

AN INEVITABLE PROGRESSION IN THE SCOPE OF TITLE VII'S ANTI-RETALIATION PROVISION: THIRD- PARTY RETALIATION CLAIMS

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I. INTRODUCTION

In today's world, it is not uncommon for family members to work for the same employer. There are some obvious advantages to working with a family member. For instance, people working with relatives have someone they can fully trust in the office and have someone to carpool with. However, there are also apparent disadvantages. Familial relationships between co-workers can negatively affect the work environment when family disputes spill over into working hours, when other employees feel a boss's relative is getting special treatment, or when cliques form. However, there is one disadvantage that is not obvious—one family member may suffer an adverse employment action as a result of the protected activity of the other.

To illustrate how this disadvantage may arise, consider the following hypothetical involving John and Katie, a married couple employed by the same employer. Katie's supervisor made sexual advances to her, and she filed a sexual harassment complaint. Shortly thereafter, John was demoted, despite his excellent employment evaluations. The employer claimed the demotion was a mere coincidence. John was convinced he had been the victim of retaliation for his wife's complaint. Should the court recognize his claim?

Title VII undoubtedly prohibits employers from firing or otherwise adversely treating employees for engaging in a protected activity.¹ Protected activity occurs when an employee opposes an unlawful employment practice or files a discrimination charge against his or her

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¹ 42 U.S.C. § 2000e-3(a) (2006) (“It shall be made an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter.”).

employer.² However, it is unclear whether Title VII protection extends to third-parties who do not personally perform a protected activity, but are treated adversely by their employers in retaliation for another's engagement in a protected activity. This situation frequently arises when two relatives work for the same employer and the employer fires one in retaliation for the other filing a discrimination charge or engaging in another form of protected activity.³

There is currently a split among the circuit courts regarding third-party retaliation claims. Some circuits allow third-party retaliation claims on the premise that they are consistent with the purpose of Title VII.⁴ Other circuits prohibit such claims, deeming them inconsistent with the plain text of Title VII.⁵

This comment addresses the circuit split on this issue and proposes that all jurisdictions should permit such third-party claims. Part II of this comment provides a brief background on Title VII. It also reviews the elements of a prima facie retaliation claim. Part III presents an overview of different third-party retaliation cases, focusing on the rationale behind the holding in each case. Part IV examines recent Supreme Court

² *Id.* (referring to protected activity as “any practice made an unlawful employment practice by this subchapter, or because he [the employee] has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter”).

³ See discussion *infra* Part II.C.2.

⁴ See *Thompson v. N. Am. Stainless, LP*, 520 F.3d 644, 646 (6th Cir. 2008) (holding Title VII prohibits “employers from taking retaliatory action against employees not directly involved in protected activity, but who are so closely related to or associated with those who are directly involved, that it is clear that the protected activity motivated the employer’s action[.]”); *EEOC v. V & J Foods, Inc.*, 507 F.3d 575, 580 (7th Cir. 2007) (holding any retaliation by an employer against a sixteen year-old employee for intervention by the employee’s mother constituted retaliation against the employee for purposes of Title VII); *Wu v. Thomas*, 863 F.2d 1543, 1549 (11th Cir. 1989) (holding a claim of retaliation for opposition to discriminatory practice “does not require that the employer actually have been engaged in an unlawful employment practice”).

⁵ See *Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 569 (3d Cir. 2002) (“The preference for plain meaning is based on the constitutional separation of powers—Congress makes the law and the judiciary interprets it. In doing so we generally assume that the best evidence of Congress’s intent is what it says in the texts of the statutes.”); *Smith v. Riceland Foods, Inc.*, 151 F.3d 813, 819 (8th Cir. 1998) (“[A] plaintiff bringing a retaliation claim under Title VII must establish that she personally engaged in the protected conduct.”); *Holt v. JTM Indus., Inc.*, 89 F.3d 1224, 1226–27 (5th Cir. 1996) (holding that individuals do not have standing to sue for retaliation if they have not participated in protected conduct).

decisions, which have broadened the scope of Title VII retaliation, and proposes that the Court should continue this broadening trend by recognizing third-party retaliation claims. Finally, Part V concludes the comment by recommending causation analysis in third-party retaliation claims to limit frivolous lawsuits.

II. BACKGROUND

A. Overview of Title VII

In 1963, President John F. Kennedy sent a proposed civil rights bill⁶ to Congress with the intent of ending racial discrimination in places of public accommodation.⁷ Congressional proponents amended this bill, adding protections for equal opportunity in employment for minorities and women.⁸ Eventually, this bill became the Civil Rights Act of 1964.⁹ Title VII of this statute deals specifically with employment discrimination.¹⁰

Title VII serves to ensure “unfettered access to statutory remedial mechanisms”¹¹ and “to protect access to machinery available to seek redress for civil rights violations.”¹² Thus, Title VII prohibits employers from discriminating against employees because of the employees’ “race, color, religion, sex, or national origin.”¹³ Furthermore, Title VII prohibits employers from retaliating against employees who have engaged in protected activities, which include contesting discriminatory practices and participating in investigations of discrimination claims.¹⁴ Under Title VII:

It shall be an unlawful employment practice for an employer to discriminate against *any of his employees* or

⁶ See H.R. 7152, 88th Cong. (1963); S. 1731, 88th Cong. (1963).

⁷ See Anita G. Schausten, Comment, *Retaliation Against Third Parties: A Potential Loophole in Title VII's Discrimination Protection*, 37 J. MARSHALL L. REV. 1313, 1314 (2004).

⁸ *Id.*

⁹ Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codifying the Civil Rights Act, as amended, in scattered sections of 42 U.S.C. (1964)).

¹⁰ See generally 42 U.S.C. §§ 2000e-e17 (2006).

¹¹ *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997).

¹² *Booker v. Brown & Williamson Tobacco Co., Inc.*, 879 F.2d 1304, 1313 (6th Cir. 1989); see also *EEOC v. Ohio Edison Co.*, 7 F.3d 541, 544 (6th Cir. 1993) (stating the purpose of Title VII is “to prevent fear of economic retaliation from inducing employees ‘quietly to accept [unlawful] conditions’”).

¹³ 42 U.S.C. § 2000e-2 (2006).

¹⁴ *Id.* § 2000e-3(a).

applicants for employment . . . because *he has* opposed any practice made an unlawful employment practice by this subchapter, or because *he has* made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.¹⁵

B. Prima Facie Retaliation Claim

To sustain a Title VII retaliation claim, an employee must first establish a prima facie case by establishing three elements.¹⁶ The employee must show (1) the employee engaged in a protected activity; (2) the employer took an adverse employment action against the employee; and (3) a causal link exists between the employee's protected activity and the employer's adverse employment action.¹⁷

1. Protected Activity

Protected activities are those activities where an employee has opposed an unlawful employment practice, has made a charge, or has participated in an investigation, proceeding, or hearing related to Title VII.¹⁸ Title VII recognizes two variations of protected activity—opposition conduct and participation conduct.¹⁹

a. Opposition Conduct

An employer may not discriminate against an employee for opposing any employment practice made unlawful by Title VII.²⁰ Opposition conduct commonly occurs when an employee complains to anyone—management, unions, other employees, or newspapers—about an employer's allegedly unlawful employment practices.²¹ An employee's

¹⁵ *Id.* (emphasis added).

¹⁶ *Stevens v. St. Louis Univ. Med. Center*, 97 F.3d 268, 270 (8th Cir. 1996).

¹⁷ *See, e.g., id.* A plaintiff can establish a prima facie case by providing direct evidence or by satisfying the *McDonnell Douglas* burden-shifting framework that is also used in other federal discrimination claims. *See* Melissa A. Essary & Terence D. Friedman, *Retaliation Claims Under Title VII, the ADEA, and the ADA: Untouchable Employees, Uncertain Employers, Unresolved Courts*, 63 MO. L. REV. 115-120 (1998). Some courts require a separate showing of employer knowledge as a fourth element for plaintiffs to meet their prima facie burden. *See, e.g., Hollins v. Atl. Co.*, 188 F.3d 652, 661 (6th Cir. 1999).

¹⁸ 42 U.S.C. § 2000e-3(a) (2006).

¹⁹ *See* *EEOC v. Nalbandian Sales, Inc.*, 36 F. Supp. 2d 1206, 1209 (E.D. Cal. 1998).

²⁰ 42 U.S.C. § 2000e-3(a).

²¹ *See, e.g., Sumner v. U.S. Postal Serv.*, 899 F.2d 203, 209 (2d Cir. 1990).

submission of an internal discrimination complaint to management through an employer's grievance procedure serves as a prime example of opposition conduct.²²

However, the scope of Title VII's anti-retaliation provision extends beyond only those employees that instigate formal complaints.²³ Most notably, the United States Supreme Court held that employees who speak out about discrimination not on their own initiative, but when answering an employer's internal investigation, are deemed covered by the opposition clause.²⁴ Furthermore, the Sixth Circuit held that employees engage in opposition conduct when they refuse to obey an employer's order because they believe the order was unlawful under Title VII.²⁵ Finally, the Seventh Circuit held that an employee who assisted a third party in opposing an employer's alleged unlawful employment practice was also engaged in protected activity.²⁶

There are, however, certain opposition conduct limitations under Title VII. An employee opposing practices made unlawful by Title VII is only protected if the employee has a good-faith or reasonable, even if mistaken, belief that there is a Title VII violation.²⁷ Furthermore, opposition conduct will only be found when an employee opposes the *employer's* alleged unlawful employment practice.²⁸ That is, unless an employer uses or condones discriminatory behavior, an employee who opposes the independent behavior of a co-worker is not opposition conduct.²⁹ Finally, an employee's simple assertion that an employer is personally bigoted, without more, is not statutorily protected opposition conduct.³⁰

b. Participation Conduct

Additionally, an employer may not discriminate against an employee who has made a charge, testified, assisted, or participated in any manner in

²² See, e.g., *Hearn v. R.R. Donnelley & Sons*, 460 F. Supp. 546, 548 (N.D. Ill. 1978).

²³ *Crawford v. Metro. Gov't of Nashville and Davidson Cty., Tenn.*, 129 S. Ct. 846, 851 (2009).

²⁴ *Id.* at 853.

²⁵ See *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 576–77 (6th Cir. 2000).

²⁶ See *McDonnell v. Cisneros*, 84 F.3d 256, 262 (7th Cir. 1996).

²⁷ See, e.g., *Croushorn v. Bd. of Tr. of Univ. of Tenn.*, 518 F. Supp. 9, 25 (M.D. Tenn. 1980).

²⁸ See 42 U.S.C. § 2000e–3(a) (2006).

²⁹ See *Silver v. KCA, Inc.*, 586 F.2d 138, 141 (9th Cir. 1978).

³⁰ See *id.* at 141–42.

an investigation, proceeding, or hearing under Title VII.³¹ Most notably, participation conduct exists where an employee files a charge of discrimination against an employer with a state or federal Equal Employment Opportunity agency (EEO).³² Participation conduct also occurs when an employee testifies before, or participates in a state or federal EEO agency investigation of another employee's charge of discrimination.³³

Courts have construed participation conduct under Title VII expansively. In fact, a court may even find participation conduct where a Title VII complaint later proved to be meritless.³⁴ A simple threat to file a charge is also considered participation conduct.³⁵ Thus, an employee does not need to actually file a discrimination charge against an employer for participation conduct to be found. Additionally, an employee's refusal to participate in an employer's employment discrimination investigation constitutes participation conduct.³⁶ Thus, an employee who refuses to participate in a pending state EEO agency investigation receives protection against retaliation to the same extent as if he or she had actually participated in such an investigation. However, most courts have held that the participation clause does not protect an employee's involvement "in an employer's internal, in-house investigation, conducted apart from a formal charge."³⁷

³¹ 42 U.S.C. § 2000e-3(a).

³² See *Crawford v. Roadway Express, Inc.*, 485 F. Supp. 914, 920 (W.D. La. 1980) (regarding a white employee testifying at an EEOC hearing who engaged in protected activity); see also *E.E.O.C v. Locals 14 & 15, Int'l. Union of Operating Eng'rs*, 438 F. Supp. 876 (S.D.N.Y. 1977) (regarding witnesses testifying at an EEOC trial who engaged in protected conduct).

³³ 42 U.S.C. § 2000e-3(a).

³⁴ See *Berg v. La Crosse Cooler Co.*, 612 F.2d 1041, 1043 (7th Cir. 1980) (stating a retaliation claim is not dependent on proof that the underlying employment discrimination that was protested or opposed was, in fact, proven to be unlawful).

³⁵ See *Gifford v. Atchison, Topeka & Santa Fe Ry. Co.*, 685 F.2d 1149, 1156 n.3 (9th Cir. 1982) (stating there is no legal distinction between filing a charge and threatening to file a charge).

³⁶ See *Smith v. Columbus Metro. Hous. Auth.*, 443 F. Supp. 61, 64 (S.D. Ohio 1977) (stating an employee's refusal to participate in a pending state agency EEO investigation was entitled to statutory protection against retaliation to the same extent as if she had actually participated in such an investigation).

³⁷ See *EEOC v. Total Sys. Servs., Inc.* 221 F.3d 1171, 1174 (11th Cir. 2000).

2. *Adverse Employment Action*

In *Burlington Northern & Santa Fe Railway v. White*,³⁸ the United States Supreme Court held that an adverse employment action is any materially adverse action that “might have ‘dissuaded a reasonable worker from making or supporting a charge of discrimination.’”³⁹ To prove an adverse employment action, “a plaintiff must show that a reasonable employee would have found the challenged action materially adverse.”⁴⁰ Thus, an adverse employment action may be established by any action that would be construed materially adverse to a reasonable employee, not just one that adversely affects the individual’s employment status or opportunities in a tangible manner.⁴¹

However, prior to *Burlington*, the circuits varied greatly as to what they considered an adverse employment action.⁴² The federal circuits adopted three different interpretations of adverse employment action: restrictive, intermediate, and expansive.⁴³ The Supreme Court chose the

³⁸ 548 U.S. 53 (2006).

³⁹ *Id.* at 54.

⁴⁰ *Id.* at 68.

⁴¹ *See id.* at 69.

⁴² *See* Brian A. Riddell & Richard A. Bales, *Adverse Employment Action in Retaliation Cases*, 34 U. BALT. L. REV. 313, 313–14 (2005); Joan M. Savage, *Adopting the EEOC Deterrence Approach to the Adverse Employment Action Prong in a Prima Facie Case for Title VII Retaliation*, 46 B.C. L. REV. 215, 216 (2004).

⁴³ *See* discussion *infra* Part III.1.c(a)–(c). Under the restrictive approach, an adverse action is found where the employer uses “ultimate employment decisions” to retaliate against workers who engaged in protected activities. *See* Riddell & Bales, *supra* note 42, at 314; *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997); *Manning v. Metro. Life Ins. Co.*, 127 F.3d 686, 692 (8th Cir. 1997) (holding that mishandling of disability benefits and hostility directed towards employees by supervisors does not constitute adverse employment action absent evidence of change in work duties or conditions constituting material disadvantage). In another case, the plaintiff alleged, *inter alia*, that she was refused opportunities for promotion, denied attendance at a training conference, and given false information regarding the procedure for procuring government travel funds. *Dollis v. Rubin*, 77 F.3d 777, 779–80 (5th Cir. 1995). The court found these were not in themselves “ultimate employment decisions,” although they “arguably might have some tangential effect upon those ultimate decisions.” *Id.* at 781–82. “Under this [restrictive] standard, an employer only would be liable for the most egregious forms of retaliatory conduct, even though more subtle acts might have just as easily and effectively dissuaded employees from reporting or opposing unlawful discrimination.” Lena P. Ryan, Note, *Expanding the Scope of the Expansive Approach: The Burlington Northern Standard as a Per Se Approach to Federal Anti-Retaliation Law*, 49 ARIZ. L. REV. 745, 749 (2007).

(continued)

expansive approach, reasoning that it best carried out the primary objective of Title VII's anti-retaliation provision, which is to prevent employer interference with employee efforts to secure or advance enforcement of the law's basic anti-discrimination guarantees.⁴⁴

3. Causation

The causal connection requirement has "generated the most intense debate because it is the linchpin of a retaliation claim."⁴⁵ Title VII, after all, only prohibits adverse action taken because of protected activity.⁴⁶ The causal connection, therefore, is often the pivotal and most contentious issue in retaliation claims.⁴⁷

The issue, then, is the quantum or level of proof required for a causal connection in the prima facie case.⁴⁸ Perhaps the most important and most common circumstantial evidence of a causal connection is temporal

Under the intermediate approach, an adverse employment action requires a strong connection between the retaliatory conduct and the employment. See Riddell & Bales, *supra* note 42, at 313. In general, these cases require plaintiffs to show they suffered materially adverse action that negatively "effected the terms, conditions, or benefits" of their employment. *Von Gunten v. Maryland*, 243 F.3d 858, 865 (4th Cir. 2001) (citations omitted).

Finally, under the expansive approach, any materially adverse action reasonably likely to deter an employee from engaging in a protected activity constitutes actionable retaliation. See Riddell & Bales, *supra* note 42, at 313; see also *Rochon v. Gonzales*, 438 F.3d 1211, 1219–20 (D.C. Cir. 2006) (holding the FBI's refusal to investigate death threats made against an agent constituted actionable retaliation where such conduct was motivated by an intent to retaliate against the agent for previously filing a race discrimination claim).

⁴⁴ *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2005).

⁴⁵ Justin O'Brien, Note, *Weighing Temporal Proximity in Title VII Retaliation Claims*, 43 B.C. L. REV. 741, 748 (2002); see also Ann Clarke Snell & Lisa R. Eskow, *What Motivates the Ultimate Decisionmaker? An Analysis of Legal Standards for Proving Causation and Malice in Employment Retaliation Suits*, 50 BAYLOR L. REV. 381, 384–86 (1998).

⁴⁶ See Snell & Eskow, *supra* note 45, at 384.

⁴⁷ See Donna Smith Cude & Brian M. Steger, *Does Justice Need Glasses? Unlawful Retaliation Under the Title VII Following Mattern: Will Courts Know It When They See It?*, 14 LAB. LAW. 373, 380 n.37 (1998); Carrie B. Temm, Comment, *Third-Party Retaliation Claims: Where to Draw the Line*, 54 U. KAN. L. REV. 865, 868 (2005).

⁴⁸ See Cude & Steger, *supra* note 47, at 380.

proximity.⁴⁹ The reasons are straightforward. The sooner an employer takes adverse action after an employee engages in a protected activity, the stronger the inference that the protected activity caused the adverse action, particularly if no legitimate reason for the adverse action is evident.⁵⁰ In addition, every retaliation claim bears evidence of some interval between protected activity and adverse action, whether that interval is measured in minutes or months.⁵¹

Although no jurisdiction has adopted a bright-line test for determining the amount of time that is probative of a causal connection, courts recognize that a very short interval between protected activity and adverse action is highly probative of a causal connection.⁵² Conversely, courts also agree that extended intervals may disprove a causal connection.⁵³

In 2001, in *Clark County School District v. Breeden*,⁵⁴ the Supreme Court recognized some areas of general agreement among lower courts on temporal proximity.⁵⁵ The Court held that “very close” temporal proximity alone *could be* sufficient evidence for a prima facie causal connection.⁵⁶ The Court further held, however, that the twenty-month period between protected activity and adverse action in the instant case was too long to establish a causal connection by itself.⁵⁷ Unfortunately, the Court did not explicitly define “temporal proximity” nor establish a mechanism for determining the length of time sufficient to establish a prima facie case. Rather, it only held that twenty months was too long in the factual context

⁴⁹ See Essary & Friedman, *supra* note 17, at 143; Debbie Rodman Sandler & Laura W. Brewer, *Retaliation Claims Under the Civil Rights Acts: Treacherous Waters for Employers*, 13 LAB. LAW. 107, 119 (1997).

⁵⁰ See Edward T. Ellis & Suzanne O. Rudder, *Current Developments in the Law of Retaliation*, A.L.I.-A.B.A. Course of Study, Current Developments in Employment Law 241, 257 (July 27–29, 2000); Sandler & Brewer, *supra* note 49, at 119.

⁵¹ See Ellis & Rudder, *supra* note 50, at 257; Sandler & Brewer, *supra* note 49, at 119.

⁵² See *Oest v. Ill. Dep't of Corr.*, 240 F.3d 605, 616 (7th Cir. 2001) (opposing adoption of “a mechanistically applied time frame,” but recognizing the relevance of temporal proximity) (emphasis added); Ellis & Rudder, *supra* note 50, at 257.

⁵³ See Penny Nathan Kahan & Lori L. Deem, *Retaliation Update*, A.L.I.-A.B.A. Course of Study, Current Developments in Employment Law 431, 445 (July 26–28, 2001); Snell & Eskow, *supra* note 45, at 401.

⁵⁴ 532 U.S. 268 (2001).

⁵⁵ *Id.* at 273–74.

⁵⁶ *Id.* at 273.

⁵⁷ *Id.* at 274.

of *Breeden*.⁵⁸ However, lower federal courts have shed some light on the allowable spans of time to show causation by temporal proximity: periods of one and two weeks have been sufficient.⁵⁹ Conversely, periods of three and four months have been insufficient.⁶⁰

C. *Third-Party Retaliation Claims*

Third-party relation claims under Title VII is an uncertain area of law. A third-party retaliation claim can be defined as a situation where an employer allegedly retaliates against an employee who is “not directly involved in protected activity, but who is so closely related to or associated with those who are directly involved,” that the co-employee’s protected activity motivated the employer’s retaliatory action.⁶¹ Third-party claims present a particular problem in proving a prima facie case.

Courts have taken two approaches when deciding the issue of third-party retaliation claims: plain meaning and purpose of the statute. Some courts apply a literal approach, in which they follow the plain language of the statute and do not recognize third-party retaliation claims.⁶² On the opposite end of the spectrum, other courts believe a literal application of Title VII’s anti-retaliation provision would defeat the purpose of the statute, and they therefore recognize third-party retaliation claims.⁶³

⁵⁸ *Id.* at 273–74.

⁵⁹ See *Holland v. Jefferson Nat’l Life Ins. Co.*, 883 F.2d 1307, 1314–15 & n.3 (7th Cir. 1989) (finding that a one-week period between a complaint and an adverse employment decision was sufficient to create a factual issue on the question of causation); *Johnson v. City of Fort Wayne, Ind.*, 91 F.3d 922, 939 (7th Cir. 1996) (allowing for a causal inference arising from the plaintiff’s allegations of his employer having denied him higher vacation pay and use of a company vehicle because the denials occurred two weeks after the plaintiff filed his EEOC complaint).

⁶⁰ See *Richmond v. ONEOK, Inc.*, 120 F.3d 205, 209 (10th Cir. 1997) (holding that a three-month period alone “was insufficient to establish a causal connection”); *Hughes v. Derwinski*, 967 F.2d 1168, 1174–75 (7th Cir. 1992) (holding that a four-month period, “by itself,” was insufficient to “raise the inference” of discrimination).

⁶¹ *Thompson v. N. Am. Stainless, LP*, 520 F.3d 644, 647 (6th Cir. 2008).

⁶² See, e.g., *Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 569 (3d Cir. 2002); *Holt v. JTM Indus., Inc.*, 89 F.3d 1224, 1226 (5th Cir. 1996); *Smith v. Riceland Foods, Inc.*, 151 F.3d 813, 819 (8th Cir. 1998).

⁶³ See, e.g., *Thompson*, 520 F.3d at 646; *EEOC v. V & J Foods, Inc.*, 507 F.3d 575, 580–81 (7th Cir. 2007); *Wu v. Thomas*, 863 F.2d 1543, 1549 (11th Cir. 1989).

1. *Literal Approach—Plain Language of the Statute*

“[T]he meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms.”⁶⁴ Courts that do not recognize third-party retaliation claims believe the plain meaning of the statute must control.⁶⁵ A “preference for the plain meaning is based on the constitutional separation of powers—Congress makes the law and the judiciary interprets it.”⁶⁶ Thus, courts should “generally assume that the best evidence of Congress’s intent is what it says in the texts of the statutes.”⁶⁷ Further, permitting third-party retaliation suits would “open the door to frivolous lawsuits” and “interfere with an employer’s prerogative to fire at-will employees.”⁶⁸

For instance, the Eighth Circuit held in *Smith vs. Riceland Foods, Inc.*⁶⁹ that a retaliation claim under Title VII must involve the same person who engaged in protected activity.⁷⁰ In *Riceland Foods*, the employer knew of a relationship between two co-workers who lived together.⁷¹ After the company denied Smith, the female in the relationship, a promotion, she filed discrimination charges under Title VII.⁷² Shortly thereafter, Riceland Foods fired Smith for allegedly “falsifying company records.”⁷³ The company subsequently fired her partner, Thomas, a long-time employee, for the same reason.⁷⁴ Thomas brought a suit against the employer, claiming third-party retaliation for Smith’s protected activity.⁷⁵ The court, however, rejected Thomas’s third-party retaliation claim because he was not personally engaged in the protected activity.⁷⁶

⁶⁴ *Caminetti v. United States*, 242 U.S. 470, 485 (1917) (citations omitted).

⁶⁵ See, e.g., *Fogleman*, 283 F.3d at 569; *Holt*, 89 F.3d at 1226; *Riceland Foods, Inc.*, 151 F.3d at 819.

⁶⁶ *Fogleman*, 283 F.3d at 569.

⁶⁷ *Id.* at 569.

⁶⁸ *Id.* at 570.

⁶⁹ 151 F.3d 813 (8th Cir. 1998).

⁷⁰ *Id.* at 819.

⁷¹ *Id.* at 815.

⁷² *Id.* at 817.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 819.

Other courts have denied third-party retaliation claims on the basis of the plain language of Title VII. For instance, in *Higgins v. The TJX Cos.*,⁷⁷ the District Court of Maine granted summary judgment against a plaintiff who claimed a company denied him employment in retaliation for his cousin filing “a sexual harassment lawsuit against the company.”⁷⁸ The court found that, in accordance with its plain language, Title VII did not recognize such a cause of action.⁷⁹

2. *Expansive Approach—Intent of the Statute*

It has long been recognized that “[t]o retaliate against a man by hurting a member of his family is an ancient method of revenge.”⁸⁰ Courts that allow third-party retaliation claims believe that this type of claim is consistent with the purpose of Title VII⁸¹ and that a literal reading of the anti-retaliation provision would defeat the plain purpose of Title VII.⁸² Courts using this approach recognize that “Congress unmistakably intended to ensure that no person would be deterred from exercising his rights under Title VII by the threat of discriminatory retaliation.”⁸³ Essentially, the courts that allow third-party retaliation claims believe that “tolerance of third-party reprisals would, like direct reprisals, deter persons from exercising their protected rights under Title VII.”⁸⁴

Similarly, these courts believe that prohibition of third-party retaliation claims “would provide a means for an employer to circumvent Title VII’s remedial scheme. [But,] Title VII should not be construed so narrowly.”⁸⁵ Thus, these courts hold that permitting an employer to retaliate against a third party would allow an employer to accomplish “indirectly what it is prohibited from doing directly.”⁸⁶

⁷⁷ 328 F. Supp. 2d 122 (D. Me. 2004).

⁷⁸ *Id.* at 123.

⁷⁹ *Id.* at 123–24.

⁸⁰ *NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086, 1088 (7th Cir. 1987).

⁸¹ *See, e.g.*, *Thompson v. N. Am. Stainless, LP*, 520 F.3d 644, 646 (6th Cir. 2007); *EEOC v. V & J Foods, Inc.*, 507 F.3d 575, 580 (7th Cir. 2007); *Wu v. Thomas*, 863 F.2d 1543, 1549 (11th Cir. 1989).

⁸² *Thompson*, 520 F.3d at 647.

⁸³ *De Medina v. Reinhardt*, 444 F. Supp. 573, 580 (D.D.C. 1978).

⁸⁴ *Id.*

⁸⁵ *Gonzalez v. N.Y. State Dep’t of Corr. Servs.*, 122 F. Supp. 2d 335, 347 (N.D.N.Y. 2000).

⁸⁶ *EEOC v. Nalbandian Sales, Inc.*, 36 F. Supp. 2d 1206, 1210 (E.D. Cal. 1998).

Finally, these courts relied on precedent to interpret Title VII broadly.⁸⁷ For instance, the Fifth Circuit echoed the Supreme Court when it held “that the provisions of Title VII must be construed broadly in order to give effect to Congress’ intent in eliminating invidious employment practices.”⁸⁸

a. Equal Employment Opportunity Commission

The Equal Employment Opportunity Commission (EEOC) was created by section 705 of the Civil Rights Act⁸⁹ and is historically unique in the fair employment practice area. It is a permanent body, which was established by Congress, rather than by the President.⁹⁰

The EEOC supports third-party retaliation claims, stating, “It is well settled that third party reprisals are cognizable under EEO law.”⁹¹ The agency recognizes that the person claiming retaliation need not be the same person who participated in protected activity or who engaged in opposition.⁹² Specifically, the EEOC Compliance Manual states that Title VII prohibits “retaliation against someone so closely related to or associated with the person exercising his or her statutory rights that it would discourage that person from pursuing those rights.”⁹³ Thus, both the individual who engaged in a protected activity and a relative or close associate who was retaliated against can challenge the retaliation.

Although the EEOC Compliance Manual is not controlling upon the courts,⁹⁴ the EEOC’s interpretation of a federal statute “constitutes an informed judgment to which some deference ordinarily is due.”⁹⁵

⁸⁷ See *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 381 (1977) (Marshall, J., concurring in part and dissenting in part) (“Title VII is a remedial statute designed to eradicate certain invidious employment practices” and that the “Act should ‘be given a liberal interpretation’”) (internal citations omitted).

⁸⁸ *B.T. Jones v. Flagship Int’l*, 793 F.2d 714, 726 (5th Cir. 1986) (citations omitted).

⁸⁹ 42 U.S.C. § 2000e-4(a) (1964).

⁹⁰ *Id.* Even so, the President retains involvement by appointing the Commission’s members “with the advice and consent of the Senate.” *Id.*

⁹¹ *Alexander v. Peters*, No. 01975380, 1998 WL 201692, at *4 (EEOC App. April 16, 1998) (citations omitted).

⁹² EQUAL EMPLOYMENT OPPORTUNITY COMM’N, COMPLIANCE MANUAL 8-10 (1998), <http://www.eeoc.gov/policy/docs/retal.pdf>.

⁹³ *Id.*

⁹⁴ *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986) (“[EEOC] Guidelines, while not controlling . . . do constitute a body of experience and informed judgment to
(continued)

b. United States Circuit Courts

In those courts recognizing third-party retaliation claims under Title VII, to plead a cause of action, a plaintiff must allege: (1) a relative or close associate engaged in a protected activity; (2) the third-party suffered an adverse employment action; and (3) a causal link exists between the protected activity and the adverse action.⁹⁶

To prove the relative or close associate element, plaintiffs must show that the relationship between themselves and the employees engaging in a protected activity is more than working for the same company.⁹⁷ Thus, courts that have extended the scope of retaliation claims to include third-parties have mostly “done so in close family relationships, such as spouses or siblings.”⁹⁸ However, some courts also have recognized third-party retaliation claims for co-employees who are not related.⁹⁹

c. Married Couples

Several courts have recognized third-party retaliation claims when the co-employees are spouses. In *Murphy v. Cadillac Rubber & Plastics, Inc.*,¹⁰⁰ the Western District of New York held that a plaintiff stated a cognizable claim by alleging that his wife “engaged in statutorily protected activities and that specific adverse employment actions were taken against him.”¹⁰¹ The plaintiff claimed that his employment conditions deteriorated the same month his wife complained of discrimination and that they worsened following his wife’s allegedly discriminatory discharge.¹⁰² The court recognized the plaintiff’s third-party retaliation claim and denied the employer’s motion to dismiss.¹⁰³

which courts and litigants may properly resort for guidance.”) (quotations and citations omitted).

⁹⁵ *Noviello v. City of Boston*, 398 F.3d 76, 90 (1st Cir. 2005).

⁹⁶ *EEOC v. Nalbandian Sales, Inc.*, 36 F. Supp. 2d 1206, 1212 (E.D. Cal. 1998).

⁹⁷ *O’Connell v. Isocor Corp.*, 56 F. Supp. 2d 649, 654 (E.D. Va. 1999).

⁹⁸ *See, e.g., Freeman v. Barnhart*, No. C 06-04900 JSW, 2008 WL 744827, at *7 (N.D. Cal. March 18, 2008).

⁹⁹ *See, e.g., EEOC v. Ohio Edison Co.*, 7 F.3d 541, 546 (6th Cir. 1993) (holding that a former employee stated a valid third-party retaliation claim when his offer for reinstatement was withdrawn after a non-related co-employee protested his discriminatory discharge).

¹⁰⁰ 946 F. Supp. 1108 (W.D.N.Y. 1996).

¹⁰¹ *Id.* at 1118.

¹⁰² *Id.*

¹⁰³ *Id.* at 1119.

Similarly, in *Wu v. Thomas*,¹⁰⁴ a husband and wife worked for the same university.¹⁰⁵ The wife complained of gender discrimination, and the husband was subsequently “removed from the chairmanship of his department without cause, notice, or explanation.”¹⁰⁶ Further, he was invited to look for work elsewhere, denied teaching assignments, removed from a committee, and given small raises.¹⁰⁷ Here, the Eleventh Circuit recognized the husband’s third-party retaliation claim.¹⁰⁸

Likewise, the District Court for the District of Columbia held in *DeMedina v. Reinhardt*¹⁰⁹ that a plaintiff stated a valid claim under Title VII when she alleged she was denied the opportunity to retake a written test and rejected for employment in reprisal for her husband’s anti-discrimination activities at the same company.¹¹⁰ In *DeMedina*, the court rejected the defendant’s argument that the plaintiff failed to state a claim under Title VII because she was not the employee who engaged in the protected activity.¹¹¹ The court stated that the language of the anti-retaliation provision of Title VII indicated Congress did not expressly consider such third-party reprisals and that prohibiting the claims would undermine Congress’s clear intent.¹¹² The court determined that if third-party reprisals were tolerated, they would deter people from exercising their protected rights just as much as direct reprisals would.¹¹³ Hence, the court rejected the employer’s argument that the plaintiff’s husband was the only person who could seek relief.¹¹⁴ Here, even though the husband could “seek injunctive relief to prohibit future reprisals against his spouse,” he could not seek back pay or promotion for his wife.¹¹⁵ Therefore, the court held that denying the wife the right to seek relief would unacceptably frustrate Title VII’s “make whole” purpose.¹¹⁶

¹⁰⁴ 863 F.2d 1543 (11th Cir. 1989).

¹⁰⁵ *Id.* at 1545.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 1548.

¹⁰⁹ 444 F. Supp. 573 (D.D.C. 1978).

¹¹⁰ *Id.* at 579–81.

¹¹¹ *Id.* at 580.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

Similarly, some courts recognize third-party retaliation claims when the co-employees are not yet married, but engaged. In *Thompson v. North American Stainless L.P.*,¹¹⁷ an employee filed a gender-discrimination charge with the EEOC.¹¹⁸ Three weeks after the employer received notice of the charge, it discharged the complainant's fiancée, who also worked for the company.¹¹⁹ The court noted that it must "go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute."¹²⁰ In other words, "[A] court must evaluate not only the contested statutory language, but also the specific context in which that language is used, and the broader context of the statute as a whole."¹²¹ With respect to the broader context and purpose of Title VII, the court cited to the Supreme Court's ruling in *Burlington Northern & Santa Fe Railway Co. v. White*, which held that a plaintiff must demonstrate a "materially adverse" retaliatory action, which was defined as one that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."¹²² Relying on *Burlington*, the Sixth Circuit ruled that a literal reading of the anti-retaliation provision of Title VII "defeats the plain purpose" of the statute.¹²³ "There is no doubt that an employer's retaliation against a family member after an employee files an EEOC charge would, under *Burlington*, dissuade 'reasonable workers' from such an action."¹²⁴

d. Siblings

Courts have also held that siblings have a close enough relationship to give rise to a third-party retaliation claim. In *EEOC v. Nalbandian Sales, Inc.*,¹²⁵ the company regularly employed the plaintiff as a seasonal employee.¹²⁶ After the plaintiff's sister, also an employee, brought charges of discrimination against the company, the employer refused to rehire the plaintiff.¹²⁷ The plaintiff then brought charges of retaliation, claiming the

¹¹⁷ 520 F.3d 644 (6th Cir. 2008).

¹¹⁸ *Id.* at 645.

¹¹⁹ *Id.* at 645–46.

¹²⁰ *Id.* at 647 (quotations and citations omitted).

¹²¹ *Id.*

¹²² *Burlington N. and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 76 (2006).

¹²³ *Thompson v. N. Am. Stainless, LP*, 520 F.3d 644, 647 (6th Cir. 2008).

¹²⁴ *Id.*

¹²⁵ 36 F. Supp. 2d 1206 (E.D. Cal. 1998).

¹²⁶ *Id.* at 1208–09.

¹²⁷ *Id.* at 1208.

refusal was a result of his sister's protected activity.¹²⁸ The court held that a narrow "interpretation would chill employees from exercising their Title VII rights against unlawful employment practices out of fear that their protected activity could adversely jeopardize the employment status of a friend or relative."¹²⁹ The court, in reaching its conclusion that third-parties may state a claim for retaliation, gave strong weight to the fact that other courts routinely interpret Title VII broadly and that the EEOC recognizes third-party actions.¹³⁰

In *Thomas v. American Horse Shows Association, Inc.*,¹³¹ the court allowed third-party retaliation where the plaintiff alleged she suffered adverse employment actions because her sister, who worked for the same employer, filed a discrimination claim against their mutual employer.¹³² However, the court ultimately granted summary judgment for the employer because the plaintiff failed to establish a causal nexus between her sister's protected activity and her adverse employment actions.¹³³

e. Unrelated Co-Workers

Some courts have gone as far as to recognize third-party retaliation claims for co-employees who are not related. In *EEOC v. Ohio Edison Co.*,¹³⁴ the Sixth Circuit held that a former employee stated a valid third-party retaliation claim when his offer for reinstatement was withdrawn after a co-employee protested his discriminatory discharge.¹³⁵ Although the court acknowledged that the anti-retaliation provision of Title VII did not explicitly address the situation where an employee suffered retaliation after his representative engaged in a protected activity on his behalf, it noted that a majority of courts construed Title VII "broadly in order not to frustrate [its] purpose."¹³⁶ Courts routinely apply "retaliation provisions of employment statutes to matters not expressly covered by the literal terms

¹²⁸ *Id.*

¹²⁹ *Id.* at 1210.

¹³⁰ *Id.*

¹³¹ No. 97-CV-3513 JG, 1999 WL 287721 (E.D.N.Y. April 23, 1999).

¹³² *Id.* at *12.

¹³³ *Id.* at *13–14. Specifically, the court felt that because a year and a half had passed between the activities, there was no temporal proximity between the two actions. *Id.* at *13. Thus, the plaintiff's reliance on the fact that her problems at work escalated after her sister's complaint was insufficient to establish her prima facie case. *Id.*

¹³⁴ 7 F.3d 541 (6th Cir. 1993).

¹³⁵ *Id.* at 546.

¹³⁶ *Id.* at 544.

of these statutes where the policy behind the statute supports a non-exclusive reading of the statutory language.”¹³⁷

In *Ohio Edison*, the court construed the phrase “he has opposed any practice” to mean “he or his representative has opposed any practice” because it was consistent with the section’s purpose of prohibiting retaliation against protected activity.¹³⁸ The opposite, restrictive interpretation of the section “would allow an employer to retaliate with impunity if someone engaged a representative to act on his behalf and would frustrate the Act’s purpose to prevent retaliation for opposing unlawful employment practices.”¹³⁹

The court noted that the causal link between the person retaliated against and the person engaged in the protected activity was clear because the co-worker was protesting the allegedly discriminatory discharge of the plaintiff.¹⁴⁰ Further, the court broadly construed the statute to protect third-parties because they believed it was consistent with the Title VII anti-retaliation provision’s purpose of prohibiting retaliation against protected activity.¹⁴¹

III. ANALYSIS

The anti-retaliation provision of Title VII is intended, in part, to encourage employees who believe they have been discriminated against by their employer to come forward and report their concerns without fear of reprisal.¹⁴² As stated by the Supreme Court, the purpose of the anti-retaliation provision of Title VII is to provide “unfettered access to statutory remedial mechanisms.”¹⁴³ Allowing third-party retaliation claims is thus consistent with the purpose of Title VII. Not affording protections to third-parties may very well deter employees from exercising their protected rights out of fear that employers will retaliate against their relatives or friends.¹⁴⁴

The Supreme Court should grant certiorari on a third-party retaliation case to resolve the circuit split regarding whether such causes of action exist under Title VII. The Court should adopt the view of the Sixth,

¹³⁷ *Id.* at 545.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 546.

¹⁴¹ *Id.*

¹⁴² See Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 20 (2005).

¹⁴³ *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997).

¹⁴⁴ See *De Medina v. Reinhardt*, 444 F. Supp. 573, 580 (D.D.C. 1978).

Seventh, and Eleventh Circuits,¹⁴⁵ which allow third-party retaliation claims by interpreting the anti-retaliation provision of Title VII broadly.¹⁴⁶

A. Support for Broad Interpretation of Title VII

There is much support for interpreting Title VII broadly.¹⁴⁷ Most notably, a recent trend in Supreme Court decisions has liberalized the scope and meaning of the anti-retaliation provision of Title VII.¹⁴⁸ Overall, the line of cases contains a common theme: If an employer retaliates against an employee, and the employer's actions are not explicitly covered by the anti-retaliation provision of Title VII, the Court is willing to expand Title VII to extend protection to these employees. Each time, the Court reasons that the rationale behind Title VII is to provide clear access to statutory remedies, and if the employer's actions prevent this, the employee should be provided protection. The Court should continue this trend and expand the anti-retaliation provision of Title VII to offer protection to third-parties who have suffered an adverse employment action because of the protected activity of a family member or close associates.

*I. Robinson v. Shell Oil Co.*¹⁴⁹

In *Robinson*, the Supreme Court broadened the scope of Title VII by holding that former employees are covered by the anti-retaliation provision.¹⁵⁰ In *Robinson*, an employee filed an employment discrimination charge with the EEOC under Title VII after he was fired by his employer.¹⁵¹ While his discrimination charge was pending, the employee applied for a job with another company, which contacted his

¹⁴⁵ See *supra* note 4 and accompanying text.

¹⁴⁶ See *Shell Oil Co.*, 519 U.S. at 346. According to the Supreme Court, "It is a well-established canon of statutory construction that a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute." *Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (1983).

¹⁴⁷ See, e.g., *Moyo v. Gomez*, 40 F.3d 982, 985 (9th Cir. 1994) (stating that Title VII is a remedial statute and has long been interpreted broadly); *B.T. Jones v. Flagship Int'l*, 793 F.2d 714, 726 (5th Cir. 1986) ("[T]he provisions of Title VII must be construed broadly in order to give effect to Congress' intent in eliminating invidious employment practices.").

¹⁴⁸ See discussion *infra* Part III.1.a-c.

¹⁴⁹ 519 U.S. 337 (1997).

¹⁵⁰ *Id.* at 346.

¹⁵¹ *Id.* at 339.

former employer for a reference.¹⁵² Claiming the former employer gave him a negative reference in retaliation for filing the EEOC charge,¹⁵³ the employee filed a retaliation suit under Title VII, which makes it unlawful “for an employer to discriminate against any of his *employees* or applicants for employment” who have availed themselves of the statute’s protections.¹⁵⁴ The Court held that the term “employees,” as used in the anti-retaliation provision of Title VII, includes former employees, thus allowing plaintiffs to sue their former employers for retaliatory post-employment actions.¹⁵⁵

The Court reasoned that reading the statute narrowly effectively eliminates coverage for employment-discharge retaliation, a consequence contrary to the purpose of the statute.¹⁵⁶ In reaching its conclusion, the Court relied heavily on the EEOC’s position that to disallow claims by former employees would allow “an employer to be able to retaliate with impunity against” terminated employees.¹⁵⁷ The Court warned against courts creating “a perverse incentive for employers to fire employees” that would “undermine the effectiveness of Title VII.”¹⁵⁸

2. *Crawford v. Metropolitan Government of Nashville*¹⁵⁹

Crawford is the most recent Supreme Court decision in which the Court broadly interpreted Title VII. Here, the Court held that protection from the anti-retaliation provision of Title VII “extends to an employee who speaks out about discrimination not on her own initiative, but in answering questions during an employer’s internal investigation.”¹⁶⁰ In *Crawford*, the employer pursued an internal investigation regarding allegations of sexual harassment against Dr. Gene Hughes.¹⁶¹ The employer’s Human Resources representative interviewed several women, including Petitioner Vicky Crawford.¹⁶² During the interview, Crawford

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 339–40 (emphasis added).

¹⁵⁵ *Id.* at 346.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ 129 S. Ct. 846 (2009).

¹⁶⁰ *Id.* at 849.

¹⁶¹ *Id.*

¹⁶² *Id.*

related several specific instances of sexual harassment by Hughes.¹⁶³ Ultimately, the investigation concluded that no witnesses could corroborate the extent of the harassment that the employees complained of, and therefore, the employer took no disciplinary action against Hughes.¹⁶⁴ After the employer concluded the investigation, Crawford was fired on charges of embezzlement,¹⁶⁵ which she stated were “found to be unfounded.”¹⁶⁶ Other women interviewed during the internal investigation were similarly discharged.¹⁶⁷ Crawford then filed a charge of discrimination with the EEOC and brought suit, alleging retaliation under Title VII.¹⁶⁸

In reversing the Sixth Circuit, the Supreme Court held that the anti-retaliation provision’s protection extends to an employee who answers questions during an employer’s internal investigation.¹⁶⁹ The Court stated that Crawford’s statement was covered by the opposition clause because “‘oppose’ goes beyond ‘active, consistent’ behavior in ordinary discourse” and may be used to describe “someone who has taken no action at all to advance a position beyond disclosing it.”¹⁷⁰ Thus, a person can “‘oppose’ by responding to someone else’s question just as surely as by provoking the discussion.”¹⁷¹

The Court reasoned that the statute’s “primary objective” is to avoid retaliatory harm to employees.¹⁷² Thus, if it were permissible “that an employee who reported discrimination in answering an employer’s questions could be penalized with no remedy, prudent employees would have a good reason to keep quiet about Title VII offenses against themselves or against others.”¹⁷³ As reiterated by the Court, “This is no imaginary horrible given the documented indications that [f]ear of

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Crawford v. Metro. Gov’t of Nashville & Davidson County, Tenn.*, 211 Fed. App’x. 373, 375 (6th Cir. 2006), *rev’d*, 129 S. Ct. 846 (2009).

¹⁶⁷ *Crawford*, 129 S. Ct. at 849.

¹⁶⁸ *Id.* at 849–50.

¹⁶⁹ *Id.* at 849.

¹⁷⁰ *Id.* at 851.

¹⁷¹ *Id.*

¹⁷² *See id.* at 852 (citing *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998)).

¹⁷³ *Crawford*, 129 S. Ct. at 852.

retaliation is the leading reason why people stay silent instead of voicing their concerns about bias and discrimination.”¹⁷⁴

3. Burlington Northern & Santa Fe Railway Co. v. White

Arguably, the Supreme Court’s most broad interpretation of the anti-retaliation provision of Title VII appeared in *Burlington Northern*, where the Court held that a plaintiff “must show that a reasonable employee would have found the challenged action *materially adverse*, ‘which in this context means it well might have dissuaded a *reasonable worker* from making or supporting a charge of discrimination.’”¹⁷⁵ Thus, after *Burlington Northern*, retaliation can be actionable even when the alleged adverse employment action did not affect any change in the employee’s “salary, benefits, job title, grade, or hours of work”¹⁷⁶

In *Burlington Northern*, an employer reassigned the plaintiff from her position to a less desirable job after she had filed a discrimination complaint at work.¹⁷⁷ The employee then filed a complaint with the EEOC, alleging her reassignment constituted unlawful gender discrimination and retaliation in response to her discrimination claim.¹⁷⁸ The employee subsequently filed suit under Title VII, claiming her transfer constituted retaliation in response to her internal complaint and the charge of sexual discrimination filed with the EEOC.¹⁷⁹ This case confronted the Court with the question of whether the employer’s transfer constituted an adverse employment action.¹⁸⁰ The Court ultimately found for the employee, holding that the transfer was a “materially adverse” action that would have dissuaded a reasonable worker from making or supporting a charge of discrimination.¹⁸¹

Prior to *Burlington Northern*, however, the circuits varied greatly as to what constituted an adverse employment action.¹⁸² The legislative history

¹⁷⁴ *Id.* (quoting Brake, *supra* note 142, at 20).

¹⁷⁵ *Burlington N. & Santa Fe Ry Co. v. White*, 548 U.S. 53, 68 (2006) (quoting Rochon v. Gonzales, 438 F.3d 1211, 1219 (D.C. Cir. 2006)) (emphasis added).

¹⁷⁶ *Kessler v. Westchester County Dep’t of Soc. Servs.*, 461 F.3d 199, 200 (2d Cir. 2006) (relying on *Burlington N.*).

¹⁷⁷ *Burlington N.*, 548 U.S. at 59.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 69.

¹⁸² *Compare Ledergerber v. Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997) (holding “[a] transfer involving only minor changes in working conditions and no reduction in pay or
(continued)

of Title VII provided little guidance other than the idea that “[management] prerogatives . . . are to be left undisturbed to the greatest extent possible.”¹⁸³ Because of the unclear statutory language and the negligible legislative history surrounding the scope of Title VII’s anti-retaliation provision, the federal circuits adopted three different interpretations of adverse employment action: restrictive, intermediate, and expansive.¹⁸⁴ Thus, *Burlington Northern* presented the Supreme Court with the challenge of analyzing the circuit court’s three interpretations of adverse employment action and determining which best carried out the purpose of Title VII.

a. Restrictive Approach

Under one line of cases, the Fifth and Eighth Circuits applied a standard that did no more than prohibit employers from using “ultimate employment decision[s]” to retaliate against workers who engaged in protected activities.¹⁸⁵ Such decisions included termination, demotion, granting leave, and reducing compensation.¹⁸⁶ Under this standard, an employer would be liable only for the most egregious forms of retaliatory

benefits” was not adverse employment action), *and Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707–08 (5th Cir. 1997) (holding hostility from fellow employees, theft of an employee’s tools, verbal threat of termination, and reprimand for not being at an assigned station were not adverse employment actions), *with Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1455–56 (11th Cir. 1998) (holding that requiring the plaintiff to work without a lunch break, imposing a one-day suspension, soliciting other employees for negative statements about employee, changing the employee’s schedule without notification, and delaying authorization for medical treatment were adverse employment actions), *and Knox v. Indiana*, 93 F.3d 1327, 1334 (7th Cir. 1996) (holding that “moving the person from a spacious, brightly lit office to a dingy closet, depriving the person of previously available support services . . . or cutting off challenging assignments” could constitute adverse employment action).

¹⁸³ Cude & Steger, *supra* note 47, at 397.

¹⁸⁴ See, e.g., Riddell & Bales, *supra* note 42, at 313–14.

¹⁸⁵ See *Mattern*, 104 F.3d at 703; *Manning v. Metro. Life Ins. Co.*, 127 F.3d 686, 692 (8th Cir. 1997).

¹⁸⁶ See *Dollis v. Rubin*, 77 F.3d 777, 782 (5th Cir. 1995) (relying on *Page v. Bolger*, 645 F.2d 227, 233 (4th Cir. 1981)). In *Dollis*, the plaintiff alleged, *inter alia*, that she was refused opportunities for promotion, denied attendance at a training conference, and given false information regarding the procedure for procuring government travel funds. *Id.* at 779–80. The court found these were not in themselves “ultimate employment decisions,” although they “arguably might have some tangential effect upon those ultimate decisions.” *Id.* at 781–82.

conduct, even though more subtle acts might have just as easily and effectively dissuaded employees from reporting or opposing unlawful discrimination.

b. Intermediate Approach

A second group of cases decided by the Third, Fourth, and Sixth Circuits required a strong connection between the retaliatory conduct and the employment.¹⁸⁷ In general, these cases required plaintiffs to show they suffered “materially adverse action” that negatively affected the “terms, conditions, or benefits of [their] employment.”¹⁸⁸ This approach was criticized for its failure to recognize that retaliation takes many forms and that “[t]he real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships, which are not fully captured by a simple recitation of the words used or the physical acts performed.”¹⁸⁹

c. Expansive Approach

Employees under the jurisdiction of the First, Seventh, Ninth, Eleventh, and D.C. Circuits were afforded the broadest construction of the anti-retaliation provision of Title VII.¹⁹⁰ Under the expansive approach,

¹⁸⁷ See *White v. Burlington N. & Santa Fe Ry. Co.*, 364 F.3d 789, 795 (6th Cir. 2004), *aff'd*, 548 U.S. 53 (2006) (holding that the “adverse employment action” standard requires that plaintiff must show “materially adverse change in the terms and conditions of [the plaintiff’s] employment”) (citations omitted); *Von Gunten v. Maryland*, 243 F.3d 858, 865–66 (4th Cir. 2001) (holding that a temporary withdrawal of the use of a state vehicle and a downgraded performance review were not actionable retaliation where the use of the vehicle was not an employment “benefit,” and performance review did not affect “the terms, conditions, or benefits of employment”); *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1300 (3d Cir. 1997) (holding that “unsubstantiated oral reprimands” and “unnecessary derogatory comments” suffered by a police officer did not rise to the level of adverse employment action because such conduct did not affect “compensation, terms, conditions, or privileges of employment”).

¹⁸⁸ See *Von Gunten*, 243 F.3d at 865–66.

¹⁸⁹ *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (citing *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81–82 (1998)).

¹⁹⁰ See *Marrero v. Goya of P.R., Inc.*, 304 F.3d 7, 23 (1st Cir. 2002) (holding a transfer not affecting salary or job description after a secretary filed an EEOC charge did not constitute materially adverse action as “gauged by an objective standard”); *Washington v. Ill. Dep’t of Revenue*, 420 F.3d 658, 662 (7th Cir. 2005) (holding removal of an employee’s “flex-time” schedule could constitute actionable retaliation because the schedule was specifically designed to accommodate the employee’s expressed need to care for the

(continued)

any materially adverse action reasonably likely to deter an employee from engaging in a protected activity constituted actionable retaliation.¹⁹¹ Thus, an employer faced potential liability for unlawful retaliation even though the charged conduct was not an “ultimate employment decision[]” or one with a close nexus to the employment, so long as it might have dissuaded a reasonable worker from exercising his or her rights under Title VII.¹⁹² “Advocates of this approach argue the expansive construction of retaliation is sufficient to encompass all types of conduct aimed at dissuading workers from reporting unlawful activity.”¹⁹³ “In addition, they contend that the materiality requirement makes it unlikely ‘petty slights, minor annoyances, and simple lack of good manners’ will form actionable offenses.”¹⁹⁴

In *Burlington Northern*, the Court chose the expansive approach because it best reflected the primary objectives of Title VII’s anti-retaliation provision, which are to “prevent an employer from interfering with an employee’s efforts to secure or advance enforcement of the Act’s basic guarantees.”¹⁹⁵ The Court’s decision to adopt the expansive approach signaled that it would eschew bright-line rules in favor of a more elastic conceptual basis for the scope of retaliation protection by adopting a case-by-case approach to the “adverse employment action” prong of a retaliation claim. The Court expanded adverse employment action beyond tangible detriments to anything which would dissuade a reasonable worker from making or supporting a charge of discrimination, not just one adversely affecting the individual’s employment status or opportunities.¹⁹⁶

employee’s disabled son); *Ray v. Henderson*, 217 F.3d 1234, 1242–43 (9th Cir. 2000) (holding that the plaintiff only needed to show “adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity”); *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1455–57 (11th Cir. 1998) (holding that depriving an employee of a lunch break, suspending the employee from work, asking other employees for negative statements about the particular employee, changing the employee’s schedule without notice, and delaying authorization for medical treatment constituted adverse employment actions); *Rochon v. Gonzales*, 438 F.3d 1211, 1213 (D.C. Cir. 2006) (holding the FBI’s refusal to investigate death threats made against an agent constituted actionable retaliation where such conduct was motivated by an intent to retaliate against the agent for previously filing a race discrimination claim).

¹⁹¹ See *Riddell & Bales*, *supra* note 42, at 313.

¹⁹² *Burlington N.*, 548 U.S. at 57, 60, 66.

¹⁹³ *Ryan*, *supra* note 43, at 751.

¹⁹⁴ *Id.* (citing *Burlington N.*, 548 U.S. at 57).

¹⁹⁵ *Burlington N.*, 548 U.S. at 54.

¹⁹⁶ See *id.* at 75–76 (Alito, J., concurring).

B. The Supreme Court Should Grant Certiorari to Provide Consistency Throughout All Circuit Courts.

Circuit courts currently interpret the anti-retaliation provision of Title VII differently. Employees in some circuits are protected from retaliation arising from the protected actions of their relatives or close associates,¹⁹⁷ but employees in other circuits are not.¹⁹⁸ Resolving the circuit split would lead to uniform application of Title VII to employees everywhere.¹⁹⁹ This would provide employees in all circuits with the same protection against the retaliation of a spiteful employer. A uniform and consistent application of Title VII's anti-retaliation provision would enable employees to more clearly understand their rights and remedies and would make cases more predictable. Employers will no longer be able to discriminate against third-parties in some circuits while being prohibited from doing so in others.

It is hard to imagine that Congress, in dictating the terse words of the anti-retaliation provision of Title VII, intentionally chose to not provide protection against retaliation for third-party claims, particularly because the primary goal in passing Title VII was to end discrimination in the work place.²⁰⁰ More likely, as the Seventh Circuit stated, Congress did not provide for third-party retaliation because employers generally have no reason to retaliate against third parties.²⁰¹ Although the majority of people do not work with their relatives,²⁰² such situations nevertheless exist, and these people need the protection of Title VII as much as any other employee if they are to feel secure in voicing their complaints or concerns about discriminatory activity in the workplace. Thus, recognizing third-party claims would not only serve the purpose of the statute, but also it

¹⁹⁷ See discussion *supra* Part II.C.1.

¹⁹⁸ *Id.*

¹⁹⁹ See Schausten, *supra* note 7, at 1333.

²⁰⁰ See *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979) (stating that the purpose of Title VII is "the elimination of discrimination in the workplace"); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975) (explaining that the purpose of Title VII is to make employers examine their work practices in an effort to eliminate discrimination); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973) (noting that the "language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate . . . discriminatory practices").

²⁰¹ See *McDonnell v. Cisneros*, 84 F.3d 256, 262 (7th Cir. 1996).

²⁰² See *Holt v. JTM Indus., Inc.*, 89 F.3d 1224, 1232 (5th Cir. 1996) (Dennis, J., dissenting) (noting that situations in which family members work for the same employer do not happen frequently).

would increase uniformity in decisions among the various courts and increase consistency in the protection provided by the various circuits.

1. Prevention of Frivolous Third-Party Retaliation Claims

Although some courts that deny third-party retaliation claims do so reluctantly in recognition that pernicious results are possible,²⁰³ these circuits do suggest legitimate fears why allowing third-party claims could bring about detrimental results. Particularly, these circuits argue that if any employee could bring a retaliation claim after any other employee engaged in a protected activity, the employer and the courts may have to deal with an abundance of nuisance or frivolous lawsuits.²⁰⁴ This would cost both employers and courts money and time, as retaliation claims have already reportedly doubled in the last decade and now comprise twenty-five percent of all EEOC charges.²⁰⁵

2. Causation as a Means to Prevent Frivolous Claims

Although there is admittedly some danger of an increase in frivolous lawsuits, potential control lies in the concept of causation.²⁰⁶ None of the courts allowing third-party claims suggest that coverage should be

²⁰³ See *id.* at 1227 (noting that a failure to recognize third-party retaliation claims might expose employees' relatives and friends to retaliation for the complaining employees' actions); see also *Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 569 (3d Cir. 2002) (explaining that although recognition of third-party claims would be more consistent with the purpose of the statute, Congress possibly did not extend protection to third parties because they may have participated in filing the charge); *De Medina v. Reinhardt*, 444 F. Supp. 573, 580 (D.D.C. 1978) (noting that an employer who retaliates against the friends and relatives of employees who initiate anti-discrimination proceedings will deter employees from exercising their protected rights).

²⁰⁴ *Fogleman*, 283 F.3d at 570 ("Congress may have feared that expanding the class of potential anti-discrimination plaintiffs beyond those who have engaged in protected activity to include anyone whose friends or relatives have engaged in protected activity would open the door to frivolous lawsuits . . .").

²⁰⁵ Thomas H. Barnard & Adrienne L. Rapp, *Are We There Yet? Forty Years After the Passage of the Civil Rights Act: Revolution in the Workforce and the Unfulfilled Promises That Remain*, 22 HOFSTRA LAB. & EMP. L.J. 627, 658 (2005).

²⁰⁶ See *EEOC v. Ohio Edison Co.*, 7 F.3d 541, 546 (6th Cir. 1993) (stating that the third-party plaintiff must show a causal connection to prevent the absurd situation where anytime an employer takes an adverse action against one employee, another employee that has engaged in protected activity may bring a claim of retaliation); *Holt*, 89 F.3d at 1232 (Dennis, J., dissenting) (emphasizing that the focus should not be on standing, but on causation).

extended to the “bare relationship of co-employees” without more.²⁰⁷ Courts should recognize third-party claims, but give the plaintiff no special treatment and require the third party to meet all of the normal requirements of a retaliation claim.

The Sixth Circuit noted that its decision in *EEOC v. Ohio Edison Co.*, which opened the door to third-party claims, did not cause an increase of litigation under this theory.²⁰⁸ Moreover, the Sixth Circuit noted that, even if such cases could be filed, “[t]he requirement of a prima facie case in general, and a causal link specifically protect employers from defending against meritless suits.”²⁰⁹ The court was more concerned with the contrary ruling, “[t]hat is, permitting employers to retaliate with impunity for opposition to unlawful practices, filing EEOC charges or otherwise participating in such efforts, as long as that retaliation is only directed at family members and friends, and not the individual conducting the protected activity.”²¹⁰

Courts should examine the inference of causation by temporal proximity alone, or by the context of the relationship between the plaintiff and the employee who took the protected action and the circumstances of the adverse action. It is nonsensical to set bright-line, exact time periods because employers would simply wait until the day after the time period ended and then take adverse actions without bearing the consequence of retaliation claims.²¹¹ The facts of each case will differ, and the length of the time period courts allow to infer causation should be adjusted accordingly.

IV. CONCLUSION

The Supreme Court should grant certiorari to resolve the current circuit split on third-party retaliation claims. The circuit split should be resolved in favor of courts allowing third-parties to have a cause of action if employers retaliate against them for the protected activities of other

²⁰⁷ *Millstein v. Henske*, 722 A.2d 850, 854 (D.C. 1999); *see also* *O’Connell v. Isocor Corp.*, 56 F. Supp. 2d 649, 654 (E.D. Va. 1999) (stating that although the court had recognized standing for third-party retaliation claims, it only did so in cases of closely-associated persons, not just “two people whose only connection is that they happened to work for the same company”).

²⁰⁸ *Thompson v. N. Am. Stainless, LP*, 520 F.3d. 644, 649 (6th Cir. 2008).

²⁰⁹ *Id.* at 650.

²¹⁰ *Id.*

²¹¹ *See* Justin P. O’Brien, *Weighing Temporal Proximity in Title VII Retaliation Claims*, 43 B.C. L. REV. 741, 768–69 (2002).

workers. The recent Supreme Court trend has liberalized the scope and meaning of the anti-retaliation provision of Title VII. The Court should continue this trend, and expand the scope and meaning of the anti-retaliation provision of Title VII to offer protection to third parties who have suffered an adverse employment action as a result of a protected activity by a family member or a close associate. Recognition of third-party claims will allow employees to exercise their rights to report discrimination and put employers on notice that no retaliation is permissible, thus safeguarding the purpose of Title VII. Though this expansion of Title VII's scope could potentially result in the filing of a greater number of lawsuits, critics should remember frivolous claims will still fail when plaintiffs cannot meet the causation prong.

