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En Banc 6th Circuit Court of Appeals Holds That Title VII Does Not Allow Third-Party Retaliation Claims

Section 704(a) of Title VII of the Civil Rights Act of 1964 provides a cause of action for retaliation, as follows:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment. . . because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

In April 2008, a divided three judge panel of the Sixth Circuit Court of Appeals held that an employee who was discharged shortly after his fiancée filed an EEOC sex discrimination charge against their common employer, could maintain an action for unlawful retaliation even though he did not allege that he, himself, had engaged in any protected activity.

On June 5, 2009 a majority of an en banc Sixth Circuit Court of Appeals rejected the previous panel decision and held that Section 704(a) of Title VII "does not create a cause of action for third-party retaliation for persons who have not personally engaged in protected activity."

The majority decision interpreted the statute in consonance with its plain language, i.e. in order for a person to sue for retaliation "he" must have personally engaged in some protected activity.

The minority opinion contended that limiting the application of the anti-retaliation provision of Title VII to a literal interpretation of the statute undermines the purpose behind such provision which is to proscribe employer actions which would discourage or prevent a person from pursuing rights under Title VII.

Epiloge

The majority decision should not be taken as a license for employers to take an adverse employment action against someone closely related to or associated with an employee who engages in protected activity under Title VII.

Clearly, the person who engages in protected activity could maintain a retaliation action based on the allegations that he or she was the real intended target of retaliation for having engaged in

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protected activity. In Thompson, however, the fiancée of the terminated employee did not pursue a retaliation claim. Whether she would have been able to have her terminated fiancée reinstated with back pay is, however, open to question but certainly not foreclosed.

Thompson v. North American Stainless LP may well wind up in the U.S. Supreme Court. In a case decided in 2006 (Burlington Northern and Santa Fe Railway Co v. White) the Court defined "retaliation" as an action that would "dissuade a reasonable worker from making or supporting a charge of discrimination." This definition may well be deemed broad enough to embrace third-party retaliation claims.

The bottom line is employers should be aware of the prospect of third-party retaliation claims in making any hiring, promotion, discipline or discharge decisions.

If you have any questions regarding the information contained in this E-news bulletin, please contact your Butzel Long attorney, a member of our Labor and Employment Practice Group, or the authors of this issue:

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