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Federal civil rights law expanded to protect related third parties from retaliation

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Recently, two civil rights cases with novel twists resulted in one clear defeat for employers. Third parties, who have not asserted their federal civil rights, but who are related to someone who did, are now protected from retaliation by supervisors and other employees. Additionally, the Michigan Court of Appeals recently held that corporations are not protected from discrimination under the Elliott-Larsen Civil Rights Act.

Because of recent decisions addressing federal retaliation claims, employers can now be held liable for retaliation even when discharge has not occurred, but the terms of employment have been altered to be less favorable than they once were. Employers can also be held liable when employees retaliate against a co-worker who has asserted his or her rights. And, now, employers can be held liable for retaliation against an associate or family member of someone who exercised their civil rights.

In *Thompson v North American Stainless, LP*, the Sixth Circuit Court of Appeals, which hears the appeals of cases originating in the federal courts in Michigan , was asked to decide "whether the anti-retaliation provisions in Title VII of the [federal] Civil Rights Act protect a related or associated third party from retaliation…" Plaintiff Thompson was, at the time of his termination, engaged to Miriam Regalado, another employee of NA Stainless. Their engagement was well known to employees at the company. Regalado filed a complaint with the Equal Employment Opportunity Commission (EEOC), alleging that her supervisors had discriminated against her based on her sex. NA Stainless was notified of the charge on Feb. 13, 2003 and, approximately three weeks later, Thompson was terminated, allegedly for performance problems.

Thompson filed a charge with the EEOC, claiming he had been fired in retaliation for his fiancé's charge of discrimination. Following its investigation, the EEOC agreed, found cause, and issued Thompson a "Right to Sue" letter. Thompson initiated a civil lawsuit, claiming NA Stainless unlawfully retaliated against him in violation of Title VII. NA Stainless filed a motion to dismiss, which was granted by the district court. Thompson appealed to the Sixth Circuit Court of Appeals, arguing that the anti-retaliation protections of Title VII prohibit an employer from taking an adverse employment action against the fiancé of an employee because the employee had exercised her rights under the law.

The Sixth Circuit began its analysis by noting that Title VII protects an employee from retaliation if he/she opposed a violation of the act or participated in an investigation, proceeding or hearing under the Act. The question was whether this protection would extend to an individual who did not engage in opposition or participation activity, but who is closely related to, or associated with, the individual who did, where it is clear that the protected activity motivated the retaliatory act. The court answered in the affirmative, noting that to rule otherwise would undermine the purpose of Title VII.

In reaching its decision, the Sixth Circuit relied, in part, on two prior cases: *Burlington Northern and Santa Fe Railway Co v White* and *Tetro v Elliott Popham Pontiac, Oldsmobile, Buick and GMC Trucks, Inc.* The Burlington court characterized the primary purpose of Title VII's anti-retaliation provision as ensuring "unfettered access to statutory remedial mechanisms." Conceding that a literal reading of the anti-retaliation section prohibits employer retaliation only against the individual who was engaged in the protected activity, the Sixth Circuit also recognized that permitting retaliation against a close family member would dissuade an employee from exercising rights under the Act.

The Sixth Circuit also noted that, in *Tetro,* the court had found "indirect" discrimination unlawful. In that case, a white employee sued after he had been discharged, not because of his race, but because of the race of his child. While a literal reading of Title VII prohibits discrimination based on the individual's race only, the court extended the prohibition to further the anti-discrimination purposes of the act.

The court summarily dismissed the concern that, as a result of its decision, there would be a flood of frivolous lawsuits by associates and relatives of those who file charges, explaining that all claimants bear the burden of showing a causal connection between the protected activity and the adverse employment action.

By comparison, the protections of Michigan's Elliott-Larsen Civil Rights Act (ELCRA) were not extended by the state appellate court's ruling. In *Safiedine v City of Ferndale*, corporate plaintiffs sued the City of Ferndale, claiming that a police officer had made discriminatory comments to the manager of a gasoline station in an effort to dissuade customers from patronizing the business. In contrast to the Sixth Circuit, the Michigan Court of Appeals refused to extend the ELCRA's protections.

The court found that "juristic persons," such as corporations, could not bring a claim under the ELCRA because protected status only applies to natural persons. Specifically, the ELCRA prohibits discrimination based on characteristics such as race, sex and marital status, which are "exclusively human characteristics." The court held that "[a] reading of the entire act makes plain that the statute grants protection from discrimination based on characteristics that cannot be reasonably applied to juridical persons."

So, what can employers expect? First, there has been a growing trend by plaintiffs to file their lawsuits in federal, rather than in state courts. There are many reasons for this trend, including the ability to obtain punitive damages under Title VII, which are not available under the ELCRA. However, there is

also a growing perception that the federal appeals court for the Sixth Circuit has become more "plaintiff" friendly, while the state appellate bench has become more conservative. The cases above do little to dispel these perceptions.

The next obvious extension is for an employer to be held liable for employees who retaliate against a co-worker who is an associate or family member of an individual who has asserted his or her civil rights. Given the extension of federal retaliation claims, now, more than ever, employers need to be cautious and review their policies and procedures to avoid potential liability.