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U.S. Supreme Court Holds that a Third-Party Has Standing to Pursue a Title VII Retaliation Claim

By Ted Schroeder and Marcy McCullough

In *Thompson v. North American Stainless, LP*, 09-291 (Jan. 24, 2011), the U.S. Supreme Court held that Title VII's anti-retaliation provision provides a cause of action to any individual with an interest "arguably sought to be protected by [Title VII of the Civil Rights Act of 1964 ("Title VII").]" The Court's decision opens the door to third-party Title VII retaliation claims by a wide, but undefined range of employees **who have never engaged in protected activity**.

Facts & Procedural History

Both the plaintiff, Eric Thompson and his fiancée, Miriam Regalado, were employees of North American Stainless (NAS). Thompson met Regalado when she was hired by NAS in 2000. In September 2002, Regalado filed a charge with the Equal Employment Opportunity Commission (EEOC) alleging that her supervisors discriminated against her based on her gender. On February 13, 2003, the EEOC notified NAS of Regalado's charge. Approximately three weeks later, on March 7, 2003, NAS terminated Thompson's employment. At the time of his termination, Thompson was engaged to Regalado and their relationship was common knowledge at NAS. In his lawsuit, Thompson alleged that he was terminated in retaliation for his fiancée's EEOC charge, while NAS contended that performance-based reasons supported Thompson's termination.

On June 5, 2009, a divided panel of the U.S. Court of Appeals for the Sixth Circuit, affirming the decision of the district court, ruled that, "under its plain language" Title VII "does not authorize a retaliation claim by a plaintiff who did not himself engage in protected activity." On January 24, 2011, the United States Supreme Court reversed the Sixth Circuit's decision.

The Supreme Court's Decision

Delivering the opinion of a unanimous Court, Justice Scalia identified two issues: "First, did NAS's firing of Thompson constitute unlawful retaliation? And, second, if it did, does Title VII grant Thompson as cause of action?"¹

In addressing the first question, the Court relied upon its prior ruling in *Burlington N.S.F.*

R. Co. v. White,² noting that Title VII's anti-retaliation provision is broader in coverage than Title VII's provision regarding discrimination. Particularly, Title VII's anti-retaliation provision prohibits an employer action that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." Applying the *Burlington* standard to this case, the Court reasoned that an employee may well be dissuaded from engaging in protected activity if she believed that her fiancé would be fired in retaliation for her protected activity.

Throughout the litigation, NAS raised the concern that applying this standard in the third-party context opens the door to potential retaliation claims from any employee who happens to have a connection to another employee. Indeed, as the Court itself asked, "perhaps retaliating against an employee by firing his fiancée would dissuade the employee from engaging in protected activity, but what about firing an employee's girlfriend, close friend, or trusted co-worker?" Although acknowledging the legitimacy of NAS's concern, the Court rejected "a categorical rule that third-party reprisals do not violate Title VII." Moreover, the Court declined "to identify a fixed class of relationships for which third-party reprisals are unlawful." Nevertheless, the Court provided practitioners with a kernel of guidance when it explained, "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, but beyond that we are reluctant to generalize."

In addressing the second question – who can actually bring a cause of action for the alleged retaliatory behavior – the Court looked to the plain language of the statute. Title VII provides that "a civil action may be brought ... **by the person claiming to be aggrieved**" NAS urged the Court to adopt a narrow reading of Title VII and to consider only the person who was the subject of unlawful retaliation to be deemed an "aggrieved person" under the law. The Court rejected this narrow reading of Title VII. Instead, the Court adopted a "zone of interests" standard for determining who is "aggrieved" under the statute. The Court explained that this standard provides a cause of action to any plaintiff with an interest "arguably sought to be protected by [Title VII]." The Court found that Thompson fell within the "zone of interests" sought to be protected by Title VII because: (1) Thompson was an employee of NAS, and the purpose of Title VII is to protect employees from their employer's unlawful actions; and (2) accepting Thompson's allegations as true, his termination was effectively an act through which NAS punished Regalado for filing her charge of discrimination. Thompson, therefore, was a "person aggrieved" and could pursue a Title VII retaliation action.

The Decision's Impact on Employers

In 2010, for the first time ever, retaliation surpassed race as the most frequently filed charge with the EEOC. The *Thompson* ruling will likely facilitate the filing of a new genre of retaliation claims that may continue this trend through 2011 and for years to come. While the U.S. Supreme Court provided limited guidance as to how an employer might reduce its exposure to such third-party retaliation claims, employers may want to consider:

- **Training of Managers/Supervisors on Third-Party Retaliation:** While managers/supervisors may have been trained that it is impermissible to retaliate against an employee who lodges an internal complaint/charge, these persons should understand that retaliation has a broader scope. Given the uncertain scope of the *Thompson* decision, managers and supervisors must understand that statutorily protected activity should not be used as a basis for retaliating against any employee.
- **Reviewing Retaliation Policies:** Employers should make sure that the language in their non-retaliation policies can be construed broadly enough to prevent retaliation against third-parties.
- **Review Policies Relating to Familial and/or Romantic Relationships Within the Same Work Unit, Location, Company:** While the decision to permit romantic partners, spouses, and other family members to work together is a function of workplace culture that implicates many issues beyond the retaliation context, employers should understand that the more closely family members work, the greater the risk for potential third-party retaliation claims. Employers are well-advised to review their policies in this area and ensure that they are being enforced and applied consistently.

Because the concept of a third-party retaliation claim under Title VII and the application of the "zone of interests" standard is novel to lower courts, employers are wise to follow the jurisprudence that will arise from and further interpret the U.S. Supreme Court's ruling in *Thompson*.

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Ted Schroeder is a Shareholder, and Marcy McCullough is Knowledge Management Counsel, in Littler Mendelson's Pittsburgh office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, Mr. Schroeder at tschroeder@littler.com, or Ms. McCullough at mmccullough@littler.com.

¹ Justice Kagan recused herself from this decision.

² 548 U.S. 53 (2006).