IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - - - - x

VICKY S. CRAWFORD, :

Petitioner :

v. : No. 06-1595

METROPOLITAN GOVERNMENT :

OF NASHVILLE AND DAVIDSON :

COUNTY, TENNESSEE. :

- - - - - - - - - - - - - - - - - - - - x

Washington, D.C.

Wednesday, October 8, 2008

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:59 p.m.

APPEARANCES:

ERIC SCHNAPPER, ESQ., Seattle, Wash.; on behalf of the Petitioner.

LISA S. BLATT, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Petitioner.

FRANCIS H. YOUNG, ESQ., Assistant Metropolitan Attorney, Nashville, Tenn.; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(12:59 p.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 06-1595, Crawford v. The Metropolitan Government of Nashville and Davidson County, Tennessee. Mr. Schnapper.

ORAL ARGUMENT OF ERIC SCHNAPPER

ON BEHALF OF THE PETITIONER

MR. SCHNAPPER: Mr. Chief Justice, and may it please the Court:

When Vicky Crawford reported to city officials that she had been repeatedly harassed by the board's director of employee relations, her conduct was protected by section 704(a) of Title VII. It is protected first by the first clause of section 704(a), which is known as the opposition clause. The opposition clause has three elements that must be proven. Only one of them is at issue here. But just to set the context, first a plaintiff will have to prove that the employer acted with a retaliatory motive. Second, the employee's statement or conduct must relate to action that was unlawful under Title VII. It might be something that happened in the past. It might be a concern about something that might happen in the future.

And third, the conduct must be in the nature

of opposition, and that's the question in dispute in this particular case.

It is our view that the -- it is sufficient to establish that element if a reasonable person would conclude from the employee's statement or conduct that the employee disapproved of or objected to the employment practice in question.

JUSTICE SCALIA: So a co-worker of your client says: You know, the boss really was guilty of sexual harassment and the co-worker says: Gee, that's terrible.

MR. SCHNAPPER: Yes, yes.

JUSTICE SCALIA: That's enough? That's opposition?

MR. SCHNAPPER: Yes. Yes, it is. In fact, there are cases involving --

CHIEF JUSTICE ROBERTS: What if it's just, sexual harassment is terrible?

MR. SCHNAPPER: That would be covered. If an employee wore a button --

CHIEF JUSTICE ROBERTS: Even if there's no link, there's no link to the person that the original -- the complainant says was engaged in that activity?

MR. SCHNAPPER: The opposition doesn't have to be directed at a particular event.

JUSTICE SCALIA: What about, violating the law is terrible?

MR. SCHNAPPER: I think if there's no reference to Title VII that wouldn't suffice.

JUSTICE SCALIA: Okay. But if she said that in response to the remark by the co-worker that she had been subjected to sexual harassment and then the remark was "Violating the law is terrible," that's opposition?

MR. SCHNAPPER: I think a trier of fact could conclude she was referring to what the co-worker had just said.

CHIEF JUSTICE ROBERTS: So if Mr. Jones, the person, did that, that's terrible.

MR. SCHNAPPER: Yes.

CHIEF JUSTICE ROBERTS: That's actionable as opposition to the practices?

MR. SCHNAPPER: It is protected. If the employer comes in and fires her for having said that. The case --

JUSTICE GINSBURG: Mr. Schnapper --

JUSTICE KENNEDY: I was going to say in part it seems to me that in isolation it seems harmless, almost trivial, but the whole point is that the employer doesn't think it is trivial. The employer uses it, by hypothesis, as a basis to retaliate.

MR. SCHNAPPER: Right. That's why the elements are important. If the employer fires a worker for that --

JUSTICE SCALIA: But that doesn't solve the problem of having too broad an entry into this thing. You get to the jury by just showing that she said "Oh, if he did that, it's terrible," and then it's up to the jury all of a sudden whether that is the reason that the employer fired this person or not. I mean, that just leaves -- lays the employer open to a lot of jury determinations that he shouldn't be subject to, it seems to me.

MR. SCHNAPPER: With all deference, Your Honor, the plaintiff must have sufficient evidence to get to the jury on all three elements. Retaliation claims are routinely dismissed on the causation element. There's not usually a dispute about whether the conduct was protected, and this case in that regard is unusual. But the --

JUSTICE SOUTER: Do you believe, as I understood you to suggest a moment ago, that you could prove causation if the statement "It is terrible" or "Sexual harassment is terrible" had been uttered in effect in the abstract without reference to particular behavior or a charge of particular behavior on the part

of a co-worker or an employer? In other words, if A says "Sexual harassment is terrible" and elsewhere in the company sexual harassment is going on and A is then fired, would it be your view that A would at least state a claim if A said, I had expressed disapproval of sexual harassment, it turns out there was sexual harassment being gone -- taking place elsewhere; and I was fired for that reason. Would that at least state a claim that would get a harassment case into court?

MR. SCHNAPPER: Up --

JUSTICE SOUTER: What I'm getting at, doesn't the statement "It's terrible" or whatever the opposition may be have to be made in relation to some specific activity?

MR. SCHNAPPER: No, Your Honor. No, Your Honor.

JUSTICE SOUTER: Then what is the limit? It seems to me you've got a cause of action in effect under the statute that would be virtually unlimited. Anybody who thinks sexual harassment is bad and later gets fired can claim retaliation under the statute if it turns out just as a matter of good luck that somebody was being sexually harassed unbeknownst to the speaker.

MR. SCHNAPPER: That's at least two questions. Let me try to answer them both. With regard

to what would constitute protected activity, it is our view -- and I think this is consistent with the lower courts and the view of the government -- that there doesn't have to actually be a violation. If a worker walks into the office with a button saying "Violations of Title VII are bad and I'm against them," she can be -- and fired for that, that's illegal even though nothing was going wrong.

JUSTICE GINSBURG: But why are we -- why are we spending so much time on hypotheticals that are so far from this case? This was a person who appeared at an internal proceeding, she gave testimony, very specific testimony. She wasn't saying: I'm against harassment. She said: This boss harassed me. It is about as specific as you get. So we're dealing with a particular case of somebody who was a witness in an internal investigation. Why do we have to reach the outer boundaries of this claim in this case?

MR. SCHNAPPER: You do not, Your Honor.

CHIEF JUSTICE ROBERTS: Well, but, you know, that's why we ask hypotheticals that aren't related to the specific facts, because we're interested in how broadly the proposition you're asking for goes. I'd still like to find out where you draw the limit. What if the person says: Mr. Jones would never do anything

like that, but if he did that would be terrible. Now, is that actionable as opposition?

MR. SCHNAPPER: Yes. Expressing disagreement with conduct that violates the law is what the opposition clause protects. It doesn't have to be about a specific instance, although it emphatically is so here. It doesn't have to reference the statute.

JUSTICE SCALIA: And there does not have to have been sexual harassment in the employment unit.

MR. SCHNAPPER: That's right.

JUSTICE SCALIA: So this is a law directed against expressive activity.

MR. SCHNAPPER: Yes. Yes.

JUSTICE SCALIA: Are those laws good? I thought we had a First Amendment.

MR. SCHNAPPER: No, no. It is a law that protect expressive activity and those laws are excellent. It protects the activity.

JUSTICE ALITO: What if the employee just made -- reports factual information: Supervisor did such and such; doesn't express opposition to it. Or what if the employee goes further and says: Supervisor did such and such, but I know he was just kidding; or I hope you don't take any action against that person. Would that be opposition?

MR. SCHNAPPER: Not necessarily. Again, it depends on the question that was asked and the answer that was given. If I might, for example, in this case the question was did Mr. Hughes engage in inappropriate activity. That was a request -- I think a trier of fact could understand that that was a request for a description of something that the witness objected to.

JUSTICE ALITO: Let me ask this. Suppose the employer conducts an investigation because it believes that the supervisor has engaged in improper activity. So what they are trying to do is substantiate grounds for dismissal or some other sanction. And then an employee provides information that's exculpatory. Can -- is that protected? Is that -- is that information protected.

MR. SCHNAPPER: It's our view that that is not protected by the opposition clause. It is our view it would be protected by the participation clause.

If I might get back to the question --

JUSTICE ALITO: Isn't it strange when there are many situations in which testimony or the reporting of information is protected, but when it's done, isn't it usually done both ways, as it is under the participation clause? So that the testimony is -- cannot be the subject of retaliation or the reporting of

information cannot be the subject of retaliation, but not it's protected only if it goes in one direction? Isn't that a very odd approach to that situation?

MR. SCHNAPPER: That's why we're advancing the view that the participation clause here provides as well, so that it's clear that exculpatory witnesses are protected. It is not unimaginable that an exculpatory witness would anger someone.

But going back to the question you asked earlier, it's possible that in response to a question an answer might be given which a reasonable person would not conclude reflected disapproval such as, well, he told that joke, and I thought it was funny.

And, indeed, in the Harris v. Forklift case there were witnesses like that who -- who confirmed that the owner of Harris Forklift had made the jokes in question but said they didn't mind. That that would not be our position at --

JUSTICE ALITO: Wouldn't that be very strange? Suppose that this -- the factual situation actually is very severe and is enough to -- to establish liability on the employer's part, but this particular reporting employee doesn't think so. So then the employer might well be very annoyed that this information which can be the -- the basis for liability

has been brought out against the employer, and the employer might want to retaliate.

Why would that be unprotected just because this employee adds his or her opinion that it isn't serious?

MR. SCHNAPPER: We think it is protected by the participation clause.

JUSTICE BREYER: Why don't you follow what the EEOC says? I mean, the EEOC, as I understand it, has said the very fact the employer has initiated an investigation of an alleged discrimination is sufficient to demonstrate the reasonableness of the employee's belief that by providing information relevant to the inquiry she is opposing an employment practice made unlawful by Title VII.

And then they go on. To be absolutely clear about it, they say an employee who assists her or her employer in the endeavor, i.e., you go and testify; so the sun was shining on that day; you are assisting your employee by telling the truth-- is by definition -- is opposing practices made unlawful by Title VII.

So here we have a difficult question, quite an interstitial question, defining precisely "opposing," and here we have the EEOC doing it. So why don't we just follow what they say?

MR. SCHNAPPER: Well, I -- that would -- that would certainly be fine with us.

JUSTICE SCALIA: It wouldn't be fine with me.

MR. SCHNAPPER: We get to the same place -- we get to the same place by a different route.

JUSTICE SCALIA: What if -- what if I am indeed very much in favor of sexual harassment? I am a world class sexual harasser, but I'm also not a liar, and I'm -- I am subpoenaed or called up by the employer in connection with this internal investigation and asked whether so-and-so harassed a particular worker. And I'd say, yes, as a matter of fact, he did, and a good thing too.

Is that expressing opposition?

MR. SCHNAPPER: No. We believe it is covered by the participation clause. We think --

JUSTICE SCALIA: Covered by the participation clause?

MR. SCHNAPPER: Because our view is that the employer's internal processes for detecting and rooting out sexual harassment, for example, is a -- is a process -- is a process that's under this title within the meaning of --

JUSTICE BREYER: Is this a real problem? I

mean, let's suppose the opposition clause protects everybody in the internal investigation who could be at all interpreted as favorable to the complainant. It also protects everybody who could possibly be viewed as neutral.

Then you have a problem about what about a person who loves sexual harassment? This is the hypothetical: he comes in, testifies: I love sexual harassment; it's wonderful, and they fire him. Now is this a real problem?

MR. SCHNAPPER: It -- it is not, Your Honor. But -- but as the -- as the Chief Justice pointed out, I'm -- you know, I'm here to answer hypothetical questions, and I'm going to do so.

JUSTICE GINSBURG: But I thought that --

[Laughter.]

JUSTICE GINSBURG: But I thought that the -- real case -- the real case that we're dealing with is somebody who appeared in an internal investigation, and I thought that what was the debate between the two sides; anyone who made a charge, testified, assisted, or participated in any manner in the investigation, I thought that the other side's position was, well, this is not an "investigation" within the meaning of the statute. That what goes on internally doesn't qualify.

"Investigation," "proceeding," or "hearing" under Title VII requires first that there be a Title VII charge. I thought that that's what the controversy we're talking about today is about: Is this a qualifying investigation?

MR. SCHNAPPER: Your Honor, there actually are two distinct questions here. One of them is whether the conduct is protected by the opposition clause and whether it constitutes opposition.

The second question is whether this conduct is protected by the participation clause and would be an investigation under Title VII. We are asserting arguments under both claims, and -- and the Respondents disagree with us on both.

CHIEF JUSTICE ROBERTS: And those are overlapping but not whatever it -- concurring --

MR. SCHNAPPER: Redundant.

CHIEF JUSTICE ROBERTS: -- positions. You can oppose without participating. You can participate without opposing.

MR. SCHNAPPER: Right. Right. This case is both. But -- but there are circumstances which are only one or the other.

And this is -- this is a statute that -- that is deliberately written with overlapping provisions

to be sure nothing is missed.

In the phrase in the Fort Stewart case, I think, Justice Scalia, it is ex abundante cotilla, out of an abundance of caution, or in modern terms boots -- belt and suspenders. So these are deliberately overlapping provisions to -- to assure that --

JUSTICE ALITO: What is the test for determining whether an investigation has been done, and the person has testified? What degree of formality, if anything, is necessary?

If -- if somebody in -- in the company simply goes to the office of an employee or the workplace of an employee or encounters the employee in the hallway or someplace and asks a question, is that enough? Does it have to be --

MR. SCHNAPPER: No.

JUSTICE ALITO: -- a sort of a formal proceeding in -- in some sense?

MR. SCHNAPPER: It -- it -- in our view, it doesn't have to be formal, but there are two essential elements to an investigation or a proceeding or anything other internal being under this title. The first is that the employer must have a rule or policy forbidding the type of discrimination in question which is similar to the requirements in section 706(c) for State and

local agencies.

Second, the individual -- the official who did whatever you describe has to have been specifically authorized by the employer to play that role. Vicarious here wouldn't cover it.

If I could reserve the balance.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Ms. Blatt.

ORAL ARGUMENT OF LISA S. BLATT

ON BEHALF OF THE UNITED STATES,

AS AMICUS CURIAE,

SUPPORTING THE PETITIONER

MS. BLATT: Thank you, Mr. Chief Justice, and may it please the Court.

We think this case is best resolved under the opposition clause, and that clause does not require employees to utter magic words of opposition or to initiate the interview in which they express opposition to unlawful conduct. Rather, the clause is satisfied when a reasonable person would understand that the employee has objected to sexual harassment in the workplace.

And when an employee discloses or reports that she has been subject to unlawful sexual harassment, a reasonable person could certainly infer that the

employee opposes a practice made unlawful by the statute.

CHIEF JUSTICE ROBERTS: In that case, doesn't the opposing employee herself have a direct cause of action under Title VII? Given what Ms. Crawford described, you know, "that happened to me, too," she could proceed under Title VII herself.

MS. BLATT: Right. She has got timing requirements. So if she hasn't complained to the EEOC within the relevant time, she wouldn't have a cause of action for discrimination. But once she has retaliated -- an adverse action is taken against her because of what she has reported, then she has timing requirements on when she has to sue for the retaliation, and she did that here.

And this is a case where the Sixth Circuit tossed the case out on summary judgment, and it erred in doing so because the facts alleged in this case were more than ample to survive summary judgment on the question of whether she opposed what the Director of Employee Relations did to her.

She alleged that in the context of a sexual harassment investigation in which she was asked to disclose inappropriate behavior by the director, she reported repeated instances of offensive, objectionable,

and unwelcome conduct by him. For instance, she said that she had her head pulled into his lap and that in response she threw him out of the office, thereby indicating that she did not like this conduct.

The jury could easily infer from those facts that she opposed the director's conduct. Now, that timing would --

CHIEF JUSTICE ROBERTS: Would you go as far as Mr. Schnapper in determining what constitutes "opposition"? I mean, do you agree with him that a case where somebody says, "oh, Mr. Jones would never do that, and if he did, I think that would be awful" -- is that "opposition"?

MS. BLATT: If you -- yes, if a reasonable person could infer that. I think that we are similar.

But if you just are a reporter of unlawful conduct, that's enough. But this case is easier, much easier. She was a victim.

CHIEF JUSTICE ROBERTS: Yes, yes, I know, but -- I know, but --

MS. BLATT: I understand that. And if -- you can either decide the broader question or the question of the Petitioner here, which she reported that she was subject, and it makes it all the more evident, and certainly a jury could have found that she opposed

the conduct.

But we do think that at least a reasonable inference could be drawn -- when you report facts that would constitute unlawful activity, the reasonable inference is that you have objected.

CHIEF JUSTICE ROBERTS: Facts that would constitute unlawful activity. What about facts that -- I mean, many of these cases, of course, are he-said/she-said cases, and what about the facts that you are reporting confirm one side or the other? They just ask you, look -- and, you know, the person says, "Well, every day at three o'clock he came in and do this," and you're outside. And he says, "No, I wasn't there."

MS. BLATT: Right. If you just have a --

CHIEF JUSTICE ROBERTS: Are you opposing it if you say -- you know, you are asked, "Well, you know, you sit outside the office; did he come in there or not?" And you say, "Yes, he did."

MS. BLATT: I think this is where we have not embraced the position of the EEOC, that we don't think that expresses opposition if all you do is say, "here's what a person's job duties were and he was in town on that day" or "I had lunch with him on that day," and that would verify -- it may verify a victim's

statement or corroborate it and thereby be the essential evidence in the case, but it wouldn't come within the statutory language of opposing.

CHIEF JUSTICE ROBERTS: Even you knew that that was the critical fact in resolving the complaint?

MS. BLATT: If a reasonable -- well, if a reasonable person knew from all the circumstances, then maybe. If this -- unfortunately, if you don't like jury trials, this is a jury question whether you oppose the practice or not, and it would have to go to a jury based on the totality of the evidence.

JUSTICE SCALIA: Well, since this is a case where the --

JUSTICE KENNEDY: It seems to me that the participation clause is the line of least resistance. I understand we have to say what a hearing is and so forth. Are you asking us to resolve on the opposition clause because that will give more guidance to the system or --

MS. BLATT: No. When you said "least resistance," it certainly is the most sweeping and broad coverage. In that sense, you cover all witnesses and participants in the process, and we think Congress intended to do so here.

CHIEF JUSTICE ROBERTS: The opposition

clause is?

MS. BLATT: The participation clause is much broader coverage. It could -- it would cover anyone who participates in the investigation, whether or not they oppose the practice.

CHIEF JUSTICE ROBERTS: Well, it depends how you define the investigation --

MS. BLATT: Opposition.

CHIEF JUSTICE ROBERTS: -- the inquiry, and that's kind of a tough issue, it seems to me.

MS. BLATT: If this were before the EEOC, everybody who testifies in that proceeding or participates in the investigation would be covered. It doesn't matter whether you oppose a practice.

CHIEF JUSTICE ROBERTS: Right.

MS. BLATT: So in that sense, it's broader. The reason why this case is easier for you, under the opposition clause, is it's a narrow holding and it doesn't get you into the question of whether just an employer investigation is an investigation --

CHIEF JUSTICE ROBERTS: Well, I guess the question I was asking earlier, you have overlapping but not concentric categories, so the "opposing" may be broader than the "participating in" depending upon how we define either one.

MS. BLATT: That's exactly right, but at a minimum when you have a victim of sexual harassment who reports it to her employer in the context of an investigation where she's asked was there anything inappropriate and she recounts here, it's so clearly opposition. It so clearly should not have been thrown out on summary judgment. And it so clearly can force --

JUSTICE STEVENS: You think -- you think the conduct in this case is also covered by the participation clause?

MS. BLATT: Absolutely.

JUSTICE STEVENS: You do?

MS. BLATT: Yes.

JUSTICE BREYER: The problem with that is that I -- while I have the EEOC with me, say, on -- assuming your thing -- on, from what I read, on the opposition clause, when I looked into what the EEOC actually said here on the participation clause, I don't think I can characterize it, except for their litigation position.

MS. BLATT: But that --

JUSTICE BREYER: I can't characterize what they've said in their compliance manual as being with you on that.

MS. BLATT: That's correct. We don't and

neither does the EEOC interpret their compliance manual as --

JUSTICE BREYER: And they could easily change it. They could easily change it.

MS. BLATT: Yes, it is true that it's in a brief, it's on their Website, it's on home page, on their Website.

JUSTICE BREYER: Yes. It's not in their manual.

MS. BLATT: It's not in their compliance manual; it's in our amicus brief, but it is the EEOC's position. And, again, that's why I think it's an easier case for you under the opposition clause.

JUSTICE ALITO: Can you think of any other situation in which the law says that a person who testifies or provides information is protected against retaliation only if that person gives testimony of a particular type or gives a statement of a particular type?

MS. BLATT: No, but you have to remember there are two separate clauses. The statute under the opposition clause just says "oppose a practice made unlawful." If you didn't oppose a practice, you're not covered under that. You would be covered under -- in the proceeding, why there is such broad coverage. Once

you're under the participation clause, no matter what the substance of your testimony is, it's covered. It protects the process itself, regardless of whether it was -- it was determined true.

JUSTICE ALITO: Well, I understand that, but I'm -- what I'm asking is, is the reason to doubt whether Congress intended in the opposition clause to provide protection only for people who testify or provide information that goes in a particular direction?

MS. BLATT: I think --

JUSTICE ALITO: If the purpose is to -- is to elicit information and protect the people who come forward with the information, then why don't you provide the protection irrespective of what the person says?

MS. BLATT: I think that position is consistent with the EEOC, and I don't think we would oppose that position in the sense that it would give the greatest and broadest protection.

And what is so upsetting about this case is the gaping hole in statutory coverage that the Sixth Circuit left. It is an inexplicable gap that a complaining witness in an employer investigation would be unprotected from retaliation. The statute simply can't function, as intended by Congress, as intended by this Court, if there are all these incentives for

employees to investigate unlawful activity, witnesses come forward and report that they, in fact, have been subjected to sexual harassment, and employers are free to retaliate. They --

JUSTICE KENNEDY: I think that's a very strong argument for the participation clause.

MS. BLATT: It is. It is, but it's all the more reason that she has to be covered under one of them if not both of them. Witnesses simply are going to be afraid to fully cooperate if they're not given protection.

And if there are no questions, we'd ask that the Sixth Circuit be --

JUSTICE GINSBURG: The -- the other side says this is not an investigation. There was no charge filed. She's filed no charge. So this is not a qualifying investigation. What is the government's position on that?

MS. BLATT: Well, I mean, we think that is border-line absurd, although all courts that have reached the issue have held that. And it just -- it makes no sense, and it -- I'm not even --

CHIEF JUSTICE ROBERTS: I'm sorry. Have held what?

MS. BLATT: Have held that -- that the

internal investigation is covered as long as somebody has filed a charge. It's not clear who or that it has to be related to the subject matter. And that would mean if the investigation is conducted on the day a charge is filed at noon, all the witnesses who came in, in the morning, are unprotected; yet all the witnesses who came in, in the afternoon, would be protected. Yet nobody even knows that a charge has been filed. And that's just not something that Congress possibly could have intended and wanted to leave the morning witnesses unprotected from retaliation.

So I don't think the current state of the law under the participation clause is supported by the text, and it's certainly not supported by any policy under Title VII.

No questions?

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Young.

ORAL ARGUMENT OF FRANCIS H. YOUNG

ON BEHALF OF THE RESPONDENT

MR. YOUNG: Thank you, Mr. Chief Justice, and may it please the Court:

Title VII was the result of a congressional compromise which struck a balance between protecting the interests of employees and employers.

In relation to the anti-retaliation provisions of section 704, that balance was struck to protect the rights of employees to report allegedly discriminatory activity, as well as employers' rights to manage their workplaces. The participation clause covers activity or conduct in the course of an investigation, proceeding, or hearing under Title VII.

The opposition clause -- the actual words of the opposition clause protect an employee who has opposed a particular unlawful practice.

CHIEF JUSTICE ROBERTS: What -- what more could Ms. Crawford do to make it clear that she opposes what was alleged in this case?

MR. YOUNG: She could have -- she could have initiated making contact with the government official to register a complaint or an objection.

Instead, she made a disclosure or she cooperated in the investigation, Your Honor.

CHIEF JUSTICE ROBERTS: Well, how can the fact that what led to the statement change the characterization of the statement? She can initiate it, go in and say, "I oppose what's going on," or if somebody just asks her, you know, "how do you feel about what's going on," she says she opposes it. It seems to me in either case you look at the statement and not what

led to the statement.

MR. YOUNG: Congress chose to use the word "oppose," Your Honor. That's why the short --

CHIEF JUSTICE ROBERTS: That's why my hypothetical uses the word "oppose." In the first case, she goes in of own volition and says, "I oppose"; in the second case, she says "I oppose" in response to a question. Congress used the word "oppose," and my hypothetical in both cases used the word "oppose."

MR. YOUNG: If she's not taking the initiative, then she has to report it and request that something be done about it. Does the word -- if she uses the word "oppose," as in your hypothetical, that would not be the facts of this case, but that would probably nudge it to the line of opposition conduct because she's using the word "oppose."

CHIEF JUSTICE ROBERTS: Right. Well, is it real a magic word? She comes in and says, "you won't believe" -- you know -- "you think that's bad, wait till I tell you what he did to me," and goes on tells -- it's quite obvious from the context that she opposes it.

MR. YOUNG: Well, that's why we advocate a reasonableness standard, Your Honor, in the ears of the person receiving the information, but under the facts of this case, that standard was not met.

The true opposition activity -- it's called the opposition clause, not the disclosure clause, not the cooperation clause. There's an element -- and all the parties have provided the Court with a dictionary -- the various dictionary definitions of the word "oppose," all of which contain the common theme of resistance, coming up against something, communicating resistance.

When the -- when what Mrs. Crawford said to the human resources investigator in response to questioning is actually examined, it is making a disclosure. There's no request that anything be done about it. The time lag between the end of the alleged harassment and the actual reporting is over two months. Mrs. Crawford had multiple opportunities to report to her supervisor, her supervisor's supervisor, the director of employee --

JUSTICE SOUTER: You mean if she had made complaints after she had answered the questions in -- and given the information at issue here, that would convert her prior statements into opposition?

MR. YOUNG: That would -- the fact that Your Honor chose the term "complaint" would be a different situation from what we had here. A subsequent --

JUSTICE SOUTER: I'm asking you. You're in effect saying there has got to be some kind of what you

call active opposition; and I took it from what you said a moment ago that if she had given the evidence in question here, and then in the period, subsequent period of two months, made some sort of complaint, that that complaint would have qualified her original evidence as opposition.

Is that your position?

MR. YOUNG: That complaint would undoubtedly be opposition. Would it reach back --

JUSTICE SOUTER: You're taking about --

MR. YOUNG: Would it retroactively imbue the initial disclosure with an opposition quality? Yes. Yes.

JUSTICE SCALIA: It would? Why? It doesn't seem so to me. I mean, it either was or wasn't. You're making the argument, essentially, that "oppose" has two quite different meanings. You can ask somebody, you know, do you oppose the war in Iraq? And all you're asking is what is your opinion of the war in Iraq. Do you think it is good or bad?

But "oppose" is also used in a quite different sense. He -- you say somebody opposed the war in Iraq, you mean he went out and -- and paraded against it and so forth.

And your assertion is that in this

legislation, it has the latter meaning. It just doesn't ask for your opinion about whether sexual harassment is good or bad. It asks whether you were actively -- actively opposing it.

Now, once you adopt that position, I don't see how the fact that you -- that something that was not active opposition can be converted into active opposition by something that occurred later.

I mean, if you want to abandon your other argument, that's fine with me, but --

(Laughter.)

MR. YOUNG: Your Honor, I'm uncomfortable with the concept that subsequent -- a subsequent complaint can imbue a prior statement with that --

JUSTICE SCALIA: Would that uncomfortable? Say it doesn't. I mean, I -- I don't care if you're uncomfortable with it. Does it or doesn't it?

MR. YOUNG: Perhaps yes. But if it does --

JUSTICE SCALIA: Then I don't understand your case.

MR. YOUNG: Well, Your Honor, I -- I don't see that distinction as being relevant. Because if -- if a subsequent complaint is made a month, two months after the initial disclosing conduct, then we're -- then we're traveling on that subsequent complaint.

And the fact that a disclosure was made a month or two prior doesn't become a relevant watershed date in terms of when the protections of the statute arise.

The -- the -- the concept is something more than disclosure, something more than mere cooperation. The language of the statute is he or she has opposed a specific practice, not just opposition to the war in Iraq in general; not just opposition to sexual harassment in general; but that a specific --

JUSTICE SCALIA: It isn't just a specific -- again, if I don't understand your case, it isn't just a matter of the specific practice.

Your point is it is not asking your opinion. It is asking whether you are actively trying to eliminate it.

I think even if -- if you were asked your opinion, you know, do you -- do you oppose what, you know, what this supervisor did? And -- and you said yes, I don't favor it, I think it's bad, I think it's a bad idea, I -- as I understand your case, that's not opposition.

MR. YOUNG: Your Honor --

JUSTICE SCALIA: And I don't see how that is changed at all when you put it in the context of a

specific act of harassment as opposed to putting it in the context of harassment in general.

You -- you -- if you're hiding behind the -- the defenses you've built up, it seems to me those defenses require something more than an expression of your opinion of whether it's good or bad.

Your opinion is whether it's good or bad is not opposition.

MR. YOUNG: I agree with that, Your Honor. I used the term "practice" inartfully. Our argument is there is a specific act that the employee considers to be unlawful, and that's what the employee is opposing. So that is what needs to be communicated to a reasonable person within the government or within --

JUSTICE SOUTER: If the -- if the employee in response to the inquiry that's being made says yes, I saw my employer do "X" and it happened -- and I think it's terrible, that is certainly specific to the act.

MR. YOUNG: It's specific to the act, Your Honor, but I -- I would argue that does not cross the line into "and I oppose it."

JUSTICE SOUTER: But the reason -- but the reason it doesn't cross the line is you are, in effect, saying that "oppose" within the meaning of the statute has got to be read more narrowly than the -- than the

notion of oppose as we commonly use that word in common speech.

And I don't know why -- I don't know what your -- what your authority is for saying that "oppose" was not used in its commonsense everyday connotation.

MR. YOUNG: Well, I think the word "oppose" can be used in a specific sense in common everyday speech and can be used in a general sense, Your Honor. And I think --

JUSTICE SOUTER: But in my hypothetical, we're not talking about a general sense. In my hypothetical we were talking about a reference to a very specific act. So the generality problem doesn't arise. And yet despite the specificity, you say, and despite the fact that in common speech a -- a specific statement like that would be taken as opposition, you say it shouldn't be under the statute.

And the statute doesn't have any definition that narrows it. Common speech wouldn't narrow it your way.

Why should it be narrowed your way?

MR. YOUNG: The -- Your Honor's hypothetical of saying something is terrible would -- would -- would not be commonly understood to communicate opposition to --

JUSTICE STEVENS: Mr. Young, even under your definition, why is not the statement that's made in this case, "get the hell out of my office," wouldn't that be opposition even under your statement, under your definition? She's opposing his advance to her. That's an active opposition it seems.

MR. YOUNG: Her statement to him to get out of my office would --

JUSTICE STEVENS: Get the hell out of my office.

MR. YOUNG: Yes, Your Honor.

(Laughter.)

JUSTICE STEVENS: Why isn't that opposition under your statement -- under your definition?

MR. YOUNG: Well, the -- because the -- in the context of anti-retaliation provisions, making a statement to an alleged harasser to stop the harassment or get out of my office does not rise to opposition conduct, because the -- the -- the essence of the opposition clause is somehow putting the employer on notice.

If every employee who was a victim of sexual harassment and says stop, if that -- if that constitutes opposition conduct under the retaliation clause, suddenly that employee has two causes of action, one for

sexual harassment and one for retaliation.

JUSTICE BREYER: Well, that isn't even -- look, the best way to oppose a crime is to cooperate with the police when they investigate individual instances.

The best way to oppose sexual discrimination in the workplace is to cooperate with the employer when, in fact, he investigates individual instances.

Is what I've just said English? Does it make sense? And indeed, I'm just quoting the EEOC's own definition.

MR. YOUNG: Yes, it was in English. Yes, it makes sense, Your Honor, but I would beg to differ, respectfully. The best way to oppose sexual harassment is to go and make a complaint about it.

JUSTICE BREYER: It is your opinion. The EEOC's opinion is, as they state, the best way to oppose is to cooperate.

Now, what are we to do with, at least ambiguity, giving you that, I'll give you ambiguity. But we have the agency charged with the enforcement of this taking the side of it that is the opposite side that you are taking.

MR. YOUNG: Yes, Your Honor. There is -- there are enough contradictory statements in the

compliance manual itself that any deference that this Court is inclined to give to the EEOC's compliance manual should be tempered by the fact that even the EEOC recognizes the importance of employees taking initiative to report harassment and not --

CHIEF JUSTICE ROBERTS: I'm sorry. Please finish your answer.

MR. YOUNG: -- and not sitting back and waiting for the investigation to come to them.

JUSTICE GINSBURG: The investigation is not of her. She's testifying as a witness.

MR. YOUNG: She's offering a statement in an interview, Your Honor, as a witness, yes.

JUSTICE GINSBURG: And this is an act that's meant to protect people against discrimination in the workplace, including harassment.

MR. YOUNG: Yes.

JUSTICE GINSBURG: This is a woman who testified truthfully -- we have to assume that because this was tossed out at the very threshold, so we have to assume that everything she alleged in her complaint is true, right?

MR. YOUNG: It is not up -- it is not before this Court on a Rule 12 standard of assuming all the allegations are true, Your Honor; but it comes to the

Court on summary judgment.

JUSTICE GINSBURG: There is no -- no dis -- then there has to be no genuine dispute as to any material fact. That means we must take her allegations of fact as true at this point.

But in any case this is a statute that's meant to govern the workplace with all of its realities.

One of them was when they asked, well, why didn't you make a complaint, use whatever internal remedies are there are? She said, because the person in this outfit who is charged with receiving complaints is the harasser.

MR. YOUNG: That isn't -- that was her contention. That's not necessarily true.

JUSTICE GINSBURG: But we have to -- everything -- for you to prevail, since there has been no trial on the facts, we have to take the facts as she alleges them.

MR. YOUNG: There are multiple places to report sexual harassment, Your Honor. She -- she didn't even report it to her boss. She didn't report it to her boss's boss, and she didn't report it to the Director of Human Resources.

JUSTICE SCALIA: Well, I suppose your point would be it doesn't matter what the reason was that she

didn't report it. In order to recover here she has to have taken a public stand; and whatever the reason why she didn't, the fact is that she didn't.

Why do you get into, you know, the reason that she didn't?

MR. YOUNG: I agree with you, Your Honor. The reasons why she didn't make a report are immaterial.

JUSTICE SCALIA: And -- and I suppose that you -- you would require the -- the opposition to be somehow a public -- a public expression of opposition. No?

MR. YOUNG: Yes.

JUSTICE SCALIA: I mean, if one political candidate says that the other one opposed the war in Iraq, do you think the other candidate could say, that's a lie? I'm sorry, that the charge would be held to be correct if, in fact, the other candidate had never said anything about the war in Iraq, although deep in his heart he thought it was probably a bad idea.

Would you say that he opposed the war in Iraq? I don't think so.

MR. YOUNG: Your Honor, even when --

JUSTICE SCALIA: The implication is --

MR. YOUNG: Even when --

JUSTICE SCALIA: The implication is that he

came out with some public position opposing it, and that's your position as to the meaning of --

MR. YOUNG: Yes, Your Honor. And even the EEOC in its own compliance manual as set forth on page 38 of the red brief, the examples of opposition cited by the EEOC are threatening to file a charge, complaining, protesting, picketing. These are active verbs.

JUSTICE ALITO: Why wouldn't this fall within the participation clause? There was an investigation, and -- and you described the people who provided information as "witnesses."

MR. YOUNG: Yes.

JUSTICE ALITO: So why doesn't it fall under the participation clause?

MR. YOUNG: An -- an employer's internal sexual harassment investigation is not an investigation under this title.

JUSTICE ALITO: Never, even after -- even after a charge has been filed with the EEOC?

MR. YOUNG: Well, the five circuits that have squarely considered the issue have held that that's the trigger that brings the internal investigation under the rubric of the participation clause here, Your Honor.

JUSTICE ALITO: And what's your argument?

MR. YOUNG: I'll -- I'll take that.

JUSTICE GINSBURG: And how about taking our decisions in the Faragher and Ellerth case which in a sense made the employer's internal investigation part of the EEO process because it says to the employer, if you don't have that find of effective internal complaint and investigation procedure, then you're going to be stuck on respondeat superior liability. If you do, then you will be shielded.

So this Court's decision in those two cases seemed to me to say to every employer, as part of your EEO compliance you had better have this internal complaint procedure and investigation.

MR. YOUNG: I agree. Faragher and Ellerth put the carrot on the stick in front of the employers and say, here's an affirmative defense that will be available to you in certain harassment cases if you adopt a -- an anti-harassment policy which includes an investigation mechanism. However, such a policy and such a mechanism is not made mandatory by Faragher and Ellerth. The argument of --

JUSTICE SOUTER: Well, you say it's not made mandatory. Any employer who doesn't go through it is crazy. And I don't see how this Court, having imposed in practical terms the requirement that Justice Ginsburg just described, can then say, oh, but we're going to

construe this indefinite term of "investigation" to exclude this kind of employer activity which our construction of the statute has virtually mandated.

So that if in fact the employer's investigation succeeds in ending the problem and there is no EEOC complaint, those who participated in the investigation are absolutely helpless against retaliation. That would be a bizarre way to interpret a -- a statute in which we have any -- any opportunity to interpret "investigation" to include this kind of investigation.

What do you say to that?

MR. YOUNG: The fact that Faragher and Ellerth create an incentive to employers to develop these policies with investigate -- which include investigations, does not elevate such investigations to fall under the statutory requirement of being --

JUSTICE SOUTER: No. But I'm -- I'm giving you an argument as to why we should construe it to elevate it, and -- and the argument is that we, in effect, in what I think were correct decisions -- you agree, you said a moment ago, were correct decisions -- have in practical terms mandated this kind of an inquiry.

Why then would it be reasonable for us, if

we have any option in construing the term "investigation," to construe it to exclude this kind of investigation and exclude coverage of the people who under our decisions are supposed to come forward and -- and answer questions? Why would that be a reasonable construction?

MR. YOUNG: Because at some point, Your Honor, the construction departs so far from what can reasonably be supported by the language of the statute itself that it --

JUSTICE SOUTER: Well, why isn't it -- why isn't an investigation by the employer an "investigation"? That's the language of the statute.

MR. YOUNG: It -- it is an "investigation." Our contention is it does not fall under the category of an "investigation" under this title even despite Faragher and Ellerth.

CHIEF JUSTICE ROBERTS: I thought Faragher and Ellerth --

JUSTICE SCALIA: Why couldn't he -- I'm sorry, Chief Justice.

CHIEF JUSTICE ROBERTS: I thought Faragher and Ellerth were limited to the hostile work environment cases.

MR. YOUNG: Of supervisory harassment,

that's true, Your Honor.

CHIEF JUSTICE ROBERTS: Well -- well, that's a different question. Is the defense we recognized in Ellerth and Faragher in the hostile work environment case or in the specific action case as well?

MR. YOUNG: My understanding of Faragher and Ellerth is that it -- it applies in the hostile work environment case involving harassment by a supervisor.

JUSTICE SCALIA: I thought you were going to answer Justice Souter with the assertion that if indeed the Court wants employers to conduct these investigations, it does not want to reduce the incentive to do so.

And the rule that is urged by the other side means whenever the -- whenever the employer conducts such an investigation, any employee who is smart enough to come in and testify against -- against sexual harassment has a guaranteed job. It is almost like -- almost like being a Federal judge.

[Laughter.]

JUSTICE SCALIA: You can't be fired after that, or the employer can't fire her without opening himself up to a lawsuit under -- under this provision. And he might win the lawsuit, but it's going to cost money. So why -- maybe an employer would rather say,

you know, I'd rather roll the dice and -- and not conduct an investigation and insulate all of my hostile employees from -- from employment actions.

MR. YOUNG: That would be the -- that would be the employer's interest. The disincentive that the employers would have to comply with these -- with this Court's directives or strong suggestions in Faragher and Ellerth is employers would stop conducting these investigations if everyone they interviewed was going to be a potential retaliation claim.

JUSTICE SOUTER: And instead they would substitute the -- the response to an EEOC investigation in which they would not have the leg to stand on in opposing respondeat superior. I suppose that would be an inducement for them to go ahead with the investigation; wouldn't you?

MR. YOUNG: Their -- they would lose the protections of Faragher and Ellerth. We would be back to respondeat superior liability. It sounds illogical, but I -- I submit to the Court that if -- that if it is going to be a Hobson's choice and it -- it would be a situation in which employers would have an incentive to choose not to -- would choose to abandon their policies and take their chances.

If they have to interview 20 people in a --

in a retaliation -- in a sexual harassment case, there's 20 potential plaintiffs because they all participated. It doesn't even matter if the employer knows what the employees said. If -- if some type of discipline or adverse action is imposed by the employer on any of those employees, there is an instant retaliation claim.

JUSTICE SOUTER: By the way, I take it in -- in this case, although this is not the issue before us, that if you -- if you lose on the issues before us, it is still your position that ultimately you should win this case, because you have good evidence, you say in your briefs, to indicate that the reason for firing had nothing to do with retaliation.

That's true, isn't it?

MR. YOUNG: I have two arguments left in my quiver on summary judgment, Your Honor, that the trial court didn't even consider. So if this case goes back down, that's what I'm going to ask the trial court to consider.

JUSTICE GINSBURG: What are the other arguments on summary judgment.

MR. YOUNG: The lack of causation, the lack of knowledge between whatever told the investigator in this confidential interview as to which confidentiality was promised and delivered, the lack of any knowledge --

-- the lack of any evidence that the decision-makers regarding Ms. Crawford and her job, that they knew what she said in this interview. The lack of causation is my first ground and the lack of pretext is my second ground that has yet to be considered. Because of the abundant evidence of misconduct which was discovered regarding how Ms. Crawford was not running her office.

JUSTICE GINSBURG: When you say it's not that the employer is stuck because there's a potential retaliation claim, if the employer is certain of its grounds, that this discharge had nothing to do with her testimony, then go ahead and discharge her.

MR. YOUNG: Yes, Your Honor.

JUSTICE SCALIA: Do you get your litigation fees if you win? If the plaintiff here loses, does she pay all the attorneys' fees that this employer has incurred on this litigation?

MR. YOUNG: It is very difficult for a victorious defendant to recover attorneys' fees under section 1988, Your Honor. The threshold is very high. I've never recovered the fees in my 14 years working for this office in a section 1983 case.

JUSTICE SCALIA: So even when you win you lose.

MR. YOUNG: Yes. In that sense, yes, Your

Honor. Or a Title VII case.

JUSTICE GINSBURG: On the other side, that attorney, there's a large disincentive. He hasn't got a good case. He's not going to be paid any retainer as you might be. And he's not going to get any counsel fees. Why should such -- why should it -- counsel be available to a person who obviously was discharged for having her hand in the till and not because she was harassed?

MR. YOUNG: First of all, there is no allegation that Ms. Crawford embezzled or took money. There is no allegation, and she was not disciplined. She was not discharged based on any allegation she was stealing money. That's simply not a factor.

JUSTICE GINSBURG: No. I meant that as a hypothetical.

MR. YOUNG: Oh, I'm sorry.

JUSTICE GINSBURG: What was the reason that she was -- what was the employer's reason for discharging her?

MR. YOUNG: Multiple -- she was the payroll coordinator and her office -- all these checks were sitting in her office and they were not being processed. Some of them were six, eight, ten months old. Her office was in complete disarray. And this came to light

as a result of this sexual harassment investigation when her subordinates were interviewed and they provided testimony regarding how she was running her office, and that eventually got to the finance department of the government, which hired an outside auditor which went in and generated all this evidence at great expense to the metropolitan government to hire this outside auditor.

That's where the evidence was developed to terminate Ms. Crawford six months after the statement to the investigators. So that's -- those were the facts on how it happened.

I forgot Your Honor's original question, or maybe I answered it. I don't know.

JUSTICE GINSBURG: I said if you have a really strong case of having discharged this person for cause that has nothing at all to do with harassment, you are going to win the lawsuit and it would be hard for the plaintiff to get a decent lawyer to represent her side of the case because she's going to lose.

MR. YOUNG: In theory, yes; but the burdens of litigation, which is part of the congressional compromise -- back in 1964 in order to gain passage of the Civil Rights Act, employer's interests were deemed to be of equal magnitude as employees'.

CHIEF JUSTICE ROBERTS: You're not going to

win -- you're not going to win this case; you're going to settle if you lose up here, right?

MR. YOUNG: If I lose up here, first I've got two more shots at summary judgment, Your Honor.

JUSTICE KENNEDY: You don't have to answer that. We'll be glad to see you again.

(Laughter.)

MR. YOUNG: I hope I'm not --

CHIEF JUSTICE ROBERTS: My point is simply that the incentive system is skewed because if you lose you pay not only your attorneys' fees but the complainants'. If you win, you have to incur yours.

MR. YOUNG: In civil rights cases the incentives, that incentive fee, that incentive system, is skewed against the defendants because of the public policy reason favoring --

CHIEF JUSTICE ROBERTS: I'm not saying it shouldn't be. But in terms of the pressures towards settlement, it is a very strong incentive.

MR. YOUNG: Yes.

JUSTICE STEVENS: Is bringing frivolous cases cost-free for the plaintiffs? There are certain costs.

MR. YOUNG: Well, Your Honor, many of these types of cases are taken on a contingent fee basis

except for hard costs.

JUSTICE BREYER: It is a mix. I mean, you know, a lot of plaintiffs might be afraid to bring these cases because they'll be accused of doing all kinds of bad things. They don't want their reputations ruined. They have lawyers who take contingent fees because they have to pay for it. Oh the other hand, you have problems with your costs and you have problems dismissing people who should be dismissed. Everybody has problems in this area. That's why we have law and lawyers. They try to minimize it. This doesn't seem fruitful to me.

JUSTICE SCALIA: Isn't it true that financially it is always cost-free for the plaintiff because she has an attorney who is taking it on a contingent basis? Now, you could say it's not cost-free to the lawyer; but even that's not always true because if the lawyer has nothing else to do he may as well be doing this, you know, whatever the odds are.

MR. YOUNG: I agree with that, Your Honor.

And if the Court has no more questions, thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Schnapper, you have four minutes remaining.

REBUTTAL ARGUMENT OF ERIC SCHNAPPER
ON BEHALF OF THE PETITIONER

MR. SCHNAPPER: Thank you, Your Honor, may it please the Court:

Protecting witnesses from being fired because they provide information in internal investigates is not going to interfere with the conduct of those investigations or deter them. We know that from experience. Until the decision in this case, no one had questioned the applicability of the opposition clause to a witness in an investigation who complains about sexual harassment. It was simply not in dispute. The compliance manual in this regard was entirely clear since 2000 because the Commission took the position witnesses who complained were protected by the opposition clause. None of the problems Mr. Young expressed concern about had happened.

CHIEF JUSTICE ROBERTS: Counsel, Ms. Blatt said the government would prefer a decision under the opposition ground as opposed to the participation. Do you have a preference?

MR. SCHNAPPER: I think she said she thought it was easier. We don't have a preference. But I'd like to address briefly the participation clause. The participation clause does have the singular value, as

Justice Alito suggested, that it is evenhanded, that it will protect witnesses for both sides. And the integrity of the process is certainly strengthened if both witnesses, witnesses on both sides, know they're protected from retaliation.

JUSTICE KENNEDY: Is the only question --

-the participation is not in doubt. The only question is whether it's an investigation under this subtitle.

MR. SCHNAPPER: But the question is under this title. That language its certainly broad enough, as Justice Souter suggested, to encompass the sort of process that's at issue here. As Justice Ginsburg pointed out, this Court's decisions in Faragher virtually mandate these decisions.

In response to the Chief Justice's point --

JUSTICE SCALIA: You think the language "investigation under this title" is the equivalent of "investigation with respect to an alleged offense under this title"? That doesn't strike me as self-evident at all. It seems to me "investigation under this title" to me means an investigation under this title, which is not an investigation by the employer.

MR. SCHNAPPER: I think the words under this title are elastic enough to support either meaning. The context of the statute and the way this Court has

repeatedly construed it give meaning to it. In response to the concern that the Chief Justice raised, Faragher and Ellerth are not the only decisions that provide an incentive for these investigations. The Court's decision in Kolstad makes the existence of this sort of process essential to avoid awards of punitive damages. So even in non-harassment cases that same incentive has been created by the courts.

In a situation involving harassment, the contours of the investigation are fact largely shaped by Federal law, not only policy guidance which the EEOC has issued helping employers figure out what to do, but a large and growing body of case law under Faragher and Ellerth elucidating what those requirements are. Particularly importantly here, the victims of sexual harassment are virtually required by the court to use these processes. Ms. Crawford had to speak up at some point or she had had no claim.

And last, as a practical matter, if sexual harassment is going to be stopped, it's mostly going to happen through these internal processes. By the time most of these controversies about sexual harassment get to the EEOC or the courts, the victims have left their jobs. In this Court's decision in Pollard, the individual had been fired. In Souter she had been

driven from her job. In Faragher and Ellerth and Harris, those had quit. If you look at the array of lower court decisions involving sexual harassment, by the time a case gets to the Commission in most of those cases the victim has give up and left.

So it's exceptionally important that these processes be effective and evenhanded.

No further questions.

CHIEF JUSTICE ROBERTS: Thank you, counsel. The case is submitted.

(Whereupon, at 1:59 p.m., the case in the above-entitled matter was submitted.)