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Client Alert

Vorys Appellate Team Supports U.S. Chamber of Commerce in Successful Amicus Briefing Before En Banc Sixth Circuit

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The en banc Sixth Circuit recently joined sister circuits in holding that a terminated employee related to a co-worker who engaged in protected activity opposing discrimination may not himself sue under Title VII if he did not also engage in protected activity. In so holding, the Sixth Circuit rejected the so-called "third party retaliation" theory of liability that the plaintiff, and the U.S. Equal Employment Opportunity Commission as amicus curiae, had advanced.

The majority—comprised of Judges Griffin, Boggs, Batchelder, Gilman, Gibbons, Sutton, Cook, McKeague, and Kethledge—viewed the question as whether Title VII provides a cause of action in favor of the co-worker plaintiff who did not oppose the discriminatory treatment of another employee. Those nine judges held that the "authorized class of claimants [for Title VII retaliation claims] is limited to persons who have personally engaged in protected activity by opposing a practice, making a charge, or assisting or participating in an investigation."

Judge Rogers concurred, but found the answer to the question before the Court in the section of the statute defining those with standing to sue for substantive Title VII violations.

Judges Martin, Daughtrey, Moore, Cole, Clay, and White dissented. Judges Martin, Moore, and White each authored a dissenting opinion. Judge Moore's dissent contended that the majority's holding is inconsistent with recent and intervening Supreme Court authority.

The majority concludes that its holding puts the Sixth Circuit in the unanimous view of the federal circuits, joining the Third, Fifth, and Eighth Circuits. Judge Moore's dissent contends that the majority's position is inconsistent with the reasoning of cases decided by the Seventh and Eleventh Circuits.

Vorys attorneys Nelson Cary, of the Labor and Employment group, and Michael Hendershot, of the Appellate Practice group, drafted the U.S. Chamber of Commerce's amicus brief contending that the majority position is consistent with both the general policy of Title VII and employers' ability to reasonably predict Title VII liability. The decision is *Thompson v. North American Stainless LP*, 07-5040. For further information visit www.vorys.com.

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