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New U.S. Supreme Court Holding on the Scope of Retaliation *Claimants* under Title VII

Well, the Supreme Court did not make employers wait very long in the new year to rule on one of our "Ones to Watch" cases of 2011, Thompson v. North American Stainless, LP.

Some of you may recall that the issue in Thompson was whether someone "close to" an employee who makes a complaint under Title VII may also file a claim for retaliation under Title VII, or whether such claims may only be asserted by the employee who makes the underlying complaint.

The Supreme Court's answer to this general question is that those "close to" the complaining employee may also bring a retaliation claim under Title VII.

What the Supreme Court refused to do, however, was to provide employers with a list of qualifying relationships or even a list of criteria as to what constitutes sufficient "closeness to the complaining employee" to give rise to standing to assert a Title VII retaliation claim under this new holding. The Court gave a little guidance in this area, by saying that "we expect that firing a close family member will almost always" meet this standard while "inflicting a milder reprisal on a mere acquaintance will almost never do so." "But beyond that, we are reluctant to generalize."

The specific facts of Thompson involved the fiancée of a female employee who had filed an EEOC Charge alleging sex discrimination under Title VII against North American Stainless, LP (NAS). Both the female employee and her fiancée had been employed by NAS. The fiancée, Mr. Thompson, was fired three weeks after the Charge was filed. Mr. Thompson then attempted to file his own EEOC Charge and then a federal court lawsuit asserting retaliation under Title VII based on his termination. Both the trial court and the Sixth Circuit Court of Appeals had dismissed these attempts by concluding that "Title VII does not permit third-party retaliation claims." The U.S. Supreme Court disagreed with this conclusion as described above.

The other related question the Court answered in Thompson was whether the now-recognized retaliation claim for firing or otherwise harming someone who is "close to" an employee who makes a complaint under Title VII actually belongs to the harmed individual or only to the complaining employee. The thought behind this question was "if the reason such 'retaliation' is 'wrong' is because it is designed to be a roundabout way of 'getting to' or 'retaliating against' the complaining employee, shouldn't that person be the one who has a right to assert the 'retaliation' claim against his/her employer?" The Supreme Court rejected this line of reasoning in favor of finding that Title VII protects "any aggrieved person" within the "zone of interests" protected by this law. The Court reasoned that since Mr. Thompson was also an employee of NAS he was within the "zone of interests protected by Title VII," such that the Title VII retaliation claim belonged to him, not the original complaining employee (his fiancée).

This "zone of protected interests" holding was a more narrow view than the Court could have taken in settling this question. In adopting this view, the Court rejected some dictum from one of its 1972 opinions, Trafficante v. Metropolitan Life Ins. Co., which had previously been used in other cases to try to expand the scope of Title VII to "any

aggrieved person" such as shareholders, etc.

Thompson does continue the Supreme Court's expansion of federal retaliation claims which began in 2006 with Burlington N. & S.F.R. Co. v. White, in which the Court held that Title VII's anti-retaliation provision should be read to cover a broad range of employer conduct – basically anything which "might dissuade a reasonable person from making or supporting a Title VII claim." Now, the range of possible retaliation ***targets*** in addition to the spectrum of retaliation ***tools*** which was expanded in Burlington has been broadened. Employers thus will need to consider not only whether employees they are planning to terminate, discipline or even transfer or not promote have recently filed a complaint contesting discrimination which is prohibited by Title VII, but also whether such employees are "close to" any other such employee.

Determining that an employee falls within this newly-protected class does not necessarily mean the employer must abort its plans. However, the employer will need to consult with legal counsel and otherwise make sure all of its "I's are dotted, and T's are crossed" regarding the fact that there is a legitimate, non-retaliatory business reason for taking its planned action.

Also, bear in mind that although Thompson dealt with someone "close to" the complaining employee, employees who merely "participate" in the investigation of a Title VII complaint also are protected from retaliation under Title VII. We thus would imagine that Thompson also will be cited for the proposition that those "close to" employees who "participate" in such investigations also are protected from retaliation, since no distinction is made in Title VII between "participating" and "initiating" such investigations.

So, "be careful out there," and please feel free to contact Stacie Caraway or any other member of our Labor & Employment law department regarding this or any other labor and employment law issues you find yourself facing in 2011.

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