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TITLE VII BARS RETALIATION AGAINST FIANCE, SUPREME COURT SAYS

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On the heels of the EEOC's fiscal year 2010 report that for the first time in history retaliation surpassed race as the most frequently filed charge against employers, the Supreme Court approved an unusual theory of retaliation, but one that could even further bolster that trend. In ***Thompson v. North American Stainless, LP***, the Supreme Court held 8-0 (Justice Elena Kagan not participating) that Title VII's anti-retaliation provisions prohibit an employer from terminating the fiancé of an employee who files an EEOC charge. From this decision, written by Justice Antonin Scalia, it is now clear that retaliation concerns go beyond the employee who engaged in the protected activity. But the Court refused to specify exactly how far.

Background of the Case

Miriam Regalado and her fiance, Eric Thompson, were both employees of North American Stainless. In 2003, Regalado filed a sex discrimination charge against the company. Three weeks later, the company terminated Thompson.

Thompson then filed his own retaliation charge, followed by a lawsuit in the U.S. District Court of the Eastern District of Kentucky. That court granted the company's motion for summary judgment, ruling that Title VII does not permit third-party retaliation claims. Thompson then appealed to the U.S. Court of Appeals for the Sixth Circuit (Kentucky, Michigan, Ohio, and Tennessee). A three-judge panel of the Sixth Circuit reversed the District Court, but the full court affirmed, reasoning that because Thompson himself did not engage in any protected activity, he was not included in the class of persons intended to be protected by the statute.

The Supreme Court's Decision

In ruling for Thompson and remanding the case for a jury trial on the merits, the Supreme Court addressed two separate but related questions. First, was the firing of Thompson unlawful retaliation? Second, did Thompson have a cause of action?

First, assuming Thompson's version of events was true, the Court held that the firing of Thompson violated Title VII. Relying on its 2006 opinion in ***Burlington Northern & Santa Fe Ry. Co. v. White***, the Court reiterated that Title VII's anti-retaliation provisions prohibit any employer action that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." Applying that standard to Thompson's claim, the Court stated that it was "obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired." The Court was quick to acknowledge, however, that it was not defining all relationships that

would satisfy this standard, given the fact-specific nature of retaliation claims. "We expect that firing a close family member will almost always meet the *Burlington* standard, and inflicting a milder reprisal on a mere acquaintance will almost never do so, but beyond that we are reluctant to generalize."

Second, the Court held Thompson did have a cause of action, even though he was not the individual who had filed the original charge. In reaching this conclusion, the Court had to interpret the portion of Title VII that provides that "a civil action may be brought…by the *person claiming to be aggrieved*." Notably, the Court rejected the company's argument that "person aggrieved" means the employee who engaged in the protected activity (in this case, Regalado). The Court emphasized that "if that is what Congress intended it would more naturally have said 'person claiming to have been discriminated against' rather than 'person claiming to be aggrieved.'" Instead, the Court adopted a test through which it concluded that Thompson fell within the "zone of interests" sought to be protected by Title VII.

(It is important to keep in mind that, at this stage of the litigation, the Court had to assume that Thompson's version of events was true. When the case goes to trial, the employer will have the opportunity to present its own evidence regarding the basis for the termination.)

Thoughts for Employers

Overall, *Thompson* is certainly a pro-employee decision and serves as an important clarification of the breadth of Title VII's anti-retaliation provisions. Employers frequently struggle when they are forced to deal, not only with an employee who takes action against the company, but also with a relative or "signifcant other" who is (or is feared to be) equally bitter and disgruntled. *Thompson* makes clear that punishing or terminating the relative or "significant other" is not the answer.

On the other hand, employers may take action against employees – even if they or their loved ones have engaged in protected activity – for legitimate reasons that would apply to any similarly-situated employee. For example, if the relative of an employee who filed a charge becomes so disgruntled that she is rude to customers, insubordinate, or confrontational with co-workers, the employer may lawfully take action.

In summary, *Thompson* does not dramatically affect what employers should be doing to avoid retaliation claims in the first place: taking employees' complaints seriously and not disciplining employees because of such complaints, but treating employees consistently without regard to such complaints. Employers should also document thoroughly. Consistency remains critical for rebutting a claim of retaliation.

If you need assistance in handling a discrimination or retaliation claim, please contact any member of Constangy's **Litigation Practice Group**, or the Constangy attorney of your choice.