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Retaliation Against One Employee Based on Protected Activity of Another is Itself Protected

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The United States Supreme Court has ruled that terminating an employee as punishment for his fiancée filing a charge of discrimination is retaliation under Title VII of the Civil Rights Act.

We know that Title VII prevents employers from retaliating against employees who engage in "protective activity," such as filing a charge of discrimination. However, until recently, it was unclear whether Title VII prevented retaliation against one employee based upon the "protected activity" of another. In *Thompson v. North American Stainless, LP*, the Supreme Court held that it does – under the right circumstances.

Eric Thompson and his fiancée, Miriam Regalado, were both employees of North American Stainless (NAS). In February 2003, NAS learned that Regalado filed a charge of discrimination accusing it of sex discrimination. Three weeks later, NAS fired Thompson. Believing that NAS fired him to punish his fiancée for filing a charge of discrimination, Thompson sued NAS for retaliation under Title VII. After Thompson's case was dismissed, he appealed to the Supreme Court.

Overturning the dismissal of Thompson's case, the Supreme Court noted that "Title VII's anti-retaliation provision prohibits any employer action that 'well might have dissuaded a reasonable worker from making or supporting a charge of

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discrimination.'" The Court decided that terminating an employee's fiancée would "obviously" dissuade an employee from filing a charge of discrimination and, therefore, is prohibited by Title VII.

NAS raised concerns that prohibiting "reprisals against third parties" will lead to problems for employers in determining what types of relationships are entitled to protection. For example, would firing a girlfriend/boyfriend, friend or trusted co-worker have the same chilling effect as firing a fiancée or spouse and, therefore, fall under Title VII's protection? While recognizing the validity of NAS's concern, the Supreme Court held that courts and employers can and will have to make these types of determinations based upon the circumstances of each case. The only guidance the Court was willing to offer was its expectation that "firing a close family member will almost always" be considered retaliation, while "inflicting a milder reprisal on a mere acquaintance will almost never" invoke Title VII's protections.

The Supreme Court also decided that Thompson had standing to sue NAS for retaliation even though it was his fiancée, and not he, who filed a charge of discrimination. Adopting a "zone of interests" test, the Court held that Title VII enables suits by employees with an interest "arguably [sought] to be protected by" Title VII. The Court explained that "Thompson is not an accidental victim of the retaliation – collateral damage, so to speak, of the employer's unlawful act . . . injuring him was the employer's intended means of harming Regalado. Hurting him was the unlawful act by which the employer punished her." Accordingly, it concluded that, under these circumstances, Thompson was "well within the zone of interests sought to be protected by Title VII" and he has the right to sue his employer even if he did not engage in "protected activity."

In addition to NAS's concerns regarding what types of relationships are protected by Title VII, the Supreme Court's decision raises other problems for employers. For example, the Court seems to imply that the degree of adverse action taken by an employer will also factor into whether third party reprisal constitutes unlawful retaliation. However, would a milder reprisal against Thompson, such as a written warning or suspension, have fallen short of Title VII's protections? Moreover, what if an employer does not know of or misunderstands the relationship between two employees? What if NAS had believed that Thompson and Regalado were merely dating, and not engaged?

Some employers require employees to disclose their personal relationships with co-workers to avoid potential conflicts of interest and possible liability to the company. The Supreme Court may have inadvertently created an incentive for employers to close their eyes to these relationships lest they be accused

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of third party reprisal. If nothing else, the Thompson decision requires that employers make certain that they have defensible and legitimate non-retaliatory bases before taking adverse actions against employees they know to be in relationships with others engaged in "protected activity."

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