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****EMPLOYMENT LAW ALERT****

Supreme Court Expands Retaliation Claims - Again

By: S. Whitney Rahman

Title VII of the Civil Rights Act of 1964, as amended, protects individuals against retaliation. Specifically, it provides:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, **because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.**

42 U.S.C. § 2000e-3(a)(emphasis added).

In Burlington N. & S.F.R. Co. v. White, 548 U.S. 53 (2006), the United States Supreme Court expanded the interpretation of this provision by broadly defining an “adverse action” sufficient to show discrimination as any action that would tend to chill an individual from exercising his or her rights under the Act.

Now, the Supreme Court has broadened the reach of retaliation claims even further. In Thompson v. North American Stainless, LP, No. 09-291 (2011), employee Miriam Regalado filed a sex discrimination claim with the Equal Employment Opportunity Commission (“EEOC”).

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Later, her employer fired her fiancé, Eric Thompson. Thompson brought a retaliation claim against the employer.

The Court held that Title VII's antiretaliation provision should be construed broadly. Since it prohibits any employer action that might dissuade "a reasonable worker from making or supporting a [discrimination] charge," White, 548 U.S. at 68, it would apply to a situation where a company fired an employee's fiancé, if the intent was to punish the employee by this action.

The company had argued that such a broad interpretation would lead to difficult problems in determining whether an action could be interpreted as retaliatory. Would the firing of an employee's girlfriend, close friend or trusted coworker be sufficient to chill them from complaining? The company complained that employers will now be at risk whenever they terminate an employee with any connection to another employee who has engaged in protected activity.

The Court acknowledged this problem, but stated that it did not justify a categorical rule that third-party reprisals cannot violate Title VII. The Court refused to give employers any guidance as to when retaliation might be found, except to say: "We expect that firing a close family member will always meet [this] standard, and inflicting a milder reprisal on a mere acquaintance will almost never do so, but beyond that we are reluctant to generalize." Accordingly, it will be up to the lower courts -- through cases filed against companies like yours -- to paint in the details as to when such claims may be viable.

The second issue the Court addressed provides an even greater expansion of the reach of retaliation claims. The Court found that the terminated employee -- who had not engaged in any protected activity under Title VII -- still could bring a claim under Title VII's antiretaliation provision. The Court held that, because Title VII allows a "person aggrieved" to file a retaliation claim, it covers even those who have not engaged in protected activity, but instead are the victims of retaliation. The Court held that Thompson, as the person who was intended to be injured in order to punish the employee who engaged in the protected activity, was within the "zone of interests" protected by Title VII. This substantially broadens the scope of individuals who are entitled to bring a claim under Title VII.

WHAT DOES THIS MEAN FOR YOU?

Retaliation claims already are often harder to defend than the underlying discrimination claim. This case makes it even more difficult. It will be more important than ever to ensure that

employers have legitimate, nondiscriminatory reasons for adverse actions taken against employees. Before making discipline or termination decisions, decisionmakers should ensure that no one close to the affected employee has recently made a complaint of discrimination or otherwise engaged in protected activity. If you determine that there is such a relationship, you should take extra care to ensure that decisionmakers have valid reasons for the actions, and are treating similarly situated employees similarly.

If you have any questions or need assistance with situations that may raise potential retaliation claims, contact S. Whitney Rahman or John W. Roland at 610-372-5588.