Employment Edge 120th Edition—Supreme Court Holds that Title VII Prohibits Retaliation Against Third Parties: What Employers Need To Do To Prevent Liability

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Miriam and Eric both worked for the same company. They were also engaged. Then, Miriam filed a sex discrimination charge against their employer with the EEOC. Three weeks later, the company fired Eric. Can Eric claim that his termination was in retaliation for his fiancÉe's charge, though he himself did not engage in any protected activity under Title VII?

Yes, answered a unanimous Supreme Court. In Thompson v. North American Stainless LP, the Court reaffirmed that Title VII prohibits "any employer action that might have dissuaded a reasonable worker from making or supporting a charge of discrimination." The Court held that Title VII's anti-retaliation provision extends, in some cases, to reprisals against a third party.

The result in the Thompson case is, in many ways, unsurprising. To the Supreme Court, it was "obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew her fiancÉ would be fired." Similarly, under Minnesota law, reprisals against an employee's fiancÉ are likely prohibited. The Minnesota Human Rights Act protects employees from discrimination and retaliation because of their marital status. The law prohibits discrimination on the basis of a spouse's or former spouse's—and likely a fiancÉ's—identity, situation, actions, or beliefs. This protection extends not only to persons who are single, remarried, divorced, separated, or widowed, but also to persons living with, but not married to, a person of the opposite sex.

What is not obvious in the wake of the Thompson decision is the impact that the decision will have in future retaliation cases. The Court did not limit its holding to retaliation claims against an employee's spouse or fiancÉ. Instead, the Court "decline[d] to identify a fixed class of relationships" that are close enough to form the basis for a cause of action for third-party reprisal.

"We expect that a close family member will almost always meet the . . . standard, and inflicting a milder reprisal on a mere acquaintance will almost never do so, but beyond that we are reluctant to generalize."

Between "close family member" and "mere acquaintance" are innumerable relationships. Which ones are close enough to form the basis for a reprisal claim? A second cousin? Someone an employee has casually dated? The EEOC Compliance Manual provides some guidance. In the Compliance Manual, the EEOC counsels that Title VII "prohibit[s] retaliation against someone so closely related to or associated with the person exercising his or her statutory rights that it would discourage or prevent the person from pursuing those rights."

Retaliation claims were already on the rise before the Thompson decision. In 2010, 36.3 percent of all EEOC charges were retaliation charges—that is roughly double the number of retaliation charges that were filed in 1997. The Court's reluctance to generalize about the class of individuals who may bring a "third party" retaliation claim may usher in a further rise in the number of retaliation claims.

The Supreme Court's decision underscores the need for employers to take proactive and thoughtful measures to prevent retaliation claims. The following practices may help employers avoid retaliation claims not only from employees who have engaged in protected activity, but also from the employee's relatives, ex-girlfriends, meal companions, second grade classmates, etc.

1. **Adopt and Communicate No Retaliation Policies.** Employers should adopt and communicate clear written policies stating that the organization will not tolerate unlawful retaliation and establishing a procedure for employees to report any concerns of retaliation.
2. **Encourage Reporting.** Employees should be encouraged to report concerns or complaints so that they can be addressed early. In addition, an employer who welcomes complaints and acts appropriately in response is less likely to appear capable of retaliation.
3. **Investigate Promptly.** In many instances, the law requires employers to investigate promptly and respond appropriately to employee complaints of misconduct or alleged legal violations. However, an employer should treat all complaints seriously and professionally, even complaints that do not appear to rise to the level of stating a legal violation. A good faith complaint, even if it proves to be meritless, still gives the employee protected status that makes retaliation unlawful.
4. **Appraise Performance Accurately.** Employers should train managers to provide timely, accurate, and straightforward performance appraisals. If legitimate performance issues exist, performance appraisals should accurately set forth those issues in a professional manner so that the employee can attempt to improve and the employer can safely rely on the performance review in defending a retaliation or other employment law claim. Managers should be encouraged to keep notes of conversations with an employee regarding the employee's performance. These notes and performance appraisals can be used to demonstrate that a performance issue existed before any report of discrimination or other unlawful conduct, by that or another employee.
5. **Treat Employees Consistently.** Employers can reduce the risk of a retaliation claim by treating an employee with a performance issue the same way as it treats any other employee with that performance issue. This works to ensure that an employee who has engaged in protected activity, or their close relation, is treated the same as employees who have not engaged in protected activity.

6. **Proceed Cautiously.** Before taking adverse action against any employee, the employer should be confident that the action is based on legitimate business reasons and is not in retaliation for any employee's protected activity. In addition, the employer should ensure that it has good documentation to support its legitimate reasons for the employment decision.

The attorneys of Gray Plant Mooty's Employment and Labor practice group are available to assist employers with workplace policies, training, and compliance, as well as litigation and dispute resolution. If you have questions about Title VII, retaliation, or other workplace issues, please contact Meghann Kantke (meghann.kantke@lathropgpm.com, 612.632.3414) or any other member of Gray Plant Mooty's Employment and Labor practice group.

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