

Managers Be Warned! Third-Party Retaliation Lawsuits and the United States Supreme Court

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Abstract

Recent Supreme Court decisions prohibiting retaliation by employers against employees seeking to vindicate their rights pursuant to civil rights anti-discrimination laws have significant consequences for employers and managers. The very recent Supreme Court decision in Thompson v. North American Stainless, LP emerges as a very important civil rights decision which materially extends the class of persons who are protected against retaliation in the workplace. The Supreme Court retaliation decisions, particularly the Thompson case, are examined herein; the implications of these Court decisions are addressed; and appropriate recommendations are offered to employers and managers on how to avoid liability for retaliation pursuant to civil rights laws.

Key words: Retaliation, discrimination, civil rights, management, managers, Supreme Court.

I. Introduction

In today's business world, it is quite common and natural for men and women to work closely together, to socialize, to travel together and perhaps to engage in a work relationship which leads to a romantic relationship. These romantic relationships are formed between employees, between supervisors and managers, but also between managers and supervisors and their subordinate employees. The number of office romances is substantial, it appears. Career-BUILDER.com's annual survey for 2009 reported that four out of ten workers of the 8000 surveyed stated that they dated a co-worker at some point in their careers (Adam, 2009). Furthermore, three in 10 workers surveyed said they married the person they dated at work. The CareerBuilder survey also found that fewer workers are keeping their office romances secret. The survey found that 72% of workers who have office romances are open with them, compared to 46% five years ago (Adams, 2009). Office romance can result in some positive consequences in the workplace by increasing workplace "engagement," that is, the desire and excitement to come to work, to care about one's company, and to work diligently (Morgan, 2010). A positive effect of office romance is that it can lead to increased productivity for both participants. Furthermore, romantically involved co-workers typically spend more time at work, take fewer days off, and are less likely to be absent and to quit (Morgan, 2010). There also may be an increase in coordination, group and team work, as well as creativity and dynamism.

The romantically involved co-workers may be more motivated to come to work, and to work. Interaction and communication at work certainly should be increased. Yet there are many disadvantages to office romance. This article is not about office romance, though that is an important topic with legal, ethical, and practical ramifications for employers and managers. Rather, this article focuses on one major disadvantage of office romance, and one that may not be readily apparent; that is, the potential for retaliation when the romantically involved co-workers or spouses work for the same employer and the employer discharges or sanctions one in retaliation for the other complaining about discrimination or filing a discrimination charge. This disadvantageous circumstance can also apply to close family members who work for the same employer as well as co-workers who are true colleagues as they are close friends and confidantes. The negative consequence may be that the family member or friend may suffer an adverse employment action as a result of the other complaining about discrimination or filing a discrimination charge. This article, therefore, deals with retaliation in the workplace. An important area of civil rights law that has received a great deal of attention recently from the United States Supreme Court is the subject of employer retaliation in the workplace. This article discusses retaliation pursuant to civil rights law, with particular attention being paid to "third party retaliation," which refers to an employer retaliating against a victim of discrimination by retaliating against someone other than the victim who opposed the discrimination.

The authors first provide some general legal and factual information about civil rights and anti-discrimination laws and practice generally and then specifically regarding retaliation. The authors next discuss an important series of U.S. Supreme Court decisions on retaliation, culminating in a detailed examination of the very recent, seminal, third-party retaliation Court decision – *Thompson v. North American Stainless, LP*. The authors then discuss the implications of the Supreme Court’s retaliation decisions for employers and managers; and finally the authors provide recommendations to employers and managers on how to avoid retaliation liability pursuant to civil rights anti-discrimination laws.

II. Civil Rights Law and Retaliation – An Overview

A retaliation lawsuit instituted is a legal cause of action by an employee who contends that he or she was discharged or otherwise adversely affected to dissuade or prevent the employee from filing a discrimination claim or to punish the employee who has filed a civil rights claim (Cavico and Mujtaba, 2008 and 2009). Morgan (2010) emphasizes that “currently, retaliation suits are contributing to a wave of litigation that has employers in a panic” (p. 74). Mota and Waldman (2010, p. 16) report that in 1997 there were 18,198 retaliation claims filed with the Equal Employment Opportunity Commission (EEOC), representing 22.6% of the claims filed that year, but in 2007 the number had steadily risen to 26,663, representing 32.3% of total claims. Morgan (2010) points to EEOC records that indicate that retaliation claims increased by 23% in 2008, which percentage was approximately twice the rate of all other claims (p. 74). Moreover, total retaliation claims were at 32,690 in 2008, and represented about 34.3% of claims filed with the EEOC (Mota and Waldman, 2010, p.16). Similarly, in 2009, retaliation claims increased again, accounting for 36% of total claims (Morgan, 2010, p. 74). Trottman (2010), moreover, reported that in 2009 retaliation claims surpassed racial discrimination complaints for the first time since the EEOC commenced operations in 1965 (p. A2). Generally, Trottman (2010) reported that private sector employees instituted a “record number” of discrimination charges in fiscal year 2010; specifically, the number of discrimination complaints filed with the EEOC against employers increased to almost 100,000, which is a 7% increase from a year earlier and a 21% increase from fiscal year 2007 (p. A2).

EEOC data from 2010 indicates that 36,258 retaliation claims were filed based on all civil rights statutes, which represents 36.3% of all claims filed; and retaliation claims for Title VII only of the Civil Rights Act totaled 30,948, representing 31% of all Title VII claims filed (Charge Statistics, 2011). Plainly, the number of retaliation claims has steadily been increasing. The Civil Rights Act of 1964, Title VII, Section 704(a) creates a legal cause of action for retaliation by employers against claims of discrimination in an employment context (42 *United States Code* Section 2000e-3(a) 2006). Section 704(a) prohibits discrimination against employees who oppose the employer’s unlawful employment practices (42 *United States Code* Section 2000e-3(a) 2006). The anti-retaliation provision clearly states that it is unlawful for an employer to discriminate against an employee because the employee “opposed” the employer’s unlawful employment practice or because the employee “participated” in an investigation or proceeding regarding alleged discrimination (42 *United States Code* Section 2000e-3(a) 2006). The Equal Employment Opportunity Commission on its website dealing with types of discrimination initially and clearly states in the retaliation section that all the laws we enforce make it illegal to fire, demote, harass, or ‘retaliate’ against applicants or employees because they filed a charge of discrimination, or because they complained to their employer about discrimination on the job, or because they participated in an employment discrimination investigation or lawsuit (Retaliation, 2011).

In dealing with Facts About Retaliation, the EEOC states that “an employer may not fire, demote, harass or otherwise ‘retaliate’ against an individual for filing a charge of discrimination, participating in a discrimination proceeding, or otherwise opposing discrimination” (Facts About Retaliation, 2011). According to the EEOC, “retaliation occurs when an employer...takes an adverse action against a covered individual because he or she engaged in a protected activity” (Facts about Retaliation, 2011). An “adverse action,” according to the EEOC, “is an action taken to try to keep someone from opposing a discriminatory practice, or from participating in an employment discrimination proceeding” (Facts about Retaliation, 2011). The EEOC provides examples of “adverse actions” in employment, such as, termination, refusal to hire, denial of promotion, unjustified negative evaluations or references, increased surveillance, or unfounded civil or criminal charges (Facts about Retaliation, 2011). The retaliation protections in civil rights law protect, according to the EEOC, “covered individuals,” who include “people who have opposed unlawful practices participated in proceedings, or requested accommodations related to employment discrimination” (Facts about Retaliation, 2011). Significantly for the purposes of this article, the EEOC also states that “covered individuals” also includes “individuals who have a close association with someone who has engaged in such protected activity” (Facts about Retaliation, 2011). The EEOC provides an example, to wit: “It is illegal to terminate an employee because his spouse participated in employment discrimination litigation” (Facts about Retaliation, 2011).

The EEOC divides “protected activity” into two categories: “opposition” to a practice believed to be unlawful discrimination and “participation” in an employment discrimination proceeding. “Opposition” activities include, according to the EEOC, complaining to anyone about alleged discrimination against oneself or others, threatening to file a discrimination charge, picketing in opposition to discrimination, or refusing to obey an order that one reasonably believed to be discriminatory (Facts about Retaliation, 2011). Feeney (2010) notes that “an employee’s submission of an internal discrimination complaint to management through an employer’s grievance procedure serves as a prime example of opposition conduct” (pp. 646-47). Oderda (2010) points out that “opposition that is directly communicated to a superior or supervisor will weigh heavily in favor of the opposition being protected. When the opposition is communicated only to a co-worker it becomes less clear whether the communication should be protected” (p.253). However, regarding opposition, the EEOC also states that the “opposition” is only “protected from retaliation as long as it is based on a reasonable, good-faith belief that the complained of practice violates anti-discrimination law; and the manner of the opposition is reasonable” (Facts about Retaliation, 2011). This “reasonable” and “good faith” standard means that so long as an employee subjectively believes (for “good faith”) and an ordinary, prudent, objective person would believe (for “reasonable”) that there is a Title VII violation, the employee can be mistaken, but protected (Feeney, 2010; Oderda, 2010). Opposition, moreover, cannot be “overly broad, ambiguous, or disruptive” (Oderda, 2010, p. 252).

Participation,” according to the EEOC, entails taking part in an employment discrimination proceeding (even if the claims were ultimately found to be invalid), filing a charge of discrimination in employment, cooperating in an internal investigation of alleged discriminatory practices, or serving as a witness in an EEOC investigation or litigation (Facts about Retaliation, 2011). Feeney adds that “an employee’s refusal to participate in an employer’s employment discrimination investigation also constitutes participation conduct” (p. 648). Accordingly, there are two distinct parts to Section 704(a) as well as the EEOC’s retaliation formulation. Long (2010) clearly and concisely explains the distinction:

The participation clause protects employees who have made a charge, testified, assisted, or participated in a formal proceeding authorized by Title VII. In contrast, the opposition clause protects employees who have engaged in less formal activity. To receive protection under the opposition clause, an employee need not file a charge of discrimination with the EEOC or participate in a court proceeding. Instead, the employee simply must ‘oppose’ conduct that he or she reasonably and in good faith believes to be unlawful under Title VII (p. 263).

To prevail in a Title VII retaliation lawsuit, the plaintiff employee must prove that he or she engaged in an activity protected by Title VII, the defendant employer possessed knowledge of the protected activity, the defendant employer took an adverse employment action against the plaintiff, and a causal connection existed between the protected activity and the adverse employment action (*McDonnell Douglas Corporation*, 1973; Feeney, 2010; Hegerich, 2010; Mota and Waldman, 2010; Oderda, 2010). If the plaintiff employee can satisfy this initial test, then the burden is shifted to the employer who now must offer a legitimate, job-related, and non-retaliatory reason for the adverse employment action. Next, if the employer does come forth with such a legitimate reason, the plaintiff employee then bears the burden of demonstrating that the employer’s reason is a pretext, that is, contrived and fake; and accordingly a jury (or judge as finder of fact) could infer that the employer actually acted with an impermissible retaliatory intent to the adversely affected employee (Donaher, 2009; Cavico and Mujtaba, 2008).

Retaliation against an employee who seeks to vindicate rights pursuant to the Civil Rights Act is consequently a civil rights violation, and one separate and distinct from the original discrimination claim (*Tarick Ali v. District of Columbia Government and District of Columbia Fire and Emergency Medical Service*, 2010). To illustrate retaliation, in one recent case, the plaintiff employee was a practicing Muslim and a firefighter and emergency medical technician for the Washington, D.C., Fire and EMS. The employee was told by his supervisor that he would have to choose between his religion and his job. Furthermore, the supervisor told him there would be “ramifications” if the plaintiff employee pursued internal complaints of religious harassment. The federal district court found there was sufficient evidence to support a retaliation claim, explaining: “Although the nature of these ‘ramifications’ is unclear, because Ali was allegedly told he would have to choose between his job and his religion, the Court infers that Ali’s supervisor was suggesting that Ali might lose his job. The Court will not conclude that fear of that consequence would not deter a reasonable employee from continuing to pursue a discrimination claim” (*Tarick Ali v. District of Columbia*, 2010, p. 93). The EEOC relates that it is illegal to retaliate against a person for opposing employment policies or practices that discriminate based on religion or for filing a discrimination charge, or testifying or participating in any way in an investigation, proceeding, or litigation pursuant to Title VII of the Civil Rights Act (Facts about Religious Discrimination, EEOC, 2010).

Furthermore, the EEOC states that requesting a religious accommodation is also a protected activity (Questions and Answers about Religious Discrimination in the Workplace, EEOC, 2010). Earp (2007) relates a case of retaliation against employees who allegedly were harassed due to their Islamic religious beliefs and Arabic national origin, and then retaliated against. In the case, the employee was frequently called “Mrs. Osama bin Laden” by a fellow employee, who also made comments that Arabs and Muslims were “stupid” and “crazy.” The employee, who was of Egyptian national origin and of the Islamic faith, repeatedly complained to management, with no results, and allegedly was discharged for reporting the harassment (Earp, 2007, p. 139). The case, which alleged national origin and religious discrimination, was ultimately settled for \$162,500 (Earp, 2007, note 28).

III. The Supreme Court’s Retaliation Decisions

The U.S. Supreme Court has addressed the retaliation provision of civil rights law in a series of important recent decisions. The first important Court retaliation decision was *Robinson v. Shell Oil Company* (1997) where the Court broadened the scope of Title VII of the Civil Rights Act by holding that a former employee was protected by the Act’s non-retaliation provision. Then in 2006, in *Burlington Northern & Santa Fe Railway Co. v. White* (2006), the Court broadly defined the retaliation necessary for a lawsuit as any employer conduct which is so “materially adverse” to an employee that the conduct would “dissuade” a reasonable employee from pursuing a discrimination claim (*Burlington Northern & Santa Fe Railway Co.*, 2006, p. 68). The case dealt with an employee who complained internally about alleged sex discrimination, who then was transferred to less desirable position, although a position that was not technically a demotion. Nevertheless, the Court ruled that the anti-retaliation provision of civil rights law protects against retaliation that does not adversely affect the employee’s job (*Burlington Northern & Santa Fe Railway Co. v. White*, 2006, p. 63-64).

The Court provided an example of such retaliation that would adversely affect an employee outside of his or her work, to wit, the employer filing false criminal charges against the employee (*Burlington Northern & Santa Fe Railway Co. v. White*, 2006, pp. 63-64). As such, *Burlington Northern & Santa Fe Railway Co. v. White* (2006) emerges as a significant case because the Court established the legal principle that the retaliation by the employer need not relate to the plaintiff’s employment to be legally actionable (p. 61). The Court reasoned that to effectuate the purposes of the Civil Rights Act, a broad interpretation of the law’s anti-retaliation provision was necessary due to the need to assure the cooperation of employees to complain about discrimination and to act as witnesses in order to prevent and prohibit discriminatory practices in the workplace (*Burlington Northern & Santa Fe Railway Co.*, 2006, pp.67- 68). The case is also significant because the Supreme Court attempted to draw a line between actionable and non-actionable retaliation that would adversely affect an employee. The Court held that employer conduct that deters the reasonable employee from complaining of discrimination to the courts, the EEOC, or his or her employer is legally actionable retaliation; whereas “retaliation” in the form of “petty slights or minor annoyances” is not legally actionable (*Burlington Northern & Santa Fe Railway Co.*, 2006, p. 68).

Then, the Supreme Court in *Crawford v. Metropolitan Government of Nashville & Davidson County, Tennessee* (2009) continued the pro-employee line of retaliation decisions. The Court held that the anti-retaliation protections of civil rights laws pursuant to Title VII extend to employees who voluntarily participate in an employer’s internal investigation of a discrimination complaint regarding sexual harassment claims by co-workers (*Crawford*, 2009, p. 853). The *Crawford* case dealt with an employee who revealed a supervisor’s sexual harassment in response to an investigation commenced by the employer as to unlawful discrimination. The plaintiff in *Crawford* contended that her conduct in answering questions about past instances of discrimination pertaining to a supervisor during the course of the employer’s internal investigation as to similar allegations constituted protected “opposition” (*Crawford*, 2009, pp. 850-51).

The Court agreed, and thus ruled that the employee “opposed” suspected discrimination pursuant to Section 704(a), even though the employee never formally filed a discrimination complaint (*Crawford*, 2009, pp. 849-51). The Court reasoned that to “oppose” discrimination encompasses not only active conduct on the part of the employee, but also answering questions and providing information during the course of an investigation (*Crawford*, 2009, p. 851). The Supreme Court, in addition, in a series of three cases decided between 2005 and 2006, recognized employee retaliation claims instituted pursuant to other civil rights statutes that did not explicitly contain anti-retaliation provisions such as Title VII contains (Long, 2010; Mota and Waldman, 2010). One case dealt with retaliation against an employee who complained of race discrimination that was aimed against another employee, which conduct is not specifically prohibited by the Civil Rights Act; another dealt with the Age Discrimination in Employment Act (ADEA) and retaliation against federal workers who file age discrimination complaints with the EEOC, again which conduct is not specifically prohibited by the

ADEA; and the third case dealt with an employee who claimed retaliation when the employee complained of sex discrimination pursuant to Title IX of the Civil Rights Act, even though Title IX does not contain an express anti-retaliation provision (Long, 2010, p. 264; Mota and Waldman, 2010, pp. 9-13).

IV. The Supreme Court's Third Party Retaliation Decision

As a precursor to examining the Supreme Court's recent third-party retaliation decision, it is important to note that the Compliance Manual of the Equal Employment Opportunity Commission states specifically that a third party related to the original discrimination claimant can sue pursuant to Title VII if the related third party is discharged or otherwise retaliated against based on the original discrimination claimant's attempt to vindicate his or her rights under the civil rights act (EEOC Compliance Manual, 2011). In its Compliance Manual, the EEOC states that for both the "opposition" and "participation" protected activities, the person claiming retaliation need not be the person who actually engaged in the opposition or participation; rather, that person can be one "closely related to or associated with the person exercising his or her statutory rights" so long as the retaliation would discourage that person from pursuing those rights (Hegerich, 2010). This EEOC standard provides an example, to wit: "It is unlawful to retaliate against an employee because his son, who is also an employee, opposed allegedly unlawful employment practices" (Hegerich, 2010). The lower federal courts have also "spoken" on the third-party retaliation issue.

Jona (2010) notes that the courts that have enunciated a "broader interpretation of the law's anti-retaliation provision generally focus on the intent and purpose of Title VII, and not necessarily on the relationship that exists between the effected parties" (p. 298). Jona (2010, pp. 303-04) and Feeney (2010, pp. 656-660) relate that the "lower" federal courts have already granted protection to co-worker relations involving spouses and siblings and even in the case of a co-worker who was not related to the worker protesting discrimination based on the fact that they were all sufficiently related or associated as well as the courts' intent to construe broadly the anti-retaliation provisions of Title VII. The EEOC interpretation of the scope of activities and people protected from retaliation as well as the decisions from the lower federal courts provide the legal background to the Supreme Court's seminal third-party retaliation decision. In January of 2011, the United States Supreme Court enunciated a major decision regarding the retaliation against employees who file civil rights claims in the case of *Thompson v. North American Stainless, LP* (2011 U.S. Lexis 913). The decision is very noteworthy because it is regarded as the Court's most recent and leading "retaliation" pronouncement. The Court ruled that in a so-called "third party" retaliation situation, employers can be sued if they retaliate against a relative or close associate of an employee who instituted a discrimination claim. The decision by the Court was a unanimous one. It was also the latest legal victory by employees on the retaliation issue, that is, the redress available to an employee who complains about discriminatory treatment at work.

The *Thompson* case arose because Eric Thompson and his fiancée, Miriam Regalado, worked together at North American Stainless. Thompson was a metal engineer. His fiancée filed a charge with the Equal Employment Opportunity Commission alleging gender discrimination. About three weeks later, North American Stainless terminated Thompson's employment. Thompson then filed a charge with the EEOC contending he was terminated in retaliation for his fiancée filing a charge against their employer. The company contended that he was fired because of poor performance and because he wrote an allegedly derogatory memo regarding the company's management practices. The EEOC filed a right-to-sue letter, and then Thompson filed a lawsuit against North American Stainless. The federal district court rejected Thompson's claim on the grounds that he personally did not engage in the protected activity. The district court explained that Title VII did not provide protection against retaliation for employees who have not themselves participated in the protected activity.

Thompson appealed to the Sixth Circuit Court of Appeals which affirmed the district court's decision, holding that Thompson did not have a viable cause of action against his employer for retaliation because Thompson did not personally engage in his fiancée's protected activity (Hegerich, 2010). Certiorari was granted to the Supreme Court. Thompson's fiancée is now his wife. The Supreme Court, with Justice Antonin Scalia writing for a unanimous court, rejected the reasoning of the lower federal courts. The anti-retaliation provision in the Civil Rights Act, said Justice Scalia, "...must be construed to cover a broad range of employer action" that could deter a "reasonable" employee from making or supporting a discrimination charge (*Thompson*, pp. 1-2). Specifically, the Justice said, "a reasonable worker obviously might be dissuaded from engaging in protected activity if she knew that her fiancée would be fired" (*Thompson*, p. 2). Justice Scalia further pointed out that the anti-retaliation provision of Title VII prohibits an employer from discriminating against its employees for engaging in protected conduct, yet "without specifying the employer acts that are prohibited" (*Thompson*, p. 7).

Justice Scalia did note the “concern” of the defendant employer that “prohibiting reprisals against third parties will lead to difficult line-drawing problems concerning the types of relationships entitled to protection” (Thompson, p. 8). He opined that “perhaps retaliating against an employee by firing his fiancée would dissuade the employee from engaging in protected activity, but what about firing an employee’s girlfriend, close friend, or trusted co-worker” (Thompson, p. 8)? Justice Scalia, moreover, raised the defendant employer’s contention that such a broad third-party retaliation ruling “will place the employer at risk any time it fires any employee who happens to have a connection to a different employee who filed a charge with the EEOC” (Thompson, p. 8). “Speaking” for the Court, Justice Scalia admitted that “we acknowledge the force of this point” (Thompson, p. 8); yet nonetheless “we do not think it justifies a categorical rule that third-party reprisals are unlawful” (Thompson, p. 8). Justice Scalia explained that the Court had adopted a “broad standard” for retaliation in the *Burlington* case “because Title VII’s anti-retaliation provision is worded broadly” (Thompson, p. 8). Accordingly, Justice Scalia stated that “we think there is no textual basis for making an exception to it for third-party reprisals, and a preference for clear rules cannot justify departing from statutory text” (Thompson, p. 9).

Furthermore, Justice Scalia refused to “draw the line” between actionable vs. non-actionable third-party reprisals. He consequently stated: “We also decline to identify a fixed class of relationships for which third-party reprisals are unlawful” (Thompson, p. 9). Nevertheless, Justice Scalia did provide some limited guidance. As such, the Justice said that “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, but beyond that we are reluctant to generalize” (Thompson, p. 9). However, to prevent the retaliation provision from being abused, Justice Scalia also said that in order to institute a retaliation lawsuit the third party plaintiff must have 1) “standing” (based on Article III of the Constitution’s requirement that the judicial power extend to “cases and controversies”); 2) be “aggrieved” (as per the requirements of Title VII of the Civil Rights Act); and 3) fall within the “zone of interests” protected by the law (as per the requirements of the Administrative Procedure Act). Although it is beyond the scope of this article to deal in depth with these important procedural issues, suffice it to say that the plaintiff Thompson met all three requirements (Thompson, pp. 10-14).

In Thompson’s case, Justice Scalia said Thompson was qualified to file a lawsuit because Thompson was an employee of the company along with his now-wife, and the purpose of the Civil Rights Act is to protect employees from their employers’ unlawful actions. Justice Scalia further explained that Thompson was not an “accidental victim of the retaliation – collateral damage, so to speak, of the employer’s unlawful act. To the contrary, injuring him was the employer’s intended means of harming (his fiancée). Hurting him was the unlawful act by which the employer punished her” (Thompson, pp. 14-15). The Court thus ruled that Thompson was “well within the zone of interests sought to be protected by Title VII. He is a person aggrieved with standing to sue” (Thompson, p. 15). The Supreme Court, accordingly, reversed the decision of the court of appeals and remanded the case back to the federal district court for a trial on the merits. The *Thompson* case, therefore, represents not only a continuum of Supreme Court civil rights retaliation decisions very favorable to employees, but also a material expansion of the meaning and scope of retaliation and particularly the employee’s retaliation rights in the context of third-party retaliation. The *Thompson* decision, of course, is very beneficial to employees; but it is also one very problematic for employers. In the next section to this article, the authors will discuss the implications of the *Thompson* decision to employers and managers, and the authors will provide recommendations for employers and managers to avoid retaliation lawsuits generally and third-party retaliation lawsuits specifically.

V. Implications and Recommendations for Employers and Managers

Employers and managers must be cognizant of the anti-retaliation provision in civil rights law, particularly the fact that an employer can be liable for retaliating against an employee who files a charge with the EEOC regardless of the validity or reasonableness of the charge (EEOC Compliance Manual, 2011). That is, the retaliation claim by the employee or a person closely related to or associated with the employee is separate and distinct from and independent of the original discrimination claim and its merits. Retaliation is in and of itself a civil rights legal action. Another salient fact that the employer and its management must comprehend is that the law’s anti-retaliation provision has two parts: the “participation” component and the “opposition” component. Regarding the latter aspect of the law, the employer must be aware that while “participation” conduct is more formal, “opposition” activity can take many forms, for example, complaining internally of discrimination as well as supporting and expressing support for co-workers who have filed discrimination complaints. To complicate matters, Title VII does not define the key term “opposition.”

Consequently, “opposing” discrimination is not required to be of any specific form or type or degree in order to be protected activity. Mota and Waldman (2010) explain that “there is, then, no reason to doubt that a person can ‘oppose’ (discrimination) by responding to someone else’s question just as surely as by provoking the discussion, and nothing in the statute requires a freakish rule protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when her boss asks her a question” (p. 17). Oderda (2010) thus counsels that “while the opposition clause has been interpreted broadly, its scope is far from clear. Because neither the wording nor the legislative history of the provision make it clear how much the opposition clause is meant to protect, courts have been left to develop their definition of protected opposition” (pp. 244-45). Furthermore, retaliating against an employee who has “participated” or “opposed,” it must be emphasized, is in and of itself a separate and distinct civil rights violation regardless of the legal viability of any underlying civil rights discrimination claim. Furthermore, determining whether the employer’s retaliation is so severe that it would dissuade a victim of discrimination from complaining about the discrimination or whether the retaliation is minor or petty and thus not actionable emerges as another difficult task for employers and managers. The line between the two types of retaliation is a critical feature of retaliation law, but there is very little guidance for employers and managers as to where and how to draw that line. As with so much of the law, the federal courts will have to make this critical determination on a case-by-case basis.

Employers and managers also must be aware that the Supreme Court, in the series of retaliation decisions discussed herein, and culminating in the significant *Thompson* third-party decision, has materially expanded the number of potential retaliation plaintiffs under civil rights law. There clearly has been a trend by the Court to enunciate very favorable retaliation decisions benefitting employees. Now, due to *Thompson*, close relatives, relatives, colleagues, close friends, friends, and maybe even “mere acquaintances” can be retaliation plaintiffs too. Actually, anyone with some sort of relationship to the employee discrimination claimant can theoretically be a third-party retaliation plaintiff. The Civil Rights Act provides no guidance as to who can file a third-party retaliation claim. Moreover, the Supreme Court in *Thompson* provided very little guidance as to the permissible class of third-party retaliation plaintiffs. There is a wide range of claimants between a “close family member,” who “almost always” will qualify for third-party status, and a “mere acquaintance,” who “almost never” will qualify for third-party status (emphasis added). In addition to the nature of the relationship between the third-party and the discrimination claimant, the *Thompson* case indicates that the type of retaliation inflicted on the third-party will be an instrumental factor. Yet again there is a wide range of reprisals from retaliation in the form of a discharge to a mere (and undefined by the Court) “milder reprisal.”

Although not specifically addressed in *Thompson*, another factor, based on conventional legal causation doctrines, would be the proximity in space and time between the original discrimination claimant seeking redress and the alleged retaliation against the third party. The result of the Court’s retaliation decisions is that the freedom of the employer to fire “at-will” pursuant to the traditional employment at-will doctrine has been further materially curtailed. The “door” has been “opened,” moreover, to more civil rights retaliation lawsuits, perhaps including frivolous third-party lawsuits. Moreover, the employer’s ability to manage its workplace has certainly been further constrained, particularly regarding the administration of work sanctions to potential third-parties. Yet not only the employer’s “life” has been made more difficult by *Thompson* and its progeny, but also the “life” of the federal judiciary who now on a case-by-case basis must determine if the third-party is sufficiently connected to the original discrimination claimant and also whether the “reprisal” inflicted on the third-party is sufficiently severe so as to merit protection on civil rights third-party retaliation law.

The Court’s retaliation decisions are plainly very beneficial and pro-employee rulings. These cases thus should serve as a very “loud and clear” warning to employers and managers not to engage in retaliation against complaining or “whistleblowing” employees. The EEOC, in fact, advises that the employer should have well publicized and uniformly applied anti-discrimination and -harassment policies that 1) treats the various forms of discrimination and harassment, 2) clearly state prohibited behavior; 3) explain the procedures for bringing discrimination and harassment to the attention of management, and 4) most importantly for the purposes herein, include assurances that employees who complain or “blow the whistle” will be protected from retaliation (Best Practices for Eradicating Religious Discrimination in the Workplace, EEOC, 2010). Employers and managers thus must be cognizant of the Supreme Court’s retaliation decisions and in particular take heed of the EEOC’s advice regarding “assurances” against reprisals. Accordingly, the authors strongly recommend that the employer promulgate a Code of Ethics or a Code of Conduct. The Code should underscore that the company, firm, or organization has been established on a foundation of legality, morality, and social responsibility and that the company strives to maintain a reputation for excellence and propriety as well as to conduct itself in a lawful, ethical, fair, and honest manner.

The employer should mention in the Code that the document has been established to assist all the employees in conducting themselves in accordance with these aforementioned fundamental values as well as the principles in the Code. The Code should also underscore that it imposes certain specific duties on employees, the performance of which are critical to the continued sustainability and success of the organization. The employees should be told that they must read the Code, understand what is required of them in this regard, and next have the employees sign a confirmation document at the end of the code, and then deliver the confirmation document to the pertinent personnel in the Human Resources Department or the Legal or Ethics Department. The Code should also state that individual managers are responsible to seeing that all the employees under their supervision clearly understand the Code, what is expected of them pursuant to the Code, and that they apply the Code consistently in all their business dealings. The Code should unambiguously state that no employee has any authority to violate the Code or to order, direct, or authorize others to do so. While it is beyond the purposes of this article to discuss in detail all the appropriate provisions in a company's Ethics Code or Code of Conduct, the authors wish to provide certain recommendations for provisions dealing with reporting violations of the law or of the code itself, and particularly regarding the retaliation against reporting or "whistleblowing" employees.

The Code, therefore, should have a distinct section titled Reporting Violations of the Law and the Code. This section should commence with a clear and firm statement that the company monitors compliance with the law and the principles in the Code. Moreover, the Code should strongly state that the employees have an obligation to report to their supervisors and managers as well as other designated pertinent company officials of violations of the law and the Code, suspected violations of the law or the principles in the Code, as well as violations that the employee thinks will occur in the future. Note that the company, as a matter of self-interest, wants to encourage the reporting of all suspected and potential violations in addition to actual violations. The objective, of course, is to take care of any "whistleblowing" wrongdoing issues internally before the matter ends up in the "hands" of government regulators or the media. Of course, the issue may arise as to a good-hearted but erroneous "whistleblowing" employee, but so long as the employee making the report acted reasonably and in good faith, the employee should not be sanctioned if the employee was not correct in his or her suspicions or predictions of illegality or impropriety. Recall that the legal standard is merely that the employee has acted reasonably and in good faith in reporting or complaining about the discrimination. As such, the mistaken employee is nonetheless a protected employee. Nonetheless, since the goal of the company is to motivate the employees to report suspected wrongdoing, the Code should also strongly state that failure to notify the company of suspected violations can itself be a violation of the Code and thus grounds for discipline.

The company should also provide anonymous channels for "whistleblowing," for example an "ethics hotline." Moreover, to assure against any reprisals against the "whistleblowing" employee, the Code should state that requests for anonymity will be respected to the extent that the anonymity does not result in the violation of the rights of another employee. The company in the Code should assure employees that all reports of suspected violations of the law or failure to adhere to the principles in the Code, whether made anonymously or otherwise, will be treated confidentially and will be investigated in a prompt, full, and fair manner. Most importantly, the Code must underscore that any reprisal, retaliation, or intimidation against an employee or any person making a disclosure or any person closely related to or associated with the employee or person making the disclosure will not be tolerated and will be severely punished. Zehrt (2010) similarly justifies such Code provisions, pointing out as follows: "Likewise, employees who step forward and participate in internal investigations initiated by employers, even if it is prior to the filing of a charge, should be protected from retaliation. If these employees fear reprisal for statements made in the course of the investigation, then the results of the investigation will be meaningless and will not serve to put the employer on notice of the actual environment of the workplace.

Employers will not be in any better position to prevent future discriminatory conduct or to avoid liability – and employees will have no incentive to voluntarily provide incriminating evidence" (pp. 175-76). The Supreme Court's retaliation decisions clearly encourage the early reporting of discrimination. The early reporting of discrimination without fear of retaliation naturally serves to effectuate the purposes of U.S. civil rights laws, thereby benefitting employees and employers as well as society as a whole. In particular, employers should want to encourage early reporting of discrimination or for that matter any type of wrongdoing. The idea would be for the employer to have an opportunity to correct any misconduct before such misbehavior resulted in an adverse employment action and a potential retaliation lawsuit. It should be noted that several states have private sector Whistleblower Protection Acts that will protect an employee's job if the employee discloses wrongdoing, in the form of legal violations or suspected legal violations, in conformity with the requirements of the statute (Cavico, 2004).

Some of these statutes, moreover, require that the employee must first bring the wrongdoing to the attention of the employer and then give the employer a reasonable opportunity to correct the illegal behavior (Cavico, 2004). Not all states have private sector Whistleblower Protection Acts. Consequently, if the employees fear reprisals, especially in states without Whistleblower Protection Acts, they may not come forward to “blow the whistle” on discrimination and wrongdoing and they may not participate or not participate fully and truthfully in any investigation of discrimination and wrongdoing, even though reprisals for reporting may rise to the level of a retaliation civil rights lawsuit. Employers and managers, of course, must obey the retaliation law – a very extensive, far-reaching, and employee-friendly *corpus* of retaliation law – posited by the Supreme Court, the federal courts, and the Equal Employment Opportunity Commission. Yet instead of loudly decrying “more government regulation,” employers and managers rather should approach these legal requirements in an ethically egoistic manner; that is, employers and managers will be in a much better position to correct discrimination and to prevent discrimination as well as other wrongdoing, and thus to avoid legal liability, moral culpability, as well as adverse publicity if they encourage employees to provide information internally and then protect from retaliation employees who do provide evidence of discrimination and wrongdoing. Employers and managers, therefore, being cognizant of retaliation law, should take heed of the recommendations offered by the authors of this article, and thus take a legal, moral, socially responsible, as well as practical and self-interested approach to retaliation in the workplace.

VI. Conclusion

The anti-retaliation provisions of Title VII clearly reflect the intent of Congress to prevent an employer from dissuading its employees from exercising their rights under the Civil Rights Act. The United States Supreme Court also has manifested a clear and firm intention to broadly construe civil rights anti-discrimination laws so as to prohibit retaliation against those who initiate discrimination claims, those who participate in discrimination proceedings, those who oppose discrimination in the workplace, and those third-parties who are closely related to, and associated with, the discrimination claimant. Consequently, there evidently is emerging a strong trend of employee-favorable Supreme Court retaliation decisions, now encompassing third-party retaliation plaintiffs, which the prudent employer and manager must be keenly aware of. In furtherance of the goal of Title VII of non-discrimination in the workplace, the federal courts, led by the Supreme Court, have appropriately extended protection to third parties who have been retaliated against because of the conduct of others in complaining about discrimination. Employers and managers, therefore, must take heed that retaliation against employees is broadly interpreted, definitely prohibited by the law, and thus amounts to a civil rights violation in and of itself. The purposes of Title VII of the Civil Rights Act have certainly been underscored and safeguarded by the Court’s expansive retaliation decisions. Legal recognition of third-party claims has further empowered employees to complain of and report discrimination. Concomitantly, employers have been clearly “put on notice” that retaliation is impermissible and grounds for a civil rights lawsuit. Accordingly, employers and managers now must ensure that they have policies and procedures in place to combat discrimination and retaliation in the workplace and thereby to fully conform to civil rights law as broadly and beneficially interpreted to protect employees by the United States Supreme Court. To do so for the employer is the right thing to do, as well as the smart thing to do!

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