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## Retaliation.

Two new rulings show that landscape of retaliation claims may be shifting.

In two rulings by Federal Appeals Courts within days of each other, the courts have addressed what constitutes retaliation under Title VII of the Civil Rights Act. In both cases, the courts ruled in favor of the employees alleging retaliation.

Title VII of the Civil Rights Act prohibits an employer from retaliating against an employee who opposes conduct considered unlawful under the Act or who participates in an investigation concerning such conduct. Typically, a retaliation claim is filed by an employee who either filed a discrimination charge with the EEOC or who participated in the investigation of a discrimination charge filed with the EEOC. However, last year the Supreme Court ruled that the filing of a charge with the EEOC is not necessarily a prerequisite for filing a retaliation lawsuit. The case that precipitated this ruling has just recently been decided in favor of the employee.

The case involves a former school district payroll coordinator in Tennessee named Jenny Crawford. Crawford had been working for the school district for approximately thirty years when she was asked by her employer to participate in an internal investigation concerning alleged sexual harassment by the school district's employee relations coordinator. No formal charges had been filed with the EEOC. Crawford participated in the investigation and disclosed to her employer that the manager had engaged in inappropriate sexual conduct. During that same time period, the school

district found what it considered serious issues with Crawford's performance. Crawford was terminated six months later. In 2003, she filed a lawsuit alleging the school district had retaliated against her because of the information that she disclosed during the investigation. The school district argued that Crawford's performance issues constituted a legitimate business reason for her termination.

Initially, both the federal district court and the circuit court dismissed Crawford's claims because there had been no charge filed with the EEOC by Crawford or any other employee. The Sixth Circuit stated that Crawford had not established a claim under either the opposition or the participation clauses of the Act. The United States Supreme Court disagreed. The high court ruled unanimously that by disclosing information concerning suspected sexual harassment in response to an employer's inquiry, Crawford engaged in protected activity under Title VII. Specifically, the Court found that Crawford's conduct fell within the opposition clause of Title VII because, the Court opined, a court can reasonably assume that a female employee who discloses information concerning sexual harassment disapproves of the alleged conduct. The Court reasoned that to hold otherwise would discourage employees from participating in sexual harassment investigations. The Supreme Court reversed the Sixth Circuit's decision dismissing the case and sent the case back to the district court.

A jury trial was held last month. At the conclusion of the trial, the jury concluded that the employer had, in fact, retaliated against Crawford for disclosing information

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about the harasser when it terminated her. The jury did not accept the employer's reasons for Crawford's termination, finding the reasons were merely pretext for the unlawful retaliation. Based upon this conclusion, the jury awarded Crawford 1.5 million dollars.

The second retaliation case, decided by the Second Circuit on February 2, 2010, addresses the actions necessary to establish an adverse action in a retaliation claim. An individual alleging retaliation under Title VII must establish four things in order for the case to proceed. He must establish that he engaged in protected activity, that the employer knew about the protected activity, that the employer took an adverse employment action, and that there is a connection between the protected activity and the adverse action. Historically, courts have interpreted the adverse action requirement to mean an ultimate employment decision that permanently changes an employee's working conditions such as a termination. However, in 2006, the Supreme Court issued an opinion that distinguished the actions necessary to support a charge of retaliation from those necessary to support a claim of discrimination under Title VII of the Civil Rights Act. The high court held that retaliation under Title VII does not have to affect an ultimate employment decision. Rather, the court broadened the scope of the adverse action to include actions that are harmful to the point that they could discourage a reasonable employee from making or supporting a charge of discrimination.

The Second Circuit Court of Appeals addressed this issue in a retaliation claim filed by three employees who claimed that after they participated in an investigation of racial discrimination by their superior, the superior

retaliated against them by engaging in "workplace sabotage" and "punitive scheduling." The federal district court dismissed the employees' claims because they did not allege an adverse employment action that resulted in a permanent change in the employees' working conditions. When the case went to the Second Circuit on appeal, the court reversed, in part, the district court's decision for its failure to apply the "new standard" for adverse actions announced by the Supreme Court. Namely, the appeals court held that the actions that the employees labeled as "workplace sabotage" and "punitive scheduling" could constitute adverse employment actions and sent the case back to the district court to determine whether the employer had produced a legitimate non-discriminatory reason for his actions.

These cases demonstrate the evolution of the retaliation claim under Title VII and, in some ways, make it easier for an employee to make it past the first hurdle of establishing a *prima facie* case. They also underscore the importance of carefully conducted investigations as well as the need to train supervisors and managers concerning conduct that constitutes unlawful retaliation under Title VII and the other federal employment statutes. Too often, employers focus their efforts on eliminating discrimination in the workplace while neglecting to address retaliation which can have serious implications for an employer. Employers should make it a practice to review their harassment policies on a regular basis to ensure that they are in compliance with the laws both with respect to discrimination and retaliation and that their employees and managers are aware of the policies and understand them.