Thompson v. North American Stainless

The U.S. Supreme Court Rules on Third-Party Retaliation Claims

By Kimberly Lambert Love and Robyn M. Funk

Employers can expect to see a new kind of Title VII retaliation claim after the Supreme Court's recent decision in *Thompson v. North American Stainless*, 562 U.S. ___, 131 S.Ct. 863 (2011). Eric Thompson and his fiancée (now wife) were both employed by North American when Thompson's fiancée filed a charge of discrimination with the Equal Employment Opportunity Commission alleging sex discrimination. Three weeks after North American received notice of the charge, the company terminated Thompson for performance problems.[1]

After his termination, Thompson sued North American,[2] claiming the company had violated the anti-retaliation provisions of Title VII by terminating him in order to retaliate against his fiancée for filing her EEOC charge. The district court granted summary judgment in favor of North American, holding that Title VII does not permit third-party retaliation claims.[3] The 6th Circuit reversed.[4] However, after a rehearing *en banc*, a divided 6th Circuit affirmed the district court's grant of summary judgment. Specifically, the 6th Circuit held that Thompson was not protected by the anti-retaliation provisions of Title VII because he had not engaged in any protected activity himself.[5]

The U.S. Supreme Court granted certiorari, and in an opinion written by Justice Scalia, the court unanimously[6] held that Thompson had a right to sue for retaliation. The court had "little difficulty" concluding that if the facts as alleged by Thompson were true, Thompson's termination violated Title VII.[7] In reaching this conclusion, the court relied on the broad standard set forth in *Burlington Northern & Santa Fe Railway Co. v. White*.[8] In *Burlington Northern*, the court held that a plaintiff must show the alleged retaliatory conduct was "materially adverse" — meaning that a reasonable person may be dissuaded from making or supporting a charge of discrimination. Applying this standard to the facts in *Thompson*, the court held it was "obvious" that a reasonable worker might be dissuaded from engaging in protected activity if the worker knew that his fiancée would be terminated.[9] In holding that third-party retaliation claims are actionable, the court declined to adopt a bright line rule regarding how far third-party retaliation claims may stretch. Instead, the court concluded that terminating "a close family member" will likely always dissuade a reasonable worker from engaging in

protected activity whereas "inflicting a milder reprisal on a mere acquaintance" will likely not.[10] The court emphasized that Title VII's anti-retaliation provision for judging harm must be objective and not based on a plaintiff's subjective feelings.[11]

Further, the second part of the court's opinion answered the more difficult question of whether Thompson — who had not engaged in protected activity while employed — had standing to sue North American.[12] The court held that Thompson *could* bring a claim against North American because he was "an aggrieved person" within the meaning of Title VII, which seeks to protect employees from their employer's unlawful actions.[13] Specifically, the court reasoned that Thompson was in the "zone of interests" protected by Title VII because Thompson was an employee of North American and terminating him was North American's intended means of harming Thompson's fiancée — the employee who engaged in the protected activity.[14] Thus, even though Thompson did not engage in protected activity himself, he could bring a retaliation claim against North American.

> **"Prior to the court's holding in *Thompson*, there was a disagreement among the various courts as to whether third-party retaliation claims were actionable."**

Prior to the court's holding in *Thompson*, there was a disagreement among the various courts as to whether third-party retaliation claims were actionable.[15] Indeed, district courts within the 10th Circuit were inconsistent on the issue.[16] For instance, in *McKenzie v. Atl. Richfield Co.*,[17] an employee filed a Title VII claim against his employer, alleging that the employer retaliated against him for sexual harassment claims made by his wife (also an employee). The District Court of Colorado recognized that the employee's claims were derivative in nature since he had not engaged in the protected activity himself. Nevertheless, the Colorado District Court allowed the employee to maintain the action.[18] In contrast, in *EEOC v. Wal-Mart Stores Inc.*,[19] the District Court of New Mexico determined that Title VII did not permit third-party retaliation claims. In *EEOC*, two adult children of a Wal-Mart employee sued Wal-Mart alleging that the company refused to hire them in retaliation for their mother's protected activity. The EEOC urged the New Mexico District Court to recognize the third-party claims, but the court dismissed the claims finding that the plain language of Title VII did not permit claims by individuals who had not engaged in protected activity.[20]

While *Thompson* makes clear that third-party retaliation claims are now cognizable, employers are left to guess how far a court will extend a retaliation claim given the fact the Supreme Court declined to establish a bright line test. For example, will courts extend *Thompson*'s holding to relationships such as co-worker friendships — an issue the court recognized but purposefully left unresolved? Indeed, at least one district court has extended the first part of *Thompson*'s holding to a co-worker friend situation. Specifically, the District Court for the District of Columbia allowed an employee to proceed past summary judgment on his retaliation claim where the employee alleged he had engaged in protected activity and his employer responded by threatening to fire his "best friend" co-worker.[21]

Thus, in light of *Thompson*'s unclear and potentially far-reaching scope, employers should review their anti-retaliation policies to ensure that the language is broad enough to prohibit third-party retaliation and should train supervisors to understand that retaliation against *any* employee is prohibited.

1. *Id*. at 867; see also 520 F.3d 644, 646 (6th Cir. 2008).
2. *Id*. at 867.
3. *See* 435 F. Supp. 2d 633 (E.D. Ky. 2006).
4. *See* 520 F.3d 644 (6th Cir. 2008).
5. *See* 567 F.3d 804 (6th Cir. 2009).
6. Justice Elena Kagan did not take part in the decision.
7. *Thompson*, 131 S.Ct. at 867.
8. 548 U.S. 53, 126 S.Ct. 2405 (2006).
9. *Thompson*, 131 S.Ct. at 868.
10. *Thompson*, 131 S.Ct. at 868.
11. *Thompson*, 131 S.Ct. at 868-69.
12. *Thompson*, 131 S.Ct. at 869.
13. The court analyzed 42 U.S.C. §2000e-5(f)(1), which provides in pertinent part, "a civil action may be brought…by the person claiming to be aggrieved."
14. *Thompson*, 131 S.Ct. at 869-70.
15. *See* 1 Employment Discrimination Coordinator Analysis of Federal Law, §8:22; *see also Thompson v. N. Am. Stainless*, 567 F.3d 804,

809-12 & n.6 (6th Cir. 2009) (collecting cases); *EEOC v. Wal-Mart Stores, Inc.*, 576 F. Supp. 2d 1240, 1243-46 (D.N.M. 2008) (collecting cases). Notably, North American argued that there was no split among the Circuits. *See e.g., Torres v. McHugh*, 701 F.Supp.2d. 1215, 1219-20 (D. New Mexico 2010) (stating that every circuit to address whether Title VII allows third-party retaliation claims has answered the question in the negative).

16. *See also Horizon Holdings, LLC v. Genmar Holdings, Inc.*, 241 F. Supp. 2d 1123, 1142-44 (D. Kan. 2002) (holding that family member of employee who engaged in protected activity could not bring a third-party retaliation claim under Title VII and granting summary judgment for employer on third-party retaliation claim); *Torres v. McHugh*, 701 F. Supp. 2d 1215 (D.N.M. 2010) (granting summary judgment for employer where plaintiff alleged only that her husband had engaged in protected activity).

17. 906 F. Supp. 572 (D. Colo. 1995).

18. *Id*. at 575.

19. 576 F.Supp.2d 1240 (D. New Mexico 2008).

20. *Id*. at 1244-47.

21. *Ali v. District of Columbia Gov't.*, 2011 U.S. Dist. LEXIS 97474 (D.D.C. Aug. 31, 2011).

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