No. 06-1595

In the Supreme Court of the United States

VICKY S. CRAWFORD,
Petitioner,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE PETITIONER

ERIC SCHNAPPER
UNIVERSITY OF WASHINGTON
SCHOOL OF LAW
P.O. BOX 353020
SEATTLE, WA 98195
(206) 616-3167
schnapp@u.washington.edu

ANN BUNTIN STEINER
Counsel of Record
STEINER & STEINER
214 SECOND AVENUE, N.
SUITE 203
NASHVILLE, TN 37201-1644
(615) 244-5063
asteiner@steinerandsteiner.com

Attorneys for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Does the anti-retaliation provision of section 704(a) of Title VII of the 1964 Civil Rights Act protect a worker from being dismissed because she cooperated with her employer's internal investigation of sexual harassment?

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The November 14, 2006, opinion of the court of appeals is reported at 211 Fed. Appx. 373 (6th Cir. 2006), and is set out at pp. 3a-10a of the Petition Appendix. The March 1, 2007, order of the court of appeals denying rehearing, which is not officially reported, is set out at pp. 1a-2a of the Petition Appendix. The January 6, 2005, opinion of the district court, which is not officially reported, is set out at pp. 12a-17a of the Petition Appendix.

STATEMENT OF JURISDICTION

The decision of the court of appeals was entered on November 14, 2006. A timely petition for rehearing and suggestion for rehearing en banc was denied on March 1, 2007. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 704(a)[1] of Title VII, 42 U.S.C. § 2000e-3(a), provides in pertinent part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his

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[1] The language of section 704(a) adopted by Congress uses the phrase "under this title." When Title VII was codified in the United States Code, what had been Title VII of the 1964 Civil Rights Act became subchapter vi of chapter 21 of 42 U.S.C. Accordingly, the codifiers reworded section 704(a), substituting the phrase "under this subchapter." For clarity we use the phrasing "under this title" actually enacted by Congress.

> 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 title.

STATEMENT OF THE CASE

This action arose out of a sexual harassment investigation conducted in 2002 by the Metropolitan Government of Nashville and Davidson County, Tennessee, referred to collectively by the courts below as "Metro." In the spring of 2002, an attorney at the Metro Legal Department learned that several women employees had expressed concern about sexual harassment by the employee relations director for the Metro School District, Dr. Gene Hughes.[2] Hughes was one of the highest ranking officials in the school district.

The investigation of this report of sexual harassment was assigned to Veronica Frazier, the Assistant Director for the Metro (i.e. county) human resources department, an office separate from the school district personnel office headed by Hughes. One of those interviewed by Frazier was petitioner Crawford, a thirty-year employee of the school district who had been the district's payroll coordinator since 1978. In the course of those interviews, three women

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[2] Crawford explained that she had not complained about the sexual harassment by Hughes because Hughes himself was "in charge of the office that . . . [I] would normally go to, employee relations." Crawford Dep., p. 15; JA 20.

employees, including petitioner Crawford, described serious acts of sexual harassment by Hughes. (Pet. App. 4a-5a).

"Crawford told the investigators that Hughes had sexually harassed her and other employees."[3] Crawford reported that "on numerous occasions" Hughes "would come to my window and ask to see -- he would say, 'Let me see your titties.'" He "always" would "grab his crotch and state 'you know what's up,'" and "there was times" Hughes "would approach her window and put his crotch up to the window." On one occasion "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." Crawford made clear that she had strongly objected to this behavior, telling "him to get the hell out of my office."[4] Crawford also told the investigators that "Hughes [had] sexually harassed . . . other employees." (JA 12). Crawford characterized her statements to the investigators as "testimony against" Hughes. (JA 14).[5] Two other women employees also described acts of sexual harassment by Hughes.[6]

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[3] Pet. App. 5a.

[4] Pet. App. 5a n. 1; JA 12, 16-19, 23.

[5] In an affidavit, Crawford explained that in making these statements to the investigators she was "opposing" Hughes' actions, and that at the time of her statements she believed that she was "exercising my rights under Federal law." (JA 12).

[6] Pet. App. 4a-5a; Br. Opp. App 9-13; Proffitt Affidavit, par. 14; Sadler Affidavit, par. 7.

All three of the women who provided information about sexual harassment expressed fears of retaliation, and all three women were indeed fired after they cooperated in the investigation. The Metro investigators themselves reported that one of the women, Dianne Proffitt, "expressed a serious concern about retaliation [for] her participation in the investigation"; she stated that "If my name comes out of this, I won't have a part-time job." (Br. Opp. App. 11). "I . . . told Veronica Frazier that I was very concerned and felt that I would lose my job if I participated in this investigation."[7] Proffitt was dismissed only four days after being interviewed by Frazier.[8]

Tamara Sadler was the employee who had first mentioned the problem of sexual harassment to the Metro attorney, Jennifer Bozeman. When Bozeman later told Sadler that her report had triggered an investigation, Sadler was immediately fearful that she would be dismissed. "I told Jennifer Bozeman that I didn't like it, . . . that I would end up losing my job over this."[9] Bozeman assured Sadler that she would not be fired. Sadler was removed from her position

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[7] Proffitt Affidavit, par. 13.

[8] Proffitt Affidavit, par. 13 (interviewed on June 24, 2002), 20 (dismissed on June 28, 2002); Br. Opp. App. 11 (Proffitt was fired "mid-investigation, shortly after the interview" by the investigators.")

[9] Sadler Affidavit, par. 6.

only minutes after she obtained a copy of the report of the results of the Metro investigation.[10]

Crawford too was afraid that she would be fired for having cooperated with the investigation. She was particularly concerned because Hughes was "very good friends" with the School District Director. "I felt like if I testified against [Hughes] that I would lose my job."[11] The investigators were aware of the witnesses' concerns, and reported that in addition to Sadler "two of the [other] witnesses were especially fearful about losing their jobs. The witnesses' apprehension about participating in this investigation was greater than Fact finders would reasonably expect." (Br. Opp. App. 17). On September 13, 2002, the same day that Metro released the report on the sexual harassment allegations that had been made by Crawford and others, Metro officials commenced a formal investigation of Crawford.[12] Crawford was suspended in November 2002 and ultimately dismissed in January 2003. (Pet. App. 5a).

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[10] Sadler Affidavit, paragraphs 10-11 ("I went to [School District Director] Pedro Garcia's office to get my copy of the report. I was mortified to see my name on the front page of the report as being one of the individuals interviewed by Veronica Frazier . . . . I left Pedro Garcia's office and walked back to my office. When I arrived in my office Julie Williams, Assistant Superintendent of Human Resources was waiting for me and placed me immediately on administrative leave.")

[11] Crawford Dep., p. 21, JA 23.

[12] Br. Opp. App. 18-19; Frazier Dep., pp. 68-69.

The report prepared by the investigators did not resolve the merits of the sexual harassment allegations. Instead, that report repeatedly recited that "Fact finders could not confirm the complainant's statements. Dr. Hughes denies such behavior and there are no witnesses to corroborate the witness' claim." (Br. Opp. App. 15-16). 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. (Br. Opp. App. 15)("Fact finders could not confirm the witness' allegations where conversation included sexual references, since Dr. Hughes denied any use of sexual references.").[13] The investigators concluded that Hughes had acted improperly in some respects, but no disciplinary action was taken against him. (Pet. App. 5a).

After filing a timely charge with the EEOC, Crawford commenced this action under Title VII in the United States District Court for the Middle District of

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[13] See Frazier Dep., pp. 80-81, JA 48:

> Q. What about the witness that claimed Dr. Hughes entered her office and pulled the witness' head into his crotch, could that constitute sexual harassment?
>
> A. Yeah, we never could corroborate that.
>
> Q. Meaning, you only had one witness?
>
> A. Correct.
>
> Q. And Dr. Hughes denied it?
>
> A. Right. We had no one else who had seen that.

Tennessee. Crawford alleged that she had been dismissed in retaliation for having told investigators about being sexually harassed by Hughes. That retaliation, she asserted, violated section 704(a) of Title VII.

The District Court dismissed the complaint, holding that section 704(a) permits an employer to retaliate against an employee because she had cooperated with that employer's own internal investigation of sexual harassment. To be covered by section 704(a), the District Court reasoned, a sexual harassment victim must on her own initiative file some sort of complaint. Once an employer initiates an investigation, the court held, mere witnesses--even witnesses who report having been sexually harassed--are outside the protections of section 704(a). (Pet. App. 15a-16a).[14]

The Court of Appeals for the Sixth Circuit affirmed. It held, first, that complaining about sexual

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[14] [P]rotected activity under Title VII does not include participation in internal investigations. . . . In the cases relied upon by Plaintiff . . . the plaintiffs initiated investigations by filing complaints or reporting allegedly unlawful conduct. Here, Plaintiff merely answered questions by investigators in an already-pending internal investigation, initiated by someone else. In her Complaint, Plaintiff alleges that she fully cooperated with Metro's investigation, that she participated in the investigation, that she was questioned by investigators, that she testified unfavorably to Dr. Hughes. There is no allegation that she instigated or initiated any complaint.

(Pet. App. 15a-16a).

harassment in the course of an employer's internal investigation is not protected by the participation clause of section 704(a), which forbids retaliation because an employee "testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title." The participation clause, the Sixth Circuit reasoned, does not apply until and unless the victim or someone else has formally filed a charge with the EEOC. (Pet. App. 8a-9a).[15] Second, the Court of Appeals held that complaining about sexual harassment in response to an internal investigation is not protected by the opposition clause of section 704(a), which forbids retaliation because an employee "has opposed" a violation of Title VII. (Pet. App. 7a-8a).[16] Opposition to

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[15] Crawford's participation in an internal investigation initiated by Metro in the absence of any pending EEOC charge is not protected activity under the participation clause. We have held that "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." *Abbott* [*v. Crown Motor Co., Inc.*], 348 F. 3d [537,] 543 [(6th Cir. 2003)]. In Crawford's case, however, no EEOC charge had been filed at the time of the investigation or prior to her firing; the investigation was internal and was prompted by an informal internal statement.

(Pet. App. 8a).

[16] Crawford's actions do not constitute opposition under the meaning of the opposition clause. The general idea is that Title VII "demands active, consistent 'opposing' activities to warrant . . . protection against retaliation." *Bell v.*

violations of Title VII, the court insisted, is only protected by the opposition clause if three requirements are met; that opposition must be "active", "consistent" and "overt." (Pet. App. 7a-8a).

SUMMARY OF ARGUMENT

I. In reporting sexual harassment to her employer, Crawford was protected by the participation clause of section 704(a), which prohibits reprisals against an employee because he "participated in any . . . investigation . . . under this title."

The court of appeals erred in holding that a "limit delineated by the language of Title VII" restricts the participation clause to EEOC proceedings. The text of section 704(a) contains no such limit.

Safety Grooving and Grinding, LP, 107 F. App'x 607, 610 (6th Cir. 2004).

> Crawford's actions consisted of cooperating with Metro's investigation into Hughes by appearing for questioning at the request of Frazier and, in response to Frazier's questions, relating unfavorable information about Hughes. Crawford does not claim to have instigated or initiated any complaint prior to her participation in the investigation, nor did she take any further action following the investigation and prior to her firing. This is not the kind of overt opposition that we have held is required for protection under Title VII.

(Pet. App. 7a-8a).

EEOC investigations and other proceedings are provided for in section 706(b) of Title VII. Section 704(a), however, is not limited to investigations or other actions "under section 706(b)", but applies instead to actions "under this title." That broader statutory language is clearly purposeful. Title VII has numerous cross-references, some to subsections, some to sections, and some to the entire Title. The use of the more inclusive language in section 704(a) was thus quite deliberate. When Congress has wanted to limit the protections of anti-retaliation statutes to contacts with particular federal agencies or officials, it repeatedly has done so expressly.

The EEOC's view, as expressed in the Government's amicus brief, is that "[a]n employer-initiated investigation designed to detect or root out discrimination prohibited by Title VII is reasonably construed . . . to be an investigation 'under' the statute." That interpretation of the participation clause reflects "a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Federal Exp. Corp. v. Holowecki*, 128 S.Ct. 1147, 1156 (2008).

In eleven decisions spanning more than a quarter of a century, this Court has emphasized that the creation of employer measures to detect and eliminate discrimination is one of the central purposes of Title VII. In particular, "Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms." *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 764 (1998). This Court has repeatedly interpreted Title VII in light of this statutory purpose. In *Ellerth*, for example, the Court

construed the terms "employer" and "agent" in section 701(b) in a manner intended to encourage employers to establish precisely the type of internal remedial mechanism at issue in the instant case. Similarly, that statutory purpose of encouraging voluntary compliance with Title VII through the creation of internal corrective and preventative mechanisms should inform the interpretation of section 704(a), which is vital to the efficacy of those very mechanisms.

The interpretation of Title VII in *Ellerth* makes the establishment of employer internal procedures for dealing with sexual harassment a practical necessity. "[A]n employer's investigation of a sexual harassment complaint is not a gratuitous or optional undertaking; under federal law, an employer's failure to investigate may allow a jury to impose liability on the employer." *Malik v. Carrier Corp.*, 202 F. 3d 97, 105 (2d Cir. 2000). An employer's investigation of a possible violation of Title VII, as part of an internal procedure whose creation was both a central purpose of Title VII and a necessary step to reduce Tile VII liability, can fairly be characterized as an investigation "under [T]itle [VII]."

II. Crawford's actions were protected as well by the opposition clause of section 704(a), which forbids retaliation against an employee because he or she "opposed any practice" forbidden by Title VII.

An employee's action or statement constitutes opposition if it "would reasonably [be] interpreted as opposition." 2 EEOC Compliance Manual § 8-II(B)(2). A trier of fact could assuredly conclude that Crawford's actions should be construed as opposition. The abusive

conduct which Crawford described was exceptionally offensive; the employer would have known that any woman in Crawford's position would have wanted steps taken to prevent further such incidents. The employer's own investigators characterized Crawford as a "complainant[]" and her statements as an "EEO claim."

The court of appeals improperly engrafted onto the opposition clause several additional requirements not found in the text of the statute.

Nothing in the language of the opposition clause limits its protections to "active" employees who "initiate" a formal complaint. It would make no sense to protect only the individual who initiates a complaint process, and then exclude from the statutory protections the very witnesses whose statements may be essential to determining the merits of the initial allegations.

Similarly, application of the opposition clause is not restricted to employees who "consistent[ly]" engage in repeated acts of opposition. Once a single act of opposition has occurred, the statutory requirement--that the plaintiff have "opposed any practice, made an unlawful employment practice by this title"--has been fully satisfied; the court below erred in holding that "further action" is required.

The text of the opposition clause does not require that the opposition be "overt." The opposition clause protects cautious workers who opt for less confrontational forms of opposition. It would be a perverse interpretation of section 704(a) to hold that

sexual harassment victims lose the statutory protection from retaliation because they have taken prudent steps to avoid retaliation itself.

ARGUMENT

I. PETITIONER'S CONDUCT WAS PROTECTED BY THE PARTICIPATION CLAUSE OF SECTION 704(a)

A. The Protections of the Participation Clause Are Not Limited to Investigations and Hearings by or Proceedings Before the EEOC

Section 704(a) protects an employee from retaliation because "he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title." The court of appeals correctly recognized 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 . . . ."

(Pet. App. 10a, *quoting Booker v. Brown & Williamson Tobacco Co., Inc.*, 879 F. 2d 1304, 1313 (6th Cir. 1989)). The court below erred, however, in holding that a "limit delineated by the language of Title VII" restricts the protections of the participation clause to "EEOC proceedings." (Pet. App. 10a). The text of section 704(a) contains no such "limit."

The participation clause refers broadly to investigations, hearings, and proceedings "under this title", language which covers more than just the activities of the EEOC. The proceedings engaged in by the EEOC--receipt of charges, investigations, determinations, and conciliation--are established by section 706(b) of Title VII. 42 U.S.C. § 2000e-5(b). The participation clause, however, is not limited to participation in investigations, proceedings and hearings "under section 706(b)", but utilizes the broader phrase "under this title." The use of that more inclusive language is clearly purposeful. The text of Title VII contains numerous internal cross-references, some to subsections[17], some to sections[18], and some to the entirety of Title VII.[19] The care with which

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[17] E.g., 42 U.S.C. § 2000e-8(d) ("In prescribing requirements pursuant to subsection (c) of this section, the Commission shall consult with other interested State and Federal agencies").

[18] E.g., 42 U.S.C. § 2000e-5(a)("The Commission is empowered . . . to prevent any person from engaging in any unlawful practices as set forth in sections 703 and 704").

[19] E.g., 42 U.S.C. §§ 2000e-5(k) ("In any action or proceeding under this [title], the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee"), 2000e-7 ("Nothing in this [title] shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any state . . . ."), 2000e-11 ("Nothing contained in this [title] shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preference for veterans"), 2000e-12(a) ("The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this [title].") The legislation enacted by Congress used the term "title" in each of

Congress framed the scope of these various cross-references makes clear that the particular language used in section 704(a)--"under this title", rather than under some particular section--was quite deliberate. The fact that Congress worded section 704(a) to refer broadly to investigations and proceedings "under this title", rather than more narrowly to such activities "under section 706(b)," precludes any argument that the text of section 704(a) itself limits the participation clause to activities of the EEOC.

The absence of any such textual limitation is confirmed by the fact that the terms "investigation", "hearing", and "proceeding" are not preceded by any limiting adjective restricting their meaning to activities by or connected to the EEOC, or in any other way. For example, unlike section 709(a), which refers narrowly to an "investigation of a charge filed under section 706," section 704(a) refers simply to any "investigation," without any such restrictive language. 42 U.S.C. § 2000e-8(a). Similarly, section 704(a) refers, not to participation in an "EEOC proceeding", but simply to participation in a "proceeding"; elsewhere in Title VII, on the other hand, Congress did qualify the term "proceeding" with just that sort of limiting language.[20] Although section 710 refers to

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these provisions. The word "subchapter" was substituted for "title" when the provisions were codified in 42 U.S.C. See n. 1, supra.

[20] 42 U.S.C. §§ 2000e-5(b)("proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d)"), 2000e-5(c)("proceedings . . . commenced under . . . State or local law"), 2000e-5(d)("criminal proceedings"), 2000e-

"hearings . . . conducted by the Commission," section 704(a) applies without such limitation to "hearings." 42 U.S.C. § 2000e-9.

The broad anti-retaliation language of the participation clause stands in clear contrast to the narrow terms of section 714, which is expressly limited to reprisals related to the EEOC. Section 714 applies "to officers, agents, and employees of the Commission," but to no other individuals, the protections of sections 111 and 1114 of the Criminal Code. 18 U.S.C. §§ 111, 1114. Section 111(a)(1), thus extended to EEOC officials, makes it a crime to "forcibly assault[] . . . any person designated in section 1114 . . . on account of the performance of official duties." When Title VII was enacted[21] section 1114, and thus section 714, did not apply to (and thus did not protect) certain Justice Department officials[22] who are responsible for

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5(e)(1)("proceedings with a State or local agency"), 2000e-5(f)(1)("court . . . proceedings"; "State or local proceedings described in subsections (c) or (d)"), 2000e-6(a)("proceedings instituted [by the Attorney General] pursuant to this section"), 2000e-8(d)("proceeding under State or local law").

[21] Section 1114 was expanded in 1996 to apply to all federal officials. See 42 U.S.C. § 1114 (1984); 1996 U.S. Code Cong. and Admin. News 944, 956.

[22] Prior to 1996 section 1114 applied to a United States Attorney, a Assistant United States Attorney and an employee of the Federal Bureau of Investigation, but not to an attorney in the Civil Rights Division. Litigation of Title VII claims by the Department of Justice would ordinarily be handled by attorneys in the Civil Rights Division.

enforcing Title VII[23] or the federal officials who serve on the Equal Employment Opportunity Coordinating Council. 42 U.S.C. § 2000e-14. The protections of section 714 also do not apply to officials of state and local EEO agencies, despite the role of those agencies under Title VII, see 42 U.S.C. §§ 2000e-5(c), 2000e-5(d), 2000e-5(e)(1), 2000e-5(f)(1), to private individuals (such as petitioner) or to an employer's personnel officials.

When Congress has wanted to limit the protection of an anti-retaliation provision to contacts with federal agencies, it has done so expressly. For example, employees of federal military contractors are protected from reprisals for providing information relating to a violation of federal law regarding contracting *only* if they provide that information to a Member of Congress, the Department of Justice, or "an authorized official of an agency." 10 U.S.C. § 2409(a). Because of this narrow language, the same employees under section 2409(a) could be fired for reporting that violation of federal law to their own employers, a company attorney, the local police, an employee of Congress, or for disclosing it in testimony in federal or state court or before a state administrative agency. Several other federal anti-retaliation laws have similar agency-specific restrictions.[24]

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[23] See 42 U.S.C. §§ 2000e-5(proceedings against state and local governments), 2000e-6(pattern or practice actions, prior to 1974).

[24] 12 U.S.C. §§ 1441a(q)(1)(forbidding retaliation for disclosure of information regarding certain violations of federal law to the Thrift Depositor Protection Oversight Board, the Resolution Trust Corporation, the Attorney General, or a federal banking agency);

This Court has recognized the practical importance of "a broad interpretation of the anti-retaliation provision [in Title VII]." *Burlington Northern & Santa Fe Rwy. Co. v. White*, 548 U.S. 53, ---, 126 S.Ct. 2405, 2413 (2006); see *N.L.R.B. v. Scrivener*, 405 U.S. 117, 124 (1972)(construction of the anti-retaliation provision of the NLRA "generally has been a liberal one in order fully to effectuate the section's remedial purpose"). The terms of the participation clause itself manifest a congressional determination that the protections of that clause be broad. Rather than limit (as do some federal anti-retaliation statutes) protections to those who engage in a particular *type* of participation (e.g., providing information), section 704(a) in sweeping language applies to all activities connected to a covered proceeding; the employee is

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1831j(forbidding retaliation for disclosure of information regarding certain violations of federal law to the Attorney General or any federal banking agency); 31 U.S.C. § 5328(a)(forbidding retaliation for disclosure of information regarding certain violations of federal law to the Attorney General, the Secretary of the Treasury, or any federal supervising agency); 41 U.S.C. § 265(a)(forbidding retaliation for disclosure of information regarding certain violations of federal law to Members of Congress, the Department of Justice, or authorized officials of an executive agency); 42 U.S.C. § 5851(a)(1)(c)(forbidding retaliation for certain testimony if made before Congress or in a federal or state proceeding); 46 U.S.C. § 2114(a)(forbidding retaliation for disclosure of information regarding certain violations of federal law to the Coast Guard or other appropriate federal agency); 50 U.S.C. § 2702(a)(forbidding retaliation for disclosure of information about violations of federal law or other improprieties to certain Members of Congress, certain congressional staff members, the Federal Bureau of Investigation, or the Inspector General of the Department of Energy).

protected from retaliation because he or she "made a charge, testified, assisted, or participated *in any manner*." (Emphasis added). The phrase "under this title" should be construed in a manner consistent with the intent to provide broad coverage manifested in the "in any manner" clause.

B. Participation in An Employer's Internal Investigation or Proceeding Regarding Gender-Based Discrimination Is Protected By the Participation Clause

An employer's internal investigation, hearing, or other proceeding directed at preventing or correcting conduct violative of Title VII[25] is action "under this title" within the meaning of section 704(a). The EEOC's view, as expressed in the Government's *amicus* brief, is that "[a]n employer-initiated investigation designed to detect or root out discrimination prohibited by Title VII is reasonably construed . . . to be an investigation 'under' the statute." Brief for the United States as Amicus Curiae, pp. 10-11. That interpretation of the participation clause reflects "a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Federal Exp. Corp. v. Holowecki*, 128 S.Ct. 1147, 1156 (2008)(*quoting*

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[25] An investigation, hearing or proceeding by the EEOC would not be an activity "under this title" if the subject matter had nothing to do with Title VII, e.g., if the Commission were to conduct an investigation of violations of federal election law. Similarly, the utilization of an employer's internal processes is only action "under this title" if the subject matter of that activity would fall within the Title VII subject matter jurisdiction of the EEOC.

Bragdon v. Abbott, 524 U.S. 624, 642 (1998) and *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944)); see *id*. at 1158 ("Where ambiguities in statutory analysis and application are present, the agency may choose among reasonable alternatives.")

In *Burlington Northern* this Court characterized an employer's own internal processes to detect, prevent and correct discrimination[26] as among the "Title VII[] remedial mechanisms." The plaintiff in *Burlington Northern* had initiated an internal proceeding by filing a sexual harassment complaint with railroad officials; in retaliation for that complaint, the plaintiff was reassigned to more arduous duties. In sustaining the plaintiff's retaliation claim, the Court explained:

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[26] The text of Title VII reflects Congress's understanding that employers seeking to comply with Title VII would have to deal with supervisors or other employees who engaged in unlawful discrimination. Section 705(g)(4) authorizes the EEOC to provide assistance to "any employer, whose employees or some of them . . . refuse or threaten to refuse to cooperate in effectuating the provisions of this title." 42 U.S.C. § 2000e-4(g)(1). A supervisor who actually violates Title VII, such as by engaging in sexual harassment, certainly is "refus[ing] . . . to cooperate in effectuating . . . [T]itle [VII]." The EEOC is also authorized to aid employers by providing "technical assistance" and by engaging in "educational and promotional activities." 42 U.S.C. §§ 2000e-4(g)(3), 2000e-4(h)(1). It was manifestly impractical for Congress to mandate in Title VII a specific form of internal process that all employers would be required to adopt. Instead, Title VII seeks to bring about those processes by providing substantial incentives for employers to fashion mechanisms appropriate to their particular circumstances, and by proffering the assistance of the EEOC to employers in doing so.

> The anti-retaliation provision seeks to prevent employer interference with "unfettered access" to Title VII's remedial mechanisms. *Robinson* [*v. Shell Oil Co.*, 519 U.S. 337,] 346 [(1997)]. 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*. *Ibid*.

548 U.S. at ---, 126 S.Ct. at 2415 (emphasis added); see 548 U.S. at ---, 126 S.Ct. at 2412 (narrow construction of section 704(a) "would fail to fully achieve the anti-retaliation provision's 'primary purpose,' namely, '[m]aintaining unfettered access to statutory remedial mechanisms.")(*quoting Robinson*). An investigation, hearing, or other proceeding that is part of such a "Title VII[] remedial mechanism" is an investigation, hearing, or proceeding "under this title."

In eleven decisions[27] spanning more than a quarter

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[27] In addition to the cases cited in the text, see *Pennsylvania State Police v. Suders*, 542 U.S. 129, 145 (2004)(*quoting Ellerth*); *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 545 (1999)(*quoting Ellerth*); *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998)("It would . . . implement clear statutory policy and complement the Government's Title VII enforcement efforts to recognize the employer's affirmative obligation to prevent violations and give credit here to employers who make reasonable efforts to discharge their duty."); *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 358 (1995)(*quoting Albemarle*); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 264-65 (1989)(*quoting Albemarle*); *Local Number 93, International Association of Firefighters, AFL-CIO v. Cleveland*, 478 U.S. 501, 517 (1986)(*quoting Albemarle*); *Owen v. City of Independence*, 445 U.S. 622, 652 n. 35 (1980); *United Steelworkers of America, AFL-CIO,*

of a century, this Court has emphasized that the creation of employer corrective mechanisms is one of the central purposes of Title VII.[28] In *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), the Court explained that the "primary objective" of Title VII is to end discrimination through voluntary compliance, and that the availability of backpay awards furthers that objective by encouraging employers to act on their own to detect and correct violations.

> It is the reasonably certain prospect of a backpay award that "provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in the country's history." *United States v. N.L. Industries*, 479 F. 2d 354, 379 ([8th Cir.] 1973).

422 U.S. at 417-18. In particular, "Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms." *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742,

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v. Weber, 443 U.S. 193, 204 (1979)(*quoting Albemarle*); *International Brotherhood of Teamsters v. U.S.*, 431 U.S. 324, 364 (1977)(*quoting Albemarle*).

[28] Congress contemplated that Title VII would be implemented, not solely or even primarily by court order or agency action, but by "creat[ing] an atmosphere conducive to . . . voluntary . . . resolution of . . . discrimination." H.R.Rep. No. 914, 88th Cong., 1st Sess., pt. 1, p. 18 (1963), 1964 U.S. Code Cong. and Admin. News pp. 2355, 2393.

764 (1998). The proceedings and investigation at issue in this case were part of just such a mechanism.

This central statutory purpose has repeatedly shaped this Court's interpretation of Title VII. In both *Albemarle* and *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 358 (1995), this Court construed the backpay provision of section 706(g)(1) in a manner intended to assure the existence of a powerful incentive for employers to solve discrimination problems on their own initiative. 42 U.S.C. § 2000e-5(g)(1). In *Ellerth* and *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998), this Court interpreted the terms "employer" and "agent" in section 701(b) in a manner intended to encourage employers to establish precisely the type of internal remedial mechanism at issue in the instant case. 42 U.S.C. § 2000e(b). *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 546 (1999), relied on that same purpose in construing section 102 of the 1991 Civil Rights Act, which authorizes awards of punitive damages for certain violations of Title VII.[29] 42 U.S.C. § 1981a(b)(1). A fortiori that statutory purpose of encouraging voluntary compliance with Title VII through the creation of such internal mechanisms should inform the interpretation of section 704(a), which will at times be vital to the efficacy of those very mechanisms.

An employer's internal policies and practices for preventing and correcting unlawful sexual harassment

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[29] Under *Kolstad* an employer's "good faith efforts to enforce an antidiscrimination policy" may defeat a claim for punitive damages. 527 U.S. at 546.

can with particular justification be characterized as "under this title" because those policies and practices were largely created in response to Title VII.[30] Prior to the enactment of Title VII, few employers had prohibitions against or procedures for dealing with sexual harassment. In 1980, when the EEOC first promulgated regulations dealing with sexual harassment, the Commission expressly admonished employers to establish internal procedures for dealing with harassment. 29 C.F.R. § 1604.11(f); see *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998). This Court's 1998 decisions in *Ellerth* and *Faragher* had the salutary effect of prompting large numbers of employers to adopt or strengthen procedures for investigating, detecting, preventing, and correcting sexual harassment.[31] In the wake of those decisions,

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[30] The lead investigator, Veronica Frazier, explained that when the Report used the phrase "sexual harassment" it was referring to conduct forbidden by "federal laws", specifically "Title 7, 1964 Civil Rights Act." (Frazier Dep., p. 79, JA 47).

Metro's current policies regarding sexual harassment expressly refer both to Title VII and to the 1980 EEOC Guidelines on Discrimination Because of Sex, see 29 C.F.R. § 1604.11. http://www.nashville.gov/civil_service/civil_service_policies.pdf (Policy No. 3.1-1 (B)(3)) (visited April 2, 2008), and http://www.nashville.gov/images/gifs/mc/EXECUTIVE_ORDERS/dean_exec_order_008_attach_A.pdf (Attachment A, part (B)(3)) (visited April 2, 2008).

[31] Brief of the Chamber of Commerce of the United States as Amicus Curiae, p. *2, *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004)(No. 03-95)("As a direct result of the incentives crafted by this Court in *Faragher* and *Ellerth* . . . , employers have made great strides in . . . establishing user-friendly, effective internal complaint procedures, and vigorously investigating

business organizations[32] and attorneys[33] have openly

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complaints of sexual and other harassment in the workplace.")

Brief of the Equal Employment Advisory Council and the Chamber of Commerce of the United States as *Amici Curiae*, *Walton v. Johnson & Johnson Services, Inc.*, 347 F. 3d 1272 (11th Cir. 2003)(No. 02-12520-JJ) p. 13("the Court's projection in *Faragher* and *Ellerth* that rejecting strict liability for employers under Title VII for workplace harassment would encourage employers to develop effective procedures to detect and respond to workplace harassment has proven true. A 2001 workplace survey of over 200 human resource executives conducted by a national law firm found that 82% of the respondents provided sexual harassment prevention training for their supervisors, a sharp increase from the 34% that provided this type of training in 1985.")

Wiggin and Dana, Employee Benefits Advisory, Winter 2001, Avoiding Liability in Sexual Harassment Claims ("As many employers know, under Supreme Court rulings, an employer may avoid liability in a sexual harassment case by establishing . . . the Ellerth-Faragher affirmative defense, [which] is dependent upon the practice and policies an employer has in place prior to a claim being brought.") http:/www.wiggin.com/pubs/advisories_template.asp?GroupName=Employee+Benefits&ID=101521132002

[32] National Restaurant Association, *It's Your Move: Stop Sexual Harassment Before It Degrades Your Restaurant* (January 1999)("two recent Supreme court decisions have made institution [of a company policy against sexual harassment] 'mandatory now,' according to Peter Kilgore, legal counsel for the National Restaurant Association"; "[t]he third key component of an effective sexual-harassment policy is establishing procedures for handling complaints.") http://www.restaurant.org/rusa/magArticle.cfm?ArticleID=421 (visited November 6, 2007).

National Association of Realtors, *Legal Update: Sexual Harassment* (under *Faragher* and *Ellerth* a realtor's "liability in a lawsuit for sexual harassment by a supervisor . . . [will] turn on

what preventative and corrective measures you take on a daily, regular basis--long before an incident of sexual harassment may occur. . . . In a lawsuit, adherence to a regular, thorough process will support your [firm's] defense that it has taken corrective measures against sexual harassment. . . . Develop an effective complaint procedure.")(emphasis omitted). https://www.realtor.org/eomag.nsf/pages/Legal_Update_SexualNARs_L?OpenDocument (visited November 6, 2007).

Personnel Policy Service, Inc., *Making Your Harassment Policy Work* ("all employers should have a harassment policy . . . [t]o prevent liability. Court decisions and guidances from the Equal Employment Opportunity Commission (EEOC) consistently show that you can decrease your liability for hostile work environment harassment . . . by maintaining and enforcing internal policies to prevent and deal with harassment"; "[a]lthough the Supreme Court [in *Faragher* and *Ellerth*] did not spell out specifically what makes a policy and complaint procedure effective, HR experts agree that the policy should include . . . [**a] viable complaint and resolution procedure**. This procedure should . . . provide for an investigative process.") http://www.ppspublishers.com/articles/workable_harassment_policy.htm (visited November 6, 2007)(emphasis in original).

[33] Mayer Brown explained to employers that "*Ellerth* and *Faragher* make it imperative" to make sure they have "effective sexual harassment policies in place." "[T]o minimize liability" employers should "mak[e] sure that there is an open and effective system for making, investigating, and resolving complaints," including "adequate procedures . . . to investigate and take appropriate action regarding allegations of sexual harassment." http://mayerbrown.com/publications/article.asp?id=244&nid=6 (visited November 6, 2007).

Covington and Burling issued an analysis which concluded that "*Faragher* and *Burlington Industries* underscore the need for employers to have a clear and well-communicated policy against sexual harassment [and] an appropriate internal complaint

admonished employers to fashion or improve their internal procedures for dealing with sexual harassment in order to minimize their legal exposure. The EEOC has assisted the fashioning of employer procedures by issuing a detailed Policy Guidance[34], on

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process." *The Supreme Court and Sexual Harassment: New Rules of Liability*, available at http://www.cov.com/files/Publiction/140cc16b-2385-4c19-abeb-bb83a3a88130/Presentation/Publication/Attachment/50a71937-de68-4773 (visited April 2, 2008).

Greenberg Traurig admonished that "*Ellerth* and *Faragher* . . . make it important for all employers to . . . take preventative measures to avoid liability. [A]s soon as employees complain of misconduct, employers must take quick steps to investigate and stop any misconduct." http://www.gtlaw.com/pub/ALERTS/1998/sexual98.htm (visited November 6, 2007).

Morris, Manning & Martin warned that *Faragher* and *Ellerth* required "at an absolute minimum" a policy that provides "clear avenues for employees to register complaints of sexual harassment." "In view of these new rules," it concluded, employers should "[e]stablish[] and apply[] uniform procedures mandating a thorough and objective investigation of any complaint or alleged instance of harassment or discrimination." http://www.mmmlaw.com/../publications/article_detail.asp?serviceid=9&articleid=80 (visited November 6, 2007).

Wiggin and Dana advised employers that, in order to establish the *Faragher-Ellerth* affirmative defense, they must have an "effective policy" for dealing with harassment which should, "as a minimum . . . set forth a clear reporting procedure , and encourage reporting." http://wiggin.com/pubs/advisories_templace.asp?GroupName=Employee+Benefits&ID=101521132003 (visited November 6, 2007).

[34] *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors*, available at http://www.eeoc.gov/policy/docs/harassment.html

which employers and courts alike have relied[35], regarding how to structure an effective internal employer mechanism. "[A]n employer's investigation of a sexual harassment complaint is not a gratuitous or optional undertaking; under federal law, an employer's failure to investigate may allow a jury to impose liability on the employer." *Malik v. Carrier Corp.*, 202 F. 3d 97, 105 (2d Cir. 2000). Today both the existence and the contours of employer anti-harassment procedures are largely the result of Title VII.

This Court's decisions in *Ellerth* and *Faragher* provide particular support for the conclusion that an employer's remedial mechanism invoked by a harassment victim is a proceeding, hearing, or investigation "under this title." Under those decisions a harassment victim in certain circumstances may be

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[35] Sidley Austin LLP, *EEOC Issues Guidance on Employer Liability for Harassment by Supervisors*:

> [T]he Guidance . . . offers critical insights into steps that employers can take to reduce or avoid liability for supervisory harassment. Although not legally binding on courts or employers, the Guidance is significant because courts often rely on EEOC pronouncements such as the Guidance when deciding harassment cases.
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> * * *
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> In light of the EEOC Guidance and recent court decisions interpreting *Ellerth* and *Faragher*, we recommend that employers take the following steps: . . . [r]eview harassment investigation and complaint resolution processes.

http://www.sidley.com/news/pub.asp?PubID=93430542000&print=yes (visited November 6, 2007).

denied relief if she or he "unreasonably failed to take advantage of any preventative or corrective opportunities." *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807. A mechanism which Title VII itself at times compels an employee to utilize is assuredly a mechanism "under this title." *See NLRB v. Scrivener*, 405 U.S. 117, 124 (1972)(compliance with NLRB subpoena is protected by NLRA from retaliation); *Pedersen v. NLRB*, 234 F. 2d 417, 420 (2d Cir. 1956)(same); *see Jordan v. Alternative Resources Corp.*, 458 F. 3d 332, 355 (unless employees are protected by section 704(a) when they attempt to utilize an employer's corrective mechanism, they will be "faced with a 'Catch-22.' They may report such conduct to their employer at their peril, or they may remain quiet and work in a . . . hostile and degrading work environment, with no legal recourse beyond resignation."), 356 ("employees are always protected by Title VII's anti-retaliation provision whenever they are obliged to report improper conduct under the *Ellerth/Faragher* defense, as otherwise some employees will be commanded to report such conduct at their peril.")(4th Cir. 2006)(King, J., dissenting). In the instant case Crawford did precisely what *Ellerth* and *Faragher* required by providing information about Hughes' harassing conduct to responsible personnel officials.[36]

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[36] Crawford's complaint in the instant case included a claim for sexual harassment. Complaint, par. 21. The employer's answer specifically alleged the *Ellerth* and *Faragher* affirmative defense, and asserted that "plaintiff failed to take advantage of opportunities to avoid harm." Answer, par. 13. Crawford's sexual harassment claim was ultimately dismissed on procedural grounds. Order, April 6, 2004.

The fact that an employer's managers or personnel officials may want employees to file internal complaints and provide evidence during internal investigations of discrimination does not guarantee that retaliation will not occur. In the case of sexual harassment in particular, the discriminatory official--who may be at risk of discipline or even dismissal--has much to gain by intimidating the victim or potential witnesses into silence. Where, as here, that official initially escaped punishment for the harassment, reprisals against a complaining party or witness would be an effective tactic to intimidate other potential complainants and witnesses, and thus to facilitate future harassment. If, as the Sixth Circuit held, those reprisals (and, thus, such threats) are permissible, the abusive official can be confident that any anti-retaliation litigation will be dismissed--as occurred in the instant case--without inquiry into whether the asserted retaliation occurred. By unequivocally forbidding such reprisals, the participation clause vindicates the interests of an employer itself in obtaining the information needed to end discrimination voluntarily.

The investigation[37] at issue in the instant case manifestly was intended to "detect or root out discrimination prohibited by Title VII." The

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[37] If a plaintiff were retaliated against for filing an internal complaint, that action would be protected as participation in a "proceeding . . . under this title" so long as the plaintiff was invoking an internal process to detect or root out discrimination prohibited by Title VII. In the wake of this Court's decisions in *Faragher* and *Ellerth*, of course, most employers have just such processes for dealing with harassment.

investigation was expressly concerned with behavior "that might constitute Sexual Harassment," and the investigators characterized the allegation that was the subject of the inquiry as an "EEO claim." (Br. Op., App. 9, 16). The investigation sought to address "all allegations made by the complainants that would be covered under EEO guidelines." (*Id*. at 9). The guidelines referred to in the Metro anti-harassment policy are evidently the 1980 EEOC Guidelines on Discrimination Because of Sex.[38] The lead investigator explained that her responsibility at Metro was "for investigating complaints of discrimination at Metro."[39]

C. Inclusion of Employer Internal Processes Within The Protections of the Participation Clause Is Important To The Implementation of Title VII

Unequivocal protection of witnesses and complainants in an employer's internal processes is essential if those mechanisms are to be effective in detecting and correcting sexual harassment and other violations of Title VII.

As the instant case illustrates all too well, there already exist among victims of sexual harassment widespread and well-founded fears that they will be punished for speaking up about sexual harassment.[40]

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[38] See n. 30, supra.

[39] Frazier Dep., p. 6, JA 32-33.

[40] *See, e.g.*, Louise F. Fitzgerald et al., *Why Didn't She Just Report Him?: The Psychological and Legal Implications of Women's*

Metro officials found it necessary to repeatedly assure potential witnesses--contrary to the position Metro took in the subsequent litigation--that they could not be fired for providing information about sexual harassment.[41] The United States Chamber of Commerce has cautioned businesses that "witnesses are often reluctant to come forward out of fear of reprisal."[42] See National Association of Realtors, Legal

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Responses to Sexual Harassment, 51 J. Social Issues 117 (1995); Cheryl R. Kaiser & Carol T. Miller, *Stop Complaining! The Social Costs of Making Attributions of Discrimination*, 27 Personality and Social Psych. Bulletin 254 (2001); Ellen R. Pierce, Benson Rosen & Tammy Bunn Hiller, *Breaking the Silence: Creating User-Friendly Sexual Harassment Policies*, 10 Emp. Resps. & Rts. J. 225 (1997).

This problem is described in detail in the Brief Amicus Curiae of the National Womens' Law Center, et al.

[41] Frazier Dep., pp. 11 ("I advise employees that retaliation is prohibited because that's often-- it is usual for employees to bring that up to me"; see JA 38), 12, 61 (Frazier advised Proffitt and others that they were "protected against retaliation" because if they were retaliated against they "had recourse,"; Sadler Affidavit, par. 6 ("I told Jennifer Bozeman [the attorney who first learned of the harassment] that I would end up losing my job over this. Jennifer Bozeman assured me that I would not lose my job over this."); Proffitt Affidavit, par. 13 ("I, at that point told Veronica Frazier that I was very concerned and felt that I would lose my job if I participated in this investigation. I was assured by Veronica Frazier that that would not happen."), 14 (Proffitt provided information to Frazier "[b]ased upon this assurance.").

[42] See http://www.uschamber.com/sb/business/tools/sxhrst_m.asp (Click on "sexual harassment aids." This admonition is on the last unnumbered page of the document, under the heading "Interviewing Witnesses")(visited November 6, 2007).

Update: Sexual Harassment ("Many employees are embarrassed to [report sexual harassment] or are fearful of retaliation.")[43]; United States Chamber of Commerce, Employer Toolkit ("[w]hen an employee actually gets the nerve up to report harassment, they are usually already apprehensive and scared.").[44]

The EEOC has concluded from many years of experience that protection of witnesses and complainants is critical.

> Employee cooperation is essential to making such internal investigations effective, yet employee cooperation will hardly be forthcoming if employees are unprotected against retaliation in the event they provide unfavorable information about their supervisors.
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> 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.

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[43] https://www.realtor.org/eomag.nsf/pages/Legal_Update_Sexual NARs_L?OpenDocument (visited November 6, 2007).

[44] http://www.uschamber.com/sb/business/P05/P05_5185.asp (visited November 6, 2007).

Brief for the United States as Amicus Curiae, pp. 9, 19-20; see *Enforcement Guidance on Vicarious Employee Liability for Unlawful Harassment by Supervisors*, 2 EEOC Compl. Man. (BNA) Pt. V(C)(1)(b) at 615-0108 n. 59 (Oct. 2002)("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.")(citations omitted). Here, as in *Robinson v. Shell Oil Corp.*, 519 U.S. 337, 345-46 (1997), the Commission's practical judgment is entitled to significant weight.

The "exceptionally broad protection" accorded by the participation clause provides to potential claimants and potential witnesses unequivocal assurance that they cannot lawfully be punished for taking part in an employer's internal processes. See *Pettway v. American Cast Iron Pipe Co.*, 411 F. 2d 998, 1006 n. 18 (5th Cir. 1969). "[O]nce the activity in question is found to be within the scope of the participation clause, the employee is generally protected from retaliation." *Booker v. Brown & Williamson Tobacco Co., Inc.*, 879 F. 2d 1304, 1312 (6th Cir. 1989). If an employee's actions are covered by the participation clause, the employer cannot retaliate against the worker because it feels that his or her complaint was unwarranted or unfair. *Pettway*, 411 F. 2d at 1007; *Womack v. Munson*, 619 F. 2d 1292, 1298 (8th Cir. 1980). By according to participation in an employer's internal processes the same degree of protection that is accorded to participation in the machinery of the EEOC, section 704(a) avoids creating any incentive to shun the employer's remedial mechanisms for those provided by the Commission.

Although, as we explain below, the opposition clause also applies to witnesses (and complaining parties) involved in an employer's internal mechanisms, the more limited protections of the opposition clause are not sufficient to overcome the serious danger of retaliation that those employees may face. "The opposition clause is less expansive [than the participation clause.]" 1 B. Lindemann and P. Grossman, Employment Discrimination Law, 998 (4th ed. 2007). An employee's complaint about or description of sexual harassment would not invariably be protected by the opposition clause; in some circumstances an employer could mount a fact-based argument that the employee's actions were not safeguarded by the opposition clause. Witnesses whose statements were important to an internal investigation, but who were not themselves opposing any asserted discrimination, would not be protected by the opposition clause at all.

The opposition clause protects statements made (or actions based on beliefs held) in good faith.[45] When an

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[45] All twelve geographical circuits have interpreted the opposition clause in this manner. *Benoit v. Technical Mfg. Corp.*, 331 F. 3d 166, 174 (1st Cir. 2003); *Kessler v. Westchester County Dept. of Social Services*, 461 F. 3d 199, 210 (2d Cir. 2006); *Moore v. City of Philadelphia*, 461 F. 3d 331, 341 (3d Cir. 2006); *Peters v. Jenney*, 327 F. 3d 307, 320 (4th Cir. 2003); *Wilson v. UT Health Center*, 973 F. 2d 1263, 1267 (5th Cir. 1992); *Booker v. Brown & Williamson Tobacco Co., Inc.*, 879 F. 2d 1304, 1312-13 (6th Cir. 1989); *Bernier v. Morningstar, Inc.*, 495 F. 3d 369, 375 (7th Cir. 2007); *Barker v. Missouri Dept. of Corrections*, 513 F. 3d 831, 834 (8th Cir. 2008); *Trent v. Valley Elec. Ass'n Inc.*, 41 F. 3d 524, 525 (9th Cir. 1994); *Petersen v. Utah Dept. of Corrections*, 301 F. 3d

employee reports being sexually harassed, it will almost always be possible for the employer to advance an argument that the employee acted in bad faith. The employer need only offer testimony from the alleged harasser denying that he engaged in the alleged misconduct. The employer could then argue that, because the complaining employee would have had personal knowledge of the events in question (e.g., what the alleged harasser did or did not say or do), the employee's complaint must have been, not a mistake, but a lie. In this respect complaints about sexual harassment are even more risky for the employee than complaints about other types of discrimination. If a worker asserts that she was denied a promotion or paid less because she is a woman, it would often be difficult for an employer to establish she acted in bad faith, because the key exculpatory information (including the motive of the decisionmaker) frequently would have been unknown to the complaining employee. The "he said-she said" nature of many sexual harassment controversies, on the other hand, means that most harassment victims who seek to invoke the protections of the opposition clause would be running the risk that their employer could argue at trial that their complaints were inaccurate and thus made in bad faith.

A potential witness or complaining party able to rely only on the opposition clause might well conclude that the uncertainties involved in the litigation of

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1182, 1188 (10th Cir. 2002); *Little v. United Technologies, Carrier Transicold Div.*, 103 F. 3d 956, 960 (11th Cir. 1997); *Parker v. Baltimore & O. R. Co.*, 652 F. 2d 1012, 1018 (D.C.Cir. 1981).

those issues--a danger that would not exist if the complainant went instead to the EEOC or the witness remained silent--are too great to justify participation in an employer's internal processes. The law accords to witnesses in civil and criminal litigation absolute immunity, rather than merely qualified immunity, precisely because such uncertainties as to the outcome of future litigation would be likely to chill "candid, objective, and undistorted" testimony. *Briscoe v. LaHue*, 460 U.S. 325, 330-34, 343 n. 29 (1983).

Some witnesses taking part in an investigation or hearing, although providing the employer with important relevant information, might not be opposing (or even be aware of) any asserted violation of Title VII. Such a witness, for example, might only have information about the qualifications of a complainant who was denied a promotion, or about whether a dismissed worker had been actually guilty of certain alleged misconduct. In a sexual harassment case, a witness might be able to confirm a key part of the complainant's claim--such as whether the alleged abuser repeatedly went into the complainant's office--without knowing whether harassment had occurred. Indeed, some witnesses providing such potentially important information to their employers might not know the purpose of the employer's inquiry or the nature of the problem under investigation.

In light of this uncertainty as to the availability of the protection of the opposition clause, a prudent attorney might well have to advise discrimination victims to bypass complaining to their employers, and to instead file charges with the EEOC, because such an EEOC charge would enjoy absolute protection

under the participation clause.[46] That course of action would assure that the complainant could not be fired or otherwise punished because of the limitations of the opposition clause, and might reduce the risk that potential witnesses could be compromised because they withheld important information during an internal investigation not protected by the opposition clause.

For similar reasons a responsible attorney would have to advise some, perhaps many potential witnesses to try to avoid taking part in an employer's internal investigation, hearing, or proceeding. Otherwise, potential witnesses could find themselves caught between the Scylla of abuser retaliation (for disclosing harassment or other discrimination) and the Charybdis of official discipline (for refusing to answer questions). Facing these twin dangers, a cautious employee might well be tempted to simply feign ignorance, or to provide exculpatory but inaccurate information. Employers as a consequence could at times fail to detect unlawful discrimination by their supervisors or other workers and thus face increased financial liability when those violations ultimately come to light.

Deterring the use of employer-created internal processes would be inconsistent with the congressional intent to foster the creation of those very mechanisms.

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[46] To the extent that an employee, under *Faragher* and *Ellerth*, may be required to notify her employer about harassment so that the employer can take preventative or corrective action, notification in the form of an EEOC charge would, of course, suffice.

Both employers and employees, moreover, would be ill-served by an interpretation of section 704(a) that forced or encouraged discrimination victims to bypass an employer's internal processes and instead to immediately file charges with the EEOC. The action of an aggrieved employee in filing such a charge with a federal agency may create an adversarial relationship between the parties that could obstruct settlement of the underlying dispute. An employer that might have welcomed a chance to address a problem internally may become more intransigent in dealing with government officials, anticipating that the EEOC charge is likely to lead to litigation. If an employer retains an attorney to help respond to the EEOC charge, premature resort to the Commission will increase costs. Forcing or encouraging discrimination victims to bypass an employer's internal processes and instead complain to the EEOC would in some cases delay the point in time at which an employer's officials (other than the perpetrator) first learn of a problem of harassment or other discrimination. With the passage of time the victim's "employment situation [may have] become so untenable that conciliation efforts would be futile." *Federal Express Corp. v. Holowecki*, 128 S.Ct. 1147, 1157 (2008). The implementation of Title VII would be facilitated by a construction of section 704(a) that avoids these counter-productive incentives by according to participation in an employer's internal processes the same protection accorded to participation in EEOC proceedings.

II. PETITIONER'S CONDUCT WAS PROTECTED BY THE OPPOSITION CLAUSE OF SECTION 704(a)

Section 704(a) forbids retaliation against an employee because he or she "opposed any practice, made an unlawful employment practice by this title." The opposition clause applies to a number of different types of actions that would appropriately be characterized as opposition.[47] The meaning of "oppose[]" relevant to the instant case is taking action (including making a statement) to end, prevent, redress, or correct unlawful discrimination. The protected employee need not express or have any view about whether the discrimination violates Title VII, or even know that Title VII exists. For example, the opposition clause would protect a worker who wrote a letter to the company CEO simply asking that the employer not lay off workers based on their race.

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[47] For example, in addition to the meaning at issue in the instant case, protected opposition might also take the form of (a) statements or actions expressing general disapproval of discrimination (e.g., "I am against paying women less than men for doing the same work", or joining the NAACP), (b) adhering to such a belief (for example, during Jim Crow some whites in the South were opposed to racial segregation, even though they did nothing to stop it and kept their opinions largely to themselves), (c) refusal to obey an order to reasonably believed to violate the law, (d) rejecting sexual advances, (e) making inquiries to determine if discrimination had occurred, or (f) providing assistance or support for an individual engaging in any such conduct. See 1 B. Lindemann and P. Grossman, Employment Discrimination Law, pp. 1011-13 (2007); EEOC Compl. Man. (BNA) § 8-II(B)(2).

Actions taken or statements made to *prevent* the occurrence of some action or state of affairs are classic examples of opposition. Opposition is not limited to efforts to undo a problem that has already occurred. Thus we describe members of the public and of Congress as having opposed President Roosevelt's court-packing scheme, President Clinton's health plan, and President Bush's Social Security proposals, although none of those measures were ever enacted. Even those who do not believe that global warming is occurring or will ever occur would describe former Vice-President Gore as opposing global warming.

When an employee complains about sexual (or other) harassment, her opposition usually is intended primarily to prevent harassment. Other forms of discrimination, such as a discriminatory dismissal or promotion decision, can be corrected by reversing the disputed decision and perhaps providing backpay. Employers can and do provide such retrospective redress. E.g., *Burlington Northern & Santa Fe Rwy. Co. v. White*, 126 S.Ct. at 2409 (employer reinstated dismissed worker and awarded backpay). But an act of harassment, unlike a promotion or dismissal decision, cannot be reversed; with harassment, what is done is done. Few if any employers have an internal process that awards damages (as distinct from backpay) to harassment victims. Thus when an employee complains to her employer about sexual harassment, what she is usually seeking is action by the employer that will prevent a continuation of harassment that has already occurred.

What Title VII forbids is not any particular act of harassment, but the creation--as a result of such acts--

of a hostile work environment. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993). Ordinarily[48] a series of harassing incidents are required to create such an environment. *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 115-16 (2002). But employees, understandably unfamiliar with Title VII caselaw, do not file complaints objecting in haec verba to the existence or possible creation of a "hostile work environment." Rather, harassment victims usually complain, as here, about particular acts of harassment.

Often the most effective action an employee can take to prevent (and oppose) the creation of an unlawful hostile work environment is to notify her employer about just such past harassment incidents. This Court's decisions in *Faragher* and *Ellerth* encourage harassment victims to oppose harassment, and thus prevent the creation of an unlawful hostile environment, in precisely this manner. An employer which knew of such past incidents but failed to prevent their recurrence could not assert the affirmative defense recognized by *Faragher* and *Ellerth*. In certain circumstances an employee may forfeit her damage claim under Title VII if she unreasonably "fail[s] to take advantage of any preventative . . . opportunities provided by her employer." *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765. When an employee brings an incident of sexual (or other discriminatory) harassment to the attention of his or her employer,

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[48] The lower courts have recognized that in some extreme circumstances, such as a rape, a single act could create a hostile work environment. *Lapka v. Chertoff*, 517 F. 3d 974, --- (D.C.Cir. 2008); *Ferris v. Delta Air Lines, Inc.*, 277 F. 3d 128, 136 (2d Cir. 2001).

that action by its very nature constitutes opposition to a hostile work environment, regardless of whether that unlawful environment already exists (and the worker is thus seeking to end a violation of Title VII)[49] or could occur if the harassment continued (and the worker is thus seeking to prevent a violation of Title VII.)

An employee need not wait until there have been so many incidents of harassment that the creation of an unlawful hostile environment is imminent, certain, or even likely. After all, an employee would be protected by the opposition clause if--in the absence of any harassment whatever at her place of employment--she wrote a letter to the editor of her local (or the company) newspaper stating in general terms that she opposed sexual harassment, was grateful that Title VII had been enacted, or endorsing this Court's decision in *Harris v. Forklift Systems, Inc*. If an employee complains about a particular act of alleged harassment, that complaint is protected by the opposition clause so long as the *type* of incident is one which, with sufficient repetition, could create an unlawful hostile work environment. An attempt to prevent the recurrence of conduct whose repetition would lead to a violation of Title VII is opposition to such a violation.

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[49] Where past incidents have already created a hostile work environment, of course, an employer may well need to do more than merely prevent a recurrence of those acts. Affirmative measures, such as transferring, disciplining, or dismissing the harasser, will often be required to dispel that hostile environment.

A statement or action constitutes opposition if it "would reasonably [be] interpreted as opposition." 2 EEOC Compl. Man. (BNA) § 8-II(B)(2), at 614:0003. A trier of fact could assuredly find that that standard was met in the instant case. The abusive conduct which Crawford described was exceptionally offensive; Metro would have known that any woman in Crawford's position would assuredly have wanted the employer to prevent further incidents. Crawford made her statement about that harassment in response to a question as to whether Hughes had engaged in "inappropriate behavior." (JA 12). Petitioner reported that she had "felt very uncomfortable around Mr. Hughes" because he "would grab himself" whenever she would speak to him." (JA 16). It is difficult to imagine how these statements could be interpreted as anything other than an indication that Crawford found Hughes' conduct objectionable and wanted it stopped. Indeed, there is evidence (although such evidence was not necessary) that Metro in fact did understand that Crawford opposed Hughes' actions. The Metro investigative report characterized Crawford and the other witnesses who reported the sexual harassment as aggrieved individuals, not simply as disinterested bystanders; it described them as "the complainants"[50] and characterized their allegations as an "EEO claim." (Br. Opp., App. 9).

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[50] Veronica Frazier, one of the Metro officials who conducted the deposition, referred to the women who had reported sexual harassment as "these complaining employees." Frazier Dep., p. 26, JA 42; see Pedro Garcia Dep., JA 55 ("claims against Gene Hughes"), JA 67 ("sexual harassment charges").

A jury also could reasonably conclude that the acts of harassment about which Crawford complained were the types of incidents which if repeated with sufficient frequency would create (if they had not already done so) an unlawful hostile work environment. For example, asking a women employee to "[l]et me see your titties" obviously is not merely a commonplace act of minor incivility. Assessing whether a series of harassing incidents would create a hostile work environment (like assessing whether such an environment existed) is a quintessential jury task.

> Today, while gender relations in the workplace are rapidly evolving, and views of what is appropriate behavior are diverse and shifting, a jury made up of a cross-section of our heterogenous communities provides the appropriate institution for deciding whether borderline situations should be characterized as sexual harassment . . . .

Gallagher v. Delaney, 139 F. 3d 338, 342 (2d Cir. 1998). Whether Hughes' actions and remarks would be sufficiently serious sufficient, with repetition, to create a hostile work environment is not a borderline situation. See *Harris v. Forklift Systems, Inc.*, 510 U.S. at 24 (Scalia, J., concurring)(determination of whether harassment "is egregious enough to warrant an award of damages" is a task for juries.)

The Sixth Circuit did not doubt that in providing her graphic description of Hughes' harassment Crawford *intended* to oppose that abusive conduct. Notwithstanding the existence of such an intent, the Sixth Circuit held that purposeful opposition to

unlawful discrimination is only protected by the opposition clause of section 704(a) when three additional requirements are met. The court of appeals insisted that a plaintiff must also prove that the opposition was (1) "active", (2) "consistent", and (3) "overt." (Pet. App. 7a-8a). None of these restrictions have any basis in the text of section 704(a) and all of them are inconsistent with the purposes of Title VII.

The absence of any of these limitations from the text of section 704(a) is fatal to this proposed interpretation of the opposition clause. Other legislation regarding the EEOC does contain limiting language regarding the particular method of opposition. Section 714 of Title VII applies 18 U.S.C. § 111 to "oppos[ition]" directed at EEOC employees; section 111(a)(1) in turn makes it a crime only to "*forcibly* . . . oppose[]" officials in the performance of their duties. (Emphasis added). Other forms of opposition to EEOC personnel--e.g., engaging in financial reprisals against EEOC employees, or obstructing their work by destroying evidence or bribing witnesses--are not criminalized. Similarly, section 10 of the Age Discrimination in Employment Act, 29 U.S.C. § 629, forbids any person to "forcibly . . . oppose . . . a duly authorized representative" of EEOC in the performance of duties under that statute.[51] See

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[51] Many criminal prohibitions apply only to those who "forcibly" oppose federal officials in the conduct of their duties. E.g., 7 U.S.C. § 87(b)(a)(8); 15 U.S.C. § 1825(a)(2)(C); 16 U.S.C. § 773e(a)(3); 18 U.S.C. § 2237(a)(2). Other criminal provisions, however, apply without such limitation to any person who "opposes" certain federal activities. E.g., 16 U.S.C. § 1417(a)(6); 17 U.S.C. § 2435(5).

18 U.S.C. §§ 1501 ("knowingly and willfully" oppose), 1502 (same), 2384 ("oppose by force"); 29 U.S.C. § 1862 ("unlawfully" oppose). However, neither "forcibly" nor any other limiting adverb restricts the scope of the word "opposed" in section 704(a).

Nothing in the text or purpose of section 704(a) supports the Sixth Circuit's rule that opposition is only protected if it is "active." Opposition to discrimination is no less real, less effective, or necessarily less infuriating to an employer or an harasser merely because it is relatively low key, quiet, or even entirely passive. A cautious worker might think it prudent to avoid speaking up about discrimination until there was some specific affirmative indication--like the employer-initiated investigation in the instant case--that the employer might be genuinely interested in correcting a particular practice. Certainly many victims of sexual harassment choose to prevent that abuse, not by upbraiding the offending supervisor, but by trying to stay, literally, out of reach. "Passive resistance is a time honored form of opposition." *McDonnell v. Cisneros*, 84 F.3d 256, 263 (7th Cir. 1996). Indeed, passive resistance was a touchstone of the very civil rights movement that led to the enactment of the 1964 Civil Rights Act.

Similarly, the language of section 704(a) does not limit the opposition clause to individuals who "initiate" or "instigate" a complaint. (Pet. App. 7a). An act of opposition can occur in a situation not initiated by the employee herself. Rosa Parks did not "initiate" the arrest that sparked the historic 1955 Montgomery bus boycott. She sat behind the movable sign reading "Colored," "not expecting any problems, as there were

several empty spaces at the whites-only front of the bus." When more white passengers got on than there were seats in the front of the bus, black passengers were expected to move further back or stand. It was the bus driver who approached Parks, initiated the conversation, and asked whether she was going to give up her seat to a white passenger. Rosa Parks merely said "No."[52]

It would make no sense to protect only the individual who initiates a complaint process, and then exclude from the statutory protections the very witnesses whose statements may be essential to determining the merits of the initial allegations, or fellow employees who may thereafter provide the complaining employee with information or moral support. In sexual harassment cases, post-complaint evidence from persons other than the original complainant is often of critical importance in convincing an employer that harassment has occurred.[53] If abusers knew that under section 704(a) they could with impunity retaliate against such often essential supporting witnesses, employers would be frustrated in their efforts to comply with Title VII.

The Sixth Circuit held that the opposition clause does not protect those who "appear [ ] for questioning

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[52] Douglas Brinkley, Rosa Parks, pp. 105-07 (2000).

[53] See e.g., *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 61-61 (1986)(describing testimony by other employees). There was similar testimony in *Harris v. Forklift Systems, Inc.,* 510 U.S. 17 (1993). See Brief for Petitioner, p. 5 (No. 92-1168); 1993 WL 302216 *5.

. . . and . . . relat[e] information." (Pet. App. 7a). But in many instances--despite the fact that the employer is seeking information about a possible violation of Title VII--whether an employee will actually provide that information may turn on whether or not the employee wants to assist in the detection and eradication of discrimination. An employee who simply did not care whether a discriminatory supervisor was stopped or punished might well choose to avoid providing information that could provoke reprisals by a powerful official or lead to discipline of a fellow employee who was a friend of the witness. Congress in 1964 knew full well from the history of federal civil and criminal civil rights litigation in the South that white witnesses who did not personally oppose racial discrimination had only rarely been willing to "appear . . . and . . . relate unfavorable information about" defendants who had violated federal law. An employee may relate the information requested by the employer (and run any attendant risks) only because he or she is opposed to the discrimination in question.

Section 704(a) extends the protections of the opposition clause to any individual who has "opposed" violations of Title VII, regardless of whether that individual did so repeatedly or "consistent[ly]" (Pet. App. 7a) or engaged in multiple "opposing activities."[54] Once a single act of opposition has occurred, the

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[54] *Bell v. Safety Grooving and Grinding, LP*, 107 Fed. Appx. 607, 610 (6th Cir. 2004)(plaintiff "who sent only one letter contesting a single decision . . . did not engage in opposing *activities*.")(emphasis added). The court below expressly relied on *Bell*. (Pet. App. 7a).

statutory requirement--that the plaintiff have "opposed any practice, made an unlawful employment practice by this title"--has been fully satisfied; no "further action" is necessary. (Pet. App. 7a). If the opposition clause were limited to workers who engage in some sort of protracted campaign against discrimination, it would rarely if ever apply. A worker whose initial effort to end discrimination was unsuccessful might reasonably conclude that further protests would be pointless, if not counter-productive. If repeated "opposing activities" were required before the protections of section 704(a) went into effect, an employer would be at liberty to dismiss a worker after the first act of opposition, before he or she was able to establish the requisite record of "consistent" opposition.[55]

The text of section 704(a) does not require that opposition be "overt." The opposition clause protects the cautious as well as the brazen. Congress assuredly did not intend the protections of the opposition clause to be limited to workers, like the fictional Norma Rae, who throw down the gauntlet to management actively, openly, and repeatedly. The far larger number of less emboldened employees whose opposition to discrimination may be quiet, subtle or isolated are essential to the remedial scheme and to the implementation of Title VII's substantive commands. Certainly an employee is not required to make a specific "demand for . . . the relief [he or she] seeks", as

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[55] In the instant case, Crawford complained again about Hughes' actions in October 2002. (Crawford Dep., pp 16-17). Respondent, however, had by then already started the investigation that led to her dismissal.

is required in a civil complaint. Fed. R.Civ.P. (8)(a)(3). Nor is the worker obligated to label his position a "charge," or include an express "request for the [employer] to take remedial action." *Federal Exp. Corp. v. Holowecki*, 128 S.Ct. 1147, 1158 (2008).

A worker may opt for a less confrontational form of opposition precisely because he or she is afraid of retaliation. Retaliation is a particularly serious problem for victims of sexual harassment, who often respond to that danger by seeking to find ways to end the harassment without being so overt as to provoke the abuser. It would be a perverse interpretation of section 704(a) to hold that sexual harassment victims lose the statutory protection from retaliation if they take prudent steps to avoid retaliation.[56] Under such a legal regime, a harasser by spreading fear of retaliation could create a license to retaliate. If workers could only obtain the protections of the opposition clause by utilizing tactics that maximized the risk of retaliation, they might reasonably conclude that the sensible choice is to remain silent. Employees, after all, "want jobs, not lawsuits." *Ford Motor Co. v. EEOC*, 458 U.S. 219, 229 (1982).

For an employee asked by his or her employer to respond to questions about harassment or other

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[56] An anonymous objection to alleged harassment or other discrimination is obviously not overt, because the identity of the objector is purposefully hidden. Surely, if the identity of an anonymous complainant later becomes known, Title VII would not then permit the employer to retaliate against the worker precisely because that employee had tried to remain anonymous in order to avoid retaliation.

discrimination, the decision below would accord the protection of the opposition clause only to a response fashioned with considerable legal ingenuity. To avoid exposure to lawful retaliation, such a worker would have to announce on the spot, in haec verba, that his or her response was intended to be a formal complaint, to spell out with specificity the elements of a Title VII violation, and then promptly to repeat that complaint at least once--if not more often--in some other manner or forum. No employee could know that such fancy legal footwork is required, and few if any could afford to bring to meetings with personnel officials an attorney to provide legal advice.

CONCLUSION

In the decades since the enactment of Title VII, as the enforcement of that statute has been strengthened and refined, the use of retaliation to suppress complaints and inculpatory information has assumed increased importance as a method of facilitating violations of the law. The numbers of retaliation charges filed with the EEOC has risen accordingly.[57]

This problem is of particular importance with regard to sexual and other forms of unlawful harassment. Unlike other violations of Title VII, harassment--particularly sexual harassment--is not a witness-less violation. The victim has painfully personal knowledge of all that has occurred, can

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[57] Between 1997 and 2007 the proportion of EEOC charges including a charge of retaliation rose from 22.6% to 32.3%. See http://www.eeoc.gov/stats/charges.html (visited April 6, 2008).

identify the abuser, and has every reason to want that harassment ended and the perpetrator punished. Today--unlike forty years ago--a sexual harasser often has good reason to fear that his continued employment could be at risk if the victim were to speak up and ultimately convince the employer that sexual harassment had occurred. No supervisor knowingly engages in sexual harassment that is being videotaped or recorded.[58]

The use of fear of reprisals to deter and punish complainants and witnesses is thus the very linchpin of sexual harassment. The threat of such retaliation is inextricably intertwined with the harassment itself. Abuser and victim alike understand clearly the power relationship and the omnipresent implicit threats that underlie sexual harassment on the job.[59] Abusers

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[58] See N. Bernstein, "An Agent, A Greencard, and A Demand for Sex", New York Times, March 21, 2008 (victim secretly recorded federal immigration official demanding sex in return for greencard; official arrested).

[59] *Faragher v. City of Boca Raton*, 524 U.S. at 803-05:

> When a fellow employee harasses, the victim can walk away or tell the offender where to go, but it may be difficult to offer such responses to a supervisor, whose "power to supervise-[which may be] to hire and fire, and to set work schedules and pay rates--does not disappear . . . when he chooses to harass through insults and offensive gestures . . . . " Estrich, Sex at Work, 43 Stan. L.Rev. 813, 854 (1991).
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> * * *
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> Supervisors do not make speeches threatening sanctions whenever they make requests . . . and yet every subordinate employee knows that the sanctions exist.

select as victims precisely those individuals who would be vulnerable to retribution if they attempted to complain. Even the most lascivious abusers do not harass their own supervisors or the boss's daughter. The complaint in this case alleges that one of the highest ranking officials of the Metro County School District repeatedly asked a payroll worker to "show me your titties." That official most assuredly would never have made such a demand of a woman who was a member of the Metro County Council, a Special Agent of the Federal Bureau of Investigation, an auditor for the Internal Revenue Service, or an airport screener for the Transportation Security Administration.

Exceptionless enforcement of section 704(a) is an essential tool to rooting out sexual harassment. If, as the Sixth Circuit held, an employee can be fired because her objection to sexual harassment was made at the wrong time, to the wrong person, or in the wrong terms, many harassment victims will sensibly regard that as no protection at all. Few if any potential witnesses will be in a position to afford the legal advice required to devise the sophisticated tactics needed to obtain protection under the Sixth Circuit's crabbed interpretation of section 704(a). In the nation's plants and offices, a decision by this Court that some internal complaints or statements about discrimination can lawfully result in dismissal will be understood only to mean that speaking up about sexual harassment has become even more dangerous and imprudent.

For the above reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

ANN BUNTIN STEINER
Counsel of Record
Steiner & Steiner
214 Second Avenue, N.
Suite 203
Nashville, TN 37021-1644
(615) 244-5063

ERIC SCHNAPPER
University of Washington
School of Law
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167

Attorneys for Petitioner