

LAW REVIEW 1127

USERRA Prohibition Against Retaliation May Extend to Service Member's Spouse Who Works for the Same Employer

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1.2 – USERRA Discrimination

In the recently decided case of *Thompson v. North American Stainless*^[1], the U.S. Supreme Court case may have laid the foundation for protecting spouses, under USERRA, from retaliation by an employer in situations where the service member and the spouse both work for the same employer.

In 2003, Miriam Regalado and her then fiancé, Eric Thompson, both worked for North American Stainless (NAS) in Kentucky. In February of that year, the Equal Employment Opportunity Commission (EEOC) notified NAS that Regalado had filed a gender discrimination complaint against the company. Three weeks later, NAS terminated Thompson's employment with the company.

Eric Thompson subsequently sued NAS for retaliation under Title VII of the Civil Rights Act of 1964. The trial court granted summary judgment in favor of NAS finding, in part, that third-party retaliation claims were not covered under Title VII. The U.S. Sixth Circuit Court of Appeals, *en banc*, affirmed the decision.

In a rare 8-0 decision^[2], the U.S. Supreme Court reversed, holding that Title VII did indeed cover third-party claims of retaliation. The Supreme Court went further by holding that a person in Thompson's situation also had a right to sue for a violation of Title VII.

So, what does this decision mean for those complaining of a USERRA violation? If a service member files a USERRA complaint with ESGR, the Department of Labor, or a private attorney, and the service member's spouse works for the same employer, can the employer retaliate by taking adverse action against the spouse? I would say probably not. 38 U.S.C. § 4311(b) states,

An employer may not discriminate in employment against or take any adverse employment action against any person because such person (1) has taken an action to enforce a protection afforded any person under this chapter, (2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter, (3) has assisted or otherwise participated in an investigation under this chapter, or (4) has exercised a right provided for in this chapter. The prohibition in this subsection shall apply with respect to a person regardless of whether that person has performed service in the uniformed services.

The language used in § 4311(b) contemplates a situation where a service member's coworker might face retaliation from the employer for participating in an investigation of a USERRA violation. If the service member's spouse happens to be a coworker, I would argue that the spouse is protected from retaliation based on the clear language of the statute, as long as the spouse,

has taken an action to enforce a protection afforded any person under this chapter, (2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter, (3) has assisted or otherwise participated in an investigation under this chapter, or (4) has exercised a right provided for in this chapter.

But what if the service member's spouse works for the same employer, but has not engaged in any of the actions described by § 4311(b)? What then? I would argue that given the broad interpretation that USERRA is supposed to be given by the courts, the spouse/coworker should still be protected against employer retaliation. "[B]oth USERRA and its predecessor statutes are to be **liberally construed** for the benefit of those who left private life to serve their country." *Duarte v. Agilent Technologies, Inc.*, 366 F.Supp.2d 1039, 1045 (D. Colo. 2005) (emphasis added). This is where the case of *Thompson v. North American Stainless* comes into play.

In that case, Eric Thompson argued that he was terminated from employment specifically because of his relationship with Miriam Regalado and not because of any action he took in support of, or connected to,

Miriam's EEOC complaint.^[3] The district court granted summary judgment for the employer finding, in part, that retaliation against an employee who had not engaged in any protected activity was not actionable.

NAS argued that the definition of "person aggrieved" under Title VII referred only to an employee who engaged in activity that was protected under Title VII (activity similar to that listed in § 4311(b)). The Supreme Court saw things differently.

We know of no other context in which the words carry this artificially narrow meaning, and if that is what Congress intended it would more naturally have said "person claiming to have been discriminated against" rather than "person claiming to be aggrieved." We see no basis in text or prior practice for limiting the latter phrase to the person who was the subject of unlawful retaliation.^[4]

I believe the *Thompson* decision would work to protect a coworker spouse of a service member from employer retaliation, even if the coworker spouse was not involved, or otherwise connected to, the service member's USERRA complaint.

Any service member who finds themselves in such a situation would be well advised to contact ESGR, the Department of Labor Veterans Employment Training Services office, or the ROA's Service Members Law Center for assistance.

^[1] 131 S.Ct. 863 (2011). Eric Schnapper, Professor of Law, University of Washington, argued the case for the petitioner, Eric Thompson. Professor Schnapper was before the U.S. Supreme Court in November 2010, in the case of *Staub v. Proctor Hospital* where he argued the case for petitioner and Army reservist Vincent Staub.

^[2] Justice Kagan did not participate in the decision.

^[3] "Thompson's complaint, however, is not that he was retaliated against because of his own protected activity, but that he was retaliated against because his fiancé filed an EEOC complaint against North American." *Thompson v. North American Stainless*, 435 F. Supp. 2d 633, 637 (E.D.Ky. 2006) *reversed*, 131 S.Ct. 863 (2011).

^[4] 131 S.Ct. at 870.

*Military title used for purpose of identification only. The view expressed in this article is the personal view of the author and is not necessarily the view of the Department of Homeland Security, the Department of Defense, the United States Coast Guard, or the U.S. government.