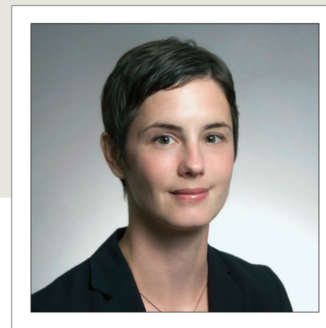
Worker Retaliation Exposure Expands

The Supreme Court has opened the door to third-party discrimination suits.

By David J. Murphy and Anne K. Davis



In January, the United States Supreme Court issued an opinion in *Thompson v. North American Stainless, LP*, extending the scope of Title VII's anti-retaliation provisions to a "zone of interest" around employees who have engaged in protected activities.

Essentially, the court provided a new right of action for third-parties to discrimination claims. Employers should consider the implications of this expanded scope, particularly the newly created "zone of interest" test, when making employment decisions that could impact employees with a relationship to an employee that has engaged in protected activity.

Sound confusing? It is. The new test is fact- and circumstance-driven, opening the door for workers claims, and making it more difficult for employers to resolve them. Just as bad, the court has provided only a general outline of the boundaries of the "zone."

Eric Thompson and his fiancée, Miriam Relgalado, were employees of North American Stainless (NAS) until 2003. In February 2003, the Equal Employment Opportunity Commission notified NAS that Ms. Relgalado had filed a claim alleging sexual discrimination on the part of her supervisor. Three weeks later, Mr. Thompson was fired. After conciliation efforts failed, Thompson filed suit on his own behalf in the Eastern District of Kentucky. The district court sided with NAS, finding that third-party retaliation claims were not permitted by Title VII. But the appeals process led the case to the Supreme Court.

The court considered two questions: first, whether Mr. Thompson's firing violated Title VII; and second, whether Title VII provides Mr. Thompson with a cause of action. The court had "no difficulty" affirmatively answering the first question, but the second posed a greater challenge.

Mr. Thompson argued that the term "aggrieved person" allows any person with standing under Article III of the Constitution to sue—potentially including even a shareholder aggrieved by the impact of discriminatory employment decisions on shareholder value. NAS countered with a Title VII-specific interpretation—only an employee engaged in a protected activity could litigate such a matter.

A significant concern for all employers was that allowing this type of claim would lead to what many commentators have called a "slippery slope." Under this view, the ruling might allow for a greatly increased number of retaliation claimants—including by persons who are nothing more than friends—within the scope of this "automatic job protection."

In response, the court observed that it was "obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancée would be fired." Besides emphasizing these factual circumstances, the court struggled with the scope of the term "aggrieved person," given the range of workplace contexts in which retaliatory actions may occur. The court found NAS's position to be "artificially narrow," while Thompson's position was seen as far too broad. Ultimately, the court declined to clearly define the class of persons or relationships that would fall within the zone.

As a result of the court's decision, Mr. Thompson is now permitted to proceed with his own Title VII retaliation claim. But employers are left with broad guidelines, ranging from the relatively certain ("firing a close family member will almost always meet" its new standard) to the uncertain ("inflicting a milder reprisal on a mere acquaintance will almost never do so.") Future court decisions will add definition to these guidelines, but in the interim, employers, human resources professionals, and counsel should proceed with caution.

Beyond this very general setting of parameters defining who may be a third-party retaliation claimant, the court's decision also pointed out that claimants must be able to show that they personally were within the "zone of interests" protected by Title VII. This will limit the decision's application in practical terms to persons who have been involved in an employment relationship with a specific employer, and should not include a stockholder who complains that stock value has gone down due to unwise and discriminatory company employment actions.

In the wake of *Thompson*, employers that are considering taking more serious disciplinary or other significant employment actions with respect to a particular employee, need to be aware of whether the employee involved is related to, or involved with, a prior discrimination claimant in anything more than a "mere acquaintance" status. If so, the employer would want to add an additional factor for consideration—whether the particular facts and circumstances involved could suggest anything like the *Thompson* case retaliation motivation. A failure to consider the "zone" of employee relationships surrounding a prior or current discrimination claimant could very possibly result in this expanded type of Title VII third-party retaliation claim arising from the new employment action.

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