

# PUBLICATION

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## Two Recent Supreme Court Holdings Split the Difference For Employees/Employers

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Within the past week, the United States Supreme Court has issued two rare, unanimous decisions in the employment law realm. In the first, *NASA v. Nelson*, the Supreme Court held that employers have great leeway in probing into their workers' past behavior, provided such inquiries are job-related and resulting information is kept confidential. In the second, *Thompson v. North American Stainless LP*, the Supreme Court handed employees a significant victory in ruling that an employer could be held liable for retaliating against a close colleague of an individual who complains of unlawful harassment or discrimination.

### **NASA v. Nelson: Employers May Ask Sensitive Background Questions of Their Workers Provided They Keep Such Information Confidential**

**Holding:** NASA's background inquiries of its contract employees regarding drug treatment and other negative "general behavior or conduct" were tailored to the government's interests in managing its workforce and therefore did not violate the employees' right to privacy. In so ruling, the Court did not address whether such information is protected by a Constitutional right to privacy.

**Facts:** Beginning in 2004, NASA began requiring "low-risk" scientists, engineers, and administrative support personnel to submit to in-depth background investigations. Twenty-eight employees who worked in Pasadena, California challenged the background investigation. Many of them had worked at the lab for decades without ever being the subject of a government background check because they were not involved with classified or military activities and did not have security clearances. The lab at which they worked produces satellites, rockets, spacecraft and telescopes for use by NASA.

NASA required all employees with access to the lab to undergo the same background investigation that it required of its civil service employees. Among the questions asked and challenged were queries about residential, educational, employment, and military histories; the names of three references who "know you well;" and whether the applicant had used, possessed, supplied or manufactured illegal drugs. Applicants who answered "yes" to the drug-related questions were then required to provide information regarding the types of substances, the nature of the activity, and any other details relating to their involvement with illegal drugs, including treatment received. The employees challenged the request for information regarding treatment or counseling as violating their right to informational privacy.

The government would then run employees' information through FBI and other federal-agency databases, as well as send an inquiry to each employee's references and former landlords requesting any adverse information about "honesty or trustworthiness," "violations of the law," "financial integrity," "abuse of alcohol or drugs," "mental or emotional stability," "general behavior or conduct," and "other matters" that may have a bearing on the applicant's suitability for employment at a federal facility. The employees challenged these inquiries as well.

**Reasoning:** The Court ruled in favor of NASA, recognizing that as an employer, the government has an interest in the security of its facilities, managing its internal operations, and employing a competent, reliable

workforce to carry out its business. The Court concluded that both sets of inquiries were reasonable, employment-related inquiries that further those interests. The drug treatment or counseling question must be viewed in the context as a follow-up question to separate illegal-drug users who are taking steps to address and overcome their problems from those who are not. Similarly, the Court held that the open-ended inquiries into the employee's general behavior or conduct are reasonably aimed at identifying capable employees who will faithfully conduct the government's business. The Court also noted that these types of inquiries are commonplace in the private sector and for the government's civil service employees. In so doing, the Court recognized that the collected information was protected by federal law, which requires written consent before the government may disclose an individual's records and imposes criminal liability for willful disclosures.

**What Does This Mean To You?** The Court's decision confirms that an employer, whether public or private, may request a broad range of background information from employees or applicants, as long as the inquiry is related to its interest in employing a competent, reliable workforce. As with all confidential information, however, both private and public employers should take meaningful steps to protect information collected from disclosure.

### ***Thompson v. North American Stainless, LP: Harming a Close Colleague of a Complainant May Now Constitute Unlawful Retaliation***

**Holding:** A male employee who claims he was fired because his fiancée filed a sex discrimination charge against their mutual employer may pursue a retaliation claim under Title VII. Applying the standards previously articulated by the Supreme Court, an employee considering filing a discrimination charge might well be dissuaded if she knew the employer would react by firing her betrothed. As such, the fiancé is a “person aggrieved” within the meaning of the act and therefore entitled to bring suit.

**Facts:** Thompson, the male fiancé, alleged that three weeks after North American Stainless received notice that Miriam Regalado, then his fiancée and now his wife, had filed a sex discrimination charge, the company fired him in retaliation for Regalado's charge. A federal district court in Kentucky granted summary judgment to the company, reasoning that since Thompson never engaged in protected activity under Title VII, he lacked a statutory retaliation claim. The U.S. Court of Appeals for the Sixth Circuit affirmed, stating that although Regalado might have a retaliation claim based on Thompson's firing, Thompson could not sue under Title VII absent evidence he had engaged in protected activity.

**Reasoning:** Title VII extends protections to “persons aggrieved.” That term is broader than just the employee who engages in protected activity. “[A]ccepting the facts as alleged, Thompson is not an accidental victim of the retaliation—collateral damage, so to speak, of their employer's unlawful actions. To the contrary, injuring him was the employer's intended means of harming Regalado. Hurting him was the unlawful act by which the employer punished her. In those circumstances, we think Thompson well within the zone of interests sought to be protected by Title VII. He is a person aggrieved with standing to sue.”

In recognizing third-party claims under Title VII, the Court acknowledged employers' concerns that “prohibiting reprisals against third parties will lead to difficult line drawing problems concerning the types of relationships entitled to protection.” “Perhaps retaliating against an employee by firing his fiancée would dissuade the employee from engaging in protected activity, but what about firing an employee's girlfriend, close friend, or trusted co-worker?” the Court said, noting North American Stainless' argument that an employer could be placed at risk “anytime it fires any employee who happens to have a connection to a different employee who filed a charge with EEOC.” But the Court said that this concern would not prevent it from recognizing Title VII third-party claims or cause them to limit such claims to family members, spouses, and near-spouses. Rather, the Court summarized, “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,” Scalia wrote. “Given the broad statutory text and the variety of workplace contexts in which retaliation may occur, Title VII’s anti-retaliation provision is simply not reducible to a comprehensive set of clear rules.”

**What Does this Mean to You?** This decision follows a recent trend of Supreme Court decisions favoring employees in retaliation cases. Unfortunately, the Court’s conclusion that “close family members” may raise third-party claims, while “mere acquaintances” may not, leaves a large body of potential plaintiffs unaccounted for. Until the Courts of Appeal begin setting boundaries for such claims, employers looking for guidance in complying with this decision are left at a loss.