



## Title VII Anti-Retaliation Protection Extended to Third Parties

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The Equal Employment Opportunity Commission (EEOC) recently reported that retaliation (under all the statutes it oversees) became the allegation most frequently asserted in EEOC charges in 2010. Retaliation claims made up more than 36 percent of all claims filed.

Title VII forbids retaliation against an individual who has opposed any practice made unlawful by Title VII ("the opposition clause") or has participated in a Title VII investigation or proceeding ("the participation clause"). Historically, to state a viable claim for Title VII retaliation, plaintiffs have had to establish that they engaged in protected activity under the opposition and/or participation clauses. Recently, however, the U.S. Supreme Court expanded the group of protected individuals and held that third parties may bring a Title VII retaliation claim based upon *another person's* protected activity. The Court's decision in *Thompson v. North American Stainless, LP*, 131 S. Ct. 863, 178 L. Ed. 2d 694 (2011), clarifies the circumstances under which such claims may be asserted.

***Thompson Sets Broad Parameters for Third-Party Retaliation Claims.*** Eric Thompson and his fiancé, Miriam Regalado, were both employed by North American Stainless ("NAS"). In early 2003, the EEOC notified NAS that Regalado had filed a sex discrimination charge. NAS terminated Thompson three weeks later. Believing NAS terminated him in retaliation for Regalado's EEOC charge, Thompson sued NAS in federal court, alleging a Title VII violation. The district and appellate courts determined that Thompson did not have standing to bring his retaliation claim because he had not engaged in protected activity.

On review, the U.S. Supreme Court considered two issues: (1) whether an employer violates Title VII's anti-retaliation provisions by terminating the fiancé of an employee who has complained of discrimination; and (2) whether the terminated fiancé may assert a Title VII claim on his own behalf. Addressing the first issue, the Court determined that, as alleged, Thompson's termination constituted unlawful retaliation. The Court pointed to the broad language of Title VII's anti-retaliation provision, which it has held prohibits any employer action that might dissuade a reasonable worker from making or supporting a discrimination charge. While declining to define a set class of relationships for which third-party retaliation is unlawful (*e.g.*, close family members versus mere acquaintances), the Court found it "obvious" that a reasonable worker could be discouraged from filing a discrimination charge if she knew that her fiancé would be fired in response.

The Court next considered whether Title VII granted Thompson standing to bring a claim. Under Title VII, only a "person claiming to be aggrieved" has standing to sue. Rejecting a narrow reading of that phrase, the Court interpreted it to mean any plaintiff with an interest "arguably sought to be protected" by Title VII, and not simply the person who engaged in protected activity. Applying this so-called "zone of interests" test, the Court determined that Thompson's interests were protected by Title VII. The Court reasoned that Title VII's purpose is to protect employees from their employers' unlawful actions. Accepting Thompson's allegations as true, terminating *him* was the retaliatory act by which NAS punished *Regalado* for her discrimination complaint. Under those circumstances, the Court held, Thompson was a "person aggrieved" with standing to bring a third-party retaliation claim. (The Court contrasted situations in which, for example, a shareholder claims the value of his stock decreased because the employer fired a valuable employee for discriminatory reasons—although arguably "aggrieved" by the discriminatory conduct, such a person does not have an interest protected by Title VII.)

Through *Thompson*, the Supreme Court again makes clear that activities protected from retaliation under Title VII are to be viewed broadly. Third parties who are the subject/victim of an employer's retaliatory action based on another person's protected activity may now bring a Title VII retaliation claim if they fall within the "zone of interests." Given this broad scope of protection, employers should consider potential retaliation claims and be careful to ensure their decisions are based upon legitimate business reasons when taking adverse action against *any* employee.

**Practical Guidance for Employers.** *Thompson* is a pro-employee decision that will require employers to defend against Title VII retaliation claims from persons who have not engaged in protected activity. As with first-party claims, understanding how to avoid third-party retaliation claims is the best defense:

- **Recognize the Wide Range of Actions Supporting First- and Third-Party Retaliation Claims.** Retaliation can consist of any employer action that might dissuade a reasonable worker from making or supporting a discrimination charge. Although "petty slights and minor annoyances" will not meet this standard, many actions short of discipline or discharge can support a retaliation claim, including: denial of a promotion; an unfavorable change in an employee's title, job duties, or schedule; denial of previously-approved paid time off; monitoring the employee; and giving the employee a poor reference post-employment.
- **Proceed with Caution.** In the event that an employee makes a discrimination complaint, carefully consider the circumstances before undertaking adverse action against that individual or potentially-protected third parties that could be viewed as retaliatory. At a minimum, individuals who reportedly engaged in the discrimination should be isolated from taking part in adverse employment decisions affecting such employees. If an employee later claims retaliation, the employer's post-complaint actions against the employee and possibly others with a close relationship will be carefully scrutinized.
- **Enforce Your Anti-Discrimination and Retaliation Policies.** Ensure that your organization has such policies and that they are communicated to your employees and consistently enforced. Make sure the policies contain a complaint procedure addressing how, and to whom, employees may complain about potential discrimination and/or retaliation. Importantly, any discrimination complaint and follow-up investigation should be kept strictly confidential, in part because a successful retaliation claim generally requires knowledge of an employee's protected activity.

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