

How far do the protections of federal anti-discrimination laws go?

Everyone knows that federal and state laws prohibit discrimination against any person because of that person's race, color, religion, sex, age, national original, or physical or mental disability.

What many people don't know is that the law also prohibits retaliation because "a person" has filed a charge of discrimination or has otherwise complained about discrimination on any of the protected bases. These retaliation claims are the fastest growing claims in federal law and the ones where employers are most vulnerable.

Essentially what the retaliation provisions say is that an employer cannot take an adverse job-related action against a person because the person engaged in "protected conduct" by reporting or complaining about discrimination or helping someone else do so. Adverse job-related action may mean denying someone a promotion or raise, terminating an employee, giving the person a bad reference or otherwise taking adverse action "because" a person made the complaint. It doesn't matter if the adverse action was motivated in whole or part because of the complaint – employers are not permitted to give any consideration to a person's protected conduct when making job-related decisions.

A new, unanimous decision by the United States Supreme Court just expanded those protections. In a case called *Thompson v North American Stainless, LP* (No. 09-291, U.S. Supreme Court, January 24, 2011) the Supreme Court held that retaliation complaints are not limited to persons who have themselves complained about discrimination. Rather, the court held, the retaliation provisions provide protections that are broader than the underlying discrimination claims, and extend protection to anyone within the "zone of interests" intended to be protected under the law.

In *Thompson*, the plaintiff's fiancée had filed a complaint with the EEOC alleging that she was discriminated against in violation of Title VII. Subsequently North American Stainless terminated Thompson, who had not filed a complaint. Thompson alleged that his termination had occurred solely because of his relationship with his fiancée and that the company had violated the anti-retaliation provisions of Title VII when it let him go. His argument, essentially, was that a person (his fiancée) had filed a discrimination complaint and that in order to get back at her, the company fired him.

The Supreme Court agreed that Thompson was protected under those provisions, even though he had not previously made any discrimination complaints of his own. The key, the Court said, is not whether Thompson had previously complained, but whether his termination "would have dissuaded a reasonable worker from making or supporting a charge of discrimination."

Although the Court ruled that Thompson was protected under the anti-retaliation provisions of the law, it declined to draw any clear lines as to what kind of relationships will give rise to a claim of retaliation. This leaves employers without clear parameters as to when and if they can terminate family members, friends and other people associated with someone who has filed a charge of discrimination. Instead the Supreme Court directed courts to evaluate these claims on a case-by-case basis. Specifically the court wrote, “We expect that firing a close family member will almost always meet . . . the standard, and inflicting milder reprisal on a mere acquaintance will almost never do so, but beyond that we are reluctant to generalize.”

Practical Impact

This new decision considerably expands the concept of who is entitled to protection under the retaliation provision of anti-discrimination laws and creates new areas of potential liability for employers.

While employers are not expected to give a free pass to bad employees, they now must be aware that adverse decisions affecting family members and others who are closely tied to persons who make discrimination claims will be closely scrutinized to ensure that the decision was not made for unlawful reasons.

To protect themselves employers should always ensure that their employment-related decisions are based only upon conduct of the employee. Concerns that an employee might be too closely associated with someone who has filed a complaint or might have mixed loyalties can no longer be a factor in employment decisions affecting the individual. Adverse-actions can be taken only for job- or conduct-related reasons that are common to all employees, regardless of their association with someone who has filed a discrimination complaint.

Recent EEOC statistics demonstrate that employers are more likely to lose cases involving retaliation allegations than claims made under any other basis. Timely documentation of employment-related problems is critical in defending against retaliation claims, just as they are against claims alleging discrimination.