

U.S. Supreme Court Decision and NLRB Settlement Expand Employer Exposure to Liability for Interference with Protected Activity

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"Unlawful Retaliation" Can Include Retaliation Against an Employee That Did Not Engage in Protected Activity, But is Closely Related to an Employee Who Did Engage in Protected Activity

The United States Supreme Court in *Thompson v. North American Stainless, L.P.*, held that an employee may seek relief directly under Title VII if he/she suffers an adverse employment action *because of* a close relationship with someone who has engaged in protected activity. This is true even where the employee has not engaged in protected activity.

Thompson and his fiancé were employed by North American Stainless ("North American"). His fiancé filed a charge with the Equal Employment Opportunity Commission ("EEOC"), alleging that her supervisor had discriminated against her on the basis of sex. North American fired Thompson three weeks later. Thompson claimed he was terminated because his fiancé filed the EEOC charge. The Supreme Court held that if Thompson's allegations were true, his termination constituted unlawful retaliation and, more significantly, that Thompson could pursue his claims under Title VII even though he personally had not engaged in any protected activity.

The Supreme Court offered little guidance on how to identify which relationships would qualify as "close relationships" for purposes of third-party retaliation claims. The Supreme Court emphasized that the determination would be on a case-by-case basis and must be based on the objective standard of a reasonable employee. The only additional guidance offered by the Supreme Court's *Thompson* opinion was its statement: "We expect that firing a close family member will almost always meet the... standard, and inflicting a milder reprisal on a mere acquaintance will almost never do so.... We think it obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired."

NLRB Settlement Reinforces Risks of Overbroad Social Media Policies

A recent Settlement Agreement between the National Labor Relations Board ("NLRB") and a private employer demonstrates that an employee's criticism of her employer on a social networking site may be protected activity. The NLRB issued a complaint against American Medical Response of Connecticut, Inc. ("AMR") alleging that AMR violated federal labor law

by terminating an employee who had posted comments about her supervisor on her Facebook page. The NLRB also alleged that AMR maintained overbroad policies in its employee handbook regarding blogging, Internet posting and communications between employees. While AMR denied these allegations, it entered into a Settlement Agreement with the NLRB in which AMR agreed that in the future it would not:

- Maintain or enforce any rules that improperly restrict employees' rights to engage in union activities or to discuss wages, hours and working conditions with fellow employees and others while not at work; or
- Discharge or discipline employees because they discussed wages, hours and working conditions, either with fellow employees or others, while not at work.

In addition, AMR acknowledged in the settlement that its Blogging and Internet Posting Policy, its Standards of Conduct Rules, and its Solicitation and Distribution Policy improperly restricted employees' rights to discuss wages, hours, and working conditions with other employees and with others.

What These Cases Mean For Employers

Employers must await future, post-*Thompson* decisions to further define the closeness of the relationship that must exist between the employee engaged in protected activity and the employee suffering the consequences of retaliation before the "non-active" employee has a cause of action under Title VII. What is abundantly clear, however, is that the potential for claims of retaliation under Title VII has been greatly expanded. After *Thompson*, any time an employee has been terminated, or suffered some other adverse employment action, that employee may be encouraged to bring a Title VII claim, even though he/she has not engaged in any protected activity, simply by claiming that the action against him/her was in retaliation for the protected activity of another employee with whom the plaintiff employee has a close relationship. Employers should continue to ensure that their legitimate, nonretaliatory reasons for employment decisions are well-documented and that they apply their policies and practices even-handedly, without influence by retaliatory motives.

With regard to the *NLRB/AMR* settlement, although settlements between the NLRB and any particular employer are not formally binding on any other employer, the *NLRB/AMR* settlement is instructive for several reasons. First, it reminds employers that non-union employees are also protected by federal labor laws, which prohibit employers from taking action that may interfere with or discourage employees from engaging in "concerted action." Concerted action includes communications between employees about their wages, hours and working conditions. Also, an employer unlawfully interferes with such protected employee rights if it maintains overly broad policies that could be reasonably interpreted as limiting such rights, even if the employer did not take action against an employee for violating those policies. Second, the *NLRB/AMR* settlement may signal that the NLRB will continue to issue complaints against employers who seek to restrict communications by employees outside of the workplace using social media and/or who discipline employees for their use of social media.

Accordingly, before taking action against an employee for something that the employee may have posted on the Internet, the employer should first consider the applicability of federal labor laws, and whether the employee's conduct could be considered protected concerted action under such laws. In addition, employers should review their existing policies regarding employee Internet use for compliance with federal labor laws.

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