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Supreme Court Opens Door to Third-Party Retaliation Claims Against Employers

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On January 24, 2011, in Thompson v. North American Stainless, LP, *the United States Supreme Court held unanimously that third parties who have not engaged in protected activity themselves, but who have suffered an adverse action in retaliation for the protected activity of one with whom they have a sufficiently close relationship, have standing to bring retaliation claims under Title VII of the Civil Rights Act of 1964. In its decision, the Court acknowledged that it was opening the door to an entirely new class of employment plaintiffs but stated that the statutory text and the broad remedial purpose of Title VII compelled its holding.*

The facts of the case are straightforward. Eric Thompson and his fiancé, Miriam Regaldo, were both employees of North American Stainless ("NAS"). Three weeks after NAS received notice that Regaldo had filed a charge with the Equal Employment Opportunity Commission alleging sex discrimination, NAS terminated Thompson's employment. Thompson brought suit in the United States District Court for the Eastern District of Kentucky asserting a claim of unlawful retaliation under Title VII. The court granted summary judgment for NAS on the basis that Title VII does not permit third-party retaliation claims. An *en banc* panel of the United States Court of Appeals for the Sixth Circuit affirmed the lower court's decision. The Supreme Court, however, reversed, holding that: (1) if Thompson's allegations were true, NAS's termination of Thompson would constitute unlawful retaliation under Title VII, and (2) Title VII granted Thompson standing to assert a Title VII cause of action despite the fact that he had not engaged in any protected activity.

Title VII Antiretaliation Provision Protects Undefined Class of Third Parties

The Supreme Court had "little difficulty concluding that if the facts alleged by Thompson are true, then NAS's firing of Thompson violated Title VII." Relying upon its 2006 decision in *Burlington N. & S.F.R.Co. v. White*, the Court explained that "Title VII's antiretaliation provision must be construed to cover a broad range of employer conduct" and that "Title VII's antiretaliation provision prohibits any employer action that 'well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'" In

the instant case, the Supreme Court found it "obvious" that a "reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired."

The Court acknowledged that its ruling "place[s an] employer at risk any time it fires any employee who happens to have a connection to a different employee who filed a charge with the EEOC," and it declined to define a class of relationships for which third-party retaliation is unlawful. The Court observed that: "We expect that firing a close family member will almost always meet the *Burlington* standard, and inflicting a milder reprisal on a mere acquaintance will almost never do so," and emphasized that the determination of whether a particular firing violates Title VII would depend on the circumstances. Although the Court provided no bright-line rule, it did affirm the principle that the standard for judging harm for purposes of a Title VII retaliation claim is "objective" so as to "avoid the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff's unusual subjective feelings."

"Zone of Interests" Test Determines Standing

The Court found the question of whether Thompson could sue NAS under Title VII "more difficult." Based on the statutory provision that "a civil action may be brought … by the person claiming to be aggrieved," the Court conducted an analysis of who has standing to assert retaliation claims under Title VII. The Court rejected the application of the very broad injury-in-fact standard for standing under Article III of the United States Constitution. Such an expansive rule, the Court explained, would lead to "absurd consequences," such as a shareholder being able to assert a retaliation claim under Title VII based on the discriminatory firing of valuable employee due to the resulting diminution in the value of company stock. On the other hand, the Court rejected as too narrow NAS's argument that standing should be limited to only those who actually engaged in protected activity.

Ultimately, the Court adopted the "zone of interests" standard it had previously applied to claims under the Administrative Procedures Act. In the context of a Title VII retaliation claim, "any plaintiff with an interest 'arguably sought to be protected by the statutes'" falls within the "zone of interests" and may bring suit. The Court held that, in this case, Thompson fell within the zone of interests Title VII was enacted to protect because "the purpose of Title VII is to protect employees from their employers' unlawful actions." In holding that Thompson was a "person aggrieved" with standing to sue NAS, the Court noted that Thompson's firing was not "collateral damage," but rather "injuring him was the employer's intended means of harming Regalado" for filing her EEOC Charge.

Implications for Employers: More Retaliation Suits

With the *Thompson* case, the Supreme Court has sent a clear signal to employers that actions intended to deter or punish employees for exercising their legal right to assert a claim under Title VII will invite fresh legal claims for retaliation. This ruling is the third in a string of Supreme Court decisions that enforce a broad reading of Title VII's protection against retaliation. In the *Burlington* case in 2006, the Court defined illegal retaliation to include any action likely to dissuade a reasonable worker from engaging in protected activity, even if the challenged action fell short of an "adverse employment action." In 2009, in *Crawford v. Metro. Gov't of Nashville & Davidson County, Tenn.,* the Supreme Court held that an employee/witness who responds to questions in an internal investigation is engaged in protected activity for purposes of Title VII's anti-retaliation provision. Now, in the wake of the *Thompson* case, employers must be aware that even employees who have not themselves engaged in protected activity may be able to bring a retaliation claim under Title VII.

Retaliation claims are already on the rise: the EEOC reports that retaliation charges under Title VII and other antidiscrimination statutes increased from 21,613 in Fiscal Year 2000 to 36,258 in Fiscal Year 2010. As a result of the *Thompson* decision, the number of retaliation charges is likely to increase further.

How Employers Can Protect Themselves

The first line of defense for employers against third-party retaliation claims is ensuring review of the legitimate business basis for any adverse action against an employee, before the action is taken. This review—often conducted by the Human Resources department or a high-level manager—is a basic element of risk management and a sound business practice. Even so, some employers reserve such review for situations involving "red flags," such as actions taken against employees who have raised a complaint of unfair treatment or who are otherwise in a legally protected category (e.g., a racial minority, an older employee, or an employee recently returned from or soon to go out on FMLA or disability leave). Now, family members or fiancés of employees who have filed EEOC charges also join the ranks of employees whose dismissal may raise heightened risk of litigation. Those employers that hope to reduce the ranks of "red flag" category employees by adopting anti-nepotism and non-fraternization policies, however, will not necessarily escape the risk of third-party retaliation actions, as the *Thompson* decision did not foreclose retaliation claims by close friends or trusted co-workers of employees who engage in protected activity.

The lesson of *Thompson* is that review of the justification for an adverse action and documentation of the legitimate basis for that decision should be a required step before taking any adverse action, regardless of whether the affected employee is in a known protected category or has personally engaged in protected activity. Where a risk factor for legal suit is known—a category which must now include close association with another employee who has engaged in protected activity—employers should also consider legal review of proposed adverse actions.

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