‘Protected Activity’ Under Title VII

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In October 2008, the U.S. Supreme Court heard oral argument in *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*, No. 06-1595, the Court’s most recent case addressing retaliation claims under Title VII of the Civil Rights Act of 1964. The question presented is whether an employee who cooperates in an employer’s internal investigation of sexual harassment is protected by the opposition and participation clauses of Section 704(a) of Title VII. 42 U.S.C. § 2000e-3(a).

Background

The employer (Metropolitan Government of Nashville and Davidson County, Tennessee School District) received complaints from several female employees about sexual harassment by Gene Hughes, the employee relations director for the School District. Several employees who had worked with Mr. Hughes were interviewed by the human resources department. During the course of these interviews, three female employees, including the petitioner, Vicky Crawford, described serious acts of alleged sexual harassment by Mr. Hughes. For example, when asked whether Mr. Hughes had engaged in "inappropriate behavior," Ms. Crawford relayed an incident in which Hughes allegedly came into her office and "grabbed her head and pulled it to his crotch." Ms. Crawford also told the investigators that Hughes had sexually harassed other employees.

A few months later, Crawford was suspended and then fired. She filed suit claiming that she was discharged in retaliation for participating in the employer’s investigation of sexual harassment complaints. She claimed that her participation was protected activity under Section 704(a), which provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees ... because [the employee] ... has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

The district court granted the employer’s summary judgment motion, holding that participation in an employer’s internal investigation does not constitute "protected activity" under Title VII. The Sixth Circuit affirmed. In her brief to the Supreme Court, Crawford argued that her activity was protected by both the "opposition" and the "participation" clauses of Section 704(a).

Crawford's Argument

In support of her "opposition" argument, Crawford relied on the EEOC’s Compliance Manual, which provides that an employee’s statements or actions are protected if they "would reasonably [be] interpreted as opposition" to unlawful conduct. Since Crawford described conduct that was offensive and, if true, potentially unlawful, the employer should have known that any woman in her position would have expected the employer to take action and prevent further incidents. The employer, on the other hand, argued that the Sixth Circuit correctly held that "opposition" requires an employee to take affirmative steps to communicate opposition to unlawful activity; simply responding to an investigator’s questions is insufficient.

Crawford also argued that her statements to the investigator were protected under the "participation" clause because the statute should be interpreted to include participation in an employer’s internal investigation, even in the absence of an EEOC charge. In an amicus brief filed by the U.S. Solicitor General, the Government endorsed this view. Crawford and other amici, including the Tennessee Education Association and the National Employment Lawyers Association, warned that a contrary holding would discourage truthful employee participation in internal investigations, as employees may fear retaliation if they confirm that unlawful conduct occurred. Crawford relied on the Court’s decisions in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), which established that plaintiffs may be denied relief under Title VII if they unreasonably fail to cooperate with an employer’s efforts to prevent and correct sexual harassment. Since Title VII requires the complaining employee to cooperate with the employer’s efforts to prevent, investigate and remedy sexual harassment in the workplace, Crawford argued, such must be covered as "investigation[s] ... under this title."

Employer's Response

The employer responded with a textual argument, asserting that Congress' choice of words surrounding the term "investigation" in Section 704(a) demonstrates that a covered "investigation" is one occurring after an EEOC charge has been filed. The use of the terms "charge," "testified," "proceeding," and "hearing," according to the employer, all indicate that Congress intended Title VII to protect employees from retaliation when they participate in the more formal investigations occurring after the statutory mechanisms of Title VII have been invoked. As the employer points out, all five Circuit Courts of Appeal to have considered the issue have so held.

Oral Argument

During oral argument, it appears that Justice Scalia favored the employer's textual argument. He was uncomfortable with the notion that an employee who responds to an employer's questions during an investigation can be considered to have "opposed" anything. He posed hypotheticals, such as the following, to test the boundaries of "opposition":

> Justice Scalia: So a co-worker of your client says: You know, the boss really was guilty of sexual harassment and the co-worker says: Gee, that's terrible.
>
> Mr. Schnapper: Yes, yes.
>
> Justice Scalia: That's enough? That's opposition?

Justice Ginsburg, however, continued to focus discussion on the facts of the case. She emphasized that it was unnecessary to pose "far-flung" hypotheticals because Crawford's statements were clear and specific. "She said: 'This boss harassed me.' It is about as specific as you get."

Justice Breyer questioned why the Court should not defer to the EEOC, which takes the position that, by providing relevant information in an employer-initiated investigation, an employee is by definition opposing practices made unlawful by Title VII. The employer's counsel responded that the EEOC's Compliance Manual contains contradictory statements on the conduct that is required to constitute "opposition."

Just last term, the Supreme Court rejected a textual argument by the employer finding a cause of action for retaliation under Section 1981 even in the absence of any retaliation language in the statute. *See CBOCS West, Inc. v. Humphries*, 128 S.Ct. 1951 (May 27, 2008) (holding that retaliation claims are cognizable under 42 U.S.C. § 1981); *see also Gomez-Perez v. Potter*, 128 S.Ct. 1931 (May 27, 2008) (holding that federal-sector provision of ADEA provides a cause of action for retaliation).

Conclusion

Another recent retaliation decision by the Court also favored employees. *See Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (June 22, 2006) (expanding "materially adverse action" element of retaliation claims). Notably, the Court recently gave deference to the EEOC's interpretation of what constitutes a "charge of discrimination" under its regulations. *Federal Express Corp. v. Holowecki*, 128 S. Ct. 1147 (Feb. 27, 2008). If the Court were to grant similar deference to the EEOC here, the petitioner's conduct is likely to be considered "protected activity."