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U.S. Supreme Court Says Retaliation Against Other Employees Is Also Illegal

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Title VII of the Civil Rights Act of 1964 contains an anti-retaliation provision that makes it unlawful for an employer to retaliate against any employee who has opposed any unlawful practice covered by Title VII or has made a charge, testified, assisted, or participated in any manner in a Title VII investigation, proceeding, or hearing.

In the U.S. Supreme Court's 2006 ruling in *Burlington Northern & Santa Fe Railway Co. v. White*, the Court held that Title VII's anti-retaliation provision may cover a "broad range" of employer conduct, such as some job reassignments and suspensions. In its 2009 ruling in *Crawford v. Metropolitan Government of Nashville*, the Supreme Court further expanded the scope of employer conduct covered by Title VII's anti-retaliation provision when it ruled that the provision protects an employee even when he or she has not filed a formal charge or complaint against the employer but instead refers to unlawful harassment during an investigation. Now, in its recent ruling in *Thompson v. North American Stainless LP*, the Supreme Court again has widened the range of employer conduct covered by Title VII's anti-retaliation provision by ruling that the provision prohibits an employer from taking any retaliatory adverse employment action that would deter an employee from engaging in activity protected by Title VII, even where the adverse action is directed at a worker other than the employee engaging in the protected

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activity. In *Thompson*, the Court held that an employee can pursue a claim against his employer under the anti-retaliation provision based on an allegation that he was fired because his fiancée, a co-worker, filed a gender discrimination claim against the company. Citing its decision in *Burlington Northern* that the main purpose of Title VII's anti-retaliation provision is to protect workers from any employer action that could "dissuade a reasonable worker from making or supporting a charge of discrimination," the Supreme Court in *Thompson* reasoned that the employee's claim fell "within the zone of interests protected by Title VII." The Court stated specifically that:

We think it obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired. ... [A]ccepting the facts as alleged, *Thompson* is not an accidental victim of the retaliation... . To the contrary, injuring him was the employer's intended means of harming [his fiancée]. Hurting him was the unlawful act by which the employer punished her.

In response to concerns that its ruling would put employers at risk for taking action against any employee who happens to have some sort of connection to or association with a co-worker who complains about employment discrimination or participates in a Title VII investigation or proceeding, the Supreme Court stated in *Thompson* that "firing a close family member will almost always meet" the standard for a violation of Title VII's anti-retaliation provision, while "inflicting a milder reprisal on a mere acquaintance will almost never do so." However, the Court declined to spell out specific types of relationships for which third-party reprisals are unlawful because "the significance of any given act of retaliation will often depend upon the particular circumstances."

With the Supreme Court's ruling in *Thompson*, illegal retaliation now includes adverse actions against other employees who have a close relationship to the complaining employee, and employers should be careful to avoid the liability associated with such

adverse actions. The line of recent Supreme Court decisions including *Thompson* shows how important it is for employers to avoid taking any type of adverse action against an employee, or a closely related co-worker, because the employee has opposed or complained about employment discrimination, filed an employment discrimination charge or complaint, or testified, assisted, or participated in any manner in a Title VII investigation, proceeding, or hearing. These decisions also emphasize the importance of having and being able to articulate legitimate, non-retaliatory reasons for adverse employment actions, and the value of consulting employment counsel whenever an adverse action could be viewed as retaliatory.



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