No. 07-5040

IN THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

ERIC L. THOMPSON,
Plaintiff-Appellant,

v.

NORTH AMERICAN STAINLESS, LP,
Defendant-Appellee.

On Rehearing *En Banc* of an Appeal from the
United States District Court for the
Eastern District of Kentucky at Frankfort

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL, NATIONAL ASSOCIATION OF MANUFACTURERS AND KENTUCKY ASSOCIATION OF MANUFACTURERS IN SUPPORT OF DEFENDANT/APPELLEE AND IN SUPPORT OF AFFIRMANCE

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 07-5040 Case Name: *Thompson v. North American Stainless, LP*

Name of counsel: Rae T. Vann

Pursuant to 6th Cir. R. 26.1, Equal Employment Advisory Council, National Association of Manufacturers, and Kentucky Association of Manufacturers make the following disclosures:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? No.

CERTIFICATE OF SERVICE

I certify that on October 10, 2008 the foregoing document was served on all parties or their counsel of record by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

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The Equal Employment Advisory Council, National Association of Manufacturers and Kentucky Association of Manufacturers respectfully submit this brief *amici curiae*, contingent on the granting of the accompanying motion for leave. The brief urges the Court *en banc* to reverse the ruling of the panel majority and affirm the district court decision below. It thus supports the position of the Defendant-Appellee North American Stainless, LP in this rehearing.

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership includes over 300 of the nation's largest private sector companies, collectively providing employment to more than 20 million people throughout the United States. EEAC's directors and officers include many of the nation's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and practices. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The National Association of Manufacturers (NAM) is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards.

The Kentucky Association of Manufacturers (KAM) was established in 1911 and is the Commonwealth's only statewide manufacturing association representing approximately 500 manufacturers. KAM's mission is to raise the prosperity of all Kentuckians by protecting and growing the state's economic engine: manufacturing. KAM accomplishes this through advocacy by working with elected officials, policy makers, chambers of commerce, other associations, economic development experts, the news media, the general public and its members.

All of EEAC's members, and many of NAM and KAM's members, are employers subject to Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, and other federal and state employment nondiscrimination laws. As potential defendants to claims of discrimination under Title VII, *amici's* members thus have a direct and ongoing interest in the issues raised by this case

regarding whether an individual can state a claim for unlawful retaliation under Title VII based solely upon the protected conduct of an individual with whom he or she is closely associated or related. The district court below properly concluded that such causes of action are squarely foreclosed by the plain text of the Act.

Because of their interest in the application of the nation's fair employment laws, EEAC, NAM and/or KAM have filed *amicus curiae* briefs in a number of cases before this Court involving the proper interpretation of Title VII,[1] as well as in appeals involving other significant labor and employment issues.[2] Given their significant experience, *amici* are well-situated to brief this Court on the ramifications of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

This case is before the Court for rehearing *en banc*. The underlying facts are set forth in the panel majority's opinion and are only briefly summarized here.

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[1] *See, e.g., EEOC v. SunDance Rehab. Corp.*, 466 F.3d 490 (6th Cir. 2006); *Reeb v. Ohio Dep't of Rehab. & Corr.*, 435 F.3d 639 (6th Cir. 2006); *Isabel v. City of Memphis*, 404 F.3d 404 (6th Cir. 2005); *Clark v. UPS*, 400 F.3d 341 (6th Cir. 2005); *White v. Burlington Northern & Santa Fe Ry.*, 364 F.3d 789 (6th Cir. 2004) (*en banc*), *aff'd*, 548 U.S. 53 (2006).

[2] *Noe v. PolyOne Corp.*, 520 F.3d 548 (6th Cir. 2008); *Winnett v. Caterpillar, Inc.*, No. 07-6275 (6th Cir. 2008) (decision pending); *Cavin v. Honda of Am.*, 346 F.3d 713 (6th Cir. 2003).

Plaintiff-Appellant Eric Thompson was terminated shortly after his employer, North American Stainless, was served with notice of an administrative charge of discrimination that had been filed with the U.S. Equal Employment Opportunity Commission (EEOC) by his co-worker and then-fiancée (now wife), Miriam Regalado. *Thompson v. North Am. Stainless, LP*, 435 F. Supp.2d 633, 634 (E.D. Ky. 2006). Specifically, Thompson was discharged on March 7, 2003 for performance-related reasons. *Thompson v. North Am. Stainless, LP*, 520 F.3d 644, 645 (6th Cir. 2008), *vacated and reh'g en banc granted*, 2008 U.S. App. LEXIS 16075 (6th Cir. July 28, 2008). He sued thereafter, alleging that he was retaliated against because of his relationship with Regalado. Thompson does not allege that he was retaliated against based on his own statutorily protected activity. *Id.* at 646.

SUMMARY OF ARGUMENT

On its face, Title VII's anti-retaliation provision extends only to those persons who have actually engaged in protected activity, not to their friends, associates and/or spouses. In fact, the majority of federal courts, including every court of appeals that has addressed the issue, has refused to recognize third-party retaliation claims on behalf of persons who themselves have not engaged in statutorily protected conduct. The plain text of Title VII compels such a

conclusion, and the district court was correct to dismiss Plaintiff-Appellant's third-party retaliation claim on that basis.

Not only would expansion of Title VII in the manner suggested by Plaintiff-Appellant be unwise, it also would be unnecessary, because the statute already contains sufficiently broad anti-retaliation protection for any person who "oppose[s]" discriminatory employment practices or "participate[s] in any manner" in a Title VII proceeding. 42 U.S.C. § 2000e-3(a). A rule that recognizes third-party retaliation claims also likely would result in considerable confusion regarding which relationships or associations warrant Title VII protection. In addition, it would impose substantial burdens on employers and would "'diminish traditional management prerogatives'" to direct and, where appropriate, discipline its workforce. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981) (quoting *United Steelworkers v. Weber*, 443 U.S. 193, 207 (1979)).

ARGUMENT

I. THE DISTRICT COURT BELOW PROPERLY CONCLUDED THAT TITLE VII DOES NOT PERMIT A CAUSE OF ACTION FOR THIRD-PARTY RETALIATION

A. The Unambiguous Text of Title VII Supports the Widely Accepted View That Only Individuals Who Have Engaged in Protected Activity, Not Their Associates, May Bring a Workplace Retaliation Claim

As Judge Griffin and the district court below both correctly observed, there is nothing in the plain text of Title VII that could lead one reasonably to conclude

that an individual who has not personally engaged in statutorily protected activity can assert a viable cause of action for unlawful retaliation under the Act. Section 704(a) of Title VII expressly provides:

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

42 U.S.C. § 2000e-3(a) (emphasis added). Unlike Title VII's nondiscrimination provisions – which bar employment bias based on an individual's *status* as member of a protected class – its anti-retaliation provision "seeks to prevent harm to individuals based on *what they do, i.e.*, their *conduct*." *Burlington Northern & Santa Fe Ry. v. White*, 548 U.S. 53, 63 (2006) (emphasis added). Thus, a critical element of a retaliation plaintiff's prima facie case is that that he or she actually "opposed" a discriminatory employment practice or "made a charge, testified, assisted, or participated" in a Title VII proceeding. 42 U.S.C. § 2000e-3(a). *See Niswander v. Cincinnati Ins. Co.*, 529 F.3d 714, 720 (6th Cir. 2008) ("In order to establish a prima facie case of retaliation under Title VII, an employee must establish that … he or she engaged in protected activity …"); *see also Smith v. Riceland Foods*, 151 F.3d 813, 819 (8th Cir. 1998) ("This Court's decisions on retaliation claims have consistently held that, in order to establish a prima facie

case of discrimination, the employee must have engaged in statutorily protected activity").

In the absence of actual protected activity of his or her own, an individual who is subjected to an adverse employment action because of someone else's statutorily protected conduct has no legal recourse under Title VII. Section 704(a) "makes it unlawful *only* for an employer to retaliate against an employee or applicant for employment who has himself or herself engaged in some type of protected activity under Title VII." *Rainer v. Refco, Inc.*, 464 F. Supp.2d 742, 750 (S.D. Ohio 2006) (emphasis added). It simply does not reach the so-called "third-party" retaliation plaintiff who has not personally engaged in any protected activity. As the district court in *Rainer* pointed out:

> [Section 704(a)] does not, by its terms, preclude [third-party retaliation], even if the purpose and effect of that retaliatory action would be to discourage employees or applicants for employment from engaging in protected activity. Although one of the purposes of Title VII is to encourage protected activity and to free applicants or employees from the fear of retaliation when they engage in protected activity, neither § 2000e-3(a) nor any other provision of Title VII appears to prohibit any and all actions, no matter whom they are directed against and no matter what they consist of, which would have *some* deterrent effect upon protected activity. There are simply some employer-initiated disincentives to protected activity which fall outside Title VII's reach.

Id.

As the district court observed correctly, the Third, Fifth and Eighth Circuits all have refused to recognize a cause of action for third-party retaliation under Title

VII, and this Court has not ruled directly on the matter. *Thompson*, 435 F. Supp.2d at 637 (citing *Smith v. Riceland Foods, Inc.*, 151 F.3d 813, 819 (8th Cir. 1998); *Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 570 (3d Cir. 2002); *Holt v. JTM Indus., Inc.*, 89 F.3d 1224, 1227 (5th Cir. 1996) (quotations omitted)); *see also EEOC v. Ohio Edison Co.*, 7 F.3d 541 (6th Cir. 1993). While acknowledging that the D.C. Circuit, some federal district courts and the EEOC all appear to have arrived at the opposite conclusion, given the lack of definitive guidance from this Court on the question, the district court rightly was "guided most significantly by the unambiguous language of the statute." *Id.* at 639-40.

Plaintiff-Appellant does not contend that he engaged in *any* statutorily protected activity, either on his own behalf or on behalf of Regalado. Rather, he alleges that Defendant-Appellee "intentionally retaliated against [him] because his wife, Miriam Thompson, filed a charge with the Equal Employment Opportunity Commission based on gender discrimination prohibited by 42 U.S.C. § 2000e-2(a). [Plaintiff-Appellant's] relationship to Miriam Thompson *was the sole motivating factor in his termination*." Pl. Complaint, ¶ 13 (emphasis added).[3]

[3] It should be noted that Thompson and Regalado did not actually become husband and wife until some time after his discharge. This point must be carefully considered in connection with the arguments in Section III of this brief *infra*, regarding the potentially intrusive burden on employers and employees to know and disclose dating and other informal relationships.

On its face, Plaintiff-Appellant's complaint fails to state a viable cause of action for retaliation under Section 704(a). The panel majority's impermissible expansion of the statute to reach his third-party retaliation claim on policy grounds thus represents nothing more than an "unbridled judicial foray[] into the legislative sphere." *Thompson*, 520 F.3d at 650 (Griffin, J., dissenting), *vacated and reh'g en banc granted*, 2008 U.S. App. LEXIS 16075 (6th Cir. July 28, 2008). As Judge Griffin pointed out in his dissent, "Were judges empowered to revise and amend statutes to further what we believe to be the 'purpose' of the law, there would be no limit on judicial legislation and little need for Congress." *Id.* (Griffin, J., dissenting).

Indeed, "[t]he preference in favor of following the plain meaning of the statute is based on the constitutional separation of powers. Congress makes the law, and the judiciary interprets it." *Singh v. Green Thumb Landscaping, Inc.*, 390 F. Supp.2d 1129, 1138 (M.D. Fla. 2005) (quoting *Fogleman* 283 F.3d at 569); *see also Freeman v. Barnhart*, 2008 U.S. Dist. LEXIS 21257, at *17-18 (N.D. Cal. 2008) ("To read Title VII as [plaintiffs] do would be more than interpreting an ambiguous passage in a statute. It would actually add language to what Congress has written …") (quoting *EEOC v. Bojangles Restaurants, Inc.*, 284 F. Supp. 2d 320, 326-27 (M.D.N.C. 2003)). The panel majority, in expanding Section 704(a) to recognize third-party retaliation claims, has disregarded this principle. Simply

stated, expanding the scope of protection available under Section 704(a) should be left to Congress, not this Court. As Judge Griffin wisely observed, "from time to time, we should remind ourselves that we are judges, not legislators. This is such a time." *Thompson*, 520 F.3d at 650 (Griffin, J., dissenting), *vacated and reh'g en banc granted*, 2008 U.S. App. LEXIS 16075 (6th Cir. July 28, 2008).

Because the plain and unambiguous text of Section 704(a) protects from retaliation only those individuals who have themselves engaged in protected activity, and since Plaintiff-Appellant's conduct does not fall within the scope of that protection, the district court properly dismissed his Title VII retaliation action.

B. Section 704(a) Already Contains Sufficiently Broad Anti-Retaliation Protection for Those Who "Oppose" Discriminatory Employment Practices or "Participate" in EEO Proceedings

In addition to undermining the plain meaning of Title VII, expanding Section 704(a) to encompass claims of retaliation brought by third parties is unnecessary, since it "already offers broad protection to such individuals by prohibiting employers from retaliating against employees for 'assisting or participating in any manner' in a proceeding under Title VII." *Riceland Foods*, 151 F.3d at 819 (citing *Holt*, 89 F.3d at 1226-27). It also would expose employers to the risk of having to defend lawsuits brought by an entirely new class of Title VII plaintiffs whose mere association with an individual who engaged in statutorily

protected conduct would give rise to a viable cause of action under the Act. As the Fifth Circuit observed in *Holt*:

> If we hold that spouses have automatic standing to sue their employers for retaliation, the question then becomes, which other persons should have automatic standing to guard against the risk of retaliation? In most cases, the relatives and friends who are at risk for retaliation will have participated *in some manner* in a co-worker's charge of discrimination. The plain language of § 623(d) will protect these employees from retaliation for their protected activities.

Holt, 89 F.3d at 1227.

Affirming the district court's decision below would serve the purposes of Title VII by maintaining a framework for protection that is broad in scope while still balancing important employer interests.

II. A RULE THAT PERMITS THIRD-PARTY RETALIATION CLAIMS TO BE BROUGHT UNDER TITLE VII WOULD CREATE CONSIDERABLE CONFUSION IN THE COURTS AND WOULD IMPOSE SUBSTANTIAL BURDENS ON EVERY EMPLOYER SUBJECT TO THE ACT

Every employee has the right to file charges with the EEOC and to oppose conduct he or she reasonably believes is unlawful under Title VII. And every employee who has exercised these rights has the potential of becoming a retaliation plaintiff. EEOC statistics show that retaliation charges are the fastest-growing category of charges filed under Title VII, now surpassing sex as the second most frequently invoked basis for alleged discrimination. U.S. Equal Employment Opportunity Commission, *Charge Statistics FY 1997 Through FY 2007* (Feb. 26,

2008)[4]. If the courts do not keep true to the plain meaning of Section 704(a) and resist urges to judicially expand the statute to include third-party retaliation claims, these numbers can only be expected to increase even more dramatically, with resulting effects on caseloads not only of the EEOC, but also of the federal courts themselves.

Furthermore, subjecting employers to the predictable flood of frivolous retaliation charges and lawsuits that would result from an expansion of Section 704(a) would frustrate their efforts to proactively address workplace issues and would impose an unmanageable burden on their compliance efforts. Employers would be placed in the untenable position of having to speculate about possible relationship(s) an employee may have that could give rise to potential liability each time they contemplate disciplinary or other action against that employee. Such an interpretation of Title VII would be at odds with the fundamental purpose of the statute, which was not intended to "'diminish traditional management prerogatives.'" *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981) (quoting *United Steelworkers v. Weber*, 443 U.S. 193, 207 (1979)).

[4] *available at* http://www.eeoc.gov/stats/charges.html

CONCLUSION

For the foregoing reasons, the Court *en banc* should reverse the panel majority's decision and affirm the district court's well-reasoned ruling below.

Respectfully submitted,

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