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ACT NOW ADVISORY

Supreme Court Rules that Fiancé of Protester Is Protected from Retaliation

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On January 24, 2011, the U.S. Supreme Court issued yet another sweeping expansion of employee protections against retaliation by employers. In *Thompson v. North American Stainless, LP*, __ U.S. __ (Jan. 24, 2011), the Court held that protection from retaliation extends not only to those employees who themselves oppose alleged discrimination or file a charge or otherwise participate in a proceeding, but also to the fiancé of an employee who filed a charge of discrimination against their common employer. This case is simply the latest in a long series of Supreme Court decisions expanding protection for whistleblowers, litigants, and those who oppose or protest against alleged discrimination or other violations of laws.

Title VII of the Civil Rights Act ("Title VII) makes it "an unlawful employment practice for an employer to discriminate against any of his employees … because he has opposed an unlawful employment practice or because he has made a charge under Title VII" (42 U.S.C. § 2000e-3). In *Thompson v. North American Stainless*, the Supreme Court held that an adverse employment action against the fiancé of an employee who filed a charge against her employer gave rise to a cause of action for Title VII retaliation by the fiancé, in part because by hurting her fiancé, the employer was hurting the employee. Justice Scalia, with no dissent, reasoned that:

> Title VII's antiretaliation provision prohibits any employer action that 'well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.' … We think it obvious that a reasonable worker might well have been dissuaded from engaging in protected activity if she knew that her fiancé would be fired.

The Court refused to provide guidance to employers and the lower courts by identifying which specific relationships would raise the retaliation specter. The Court would only elaborate that "firing a close family member will almost always" trigger retaliation liability potential, but "inflicting a milder reprisal on a mere acquaintance will almost never do so, but beyond that we are reluctant to generalize."

This ruling will potentially expose employers to claims when they take adverse employment action against an employee who never filed a charge, or protested or opposed an allegedly illegal act, so long as the employee can establish some sort of close relationship with another employee who is protected by Title VII. Employers can expect much litigation on this issue in the coming years.

What Employers Should Do to Avoid Litigation

1. Train managers as to the broad reach of anti-retaliation rules, or include the subject of anti-retaliation in any existing management training seminars.

2. Remind all managers and others accused of discrimination or harassment that they may not retaliate against anyone because of the accusation. Explain that retaliation includes any action that might dissuade a reasonable worker from making or supporting a charge of discrimination.

3. Consider adopting an anti-retaliation policy if one is not already in place.

4. Before taking any adverse employment action against someone closely associated with an individual who has opposed an allegedly discriminatory practice or filed a charge, consider the grounds to be sure you have fair and legitimate business reasons for the contemplated action.

5. Create a reviewing committee that includes, for example, counsel, human resources officials, and operating management to make sure the fair and legitimate business reasons for the adverse employment will withstand scrutiny by a judge or jury, should litigation ensue.

6. Consider adopting, enforcing, or strengthening a no-nepotism policy to limit potential exposure. (Nepotism can lead to other problems in the workplace, but this decision simply highlights one more potential problem that can arise from such situations.)

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