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## U.S. Supreme Court Protects Workers from Retaliation in Workplace Discrimination Investigations

On January 26, 2009, the United States Supreme Court, in *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*, concluded that Title VII's anti-retaliation provision protects an employee-witness who "speaks out" about alleged discrimination "not on the employee's own initiative," but in answering questions during the employer's internal investigation.

### Retaliation Claim

Based on rumors that the Metro School District's (Metro) employee relations director (Hughes) had sexually harassed several Metro employees, Metro asked Crawford, a 30-year Metro employee, whether she had witnessed any "inappropriate behavior" by Hughes. Metro posed these questions to Crawford during its internal investigation, which Crawford did not initiate. In response to the questions, Crawford described several instances where she witnessed Hughes' sexually harassing behavior. Shortly after concluding its investigation, Metro did not take any action against Hughes; however, Metro discharged Crawford and two other employees purportedly for reasons unrelated to the investigation. Relying on her answers given during the internal investigation, Crawford lodged a retaliation claim against Metro. The Sixth Circuit Court of Appeals rejected Crawford's retaliation claim, finding that she did not actually "oppose" discriminatory behavior. The appeals court reasoned that Title VII "demands active, consistent 'opposing' activities to warrant . . . protection against retaliation." Crawford's action (cooperating with an internal investigation), the court explained, was not an "overt opposition" to be afforded Title VII's protection.

### Supreme Court Analysis and How it May Affect Employers

Contrary to the appeals court, the U.S. Supreme Court took a much broader view of Title VII's anti-retaliation provision. Applying the ordinary meaning to the word "oppose," namely, "to resist or antagonize," the High Court found that Crawford's description of Hughes' behavior qualified as "resistant or antagonistic" to Hughes' harassing treatment. Accordingly, even if an employee does not initiate a complaint or discussion about a co-worker's alleged discriminatory treatment, an employee may "oppose" discriminatory conduct by responding to an employer's questions. In the Supreme Court's view, concluding otherwise would create a real dilemma for employee-witnesses involved in an internal investigation into co-worker bias – if an employee reports discrimination by answering an employer's questions, the employer could penalize the employee without incurring Title VII liability. This would cause prudent employees to keep quiet about Title VII offenses against themselves or others, an outcome contrary to Title VII's purpose.

The *Crawford* opinion is consistent with the Supreme Court's recent pro-employee trend in retaliation cases. Given the Court's broad interpretation of opposition activity, employers can expect increased litigation over workplace retaliation claims. Further, *Crawford* will make some employers wary about the scope of their internal investigations into possible employee bias. For example, employers may balk at interviewing an employee-witness with ongoing performance problems based on a concern that the problem employee will pursue a retaliation claim after the employer discharges the employee for poor performance. Attempting to alleviate this concern, the *Crawford* Court emphasized that employers have an affirmative duty to investigate and root out workplace sexual and other forms of prohibited harassment; failing to do so will expose the employer to increased liability.

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In light of the *Crawford* Court's admonition, employers should continue to (i) train *all workers* to understand and follow the employer's anti-harassment policies and procedures; and (ii) conduct *immediate and thorough* investigations into workplace discrimination and harassment.

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