



## LABOR E-BRIEF

### Settlement Reached in the NLRB Facebook Case

On February 7, 2011, the NLRB and a private employer reached a settlement regarding the employer's termination of an employee allegedly based, in part, on Facebook posts made by the employee. However, because the case had not made it through the courts, employers and employees will have to continue to wait for a definitive decision regarding the legality of disciplining an employee for his or her postings about a supervisor on a personal social media platform.

On October 27, 2010, the National Labor Relations Board's Hartford regional office issued a complaint against an ambulance service and alleged, inter alia, that the company illegally terminated an employee who posted negative remarks about her supervisor on her personal Facebook page. According to the complaint, the employee's Facebook postings constituted protected concerted activity under the National Labor Relations Act, which guarantees that employees have the right to engage in concerted activity for the purpose of collective bargaining or other mutual aid or protection. The complaint also found that the company's blogging and internet posting policy contained unlawful provisions, particularly a provision that prohibited employees from making disparaging remarks when discussing the company or supervisors, and a provision which prohibited employees from depicting the company in any way over the internet without company permission.

On February 7, 2011, the NLRB reached a settlement with the company. According to the NLRB's February 8, 2011 press release, under the terms of the settlement, the company agreed, among other conditions, "to revise its overly-broad rules to ensure they do not improperly restrict employees from discussing their wages, hours and working conditions with co-workers and others while not at work, and that they would not discipline or discharge employees for engaging in such discussions."

Because the matter did not proceed to a final decision, the settlement itself has no precedential value, and the issues raised by this case – particularly concerning an employee's right, on his or her own time and using his or her own personal computer, to disparage a supervisor through social media – remain unresolved. However, the settlement highlights the need for employers to reexamine and, if appropriate, revise employee handbooks, especially internet and/or social media policies, to ensure that such policies comply with the National Labor Relations Act and other laws.



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## Supreme Court Holds Title VII Retaliation Claim Available to Terminated Fiance



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The Supreme Court recently struck a blow to employers and made another expansion to the scope of Title VII's retaliation provisions. By its January 24, 2011 decision in *Thompson v. North American Stainless, LP*, --U.S. --, 2011 WL 197638 (2011), the court overturned a Sixth Circuit decision which had affirmed the dismissal of the retaliation claims brought by a terminated fiancé of another employee who had brought a sexual harassment charge. By its ruling, the Supreme Court held that the fiancé **could bring his own suit under Title VII for the alleged retaliatory termination, even though he did not himself engage in any protected activity prior to his termination.**

The Supreme Court focused the language of 42 U.S.C. 2000e-5(f), which bestows the right to bring a civil action to a "person ... aggrieved." Using a "zone of interest" test —enabling suit by any plaintiff with an "interest arguably sought to be included in the statute" – the Court construed the Title VII provision broadly, determining that the statute encompassed claims by persons harmed in retaliation for another employee's protected activity. *Id.*, at 5. The court rejected the argument that Title VII did not reach third-party reprisals, referring back to the lesson in *Burlington*, which also held that the retaliation provision is very broad.

The Court explained: "[Fiancé] falls within the zone of interests protected by Title VII. He was an employee of NAS, and Title VII's purpose is to protect employees from their employers' unlawful actions. Moreover, accepting the facts as alleged, [Fiancé] is not an accidental victim of the retaliation. Hurting him was the unlawful act by which NAS punished [Complaining Employee]." *Id.*

The Court also refused to restrict or specifically define any particular set of relationships that would fall into the "zone of interest" of Title VII's retaliation provision, stating:

*"We must also decline to identify a fixed class of relationships for which third-party reprisals are unlawful. We expect that firing a close family member will almost always meet the Burlington standard, and inflicting a milder reprisal on a mere acquaintance will almost never do so, but beyond that we are reluctant to generalize. As we explained in Burlington, 548 U.S., at 69, 126 S.Ct. 2405, 'the significance of any given act of retaliation will often depend upon the particular circumstances.' Given the broad statutory text and the variety of workplace contexts in which retaliation may occur, Title VII's antiretaliation provision is simply not reducible to a comprehensive set of clear rules. We emphasize, however, that 'the provision's standard for judging harm must be objective,' so as to 'avoi [d] the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff's unusual subjective feelings.' *Id.*, at 68-69, 126 S.Ct. 2405."*

*Id.*, 4 (Emphasis added).

Because the ADA adopts the same "person ... aggrieved" provisions of 42 USC 200e-5 and the ADEA provides at 29 U.S.C. 626 that "any person aggrieved may bring a civil action..." the *Thompson* decision likely will not be limited to retaliation under Title VII.