

# PUBLICATION

---

## A New Retaliation Decision Offers Some Relief to Employers

April 18, 2007

Has the target of an internal investigation you have initiated ever been the person who actually is responsible for investigating discrimination complaints? Have you ever had a long time employee participate in that internal investigation? Have you then later terminated that employee for reasons unrelated to the investigation and faced a lawsuit challenging the basis of the discharge? Let's look at a recent Sixth Circuit case to see how it strengthens your hand when defending this kind of lawsuit.

Ms. Vicki Crawford had worked for the Metropolitan Government of Nashville and Davidson County, Tennessee ("Metro") for around thirty years when Metro hired a new employee relations director, Dr. Gene Hughes, for the local school district. Among other duties, Dr. Hughes was responsible for investigating complaints of discrimination. When allegations surfaced that Dr. Hughes had acted inappropriately around female employees, Metro had its human resources department investigate. Human resources asked employees who worked with Dr. Hughes to come by for interviews, and Ms. Crawford was one of those employees. During her interview, Ms. Crawford made some very serious sexual harassment allegations against Dr. Hughes. After the investigation ended, Metro concluded that, while Dr. Hughes had acted inappropriately and unprofessionally, his conduct had not risen to the level alleged by Ms. Crawford, and he was not disciplined.

The matter does not stop there. After the investigation of Dr. Hughes ended, Ms. Crawford alleged that she and two other employees were investigated for other reasons and then discharged. The three employees who were discharged, she alleged, were the same three employees who during Metro's investigation of Dr. Hughes claimed he had sexually harassed them. The reason Metro gave for Ms. Crawford's discharge is that she had embezzled money and used drugs. Ms. Crawford denied those charges, brought a claim of retaliation with the EEOC, and then filed suit. The trial court granted Metro's summary judgment motion, and Ms. Crawford appealed to the Sixth Circuit.

At the heart of Ms. Crawford's wrongful discharge claim lay her belief that she had participated in protected activity when interviewed and making statements during Metro's investigation of Dr. Hughes. She asserted that Metro retaliated against her contrary to her rights under Title VII. Under Title VII, it is unlawful to discriminate against an employee who "has opposed any practice" made unlawful by Title VII or "made a charge, testified, assisted, or participated in any manner in an investigation" under Title VII. See 42 U.S.C. 2000e-3(a). To prove unlawful retaliation, Ms. Crawford had to assert facts supporting that

- she had engaged in protected activity under Title VII
- the defendant knew she had engaged in that activity
- the defendant later took employment action adverse to her interests; and
- there was a causal link between the protected activity and the adverse employment action.

The Sixth Circuit analyzed Ms. Crawford's claims under two established lines of reasoning regarding retaliation claims under Title VII: (1) did she "oppose" a practice made unlawful by Title VII, or (2) did she "participate" in an investigation? As did the trial court below, the Sixth Circuit reasoned that Ms. Crawford did not merit the protections of Title VII. First, the court reasoned that Ms. Crawford had not "opposed" unlawful behavior because she had not initiated or brought any complaint before Metro's investigation of Dr. Hughes began, and

she did nothing further after the Hughes investigation concluded. She had simply cooperated in an internal investigation begun by Metro. Second, the court concluded that Ms. Crawford's "participation" in the Hughes investigation, in the absence of a pending EEOC charge or other formal proceeding under Title VII, likewise was not protected activity. The court emphasized that the Hughes investigation was purely an internal matter initiated by Metro.

There are some good points here for employers. First, the court declined to agree with Ms. Crawford that it should extend the law to cover circumstances in which no EEOC charge or other formal proceeding under Title VII was pending. The court did not accept her argument that such a requirement would chill employees' rights and make them "stay silent" rather than identify unlawful behavior. As a basis for its decision, the court explained that firing an employee for testifying negatively during an investigation would not be reasonable and would be in bad faith, nullifying the defenses given employers under *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

Second, the court added that one of the primary purposes of Title VII's "participation" clause is to give and protect access to the benefits of Title VII's procedures. In the absence of a pending EEOC charge or other formal proceeding under Title VII, this type of claim had to be reviewed under the "opposition" clause. As a policy matter, then, protecting only participation in such formal situations keeps the "onerous" burdens of Title VII from resting on an employer who voluntarily initiates a purely internal investigation. The Sixth Circuit stated that it did not want to "discourage" such investigations. This reasoning is consistent with other principles in the law that protect a company's efforts, in certain instances, to proactively improve its work environment and practices.

Third, this case emphasizes that it can pay dividends to conduct a complete investigation before a formal charge is filed. It also is a friendly reminder that Title VII does offer protections to employees who oppose unlawful activity or participate in EEOC-driven investigations. In conclusion, then, be very careful how you treat employees who have participated in your investigations because they, too, may have protected rights.

*Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*, No. 05-5258, 2006 WL 3307507 (6th Cir. Nov. 14, 2006).