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RETALIATION AGAINST THIRD PARTIES: A POTENTIAL LOOPHOLE IN TITLE VII'S DISCRIMINATION PROTECTION

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Should the sins of the father be visited upon the son?¹ Or, for that matter, should the sins of the husband be visited upon the wife or the sins of a friend upon another friend? When one employee suffers an adverse employment action as a result of the protected activity of another, should there be a cause of action for the employee that did not engage in the protected activity? For example, if a mother and daughter both work for the same company and the mother engages in a protected activity, such as filing a charge of discrimination, should the daughter have a cause of action against the company if she is subsequently fired in retaliation for her mother's claim?

This is the question that courts must address in third party employment retaliation cases. Currently, courts are split on the issue.² The courts that allow the claims do so on the basis that it comports with the purpose of Title VII of the 1964 Civil Rights Act.³ Other courts do not allow the claims on the basis that the plain language of Title VII does not support it.⁴

This comment will address the split on this issue and propose that third-party claims are permissible. Part I will provide a brief background on Title VII. It will also review the elements of a prima facie retaliation claim and the problems associated with a third-party claim. Part II will discuss the major cases on third

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1. *Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 564 (3d Cir. 2002) (citing EURIPIDES, PHRIXUS, frag. 970; HORACE, ODES III, 6:1; WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE, act 3, sc. 5).

2. Melissa A. Essary & Terence D. Friedman, *Retaliation Claims Under Title VII, the ADEA, and the ADA: Untouchable Employees, Uncertain Employers, Unresolved Courts*, 63 MO. L. REV. 115, 130 (1998). The commentators contend that besides issues concerning what constitutes an adverse employment action, "there is no more uncertain area of the case law on retaliation than that of retaliation against employees who work in the same workplace as spouses, relatives, or other closely related third parties who have themselves engaged in protected conduct." *Id.*

3. *Equal Employment Opportunity Comm'n v. Ohio Edison Co.*, 7 F.3d 541, 545-46 (6th Cir. 1993).

4. *Smith v. Riceland Foods, Inc.*, 151 F.3d 813, 819 (8th Cir. 1998).

party retaliation, focusing on the reasoning behind the holding in each case. Finally, Part III will propose that the purpose of Title VII is best served by adopting a broad interpretation of the statutory language to include retaliation claims by third parties.

I. TITLE VII: PUTTING AN END TO EMPLOYMENT DISCRIMINATION
AND ASSOCIATED RETALIATION

A. Overview and Purpose of Title VII

President John F. Kennedy sent a proposed civil rights bill to Congress at a time of great civil unrest⁵ for the purpose of ending racial discrimination in places of public accommodation.⁶ As the acrimonious and sometimes violent battle⁷ to end discrimination wore on, congressional proponents of the bill amended it to add protection for equal opportunity in employment for minorities⁸ and, eventually, for women.⁹ This bill became the 1964 Civil Rights Act; Title VII¹⁰ of this bill deals with employment discrimination.¹¹

Title VII currently makes it unlawful to discriminate against an employee on the basis of race, color, religion, sex or national origin.¹² It also contains a provision prohibiting retaliation by an

5. ROBERT D. LOEVY, *THE CIVIL RIGHTS ACT OF 1964* 19, 38-40 (1997). In the book, the author states that “[i]t can be said of the Civil Rights Act of 1964 that, short of a declaration of war, no other act of Congress had a more violent background – a background of confrontation, official violence, injury, and murder that has few parallels in American history.” *Id.* at 40.

6. *Id.* at 38-42.

7. *Id.* at 39-42. After the first two black students registered for classes at the University of Alabama in 1963, President Kennedy addressed the nation, stating that “[t]he fires of frustration and discord are burning in every city, North and South, where legal remedies are not at hand Next week I shall ask the Congress . . . to make a commitment . . . to the proposition that race has no place in American life or law.” *Id.* at 353.

8. *Id.* at 334, 355-56.

9. *Id.* at 357. See 1 ARTHUR LARSON & LEX K. LARSON, *EMPLOYMENT DISCRIMINATION (MB)* § 2.05 (2003) (providing a history of discrimination, including the fact that “for most of the history of American law courts at all levels accepted the constitutionality of discrimination based on sex”). These amendments regarding employment became the basis for Title VII, Equal Employment Opportunity, which prohibits discrimination in employment based on several enumerated factors and set up the Equal Employment Opportunity Commission (“EEOC”). CHARLES W. WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE* 241 (1985).

10. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (2000).

11. WHALEN & WHALEN, *supra* note 9, at 241.

12. 42 U.S.C. § 2000e-2. An unlawful employment practice consists of “fail[ing] or refus[ing] 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.” *Id.* The Act is applicable to employers

employer against employees who file discrimination charges or otherwise engage in protected activity.¹³ The statute states:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.¹⁴

A retaliation claim is a separate claim and may proceed even if the underlying discrimination claim fails.¹⁵

To sustain a claim of retaliation, an employee must first establish a prima facie case by establishing three elements: (1) that he engaged in protected activity; (2) that the employer took an adverse employment action against him; and (3) that there was a causal connection between his engaging in protected activity and the adverse employment action.¹⁶ In *McDonnell Douglas Corp. v. Green*,¹⁷ the Supreme Court set forth the framework for analyzing a retaliation claim and the accompanying burden-shifting of proof.¹⁸ Under this framework, employees must first establish

having fifteen or more employees. *Id.* § 2000. The procedure for filing a complaint is set forth in the statute and requires that an aggrieved employee first file with the EEOC before bringing a charge in a court of law. *Id.* § 2000e-5.

13. *Id.* § 2000e-3(a).

14. *Id.*

15. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, COMPLIANCE MANUAL 8-2 (1998) [hereinafter EEOC COMPLIANCE MANUAL], <http://www.eeoc.gov/docs/retal.pdf>.

16. *Smith*, 151 F.3d at 818; *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 705 (5th Cir. 1997). *But see Stone v. Indianapolis Pub. Util. Div.*, 281 F.3d 640, 644 (7th Cir. 2000) (changing the traditional prima facie case for retaliation to include the same elements used for discrimination).

17. 411 U.S. 792 (1973).

18. *Id.* at 802-05. In *McDonnell Douglas*, the Supreme Court established that a plaintiff must first show a prima facie case of racial discrimination by showing:

(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Id. at 802. If the plaintiff establishes a prima facie case, the burden shifts to the defendant to show some "legitimate, nondiscriminatory reason" for not hiring the employee. *Id.* Once the defendant comes forward with such information, the burden then shifts back to plaintiff to show that the reason given by the defendant is pretextual. *Id.* at 804-05. This rule was then clarified in *Texas Department of Community Affairs v. Burdine* by emphasizing that the burden of persuasion regarding discrimination remains on the plaintiff at all times. 450 U.S. 248, 253 (1981). This same burden-shifting analysis is applied to retaliation claims. *Contreras v. Suncast Corp.*, 237 F.3d 756, 759-60 (7th Cir. 2001); *EEOC v. Avery Dennison Corp.*, 104 F.3d

their prima facie case.¹⁹ If they are able to do so, the burden then shifts to the employer to provide a legitimate, non-discriminatory reason for the adverse employment action.²⁰ If the employer offers such a reason, the burden shifts back to the employee to show that the offered reason is actually a pretext for retaliation.²¹

B. Prima Facie Retaliation Case

1. Protected Activity

Title VII provides two basic types of protected activity: opposing unlawful practices and assisting or participating in the process.²² While it is well settled that an employee may bring a retaliation claim based on participation, whether or not the underlying charge is meritorious, this is not the case under the opposition clause.²³ Some courts do not allow a retaliation claim based on opposition unless the plaintiff is actually able to prove discrimination.²⁴ Most courts, however, hold that employees may bring a claim regardless of the merits of the underlying case as long as they have a reasonable belief in the claim.²⁵

858, 862 (6th Cir. 1997); *Long v. Eastfield Coll.*, 88 F.3d 300, 304 (5th Cir. 1996). However, where there is direct evidence, the burden-shifting analysis of *McDonnell Douglas* is not necessary. *Stone*, 281 F.3d at 643; EEOC COMPLIANCE MANUAL, *supra* note 15, at 8-16.

19. *Holifield v. Reno*, 115 F.3d 1555, 1566 (11th Cir. 1997).

20. *Id.*

21. *Id.*

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

23. *See Jeffries v. Kan. Dep't of Soc. & Rehab. Servs.*, 147 F.3d 1220, 1231 (10th Cir. 1998) (stating that a "plaintiff may maintain an action for retaliation based on participation . . . regardless of whether the conduct forming the basis of her underlying complaint is adjudged to violate Title VII"); 1 EMPLOYEE RIGHTS LITIGATION: PLEADING AND PRACTICE (MB) § 2.02[6](a) (2002) [hereinafter EMPLOYEE RIGHTS LITIGATION]. *But see Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1454-55 (11th Cir. 1998) (holding that because the plaintiff showed a reasonable basis for filing a retaliation claim, the court need not decide if a retaliation claim based on the participation clause must show a reasonable, good-faith basis).

24. EMPLOYEE RIGHTS LITIGATION, *supra* note 23, § 2.02[6](a) (citing *EEOC v. C&D Sportswear Corp.*, 398 F. Supp. 300 (M.D. Ga. 1975)).

25. *Wyatt v. Boston*, 35 F.3d 13, 15 (1st Cir. 1994) (quoting 3 ARTHUR LARSON & LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 87.12(b) (1994) that "there is nothing in [the statute's] wording requiring that the charges be valid, nor even an implied requirement that they be reasonable"); *Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1458 (7th Cir. 1994) (holding that an employee may bring a retaliation case even though the challenged activity did not actually violate Title VII as long as there was a reasonable, good-faith belief); EMPLOYEE RIGHTS LITIGATION, *supra* note 23, § 2.02[6](a). The Supreme Court recently declined to rule on the Ninth Circuit's holding that a cause of action for retaliation extends to claims that the employee "could reasonably believe were unlawful." *Clark County Sch. Dist. v. Breeden*, 532

A protected activity generally includes filing a charge with the Equal Employment Opportunity Commission,²⁶ threatening to file a charge²⁷ or discussing a potential charge with an EEOC counselor prior to actually filing a complaint.²⁸ It can also include refusing to obey orders thought to be discriminatory.²⁹ However, an informal complaint to a supervisor without any specific allegations of discrimination is generally not sufficient.³⁰

Although Title VII only specifically includes employees and applicants for employment,³¹ the Supreme Court ruled that the term "employee" also extends to former employees.³² The Court explained that the more inclusive definition is consistent with the broader context of Title VII and its purpose.³³

U.S. 268, 270 (2001). The case involved an underlying claim of sexual harassment based on a single incident of an ambiguous remark. *Id.* at 269-71. The Court concluded that there was no occasion to rule because, in the particular case, "no one could reasonably believe that the incident . . . violated Title VII." *Id.* at 270.

26. *Smart v. Ball State Univ.*, 89 F.3d 437, 440-41, (7th Cir. 1996); *Jones v. Flagship Int'l*, 793 F.2d 714, 726 (5th Cir. 1986).

27. *Snodgrass v. Brown*, No. 89-1171-K, 1990 U.S. Dist. LEXIS 16418, at *43 (D. Kan. Nov. 26, 1990); *Gifford v. Atchison, Topeka & Santa Fe Ry.*, 549 F. Supp. 1, 16-17 (C.D. Cal. 1980). *See also Sauer v. Salt Lake County*, 1 F.3d 1122, 1128 (10th Cir. 1993) (holding that an "[a]ction taken against an individual in anticipation of that person engaging in protected opposition to discrimination" may be retaliatory in nature).

28. *Hashimoto v. Dalton*, 118 F.3d 671, 679-80 (9th Cir. 1997). The court held that the employee had engaged in protected activity even though, by the end of the meeting, the employee no longer felt there was an actual discrimination issue. *Id.*

29. *Moyo v. Gomez*, 40 F.3d 982, 984 (9th Cir. 1994). *But see Whatley v. Metro. Atlanta Rapid Transit Auth.*, 632 F.2d 1325, 1329 (5th Cir. 1980) (holding that assisting another in filing a complaint does not protect an employee who does not follow instructions from his supervisor or who performs poorly).

30. *Watts v. Kroger Co.*, 170 F.3d 505, 511 (5th Cir. 1999). *See also Little v. United Tech.*, 103 F.3d 956, 961 (1997) (holding that a single remark did not constitute an unlawful employment practice and, therefore, opposition to the remark did not constitute protected activity).

31. 42 U.S.C. § 2000e-3(a).

32. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997). This case involved an employee who filed a discrimination charge after being fired. *Id.* at 339. The former employee claimed that the employer gave a negative reference to a new prospective employer in retaliation for the discrimination charge. *Id.*

33. *Id.* at 346. The Court reached this conclusion after determining that the word "employees" was ambiguous. *Id.* at 341. The Court stated that "[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Id.* at 341 (citing *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 477 (1992); *McCarthy v. Bronson*, 500 U.S. 136, 139 (1991)).

2. Adverse Employment Action

There is currently a great deal of controversy and a circuit split over what constitutes an adverse employment action.³⁴ Some courts hold that anything short of an "ultimate employment decision" is not covered by the statute,³⁵ while others take a more liberal view.³⁶ For instance, in *Mattern v. Eastman Kodak Co.*,³⁷ the court defined an adverse employment action as consisting of "hiring, granting leave, discharging, promoting, and compensating."³⁸ In this case, the employee claimed retaliation after the employer made an unprecedented visit to her home, demanding she return to work after she became ill with a work-related illness.³⁹ The employee further claimed that the employer later reprimanded her for not being at her work station even though, at the time, she was in the Human Resource Department discussing the situation, and that the employer reviewed her more negatively after her EEOC charge than before.⁴⁰ In its ruling, the court held that the employee had failed to demonstrate a prima facie case for retaliation as the described events "[did] not constitute 'adverse employment actions' because of their lack of consequence."⁴¹ Other courts have taken a similarly narrow view.⁴²

34. See *Wideman*, 141 F.3d at 1456 (stating that there is a circuit split on this issue and joining the courts that have held that discrimination includes more than an ultimate employment decision). See also Linda M. Glover, *Title VII Section 704(a) Retaliation Claims: Turning a Blind Eye Toward Justice*, 38 HOUS. L. REV. 577, 581 (2001) (proposing a liberal view that claims are actionable if the employer takes conduct "that chills employee access to the anti-discrimination provisions of Title VII"). But see Matthew J. Wiles, Comment, *Defining Adverse Employment Action in Title VII Claims for Employer Retaliation: Determining the Most Appropriate Standard*, 27 U. DAYTON L. REV. 217, 220 (2001) (proposing adoption of a middle-of-the-road standard which includes only those actions that "materially affect the terms and conditions" of employment). All courts and the EEOC agree that "petty slights and trivial annoyances are not actionable . . ." EEOC COMPLIANCE MANUAL, *supra* note 15, at 8-13.

35. *Mattern*, 104 F.3d at 708.

36. *Gunnell v. Utah Valley State Coll.*, 152 F.3d 1253, 1264 (10th Cir. 1998) (stating that the court decides the issue of adverse employment action on a case-by-case basis and holding that co-worker hostility, "if sufficiently severe, may constitute 'adverse employment action' for purposes of a retaliation claim").

37. *Mattern*, 104 F.3d at 702.

38. *Id.* at 707 (quoting *Dollis v. Rubin*, 77 F.3d 777, 782 (5th Cir. 1995)). The court further stated that "Title VII was designed to address ultimate employment decisions, not to address every decision made by employers that arguably might have some tangential effect upon those ultimate decisions." *Id.* (quoting *Dollis*, 77 F.3d at 781-82).

39. *Id.* at 705.

40. *Id.* at 705-06.

41. *Id.* at 708.

42. See *Burger v. Cent. Apartment Mgmt., Inc.*, 168 F.3d 875, 878 (5th Cir. 1999) (stating that the Fifth Circuit has held to a stricter standard than other

In contrast, the court in *Wideman v. Walmart Stores, Inc.*⁴³ held that the “protection against retaliatory discrimination extends to adverse actions which fall short of ultimate employment decisions.”⁴⁴ In *Wideman*, the alleged adverse actions consisted of being improperly listed as a “no show” on a day the employee was not scheduled to work, being forced to work through a lunch break and receiving two written reprimands and a suspension, even though in the previous eleven months of employment the employer had given the employee no reprimands.⁴⁵ In addition, the employee alleged that the employer began to solicit fellow employees for negative comments about her, one manager threatened her when she stated her intention to call company headquarters about her treatment and the company delayed in getting medical treatment for her when she suffered an allergic reaction at work.⁴⁶ Although the employer claimed that none of these events were sufficient to rise to the level of adverse employment actions, the court disagreed, explaining that its ruling was consistent with the remedial purpose of Title VII.⁴⁷ The court noted that allowing employers to take retaliatory action, as long as it fell short of an ultimate employment action, “could stifle employees’ willingness to file charges of discrimination.”⁴⁸ This more liberal, more encompassing view is held by the majority of courts.⁴⁹

courts and affirming the ultimate employment decision set forth in *Mattern*). See also *Ledergerber v. Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997) (concluding that “[w]hile the action complained of may have had a tangential effect on her employment, it did not rise to the level of an ultimate employment decision intended to be actionable under Title VII”).

43. 141 F.3d at 1453.

44. *Id.* at 1456. The court further stated that the position of the Fifth and Eighth Circuits is inconsistent with the plain language of the statute. *Id.* It held that “[r]eading in the light of ordinary understanding, the term ‘discriminate’ is not limited to ‘ultimate employment decisions.’” *Id.*

45. *Id.* at 1455.

46. *Id.*

47. *Id.* at 1455-56.

48. *Id.* at 1456.

49. See *Randlett v. Shalala*, 118 F.3d 857, 862 (1st Cir. 1997) (rejecting the “view that a refusal to transfer is automatically outside Title VII”); *Knox v. Indiana*, 93 F.3d 1327, 1334 (7th Cir. 1996) (stating that the law does not provide a specific “laundry list” of actions that may be considered retaliatory and that allowing harassment by fellow employees after a complainant engages in protected activity could fall within the category protected by Title VII); *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 986 (10th Cir. 1996) (holding that malicious prosecution may constitute an adverse employment action); *Yartsoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987) (holding that the transfer of job duties and undeserved below average performance ratings can constitute adverse employment action if proven). In *Ray v. Henderson*, the Ninth Circuit held that “an adverse employment action is adverse treatment that is reasonably likely to deter employees from engaging in protected activity,” including such actions as elimination of employee meetings,

3. Causation

The third element plaintiffs must prove in their prima facie case is causation.⁵⁰ To prove causation, employer knowledge of the protected activity is generally required,⁵¹ although it may be inferred from the circumstances.⁵² As with the other elements, there is controversy and a circuit split over the standard necessary to prove causation.⁵³ Some courts take a liberal approach, requiring only that the protected activity and the adverse employment action not be “completely unrelated”⁵⁴ or that the actions be close in temporal proximity.⁵⁵ However, within the area of temporal proximity, there is no set guideline for how close in time the two actions must be.⁵⁶ For example, courts have held that two days,⁵⁷ or even five months,⁵⁸ is close enough to establish causation while others have held that four months is too long.⁵⁹ Additionally, some courts extend the time if there are other factors present, such as “a pattern of antagonism”⁶⁰ or inconsistent

elimination of flexible starting times, institution of a “lockdown”, and a reduction in salary. 217 F.3d 1234, 1237 (9th Cir. 2000). The court, giving a complete review of the circuit split, noted that the First, Seventh, Tenth, Eleventh and D.C. Circuits define an adverse employment action broadly. *Id.* at 1240. It further explained that the Second and Third Circuits take an intermediate position, while the Fifth and Eighth Circuits take the most restrictive views. *Id.* The Ninth Circuit concluded that the more liberal standard is appropriate given “the language and purpose of Title VII.” *Id.* at 1243.

50. *Sauers*, 1 F.3d at 1128 (citing *Williams v. Rice*, 983 F.2d 177, 181 (10th Cir. 1993)).

51. *Brower v. Runyon*, 178 F.3d 1002, 1006 (8th Cir. 1999); *Dey*, 28 F.3d at 1458.

52. *Hernandez v. Spacelabs Med. Inc.*, No. 02-35615, 2003 WL 22097877, at *6 (9th Cir. Sept. 11, 2003).

53. Rhea Gertken, Note, *Causation in Retaliation Claims: Conflict Between the Prima Facie Case and the Plaintiff's Ultimate Burden of Pretext*, 81 WASH. U. L.Q. 151, 155 (2003) (citing *Gorman-Bakos v. Cornell Coop. Extension of Schenectady County*, 252 F.3d 545, 554-55 (2d Cir. 2001)).

54. *Wideman*, 141 F.3d at 1457 (citing *Meeks v. Computer Assocs. Int'l*, 15 F.3d 1013, 1021 (11th Cir. 1994) (quoting *EEOC v. Reichhold Chems., Inc.*, 988 F.2d 1564, 1571-72 (11th Cir. 1993)); *Holifield*, 115 F.3d at 1567.

55. *Williams v. Cerberonics, Inc.*, 871 F.2d 452, 457 (4th Cir. 1989). The Fourth Circuit explained that the plaintiff's proof of causation was essentially that the employer fired her after it became aware that she had filed a discrimination charge. *Id.* The court stated that “[w]hile this proof far from conclusively establishes the requisite causal connection, it certainly satisfies the less onerous burden of making a prima facie case of causality.” *Id.*

56. See generally *Essary & Friedman*, *supra* note 2, at 143-44 (explaining that the time frame necessary to show causation can vary from one day to many months); Gertken, *supra* note 53, at 155-59 (discussing various court rulings on temporal proximity in relation to causation).

57. *Jalil v. Avdel Corp.*, 873 F.2d 701, 708 (3d Cir. 1989).

58. *Gorman-Bakos*, 252 F.3d at 555.

59. *Cooper v. City of North. Olmsted*, 795 F.2d 1265, 1272 (6th Cir. 1986).

60. *Kachmar v. Sungard Data Sys.*, 109 F.3d 173, 177 (3d Cir. 1997) (citing

statements given for the adverse employment action.⁶¹ Still others, such as the Fifth Circuit, use a “but for” causation standard which includes temporal proximity as only one factor to be considered in the determination.⁶²

C. Third Party Claims

Third party claims present a particular problem in proving a prima facie case. Title VII states that “[i]t shall be unlawful . . . for an employer to discriminate against any of his employees . . . because *he* has opposed any practice . . . or because *he* has made a charge.”⁶³ Taken literally, this implies that the person who is retaliated against must be the same person that opposed an unlawful practice or participated in a protected activity.⁶⁴ This presents a problem in third-party-retaliation claims because the person who suffers the adverse employment action under the second element is not the same person who engages in the protected activity.⁶⁵ Currently, courts are divided over whether to

Robinson v. Southeastern Pa. Transp. Auth., 982 F.2d 892, 895 (3d Cir. 1993)). The district court in the case rejected the plaintiff's claim of retaliation because she was terminated over a year after engaging in protected activity. *Id.* The Third Circuit disagreed, however, finding that the district court erred in setting its date of the protected activity. *Id.* at 177-78. Furthermore, the court stated that temporal proximity is only a basis from which an inference of causation can be drawn. *Id.* at 178. It emphasized that to show causation, courts must look at the evidence as a whole, in light of the particular circumstances of the case. *Id.* at 177. The court stated that causation, “which necessarily involves an inquiry into the motives of an employer, is highly context-specific” and that an “absence of immediacy between the cause and effect does not disprove causation.” *Id.* at 178. Finally, the Third Circuit held that the district court should have made an inquiry to determine if the “protected activity was the likely reason for [the plaintiff's] termination.” *Id.* at 179.

61. Farrell v. Planters Lifesavers Co., 206 F.3d 271, 281 (3d Cir. 2000) (citing Waddell v. Small Tube Prods., Inc., 799 F.2d 69, 73 (3d Cir. 1986)).

62. Shirley v. Chrysler First, Inc., 970 F.2d 39, 43-44 (5th Cir. 1992). In *Shirley*, the court found that although fourteen months had passed since the filing of the EEOC complaint to the employee's termination, the circumstances of the case established causation. *Id.* at 42-44. After filing the complaint, the plaintiff was written up for altering loan records and subsequently suspended and then terminated, even though in her previous nine years of employment she had never had any disciplinary problems. *Id.* at 43. The court disagreed that the passage of fourteen months was legally conclusive proof of no retaliation. *Id.*

63. 42 U.S.C. § 2000e-3(a) (*emphasis added*).

64. 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, 484 (2002).

65. *Id.* There is a compelling argument that the purpose of the statute would be compromised if an employer were free to retaliate against a relative or friend of an employee after the employee engages in protected activity. *Id.* However, an attack on the plain meaning of the statute will clearly not work. *Id.* at 484-85. Additionally, many judges are unreceptive to arguments based

interpret the statute according to its literal meaning⁶⁶ or to give it a more expansive meaning to effectuate the purpose of the statute.⁶⁷ If interpreted according to its literal meaning, the statute provides no protection for retaliation against closely-associated third parties.⁶⁸

II. THE DEBATE RAGES: PLAIN MEANING V. PURPOSE OF THE STATUTE

Courts take two opposing views of interpretation when deciding the issue of third-party-retaliation claims: plain meaning and purpose of the statute.⁶⁹ Because cases under Title VII, the Americans with Disability Act ("ADA"),⁷⁰ and Age Discrimination in Employment Act ("ADEA")⁷¹ all tend to be analyzed similarly in relation to retaliation,⁷² courts use cases from all three statutes as

totally on the purpose of the statute. *Id.* at 485. Therefore, a proponent of third-party claims must first establish an ambiguity based on the broader context of the statute and then argue that the term "he" may be broad enough to cover the case of a spouse or one employee acting for another one. *Id.* at 485-87. The ambiguity thus created should be resolved in favor of a broad reading of the statute. *Id.* at 487.

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

67. *De Medina v. Reinhardt*, 444 F. Supp. 573, 580 (D.D.C. 1978), *aff'd in part and rev'd in part*, 686 F.2d 997 (D.C. Cir. 1982).

68. *Nalbandian*, 36 F. Supp. 2d at 1209; *Gregory*, *supra* note 64, at 484.

69. Although the views basically fall into two camps, there are several circuits that have not yet addressed the issue. The Second, Fourth, and Tenth Circuits are in this group. See *Thomas v. Am. Horse Shows Ass'n, Inc.*, No. 99-7662, 2000 U.S. App. LEXIS 904, at *2 (2d Cir. Jan. 25, 2000) (holding that it had not yet decided the issue of third-party-retaliation claims but affirming summary judgment on the ground that, even if such a cause of action exists, the plaintiff had not established a prima facie case); *EEOC v. Bojangles Rest., Inc.*, 284 F. Supp. 2d 320, 326 (M.D.N.C. 2003) (stating that the Fourth Circuit had not addressed the issue, but finding the decisions of the courts that had rejected the claim as more persuasive); *Horizon Holdings, L.L.C. v. Genmar Holdings, Inc.*, 241 F. Supp. 2d 1123, 1143 (D. Kan. 2002) (noting that the Tenth Circuit had not had the opportunity to decide the issue). Several district courts in the second circuit faced this issue recently but resolved the actions on other grounds. See *Reiter v. Metro. Transit Auth.*, No. 01 Civ. 2762, 2002 U.S. Dist. LEXIS 18537, at *23 (S.D.N.Y. Sept. 20, 2002) (noting that it was unnecessary to make a decision regarding third-party claims because no reasonable juror could find that the plaintiff had actually suffered retaliation); *Sacay v. Research Found. of the City Univ. of N.Y.*, 193 F. Supp. 2d 611, 634 (E.D.N.Y. 2002) (noting that it was unnecessary to resolve third-party standing because the daughter had raised an issue of material fact that she had engaged in protected activity in her own right). However, at least one district court in the second circuit has recognized a cause of action for third-party-retaliation claims. *Gonzalez v. N.Y. State Dep't of Corr. Servs. Fishkill Corr. Facility*, 122 F. Supp. 2d 335, 347 (N.D.N.Y. 2000).

70. 42 U.S.C. § 12206.

71. 29 U.S.C. § 623(d).

72. *Fogleman*, 283 F.3d at 567 (citing *Krouse v. Am. Sterilizer Co.*, 126 F.3d 494, 500 (3d Cir. 1997)).

precedent in making their decisions. The three statutes are worded very similarly except that the ADA has a section that has a broader scope than the other two.⁷³

A. Plain Meaning of the Statute

1. Fifth Circuit

The Fifth Circuit is one of the circuits taking a firm stance that a retaliation claim should be interpreted according to the plain meaning of the statute. *Holt v. JTM Industries, Inc.*⁷⁴ is the seminal case for this view.⁷⁵ *Holt* involved a situation where a husband and wife worked for the same employer.⁷⁶ After being terminated, the wife filed a charge of age discrimination against the employer.⁷⁷ Approximately two weeks after receiving notice of the complaint, the company placed her husband, a plant manager, on paid administrative leave and later offered him another job out of state.⁷⁸ The husband then voluntarily quit and brought charges of retaliation based on his wife's protected activity.⁷⁹ He made no claim that he had actually participated in his wife's charges but instead claimed that her protected activity should be imputed to him.⁸⁰

The Fifth Circuit rejected the claim, holding that granting automatic standing to a spouse for retaliation would be contrary to the plain language of the ADEA.⁸¹ Although dismissing the claim, the Court acknowledged that there was a risk that an employer might actually retaliate against a spouse, other relative, or even a friend of the person engaging in protected activity.⁸² The Court, however, reasoned that the extra protection would rarely be necessary because the spouse or other closely-associated person would, in most cases, participate in the protected activity "in some manner."⁸³

73. 1 JONATHAN R. MOOK, AMERICANS WITH DISABILITIES ACT: EMPLOYEE RIGHTS AND EMPLOYER OBLIGATIONS, App. G, §8-II[B](1) (2003).

74. 89 F.3d at 1224.

75. *Id.* at 1226-27.

76. *Id.* at 1225.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Holt*, 89 F.3d at 1226. The court, however, did not see this as contradictory to the Sixth Circuit's allowance of a claim for an employee whose representative had engaged in protected activity on his behalf. *Id.* at 1227 n.2 (citing *Ohio Edison*, 7 F.3d at 545). The court reasoned that having someone act on another employee's behalf satisfied the participation requirement. *Id.*

82. *Id.* at 1226-27. The Fifth Circuit further acknowledged that the statute contained "broad language" to prevent fear from economic retaliation for engaging in protected activities. *Id.*

83. *Id.* at 1227. The Fifth Circuit reaffirmed its requirement of some level

The dissenting judge expressed strong opposition to the holding, stating that “[t]he literal meaning of the anti-retaliation provision should not be used to undermine the clear purpose and intent of the [statute].”⁸⁴ The dissent further emphasized that instead of focusing on whether the company retaliated against the same person who engaged in protected activity, the focus should be on the causal connection between the protected activity and the adverse employment action inflicted on the third party.⁸⁵

2. Eighth Circuit

Approximately two years after *Holt*, the Eighth Circuit returned a similar ruling in *Smith v. Riceland Foods, Inc.*⁸⁶ In this case, two employees lived together and management knew of their relationship.⁸⁷ After the company denied Smith, the female, a promotion, she filed discrimination charges based on race and gender under Title VII.⁸⁸ Shortly thereafter, the employer accused Smith of falsifying company records and terminated her.⁸⁹ The company subsequently fired her partner, Thomas, a long-time employee, for the same reason.⁹⁰ Both parties then brought suits against the employer, claiming retaliation for Smith’s protected activity.⁹¹

of participation in a later Title IX case. *Lowrey v. Tex. A & M Univ. Sys.*, 117 F.3d 242, 251-52 (5th Cir. 1997). The court found the necessary participation by the plaintiff-coach voicing her opposition to discrimination against female athletes. *Id.* at 251.

84. *Holt*, 89 F.3d at 1231 (Dennis, J., dissenting). The dissent relied on ADEA § 7(c), which states that “any person aggrieved” may bring an action to “effectuate the purposes of this Act.” *Id.* at 1228 (Dennis, J., dissenting). According to the Act, an “aggrieved person” is “any person who claims to have been injured by a discriminatory practice.” *Id.* at 1228-29 (Dennis, J., dissenting). The dissent stated that the circuit had previously construed Title VII according to the usage in the Fair Housing Act and should do so once again to give standing a broad application. *Id.* at 1229 (Dennis, J., dissenting).

85. *Id.* at 1232 (Dennis, J., dissenting). Additionally, courts should modify the prima facie case for retaliation to read: “(1) that an employee engaged in activity protected by the ADEA; (2) that an adverse employment action occurred to the plaintiff; and (3) that a causal link between the participation in the protected activity and the adverse employment decision exists.” *Id.* at 1233 (Dennis, J., dissenting) (emphasis added).

86. 151 F.3d at 813.

87. *Id.* at 815-16.

88. *Id.* at 816.

89. *Id.* at 816-17.

90. *Id.* at 817. Falsification of records meant there was a discrepancy between the time employees spent at a computer center and the amount of time actually spent on the computer. *Id.* at 816-17. While other employees had similar discrepancies in their pay records, the company did not terminate them because, according to the employer, no employee had made statements implicating them in abuse as they had against Smith and Thomas. *Id.* at 817.

91. *Id.*

The Eighth Circuit, however, rejected Thomas's claim of retaliation.⁹² Although Thomas claimed he had assisted Smith in her charge, the court concluded that no reasonable jury could find that the company knew of his assistance; therefore, there was no causation.⁹³ Thomas claimed, in the alternative, that even if the company had no knowledge of his assistance in Smith's activity, he should have standing based on his relationship as her "significant other."⁹⁴ The court, relying on *Holt*, rejected this theory as well and held that the person bringing a retaliation claim under Title VII must be the same person who engaged in protected activity.⁹⁵

3. Third Circuit

More recently, the Third Circuit took a "plain language" stance on the third party issue in *Fogleman v. Mercy Hospital, Inc.*⁹⁶ In this case, a father and son worked for the same hospital.⁹⁷ After the hospital gave the father a choice between a demotion and a voluntary departure, the father left the company and filed age and disability discrimination charges against the hospital.⁹⁸ While the father's suit was pending, the hospital accused the son of violating company rules and suspended him.⁹⁹ The hospital then fired the son on the same day the father was to be deposed in his lawsuit against the hospital.¹⁰⁰ As a result, the son brought suit under the ADA, ADEA, and a Pennsylvania statute, claiming the hospital fired him in retaliation for his father's protected activity.¹⁰¹

In reviewing the son's claims, the court looked at the plain meaning of the statute and found it to be unambiguous in its meaning that the person who was retaliated against must be the same person that engaged in protected activity.¹⁰² The court,

92. *Smith*, 151 F.3d at 818.

93. *Id.* at 818-19.

94. *Id.* at 819.

95. *Id.*

96. 283 F.3d at 568.

97. *Id.* at 564.

98. *Id.* at 565.

99. *Id.* at 565-66. The son, the Supervisor of Security for the hospital, entered the hospital gift shop using a spare key, allegedly to check on an elderly employee. *Id.* at 566. Even though the son's supervisor testified that the son had routinely entered the shop to check on the elderly employee, the hospital, troubled by conflicting information from the elderly employee, found that the son had violated company rules. *Id.*

100. *Id.* It appears that no actual investigation of the incident took place prior to the decision to terminate the son. *Id.*

101. *Id.*

102. *Fogleman*, 283 F.3d at 568. Even though the court ruled according to the plain meaning of the statute, it stated that there was no doubt that retaliation against a friend or relative of an employee that had engaged in protected activity would deter employees from engaging in such activity. *Id.*

although acknowledging that recognition of third-party claims would be "more consistent with the purpose of the anti-discrimination statutes," stated that interpreting according to the plain meaning did not produce "an absurd outcome that contravenes the clearly expressed intent of the legislature."¹⁰³ The court further discussed possible, although not "particularly convincing," reasons why Congress may not have wanted to extend protection to third-party retaliation claims.¹⁰⁴ The reasons included Congress's possible fear for an increase in frivolous lawsuits and the fact that friends and relatives may have participated in filing the charges, thereby negating the need for additional protection.¹⁰⁵

The court, although rejecting the son's retaliation claim based on the ADA, ADEA, and the state statute, held that he did have a cause of action under the second anti-retaliation provision of the ADA.¹⁰⁶ This provision states that "[i]t shall be unlawful to coerce [or] intimidate . . . on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter."¹⁰⁷ The court found that this language did not "limit a cause of action to the particular employee that engaged in protected activity" and compared the language to that found in the National Labor Relations Act ("NLRA"), section 8(a)(1).¹⁰⁸ The court stated that because of its own precedent,¹⁰⁹ plus that from other circuits,¹¹⁰ in recognizing a cause of action for close relatives of employees that engage in protected activity under the NLRA, as well as similar policies underlying the two statutes, the son could assert a claim under the second provision of the ADA.¹¹¹

at 568-69.

103. *Id.* at 569. The District Court of Kansas recently adopted the rationale of *Fogleman*. *Horizon Holdings*, 241 F. Supp. 2d at 1144. Like the court in *Fogleman*, the Kansas court acknowledged the tension between the plain meaning of Title VII and the purpose behind the statute. *Id.* at 1143-44. The Tenth Circuit, however, has not addressed this issue yet. *Id.* at 1143.

104. *Fogleman*, 283 F.3d at 569.

105. *Id.* at 569-70.

106. *Id.* at 570.

107. *Id.* (quoting 42 U.S.C. § 12203(b)).

108. *Id.*

109. *Id.* The NLRA makes it an unfair labor practice to "interfere with, restrain, or coerce employees' in exercising their rights guaranteed under the Act." *Id.* The court previously held, in an NLRA case, that the firing of a friend or family member could constitute coercion. *Id.* (citing *Kenrich Petrochemicals, Inc. v. NLRB*, 907 F.2d 400, 407 (3d Cir. 1990)).

110. *Fogleman*, 283 F.3d at 570. The court noted that the D.C. and Seventh Circuits also prohibit the firing of a close relative under section 8(a)(1) of the NLRA. *Id.* (citing *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 127-28 (D.C. Cir. 2001); *NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086, 1088-89 (7th Cir. 1987)).

111. *Id.*

B. Purpose of the Statute

1. D.C. District Court

*De Medina v. Reinhardt*¹¹² was one of the first cases taking the other point of view in the controversy over recognition of a third-party-retaliation claim.¹¹³ In this case, a woman alleged she was denied employment in retaliation for her husband's anti-discrimination activities on behalf of minorities.¹¹⁴ The court stated that while Congress did not explicitly provide coverage for third-party claims, it would be against the purpose of the statute not to do so.¹¹⁵ It stated that "[s]ince tolerance of third-party reprisals would, no less than the tolerance of direct reprisals, deter persons from exercising their protected rights," the anti-retaliation provision must proscribe this type of activity against third parties.¹¹⁶ The court concluded that to do otherwise would produce unjust results.¹¹⁷

2. Sixth Circuit

A number of years later, the Sixth Circuit also recognized a cause of action for retaliation against a third party.¹¹⁸ In *EEOC v. Ohio Edison Co.*,¹¹⁹ the employer terminated the employee, then offered to reinstate him and later withdrew that offer.¹²⁰ The employee then filed a charge of retaliation, claiming the offer was withdrawn after a co-worker protested the initial termination.¹²¹ The court, relying on *De Medina*, rejected the employer's argument that the person being retaliated against must be the same person

112. 444 F. Supp. at 573.

113. *Id.* at 581.

114. *Id.* at 574.

115. *Id.* at 580.

116. *Id.*

117. *Id.* The court noted that the husband would not be in a position to seek back pay or other remedies associated with his wife's situation. *Id.* Thus, the "make whole" purpose of the statute would be frustrated if the court did not recognize a cause of action. *Id.* In 1999, the D.C. Circuit faced the issue of third-party claims but rejected the application of the theory on the facts of the particular case. *Milstein v. Henske*, 722 A.2d 850, 851 (D.C. 1999). The case involved an employee who claimed retaliation for a second employee's protected activity, even though there was no relation or even personal friendship between the employees. *Id.* at 854. The court stated that to allow a third party claim in such a case would "represent[] an unprecedented expansion of the definition of 'third-party.'" *Id.* Further, the court stated that even if it allowed such a broad theory, the plaintiff still failed to show any causation. *Id.* at 855.

118. *Ohio Edison*, 7 F.3d at 545-46.

119. *Id.* at 541.

120. *Id.* at 542.

121. *Id.*

that engaged in protected activity.¹²² The court stated that previous holdings in cases involving the Fair Labor Standards Act and the ADEA gave support to a broad reading of Title VII.¹²³ It also relied heavily on the Supreme Court's statement that a statute "should 'be read more broadly' if such a reading was also consistent with the 'purpose and objective'" of the statute.¹²⁴ The court, therefore, concluded that the anti-retaliation provision should be construed broadly to include an employee or the employee's representative.¹²⁵

3. Seventh Circuit

The Seventh Circuit likewise interpreted the retaliation provision broadly in *McDonnell v. Cisneros* when a supervisor claimed his employer retaliated against him because he did not discourage or prevent other employees from filing discrimination charges.¹²⁶ The court, acknowledging that such a claim did not come within a literal reading of Title VII, nevertheless, found that it was error to dismiss the complaint.¹²⁷ It explained that the probable reason Congress had not explicitly included third-party protection was that, generally, an employer has no reason to retaliate against a third party.¹²⁸ While the court was careful to limit the extension of the statute to two types of situations apparently unforeseen by Congress (the current situation and "collective punishment"),¹²⁹ it stated that "no great violence" had been done to the statute by deviating from the literal reading to effectuate its purpose in preventing "genuine retaliation."¹³⁰

122. *Id.* at 543-44. In a later case, the Sixth Circuit quoted the EEOC's liberal stance regarding allowance of third-party claims with approval. *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 580 (6th Cir. 2000).

123. *Ohio Edison*, 7 F.3d at 544.

124. *Id.* at 545 (quoting *NLRB v. Scrivener*, 405 U.S. 117, 122 (1972)).

125. *Id.* at 545-46. The court stated that on remand, the plaintiff would have to show causation, the third element of a retaliation claim. *Id.* at 546. Otherwise, it commented, any time an employer took an adverse employment action against an employee, the employer would open himself up to retaliation claims if someone else was engaging in protected activity at the same time. *Id.* The Fourth Circuit cited this case with approval in *Baird v. Rose*, a case where a mother engaged in protected activity on behalf of her daughter. 192 F.3d 462, 471 n.10 (4th Cir. 1999).

126. *Id.* at 262.

127. *Id.*

128. *Id.*

129. *Id.* The court stated the two situations are: (1) where there is "collective punishment" against several employees because the employer does not know who filed the charge; and (2) where an employer retaliates against an employee for not preventing another from engaging in protected activity. *Id.*

130. *Id.* The court commented that *Wu v. Thomas*, 863 F.2d 1543 (11th Cir. 1989), was even more liberal in its interpretation of Title VII. *McDonnell*, 84 F.3d at 262 (referencing *Wu*, 863 F.2d at 1547-48). In the *Wu* case, both the

4. District Court of California

The District Court for the Eastern District of California also interprets Title VII broadly to encompass third party retaliation claims in order to effectuate the purpose of the statute.¹³¹ In *EEOC v. Nalbandian Sales, Inc.*,¹³² the company regularly employed the plaintiff as a seasonal employee.¹³³ After the plaintiff's sister, also an employee, brought charges of discrimination against the company, the employer refused to rehire the plaintiff.¹³⁴ The plaintiff then brought charges of retaliation, claiming the refusal was a result of his sister's protected activity.¹³⁵

The court found the statutory language of Title VII to be ambiguous and, therefore, looked at the purpose of the statute.¹³⁶ It determined that a narrow "interpretation would chill employees from exercising their Title VII rights . . . out of fear that their protected activity could adversely jeopardize the employment status of a friend or relative."¹³⁷ The court, in reaching its conclusion that third parties may state a claim for retaliation,

husband and wife worked for the same university. 863 F.2d at 1545. After the wife brought charges of gender discrimination, the university, without explanation, removed the husband from his position as chairman of the department and advised him to look for a new position. *Id.* The wife then filed a second charge, claiming that the university had retaliated against her husband in response to her protected activities. *Id.* The district court found that the husband had no cause of action for retaliation because he had not filed a separate EEOC complaint. *Id.* at 1547. The Eleventh Circuit reversed, finding that the husband's claim was properly before the court even though he had not made an independent charge. *Id.* at 1548.

131. *Nalbandian*, 36 F. Supp. 2d at 1211. Numerous other district courts have interpreted Title VII to include third-party-retaliation claims. See *Murphy v. Cadillac Rubber & Plastics, Inc.*, 946 F. Supp. 1108, 1118 (W.D.N.Y. 1996) (focusing on the causal relationship, the court held that a husband had a cause of action for retaliation as a result of his wife's charges of discrimination under Title VII); *Thurman v. Robertshaw Control Co.*, 869 F. Supp. 934, 941 (N.D. Ga. 1994) (stating that in the case of retaliation against a close relative of a co-employee who participates in a protected activity, "the first element of the prima facie case is modified to require the plaintiff to show that the relative was engaged in statutorily protected expression"); *Mandia v. Arco Chem. Co.*, 618 F. Supp. 1248, 1250 (W.D. Pa. 1985) (finding that Title VII prohibits retaliation against close relatives of employees that engage in protected activity).

132. 36 F. Supp. 2d at 1206.

133. *Id.* at 1207-08.

134. *Id.* at 1208.

135. *Id.*

136. *Id.* at 1209-10. The court found that the primary purpose of Title VII's retaliation provision was to provide "unfettered access to statutory remedial mechanisms." *Id.* at 1210 (citing *Shell Oil Co.*, 519 U.S. at 346).

137. *Id.* The court further explained that denying a third-party claim would allow an employer to do indirectly what he is prohibited from doing directly. *Id.*

gave strong weight to the fact that other courts routinely interpret Title VII and related statutes broadly¹³⁸ and that the EEOC recognizes third-party actions.¹³⁹

III. A BROAD INTERPRETATION OF THE RETALIATION PROVISION IS NECESSARY TO END DISCRIMINATION

Courts must interpret the retaliation provision of Title VII broadly to include third-party claims in order to serve the purpose of providing “unfettered access to statutory remedial mechanisms.”¹⁴⁰ Otherwise, without this protection, employers can effectively prevent employees from exercising their rights under the statute for fear of retaliation against a close friend or relative.¹⁴¹

A. Support for a Broad Interpretation

There is much support for interpreting Title VII broadly.¹⁴² Not only is there precedent from the courts that currently recognize third-party claims, but there is also precedent from the Supreme Court’s interpretation of Title VII in other contexts,¹⁴³

138. *Nalbandian*, 36 F. Supp. 2d at 1211-12.

139. *Id.* at 1211. The EEOC has long recognized third-party-retaliation claims. *Evangeline Z. Bates*, No. 01963655, 1997 WL 332902, at *1 (EEOC App. June 10, 1997). The EEOC Compliance Manual specifically recognizes this cause of action. EEOC COMPLIANCE MANUAL, *supra* note 15, at 8-9, 8-10.

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

141. *Nalbandian*, 36 F. Supp. 2d at 1210 (citing *Clark v. R.J. Reynolds Tobacco Co.*, No. 79-7, 1982 U.S. Dist. LEXIS 11679, at *19 (E.D. La. Feb. 2, 1982)); *De Medina*, 444 F. Supp. at 580.

142. See *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 381 (1977) (Marshall, J., concurring in part and dissenting in part) (asserting that “Title VII is a remedial statute designed to eradicate certain invidious employment practices” and that the “Act should ‘be given a liberal interpretation’”); *Moyo*, 40 F.3d at 985 (stating that Title VII is a remedial statute and has long been interpreted broadly); *Flagship Int’l*, 793 F.2d at 726 (noting that “the provisions of Title VII must be construed broadly in order to give effect to Congress’ intent in eliminating invidious employment practices”).

143. An example of how the courts construe Title VII broadly is their generosity in allowing a prevailing plaintiff to collect attorney’s fees while generally failing to award such fees to a prevailing defendant. See *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 418 (1978) (holding that the equitable considerations that favor granting awards of attorney fees to prevailing plaintiffs are absent in the case of a prevailing defendant); *Sobel v. Yeshiva Univ.*, 619 F. Supp. 839, 843 (S.D.N.Y. 1985) (stating that “the standard for awarding fees to prevailing plaintiffs is very generous” while the burden on a prevailing defendant is “significantly greater” due to the policy of encouraging legitimate claims).

such as sexual harassment.¹⁴⁴ For example, the Court extended coverage for hostile work environment to include a situation where the employee suffered no actual psychological injury.¹⁴⁵ It held that an individual may recover without showing that she suffered a tangible employment action¹⁴⁶ or that the employer was negligent or at fault.¹⁴⁷ The Court also extended coverage to harassment by members of the same sex.¹⁴⁸ In doing so, the Court stated that Title VII should not be construed narrowly because it “evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment.”¹⁴⁹

The EEOC also provides support to recognition of third-party claims, stating that “[i]t is well settled that third party reprisals are cognizable under EEO law.”¹⁵⁰ The agency specifically recognizes that the person claiming retaliation need not be the same person who participated in protected activity¹⁵¹ or who

144. See Christopher M. O'Connor, Note, *Stop Harassing Her or We'll Both Sue: Bystander Injury Sexual Harassment*, 50 CASE W. RES. L. REV 501, 515-16 (1999) (reviewing relevant case law in relation to bystander injury for sexual harassment).

145. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993). The Court defined a hostile work environment as one in which a reasonable person would perceive the environment to be hostile or abusive. *Id.* The courts were previously divided as to whether the conduct had to cause actual injury or “seriously affect [an employee’s] psychological well-being” before a plaintiff could recover. *Id.* at 20.

146. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998). “A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.” *Id.* at 761. It generally “inflicts direct economic harm.” *Id.* at 762.

147. *Id.* at 765. The employer may claim an affirmative defense, that it used reasonable care in preventing harassment and that the plaintiff failed to take advantage of available corrective measures, when the employee suffers no tangible employment action. *Id.* Prior to this case and a companion decision the same year, courts were split as to when to hold an employer liable for the acts of supervisors. Ann M. Henry, Comment, *Employer and Employee Reasonableness Regarding Retaliation Under the Ellerth/Faragher Affirmative Defense*, 1999 U. CHI. LEGAL F. 553, 555 (1999).

148. *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 80 (1998). The male plaintiff in the case brought charges of sexual harassment after fellow crew members on an oil platform subjected him to sex-related humiliating actions and threatened to rape him. *Id.* at 77. The Court, while noting that sexual harassment of one male by another was certainly “not the principal evil Congress was concerned with when it enacted Title VII[,] . . . statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils.” *Id.* at 79.

149. *Id.* at 78 (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986)). The Court had previously rejected the presumption that an employer would not discriminate against an employee of the same race. *Id.*

150. Pamela G. Alexander, No. 01975380, 1998 WL 201692, at *4 (EEOC App. April 16, 1998).

151. EEOC COMPLIANCE MANUAL, *supra* note 15, at 8-10.

engaged in opposition.¹⁵² Further, the EEOC Compliance Manual states that Title VII "prohibit[s] retaliation against someone so closely related to or associated with the person exercising his or her statutory rights that it would discourage that person from pursuing those rights."¹⁵³

The strongest argument for a broad interpretation of Title VII comes from the Supreme Court's ruling in *Robinson v. Shell Oil Co.*,¹⁵⁴ where it held that former employees are covered by the anti-retaliation provision.¹⁵⁵ The Supreme Court found that to read the statute narrowly would effectively eliminate coverage for employment discharge retaliation, a consequence contrary to the purpose of the statute.¹⁵⁶ In reaching its conclusion, the Court relied heavily on the EEOC's position that to disallow claims by former employees would allow "an employer to be able to retaliate with impunity against" terminated employees.¹⁵⁷

The Supreme Court, in *Griggs v. Duke Power Co.*,¹⁵⁸ stated that the EEOC's interpretation of Title VII "is entitled to great deference" by the courts.¹⁵⁹ Thus, just as the Supreme Court showed deference to the EEOC's interpretation of the term "employees" in *Shell Oil Co.*,¹⁶⁰ courts should show a similar deference to the EEOC's interpretation of the retaliation clause by recognition of third-party claims.

B. A Broader Definition Would Increase Consistency

There is currently a great deal of variance in how courts handle third-party-retaliation claims. Some courts allow the claims to proceed while others do not. Still other courts use a broad interpretation of other aspects of the retaliation provision to provide coverage. For example, a district court recently rejected coverage for a third-party plaintiff due to a plain language reading, but nevertheless found coverage under the statute by interpreting the participation clause broadly.¹⁶¹ The court stated

152. *Id.* at 8-9.

153. *Id.*

154. 519 U.S. at 337.

155. *Id.* at 346.

156. *Id.* The Court, after finding that the term "employees" was ambiguous, held that including former employees within the definition was "more consistent with the broader context of Title VII and the primary purpose" of the section. *Id.*

157. *Id.* The EEOC argued that the possibility of post-employment retaliation would not only deter an employee from making a complaint but "would provide a perverse incentive for employers to fire employees who might bring Title VII claims." *Id.*

158. 401 U.S. 424 (1971).

159. *Id.* at 434.

160. *Shell Oil Co.*, 519 U.S. at 346.

161. *Bojangles Rest.*, 284 F. Supp. 2d at 327-28. The case involved a situation in which the employer denied the female the opportunity to return to

that assistance included “voluntary or involuntary support” and that “assistance may, but need not, be actual assistance so long as it is proven that the employer perceives that assistance was or will be given.”¹⁶²

While this “middle of the road” approach does represent a compromise between the plain language and purpose of the statute positions, it simply encourages the courts and plaintiffs to stretch meanings and begs the question of what constitutes participation “in any manner.”¹⁶³ Is simply providing emotional support to the person engaging in protected activity enough or is driving the relative or close friend to the local EEOC office required?¹⁶⁴ Where does one draw the line?

Not only does denial of third-party claims lead to inconsistent results among courts but it also leads to inconsistent results in the protection available from the various employment-related statutes. Courts treat cases under Title VII, the ADA and the ADEA similarly and use cases from one statute in analyzing a case under another statute.¹⁶⁵ Yet, the ADA contains a section that courts interpret broadly to allow claims by third parties.¹⁶⁶ The same is true for the NLRA.¹⁶⁷

It makes little sense to think that Congress would provide additional protection under other statutes but stop short of providing complete protection for retaliation claims brought under Title VII. This is particularly true given that Congress’s intent in passing Title VII was to end discrimination in employment.¹⁶⁸

work, following a pregnancy leave, after her fiancée threatened to bring discrimination charges against their employer. *Id.* at 324-25. The employer knew that the fiancée was the father of the child and that the two employees lived together. *Id.* at 324. The court, while not recognizing a third-party claim, found that Title VII already provides adequate protection to the plaintiff “by construing the existing language in a natural, unstrained fashion, albeit broadly, as is consistent with the remedial purpose of Title VII.” *Id.* at 327. (citing *Culpepper v. Reynolds Metals Co.*, 421 F.2d 888, 891 (5th Cir. 1970)).

162. *Id.* at 329.

163. 42 U.S.C. § 2000e-3(a).

164. *Bojangles Rest.*, 284 F. Supp. 2d at 329. (citing *Owens v. Rush*, 654 F.2d 1370, 1379 (10th Cir. 1981), a case not involving a Title VII claim, where the Eleventh Circuit defined “assisted” to include accompanying a spouse to an attorney’s office and providing undefined help).

165. *Fogleman*, 283 F.3d at 567.

166. *Id.* at 570.

167. *Id.*

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

More likely, as the Seventh Circuit stated, Congress did not provide for retaliation because employers generally have no reason to retaliate against third parties.¹⁶⁹ While it is maybe uncommon for members of the same family to work for the same employer,¹⁷⁰ such situations nevertheless exist, and these people need the protection of Title VII as much as any other employee if they are to feel free to voice their complaints or concerns about discriminatory activity. Thus, recognizing third-party claims would not only serve the purpose of the statute but would increase consistency in decisions among the various courts and increase consistency in the protection provided by the various employment-related statutes.

Many of the courts that do not extend coverage for third-party claims explain their decisions by stating that, while it would be more consistent with the aims of Title VII, the extra protection for a family member or other closely associated person is rarely needed due to the participation clause.¹⁷¹ However, as demonstrated by the cases, not all third-party plaintiffs *claim* participation, but may nevertheless suffer the consequences of an adverse employment action because of their association with a person who engaged in protected activity or because the employer feared or suspected that they had participated in the activity.¹⁷² Moreover, retaliation in such situations may be all the more devastating because the employer's discriminatory actions negatively impact two people, not just one.

While there is admittedly some danger of an increase in frivolous lawsuits, this can be kept to a minimum by looking carefully at causation.¹⁷³ None of the courts that have allowed third-party claims suggest that coverage should be extended to the

eliminate . . . discriminatory practices").

169. *McDonnell*, 84 F.3d at 262.

170. *See Holt*, 89 F.3d at 1232 (Dennis, J., dissenting) (noting that situations in which family members work for the same employer do not happen frequently).

171. *See id.* at 1227 (stating that in most cases relatives or friends participate in the charge in some manner); *Fogleman*, 283 F.3d at 569 (explaining that while recognition of third-party claims would be more consistent with the purpose of the statute, Congress possibly did not extend protection to third parties because they may have participated in filing the charge).

172. *See supra* discussion Part II (stressing that a situation sometimes occurs in which the third-party plaintiff did not encourage or participate in the protected activity).

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

“bare relationship of co-employees” without more.¹⁷⁴ Courts should recognize third-party claims but give the plaintiff no special treatment and require the third party to meet all of the normal requirements of a retaliation claim.

IV. CONCLUSION

Although courts need to be concerned about the possibility of frivolous lawsuits keeping employers from conducting their businesses and bogging down the judicial system, valid retaliation claims by third parties should be allowed in all circuits to fill a loophole in the current law and to provide consistency throughout the judicial system. Courts should modify the elements of the prima facie case to reflect this improved protection for third parties, but still require the plaintiff to meet all other requirements, including causation. Recognition of third-party claims will allow employees to exercise their rights to report discrimination and put employers on notice that *no* retaliation is permissible, thus serving the purpose of Title VII.

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

