

Administrative & Civil Law

Don't Ask Don't Tell Repeal Act of 2010

On 22 December 2010, President Obama signed the Don't Ask Don't Tell Repeal Act of 2010.¹ The Act repeals 10 U.S.C. § 654 sixty days after the President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff certify that three actions have occurred: (1) that they have considered the Department of Defense Comprehensive Review on repealing Don't Ask Don't Tell; (2) that the Department of Defense has established the necessary policies and regulations to implement repeal; and (3) that implementation of those policies and regulations is consistent with military readiness, effectiveness, cohesion, retention, and recruiting.² Until certification occurs, current regulations and directives implementing 10 U.S.C. § 654 are still in effect.³

On 23 February 2011, the Army began training personnel on how the Army will implement the repeal of 10 U.S.C. § 654. The deadline for training all Active⁴ and Reserve component personnel on implementing the repeal is 15 August 2011.⁵

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Summary of *Thompson v. North American Stainless*

In January 2011, the U.S. Supreme Court ruled in an 8-0 opinion (Kagan, J., recused) that Title VII's ban on workplace retaliation against an employee who challenges discrimination also protects a co-worker who is closely related to the employee who filed the complaint. In *Thompson v. North American Stainless, LP* (NAS),⁶ the respondent (NAS) fired Thompson after his fiancée, also a NAS employee, filed a sex discrimination charge against NAS with the Equal Employment Opportunity Commission (EEOC). The district court granted NAS summary judgment on the ground that third-party retaliation claims were not permitted by Title VII, and the Sixth Circuit affirmed.

¹ Pub. L. No. 111-321, ___ Stat. ___.

² 10 U.S.C. § 654 (2006).

³ *Id.*

⁴ Memorandum, Under Sec'y of Def. (Pers. & Readiness), subject: Repeal of Don't Ask, Don't Tell and Future Impact on Policy (28 Jan. 2011).

⁵ *Id.*

⁶ No. 09-291, slip op. at 1 (S. Ct. Jan. 24, 2011).

Justice Scalia, writing for the Court, rejected the Sixth Circuit's narrow reading of Title VII's anti-retaliation ban. The Court held that the anti-retaliation provision "prohibits any employer action that 'well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'" ⁷ In this case, the Court argued that it was "obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired."⁸ The Court declined to identify a fixed class of relationships that would warrant protection under Title VII, stating only that "firing a close family member will almost always meet the *Burlington* standard, and inflicting a milder reprisal on a mere acquaintance would almost never do so."⁹

The Court adopted a "zone of interests" test for determining whether a complainant has a cause of action for alleged retaliation. In order to be in the "zone of interests" necessary to sustain a complaint, the employee must have an interest that Congress intended to be protected by the relevant statute. Since Title VII's purpose is to protect employees from unlawful retaliation, the Court found that Thompson fell within the zone of interests because, assuming the alleged facts were true, it was unlawful retaliation for NAS to fire Thompson for his fiancée's EEOC complaint.¹⁰ Thus, the Court held that Thompson, as a third party, had a cause of action under Title VII despite the fact that he personally did not file the EEOC complaint or otherwise engage in protected activity.

Thompson v. North American Stainless, LP is significant because it expands the scope of Title VII's protection against workplace retaliation. While this is the first time the Court has explicitly allowed a third party to sue under Title VII, the EEOC has been applying a similar interpretation for years.¹¹ Practitioners and managers should be aware of the practical effect this ruling has in expanding the potential class of employees who have actionable retaliation claims.

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⁷ *Id.* at 3 (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006)).

⁸ *Id.*

⁹ *Id.* at 4.

¹⁰ *Id.* at 7.

¹¹ See EEOC COMPLIANCE MANUAL § 8, at 8008 (1998) (retaliation) ("Although EEOC Guidelines are not binding on the courts, they 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'" (quoting *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986)).