# Employment Alert

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## Five Years, Three Cases, Record Number of Retaliation Charges

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The Supreme Court's January 2011 decision in *Thompson v. N. American Stainless* is one of a series of decisions issued by the Court in recent years which have changed the game with regard to Title VII retaliation claims. In three cases decided since 2006, the Supreme Court has dramatically expanded the definition of an adverse employment action and has created causes of action for individuals who do not even make their own complaints or charges of discrimination. As a result of these cases, employers considering disciplining or discharging an employee must give careful consideration and analysis to the impact of such decisions in order to avoid claims of retaliation.

In 2006, the Supreme Court softened the standard of what can be considered an adverse employment action in *Burlington Northern v. White.* Under *Burlington Northern*, any action taken against an employee that might deter a report of harassment or discrimination can be considered an adverse employment action. Courts applying this standard have found that all sorts of workplace interactions can be viewed as retaliation, ranging from the more obvious, such as discipline or a negative performance evaluation that prevents advancement, to the seemingly counterintuitive, such as a job transfer that involved a one-time bonus and a pay increase.

In 2009, the Supreme Court expanded what it means to engage in protected activity. In *Crawford v. Metro Govt of Nashville & Davidson County*, the Court held that that an employee does not have to make his or her own complaint or charge of harassment or discrimination in order to bring a claim of retaliation. Instead, simply being interviewed as part of the investigation of someone else's complaint is now enough to protect an employee against retaliation.

In January 2011, the Supreme Court issued another decision that even further expanded the definition of protected activity. In *Thompson v. North American Stainless*, the Court held that not only does an employee not have to make his or her own complaint or charge of harassment, the employee does not even have to participate in any investigation in order to be protected from retaliation. According to the Supreme Court, an employee is protected merely by being in the "zone of interest" of someone who made a complaint or participated in an investigation. In *Thompson*, the Court found that the fiancé of an employee who filed an EEOC charge against their respective employer was within the "zone of interest" of an employee who engaged in protected activity. The Supreme Court reasoned that the man had standing to bring a retaliation claim against his employer because reasonable workers might hesitate to bring a charge of discrimination if they believe their fiancées could be retaliated against. Unfortunately, the Supreme Court left open the question of who else might be included in the charge-filer's "zone of interest," but it gave one clue: "We expect that firing a close family member will almost always meet the standard, and inflicting a milder reprisal on a mere acquaintance will almost always never do so, but beyond that we are reluctant to generalize." In other words, whether a relationship will be close enough to offer protection against retaliation will have to be determined on a case by case basis.

With these drastic expansions of the law, it is no surprise that the number of retaliation charges filed with the EEOC has more than doubled in the last decade, and that in 2010, charges of retaliation filed with the EEOC accounted for thirty-six percent of all charges filed, exceeding the number of race discrimination charges for the first time in history. One certainty to come from the Supreme Court's recent cases on retaliation is that many different courts will be issuing many conflicting decisions about who has sufficiently engaged in protected activity in order to bring a retaliation lawsuit. It will likely be more difficult to get by summary judgment if an employee brings a lawsuit, and employers who permit action to be taken without sufficient due diligence or planning may find themselves in front of a jury – not the best place to be in this tough economy!

So, what can an employer do to reduce the risk of liability for retaliation? First and foremost, as mentioned above, employers should take care when making "adverse employment action" decisions. Consider the following points:

- Has this employee made a complaint or filed a charge of discrimination or harassment?
- Has this employee exercised FMLA rights, filed a wage and hour complaint, or engaged in protected activity under any other statute?
- Has this employee participated in or been interviewed in the course of the investigation of a complaint or charge?

Is this employee close (i.e., a family member, relative, or close friend) to any other employee who has made a complaint or filed a charge of discrimination or harassment, or who participated in the investigation of such a complaint or charge?

Consider also that plaintiff's lawyers and government agencies will surely attempt to apply the Supreme Court's "zone of interest" logic in *Thompson* to third party reprisal claims under the FMLA, FLSA, and other statutes. Therefore, also determine whether an employee has taken FMLA leave or filed a wage and hour complaint, or if he or she has a significant connection to another employee who has.

As always, employers must ensure that they complete a thorough investigation, including talking to the employee to get his or her side of the story. When deciding what discipline or discharge action will be taken, remember that context matters! Consider the impact the action might have on the employee. For example, a change in an employee's schedule, even if coupled with a raise, might have a significant negative impact on a single mom. Finally, be consistent. Avoid permitting inconsistencies in following policies or procedures or adhering to past practices unless there is a strong basis for doing so. In any close case, contact your employment counsel.

If you have any questions regarding this or any other workers' compensation or labor and employment law issue, please contact any member of the Labor and Employment Section at 419-241-6000 or visit our website at www.eastmansmith.com.

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Heidi N. Eischen is a member in the Labor and Employment Practice Group of Eastman & Smith Ltd. She counsels employers on wide variety of employment matters, including drafting, implementation and application of employment policies and handbooks and issues related to compliance with equal employment opportunity laws, the Family and Medical Leave Act, and the Americans with Disabilities Act. Her practice also includes defending employers against employment claims in federal and state courts and representing employers before administrative agencies including the EEOC, OCRC, NLRB, and the Industrial Commission of Ohio.

Ms. Eischen is licensed to practice in the State of Ohio. She is a member of the Ohio State Bar Association and the Toledo Bar Association. She obtained her juris doctor degree, magna cum laude, from The University of Toledo College of Law, where she was a note and comment editor and published member of The University of Toledo Law Review. She is a member of the Order of the Coif. She received her bachelor of arts degree from The University of Toledo, cum laude, in 1998.