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U. S. Supreme Court Expands Scope of Individuals Who Can Bring Title VII Retaliation Claims

The U. S. Supreme Court recently expanded the law on individuals who have a potential claim under the anti-retaliation protections of Title VII in Thompson v. North American Stainless, LP, 131 S. Ct. 863, 870 (January 24, 2011). In an 8-0 decision, without Justice Kagan, the Court found that "Title VII's anti-retaliation provision prohibits any employer action that well might have dissuaded a reasonable worker from making or supporting a charge of discrimination," including an employer's action taken against a third-party who has not himself or herself engaged in protected activity. Id. at 868.

The Thompson decision broadens the scope of retaliation claims beyond reprisals against employees engaged in protected activity, such as the protected activity of filing a discrimination charge with the EEOC, by holding that reprisals against third-parties intended to punish other employees who are engaged in protected activity are unlawful as well. The Court declined "to identify a fixed class of relationships for which third-party reprisals are unlawful," stating that "the significance of any given act of retaliation will often depend upon the particular circumstances." Id. However, the Court provided the following guidance:

> We expect that firing a close family member will almost always meet the *Burlington* standard [defining retaliation under Title VII], and inflicting a milder reprisal on a mere acquaintance will almost never do so, but beyond that we are reluctant to generalize. . . Given the broad statutory text and the variety of workplace contexts in which retaliation may occur, Title VII's anti-retaliation provision is simply not reducible to a comprehensive set of clear rules.

Id. (internal citations and quotations omitted) (emphasis in original).

Key Facts and Points of Law

Eric Thompson and his fiancee were employees of North American Stainless, LP ("NAS"). Mr. Thompson's fiancee filed a charge against NAS with the EEOC alleging sex discrimination. Three weeks after NAS learned of the charge, NAS fired Eric Thompson. Mr. Thompson filed his own charge with the EEOC and a subsequent lawsuit in the United States District Court for the Eastern District of Kentucky alleging that NAS fired him in retaliation for his fiancee's protected activity.

The District Court granted summary judgment to NAS, holding that Title VII does not allow third-party retaliation claims. The Sixth Circuit Court of Appeals en banc affirmed, holding that Title VII does not create a third-party retaliation cause of action for persons who have not engaged in protected activity.

The U. S. Supreme Court reversed and remanded, holding that NAS' firing of Mr. Thompson in response to his fiancee's protected activity, if true, is unlawful retaliation under Title VII. Although Mr. Thompson did not engage in protected activity himself, he is an aggrieved person with standing to bring such a retaliation claim. The Court stated:

> Thompson was an employee of NAS, and the purpose of Title VII is to protect employees from their employers' unlawful actions. Moreover, accepting the facts as alleged, Thompson is not an accidental victim of retaliation -- collateral damage, so to speak, of the employer's unlawful act. To the contrary, injuring him was the employer's intended means of harming [his fiancee]. . . In those circumstances, we think Thompson well within the zone of interests sought to be protected by Title VII. He is a person aggrieved with standing to sue.

Id. at 870.

Implications for Employers

- The decision in Thompson follows other recent U. S. Supreme Court decisions expanding the scope of anti-retaliation protections. See, Crawford v. Metro. Gov't. of Nashville & Davidson County, 555 U.S. 271 (2009) (employee who speaks out about discrimination during internal investigation of another employee's sexual harassment claim protected from retaliation under Title VII); CBOS West, Inc. v. Humphries, 553 U.S. 442 (2008) (race retaliation claims actionable under 42 U.S.C. § 1981); Gomez-Perez v. Potter, 553 U.S. 474 (2008) (retaliation claims actionable for federal employees under Age Discrimination in Employment Act). For additional information, see, our February 5, 2009 and June 3, 2008 Client Alerts at www.socw.com.

- Due to these recent U. S. Supreme Court rulings, the number of cases alleging claims of retaliation continues to increase in the federal and state courts. Such claims are now routinely added to other employment claims, providing potentially important tools for the plaintiff's bar and challenges for employers.

- To reduce risk, employers should consider (i) including anti-retaliation policies in employee handbooks and/or policies, as well as strong training programs; (ii) keeping protected activities, such as internal complaints of discriminatory treatment or harassment, as strictly confidential as possible; and (iii) limiting the pool of employees with knowledge of protected activity (while still adequately investigating) so as to reduce the number of individuals who might have standing to claim retaliation.

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