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Court Dramatically Expands Illegal Retaliation

WORKPLACE: Decisions make it easier for employees to sue their companies.

EMPLOYMENT LAW

Richard Rosenberg

Employers beware. The U.S. Supreme Court has issued two significant decisions which dramatically expand the concept of illegal "retaliation" under federal job bias and wage hour laws. Both cases make it easier for employees to sue for retaliation.

The first case, **Thompson v. North American Stainless, LP,** was unusual because it involved two co-workers at North American Stainless who were engaged to be married. The company fired male employee **Eric Thompson** after Thompson's fiancée, **Miriam Regalado**, filed a sex discrimination charge against the company with the Equal Employment Opportunity Commission (EEOC). Thompson sued North American, claiming that North American fired him in retaliation for his fiancée's EEOC filing.

The anti-retaliation provision in Title VII prohibits discrimination against an employee because the employee has filed a charge and permits a person claiming to be aggrieved by an alleged employment practice to file a civil suit.

The trial court ruled for NAS and dismissed the case on the ground that third-party retaliation claims like this were not permitted by Title VII. The Sixth Circuit Court of Appeal also upheld dismissal of the suit, reasoning that Thompson's termination could not be "retaliatory" as that word is used in Title VII since Thompson himself had not engaged in any activity protected by the statute.

High court disagrees

A unanimous Supreme Court disagreed and reinstated Thompson's case. The Supreme Court said that if the facts Thompson alleges are true, his firing by NAS would indeed constitute unlawful retaliation. In allowing his case to proceed, the Court said that Title VII's anti-retaliation provision must be construed to cover a broad range of employer conduct that might dissuade a reasonable worker from making or supporting a discrimination charge. According to the Court, a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired.

While the Court thought it "obvious" that a reasonable worker might be dissuaded from engaging in protected activity if she knew her fiancé would be fired, it declined to identify a fixed class of relationships for which third-party reprisals are unlawful. In fact, the only guidance given by the high court on the issue was to say that firing a close family member would certainly count, whereas a milder reprisal on a mere acquaintance will almost never do so. As for everything in between, that will be a matter for future litigation.

Second decision

In **Kasten v. Saint-Gobain Performance Plastics Corp.** the Supreme Court expanded potential employer liability for retaliation under the FLSA. In this second ruling, the high court was asked to decide whether a mere oral complaint about wages to a supervisor was enough to form the basis of a retaliation case.

The employee, **Kevin Kasten**, claimed that he had been terminated in retaliation for orally complaining to company officials about the time clocks. Among other comments, Kasten had told supervisors that he was "thinking about starting a lawsuit about the placement of the time clocks."

The FLSA provides minimum wage, maximum hour, and overtime pay rules. Like Title VII, the FLSA also forbids employers from discharging an employee because the employee has "filed any complaint". The high court ruled that the term "filed any complaint" is not limited to written formal complaints with the Department of Labor, but is broad enough to include oral complaints to management like those made by Kasten.

Responding to a concern that employers won't be able to know whether an employee is actually making a protected complaint or just letting off steam, the Court offered the following guidance: a complaint "must be sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the statute and a call for their protection."

Both decisions by the high court expand the concept of illegal retaliation under federal job bias and wage-hour laws. The Court made it abundantly clear that the anti-retaliation provisions apply to a broad range of employer conduct and that the words an employee utters to even a low level management member can be legally significant. In light of this development, employers should double their efforts to educate managers about how retaliation laws apply in the workplace.

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