

United States Supreme Court Expands Retaliation Risks for Employers

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The Supreme Court recently decided the second of two retaliation cases that continued a long and nearly unbroken series of losses for employers. In both cases, the Court broadened the scope of employer's potential exposure to claims of unlawful retaliation.

In the first case, *Thompson v. North American Stainless, LP*, ___ U.S. ___, No. 09–291 (decided January 24, 2011), the Court held that third parties, who do not themselves engage in a protected activity, may nevertheless bring retaliation claims under Title VII of the Civil Rights Act of 1964. The decision arguably limits this new category of potential plaintiffs to employees with close relationships with the employee who engaged in the protected activity – a range of relationships the Court refused to define – but it plainly broadens the risks that an employer must consider whenever an employee engages in protected activity. And for now, the scope of that risk remains for further development in the lower courts.

In the second case, *Kasten v. Saint-Gobain Performance Plastics Corp.*, ___ U.S. ___, No. 09–834 (decided March 22, 2011), the Court held that oral complaints of a violation of the Fair Labor Standards Act (“FLSA”) may constitute protected conduct under FLSA’s antiretaliation provision. The Court refused to decide a separate but related question, whether the FLSA’s anti-retaliation provision applies only to complaints made to the government. For now, at least, employers must consider internal complaints as possible predicates for retaliation claims.

Thompson and Third Party Retaliation Claims:

Eric Thompson and his fiancé, Miriam Regalado, both were employees at North American Stainless. Three weeks after Regalado filed a sex discrimination complaint with the EEOC, Thompson was fired. He sued under Title VII for unlawful retaliation, alleging that North American Stainless fired him because Regalado filed an EEOC charge.

The district court granted summary judgment for North American Stainless. The Sixth Circuit affirmed, holding that Thompson was not included in the class of persons entitled to sue under Title VII’s anti-retaliation provision because he did not engage in any statutorily protected activity. The Supreme Court granted certiorari to resolve two issues: first, whether Thompson’s termination constituted unlawful retaliation; and second, whether Thompson had standing to sue under Title VII.

The Court held that Thompson’s firing would be unlawful under Title VII, assuming it was in retaliation for Regalado’s protected activity. The antiretaliation provision of Title VII provides in part that “it shall

be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has made a charge.” Although this language seems to require a direct connection between a specific employee’s charge and his or her adverse treatment, according to the Court, it covers a broad range of employer conduct, not limited to actions taken against the person who engaged in the protected activity. Referring to its 2006 decision in *Burlington Northern*, the Court reiterated that the antiretaliation provision prohibits “any employer action that well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.” Firing one’s fiancée because of her protected activity, the Court held, satisfies the *Burlington Northern* standard.

The Court acknowledged that its ruling may create a risk of liability for an employer any time it fires an employee with a connection to another who has filed a charge of discrimination. But it declined to fix the outer boundaries of relationships for which third party reprisals would be unlawful. “We expect that firing a close family member will almost always meet the *Burlington* standard and inflicting a milder reprisal on a mere acquaintance will almost never do so,” the Court explained, “but beyond that we are reluctant to generalize.”

Whether Thompson had standing to sue for this violation of Title VII, however, was the more difficult question, according to the Court. Title VII provides that a “civil action may be brought . . . by the person claiming to be aggrieved.” 42 U.S.C. §2000e—5(f)(1). Previously, the lower federal courts had generally agreed that standing under Title VII was consistent with the broad “injury-in-fact” standard used for purposes of standing under Article III of the Constitution. Such an interpretation of Title VII, the Court explained, would lead to “absurd consequences.” For example, a shareholder would “be able to sue a company for firing a valuable employee for racially discriminatory reasons, so long as he could show that the value of his stock decreased as a consequence.” The Court rejected that interpretation.

Instead, the Court held that an aggrieved person under Title VII is anyone who falls within the “zone of interests” sought to be protected by the statute, a standard long applied in litigation arising under the Administrative Procedures Act. A plaintiff has no right to sue if his interests are marginally related to the purpose of the statute, the Court explained. Because the purpose of Title VII’s anti-retaliation provision is to protect employees from unlawful acts of the employer, the Court found that Thompson fell within the zone of interests protected by the statute. One could reasonably interpret the decision as limiting the category of third parties who may now bring retaliation claims to employees or former employees. The key issue for development in the lower courts, however, will focus on the nature of the relationship between the individual engaging in protected activity and the third party.

***Kasten* and Oral Complaints as Protected Activity Under FLSA**

In *Kasten*, the plaintiff allegedly complained that the location of a timeclock resulted in the exclusion of time spent by workers putting on and taking off work clothes. Kasten testified that he orally presented his concerns to his shift supervisor, his lead operator, a human resources manager and the operations manager. Kasten allegedly told them that he believed the location of the timeclock was illegal. He never reduced his complaints to writing. St. Gobain maintained, however, that Kasten never made any significant complaint about the timeclock location, and that it fired him because he repeatedly failed to record his comings and goings, despite multiple warnings to do so. Kasten was, however, fired *after* allegedly raising his concerns, so he brought a claim for retaliation under the FLSA.

The FLSA's anti-retaliation provision makes it unlawful "to discharge or in any other manner discriminate against any employee because such employee has *filed any complaint*" related to the FLSA. 29 U.S.C. § 215(a)(3). The district court granted the employer summary judgment, holding that the phrase "filed any complaint" covers only written complaints. On appeal, the Seventh Circuit affirmed.

The Supreme Court granted certiorari and held that the phrase "filed any complaint" covers oral complaints. In reaching its decision, the Court found that the text of the statute did not clearly include or exclude oral complaints from its coverage. So the Court looked beyond the plain language of the statute.

First, the Court found, there are "[s]everal functional considerations" that "indicate that Congress intended the antiretaliation provisions to cover oral, as well as written, complaints." Limiting it to written complaints would "undermine the [FLSA's] basic objectives" of maintaining "minimum standards of living necessary for health, efficiency and general well-being of workers." An interpretation that the statute requires written complaints would limit protections available to illiterate and less educated workers. And, the Court concluded, such an interpretation would circumscribe the flexibility of those charged with enforcing the FLSA, by preventing the use of "hotlines, interviews and other oral methods of receiving complaints."

Second, the Court gave weight to what it considered the "reasonable" views of the Secretary of Labor (who is charged with enforcement of the FLSA) and the EEOC (which is charged with enforcement of the Equal Pay Act), both of which have consistently taken the position that oral complaints are covered by the antiretaliation provision.

Responding to the employer's arguments, the Court acknowledged that the statute requires some degree of formality to ensure that employers have adequate notice of complaints. But that needed formality did not come from a requirement that complaints be written. The plaintiff, the Court emphasized, still must prove that the employer took action "*because*" the employee "*filed any complaint.*" Moreover, it created an objective standard for determining whether an oral complaint qualifies as protected activity. An oral complaint can provide the requisite notice to the employer, the Court stated, provided it is "sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the statute and a call for their protection." *Kasten* was remanded for further proceedings. It remains to be seen whether *Kasten* can prove that he did, in fact, provide the requisite notice to St. Gobain and, if so, whether St. Gobain fired him "*because*" he "*filed any complaint.*"

Unfortunately for employers, the *Kasten* decision leaves an important issue unanswered: whether the "filed any complaint" language in FLSA's anti-retaliation provision is limited to complaints made to the government. The Court declined to address this issue because Saint-Gobain failed to raise it in its certiorari briefs. In a dissent joined by Justice Thomas, Justice Antonin Scalia agreed with Saint-Gobain's contention that only complaints to the government may form the predicate for an FLSA retaliation claim. It remains to be seen whether there are at least three other justices who share that view.

Retaliation Risks After *Thompson* and *Kasten*

In recent years, the Supreme Court's decisions in the area of retaliation have steadily expanded the protections afforded to employees under federal law. The decisions in *Thompson* and *Kasten* are no

exception. Both require employers to think more broadly when assessing the risks of retaliation claims.

Thompson requires employers to consider that individuals who themselves have not engaged in protected activity may still be potential plaintiffs. Employees who are family members and fiancées fall into that new category, for sure. But beyond that, the category is not well-defined. Employers must consider carefully whether actions to be taken against a third party, known by the employer to be a close friend or colleague of someone who has engaged in protected activity, “well might have dissuaded a reasonable worker” for engaging in protected activity. Employers may want to revisit their employee fraternization and dating policies to see if they are adequately protected.

The impact of the decision in *Thompson* may go beyond Title VII. It necessarily applies to the ADEA because the relevant language of that statute mirrors Title VII. See 29 U.S.C. § 623(d) (“it shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has made a charge.”); 29 U.S.C. §626(c)(1)) (“Any person aggrieved may bring a civil action . . .”). The reasoning in *Thompson* just as easily could be applied by the plaintiff’s bar to retaliation claims brought under the EPA and the FLSA. Like Title VII, those statutes define the activities that are unlawful and then separately define a category of individuals who may bring suit that is not limited to those who engage in protected activity. See 29 U.S.C. § 215(a)(3) (“it shall be unlawful for any person – to discharge or in any other manner discriminate against any employee because such employee has *filed any complaint.*”); 29 U.S.C. § 216(b) (employers who violate the statute “shall be liable to the employee or employees affected”). So *Thompson* creates a risk of third party retaliation claims under those statutes as well.

The impact of the decision in *Kasten* is more uncertain. While overruling decisions that have held oral complaints under the FLSA insufficient predicates for retaliation claims, the Court established an objective standard for determining whether an employee orally has “filed any complaint.” So there remains room for employers still to argue that the alleged predicate act does not meet that standard, and that because it fails to meet that standard of notice, the plaintiff cannot prove that the adverse action was “because” the employee “filed any complaint.”

In short, when considering an adverse action against an employee, employers must now consider (a) whether that employee has a relationship with another who has engaged in protected activity such that the contemplated action “well might have dissuaded a reasonable worker” from engaging in protected activity; and (b) whether the employee has made any oral or written complaints that might reasonably be construed as “as an assertion of rights protected by the statute and a call for their protection.” In either case, employers should take care to evaluate the strength of the evidence that will show the action was taken because of legitimate, non-retaliatory reasons.

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