.S. Supreme Court's Decision in *Crawford*

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In recent years, the United States Supreme Court has demonstrated a fondness for employment retaliation cases. Most recently, in *Crawford v. Metropolitan Government of Nashville*, the Court expanded legal protections for employees who complain about discrimination or harassment in the workplace. The Court's decision in *Crawford* is shaping the way employers conduct internal investigations and signals an expansion of employer liability.

Title VII of the Civil Rights Act of 1964 prohibits retaliation by employers against employees who oppose any practice made unlawful by Title VII or participate in any investigation under Title VII. The anti-retaliation provisions are referred to as the "opposition clause" and "participation clause." In *Crawford*, the Court examined whether Vicky Crawford, a payroll coordinator for the Metropolitan Government of Nashville, opposed unlawful conduct when she answered questions during an internal harassment investigation.

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During the course of Crawford's employment, a sexual harassment complaint was lodged against Gene Hughes, the director of employee relations for the Metro Public School System. Although Crawford did not file the complaint, she was questioned about Mr. Hughes' conduct. She informed the investigators that Hughes had behaved inappropriately toward her and described several instances of sexually harassing behavior. Shortly after the investigation, Metro fired Crawford, saying that she embezzled monies. Crawford sued, alleging that she was fired in retaliation against her for reporting Hughes' behavior.

The lower courts found in favor of Metro, concluding that Crawford could not satisfy the opposition clause because she had not "instigated or initiated any complaint," but had "merely answered questions by investigators in an already-pending internal investigation, initiated by someone else." The Supreme Court disagreed and took a much broader view of the opposition clause. The Court held that "oppose" goes beyond active behavior such as filing a complaint and includes such limited behavior as disclosing information. The Court's reasoning was based on an EEOC guideline:

When an employee communicates to her employer a belief that the employer has engaged a form of employment discrimination, that communication virtually always constitutes the employee's "opposition" to the activity.

In the wake of *Crawford*, employers should be cautious when receiving employee complaints, regardless of the form or manner of the complaint. After *Crawford*, "opposition activity" will be broadly construed and has already been held to include an employee's complaints to nearly anyone – management, other employees, unions, or media; other activity such as refusing to obey an order because the employee thinks it is unlawful under Title VII; or even opposing unlawful acts by co-workers.

Likewise, employers should be mindful when conducting investigations of complaints of harassment or discrimination because post-*Crawford*, employees who participate in internal investigations will be protected from retaliation. A witness could, for example, claim that disciplinary action against him or her was due to his or her support of a complaining party's version of the facts. While some employers may think they would be best served by limiting the number of interviewees, such misperception could result in employer liability. Employers who do not conduct full and complete investigations, including interviews of all identified witnesses, may find themselves in the same unfortunate position as the Michigan employer in *Vorachek v. Security Federal Credit Union*. In *Vorachek*, the employer declined to interview two witnesses identified by another employee who complained of coworker harassment. The Court allowed the complaining employee's claim to go to a jury, in part, because the employer failed to follow up on all leads, and in the court's view, conducted an inadequate investigation.

The implications of the Court's decision in *Crawford* have yet to be determined. Although the number of retaliation claims has increased since *Crawford*, the potential effects may reach much further than Title VII claims. It is likely that employees will ask the courts to extend the holding of *Crawford* to employees claiming retaliation for participating in workplace investigations regarding any illegal practices – not just complaints alleging unlawful Title VII practices. Thus, the *Crawford* decision highlights the importance of good investigation and documentation processes in all aspects of employment. Employers should develop a strategy for investigating complaints that minimizes the potential for

retaliation claims. To the extent possible, employers should limit management participation in the investigation process and limit management's knowledge of the investigation results. Ideally, individuals with immediate disciplinary authority (i.e. supervisors) over witness or complaining parties should only be informed of the investigatory details on an as-needed basis. This will serve to shield both the supervisor and the employees from undesirable consequences. In addition to fine-tuning investigation practices, employers should place a renewed focus on documenting employee performance concerns as they arise. The significance of proper documentation plays a key role in defending against claims of discrimination and retaliation. For assistance developing an investigation strategy or responding to claims of harassment and discrimination, feel free to contact Eastman & Smith Ltd.



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