SCOTUS Dramatically Expands Who Can Sue for Retaliation

24. January 2011 By Steve Palazzolo

"Until 2003, both petitioner Eric Thompson and his fiancée, Miriam Regalado, were employees of respondent North American Stainless (NAS). In February 2003, the Equal Employment Opportunity Commission (EEOC)notified NAS that Regalado had filed a charge alleging sex discrimination. Three weeks later, NAS fired Thompson."

And with that introduction, Justice Scalia, writing for a unanimous Court (Justice Kagen did not participate) dramatically expanded the rights of employees to sue their employers for retaliation under Title VII of the Civil Rights Act of 1964.

The Court framed two questions if felt it needed to answer: "First, did NAS's firing of Thompson constitute unlawful retaliation? And second, if it did, does Title VII grant Thompson a cause of action?"

The Court had little trouble answering the first question in favor of employees. Viewing Thompson's allegations as true (which the Court must do for purposes of the appeal), the Court noted " . . . Title VII's antiretaliation provision prohibits any employer action that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."" The Court then went on to hold that a reasonable worker could very well be dissuaded from filing a charge of discrimination if he or she knew that the consequence of doing so was having one's fiancee terminated. The Court was unmoved by the potential confusion that such a rule might cause for employers. Instead, the Court stated:

"Although we acknowledge the force of this point, we do not think it justifies a categorical rule that third-party reprisals do not violate Title VII. As explained above, we adopted a broad standard in *Burlington* because Title VII's antiretaliation provision is worded broadly. We think there is no textual basis for making an exception to it for third-party reprisals, and a preference for clear rules cannot justify departing from statutory text."

Moving to the second question—which the Court felt that it was a more difficult question—the Court analyzed whether Thompson, or any plaintiff in his situation had "standing" to sue his or her employer under Title VII. Standing is a legal concept that requires a party who wishes to sue to demonstrate that they have sufficient connections to the cause of action to support their participation in the suit. After a fairly lengthy discussion of the legal principles involve (that I won't bore you with here), the Court determined that Thompson did have standing to sue and adopted a so called "zone of interest" test.

"Applying that test here, we conclude that Thompson falls within the zone of interests protected by Title VII. Thompson was an employee of NAS, and the purpose of Title VII is to protect employees from their employers' unlawful actions. Moreover, accepting the facts as alleged, Thompson is not an accidental victim of the retaliation—collateral damage, so to speak, of the employer's unlawful act. To the contrary, injuring him was the employer's intended means of harming Regalado. Hurting him was the unlawful

act by which the employer punished her. In those circumstances, we think Thompson well within the zone of interests sought to be protected by Title VII. He is a person aggrieved with standing to sue."

Although Thompson, as Regalado's fiancé, was well within the "zone of interest," the difficult question for employers is just how far the "zone of interest" extends? Does it include friends of the complaining employee? What if the employer does not know of the alleged connection between the employee who complained and the employee who was disciplined or fired – how will it prove that? These questions will surely be the stuff of future litigation.

If you have any questions about how this expanded definition of retaliation might effect how you make decisions regarding your employees feel free to give me a call.