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LEGAL ALERT



## Legal Alert: U.S. Supreme Court Will Determine Whether an Employee who Cooperates in Internal Harassment Investigation is Protected from Retaliation

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The U.S. Supreme Court recently granted review in a retaliation case that could have a significant impact on employers. In *Crawford v. Metropolitan Government of Nashville and Davidson County Tennessee* (U.S. cert. granted Jan. 18, 2008), the Court will determine whether an employee who cooperates in an employer's internal investigation of a sexual harassment allegation, where no agency charge has been filed, is protected from retaliation under Title VII of the 1964 Civil Rights Act.

Crawford claimed she was discharged because of statements she made to an investigator during the internal investigation of another employee's sexual harassment allegation. There was no agency charge pending during or following the investigation. Although the employer claimed Crawford was discharged for drug use and embezzlement, Crawford claimed she was retaliatorily discharged because she told the investigator that she had witnessed sexually harassing behavior at work.

Title VII prohibits retaliation against employees who oppose an employment practice made unlawful under Title VII (the opposition clause) and against employees who participate in an investigation under Title VII (the participation clause).

The Sixth Circuit held that Crawford was not protected by the opposition clause in Title VII because that clause only protects actions that constitute "overt opposition." According to the court, Crawford did not engage in overt opposition by answering questions asked during an interview as part of the internal investigation because she did not instigate or initiate any complaint prior to her participation in the investigation, nor did she take any further action following the investigation and prior to her firing.

Additionally, the Sixth Circuit held that Crawford's actions were not protected by Title VII's participation clause because it protects an employee's participation in an employer's internal investigation into allegations of unlawful discrimination only when that investigation occurs pursuant to a pending EEOC charge. Thus, since no charge had been filed at the time of the investigation, Crawford's participation in the investigation was not protected by Title VII.

Acknowledging that there is no direct conflict among the federal appeals courts with regard to the Sixth Circuit's interpretation of the opposition clause, the U.S. Solicitor General nevertheless urged the Supreme Court to review the case. The government argued that the Sixth Circuit's decision "is out of step with the decisions of other circuits on the scope of Section 704(a) and creates an inexplicable gap in the statute's prohibition against retaliation."

**Employers' Bottom Line:**

The Supreme Court's decision in this case could have a significant impact on employers if the Court broadens the scope of protected activity under either the opposition clause or the participation clause. We will keep you updated on the status of this case.

If you have any questions regarding this case or other labor or employment law issues, please contact the Ford & Harrison attorney with whom you usually work.