

# EMPLOYMENT LAW ALERT

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## Supreme Court Recognizes "Third Party" Retaliation Claims

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Yesterday, the United States Supreme Court unanimously held that when an employee makes a complaint alleging unlawful discrimination, an employer can be held liable under federal law for retaliation not only against the person who engaged in the "protected activity" but also against a co-worker who is closely related to the employee who made the complaint - in this case, the fiancé of the employee who complained.

In *Thompson v. North American Stainless LP*, Miriam Regalado and Eric Thompson were both employees of the defendant company, North American Stainless, and were engaged to be married. Regalado, a supervisor, filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC), alleging that she had not been receiving raises consistent with her male counterparts. Three weeks after being notified of the EEOC charge, North American Stainless fired Thompson, an engineer. Thompson then brought a lawsuit under Title VII of the Civil Rights Act of 1964, alleging that his firing had been in retaliation for the EEOC charge being filed by his fiancée Regalado.

The trial court dismissed Thompson's lawsuit, holding that Title VII "does not permit third party retaliation claims." The Sixth Circuit Court of Appeals upheld the decision, reasoning that because it was not Thompson, but rather Regalado, who had made the initial complaint of discrimination, Thompson had not engaged in "protected conduct" and was thus "not included in the class of persons for whom Congress created a retaliation cause of action."

Before the Supreme Court were two issues: (1) whether Title VII prohibits "third party" retaliation; and (2) assuming it does, whether Title VII grants such a "third party" the right to bring his own lawsuit against the employer.

### **Applying the Expanded Definition of "Retaliation"**

Justice Scalia began the Court's decision by emphasizing that the Title VII anti-retaliation provision applies to a wider range of employer conduct than Title VII's prohibition of discrimination. In the 2006 decision of *Burlington N. & S.F.R. Co. v. White*, the Supreme Court held that an employee alleging unlawful retaliation under Title VII does not have to prove that an employer took a concrete employment action sufficient to affect the terms and conditions of employment as is required to pursue a claim of discrimination. Rather, the employee only has

to prove that the employer engaged in conduct "that might have dissuaded a reasonable worker from making or supporting a charge of discrimination."

Applying the foregoing standard, the Supreme Court held that the conduct alleged by Thompson violated Title VII: "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." The Court acknowledged the employer's concern about "difficult line-drawing problems concerning the types of relationships entitled to protection," articulated by the employer as "what about firing an employee's girlfriend, close friend, or trusted co-worker?" Nevertheless, the Court held that such a concern does not justify a categorical rule that third-party reprisals do not violate Title VII. The Court emphasized that the standard for prohibited conduct was context-specific and declined to establish a clear rule concerning which types of relationships are protected from third-party reprisals and which are not. Rather, the Court only provided generalized guidance, stating: "We expect that firing a close family member will almost always meet the *Burlington* standard, and inflicting a milder reprisal on a mere acquaintance will almost never do so ..."

### **Third Parties Are Entitled to Bring Lawsuits**

The Supreme Court acknowledged that even if the employer's conduct constituted unlawful retaliation, "the more difficult question" was whether Thompson should be permitted to sue under Title VII, rather than (or in addition to) Regalado, who had made the initial charge of discrimination. Title VII states that "a civil action may be brought ... by the person claiming to be aggrieved by the alleged unlawful employment practice." The Supreme Court held that Title VII's definition of an "aggrieved" person was not limited solely to the "person who engaged in the protected activity" (i.e., Regalado), but rather applies to any person who "falls within the zone of interests protected by Title VII." Using this "zone of interests" construct, the Court determined that the term "aggrieved" in Title VII would permit a suit by "any plaintiff with an interest 'arguably [sought] to be protected by the statutes.'" The Court held that Thompson met this standard, for two reasons. First, he was an employee of the defendant, and "the purpose of Title VII is to protect employees from their employers' unlawful actions." Second, 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." On this basis, the Supreme Court held that Thompson was "well within the zone of interests sought to be protected by Title VII" and was permitted to proceed with his lawsuit against North American Stainless.

### **Practical Implications**

As the Supreme Court acknowledged, employers are now tasked with the difficult "line-drawing" problem of determining which types of employee relationships are entitled to protection and could give rise to potential Title VII exposure. At a minimum, employers should now be mindful that if an employee makes a complaint of discrimination, there could be liability for any adverse action taken not only against the employee who complained, but against any other employee who has a family or close personal relationship with the complainant. Thus, employers should take precautions with respect to such third parties just as they would with the employee who brings a complaint: reiterate with supervisors that any retaliatory actions or comments will not be tolerated, and document employment issues as they arise so as to avoid an inference that any subsequent conduct is a "pretext" for retaliation.

Moreover, in deciding whether an employee is in the "zone of interests" protected by Title VII, the Supreme Court emphasized the employer's intent to punish the complaining party by taking action against someone close to her. Thus, presumably, traditional defenses concerning employer intent should remain applicable. For example, an employer would not be liable for retaliation against a third party if it was not aware of the relationship between the complainant and the third party alleging retaliation. The Court's decision emphasizes again that, in this age of information overload, sometimes not knowing everything about an employee's personal life can be a good thing.

If you have any questions about "third party" retaliation claims or wish to discuss their implications, please contact one of our Labor and Employment attorneys below.

**Bass, Berry & Sims Labor and Employment Attorneys**

**Lymari Martinez Cromwell**  
(615) 742-7903  
[lcromwell@bassberry.com](mailto:lcromwell@bassberry.com)

**Davidson French**  
(615) 742-6240  
[dfrench@bassberry.com](mailto:dfrench@bassberry.com)

**Tim K. Garrett**  
(615) 742-6270  
[tgarett@bassberry.com](mailto:tgarett@bassberry.com)

**Robert W. Horton**  
(615) 742-7708  
[rhorton@bassberry.com](mailto:rhorton@bassberry.com)

**Lin B. Howard**  
(615) 742-7927  
[lhoward@bassberry.com](mailto:lhoward@bassberry.com)

**Alonda W. McCutcheon**  
(615) 742-7717  
[amccutcheon@bassberry.com](mailto:amccutcheon@bassberry.com)

**Michael S. Moschel**  
(615) 742-6297  
[mmoschel@bassberry.com](mailto:mmoschel@bassberry.com)

**Annie Warnock Neal**  
(615) 742-6517  
[aneal@bassberry.com](mailto:aneal@bassberry.com)

**William N. Ozier**  
(615) 742-6232  
[bozier@bassberry.com](mailto:bozier@bassberry.com)

**Justin A. Page**  
(615) 742-7786  
[jpage@bassberry.com](mailto:jpage@bassberry.com)

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