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Megan E. Mowrey

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Discriminatory Retaliation: Title VII Protection for the Cooperating Employee

Megan E. Mowrey*

Discriminatory retaliation represented 32.3% of all Equal Employment Opportunity Commission (“EEOC”) claims in 2007, up from 22.6% in 1997. 28.3% of those retaliation charges specifically involved Title VII,¹ an increase from 20.3% in 1997.² As the frequency of retaliation claims filed through the EEOC has increased, courts have devoted more time to the issue, evidenced, for example, by the Supreme Court’s recent consideration of three retaliation cases: *CBOCS West, Inc. v. Humphries*,³ *Gomez-Perez v. Potter*,⁴ and *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*.⁵ While the decisions in *CBOCS West* and *Gomez-Perez* respectively involved the Civil Rights Act of 1991⁶ and the Age Discrimination in Employment Act,⁷ *Crawford* addressed retaliation under Ti-

* Associate Professor, Clemson University, College of Business and Behavioral Science.

1. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a) (2006).

2. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N (“EEOC”), CHARGE STATISTICS: FY 1997 THROUGH FY 2008, <http://www.eeoc.gov/stats/charges.html>. (last visited Oct. 2, 2009). Compare, for example, the percentage of all retaliation charges filed in 1997 (18,198 of a total of 80,680 charges – 22.6%) with the number of charges in 2002 (22,768 of a total of 84,442 charges – 27%) and in 2007 (26,663 of a total of 82,792 charges – 32.3%). *Id.* The percentage of charges filed specifically for Title VII retaliation was 20.3% in 1997 (16,394 of a total of 84,442 charges), 24.6% in 2002 (20,814 of a total of 80,680 charges), and 28.3% in 2007 (23,371 of a total of 82,792 charges). *Id.*

3. 128 S. Ct. 1951 (2008).

4. 128 S. Ct. 1931 (2008).

5. 129 S. Ct. 846 (2009).

6. 42 U.S.C. § 1981 (2006).

7. 29 U.S.C. § 633a (2006). Both the *CBOCS West* and *Gomez-Perez* cases were remanded for further action after the Supreme Court found that 42 U.S.C. § 1981 and 29 U.S.C. § 633a did encompass discriminatory retaliation, even though neither statute specifically stated that retaliation was an illegal act. *See CBOCS*, 128 S. Ct. at 1954, 1961; *Gomez-Perez*, 128 S. Ct. at 1935, 1943.

tle VII.⁸ This review examines retaliation in *Crawford* and analyzes the case in light of employment discrimination law.

Title VII makes discriminatory employment retaliation illegal:⁹

It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.¹⁰

Title VII outlaws retaliation by virtue of the Act's opposition clause (i.e., retaliation employees suffer due to their opposition to an employer's allegedly discriminatory acts), and the Act's participation clause (i.e., retaliation employees suffer due to their participation in an investigation, proceeding, or hearing involving an employer's alleged discrimination).¹¹

The Supreme Court announced in *Crawford* that a worker who testifies in an employer's internal investigation of discrimination engages in opposing conduct and is protected by the opposition clause.¹² The Court held that when the *Crawford* employer fired its worker, in retaliation for her cooperation, the employer violated Title VII.¹³ Several Circuits were already in agreement with the Supreme Court's classification of cooperation as protected opposing conduct, even absent additional external involvement by the EEOC.¹⁴ The Court declined to consider whether cooperation in an internal investigation is

8. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a) (2006). *See Crawford*, 129 S. Ct. at 846-53. Other federal statutes explicitly prohibit retaliation, including, for example, the Americans with Disabilities Act of 1990 § 503, 42 U.S.C. § 12203(a) (2006), and the Fair Labor Standards Act of 1938, ch. 676 § 15, 29 U.S.C. § 215(a)(3) (2006).

9. 42 U.S.C. § 2000e-3(a).

10. *Id.* § 2000e-3.

11. *See Crawford*, 129 S. Ct. at 850.

12. *Id.* at 850-51.

13. *Id.*

14. *See, e.g.,* Cardenas v. Massey, 269 F.3d 251, 258 (3d Cir. 2001); Evans v. City of Houston, 246 F.3d 344, 347 (5th Cir. 2001); Scott v. County of Ramsey, 180 F.3d 913, 915 (8th Cir. 1999); McDonnell v. Cisneros, 84 F.3d 256, 257 (7th Cir. 1996). *See also* discussion *infra* Section II.

also protected conduct under the participation clause.¹⁵ The Sixth Circuit, which heard the initial appeal of *Crawford*, had held that cooperation was not a protected act under either clause.¹⁶

This Article argues that Title VII protects *Crawford* and similarly situated workers under both the opposition clause and the participation clause. Not only do the aims of Title VII (i.e., the prevention of discrimination) counsel full coverage of employees in cases like *Crawford*, coverage under the opposition and participation clauses will, consistent with the Court's decision, promote employees' cooperation when their employers investigate discrimination allegations. Employers may effectively internally address reported discrimination when they talk with workers who can attest to an allegation's authenticity. Employees who know that their cooperation cannot result in negative employment actions, without the employer's exposure to potential liability, will be much more likely to cooperate through their testimony.¹⁷

The notion that coverage is provided to employees through both the participation and opposition clauses also recognizes the importance of employers' internal procedures in preventing employment discrimination. Employers have the opportunity to prevent and address discrimination in the workplace through their anti-discrimination policies.¹⁸ The Supreme Court has

15. *Crawford*, 129 S. Ct. at 853.

16. *Crawford v. Metro. Gov't of Nashville & Davidson County, Tenn.*, 211 F. App'x 373, 377 (6th Cir. 2006).

17. See, e.g., Brief for the Petitioner at 33-34, *Crawford*, 129 S. Ct. 846 (No. 06-1595), 2008 WL 1721898, at *33-34. The petitioner argued that:

In the absence of protection against retaliation, witnesses and victims would be understandably reluctant to participate in an investigation into unlawful conduct, which in turn, would undermine Title VII's purpose to spur employers' efforts to deter and detect unlawful discrimination in the workplace. . . . [] "Surveys have shown that a common reason for failure to report harassment to management is fear of retaliation . . . [and] a significant proportion of harassment victims are worse off after complaining." []

Id. (citing ENFORCEMENT GUIDANCE, VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS, 2 EEOC Compl. Man. (BNA) § 615:108, at § V(C)(1)(b) n.59 (June 18, 1999); Brief for United States as Amicus Curiae at 9, 19-20, *Crawford*, 129 S. Ct. 846 (No. 06-1595), 2007 WL 4439456, at *9, *19-20).

18. See, e.g., *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764-65 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 804-07 (1998). See also discussion *infra* Section II.

held that anti-discrimination policies are a key component of an employer's affirmative defense to employment discrimination.¹⁹ The affirmative defense was created by the Court when it allowed employers to defend against the employers' vicarious liability triggered by its supervisors; an employer that demonstrates the establishment of a valid anti-discrimination policy, and that the worker failed to use it, may successfully defeat a claim for sexual harassment, establishing the importance of internal measures designed to address discrimination.²⁰

Cooperation in an internal investigation is, therefore, a protected act, whether a court understands investigations to be a part of the Title VII process that generally obligates employers to prevent discrimination, or whether a court interprets investigations to be required under the Supreme Court's discussion of the affirmative defense. The affirmative defense and Title VII's goals both place cooperation in an investigation into the category of protected acts, cognizable "under [Title VII]" as enforced by the EEOC, as are actions taken in connection with an official EEOC claim.²¹

Additionally, the Supreme Court's decision in *Crawford* can be compared to the Court's resolution of other Title VII cases, such as *Ledbetter v. Goodyear Tire & Rubber Company*.²² These comparisons are useful, in part, because the Court's decisions demonstrate what the Court holds as necessary for Title VII to serve the public interest. In *Ledbetter*, the Court required employees to file a claim for discriminatory compensation the moment that a discriminatory pay practice was initiated.²³ The *Ledbetter* Court thus placed a premium on potential employee-plaintiffs taking official action as soon as possible, else they would lose the right to subsequently sue for discriminatory compensation.²⁴ Because of the difficulties that *Ledbetter* posed to future employee-plaintiffs through its requirement for filing timely claims, Congress altered the effect of the Court's *Ledbet-*

19. *Ellerth*, 524 U.S. at 764-65; *Faragher*, 524 U.S. at 804-07.

20. *Ellerth*, 524 U.S. at 764-65; *Faragher*, 524 U.S. at 804-07.

21. 42 U.S.C. § 2000e-3(a) (2006).

22. 558 U.S. 618 (2007).

23. *Id.* at 623.

24. *Id.* The statute of limitations for filing a Title VII claim is either 180 or 300 days. 42 U.S.C. § 2000e-5(e)(1).

ter decision by enacting the Lilly Ledbetter Fair Pay Act of 2009.²⁵

In *Crawford*, the Court announced that the public may be served by fostering employment relations that protect against retaliation provoked by an employee's opposition to discrimination.²⁶ Title VII tries to accomplish this protection not only through lawsuits, but with the machinery surrounding anti-discrimination policies, the use of which may avert the need to formally sue, to the extent that discrimination and retaliation are prevented in the first place.²⁷ The Supreme Court stated in *Burlington Northern & Santa Fe Railway Co. v. White*:

Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses. "Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances." Interpreting the anti-retaliation provision to provide broad protection from retaliation helps assure the cooperation upon which accomplishment of the Act's primary objective depends.²⁸

The Supreme Court compromised the "broad protection from retaliation" that its prior decisions had urged²⁹ to the extent that the Court failed to address the employee's claim under the participation clause.³⁰

Title VII must cover retaliation for a worker fired due to his or her cooperation in an internal investigation, as decided by *Crawford*, under the opposition clause. To hold otherwise

25. Pub. L. No. 111-2, 123 Stat. 5 (2009). See also *infra* notes 229-230 and accompanying text.

26. *Crawford v. Metro. Gov't of Nashville & Davidson County, Tenn.*, 129 S. Ct. 846, 852 (2009).

27. See *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006) (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997)). See also *Crawford v. Metro. Gov't of Nashville & Davidson County, Tenn.*, 211 F. App'x 373, 377 (6th Cir. 2006) ("This court has stated that the purpose of Title VII's participation clause 'is to protect access to the machinery available to seek redress for civil rights violations and to protect the operation of that machinery once it has been engaged.'" (quoting *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1313 (6th Cir. 1989))).

28. *White*, 548 U.S. at 67 (quoting *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960)).

29. *Id.*

30. *Crawford*, 129 S. Ct. at 853.

would place Title VII at risk, not only because it would leave workers unprotected, but because it would weaken the statute, harming the efforts of thoughtful employers who try to prevent discrimination. Coverage for an employee like Crawford should come, however, through both the opposition clause and the participation clause. This Article begins its analysis by examining the Sixth Circuit's decision in the *Crawford* case.

I. *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee* in the Sixth Circuit

A. *Procedure and Facts*

In *Crawford*, the Sixth Circuit affirmed the district court's summary judgment in favor of the defendants.³¹ The case, filed by Vicky Crawford against the Metropolitan Government of Nashville and Davidson County, Tennessee, involved Crawford's employer of thirty years, the Nashville Metropolitan School District ("Metro").³² The genesis of *Crawford* occurred when several Metro employees accused Metro's Employee Relations Director, Gene Hughes, of sexual harassment.³³ The position Hughes held with Metro required that he examine allegations of employment discrimination, and, because the workers' claims involved such discrimination by Hughes, Metro eventually appointed Veronica Frazier, Assistant Director of Human Resources, to conduct the investigation.³⁴

Crawford became involved in Metro's investigation when Frazier interviewed employees who had worked with Hughes.³⁵ Frazier spoke with Crawford in July 2002,³⁶ and the interview produced testimony by Crawford concerning Hughes's sexual harassment of Crawford and other employees.³⁷ Crawford's

31. *Crawford*, 211 F. App'x 373 (6th Cir. 2006), *aff'g* No. 03-0996, 2005 WL 6011557 (M.D. Tenn. Jan. 6, 2005), *rev'd*, 129 S. Ct. 846 (2009).

32. *Id.* at 374. Crawford held several jobs during her thirty-year tenure with Metro, including payroll coordinator, the position she occupied at the time of her termination. Final Brief of Appellant at 5, *Crawford*, 211 F. App'x 373 (No. 05-5258), 2006 WL 3522669, at *5.

33. *Crawford*, 211 F. App'x at 374.

34. *Id.*

35. *Id.* at 375.

36. *Id.*

37. *Id.* Crawford did not claim discrimination in the employees' initial complaints against Hughes. *Id.* at 374-75.

statements regarding the sexual harassment perpetrated by Hughes included requests by Hughes to Crawford, and one of her statements claimed,

that Hughes had asked to see her titties on numerous occasions, that she would say, “Hey Dr. Hughes, What’s up?” and he would grab his crotch and state “you know what’s up,” that he would approach her window and put his crotch up to the window and ask to see her titties all at the same time, and that one time, Hughes came into her office and she asked him what she could do for him and he grabbed her head and pulled it to his crotch.³⁸

Metro ultimately took no action against Hughes, finding that, while he “had engaged in inappropriate and unprofessional behavior,” his behavior was not actionable by Metro.³⁹ Subsequent to its investigatory interview, Metro fired Crawford, however, for alleged embezzlement and drug use in November 2002.⁴⁰ The Sixth Circuit’s opinion noted that Crawford stated the charges were unfounded.⁴¹ Prior to Crawford’s termination, Metro fired two other employees immediately after their respective interviews regarding Hughes’s conduct, and their terminations rested on allegedly unfounded charges as well.⁴²

38. *Id.* at 375 n.1 (some internal quotation marks and citations omitted).

39. *Id.* at 375.

40. *Id.* at 374. The Sixth Circuit noted two dates for Crawford’s termination. The first was in November 2002. *Id.* The second was in January 2003. *Id.* at 375. According to the Final Brief of the Appellant, filed with the Sixth Circuit in 2006, Crawford was placed on administrative leave in November 2002, relating to unfounded charges against Crawford for embezzlement and drug use. Final Brief of Appellant, *supra* note 32, at 15, 2006 WL 3522669, at *15. The dates of Crawford’s administrative leave and termination were corroborated by the Final Brief of the Appellee to the Sixth Circuit, as Metro placed Crawford on administrative leave in November 2002 and formally fired her in January 2003. Final Brief of Defendant/Appellee at 4, *Crawford*, 211 F. App’x 373 (No. 05-5258), 2006 WL 3522670, at *4.

41. *Crawford*, 211 F. App’x at 375.

42. *Id.*

Despite statements from three different women describing sexual harassment by Hughes, the investigators explained that they were unwilling to make any findings about Hughes’ actions because each of the victims was alone with Hughes at the time of the alleged harassment. Hughes’ denial of each allegation of harassment was apparently enough by itself to preclude any finding of harassment.

Brief for the Petitioner, *supra* note 17, at 6, 2008 WL 1721898, at *6.

In the course of their interviews, each of the three fired employees confirmed that Hughes engaged in sexual harassment.⁴³

Crawford filed a civil action against Metro in June 2003 under Title VII of the Civil Rights Act of 1964,⁴⁴ claiming that Metro retaliated against her by both manufacturing charges and by firing her in response to her statements regarding Hughes.⁴⁵ The district court dismissed the case in an unpublished opinion,⁴⁶ and Crawford appealed to the Sixth Circuit.⁴⁷

B. *The Sixth Circuit's Discussion*

The Sixth Circuit divided Title VII retaliation claims into two types, consistent with the statute's language and the Supreme Court's prior experiences with the term.⁴⁸ The first type consists of retaliation that results from an employee's opposition to an employer's discriminatory conduct—the Act's opposition clause.⁴⁹ The second type consists of retaliation that occurs as a result of an employee's participation in an investigation, proceeding, or hearing regarding discriminatory conduct—the Act's participation clause.⁵⁰

43. *Crawford*, 211 F. App'x at 375.

44. 42 U.S.C. § 2000e-3(a) (2006).

45. *Crawford*, 211 F. App'x at 374-75. Title VII includes as an unlawful employment practice:

Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings[.]

It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a).

46. *Crawford v. Metro. Gov't of Nashville/Davidson County*, No. 03-0996, 2005 WL 6011557 (M.D. Tenn. Jan. 6, 2005).

47. *See, e.g.*, Final Brief of Appellant, *supra* note 32, at 1, 2006 WL 3522669, at *1.

48. *Crawford*, 211 F. App'x at 375-76. *See, e.g.*, *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 59 (2006) ("Title VII's anti-retaliation provision forbids employer actions that 'discriminate against' an employee (or job applicant) because he has 'opposed' a practice that Title VII forbids or has 'made a charge, testified, assisted, or participated in' a Title VII 'investigation, proceeding, or hearing.'") (some internal quotation marks and citations omitted).

49. *Crawford*, 211 F. App'x at 376.

50. *Id.* *See Bell v. Safety Grooving & Grinding, L.P.*, 107 F. App'x 607, 610 (6th Cir. 2004); *Abbott v. Crown Motor Co.*, 348 F.3d 537, 542-43 (6th Cir. 2003); *EEOC v. Total Sys. Servs., Inc.*, 221 F.3d 1171, 1174 n.2 (11th Cir. 2000). Similar

According to the Sixth Circuit, a claim based upon the opposition clause required “active, consistent opposing activities to warrant protection against retaliation.”⁵¹ Because Crawford did not initiate the actions against Hughes, nor did she actively oppose the discrimination practiced by Hughes against other employees, Crawford’s cooperation in her employer’s internal investigation failed to qualify as opposing conduct.⁵² The Sixth Circuit stated that Crawford only cooperated “by appearing for questioning at the request of [Metro]. . . . This is not the kind of overt opposition that we have held is required for protection under Title VII.”⁵³ The Sixth Circuit explained what could be considered opposing behavior under Title VII.⁵⁴ The court stated that opposing conduct included “*complaining to anyone (management, unions, other employees, or newspapers) about allegedly unlawful practices*; refusing to obey an order because the worker thinks it is unlawful under Title VII; and opposing unlawful acts by persons other than the employer—e.g., former employers, union, and co-workers.”⁵⁵ The Sixth Circuit ruled that Title VII failed to provide Crawford protection under the opposition clause primarily because Crawford failed to claim discrimination prior to her interview.⁵⁶ Crawford’s actions, the

to Title VII, which prohibits retaliation under the participation and opposition clauses, the Americans with Disabilities Act also establishes participation clause and opposition clause claims. “No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.” 42 U.S.C. § 12203(a) (2006). Protection is given under the Fair Labor Standards Act as well, where it is unlawful for any person:

[T]o discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

29 U.S.C. § 215(a)(3) (2006).

51. *Crawford*, 211 F. App’x at 376 (internal quotation marks and citation omitted).

52. *Id.*

53. *Id.*

54. *Id.* (citing *Bell*, 107 F. App’x at 610; *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 579 (6th Cir. 2000)).

55. *Id.* (quoting *Johnson*, 215 F.3d at 579) (internal quotation marks omitted and emphasis added).

56. *Id.*

court reasoned, were passive conduct, not active opposition, as required by the court's interpretation of the statute.⁵⁷

The Sixth Circuit also held that Crawford's cooperation failed to constitute a recognizable claim under the participation clause of Title VII.⁵⁸ According to the court, claims for violations under the participation clause must come in tandem with involvement by the EEOC.⁵⁹ Because the investigation into Hughes's discrimination stemmed from Metro's own, internal actions, and because it was not due to the EEOC's intervention, Metro's internal investigation failed to trigger protection for Crawford under Title VII.⁶⁰ The Sixth Circuit stated, "Title VII protects an employee's participation in an employer's internal investigation into allegations of unlawful discrimination where that investigation occurs pursuant to a pending EEOC charge."⁶¹ The Sixth Circuit pointed to prior decisions in its own circuit, as well as decisions by the Eighth, Ninth, and Eleventh Circuits, and the District Court of Tennessee, stating: "[T]he participation clause does not protect an employee's participation in an employer's internal, in-house investigation, conducted apart from a formal charge with the EEOC; at minimum, an employee must have filed a charge with the EEOC or otherwise instigated proceedings under Title VII."⁶² The Sixth Circuit held, therefore, that the mechanisms of Title VII do not include internal investigations, without the benefit of the government's intercession, as a necessary part of Title VII's purpose of preventing discrimination under the participation clause.⁶³

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* (quoting *Abbott v. Crown Motor Co.*, 348 F.3d 537, 543 (6th Cir. 2003)).

62. *Id.* (quoting *Abbott*, 348 F.3d at 543; *Brower v. Runyon*, 178 F.3d 1002, 1006 (8th Cir. 2000); *EEOC v. Total Sys. Serv., Inc.*, 221 F.3d 1171, 1174 n.2 (11th Cir. 2000); *Vasconcelos v. Meese*, 907 F.2d 111, 113 (9th Cir. 1990); *Goldberg v. Media Gen., Inc.*, No. 01-325, 2003 WL 21920923, at *3 (E.D. Tenn. June 18, 2003)) (internal quotation marks omitted).

63. *Id.*

C. *The Holding of the Sixth Circuit*

1. The Circuit Court's Conclusion

The Sixth Circuit concluded its decision in *Crawford* by stating that:

[T]he purpose of Title VII's participation clause "is to protect access to the machinery available to seek redress for civil rights violations and to protect the operation of that machinery once it has been engaged. Accordingly, any activity by the employee prior to the instigation of statutory proceedings is to be considered pursuant to the opposition clause."⁶⁴

The court explained that Crawford's claim could not rest with the opposition clause, nor could it be raised under the participation clause.⁶⁵ The court stated that its interpretation served to encourage internal investigations.⁶⁶ In the court's words, "the participation clause prevents the burden of Title VII from falling on an employer who proactively chooses to launch an internal investigation. Expanding the purview of the participation clause to cover such investigations would simultaneously discourage them."⁶⁷ The court's reasoning presumed that if all employees who are called to testify in an internal investigation merit Title VII protection by virtue of a retaliation claim, employers will not initiate internal investigations, fearing that any employee called to testify may subsequently file suit.⁶⁸ The Sixth Circuit then affirmed the district court's dismissal of the suit.⁶⁹

2. Analysis

Despite the Supreme Court's prior admonitions that employers must try to prevent discrimination,⁷⁰ the Sixth Circuit

64. *Id.* at 377 (quoting *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1313 (6th Cir. 1989)).

65. *Id.* at 376.

66. *Id.* at 377.

67. *Id.*

68. *Id.*

69. *Id.*

70. *See Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 66-67 (2006) (discussing employees' cooperation in an investigation of discrimination as necessary to the application and enforcement of Title VII).

did not look at the *Crawford* employee's circumstance as an opportunity to protect workers through a successful application of Title VII. Instead, the Sixth Circuit assumed that protecting the worker in *Crawford* posed a potential danger to employers; by protecting the *Crawford* employee, employers would stop investigating discrimination out of fear of retaliation lawsuits, particularly if cooperation in an investigation constituted protected conduct.⁷¹

The court's assessment failed to recognize that an employer's disinclination to investigate would compromise the ability of the employer to establish an affirmative defense to discrimination charges should the alleged discrimination take the form of an intangible employment action against the employee.⁷² The Supreme Court created the affirmative defense when it held that a worker's claim, that his or her employer is vicariously liable for an intangible harm caused by a discriminating supervisor, will be unsuccessful to the extent that the employer established a valid anti-discrimination policy and that the employee failed to use it.⁷³ A valid policy will likely provide for investigations into a worker's discrimination allegations.⁷⁴ A failure to investigate, therefore, would eliminate the employer's access to the defense because the employer would be unable to establish its first element. The Sixth Circuit believed that the employer needs protection from the "burden of Title VII,"⁷⁵ not that the employee needs protection through Title VII when the employer decides to fire the worker who cooperates.

71. *Crawford*, 211 F. App'x at 376. As discussed *infra*, the Supreme Court would come to a different conclusion. See discussion *infra* Section III (analyzing the Court's reversal of the Sixth Circuit's decision, its holding that *Crawford* had established retaliation under the opposition clause, and explaining that the Sixth Circuit's reasoning was flawed because the lower court incorrectly assumed that classifying cooperation in internal investigations as protected conduct would inevitably lead employers to stop investigating).

72. See discussion *infra* Section III.

73. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764-65 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 805-07 (1998).

74. See discussion *infra* Section II.

75. *Crawford*, 211 F. App'x at 377. The "burden" here refers to the obligation of preventing discrimination and the likelihood of liability should the employer's efforts fail. See generally Lena P. Ryan, *Expanding the Scope of the Expansive Approach: The Burlington Northern Standard as a Per Se Approach to Federal Anti-Retaliation Law*, 49 ARIZ. L. REV. 745 (2007) (discussing the burden of the employer to prevent discrimination under Title VII and other federal laws).

II. An Employee's Claims under the Opposition Clause and the Participation Clause

This section more specifically examines the Sixth Circuit's refusal to hold that *Crawford* established a cause of action under either the opposition clause or the participation clause of Title VII's anti-retaliation provision. Indeed, the holdings of other Circuits, prior Supreme Court rulings involving Title VII, and the practical implications of the Sixth Circuit's decision counsel otherwise.

A. *The Opposition Clause: Is Cooperating Opposing?*

Crawford argued that Title VII afforded her protection through the opposition clause of Title VII.⁷⁶ Rather than addressing the several circuits that had already held that cooperation in internal investigations constitutes opposing conduct for purposes of the opposition clause,⁷⁷ the Sixth Circuit held that *Crawford*'s cooperation was a passive action and unsuitable for protection.⁷⁸ The court stated that "[t]his is not the kind of overt opposition that we have held is required for protection under Title VII."⁷⁹ The Sixth Circuit believed that cooperation under the facts in *Crawford* was activity warranting no protection against retaliation.⁸⁰ Other circuit courts disagree. The following section examines allegations in circumstances similar to *Crawford*'s case from the Third, Fifth, Seventh and Eighth Circuits. Only one of the cases was referenced, albeit not discussed, by the Supreme Court in its *Crawford* decision.⁸¹

1. *Cardenas v. Massey*

Gerard Cardenas brought several charges against his state employer and state officials, alleging discrimination based on

76. *Crawford*, 211 F. App'x at 375-76. See also B. Glenn George, *Revenge*, 83 TUL. L. REV. 439, 477 (2008) (examining *Crawford*'s opposition clause claim).

77. See *Cardenas v. Massey*, 269 F.3d 251, 263-64 (3d Cir. 2001); *Evans v. City of Houston*, 246 F.3d 344, 347 (5th Cir. 2001); *Scott v. County of Ramsey*, 180 F.3d 913, 915 (8th Cir. 1999); *McDonnell v. Cisneros*, 84 F.3d 256, 257 (7th Cir. 1996). See also discussion *infra* Section II.A.

78. *Crawford*, 211 F. App'x at 375-76.

79. *Id.* at 376.

80. *Id.*

81. *Crawford v. Metro. Gov't of Nashville & Davidson County, Tenn.*, 129 S. Ct. 846, 850, 851 (2009) (citing *McDonnell*, 84 F.3d at 262).

his ethnicity, including disparate pay, a hostile work environment, and retaliation in violation of federal and state anti-discrimination laws.⁸² As summarized by the Third Circuit, “[e]ssentially, the claims [concerned Cardenas’s] . . . contention that he was hired at a lower grade level than merited by the work he was assigned, received disparate pay as a result, was not promoted as merited, was the subject of retaliation, and was subject to a hostile work environment, all as a result of his ethnicity.”⁸³ The district court granted summary judgment on some of the claims, Cardenas settled another with one of the defendants, and he subsequently appealed to the Third Circuit on the remaining claims.⁸⁴ While the Circuit Court addressed Cardenas’s claims of disparate pay and a hostile work environment, both of which the court remanded,⁸⁵ an issue on appeal also concerned whether Cardenas had established retaliation in violation of federal and state laws, including Title VII.⁸⁶

Cardenas supported his allegations by claiming that he suffered retaliation after providing support to two of his co-workers when they filed complaints against supervisors.⁸⁷ In addition to supporting his co-workers, Cardenas also filed his own report of discrimination against Massey and Rebo with the employer’s Equal Employment Opportunity Officer.⁸⁸ Cardenas’s actions in support of his co-workers occurred as a result of his employer’s internal investigation, and, until Cardenas filed his own EEOC charge, no external actions had been filed.⁸⁹ As a result of the support Cardenas gave to his co-workers and Cardenas’s own allegations, Cardenas claimed that his employer took retaliatory actions against him, including:

[F]or example, an allegedly undeservedly low performance evaluation . . . , a threat of discipline which sent him to the hospital with stress-induced chest pains, in-

82. *Cardenas*, 269 F.3d at 253-54 (claiming violations of 42 U.S.C. §§ 1981, 2000e-3 (2006), and the New Jersey Law Against Discrimination, N.J. Stat. Ann. § 10:5-1 (West 2002)).

83. *Id.* at 254.

84. *Id.*

85. *Id.* at 269.

86. *Id.* at 260, 263.

87. *Id.* at 260.

88. *Id.*

89. *Id.*

creased personnel disruptions in his unit, and an unusual summons to the human resources department which provoked a second stress attack severe enough to warrant a second hospital visit.⁹⁰

Cardenas resigned, claiming that he suffered a constructive discharge (i.e., a “hostile environment . . . severe enough to have precipitated Cardenas’ resignation”), and he sued pursuant to an EEOC action.⁹¹

The district court listed the elements of a *prima facie* retaliation claim,⁹² which the Third Circuit repeated: “(1) that [Cardenas] engaged in a protected activity; (2) that [Cardenas] suffered an adverse employment action; and (3) that there was a causal connection between the protected activity and the adverse employment action.”⁹³ The district court dismissed Cardenas’s retaliation complaint based on its judgment that the employer’s actions were not prompted by protected activity engaged in by Cardenas, and that, if they had been, that Cardenas could not show a “causal relationship between [Cardenas’s protected] activity and the actions that were allegedly retaliatory.”⁹⁴

The Third Circuit, however, held that Cardenas had engaged in protected activity by virtue of his support of co-workers and his own complaints.⁹⁵ The only additional evidence of retaliation considered by the court concerned the timing of the employer’s behavior relative to Cardenas’s actions.⁹⁶ The court stated that the temporal relationship of the low performance evaluations, threats of discipline, and demands that Cardenas appear at the personnel office could not constitute retaliation merely because each followed Cardenas’s engagement in protected activity.⁹⁷ While Cardenas claimed that the temporal relationship established causation,⁹⁸ the Third Circuit disagreed,

90. *Id.*

91. *Id.* at 267.

92. *Cardenas v. Massey*, No. 96-CV-4077, 1999 WL 33496397, at *22 (D.N.J. Mar. 31, 2000).

93. *Cardenas*, 269 F.3d at 263.

94. *Id.* (discussing the district court’s holding). *See Cardenas*, 1999 WL 33496397, at *22-23.

95. *Cardenas*, 269 F.3d at 253.

96. *Id.* at 264.

97. *Id.*

98. *Id.*

stating, “[t]he temporal relationship in this case is, alone, insufficient to establish causation, because the alleged protected activity took place over a substantial period of time and any routine employment action taken during that period would necessarily be related temporally.”⁹⁹ The Third Circuit agreed with the district court and affirmed the dismissal of the retaliation claims.¹⁰⁰

The retaliation claim fell, therefore, because Cardenas was not able to establish causation, as he could not show that his employer’s actions were a direct response to his support of his co-workers and to his personal claims; his claim did not fall due to a failure to establish that he had engaged in a protected activity. In the Third Circuit’s opinion, Cardenas had engaged in protected activity in the form of both his support of co-workers and his own allegations of discriminatory treatment, despite the fact that at the moment Cardenas made his allegations, the charges were part of an internal investigation.¹⁰¹

Crawford also testified in an internal investigation.¹⁰² The Third Circuit would likely have characterized her conduct as “opposing”—contrary to the Sixth Circuit’s decision.

2. *Evans v. City of Houston*

Lee Evans, an African American nurse employed by the Health and Human Services Department of Houston, Texas (the “City”), claimed that the City had engaged in racial and age discrimination in violation of several statutes, including Title VII,¹⁰³ the Age Discrimination in Employment Act (ADEA),¹⁰⁴ and State human rights statutes that prohibited discriminatory conduct.¹⁰⁵ In Evans’s case, she cooperated in an internal investigation of age and race discrimination allegedly committed by

99. *Id.* See also generally Justin P. O’Brien, *Weighing Temporal Proximity in Title VII Retaliation Claims*, 43 B.C. L. REV. 741 (2002) (discussing timing and the requirements needed to establish liability in lawsuits alleging retaliation).

100. *Cardenas*, 269 F.3d at 264.

101. *Id.* at 263.

102. *Crawford v. Metro. Gov’t of Nashville & Davidson County, Tenn.*, 211 F. App’x 373, 374 (6th Cir. 2006).

103. 42 U.S.C. §§ 2000e-2(a)-3(a) (2006).

104. 29 U.S.C. § 623(d) (2006).

105. TEX. LAB. CODE ANN. §§ 21.051, 21.055 (Vernon 2006). See *Evans v. City of Houston*, 246 F.3d 344, 347 (5th Cir. 2001).

her supervisor, Rosa Abram, against her co-worker.¹⁰⁶ Shortly after Evans's testimony in an internal grievance hearing in January 1995 was postponed, the City decided to demote her.¹⁰⁷ She was not notified of the coming demotion until nine days after actually giving her testimony.¹⁰⁸ The Fifth Circuit noted that the effective date of the demotion was in dispute,¹⁰⁹ and complicating the actions taken by the City was whether the demotion occurred while Evans was serving a probationary period.¹¹⁰ The City required all workers who had been promoted to complete an automatic probationary period during their first six months; two of the four proffered dates of Evans's demotion fell within her probationary period.¹¹¹

Focusing on the retaliation claim, the district court acknowledged that Evans had engaged in protected activity by testifying at the employer-held hearing, consistent with *Long v. Eastfield College*.¹¹² In *Long*, the Fifth Circuit provided the elements of retaliation under a Title VII claim in a summary judgment action, which included: "(1) that [the plaintiff] engaged in activity protected by Title VII, (2) that an adverse employment action occurred, and (3) that a causal link existed between the protected activity and the adverse employment action."¹¹³ The

106. *Evans*, 246 F.3d at 347.

107. *Id.* at 347, 353.

108. *Id.* at 347.

109. *Id.* The court noted that the City had claimed in its brief that Evans was demoted "during a promotional probationary period which specifically directs a supervisor to ascertain whether an employee is competent to perform his or her new duties within six (6) months." *Id.* at 351 n.5.

110. *Id.* at 347.

111. *Id.*

112. *Id.* at 352 (quoting *Long v. Eastfield Coll.*, 88 F.3d 300, 304 (5th Cir. 1996)).

113. *Long*, 88 F.3d at 304. See also *Evans*, 246 F.3d at 352. The Fifth Circuit noted in *Evans* that the district court had correctly determined that a Title VII retaliation claim should be read consistently with the Supreme Court's holding in *McDonnell Douglas Corporation. v. Green*, 411 U.S. 792, 802 (1973), which had announced the requirements for a plaintiff to establish a prima facie case of employment discrimination. *Evans*, 246 F.3d at 348-49. These requirements included:

(1) [T]hat she belongs to a racial minority; (2) that she applied and was qualified for a job for which the employer was seeking applicants; (3) that, despite her qualifications, she was rejected; and (4) that, after her rejection, the position remained open and the employer continued to seek applicants from persons of the complainant's qualifications.

district court held that Evans failed to meet the second element of a prima facie retaliation claim because she could not establish that her demotion was an adverse employment action.¹¹⁴

The Fifth Circuit agreed with the district court that Evans had engaged in a protected activity, and thus had satisfied the first element of the *Long* criteria.¹¹⁵ Furthermore, the Fifth Circuit held that Evans's demotion may have constituted a tangible employment action in satisfaction of the second element.¹¹⁶ The court also noted that "Evans's demotion could very well be an adverse employment action if it meets certain criteria,"¹¹⁷ but it declined to analyze the issue "[b]ecause Evans raised a fact question as to this issue, [and thus] summary judgment was improper."¹¹⁸ The court noted that if the demotion had occurred after the probationary period, it would be a tangible employment action cognizable under the statute.¹¹⁹

In regard to *Long*'s third requirement for a plaintiff to establish a retaliation claim, the Fifth Circuit held that "a plaintiff need not prove that her protected activity was the sole factor motivating the employer's challenged decision in order to establish the 'causal link' element of a prima facie case."¹²⁰ The City argued that Evans had experienced problems in her position, stating that she "has had a checkered disciplinary history with the Department."¹²¹ Despite the City's production of legitimate reasons for Evans's demotion, the court determined that:

"Close timing between an employee's protected activity and an adverse action against [her] may provide the 'causal connection' required to make out a prima

Id. at 348 (citing *McDonnell*, 411 U.S. at 802).

114. *Id.* at 351-52 (citing *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 708 (5th Cir. 1997)).

115. *Id.* at 353.

116. *Id.* at 353-54.

117. *Id.* at 353 (citing *Sharp v. City of Houston*, 164 F.3d 923, 933 n.21 (5th Cir. 1999)). See also O'Brien, *supra* note 99, at 741, 751 n.94 (discussing the temporal proximity of protected conduct and retaliatory acts).

118. *Evans*, 246 F.3d at 354.

119. *Id.* at 353-54.

120. *Id.* at 354 (quoting *Long v. Eastfield Coll.*, 88 F.3d at 305 n.4 (5th Cir. 1996)).

121. *Id.* at 351 n.5 (internal quotation marks omitted). Evans had been suspended for misbehavior twice during this period: once in July 1995 and once in February 1997. *Id.* at 347.

facie case of retaliation.” . . . Accordingly, we find that a time lapse of five days in this case is sufficient to provide a “causal connection” that enables Evans to satisfy the third prong of the prima facie case of her retaliation claims against the City.¹²²

The court also stated that because evidence of pretext existed for the defendant’s conduct, such evidence should have been presented to the factfinder, and thus the district court’s summary judgment was inappropriate.¹²³ The district court’s decision on the issue of retaliation was reversed by the Third Circuit, but its decisions regarding the remaining claims were affirmed.¹²⁴

Evans suggests that testimony in an employer’s internal procedure constitutes “opposing” conduct.¹²⁵ Therefore, it is arguable that based on its language, the Fifth Circuit would have held that Crawford’s cooperation similarly constituted protected opposition.

3. *McDonnell v. Cisneros*

McDonnell involved two plaintiffs, Mary Pat McDonnell and Thomas Bookmeier, who were accused of sexual misconduct via an anonymous note sent to their employer, the U.S. Department of Housing and Urban Development (“HUD”).¹²⁶ HUD’s internal investigation failed to reveal any sexual misconduct, but both workers protested the manner in which they had been investigated.¹²⁷ HUD failed to take any action in response to their protests, so McDonnell took further action and complained “that management ostracized, disdained, and ridiculed her in retaliation for her having filed complaints.”¹²⁸ At the same

122. *Id.* at 354 (quoting *Swanson v. Gen. Servs. Admin.*, 110 F.3d 1180, 1188 (5th Cir. 1997)). The Fifth Circuit further stated that “a time lapse of up to four months has been found sufficient to satisfy the causal connection for summary judgment purposes.” *Id.* (quoting *Weeks v. NationsBank, N.A.*, No. 3:98-CV-1352M, 2000 WL 341257, at *3 (N.D. Tex. Mar. 30, 2000)). See also generally O’Brien, *supra* note 99 (discussing timing and the requirements needed to establish liability in lawsuits alleging retaliation).

123. *Evans*, 246 F.3d at 354-55.

124. *Id.* at 359.

125. *Id.* at 353-54.

126. *McDonnell v. Cisneros*, 84 F.3d 256, 257 (7th Cir. 1996).

127. *Id.* at 258.

128. *Id.*

time, HUD reassigned Bookmeier “as a punishment for his having failed to control his subordinate—that is, to get McDonnell to drop her complaints.”¹²⁹

Taking each plaintiff’s Title VII retaliation claims in turn, the Seventh Circuit first held that McDonnell’s treatment by HUD failed to constitute retaliation, stating that:

The allegedly retaliatory conduct was merely the continuation of the conduct giving rise to the complaints. . . . [N]othing changed when [McDonnell] filed her complaints. There was no ratcheting up of the harassment. Therefore the complaints could not have been the cause of the ostracism, disdain, and ridicule of which she complains¹³⁰

The Seventh Circuit affirmed the district court’s dismissal of McDonnell’s case.¹³¹

Second, the Seventh Circuit held that Bookmeier’s claim of retaliation, that he was reassigned when he failed to quash McDonnell’s complaints, was an illegal and retaliatory act.¹³² The Circuit Court stated that “[s]everal courts, including our own, hold that assisting another employee with his (in this case her) discrimination claim, as well as other endeavors to obtain the employer’s compliance with Title VII, is protected ‘opposition conduct.’”¹³³ Bookmeier’s punishment by HUD stemmed from what the Seventh Circuit characterized as passive opposition; Bookmeier failed to prevent McDonnell’s ongoing complaints.¹³⁴ The punishment meted out by HUD was retaliatory, and the Seventh Circuit remanded Bookmeier’s retaliation claim.¹³⁵ The Seventh Circuit avoided making a determination that would have protected employers in these circumstances; the court did not allow a situation whereby employers who encourage supervisors to suppress their subordinates’ complaints

129. *Id.*

130. *Id.* at 259.

131. *Id.* at 263.

132. *Id.* at 261-62.

133. *Id.* at 262 (citing *EEOC v. Ohio Edison Co.*, 7 F.3d 541 (6th Cir. 1993); *Parker v. Baltimore & Ohio R.R. Co.*, 652 F.2d 1012, 1019 (D.C. Cir. 1981); *Rucker v. Higher Educ. AIDS Bd.*, 669 F.2d 1179, 1182 (7th Cir. 1979); *Novotny v. Great Am. Fed. Sav. & Loan Ass’n*, 584 F.2d 1235, 1260-61 (3d Cir. 1978)).

134. *Id.*

135. *Id.* at 262-63.

of discrimination, through actual or threatened punishment against the supervisors if the supervisors failed to keep their subordinates in line, would be able to avoid the supervisors' access to the courts though Title VII's retaliation machinery:¹³⁶

Passive resistance is a time-honored form of opposition . . . and it would be very odd to suppose that Congress meant a form of behavior that straddles what the cases, characterizing the dual structure of the retaliation provision, call "opposition" and "participation" conduct to fall between the stools. The result would be that employers could obtain immunity from the retaliation statute by directing their subordinates to take steps to prevent other workers (as by threat of dismissal or other discipline) from complaining about discrimination.¹³⁷

In *Crawford*, a similar logic holds—if Title VII does not protect the cooperating employee in the course of an internal investigation by determining it is not at least opposing conduct, then the Act's proscriptions fail to cover the vulnerable employee who needs protection.

4. *Scott v. County of Ramsey*

The Ramsey County, Minnesota, Sheriff's Department (the "Department") fired Gregory Scott, a deputy sheriff, within a month of Scott's having provided corroborating statements in an internal investigation of discrimination claims made by his co-worker, Mark Kolasa.¹³⁸ New deputies in the Department worked under a probationary term for the first twelve months after their hire, during which time they were at-will employees.¹³⁹ The Department ordered Scott to testify in the internal investigation "[o]n the same day that he received his second performance evaluation," at the end of his probationary term.¹⁴⁰ Kolasa was a probationary employee when he claimed that he suffered discriminatory treatment by two female co-workers.¹⁴¹ Sergeant Biehn, the individual who supervised Scott and Ko-

136. *See id.* at 262.

137. *Id.*

138. *Scott v. County of Ramsey*, 180 F.3d 913, 915 (8th Cir. 1999).

139. *Id.*

140. *Id.* at 916.

141. *Id.*

lasa, allegedly failed to take action in response to Kolasa's complaints.¹⁴² A few days after the distribution of the final internal investigation report, which contained Scott's statements, a subordinate was ordered by a superior in the Department "to assemble negative information regarding Scott for the purpose of documenting his termination, despite the fact that [Scott] had seen the favorable end-of-probation performance review."¹⁴³ Within a month, Scott was fired, and he then sued the Department for retaliation in violation of Title VII.¹⁴⁴ The Department defended its actions in the district court, stating that the termination was justified because Scott had abused sick leave and was absent for training.¹⁴⁵ Scott successfully argued that he received a positive performance review immediately preceding his termination, and the district court found for Scott.¹⁴⁶ The Department then appealed.¹⁴⁷

Consistent with the Supreme Court's prior holdings regarding discrimination and the burden-shifting framework used in establishing a *prima facie* case,¹⁴⁸ the Eighth Circuit noted that, "[t]o establish a *prima facie* case of retaliation, the plaintiff must show that he engaged in a protected activity, that the defendant took adverse action against him, and that there is a connection between the two."¹⁴⁹ While burden-shifting allows the defendant and plaintiff to argue over the lawful or unlawful reasons for the employer's actions, "the ultimate burden of persuasion remains with the plaintiff to show that the termination was motivated by intentional retaliation."¹⁵⁰ In Scott's case, the Eighth Circuit held that a reasonable jury could have concluded that Scott presented sufficient evidence proving that the Department retaliated against him, regardless of the Department's arguments to the contrary.¹⁵¹ The court held that the conduct in which Scott participated—i.e., testifying in an inter-

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *See, e.g., McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

149. *Scott*, 180 F.3d at 917.

150. *Id.* (citing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 508 (1993)).

151. *Id.* at 918.

nal discrimination investigation—constituted protected conduct to which the opposition clause applied.¹⁵²

As examined in the preceding section, circuit courts have held that cooperation in an internal investigation constitute opposing behavior under the opposition clause—as should have been true in Crawford’s case in the Sixth Circuit. Crawford’s participation-clause claim will be addressed next.

B. *Coverage under the Participation Clause*

The Supreme Court declined to address Crawford’s claim under the participation clause.¹⁵³ Circuit courts have held that in order for the participation clause to protect cooperation, a prior external official act must have been taken, particularly through the EEOC.¹⁵⁴ Future courts may reconsider whether Title VII includes cooperation as participating conduct, protected against retaliation by the Act, irrespective of an official claim. The Supreme Court’s recent decision in *Crawford* may indicate that complete coverage for similarly situated employees under both the opposition and the participation clauses is warranted. The following section explores Crawford’s claim

152. *Id.*

153. *Crawford v. Metro. Gov’t of Nashville & Davidson County*, Tenn., 129 S. Ct. 846, 853 (2009).

154. *See, e.g., Crawford v. Metro. Gov’t of Nashville & Davidson County*, Tenn., 211 F. App’x 373, 376 (6th Cir. 2006) (“participation in an internal investigation . . . in the absence of any pending EEOC charge is not a protected activity under the participation clause”); *Abbott v. Crown Motor Co.*, 348 F.3d 537, 543 (6th Cir. 2003) (“Title VII protects an employee’s participation in an employer’s internal investigation into allegations of unlawful discrimination where that investigation occurs pursuant to a pending EEOC charge”); *Brower v. Runyon*, 178 F.3d 1002, 1006 (8th Cir. 2000) (“Not all discussions with individuals who are part of the Title VII grievance process or all informal complaints will amount to participation in a Title VII proceeding, however. At a minimum there would have to be factual allegations of discrimination against a member of a protected group and the beginning of a proceeding or investigation under Title VII.”); *EEOC v. Total Sys. Servs., Inc.*, 221 F.3d 1171, 1174 n.2 (11th Cir. 2000) (“at a minimum, some employee must file a charge with the EEOC (or its designated representative) or otherwise instigate proceedings under the statute for the conduct to come under the participation clause”); *Vasconcelos v. Meese*, 907 F.2d 111, 113 (9th Cir. 1990) (“Accusations made in the context of charges before the Commission are protected by statute; charges made outside of that context are made at the accuser’s peril.”); *Goldberg v. Media Gen., Inc.*, No. 01-CV-325, 2003 WL 21920923, at *11 (E.D. Tenn. June 18, 2003) (“the instigation of proceedings leading to the filing of a complaint or a charge, including a visit to a government agency to inquire about the filing [of] a charge, is a prerequisite to protection under the participation clause”).

that her cooperation was protected participating conduct, as well as that it was a protected act of opposition, by looking to the Sixth Circuit's analysis of the issue, and then by evaluating the Circuit's approach in light of the Supreme Court's holdings.

1. *Crawford* and the Affirmative Defense

The *Crawford* employee claimed that prior EEOC charges need not be filed in order to trigger protection under the participation clause.¹⁵⁵ The employee argued that requiring an employee (or a co-worker) to officially file a complaint with the EEOC contravened the creation of an affirmative defense to sexual harassment, as announced by the Supreme Court in two 1998 cases, *Faragher v. City of Boca Raton* and *Burlington Industries, Inc. v. Ellerth* (also known as "the *Faragher* defense").¹⁵⁶ The affirmative defense relieves the employer from vicarious liability for its supervisor's sexually harassing behavior when, "(1) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (2) the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."¹⁵⁷ The affirmative defense may be raised when sexual harassment results in an intangible employment action suffered by the employee.¹⁵⁸ The employee who is, for example, fired by his or her supervisor, suffers a tangible action; tangible actions include "hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits," and the affirmative defense is unavailable for such actions.¹⁵⁹

Despite the premium placed by the Supreme Court on the creation of anti-discrimination policies, and the need to ensure

155. Brief for the Petitioner, *supra* note 17, at 13, 39, 2008 WL 1721898, at *13, *39. See also *Crawford*, 211 F. App'x at 376.

156. *Crawford*, 211 F. App'x at 376-77. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764-65 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 805-07 (1998). The Supreme Court issued decisions regarding *Faragher* and *Ellerth* on the same day in 1998, and each case concerned essentially the same issue (i.e., the employer's liability for a supervisor's sexually harassing conduct and the employer's use of the affirmative defense). In each case, the Court reached the same holding. See *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 806-07.

157. *Crawford*, 211 F. App'x at 376 (quoting *Faragher*, 524 U.S. at 807).

158. *Faragher*, 524 U.S. at 807.

159. *Ellerth*, 524 U.S. at 761.

that such policies are valid through, for example, effective investigations of alleged discrimination, the Sixth Circuit's decision held that employees who cooperate in purely internal investigations are unprotected by Title VII.¹⁶⁰ Internal investigations are not, in the Sixth Circuit's understanding, official acts, as required by the participation clause.¹⁶¹ The Sixth Circuit concluded that, absent additional, external actions, employees may be fired with impunity if and when they cooperate in an internal investigation.¹⁶²

If an investigation is not provided, such inaction jeopardizes the employer's ability to raise the affirmative defense, because the failure indicates that a valid anti-discrimination policy was not in place.¹⁶³ As the Supreme Court noted in *Faragher*, "those responsible for city operations could not reasonably have thought that precautions against hostile environments in any one of many departments in far-flung locations could be effective without communicating some formal policy against harassment, with a *sensible complaint procedure*."¹⁶⁴ Crawford worked for a government agency, as was true for the employee in *Faragher*.¹⁶⁵ A "sensible complaint procedure" must logically encompass a method of investigating a complaint; absent an investigation, the policy and process would

160. The participation clause provides protection against retaliation when the employee participates in acts of discrimination made unlawful "under this subchapter." Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a) (2006). Crawford's claim in the Sixth Circuit with regard to the participation clause fundamentally involved whether the employee's act must come in the form of an external official claim, in order to comport with the statute's language. See *Crawford*, 211 F. App'x at 376-77.

161. *Crawford*, 211 F. App'x at 376-77.

162. *Id.* The affirmative defense would obviate the employer's blame should any intangible action be taken against the worker if the worker eventually files, as long as a valid anti-discrimination policy is in place and the employee failed to use it.

163. See, e.g., 45B AM. JUR. 2D *Job Discrimination* § 853 (2009); 52 AM. JUR. 3D *Proof of Facts* 1, § 9 (2009). See also Brooke Iley & Mark Blondman, *An Employer's Guide to Conducting an Internal Investigation*, CORP. COMPLIANCE & REG. NEWSL. (Law.com, New York, N.Y.), July 21, 2006, available at <http://www.law.com/jsp/PubArticle.jsp?id=900005458454> (discussing how employers may conduct an investigation).

164. *Faragher v. City of Boca Raton*, 524 U.S. 775, 808-09 (1998) (emphasis added).

165. See *id.* at 781 (stating that Faragher worked for the Parks and Recreation Department of Boca Raton, Florida).

take the form of a claim and a conclusion, devoid of any report and analysis of the allegations.¹⁶⁶ The Sixth Circuit took the position that, while it may be to the employer's advantage to investigate, simply because the affirmative defense crafted this incentive did not signal that an investigation qualifies as an official action.¹⁶⁷

The Sixth Circuit's discussion and interpretation of the affirmative defense arguably confused two concepts. First, the affirmative defense becomes critical only when a supervisor's sexually harassing behavior results in an intangible employment action.¹⁶⁸ The employer can raise the affirmative defense and avoid vicarious liability for intangible actions to the extent that the employer had a viable anti-discrimination policy and the employee failed to take advantage of it.¹⁶⁹ The affirmative defense is available when no material employment actions have been taken against an employee; the Court has stated, "Tangible employment actions, such as a termination, pose material harms of the first order, and the affirmative defense is not

166. *Id.* An effective anti-harassment policy may also allay an employer's concerns regarding punitive damage awards, since such awards are available in cases of intentional discrimination; an employer may not owe punitive damages if it can demonstrate the presence of a valid anti-discrimination policy. See *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 545-46 (1999) ("giving punitive damages protection to employers who make good-faith efforts to prevent discrimination in the workplace accomplishes Title VII's objective of motivating employers to detect and deter Title VII violations") (internal quotation marks and citation omitted).

167. *Crawford*, 211 F. App'x at 377.

168. See *supra* note 166 and accompanying text.

169. See, e.g., *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 64-65 (2006). There, the Court noted that:

Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998) . . . speaks of a Title VII requirement that violations involve tangible employment action such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. But *Ellerth* does so only to identify a class of [] hostile work environment[] cases in which an employer should be held vicariously liable (without an affirmative defense) for the acts of supervisors. *Ellerth* did not discuss the scope of the general anti-discrimination provision. And *Ellerth* did not mention Title VII's anti-retaliation provision at all. At most, *Ellerth* sets forth a standard that petitioner and the Solicitor General believe the anti-retaliation provision ought to contain. But it does not compel acceptance of their view.

Id. (internal quotation marks and citations omitted).

available.”¹⁷⁰ When the employer is merely investigating alleged discrimination, the employee who cooperates in an investigation may have personally suffered no intangible action, or for that matter, a tangible action, at that moment, and the alleged discriminatory acts may, instead, involve a co-worker and not the cooperating employee at all.¹⁷¹ According to the Sixth Circuit analysis, if the cooperating employee is fired, but has not filed an EEOC charge (and neither has a co-worker filed such a charge), then the employer may fire that cooperating employee as a result of its internal investigation (i.e., the employee may be fired because of his or her cooperation, despite the Supreme Court’s admonition to employers that they establish anti-discrimination policies and that employees use them).¹⁷² Again, in the context of an investigation, there may be no intangible or tangible employment actions involving the cooperating employee. Firing the cooperating employee, whose testimony may be personally unconnected to the initial allegation of discrimination (because the cooperating worker has not directly suffered discrimination against him or her and merely supports a co-worker’s claim), certainly constitutes a tangible employment action,¹⁷³ but, according to the Sixth Circuit, it is not retaliation punishable under the Act.¹⁷⁴

170. *Ellerth*, 524 U.S. at 761. See also Megan E. Mowrey, *Discriminatory Pay and Title VII: Filing a Timely Claim*, 41 J. MARSHALL L. REV. 325, 379 & n.512 (2008) (discussing *Ellerth* and tangible harms).

171. Crawford’s statements to the employer show that she did personally suffer discrimination. *Crawford v. Metro. Gov’t of Nashville and Davidson County, Tenn.*, 129 S. Ct. 846, 849 (2009); *Crawford*, 211 F. App’x at 374. It is understandable in Crawford’s case that Crawford hesitated to file her own complaint, despite the discrimination she endured; the person charged with investigating discrimination claims was the person who allegedly committed the harassment. *Crawford*, 211 F. App’x at 374. Justice Ginsburg raised this issue during oral argument:

[T]his is a statute that’s meant to govern the workplace with all of its realities. One of them was when they asked, well, why didn’t you make a complaint, use whatever internal remedies [sic] there are? She said, because the person in this outfit who is charged with receiving complaints is the harasser.

Transcript of Record at 38, *Crawford*, 129 S. Ct. 846 (No. 06-1595), 2008 WL 4527984, at *38 (oral argument).

172. *Faragher v. City of Boca Raton*, 524 U.S. 775, 806-07 (1998).

173. See Mowrey, *supra* note 170, at 379 n.512.

174. *Crawford*, 211 F. App’x at 376-77.

Second, the Circuit Court failed to adequately weigh the notion that the Supreme Court altered the parties' approach to sex discrimination claims with the advent of the affirmative defense; the Court virtually eliminated an employer's potential vicarious liability through the affirmative defense in exchange for the principle that Title VII's protections should encourage the prevention of discrimination through the establishment and the use of anti-discrimination policies in the workplace.¹⁷⁵ If the exchange is honored, cooperating employees should find that their cooperation in an investigation of their own or a co-worker's discrimination is protected by the Act. As noted by the Supreme Court:

The anti-discrimination provision seeks a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status. The anti-retaliation provision seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees. The substantive provision seeks to prevent injury to individuals based on who they are, *i.e.*, their status. The anti-retaliation provision seeks to prevent harm to individuals based on what they do, *i.e.*, their conduct.¹⁷⁶

In order to accomplish Title VII's goals, the anti-retaliation provision should be interpreted as affording protection that encourages employees to come forward, rather than abandoning workers when the cooperation results in an employer's negative response.¹⁷⁷

Interpreting internal investigations as sufficient to trigger protection under the participation clause also would have a

175. *Faragher*, 524 U.S. at 806-08. *See also* *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 62-64 (2006) (discussing the substantive and anti-retaliation protections of Title VII).

176. *White*, 548 U.S. at 63 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-01 (1973)). *See also* George, *supra* note 76, at 472-76 (discussing the *El-lerth/Faragher* affirmative defense).

177. *See supra* note 17 and accompanying text (discussing the importance of employees' cooperation in Title VII actions). "Interpreting the anti-retaliation provision to provide broad protection from retaliation helps assure the cooperation upon which accomplishment of the Act's primary objective depends." *White*, 548 U.S. at 67.

practical effect; to decide otherwise puts employees' cooperation in jeopardy because employees would know that their cooperation may permit a resulting termination.¹⁷⁸ A termination certainly constitutes a tangible employment action, but if cooperation in an investigation is not adequate to trigger complete protection, termination under the circumstances of cooperation is an action against which the employee has limited recourse under Title VII.

The Sixth Circuit also supported its analysis by stating that if an employer fired a worker for his or her cooperation in an internal investigation, the termination indicates that the employer does not possess a valid anti-discrimination policy, as required by the affirmative defense:

Certainly, a policy or practice of firing a person who testified negatively during an investigation into complaints of sexual harassment would not be "reasonable." Courts have held that an anti-harassment policy designed to deter sexual harassment can help an employer meet its burden as to the first element of the *Faragher* test only if the policy is "both reasonably designed and reasonably effectual" and not administered "in bad faith." A policy of firing any witness that testified negatively during an internal investigation would certainly constitute bad faith; even an instance of an allegedly unjustified firing would put the *Faragher* defense at risk.¹⁷⁹

The Sixth Circuit ignored the problem faced by the fired, cooperating employee, and instead, it relied on a presumed recognition by the employer that, if the employer fired the cooperating worker, then the termination would jeopardize the employer's anti-harassment policy—which may subsequently compromise the employer's ability to win in a case filed by the harassed employee. Unfortunately, the Sixth Circuit's logic here has no relevance to the cooperating employee who, up until his or her termination, may not have been discriminatorily harassed, but may only have been providing information re-

178. The Supreme Court thus recognized in its decision the practical difficulties of a cooperating employee. See *Crawford v. Metro. Gov't of Nashville and Davidson County, Tenn.*, 129 S. Ct. 846, 852 (2009).

179. *Crawford*, 211 F. App'x at 377 (quoting *Brown v. Perry*, 184 F.3d 388, 396 (4th Cir. 1999)).

garding the harassment of another. Rather than protecting the cooperating employee, the court placed its faith on the employer's knowledge that it may lose access to the affirmative defense in a lawsuit brought by the specifically sexually harassed employee, who may never file formal, official, external charges. The Sixth Circuit's assumption may not be accurate or adequately protect the cooperating employee. If the affirmative defense, created by the Supreme Court in conjunction with Title VII, necessitates internal investigations in an effort to prevent discrimination through anti-discrimination policies, retaliatory acts premised on those investigations should be considered unlawful, despite the Sixth Circuit's analysis to the contrary.

2. Respective Obligations under the Affirmative Defense

The Sixth Circuit may have tried to balance the responsibilities of the employer and of the employee, just as the obligations of each were balanced by the Supreme Court in its analyses in *Ellerth*,¹⁸⁰ *Faragher*,¹⁸¹ and more recently in *Pennsylvania State Police v. Suders*.¹⁸² In *Suders*, the Court reiterated the use of the affirmative defense and clarified its exclusive availability for nontangible employment actions taken by the employer through its supervisors.¹⁸³ *Suders* held that voluntary actions by the employee—for example, through a constructive discharge—are intangible employment actions to which the affirmative defense applies.¹⁸⁴ The Court's decision was prompted by recognition of the potential burden on the employer; to have held otherwise would have endangered an employer's use of the affirmative defense as a shield against discrimination claims when an employee fails to take advantage of his or her employer's anti-discrimination policy.¹⁸⁵

180. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764-65 (1998).

181. *Faragher v. City of Boca Raton*, 524 U.S. 775, 806-07 (1998).

182. 542 U.S. 129, 148-50 (2004) (finding that a constructive discharge constituted an intangible employment action, and that an employer may raise the affirmative defense).

183. *Id.*

184. *Id.* In situations involving constructive discharge, workers claim that their employment conditions became unbearable to the point that they were forced to quit. *See, e.g., id.* at 141 ("Did working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign?").

185. *See id.* at 145-51.

One way to effect Title VII's protection against discrimination is to encourage employers to prevent sexual harassment in the first instance by establishing valid anti-discrimination policies, strengthened by the employers' knowledge that the policies provide a significant degree of shelter against claims brought by employees if the employees ignore them.¹⁸⁶ The *Suders* Court looked to the analysis supplied in *Ellerth* and concluded:

The [*Ellerth*] Court reasoned that tying the liability standard to an employer's effort to install effective grievance procedures would advance Congress' purpose "to promote conciliation rather than litigation" of Title VII controversies. At the same time, such linkage of liability limitation to effective preventive and corrective measures could serve Title VII's deterrent purpose by "encourag[ing] employees to report harassing conduct before it becomes severe or pervasive."¹⁸⁷

The importance placed by the Supreme Court on providing conciliation and preventive and corrective measures may indicate that future courts should bolster the protective efforts of an employer's internal procedures and offer protection under the participation clause.

While it is true that the affirmative defense is not completely severable from retaliation, the link is not formed in the sense that the Sixth Circuit chose to analyze the two concepts. The affirmative defense concerns whether an employer has a valid anti-discrimination policy and whether the employee uses it in the context of an intangible employment action; retaliation

186. As stated in *Suders*:

Absent . . . an official act, the extent to which the supervisor's misconduct has been aided by the agency relation, as we earlier recounted . . . is less certain. That uncertainty, our precedent establishes, justifies affording the employer the chance to establish, through the *Ellerth/Faragher* affirmative defense, that it should not be held vicariously liable.

542 U.S. at 148-49 (internal quotation marks and citations omitted). See also *Crawford v. Metro. Gov't of Nashville & Davidson County, Tenn.*, 129 S. Ct. 846, 852 (2009) (citing studies put forth within the Petitioner's Brief, and which the Petitioner used to argue that "Ellerth and Faragher have prompted many employers to adopt or strengthen procedures for investigating, preventing, and correcting discriminatory conduct").

187. *Suders*, 542 U.S. at 145 (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764 (1998)).

concerns discriminatory actions taken by the employer irrespective of the affirmative defense.¹⁸⁸ The affirmative defense may be unavailable in cases of retaliation, since the defense's use is limited to the sexually harassing environment in which nontangible employment actions are taken against an employee.¹⁸⁹ The Sixth Circuit's opinion confused the requirements needed to establish a retaliation claim with the principles regarding the affirmative defense—when each should be read as part of the universe of sexual harassment law. The two concepts coexist, separately but not completely apart, and are tethered by a statute and case law with the common goal of preventing discrimination. According to the Sixth Circuit in *Crawford*, the two concepts are linked by assumptions that employers may make in fashioning an effective defense to their actions, rather than by understanding the concepts as working together to prevent employment discrimination.

Crawford did not allege that Metro failed to establish an anti-discrimination policy, nor did the Sixth Circuit claim that it did.¹⁹⁰ Instead, the Sixth Circuit stated that an employer's affirmative defense could be jeopardized to the extent that an employee was, for example, fired, regardless of its anti-harassment policy. In any event, termination, a tangible employment action, makes raising the policy ineffective, despite the policy's existence. Indeed, *Crawford*'s claim, and her employer's arguments against culpability, did not specifically involve the employer's resort to the affirmative defense. *Crawford*'s argument

188. See *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63-64 (2006); Rhonda Reaves, *Retaliatory Harassment: Sex and the Hostile Coworker as the Enforcer of Workplace Norms*, 2007 MICH. ST. L. REV. 403, 412-417 (2007) (noting that substantive discrimination protects workers for who they are and retaliation protects workers for what they do).

189. See *White*, 548 U.S. at 68 (holding that to prove actionable retaliation, "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, 'which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination'" (quoting *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2006))). But see generally Christopher J. Eckhart, *Employers Beware: Burlington Northern v. White and the New Title VII Anti-Retaliation Standard*, 41 IND. L. REV. 479 (2008) (analyzing the use of the affirmative defense in retaliation claims); Steven Seidenfeld, *Employer Liability Under Title VII: Creating an Employer Affirmative Defense for Retaliation Claims*, 29 CARDOZO L. REV. 1319 (2008) (same).

190. *Crawford v. Metro. Gov't of Nashville & Davidson County, Tenn.*, 211 F. App'x 373, 377 (6th Cir. 2006).

was not that she should be protected under Title VII despite the anti-discrimination policy, but rather that the court's analysis should be consistent with *Ellerth* and *Faragher*.¹⁹¹ If an internal investigation results in negative employment consequences for cooperating employees who confirm discriminatory behavior, then the internal investigation (whether or not part of an anti-discrimination policy) should not protect an employer when it retaliates against cooperating employees.¹⁹² As discussed in the following section, the Supreme Court mitigated the difficulties faced by cooperating employees to the extent that employees find some protection against retaliation through the opposition clause.

III. *Crawford* in the Supreme Court: Decision and Analysis

The Supreme Court unanimously held in a short, nine-page opinion that cooperation in an employer's internal investigation is protected conduct under Title VII.¹⁹³ The Court mentioned the Seventh Circuit's resolution of *McDonnell v. Cisneros*, and stated that, "[b]ecause the Sixth Circuit's decision conflicts with those of other Circuits, . . . we granted *Crawford*'s petition for certiorari."¹⁹⁴

Like the Sixth Circuit before it, the Supreme Court drew a distinction between Title VII's proscriptions against retaliation

191. *Crawford* cooperated in this case in concert with her employer's anti-discrimination policy. *Id.* at 374-75.

192. Brief for the Petitioner, *supra* note 17, at 31-39, 2008 WL 1721898, at *31-39 (discussing the difficulties employees face in providing testimony in support of their own or a co-worker's claim). *See also* George, *supra* note 76, at 442 n.6 (noting that "studies typically show that between 30 and 60 percent of employees who report discrimination experience retaliation." (internal citation omitted)); Ryan, *supra* note 75, at 746 n.10 ("Studies show that only a small percentage of women who experience sexual harassment report it. Those who do report it often fear retaliation by their employer.").

193. *Crawford v. Metro. Gov't of Nashville & Davidson County*, Tenn., 129 S. Ct. 846, 853 (2009). Justices Alito and Thomas concurred in the judgment, but would have held that opposing conduct should be limited to purposive acts and not include "silent opposition." *Id.* at 853-55 (Alito, J., concurring). They stated that "the statutory term 'oppose' means 'taking action,'" not merely, for example, expressing an opinion. *Id.* at 854 (Alito, J., concurring).

194. *Id.* at 850 (citing *Crawford v. Metro. Gov't of Nashville & Davidson County*, Tenn., 128 S. Ct. 1118 (2008) (granting *Crawford*'s petition for certiorari); *McDonnell v. Cisneros*, 84 F.3d 256, 262 (7th Cir. 1996)).

claimed under either the opposition or participation clauses.¹⁹⁵ The Court then declined to review Crawford's claim under the participation clause because it determined that her claim was fully addressed by the opposition clause.¹⁹⁶ With regard to the opposition clause, the Court clarified that "[t]he term 'oppose,' being left undefined by the statute, carries its ordinary meaning: 'to resist or antagonize . . . ; to contend against; to confront; resist; withstand.'"¹⁹⁷ The Court held that Crawford's conduct constituted opposition and that her resulting termination was retaliation, outlawed by the Act.¹⁹⁸ The Court declared that:

There is . . . no reason to doubt that a person can "oppose" by responding to someone else's question just as surely as by provoking the discussion, and nothing in the statute requires a freakish rule protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when her boss asks a question.¹⁹⁹

The Court also noted that its conclusions in reference to the opposition clause were consistent with the arguments presented by the United States as Amicus Curiae and with the EEOC's own guidelines.²⁰⁰

The Supreme Court made clear that the Sixth Circuit's interpretation of the opposition clause placed an unwise limit on

195. *Crawford*, 129 S. Ct. at 850.

196. *Id.*

197. *Id.* (citing *Perrin v. United States*, 444 U.S. 37, 42 (1979) (quoting Webster's New International Dictionary 1710 (2d ed. 1988))).

198. *Id.* at 849-51. The Court noted that "Crawford's description of the louche goings-on would certainly qualify in the minds of reasonable jurors as 'resistant' or 'antagonistic' to Hughes's treatment." *Id.* at 851. It then determined that "[t]he statement Crawford says she gave to Frazier is . . . covered by the opposition clause, as an ostensibly disapproving account of sexually obnoxious behavior toward her by a fellow employee . . . [which] antagonized her employer to the point of sacking her on false pretenses." *Id.* at 850-51.

199. *Id.* at 851. See also Transcript of Record, *supra* note 171, at 27, 2008 WL 4527984, at *27.

[I]f the investigation is conducted on the day a charge is filed at noon, all the witnesses who came in, in the morning, are unprotected; yet all the witnesses who came in, in the afternoon, would be protected. Yet nobody even knows that a charge has been filed. And that's just not something that Congress possibly could have intended and wanted to leave the morning witnesses unprotected from retaliation.

Id.

200. See, e.g., *Crawford*, 129 S. Ct. at 851.

opposing behavior because it required “active, consistent opposing activities to warrant . . . protection against retaliation.”²⁰¹ According to the Court, the Sixth Circuit failed to realize that, although “instigat[ing] or initiat[ing]”²⁰² are opposing behaviors as required by the statute, “they are not limits of it.”²⁰³ The Court further stated:

If it were clear law that an employee who reported discrimination in answering an employer’s questions could be penalized with no remedy, prudent employees would have a good reason to keep quiet about Title VII offenses against themselves or against others. This is no imaginary horrible given the documented indications that “[f]ear of retaliation is the leading reason why people stay silent instead of voicing their concerns about bias and discrimination.”²⁰⁴

The Court thereby recognized the practical difficulties of cooperating employees who would otherwise be left dangling without protection under the statute. Protection under Title VII against retaliation must include the cooperating employee, at least under the opposition clause, if not also, as argued by this Article, under the participation clause.

The Court chose to analyze Crawford’s arguments concerning the affirmative defense in reference to the opposition clause.²⁰⁵ The Sixth Circuit had examined the affirmative defense in reference to both the opposition and participation clauses, and the circuit court discussed its belief that employers would likely fail to investigate discrimination should Title VII’s anti-retaliation provisions apply to all employees who cooperate in internal investigations.²⁰⁶ Focusing on the opposition clause,

201. *Id.* at 851 (quoting *Crawford v. Metro Gov’t of Nashville & Davidson County, Tenn.*, 211 F. App’x 373, 376 (6th Cir. 2006)).

202. *Crawford*, 211 F. App’x at 376.

203. *Crawford*, 129 S. Ct. at 851. Prior cases decided by the Supreme Court similarly state that a list provided by a court in its analysis and application of Title VII may be nonexhaustive. *See, e.g.*, *Pa. State Police v. Suders*, 542 U.S. 129, 144-45 (2004) (noting that which actions are considered tangible employment actions, and the analyses of actions that are tangible, may extend beyond lists generated in prior cases).

204. *Crawford*, 129 S. Ct. at 852 (quoting Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 20 (2005)).

205. *Id.* at 850-51.

206. *Crawford*, 211 F. App’x at 376-77.

the Supreme Court stated: “As [the Sixth Circuit and the employer] see it, if retaliation is an easy charge when things go bad for an employee who responded to enquiries, employers will avoid the headache by refusing to raise questions about possible discrimination.”²⁰⁷ Pursuant to the Court’s prior decisions, however, the affirmative defense requires that employers promulgate and enforce valid anti-discrimination policies.²⁰⁸ Binding its explanation of the incentives created for employers by virtue of the affirmative defense with the goals served by Title VII, the Court in *Crawford* stated:

Employers are thus subject to a strong inducement to ferret out and put a stop to any discriminatory activity in their operations as a way to break the circuit of imputed liability. The possibility that an employer might someday want to fire someone who might charge discrimination traceable to an internal investigation does not strike us as likely to diminish the attraction of an *Ellerth-Faragher* affirmative defense.²⁰⁹

The Court’s discussion of the affirmative defense may imply that an employee’s cooperating actions, particularly when taken in concert with his or her employer’s anti-discrimination policy (as was the case in *Crawford*), will be protected as opposing and participating conduct. The employer who takes negative action against the worker should be liable if the employer responds by retaliating against the worker’s cooperation; a decision that the worker under such circumstances is not fully protected would flummox the incentives established by the affirmative defense. As noted previously, the Court in *Suders* pointed out, in its discussion of the affirmative defense, that “tying the liability standard to an employer’s effort to install effective grievance procedures would advance Congress’ purpose ‘to promote conciliation rather than litigation’ of Title VII controversies.”²¹⁰

207. *Crawford*, 129 S. Ct. at 852.

208. See, e.g., *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 806-07 (1998).

209. *Crawford*, 129 S. Ct. at 852 (internal citations omitted).

210. *Pa. State Police v. Suders*, 542 U.S. 129, 145 (2004) (quoting *Ellerth*, 524 U.S. at 764).

For the defense to be successful, an employer must understand that investigations of alleged discrimination are required. The validity of the affirmative defense requires, in part, an investigation.²¹¹ The incentive to investigate establishes that actions that occur in connection with an employer's application of an anti-harassment policy (including investigations of discrimination as the policies are applied) are official acts, as required by the Court by its establishment of the affirmative defense, and necessary if future courts insist that participation-clause protection must come in tandem with official acts.

IV. Is a Lawsuit a Worker's First and Best Resort for an Employer's Alleged Discriminatory Wrong?

Title VII prohibits employment discrimination.²¹² Title VII also specifically provides that discriminatory employment retaliation is unlawful.²¹³ While the Act provides a mechanism for bringing suit against a discriminatory employer, the purpose of Title VII goes beyond the creation of a cause of action. Title VII discourages lawsuits, not only by virtue of the employer's fear of being sued, but also by its statutory requirements as applied by the courts. "Although Title VII seeks 'to make persons whole for injuries suffered on account of unlawful employment discrimination,' *its 'primary objective,' like that of any statute meant to influence primary conduct, is not to provide redress but to avoid harm.*"²¹⁴ Depending on their interpretation of Title

211. The Court addressed the employer's argument in its interpretation of the affirmative defense (that workers are responsible for actively reporting discrimination, in an effort to mitigate potential harms, and that Crawford did not do so in response to her co-workers' discrimination). See *Crawford*, 129 S. Ct. at 852. In disagreeing with the employer's view, the Court stated:

We have never suggested that employees have a legal obligation to report discrimination against others to their employer on their own initiative, let alone lose statutory protection by failing to speak. . . . [E]mployees will often face retaliation not for opposing discrimination they themselves face, but for reporting discrimination suffered by others. Thus, they are not "victims" of anything until they are retaliated against, and it would be absurd to require them to "mitigate" damages they may be unaware they will suffer.

Id. at 853 n.3.

212. 42 U.S.C. § 2000e (2006).

213. *Id.* § 2000e-3(a).

214. *Faragher v. City of Boca Raton*, 524 U.S. 775, 805-06 (1998) (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975)) (emphasis added). See generally Brianne J. Gorod, *Rejecting "Reasonableness": A New Look at Title VII's*

VII, courts may promote litigation, however, rather than prevent harm.

The following section analyzes the resulting peril that would ensue if the Supreme Court had agreed with the Sixth Circuit's interpretation and neglected to afford the *Crawford* worker any protection under Title VII. The identified danger is lessened to the extent the Court permitted Crawford to successfully make a claim under the opposition clause. Nevertheless, consideration of Title VII's purpose, as a device to allow or disallow claims and as a method of preventing discrimination, may be goals that the Court kept in mind in its resolution of *Crawford*.²¹⁵ This section examines the premium placed on the litigious resolution of discrimination, particularly through the Supreme Court's decision in *Ledbetter v. Goodyear Tire and Rubber Company* and the Sixth Circuit's decision in *Crawford*.

A. Crawford and Ledbetter: Context to the Controversies

Both *Crawford* and *Ledbetter* involved Title VII lawsuits; *Crawford* addressed retaliation,²¹⁶ while the *Ledbetter* employee claimed discriminatory pay.²¹⁷ In *Crawford*, the Sixth Circuit ruled that merely internal investigations will not trigger anti-retaliation protection under Title VII,²¹⁸ but the Supreme Court reversed.²¹⁹ In *Ledbetter*, the employee's failure to register an official action early in the process defeated a later Title VII claim.²²⁰ The Sixth Circuit's resolution of *Crawford* and the Supreme Court's decision in *Ledbetter* both emphasized the need to take official action in order for the employee to make a later complaint that courts may contemplate, and both of these decisions placed the onus of making an official allegation on the

Anti-Retaliation Provision, 56 AM. U. L. REV. 1469 (2007) (noting that in addition to establishing liability, Title VII retaliation protection also encourages workplace communication).

215. See, e.g., *Crawford*, 129 S. Ct. at 851 (stating that "nothing in the statute requires a freakish rule protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when her boss asks a question").

216. *Id.* at 849.

217. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 621-22 (2007).

218. *Crawford v. Metro Gov't of Nashville & Davidson County, Tenn.*, 211 F. App'x 373, 377 (6th Cir. 2006).

219. *Crawford*, 129 S. Ct. at 850-51.

220. *Ledbetter*, 550 U.S. at 642-43.

plaintiff.²²¹ The obligation to initiate a complaint is not contrary to the Act; one cannot win a suit if one does not file. The practical circumstances of the *Crawford* and *Ledbetter* employees meant, however, that Title VII's protections were circumscribed to the extent the courts' rulings were left undisturbed—either through a successful appeal to the Supreme Court for the employee in *Crawford* or through Congressional action in response to *Ledbetter*.

B. *The Implications of Ledbetter v. Goodyear Tire & Rubber Co., Inc.*

In *Ledbetter*, the Supreme Court held that an employee who alleges discriminatory pay must file a Title VII claim within 180 days of his or her employer's initial discriminatory pay practice.²²² Title VII's statutory time limit on discriminatory actions required, in the Court's understanding, that the permissible time period during which the employee may sue be triggered by the first incident of discrimination.²²³ For similarly situated employees, this meant that the employee must sue at the moment the employee is paid less for discriminatory reasons.²²⁴

The time limitation placed on filing suit for discriminatory pay and the concomitant necessity of filing at the first moment that discriminatory pay is suspected place employees in a problematic situation. First, employees may not know that they are being paid less than co-workers until long after the discriminatory pay begins. The practical difficulties of discovering a pay differential, or indeed of knowing how any employees are paid, was discussed by Justice Ginsburg in her *Ledbetter* dissent.²²⁵ Justice Ginsburg stated that “[i]t is not unusual . . . for management to decline to publish employee pay levels, or for employees to keep private their own salaries.”²²⁶ The employee who does

221. See *Crawford*, 211 F. App'x at 376-77; *Ledbetter*, 550 U.S. at 632.

222. *Ledbetter*, 550 U.S. at 623-24.

223. *Id.* at 639.

224. *Id.*

225. *Id.* at 643-61 (Ginsburg, J., dissenting).

226. *Id.* at 649-50 (Ginsburg, J., dissenting). Justice Ginsburg also noted that “one-third of private sector employers have adopted specific rules prohibiting employees from discussing their wages with co-workers; only one in ten employers has adopted a pay openness policy.” *Id.* at 650 n.3 (Ginsburg, J., dissenting) (citing

not know that he or she is being paid less for potentially discriminatory reasons until after the statutory time limit has passed would not meet the 180-day deadline, and the *Ledbetter* majority failed to offer relief in such cases. The second reason why the 180-day filing limitation is problematic is that if the worker learns of a discriminatory pay differential in time to meet the deadline (or at least suspects discrimination may have occurred), then the *Ledbetter* decision placed a premium on suing early, to avoid losing access to a cause of action under Title VII. The moment that employees understood or suspected that they were being paid less, they must file, or again, they would lose access to civil relief if more than 180 days passed after the pay discrepancy was initiated.²²⁷

The Court's decision left the employee with the following dilemma. First, the employee might hope that the pay differential was not based on discriminatory animus, but simply acknowledge that discrimination could be at work, and accept the pay differential and not sue—even if the employee eventually learned that pay was awarded discriminatorily. Second, alternatively, the employee might file suit under Title VII, knowing that a failure to file would result in foreclosure of a suit if the time limitation was violated, regardless of what the employee hoped, believed or eventually learned. The latter case would indicate that the employee would make an early, presumptive strike against the employer's pay policies, which may not, understating the case here, broadly signify to the employer the good will of the worker. In any event, the employee may not know whether a sufficiently material differential in pay would be found, which could be the case, for instance, if a small difference in pay were allowed to compound over years of employment.²²⁸ Unfortunately, the employee might merely suspect

Leonard Bierman & Rafael Gely, "Love, Sex and Politics? Sure. Salary? No Way": *Workplace Social Norms and the Law*, 25 BERKELEY J. EMP. & LAB. L. 167, 168 (2004)).

227. See generally Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859 (2008) (discussing *Ledbetter* in the Supreme Court); Young Eun Lee, *Creating a Proper Incentive Structure: A Case Study of Ledbetter v. Goodyear Tire & Rubber Co.*, 15 CARDOZO J. L. & GENDER 117 (2008) (explaining the impact of *Ledbetter*, including the incentives to prevent discrimination).

228. See, e.g., *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (requiring the retaliatory harm to be materially adverse); *Ledbetter v.*

that discrimination motivated the differential. If employees merely suspect unlawful conduct, is that suspicion enough to warrant action under Title VII? While Title VII was not intended to promote speculative lawsuits,²²⁹ and, therefore, one should know about discriminatory intent before filing, the Court's decision nonetheless could prompt the employee to file early, or else forever relinquish any right to sue even if the employee subsequently discovered additional information regarding discrimination and its material impact. Under either alternative, employees were left either unprotected or more likely to file suit. Congress voted to change the *Ledbetter* result through the Lilly Ledbetter Fair Pay Act of 2009, recognizing that harm resulting from discriminatory pay occurs every time the employee receives a discriminatory paycheck. Under the Act, Title VII's 180-day limitation for filing suit is, thereby, renewed with each check.²³⁰ President Barack Obama chose to

Goodyear Tire & Rubber Co., 421 F.3d 1169, 1174 (11th Cir. 2005) (stating "[A]t the end of 1997, [Ledbetter] was still earning \$3727 per month, less than all fifteen of the other Area Managers in Tire Assembly. The lowest paid male Area Manager was making \$4286, roughly 15% more than Ledbetter; the highest paid was making \$5236, roughly 40% more than Ledbetter.").

229. See, e.g., *White*, 548 U.S. at 68. The Court noted the concept of the materiality of harm:

We speak of *material* adversity because we believe it is important to separate significant from trivial harms. Title VII, we have said, does not set forth a general civility code for the American workplace. An employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience. The anti-retaliation provision seeks to prevent employer interference with unfettered access to Title VII's remedial mechanisms. It does so by prohibiting employer actions that are likely to deter victims of discrimination from complaining to the EEOC, the courts, and their employers. And normally petty slights, minor annoyances, and simple lack of good manners will not create such deterrence.

White, 548 U.S. at 68 (internal quotation marks and citations omitted).

230. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009). Congress stated that:

(1) The Supreme Court in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), significantly impairs statutory protections against discrimination in compensation that Congress established and that have been bedrock principles of American law for decades. The *Ledbetter* decision undermines those statutory protections by unduly restricting the time period in which victims of discrimination can challenge and recover for discriminatory compensation decisions or other practices, contrary to the intent of Congress.

make the Act the first bill that he signed into law, which he did on January 29, 2009.²³¹

If *Ledbetter* stood for the proposition that employees should file actions early in order to preserve their claim for discriminatory pay (if they could file at all), then the Sixth Circuit's decision in *Crawford* similarly encouraged employees to seek official, external actions for discrimination claims, despite an

(2) The limitation imposed by the Court on the filing of discriminatory compensation claims ignores the reality of wage discrimination and is at odds with the robust application of the civil rights laws that Congress intended.

(3) With regard to any charge of discrimination under any law, nothing in this Act is intended to preclude or limit an aggrieved person's right to introduce evidence of an unlawful employment practice that has occurred outside the time for filing a charge of discrimination.

Id. § 2, 123 Stat. at 5.

231. See Sheryl Gay Stolberg, *Obama Signs Equal-Pay Legislation*, N.Y. TIMES, Jan. 30, 2009. The Lilly Ledbetter Fair Pay Act of 2009 amended Title VII by adding:

(3)(A) For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits or other compensation is paid, resulting in whole or in part from such a decision or other practice.

(B) In addition to any relief authorized by section 1977A of the Revised Statutes (42 U.S.C. 1981a), liability may accrue and an aggrieved person may obtain relief as provided in subsection (g)(1), *including recovery of back pay for up to two years preceding the filing of the charge*, where the unlawful employment practices that have occurred during the charge filing period are similar or related to unlawful employment practices with regard to discrimination in compensation that occurred outside the time for filing a charge.

Lilly Ledbetter Fair Pay Act § 3, 123 Stat. at 5-6 (amending 42 U.S.C. § 2000e-5(e) (2006)) (emphasis added). The Act also amends, for example, the Age Discrimination in Employment Act of 1967, § 4, 123 Stat. 6 (amending 29 U.S.C. 626(d) (2006)), and the Americans with Disabilities Act of 1990, § 5, 123 Stat. 6 (amending scattered sections of 42 U.S.C. §§ 12111, 12203 (2006)). To some extent, the Act reinstates the "continuing violation doctrine" for pay discrimination cases. See, e.g., *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 105 (2002). The Court in *Morgan* explained that, in regard to a Title VII case concerning allegations of race discrimination, "each week's paycheck that delivered less to a black than to a similarly situated white is a wrong actionable under Title VII." *Id.* at 112 (quoting *Bazemore v. Friday*, 478 U.S. 385, 395 (1986) (per curiam)). The Act also limits the recovery for harms caused to a maximum of two years. Lilly Ledbetter Fair Pay Act § 2, 123 Stat. 6 (amending 42 U.S.C. § 2000e-5(e)). See also Lee, *supra* note 227, at 129-31 (discussing the last major amendments to Title VII in 1991).

employer's efforts to address the alleged discrimination internally.

C. *The Implications of Crawford*

The Sixth Circuit held in *Crawford* that an employee who cooperated in an employer's internal investigation of discrimination may not establish a claim of unlawful retaliation, even if the employee was fired due to his or her participation.²³² The Sixth Circuit's *Crawford* decision failed to protect employees who internally provide information related to discrimination claims in favor of protecting only those employees whose cooperation in an investigation occurred in association with an official, external action. The result in the Sixth Circuit was, as was true in *Ledbetter*: officially file, and file soon, or risk losing access to the courts.

The Supreme Court recognized the inadequacy of the protection provided by the Sixth Circuit's decision. The Court noted that employees in circumstances similar to those in *Crawford* are protected by the EEOC under the opposition clause, according to the EEOC's guidelines regarding retaliation.²³³

The EEOC Compliance Manual states that actions taken against workers by an employer may constitute retaliation, and the manual does not contain a specific reference to any need for

232. *Crawford v. Metro. Gov't of Nashville & Davidson County, Tenn.*, 211 F. App'x 373, 376-77 (6th Cir. 2006).

233. *Crawford v. Metro. Gov't of Nashville & Davidson County, Tenn.*, 129 S. Ct. 846, 851 (2009). The Court stated that "[w]hen 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.'" *Id.* (quoting Brief for the United States as Amicus Curiae Supporting Petitioner at 9, *Crawford*, 129 S. Ct. 846 (No. 06-1595), 2008 WL 1757590, at *9) (emphasis in original). Additionally, the EEOC Guidelines stated that opposition includes "*informing an individual's prospective employer about the individual's protected activity.*" 2 EEOC Compl. Man. (BNA) § 614:1, at § 8-II(D)(2) (May 20, 1998) (emphasis added). So long as the opposition is based on "a reasonable and good-faith belief that the opposed practices were unlawful," a violation of retaliation charge can be substantiated. *Id.* § 8-II(B)(3)(b). Examples of protected opposition include "[t]hreatening to file a charge or other formal complaint alleging discrimination," "[c]omplaining to anyone about alleged discrimination against oneself or others," and "[r]efusing to obey an order because of a reasonable belief that it is discriminatory." *Id.* § 8-II(B)(2) (emphasis added).

employees to previously register a formal EEOC charge.²³⁴ This is made clear in the EEOC Compliance Manual's discussion of the opposition clause of the anti-retaliation provisions of Title VII and the EEOC's general guidance on retaliation:

The anti-retaliation provisions make it unlawful to discriminate against an individual because s/he has opposed any practice made unlawful under the employment discrimination statutes. *This protection applies if an individual explicitly or implicitly communicates to his or her employer or other covered entity a belief that its activity constitutes a form of employment discrimination that is covered by any of the statutes enforced by the EEOC.*²³⁵

The Compliance Manual also provides examples of opposition:

*A complaint or protest about alleged employment discrimination to a manager, union official, co-worker, company EEO official, attorney, newspaper reporter, Congressperson, or anyone else constitutes opposition. Opposition may be nonverbal, such as picketing or engaging in a production slow-down. Furthermore, a complaint on behalf of another, or by an employee's representative, rather than by the employee herself, constitutes protected opposition by both the person who makes the complaint and the person on behalf of whom the complaint is made.*²³⁶

The Compliance Manual further states that, with respect to the participation clause, no official government action must first be taken in order to qualify for protection against retaliation.²³⁷ The Manual states:

The anti-retaliation provisions make it unlawful to discriminate against any individual because s/he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, hearing, or litigation under Title VII, the ADEA, the EPA, or the ADA. This protection applies to individuals

234. See 2 EEOC Compl. Man., § 614:1, at § 8-II.

235. *Id.* § 8-II(B)(1) (footnote omitted) (emphasis added).

236. *Id.* § 8-II(B)(2) (emphasis added).

237. See *id.* § 8-II(C)(1).

challenging employment discrimination under the statutes enforced by EEOC in EEOC proceedings, in state administrative or court proceedings, as well as in federal court proceedings, and to individuals who testify or otherwise participate in such proceedings.²³⁸

With respect to the guidance provided by the EEOC in regard to participating conduct, the Compliance Manual notes that participating is a protected act and that participating may include conduct in conjunction with an EEOC action, but that the connection is not mandatory.²³⁹

Participation means *taking part in an employment discrimination proceeding*. Participation is protected activity even if the proceeding involved claims that ultimately were found to be invalid. Examples of participation include: [f]iling a charge of employment discrimination; [c]ooperating with an internal investigation of alleged discriminatory practices; or [s]erving as a witness in an EEO investigation or litigation.²⁴⁰

The Supreme Court has acknowledged the influence that an agency's interpretation can have on a court's interpretation of statutes. In *Federal Express Corporation v. Holowecki*, the Court examined how the EEOC administered claims filed under the Age Discrimination in Employment Act of 1967:²⁴¹

Just as we defer to an agency's reasonable interpretations of the statute when it issues regulations in the first instance, the agency is entitled to further deference when it adopts a reasonable interpretation of regulations it has put in force. Under [*Auer v. Robbins*], we accept the agency's position unless it is "plainly erroneous or inconsistent with the regulation."²⁴²

The Court in *Crawford* cited to *Holowecki* and emphasized the importance of the EEOC's interpretations of the Court's de-

238. *Id.* (emphasis added).

239. *See id.* § 8-II(C)(2).

240. EEOC, Retaliation, <http://www.eeoc.gov/types/retaliation.html> (last visited Oct. 3, 2009).

241. 29 U.S.C. §§ 621-629 (2006).

242. *Fed. Express Corp. v. Holowecki*, 128 S. Ct. 1147, 1155 (2008) (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997)) (internal citations omitted).

cisions.²⁴³ Future courts may agree with the EEOC's insistence that Crawford successfully made claims under both the opposition and the participation clauses, holding that the EEOC's understanding of retaliation under Title VII is entitled to similar deference.²⁴⁴

If the Sixth Circuit's approach to *Crawford* had been echoed by the Supreme Court, a premium would have been placed on filing lawsuits, rather than on fostering employment that both discourages discrimination through internal investigations of unlawful activity and protects workers who cooperate in those investigations. The *Ledbetter* decision also increased the likelihood of lawsuits with respect to claims that may ultimately be premature, but which are filed in order to preserve a worker's future actions against an employer. Similarly, the Sixth Circuit's resolution of *Crawford* held that the employee who failed to sue faced the possibility that he or she might be subject to unprotected retaliatory actions, including dismissal, and that the retaliation would only be actionable if formal charges had been previously filed.²⁴⁵

The employees in *Crawford* and *Ledbetter* eventually did file suit, but were unsuccessful. In *Crawford*, the employee's official action against the employer came only after she suffered retaliation.²⁴⁶ In *Ledbetter*, the employee's official action came too late to comport with Title VII's time limitations.²⁴⁷ Accord-

243. *Crawford v. Metro. Gov't of Nashville & Davidson County, Tenn.*, 129 S. Ct. 846, 851 (2009) (noting that "the EEOC compliance manuals 'reflect a body of experience and informed judgment to which courts and litigants may properly resort for guidance'" (quoting *Holowecki*, 128 S. Ct. at 1156)).

244. See Brief for United States as Amicus Curiae Supporting Petitioner, *supra* note 233, at 9-25, 2008 WL 1757590, at *9-25 (arguing the EEOC's position regarding coverage by the opposition and participation clauses). See generally Joan M. Savage, Note, *Adopting the EEOC Deterrence Approach to the Adverse Employment Action Prong in a Prima Facie Case for Title VII Retaliation*, 46 B.C. L. REV. 215 (2004) (discussing discrimination, retaliation, and providing protection to the employee, as consistent with EEOC guidelines).

245. If the employee personally suffers no discrimination, then he or she may be unlikely to file.

246. Crawford could have filed her own discrimination claim for sexual harassment based upon her testimony as to what she told Ms. Frazier during the Metro internal investigation. *Crawford v. Metro. Gov't of Nashville & Davidson County, Tenn.*, 211 F. App'x 373, 375 n.1 (6th Cir. 2006). See *infra* note 171 (discussing the alleged harassment suffered by Crawford and why she did not file her own claim).

247. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 632 (2007).

ing to the Courts' respective understandings, both employees had an obligation to file, and, in both cases, filing an official action early in the process was mandatory for protection to be available.

In reference to the need to register a prior, official charge, the employer in *Crawford* expressed its concern that protecting workers who cooperate in an employer's internal investigation would create a cause of action that was not intended under Title VII.²⁴⁸ The Sixth Circuit agreed, noting:

The impact of Title VII on an employer can be onerous. By protecting only participation in investigations that occur relative to EEOC proceedings, the participation clause prevents the burden of Title VII from falling on an employer who proactively chooses to launch an internal investigation. Expanding the purview of the participation clause to cover such investigations would simultaneously discourage them.²⁴⁹

The Sixth Circuit thus established a premium for filing suit that appeared contradictory to its stated intention of protecting employers from "the burden of Title VII."²⁵⁰ On the one hand, the Sixth Circuit assumed that employers must know that valid anti-discrimination policies are required of prudent, diligent employers, and that valid policies should provide for investigation. On the other hand, the court assumed that placing investigations within the types of official acts that trip retaliation protection (should negative consequences ensue for the testifying workers) would discourage investigations. The Sixth Circuit wanted it both ways, but neither assumption could have been helpful for a worker in *Crawford*'s position.

248. Transcript of Record, *supra* note 171, at 27-28, 2008 WL 4527984, at *27-28.

Title VII was the result of a congressional compromise which struck a balance between protecting the interests of employees and employers. In relation to the anti-retaliation provisions of [Title 42, United States Code, Section 2000e-3(a)], that balance was struck to protect the rights of employees to report allegedly discriminatory activity, as well as employers' rights to manage their workplaces.

Id.

249. *Crawford*, 211 F. App'x at 377.

250. *Id.*

As stated by the Supreme Court, “Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses.”²⁵¹ Cooperation is facilitated to the extent that the opposition clause covers employees like Crawford,²⁵² but cooperation will be further encouraged if it is also covered through the participation clause. To ensure employees’ cooperation, to protect all employees under the Act, and to encourage employers to prevent discrimination through their anti-discrimination policies, future courts must carefully consider whether employment discrimination is best prevented by the litigious employee or by an employee who is encouraged to informally cooperate with his or her employer.

V. Conclusion

In order to fulfill the purposes of Title VII, the Sixth Circuit required that employees file an official claim, or else they would not be protected by the Act. If one recognizes that cooperation in an internal investigation qualifies as an act that constitutes opposing conduct under the opposition clause, or more particularly, as participation under the participation clause, then one may indeed be classifying that cooperation as an official act. The Sixth Circuit would allow as official acts only those which take the form of external complaints; an external, official claim would be the sole type of official action that the Sixth Circuit would contenance under the participation clause. Lawsuits are not, however, the only types of official actions contemplated by the Act, as the Court recognized in *Ellerth* and *Faragher*.²⁵³ Other acts, particularly those whose intents and purposes are to further the goals of Title VII, must be recognized as triggering the protection of Title VII—not only through the opposition clause, but through the participation clause as well. The Supreme Court explained in *White* that Title VII’s anti-retaliation provisions are intended to “maintain[] unfettered access to statutory remedial mechanisms.”²⁵⁴ The Supreme Court had

251. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006).

252. *Crawford v. Metro. Gov’t of Nashville & Davidson County, Tenn.*, 129 S. Ct. 846, 850-51 (2009).

253. *See, e.g., supra* notes 8, 231.

254. *White*, 548 U.S. at 64 (internal quotation marks, citation, and alteration omitted).

the opportunity to acknowledge that cooperation in an investigation is both an act of opposition and of participation against discrimination. The easier path for the Court was to recognize cooperation in internal investigations only as an act of opposition, not participation. The better path would recognize it as both.

