U.S. Supreme Court Approves Third Party Retaliation Claims

By Christopher P. Mazzoli

In a recent decision, *Thompson v. North American Stainless, LP*, the U.S. Supreme Court reconfirmed the broad coverage of the antiretaliatiion provision of Title VII of the Civil Rights Act of 1964 by holding that it applies to third party retaliation claims.

The employer in *Thompson*, North American Stainless (“NAS”), employed Eric Thompson and his fiancée, Miriam Regalado. Three weeks after learning that Delgado had filed a charge with the Equal Employment Opportunity Commission (“EEOC”), NAS fired Thompson. Thompson filed a charge with the EEOC and eventually sued NAS for retaliation. The U.S. District Court dismissed the lawsuit on the basis that Title VII does not permit third party retaliation claims. In an *en banc* decision, the Sixth Circuit Court of Appeals affirmed the dismissal of Thompson’s lawsuit.

In its decision reversing the Sixth Circuit, the Supreme Court considered two questions: Did NAS’s firing of Thompson constitute unlawful discrimination and, if so, does Title VII grant Thompson a cause of action. With respect to the first question, the Court cited its 2006 decision in *Burlington N. & S. F. R. Co. v. White*, in which it held that Title VII’s antiretaliatiion provision covers a broad range of employer conduct. In *Burlington*, the Court noted, it decided that the antiretaliatiion provision is not limited to discriminatory actions that affect the terms and conditions of employment. Rather, the antiretaliatiion provision prohibits any employer action that “well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.” Based on this standard, the Court had little trouble concluding in *Thompson* that “a reasonable worker might by dissuaded from engaging in protected activity if she knew that her fiancée would be fired.”

The Court recognized that the above holding will result in difficult line-drawing problems regarding the types of relationships entitled to protections. For example, would the discharge of a girlfriend, close friend or trusted co-worker dissuade a reasonable worker from engaging in protected activity? The Court, however, concluded such difficulties did not outweigh the broad standard mandated by the broad wording of the antiretaliatiion provision. Unfortunately, despite recognizing these difficulties, the Court also refused to provide much additional guidance about which relationships would be entitled to protection, other than to state generally that firing a close family member would almost always meet the *Burlington* standard, while inflicting a milder reprisal on an acquaintance would almost never meet the standard. This limited example suggests that courts will have to use a sliding scale in which the greater the level of discipline inflicted on the third party, and the closer the relationship between the third party and the employee who engaged in protected activity, the more likely the third party will meet the *Burlington* standard. We can expect significant litigation on this issue until the lower courts develop a standard for determining when a third party is entitled to protection and they draw the lines the Supreme Court refused to draw.

With respect to the second question raised by this lawsuit, the Supreme Court held that Thompson could sue NAS for violating Title VII. The statute provides that a person “aggrieved” may bring a lawsuit. The Court concluded that the term “aggrieved” in Title VII permits anyone
with an interest arguably protected by Title VII to bring a lawsuit. Applying this test to Thompson, the Court noted that Thompson was employed by NAS and that Title VII’s purpose is to protect employees from their employers’ unlawful action. The Court also noted that if the facts alleged by Thompson were true (as required by the procedural posture of the case), Thompson was not an accidental victim of the retaliation. Rather, injuring Thompson was NAS’s intended means of harming Delgado. Under these circumstances, the Court held Thompson was within the zone of interest protected by Title VII and, therefore, he was an “aggrieved” person with standing to sue.

With Burlington and now Thompson, the Supreme Court has made it clear that Title VII’s antiretaliation provision applies to a broad range of employer conduct and to a broad range of employees, including employees who did not engage in protected activity. Too often, however, employers who are diligent about preventing illegal discrimination in the workplace, and who carefully review employment decisions to make sure that they are not tainted by such illegal discrimination, fail to consider Title VII’s antiretaliation provision because they do not understand the breadth of its coverage. As a result, employers have had to respond to an increasing number of retaliation charges. Indeed, the number of retaliation charges filed with the EEOC reached an all time high in 2010 and now nearly one-third of all charges filed with the EEOC involve retaliation. The Court’s decision in Thompson will only increase the number of retaliation charges. To avoid becoming another retaliation charge statistic, employers must train their managers to not only know how to properly manage an employee who has engaged in protected activity, but also how to manage any third party employees who have a relationship with the employee who engaged in protected activity.