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*Supreme Court Expands Scope of Litigants who can bring Retaliation Claims
under Title VII*

Thompson v. North American Stainless, LP – U.S. Supreme Court - 09-291

Decided: January 24, 2011

In this matter, the Supreme Court was charged with determining whether the protections of Title VII's anti-retaliation provision extended to an employee who was terminated as retaliation against the employee's fiancé (also an employee) for filing a sex discrimination claim with the EEOC. In finding that plaintiff had standing to bring his suit against his employer, the Court appears to have expanded the scope of potential litigants who may bring claims under Title VII. This article will discuss the background of the litigation, the Supreme Court's ruling and the impact it may have on equal protection litigation in the future.

Eric Thompson began his employment at North American Stainless in 1997. In 2000, he met and began dating and was eventually engaged to another employee, Miriam Regalado. In 2003, Regalado filed a sex discrimination claim with the EEOC. Three weeks later, Thompson was fired. After concluding that he had been fired as retaliation against Regalado, Thompson filed an anti-retaliation complaint with the EEOC. The EEOC determined that there was reasonable cause to believe that Thompson had been the victim of retaliation, however, a settlement with North American Stainless could not be reached. Thereafter, Thompson brought his civil suit against his former employer in the federal District Court for the Eastern District of Kentucky.

In granting summary judgment in favor of North American Stainless, the District Court first set forth the operative statutory language found in Title VII, Section 704(a):

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment...because he has opposed any practice made an unlawful practice by this subchapter, or because he has made a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing under this subchapter.

Next, the District Court set forth the elements which must be met in order to prevail in a claim under Title VII's anti-retaliation provision:

...a plaintiff must establish that: (1) he engaged in an activity protected by Title VII; (2) this exercise of protected right was known to the defendant; (3) the defendant thereafter took an adverse employment action against the plaintiff; and (4) there was a causal connection between the protected activity and the adverse employment action.

Thereafter, the District Court found that Thompson failed to establish the first element as there were no allegations that he had participated in any protected activity, which is required by the plain language of the statute. Accordingly, Thompson's action was dismissed. Thompson appealed.

At the appellate level, the matter was first considered by a three judge panel who ruled that, "Title VII prohibit[s] employers from taking retaliatory action against employees not directly involved in protected activity but who are so closely related to or associated with those who are directly involved, that it is clear that the protected activity motivated the employer's action."

In making its ruling, the panel determined that, while the plain language of the statute did not appear to support retaliation claims by association, other Supreme Court cases (e.g. *Burlington North and Santa Fe Railway Co. v. White*, 126 S.Ct. 2405 (2006)), clearly indicated that the statute is intended to protect against any retaliatory action that might "dissuade a reasonable worker from making or supporting a charge of discrimination." By a two to one vote, the three judge panel reversed the District Court.

Thereafter, the full Sixth Circuit appellate panel agreed to review the case and vacated the three judge panel's findings and affirmed the District Court. By its ruling, the full Sixth Circuit panel fell in-line with the Third, Fifth and Eighth Circuits in determining that, because Thompson did not allege he engaged in any statutorily protected activity (i.e., did not oppose an unlawful employment practice, make a charge, testify, assist, or participate in an investigation), by the plain language of the statute Thompson was not included in the class of persons for whom Congress intended to protect by enacting the retaliation provision of Title VII. The dispute was then appealed to the Supreme Court who accepted review of the matter.

The Supreme Court was presented with two questions:

- (1) Does section 704(a) forbid an employer from retaliating for such activity by inflicting reprisals on a third party, such as a spouse, family member or fiancé, closely associated with the employee who engaged in such protected activity?
- (2) If so, may that prohibition be enforced in a civil action brought by the third party victim?

Based upon the questioning by the justices at oral argument, it appeared certain that the Court would find in favor of North American. Namely, many of the questions posed revolved around where and how to draw the line regarding what type of relationships would be sufficient to allow third-party retaliation claims. In other words, if the Court found that a fiancé was sufficiently related to the person who participated in the protected activity, would this also include girlfriends, boyfriends, close associates or trusted friends? Indeed, this concern echoed that expressed by North American in its brief to the Court. The Court was further concerned with how an employer would protect itself from such a claim if it believed it had appropriate grounds for terminating an employee. Would the employer have to

investigate whether any other employees had a close enough relationship with the employee who was to be terminated?

Without concrete guidance from previous cases, one could easily conclude that the Court would rule that whether the retaliation provision of Title VII was intended to provide protection to third-parties and, if so, what relationships are sufficient, is an issue best left to the legislative branch to define. Such a result would not be unexpected based on the conservative leaning majority of the justices currently sitting on the bench. Surprisingly however, by unanimous decision, the Court answered both questions posed to it in the affirmative, reversing the Sixth Circuit.

With regard to the first question, the Court rather easily found that, if the allegations in Thompson's complaint were true, North American unquestionably engaged in prohibited conduct which, "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." Interestingly, the Court went on to find that it would not determine a bright-line rule regarding which type of relationships would be found close enough to allow the "associate" to bring a claim under Title VII. Rather, the Court (relying on the aforementioned *Burlington* case) determined that, "given the broad statutory text and the variety of work place contexts in which retaliation may occur, Title VII's antiretaliation provision is simply not reducible to a comprehensive set of clear rules." In other words, whether an employer's actions towards a third-party, "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination", should be examined on a case by case basis. This portion of the decision would appear to expand the number of potential litigants tremendously and without limitation.

Turning to the second question, the Court first addressed the statutory language which states that a civil action can be brought against an employer, "by the person claiming to be aggrieved." Thompson argued that this language clearly included the plaintiff and clearly indicated that he has a right to bring his claim for retaliation. North American, on the other hand, argued that this language is nothing more than a reiteration of the basic "standing" requirement qualifying litigants to sue.¹ Thus, the language "person aggrieved" should not be read into the substantive portion of Title VII which, on its face, would appear to require that the individual bringing the retaliation claim have participated in some form of protected activity.

While acknowledging North American's position as reasonable, the Court found that the "person aggrieved" language should be considered more than a simple reiteration of the standing requirement but, at the same time, should be narrowly construed in order to limit access to the courts. In this regard, the Court relied on the Administrative Procedure Act's (5 USC §551) authorization of suits to challenge a federal agency by any "person adversely affected or aggrieved within the meaning of a relevant statute", for the conclusion that a plaintiff may not sue unless he falls within the "zones of interest" sought to be protected by the statutory provision whose violation forms the legal basis for his complaint.

¹ In order to have standing, a potential litigant must have suffered an injury which is causally connected to the conduct complained of and is redressable by the court. *Lujan v. Defenders of Wildlife*, 504 US 555 (1992).

The Court further defined “zone of interest” as excluding litigants whose interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit. Applying this test to the instant dispute, the Court concluded that Thompson was within the zone of interest as he was an employee and Title VII is intended to protect employees for unlawful acts of employers. Moreover, Thompson was not an accidental victim of the unlawful act, but was the target of the unlawful act which was intended to retaliate against his fiancé. Accordingly, Thompson falls within the intended protections of Title VII and constitutes as “person aggrieved” entitled to bring suit.

In embedding the “zone of interest” test into the “aggrieved person” provision, the Court provides some measure of limitation on the seemingly unrestrained scope of litigants granted access to the courts as set forth in the Court’s answer to the first question posed to it. However, the zone of interest test is not a bright line test which will automatically exclude certain groups of potential litigants, such as anyone unrelated to the employee who engaged in protected activity. Accordingly, while actions brought by third-parties may eventually be dismissed if the litigant falls outside the zone of interest, employers will still be required to expend time, energy and money in defending the matter at the initial pleadings stage.

That being said, the Court’s ruling only applies to a fairly unique set of circumstances wherein an employer retaliates against an employee who engaged in protected activity by taking unlawful action against a co-worker with a sufficiently close relationship to the person being retaliated against. At the same time, the precedent set by the Court should strongly encourage employers to ensure that employee performance and personnel files are kept current and well-documented in order to support a merit-based termination should the same become necessary.

Ultimately, the Thompson decision increases employers’ exposure to retaliation claims under Title VII, which will require greater diligence on behalf of employers to avoid, or to defeat once a claim is filed. In the current economic conditions, this is most likely unpleasant news for employers, and certainly has enterprising plaintiff attorneys licking their chops. It will now be up to the federal district courts to determine which types of intra-employee relationships fall within the zone of interest entitling aggrieved persons to maintain retaliation suits against employers. It is not hard to imagine that this is not the last time the Supreme Court will be asked to weigh in on this particular issue.

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