

Some Recent Retaliation Developments

by

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Retaliation under Title VII:

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

- Summary of Crawford:
 - The issue in the case was whether Title VII protected an employee who spoke out about discrimination not on her own initiative, but in answering questions during an employer's internal investigation.
 - The lower court held that answering questions in this manner did not constitute adequate "opposition" requisite to trigger the protections of Title VII's retaliation provisions.
 - The Supreme Court reversed, and held that the plaintiff's conduct constituted adequate "opposition" for the purposes of Title VII.

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Retaliation under Title VII (cont'd):

Crawford v. Metro. Gov't of Nashville & Davidson County, 129 S. Ct. 846 (Jan. 26, 2009)
(cont'd)

- Articles Discussing the Implications & Impact of *Crawford*:
 - Barbara Stacy Kline, *Comment: "Oppose" By Any Other Name: The Title VII Opposition Clause and Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*, 34 *Olka. City U.L. Rev.* 591 (Fall 2009).
 - Vijay K. Mago, Nancy B. Sasser, & Allison M. Perry, *Article: Labor and Employment Law*, 44 *U. Rich. L. Rev.* 513 (Nov. 2009).
 - Anne C. Patin, *The Impact of "Crawford" on Employer-Initiated Investigations*, *New York Law Journal*, July 27, 2009,
<http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=1202432487420&slreturn=1&hbxlogin=1>.
 - Roy Ginsburg, *Retaliation, The Crawford Decision*, Dorsey & Whitney LLP's "Quirky Questions, Real-Life Employment Law" Blog, June 22, 2009,
<http://www.quirkyemploymentquestions.com/qq/blog.aspx?entry=291>
 - Drew M. Capruder, *US Supreme Court Broadens Definition of "Opposition" for Retaliation Claims: Crawford v. Metropolitan Government of Nashville 1-26-09*, Drew Capruder's Employment Law Blog, Jan. 26, 2009,
<http://capuderfantasia.com/blog/2009/01/us-supreme-court-broadens-definition-of-opposition-for-retaliation-claims-crawford-v-metropolitan-government-of-nashville-1-26-09/>.
 - Kevin Russell, *Recap on Opinion in Crawford v. Nashville*, SCOTUSblog, January 26, 2009, [http://www.scotusblog.com/2009/01/recap-on-opinion-in-crawford-v-nashville-county/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+scotusblog%2FpFXs+\(SCOTUSblog\)](http://www.scotusblog.com/2009/01/recap-on-opinion-in-crawford-v-nashville-county/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+scotusblog%2FpFXs+(SCOTUSblog)).

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Retaliation under Title VII (cont'd):

- Other Recent Articles on Retaliation under Title VII:
 - Megan E. Mowrey, *Discriminatory Retaliation: Title VII Protection for the Cooperating Employee*, 29 Pace L. Rev. 689 (2009).
 - Natalie W. Winslow, Comment, *When Just Saying “No” is Not Enough: How an Employee Who Rejects a Supervisor’s Sexual Advances May Not Be Protected from Retaliation – and What the Supreme Court Can Do About It*, 46 Cal. W. L. Rev. 211 (2009).

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Retaliation under the FLSA – Verbal Complaints:

Kasten v. Saint-Gobain Performance Plastics Corp., 585 F.3d 310 (7th Cir. June 29, 2009)

- Summary:
 - In *Kasten*, the Seventh Circuit held that the anti-retaliation provision in the FLSA prohibits employers from retaliating against employees for filing formal complaints, instituting proceedings, or testifying about FLSA violations, but does not cover verbal complaints made to a supervisor. The Court noted that “the natural understanding of the phrase ‘file any complaint’ requires the submission of some writing to an employer, court, or administrative body.”

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Retaliation under the FLSA – Verbal Complaints

(cont'd)

Kasten v. Saint-Gobain Performance Plastics Corp., 585 F.3d 310 (7th Cir. June 29, 2009)
(cont'd)

- Circuit Split:

- The *Kasten* court noted that other circuit courts that have dealt with the verbal complaint issue are split:
 - *Ball v. Memphis Bar-B-Q Co., Inc.*, 228 F.3d 360, 364 (4th Cir. 2000) (the FLSA “prohibits retaliation for testimony given or about to be given but not for an employee’s voicing of a position on working conditions in opposition to an employer”).
 - *Lambert v. Genesee Hospital*, 10 F.3d 46 (2d Cir. 1993) (“The plain language of this provision limits the cause of action to retaliation for filing formal complaints, instituting a proceeding, or testifying, but does not encompass complaints made to a supervisor”).
 - *EEOC v. Romeo Community Schools*, 976 F.2d 985, 989-90 (6th Cir. 1992) (holding, without discussion of the verbal vs. written distinction, that plaintiff’s apparently oral complaints to supervisors were protected activity).
 - *EEOC v. White & Son Enters.*, 881 F.2d 1006, 1011 (11th Cir. 1989) (holding, without discussion of the verbal vs. written distinction, that plaintiffs’ oral complaints were protected activity).
 - *Brock v. Richardson*, 812 F.2d 121, 125 (8th Cir. 1987) (holding, without discussion of the verbal vs. written distinction, that defendant’s mistaken belief that plaintiff had made apparently oral complaints to supervisors was grounds for suit).
 - *Brennan v. Maxey’s Yamaha*, 513 F.2d 179, 183 (8th Cir. 1975) (holding, without discussion of the verbal vs. written distinction, that employee’s “voicing” of concern was protected activity).

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Retaliation under the FLSA – Verbal Complaints (cont'd):

Kasten v. Saint-Gobain Performance Plastics Corp., 585 F.3d 310 (7th Cir. June 29, 2009)
(cont'd)

- Articles and Other Sources on *Kasten*:
 - The Harman Firm, *The 7th Circuit Follows the 2nd Circuit in Holding that the Fair Labor Standards Act (FLSA) Does Not Prohibit Retaliation for Internal Verbal Complaints*, New York Employment Attorneys Blog, July 8, 2009, <http://www.newyorkemploymentattorneysblog.com/2009/07/the-7th-circuit-follows-the-2n.html>.
 - Jon Hyman, *Court Holds Wage and Hour Laws Don't Protect Oral Complaints*, Ohio Employer's Law Blog, July 2, 2009, [http://ohioemploymentlaw.blogspot.com/2009/07/court-holds-wage-and-hour-laws-dont.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+OhioEmployersLawBlog+\(Ohio+Employer%27s+Law+Blog\)](http://ohioemploymentlaw.blogspot.com/2009/07/court-holds-wage-and-hour-laws-dont.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+OhioEmployersLawBlog+(Ohio+Employer%27s+Law+Blog)).
 - P.K. Runkles-Pearson, *Seventh Circuit Rules FLSA Doesn't Protect Verbal Complaints*, World of Work, July 1, 2009, [http://www.worldofworklawblog.com/2009/07/articles/flsa-1/seventh-circuit-rules-flsa-doesnt-protect-verbal-complaints/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+WorldOfWork+\(World+of+Work\)](http://www.worldofworklawblog.com/2009/07/articles/flsa-1/seventh-circuit-rules-flsa-doesnt-protect-verbal-complaints/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+WorldOfWork+(World+of+Work))
 - Benjamin Spencer, *Seventh Circuit Notes Split Re Whether Verbal Complaints Are Protected Activity under the FLSA*, Split Circuits, June 30, 2009, <http://splitcircuits.blogspot.com/2009/06/seventh-circuit-notes-split-re-whether.html>.

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Retaliation under SOX:

Tides v. Boeing Co., 2010 U.S. Dist. LEXIS 11282 (W.D. Wash. Feb. 9, 2010)

- Summary of *Tides*:
 - The plaintiffs, former compliance auditors for Boeing, were performing testing on Boeing's IT controls in compliance with SOX's mandate that publicly traded companies review their controls over financial reporting. The auditors identified certain perceived deficiencies in the controls, and tried to raise their concerns with their supervisors. When they thought that their concerns had fallen on deaf ears, the auditors told a local newspaper reporter about the alleged deficiencies. Boeing terminated the auditors shortly thereafter.
 - The U.S. District Court for the Western District of Washington dismissed the auditors' claims on Boeing's motion for summary judgment, holding that leaking information to the media is not protected activity under SOX.
- Articles and Other Sources on *Tides*:
 - Doug Cornelius, *Media Leak is Not Protected as a SOX Whistleblower*, Compliance Building, Feb. 17, 2010, [http://www.compliancebuilding.com/2010/02/17/media-leak-is-not-protected-as-a-sox-whistleblower/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+compliancebuilding+\(Compliance+Building\)](http://www.compliancebuilding.com/2010/02/17/media-leak-is-not-protected-as-a-sox-whistleblower/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+compliancebuilding+(Compliance+Building)).
 - Doug Cornelius, *Tides v. Boeing: Summary Judgment in SOX Whistleblower Case*, JD Supra, Feb. 9, 2010, <http://www.jdsupra.com/post/documentViewer.aspx?fid=62080a02-ade0-4526-af78-7442af50cf6b>

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Retaliation under State Law:

Roa v. LAFE, 985 A.2d 1225 (N.J. Jan. 14, 2010)

- Summary of Roa:
 - In *Roa*, The Supreme Court of New Jersey held, inter alia, that an employer's post-termination conduct, including retaliatory opposition to an employee's claim for unemployment compensation, is covered by the retaliation provisions of the New Jersey Law Against Discrimination.

- Articles and Other Sources on Roa:
 - Daniel N. Kuperstein, *Recent NJ Supreme Court Decision Affirms Appellate Division's Warning to Employers: Ending Employment Relationship Doesn't End Exposure to Liability*, Fox Rothschild LLP, Jan. 2010, <http://www.foxrothschild.com/newspubs/newspubsArticle.aspx?id=13594>

 - Stark & Stark, *It Ain't Over, Even After It's Over: New Jersey Court Extends Retaliation Claims Under Law Against Discrimination (NJLAD) For Post-Termination Actions*, New Jersey Law Blog, November 6, 2008, [http://www.njlawblog.com/2008/11/articles/employment/it-aint-over-even-after-its-over-new-jersey-court-extends-retaliation-claims-under-law-against-discrimination-njlad-for-posttermination-actions/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+NewJerseyLawBlog+\(New+Jersey+Law+Blog\)](http://www.njlawblog.com/2008/11/articles/employment/it-aint-over-even-after-its-over-new-jersey-court-extends-retaliation-claims-under-law-against-discrimination-njlad-for-posttermination-actions/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+NewJerseyLawBlog+(New+Jersey+Law+Blog)) (covering the decision below by the New Jersey Appellate Division).