

NO TITLE VII RETALIATION CLAIM FOR TERMINATED FIANCÉ OF EMPLOYEE ENGAGED IN PROTECTED ACTIVITY

In Thompson v. North American Stainless, --- F.3d---(6th Cir. June 5, 2009), after hearing en banc, the Sixth Circuit addressed the issue of whether § 704(a) of Title VII of the Civil Rights Act of 1964 creates a cause of action for third-party retaliation for persons who have not personally engaged in protected activity but who have been retaliated against because of their association with an individual who has opposed discrimination. The Sixth Circuit joined the Third, Fifth, and Eighth Circuit Courts of Appeal in holding that the authorized class of claimants is limited to only persons who have personally engaged in a protected activity and, therefore, there is no viable Title VII claim for third-party retaliation.

The Thompson case presented a compelling factual situation. In that case, Thompson worked as an engineer in a steel manufacturing facility from 1997 through March of 2003. In 2001, Thompson met his future wife when the company hired her. In 2002, the Plaintiff's then fiancé filed a claim with the EEOC alleging that her supervisors discriminated against her on the basis of gender. On February 13, 2003, the EEOC notified the employer of the charge. By that time, it was well known throughout the company that Thompson and his fiancé were engaged to be married. Three weeks later, the employer terminated Thompson.

Thompson filed a charge with the EEOC, which conducted an investigation and found that there was reasonable cause to believe that the employer retaliated against Thompson in violation of Title VII. The EEOC issued the right to sue letter and Thompson filed suit.

Before the District Court and again before the Sixth Circuit, the employer argued that Thompson's allegation that his fiancé's filing was the sole motivating factor in his termination was

insufficient as a matter of law to support a claim for retaliatory discharge under Title VII. The District Court and the Sixth Circuit agreed.

The Sixth Circuit held that regardless of the relationship of the employees, Title VII does not allow for a cause of action for retaliation against a person who has not engaged in protected activity. When Congress enacted the Civil Rights Act of 1964, it created a new and limited cause of action for retaliation in the employment setting. Section 704(a) provides:

It shall be unlawful employment practice for an employer to discriminate against any of his employees ... because he has opposed any practice made any 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.

The Sixth Circuit determined 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. To be included in this class, plaintiff must show that his employer discriminated against him because he opposed any unlawful employment practice. The Circuit Court affirmed the decision by the District Court because Thompson failed to establish that he personally engaged in any sort of protected activity.

While cases of third-party retaliation present conflict between a statute's plain meaning and its general policy objectives of protecting against retaliation, the circuits that have addressed this issue have unanimously held that Section 704 is unambiguous in its protection of a limited class of persons who are afforded the right to sue for retaliation.

PROFESSIONALS ENTITLED TO UNEMPLOYMENT BENEFITS BASED ON SAME STANDARD AS NON-PROFESSIONALS

The Illinois Appellate Court addressed the novel issue of whether an attorney, who was allegedly terminated for unsatisfactory performance, could be denied unemployment benefits under the exclusion for employee misconduct. Messer & Stilp, Ltd. v. The Department of Employment, 1-08-1761 (Ill.App. 1st Dist. 2009). The Appellate Court held that an attorney is entitled to the same consideration as any other employee in determining whether the employee is entitled to unemployment benefits.

Most states have similar unemployment exclusions for misconduct. Under the common exclusionary provision, former employees cannot collect unemployment benefits where the employee is discharged for misconduct. In order to prove misconduct, the employer must demonstrate that there was a deliberate and willful violation of a rule or policy, the rule or policy of the employer was reasonable and the violation either harmed the employer or was repeated by the employee despite previous warnings. The common exclusionary provision does not distinguish between the nature and type of employment.

In the Messer case, however, the employer argued that a different misconduct standard should apply to attorneys because attorneys are held to a higher standard of professional conduct. The employer argued that alleged dissatisfaction with the attorney's work product should be sufficient to deny benefits under the misconduct provision. The Appellate Court disagreed. The Appellate Court held that the statute unequivocally applied to all employees, regardless of the nature or type of employment or the designation or position of the employee.

A SUBORDINATE AND A UNION MEMBER IS NOT A COMPARATIVE TO A SUPERVISOR

In Milloy v. WBBM-TV, 2009 WL 1344947 (N.D. Ill. 2009), a male employee alleged employment discrimination based on race and sex discrimination. The male employee alleged that a female employee was a comparative and was not treated similarly to the male employee. However, the Court found that the female employee was not similarly situated to the male employee for purposes of establishing a prima facie case of employment discrimination. This was because the female employee was a subordinate of the male employee. In addition, she was also a union member subject to the protective provisions of a collective bargaining agreement. The male employee was not a member of the union.

PLAINTIFFS' LIES MEAN NO COMPARATIVES

In Antonetti v. Abbott Laboratories, 2009 WL 1053155 (7th Cir. 2009), Caucasian employees were terminated for time card fraud. They alleged race and national origin discrimination on the basis that a similarly situated Hispanic coworker was not terminated. A comparative was required for the Caucasian employees to establish a prima facie case of Title VII discrimination. The Court found that the coworker was not similarly situated because the coworker did not tell the supervisor in charge of the time cards that he took no lunch break during the overtime shift and, in fact, admitted to going out to breakfast when questioned by his supervisor. The Caucasian employees, however, told the supervisor in charge of the time cards that they did not take a lunch break and initially denied they went off-site during the overtime shift for breakfast.

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