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CLIENT ALERT

UPDATE FROM THE LABOR & EMPLOYMENT TEAM

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Contacts

If you have questions or would like more information, please contact any of the attorneys listed at the end of this Alert. Hunton & Williams' labor and employment law practice covers the entire spectrum of labor and employment litigation, arbitration, administrative practice before the NLRB, EEOC, and the DOL, federal contract compliance, wage-hour standards, workplace safety and health standards, workers' compensation, contractual rights and remedies, Sarbanes-Oxley and whistleblower claims, workplace investigations and client counseling under federal and state labor and employment laws.

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Supreme Court Expands Title VII's Antiretaliation Provision

If an employee gives evidence to the employer in the course of an internal investigation of complaints addressing discrimination, is the employee involved in protected "opposition" under the antiretaliation provisions of Title VII and similar laws? The Supreme Court held "yes" in its unanimous decision last week in *Crawford v. Metro Gov't of Nashville and Davidson County, Tennessee*. This decision expands the reach of Title VII's antiretaliation clause, which forbids employers from retaliating against employees who report workplace discrimination or harassment.

Title VII's antiretaliation provision contains two separate clauses. The opposition clause makes it unlawful for an employer to discriminate against an employee who contests unlawful employment practices under Title VII. The participation clause makes it unlawful to discriminate against any employee who has made a charge, assisted, or participated in a government investigation, proceeding, or hearing under Title VII. Though it has always been well-settled that the "opposition" clause of the antiretaliation provision provides protection to employees who take the initiative to report workplace harassment, there was uncertainty as to whether the provision provides protection to an employee who, for the first time, gives evidence of harassment in response to an employer's investigation. This was the issue before the Supreme Court in *Crawford*.

Crawford v. Metro. Gov't of Nashville and Davidson County, Tennessee

Vicky Crawford was a 30 year employee of Metropolitan Government of Nashville and Davidson County, Tennessee ("Metro"). In 2002, Crawford was interviewed as part of an internal sexual harassment investigation resulting from rumors about Metro's director of employee relations. Crawford described several instances of sexually harassing behavior by the employee relations director. Following the investigation, Crawford was fired, purportedly for embezzlement.

In reversing the decision of the Sixth Circuit, the Supreme Court applied the ordinary meaning of "oppose" and determined that Crawford was protected by the opposition clause of the antiretaliation provision of Title VII because her statements gave an account of sexually obnoxious behavior toward her by a fellow employee. The Court referred to an EEOC guideline that says an employee communicating her belief to her employer that the employer has engaged in discrimination virtually always constitutes opposition. The Court specifically rejected the view that the employee must instigate or initiate the claim to qualify under

the opposition clause and instead held that an employee who gives evidence of harassment in response to questions is sufficient to qualify as opposition and is thus protected by the antiretaliation clause of Title VII.

Implications of the Expansion of Title VII's Antiretaliation Provision

In its opinion, the Court rejected the employer's argument that expanding the antiretaliation provision would discourage employers from conducting internal investigations. The Court explained that the requirements set forth in *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. Boca Raton*, 524 U.S. 775 (1998), provide employers with sufficient incentive to investigate complaints of workplace harassment.

The so-called *Faragher/Ellerth* defense protects employers from vicarious liability for an actionable hostile environment created by a supervisor so long as the employer exercised reasonable care to prevent or correct the conduct. However, the defense is not available where the supervisor's conduct results in discharge or demotion.

In light of the *Crawford* decision, employers must be mindful that their legal obligations are not limited to employees who affirmatively make complaints of harassment, but they also extend to employees who give evidence of harassment or discrimination during the course of an investigation. Employers should take steps to ensure that their managers and human resources employees who may conduct investigations are properly trained and are aware of the employer's legal obligations — both as it relates to how to conduct a proper investigation and as to the fact that anyone who reports harassment is protected by Title VII's antiretaliation provision. In this regard, all details provided during investigations and interviews that may refer to or insinuate acts of discrimination or harassment should be reported and documented. Though Title VII's antiretaliation provision does not insulate a complaining employee from the application of disciplinary and performance rules and policies, employers must be sure that any adverse action taken against such an employee is based on a neutral application of the rules and policies and not tainted by the employee's prior complaint.

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