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The Supreme Court Confirms Employee Retaliation Rights Protection

By: Nancy Richards-Stower and Debra Weiss Ford

Editor's note: This is the sixth Bar News "debate" between employment lawyers Nancy Richards-Stower (employee advocate) and Debra Weiss Ford (employer advocate), both Fellows of the College of Labor and Employment Lawyers. The topic is the recent retaliation decision issued by the United States Supreme Court on October 8, 2008.

Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee held that an employee who participates in an employer's internal corporate investigation of discrimination is protected by the "opposition" retaliation provision of Title VII of the Civil Rights Act of 1964, as amended, although there was no pending EEOC complaint at the time of the investigation.

This is only the most recent in a string of Supreme Court decisions protecting the rights of employees against retaliation. (See the attorneys' earlier retaliation debates: "The Supreme Court Revs Up Employee Retaliation Rights," *NH Bar News, 8/15/08*; and "Retaliation Under Title VII: Two Viewpoints," *NH Bar News, 8/11/06*)

Debra: Six debates and six times seeing you gloat, Nance. This is getting old!

Nancy: So am I, but this is a gender case so age is irrelevant.

Debra: All in all, *Crawford's* not a big surprise. After the U.S. Supreme Court decided in 1998 that an employer could escape Title VII liability for supervisory sexual harassment by instituting an anti-harassment policy (see *Burlington Industries, Inc., 524 U.S. 724, and Faragher v. City of Boca Raton, 524 U.S. 775*), most employers have instituted such policies, and many now conduct internal investigations upon first notice of any discriminatory harassment.

Nancy: Yes, since the Supreme Court provided a "Get Out of Jail Free" card to the employers of supervisory harassers (a/k/a "pigs") who retaliate against, but do not fire or demote, the complainer, many play that hand. However, many more employers neither recognize, nor provide training in the area of, "retaliation." Even more fail to realize that retaliation rarely reflects the underlying type of employment discrimination.

For example, a complaint about race harassment may yield retaliation of an apparently neutral performance critique, like underlying cases of discrimination which lack direct evidence or name-calling or even a" smoking gun," but are evidenced by "mere" differential treatment. Deb, as you know, what really, really "frosts" me is that many federal courts remain clueless to what everyone else on earth knows: "Revenge is Best Served Cold"!

Thus, federal decisions require proof of "temporal proximity" between the underlying complaint and the retaliatory act. Political activists know that some slight to a power player a decade ago can yield a passover for an appointment today. It works exactly the same in the corporate world.

Debra: Is there a vacancy in your sights? Never mind. Let's focus on the facts of *Crawford*. In that case, the employer conducted an internal investigation following the sexual harassment complaint of an employee.

Nancy: The employee against whom the complaint was made was the agency's "employee relations director," one Mr. Hughes. Now isn't that special!

Debra: Perhaps he skipped some of his own seminars! Anyway, Ms. Crawford, a 30-year employee of the agency, was interviewed in a sexual harassment investigation about Hughes. She then reported that she also had been sexually harassed by him.

Nancy: So, Deb, what did the employer do to Hughes? Nothing! But it fired Crawford for alleged embezzlement along with two other discrimination witnesses. This is a very common story in my experience: the employee who sticks her neck out during an

internal investigation loses her head! That is why employees are afraid to invoke their employer's internal complaint procedure.

Debra: Nance, few employees have been beheaded! In fact, everyone is better served when prompt remedial measures are taken upon a founded complaint.

Nancy: Yes, but one party's "founded" is another party's "unfounded," and, regardless, the retaliation train rolls over the employee.

Debra: Not always.

Nancy: Often enough. In the workplace, the "squeaky wheel usually gets the shaft," not the grease.

Debra: Back to *Crawford*.

Nancy: Yes, let's talk about Mr. Hughes, the great H.R. person who responded to Crawford's friendly greeting of "What's Up?" with a crotch grab (at least it was his own). That was accompanied by his leering "You know what's up!" and followed several other sordid "crotch events."

Debra: The allegations certainly defined "pig!" Anyway, the Supreme Court reminded us that Title VII prohibits two kinds of retaliation: one for opposing discrimination and the other for "testif[ying], assist[ing] or participat[ing]...in an investigation, proceeding or hearing under [*Title VII*]."

Nancy: Shorthand: Opposition and/or Participation = Protected Conduct.

Debra: That's right. But it is odd that it took until 2008 for it to be made clear that participating in an internal investigation triggered one or both. In this case, the district court granted summary judgment for the employer, holding that there was no "opposition" here because Crawford hadn't "instigated or initiated any complaint" but had "merely answered questions by investigators in an already-pending internal investigation initiated by someone else"; and there was no" participation" because there was no "pending EEOC charge."

Nancy: Why were you surprised that the federal courts granted/upheld summary judgment? Summary judgment is the docket-clearing spray cleaner for employment claims in federal court. (See "Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?" by Stewart J. Schwab, Dean of the Cornell Law School, and Kevin M. Clermont, law professor at the Cornell Law School, linked to by the *NH Bar News, 1/16/09*.)

Debra: That's a bit harsh, Nance. Perhaps you should do it in poetry.

Nancy: I created a rap....

Debra: I've heard your rap. The *Crawford* decisions below made no sense to me, and I've represented employers over my entire career. When the Supreme Court invites you to investigate discrimination claims promptly to avoid liability, you can't very well go about punishing those to whom you direct investigative inquiries!

Nancy: Yet the Supreme Court conducted a painstaking analysis of dictionary meanings of "opposition" before ruling for the employee. Just once I'd like to see "the Supremes" say "Duh! Of course it's illegal, you turkey!"

Debra: I guess we know of one vacancy you won't be waiting for....

Nancy: Why does it take the U.S. Supreme Court to open to the dictionary meaning of "oppose" to clarify the law of the land for the circuit courts of appeal in such a simple case? Why does it take the Supreme Court to note that "oppose" can include answering questions or even "standing pat…refusing to follow a supervisor's order to fire a...worker for discriminatory reasons…." The decisions below are typical of federal decisions which twist themselves into pretzels to avoid giving employees their jury trials.

Debra: Well, the U.S. Supreme Court made short shrift of the employer's argument that by protecting the "mere" answering of an employer-posed question, the court would invite employers to turn a blind eye to workplace discrimination.

Nancy: Right. Ignoring complaints would vaporize the affirmative defense "get out of jail free" card gifted by *Ellerth* and *Faragher*. (Employee advocates also call those decisions "one free bite of the apple/ one free bite of the employee.")

Debra: Although the 1998 cases of *Ellerth* and *Faragher* were limited to the issue of employer vicarious liability for supervisory sexual harassment when the employee has not been fired or demoted (or otherwise subject to some "tangible employment action"), they seem to have been imported into all other types of discrimination claims, so that a current employee must have a good excuse for skipping the employer's complaint procedure before filing with the EEOC or Human Rights Commission.

Nancy: To properly invoke the Ellerth/Faragher affirmative defense, the employer must have a policy calculated (a) to prevent, as well as to (b) respond to harassment. I've seen few workplace policies imple-

mented in a way reasonably calculated to prevent harassment. Usually they exist on paper only, and are thrust before an employee while she is signing her hiring papers, never to be seen again until I request her personnel file.

Debra: Not my clients, Nance! Most have instituted training classes at regular intervals both for management and hourly workers.

Nancy: And those that do rarely get sued by me; right?

Debra: Right!

Nancy: We should mention the exception to the "free bite of the apple": when there is a reasonable excuse for the employee to avoid the company's complaint procedure. For example, she observed that the last employee who filed a complaint was harassed or fired.

Debra: However, mere "fear" that an internal complaint will result in retaliation isn't enough to avoid the internal complaint rules of Ellerth/Faragher.

Nancy: Well, not according to the federal courts, but as I noted earlier, "Revenge is best served cold," and fear of retaliation is usually a very, very reasonable fear.

Debra: Well, employees should be less fearful now that the U.S. Supreme Court has ruled that participants of internal employment discrimination investigations are protected under the "opposition clause" of Title VII.

Nancy: Hopefully it will not require another Supreme Court appeal for the courts to "get" that participating in an internal investigation is also protected by the "participation clause," something the *Crawford* court decided not to reach.

Debra: And one more note of interest: Justice Alito, in a concurring opinion, specifically stated that the decision should not be seen as granting Title VII protection to "silent opposition" to alleged harassment or discrimination. I'm sure we will see some litigation on that issue.

Nancy: And remember, everything that violates Title VII, by definition, violates RSA 354-A (see *RSA 354A:2, XV(b)*), so *Crawford* also added to the arsenal against reprisals found in 354-A:11 (Interference, Coercion, Intimidation), 354-A: 19 (Retaliation and Required Records) and 354-A:25 (Construction).

Debra: The Supreme Court will soon rule in *Gross v. FBL Financial Services* whether direct evidence is necessary in ADEA mixed-motive cases. *Desert Palace, d/b/a Caesar's Palace v. Costa*, a Title VII case, left the question open. Want to debate the pro's and con's of a mixed-motive case when Gross is handed down?

Nancy: As they say in Alaska, "You betcha!"

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