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## Employers Should Pay Close Attention to Two Retaliation Cases Set for Hearing During the Supreme Court's Next Term

The Supreme Court's next term begins in October 2010, and two important retaliation cases are set to be heard:

- *Thompson v. North American Stainless, LP*<sup>1</sup> - the Sixth Circuit held that anti-retaliation provisions under Section 704(a) of Title VII protect only those who personally engage in protected activity and not any third parties closely associated with them.
- *Kasten v. Saint-Gobain Performance Plastics Corp*<sup>2</sup> - the Seventh Circuit held that the anti-retaliation provision of the Fair Labor Standards Act (FLSA) excludes unwritten, verbal complaints.

If the Supreme Court affirms these holdings, the class of employees capable of bringing Title VII and FLSA retaliation lawsuits will be significantly limited.

### *Thompson v. North American Stainless*

At issue is whether Title VII's section 704(a) forbids an employer from retaliating against a third party, such as a spouse, family member, or significant other, that is closely associated with the employee who engaged in the protected activity. A plaintiff must establish that: (1) he engaged in activity protected by Title VII; (2) the defendant knew that the plaintiff engaged in the activity; (3) the defendant thereafter took an adverse employment action against him; and (4) there was a causal connection between the protected activity and the adverse employment action.<sup>3</sup> "Protected activity" means opposing a practice, making a charge, or assisting or participating in an investigation.<sup>4</sup>

In *Thompson*, Plaintiff's fiancée filed an EEOC charge against Defendant alleging discrimination based on gender. About three weeks after learning of the charge, Defendant terminated Plaintiff who was also an employee. Plaintiff then filed his own EEOC charge alleging retaliation for his fiancée filing her EEOC charge. The EEOC found "reasonable cause to believe [that Defendant] violated Title VII." Plaintiff filed suit after EEOC conciliation efforts failed.

The district court dismissed the suit for failure to state a claim under Title VII. The Sixth Circuit affirmed, joining the Third, Fifth, and Eighth Circuits by relying on the statutory text and rejecting any general policy objectives in favor of Plaintiff. Specifically, the Sixth Circuit found that the statute "cannot read to 'piggyback' protection of employees" who do not themselves "engage in protected activity, but who merely associate with another employee who did oppose an alleged unlawful employment practice."<sup>5</sup>

There were strong dissents in the case largely based on a belief that the Congressional purpose of the statute would be defeated as a result of the majority's opinion<sup>6</sup> and that the Supreme Court's recent opinion in *Crawford v. Metropolitan Government of Nashville*<sup>7</sup> broadened the meaning of "oppose" in Section 704(a) as to, at least, allow Plaintiff to survive summary judgment and "be given the opportunity to try to prove that his employer knew of his unexpressed opposition and fired him for that reason."<sup>8</sup>

*Kasten v. Saint-Gobain Performance Plastics Corp.*

The Supreme Court will resolve a circuit split as to whether the FLSA anti-retaliation provision protects oral complaints of FLSA violations. The FLSA "states, in relevant part: '[I]t shall be unlawful for any person ... to discharge or in any other manner discriminate against any employee because such employee *has filed* any complaint or instituted or caused to be instituted any proceeding ... [emphasis added].'"<sup>9</sup>

In *Kasten*, Plaintiff asserted he was terminated in retaliation for his verbal complaints regarding the location of Defendant's time clocks which he claimed "prevented employees from being paid for time spent donning and doffing their required protective gear." Defendant denied that Plaintiff "ever told any of his supervisors or any human resources personnel that he believed that the clock locations were illegal." Defendant claimed it terminated Plaintiff for his fourth time clock violation following three warnings. Plaintiff filed suit, but the district court dismissed it on summary judgment "because he had not 'filed any complaint' about the allegedly illegal location of the time clocks."

On appeal, the Seventh Circuit affirmed even though a majority of the other circuits have held oral complaints to be protected<sup>10</sup> and the U.S. Department of Labor supported Plaintiff's argument. It reasoned that the phrase "has filed any complaint" excludes oral complaints because the phrase requires some sort of writing. The Court further noted that had Congress wanted to protect oral complaints, it would have used "broader language" such as that in Title VII and the ADEA, which "forbid employers from retaliating against any employee who 'has opposed any practice' that is unlawful under the statutes."<sup>11</sup> The Seventh Circuit concluded that Congress's "selection of the narrower 'file any complaint'" language in the FLSA was significant.<sup>12</sup>

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<sup>1</sup> 567 F.3d 804 (6th Cir. 2009).

<sup>2</sup> 570 F.3d 834 (7th Cir. 2009).

<sup>3</sup> 42 U.S.C. § 2000e-3(a).

<sup>4</sup> *Id.*

<sup>5</sup> *Thompson*, 567 F.3d at 816.

<sup>6</sup> For instance, under the majority's opinion, an employer could use employees like Plaintiff "as swords to keep employees from invoking their statutory rights with no redress for the harms suffered by those individuals." *Id.* at 822 (K. Moore, dissenting).

<sup>7</sup> 129 S. Ct. 846 (2009).

<sup>8</sup> *Thompson*, 567 F.3d at 819 (B. Martin, Jr., dissenting).

*Kasten*, 570 F.3d at 837 (quoting 29 U.S.C. § 215(a)(3)).

<sup>10</sup> See *EEOC v. Romeo Community Schools*, 976, F.2d 985, 989-90 (6th Cir. 1992); *EEOC v. White & Son Enters.*, 881 F.2d 1006, 1011 (11th Cir. 1989); *Brock v. Richardson*, 812 F.2d 121, 125 (8th Cir. 1987); but see *Ball v. Memphis Bar-B-Q Co., Inc.* 228 F.3d 360, 364 (4th Cir. 2000).

<sup>11</sup> *Kasten*, 570 F.3d at 840.

<sup>12</sup> *Id.*

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