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What Third-Party Retaliation Means for Your Business

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The U.S. Supreme Court recently expanded retaliation law in ***Thompson v. North American Stainless, LP*** by holding that an employee may sue for "**third-party retaliation" under Title VII of the Civil Rights Act of 1964**. Third-party retaliation occurs when an employer takes an "**adverse employment action"** (e.g., discharge or demotion) against someone other than the person who engaged in statutorily "protected activity" (e.g., filed a discrimination charge or lawsuit). Even before this decision, "retaliation" was the most prevalent charge at the **Equal Employment Opportunity Commission (EEOC),** representing 36.3% of total filings in 2010. Race discrimination charges ranked second at 35.9%, while sex discrimination charges were third at 29.1%.

Title VII prohibits employers from retaliating against an employee because he or she has "opposed" unlawful discrimination or "has made a charge, testified, assisted or participated in any manner in an investigation, proceeding or litigation under this chapter." These are known as the "opposition" and "participation" clauses of Title VII. Filing a charge of discrimination is plainly "protected activity" under this definition. In ***Crawford v. Metropolitan Government of Nashville and Davidson County, TN*****,** decided in 2009, the Supreme Court held that the "opposition" clause protects an employee who reports or opposes discrimination when answering an employer's questions during an internal investigation. The Supreme Court has not yet addressed whether an employee's mere participation in an internal investigation constitutes "protected activity" under the "participation" clause of Title VII when the employee has no knowledge of discrimination and the investigation is purely internal (i.e., unrelated to a discrimination charge or lawsuit).

For employers, the Supreme Court's *Thompson* decision has ramifications for you in circumstances you may not have foreseen. For example, if one of your female employees files a sex discrimination charge with the EEOC and you fire her brother six weeks later, that could give rise to a third-party retaliation claim. Assume the brother had been verbally counseled for repeated performance issues. However, at the time his sister filed her EEOC charge, you had not given her brother a formal disciplinary write-up. Can the fired brother assert a third-party retaliation claim against your company for firing him in order to retaliate against his co-worker/sister for her EEOC charge? Based on the *Thompson* decision, the answer is yes. It remains to be seen whether the decision extends to an employee who answers questions as part of an internal investigation of alleged discrimination, or a co-worker who is in a relationship with that employee.

Thompson: Analyzing the Supreme Court's Third-Party Retaliation

Decision

In *Thompson*, North American Stainless, LP (NAS) fired Miriam Relalado's fiancé and co-worker, Eric Thompson, three weeks after she filed a sex discrimination charge with the EEOC. Thompson filed his own charge and a subsequent lawsuit asserting that NAS fired him to retaliate against Relalado for her charge.

The United States District Court for the Eastern District of Kentucky granted NAS summary judgment on the grounds that Title VII does not permit third-party retaliation claims. It held that Thompson did not engage in any statutorily "protected activity" to support a retaliation claim such as filing a charge prior to his discharge. The Sixth Circuit Court of Appeals initially reversed but later affirmed the district court's ruling.

The Supreme Court reversed and held that if the facts Thompson alleged are true, his firing constituted unlawful retaliation. The justices remanded the case to the district court for trial, explaining that Title VII's anti-retaliation provision must be construed to cover a broad range of employer actions that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." Applying this test, the Supreme Court deduced, a "reasonable worker obviously might be dissuaded from engaging in 'protected activity' if she knew that her fiancé would be fired." The Supreme Court held that Thompson fell within the "zone of interests" protected by Title VII because (1) he was an NAS employee, (2) Title VII's purpose is to protect employees from employers' unlawful acts and (3) NAS's alleged conduct was not accidental but unlawful retaliation intended to punish Thompson's fiancée.

Applying the Decision to Future Claims: What Does "Zone of Interests" Mean?

The Supreme Court rejected NAS's concern that it would be at risk for a retaliation claim from any employee who has a relationship with employees engaging in "protected activity." It explained that an individual's interests cannot be "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." However, the Supreme Court declined to "identify a fixed class of relationships" for which third-party retaliation is unlawful. Does third-party retaliation apply only to family and couples who are engaged to be married? Does it apply to those who are merely dating? To friends in the workplace? To work acquaintances?

What we do know from the *Thompson* decision is that the "zone of interests" extends beyond an employee who engages in protected activity to her fiancé. Given that, the protected zone most likely extends to immediate family members. It is unlikely that courts will extend the "zone of interests" to mere work acquaintances. However, as the Supreme Court explained, retaliation claims are highly fact-dependent. Exactly who falls within the protected "zone of interests" will be determined by subsequent cases over the next few years. Given that, it behooves employers to consult with their labor and employment counsel to ascertain whether termination decisions now expose them to future third-party retaliation claims and whether those claims are readily defensible.

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