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# LEGAL ALERT

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## Supreme Court: “Employee Who Never Complained Of Discrimination May Bring Claim For Retaliation”

Today, the Supreme Court in a unanimous ruling determined that an employee who does not directly engage in protected activity can still assert a claim for retaliation under Title VII of the Civil Rights Act as a victim who falls within the “zone of interests” of protection afforded by the statute. Writing for the majority, Justice Scalia stated “[w]e think it obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired.” And further, that the employee “is a person aggrieved with standing to sue.” *Thompson v. North American Stainless, LP*.

### Who Is “A Person Aggrieved”?

Eric Thompson and his fiancée, Miriam Regalado, both worked for North American Stainless. In September 2002, Regalado filed a charge with the Equal Employment Opportunity Commission (EEOC) alleging that she was discriminated against because of her gender. On February 13, 2003, the EEOC notified North American Stainless of Regalado’s charge. Approximately three weeks later, Thompson was terminated from employment. He and Regalado were engaged at the time of his termination. The engagement was common knowledge in the workplace.

Thompson, who admittedly never took part in any protected activity on behalf of himself, his fiancée or any other employee, claimed that he was terminated because Regalado filed a charge of discrimination. The company maintained that it terminated him for performance reasons. Thompson in turn filed his own charge with the EEOC claiming retaliatory discharge under Title VII. The Commission found “reasonable cause” to determine that the company’s termination of Thompson violated Title VII, i.e. that Thompson was a “person aggrieved” under the statute. Regalado never filed suit against North American Stainless for alleged violations of Title VII on behalf of herself or Thompson. North American Stainless challenged Thompson’s right to sue claiming that he lacked standing under Title VII.

### The Road To The Supreme Court

Thompson sued North American Stainless under Section 704(a) of Title VII, which states:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants . . . because he has opposed any



practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Thompson claimed that Title VII prohibits third-party retaliation and permits the third-party victim to sue the employer directly for damages. The trial court, relying upon the plain language of the statute, awarded summary judgment to the employer, ruling that Thompson did not fit within the class of persons Congress intended to protect because he failed to engage in statutorily-protected conduct.

On appeal, the U.S. Court of Appeals for the 6<sup>th</sup> Circuit first vacated the trial court’s dismissal of the case. But later, in an *en banc* decision, the Court affirmed summary judgment for the employer holding that Thompson lacked standing to sue for retaliation. The 6<sup>th</sup> Circuit distinguished Thompson from the Supreme Court’s 2009 ruling in *Crawford v. Metro Gov’t of Nashville and Davidson County, Tenn.* In *Crawford*, the Supreme Court overruled the 6<sup>th</sup> Circuit’s view of the opposition clause, i.e. that an employee must actively oppose violative conduct. Here, the 6<sup>th</sup> Circuit distinguished *Crawford*, holding that Thompson did not engage in *any* protected activity – whether voluntary

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or involuntary. Therefore, he was not within the class of persons for whom Title VII created a retaliation cause of action.

Thompson appealed to the United States Supreme Court, which granted *certiorari* and heard oral argument on December 7, 2010. The Court certified the following questions: 1) whether section 704(a) forbids an employer from retaliating for such activity by inflicting reprisals on a third party closely associated with the employee, such as a spouse, family member, or fiancé; and 2) if so, whether that prohibition may be enforced in a civil action brought by the third-party victim.

## The Arguments And The Ruling

Thompson argued that if third-party victims are not permitted to bring retaliation claims, this would have a chilling effect on employees who might otherwise complain of discriminatory treatment out of concern for those with whom they are closely associated. Thompson claimed that there was a split in the circuits that must be resolved by the Supreme Court and that the EEOC’s interpretative guidance of Section 704(a) should be awarded great deference.

North American Stainless argued that no split in the circuits was present and that Thompson was attempting to expand the coverage of Title VII beyond its original congressional intent. In doing so, the company argued that it would create confusion for employers and greatly expand the realm of retaliation claims. The company also urged the Supreme Court to adhere to the rules of statutory construction and find that Thompson was not aggrieved merely because he happened to be engaged to Regalado at the time of his termination. Absent his own participation or opposition within the confines of Title VII, Thompson had no claim. On the other hand, according to the company, Regalado would have standing to assert a retaliation claim because the termination of Thompson, as a third party, allegedly resulted from her engagement in protected activity.

The Supreme Court overturned the ruling of the 6<sup>th</sup> Circuit, finding that Thompson was himself a person aggrieved within the meaning of Title VII and applied to “zone of interests” test to determine that he had standing to sue under the statute. Like other federal statutes which may sanction a cause of action for an individual closely associated with an employee who engages in protected activity, such as the National Labor Relations Act and the Fair Housing Act, the Court determined that here Congress intended the same broad result under Title VII. The Supreme Court further reasoned that the nature of the anti-retaliation provision

included a broad range of employer conduct that might dissuade a reasonable worker, such as a close family member or fiancé, from making or supporting a charge of discrimination.

## What Does This Mean For Employers?

Because the Supreme Court determined that third parties have standing to sue for retaliation under Title VII – even when they fail to engage in protected activity – employers are wise to be cautious in taking adverse employment action against a spouse, fiancé, or family member of an employee who does engage in protected conduct under state or federal law. The EEOC, which is also responsible for enforcement of the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Equal Pay Act takes the position that these statutes do permit a third-party victim to bring a claim for retaliation even when they do not take affirmative steps of participation or opposition. The ADA, for example, specifically permits claims for discrimination based upon relationship or association.

The EEOC, which found reasonable cause after investigating Thompson’s charge, will likely be emboldened by this recent ruling. Although the Supreme Court did not create a bright line test for such relational retaliation claims, it did state: “[w]e 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.”

Certainly, employers are well within their rights to take action against an employee for legitimate non-discriminatory and non-retaliatory reasons. But timing can be critical. Employers are not expected to guess about the relationships of complaining employees, but often times it may be common knowledge.

When faced with the *Thompson* scenario ensure that you are adhering to applicable laws, as well as your own employee policies. Documentation of employee performance, attendance, discipline, and decisions to promote, demote, transfer or terminate is important in defending against discrimination and retaliation claims. And always be cognizant of those similarly situated to the employee subject to the adverse employment action, to ensure consistency in your personnel actions. Employers, when feasible, may also want to consider policies that do not permit employment of relatives or co-worker relationships.

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