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Alert

Supreme Court Expands Availability of Retaliation Claim to Parties "Connected" to an Employee Who Complains of Discrimination

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Employers have a new reason to take care when making employment decisions that could subject them to statutory liability. Retaliation complaints under federal employment discrimination laws — in which individuals claim that they were punished by employers for taking statutorily-protected actions — have increased significantly in number during the past few years. Complainants filed 36,258 retaliation charges against private employers with the Equal Employment Opportunity Commission (the "EEOC") in the 2010 fiscal year. Totaling 36.3 percent of all EEOC charges for the year, retaliation claims surpassed other federal discrimination charges for the first time.[1]

The increase in recent years follows a 2006 U.S. Supreme Court decision, *Burlington Northern & Santa Fe Railroad Co. v. White*,[2] in which the Court broadly interpreted the anti-retaliation provision of Title VII of the Civil Rights Act of 1964 ("Title VII"), which makes it illegal to discriminate against employees or applicants on the basis of race, color, religion, sex or national origin or to retaliate against an employee or applicant for complaining about discrimination, filing a charge of discrimination or participating in a discrimination investigation or lawsuit. The Court held that an employer covered by Title VII may not take any action that "might have dissuaded a reasonable worker from making or supporting a charge of discrimination." Relying on the *Burlington* ruling, the Court on Jan. 24, 2011 opened the door for additional retaliation claims with an even more expansive reading of Title VII's anti-retaliation provision in its decision in *Thompson v. North American Stainless, LP*.[3]

What Happened in *Thompson*?
The Court held that Eric Thompson had a claim under Title VII against North American Stainless LP ("NAS") when he was fired — three weeks after his fiancée, another NAS employee, filed a charge of sex discrimination against NAS. Thompson claimed that NAS fired him to punish his fiancée for filing the charge. The Court concluded that NAS unlawfully retaliated against Thompson's fiancée when it terminated Thompson's employment because "a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired." The Court further held that Thompson could maintain a charge against NAS on his own behalf, even though he did not engage in protected activity. Noting that the "purpose of Title VII is to protect employees from their employers' unlawful actions," the Court determined that Thompson could file a charge as a person "aggrieved" under Title VII within the "zone of interests" protected by the statute.

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[1] *See* http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm.

[2] *See* 548 U.S. 53 (2006).

[3] *See* http://www.supremecourt.gov/opinions/10pdf/09-291.pdf.

What Does *Thompson* Mean for Employers?
The Court's decision in *Thompson* creates uncertainty in the law for already wary employers. *Thompson* permits an employee who did not complain of discrimination or otherwise engage in activity protected by Title VII, to file a Title VII charge when the employee happens to have a "connection" to a different employee who engaged in protected activity. The Court did not clearly delineate the relationships which would permit a third-party to bring a retaliation claim. The Court stated that "firing a close family member" in response to that employee's protected activity will almost always expose an employer to liability, and that "inflicting a milder reprisal on a mere acquaintance will almost never do so." Under *Thompson*, a good friend, daily lunch companion, girlfriend, boyfriend or mere sympathizer of an employment discrimination complainant can possibly maintain a Title VII charge against his or her employer for retaliation, based on the tangential connection. The Court did, however, rule out the ability of a non-employee — including a shareholder of the employer or any other accidental victim of the retaliation — to bring a claim against the employer by noting that such non-employees are outside the "zone of interests" of protection afforded by Title VII. Without more clarification from the Court, employers will likely need to defend against a new group of employees interested in testing this ruling's boundaries.

Employers should also note that *Thompson* could increase the frequency of retaliation claims brought by employees claiming that they were punished in response to other employees' protected activity under other federal anti-discrimination laws. Both the Age Discrimination in Employment Act of 1967 (the "ADEA")[4] and Title I of the Americans with Disabilities Act of 1990 (the "ADA")[5] proscribe retaliation, and have language similar to that in Title VII. Courts have already applied the *Burlington* standard to claims brought under the ADEA and ADA and will now likely apply the *Thompson* ruling to charges filed under those statutes. Courts may also import the reasoning in *Thompson* to claims brought under other federal statues that contain anti-retaliation provisions — including the National Labor Relations Act (the "NLRA")[6] and the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act").[7]

The importance of documenting the lawful basis for all employment decisions cannot be overstated. While the factual circumstances in *Thompson* are unique, the U.S. Supreme Court has significantly broadened the scope of potential third-party retaliation claims by declining to limit the types of connections between employees that will be recognized. An employer who vigilantly documents the legitimate reasons for any employment action should minimize the risk of liability for retaliation claims, regardless of the relationships involved.

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If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

[4] *See* 29 U.S.C. §, § 623(d), 626(c) (1967).

[5] *See* 42 U.S.C. §, § 12203(a), 12203(c) (1990).

[6] *See* 29 U.S.C. § 151-169 (1935).

[7] *See* Pub.L. 111-203, H.R. 4173 (2010).

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