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## How Far Will The High Court Go On 3rd-Party Reprisals?

Law360, New York (July 29, 2010) -- On June 29, the U.S. Supreme Court granted certiorari in *Thompson v. North American Stainless LP*, a vitally important Title VII case that will likely determine the viability of retaliation claims by third parties to an employment discrimination dispute. At issue is whether an individual who neither opposed nor participated in an investigation of a discriminatory practice, but who was nonetheless retaliated against for the protected activity of someone with whom they share a close relationship, may state a claim for retaliation.

For years, federal courts have split on the issue. On one side, some courts have held that such a claim must fail because it is not explicitly mentioned in Title VII and other anti-discrimination statutes, or because the statutes already provide extensive protection from retaliation. Other courts have noted that a bar on actions for third-party reprisals runs contrary to the purpose of the anti-discrimination laws and provides employers with an end-run around the prohibition on retaliation. The Supreme Court's resolution of this split will define the scope of anti-retaliation protections and will have widespread ramifications for employers and employees.

In *Thompson*, Miriam Regalado and her fiance Eric Thompson both worked at North American Stainless, and it was common knowledge at their place of work that they were engaged. Regalado filed a charge with the U.S. Equal Employment Opportunity Commission in September 2002, alleging that the company had illegally discriminated against her based on her sex. On Feb.13, 2003, the EEOC informed North American Stainless of the charge. Just three weeks later, on March 7, 2003, the company fired Thompson. Thompson then filed his own EEOC charge, alleging that North American Stainless had fired him in retaliation for his fiancee's EEOC complaint.

The U.S. District Court for the Eastern District of Kentucky granted summary judgment to North American Stainless and dismissed Thompson's complaint. In reaching its conclusion, the

court acknowledged the split among the courts of appeals but held that the anti-retaliation provision of Title VII, Section 704(a), does not provide protection from third-party reprisals. The court was not unsympathetic to Thompson and others in his position, however, and recognized that retaliation against someone with a close relationship to an alleged victim of discrimination could well deter the victim from exercising her rights under Title VII.

Still, the district court reasoned that "Title VII already offers broad protection in such situations by prohibiting employers from retaliating against employees who oppose unlawful employment actions or who participate in any manner in a proceeding under Title VII." Although the district court did not address the issue directly, it is possible that under its reasoning, the company's termination of Thompson would have given rise to a retaliation claim by Regalado, even though Thompson could not bring such a claim on his own behalf.

The U.S. Court of Appeals for the Sixth Circuit reversed, holding that Title VII prohibits employers from taking retaliatory action against employees closely related to those directly involved in protected activity, where "it is clear that the protected activity motivated the employer's action." In reaching its conclusion, the appeals court looked beyond the literal language of the statute, stating that to deny a claim for third-party reprisals "would defeat the plain purpose of Title VII."

The court cited the Supreme Court's landmark decision in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), for the proposition that the anti-retaliation provision of Title VII is intended to secure a nondiscriminatory workplace by ensuring that employees have "unfettered access to the statutory remedial mechanisms." As the district court noted, if the law permitted retaliation against family members or close associates of a person complaining of discrimination, it would likely dissuade a reasonable worker from exercising her protected rights.

On rehearing en banc, the Sixth Circuit reversed the panel decision, in a sharply divided opinion that mirrors the current split in authority among the circuits. The majority joined the Third, Fifth and Eighth circuit courts of appeal in holding that the only individuals who can bring claims for retaliation under Section 704(a) are those who have "personally engaged in protected activity by opposing a practice, making a charge, or assisting in an investigation." In so holding the majority, like the district court, looked to the plain language of the statute and held that nothing therein gives a cause of action to a third party, regardless of his relationship to the aggrieved individual. A concurring opinion by Judge Rogers, meanwhile, made explicit what the district court implied, i.e., that in no event should the denial of a third-party right of action for retaliation be construed as a limitation on a "personally

engaged" individual's right to sue for retaliation in response to "harm imposed on people that (the employer knows) the protected persons care about."

Three scathing dissents sided with the D.C. Circuit, the EEOC and numerous district courts. It attacked what it viewed as the majority's misinterpretation of basic canons of statutory construction. The dissent pointed to the majority's apparent conflation of Section 704(a), which identifies the practices forbidden by Title VII, with Section 706(f)(1), which authorizes a civil action by any "person aggrieved." Accepting the facts as pled, the dissenters wrote, Thompson would clearly qualify as a person aggrieved based on prohibited retaliation.

The Supreme Court's grant of certiorari in this case has the potential to decide important issues that have long remained unsettled under Title VII and other anti-discrimination and anti-retaliation statutes. The simpler question is whether third-party reprisals are actionable by anyone, including the person who engaged in protected activity. If the court addresses this question directly, it will almost certainly answer it in the affirmative, in light of the "materially adverse" standard for retaliation set forth in *Burlington Northern*.

The more central question, and the one that has created sharp divisions among the federal courts, is whether the Eric Thompsons of the world can bring their own claims for retaliation. Employers will no doubt argue that allowing claims for third-party reprisals will open the door for opportunistic suits by anyone with any sort of relationship to a person engaged in protected activity. Nevertheless, the apparent purposes of anti-discrimination and anti-retaliation laws, along with basic principles of fairness, suggest that in a case like Thompson's (assuming the facts to be as they were pled), there should be some remedy for a person who loses his job because someone close to him has exercised her rights.

How the court will rule in this matter is difficult to predict. At times, the Roberts court has seemed decidedly pro-business, handing down decisions such as *Ledbetter*. The same court, however, decided *Burlington Northern* by an 8-1 majority. The issue may come down to the parsing of statutory language and an analysis of prudential standing, or it may be decided based on the more general purposes of Title VII. Regardless of the outcome, Thompson will likely frame the debate on the outer bounds of anti-retaliation provisions for years to come.

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