Publications

"The 6th Circuit Rejection of 'Third Party Retaliation'"

Related Attorneys

Nelson D. Cary

Related Services

Appellate Practice

Employment Litigation

Labor and Employment

AUTHORED ARTICLE | 7.23.2009

Nelson D. Cary co-authored the article "The 6th Circuit Rejection of 'Third Party Retaliation'" which appeared in the July 23, 2009 edition of *Employment Law360*.

The 6th Circuit Rejection of 'Third Party Retaliation

July 22, 2009 - If an employee files a discrimination charge, are her friends and family members protected, as she is, from any resulting retaliation? A recent decision from the Sixth Circuit Court of Appeals says no.

Nevertheless, the case is one more reminder of the importance of establishing and documenting the nondiscriminatory and nonretaliatory bases for all terminations.

In *Thompson v. North American Stainless LP*, decided on June 5, 2009, the court examined whether § 704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a), creates a cause of action for third-party retaliation for persons who have not personally engaged in protected activity.

The claimed retaliation in Thompson revolved around a couple that worked for the same employer.

Plaintiff Eric L. Thompson worked as a metallurgical engineer for defendant North American Stainless LP in a stainless steel manufacturing facility in Kentucky. Thompson met Miriam Regalado, currently his wife, when she was hired by the company in 2000 and they began dating soon after.

Regalado filed a charge with the Equal Employment Opportunity Commission in September 2002, alleging that her supervisors discriminated against her based on her gender.

On Feb. 13, 2003, the EEOC notified North American Stainless of this charge. On March 7, 2003, the company terminated Thompson's employment.

At the time of Thompson's termination, he and Regalado were engaged and their relationship was common knowledge at North American Stainless. Thompson alleged the termination was in retaliation for Regalado's EEOC charge, while North American Stainless contended the termination was performance-based.

In the subsequent lawsuit, North American Stainless moved for summary judgment on Thompson's retaliation claim, arguing that Title VII simply does not recognize any "third-party" retaliation claim of the type Thomson had articulated.

The District Court agreed, holding that Thompson failed to state a claim under either the antidiscrimination provision contained in 42 U.S.C. § 2000e-2(a) or the antiretaliation provision set forth in 42 U.S.C. § 2000e-3(a).

Thompson appealed, contending the antiretaliation provision of Title VII applied to his case because of his relationship with a co-worker. The EEOC filed an amicus curiae brief in support of Thompson's position.

The majority opinion, authored by Judge Griffin and joined by eight other judges of the court, viewed the question as whether Title VII provides a cause of action in favor of the co-worker who did not himself oppose the discriminatory treatment of another employee.

The court first looked at the plain meaning of the statute and determined that the words themselves did not place Thompson in the class of people the statute sought to protect. The relevant language of Title VII of the Civil Rights Act of 1964, § 704(a), 42 U.S.C. § 2000e-3(a) provides:

"It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment … 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."

The majority reasoned that Thompson was not included in the class of persons Congress intended to protect in a retaliation action because he did not personally oppose an unlawful employment practice, make a charge, testify, assist or participate in an investigation.

Thompson and the EEOC argued the statute should be construed to include claimants who are "closely related [to] or associated [with]" a person who has engaged in protected activity.

However, the court reasoned that the statute is not ambiguous in its language, and thus does not apply to those who merely "associate with" a complaining party.

The outcome in Thompson is in line with that reached by other Courts of Appeals examining similar issues. In *Holt v. JTM Industries*, 89 F.3d 1224 (5th Cir. 1996), for example, a former employee claimed that he was fired because his wife, who worked for the same company, filed a complaint under the Age Discrimination in Employment Act.

The Fifth Circuit held that while protecting an employee's spouse who sues for retaliation "might eliminate the risk that an employer will retaliate against an employee for their spouse's protected activities," it would "contradict the plain language of the statute and will rarely be necessary to protect employee spouses

from retaliation."

The court pointed out that if the fired employee had assisted or participated in his spouse's original complaint he would have been protected under the statute, and thus the statute already provides protection to spouses in cases where a spouse participated in a protected activity.

In *Smith v. Riceland Foods Inc*., 151 F.3d 813 (8th Cir. 1998), the plaintiff alleged he was discharged because a female employee, who lived with him, filed a discrimination charge against the employer.

The plaintiff urged the court to expand its interpretation of Title VII to stop employers from taking action against employees whose significant others had engaged in statutorily protected activity against the employer.

The Eighth Circuit held that such a construction is neither supported by the plain language of Title VII nor necessary to protect third parties, such as spouses or significant others, from retaliation.

If a third party had assisted or participated in their spouse or significant others' claim they would be protected under the statute.

In *Fogleman v. Mercy Hosp. Inc*., 283 F.3d 561 (3d Cir. 2002), the plaintiff sued under the Americans with Disabilities Act, the ADEA and a Pennsylvania statute, alleging that he was fired in retaliation after his father filed a discrimination complaint against their joint employer.

The Fogleman court noted that the antiretaliation provisions of the ADA and the ADEA are similar to the antiretaliation provision of Title VII. As a result, for reasons similar to the Fifth and Eighth Circuits, the Third Circuit held that the plain language of the statutes did not give protection to a third party.

Despite these cases supporting the majority's rationale, the dissenting opinions in the case strongly suggest that other federal courts might potentially decide this issue differently in the future.

Writing for a group of dissenting judges, Judge Martin focused on the ambiguity he perceived in the critical term "oppose" as used in the statute.

This ambiguity, Judge Martin argued, meant that the majority's focus on "plain meaning" was wrong and the statute had to be interpreted by resort to the text, structure, history and purpose of the act.

A separate dissent by Judge Moore argued that both long-standing and recent Supreme Court decisions supported a reading of § 704(a) that would permit a third-party retaliation claim to go forward.

Moore also cited cases from the Seventh and Eleventh Circuits that she categorized as recognizing the availability of third-party retaliation claims. See W*u v. Thomas*, 863 F.2d 1543, 1547-48 (11th Cir. 1989); and McDonnell v. Cisneros, 84 F.3d 256, 262 (7th Cir. 1996).

Moore cited *Bob Jones University v. United States*, 461 U.S. 574 (1983), for the proposition that a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute.

She pointed out that the Supreme Court has found that the primary purpose of Section 704(a) is to maintain unfettered access to statutory remedial mechanisms. See *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 64 (2006).

Similarly, she noted that the Supreme Court's recent decision in *Crawford v. Metropolitan Government of Nashville*, 129 S. Ct. 846 (2009), emphasized the need to interpret protective statutes broadly in order to ensure that the statutory purpose is satisfied.

Consequently, she concluded that the court must look very carefully at whether protection of third parties would be consistent with the purpose of Section 704(a). In the end, Moore concluded that Section 704(a) should indeed be interpreted to include among its protections "third-party" retaliation claims.

The practical effect of Thompson for employers may be limited — and may actually be a cautionary tale. It is certainly helpful for employers that the Sixth Circuit rejected Thompson's (and the EEOC's) theory because the plaintiff's view would have exposed employers to potentially open-ended liability to retaliation claims.

For example, if Thompson's (and the EEOC's) argument had prevailed, employers would have faced unsolved questions about the degree of relationship, or the necessity of the employer's knowledge of the relationship, that triggered statutory protection.

Answering these questions would have required further litigation between employers and employees. Human resources and management professionals would have faced the daunting task of attempting to determine whether or not someone was in a protected group.

The Supreme Court's Crawford decision, however, underscores the importance for employers of ensuring that employment decisions are based upon rational, nondiscriminatory/nonretaliatory reasons, regardless of who may be involved.

Even on facts much like those in Thompson, Crawford could impose liability on employers. Crawford interpreted the "opposition" clause in Title VII, holding that "opposition" to discriminatory conduct need not be "active" or "consistent" to trigger protection under the statute.

The greater breadth of the opposition clause after Crawford means that future plaintiffs in Thompson's position might have a claim for opposition-based retaliation. Indeed, Judge Moore's dissent opined that Thompson satisfied the Crawford standard.

It is important to note that regardless of the outcome of Thompson, employers are well advised to focus first on the legitimate business reasons for adverse employment actions.

After ensuring there are legitimate business reasons for the employment decision, employers should then focus on whether an employee has sufficiently opposed unlawful conduct or on the nature of relationships between employees in the workplace.

Beyond these practical concerns for employers, Thompson poses the question of whether it widens a circuit split that will attract the Supreme Court's attention.

According to the dissent, the Thompson decision widens a circuit split, with the Third, Fifth, Eighth and now Sixth Circuits on one side and the Seventh and Eleventh Circuits on the other.

The majority did not address the Seventh and Eleventh Circuits' decisions in Wu and McDonnell. The dissent cited them as support for the position that the retaliation provisions of Title VII should be interpreted according to their overarching purpose.

According to Judge Moore, the differences in the sister circuits' approaches mirror those of the majority and dissent in Thompson: is antiretaliation language susceptible to a plain-meaning interpretation or should it be interpreted by resort to the statutes' overriding purpose.

Because Crawford may have narrowed the disputed ground between these two approaches, the Supreme Court may not weigh in unless the dissent's perceived split persists as the Circuit Courts render decisions post-Crawford.