CLIENT ALERT: Supreme Court Holds Title VII Protects From Retaliation Employees Who Cooperate With Internal Investigation

On January 26, 2009, a unanimous Supreme Court held that an employee terminated within a few months of replying to an employer's inquiry concerning alleged sexual harassment could pursue a retaliation claim under Title VII of the 1964 Civil Rights Act.

In *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*, the employer had commenced an investigation of alleged sexual harassment by the school district's employee relations director. When Crawford was questioned by the employer, she described a number of instances of sexually harassing behavior by the director. No action was taken against the director. However, several months after the inquiry, Crawford was fired for alleged embezzlement.

Crawford sued the employer claiming retaliation. She alleged that her actions were protected by both the "opposition clause" and "participation clause" of Title VII. The "opposition clause" protects an employee if he/she has opposed any practice made unlawful by the statute. The "participation clause" protects an employee who has filed a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing under the statute.

The federal district court and court of appeals dismissed Crawford's claims. With respect to the "opposition clause," the courts held that Crawford's actions were not protected because she did not instigate or initiate any complaint and did not take any further action after speaking to the investigator. Similarly, the courts found no protection for Crawford in the "participation clause" because the employer's investigation was not conducted pursuant to a pending charge at the Equal Employment Opportunity Commission.

In reversing, the Supreme Court looked to the ordinary dictionary meaning of the term "oppose." That meaning covered Crawford's conduct since she gave the investigator an ostensibly disapproving account of sexually obnoxious behavior towards her by a fellow employee. The Court also cited with approval an EEOC Guideline which states, "When an employee communicates to her employer a belief that the employer has engaged in … a form of employment discrimination, that communication" virtually always "constitutes the employee's opposition to the activity." 2 EEOC Compliance Manual §§8-II-B(1), (2), p. 614: 0003 (Mar. 2003).

Because the Court found Crawford's action in responding to the employer's inquiry protected by the "opposition clause," it declined to address whether her action was also protected by the "participation clause."
In a separate concurring opinion, Justice Alito, joined by Justice Thomas, wrote to emphasize his understanding that the Court's holding was limited to employees who testify in internal investigations or engage in "analogous purposive behavior" and did not include "silent opposition" or participation in "water cooler" conversations with co-workers. In his concurring opinion, Justice Alito cited statistics showing that retaliation charges filed with the EEOC doubled between 1992 and 2007.

The *Crawford* decision expands the types of conduct for which an employer may not retaliate under Title VII to include participation in an internal investigation. Employers must be sensitive and identify all types of potentially protected conduct, including allegations made during their own investigations. Moreover, employers should carefully document employee performance concerns as they occur, so as to minimize the likelihood that an adverse action may be deemed retaliatory. As always, employers need to proceed cautiously and consult with employment counsel whenever considering the possibility of taking an adverse employment action with an employee who may have

engaged in activity protected by the retaliation provisions of Title VII.

Nathan Kaitz, Esq. is a partner with Morgan, Brown & Joy, LLP. Nathan may be reached at (617) 523-6666 or at nkaitz@morganbrown.com. Morgan, Brown & Joy, LLP focuses exclusively on representing employers in employment and labor matters.