09-291
No. [redacted]

NOV 24 2009

In The
Supreme Court of the United States

ERIC L. THOMPSON,

Petitioner,

v.

NORTH AMERICAN STAINLESS, LP,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF FOR PETITIONER

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I. INTRODUCTION

The decision of the Sixth Circuit turned on two inter-related questions of law:

> (1) whether section 704(a) forbids an employer to inflict reprisals on an employee's relative or fiancé as a method of retaliating against the employee for protected activity,[1] and
>
> (2) whether that prohibition can be enforced in an action for redress by the injured third party.[2]

Those are the questions presented by the petition.

Respondent devotes much of its brief in opposition to a quite different question – whether merely associating with a person who has complained about discrimination is itself a form of activity protected by section 704(a).[3] But that is not the issue which divided the Sixth Circuit, and it is not the question presented by the petition in this Court. Petitioner does not contend that he engaged in protected activity by associating with his then fiancé. Rather, petitioner argues – as did the dissenting

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[1] Pet. App. 29a (Rogers, J., concurring); see Pet. App. 40a, 42a n.4, 43-44a (Moore, J., dissenting), 53a, 54a n.1, 57a (White, J., dissenting).

[2] Pet. App. 30a-33a (Rogers, J., concurring), 42a-43a, 50a-53a (Moore, J. dissenting), 57a-62a (White, J., dissenting).

[3] Br. Opp. i, 7, 8, 10, 15, 19, 20, 24.

judges (and, as to the first issue, the concurring judge) – that Title VII forbids an employer to inflict reprisals on a third party as a *method* of retaliating against a worker who has engaged in protected activity, and that Title VII authorizes that third party to obtain judicial redress for such a reprisal.

II. THE LOWER COURTS ARE DIVIDED REGARDING WHETHER REPRISALS AGAINST THIRD PARTIES ARE UNLAWFUL AND ACTIONABLE

(1) With regard to whether Title VII (and other federal employment laws) permits an employer to retaliate against a worker who complained about discrimination by inflicting reprisals on a family member or other third party, respondent states:

> [T]he lawful or unlawful nature of third-party reprisals is not at issue in this case. Rather, this Court has already recognized that retaliation is unlawful if "a reasonable employee would have found the challenged action materially adverse, 'which in this context means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.''" *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 68 ... (2006).

(Br. Opp. 10). Whether such reprisals are lawful or unlawful, however, was very much at the center of the dispute in the Sixth Circuit. That issue was a key

element of the dissenting opinions and of Judge Rogers' concurring opinion.

Respondent appears to defend the Sixth Circuit decision on the ground that reprisals against third parties are lawful. The text of section 704(a), respondent objects, does not include an express "prohibition [against] the use of third party reprisals." (Br. Opp. 19). A ban on such reprisals, respondent asserts, would be impossible to administer, and would lead to "chaos ... in the workplace." (Br. Opp. 31 (capitalization omitted); see *id.* at 31-34). But if, as respondent appears to suggest, the Sixth Circuit decision holds that reprisals against third parties are actually a lawful method of retaliation, that decision clearly conflicts with decisions in several other circuits. (Petition 26-32).

Respondent seeks to distinguish the Eleventh Circuit decision in *Wu v. Thomas*, 863 F.2d 1543 (11th Cir. 1989), arguing that the third-party victim in that case (Mr. Wu) had himself engaged in protected activity. Respondent relies on a passage in the complaint (filed by both Mr. Wu and his wife) alleging retaliation "because they have made a civil rights complaint against the defendant." (Br. Opp. 12 (quoting *Wu*, 863 F.2d at 1549)). However, a closer reading of the opinion makes clear that there actually was no claim that Mr. Wu had made any such complaint. While his wife had filed one internal complaint, three EEOC charges, and one lawsuit against the defendant, Mr. Wu had never taken any such actions. The Eleventh Circuit overturned the

dismissal of Mr. Wu's claim, not because he had engaged in any protected activity (which he had not), but because of his wife's EEOC charge, which alleged "retaliation [against her] ... based on the university's actions toward her husband." 863 F.2d at 1548.

Respondent correctly notes that in *McDonnell v. Cisneros*, 84 F.3d 256 (7th Cir. 1996), the plaintiff himself had engaged in protected activity. But the interpretation of section 704(a) in *McDonnell* is emphatically not restricted to such cases. Rather, the Seventh Circuit's opinion expressly holds that the protections of section 704(a) also extend to reprisals against individuals whom the employer knows did not engage in protected activity, such as the infliction of "collective punishment." 84 F.3d at 262.

To support its contention that the decision of the Sixth Circuit in this case is "in accord with all other circuits having occasion to rule on the same specific issue" (Br. Opp. 8), respondent argues that "[t]he majority of federal courts who have considered the result of third-party causes of action have refused to recognize such claims as valid causes of action under federal anti-retaliation laws." (Br. Opp. 9). Respondent relies in particular on the Third Circuit decision in *Fogelman v. Mercy Hospital*, 283 F.3d 561, 558-60 (3d Cir. 2002), which construed the anti-retaliation provisions in the Age Discrimination in Employment Act and in section 503(a) of the Americans With Disabilities Act, and the Fifth Circuit decision in *Holt v. JTM Industries*, 89 F.3d 1224 (5th Cir. 1996), also interpreting the ADEA. (Br. Opp. 9, 10-11, 22).

Respondent simply ignores, however, the contrary construction of several other federal anti-retaliation statutes: the Occupational Safety and Health Act, the Equal Pay Act, and the Employee Retirement Income Security Act. (Petition 28-29). The courts of appeals are in fact sharply divided as to whether federal anti-retaliation laws forbid reprisals against third parties; a majority of the decisions actually conclude that that form of retaliation is unlawful.

The decisions in the Third, Seventh and District of Columbia Circuits holding third-party reprisals unlawful under the National Labor Relations Act are particularly significant. (Petition 26-28). Respondent suggests that the interpretation of the NLRA should be ignored because the language of the anti-retaliation provision of the NLRA is somewhat different than the terms of section 704(a). (Br. Opp. 25). But in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), this Court expressly relied on the interpretation of the NLRA in construing section 704(a). The Court pointed out that it had "drawn analogies [to the NLRA] ... in other Title VII contexts." 548 U.S. at 66 (quoting *Hishon v. King & Spaulding*, 467 U.S. 69, 76 n.8 (1984)). *Burlington Northern*, clearly referring to Title VII and the NLRA, observed that "Congress has provided similar kinds of protection from retaliation in comparable statutes." 548 U.S. at 66. The NLRA is especially important because in 1962, before Congress relied on the NLRA in framing Title VII, the National

Labor Relations Board had already construed the NLRA to forbid reprisals against third-parties. *Golub Bros. Concessions*, 140 NLRB 120 (1962).

(2) Section 706(f)(1) provides that "a civil action may be brought ... by the person claiming to be aggrieved." The six dissenting members of the Sixth Circuit reasoned that a third-party reprisal victim is "aggrieved" within the meaning of section 706(f)(1), and therefore is authorized to bring a Title VII suit. (Pet. App. 50-53, 58-60). That broad interpretation of section 706(f)(1) is followed by the Third, Seventh, Eighth and District of Columbia Circuits. (Petition 35). In a concurring opinion, Judge Rogers contended that a third-party reprisal victim is not "aggrieved" under section 706(f)(1), and thus cannot maintain an action under Title VII. (Pet. App. 30a-33a). That is the construction of section 706(f)(1) adopted by the Fifth Circuit in *Holt v. JTM Industries*, 89 F.3d 1224 (5th Cir. 1996).

The en banc majority rejected both of these lines of cases. On the one hand, the majority expressly disapproved of *Holt*, and acknowledged that Thompson was "aggrieved" within the meaning of section 706(f)(1). (Pet. App. 9a-10a n.1, 13a n.4). On the other hand, the en banc court held that merely being a "person ... aggrieved" is not sufficient to authorize an individual to bring a claim under Title VII. The decisions in the Third, Seventh, Eighth and District of Columbia Circuits, however, recognize no additional requirement. As the District of Columbia Circuit explained:

> Congress specifically permitted any "person claiming to be aggrieved" by an unlawful employment practice to file suit.... This language, we have held, opens the courts to "anyone who satisfies the constitutional requirements." *Gray v. Greyhound Lines*, 542 F.2d 169, 176 (D.C.Cir. 1976).... Accordingly, if the council can back up its allegations of Article III standing with actual proof, it has a cause of action under Title VII.

Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corp., 28 F.3d 1268, 1278 (D.C.Cir. 1994)

(3) Respondent correctly characterizes the Sixth Circuit opinion as holding that Title VII does not accord a "cause of action" to a third-party who is punished as a means of retaliating against someone else.[4] Despite the fact (or, perhaps, assuming arguendo) that Title VII forbids such reprisals, and that a third-party victim is a "person aggrieved" authorized to sue under section 706(f), the Sixth Circuit insists that there is a third, additional requirement – the existence of a cause of action – which is not met in this case. Whether a plaintiff has a cause of action under Title VII, or any other statute, turns on whether he or she "is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court." (Pet.

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[4] Br. Opp. 5, 6, 9, 10, 15, 18, 19, 22, 23, 25, 26, 27.

App. 9a (quoting *Davis v. Passman*, 442 U.S. 228, 239 n.18 (1979)).

But the question of which class of litigants may invoke the power of the court to enforce Title VII is squarely answered by section 706(f)(1), which states that "a civil action may be brought ... by the person claiming to be aggrieved." 42 U.S.C. § 2000e-5(f)(1). Section 706(f)(1) creates the cause of action to "invoke the power of the court," and defines who may do so. Once a plaintiff establishes that he or she is "aggrieved" within the meaning of section 706(f)(1), the inquiry envisioned by *Davis v. Passman* is at an end. The courts are not at liberty to engraft additional requirements onto section 706(f)(1), or to accord the cause of action created by that provision only to some but not all "person[s] ... aggrieved."

The Sixth Circuit's additional "cause of action" requirement emphatically is not "in accord" with every, or indeed any, other circuit. The District of Columbia Circuit in *Fair Employment Council* expressly (and correctly) held that Title VII provides a cause of action to any person who is aggrieved within the meaning of section 706(a)(1) and who has constitutional standing. Respondent suggests that the Third, Fifth and Eighth Courts of Appeals rejected claims of third-party victims on the ground that such plaintiffs lack a "cause of action." (Br. Opp. 9, 10). That simply is not correct. The decisions in the Third and Eighth Circuits held that this form of retaliation is lawful (thus precluding any inquiry as to who could enforce such a prohibition if it existed) and the

decision in the Fifth Circuit held that third-party victims do not have standing to sue under Title VII (an interpretation which respondent and the Sixth Circuit expressly disavow). The phrase "cause of action" never appears in the Fifth and Eighth Circuit decisions, and is absent from the Third Circuit's analysis of the claim which it rejected.

III. THE DECISION OF THE SIXTH CIRCUIT IS CLEARLY INCORRECT

Respondent insists with great fervor that the terms of Title VII are "unambiguous," and that the "plain text" of the statute precludes the claim in this case.[5] But respondent makes little effort to explain how the text of the statute actually supports the decision of the court of appeals.

Respondent suggests that reprisals against third parties are lawful under section 704(a) because section 704(a) does not specifically list that particular method of retaliating against individuals who engage in protected activity. (Br. Opp. 19). But section 704(a) does not contain an arguably exclusive list of the forbidden types of retaliation; indeed, it does not mention any specific methods at all. What the statute forbids is "discriminat[ion]" against a person who engages in protected activity, a term that encompasses any adverse treatment of the protected individual not

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[5] Br. Opp. 7, 16, 19, 22, 23, 29.

inflicted on others. An employer who fires the family members or fiancé of a worker who engaged in protected activity, but takes no similar actions against the family members or fiancés of other employees, is engaging in discrimination. The limitation suggested by respondent on the methods of retaliation forbidden by section 704(a) finds no support whatever in the text of the statute.

Section 706(f)(1) spells out with crystal clarity the individuals who are authorized to file suit under Title VII – those who are "aggrieved" by the asserted violation. Neither respondent nor the court of appeals denied that the terms of that provision are satisfied when a worker, as part of a scheme to retaliate against a family member or fiancé, is fired.

The court of appeals asserted that the text of section 704(a) limits the "class of persons who are afforded the right to sue for retaliation." (Pet. App. 7a). That is simply incorrect. Section 704(a) addresses only *what* conduct constitutes forbidden retaliation; section 704(a) does not even purport to address *who* can file suit to enforce that prohibition. The "class of persons who are afforded the right to sue" – for retaliation or any other violation of Title VII – is set out instead in section 706(f)(1), which requires only that a plaintiff be "aggrieved." Similarly, the statutory authorization of suits by the EEOC and the Department of Justice to enforce section 704(a) is found, not in section 704(a), but in section 706.

IV. THE QUESTIONS PRESENTED RAISE IMPORTANT ISSUES AFFECTING THE ADMINISTRATION OF FEDERAL EMPLOYMENT LAWS

For almost half a century the federal agencies responsible for administering the nation's employment laws have insisted with complete consistency that the anti-retaliation provisions of those statutes forbid the use of third-party reprisals to punish workers who engage in protected activities. (Petition 21). The EEOC has adhered to that interpretation of Title VII since 1975, subsequently embodying that construction in its Compliance Manual, and later advancing that view in a series of briefs in the courts of appeals. (Petition 18-19). The Commission's construction of Title VII – and the other anti-discrimination statutes which it enforces – is grounded in its practical judgment that retaliation against family members and others would be a potent tool to obstruct access to the EEOC itself and to other remedial mechanisms. This Court has credited the EEOC's intensely practical evaluation of the consequences of an unduly narrow interpretation of the anti-retaliation provision in Title VII. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997).

Respondent insists that employees who participate in an EEOC investigation are "protected by § [704(a)]." (Br. Opp. 30). Certainly section 704(a) applies to workers who take part in EEOC investigations; the question at issue is what forms of retaliation the statute protects *against*. The Brief in

Opposition suggests that section 704(a), and the majority decision below, permit retaliation against an employee who cooperates with the EEOC, or who engages in other protected activities, by firing family members or others close to the protected worker.

Even if the retaliation alleged in this case were unlawful in the Sixth Circuit, it is emphatically clear that under the court of appeals' decision no private cause of action exists to redress any such violation. From the perspective of a worker deciding whether to complain about discrimination, it is of no practical importance whether reprisals against third parties are permitted by Title VII, or are the subject of a nominal but unenforceable prohibition. Either way no sensible employee would complain about discrimination if doing so would expose a family member or fiancé to a dismissal for which the law would provide no redress.

The Sixth Circuit decision, at best, leaves open the possibility that the EEOC itself – or the Department of Justice, in the case of a state or local government employer – might be able to file suit to enforce section 704(a) in the case of reprisals against a third party. But neither the Commission nor the Department of Justice has the resources to shoulder alone the burden of seeking judicial relief in this entire class of cases. The decision below places inappropriate pressure on both agencies to divert time and effort from other priorities.

The EEOC website continues to assure members of the public that Title VII and other federal anti-discrimination laws forbid an employer from inflicting reprisals on a third party as a method of retaliating against an employee who engages in protected activities.[6] The website of the Department of Justice Civil Rights Division contains a link to that same assurance.[7] At least with regard to millions of employees who work in the Sixth Circuit, that official assurance today is not an accurate statement of the law.

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[6] http://www.eeoc.gov/policy/docs/retal.m.html Visited on November 22, 2009 (part 8-II(C)(3)).

[7] http://www.justice/crt/emp/ Visited November 22, 2009; the link is accessed by clicking on "Title VII."

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Sixth Circuit. In the alternative, the Solicitor General should be invited to file a brief expressing the views of the United States.

Respectfully submitted,

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