



Supreme Court Expands Zone of Protected Activity to Include Third-Party Retaliation Claims.

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The United States Supreme Court decision in *Thompson v. North American Stainless, LP* (No. 09-291, Jan. 24, 2011) significantly increased the likelihood of "retaliation-by-association" claims brought by employees who have close relationships with coworkers who engage in protected activity. In *Thompson*, the Court held that an employee who was fired three weeks after his fiancée (who also worked for the company) made a complaint of discrimination had standing to bring a claim of retaliation, even though the employee himself had not engaged in any protected activity.

In reaching its decision, the Court considered its precedent in *Burlington Northern Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), in which it held that "the antiretaliation provision, unlike the substantive provision [of Title VII], is not limited to discriminatory actions that affect the terms and conditions of employment." Under *Burlington*, 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." In considering the third-party retaliation claim brought by Mr. Thompson, the Court found it "obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancée would be fired."

In addressing the employer's concern that an employer could be at risk of a retaliation claim any time it fires any employee who happens to have a connection to a different employee who filed a charge with the EEOC, the Court declined to adopt a categorical rule that third-party reprisals do not violate Title VII. Instead, it noted that "Title VII's antiretaliation provision is worded broadly" and that "a preference for clear rules cannot justify departure from the statutory text." The Court recognized that the firing of a close family member will almost always meet the standard set forth in *Burlington*. On the other hand, "inflicting a milder reprisal on a mere acquaintance will almost never do so." Beyond that, the Supreme Court was reluctant to generalize about what types of associations fall within the "zone of interest" protected by Title VII's antiretaliation provision, although it emphasized that the "standard for judging harm must be objective, so as to avoid the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff's unusual subjective feelings."

Essentially, the Court has expanded the definition of "person aggrieved" within the meaning of Title VII to include not only the employee who engages in protected activity, but also third parties within the "zone of interest." The Court found that Mr. Thompson fell within the "zone of interest" sought to be protected by Title VII because he was "not an accidental victim of the retaliation - collateral damage, so to speak, of [the employer] harming [his fianc?e]. Hurting him was the unlawful act by which the employer punished her." Accordingly, he "is a person aggrieved with standing to sue."

The Thompson decision adds to the Supreme Court's current trend of favoring plaintiffs in retaliation cases under Title VII, and will likely lead to more retaliation claims (the most frequent charge filed with the EEOC during the past year). The Court's failure to define clearly what relationships are sufficient to trigger a third-party retaliation claim under the "zone of interests" test may encourage an increase in charges from employees who claim they should be protected from adverse actions due to their association with coworkers who engage in protected activity. Of course, these employees will still have to prove that any adverse action is causally connected to the protected activity of their coworkers.

Employers should continue to document and clearly articulate legitimate business reasons for any adverse employment actions. In addition, businesses need to train managers that retaliation has a broader scope beyond impermissible reprisals against employees who engage in protected activity, and that it now includes retaliation against those employees who are closely associated with an employee who has filed an internal complaint or otherwise engaged in protected activity. Employers should ensure that the language in their antiretaliation policies is broad enough to prevent retaliation against third parties. Where applicable, employers should also consider implementing policies that prohibit family members from working together and romantic relationships in the workplace and ensure that current policies addressing these prohibitions are enforced.

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