

ALBANY  
 AMSTERDAM  
 ATLANTA  
 AUSTIN  
 BOSTON  
 CHICAGO  
 DALLAS  
 DELAWARE  
 DENVER  
 FORT LAUDERDALE  
 HOUSTON  
 LAS VEGAS  
 LONDON\*  
 LOS ANGELES  
 MIAMI  
 NEW JERSEY  
 NEW YORK  
 ORANGE COUNTY  
 ORLANDO  
 PALM BEACH COUNTY  
 PHILADELPHIA  
 PHOENIX  
 SACRAMENTO  
 SAN FRANCISCO  
 SHANGHAI  
 SILICON VALLEY  
 TALLAHASSEE  
 TAMPA  
 TYSONS CORNER  
 WASHINGTON, D.C.  
 WHITE PLAINS

*Strategic Alliances with independent law firms\*\**

MILAN  
 ROME

## Supreme Court Permits Title VII Third Party Reprisal Claims

On January 24, 2011, in *Thompson v. North American Stainless, LP*, the Supreme Court determined that an employee may state a claim for retaliation under Title VII of the Civil Rights Act even if that employee had not directly engaged in a protected activity. Authored by Justice Scalia, the unanimous decision notes that Title VII’s anti-retaliation language provision is broadly worded and “offers no textual basis for making an exception to it for third-party reprisals. . . .” The decision promises to further confound employers and courts, alike, as it opens the door to a potentially broad array of new legal claims.

### The Facts Underlying *Thompson*

The suit was brought by Eric Thompson, who along with his fiancée Miriam Regalado, had worked for North American Stainless. Three weeks after Regalado filed a charge with the Equal Employment Opportunity Commission (EEOC), alleging that she was discriminated against because of her gender, Thompson’s employment was terminated. Even though Thompson had not taken part in any protected activity, he claimed his termination was in retaliation for Regalado’s having filed a charge with the EEOC, and filed his own charge with the EEOC. North American Stainless denied the termination was based on anything other than performance, but the EEOC found reasonable cause to determine that the termination violated Title VII.

Thompson sued North American Stainless in the U. S. District Court for the Eastern District of Kentucky, alleging a violation of § 704(a) of Title VII. That provision reads:

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

North American Stainless challenged Thompson’s right to sue, claiming that he lacked standing because he was not a “person aggrieved” by a Title VII violation. The District Court agreed, finding that because Thompson had not engaged in statutorily protected conduct he could not satisfy the standing requirement. The Sixth Circuit Court of Appeals, in an en banc decision, affirmed, holding that Thompson’s lack of participation in any protected activity precluded him from the class of persons for which protection was intended by Title VII.

The United States Supreme Court granted *certiorari*, certifying the following questions:

- 1) whether section 704(a) forbids an employer from retaliating for such activity by inflicting reprisals on a third party closely associated with the employee, such as a spouse, family member, or fiancé;
- 2) if so, whether that prohibition may be enforced in a civil action brought by the third-party victim.

### The Supreme Court's Ruling

The Supreme Court quickly decided that §704(a) forbids an employer from retaliating for protected activity by reprisals on third parties. The Court relied on its previous ruling in *Burlington N. & S. F. R. Co. v. White*, 548 U. S. 53 (2006) and reiterated its prior conclusion that § 704 prohibits a wide range of employer action, including any that “well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.” *Thompson*, quoting *Burlington*, 548 U.S. at 68. The Court found it “obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired.”

The Court acknowledged the force of North American Stainless's argument that line-drawing would be difficult, as an employer may not know how close the relationship between a complaining worker and a coworker might be. However, the Court held that such difficulty could not justify a rule that third party reprisals could not violate Title VII. The Court declined to set forth a specific degree of relationship that would fall within the prohibition, stating only that it expected “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.”

The Court was more troubled by the issue of the third party enforcing the prohibition through a civil action. Previously, the Court had suggested that Title VII's standing requirement that a person be aggrieved by violation of its protections could be satisfied by any person who suffered an injury in fact that is remediable by a court, i.e., Article III standing. However, the Court recognized that applying such a broad standard could lead to absurd extremes, such as a shareholder suing a company because the discriminatory termination of a valuable employee may affect the value of the company's stock. But the Court also rejected that narrow construction proposed by North American Stainless, which would limit standing to those engaged in the protected activity.

Instead, the Court, citing case law interpreting the Administrative Procedure Act, held that the question is whether the plaintiff is a person who falls within the “zone of interests” sought to be protected by the statutory provision. *Thompson*, as an employee of North American Stainless, was within the zone of interests sought to be protected by Title VII, particularly since, assuming his allegations are true, he was not an accidental victim of the retaliation, but instead, “injuring him was the employer's intended means of harming Regalado.”

Justice Ginsberg filed a concurring opinion, joined by Justice Breyer, in which she noted that the Court's ruling was consistent with the EEOC's longstanding interpretation of the anti-retaliation provision, which should be entitled to deference. Justice Kagan took no part in the decision.

### *Thompson's implications for employers*

The Supreme Court's ruling means that employers should exercise caution if contemplating an adverse employment action against a family member or significant other of a person who has engaged in protected activity. Where relationships are common knowledge or otherwise known, particular consideration should be given to adverse actions made for legitimate non-discriminatory and non-retaliatory reasons. Policies that either prohibit, or require disclosure of, relationships between co-workers may be appropriate to ensure the employment decisions are made with full awareness of relevant facts.

As always when faced with the prospect of taking adverse action against an employee, conform to your own employee policies and to applicable state and federal laws. The safest route is to maintain consistent documentation of all employee decisions, including employee performance, promotion and discipline. Such documentation is important not only for the sake of establishing the basis for actions taken, but also to establish consistency of treatment of similarly situated employees.

---

This *GT Alert* was prepared by [Tami D. Cowden](#). Questions about this information can be directed to Ms. Cowden at 702.938.6874 ([cowdent@gtlaw.com](mailto:cowdent@gtlaw.com)) or to any member of Greenberg Traurig's [Labor & Employment Group](#) listed on the next page.

For more insight into labor and employment issues, please visit GT's LE Blog at <http://www.gtleblog.com/>.

**Albany**  
518.689.1400

**Amsterdam**  
+31 20 301 7300  
Dennis Veldhuizen

**Atlanta**  
678.553.2100  
Ernest LaMont Greer  
David Long-Daniels  
Todd D. Wozniak

**Boston**  
617.310.6000  
Joseph W. Ambash  
Terence P. McCourt  
Paul Murphy

**Chicago**  
312.456.8400  
Ruth A. Bahe-Jachna  
Paul T. Fox  
Michael D. Karpeles  
Matthew Prewitt

**Dallas**  
214.665.3600  
Hugh E. Hackney

**Delaware**  
302.661.7000

**Denver**  
303.572.6500  
Naomi G. Beer  
Jeannette M. Brook  
Brian L. Duffy

**Fort Lauderdale**  
954.765.0500  
William R. Clayton  
Paul B. Ranis  
Caran Rothchild  
Michele L. Stocker

**Houston**  
713.374.3500  
L. Bradley Hancock  
Mary-Olga Lovett

**Las Vegas**  
702.792.3773  
Tami Cowden

**London\***  
+44 (0) 203 349 8700  
Naomi Feinstein

**Los Angeles**  
310.586.7700  
Michelle Lee Flores

**Miami**  
305.579.0500  
Joseph Z. Fleming  
Julissa Rodriguez  
Ronald M. Rosengarten

**New Jersey**  
973.360.7900  
Eric B. Sigda

**New York**  
212.801.9200  
Jerrold F. Goldberg  
Jonathan Israel  
Eric B. Sigda  
Jonathan Sulds  
Eric Whitney

**Orange County**  
949.732.6500  
Richard Hikida  
Todd R. Wulffson

**Orlando**  
407.420.1000  
Dawn Giebler-Miller  
Michele Johnson

**Palm Beach County North**  
561.650.7900  
Bridget A. Berry  
Mark F. Bideau  
Lorie M. Gleim

**Palm Beach County South**  
561.955.7600  
Stephen A. Mendelsohn

**Philadelphia**  
215.988.7800  
James N. Boudreau  
Robert M. Goldich

**Phoenix**  
602.445.8000  
Mary E. Bruno  
John Alan Doran  
Daniel B. Pasternak  
Lawrence Rosenfeld  
Mona M. Stone  
Jeffrey H. Wolf

**Sacramento**  
916.442.1111  
Kurt A. Kappes  
Carol Livingston  
James Nelson

**San Francisco**  
415.655.1300  
Scott Lawson  
Kenneth Steinthal

**Shanghai**  
+86 21 6391 6633

**Silicon Valley**  
650.328.8500  
William J. Goines  
Magan P. Ray

**Tallahassee**  
850.222.6891  
Lorence Bielby  
John Londot

**Tampa**  
813.318.5700  
Cynthia May  
Richard C. McCrea  
Peter Zinober

**Tyson's Corner**  
703.749.1300  
Craig A. Etter  
John Scalia

**Washington, D.C.**  
202.331.3100

**White Plains**  
914.286.2900

*This Greenberg Traurig Alert is issued for informational purposes only and is not intended to be construed or used as general legal advice. Please contact the author(s) or your Greenberg Traurig contact if you have questions regarding the currency of this information. The hiring of a lawyer is an important decision. Before you decide, ask for written information about the lawyer's legal qualifications and experience. Greenberg Traurig is a service mark and trade name of Greenberg Traurig, LLP and Greenberg Traurig, P.A. ©2011 Greenberg Traurig, LLP. All rights reserved. \*Operates as Greenberg Traurig Maher LLP. \*\*Greenberg Traurig is not responsible for any legal or other services rendered by attorneys employed by the strategic alliance firms.*