

## **In Search of UnderStanding: An Analysis of *Thompson v. North American Stainless, L.P.*, and The Expansion of Standing and Third-Party Retaliation Claims Under Title VII of the Civil Rights Act of 1964, et seq.**

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- I. INTRODUCTION**

It is likely no accident, that Title VII, similar to many federal statutes that prohibit discriminatory conduct, also includes a prohibition on retaliation against those attempting to vindicate their rights under its anti-discrimination provisions.<sup>204</sup> Another important aspect of anti-discrimination law, and general procedural requirements is standing. In the past, many courts, including the Supreme Court have limited the reach of both retaliation and standing, in an effort to clarify these factors in the civil litigation context. The practical affect of these limitations however, may be to actually limit the number and types of claims that may be brought under federal civil rights statutes. While judicial economy and efficiency is a noble principle and ideal, this ideal should never override the interest of preserving and protecting the rights of a prospective litigant and/or of providing an alleged victim of discrimination with “their day in Court,” so to speak. This is precisely why the Supreme Court’s decision in *Thompson v.*

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<sup>204</sup> See 42 U.S.C. Sec. 2000e, as amended, et. seq..

*North American Stainless, L.P.*, 131 S. Ct. 863, 178 L.Ed.2d 694 (2011), makes both legal and practical sense.

The reason why this decision is of importance is not just because it expands the reach of retaliation claims under Title VII, but also because it signals somewhat of a departure from the Court's previous decisions as it relates to the area of employment discrimination, especially given the Court's current apparent ideological composition. This paper examines the U.S. Supreme Court's holding in *Thompson*, in light of its previous jurisprudence concerning retaliation in the employment discrimination context. It also forecasts the meaning of the *Thompson* decision and predicts guidelines for employers and employees in the future in retaliation cases.

## II. PRE-THOMPSON CONTEXT OF RETALIATION DISCRIMINATION

### a. Statutory Context

Under Title VII of the Civil Rights Act of 1964, et. seq. ("Title VII"), "It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."<sup>205</sup> In addition, "It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because *he* has opposed any practice made an unlawful employment practice by this subchapter, or because *he* has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."<sup>206</sup>

Thus, according to the text of Title VII alone, in order to recover for retaliation discrimination, one must have been discriminated against or subjected to an adverse employment action because of *their own* engagement in a protected activity, for example, by filing a charge of discrimination. As a result, an employee could only state a claim for retaliation for *their* protected conduct

### b. Case Law Pre-*Thompson*

This conclusion is reinforced by the holdings of many courts, including the Tenth Circuit Court of Appeals, which held that, "[t]o establish a prima facie case of retaliation Cole [the plaintiff] must show that: (1) *she* engaged in protected opposition to Title VII discrimination or participated in a Title VII proceeding; (2) *she* suffered an adverse employment action contemporaneous with or subsequent to such opposition or participation; and (3) there is a causal connection between the protected activity and the adverse employment action (emphasis

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<sup>205</sup>42 U.S.C. § 2000e-2(a), et seq. (1991)

<sup>206</sup>42 U.S.C. § 2000e-3(a), et seq. (1991) (emphasis added).

added).<sup>207</sup> Meanwhile, *Clark County School District v. Breeden*, before the U.S. Supreme Court, involved a claim by the plaintiff that the “...petitioner had taken two separate adverse employment actions against *her* in response to two different protected activities in which *she* had engaged.”<sup>208</sup> Prior to its holding in *Thompson*, the U.S. Supreme Court’s analysis of retaliation claims under Title VII focused on the causal connection between the plaintiff’s protected activities and the adverse employment action. As such, it seemed almost *a fortiori*, that a claim for retaliation by one claimant was not cognizable under Title VII, where the claimant did not engage in the protected activity,<sup>209</sup> a conclusion also reached by other federal courts to consider this issue.<sup>210</sup> In each of these cases, the Court’s rationale appeared to be that the plain language of Title VII’s retaliation provisions did not contemplate the extension of retaliation to third persons, or persons not engaged in the protected activity themselves.<sup>211</sup> However, even in some cases where courts declined to extend Title VII’s retaliation to third persons, the court still seemed to recognize policy arguments supporting the recognition of “third-party retaliation” claims, under Title VII.<sup>212</sup>

### III. ANALYZING THOMPSON V. NORTH AMERICAN STAINLESS, L.P.,

#### a. Facts

The relevant facts in *Thompson* are that both the Plaintiff, Eric Thompson (hereinafter “Plaintiff Thompson”) and his fiancé, Miriam Regalado (hereinafter, “Regalado”) were at some point employed by North American Stainless (hereinafter, “North American”), and during this time, in February 2003, North American was informed by the U.S. Equal Employment Opportunity Commission (hereinafter, “EEOC”) that Regalado filed a charge against North American for sexual discrimination.<sup>213</sup> Three weeks after this notification, North American terminated Plaintiff Thompson from its employment.<sup>214</sup> Thereafter Plaintiff Thompson filed an EEOC Charge against North American, and later after conciliation failed, he filed a lawsuit against North American alleging that his termination was in retaliation to Regalado’s filing of an EEOC Charge against North American.

#### b. Procedural Posture

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<sup>207</sup> **Cole v. Ruidoso Municipal Schools, 43 F. 3d 1373 (10<sup>th</sup> Cir. 1994) (citing, Daniel v. Loveridge, 32 F.3d at 1475; Burrus v. United Tel. Co. of Kansas, 683 F.2d 339, 343 (10th Cir.), cert. denied, 459 U.S. 1071, 103 S.Ct. 491, 74 L.Ed.2d 633 (1982) (emphasis added).**

<sup>208</sup> 532 U.S. 268 (2001) (emphasis added).

<sup>209</sup> See *Higgins v. TJX Companies, Inc.*, 328 F. Supp. 2d 122 (D.Me. 2004) (“holding that the plaintiff did not state a claim for retaliation under Title VII because they did not engage in the protected activity”).

<sup>210</sup> See, e.g., *U.S. EEOC v. Bojangles Restaurants, Inc.*, 284 F. Supp. 2d 320 (Dist. Court, MD North Carolina 2003) (holding retaliation claim not stated as where other employees engaged in protected activity generally, and specifically not for protected activity of employee’s fiancé); See also, *O’Connell v. Isocor Corp.*, 56 F. Supp. 2d 649 (E.D.Va. 1999) (holding no Title VII third-party retaliation claim stated, due to lack of close relationship between employee and the co-worker filing suit against the employer).

<sup>211</sup> *Id.*

<sup>212</sup> See *Higgins supra*, at 328 F. Supp. 2d 122.

<sup>213</sup> *Thompson v. North American Stainless, L.P.*, 131 S.Ct. 863, (U.S. 2011).

<sup>214</sup> See *Id.*

Plaintiff Thompson filed his lawsuit in the Eastern District of Kentucky, and it was dismissed on summary judgment by the trial court, holding as previous federal courts had done, that Title VII does not reach retaliation claims, where the employee did not themselves engage in the protected activity. Although a panel of the Sixth Circuit Court of Appeals initially reversed, upon a rehearing en banc, the Sixth Circuit Court of Appeals affirmed the district court's dismissal of Thompson's retaliation claim under Title VII, in a 10-6 decision. The Supreme Court granted Certiorari to answer the following questions:

c. Questions Presented

As stated by Justice Scalia, the questions for the Court were as follows: "...First, did NAS [North American]'s firing of Thompson constitute unlawful retaliation? And second, if it did, does Title VII grant Thompson a cause of action?"<sup>215</sup>

d. Majority Opinion's Analysis

i. *Unlawful Retaliation*

Justice Scalia, writing for the majority, did not take much effort in resolving the first issue presented, as the opinion concluded that if the facts alleged were taken as true, North American's firing of Thompson would constitute unlawful retaliation discrimination. In reaching this conclusion, Justice Scalia relied on the Court's decision in *Burlington N. & S.F.R. Co. v. White*, in which the Court interpreted Title VII's anti-retaliation provisions, "... to cover a broad range of employer conduct."<sup>216</sup> Justice Scalia went on to explain that the Court reached this conclusion in *Burlington* based on the Court's reading of the purpose of the retaliation provisions and by contrasting Title VII's anti-retaliation provisions to the anti-discrimination provisions, and finding that Title VII's anti-retaliation provisions are not limited to the discriminatory actions affecting conditions of employment, but instead extend to any action of the employer which could cause a reasonable employee to refrain from filing or supporting a charge of discrimination.<sup>217</sup>

Applying this conclusion to the facts of the case, Justice Scalia easily found that a reasonable employee would be reluctant to participate or initiate protected activity, if they knew that their fiancé may be discharged as a result.<sup>218</sup> Justice Scalia concludes this issue with the pronouncement that Title VII's broad language supports the conclusion that third-party retaliation is protected by the Title VII, but refuses to delineate which third-party relationships will be covered thereunder. Instead, Justice Scalia provides a spectrum: a mere acquaintance will not suffice under the standard in *Burlington*, but a close relative or family member will. Finally, Justice Scalia tempers his earlier statements, with the qualifications that the analysis of a third-party retaliation claim involves a fact-specific analysis and requires the application of an objective standard when viewing the harm alleged.

ii. *Standing for Plaintiff Thompson*

As to the next issue of standing, Justice Scalia begins by indicating that this issue is more difficult to discern largely due to the appropriate definition to be applied under the "person

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<sup>215</sup> Thompson, supra, 131 S.Ct. at 867.

<sup>216</sup> 548 U.S. 53 (2006).

<sup>217</sup> *Burlington N. & S.F.R. Co. v. White*, 548 U.S. 53, 68 (2006).

<sup>218</sup> Thompson, supra 131 S. Ct. 863, note 10 at 868.

aggrieved” standard under Title VII’s statutory text. Accordingly, Justice Scalia conducted a brief analysis of the two possible interpretations for this standard, either the broader interpretation of Article III standing, or the narrower interpretation of only the employee engaged in the protected activity having standing. He ultimately abandons both interpretations in favor of a middle ground interpretation which is the “zone of interest” standard utilized by the Court in its review of actions under the Administrative Procedure Act (“APA”).<sup>219</sup> The Court has interpreted the “zone of interest” standard as one where the “...plaintiff falls within the zone of interests sought to be protected by the statutory provision whose violation forms the legal basis for his complaint.”<sup>220</sup> However, the Court has further defined this standard as not applying to claims where the Plaintiff’s interest is only tangentially related or inconsistent with the statutory provisions, such that the plaintiff’s case was not supported by the Congressional intent underlying the statute.<sup>221</sup>

As applied to the facts of this case, Justice Scalia found that under the facts alleged, Thompson met the “zone of interests” test, as he was more than just marginally related to Title VII’s anti-retaliation provisions, since he was an employee of North American, and its actions toward Thompson were directed to harm Thompson’s fiancé, for engaging in protected activity against the company.<sup>222</sup>

#### e. Court’s Conclusion

Accordingly, the Supreme Court reversed the Sixth Circuit’s decision, holding that Thompson’s third party retaliation claim, was cognizable under Title VII, based on the protected activity of his fiancé and that he indeed had standing to sue for retaliation under Title VII as well.

#### f. Justice Ginsburg’s Concurring Opinion’s Analysis

Justice Ginsburg concurred in the result, joined in the Majority’s opinion, and issued a concurring opinion joined by Justice Breyer simply to include the observation that the Court’s decision comports with the EEOC’s long-standing interpretative guidance in its Compliance Manual, that it should be accorded deference by the Court, and that it is consistent with the interpretations by other federal agencies of similar federal statutes.<sup>223</sup>

### IV. SIGNIFICANCE OF THE THOMPSON DECISION

#### a. Employees

For employees, for the first time, the U.S. Supreme Court confirmed that indeed the anti-retaliation provisions of Title VII are applicable to third persons. Previously, many federal courts had denied application of the anti-retaliation provisions of Title VII to parties other than those engaging in the protected conduct under Title VII. *Thompson* reverses this position. The further significance of the *Thompson* decision for employees, is that the Court also clarified its interpretation of the standing requirements under Title VII, utilizing the “zone of interests” test for determining whether the plaintiff has standing to bring a retaliation claim under Title VII.

<sup>219</sup>Thompson, supra, 131 S. Ct. at 869-870.

<sup>220</sup> *Thompson*, supra 131 S. Ct. at 869-870 (quoting, *Lujan v. National Wildlife Federation*, 497 U.S. 871, 883 (1990)).

<sup>221</sup> Thompson, supra 131 S. Ct 863, note 10 at 868-870.

<sup>222</sup> Thompson, supra 131 S. Ct. at 870.

<sup>223</sup> Thompson, supra 131 S. Ct. at 870-871.

Lastly, the fact that the Court re-affirmed its previous holding that the text of Title VII's anti-retaliation provisions reach a broader range of employer conduct, and thus require a broader interpretation than its anti-discrimination provisions, is also significant for employees.

b. Employers

For starters, employers now know that Title VII's anti-retaliation provisions are not limited to just employees engaging in protected activity. Thus, *Thompson* has essentially broadened the class of employees to which Title VII's anti-retaliation provisions might apply, especially in the case of employees with close relationships with the employer's other employees. Furthermore, it is significant for employers that standing for anti-retaliation claims under Title VII, and possibly for other provisions of Title VII does not extend as far as the "any person aggrieved" Article III standing under the U.S. Constitution.<sup>224</sup> Rather, employers can at least be confident that at this point the Court will only extend the reach of Title VII to the same extent as plaintiffs under the APA, a standard with which at least some employers, mostly public agencies, may already be familiar. Additionally, employers must take heed that the Court refused to create a bright-line test, and instead took a case-by-case approach. The positive affect of this strategy by the Court for employers is that there is no blanket class that will be protected under Title VII's anti-retaliation provisions. On the other hand, a negative affect is that using the case-by-case approach, it may be more difficult for employers to predict the outcomes of individual circumstances where an employee complains of third-party retaliation discrimination.

c. Extension

The reach of the *Thompson* decision rests on the two primary aspects of the decision. First, as to the coverage of third persons, *Thompson* extends Title VII's anti-retaliation provisions to third persons, other than those who had engaged in protected activity. Similarly, as to standing to bring a retaliation claim under Title VII, the *Thompson* decision extends the standing to any plaintiffs that are within the "zone of interests" contemplated by Title VII.

d. Limitations

As with most decisions of the Supreme Court, *Thompson* does have some limitations to its holding. First the Court limited the decision by refusing extend the standing requirement to the broader, Article III standing under the U.S. Constitution, and recognized by federal courts under Title VII. Furthermore, the Court limited the reach of Title VII's anti-retaliation provisions to claims involving an objective test, and by indicating that the third party retaliation protections under Title VII will be applied on a case-by-case basis.

## V. ANALYZING THE IMPACT OF THOMPSON

a. Practical Implications

By finally extending Title VII's anti-retaliation provisions to a class of persons not previously covered under the Act, the Court's decision will undoubtedly have the practical effect of increasing in the number of claims filed and actions commenced under these provisions, although the EEOC had long-since held this interpretation. That being said, given the Court's reluctance to create a bright-line test or to provide a detailed list of the relationships to which the *Thompson* decision will apply, there will likely be future court decisions which will identify and delineate these relationships, based on the parameters identified by the Court in this case.<sup>225</sup>

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<sup>224</sup> U.S. Const. Art. III, Sec. 2.

<sup>225</sup> See *Sterner v. County of Berks, Pennsylvania, et. al, Defendants*, 13-1568, (E.D. Penn. March 28, 2014) (holding

Additionally, the practical effects of the *Thompson* decision may be that employers may take more precautions when dealing with employees who are or may be considered to be within close familial relationships. On the other hand, employees may become more sensitive to relationships at work, and whether every activity by the employer toward any other employee with which they have some relationship, could be in violation of Title VII's anti-retaliation provisions.

#### b. Future Jurisprudence

As for the legal implications of *Thompson*, it is important to note that although there were lower courts that found policy arguments for extending Title VII's anti-retaliation provisions to third parties, the Supreme Court did not rest its decision on this basis. Instead the Court relied on its prior interpretation as to textual intent of the anti-retaliation provisions of Title VII, in contrast to its anti-discrimination provisions. Thus, in the eyes of the majority of Court, its decision was not a radical departure from its previous decisions in this area of law, but a clarification of textual interpretations of the statutory provisions of Title VII. This may help to illustrate and explain why Justice Scalia authored the opinion of the Court. Furthermore, the result in *Thompson*, had already been the long-standing interpretation of the EEOC, and was consistent with decisions facing similar questions under federal statutes comparable to Title VII, as Justice Ginsberg's Concurring Opinion was quick to remind the Court. Accordingly, it is likely that one may surmise that the broader the statutory language, the more likely the Court will be to take a broader view, at least as the Court is currently composed.

### VI. CONCLUSION AND RECOMMENDATIONS

#### a. Conclusion

The goal of this article is to highlight and analyze the *Thompson* case, in light of both the propositions it stands for as well as the future implications as a result of the decision. The *Thompson* case, was a very short opinion, and the Concurring Opinion even shorter. However, its meaning far exceeds the length of *Thompson*.<sup>226</sup> This is because this paper concludes that *Thompson's* importance is found not only in the fact of its extension of the retaliation provisions to third persons under Title VII, or in its clarification of the standing necessary thereunder. Indeed *Thompson's* importance is also found in that it provides courts, practitioners, employers, and employees with an insight into the Court's analysis with regard to employment discrimination law, guided by the text of Title VII, and the Court's previous interpretations thereof. To this end *Thompson* is helpful in many respects as it signals a victory for employees and plaintiffs seeking to recover for retaliation at least insofar as the facts of the case provide. At the same time, it provides some comfort to employers as it restrains the Court's holding to very limited circumstances, and does not represent a free for all, by placing reasonable limitations on its expansion of the retaliation provisions under Title VII. In doing so, *Thompson* is unique in that it provides both sides of the case, both employer and employee with valuable lessons. Moreover *Thompson* synthesized the spirit of Title VII's anti-retaliation provisions with the letter of the law's provisions.

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that based on the context of *Thompson*, that a close friendship fits within the context of the zone of interests to allow a third-party retaliation claim on that basis).

<sup>226</sup> See Michael Selmi, *The Supreme Court's Surprising And Strategic Response to the Civil Rights Act of 1991*, 46 Wake Forest L. Rev. 281 (2011).

b. Recommendations Post-*Thompson*

In light of *Thompson*, future litigators and practitioners in this area, should take heed of the principles articulated in the case. For example, to increase their chances of success in the employment discrimination context, Plaintiffs' attorneys should focus on showing: (1) objective facts evidencing the discriminatory conduct, (2) EEOC guidance supporting their clients' claims, and (3) similar favorable court decisions interpreting comparable federal statutes.

On the other hand, to have better chances of achieving dismissals of retaliation claims under Title VII, and similar laws against their clients, defense attorneys should distinguish their case from *Thompson*, by showing their case: (1) involves more limited statutory language, (2) lacks of support from the EEOC or other administrative guidance, and/or (3) involves more subjective facts on the part of the employee.