


2012

Family, Cubicle Mate and Everyone in Between: A Novel Approach to Protecting Employees from Third-Party Retaliation Under Title VII and Kindred Statutes

Matthew W. Green Jr.
Cleveland State University, m.w.green@csuohio.edu

Follow this and additional works at: https://engagedscholarship.csuohio.edu/fac_articles

 Part of the [Civil Rights and Discrimination Commons](#), and the [Labor and Employment Law Commons](#)
How does access to this work benefit you? Let us know!

Original Citation

Matthew Green, Family, Cubicle Mate and Everyone in Between: A Novel Approach to Protecting Employees from Third-Party Retaliation Under Title VII and Kindred Statutes, 30 Quinnipiac L. Rev. 249 (2012).

This Article is brought to you for free and open access by the Faculty Scholarship at EngagedScholarship@CSU. It has been accepted for inclusion in Law Faculty Articles and Essays by an authorized administrator of EngagedScholarship@CSU. For more information, please contact research.services@law.csuohio.edu.

HEINONLINE

Citation: 30 Quinnipiac L. Rev. 249 2011-2012



Content downloaded/printed from
HeinOnline (<http://heinonline.org>)
Thu Dec 5 22:03:26 2013

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/cc/basicSearch.do?
&operation=go&searchType=0
&lastSearch=simple&all=on&titleOrStdNo=1073-8606](https://www.copyright.com/cc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=1073-8606)

FAMILY, CUBICLE MATE AND EVERYONE IN BETWEEN: A NOVEL APPROACH TO PROTECTING EMPLOYEES FROM THIRD-PARTY RETALIATION UNDER TITLE VII AND KINDRED STATUTES

Matthew W. Green Jr. *

I. INTRODUCTION

Is the Supreme Court “pro-employee?” Some may question the seriousness of that inquiry considering some of the Court’s recent employment discrimination decisions, which have been cast as favoring businesses rather than the people they employ.¹ Indeed, in 2009, the Congressional House Subcommittee on the Constitution, Civil Rights and Civil Liberties held a hearing entitled *Civil Rights Under Fire: Recent Supreme Court Decisions* that critiqued the narrow interpretation the Court has recently given civil rights statutes, including employment discrimination laws, the effects of those interpretations and what, if anything, Congress could do about it.² In his opening remarks, the

* Assistant Professor, Cleveland-Marshall College of Law; LL.M., Columbia University, Harlan Fiske Stone Scholar; J.D., University of Baltimore School of Law, Magna Cum Laude; B.A., University of Maryland, College Park; law clerk to the Hon. Eric L. Clay, U.S. Court of Appeals for the Sixth Circuit, 2001-2002 and the Hon. Deborah K. Chasanow, U.S. District Court for the District of Maryland, 2000-2001. I owe very special thanks to the Cleveland-Marshall Fund and the Summer Research Grants Committee at the Cleveland-Marshall College of Law for providing the support necessary to work on this project. I also owe thanks to Professor Michael Hayes at the University of Baltimore School of Law for his mentorship and our numerous helpful discussions regarding the Supreme Court’s recent retaliation decisions. Similarly, I owe thanks to Professor Michael Z. Green at Texas Wesleyan University School of Law for his very helpful comments and critiques of an earlier draft of this article. I would also like to thank my colleagues Professors Susan J. Becker, Lolita Buckner Innis, Browne C. Lewis and Brian E. Ray at the Cleveland-Marshall College of Law for their comments and encouragement regarding this article, as well as to my research assistants Sarena Holder and Jill Battagline-Goff for their hard work. Each person listed in this footnote provided invaluable assistance, and any shortcomings appearing in this article are solely my own.

1. See *infra* note 3 and accompanying text.

2. See *Civil Rights Under Fire: Recent Supreme Court Decisions Before the Subcomm.*

Subcommittee Chair Michigan Representative John Conyers Jr. proclaimed that the Court had recently “interpret[ed] statutes so narrowly that [it has] weaken[ed] . . . employment rights of Americans.”³

Those sentiments expressed during the congressional hearing may be true of some of the Court’s recent employment discrimination decisions,⁴ but the Court has taken a decidedly less restrictive path when interpreting the anti-retaliation provisions under employment discrimination statutes, particularly Title VII. As one commentator recently noted, the inquiry about a “pro-employee” Court may be a reasonable one when considering recent retaliation decisions.⁵ Since 2006, the Court has decided five cases regarding workplace retaliation.

on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary, 111th Cong. (2009), available at http://judiciary.house.gov/hearings/printers/111th/111-32_52708.PDF.

3. *Id.* (statement of the Hon. John Conyers, Jr.), available at <http://judiciary.house.gov/hearings/pdf/Conyers091008.pdf>. Two of the cases that Representative Conyers referenced to demonstrate his point that the Court has too narrowly interpreted civil right statutes were employment discrimination decisions, *Ledbetter v. Goodyear Tire and Rubber Co.*, 550 U.S. 618 (2007), and *Gross v. FBL Financial Services*, 557 U.S. 167, 129 S. Ct. 2343 (2009). Both *Ledbetter* and *Gross* were decided by a five-to-four vote and split along ideological lines. In *Ledbetter*, a five-member majority of the Court interpreted Title VII of the Civil Rights Act of 1964 to narrow the window of time in which a plaintiff must challenge an alleged discriminatory pay-setting decision. *See Ledbetter*, 550 U.S. at 623–25. Congress subsequently abrogated *Ledbetter* with the Lilly Ledbetter Fair Pay Act. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.); *see also* 42 U.S.C.A. § 2000e-5(e)(3)(A) (West 2011). In *Gross*, the same five-member majority reversed every court of appeals to have decided the issue and held that under the Age Discrimination in Employment Act (“ADEA”), a plaintiff alleging age discrimination could no longer hold an employer liable under the statute simply by showing that age, in part, motivated an adverse employment decision. *Gross*, 129 S. Ct. at 2350. Rather, age had to be *the reason* for the adverse employment decision for liability to arise under the statute. *See id.* at 2355–56. *But see id.* at 2355 n.5, 2356 (Stevens, J., dissenting) (explaining that courts of appeals to have considered the matter held a mixed-motive theory applicable to ADEA claims). Cases such as *Gross* and *Ledbetter* have caused the Roberts Court to be painted as being hostile to employment discrimination protections for workers. *See, e.g.*, Erwin Chemerinsky, *The Roberts Court at Age Three*, 54 WAYNE L. REV. 947, 962 (2008) (calling the Roberts Court the most pro-business since the mid-1930s and arguing that this is “manifest in many different areas” including “employment discrimination”).

4. *See supra* note 3 and accompanying text.

5. *See* Michael J. Zimmer, *A Pro-Employee Supreme Court?: The Retaliation Decisions*, 60 S.C. L. REV. 917, 917–18 (2009) (answering the question of whether the Court is pro-employee in the affirmative when it comes to retaliation and arguing that, in its retaliation decisions, the Court has taken a pragmatic approach to interpreting anti-discrimination statutes).

The plaintiff prevailed in each case.⁶ None were decided by a five-to-four vote, representing the classic ideological split among current justices. The most recent decision, *Thompson v. North American Stainless LP*, was unanimous.⁷

Thompson continues the Court's "pro-employee" trend, at least as far as its retaliation decisions go, by recognizing the viability of third-party retaliation claims under Title VII and kindred statutes, an issue that had divided the lower courts for decades.⁸ Third-party reprisal claims arise when an employee engages in "protected activity" under the statute, such as complaining to an employer or the Equal Employment Opportunity Commission ("EEOC") about unlawful discrimination, but is not punished directly by the employer for doing so.⁹ Such persons who complain about workplace discrimination are sometimes labeled "troublemakers."¹⁰ Under the typical retaliation paradigm, an employer punishes the troublemaker directly for engaging in protected activity. In the context of third-party retaliation, however, the employer indirectly punishes the troublemaker by targeting the troublemaker's "friend."¹¹ The word "friend" is used here in its broadest sense; the person who is punished is often more than just a friend, such as a spouse, relative or a romantic partner.¹² *Thompson* now determines which "friends" will be protected against third-party retaliation.¹³

This Article begins the discussion in the post-*Thompson* era of who

6. See *Thompson v. N. Am. Stainless LP*, 131 S. Ct. 863, 870 (2011) (reversing lower court judgment in favor of employer and holding that Title VII makes third-party retaliation unlawful); *Crawford v. Metro. Gov't*, 555 U.S. 271, 274 (2009) (reversing lower court in favor of employer and holding that anti-retaliation provision extends protection to employees who participate in an employer's internal investigation into discrimination by answering questions about potential discrimination they have witnessed); *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 445 (2008) (holding retaliation cause of action viable under 42 U.S.C. § 1981 although statute says nothing expressly about retaliation); *Gomez-Perez v. Potter*, 553 U.S. 474, 477 (2008) (same holding as in *CBOCS*—in this case involving the federal-sector provisions of the Age Discrimination in Employment Act, which also does not contain an express anti-retaliation provision); *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 70 (2006) (affirming jury verdict in favor of employee in Title VII anti-retaliation decision).

7. 131 S. Ct. 863.

8. See discussion *infra* Part III.A.1–2.

9. See *Thompson*, 131 S. Ct. at 868.

10. Alex B. Long, *The Troublemaker's Friend: Retaliation Against Third Parties and the Right of Association in the Workplace*, 59 FLA. L. REV. 931, 933 (2007).

11. *Id.*

12. See discussion *infra* Part III.B.1–2.

13. See discussion *infra* Parts III.D., IV.

should be protected against third-party retaliation and when. It demonstrates that third-party retaliation should extend beyond protecting individuals involved in close, intimate relationships. Moreover, it shows that understanding third-party retaliation in this light is consistent with *Thompson*, Title VII's broadly worded anti-discrimination statute, and the purposes that underlie it.

The potential effects of *Thompson* are broad. First, third-party retaliation claims have arisen under virtually all federal anti-discrimination statutes.¹⁴ While *Thompson* arose under Title VII, that decision and interpretations of it will, in all likelihood, apply to other federal anti-discrimination statutes with similarly worded anti-retaliation provisions.¹⁵ Moreover, the Court rejected any definitive line drawing regarding the employees or types of relationships that warrant protection against third-party retaliation.¹⁶ Instead, the Court relied on another of its recent retaliation cases, *Burlington Northern & Santa Fe Railway Co. v. White*,¹⁷ to guide courts in determining whom to protect against third-party retaliation and when. *Burlington* held that an employer violates Title VII's anti-retaliation provisions when, in response to an employee's protected activity, the employer takes action that a reasonable employee would find materially adverse.¹⁸ *Thompson* applies *Burlington* in the context of a third-party retaliation claim.¹⁹ The third party who does not complain of discrimination is protected against an employer's retaliatory act if that retaliation might dissuade a reasonable

14. See Brief for Petitioner at 5–6, *Thompson v. N. Am. Stainless*, 131 S. Ct. 863 (2011) (No. 09-291), 2010 WL 3501186 at *5–6 (noting that “[t]he problem of reprisals against third parties is not limited to Title VII,” but has arisen under “[v]irtually all federal statutes governing the employment relationship,” including the ADEA, ADA, the Occupational Safety and Health Act (“OSHA”), and the Family Medical Leave Act (“FMLA”)).

15. See discussion *infra* note 86 and accompanying text (explaining that the anti-retaliation provisions of Title VII and several other anti-discrimination statutes, such as the ADA and ADEA, are similar if not identical and courts have typically interpreted the anti-retaliation provisions of these disparate statutes similarly). At least one court has suggested that *Thompson*'s holding also may apply to civil rights statutes that do not contain an express anti-retaliation provision similar to Title VII but that nevertheless have been interpreted to protect against retaliation. See *Condiff v. Hart County School Dist.*, 770 F. Supp. 2d 876, 883 n.4 (W.D. Ky. 2011) (noting that in light of *Thompson*, plaintiff may be able to state a prima facie case of third-party retaliation under Title IX, which contains no express anti-retaliation provision but is analyzed using the standard used for Title VII claims).

16. *Thompson*, 131 S. Ct. at 868.

17. 548 U.S. 53 (2006).

18. *Id.* at 68.

19. See *Thompson*, 131 S. Ct. at 867–70.

person in the position of the complaining employee (i.e., the troublemaker) from engaging in protected activity.²⁰

Before *Thompson*, most courts that recognized the viability of third-party retaliation claims under Title VII or kindred statutes required a “close relationship” between the employee who engaged in protected activity and the employee who suffered an adverse action as a result.²¹ In some cases, recognition extended only to a familial relationship between the employees.²² A close, intimate relationship between employees continues to be relevant to third-party retaliation post *Thompson*, but the scope of protection that *Thompson* affords employees is not limited to instances where such relationships exist.²³ To the contrary, *Thompson* declined to identify a fixed class of relationships for which third-party retaliation is unlawful.²⁴

Consistent with *Thompson*, this Article rejects a formalistic, mechanical approach to third-party retaliation of extending protection against third-party retaliation when a fixed-class of relationships is alleged and rejecting them in all other cases. Rather, the Article argues that the material adversity standard should be read broadly to protect an individual whenever there is proof that the employer targeted him or her to punish a coworker who engaged in protected activity. The Article further argues that, barring any circumstances unique to a particular case, courts should find the material adversity hurdle cleared if the adverse action alleged would meet the material adversity standard had the employer taken that action directly against the person who engaged in protected activity. Taking this approach to third-party retaliation would at a minimum bar employers from doing indirectly to a third-party—because of her association with the employee who engaged in protected activity—what they undisputedly could not do directly to the complaining employee herself because of her protected activity.

This Article demonstrates that, properly interpreted, *Thompson* should protect third parties who, in some cases, do not fit the traditional

20. See *id.* at 868 (“We think it is obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired.”).

21. See *id.* As used in this Article, the word “close,” as in “close relationship,” “close associate,” or “close association,” refers to a relationship associated with intimacy or a close affective bond, such as one between family members, love interests, or good friends; the cases addressing third-party retaliation have used the word “close” in that context. See *id.*

22. See discussion *infra* Part III.B.1–2.

23. See *Thompson*, 131 S. Ct. at 868.

24. *Id.*

third-party reprisal paradigm in which the third party is a relative, paramour or close friend.²⁵ For example, pre-*Thompson*, a plaintiff alleged third-party retaliation under the following set of facts:

George Cotton, a supervisory employee working for a large employer, engaged in protected activity under Title VII. He subsequently requested that one of his subordinates, Janice Bates, be given a promotion and raise, which he believed she deserved. Their employer denied Cotton's request. Bates subsequently filed her own charge of discrimination alleging that the employer denied Cotton's request as part of a scheme to punish her and other employees who associated with Cotton in an effort to get back at him for filing a discrimination lawsuit. The EEOC found probable cause that Bates and Cotton's employer denied Bates' promotion and raise because of her association with Cotton.²⁶

Cases in which an employee claiming third-party retaliation alleged only a professional relationship with a coworker who had engaged in protected activity—as in *Bates*—were often summarily rejected prior to *Thompson*.²⁷ This Article demonstrates, however, that extending protection in such a scenario is consistent with the broad, flexible approach to third-party retaliation that *Thompson* adopts.

Despite the broadly worded anti-retaliation provision, there will be some limits on the instances in which employees are protected against retaliation. Those limits flow, in part, from the Court's holdings in *Burlington* and *Thompson*, which do not protect workers against all retaliation but against retaliation the courts find to be materially adverse.²⁸ As explained *infra*, however, the type of relationship alleged should not alone foreclose a claim.

This Article is set forth in four parts. Part II discusses *Burlington*, which set the stage for recognizing the viability of third-party retaliation claims. Part III discusses third-party retaliation and why lower courts

25. See discussion *infra* Part IV.B.

26. *Bates v. Clark County*, No. 2:04-CV-00518-KJD-GWF, 2006 WL 3308214, at *1 (D. Nev. Nov. 13, 2006).

27. See discussion *infra* Part III.B.2.b. The court in this instance did not reject this claim because of the relationship alleged, but because it held that third-party retaliation claims were not-cognizable under Title VII. *Bates*, 2006 WL 3308214, at *3–4. However, for reasons explained later, even if the court was one that recognized third-party retaliation pre-*Thompson*, it is doubtful whether the claim would have survived, particularly in those courts that required a close, intimate relationship between coworkers to state a viable third-party retaliation claim. See *id.* *infra* Part III.B.2.b.

28. See *Thompson v. N. Am. Stainless, LP*, 131 S. Ct. 863, 868–69 (2011); see also discussion *infra* Part IV.A–B.

were split for decades on whether the theory was cognizable under Title VII and kindred statutes. Part III also examines who the classes of employees alleging third-party retaliation have traditionally included and why courts only protected employees involved in certain types of relationships from third-party retaliation. It explains that third-party retaliation plaintiffs without a familial or close emotional bond to the troublemaker received scant protection against this form of retaliation. Part III also discusses *Thompson*, the Court's most recent, and unanimous, retaliation decision, in which the Court expansively interpreted Title VII's anti-retaliation provision by recognizing the viability of third-party retaliation under the statute and rejecting the identification of a fixed class of relationships for which third-party retaliation is unlawful.²⁹ Part IV calls for an expansive approach to analyzing third-party retaliation claims and argues that doing so is consistent with *Thompson*, as well as the broad text and purposes of Title VII. The Article explores an expansive approach to third-party retaliation claims by arguing that third-party retaliation should be actionable even where there exists only a purely professional relationship between the employee who lodged a discrimination complaint and the employee who claimed she suffered an adverse action as a result.

II. *BURLINGTON* AND THE MATERIAL ADVERSITY STANDARD: SETTING THE STAGE FOR THIRD-PARTY RETALIATION CLAIMS

Although it was unknown when it was decided, *Burlington* would later set the stage for recognizing the viability of third-party retaliation claims.³⁰ It was most likely unknown because the case (at least at first blush) had nothing to do with third-party reprisals.³¹ Rather, *Burlington*

29. See *Thompson*, 131 S. Ct. at 868.

30. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006).

31. The facts in *Burlington* are as follows: Sheila White, the only woman working in her department at the defendant's facility, was hired as a track laborer and assigned to operate a forklift. *Id.* at 57. White was subsequently reassigned after her supervisor told her that he had heard complaints that a more "senior man" should have the job as forklift operator. *Id.* at 58. White was later suspended for thirty-seven days without pay after an altercation with her immediate supervisor. *Id.* After an investigation into the altercation, White was reinstated with back pay. *Burlington*, 548 U.S. at 58–59. White claimed that her reassignment and suspension were unlawful retaliation under Title VII. *Id.* at 59. After a jury trial and an *en banc* Sixth Circuit decision in the plaintiff's favor, the Supreme Court granted *certiorari* to resolve a conflict among the circuits about the scope of Title VII's anti-retaliation provisions.

established the standard for determining when an employer's adverse action taken in response to an employee's protected activity under Title VII is sufficiently harmful to be actionable under the statute.³² Specifically, *Burlington* addressed two issues: (1) whether the phrase "discriminate against" under Title VII's anti-retaliation provision confines itself to activity that affects the terms and conditions of employment; and (2) how harmful such activity must be to be actionable under the statute.³³

A. The Meaning of "To Discriminate Against"

Relying on both the broadly worded language and the purposes of the anti-retaliation provision, the Court answered the first question in the negative.³⁴ Title VII's anti-retaliation provision provides:

It shall be 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 [under Title VII], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII].³⁵

By contrast, the substantive provision, among other things, bars employers from discriminating against an employee "with respect to . . . compensation, terms, conditions, or privileges of employment, because of [his or her] race, color, religion, sex, or national origin."³⁶ Thus, the

Id.

32. *Id.* at 57.

33. *See Burlington*, 548 U.S. at 61. The Court also addressed whether the actions taken against White fell within the scope of the statute. *See id.* at 70–73. The Court held that her suspension and reassignment were sufficiently harmful to be actionable under the statute. *See id.*

34. *Id.* at 57.

35. 42 U.S.C. § 2000e-3(a) (2006) (emphasis added).

36. *Id.* § 2000e-2(a)(1). The statute provides that:

It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual employment opportunities . . . because of such individual's race, color, religion, sex, or national origin.

Id. § 2000e-2(a)(1)–(2).

text of the substantive provision limits the scope of Title VII's protection to actions that affect or alter the conditions of employment.³⁷ The anti-retaliation provision, on the other hand, contains no such limiting language. The language merely provides that an employer may not "discriminate against," or as more generally understood "retaliate against," an employee because of that individual's protected activity.³⁸ The language in the two provisions differs, and the Court presumed that Congress intended that difference to matter.³⁹

Moreover, according to the Court, the underlying purpose of the anti-retaliation provision reinforces what the language already indicates—broader protection against retaliation than is applicable to the substantive provision.⁴⁰ The purpose of the substantive provision of Title VII includes securing a workplace where individuals are free from discrimination based on who they are, i.e., their status.⁴¹ The Court reasoned that Congress only needed to bar employment-related discrimination to secure that objective.⁴² Conversely, the anti-retaliation provision seeks to secure Title VII's primary objective by preventing employers from interfering (via retaliation) with the employee's efforts to enforce the statute's basic guarantees.⁴³ That objective could only be achieved by eliminating the many ways an employer might stymie an employee's efforts to enforce his or her rights under the Act.⁴⁴ According to the Court, "[a]n employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm *outside* the workplace."⁴⁵ A limited construction of the anti-retaliation provision would thus undermine the primary purpose of the anti-retaliation provision to "[m]aintain[] unfettered access to statutory remedial mechanisms."⁴⁶ The Court also explained

37. See *Burlington*, 548 U.S. at 62.

38. *Id.* (quoting 42 U.S.C. § 2000e-3(a)).

39. *Id.* at 62–63.

40. *Id.* at 63–64.

41. See *Burlington*, 548 U.S. at 63.

42. *Id.*

43. See *id.* at 64.

44. See *id.* at 63.

45. *Burlington*, 548 U.S. at 63–64. As Judge Richard Posner has colorfully put it, "[s]hooting a person for filing a complaint of discrimination would be an effective method of retaliation" *McDonnell v. Cisneros*, 84 F.3d 256, 259 (7th Cir. 1996). Such an act would certainly deter an employee from complaining about discrimination, but would have nothing to do with the workplace in the way that docking an employee's pay or demoting him would.

46. *Burlington*, 548 U.S. at 64.

that a broad interpretation of the anti-retaliation provision was necessary because the enforcement of Title VII depends on individuals who are willing to file complaints and act as witnesses.⁴⁷ Effective enforcement can only be achieved if individuals feel free to approach their employers or the EEOC with their grievances without fear of reprisal.⁴⁸

The Court also rejected arguments by Burlington and the United States, which filed an amicus brief, that to be actionable an employer's retaliation should result in a tangible employment action.⁴⁹ In its sexual harassment cases, for instance, the Court has allowed employers to assert an affirmative defense to hostile work environment claims unless the employer has taken a so-called "tangible employment action" against the employee, such as "hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."⁵⁰ Burlington argued that this limitation should be placed on the term "discriminate against" under the anti-retaliation provision.⁵¹ The Court rejected the argument, explaining that the Court's sexual harassment decisions did not control the issue, as those decisions neither discussed the scope of the substantive provision nor mentioned Title VII's anti-retaliation provision.⁵² At most, the Court explained, limiting actionable retaliation to tangible employment actions was merely the standard that Burlington and the United States wanted the Court to adopt, not a standard compelled by the language of the anti-retaliation provision.⁵³

B. Actionable Harm: The Material Adversity Standard

Prior to *Burlington*, lower courts took different approaches regarding how harmful a particular adverse action had to be to make out an actionable retaliation claim. The Fifth and Eighth Circuits applied the most restrictive standard, insisting that a plaintiff show an "ultimate employment" action, such as hiring, firing, failing to promote or

47. *Id.* at 67.

48. *Id.*

49. *Id.* at 64 (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998)).

50. *Burlington*, 548 U.S. at 64 (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998)) (internal quotation marks omitted).

51. *Id.*

52. *Id.* at 64–65.

53. *Id.* at 64–65 (explaining that sexual harassment precedent does not compel the Court to limit actionable retaliation to tangible employment actions).

compensation decisions.⁵⁴ At the other end of the spectrum was the Ninth Circuit, which made actionable “any adverse treatment that [was] based on a retaliatory motive and [was] reasonably likely to deter the charging party or others from engaging in protected activity.”⁵⁵ Other circuits adopted standards somewhere in the middle of these two extremes.⁵⁶

The *Burlington* Court adopted one of the middle-of-the-road approaches.⁵⁷ It held that for an actionable retaliation claim, a plaintiff must show that a reasonable employee would have found the challenged action materially adverse.⁵⁸ This means that the employee must demonstrate that the challenged action “might have dissuaded a reasonable worker from” engaging in protected activity.⁵⁹ The Court reasoned that the material adversity standard struck a balance between the trivial and the significant, determining that the statute cannot immunize employees from a lack of good manners, “petty slights or minor annoyances that often [occur] . . . and that all employees

54. See *id.* at 60. The standard indeed set a high bar for actionable retaliation. For instance, a decision that clearly limited “an employee’s opportunities for promotion” did not qualify as an ultimate employment action. See, e.g., *Banks v. E. Baton Rouge Parish School Bd.*, 320 F.3d 570, 575 (5th Cir. 2003).

55. *Ray v. Henderson*, 217 F.3d 1234, 1242–43 (9th Cir. 2000) (citing EEOC Compliance Manual Section 8, “Retaliation,” ¶ 8008 (1998)). The standard ultimately adopted by the Supreme Court in *Burlington* is more exacting than the deterrence standard articulated by the Ninth Circuit in *Ray*, as the Ninth Circuit, pre-*Burlington*, did not require a plaintiff to prove that an adverse action taken in response to the plaintiff’s protected activity was material or significant. See *id.*; see also *Siller v. Nevada*, 385 Fed. Appx. 669, 671 (9th Cir. 2010) (explaining that, pursuant to the rule articulated by the court in *Ray*, a lateral transfer may constitute an adverse employment action, but the Court in *Burlington* explained that such a transfer is not actionable unless the plaintiff shows that it also materially adverse); *infra* notes 66–75 and accompanying text (explaining the standard adopted by the Court in *Burlington*).

56. See, e.g., *Washington v. Illinois Dept. of Revenue*, 420 F.3d 658, 662 (7th Cir. 2005) (finding that action may be materially adverse and thus actionable if it affects pay *or* promotion opportunities). The circumstances unique to a particular case may also be relevant in determining whether the alleged harm rises to the level of being actionable, such as where an employer seeks to exploit a vulnerability of the employee; thus, an actionable claim may exist where, for instance, an employee who the employer knows has a nervous condition is moved “from a quiet office to one where Muzak plays constantly.” *Id.* See generally *Burlington*, 548 U.S. at 60–61 (explaining various approaches courts used prior to *Burlington*).

57. See *Burlington*, 548 U.S. at 68 (adopting standard used in the D.C. and Seventh Circuits).

58. See *id.*

59. *Id.*

experience.”⁶⁰ The Court assumed that such actions would not deter employee complaints about discrimination.⁶¹

The Court did not identify a precise dividing line between unprotected trivial harms and protected material or “significant” harms, although it cited some adverse acts that it thought too petty to be actionable, such as snubbing by a supervisor or coworkers.⁶² The Court explained, however, that the material adversity standard is stated in general terms because the significance of a given act of retaliation will depend on the particular circumstances.⁶³ In other words, “[c]ontext matters.”⁶⁴ For instance, the Court explained that typically a schedule change may matter little to an employee, but may matter a great deal to a young mother with school-age children.⁶⁵

The material adversity standard has been heavily criticized both for going too far to protect employees against retaliation and for not going far enough.⁶⁶ For instance, Deborah Brake and Joanna Grossman have

60. *Id.*

61. See *Burlington*, 548 U.S. at 68; see also *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2006) (explaining that “trivial” actions do not become the makings of a federal lawsuit because an employer’s retaliatory action must be significant enough to dissuade a reasonable employee from engaging in protected activity); *id.* (quoting *Brown v. Brody*, 199 F.3d 446, 457 (D.C. Cir. 1999)) (internal quotations omitted) (explaining that plaintiff must show “materially adverse consequences . . . such that a reasonable trier of fact could conclude that the plaintiff has suffered objectively tangible harm”).

62. *Burlington*, 548 U.S. at 68 (explaining that “personality conflicts . . . that generate antipathy and snubbing by supervisors and co-workers” appear to constitute trivial, non-actionable harm); see also *id.* (noting that in the context of sexual harassment, sporadic use of abusive language, gender-related jokes, and occasional teasing are part of the everyday tribulations that arise in the workplace and are not actionable).

63. *Id.* at 69.

64. *Id.*

65. *Burlington*, 548 U.S. at 69. The Court provided another example that separates the trivial from the significant. It stated that typically a supervisor’s refusal to invite a subordinate to lunch is a petty, non-actionable slight, but if that lunch is part of a weekly training program that contributes significantly to the employee’s professional development, the refusal to invite the employee becomes actionable. See *id.*

66. Compare Lisa M. Durham Taylor, *Adding Subjective Fuel to the Vague-Standard Fire: A Proposal for Congressional Intervention After Burlington Northern & Santa Fe Railway Co. v. White*, 9 U. PA. J. LAB. & EMP. L. 533, 533–34 (2007) (arguing that “the Court went too far in [*Burlington*], implementing a vague and highly subjective standard that affords employees who complain of discrimination, whether founded or not, what in practicality amounts to near immunity from even the slightest changes in working conditions”), and Nicholas Villani, Note, *A Bridge Too Far: The Supreme Court Overextends the Anti-Retaliation Provision of Title VII*, 56 CATH. U. L. REV. 715, 719, 738–44 (2007) (arguing that courts should exercise restraint in applying the material adversity standard because if it is too broadly applied, it has the potential for courts to be inundated with new Title VII retaliation claims), with Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII As a Rights-*

argued that the material adversity standard is devoid of any empirical support concerning the types of adversity that actually cause some people not to complain of discrimination.⁶⁷ They cite social science literature demonstrating that fear of social ostracism (arguably a type of snubbing) actually deters individuals from complaining about discrimination; yet many courts have considered such fears too trivial to satisfy the material adversity standard without the plaintiff also alleging some tangible harm (e.g., an action affecting pay or benefits).⁶⁸ Professors Brake and Grossman explain that in many instances, “lower courts [have] expect[ed] the reasonable employee to endure a substantial degree of adversity for the sake of challenging discrimination” based on nothing more than “normative judgments about the level of adversity employees should [be able to] tolerate in exchange for the privilege of asserting Title VII rights.”⁶⁹

To be sure, the Court could have gone further to protect employees against retaliation. For instance, the Court could have adopted the deterrence standard used by the Ninth Circuit pre-*Burlington*, which sought to weed out trivial harms, but also would have potentially offered employees greater protection against retaliation as that standard did not require employees to prove a challenged adverse action was material or significant.⁷⁰ That standard certainly would have comported with the Court’s stated goals of “construing the anti-retaliation provision to cover a broad range of employer conduct” because the statute is written broadly.⁷¹ Despite these criticisms and shortcomings, the material adversity standard the Court did adopt represents a relatively expansive, even if less than optimal, approach to interpreting the anti-retaliation provision. The Court rejected arguments that an adverse action

Claiming System, 86 N.C. L. REV. 859, 908 (2008) (arguing that social science research indicates that fear of social ostracism deters employees from complaining about discrimination; yet lower courts have required employees to allege some tangible harm or something more than their fear of ostracism to clear the material adversity hurdle).

67. See Brake & Grossman, *supra* note 66, at 912.

68. See *id.* at 908, 911. Professors Brake and Grossman criticize *Burlington*’s material adversity standard as not reflective of the actual harms that deter employees from complaining about discrimination. *Id.* at 904–12 (noting that *Burlington* presupposes a hypothetical employee who is “resilient, self-sufficient, and willing to risk the loss of congenial relationships at work in exchange for assertion of civil rights”). According to the authors, the material adversity standard is a “mismatch between widely shared expectations about how employees respond to discrimination and their actual responses.” *Id.* at 913.

69. *Id.* at 908, 912.

70. See *Ray v. Henderson*, 217 F.3d 1234, 1242–43; see also *Burlington*, 548 U.S. at 69.

71. *Thompson v. N. Am. Stainless, L.P.*, 131 S. Ct. 863, 868.

necessarily had to relate to the employee's employment, and it also held that the material adversity standard should take into account the unique circumstances of a particular case.

Before explaining how the Court interpreted *Burlington's* material adversity standard to recognize the viability of third-party retaliation claims under Title VII, the Article first discusses the reason why pre-*Thompson* courts split on the issue of whether third-party retaliation violated Title VII or similarly worded statutes, the classes of plaintiffs who brought third-party retaliation claims, and when, pre-*Thompson*, courts were likely to determine whether a relationship was close enough to warrant protection against third-party retaliation.

III. PROTECTING THIRD PARTIES FROM RETALIATION

A. *The Divide: Plain Language Versus Statutory Purposes*

1. *A Plain Language Problem*

At least since the 1980s, the Supreme Court has utilized a method of statutory interpretation that emphasizes the primacy of statutory text over one that gives effect to statutory purposes.⁷² Some earlier cases under Title VII altogether ignored the statute's language where a literal interpretation of the text was contrary to the statute's overall purposes or goals.⁷³ That era is long passed. Justice Thomas recently recognized as much in his dissent in *Jackson v. Birmingham Board of Education*,⁷⁴

72. See, e.g., Robert J. Gregory, *Overcoming Text In An Age of Textualism: A Practitioner's Guide to Arguing Cases of Statutory Interpretation*, 35 AKRON L. REV. 451, 455-56 (2002) (explaining that for the better part of the twentieth-century, "the predominant view of statutory interpretation emphasized the statute's purpose more so than literal textual meaning;" although text was relevant because it provided persuasive evidence of legislative intent, "bare text was not controlling"). According to Gregory, during the purpose-oriented era of statutory interpretation, "courts were empowered to give effect to the manifest purpose of a statute even in the face of seemingly unambiguous statutory language." *Id.* at 457. Commentators mark the 1980s as the end of that era when so-called "strict constructionists" were appointed to the bench. See *id.* at 459. With that change marked the era of statutory interpretation sometimes referred to as "new textualism," where the text controls above all else when interpreting a statute. See *id.* at 459-60. To that end, the statute's text is not an "aid . . . in ascertaining congressional intent . . . [but,] it is the end itself." *Id.* at 460.

73. See, e.g., *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 231-55 (1979) (holding that despite Title VII's explicit prohibition against discrimination on the basis of race, private employer could adopt affirmative action program for African-American employees; resting decision on the "spirit" of the statute if not its literal language).

74. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 184-96 (2005) (Thomas, J.,

where a majority of the Court held that a retaliation claim existed under Title IX of the Civil Rights Act, although the statute on its face says nothing about retaliation.⁷⁵ According to Justice Thomas, the Court's holding "returns this Court to the days in which it created remedies out of whole cloth to effectuate its vision of congressional purpose."⁷⁶

The Court's move toward an interpretative model that emphasizes text over effectuating a statute's purposes has not been lost on the lower courts. Courts that rejected recognizing third-party retaliation claims under Title VII or similarly worded statutes reflected the trend of emphasizing a statute's text to ascertain meaning.⁷⁷

By its terms, Title VII's anti-retaliation provision bars retaliation against an employee or applicant who either has opposed an act made unlawful under Title VII or who, among other things, has participated in some proceeding filed with an administrative agency to challenge an alleged discriminatory action.⁷⁸ Engaging in *opposition or participation*

dissenting).

75. *See id.* at 171 (majority opinion). The statute declares that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . ." 20 U.S.C. § 1681(a) (2006). In what might be described as a creative reading of the statute, however, the Court held that implying a right of retaliation from the language of the statute was consistent with its text, as retaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination. *See Jackson*, 544 U.S. at 173–74. The Court pointed out that retaliation is an intentional act. *See id.* at 174. Retaliation, it continued, is discrimination on the basis of sex because retaliation is an intentional response to the nature of the complaint: an allegation of sex discrimination. *See id.*

76. *Id.* at 195 (Thomas, J., dissenting).

77. *See, e.g., Thompson v. N. Am. Stainless, LP*, 567 F.3d 804, 805, 807–09 (6th Cir. 2009) *rev'd and remanded*, 131 S. Ct. 863 (2011) (holding that Title VII's anti-retaliation provision is plain in that third parties are not included in the class of person for whom Congress created a retaliation cause of action because he did not "personally engage[] in protected activity," saying that it would "not disregard the text of the statute in favor of . . . public policy preferences"); *Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 567–69 (3d Cir. 2002) (discussing that ADEA's anti-retaliation provision, which is identical to Title VII's, plainly does not present third-party retaliation claims, and while reading statute in this manner conflicts with the purposes of the statute, court would adhere to the text unless doing so would lead to "a patently absurd result that no rational legislature could have intended"). The court in *Fogleman* found that while unconvincing, it was at least "plausible" that Congress purposely failed to include protection against third party retaliation. *Id.* at 569. For instance, Congress may have thought that close associates of the complaining employee would be likely themselves engage in protected activity on behalf of the employee and in that case would be protected for their own activity. *See id.*

78. *See* 42 U.S.C. § 2000e-3(a) (2006).

conduct is considered “protected activity” under Title VII.⁷⁹ Before the Court resolved the issue in *Thompson*, the viability of third-party retaliation claims under Title VII (or other similarly worded anti-discrimination statutes) divided the lower courts.⁸⁰ For instance, the Third, Fifth, Sixth, and Eighth Circuits rejected the claims. These courts held that under a literal reading of the statute, a plaintiff was not deemed

79. See *Vaughn v. Epworth Villa*, 537 F.3d 1147, 1151 (10th Cir. 2008) (quoting *Laughlin v. Metro. Washington Airports Auth.*, 149 F.3d 253, 259 (4th Cir. 1998)) (“Protected activities fall into two distinct categories: participation or opposition.”); *Kubicko v. Ogden Logistics Servs.*, 181 F.3d 544, 551 (4th Cir. 1999) (explaining that under the anti-retaliation provision, protected activities fall into either the opposition clause or the participation clause).

80. See, e.g., *Thompson*, 567 F.3d at 805–06 (finding that plain language of the statute did not support claim, as plaintiff did not himself engage in statutorily protected activity, but had instead asserted a cause of action because of his fiancée’s protected activity); *Fogleman*, 283 F.3d at 568 (noting that “no consensus has emerged” in the courts concerning third-party retaliation claims, but rejecting such claims as contrary to the plain language of the ADEA); *id.* at 569 (acknowledging that plaintiff’s position presents a conflict between the statute’s plain meaning and its underlying policies, but explaining that where such conflict arises, plain meaning should prevail as long as resulting interpretation is not “patently absurd”); *Smith v. Riceland Foods, Inc.*, 151 F.3d 813, 819 (8th Cir. 1998) (rejecting plaintiff’s argument that he was protected against retaliation based on fact that employer must have known he aided his girlfriend with her discrimination claim merely because he lived with girlfriend and employer treated them as a married couple); *id.* (rejecting argument that significant other’s protected activity could be imputed to third party so that third party may state a retaliation claim; plaintiff must allege he opposed a practice made unlawful by Title VII); *Holt v. JTM Indus., Inc.*, 89 F.3d 1224, 1226–27 (5th Cir. 1996) (holding that husband did not have “standing” to bring retaliation claim, as he had not engaged in protected activity; plain language of the statute requires that employee himself engage in protected activity for standing purposes). But see *Gonzalez v. N.Y. State Dep’t of Corr. Servs. Fishkill Corr. Facility*, 122 F. Supp. 2d 335, 347 (N.D.N.Y. 2000) (recognizing third-party retaliation claim, as plaintiff was “the person actually injured by the type of conduct Title VII seeks to eradicate—retaliation for the filing of a charge of discrimination”); *EEOC v. Nalbandian Sales, Inc.*, 36 F. Supp. 2d 1206, 1211–1212 (E.D. Cal. 1998) (explaining that Title VII as remedial legislation should be interpreted broadly and that to allow employers to engage in third-party reprisals would undermine Congress’ intent to maintain unfettered access to Title VII’s remedial scheme and root out discrimination in employment); *Murphy v. Cadillac Rubber & Plastics, Inc.*, 946 F. Supp. 1108, 1117 (W.D.N.Y. 1996) (allowing third-party retaliation claim to proceed and noting that courts have allowed such claims to effectuate Congress’ clear intent in barring retaliation); *DeMedina v. Reinhardt*, 444 F. Supp. 573 (D.D.C. 1978), *aff’d in part and rev’d in part*, 686 F.2d 997 (D.C. Cir. 1982) (recognizing third-party reprisal claim under Title VII because, although “Congress did not expressly consider the possibility of third-party reprisals[,] . . . the very clear intent of Congress would be “undermined by” a construction of the statute that fails to recognize such claims). Cf. *Wu v. Thomas*, 863 F.2d 1543, 1546–48 (11th Cir. 1989) (finding that although husband failed to file his own EEOC charge, he could pursue judicial action as he was able to piggy-back on wife’s charge; in allowing such claims, court looks to see whether the gravamen of the complaints are the same; here they were, so there was no need for husband to also file a charge in the case).

to have engaged in protected activity merely by being related to or associated with someone who had engaged in protected conduct.⁸¹ The statute only prohibits an employer from retaliating against an employee or applicant because he or she, and not someone else such as a close associate, had engaged in protected activity.⁸² Thus, the provision requires that the person retaliated against also be the person who engaged in the protected activity. As explained below, while courts rejecting the viability of third-party retaliation claims did so on the basis of the text of Title VII or kindred statutes, they analyzed the issue in distinct ways to reach similar results—that the victim of third-party retaliation could not sue for any harm suffered.

a. Third-Party Retaliation is Not Unlawful Under Title VII or Kindred Statutes

Some courts altogether rejected the proposition that retaliating against third parties was proscribed by Title VII or analogously worded statutes.⁸³ In other words, according to these courts, an employer did not violate Title VII by retaliating against an employee because a close associate of that employee engaged in protected activity. For instance, in *Fogleman v. Mercy Hospital, Inc.*, the plaintiff alleged that he was fired after his father sued their employer for age and disability discrimination.⁸⁴ The plaintiff sued for retaliation under the Americans with Disabilities Act (“ADA”) and the Age Discrimination in Employment Act (“ADEA”), alleging that his termination violated the anti-retaliation provisions of those statutes.⁸⁵ In addressing his claims, the Third Circuit explained that the anti-retaliation provisions of the ADA and ADEA are “nearly identical” to the anti-retaliation provision of Title VII and that “precedent interpreting any one of [those] statutes [was] equally relevant to interpretation of the others.”⁸⁶ It explained that

81. See *Thompson*, 567 F.3d at 809–11 (collecting and discussing lower court cases).

82. See *id.* at 808.

83. The Third and Eighth Circuits held this view. See *Fogleman*, 283 F.3d at 568 (rejecting argument that third-party retaliation was actionable under the ADEA); *Riceland Foods*, 151 F.3d at 819 (same).

84. See *Fogleman*, 283 F.3d at 565–66.

85. *Id.* at 567. The plaintiff also alleged that his discharge violated the anti-retaliation provisions of Pennsylvania’s employment discrimination statute. *Id.*

86. *Id.* at 567. The anti-retaliation provisions of several federal employment discrimination statutes—Title VII, the ADEA and the ADA—are worded similarly. See, e.g., *Smith v. Specialty Pool Contractors*, No. 02:07cv1464, 2008 WL 4410163, at *5 (W.D. Pa. Sept. 24, 2008) (noting similarity in the language of all three statutes). The Supreme Court

the plain text of the anti-retaliation provision in the statute requires that the person retaliated against also be the person who engaged in protected activity.⁸⁷ “By their own terms, then [the anti-retaliation provisions of Title VII, the ADA and the ADEA] do not make actionable discrimination against an employee who has not engaged in protected activity.”⁸⁸ It would appear that under *Fogleman*, an employer could retaliate against a third party who did not engage in protected activity and that Title VII and kindred statutes would afford no relief for the employer’s retaliatory conduct in such instances.⁸⁹

Interestingly, the same plain language rationale that defeated the plaintiff’s third-party retaliation claim in *Fogleman* allowed the plaintiff to proceed under a slightly different theory. Specifically, the court allowed the plaintiff’s retaliation claim to proceed on a so-called “perception theory.”⁹⁰ In addition to alleging that he should be protected on the basis of his father’s protected activity (an argument the court rejected), the plaintiff also alleged that because of his close association with his father, his employer perceived or believed that he had assisted his father with his protected activity and retaliated against the plaintiff on that basis.⁹¹ The court agreed that, if true, these facts would give rise to an actionable retaliation claim, explaining:

[W]e read the statutes as directly supporting a perception theory of discrimination due to the fact that they make it illegal for an employer to

has not always interpreted these acts consistently in every respect. *See, e.g.*, *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 393 (2008) (“[C]ounsel must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination.”). As the *Fogleman* court noted, however, the anti-retaliation provisions of these various statutes are typically interpreted consistently. *See Fogleman*, 283 F.3d at 567; *see also* *Holt v. JTM Indus., Inc.*, 89 F.3d 1224, 1226 n.1 (5th Cir. 1996) (quoting *Shirley v. Chrysler First, Inc.*, 970 F.2d 39, 42 n.5 (5th Cir. 1992)) (noting the similarity between the anti-retaliation provisions of the ADEA and Title VII and explaining that “cases interpreting” the provisions of one statute “are frequently relied on in interpreting the [other]”).

87. *See Fogleman*, 283 F.3d at 568.

88. *Id.*

89. *See id.* (holding that statute does not make actionable discrimination against a third party). The court further noted, however, that the ADA contains a second anti-retaliation provision that is both worded differently and sweeps broader than the provisions contained in Title VII or the ADEA. *See id.* at 570. The court held that the plaintiff’s third-party retaliation was cognizable under the second anti-retaliation provision. *See Fogleman*, 283 F.3d at 570 (explaining that the ADA’s second anti-retaliation provision was worded similarly to the anti-retaliation provision contained in the NLRA, and the court had previously recognized the viability of third-party retaliation claims under the latter statute).

90. *See id.* at 571.

91. *Id.*

“discriminate against any individual *because* such individual has engaged in protected activity.” “Discriminat[ion]” refers to the practice of making a decision based on a certain criterion, and therefore focuses on the decisionmaker’s subjective intent. What follows, the word “because,” specifies the criterion that the employer is prohibited from using as a basis for decisionmaking. The laws, therefore, focus on the employer’s subjective reasons for taking adverse action against an employee, so it matters not whether the reasons behind the employer’s discriminatory animus are actually correct as a factual matter.⁹²

The court further illustrated its point: If, for instance, an employer refuses to hire an individual because it believes he is a Muslim, the employer is discriminating on the basis of religion even if the applicant turns out not to be Muslim.⁹³ According to the court, the relevant inquiry is that the applicant, “whether Muslim or not, was treated worse than he otherwise would have been for reasons prohibited by the statute.”⁹⁴

Likewise, the court explained if the allegations were true in Fogleman’s case, the employer violated the statute because it intended to discriminate on a basis barred by the statute—an employee’s protected activity—whether or not the employee actually engaged in protected activity.⁹⁵ Thus, although the plaintiff may not have engaged in protected activity, he was able to proceed on his retaliation claim because his employer believed that he engaged in such behavior and was motivated to retaliate against him on that basis. *Fogleman* is unique in that the court rejected a third-party retaliation claim based on the plain language of the statute, but allowed the same claim to proceed under a slightly different theory. In other courts, plaintiffs did not have the same success.⁹⁶

b. Victims of Third-Party Retaliation Lack Standing to Sue

The Fifth Circuit also rejected the viability of third-party retaliation claims, but framed the issue in terms of standing to sue. In *Holt v. JTM Industries, Inc.*, for instance, the plaintiff alleged that he was retaliated against after his employer received notice that his wife had filed an age

92. *Id.* (quoting 42 U.S.C. § 12203(a) (2006)) (internal citations omitted).

93. *Fogleman*, 283 F.3d at 571.

94. *Id.*

95. *Id.* at 571–72.

96. See discussion *infra* Part III.A.1.b–c.

discrimination charge with the EEOC.⁹⁷ Although the plaintiff did not himself engage in protected activity, he contended that he should nevertheless be protected against retaliation under the ADEA because his wife's protected activity should have been imputed to him, thus vesting him with "automatic standing" to sue for retaliation under the statute.⁹⁸ The court rejected that argument.

According to the Fifth Circuit, the "plain language" of the statute only bars employers from retaliating against an employee because that individual, and not someone else, has engaged in protected activity.⁹⁹ The court determined that extending protection to third parties who themselves had not engaged in protected activity was neither supported by the language of the statute nor required to "eliminate the risk that an employer will discriminate against a complaining employee's spouse in retaliation for the complaining employee's protected activities."¹⁰⁰ The court explained that if it bypassed the statute's plain language to protect persons who never engaged in protected activity on the basis of their relationships, it would also have to determine the types of relationships that should be entitled to protection under the statute.¹⁰¹ If it extended protection to spouses, it might also have to do so for relatives or friends.¹⁰² The court was unwilling to engage in that type of line drawing. Moreover, the court saw little risk in not granting standing to spouses and other family members to sue for retaliation.¹⁰³ Those individuals, it concluded, would most likely participate in some manner in their associate's discrimination charge and thus would be protected because of their own protected activity and would not have to rely on the activity of another.¹⁰⁴

c. Third-Party Retaliation Might Be Unlawful Under Title VII but the Victim Has No Right to Sue

In *Thompson v. North American Stainless, LP*, a majority of the

97. *Holt v. JTM Indus., Inc.*, 89 F.3d 1224, 1226 (5th Cir. 1996).

98. *Id.*

99. *See id.*

100. *Id.*

101. *Holt*, 89 F.3d at 1227 ("If we hold that spouses have automatic standing to sue their employers for retaliation, the question then becomes, which other persons should have automatic standing to guard against the risk of retaliation?").

102. *See id.*

103. *See id.*

104. *Id.*

Sixth Circuit sitting *en banc* took yet another approach to address the issue.¹⁰⁵ The majority of the *en banc* court disagreed with the Fifth Circuit's framing of the issue as one of standing and determined that whether one has standing to sue under Title VII is addressed by a provision other than the anti-retaliation provision.¹⁰⁶ The court also did not go so far as to hold that an employer's retaliatory act is never actionable under Title VII where an employee has not himself engaged in protected conduct, thus seeming to reject the reasoning of the Third Circuit in *Fogleman* and the Eighth Circuit.¹⁰⁷

The Sixth Circuit held, however, that based on the plain language of the anti-retaliation provision, only a plaintiff who actually engaged in protected conduct had a *cause of action* for retaliation under the statute.¹⁰⁸ Thus, Thompson, the plaintiff who alleged third-party retaliation, could not sue under the statute for whatever injury he suffered as a result of his discharge, as he did not engage in protected activity.¹⁰⁹ The court suggested (although it did not expressly hold) that Thompson's fiancée who actually engaged in protected activity may have been able to sue for the adverse action against Thompson.¹¹⁰

While the approach taken by the Sixth Circuit may have surface appeal, upon closer inspection it would fail to protect individuals in Thompson's position. First, the person who engages in protected activity (i.e., Thompson's fiancée) may choose not to pursue a claim on behalf of the party who suffered injury as a result of that protected activity—in this case Thompson. An employee in Thompson's position, therefore, would be disadvantaged because it would put him at the mercy

105. 567 F.3d 804, 805 (6th Cir. 2009), *rev'd and remanded*, 131 S. Ct. 863 (2011).

106. *Id.* at 810 n.4 (“To the extent the [Fifth Circuit in] *Holt* [] characterized the viability of the plaintiff's claim as an issue of ‘standing,’ rather than whether the prima facie elements of a cause of action had been established, we disagree with its analysis.”).

107. See *Smith v. Riceland Foods, Inc.*, 151 F.3d 813, 819 (8th Cir. 1998) (holding that Title VII does not bar employer from taking adverse action against an employee because of the protected activity of a spouse or significant other).

108. *Thompson*, 567 F.3d at 809 (holding that district court ruled correctly that Thompson failed to establish prima facie case of retaliation, as he did not allege that he had engaged in any sort of protected activity).

109. *Id.*

110. See *id.* at 816 n.10 (noting that the parties agreed that, “if Miriam Regalado believed that she was the intended target of retaliation for engaging in her protected activity, she could have filed a retaliation action . . . and, under *Burlington Northern*, defendant's termination of Thompson potentially could be deemed an ‘adverse employment action against her’”). Interestingly, the Sixth Circuit did not hold that Regalado or someone in her position could sue, but the parties agreed that she could do so. See *id.*

of another person deciding to avenge his wrong. Should his fiancée choose not to pursue a claim, Thompson would be out of a job and have no recourse. Moreover, assuming for the sake of argument that Thompson's fiancée chose to file suit on his behalf, it is unlikely that a court would hold that she would have standing to seek relief on his behalf for the injuries he sustained as a result of his discharge, thereby frustrating the goals of Title VII's remedial provisions—to make persons whole for injuries sustained as a result of unlawful employment discrimination.¹¹¹

In sum, however the issue is framed, the *en banc* court in *Thompson* joined those circuits that held the anti-retaliation provision served as a bar to third-party reprisal claims. As explained below, not all courts adopted this approach.

2. Statutory Purposes Trump Text

Because allowing third-party reprisals undermines the statutory purposes of Title VII, some courts were forgiving about what they saw as the limitation of the anti-retaliation provision's plain language.¹¹² The

111. See, e.g., *De Medina v. Reinhardt*, 444 F. Supp. 573, 580–81 (D.D.C. 1978) (finding that husband who engaged in protected activity “would certainly not be in a position to seek back pay and/or retroactive promotion based on his spouse’s employment denial . . . [U]nless plaintiff herself is permitted to seek relief based on the denial of her employment application, the ‘make whole’ purpose of Title VII would be frustrated”); see also *Thompson*, 567 F.3d at 822 n.5 (Moore, J., dissenting) (explaining that Thompson would have to sue on his own behalf to be made whole under Title VII, as “it is unclear whether [Thompson’s fiancée] would be able to sue to have Thompson reinstated [or otherwise] completely remedy Thompson’s harm”). Cf. *Smith v. Frye*, 488 F.3d 263, 272–73 (4th Cir. 2007) (holding that son who engaged in protected activity under First Amendment lacked standing to sue for injuries his mother suffered after she was fired because of his activity; son had no claim based on argument that his First Amendment rights were chilled as a result of retaliatory act visited upon his mother, as any injury from his mother’s discharge flowed to her and not to her son).

112. The courts adopting this approach were primarily, although not exclusively, district courts. See, e.g., *Thompson v. N. Am. Stainless, LP*, 520 F.3d 644, 647 (6th Cir. 2008) (quoting *Bob Jones University v. United States*, 461 U.S. 574, 586 (1983)) (holding that prohibition on employer retaliation only when directed at individual who conducted the protected activity “would defeat the plain purpose of the statute”), *rev’d en banc*, 567 F.3d 804 (6th Cir. 2009), *rev’d and remanded*, 131 S. Ct. 863 (2011); *Gonzalez v. New York State Dep’t of Corr. Servs. Fishkill Corr. Facility*, 122 F. Supp. 2d 335, 347 (N.D.N.Y. 2000) (recognizing third-party retaliation claim, as plaintiff was the person actually injured by the type of conduct Title VII seeks to eradicate—retaliation for the filing of a charge of discrimination); *EEOC v. Nalbandian Sales, Inc.*, 36 F. Supp. 2d 1206, 1211–12 (E.D. Cal. 1998) (explaining that Title VII as remedial legislation should be interpreted broadly and that allowing employers to engage in third-party reprisals would undermine Congress’ intent to maintain unfettered access to Title VII’s remedial scheme and root out discrimination in

primary purpose of Title VII's anti-retaliation provision is to maintain "unfettered access" to Title VII's remedial scheme.¹¹³ There may be no greater way of disincentivizing employees from reporting discrimination than if the employees fear reprisal against a family member or some other close associate.¹¹⁴ Directly going after the individual who engaged in protected activity would open an employer up to a retaliation claim. By targeting that individual's close associate, however, the employer could accomplish its goal indirectly.¹¹⁵ Congress did not likely contemplate such a loophole in the statute.¹¹⁶

One early case that recognized the tension between Title VII's anti-retaliation provision's language and the purposes of the statute was *De Medina v. Reinhardt*.¹¹⁷ In *De Medina*, the plaintiff alleged that she was denied employment after her husband, who worked for the same employer, complained of discrimination against minorities in the workplace.¹¹⁸ The defendant moved for summary judgment on several bases, including that Title VII's anti-retaliation provision only protects an individual because of his or her own protected activity.¹¹⁹ In response to the defendant's motion, the court explained:

employment); *Murphy v. Cadillac Rubber & Plastics, Inc.*, 946 F. Supp. 1108 (W.D.N.Y. 1996) (allowing third-party retaliation claim to proceed and noting that courts have allowed such claims to effectuate Congress' clear intent in barring retaliation); *De Medina*, 444 F. Supp. at 580 (recognizing third-party reprisal claim under Title VII; although "Congress did not expressly consider the possibility of third-party reprisals . . . the very clear intent of Congress would be undermined by" a construction of the statute that fails to recognize such claims).

113. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 64 (2006) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997)).

114. *See Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 568–69 (3d Cir. 2002).

115. *See Nalbandian*, 36 F. Supp. 2d at 1210.

116. *Id.* (explaining that it is unlikely that Congress intended to thwart Title VII's broad aims by allowing third party reprisals). Commentators who addressed the issue prior to *Thompson* also favored recognizing third-party retaliation claims. Carrie B. Temm, *Third-Party Retaliation Claims: Where to Draw the Line*, 54 U. KAN. L. REV. 865, 865–66 (2006) (noting the then current circuit split and advocating for recognizing third-party reprisal claims based on relationship of the third-party and associate); Anita G. Schausten, *Retaliation Against Third Parties: A Potential Loophole in Title VII's Discrimination Protection*, 37 J. MARSHALL L. REV. 1313, 1313 (2004) (addressing circuit split and advocating for broad reading of anti-retaliation provisions to recognize third party retaliation claims); *see Gregory*, *supra* note 72, at 454 (arguing that even under Supreme Court's plain language approach to statutory interpretation, an argument may be made that anti-retaliation provisions protect against third-party retaliation).

117. 444 F.Supp. 573, 580 (D.D.C. 1978).

118. *See id.* at 575.

119. *Id.* at 580.

While the language of the section indicates that Congress did not expressly consider the possibility of third-party reprisals i.e., discrimination against one person because of a friend's or relative's protected activities the very clear intent of Congress would be undermined by the construction defendant suggests. In enacting [the anti-retaliation provision], Congress unmistakably intended to ensure that *no person would be deterred from exercising his rights under Title VII* by threat of discriminatory retaliation. Since tolerance of third-party reprisals would, no less than the tolerance of direct reprisals, deter persons from exercising their protected rights under Title VII, the Court must conclude . . . that [the anti-retaliation provision protects against third-party retaliation claims].¹²⁰

In those courts that permitted third-party retaliation claims, like the district court in *DeMedina*, another challenging issue often arose: Who would be protected against such retaliation? That issue survives *Thompson*.

B. The Relationship Question

1. Protecting the Close Associate

One might assume that an employee who knows that her complaints about discrimination might cause another coworker to undergo a tougher time in the workplace would deter her from engaging in protected activity. Many courts that recognized third-party retaliation prior to *Thompson*, however, did not adopt such an expansive approach to dealing with third-party retaliation. Retaliation is an intentional act.¹²¹ In the context of third-party retaliation, the plaintiff must prove that the employer's motivation for taking the adverse action against the plaintiff was to retaliate against another employee who engaged in protected activity. This theory has traditionally presupposed that the two employees have a close, intimate relationship.

The U.S. Court of Appeals for the Seventh Circuit explained this rationale for recognizing third-party retaliation claims in *NLRB v. Advertisers Manufacturing Co.*¹²² There, the National Labor Relations Board ("NLRB") found that an employee was fired because her son had

120. *Id.* (emphasis added).

121. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173–74 (2005) ("Retaliation is, by definition, an intentional act. It is a form of 'discrimination' because the complainant is being subjected to differential treatment.").

122. *See* 823 F.2d 1086, 1090–91 (7th Cir. 1987).

been elected chief steward of the local union.¹²³ In response to the employer's argument that third-party retaliation was not unlawful under the National Labor Relations Act ("NLRA"), the Seventh Circuit stated that had the employer fired the son directly, it would have unquestionably violated the NLRA.¹²⁴ The court explained that firing the steward's mother was an equally effective means of punishing him because, "[i]f he loves his mother, [her discharge] had to hurt him as well as her."¹²⁵ As the court's rationale implies, third-party retaliation typically assumes that a close, intimate relationship exists between the plaintiff and the person who engaged in protected activity. The employer is motivated to punish the employee who engaged in protected activity by targeting someone for whom the employee has strong feelings.¹²⁶ One judge has explained that, "[w]here the relationship between the two employees is . . . attenuated, it will be more difficult [for the alleged victim of third-party retaliation] to prove this unlawful motivation."¹²⁷

Many employers appear to make assumptions about the affinity between certain employees when deciding who to target for third-party retaliation. Cases involving third-party retaliation overwhelmingly have involved allegations that employers acted adversely against an employee whose spouse,¹²⁸ relative,¹²⁹ or significant other¹³⁰ had engaged in

123. *Id.* at 1088.

124. *Id.* at 1088–89.

125. *Id.* at 1089.

126. *Advertisers Mfg. Co.*, 823 F.2d at 1088.

127. *Thompson v. N. Am. Stainless, LP*, 567 F.3d 804, 829 (6th Cir. 2009) (White, J., dissenting), *rev'd and remanded*, 131 S. Ct. 863 (2011); *see also* *O'Connell v. Isocor Corp.*, 56 F. Supp. 2d 649, 654 (E.D. Va. 1999) ("[T]he third-party retaliation doctrine does not cover two people whose only connection is that they happen[] to work for the same company.").

128. *See, e.g., Holt v. JTM Indus., Inc.*, 89 F.3d 1224, 1226 (5th Cir. 1996) (holding that third party retaliation was not actionable under the statute; plaintiff lacked standing to sue for retaliation under the ADEA, which court interpreted consistently with Title VII, as plaintiff did not engage in protected activity but was relying for his claim on the protected activity of his spouse); *Elsensohn v. Parish of St. Tammany*, No. 06-11393, 2007 WL 1799684, at *3–4 (E.D. La. June 19, 2007) (rejecting third-party retaliation claim under the Family Medical Leave Act ("FMLA") where husband alleged denial of promotions, shift changes, lost pay, and ability to obtain supplemental employment were because his wife had sued under the FMLA), *aff'd sub nom.*, *Elsensohn v. St. Tammany Parish Sheriff's Office*, 530 F.3d 368 (5th Cir. 2008); *Shoecraft v. Univ. of Houston-Victoria*, No. Civ. A. V-03-85, 2006 WL 870432, at *2–3 (S.D. Tex. Mar. 28, 2006) (rejecting wife's retaliation claim under Title VII challenging a reduction in force, which adversely affected her; claim failed as wife alleged that her employer retaliated against her because of her husband's protected activity in another

protected activity. Those courts holding that third-party retaliation was cognizable under Title VII or a similarly worded statute pre-*Thompson* did not typically question whether employees involved in these relationships were close enough to draw the inference that an employer might target one employee to harm the other.¹³¹ Indeed, some courts

discrimination suit against their employer; “mere existence of a marital relationship between [an] employee engaged in protected activity and his/her spouse is not a sufficient connection to impute protected activity to that spouse”) (citations omitted); *Mutts v. S. Conn. State Univ.*, No. 3:04 CV 1746(MRK), 2006 WL 1806179, at *8–11 (D. Conn. June 28, 2006) (rejecting claim where wife alleged employer took various adverse actions against her, including refusing to accommodate her disability, allowing a supervisor to make derogatory comments about her health and interracial marriage, and assigning her an “unreasonable amount of work” as a consequence of her husband’s protected activity), *aff’d*, 242 F. App’x 725 (2d Cir. 2007); *Singh v. Green Thumb Landscaping, Inc.*, 390 F. Supp. 2d 1129, 1131–32, 1138 (M.D. Fla. 2005) (rejecting retaliation claim where husband alleged he was terminated because of wife’s protected activity of complaining about sex discrimination).

129. *Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 564 (3d Cir. 2002) (rejecting third-party reprisal theory where son alleged he was terminated as a result of his father’s age discrimination claim against their employer); *EEOC v. Wal-Mart Stores, Inc.*, 576 F. Supp. 2d 1240, 1242, 1247 (D.N.M. 2008) (finding that adult son and daughter did not engage in protected activity and could not rely on protected activity of their mother who was also an employee with defendant to challenge defendant’s refusal to hire them); *Rainer v. REFCO, Inc.*, 464 F. Supp. 2d 742, 745, 751 (S.D. Ohio 2006) (holding that son could not state a retaliation claim based on his termination by relying on his mother’s protected activity); *Genao v. New York City Dept. of Parks & Recreation*, No. 04 CV 2893 JG, 2005 WL 1220899, at *2, *6 (E.D.N.Y. May 23, 2005) (emphasis added) (internal quotation marks and citations omitted) (rejecting argument that plaintiff could state a claim for retaliation based on his brother’s protected activity; also finding pre-*Burlington* that the adverse actions plaintiff complained of were not actionable, as they were not “materially adverse change[s] in the terms and conditions of [his] employment”), *aff’d*, 178 F. App’x 42 (2d Cir. 2006); *Higgins v. TJX Companies, Inc.*, 328 F. Supp. 2d 122, 123 (D. Me. 2004) (rejecting retaliatory refusal to hire claim, as plaintiff did not engage in protected activity but sought to rely on the fact that his cousin, a former employee of the same company, had previously sued the company for sexual harassment); *Horizon Holdings, L.L.C. v. Genmar Holdings, Inc.*, 241 F. Supp. 2d 1123, 1142–44 (D. Kan. 2002) (rejecting plaintiff’s retaliatory termination claim, as he did not engage in protected activity but sought to rely on the protected activity of his wife and father-in-law, who were also employees of the company).

130. *See Thompson*, 567 F.3d at 809; *Smith v. Riceland Foods, Inc.*, 151 F.3d 813, 819 (8th Cir. 1998) (rejecting plaintiff’s claim where plaintiff’s live-in girlfriend and co-employee filed a charge of discrimination and plaintiff alleged he was terminated as a result; refusing to allow retaliation claim where one’s “spouse or significant other” but not the plaintiff engages in protected activity); *EEOC v. Bojangles Restaurants, Inc.*, 284 F. Supp. 2d 320, 324, 326–27 (M.D.N.C. 2003) (refusing to read statute to recognize third-party retaliation claims where plaintiff’s fiancée engaged in protected conduct and plaintiff alleged she was terminated as a result).

131. *See, e.g., Spouse: Wegeng v. Papa John’s USA, Inc.*, No. 05-636-GPM, 2006 WL 1207259, at *1 (S.D. Ill. May 2, 2006) (allowing third-party retaliation claim by husband); *Bolin v. Oklahoma Conference of the United Methodist Church*, 397 F. Supp. 2d 1293, (N.D.

characterized third-party retaliation claims as viable only where a close relationship and in some cases only a familial relationship existed between coworkers.¹³²

Alleging a close, intimate relationship, however, has never been the *sine qua non* of a successful third-party retaliation claim. An intimate relationship might strengthen the inference that the employer acted with a retaliatory motive,¹³³ but it does not mean the employer actually did so. In any Title VII retaliation claim, a plaintiff must plead and prove causation, that is, that the employer acted adversely against an employee because of his or her protected activity.¹³⁴ In the context of third-party

Okl. 2005) (holding that wife presented sufficient evidence to survive summary judgment on third-party retaliation claim); *Gonzalez v. New York State Dep't of Corr. Servs. Fishkill Corr. Facility*, 122 F. Supp. 2d 335 (N.D.N.Y. 2000) (finding that wife had standing to sue for third-party retaliation under Title VII); *Murphy v. Cadillac Rubber & Plastics, Inc.*, 946 F. Supp. 1108, 1118 (W.D.N.Y. 1996) (denying motion to dismiss as to husband of employee who engaged in protected activity; third-party retaliation permissible under Title VII if there is a causal connection between protected activity of one employee and adverse action against another); *DeMedina v. Reinhardt*, 444 F. Supp. 573, 581 (D.D.C. 1978) (holding that third-party retaliation claims were viable under Title VII and wife stated claim where she alleged discrimination for husband's protected activity); **Other relative**: *Gore v. Trustees of Deerfield Acad.*, 385 F. Supp. 2d 65, 73–74 (D. Mass. 2005) (third-party retaliation claim by daughter for parent's protected activity survived motion for summary judgment); *Genao*, 2005 WL 1220899, at *8–9 (claim by brother of employee who engaged in protected activity failed because he failed to causation between protected activity and adverse action); *Thomas v. Am. Horse Shows Assoc., Inc.*, No. 97-CV-3513 JG, 1999 WL 287721, at *12–14 (E.D.N.Y. Apr. 23, 1999) (finding that sister had standing to sue for third-party retaliation), *aff'd*, 205 F.3d 1324 (2d Cir. 2000); *E.E.O.C. v. Nalbandian Sales, Inc.*, 36 F. Supp. 2d 1206, 1212 (E.D. Cal. 1998) (finding that employee stated claim where he was allegedly not hired because of sister's protected activity); **Romantic partner**: *Thompson v. N. Am. Stainless, LP*, 520 F.3d 644 (6th Cir. 2008) (holding that third-party retaliation is cognizable under Title VII and prevented employer from discriminating against employee because of protected activity of fiancée), *rev'd en banc*, 567 F.3d 804 (6th Cir. 2009) (rejecting third-party retaliation claim based on plain language of statute), *rev'd and remanded*, 131 S. Ct. 865 (2011) (holding that third-party retaliation is cognizable under Title VII); *Sweeney v. City of Ladue*, No. 4:92CV01014 JCH, 1993 WL 726237, at *2–5 (E.D. Mo. Aug. 31, 1993) (finding that, although third-party retaliation typically involves claims by employees for a spouse's protected activity, a dating relationship would qualify as an "association" protected under a state statute that is worded and interpreted similarly to Title VII; holding, however, that retaliation claim by police officer failed because he could not show causal connection between his discharge and the protected activity of his girlfriend), *aff'd*, 25 F.3d 702 (8th Cir. 1994), *abrogated by*, *Torgerson v. City of Rochester*, 643 F.3d 1031 (8th Cir. 2011).

132. See discussion *infra* Part III.B.2.

133. See discussion *supra* Part III.A.1.a.

134. A *prima facie* case of retaliation requires a showing that the plaintiff engaged in protected activity and suffered a materially adverse action as a result of that protected activity. See, e.g., *Vera v. McHugh*, 622 F.3d 17, 32 (1st Cir. 2010) (setting forth elements of *prima facie* case); see also *Smith v. City of Salem*, 378 F.3d 566, 570 (6th Cir. 2004) (citing *DiCarlo*

retaliation, a plaintiff must plead and prove that an alleged adverse action was the result of an associate's protected activity and not some other non-retaliatory reason.¹³⁵ Despite a close, intimate relationship, courts have not hesitated to render judgment in favor of an employer because of an employee's inability to rebut an employer's showing that it had a legitimate, non-discriminatory reason for taking an adverse action and not because of the protected activity of a coworker.¹³⁶

Nevertheless, although an intimate relationship alone has not been tantamount to a successful third-party retaliation claim, plaintiffs involved in such relationships have fared better than other employees

v. Potter, 358 F.3d 408, 420 (6th Cir. 2004)) (showing a causal connection between the protected activity and the adverse employment action is a required element of a prima facie case of retaliation).

135. See *Ohio EEOC v. Ohio Edison Co.*, 7 F.3d 541, 546 (6th Cir. 1993) (explaining that with respect to retaliation claims involving multiple employees, a complaint should indicate causal connection between protected activity and the adverse action, "[o]therwise, any time that an adverse employment action is taken by an employer against an employee at the same time a second employee is engaging in protected activity, the first employee could allege retaliation"); see also *Rodriguez v. Ohio State Univ.*, No. 2:08-cv-00139, 2011 WL 335854, at *14 (S.D. Ohio Jan. 31, 2011) (explaining that "[a] plaintiff establishes a prima facie case of retaliation by showing: (1) participation . . . in a protected activity known to the defendant; (2) an employment action adverse to the plaintiff; and (3) a causal connection between the protected activity and the adverse employment action").

136. *Webber v. Christus Schumpert Health Sys.*, No. 10-1177, 2011 WL 3880398, at *9–*10 (W.D. La. Sept. 2, 2011) (holding that *Thompson* was distinguishable from the instant case as the plaintiff failed to allege that her employer's adverse action taken against her was to retaliate against a coworker with whom the plaintiff claimed she had a close relationship); *Rodriguez*, 2011 WL 335854, at *14–15 (noting that *Thompson* now allows for third-party retaliation claims and allowing plaintiff to state a claim for third-party retaliation by relying on the protected activity of her "significant other," but ultimately granting employer's motion for summary judgment as she failed to show causal connection between the protected activity and the alleged adverse actions); *Zuk v. Onondaga County*, No. 5:07-CV-732 (GTS/GJD), 2010 WL 3909524, at *18 (N.D.N.Y. Sept. 30, 2010) (finding that plaintiff's third-party retaliation claim failed for numerous reasons including that there were legitimate reasons for the adverse actions about which he complained); *Genao v. New York City Dept. of Parks and Recreation*, No. 04 CV 2893 JG, 2005 WL 1220899, at *6–8 (E.D.N.Y. May 23, 2005) (granting employer's motion to dismiss claim by employee who alleged retaliation because his brother engaged in protected activity; plaintiff failed to allege facts sufficient to show causation between protected activity and adverse action); *Thomas v. Am. Horse Shows Ass'n, Inc.*, No. 97-CV-3513 JG, 1999 WL 287721, at *12–14 (E.D.N.Y. Apr. 23, 1999) (granting summary judgment in favor of employer where plaintiff failed to allege facts showing a causal connection between her failure to be promoted and her sister's protected activity), *aff'd*, *Thomas v. Am. Horse Shows Ass'n, Inc.*, No. 99-7662, 2000 WL 232041 (2d Cir. Jan. 25, 2000) (summary order); *Sweeney v. City of Ladue*, No. 4:92CV010144 JCH, 1993 WL 726237, at *4–5 (E.D. Mo. Aug. 31, 1993) (granting motion for summary judgment on third-party retaliation claim where police officer failed to show a causal connection between his discharge and the protected activity of his girlfriend).

bringing such claims.

2. *Protecting More Distant Associates*

a. *Close Friends and the Perception Theory Revisited*

Not all claims involving non-family members failed prior to *Thompson*; nor should they have. Many meaningful relationships, from marriages to friendships, form at the workplace. Indeed, adults who work full-time spend a lot of time at work¹³⁷ and, while workplaces vary, many of those people spend a great deal of their working time interacting with coworkers.¹³⁸ Cynthia Estlund has stated that the physical proximity and interaction between coworkers are two reasons why employees develop affinity for one another. She explains:

Employees tend to see the same people day after day over a significant period of time, and often work closely with them in carrying out their jobs. Coworkers interact not only in doing the job itself but also at the beginning and end of the workday, during breaks, in locker rooms and restrooms, and at the proverbial water cooler. Opportunities for this sort of interchange vary [according to workplace]. . . . For those who work full-time, most discussions of current issues and events, movies, sports, popular culture, and personal relationships outside the family are with coworkers. Through these repeated and frequent interactions, coworkers often learn about each others' lives and develop feelings of affection, mutual understanding, empathy, and loyalty.¹³⁹

Professor Estlund does not claim that proximity or interaction alone fosters deep relationships among employees.¹⁴⁰ Another important factor, for instance, is the process of working together to get the job done, which requires, at a minimum, "cooperative and constructive relations."¹⁴¹ Similar to Professor Estlund's findings, Patria M. Sias, whose research focuses on relationships in organizations, also found that proximity and working together on shared tasks foster close

137. See Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L. J. 1, 8 (2000).

138. See *id.* at 9.

139. *Id.*

140. See *id.* at 9–13 (noting, for example, that relationships are fostered because coworkers must work together to get the job done, which further fosters trust among employees working cooperatively together; citing several other complex factors that together breed affinity among coworkers).

141. See Estlund, *supra* note 137, at 9.

relationships at work among peers.¹⁴²

Considering the daily interaction among many coworkers, which may result in sharing everything from thoughts about the latest Harry Potter movie to one's personal relationship, it is at least plausible that an employer might target one coworker to punish another for complaining about discrimination because of the close bonds that coworkers can form. Courts have recognized as much. Generally, third-party retaliation claims involving non-related or romantically linked coworkers have been most successful in two scenarios: (1) where the relationship concerned was between "close" friends,¹⁴³ or (2) where the facts indicated that because coworkers associated with one another, the employer believed that the plaintiff actually participated in a coworker's discrimination complaint and retaliated against the plaintiff on the basis of that belief.¹⁴⁴ *Fogleman*, discussed *supra*,¹⁴⁵ falls in this latter category.

b. "Just Friends" and Other Coworkers

Employees who alleged that they were victims of third-party retaliation and were "just friends" (as opposed to "close friends"), or who had only a professional relationship with the employee who

142. See PATRICIA M. SIAS, ORGANIZING RELATIONSHIPS: TRADITIONAL AND EMERGING PERSPECTIVES ON WORKPLACE RELATIONSHIPS 105 (2009) (describing physical proximity and shared tasks as important contributors to workplace friendship development among peers).

143. See, e.g., *Reich v. Cambridgeport Air Sys., Inc.*, 26 F.3d 1187, 1188–89 (1st Cir. 1994) (holding that employer violated Occupational Health and Safety Act by firing employee because of the "special friend[ship]" he shared with another employee who had engaged in protected activity; plaintiffs were "particularly close friends" and management knew it); *Craig v. Suburban Cablevision, Inc.*, 660 A.2d 505, 506, 508 (N.J. 1995) (holding that under state anti-discrimination statute, plaintiffs had standing to assert retaliation claim after being fired for being "close friends" with their supervisor who had sued the company for sex discrimination; plaintiffs showed that entire "department was small and cohesive," which caused employer to retaliate against the entire department; further, employer perceived that employees supported their supervisor in her discrimination claim).

144. *EEOC v. Union Bank of Arizona*, No. Civ. 75-257, 1976 WL 1727, at *3 (D. Ariz. Jan. 20, 1976) (holding that employer unlawfully retaliated against plaintiff because it believed she had filed charge of discrimination or aided others who did so because of plaintiff's association with employees known to have filed charges); see also *Craig*, 660 A.2d at 506, 508 (holding that under state anti-discrimination statute, plaintiffs had standing to assert retaliation claim after being fired in connection with their supervisor's discrimination complaint as, among other things, their employer perceived that they supported their supervisor in her discrimination claim).

145. See discussion *supra* Part III.A.1.a.

engaged in protected activity, often pursued retaliation claims in vain. Many courts rejected such claims because they restricted third-party retaliation to instances involving close relatives or at least close friends.

In *Whychock v Coordinated Systems*, for instance, the court rejected the idea that third-party retaliation could ever apply to employees who were not “close relatives of an individual who did in fact engage in protected activity.”¹⁴⁶ According to the court, the plaintiff admitted that she and the employee who had engaged in protected activity were “merely friends,” although their relationship extended beyond the workplace.¹⁴⁷ Indeed, the employer claimed that it terminated the plaintiff, in part, because she violated confidentiality rules by speaking with her “mere friend” and his wife on several occasions about the friend’s medical condition.¹⁴⁸

Similarly, in *Freeman v. Barnhart*, the court rejected a third-party retaliation claim where the plaintiff alleged that she was fired for associating with other employees who had engaged in protected activity.¹⁴⁹ While the court primarily rested its decision on the plain language of the statute—an issue that doomed these claims in many courts—it also indicated that, to the extent it might have been persuaded to recognize such claims, it would not have done so based on the relationship alleged. According to the court, there was nothing special about plaintiff’s friendship with her coworkers who had engaged in protected activity, as she admitted that she associated no more with these individuals than she did with her other workplace friends.¹⁵⁰

If plaintiffs were often unprotected on the basis of their mere friendships, purely professional relationships fared worse. For example, in *Millstein v. Henske*, the D.C. Court of Appeals rejected a claim where a plaintiff alleged that she was terminated for the protected activity of a coworker.¹⁵¹ According to the court, third-party retaliation only extends to family or perhaps close friends of the individual who engaged in

146. No. Civ. A. 01-3873, 2003 WL 927704, at *6 (E.D. Pa. Mar. 4, 2003) (rejecting argument that third-party retaliation could ever apply to employees who were not “close relatives of individual who did in fact engage in protected activity”; noting that, in any event, plaintiff and person who engaged in protected activity “were merely friends, who spoke at work when they saw each other, and spoke outside of work on occasion”).

147. *See id.* at *6.

148. *See id.* at *1–2.

149. No. C 06-04900 JSW, 2008 WL 744827, *5 (N.D. Cal. Mar. 18, 2008).

150. *See id.* at *7.

151. *Millstein v. Henske*, 722 A.2d 850 (D.C. 1999).

protected activity.¹⁵² Thus, the court found it irrelevant that the plaintiff and her coworker, who earlier had complained of sex discrimination, had a twelve-to-thirteen year “professional relationship.”¹⁵³

Although the plaintiffs in the aforementioned cases may not have prevailed on their third-party claims for other reasons, such as a failure to show causation,¹⁵⁴ the point is that such claims failed for no reason other than because the relationship between the employees was considered too attenuated for purposes of a viable third-party retaliation claim.¹⁵⁵ In sum, most third-party retaliation claims have involved family members and romantic partners, which may be unsurprising considering the affection presupposed to exist in such relationships.¹⁵⁶ Other coworkers received protection against third-party retaliation prior to *Thompson*, but generally only where the facts demonstrated a particularly close relationship or where the employer believed the plaintiff participated in the protected activity of a coworker because of their association.

As explained below, the material adversity standard that *Thompson* adopted will determine who warrants protection against third-party retaliation and under what circumstances. It rejects the argument that third-party retaliation may arise only in the context of an intimate or family relationship.

152. See *id.* at 854–55.

153. See *id.*

154. See discussion *supra* notes 134–136 and accompanying text.

155. See, e.g., *DeHart v. Baker Hughes Oilfield Operations*, 214 Fed.Appx., 437, 441, n.4 (5th Cir. 2007) (holding that court did not need to determine whether causation existed between adverse action and coworker’s protected activity because plain language of the statute barred third-party retaliation claims altogether; even assuming that court were to adopt the holding of one of the courts that recognized such claim, those courts did not “extend standing as far as” plaintiff urged since she failed to allege that family relationship existed between herself and the other coworker who engaged in protected activity); see also *Wychock v. Coordinated Health Sys.*, No. Civ. A. 01-3873, 2003 WL 927704, at *6 & n.5 (E.D. Pa. Mar. 4, 2003) (finding that, although plaintiff presented sufficient evidence to demonstrate a dispute of material fact regarding whether the employer terminated her for the reasons it proffered, her third-party retaliation claim failed because she alleged no familial relationship with the coworker who engaged in protected activity; thus, court had no reason to address other elements of her retaliation claim). But see *Millstein*, 722 A.2d at 855–56 (even assuming arguendo that court would impute protected activity of one employee to another, plaintiff also failed to show a causal connection between her adverse action and her coworker’s protected activity).

156. See generally *NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086 (7th Cir. 1987) (finding that firing employee’s mother would harm mother and her son as well if he loved his mother).

C. The Sixth Circuit: A Problem of Language and “Irrelevant” Law

Thompson represents a classic third-party reprisal case. Eric Thompson was an employee at North American Stainless (“NAS”), where his fiancée, Miriam Regalado, also worked.¹⁵⁷ During her tenure at NAS, Regalado filed a charge with the EEOC, alleging that she had been discriminated against on the basis of her sex.¹⁵⁸ The EEOC notified NAS of Miriam’s charge and approximately three weeks later NAS fired Thompson.¹⁵⁹

Much of the litigation in the lower court turned on the issue of whether an employee such as Thompson could be protected on the basis of the protected activity of his fiancée, Regalado.¹⁶⁰ As to that issue, the district court granted NAS’s motion for summary judgment, finding that Title VII’s anti-retaliation provision did not protect a plaintiff in Thompson’s position who did not himself engage in protected activity.¹⁶¹

While a panel of the Sixth Circuit originally reversed the district court’s grant of summary judgment in favor of NAS, the court decided to hear the case *en banc* and reversed the panel.¹⁶² *Thompson* yielded five separate opinions: the majority, one concurrence, and three dissents that argued for various reasons that Thompson should be allowed to proceed with his third-party retaliation claim.¹⁶³ Relying on “the plain language” of the statute, a majority of the *en banc* court held that Thompson had no cause of action under Title VII’s anti-retaliation provision because he did not engage in protected activity.¹⁶⁴

157. *Thompson v. N. Am. Stainless, LP*, 131 S. Ct. 863, 867 (2011).

158. *Id.*

159. *Id.*

160. *Id.*

161. *See Thompson v. N. Am. Stainless, LP*, 435 F. Supp. 2d 633, 638 (E.D. Ky. 2006).

162. *See Thompson v. N. Am. Stainless, LP*, 567 F.3d 804, 805–06 (6th Cir. 2009).

163. *See id.* at 816 (Rogers, J., concurring in the judgment) (agreeing that Thompson had no cause of action under the anti-retaliation provision but for slightly different reasons than the majority opinion); *id.* at 818 (Martin, J., dissenting) (arguing that Thompson should be allowed to argue on remand how the Supreme Court’s recent retaliation decisions, particularly *Crawford v. Metro. Gov’t*, 555 U.S. 271 (2009), might support a third-party retaliation claim); *id.* at 820 (Moore, J., dissenting) (relying, among other things, on the broad purposes of the anti-retaliation provision as a means to recognize the viability of third-party retaliation); *Thompson*, 567 F.3d at 827–28 (White, J., dissenting) (arguing that *Burlington* indeed supports the viability of third-party retaliation claims and that Title VII’s enforcement provision allows Thompson to sue for the adverse treatment that he alleged he suffered).

164. *Id.* at 808 (majority decision) (“By application of the plain language of the statute, Thompson is not included in the class of persons for whom Congress created a retaliation

1. *The Irrelevance of Burlington*¹⁶⁵

According to the majority of the *en banc* court, the Court's holding in *Burlington* did not aid Thompson.¹⁶⁶ That decision, it explained, addressed only the scope of the anti-retaliation provision and not the separate issue of whether that provision permits an employee who did not engage in protected activity to bring a retaliation claim.¹⁶⁷ While *Burlington* undoubtedly addressed the scope of the anti-retaliation provision, the *en banc* court gave short shrift to the fact that under *Burlington*'s material adversity standard, Thompson's discharge may have been adverse to Regalado as well. Certainly, if removing Sheila White's forklift duties in *Burlington* (one of the adverse actions alleged in that case) would dissuade her from engaging in protected activity,¹⁶⁸ then firing her fiancé would likely do so as well. The court did not engage in any extensive analysis with regard to *Burlington*'s potential effect on Regalado. Rather, it stated in a footnote that "[a]ll of the parties agree[]" that Regalado might be able to sue if she believed Thompson's firing was "an 'adverse employment action' against her."¹⁶⁹ The court did not opine on whether it agreed with the parties.¹⁷⁰

2. *Title VII's Enforcement Provision*

Apart from Title VII's anti-retaliation provision, the court also gave short shrift to the enforcement provision which, by its terms, governs who may sue for a statutory violation. Title VII's enforcement provision would play as big a role as the anti-retaliation provision in the Court's later discussion of third-party retaliation.

Title VII's enforcement provision provides that a civil action may be brought by a "person claiming to be aggrieved" by an "alleged

cause of action because he personally did not oppose an unlawful practice, make a charge, testify, assist, or participate in an investigation.").

165. Because the Supreme Court would ultimately rely on *Burlington* to recognize the viability of third-party retaliation, this Article briefly discusses the *en banc* court's approach to *Burlington*, and why the lower court held that even if Thompson's termination violated Title VII, he had no right to sue because of it.

166. *See id.* at 815.

167. *Id.*

168. *See Burlington v. White*, 548 U.S. 53, 68–69 (2006).

169. *Thompson*, 567 F.3d at 816 n.10.

170. *Id.* Moreover, as explained earlier, it is far from clear whether Regalado could have sought all the relief that Thompson could have requested for himself had he sued on his own behalf—a result that would have frustrated the "make whole" purposes of Title VII's remedial provisions. *See supra* note 111 and accompanying discussion.

unlawful employment practice.”¹⁷¹ Thompson clearly alleged that an unlawful employment practice had occurred when he was fired because of Regalado’s protected activity and that he was aggrieved because he lost his job. The court held, however, that this provision had nothing to do with whether Thompson could bring a lawsuit under Title VII.¹⁷² In a somewhat confusing analysis of the provision (which the Court would later reject), the majority of the *en banc* court held that this language meant only that a plaintiff suing under Title VII had to have Article III standing to bring a lawsuit for a statutory violation.¹⁷³ It was, according to the court, a separate matter whether Thompson could assert a cause of action under the statute for retaliation.¹⁷⁴ The anti-retaliation provision, and not the enforcement provision, controlled who could sue for retaliation and, pursuant to the plain language of the anti-retaliation provision, such persons were limited to individuals who had actually engaged in protected activity.¹⁷⁵

As explained below, the Supreme Court relied on *Burlington’s* material adversity standard to recognize the viability of third-party retaliation claims under Title VII. Further, it held that a third party could sue for the retaliation.

D. The Pro-Employee Court Strikes Again

The Supreme Court addressed two issues in *Thompson*: (1) did NAS’s firing of Thompson constitute unlawful retaliation; and (2) if so, did Title VII grant Thompson a cause of action?¹⁷⁶ The Court answered both questions in the affirmative.¹⁷⁷

171. *Thompson*, 567 F.3d at 817 (Rogers, J., concurring in the judgment) (explaining 42 U.S.C.A. § 2000e-5 (West 2011)).

172. *See id.* at 809 n.1.

173. *See id.* (citing *Leibovitz v. N.Y.C. Transit Auth.*, 252 F.3d 179, 185 (2d Cir. 2001)) (explaining that “[w]hat it means to be ‘aggrieved’ is a question of standing” and that, although Thompson had standing to sue under Title VII because he met the minimum requirements under Article III, it did not mean he had a right to sue for retaliation under the statute).

174. *See id.* (explaining that the issue of standing and whether Thompson had “asserted a cause of action” are distinct inquiries). The court explained that it had previously taken a broad view of standing in Title VII actions, including extending standing as broadly as is permitted by Article III of the U.S. Constitution. *Thompson*, 567 F.3d at 809 n.1.

175. *See id.*

176. *Thompson v. N. Am. Stainless, LP*, 131 S. Ct. 863, 867 (2011).

177. *See id.* at 870.

1. Protecting Third Parties Against an Employer's Retaliatory Ire

The Court had little difficulty finding that *Burlington* resolved the first issue. *Burlington* held that Title VII's anti-retaliation provision must be interpreted to cover a broad range of employer conduct.¹⁷⁸ The Court reached that conclusion after noting that, unlike the statute's substantive provision, the anti-retaliation provision is not limited to protecting against discrimination that relates to such factors as the terms and conditions of employment.¹⁷⁹ Considering the broad language and purposes of the anti-retaliation provision, the Court adopted the material adversity standard in *Burlington* to protect employees against the many ways employers may retaliate against employees for engaging in protected activity. Under that standard, the Court thought it was "obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired."¹⁸⁰

Contrary to how third-party retaliation claims had previously been framed in the lower courts, i.e., whether a plaintiff in Thompson's position had engaged in protected activity and was punished as a result of his own activity,¹⁸¹ the issue in *Thompson* was whether an employee in Regalado's position (as the plaintiff's fiancée) had engaged in protected activity and whether she could have found her fiancé's subsequent firing to be materially adverse.¹⁸² Indeed, NAS did not deny that Thompson's termination would meet *Burlington's* material adversity standard as to Regalado.¹⁸³

NAS argued, however, that recognizing third-party retaliation claims would lead to difficult line-drawing issues regarding the types of relationships entitled to protection.¹⁸⁴ NAS contended that firing one's fiancée might dissuade an employee from engaging in protected activity, but what about "an employee's girlfriend, close friend, or trusted coworker?"¹⁸⁵ NAS argued that applying *Burlington* in these circumstances would expose the employer to liability any time it fired an employee who happened to be associated with an employee who had

178. *See id.* at 868.

179. *See id.*

180. *Thompson*, 131 S. Ct. at 868.

181. *See discussion supra* Part III.A.

182. *See Thompson*, 131 S. Ct. at 868.

183. *See id.*

184. *Id.*

185. *Id.*

filed charges with the EEOC.¹⁸⁶

The Court “acknowledge[d] the force of this point,” but did not think that NAS’s argument justified “a categorical rule that third-party reprisals do not violate Title VII.”¹⁸⁷ The Court explained that it adopted a broad rule in *Burlington* because the anti-retaliation provision is worded broadly.¹⁸⁸ It therefore saw no basis for excluding all third-party reprisal claims.¹⁸⁹

The Court also declined to “identify a fixed class of relationships for which third-party reprisals are unlawful.”¹⁹⁰ It explained that: “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.”¹⁹¹ Given the broad language contained in the anti-retaliation provision and the myriad contexts in which retaliation may occur, the Court explained that the anti-retaliation provision was not reducible to a set of rigid rules.¹⁹² The Court reiterated, however, that under *Burlington*, harm must be judged from an objective perspective of whether the adverse action, whatever it may be, would have deterred a reasonable person from engaging in protected conduct.¹⁹³

2. Third Party Retaliation Victims May Sue—The Zone of Interest Test

The Court found the issue of who may sue under the statute to be a slightly more difficult question than whether Regalado could have found Thompson’s firing to be materially adverse.¹⁹⁴ The Court disagreed with the Sixth Circuit’s view that Title VII’s enforcement provision did not control who had a right to sue for a violation of Title VII.¹⁹⁵ The enforcement provision “unquestionably permits a person claiming to be

186. *Thompson*, 131 S. Ct. at 868.

187. *Id.*

188. *Id.*

189. *Id.*

190. *Thompson*, 131 S. Ct. at 868.

191. *Id.*

192. *Id.*

193. *See id.* at 868–69 (quoting *Burlington v. White*, 548 U.S. 68–69 (2006)) (“We emphasize . . . 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.’”).

194. *See Thompson*, 131 S. Ct. at 869.

195. *Id.*

aggrieved [by a violation of Title VII] to bring a ‘civil action.’”¹⁹⁶ Here, an alleged unlawful employment practice had occurred and the statute was violated when NAS allegedly fired Thompson for Regalado’s protected activity. According to the Court, the critical issue was therefore whether Thompson was a person aggrieved because of that unlawful employment practice or statutory violation.¹⁹⁷ If he was, he could sue.¹⁹⁸

The Court was not writing on a blank slate in interpreting the term “person aggrieved.” In *Trafficante v. Metropolitan Life Insurance Co.*,¹⁹⁹ the Court addressed a similar issue under Title VIII of the Civil Rights Act (the Fair Housing Act), which proscribes discrimination in the sale, rental and finance of dwellings.²⁰⁰ In *Trafficante*, two plaintiffs—one white and one black—alleged harm after their landlord had discriminated against other nonwhite, prospective tenants on the basis of race.²⁰¹ The lower court dismissed the plaintiffs’ complaint, determining that the plaintiffs “were not within the class of persons” the statute protected, which was limited to the “objects of discriminatory housing practices.”²⁰² The Supreme Court reversed, noting that the FHA allows a person aggrieved to commence a civil action in district court after exhaustion of administrative remedies.²⁰³ In determining what “person aggrieved” meant, the Court pointed to an earlier decision from the Third Circuit, which had interpreted the phrase “person claiming to be aggrieved” under Title VII as showing a congressional intent to define standing to bring a civil action under the statute “as broadly as is permitted by Article III of the Constitution.”²⁰⁴ To satisfy that constitutional minimal standard for standing, a plaintiff must show “an

196. *Id.*

197. *Id.*

198. *Thompson*, 131 S. Ct. at 869.

199. 409 U.S. 205 (1972).

200. See 42 U.S.C. § 3601 (2006).

201. *Trafficante*, 409 U.S. at 206–07 (alleging that landlord discriminated in a number of ways, including manipulating the waiting list for apartments and using discriminatory acceptance standards). The plaintiffs alleged that they were harmed by the landlord’s practices because, among other things, they lost the social benefits of living in a mixed-raced community, missed business and professional opportunities that would have accrued from living with minorities, and suffered from the stigma as residents of a “white ghetto.” *Id.* at 208.

202. *Id.* at 208.

203. *Trafficante*, 409 U.S. at 209.

204. *Id.* at 209 (citing *Hackett v. McGuire Bros., Inc.*, 445 F.2d 442 (3d Cir. 1971)).

injury in fact caused by the defendant and remediable by the court.”²⁰⁵

The Court in *Thompson* decided not to read *Trafficante* as permitting anyone who could satisfy Article III standing requirements to be able to sue under Title VII.²⁰⁶ Ultimately, the Court believed that extending standing under Title VII as far as Article III could lead to absurd results.²⁰⁷ For instance, it reasoned that a shareholder of a company would be able to meet that minimal Article III standing threshold and sue under Title VII if the company fired a productive employee for racially discriminatory reasons and the shareholder could show “his stock decreased as a consequence.”²⁰⁸

Instead of the broadest possible interpretation, the Court defined the term “person aggrieved” in a manner consistent with the meaning it had given the term under the Administrative Procedure Act (“APA”).²⁰⁹ The APA allows “suit to challenge a federal agency by any person . . . adversely affected or aggrieved . . . within the meaning of a relevant statute.”²¹⁰ The Court had previously held that this language allows a plaintiff to sue to challenge an agency action if he “falls within the ‘zone of interests’ sought to be protected by the [statute] whose violation forms the . . . basis for his complaint.”²¹¹ The Court explained that a plaintiff will be considered not to meet that standard only where “the plaintiff’s interests are so marginally related to or inconsistent with the purposes . . . [of] the statute that it cannot reasonably be assumed that Congress intended to permit the suit.”²¹² A plaintiff satisfies the test as long as he or she asserts “an interest ‘arguably sought to be protected by the statutes.’”²¹³

The Court held “that Thompson [fell] within the zone of interests

205. *Thompson v. N. Am. Stainless, LP*, 131 S. Ct. 863, 869 (2011).

206. *Id.* The Court further determined that the language in *Trafficante*, which declared that the term “person aggrieved” referred to Article III standard requirements, was *dicta*. See *id.* The Court acknowledged that some of its other decisions reiterated that the “term ‘aggrieved’ in Title VII reaches as far as Article III permits . . .” *Id.* The Court explained, however, that *Trafficante* only stated that the “person aggrieved” was coextensive with Article III standing insofar as plaintiffs were actual tenants. *Thompson*, 131 S. Ct. at 869.

207. *Id.*

208. *Id.*

209. *Id.* at 870.

210. *Thompson*, 131 S. Ct. at 870 (quoting 5 U.S.C. § 702 (2011)) (internal quotation marks omitted).

211. *Id.* at 870.

212. *Id.* (quoting *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 399–400 (1987)).

213. *Id.* (quoting *Nat’l Credit Union Admin. v. First Nat. Bank & Trust Co.*, 522 U.S. 479, 495 (1998)).

protected by Title VII” and thus was a person aggrieved under the statute.²¹⁴ First, Thompson was a NAS employee and “the purpose of Title VII is to protect employees from their employer’s unlawful actions,” which occurred in this case when NAS fired him as a means to punish Regalado for her discrimination complaint.²¹⁵ Second, the Court explained that, unlike the shareholder, “Thompson [was] not an accidental victim of the retaliation [or] . . . collateral damage . . . of the employer’s unlawful act.”²¹⁶ Rather, he was the means by which his employer intended to harm Regalado.²¹⁷ “Hurting him was the unlawful act by which [NAS] punished her.”²¹⁸ He was therefore “well within the zone of interests sought to be protected by Title VII” and thus a person aggrieved under the statute.²¹⁹

The scope of the protection that *Thompson* will afford victims of third party retaliation going forward will depend on how broadly the lower courts read *Thompson* and, in turn, how broadly they choose to interpret the anti-retaliation provision within the confines of the material adversity standard *Thompson* adopts. These issues are discussed in the following section.

IV. A NEW APPROACH TO AN OLD PROBLEM

A. *Going Beyond Family, Paramour and Close Friend*

The issue of who will be protected against third-party retaliation and under what circumstances remains after *Thompson*. Under

214. *Thompson*, 131 S. Ct. at 870.

215. *Id.*

216. *Id.*

217. *Id.*

218. *Thompson*, 131 S. Ct. at 870.

219. *Id.* Justice Ginsburg, joined by Justice Breyer, filed a concurring opinion although she also joined the opinion of the Court. *See id.* at 870–71. Justice Ginsburg noted that the Court’s holding comported with the long-standing position of the EEOC that retaliation can be challenged “by both the individual who engaged in protected activity and [his or her] relative, where both are employees” of the same defendant employer. *Id.* at 871 (citing U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, EEOC COMPLIANCE MANUAL § 8–II(C)(3) (May 20, 1998), available at <http://www.eeoc.gov/policy/docs/retal.html>). Justice Ginsburg opined that the “EEOC’s statements” regarding third-party retaliation “merit[ed] deference” *Thompson*, 131 S. Ct. at 871. She further noted that the agency’s position was “consistent with the interpretations of analogous statutes by other federal agencies.” *Id.* (noting the National Labor Relations Board’s position that retaliation against a relative violates the National Labor Relations Act).

Thompson's broad standard, no relationship or adverse action is beyond the pale. For instance, the Court expected that a "mild[] reprisal on a mere acquaintance" would almost never satisfy the material adversity standard, but even under those circumstances, it did not foreclose the possibility.²²⁰ The Court's approach was guided both by the fact that the anti-retaliation provision is broadly worded and that retaliation may occur in various contexts.²²¹ Thus, because the Court recognized that retaliation may manifest itself in any number of ways, including but not limited to an employer targeting an employee because his fiancée had engaged in protected activity, the Court adopted a broad standard to guide the lower courts in determining whom to protect.²²²

Despite the potential breadth of *Thompson*, lower courts may fall back into the approach adopted by some courts prior to *Thompson*—extending protection only to the closest associates and, in particular, family members. Although *Thompson* is still a relatively recent decision, there already is some indication that lower courts may be placing such limits on *Thompson*.

For instance, in *Morgan v. Napolitano*, the plaintiff alleged third-party retaliation for his wife's legal representation of individuals who had filed discrimination claims against the plaintiff's employer.²²³ Regarding *Thompson*, the court explained that "[t]he Supreme Court recently held that the anti-retaliation provisions of Title VII prohibit retaliation against *close family members* of those who complain about unlawful discrimination"²²⁴ Similarly, in a case involving a plaintiff alleging retaliation as a result of his father's protected activity, the Fifth Circuit described *Thompson*'s holding as allowing "an employee [to] bring a Title VII claim on the basis of retaliation that he suffered in response to protected activity engaged in by a co-worker *who [is] a close family member*."²²⁵ To be sure these courts may only have

220. *Id.* at 868.

221. *Id.*

222. *Thompson*, 131 S. Ct. at 868.

223. No. CIV. S-09-2649 LKK/DAD, 2011 WL 2462968, at *11–12 (E.D. Cal. June 17, 2011).

224. *Id.* at *11 (emphasis added).

225. *Zamora v. City of Houston*, 425 Fed. App'x 314, 316 (5th Cir. 2011) (emphasis added); see also *Daughtry v. Family Dollar Stores, Inc.*, No. 09-5111 (RBK/AMD), 2011 WL 601270, at *4 (D.N.J. Feb. 16, 2011) (explaining that *Thompson* "held . . . [that] a plaintiff may bring a third-party retaliation claim based on the protected activity of [a] close family member"); *id.* at *5 ("Title VII's antiretaliation provision is capacious enough to encompass an employer's attempt to retaliate against an employee by taking adverse action against that

cast *Thompson*'s holding as pertaining to close family members because the facts before those courts involved such relationships. The courts' characterization of *Thompson*'s holding may not be indicative of how these courts would handle an issue involving a non-familial relationship. On the other hand, it is not unreasonable to conclude that plaintiffs in relationships with the employee who engaged in protected activity that are non-familial or that the Court deems to be insufficiently "close" would face obstacles considering the limiting language these courts used to describe *Thompson*'s holding as well as the limitations imposed on third-party retaliation claims pre-*Thompson*.²²⁶ These statements regarding *Thompson*'s holding may signal an early trend in limiting protection against third-party retaliation to situations involving family or the type of close, intimate relationship at issue in *Thompson*—i.e., family-like relationships.

Thompson of course did not limit protection against third-party retaliation only to close family members. Certainly, *Thompson* extends that far, but nothing in the opinion indicates that protection should stop there. Casting *Thompson*'s holding as only extending protection to close family members (or to any particular relationship class) ignores the fact that the Court declined to "identify a fixed class of relationships for which third-party reprisals are unlawful."²²⁷ As explained, the Court refused to adopt rigid rules regarding who might be protected, as the anti-retaliation provision is worded broadly and retaliation may occur "in a variety of workplace contexts."²²⁸ Thus, an overly restrictive interpretation of *Thompson* ignores the breadth of the anti-retaliation clause, which evinces Congress' intent to provide expansive protection against retaliation and resulted in the Court's holding in *Thompson* in the first place.

B. Protecting More Distant Associates

As *Thompson* recognized, there is no one-size fits all approach to analyzing third-party retaliation claims. While the following discussion is not intended to offer a "comprehensive set of clear rules,"²²⁹ it

employee's close family member.").

226. See discussion *supra* Part III.B.1-2.

227. *Thompson*, 131 S. Ct. at 868.

228. *Id.*

229. *Id.*

explores how *Thompson* might be interpreted to protect employees who do not have a familial or close amity relationship with the person who engaged in protected activity by examining a case that was decided prior to *Thompson* and in which the court granted summary judgment in the employer's favor. The relevant facts, which were set forth in the Introduction, are briefly as follows:

George Cotton, a supervisory employee, engaged in protected activity under Title VII and thereafter²³⁰ requested that his subordinate, Janice Bates, be given a promotion and raise.²³¹ Their employer denied his request. In her subsequent retaliation suit, Bates alleged that their employer denied Cotton's request to get back at him for filing a discrimination lawsuit.²³² The EEOC found by a preponderance of the evidence that Bates and Cotton's employer denied Bates' promotion and raise because of her association with Cotton.²³³

The district court rejected Bates' claim under the plain language of the statute; this same type of analysis felled many third-party retaliation claims before *Thompson*.²³⁴ This Article proposes that *Bates* should now be resolved differently in order to be consistent with *Thompson*.

1. *Material Adversity*

Thompson instructs that both the relationship between employees and the adverse action taken by the employer in response to protected activity are relevant to the material adversity inquiry. Both points are discussed below.

a. *The Relationship Question Revisited*

As Professor Estlund points out, coworkers spend much of their waking time at work and interact and share work-related, as well as personal, matters with one another while there, which often breeds mutual affinity.²³⁵ Therefore, one may infer that because Bates and Cotton worked together in a supervisor-subordinate relationship, they

230. *Bates v. Clark Cnty.*, No. 2:04-CV-00518-KJD-GWF, 2006 WL 3308214, at *1 (D. Nev. Nov. 13, 2006).

231. *Id.*

232. *Id.*

233. *Bates*, 2006 WL 3308214, at *1.

234. *See id.* at *3.

235. Estlund, *supra* note 137, at 9.

shared a mutual affinity.²³⁶ Accordingly, Bates might argue that she and Cotton were sufficiently close that a reasonable supervisor in Cotton's position would be dissuaded from engaging in protected activity if he knew that it would result in one of his subordinates not receiving the raise and promotion that he had recommended.²³⁷

More importantly, the court should consider whether Bates' and Cotton's employer ran afoul of the broadly worded text of the anti-retaliation provision when it fired Cotton. As previously mentioned, retaliation is an intentional act.²³⁸ Because the language of Title VII and kindred statutes bar employers from retaliating against employees because of their protected activity,²³⁹ the critical inquiry is whether the employer sought to retaliate against Cotton for engaging in protected activity by harming employees with whom Cotton associated.

The EEOC found probable cause that the employer denied Bates' promotion and raise for retaliatory reasons.²⁴⁰ For its part, the EEOC has long interpreted the statutes it administers as recognizing that actionable retaliation might arise where an employer acts adversely against an employee "closely related to *or associated with* the person exercising his or her statutory rights."²⁴¹

While the facts are unclear, the employer may have been motivated to target Bates because it believed that she and Cotton were close enough that harming her would harm him²⁴² or that, because of their

236. Of course, the employer could seek to introduce evidence to the contrary.

237. *Cf. Craig v. Suburban Cablevision, Inc.*, 660 A.2d 505, 508–09 (N.J. 1995) (holding that under state anti-discrimination statute, plaintiffs had standing to assert retaliation claim after being fired for being "close friends" with their supervisor who had sued the company for sex discrimination; plaintiffs showed that the entire "department was small and cohesive," which caused employer to retaliate against the entire department; further, employer perceived that they supported their supervisor in her discrimination claim).

238. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 168 (2005).

239. See discussion *supra* Part III.A.1; see also 42 U.S.C. § 2000e-3(a) (2006).

240. See *Bates*, 2006 WL 3308214, at *1. For purposes of this discussion, this Article assumes that the employer denied Bates's promotion and raise because of Cotton's protected activity.

241. See EEOC COMPLIANCE MANUAL, *supra* note 219, at § 8–II(C)(3) (emphasis added). It is not entirely clear what the EEOC means by "close" in this context, but the example it sets forth in its compliance manual as illustrative involves retaliation against an employee because of his son's protected activity. See *id.* The manual, however, not only uses "closely related to," but also "closely associated with," indicating that individuals beyond close family members or relatives may be protected. *Id.*

242. *Cf. NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086, 1089 (7th Cir. 1987) (explaining that employer's action against mother for son's protected activity would hurt him as well as her if he loves her).

association, Bates supported and assisted Cotton with his discrimination suit.²⁴³

On the other hand, their employer may have been motivated to target Bates for reasons other than believing the two were close, in terms of an affective bond. Suppose, for instance, that because of Cotton's protected activity, their employer denied Bates's promotion as part of a scheme to usurp Cotton's authority to manage his department? Or suppose that the position to which Bates was to be promoted would have allowed her to take on some duties that Cotton had been performing, and his employer denied Cotton's request to promote Bates to that position only to ensure that Cotton's workload would remain more burdensome and his life made more difficult because of his protected activity? In either case, "a reasonable worker *might* be dissuaded from engaging in protected activity" as a result of the employer's actions.²⁴⁴

Several factors are relevant in assessing whether the attack on Bates might be materially adverse to a reasonable person in Cotton's position. First, as Professors Deborah Brake and Joanna Grossman explain, the material adversity standard is not based on empirical evidence that sheds light on the types of adversity that actually cause some people not to complain about discrimination.²⁴⁵ Rather, it is based on judges' "normative judgments about the level of adversity [that] employees should tolerate" before employees may state an actionable retaliation claim.²⁴⁶ Thus, nothing other than a stringent application of the material adversity standard would prevent the alleged adverse action—tangible harm—taken against Bates from being considered by Cotton to be materially adverse—i.e., an action that at least *might* dissuade him from engaging in protected activity.²⁴⁷ Second, *Thompson* supports the result here. In *Thompson*, the Court failed to identify "a fixed class of relationships for which third-party reprisals are unlawful" because it

243. Bates may in that instance be able to rely on the perception theory advanced in some courts prior to *Thompson*. She would be protected on the basis of her own protected activity, as her employer would have retaliated against her because it believed that Bates herself had engaged in protected activity even if she had not actually done so. See discussion *supra* Parts III.A.1.a, 2.a.

244. See *Thompson v. N. Am. Stainless, LP*, 131 S. Ct. 863, 868 (2011) (framing relevant inquiry as whether a particular action "might" have deterred a reasonable person from engaging in protected activity and instructing that the relevant circumstances must be taken into account in reaching that determination).

245. Brake & Grossman, *supra* note 66, at 912.

246. *Id.*

247. See *Burlington*, 548 U.S. at 68.

determined that there can be no one-size fits all approach to third-party retaliation claims.²⁴⁸ It explained that, “[g]iven 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.”²⁴⁹ Moreover, while the court explained that it expected a “mild[] reprisal” against a mere associate to *almost* never meet the *Burlington* standard, it did not foreclose such a claim.²⁵⁰ A *per se* rule drawing lines at protecting only family or close friends would foreclose such claims. The adverse action here (denial of Bates’ promotion and raise) would not have occurred but for a workplace association between Bates and Cotton—here the fact that she worked for him.²⁵¹ No closer association should be required where the facts indicate that because of a workplace association, the employer sought to retaliate against one employee (Cotton) by harming another (Bates). The critical issue here, as with all retaliation claims, is causation, i.e., whether the employer’s adverse action against Bates was motivated by Cotton’s protected activity.²⁵² If the facts support such a causal connection, then the type of relationship between coworkers should not alone determine whether a plaintiff has a cognizable claim for third-party retaliation. To be sure, “[w]here the relationship between . . . employees is more attenuated, it [may be] more difficult to prove [an] unlawful motivation.”²⁵³ Such a showing, however, certainly may be possible, and where it is, the plaintiff’s claim should not be summarily rejected on the basis of the relationship alone, as occurred pre-*Thompson*.²⁵⁴

248. *Thompson*, 131 S. Ct. at 868.

249. *Id.* (emphasis added).

250. *Id.*

251. *Bates v. Clark Cnty.*, No. 2:04-CV-00518-KJD-GWF, 2006 WL 3308214, at *1 (D. Nev. Nov. 13, 2006).

252. See *supra* notes 134–136 and accompanying text.

253. *Thompson v. N. Am. Stainless, LP*, 567 F.3d 804, 829 (6th Cir. 2009) (White, J., dissenting), *rev’d on other grounds and rem’d*, 131 S. Ct. 863 (2011).

254. See e.g., *Wychock v. Coordinated Health Sys.*, No. Civ. A. 01-3873, 2003 WL 927704, at *6 & n.5 (E.D. Pa. Mar. 4, 2003) (finding that, although plaintiff presented sufficient evidence to demonstrate a dispute of material fact regarding whether the employer terminated her for the reasons it proffered, her third-party retaliation claim failed because she alleged no familial relationship with the coworker who engaged in protected activity; thus, court had no reason to address other elements of her retaliation claim); see also *Dehart v. Baker Hughes Oilfield Operations*, 214 Fed. Appx., 437, 441, n.4 (5th Cir. 2007) (holding that the court did not need to determine whether causation existed between adverse action and coworker’s protected activity because plain language of the statute barred third-party

Requiring an employee to plead and prove causation should quell some of the concern by employers who fear that recognizing third-party retaliation might put employers at risk whenever they sanction an employee who has some connection to an employee who earlier engaged in protected activity.²⁵⁵ Even if an employee could allege third-party retaliation based on whatever connection he has to a coworker who engaged in protected activity, the employee would not prevail on a claim unless he or she could plead and prove the employer took the action because of the other employee's protected activity.²⁵⁶

Moreover, the employer's concern in this regard may be overstated. Third-party retaliation is not a new phenomenon,²⁵⁷ and these claims were recognized by many courts prior to *Thompson*.²⁵⁸ The reported decisions, however, demonstrate that the overwhelming majority of plaintiffs bringing these claims are relatives (particularly spouses), romantic partners, or friends of the person who engaged in protected activity.²⁵⁹ Few decisions have involved plaintiffs who had only a professional relationship with another coworker.²⁶⁰ Other than speculation, there is no support for the argument that recognizing third-party retaliation will result in a flux of third-party retaliation claims by coworkers who have only a tangential connection to another coworker who earlier engaged in protected activity.

retaliation claims altogether; even assuming that the court were to adopt the holding of one of the courts that recognized such claims, those courts did not "extend standing as far as" plaintiff urged since she failed to allege that a family relationship existed between herself and the other coworker who engaged in protected activity).

255. See *Thompson*, 131 S. Ct. at 868.

256. See *supra* note 135 and accompanying text.

257. "To retaliate against a man by hurting a member of his family is an ancient method of revenge, and is not unknown in the field of labor relations." *NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086, 1088 (7th Cir. 1987). The NLRB has recognized the concept under the NLRA since the early 1960s. See *Golub Bros. Concessions*, 140 NLRB 120, 120-21 (1962) (determining that employer violated the NLRA by firing wife in response to her husband's union activities). Moreover, the first decisions addressing the issue under Title VII began to surface in the 1970s. See, e.g., *De Medina v. Reinhardt*, 444 F. Supp. 573, 580 (D.D.C. 1978) (recognizing third-party reprisal claim under Title VII; although "Congress did not expressly consider the possibility of third-party reprisals . . . the very clear intent of Congress would be undermined by" a construction of the statute that fails to recognize such claims; pointing to one other decision from federal district court that also raised an issue of third-party retaliation a few years prior), *aff'd in part and remanded in part*, 686 F.2d 997 (D.C. Cir. 1982); see also discussion Part III.B.1-2 (discussing decisions in which plaintiffs have alleged third-party retaliation claims prior to *Thompson*).

258. See discussion Part III.B.1-2.

259. See *id.*

260. See *id.*

Indeed, while *Thompson* is still a new decision, the class of employees who have alleged third-party retaliation claims post-*Thompson* have all alleged involvement in an intimate relationship with a coworker who engaged in protected activity.²⁶¹ Thus, employees with no close relationship have not rushed the courts with third-party retaliation claims as a result of *Thompson*. Nevertheless, where an employee does bring a claim and demonstrates causation, the individual should be protected for the reasons explained.

Finally, reading the material adversity standard as satisfied under the circumstances presented here is consistent with the purposes of the anti-retaliation provision. For instance, in this case perhaps Bates and Cotton are not friends, but other employees watching what is going on may consider themselves to be friends. Allowing the retaliation to occur here might affect the willingness of others to engage in protected activity if they know that the employer has *carte blanche* to take it out on most other employees with whom they associate—from the cubicle mate to the workplace buddy. Family may be off limits, but *Thompson* rejected

261. See, e.g., *Zamora v. City of Houston*, 425 Fed.App'x 314, 317 (5th Cir. 2011) (remanding case in light of *Thompson* where son alleged he was retaliated against for his father's protected activity); *Webber v. Christus Schumpert Health Sys.*, No. 10-1177, 2011 WL 3880398, at *9 (W.D. La. Sept. 2, 2011) (alleging that plaintiff and employee who engaged in protected activity had a "close relationship" as they were friends who vacationed together); *Male v. Tops Markets, LLC*, No. 09-CV-6532 CJS, 2011 WL 2471449, at *5 (W.D.N.Y. June 22, 2011) (alleging that husband was terminated because his wife had engaged in protected activity); *Morgan v. Napolitano*, No. CIV. S-09-2649 LKK/DAD, 2011 WL 246298, at *11–12 (E.D. Cal. June 17, 2011) (finding that husband stated claim by alleging retaliation as a result of wife's legal representation of other employee's in discrimination cases against husband's employer); *McGhee v. Healthcare Servs. Grp, Inc.*, No. 5:10cv279/RS-EMT, 2011 WL 818662, at *3 (N.D. Fla. Mar. 2, 2011) (holding that husband stated claim for retaliation for wife's protected activity); *DeGroat v. Pa. Dep't of Transp.*, No. 3:08cv463, 2011 WL 672416, at *1, 4 (M.D.Pa. Feb. 17, 2011) (relying on pre-*Thompson* circuit precedent to reject third-party retaliation decision where plaintiff alleged retaliation as a result of his fiancée's protected activity; noting that couple had been together for fifteen years in addition to being engaged); *Daughtry v. Family Dollar Stores, Inc.*, No. 09-5111 (RBK/AMD), 2011 WL 601270, at *3 (D.N.J. Feb. 16, 2011) (alleging retaliation as a result of wife's engagement in protected activity under Title VII); *Rodriguez-Monguio v. Ohio State Univ.*, No. 2:08-cv-00139, 2011 WL 335854, at *14 (S.D. Ohio Jan. 31, 2011) (allowing plaintiff to state a claim for third-party retaliation by relying on the protected activity of her "significant other," but ultimately rejecting the claim as she failed to show causal connection between the protected activity and the alleged adverse actions); *Condiff v. Hart Cnty. Sch. Dist.*, 770 F.Supp.2d 876, 883 (W.D. Ky. 2011) (suggesting in *dicta* that *Thompson* applies to claims raised under Title IX and contending that under that theory, plaintiff would be protected against retaliation on the basis of her husband's protected activity).

a bright-line rule of protecting only family.²⁶² An employee would be left to size up all workplace relationships to determine whether a discrimination complaint might doom a coworker with whom she has a connection to adverse treatment. The employee would be left to wonder how close is close enough? An employee contemplating whether to engage in protected activity should not have to guess at how close he or she needs to be to a coworker before Title VII affords protection to that coworker against third-party retaliation. Thus, allowing this type of retaliation to go unchecked undermines Title VII's goal of maintaining *unfettered* access to the statutory scheme, as it does not foster an environment in which "no person would be deterred" from filing complaints and serving as witnesses in Title VII actions.²⁶³

b. The Retaliatory Act

Thompson also raises the issue of the type of action visited upon the third-party because of a coworker's protected activity. *Thompson* instructs that material adversity is not only judged on the basis of a particular relationship between the employee who engaged in protected activity and the employee who was targeted, but also how that employee was targeted.²⁶⁴ In *Thompson*, the Court explained that it "expect[ed] that *firing* a close family member will almost always meet" the material adversity standard, and that "*inflicting a milder reprisal* on a mere acquaintance will almost never do so."²⁶⁵ Beyond that, the court was reluctant to generalize and for good reason.²⁶⁶

The material adversity standard should be a flexible one, as there may be circumstances unique to a particular case that should be taken into account.²⁶⁷ *Burlington*, for instance, explained that a schedule

262. *Thompson v. N. Am. Stainless, LP*, 131 S. Ct. 863, 868 (2011).

263. *DeMedina v. Reinhardt*, 444 F.Supp. 573, 580 (D.D.C. 1978) (holding that third-party reprisals should be unlawful under Title VII, as doing otherwise would undermine Congress' "unmistakabl[e] inten[t] to ensure that *no person would be deterred from exercising his rights under Title VII* by threat of discriminatory retaliation") (emphasis added); see also *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (explaining that a broad interpretation of Title VII's anti-retaliation provision is necessary because Title VII depends for its enforcement on individuals who are willing to file complaints and act as witnesses).

264. *Thompson*, 131 S. Ct. at 868.

265. *Id.* (emphasis added).

266. See *id.* at 868.

267. See *Burlington*, 548 U.S. at 69 (noting that the material adversity standard is stated "in general terms because the significance of any given act of retaliation will often depend upon the particular circumstances").

change may matter little to an employee, but may mean a great deal to a mother with school-age children.²⁶⁸ Likewise, a wife's schedule change may or may not matter much to her husband, who works evenings for the same employer. The analysis may change greatly, however, if the employer also moves the wife to evenings knowing the couple has young children and the wife's former schedule allowed her to care for them during the evenings.

At a minimum, without any unique circumstances that may attend to a particular case, an employer should not be allowed to do indirectly what it cannot do directly. Although the Court in *Burlington* declined to read a tangibility requirement into the anti-retaliation provision, such harm in most instances would likely have been actionable under the most stringent of standards prior to *Burlington*.²⁶⁹ If in response to Cotton's protected activity, an employer denied him a promotion and pay increase, that tangible employment action act would typically satisfy the material adversity standard.²⁷⁰

Where a court would find a particular act to be materially adverse if taken against the employee who engaged in protected activity, it should impose no more onerous a burden on the employee who was indirectly targeted as a result of that same protected activity. The denial of a promotion and raise would be materially adverse had it happened to Cotton because of his protected activity and should also be considered materially adverse as to Cotton, even though it was inflicted indirectly on a coworker because of Cotton's protected activity.

2. *Person Aggrieved*

The only remaining issue is whether Bates is a "person aggrieved" under the zone of interests test. This Article proposes that Bates is a person aggrieved. As the Court explained in *Thompson*, a plaintiff fails to meet the test only where his or her interest is "marginally related to or inconsistent with [Title VII's] purposes . . . [so] that it cannot reasonably be assumed that Congress intended to permit suit."²⁷¹ The Court

268. *Id.*

269. *See id.* at 60, 67 (rejecting the most onerous standard that lower courts had used to determine the threshold for actionable harm under the anti-retaliation provision; "ultimate employment decisions" test was the most onerous standard used and included such acts as promotion and compensation decisions).

270. *See id.*

271. *Thompson*, 131 S. Ct. at 870.

adopted the standard out of a concern that a failure to limit who may sue for a Title VII violation might allow individuals who are not harmed by discrimination in connection with their employment to sue any employer under an employment discrimination statute.²⁷² Allowing Bates to sue in the aforementioned scenario does not implicate these concerns.

Title VII is intended to protect employees from discrimination,²⁷³ which occurred here when the employer denied Cotton's request to promote Bates for retaliatory reasons.²⁷⁴ Further, denying Cotton's request to promote Bates was the means by which the employer intended to retaliate against Cotton. As the Court put it, "injuring [Bates] was the employer's intended means of harming [Cotton]."²⁷⁵

CONCLUSION

It may well be accurate to call the current Court pro-employee when it comes to its recent decisions interpreting Title VII's anti-retaliation provision. In adjudicating anti-retaliation claims, the lower courts should follow suit by relying on Title VII's broad text and the purposes that underlie it. *Thompson* continues the Court's trend with regard to retaliation. It gives courts broad discretion to determine the types of action that a reasonable employee would find materially adverse. Courts interpreting Title VII and similar statutes should use that discretion in a manner that broadly protects against retaliation consistent with the broadly-worded anti-retaliation provisions Congress enacted and the Court's approach to interpreting these provisions. In short, the material adversity standard *Thompson* adopts should be interpreted to root out third-party retaliation in the many contexts in which it may manifest—family, friend, cubicle mate or otherwise.

272. See *id.* at 869. The example the court used to express this concern is a situation where a company's shareholder would state a Title VII claim against the company because a productive employee of the company was fired for discriminatory reasons. *Id.* The shareholder would claim she was aggrieved because the firing made the company less profitable. *Id.*

273. See *Thompson*, 131 S. Ct. at 870.

274. Cf. *id.* at 870 (stating that statute was violated when employer fired *Thompson* to get back at his fiancée).

275. *Id.*

