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The Supreme Court’s Open-Ended Protection Against Third-Party Retaliation

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For many years, federal courts have struggled with whether to recognize claims of “third party retaliation” under Title VII.1 Third-party retaliation claims arise when one employee engages in some protected activity for purposes of Title VII, but where his or her employer takes adverse action, not against that employee, but rather against one of his or her coworkers. For example, an employee might file a discrimination charge against her employer, but the employer might retaliate not against this employee, but rather against her husband who works for the same employer. An employee might participate in a workplace discrimination investigation, but the employer might demote the sibling of this employee, who works for the same employer. Each of these situations involve “third-party retaliation” – an employer attempting to retaliate for one employee’s protected activity by taking adverse action against another employee with whom this original worker has some relationship. Until quite recently, the federal courts were split regarding the extent to which they should recognize these claims as falling within Title VII’s prohibitions.

Some of the confusion among federal courts regarding the viability of the third-party retaliation doctrine stems from the language of Title VII itself. By its very terms, Title VII bars employers from “retaliating” against employees who have engaged in activities protected under Title VII.2 However, the specific language of this anti-retaliation provision seems to contemplate barring only “direct” (as opposed to third-party) retaliation by employers. Specifically, Section 704 of Title VII states that

“[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment… 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.”

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2 See id. at § 2000e-3(a) (“It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . 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”).

3 Id. (emphasis added).
Many courts previously interpreted this language – and particularly, the term “he” within this provision – to mean that the individual receiving adverse action from an employer must be the same person who engaged in some protected activity. As one court observed, “it is hard to imagine a clearer way of specifying that the individual who was discriminated against must also be the individual who engaged in protected activity.” While some courts acknowledged that this narrow reading of Section 704 could stymie the ability of certain plaintiffs to seek relief in the wake of indirect retaliation by their employers, these courts felt constrained by what they saw as Congress’s stated intent with respect to the scope of this statutory provision. Thus, until very recently, every federal court to rule on this issue held that third-party retaliation claims fell outside the scope of Title VII’s prohibitions.

In January 2010, the U.S. Supreme Court finally had the opportunity to express its view regarding the viability and scope of the third-party retaliation doctrine. In Thompson v. North
American Stainless, LP, contrary to the view of lower federal appellate courts, the Supreme Court unanimously held Title VII prohibits employers from engaging in third-party retaliation.\textsuperscript{9} To be sure, this decision by the Supreme Court resolved an important ambiguity in federal antidiscrimination law, clarifying the viability of third-party retaliation claims under Title VII. Yet that was virtually \textit{all} that the Supreme Court said in this case: As discussed in greater detail below, the \textit{Thompson} Court failed to provide lower courts with any workable framework for understanding the precise scope of the third-party retaliation doctrine.

In many respects, \textit{Thompson} represented a rather straightforward example of alleged third-party retaliation by an employer. The case arose when Eric Thompson, who – along with his then-fiancée, Miriam Regalado – worked for the defendant North American Stainless, LP (“North American”),\textsuperscript{10} was terminated by North American shortly after Regalado filed a discrimination charge against North American.\textsuperscript{11} Thompson subsequently sued North American, claiming that North American terminated him in retaliation for Regalado’s protected activity.\textsuperscript{12} Notably, the \textit{sole} basis for Thompson’s retaliation claim was his Regalado’s discrimination claim: Nowhere in his complaint did Thompson allege that he personally engaged in \textit{any} protected activity, such as by assisting Regalado in filing her discrimination charge or otherwise opposing North America’s alleged treatment of Regalado.\textsuperscript{13} Instead, Thompson explicitly alleged that his “relationship to Miriam Thompson [née Regalado] was the sole motivating factor in his termination.”\textsuperscript{14}

The district court in Thompson’s case granted summary judgment to North American, holding that Title VII did not permit third-party retaliation claims.\textsuperscript{15} The Sixth Circuit ultimately agreed with this view,\textsuperscript{16} and Thompson appealed to the U.S. Supreme Court. Upon its consideration of Thompson’s claim, the Supreme Court adopted a distinctly different view than

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  \item \textsuperscript{9} Thompson v. N. Am. Stainless LP, 131 S.Ct. 863 (2011).
  \item \textsuperscript{10} See Thompson, supra note 8, at 806 (citation omitted).
  \item \textsuperscript{11} See id. (citation omitted).
  \item \textsuperscript{12} See id. (citation omitted).
  \item \textsuperscript{13} See id. at 807.
  \item \textsuperscript{14} Id. at 808 (emphasis removed); see also id. (observing that Thompson’s “Statement of the Issue” on appeal and “Statement of Facts” also made clear that Thompson’s retaliation claim was based upon the protected activity of his fiancée, as opposed to any activity that he engaged in himself).
  \item \textsuperscript{15} Thompson v. N. Am. Stainless, LP, 435 F. Supp. 2d 633, 638 (E.D. Ky. 2006).
  \item \textsuperscript{16} See id. at 805. While a three-judge panel of the Sixth Circuit initially reversed the district court, holding that Thompson could pursue his claim against North American, see Thompson v. North American Stainless, LP, 520 F.3d 644 (6th Cir. 2007), the full Sixth Circuit, hearing the case \textit{en banc}, ultimately reached the opposite conclusion, determining that only individuals who personally engage in protected activity can assert retaliation claims under Title VII. See Thompson, supra note 8, at 805-06.
\end{itemize}
that ultimately adhered to by the lower courts here, finding that Thompson could allege a third-party retaliation claim based upon Regalado’s protected activity.\footnote{Thompson, supra note 2, at 867-68.}

In its opinion, the Supreme Court relied in large part on its previous decision in \textit{Burlington Northern & Santa Fe Railway Co. v. White,}\footnote{Burlington Northern and Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006).} where the Court had expanded its view of what would constitute an “adverse action” for purposes of Title VII.\footnote{See id. at 67-68} In any retaliation case, the plaintiff must establish: (i) that he or she engaged in some “protected activity” for purposes of Title VII, either under the statute’s “participation” or “opposition” framework; (ii) that he or she suffered some adverse employment action; and (iii) that there is some causal connection between the protected activity and the adverse action.\footnote{See Fogelman, supra note 5, at 567-58 (citation omitted); Little v. Windermere Relocation, Inc., 301 F.3d 958, 969 (9th Cir. 2002) (citation omitted).} In \textit{Burlington Northern}, the Court focused on the “adverse action” prong of this framework, holding that actionable retaliation under Title VII was not limited to employment-related activities, or to those affecting the terms and conditions of employment.\footnote{See Burlington Northern, supra note 19, at 67-68.} Rather, according to the Court, Title VII’s retaliation provision would bar those retaliatory actions that “a reasonable employee would … [find] materially adverse,” meaning that conduct which “might … dissuade[] a reasonable worker from making or supporting a charge of discrimination.”\footnote{Id. at 68 (citation and internal quotation omitted).} Applying this analysis to Thompson’s claim, the Court implied that it might find unlawful retaliation \textit{whenever} an employer engages in conduct that reasonably might change an employee’s mind about engaging in protected activity – regardless of whether that employer’s conduct was directed at the employee who would have engaged in protected activity or at a coworker of that employee.

Thus, the Court made clear in the \textit{Thompson} decision that Title VII does prohibit more than just “direct” retaliation by an employer, but also “indirect,” third-party retaliation. Yet while the Court acknowledged the basic viability of the third-party retaliation doctrine in this case, the Court failed to establish any meaningful boundaries with respect to the scope of this doctrine. While \textit{Thompson} makes clear that an employer cannot retaliate against the fiancé of an employee who engages in protected activity, what about protection for those with more distant relationships with employees who engage in protected activity, such as the girlfriend, or distant cousin, or lunchroom buddy of the employee who has engaged in protected activity? If one employee participates in a discrimination investigation at work, and the employer takes adverse action against one of these other employees – employees with a more distant relationship to the employee who participated in this investigation – does Title VII provide a federal cause of action in that situation? What are the limits of this third-party retaliation doctrine?
In its decision in Thompson, the Court expressly declined to establish such contours, stating “decline to identify a fixed class of relationships for which third-party reprisals are unlawful,” and noting that lower courts should examine the “particular circumstances” in any given case to determine whether to recognize a claim of third-party retaliation. In this respect, the Supreme Court left it almost entirely to the lower courts to determine which types of relationships will or will not support a third-party retaliation claim. While such open-endedness undoubtedly provides the courts with greater flexibility to address each case of alleged third-party retaliation in its particular facts, this lack of more specific guidance by the Supreme Court not only might lead to a lack of uniformity in how various jurisdictions apply the third-party retaliation doctrine, but also might lead to tremendous uncertainty among both employers and employees regarding the extent of the protections provided by Title VII.

In addition to recognizing the viability of third-party retaliation claims in Thompson, the Court also addressed an additional issue regarding the practical operation of the third-party retaliation doctrine, examining which individual within a workplace relationship should be permitted to bring a third-party retaliation claim: Should these claims be brought by the individual who engaged in the protected activity, but did not personally suffer any adverse action? Should these claims be brought by the individuals who received adverse action, even though these individuals did not engage in protected activity? Or, should either party be permitted to sue?

By its terms, Title VII permits a person “claiming to be aggrieved” to bring a civil action. North American argued that this provision should be interpreted to allow only the employee who engaged in protected activity (i.e., Regalado) to sue. The Supreme Court, however, rejected this view, drawing upon a body of administrative law to conclude that a “person aggrieved” for purposes of Title VII would be anyone within the “zone of interests” of the statute. Under this “zone of interests” analysis, the Court would permit a plaintiff to sue – regardless of whether the employee personally engaged in protected activity – so long as the interests that he or she sought to protect in the suit were sufficiently related to the purposes of Title VII. Accordingly, employers might face third-party retaliation claims either from an

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23 Thompson, supra note 2, at 868.
24 Id.
25 For a more detailed discussion of the implications of the Court’s failure to provide greater detail regarding the scope of the third-party retaliation doctrine, see See Jessica Fink, Protected by Association? The Supreme Court’s Incomplete Approach to Defining the Scope of the Third-Party Retaliation Doctrine, 63 HASTINGS LAW JOURNAL ___ (forthcoming 2011).
27 See Thompson, supra note 2, at 869-70.
28 Id. (citations omitted).
individual who engaged in protected activity and who claims that a colleague subsequently received adverse action as a result, or from an individual who claims to have been fired or demoted or otherwise harmed due to the protected activity of a coworker.

* * *

The ramifications of the Thompson decision remain to be seen. One likely result of this decision will be an increase in the number of third-party retaliation claims asserted against employers. For several years, retaliation claims generally have been on the rise. Retaliation claims currently make up more than one-third of all charges filed with the Equal Employment Opportunity Commission, and this increase shows no signs of abating. While it is unclear what percentage of these retaliation charges involve claims of third-party (as opposed to traditional/“direct”) retaliation, the Supreme Court’s decision in Thompson undoubtedly could open the door to an increase in this particular type of retaliation claim. Indeed, with the Supreme Court not only providing recognition for third-party retaliation claims, but also leaving the contours of this doctrine fairly undefined, employees and those who represent them likely will avail themselves of this evolving cause of action whenever faced with plausible factual circumstances.

Without a doubt, expanding the protection available to employees against employer retaliation will provide a new source of relief for employees who experience “indirect” employer retaliation. Yet this increase in protection is not without costs. Given the Supreme Court’s direction that the viability of any particular third-party retaliation claim will “depend on the particular circumstances” of that case, these cases – even those involving fairly attenuated claims – will largely turn on their facts: The courts will have to scrutinize the facts of any allegation of third-party retaliation to determine, among other things, whether the relationship between the party who engaged in protected activity and the party who received adverse action is sufficient to support a third-party retaliation claim. Accordingly, with the facts playing such a key role, these third-party retaliation cases rarely will be resolved prior to summary judgment. The parties instead invariably will have to engage in expensive and time-consuming litigation in order to reach a conclusion in these cases. Thus, even if successful third-party retaliation

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29 See id. (citations an internal quotations omitted) (“We have described the zone of interests test as denying a right of review if the plaintiff’s interests are so marginally related to or in- consistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit”).


31 Thompson, supra note 2, at 868 (citation and internal quotation omitted).

32 See Fed. R. Ctv. P. 56(a) (“…The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law…”).

33 According to one recent study, it costs, on average, over $120,000 simply to defend against a wrongful discharge claim, not including any costs of settling the claim nor any judgment that a defendant may ultimately have to pay. See Brief of Chamber of Commerce of the United States of America as Amicus Curiae in Support of Respondent, Thompson v. N. Am. Stainless, LP, 2010 WL 4339890, No. 09-291, (Nov. 1, 2010), at *1, *2 (citation omitted); see also Jessica Fink, Unintended Consequences: How Antidiscrimination Litigation Increases Group Bias in
claims comprise a small minority of courts’ dockets going forward, employers may be forced to expend vast resources finding off meritless claims of this nature, simply because the Court declined to more clearly define the scope of this doctrine. Whether the benefits of the Court recognizing the third-party retaliation doctrine in *Thompson* outweighs these potential costs remains to be seen.

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*Employer-Defendants*, 38 N. MEX. L. REV. 333, 340 (2008) (citations omitted) (“Some estimate that an employer may spend close to $100,000 to defend against an individual claim of discrimination, and more than $460,000 to defend against a discrimination class action”).