Retaliation Redux!

A Transformative Time for the American Workplace

By Noreen DeWire Grimmick and Emina Poricanin

It will take more than simply incorporating antiretaliation provisions into company policies and guidelines to ensure that businesses can adequately address the issues that arise in these cases.

In an effort to develop workplace policies to protect their employees from discriminatory practices and to insulate themselves from expensive litigation, employers and their attorneys continually struggle to keep abreast of the law and the court decisions interpreting that law. The evolving case law construing the antiretaliation provisions of Title VII underscores their concerns.

While employers aim to implement workplace strategies that provide some measure of assurance that they have *established* safeguards against retaliation claims, the United States Supreme Court continues to issue decisions that should give all employers reason to pause and reconsider their strategies. The Court in recent years has defined retaliation claims under Title VII to include activities both in and out of the workplace. The Court also has interpreted the law as providing protections to individuals who neither complained of discrimination themselves nor participated in a proceeding or an investigation of a complaint made by another. Given these recent decisions, employers are right to seek guidance. One of the most recent Title VII decisions that the Court has issued is *Thompson v. North American Stainless, LP*, 131 S. Ct 863 (2011). This case clearly broadened the scope of the antiretaliation provision of Title VII beyond the parameters that most defense attorneys thought applied to retaliation claims. In retrospect, however, the Supreme Court set the course to *Thompson* in many decisions that preceded it. This article examines recent antiretaliation jurisprudence, the Court's decision in *Thompson*, and how lower courts have interpreted that decision.

Setting the Stage for *Thompson*

In *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997), the Court determined that a former employee was entitled to protection under the antiretaliation provisions of Title VII. While it may seem straightforward that a former employee who had filed a complaint against a former employer would be entitled to those protections, the Court nonetheless went through the rigor of analyzing

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the definition of the term "employee" in the context of the antiretaliation provision. Finding that the primary purpose of antiretaliation provisions was to maintain "unfettered access to statutory remedial mechanisms," the Court concluded that "employees," as that term is used in §704 (a) of Title VII, includes former employees. Justice Thomas's phrase, "[u]nfettered access to statutory remedial mechanisms," is now a tenet in the law of retaliation.

Another tenet is that the antiretaliation provision is not limited to "discriminatory actions that affect the terms and conditions of employment," unlike the substantive provisions of Title VII. *See Burlington Northern & Santa Fe Railroad v. White*, 548 U.S. 53, 64 (2006). In *Burlington Northern*, the Court drew a distinction between the substantive provision of Title VII and the antiretaliation provision. The Court noted that

> [t]he anti-discrimination provision seeks a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status… The anti-retaliation provision seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees. The substantive provision seeks to prevent injury to individuals based on who they are, *i.e.*, their status. The anti-retaliation provision seeks to prevent harm to individuals based on what they do, *i.e.*, their conduct.

Id.

On January 26, 2009, the Supreme Court issued a decision in the case of *Crawford v. Metropolitan Government of Nashville and Davidson County* expanding the scope of protected conduct under the "opposition clause" of the antiretaliation provisions of Title VII. *Crawford v. Metropolitan Gov't of Nashville and Davidson County*, 555 U.S. 271 (2009). The plaintiff, Ms. Crawford, was interviewed in connection with the defendant's investigation of the conduct of a supervisor who was the subject of a harassment complaint made by another employee. During the interview, Ms. Crawford reported that the same supervisor also had sexually harassed her. Soon after this interview, Ms. Crawford, a 30-year employee, was fired for allegedly committing embezzlement. Ms. Crawford then filed a claim of retaliation.

The district court dismissed Ms. Crawford's case and granted the defendant's motion for a summary judgment. It held that the "participation clause" of the antiretaliation provisions of Title VII did not protect Ms. Crawford because the investigation was not performed in connection with a pending U.S. Equal Employment Opportunity Commission (EEOC) charge. According to the district court, Ms. Crawford's mere response to questions asked in the course of an investigation could not support her claim under the "opposition clause" of Title VII because she had not instigated or initiated a complaint. The Sixth Circuit Court of Appeals upheld the district court's decision, holding that the opposition clause "'demands active, consistent "opposing" activities to warrant… protection against retaliation,'" *Id.* at 275. Ms. Crawford's report of sexual harassment made during the course of her employer's investigation was thus, not sufficient to afford protection to her under the antiretaliation provisions of Title VII.

In the Supreme Court's unanimous decision written by Justice Souter, the Court reversed the Sixth Circuit holding interpreting the "opposition clause" as it applied to Ms. Crawford's claim: "When an employee communicates to her employer a belief that the employer has engaged in… a form of employment discrimination, that communication" virtually always "constitutes the employee's opposition to the activity." *Id.* at 276. The Court stated that the statute does not impose a "freakish" rule that would protect an employee who reported conduct on his or her own initiative but not an employee who reported the same conduct in response to a supervisor's question.

Justice Alito and Justice Thomas concurred with the majority in the *Crawford* case, but in their separate opinion authored by Justice Alito, they expressed concern about expanding the scope of the antiretaliation provisions rather than limiting opposition clause protection to protecting conduct that qualified as "active" and "purposive." *Id.* at 282. They expressed concerns about the growing number of retaliation claims and that expansively interpreting protected conduct under the opposition clause would lead employees to file more claims for which the support would likely become questions of fact. *Id.* at 282–83.

As the framework of the Court's analysis in these three decisions makes apparent, clearly employers have challenges that involve more than crafting adequate policies and guidelines. For many workplaces in America the challenges really mean instituting new corporate cultures, and those changes will take time. Attorneys who represent employers in employee disputes must keep their clients proactively informed and set the stage for employers to adopt a new perspective on retaliation.

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Expanding Anti-Retaliation Protections

Against this backdrop the United States Supreme Court issued a landmark decision last year: *Thompson v. North American Stainless, LP*, 131 S. Ct 863 (2011). In *Thompson*, petitioner Eric Thompson and his fiancée were employed by respondent North American Stainless. The fiancée filed a charge against the employer with EEOC alleging sex discrimination. *Id.* Three weeks later, the employer terminated Mr. Thompson. *Id.* Mr. Thompson then filed a charge with the EEOC and sued the employer in a federal court claiming that the employer had fired him in retaliation

for his fiancée's filing of the charge with the EEOC. *Id.* The federal court granted a summary judgment to the employer concluding that Title VII did not permit third-party retaliation claims. *Id.*

The Sixth Circuit Court of Appeals affirmed the lower court's decision, holding that Mr. Thompson did not engage in any statutorily protected activities, either on his own behalf or on behalf of his fiancée and, therefore, he was not included in the class of persons that Congress intended to protect through the antiretaliation statute. *Id.*

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The Supreme Court reversed the Sixth Circuit's decision. *Id.* at 870. The Court first concluded that, assuming that the facts as alleged by Mr. Thompson were true, the employer's termination of Mr. Thompson violated Title VII. *Id.* at 867–868. Citing *Burlington Northern*, the Court noted that Title VII prohibited any employer action that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.* at 868. And courts had to construe Title's VII antiretaliation provision as covering a broad range of employer conduct. *Id.* The Court then held that it was obvious that a reasonable worker would be dissuaded from engaging in protected activity if he or she knew that his or her fiancé would be fired. *Id.* The Court declined to identify a specific class of relationships that rendered third-party reprisals unlawful. *Id.* Firing a close family member would almost always meet the *Burlington Northern* standard. *Id.* Inflicting a milder reprisal on a mere acquaintance, however, would almost never do so. *Id.* Beyond that, the Court was "reluctant to generalize." *Id.*

The "more difficult" question before the Court was whether Mr. Thompson was an "aggrieved" person under Title VII. *Id.* at 869. For purposes of Title VII standing, courts had to construe "aggrieved" more narrowly than Article III standing, the Court determined. *Id.* Mr. Thompson fell within the zone of interest protected by Title VII because he was an employee of Stainless, and the purpose of Title VII was to protect employees from their employer's unlawful actions. *Id.* at 870. Mr. Thompson was not an accidental victim of the retaliation; "to the contrary, injuring him was the employer's intended means of harming" his fiancée. *Id.* Thus, the Court concluded that Mr. Thompson was aggrieved by the employer's actions and had standing to sue. *Id.* Thus, a new tenet emerged: the class of persons who may be considered aggrieved under the antiretaliation provisions of Title VII is more encompassing than those under the substantive provisions.

As mentioned, the Court intentionally declined to specify the class of relationships that rendered which third-party reprisals unlawful. Familial relationships, as the Court noted, will almost always qualify. *See*, *e.g.*, *Zamora v. City of Houston*, 425 F. App'x 314 (5th Cir. 2011) (remanding the case in light of *Thompson* for reconsideration of whether the son's retaliation claim could be based on protected actions undertaken by his father). Also, spouses may assert a Title VII violation when an employer retaliates against one spouse based on the conduct of the other. *See*, *e.g.*, *McGhee v. Healthcare Services Group, Inc.*, 2011 WL 5299660 (N.D. Fla. 2011); *Willis v. Cleco Corp.*, 2011 WL 4443312 (W.D. La. 2011).

At least one court, however, has denied a summary judgment to an employer when one of the parties in a romantic relationship asserted a retaliation claim based on the employer's retaliatory conduct against the other. In *Harrington v. Career Training Institute Orlando, Inc.*, the plaintiff-coworkers began a romantic relationship in the course of their employment. 2011 WL 4389870, at *1 (M.D. Fla. 2011). A supervisor allegedly began subjecting the plaintiffs to discrimination and disparate treatment after learning that they were dating. *Id.* The plaintiffs filed a formal discrimination complaint against the supervisor. Afterward, one of the plaintiffs was fired and the other's duties were changed. *Id.* The plaintiffs sued the employer for retaliation under 42 U.S.C. §1981. *Id.* Relying on *Thompson*, the court denied the employer's motion to dismiss, noting that the Supreme Court did not specifically exclude third-party reprisal claims for individuals who were merely dating. *Id.* at *2–3.

Without a close familial or personal relationship, however, plaintiffs will struggle to prevail on summary judgment motions in Title VII cases. In one case, for example, when an employee was terminated for allegedly encouraging *a nonemployee* to file a sexual harassment complaint against the employee's coworker and refusing to "cover up" the coworker's sexual harassment, the court held that the employee was not within the zone of interest that Title VII sought to protect. *See Alford v. Hunt County*, 2011 WL 510454, at *1 (N.D. Tex. 2011).

Additionally, a plaintiff cannot assert a Title VII action on behalf of another employee. For example, in *Bradley v. Pitney Bowes Inc.*, the plaintiff filed an action against his former employer alleging that the employer retaliated against *his friend* in violation of Title VII because the friend had testified against the employer in a race discrimination case commenced by the plaintiff. 2011 WL 4373934, at *3 (N.D. Tex. 2011). The court dismissed the plaintiff's retaliation claim, as asserted on behalf of his friend, holding that the friend himself could file a claim based on a violation of Title VII. *Id.*

And at least one court has indicated that an employer's discrimination against its customers does not constitute an unlawful employment practice for purposes of Title VII. In *Klinger v. BIA, Inc.*, the plaintiff alleged that she was terminated after she objected to her employer's discrimination against African-American customers, and she refused to participate in various violations of the state' liquor laws. 2011 WL 4945021, at *1 (N.D. Ill. 2011). The court held that the definition of "unlawful practice" under Title VII, although covering a broad range of practices, only prohibited practices that discriminated against employees. *Id.* As such, the employer's

treatment of its customers did not qualify as an employment practice. *Id.*

Plaintiffs asserting that their employers retaliated against them because a third party had engaged in protected activity do not necessarily have to be employed by the same employer as the third party. While that was certainly the case in *Thompson*, courts have expanded the rule to cover employees who have close familial or personal relationships and intertwined employment. *McGhee v. Healthcare Services Group, Inc.*, offers a good example. 2011 WL 5299660, at *3 (N.D. Fla. 2011). In that case a wife asserted a discrimination claim against her employer after the employer terminated her employment. *Id.* at *1. A subcontractor of the wife's employer employed her husband. *Id.* Shortly after the wife filed her complaint against the contractor, the subcontractor terminated the husband's employment. *Id.* *2. The husband asserted a retaliation complaint and claimed that the contractor had ordered the subcontractor to terminate him in retaliation for his wife's activities. *Id.* The employer's attorney argued that *Thompson* did not apply in this situation because two separate employers employed the spouses. *Id.* The court disagreed, noting that although the spouses worked for different employers, they had the same physical workplace and the two employers and their employees were "clearly intertwined." *Id.* at *3. *Thompson*, the court held, did not compel a different result because permitting employers to induce their subcontractors to fire the subcontractors' employees in retaliation for the protected activity of spouses would contravene the purpose of Title VII. *Id.*

Similarly, in *Morgan v. Napolitano*, the court denied the employer's motion to dismiss the retaliation complaint asserted by an employee alleging that his employer retaliated against him for his wife's protected activity. 2011 U.S. Dist. Lexis 14070, at *34 (E.D. Cal. 2011). The wife was an attorney who represented plaintiffs in discrimination cases against, among others, her husband's employer. Clearly, the wife and husband did not work for the same employer. *Id.* at *3. The husband was a union representative at his workplace. *Id.* at *5. He claimed that the employer retaliated against him because of his wife's legal representation of other employees in lawsuits against the employer. *Id.* at 32. The court determined that "in her representation of defendant's employees, [the] plaintiff's wife effectively stands in the shoes of those employees and becomes the conduit through which they exercise their Title VII rights." *Id.* Thus, according to the court, the wife had engaged in protected activity that triggered *Thompson*'s protections for the husband. *Id.*

Courts have already shown a willingness to apply *Thompson*'s reasoning to retaliation claims pursued under other statutes. In *Dembin v. LVI Services, Inc.*, the plaintiff asserted a retaliation claim under the Age Discrimination in Employment Act (ADEA) after she was terminated, claiming she was discharged because her father, another employee, complained of age discrimination. 2011 WL 5374148, at *2 (S.D.N.Y. 2011). The court denied the defendants' motion for a summary judgment on the plaintiff's ADEA retaliation claim not finding justification not to apply *Thompson*'s reasoning to ADEA actions. *Id.* at 2.

Conclusion

Attorneys for employers must advise their clients of the United States Supreme Court's interpretation of the antiretaliation provisions of Title VII so far. Attorneys not only should make business owners aware of the heightened risk of retaliation claims, but middle line managers should receive this information so that they can take appropriate actions to reduce the risk. Yes, company policies and guidelines should incorporate antiretaliation provisions. But it will take more than that to ensure that businesses adequately can address the issues that arise in these cases. Corporate culture will adapt and change over time, but this process needs to begin with good counseling that recognizes the Court's analysis and communicates the implications of that analysis to American businesses.