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U.S. Supreme Court Allows Claim of Third-Party Retaliation Under Title VII

On January 24, 2011, the U.S. Supreme Court issued an 8-0 opinion in *Thompson v. North American Stainless, LP*, Case No. 09-291, holding that Title VII encompasses retaliation taken against a third-party based on the protected activity of another. In this case, Eric Thomson and his fiancée, Marium Regalado, both worked for North American Steel ("NAS"). In 2002, Ms. Regalado filed a sex discrimination charge with the Equal Employment Opportunity Commission ("EEOC") against NAS. Three weeks after receiving notification of the charge, NAS terminated Mr. Thompson. Mr. Thompson claimed that he was fired by NAS as retaliation against his fiancée, Ms. Regalado.

Title VII clearly prohibits NAS from retaliating against Ms. Regalado directly, but the question was whether Title VII prohibited NAS from taking an adverse action against Mr. Thompson. The Court made two important determinations. First, the Court found that terminating the fiancé of an employee because the employee engaged in protected activity is prohibited by Title VII because a reasonable worker "might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired." Second, the Court found that a claim for retaliation is *not* limited "to the person who was the subject of unlawful retaliation" but instead may be brought by those individuals whose interests are "arguably sought to be protected" by Title VII.

Activities that Dissuade an Employee from Engaging in Protected Activity

The Court reiterated the test that retaliation may be found where the employer's action "well might have dissuaded a reasonable worker from making or supporting a discrimination charge." But under its ruling, that test will now be applied to actions not only directly against the employee engaging in protected activity, but also actions against those who are connected to such employee. The Court provided little guidance as to the variety of adverse actions against a third-party employee that may now be considered a violation of Title VII. Instead, whether a certain employment action may be prohibited retaliation will depend on both the severity of the employer's action taken against the third party and the relationship between the third party and the person engaging in the protected activity. Although "reluctant to generalize," the Court did opine that the "firing [of] a close family member will almost always meet [this] standard, and inflicting a milder reprisal on a mere acquaintance will almost never do so."

However, the variety of additional scenarios is limitless. What about the firing of an employee's boyfriend, close friend, or trusted co-worker? What if the action taken is something short of termination, e.g., declining to promote the third party or relocating them to another office? The test will ultimately be whether a "reasonable" worker would be deterred from engaging in protected activity under Title VII because of the employer's actions.

Those "Aggrieved" by Unlawful Employment Practices May Bring Claims

In order to file a discrimination or retaliation charge with the EEOC, an individual must be "a person claiming to be aggrieved" by an alleged unlawful employment practice. Mr. Thompson argued for a broad interpretation of the standing requirement that would allow any "injured" individual to bring a Title VII claim. The Court rejected the broad interpretation argued for by Mr. Thompson and determined that the aggrieved individual had to at least be within the "zone of interests" the statute purports to protect. Thus, Mr. Thompson, an employee of NAS, could sustain a Title VII cause of action because "the purpose of Title VII is to protect employees from their employers' unlawful actions." Additionally, the Court pointed out that Mr. Thompson's termination was "the employer's intended means of harming [Ms.] Regalado" and that he was not an "accidental victim" or "collateral damage." Therefore, Mr. Thompson was "well within the zone of interests sought to be protected by Title VII" and could sustain a claim on his own behalf.

Suggestions for Employers

The Court's decision recognizes an entirely new set of claimants under Title VII. Employers now must consider potential liability when terminating an employee who is a family member of, or has a close connection to, an employee who has engaged in protected activity (e.g., filed a charge, complained of harassment, etc.). Although employers should prohibit retaliation in any form, employers are advised to make supervisors and other management personnel with decision-making power aware of this potential claim. Employers should ensure that they are taking active steps to document all business-related

reasons for taking employment actions.

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