

United States Supreme Court Allows Third Party Retaliatory Claim

Title VII of the Civil Rights Act of 1964 is a federal law that prohibits discrimination with respect to all employment practices on the basis of race, color, religion, sex or national origin (anti-discrimination provision). The Act also prohibits retaliation against anyone that brings a complaint of discriminatory acts (antiretaliation provision). Title VII is administered and enforced by the Equal Employment Opportunity Commission (EEOC).

In February 2003, the EEOC notified North American Stainless (NAS) that one of its employees, Miriam Regalado, filed an allegation of sex discrimination against the company. NAS fired Regalado's co-worker and fiancé, Eric Thompson, three weeks later. Thompson filed a charge with the EEOC that enabled him to then bring suit against NAS in the United States District Court for the Eastern District of Kentucky under Title VII for terminating him as a means to retaliate against Regalado filing her charge with the EEOC. The District Court granted summary judgment to NAS holding that Title VII "does not permit third party retaliation claims." The Sixth Circuit Court of Appeals upheld the District Court's ruling affirming that Thompson was "not included in the class of persons for whom Congress created a retaliation cause of action" because he was not engaged in any statutorily protected activity on either his or his fiancé's behalf.

On appeal, the United States Supreme Court was presented with two questions: 1. Did Thompson's termination constitute unlawful retaliation? 2. Did Thompson have a cause of action under Title VII?

To answer the first question, the Court applied the standard it first developed in *Burlington N. & S. F.R. Co. v. White*, 548 U.S. 53 (2006). In that case, the Court held that Title VII's antiretaliation provision prohibits employer conduct that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." Here, such a dissuasive influence was "obvious" to the Court. In fact, NAS didn't dispute that Thompson's firing met this standard. Rather, NAS questioned the application of the *Burlington* standard altogether because it raises concerns about which relationships are entitled to protection from third party reprisals. If firing an employee's fiancé is an obvious example of retaliation, what about a connection that is not so obvious, such as when it's a close friend or girlfriend? Despite refusing to draw clear lines, the Court did offer some guidance for employers: "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." Oftentimes, however, the Court said that whether an action is retaliatory or not will depend on the particular circumstances of the case.

The resolution of the second question before the Court (Did Thompson have a cause of action under Title VII?) turned on an interpretation of the word "aggrieved." Title VII provides that a "civil action may be brought ... by the person claiming to be aggrieved." 42 U.S.C. § 2000e-5(f)(1). In the past, the Court suggested that the Title VII aggrievement requirement conferred a right to sue on anyone who had standing under Article III of the Constitution. Under this standard, a person must have an injury in fact caused by the defendant for which a remedy is provided under law. The Court determined, however, that this bar to suit was too low for Title

VII purposes because “absurd consequences would follow. For example, a shareholder would be able to sue a company for firing a valuable employee for racially discriminatory reasons, so long as he could show that the value of his stock decreased as a consequence.” NAS argued for a narrower definition of the phrase “person aggrieved” that was limited to only those employees engaged in a protected activity. The Court opted instead for a common usage of the term taken from the Administrative Procedure Act (APA). The APA confers standing on any “person ... adversely affected or aggrieved ... within the meaning of a relevant statute.” This standard would limit plaintiffs to only those injured in an Article III sense who were within the “zoning of interests” sought to be protected by Title VII. Applying this test to the case at hand, the Court found that Thompson fell within this zone because “(h)urting him (Thompson) was the unlawful act by which the employer punished her (Regalado),” and the purpose of Title VII is to protect employees from the unlawful acts of their employers.

Though Title VII applies to only those employers with at least 15 or more employees, all municipalities should be aware of this ruling because the Vermont counterpart to this law (the Vermont Fair Employment Practices Act, or VFEPA) applies to all municipal employers regardless of their number of employees and would likely be interpreted in the same way. Though the two laws are similar, there are some noticeable differences. For example, VFEPA provides broader statutory protections for employees in Vermont by making it illegal to discriminate in all employment practices on the basis of race, color, religion, sex or national origin and also sexual orientation, ancestry, place of birth age or disability. Also, unlike Title VII, an employee may file a lawsuit under VFEPA without first filing a claim with the enforcing agency (Vermont Attorney General’s office). Like Title VII, however, VFEPA prohibits employers from retaliating against employees for lodging a complaint or cooperating in an investigation of discriminatory practices. 21 V.S.A. § 495. Though exceptions to both laws exist for lawful discrimination based upon bona fide occupational qualifications or observing the terms of a bona fide seniority system or benefit plan, municipalities can always avoid claims of retaliatory conduct by ensuring a record of regular personnel evaluations to support discharge for good cause.

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