In the
# Supreme Court of the United States

VICKY S. CRAWFORD,
*Petitioner*,

v.

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

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

## PETITION FOR WRIT OF CERTIORARI

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

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

*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?

## PARTIES

The parties to this action are set forth in the caption.

The original complaint also named as defendants two individuals: Dr. Gene Hughes and Dr. Pedro Garcia. The claims against those individuals were dismissed on grounds not related to the question presented. For that reason they are not respondents in this Court.

## TABLE OF CONTENTS

APPENDIX

## TABLE OF AUTHORITIES

**Cases**

**Statutes**



**Other Authorities**

## PETITION FOR A WRIT OF CERTIORARI

Petitioner Vicky S. Crawford respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered on November 14, 2006.

## OPINIONS BELOW

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 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 Appendix. The January 6, 2005, opinion of the district court, which is not officially reported, is set out at pp. 12a-17a of the 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) 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 employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or

> because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

## STATEMENT OF THE CASE

The question presented in this case is whether, as the Sixth Circuit held, Title VII permits an employer to dismiss an employee because, in the course of an internal investigation of sexual harassment, the employee objected that she herself had been sexually harassed.

The events giving rise to 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 female employees had expressed concern about being sexually harassed by the employee relations director for the Metro School District, Dr. Gene Hughes. Responsibility for investigating possible sexual harassment by Hughes was assigned to Veronica Frazier, the assistant director for human resources. Frazier contacted employees who had worked with Hughes in the Metro administrative offices, and asked them to come to her office to be interviewed. In the course of those interviews, three female employees, including Petitioner Crawford, described serious acts of sexual harassment by Hughes. (App. 4a-5a).

"Crawford told the investigators that Hughes had sexually harassed her and other employees." (App. 5a). Crawford stated that Hughes "would come to my window and ask to see -- he would say, 'Let me see your titties.'" (J.App. 45). He would "grab his crotch and state 'you know what's up,'" and "would approach her window and put his crotch up to the

window." (*Id.*) 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." (*Id.*; see App. 5a n.1). Crawford made clear that she strongly objected to this behavior. On one occasion she "told him to get the hell out of my office." (J.App. 45). Crawford characterized her statements to the investigators as "testimony against" Hughes. (JA 47, 53).

At the time that Crawford spoke to the investigators, she was afraid that if she told them about Hughes' sexual harassment "I would lose my job." (JA 47). Those fears were well founded. Within a few months of taking part in the internal investigation, Crawford was suspended and then fired. The two other women who had complained to investigators about being sexual harassment were also fired. (App. 5a). The investigators concluded that Hughes to some degree had acted improperly, but no disciplinary action was taken against him. (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 Tennessee. Crawford alleged that she had been dismissed in retaliation for having told investigators about being harassed by Hughes. That retaliation, she asserted, violated section 704(a) of Title VII.

Metro moved for summary judgment. It argued, inter alia, that it is entirely lawful to dismiss a woman who during the course of an internal investigation complains about sexual harassment. Providing information to a company's own investigators, Metro contended, is not "protected activity" covered by section 704(a), even if the information consists--as

here--of an allegation that the employee had been sexually harassed.[1]

The District Court dismissed the complaint, holding that participation in an employer's internal investigation is not protected by section 704(a). To be protected by section 704(a), it reasoned, a sexual harassment victim must on her own initiative file some sort of formal complaint. Once an employer has initiated an investigation, mere witnesses--even witnesses who object to having been sexually harassed--are outside the protection of section 704(a).

> [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

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[1] Motion for Summary Judgment, p. 7 (JA 39):

> Plaintiff's statements to the sexual harassment investigators do not constitute "protected activity." Plaintiff contends that the statements she made to [the sexual harassment investigators] about Gene Hughes' inappropriate behavior are the "protected activity" which prompted the alleged retaliation against her. However, since she gave these statements during an in-house sexual harassment investigation - which was completed way before she or anyone else filed a formal charge of discrimination with the EEOC - these statements are not "protected activity" as a matter of law.

> 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.

(App. 15a-17a). In this case, since the investigation was initiated by the Metro's own Legal Department, all of the sexual harassment victims were merely cooperating witnesses, and thus all the victims could be lawfully dismissed for complaining that they had been harassed.

The court of appeals affirmed. It held, first, 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.

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

(App. 7a-8a).

Second, the court of appeals held that complaining about sexual harassment in response to an 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, it held, does not apply until and unless the victim or someone else has first filed a charged with the EEOC itself.

> 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." *Abbot* [*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.

(App. 8a).

The court of appeals reasoned that applying the protections of section 704(a) to sexual harassment victims who speak out during an internal investigation would actually

deter employers from even conducting investigations of possible sexual harassment.

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

(App. 10a).

Crawford filed a timely petition for rehearing and for rehearing en banc. The petition was denied on March 1, 2007. (App. 1a-2a).

## REASONS FOR GRANTING THE WRIT

### I. THIS CASE PRESENTS AN ISSUE OF VITAL IMPORTANCE TO THE ADMINISTRATION OF TITLE VII

The Sixth Circuit in this case held that the anti-retaliation provisions in section 704(a) of Title VII do not protect an employee who during the course of an employer's internal investigation complains about sexual harassment. Specifically, the court of appeals held that statements by witnesses during such an internal investigation are not protected either by the opposition clause of section 704(a) (which forbids retaliation because an employee "opposed any" practice prohibited by Title VII) or by the participation clause (which forbids retaliation because an employee

"participated in any manner in an investigation . . . under this title.")

The EEOC emphatically construes section 704(a) in precisely the opposite manner. With regard to the opposition clause, the EEOC Compliance Manual explains:

> Protected activity . . . includes testifying or presenting evidence as part of an internal investigation pertaining to an alleged EEO violation. . . . Because encouraging employers to discover and prevent discriminatory practices in the workplace is a primary objective of Title VII, an employee who assists his/her employer in this endeavor is, by definition, opposing practices made unlawful by Title VII.[2]

The application of section 704(a) to participation in an internal investigation follows from the EEOC's general interpretation of the opposition clause of section 704(a).

> This protection applies if an individual explicitly or implicitly communicates to his or her employer or other covered entity a belief that its activity constitutes a form of employment discrimination that is covered by any of the statutes enforced by EEOC.[3]

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[2] EEOC Compliance Manual, section 915.003, part 2-II(A)(5), available at http://www.eeoc.gov/policy/docs/threshold.html, visited May 23, 2007.

[3] EEOC Compliance Manual, section 915.003, part 8-II(B)(1), available at http://www.eeoc.gov/policy/docs/retal.html, visited May 23, 2007.

The Commission also insists that an employee who cooperates in an internal investigation is protected by the participation clause of section 704(a):

> Participation means taking part in an employment discrimination proceeding. . . . Examples of participation include: . . . [c]ooperating with an internal investigation of alleged discriminatory practices; or . . . [s]erving as a witness in an EEO investigation . . . .[4]

The EEOC has advanced its interpretations of section 704(a) in briefs in the courts of appeals.[5]

This issue is vital to the implementation of Title VII and other federal employment statutes. Although Title VII authorizes aggrieved employees to file suit in federal court, the most important stage of compliance is in the workplace itself. Federal litigation is the enforcement tool of last resort; the overarching purpose of that remedy, and of Title VII, is to induce employers "to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible" unlawful discrimination and its lingering effects. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975). Because the relevant information about discriminatory practices is usually in the hands of an employer's own workers, protecting those workers from

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[4] EEOC, "Retaliation" (undated). This interpretation of section 704(a) and similarly worded anti-retaliation provisions is available at http://www.eeoc.gov/types/retaliation.html, visited May 23, 2007.

[5] *See* nn. 11 and 13, *supra*.

reprisals is critical to the viability of any employer's internal investigation and review process.

An employer's internal processes for investigating and correcting possible violations of Title VII have a particularly central role in the elimination of sexual harassment. In order to strengthen employers' internal processes for dealing with harassment, this Court has interpreted Title VII to impose strict liability on an employer for a supervisor's discriminatory harassment, subject to an affirmative defense designed "to recognize the employer's affirmative obligation to prevent violations and give credit . . . to employers who make reasonable efforts to discharge their duty." *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998). The protections of section 704(a) are particularly critical with regard to claims of sexual or other harassment. In such cases the alleged harasser will predictably be angered by the harassment allegation, most harassment occurs at the hands of supervisors who are well situated to bring about reprisals against cooperating witnesses, and all too often the witness is under the supervision of the alleged harasser.

The EEOC properly regards statements by witnesses as critical to a sexual harassment investigation. The EEOC advises employers conducting internal investigations to identify any such witnesses[6], provides guidance regarding the

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[6] Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (June 6, 1999), part V(C)(1)(e)(i);

> **Questions to Ask the Complainant**:
>
> * * *
>
> --Are there any persons who have relevant information?

questions that should be asked of them[7], and emphasizes the importance of such witnesses in corroborating other

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> Was anyone present when the alleged harassment occurred? Did you tell anyone about it? Did anyone see you immediately after episodes of alleged harassment?
> --Did the person who harassed you harass anyone else? Do you know whether anyone complained about harassment by that person?

Available at http://www.eeoc.gov/policy/docs/harassment.html, visited May 23, 2007.

[7] *Id.*:

> **Questions to Ask Third Parties**:
> --What did you see or hear? When did this occur? Describe the alleged harasser's behavior toward the complainant and toward others in the workplace.
> --What did the complaint tell you? When did s/he tell you this?
> --Do you know of any other relevant information?
> --Are there other persons who have relevant information?

testimony.[8] Both before[9] and after this Court's decisions in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), the EEOC has emphasized the particular importance of preventing retaliation against witnesses from occurring in connection with an investigation of sexual harassment. The EEOC's current Policy Guidance admonishes employers to assure "that employees who . . . provide information related to such complaints will be protected against retaliation."[10]

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[8] *Id.* at part V(C)(1)(e)(ii):

> -- **Corroboration**: Is there *witness testimony* (such as testimony by eye-witnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with him or her at around the time that they occurred) . . . ?
> -- **Past record**: Did the alleged harasser have a history of similar behavior in the past?

[9] Policy Guidance on Current Issues of Sexual Harassment, No. N-915-050 (March 19, 1990), part E(1) (employer must provide "protection of victims and witnesses against retaliation.") Available at http://www.eeoc.gov/policy/docs/currentissues.html, visited on May 23, 2007.

Policy Guidance on Current Issues of Sexual Harassment, No. N-915.030 (October 25, 1988), p.28 (employer must provide "protection of victims and witnesses against retaliation.") This Policy Guidance is quoted in *Newsday, Inc. v. Long Island Typographical Union, No. 915, CWA*, 915 F.2d 840, 845 (2d Cir. 1990).

[10] Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (No. 915.002, June 6, 1999),

The EEOC, which has the primary responsibility for enforcing Title VII, has also concluded that its *own* ability to meet those statutory responsibilities would be seriously impeded if internal-investigation witnesses were not protected by section 704(a).

> Now that the Supreme Court [in *Faragher* and *Ellerth*] has made participation in an employer's internal complaint procedure a virtual prerequisite to recovery, employees involved in internal investigations are playing an essential role in the EEOC's enforcement efforts. If employees are too intimidated to participate freely in internal investigations, the EEOC's ability to enforce Title VII would be seriously compromised.[11]

If in the course of an employer's sexual harassment investigation a harassment victim refuses to answer questions or fails to disclose that she has been harassed, that lack of cooperation may ultimately preclude the EEOC as well as the victim from thereafter obtaining relief under Title VII.

> Given the new emphasis on internal complaint procedures, participation in an internal investigation has essentially become a prerequisite for recovery . . . . Unless an employee has complained to her employer . . . her eventual EEOC charge may be ineffective as a means to remedy illegal harassment. To the extent that the participation clause seeks to

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part V(C)(1). Available at http://www.eeoc.gov/policy/docs/harassment.html, visited May 23, 2007.

[11] Brief of the EEOC as Appellant, *EEOC v. Total Systems Services, Inc.*, 221 F.3d 1171 (11th Cir. 2000), No. 99-13196-JJ, pp. 17-18.

> protect the EEOC's ability to enforce Title VII, the new legal regime mandates that its protections now extend to participation in an internal investigation of a supervisor's sexual harassment. Absent such protection, employees may be too intimidated to come forward first to their employer and then to the EEOC, and the EEOC's ability to enforce the statute may thereby be compromised.[12]

"Only by making it impossible for employers legally to retaliate against employees who participate in internal investigations can this Court fulfill Title VII's mandate of fully protecting access to EEOC's enforcement machinery."[13]

The Department of Labor has similarly observed regarding claims under the Fair Labor Standards Act that an anti-retaliation provision would often be ineffective if its

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[12] *Id.* at 12-13.

[13] *Id.*at 14. See Reply Brief of the Equal Employment Opportunity Commission as Appellant, *EEOC v. Total Systems Services, Inc.*, 221 F.3d 1171 (11th Cir. 2000), No. 99-13196-JJ, pp. 3-4 ("The new importance that *Faragher* places upon internal investigations essentially elevates participation in such investigations into a procedural prerequisite for Title VII enforcement. . . . Especially when the issue under investigation is sexual harassment by a supervisor, employees need all the reassurance that they can get before they will come forward."), 6 ("Coverage under the participation clause would remove fear of retaliation as an impediment to participation in an employer's internal investigation of sexual harassment. It would, therefore, promote enforcement of Title VII by removing a potential barrier to the EEOC's eventual involvement.")

protections did not come into play until *after* a lawsuit (or, in this case, an EEOC charge) was filed.

> [Such a limitation] will allow an employer, on learning that it is about to be sued for FLSA violations, to retaliate against employees with information needed for the lawsuit. That result . . . can be expected "to dry up legitimate sources of information . . . , to impair the functioning of the machinery provided for the vindication of the employees' rights and, probably, to restrain employees in the exercise of their protected rights." *NLRB v. Electro Motive Mfg. Co.*, 389 F.2d 61, 62 (4th Cir. 1968).[14]

## II. THE DECISION OF THE SIXTH CIRCUIT IS IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS

In the other courts of appeals, unlike the Sixth Circuit, the EEOC's interpretation of section 704(a) is largely unquestioned.

In *Cardenas v. Massey*, 269 F.3d 251 (3d Cir. 2001), the plaintiff alleged that he had been retaliated against because he "offered to support [another individual's] EEO complaint" and supported the complaint of another. 269 F.3d at 260. The plaintiff had merely offered to be a witness in connection

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[14]Brief for the Secretary of Labor as Amicus Curiae, *Ball v. Memphis Bar-B-Q Company, Inc.*, 228 F.3d 360 (4th Cir. 2000), No. 9901261, pp. 10-11 (1999 WL 33636931).

with an in-house investigation.[15] The district court dismissed the retaliation claim on the ground that the plaintiff "had not shown that he engaged in a protected activity." 269 F.3d at 263. The Third Circuit reversed, holding that the plaintiff's "cooperation in the complaints of . . . other individuals" constituted protected activity." *Id.*

In *Evans v. City of Houston*, 246 F.3d 344 (5th Cir. 2001), the plaintiff alleged that he had been retaliated against for testifying at the grievance hearing of another city employee; Evans had not volunteered to appear, but was required by subpoena to do so. The Fifth Circuit held that that testimony was protected activity under section 704(a), rejecting the city's contention that "[i]nternal grievance procedures are not 'protected activities' under Title VII." 246 F.3d at 352 n. 7.

> Evans was subpoenaed to testify at [the] grievance hearing . . . and Evans did appear and testify. The grievance hearing concerned [the other worker's] Title VII claims of discrimination. . . . If an employee has "'made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing' under Title VII," the employee has engaged in a protected activity. The district court was

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[15] "[The person who filed the in-house complaint] told [a manager] that Cardenas had offered to be a witness for [the complainant] regarding [his] pending in-house EEO complaint. [The manager] summoned Cardenas and [another employee] to [his] office, and upon their arrival announced an intention to impose substantial disciplinary sanctions upon Cardenas while vigorously berating him for offering to assist [the complainant]." Brief for Appellant, *Cardenas v. Massey*, No. 00-5225, p. 23. The employer on appeal did not dispute this account of those events.

> therefore correct to find that Evans had [engaged in protected activity.]

246 F.3d at 352-53 (citation omitted).

In *Scott v. County of Ramsey*, 180 F.3d 913 (8th Cir. 1999), the Eighth Circuit upheld a jury verdict finding unlawful retaliation based on the actions of the plaintiff in cooperating with a sexual harassment investigation. "Scott was ordered to give a statement in an internal investigation regarding a sexual harassment claim that had been filed by another . . . deputy." 180 F.3d at 916. "Scott gave a recorded statement . . . that confirmed the inappropriate comments [complained of, and] stated he was sure that [a named supervisor] was aware of the behavior." *Id.* Scott alleged, and the jury found, that he was "terminated in retaliation for participating in a protected activity." *Id.* The Eighth Circuit upheld that finding. In *Hoffman v. Rubin*, 193 F.3d 959, 963-64 (8th Cir. 1999), the Eighth Circuit held that answering questions from "internal-affairs investigators" concerning alleged sexual harassment, and responding to questions from the press about that problem, constituted protected activities. See *Kempcke v. Monsanto Co.*, 132 F.3d 442, 446 (8th Cir. 1998) (providing documents to attorney is protected activity).

In *EEOC v. Total Systems Services, Inc.*, 221 F.3d 1171 (11th Cir. 2000), the Eleventh Circuit concluded that cooperation with an internal investigation is not protected activity within the scope of the participation clause, but held that such cooperation could be protected activity under the opposition clause. In the circumstances of that case, however, the court held that the employer's actions were not

motivated by an unlawful purpose.[16] In response to a petition for rehearing, Judge Edmondson, who had authored the original panel decision, emphasized that the panel had held that opposition clause can apply to cooperation with an internal investigation:

> [T]he panel's decision does not hold (nor does it suggest) that a retaliation claim is impossible unless someone has first filed an applicable EEOC complaint. To read the opinion differently is inaccurate. We recognize that a plaintiff--in circumstances similar to those in this case, that is, a private employer's internal investigation with no government involvement--might have protection under Title VII and that this protection would flow from the "opposition clause" of the Act. . . . Applying the law as the panel does, may significantly advance the fulfillment of Title VII's goals by encouraging employers to . . . engage in self-examination, and to resolve-- . . . internally. . . . -- disputes involving claims of discrimination . . . without too much fear (*so long as the employer acts honestly*) of potential, troublesome and costly litigation. . . . An employee who participates in an employer's own internal investigation of discrimination *is* within the scope of the opposition clause and can be protected by the clause: for example, an employer cannot throw up just a pretext and get away with punishing an employee for speaking out.

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[16] The panel concluded the evidence showed that the plaintiff had been dismissed, not for having participated in the internal investigation, but because the employer believed she had lied to the investigators.

240 F.3d at 904-05 (emphasis added). Judge Edmondson's reiteration of the panel holding is regarded is authoritative in the Eleventh Circuit. *E.g., MacLean v. City of St. Petersburg*, 194 F. Supp. 2d 1290, 1298 (M.D.Fla. 2002).

The holding of the Sixth Circuit in the instant case that the opposition clause of section 704(a) protects only "active" opposition (App. 7a) was emphatically rejected by the Seventh Circuit in *McDonnell v. Cisneros*, 84 F.3d 256 (7th Cir. 1996). In *McDonnell* in the plaintiff at issue, Thomas Boockmeier, was retaliated against for simply doing nothing at all. Two female workers, both subordinates of Boockmeier, had filed discrimination charges. A higher ranking official warned the women that if they did not withdraw their charges, the employer would punish Boockmeier "for failing to control his subordinates." *McDonnell v. Cisneros*, 1995 WL 110131 at * 2 (N.D.Ill. 1995); see 84 F.3d at 258. The employer never ordered Boockmeier to direct the women to withdraw the charges, but evidently hoped he would encourage them to do so in order to avoid reprisals. Boockmeier took no action, and the women did not withdraw their complaints. The employer then retaliated against Boockmeier by permanently transferring him from Chicago to Washington, and told Boockmeier the transfer was being imposed because of his failure to persuade the women to do so. 84 F.3d at 258. The Seventh Circuit held that section 704(a) protected even purely passive opposition. Judge Posner explained:

> [Section 704(a)] forbids retaliating against an employee "because he has opposed any practice made an unlawful employment practice" by Title VII. Several courts, including our own, hold that assisting another employee with his (in this case her) discrimination claim, as well as other endeavors to

> obtain an employer's compliance with Title VII, is protected "opposition conduct." . . . It is true that there are cases of *active* opposition. Boockmeier's opposition was *passive*. . . . Passive resistance is a time-honored form of opposition, however, and it would be very odd to suppose that Congress meant a form of behavior that straddles what the cases . . . call "opposition" and "participation" conduct to fall between the stools.

84 F.3d at 262 (emphasis added).

## III. THE DECISION OF THE SIXTH CIRCUIT WILL SERIOUSLY IMPEDED ADMINISTRATION OF TITLE VII

The holding of the Sixth Circuit in this case is far more than a rule for deciding Title VII retaliation cases; that holding will predictably shape the actions of the large numbers of employees and employers in Michigan, Ohio, Kentucky and Tennessee. As this Court has expressly recognized, Congress has enacted anti-retaliation statutes because it concluded that employees are likely to refuse to disclose information about violations of federal law if they can be fired or otherwise discriminated against in reprisal. *Burlington Northern and Santa Fe Rwy. Co. v. White*, 126 S. Ct. 2405, 2414 (2006)(Title VII); *Jackson v. Birmingham Bd. of Education*, 544 U.S. 167, 180 (2005) (Title IX); *NLRB v. Scrivener*, 405 U.S. 117, 122 (1972) (NLRA); *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) (FLSA).

Workers of ordinary prudence would be likely to avoid cooperating with a sexual harassment internal investigation if they knew they could be fired for doing so, certain as most

will be that such cooperation will anger the alleged harasser, who usually is a supervisor and who all too often is the witness's own supervisor. "[E]mployees would have a disincentive to cooperate, if their participation in internal investigations is not protected." *EEOC v. Total System Services, Inc.*, 240 F.3d 899, 803 n. 7 (11th Cir. 2001) (Barkett, J., dissenting from denial of en banc rehearing). "Placing a voluntary witness into this kind of legal limbo would impede remedial mechanisms by denying interested parties 'access to the unchilled testimony of witnesses.'" *Jute v. Hamilton Sundstrand Corp.*, 420 F.3d 166, 175 (2d Cir. 2005) (citation omitted).

"If [employers] were permitted to retaliate freely, individuals who witness discrimination would be loath to report it, and all manner of . . . violations might go unremedied as a result." *Jackson v. Birmingham Bd. of Education*, 544 U.S. 167, 180 (2005). Under Title VII whether an employer is legally responsible for sexual or other harassment often turns on whether the employer knew that the harassment was occurring. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 760 (employer liable for negligent failure to correct harassment by co-workers), 765 (employer liable for harassment by supervisor if employer failed to exercise care to correct harassment) (1998). If witnesses to unlawful harassment are unwilling to cooperate with an internal investigation, and the employer as a result is able to show it did not learn of the harassment, both private claimants and the EEOC itself may be unable to obtain redress for that harassment. See *Jackson v. Birmingham Bd. of Education*, 544 U.S. 167, 180 (2005) ("Without protection from retaliation, individuals who witness discrimination would likely not report it, indifference claims would be short-circuited, and the underlying discrimination would go unremedied.") As this case and others like it well illustrate,

many harassment victims who might be reluctant to file formal complaints on their own initiative would be willing to provide candid answers in response to an internal investigation; that often critical source of information would be cut off if cooperation with such an investigation could lawfully lead to dismissal.

The decision below also creates significant and undesirable incentives for those harassment victims who do decide to file some sort of a formal complaint. Because relevant witnesses would have good reason to withhold cooperation from an employer's own internal investigation, a complaint to the employer itself may well be ineffective. Worse yet, if the employer--for want of corroborating information-- does not conclude that harassment occurred, and as a consequence does not take steps to end the harassment, the victim may have no claim, because-- in the absence of that corroboration--the employer's inadequate response may be held reasonable. *E.g., Jackson v. County of Racine*, 474 F.3d 493 (7th Cir. 2007). Given that situation, a harassment victim would be well advised to bypass the employer's own corrective processes and instead proceed at once to file a Title VII charge with the EEOC. Forcing sexual harassment victims to do so, however, would significantly increased the caseload of an already over-burdened EEOC.

Finally, the decision below provides employers with an entirely legal manner in which they can punish, and deter, employees who might provide information that would support sexual harassment claims by their co-workers. There is in the Sixth Circuit today a well-defined window of opportunity during which an employer is free to retaliate against witnesses or potential witnesses; reprisals are entirely lawful until and unless a related Title VII charged is filed with the EEOC or the potential witness files his or her own formal internal

complaint. A witness lawfully dismissed at the internal investigation stage could be unavailable by the time a case gets to trial, other workers--aware of the fate of their colleague--may well be deterred from cooperating at later stages of the Title VII process (even though legal protections would then apply) and the original complaining party will have little ability, reason or standing to try to prove at her own trial that internal-investigation witness was (lawfully) dismissed for a retaliatory purpose.

The Sixth Circuit decision in this case also creates an immediate administrative problem for the EEOC. The EEOC web site (eeoc.gov), which is visited more than 10 million times a year, is a critical source of information for employees. An employee who opens the EEOC home page and clicks on "retaliation" is shown a short summary of employee rights which categorically assures the viewer that he or she cannot be fired or otherwise retaliated against for taking part in an internal investigation.[17] That assurance serves the salutory purpose of encouraging workers to provide information to company officials, cooperation of great importance to sexual harassment investigations under *Faragher* and *Ellerth*.

But for the millions of employees in the Sixth Circuit, that categorical EEOC assurance is now flatly wrong. In regrettably similar language, the EEOC web site assures employees they are protected for "[c]ooperating with an

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[17] EEOC, "Retaliation" (undated). This interpretation of section 704(a) and similarly worded anti-retaliation provisions is available at http://www.eeoc.gov/types/retaliation.html, visited May 23, 2007. *See* text at n. 4, *supra*.

internal investigation"[18], while the opinion below holds, to the contrary, that "cooperation with Metro's investigation . . . is not the kind of overt opposition that we have held is protected under Title VII." (App. ---). Unlike other portions of the EEOC web site, which may be relied on primarily by attorneys or judges, the Commissions's guidance regarding what is and is not protected activity provides essentially legal advice on which employees themselves can and do rely in deciding how to respond to sexual harassment.

In the Sixth Circuit today no responsible attorney or labor union would assure a worker there that he or she cannot lawfully be fired for cooperating with an internal investigation. If, however, the EEOC responds to this problem by deleting participation in internal investigations from its public list of protected activities, workers outside the Sixth Circuit may be needlessly deterred from taking part in those investigations. The EEOC could, of course, provide state-by-state guidance (employees in general would not know in which circuit they are located), distinguishing states in circuits where cooperation is protected from states where cooperation is not protected and from states in which the law may now be unclear. But the resulting crazy-quilt pattern, while accurate, would graphically depict precisely the sort of inter-circuit division which warrants review by this Court.

## CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

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[18] *Id.*

In the alternative, the Solicitor General should be invited to file a brief in this case expressing the views of the United States.

Respectfully submitted,

ANN BUNTIN STEINER*
Steiner & Steiner
214 Second Avenue, N.
Suite 203
Nashville, TN 37201-1644
(615) 244-5063

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

*Counsel of Record
*Counsel for Petitioner*