

**SUPREME COURT GRANTS EMPLOYEES WITHIN THE
“ZONE OF INTERESTS” STANDING TO SUE FOR TITLE VII RETALIATION**

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On January 24, 2011, in a unanimous landmark ruling, the United States Supreme Court held Title VII of the Civil Rights Act of 1964, as amended, prohibits retaliation by an employer against an employee because of protected activity by the employee’s fiancée (also a company employee). This decision is significant because it extends protection from retaliation, and standing to sue for such retaliation, to certain employees simply because of their relationship to a third party, even if they have never actually engaged in any form of protected activity of their own.

In *Thompson v. North American Stainless LP*, No. 09-291, Eric Thompson claimed he was the victim of a retaliatory discharge by his employer, North American Stainless, LP (“NAS”), in response to a charge of sex discrimination filed by his fiancée with the Equal Employment Opportunity Commission. Thompson was discharged approximately three weeks after his fiancée filed her charge of discrimination. NAS claimed Thompson’s discharge was the result of poor performance and unrelated to the charge of sex discrimination.

Title VII makes it unlawful for an employer to retaliate against any employee who has opposed an unlawful practice covered by Title VII or has made a charge, testified, assisted, or participated in any manner in a Title VII investigation, proceeding, or hearing. The District Court dismissed Thompson’s claim ruling, “Title VII does not permit third-party retaliation claims.” In a panel decision, the United States Court of Appeals for the Sixth Circuit reversed the lower court’s decision and reinstated the claim. The Sixth Circuit panel ruled that by

punishing Thompson, the employer may have actually been trying to retaliate against his fiancée and that such action could have a chilling effect upon employees with legitimate discrimination complaints. The court then granted NAS's petition for a rehearing, *en banc*. Upon rehearing, the Sixth Circuit ruled by a 10-6 vote in favor of NAS, finding Thompson did not "engage in any statutorily protected activity" and therefore "is not included in the class of persons for whom Congress created a retaliation cause of action." Thompson then petitioned the Supreme Court of the United States.

The Supreme Court's Analysis

As a threshold matter, the Supreme Court was required to determine whether Thompson's discharge, could be considered a potential violation of Title VII. The Court easily answered this in the affirmative. Referencing its prior decision in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), the Court noted that Title VII's anti-retaliation provision "must be construed to cover a broad range of employer conduct." Again quoting *Burlington*, the Supreme Court declared, "Title VII's anti-retaliation provision prohibits any employer action that 'well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'" The Court found it "obvious" that an employee with a legitimate claim "might be dissuaded from engaging in protected activity if she knew her fiancé would be fired," and therefore concluded Thompson's discharge, if in retaliation for his fiancée's complaint, would violate Title VII's anti-retaliation provision.

Not surprisingly, NAS had argued that to find unlawful retaliation against one employee because of another employee's protected activity would create a slippery slope, potentially creating claims by any persons with some arguable connection to the complaining employee. The Court acknowledged the "force of this argument" but ultimately rejected imposing a "categorical rule that third-party reprisals do not violate Title VII." Relying on *Burlington's*

broad interpretation of Title VII's anti-retaliation language, the Court held that there is "no textual basis for making an exception to [Title VII] for third-party reprisals, and a preference for clear rules cannot justify departing from statutory text." The Court left unanswered the obvious question of which third-party relationships are now entitled to statutory protection from retaliation. Recognizing its unwillingness to announce specific guidelines, the Court said only, "We expect that firing a close family member will almost always meet the standard, and inflicting a milder reprisal on a mere acquaintance will almost never do so, but beyond that we are reluctant to generalize."

Finally, the Court addressed whether Thompson, if the victim of retaliation aimed at his fiancée, himself had standing to sue NAS for the alleged unlawful conduct. The Court explained under Title VII, a civil action may only be brought "by the person claiming to be aggrieved." The Court determined the word "aggrieved," as used in Title VII, incorporates the "zone of interests" test, enabling suit by any plaintiff with an interest "arguably sought to be protected by the statute." Applying this standard, the Court determined Thompson was an aggrieved person with standing to sue because "hurting him was the unlawful act by which the employer punished [his fiancée]."

Practical Considerations

Of course, nothing in the *Thompson* decision prevents an employer from discharging any employee for legitimate, non-retaliatory business considerations. Nonetheless, employers must now be especially cautious when contemplating adverse employment action against an employee with a known connection to a complaining employee. Decisions adversely affecting such employees must be scrutinized with the same level of review as decisions adversely affecting the employees who actually engage in protected activity. This means the employer's human resources personnel, in-house counsel, and in certain circumstances, outside counsel, should

review the facts and circumstances underlying these decisions. As always, employers should document all performance/conduct issues related to its employees and all steps taken to resolve them.

The Impact

The real impact of *Thompson* may not be known for some time because, in the view of these authors, the decision creates more questions than it answers. Perhaps the most provocative statement in the Court's decision is the remark that, "... inflicting a *milder* reprisal on a mere acquaintance will almost never" meet the *Burlington* standard. Is the use here of the qualifying "milder" intended to suggest a more severe act of reprisal would be more likely to meet the standard even if the relationship is still only that of a "mere acquaintance?" If so, how is this interpretation reconciled with the statutory language of Title VII, which does not condition the scope of its protections on the severity of the proscribed conduct? Further, how will the district courts determine the protectable third-party relationships? Will there be a sliding scale containing severity of reprisal on the one hand and the closeness of the third-party relationship on the other, such that the closer the relationship, the less severe the reprisal needs to be, and *vice versa*? Finally, how will state courts interpret their own state anti-discrimination laws in the wake of *Thompson*?

One thing is for certain. Only time, and additional litigation, will provide answers.