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Can You Be Held Liable For Retaliating Against Someone Who Never Opposed Discrimination?

By Angela K. Dorn, Esq.

Employees and the attorneys who represent them continue to push for the expansion of Title VII, and one of the areas of recent expansion has concerned retaliation. Last year, the Supreme Court interpreted Title VII's anti-retaliation provisions to apply to employees who involuntarily participated in an internal investigation of alleged sexual harassment. Now a case that will soon be heard by the Supreme Court may expand the class of employees who can sue for retaliation - even if those employees never opposed discrimination in any manner at all.

In *Thompson v. North American Stainless, LP*, which the Supreme Court should hear this December, the Court will decide whether an employee who suffered an adverse employment action can sue an employer for retaliation when that employee did not actually oppose discrimination in the workplace, but rather was related to an employee who *did*. Eric Thompson had been a metallurgical engineer with North American Stainless, LP since 1997. His fiancée, Miriam Regalado, also worked for North American Stainless, and their relationship was common knowledge at the company. In February 2003, North American Stainless learned that Ms. Regalado had filed a charge with the EEOC accusing North American Stainless of gender discrimination. Just over three weeks later, North American Stainless terminated Mr. Thompson's employment. Mr. Thompson then sued North American for a violation of Title VII alleging that *his* termination was a retaliatory employment action against his fiancée's protected activity. Mr. Thompson, however, had never complained about discrimination toward himself, towards his fiancée, or on his fiancée's behalf. Nor had he participated in an investigation of workplace discrimination, including the investigation of Ms. Regalado's claim. In fact, no evidence was presented that he had ever uttered a single word to

his employer about discrimination in the workplace or even assisted Ms. Regalado in filing her charge of discrimination. Nevertheless, Mr. Thompson believed that he had been unjustly terminated because his fiancée filed a claim under Title VII and that his termination was in retaliation for his fiancée's claim against their mutual employer.

The case has produced contrary results throughout its history. The trial court ruled in favor of North American Stainless, holding that Title VII's anti-retaliation provisions only applied to employees who actually opposed discrimination in some fashion. A three-judge panel of the Sixth Circuit initially overturned the trial court, but upon a rehearing before the entire Sixth Circuit (called an "en banc" hearing), the appellate court affirmed the trial court's decision for North American Stainless in a divided result that produced five different opinions.

It is difficult to predict how the Supreme Court will rule on the issue, but as mentioned earlier, last year the Supreme Court recently expanded the potential employees who can claim retaliation to include employees who had not raised any opposition to discrimination themselves, but had involuntarily participated in an internal investigation of sexual harassment. Before that case, *Crawford v. Metropolitan Government of Nashville*, many courts had ruled that an employee's participation in, but not initiation of, an investigation was not a sufficient "opposition to discriminatory practices" to qualify as a protected activity under Title VII. However, the Supreme Court in *Crawford* felt otherwise - unanimously.

The implications of a favorable ruling for Mr. Thompson should become quickly apparent to employers. A favorable but narrow ruling in favor of Mr. Thompson - say, a ruling that expands the anti-discrimination provisions of Title VII only to family members, fiancées, or spouses of those employees opposing discrimination - will, while not favorable to employers, at least provide clear guidelines for employers and their attorneys. The real concern is a favorable but vague ruling for Mr. Thompson that allows retaliation claims by third parties such as Mr. Thompson but fails to define the scope as to which third parties can sue for such retaliation. Would a close friend of someone who opposed alleged discrimination be able to sue for retaliation after suffering an adverse employment action? A live-in boyfriend or girlfriend? A platonic roommate? At this point, one can only speculate, which makes the Supreme Court's decision one to watch.

However, even if the Supreme Court upholds the decision of the lower courts and does not grant employees such as Mr. Thompson the right to file a retaliation claim, employers may still be liable under facts similar to Mr. Thompson's case. As both sides acknowledged in oral arguments before the Sixth Circuit, under current Title VII law, Ms. Regalado could have sued North American Stainless for retaliation based on its termination of Mr. Thompson if she believed that termination was retaliation against *her* for filing a charge of discrimination.

Although one cannot predict how the Supreme Court will rule, one can take away good lessons and reminders from the *Thompson*

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case. As always, when an employee either instigates or participates in an investigation, employers should ensure the employee that there will be no retaliation for that employee's participation. When an employer needs to take an adverse action against any employee who could potentially file a retaliation claim down the line, the employer should always document and clearly explain the legitimate, non-discriminatory reasons for its action. If an employer has spouses or family members in its employ, it should consider having them work in different departments or under different chains of command to lessen the likelihood the employer can be accused of taking an adverse employment action against one to retaliate against the other. Uncertainty over the scope of retaliation law can create problems for employers, but hopefully the Supreme Court's decision, regardless of outcome, will not leave uncertainty in its wake.

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