

Third Party Retaliation Claims- Viable or Not?

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Retaliation claims are authorized by a variety of federal and state laws, including Title VII, ADA, the ADEA, the Equal Pay Act, OSHA, and state workers' compensation laws. Nearly one-fourth of all claims filed with the EEOC agency are premised on a retaliation claim.¹ Retaliation laws are intended to prevent or punish a company for the filing of a claim or other protected activity.

Why are retaliation claims growing? The main reason is that it is easier to prove retaliation than discrimination.² Often the employee is fired only days or weeks after filing a workers' compensation claim or an EEO charge. Retaliation cases are easy to prove when this short window of timing occurs between the two events.³ There is no such shortcut of proof in discrimination cases.⁴ Juries may seem more inclined to believe that someone would retaliate than discriminate based on race, sex or other protected minority-status factors.⁵

Retaliation actions are typically brought by two methods. Most retaliation claims are brought by a person (employee) that engaged in some type of protected activity. The second method used to bring a retaliation action is an associational claim. Associational claims are usually brought by a relative or those with a close association to the complaining employee. On average, the plaintiff in association claims attempts to sue based on his or her treatment during association. Association discrimination is a lesser-known but increasingly-litigated area of employment law. Employers should be aware of the possibility of both association discrimination and associational retaliation claims.⁶

Retaliation can be directed to a third party that has a close relationship with the protected employee, such as a spouse or friend working for the same employer. For example, an employer might take adverse actions against a husband in retaliation for his wife's claim of gender discrimination against a supervisor at their mutual employer.⁷ Another example occurs when a midlevel employee is retaliated against because he or she was unable to keep a

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¹ See *Ins and Outs of Retaliation Cases* at <http://library.findlaw.com/2004/Nov/1/231137.html>. See also U.S. EEOC website at <http://www.eeoc.gov/stats/charges.html>. In the last 3 years (FY 2006-2008), the EEOC reports a steady climb in Title VII retaliation charges.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ See cases listed in footnote 6 of *Thompson v. N. American Stainless. LP*, 567 F.3d 84, 822 (6th Cir. 2009).

⁷ See, e.g., *Wu v. Thomas*, 996 F.2d 271 (11th Cir. 1993)

subordinate from filing harassment, hostile workplace, or other employment related suits.⁸

The Majority of Circuits Reject Third Party Retaliation Claims

The Third, Fifth, and Eighth Circuit Courts of Appeal have unanimously rejected third-party retaliation claims.⁹ These courts reason that the plain language of the statute does not permit retaliation claims brought by third parties. In the Third Circuit, the court held that “The plain text of the anti-retaliation provisions requires that the person retaliated against also be the person who engaged in the protected activity ... by their own terms, then, the statutes do not make actionable discrimination against an employee who has not engaged in protected conduct.”¹⁰

A split in the circuits appeared in April 2008 when, a divided three-judge panel of the Sixth Circuit in *Thompson v. North American Stainless LP* held that an employee may sue for retaliatory acts against him by his employer in response to protected activity by a related employee, a close friend, or family member.¹¹

The Sixth Circuit Joins Its Sister Circuits

Recently the Sixth Circuit Court of Appeals vacated its 2008 decision that permitted third party retaliation claims and joined its sister circuits in rejecting a cause of action for associational retaliation in a narrowly-divided opinion.¹² The court held that an employee that was fired after his fiancée/coworker filed a gender discrimination EEOC Charge, was not entitled to bring a third party retaliation cause of action.¹³ The court refused to allow a retaliation claim absent evidence that the Plaintiff “engaged personally” in the protected activities.¹⁴

The sole issue raised in the rehearing en banc was whether § 704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 e-3(a), created a cause of action for third party retaliation for persons who have not personally engaged in protected activity.¹⁵ After applying the plain and unambiguous statutory text, the Court of Appeals held that: 1) an employee who was terminated after his fiancée filed gender discrimination charge was not a member of the protected class, and 2) Title VII does not create a cause of action for third party retaliation for persons who have not personally engaged in protected activity.¹⁶ The court stated that since the plaintiff did not claim that he personally engaged in any protected

⁸ See, e.g., *McDonnell v. Cisneros*, 84 F.3d 256 (7th Cir. 1996)

⁹ *Thompson v. N. American Stainless, LP*, 567 F.3d 804, 809 (6th Cir. 2009).

¹⁰ *Fogelman v. Mercy Hosp. Inc.*, 283 F.3d 561, 568 (3d Cir. 2002).

¹¹ *Fogelman v. Mercy Hosp. Inc.*, 283 F.3d 561, 568 (3d Cir. 2002).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 805

¹⁶ *Id.*

activity, it declined the invitation to rewrite the law and affirmed the judgment of the district court granting summary judgment in favor of the defendant.¹⁷

The court began its analysis by deciding that the text of § 704 (a) is plain in its protection of a limited class of persons who are afforded the right to sue for retaliation.¹⁸ To be included in this class, the court held that the plaintiff must show that his employer discriminated against him “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, investigation, proceeding, or hearing under this subchapter.”¹⁹ By application of the plain language of the statute, the court found that Thompson is not included in the class of persons for whom Congress created a retaliation cause of action because he personally did not oppose an unlawful employment practice, make a charge, testify, assist, or participate in an investigation.²⁰

The plaintiff, with support of the EEOC, argued that the statute should be construed to include claimants who are “closely related to or associated with a person who has engaged in protected activity.”²¹ In essence, the plaintiff and the EEOC requested that the Sixth Circuit become the first circuit to hold that Title VII creates a cause of action for third party retaliation on behalf of friends and family members who have not engaged in the protected activity.²²

It is well established that to prevail on a Title VII retaliation claim, “a plaintiff must establish that: (1) he engaged in activity protected by Title VII; (2) this exercise of protected rights was known to the defendant; (3) the defendant thereafter took an adverse employment action against the plaintiff; and (4) there was a causal connection between the protected activity and the adverse employment action.”²³

The court held that the district court ruled correctly that Thompson failed to establish the first element because his complaint did not allege that he personally engaged in any sort of protected activity. Instead, it held that his retaliation claim was that he was punished for a discrimination complaint brought by his then-fiancée. The district court reviewed the statutory text and held that under its plain language, the statute does not authorize a retaliation claim by a plaintiff who did not himself engage in protected activity.²⁴ The court stated that although it had not addressed directly the precise issue at hand, the Third, Fifth, and Eighth Circuit Courts of Appeal have unanimously rejected such third party retaliation

¹⁷ *Thompson v. N. American Stainless, LP*, 567 F.3d 806 (6th Cir. 2009).

¹⁸ *Id.* at 807

¹⁹ *Id.* (quoting 42 U.S.C § 2000-3(a)).

²⁰ *Id.* at 808.

²¹ *Id.*

²² *Id.*

²³ *Id.* at 809 (citing *Martin v. Toledo Cardiology Consultants, Inc.*, 548 F. 3d 405, 412 (6th Cir. 2008)).

²⁴ *Id.*

claims.²⁵ In sum, the court stated that no circuit court of appeals has held that Title VII creates a claim for third party retaliation in circumstances where the plaintiff has not engaged personally in any protected activity.²⁶ The court disagreed with the plaintiff's and the EEOC's argument that the language of § 704(a) is ambiguous and that enforcement of this statutory text will lead to the absurd results.²⁷

The Sixth Circuit noted that even the Supreme Court's recent decisions addressing retaliation claims do not require that it alter its analysis or change its conclusion.²⁸ The court found that the present circumstances of Thompson are far removed from *Crawford* and that the reach of the *Crawford* court does not extend to the present circumstances.²⁹ The court stated that even if the principles from *Crawford* were applied to these circumstances, Thompson failed to raise a genuine issue of material fact that he engaged in protected activity by personally opposing a discriminatory practice under Title VII's anti-retaliation provision.³⁰

Thompson argued that the phrase "discriminated against" should be generously interpreted to preserve "unfettered access to Title VII's statutory remedial mechanisms," in light of the determination in *Burlington Northern*.³¹ The court disagreed and held that the statutory language at issue in the present case should be construed strictly.³² The court noted that the statutory language of §704(a) pertinent to the present case is not silent regarding who falls under the umbrella of its protection, but instead explicitly identifies those individuals who are protected: employees who "opposed any practice made an unlawful employment practice" or who "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" under Title VII.³³

The court determined that a plaintiff must engage in a discrete, identifiable, and purposeful act of opposition to discrimination, thus, an action is a critical

²⁵ *Thompson v. N. American Stainless, LP*, 567 F.3d 804, 810 (6th Cir. 2009). (See e.g. *Fogleman v. Mercy Hosp., Inc.*, 283 F. 3d 561 (3d Cir. 2002); *Holt v. JTM Indus.*, 89 F. 3d 1224 (5th Cir. 1996); *Smith v. Riceland Foods, Inc.*, 151 F. 3d 813 (8th Cir. 1998).

²⁶ *Id.* at 811.

²⁷ *Id.*

²⁸ *Id.* at 812 (See generally *Crawford v. Metro Govt. of Nashville and Davidson Co., Tenn.*, 129 S. Ct. 846, 172 L. Ed. 2d 650 (2009) (holding that the opposition clause demands active, consistent, opposing activities to warrant protection against retaliation and that an employee must instigate or initiate a complaint to be protected under § 704 (a))).

²⁹ *Id.* at 813. Judge Moore conceded in her dissent that it did not appear that Thompson himself informed any of his supervisors that he aided his fiancé with filing her complaint.

³⁰ *Id.* at 814.

³¹ *Id.* at 815. (Referencing *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (2006)).

³² *Id.*

³³ *Id.*

component of a prima facie case of retaliation under Title VII.³⁴ When interpreting the plain text, the court held that it simply cannot be read to encompass “piggyback” protection of employees like Thompson who did not engage in protected activity, but who is merely associated with another employee who did oppose an alleged unlawful employment practice.³⁵

What Employers Must Do

Because the EEOC is the gatekeeper of retaliation claims under Title VII, and the number of retaliation charges at the EEOC continues to grow, employers are well advised to implement some steps to prevent these easy-to-prove retaliation claims.

Do:

- 1) Document everything. Remember- it does not exist if it is not documented.
 - Keep detailed notes on everything surrounding employees work, including performance and complaints

- 2) Establish a complaints policy and ensure all employees are aware of it.
 - Every employer should have a complaints policy implemented in order to reduce the potential for liability.
 - Include established mechanisms – Employees need to have established mechanisms at the work place to communicate problems relating to issues such as:
 - problems with co-workers or supervisors, discrimination, harassment, or retaliation issues
 - dissatisfaction with working conditions
 - other work place issues
 - Discrimination and Harassment
 - for serious complaints such as discrimination or harassment, an established, well-publicized policy provides a structure for the employee to communicate these serious issues with the confidence that the complaints will be taken seriously and given the consideration they deserve.
 - An established complaints policy gives employees a mechanism through which they can vent frustrations and petty complaints,

³⁴ *Thompson v. N. American Stainless, LP*, 567 F.3d 804, 816 (6th Cir. 2009). (citing *Crawford v. Metro Govt. of Nashville and Davidson Co., Tenn.*, 129 S. Ct. 846, 850, 172 L. Ed. 2d 650 (2009).

³⁵ *Id.*

which is often sufficient to remedy a minor issue before it escalates into a full-scale problem.

- Employers should be committed to strict compliance with the established complaint policy and procedures. Consistency promotes efficiency in the implementation and application of the policy, increases employee confidence in the system, and gives the employer an advantage if a complaint results in litigation.
- 3) Keep complaints confidential
 - While the complaint is investigated, the employer should only release information on a need- to- know basis.
 - If the person accused of retaliatory action was unaware of the complaint, it will make it more difficult for the employee to show a casual connection between the protected activity and retaliation.
 - 4) Adopt a stand alone retaliation policy
 - This policy, which would be separate from the complaint and harassment policies, would provide a guideline of prohibited actions to prevent retaliation after an employee engages in protected activities.
 - 5) Provide for an alternate decision maker to take actions affecting the complaint
 - If possible, an employer should require a supervisor or manager without knowledge of the complaint to make a decision or take action against the affected employee rather than one who has knowledge of or is the subject of the complaint.
 - 6) Retain legal counsel to provide advice and/or conduct the investigation.

Don't:

- 1) Discipline or take action against an employee without supporting documentation
 - An employer should be prepared to show documentation supporting any adverse action, such as termination or a demotion, after the employee has made a complaint.
 - This will show that the action was not related to the employee's complaint
- 2) Automatically remove or transfer an employee to resolve problem
 - When an employee's complaint focuses on behaviour from another employee or supervisor, a transfer to another shift or location may solve the problem but could be perceived as retaliation.

The challenges that possible retaliation claims present may require some extra patience and guidance. However, their possibility should not prevent an employer from taking the appropriate and necessary disciplinary action in the workplace.