

## Schneider Pfahl & Rahmé LLP

### A MESSAGE FROM DAN SCHNEIDER

#### This Month.

Friends and Clients:

This month we are pleased to feature a guest writer / employment counsel, Alix R. Rubin, Esq. I met Alix when we represented different clients with congruent interests in a matter that was successfully settled through mediation. Alix is a knowledgeable and skillful attorney (admitted in both NY and NJ) and is wonderful to work with. She knows the subject of employment law well. It's nice to know the Supreme Court is helping to protect employees who are wrongfully discharged in violation of existing law.

We hope to see you at the April 4th First Mondays!  
(see: [www.firstmondays.com](http://www.firstmondays.com) for details).

Cheers,  
Dan

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### FEATURED ARTICLE

#### Supreme Court: Third Parties May Sue For Retaliation

By: Alix R. Rubin, Esq.

A man who was fired after his fiancée filed a sex discrimination charge can sue their common employer for retaliation, the U.S. Supreme Court recently held. In a unanimous decision that follows the longstanding policy of the Equal Employment Opportunity Commission ("EEOC"), the Court ruled that such third-party retaliation suits are viable under Title VII, the nation's major job bias law.

The defendant in Thompson v. North American Stainless, LP, No. 09-291, 562 U.S. \_\_\_\_ (Jan. 24, 2011), fired the plaintiff three weeks after learning that his fiancée, also an employee, had filed a sex discrimination charge with the EEOC. Plaintiff sued, claiming that the employer had retaliated against him for his fiancée's protected activity.

### FEATURED ARTICLE

#### [Supreme Court: Third Parties May Sue for Retaliation](#)

Alix R. Rubin, Esq. explains the effects of a recent Supreme Court Case allowing third party retaliation under Title VII, the nation's job bias law. Ms. Rubin also discusses best practices for employers to protect themselves from third party liability under these laws.

[Alix Rubin, Esq.](#) specializes in employment law at her New Jersey based law firm. For more information, visit her LinkedIn profile by [clicking here](#).

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The trial court ruled in the employer's favor, holding that Title VII does not permit third-party retaliation suits. Plaintiff appealed.

The U.S. Court of Appeals for the Sixth Circuit upheld the trial court's decision in an en banc ruling, reasoning that plaintiff was not protected by Title VII because he did not "engage in any statutorily protected activity, either on his own behalf or on behalf of [his fiancée]." Thompson, 567 F. 3d 804, 807-808 (6th Cir. 2006). Plaintiff appealed to the Supreme Court, which granted certiorari on two questions:

- Did defendant's firing of plaintiff constitute unlawful retaliation?
- If so, does Title VII grant plaintiff a cause of action?

#### Supreme Court Reads Title VII Broadly

Relying on Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S. 53 (2006), the Court easily concluded that, if the facts plaintiff alleged are true, defendant's firing of him violated Title VII. In Burlington, the Court held that Title VII's anti-retaliation provision "is not limited to discriminatory actions affecting the terms and conditions of employment." Id. at 64. Rather, this provision prohibits any action that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." Id. at 68.

The Court reasoned in Thompson that it is "obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired." However, the Court declined to identify the category of relationships protected, except to state that firing a close family member will almost always constitute unlawful retaliation, while "inflicting a milder reprisal on a mere acquaintance will almost never do so."

#### Third Parties Have Standing to Sue

The more difficult question for the Court was whether plaintiff may sue his employer for allegedly retaliating against him. Title VII permits a person "claiming to be aggrieved" to file a civil action. 42 U.S.C. §2000e-5(f)(1). The Supreme Court declined to follow the Sixth Circuit's ruling or its own dictum that Article III standing -- which merely requires an injury that defendant caused and the court can remedy -- fulfills the aggrievement requirement, as this would lead to absurd results in this context.

Yet, the term "aggrieved" is not limited to the employee who engaged in the protected activity. Rather, the Court held that, as under the Administrative Procedure Act, if the person is adversely affected within the meaning of the relevant statute, he "falls within the 'zone of interests' sought to be protected" and thus has standing to sue. The plaintiff in Thompson falls within the zone of interests Title VII protects, the Court held, because he was an employee of defendant and "hurting him was the unlawful act by which the employer punished [his fiancée]."

#### Employer Liability Expanded

The Supreme Court's validation of third-party retaliation claims under Title VII expands potential liability for employers. The ruling means that taking adverse action against an employee in retaliation for the protected activity of a family member, friend or co-worker is illegal, regardless of whether the employee participated in the protected activity. Employers must take care when making employment decisions that the protected activity -- such as the filing of an EEOC charge -- of a family member, friend or co-worker is not a motivating

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factor. Thorough, careful investigation and documentation of the legitimate reasons for taking the adverse employment action are essential.

An employee who engages in protected activity as well as a relative, friend or co-worker who experiences an adverse employment action may sue their common employer for retaliation under Title VII. If the action would dissuade a reasonable worker from engaging in protected activity, then it will constitute unlawful retaliation. Therefore, a best business practice for employers is to have zero tolerance for retaliation, regardless of whether the third party falls within the “class of relationships for which third-party reprisals are unlawful.” And plaintiffs’ lawyers should ask their clients whether any relatives or friends who work for the same employer have experienced any fall out as a result of the client’s discrimination complaint.

## About Alix R. Rubin, Esq.

Alix R. Rubin, Esq. empowers employers and employees to stop fighting so everyone can get back to business. She counsels employers on best employment practices to minimize the risk of a lawsuit and defends them when they are sued; helps high-level executives secure their future careers; and makes sure employees get a fair shake.

The founder and principal attorney of Alix Rubin Law, LLC, Alix earned her law degree from the University of Pennsylvania Law School, where she was associate and book review editor of the [Comparative Labor Law Journal](#) as well as a legal research fellow. She began her career in private practice as a general litigator at two major New Jersey law firms, Hannoch Weisman, a Professional Corporation, and Lowenstein Sandler PC. Most recently, she was the employment counseling and litigation partner at the New York-based firm of Entwistle & Cappucci LLP. After obtaining a Bachelor of Arts degree in English and French [magna cum laude](#) from Tufts University, Alix earned a Master of Journalism degree from Temple University and worked as a public relations practitioner and journalist before attending law school. She is admitted to the bar in New York, New Jersey and Pennsylvania.



In addition to running her law firm, Alix is an investigator for Verita, LLC ([www.verita.us](http://www.verita.us)), where she conducts independent and unbiased factual investigations of all types of workplace claims. She also serves as Secretary of the Board of Trustees of Volunteer Lawyers for Justice, Inc., is a member of the District V-C Ethics Committee of the Office of Attorney Ethics of the Supreme Court of New Jersey, sits on the Board of Directors of the Wharton Club of New Jersey and is an Advisor of the I Can Still Do That Foundation.

For more information, please [click here](#). Alix can be reached by e-mail at [arubin@alixrubinlaw.com](mailto:arubin@alixrubinlaw.com).

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