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EMPLOYMENT

U.S. Supreme Court Expands The Scope Of Permissible Retaliation Claims Under Title VII

By: Clifford S. Anderson, Esq.

On January 24, 2011, the United States Supreme Court decided *Thompson v. North American Stainless,* LP., ___S. Ct.___, 2011 WL 197638 (Jan. 24, 2011). In this lawsuit, employee Eric Thompson brought a Title VII action against his employer North American Stainless ("NAS") for retaliation. He alleged that he was terminated three weeks after his fiancé Miriam Regalado, who worked for the same employer, had filed a prior gender discrimination charge with the Equal Employment Opportunity Commission ("EEOC"). He contended that his firing was in retaliation for her filing that charge.

A Kentucky federal district dismissed Thompson's claim on summary judgment. The trial court concluded that Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* "does not permit third party retaliation claims." *Thompson v. North American Stainless,* LP, 423 F. Supp.2d 633, 639 (E.D. Ky. 2006). Although a panel of the Sixth Circuit reversed, upon rehearing *en banc,* in 10-to-6 vote, the *en banc* court affirmed reasoning that because Thompson did not "engage[e] in any statutorily protected activity, either on his own behalf or on behalf of Miriam Regalado," Thompson was "not included in the class of persons for whom Congress created a retaliation cause of action." *Thompson v. North American Stainless*, LP, 567 F.3d 804, 807-808 (2009).

In a unanimous opinion, in which Justice Kagan did not participate, the United States Supreme Court reversed. In an opinion written by Justice Scalia, the Court first held that if the facts as alleged by Thompson were true, his firing by NAS constituted unlawful retaliation. Second, the Court held that a person "aggrieved" under Title VII includes any person with an interest arguably sought to be protected by a statute. Third, in this case, the Court concluded Thompson fell within the zone of interests intended to be protected by Title VII.

The Court's Analysis

Following its recitation of the procedural history of Thompson's lawsuit as described above, the Court first noted that Title VII provides that "[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has made a charge" under Title VII. *Thompson,* 2011 WL 197638 at *3 (citing 42 U.S.C. § 2000e-3(a)). Thus, in the context of the *Thompson* facts, Title VII makes clear that it would be unlawful for NAS to discriminate against Regalado for her filing of her charge of sex discrimination because doing so was protected conduct. Stated differently, clearly NAS could not fire Regalado for *her* filing of her sex discrimination charge because to do so would be unlawful retaliation for her engaging in indisputably protected conduct.

The twist in *Thompson* is whether NAS's firing of Regalado's fiancé, Eric Thompson, to retaliate against Regalado for filing a charge, would *also* constitute unlawful retaliation even though the retaliation was not directed specifically at Regalado but rather indirectly towards her by harming her fiancé. The second question raised by the Thompson facts, assuming the firing of Thompson by NAS was unlawful retaliation, is whether Thompson, *not* Regalado, could state a cause of action for unlawful retaliation. The Court dealt with each question in turn. *Thompson,* 2011 WL 197638 at *3.

Issue No. 1 - *Did NAS's firing of Thompson constitute unlawful retaliation?*
Due to the fact that Thompson's case was dismissed on summary judgment, for purposes of its analysis, the Court was required to assume

that NAS fired Thompson in order to retaliate against Regalado for her filing a sex discrimination charge. Based on that assumption, the Court had little difficulty concluding that such conduct by NAS would violate Title VII if proven to be true. The Court began its analysis by noting that in *Burlington N. & S.F.R. Co. v. White,* 548 U.S. 53, 62 (2006), the Court held that "Title VII's antiretaliation provision must be construed to cover a broad range of employer conduct." *Thompson,* 2011 WL 197638 at *3. The Court therefore concluded in that case that Title VII prohibits any employer action that might have dissuaded a reasonable worker from making or supporting a discrimination charge. *Id.* From those holdings, applying them to the facts of Thompson, the Court easily concluded that "a reasonable worker [*i.e.,* Regalado] might be dissuaded from engaging in protected activity [*i.e.,* filing a charge] if she knew that her fiancé [*i.e.,* Thompson] would be fired" by her doing so. *Id.*

NAS did not dispute the above conclusion but argued that in adopting a rule prohibiting reprisals against third parties would lead to "difficult line-drawing problems concerning the types of relationships entitled to protection." Id. In short, NAS contended such a rule should not be adopted because doing so would "place the employer at risk any time it fires any employee who happens to have a connection [*e.g.,* girlfriend, close friend, trusted co-worker] to a different employee who filed a charge with the EEOC."

While acknowledging the "force" of NAS's argument, the Court concluded that it did not warrant a "categorical rule that third-party reprisals do not violate Title VII." *Id.* at *4. Consistent with Justice Scalia's strict constructionist views, the Court concluded that "there is no textual basis for making an exception" to Title VII's broad antiretaliation provision and a "preference for clear rules cannot justify departing from statutory text." *Id.* Rather, the Court observed that the "firing of a close family member will almost always meet the *Burlington* standard" whereas "inflicting a milder reprisal on a mere acquaintance will almost never do so." *Id.* In sum, the Court concluded that "Title VII's antiretaliation provision is simply not reducible to a comprehensive set of clear rules" leaving each case to turn on its own unique facts. *Id.*

Issue No. 2 - *May a third-party such as Thompson sue for retaliation?*

The more thorny issue for the Court was whether Thompson, as contrasted with Regalado, could sue NAS for its alleged violation of Title VII's prohibition on retaliation. The Court began its analysis by noting that Title VII provides that "a civil action may be brought . . . by the person claiming to be *aggrieved.*" *Id.* (citing 42 U.S.C. § 2000e-5(f)(1)). The Court first rejected the analysis of the Sixth Circuit and its own *dictum in Trafficante v. Metropolitan Life Ins. Co.,* 409 U.S. 205 (1972), and concluded that the term "aggrieved" must be construed more narrowly than the outer boundaries of Article III that merely confer standing to sue otherwise "absurd consequences would follow" whereby even those with a limited nexus to the underlying protected conduct at issue could sue. *Id.* at *4-5. At the other extreme, the Court also rejected the narrow construction offered by NAS that a "person aggrieved" is "a term of art that refers only to the employee who engaged in the protected activity," in this case, Regalado. *Id.*

Instead, the Court struck a middle ground and held that the term "aggrieved" in Title VII enables "suit by any plaintiff with an interest arguably [sought] to be protected by the statutes . . . while excluding plaintiffs who might technically be injured in the Article III sense but whose interests are unrelated to the statutory prohibitions in Title VII." *Id.*

Applying the above holding in *Thompson,* the Court concluded that Thompson fell within the zone of interests protected by Title VII. The Court noted that Thompson was an employee entitled to the protections of Title VII and he was not an accidental victim of the unlawful act of NAS, but rather, "injuring him was the employer's intended means of harming [his fiancé] Regalado." *Id.* at *6. Accordingly, the Court concluded he was well within the zone of interests sought to be protected by Title VII and had standing to sue.

Conclusion

In the wake of *Thompson,* it is clear that employers must now add an additional layer of analysis to any serious discipline or termination decision that they make regarding their employees so as to ensure there is no nexus to a closely related employee who may have engaged in earlier protected conduct. Moreover, such cases will undoubtedly be fact intensive, and not necessarily susceptible to summary judgment. Accordingly, handling such employment decisions well and with care at the time they are occurring will be vital to avoiding expensive and protracted litigation later as a consequence of the expansion of retaliation claims available to interested third parties under Title VII.

H&J Adds New Attorneys

Hellmuth & Johnson, PLLC is pleased to announce that Katheryn Andresen, Edward Beckmann, and Michael McNamara have joined the firm.

Kate Andresen joins the firm as Partner and has over 15 years of experience in the areas of information technology, eCommerce, intellectual property and general corporate law.

Ed Beckmann has represented parties involved in disputes arising from several industries, including aviation, construction, energy, reinsurance and others. He is also uniquely qualified to represent individuals and businesses whose reputations have been tarnished by libel, slander, or exposure of private information.

Michael McNamara practices in the firm's litigation and insurance practice groups. Michael received his law degree from William Mitchell College of Law and is licensed to practice in the State of Minnesota.

To learn more about our new attorneys, please view their biographies on our website at **www.hjlawfirm.com**.

Minnesota Supreme Court Raises Standards For Retaliation Claims

By: John J. Steffenhagen, Esq.

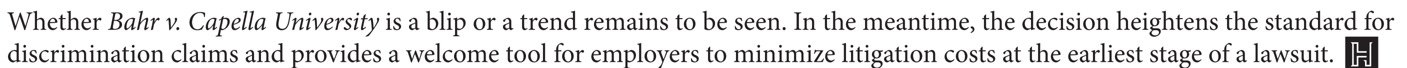
The economic downturn ushered in yet another uncomfortable fact for employers: discrimination claims reached an all-time high. In fiscal year 2010, for example, the U.S. Equal Employment Opportunity Commission received nearly 100,000 new private sector charges of employment discrimination – the most ever in the agency's 45-year history and a 7.2% increase over the number of charges filed in 2009. In short, harsh economic conditions, the need to cut costs, and an employee's need to justify or rationalize job loss make for a potent mixture.

However, the Minnesota Supreme Court recently lended welcomed certainty – and a higher standard – to the analysis of discrimination claims. In *Bahr v. Capella University, No. A-08-1367,* a former employee alleged retaliation under the Minnesota Human Rights Act ("MHRA"). In particular, the employee argued that she had refused to participate in employment practices forbidden under the MHRA. The Minnesota Supreme Court affirmed that the complaint was properly dismissed at the pleadings stage – without trial, discovery, or the expense of lengthy litigation.

In doing so, the Minnesota Supreme Court made two holdings that employers can utilize both proactively (to avoid litigation) and retroactively (to minimize litigation costs when a claim arises). First, the Court held that a discrimination or retaliation complaint must "provide more than labels and conclusions." In other words, the Court rejected the generic plead-it-now-and-prove-it-later theory of litigation.

Second, even if a plaintiff alleges specific facts, the Court held that a complaint is still subject to dismissal if no "reasonable person" could believe that conduct forbidden by the MHRA had occurred. In other words, the decision paves the way for trial courts to screen meritless claims by analyzing whether a reasonable person could believe that a violation had occurred.

Whether *Bahr v. Capella University* is a blip or a trend remains to be seen. In the meantime, the decision heightens the standard for discrimination claims and provides a welcome tool for employers to minimize litigation costs at the earliest stage of a lawsuit.



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