No. 09-____

In The
Supreme Court of the United States

ERIC L. THOMPSON,

Petitioner,

v.

NORTH AMERICAN STAINLESS, LP,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

ERIC SCHNAPPER*
School of Law
University of Washington
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167

DAVID SUETHOLZ
3666 S. Property Rd.
Eminence, KY 40019
(859) 466-4317

Counsel for Petitioner

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Section 704(a) of Title VII forbids an employer from retaliating against an employee because he or she engaged in certain protected activity. The questions presented are:

(1) Does section 704(a) forbid an employer from retaliating for such activity by inflicting reprisals on a third party, such as a spouse, family member or fiancé, closely associated with the employee who engaged in such protected activity?

(2) If so, may that prohibition be enforced in a civil action brought by the third party victim?

PARTIES

The parties to this proceeding are set forth in the caption.

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Petitioner Eric L. Thompson respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered on June 5, 2009.

OPINIONS BELOW

The June 5, 2009 en banc opinion of the Court of Appeals, which is reported at 567 F.3d 804 (11th Cir.2009) (en banc), is set out at pp. 1a-63a of the Appendix. The March 31, 2008 opinion of the Court of Appeals, which is reported at 520 F.3d 644 (11th Cir.2008), is set out at pp. 64a-90a of the Appendix. The December 18, 2006 order and opinion of the District Court for the Eastern District of Kentucky, which is not reported, is set out at pp. 91a-94a of the Appendix. The June 20, 2006 opinion and order of the District Court, which is reported at 435 F.Supp.2d 633 (E.D.Ky.2006), is set out at pp. 95a-109a of the Appendix.

STATEMENT OF JURISDICTION

The decision of the Court of Appeals was entered on June 5, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved are set out in the Appendix.

STATEMENT OF THE CASE

Title VII of the 1964 Civil Rights Act, like other major federal employment statutes, forbids an employer to retaliate against an employee because he or she engaged in certain specified protected activities. For several decades there has been a growing conflict among the lower courts regarding cases in which the employer retaliates, not by taking action directly against the employee who engaged in the protected activity, but by instead inflicting reprisals on another person – typically a family member or fiancée – whose well being is of obvious importance to that employee. In the instant case that increasingly complex conflict resulted in an unusually splintered en banc decision in the Sixth Circuit, with five separate opinions charting distinct approaches to this recurring type of retaliation.

At the time when this action arose, Eric Thompson was an employee of North American Stainless, LP, as was Miriam Regalado. Thompson and Regalado were engaged to be married,[1] and "their relationship was common knowledge at North

[1] Thompson and Regalado were subsequently married.

American Stainless." (App. 66a). In September 2002 Regalado filed a charge with the Equal Employment Opportunity Commission, alleging that her supervisors had discriminated against her based on her gender. On February 13, 2003, the EEOC notified North American Stainless of Regalado's charge. Slightly more than three weeks later, on March 7, 2003, the defendant dismissed Thompson. Thompson alleges that he was fired in retaliation for his then-fiancée's (now wife's) EEOC charge. (App. 3a-4a).

Thompson filed a charge with the EEOC, which conducted an investigation and found "reasonable cause to believe that [the defendant] violated Title VII." (App. 4a). After conciliation efforts were unsuccessful, the EEOC issued a right-to-sue letter and Thompson brought this action against North American Stainless. Thompson's complaint alleged that the employer had dismissed him in retaliation for his then-fiancée's EEOC charge. Retaliating in that way, Thompson asserted, violated section 704(a) of Title VII, which forbids an employer to "discriminate against any of his employees ... because he has ... made a charge ... under this title." 42 U.S.C. § 2000e-3(a).

North American Stainless moved for summary judgment, contending that as a matter of law reprisals against a third party would not "support a

Title VII cause of action."[2] The District Court granted the motion and dismissed Thompson's complaint, holding that Title VII "does not permit third party retaliation claims." (App. 108a).[3]

A divided panel of the Sixth Circuit initially overturned the dismissal of the complaint. (App. 64a-90a). The court of appeals granted the employer's petition for rehearing en banc. A splintered en banc court upheld the dismissal of Thompson's complaint. (App. 1a-63a). In addition to the majority opinion, there were both a separate concurring opinion and three dissenting opinions. The various opinions of the Sixth Circuit disagreed about the proper disposition of the case, about what legal issue was controlling, and about whether the result arrived at by the majority was in conflict with decisions in other circuits.

The majority acknowledged that Thompson met the constitutional standard for standing under Article III. (App. 9a n.1). Because the remedy sought by Thompson included both damages and reinstatement, the defendant did not dispute the existence of Article III standing. The majority also held that Thompson had standing to sue under the terms of section 706(f)(1) of Title VII itself. (*Id*.). The majority

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[2] North American Stainless's Memorandum in Support of Motion for Summary Judgment, 5.

[3] The District Court subsequently denied a motion to reconsider its decision in light of this Court's decision in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006). (App. 91a-94a).

concluded, however, that Title VII did not provide a "cause of action" for a plaintiff such as Thompson. (App. 9a-29a). Section 704(a), the majority held, was "plain and unambiguous" in specifying that an action to enforce section 704(a) can be brought only by a person who engaged in protected activity. (App. 2a).[4]

Judge Rogers concurred in the result, but rejected the reasoning of the majority opinion. The majority, he objected, had confused the question of what retaliation is unlawful under section 704(a) with the issue of who can sue to enforce that provision.

> [Section 704(a)] dictates what practices amount to unlawful retaliation, not who may sue. The question of who may sue is simply not addressed by § [704(a)].... My difference with the majority is founded on a concern that by relying on the language of the provision stating what is unlawful, rather than on the language of the provision

[4] In a footnote the court noted that

> [a]ll of the parties in this case agreed at oral argument 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 pursuant to § 704(a) and, under *Burlington Northern [& Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006)], defendant's termination of Thompson potentially could be deemed an "adverse action" against her.

(App. 29a n.10). The court did not state whether it agreed with the defendant's oral concession.

> regarding who can sue, the holding may be misinterpreted to preclude claims by protected persons, like Regalado, for retaliation in the form of harm imposed on people that (the employer knows) the protected persons care about.

(App. 29a-33a). The type of retaliation alleged in this case, the concurrence insisted, would be unlawful under section 704(a). (App. 30a). Judge Rogers concluded, however, that a third party victim such as Thompson could not sue to enforce that prohibition. Section 706(f)(1) authorizes any "person aggrieved" to file suit to enforce Title VII. The majority held that the phrase "person aggrieved" encompassed any person with standing under Article III, and thus included plaintiff Thompson. (App. 9a n.1). Judge Rogers, on the other hand, disagreed that standing under section 706(f)(1) "was intended to be as broad as Article III permits." (App. 31a n.1). Rather, he insisted, "person aggrieved" in the retaliation context means only the person who engaged in the protected activity. (App. 32a).

There were three dissenting opinions joined by a total of six members of the court of appeals. Judge White[5] correctly observed that third party reprisals actually present two distinct issues. "The relevant questions are whether defendant violated § 704(a) and whether Thompson is a person aggrieved by that

[5] This dissenting opinion was joined by Judge Daughtrey.

violation." (App. 62a). Third party reprisals, White insisted, are forbidden by section 704(a). (App. 53a). Judge White maintained that the majority opinion had confused the issue of whether such retaliation is unlawful under section 704(a) with the issue of who can file suit to enforce that provision.

> [T]he plain language of § 704(a) ... does not tell us "*who* falls under the umbrella of its protection," [(App. 27a)], but rather *what* conduct is prohibited.... The majority ... conclude[s] that even if Thompson can prove such a case, he cannot maintain the action because he is not the person who opposed the unlawful practice. The majority bases this conclusion on the plain meaning it ascribes to § 704(a), notwithstanding that § 704(a) does not purport to address the question who can bring a charge or maintain an action based on a violation....

(App. 58a-60a) (emphasis in original). "[O]nce the employer's conduct is found to violate § 704(a), there is no reason to look back to that section to determine who may maintain an action based on the violation." (App. 58a). The question of who may maintain such an action, White explained, is addressed instead by section 706(f)(1), which authorizes a civil action by any "person aggrieved." (*Id.*).

> Thus, to answer the question whether Thompson can sue based on a § 704(a) violation, we need ask whether Thompson is aggrieved by the unlawful employment practice. Accepting the allegations as pled,

> Thompson, himself, is unquestionably claiming to be aggrieved.

(App. 58a).

Judge Moore, in a second dissenting opinion,[6] objected that the majority opinion permitted employers to retaliate with impunity by inflicting reprisals on the family or friends of a person who engaged in protected activity. (App. 43a-44a). Even if the party who had engaged in the protected activity were permitted to sue, Judge Moore noted, he or she would not be able to obtain meaningful relief for the third party victim. (App. 43a-44a n.5). Judge Moore noted that the majority opinion conflicted with decisions in the Seventh and Eleventh Circuits which "have recognized the need to interpret § 704(a) broadly to include third-party retaliation claims." (App. 44a n.6.). Moore objected that the majority had improperly ignored this Court's decisions construing section 704(a). "I am baffled by the majority's downplaying of important Supreme Court precedent in this arena" (App. 38a); "I do not believe that these Supreme Court decisions can be so cavalierly dismissed." (App. 50a). Judge Moore's dissent also disagreed with the analysis of section 706(f)(1) in Judge Rogers' concurring opinion. (App. 50a-53a).

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[6] This dissenting opinion was joined by Judges Martin, Daughtrey, Cole, Clay and White.

In a third dissenting opinion, Judge Martin[7] rejected the premise of the majority opinion that section 704(a) is "plain and unambiguous." (App. 33a). "Section 704(a) is broader than [the majority] thinks and, at minimum, ambiguous." (*Id*.). Judge Martin believed that the ambiguity of section 704(a) had been recognized by both the majority and concurring opinions in *Crawford v. Metropolitan Government of Nashville*, 129 S.Ct. 846 (2009), a reading of *Crawford* which the en banc majority had rejected. (Compare App. 18a-23a (majority opinion) with App. 34a-37a (Martin, J., dissenting)). Because section 704(a)

> is ambiguous, determining whether plaintiffs like Thompson should be allowed to sue ought to depend on how much weight Congress could have given the "important practical implications" ... Judge Moore identif[ies].... I would hold these claims cognizable.

(App. 37a).

[7] This dissenting opinion was joined by Judges Daughtrey, Moore, Cole, Clay and White.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals Decided Incorrectly An Important Issue of Law Which Should Be Resolved by This Court

(1) A sharply divided Sixth Circuit has held that the anti-retaliation provision of Title VII provides no judicial redress for one of the most widely condemned forms of reprisal. "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.3d 1086, 1087 (7th Cir.1987). Such reprisals against an individual's family or close associates have a long and unfortunate history as a method of punishing enemies, deterring conduct, and coercing disclosure of information, and remain all too common in news accounts of events both at home and abroad.[8]

The ramifications of the decision below reach well beyond Title VII. Virtually all major federal statutes governing the employment relationship prohibit employers from retaliating against employees for engaging in certain specified protected activity. The question of whether third party reprisals are forbidden and redressable has arisen under a wide variety of those statutes: the National Labor Relations Act,[9] the Americans With Disabilities

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[8] See e.g. *Wilson v. Libby*, 535 F.3d 697 (D.C. Cir.2008).

[9] See pp. 20-21, 26-28, *infra*.

Act,[10] the Age Discrimination in Employment Act,[11] the Occupational Safety and Health Act,[12] the Family and Medical Leave Act,[13] the Rehabilitation Act,[14] Employee Retirement Income Security Act,[15] the Equal Pay Act,[16] the Whistleblower Protection Act,[17] the Federal Mine Safety and Health Act,[18] Title IX,[19] and 42 U.S.C. § 1981.[20]

The problem of statutory interpretation posed by this practice is similar under all of these statutes. Each of these laws, like Title VII, forbids an employer in general terms from taking action against an employee because he or she has engaged in protected

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[10] *Fogelman v. Mercy Hospital, Inc.*, 283 F.3d 561 (3d Cir.2002).

[11] *Fogelman*, *supra*.

[12] *Reich v. Cambridgeport Air Systems, Inc.*, 26 F.3d 1187 (1st Cir.1994).

[13] *Elsensohn v. Parish of St. Tammany*, 2007 WL 1799684 (E.D.La.).

[14] *Mutts v. Southern Connecticut State University*, 2006 WL 1806179 (D.Conn.).

[15] *Fitzgerald v. Codex Corp.*, 882 F.2d 586 (1st Cir.1989).

[16] *Marshall v. Georgia Southwestern College*, 489 F.Supp. 1322, 1331 (M.D.Ga.1980).

[17] *Duda v. Department of Veterans Affairs*, 51 M.S.P.R. 444, 447 (1991).

[18] *Secretary of Labor v. Leeco, Inc.*, 24 FMSHRC 589, 591, 2002 WL 31412752 at *3 (F.M.S.H.R.C.).

[19] *Dawn L. v. Greater Johnstown School Dist.*, 586 F.Supp.2d 332, 380 (W.D.Pa.2008).

[20] *Allen-Sherrod v. Henry County School Dist.*, 2007 WL 1020843 at *3 (N.D.Ga.).

activity. But none of these statutes contains a specific list of the methods of retaliation that are forbidden, and none of these laws provides a special remedial mechanism for any particular type of retaliation. Because of the parallel structure of these statutes, the lower courts in analyzing third party reprisal claims under any one law have routinely relied on decisions interpreting the anti-retaliation provisions of other statutes.

It is of great importance whether the victims of third party reprisals can obtain redress, because that type of retaliation can be a highly effective method of obstructing enforcement of the law.[21] The district

[21] *Fogelman v. Mercy Hospital, Inc.*, 283 F.3d 561, 568-69 (3d Cir.2002) ("There can be no doubt that an employer who retaliates against the friends and relatives of employees who initiate anti-discrimination proceedings will deter employees from exercising their protected rights"); *Holt v. JTM Industries, Inc.*, 89 F.3d 1224, 1233 (5th Cir.1996) (Dennis, J., dissenting) ("the threat of retaliatory action against a family member or friend is a substantial deterrent to the free exercise of rights protected under the ADEA"); *Rainer v. Refco, Inc.*, 464 F.Supp. 742, 746 (S.D.Ohio2006) ("[c]learly, if an employer were free to discharge any relative of an employee who complained about discrimination without fear of liability, there would be a chilling effect on the inclination of employees whose relatives were part of the same workforce to complain about discrimination"); *EEOC v. Nalbandian Sales, Inc.*, 36 F.Supp.2d 1206, 1210 (E.D.Cal.1998) ("an interpretation [that permitted third party reprisals] would chill employees from exercising their Title VII rights against unlawful employment practices out of fear that their protected activity could adversely jeopardize the employment status of a friend or relative"); *Clark v. R.J. Reynolds Tobacco Co.*, 1982 WL 2277 at *7 (E.D.La.) ("[p]laintiff's son would certainly be deterred from exercising his

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judge in this case, although concluding that Sixth Circuit precedent barred any action for third party reprisals, candidly recognized that "retaliating against a spouse or close associate of an employee will deter the employee from engaging in protected activity just as much as if the employee were himself retaliated against." (App. 108a). To deny judicial redress to those third party victims

> would encourage employers to take reprisals against the friends, relatives, and colleagues of an employee who have asserted a[discrimination] claim. Through coercion, intimidation, threats, or interference with an employee's co-workers, an employer could discourage an employee from asserting such a claim.

Craig v. Suburban Cablevision, Inc., 140 N.J. 623, 630, 660 A.2d 505, 508 (1995).

In the absence of an enforceable prohibition against that practice, employers could deliberately

> evade the reach of the [anti-retaliation] statute by making relatives or friends of complaining parties the "whipping boys" for the protected conduct of others.

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rights under Title VII if there was a threat that his former employer would fire his father if he were to file a charge of discrimination against it"); *De Medina v. Reinhardt*, 444 F.Supp. 573, 580 (D.D.C.1978) ("tolerance of third-party reprisals would, no less than tolerance of direct reprisals, deter persons from exercising their protected rights under Title VII").

Holt v. JTM Industries, Inc., 89 F.3d at 1233 (Dennis, J., dissenting). For an employer intent upon retaliating against a worker who has engaged in protected activity, the decision below creates a grotesque incentive to do so by punishing the worker's relatives or friends. As the EEOC has repeatedly warned, if third party reprisals are not prohibited – or if any such prohibition is incapable of meaningful enforcement – an employer could adopt an express policy of inflicting such reprisals.

> [A]n employer could openly use the threat of third-party retaliations to ban the very activities protected by Section 704(a). An employer could adopt a policy of seeking reprisals in any case in which an employee protested discrimination, filed a charge with the Commission, or otherwise participated in the enforcement process. That policy could require the termination of any relative, friend, or co-worker of the individual engaging in the protected activity.[22]

In practice a single unredressed reprisal could be a powerful deterrent to protected activity. In the wake of the dismissal of petitioner Thompson, and of the Sixth Circuit decision that followed, any worker of ordinary prudence at North American Stainless could

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[22] Brief of the Equal Employment Opportunity Commission as Appellant, *EEOC v. Ohio Edison Co.* (No. 92-3173) (6th Cir.), text at n.1.

be understandably reluctant to file a charge with the EEOC.

The decision of the Sixth Circuit offers no meaningful check on such abuses. A worker who engaged in protected activity would rarely have suffered any significant injury of his or her own as the result of a third party reprisal, and that employee would lack Article III standing to seek relief for the third party victim. Ms. Regalado as a plaintiff would have had no Article III standing to obtain an award of back pay or damages payable to, or reinstatement for, her then-fiancé.

In the legal framework of Title VII, limiting any claim regarding third party reprisals to actions by the worker who engaged in protected activity – and excluding claims by the actual third party victim – would in this regard render section 704(a) unenforceable. A plaintiff cannot bring suit under Title VII without first filing a charge with the EEOC. But it would never occur to most couples that if one of them is the victim of a third party reprisal, the *other* employee would have to complain to the EEOC. "Such technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." *Love v. Pullman Co.*, 440 U.S. 522, 527 (1972).

(2) Reprisals against a third party are assuredly an unlawful *method* of retaliating against an employee for engaging in protected activities. The employer in this case clearly "discriminate[d]"

against Regalado for filing a Title VII charge. In March 2003 the employer did not punish *all* of its workers by firing their fiancés; rather, it selected only Regalado (and *her* fiancé) for that sanction. *Burlington Northern & Santa Fe Rwy. Co. v. White*, 548 U.S. 53 (2006), makes clear that section 704(a) forbids "the many forms that effective retaliation can take." 548 U.S. at 64. Nothing in the language of section 704(a) excludes from its prohibition the use of third party reprisals.

The touchstone of illegality under *Burlington Northern* is whether a particular reprisal would be "likely to dissuade employees from complaining or assisting in complaints about discrimination." 548 U.S. at 70. The district court in the instant case correctly recognized that reprisals against third parties can be every bit as effective in deterring protected activity as more direct reprisals against those who engage in such activities. (App. 108a). Indeed, as the EEOC has repeatedly noted, threats of reprisals against third parties could be especially efficacious.

> [T]he fact that retaliation is against a third party only enhances the pressure on the employee contemplating the exercise of protected activity. Where an employee has already been the target of discrimination, the threat of economic sanction may be outweighed by the employee's personal desire to vindicate her statutory rights. If the employer, however, could reach into the workforce to target other employees, the

> aggrieved employee may be more reluctant to assert her statutory rights. In that case, the employee risks not only her own economic future, which has already been threatened by the employer, but the future of her fellow workers as well.[23]

If section 704(a) were construed to permit third party reprisals,

> such a limited construction would fail to fully achieve the anti-retaliation provision's "primary purpose," namely, "[m]aintaining unfettered access to statutory remedial mechanisms." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997).

548 U.S. at 64. Employees would not be "'completely free from coercion against reporting' unlawful practices," 548 U.S. at 67, if – as the decision below permits – "employers can use Thompson, and others like him, as swords to keep employees from invoking their statutory rights with no redress for the harms suffered by those individuals." (App. 43a-44a) (Moore, J., dissenting).

In *Burlington Northern* this Court cited as an example of "effective[ ] retaliat[ion] against an employee ... causing him harm outside the workplace" the reprisal in *Rochon v. Gonzalez*, 438 F.3d 1211,

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[23] Brief of the EEOC as Amicus Curiae In Support of the Appellant, *Fogelman v. Mercy Hosp.*, (No. 00-2263) (3d Cir.) at 25-26.

1213 (D.C. Cir.2006), in which the FBI retaliation against the employee "took the form of the FBI's refusal ... to investigate death threats a federal prisoner made against [the Special Agent] and *his wife*." 548 U.S. at 63-64 (emphasis added and omitted).[24] It is inconceivable that in a situation such as *Rochon* section 704(a) permits a government agency to retaliate against a law enforcement officer who filed a charge with the EEOC by refusing to protected his or her family from death threats.

The EEOC has long interpreted section 704(a) to forbid an employer to retaliate against a worker who engaged in protected activity by inflicting reprisals on a relative or other associated individual. The Commission has applied this interpretation in a series of administrative determinations and adjudications dating from 1977.[25]

> Section 704(a)['s] ... broad based protection should not be undermined by allowing the [employer] to accomplish indirectly what

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[24] Cf. 548 U.S. at 72:

> White *and her family* had to live for 37 days without income. *They* did not know during that time whether or when White could return to work. White described to the jury the physical and emotional hardship that 37 days of having "no income, no money" in fact caused.... (" ... No income, no money, and that made *all of us* feel bad ... ")

(Emphasis added).

[25] EEOC Decision 77-34, 1977 WL 5345 (EEOC); see EEOC Decision No. 72-1267, 1972 WL 4006 (EEOC).

> it cannot accomplish directly.... Certainly, where it can be shown that an employer discriminated against an individual because he or she was related to a person who filed a charge, it is clear that the employer's intent is to retaliate against the person who filed the charge.... [I]f such retaliation has occurred, it has occurred against both the person who previously filed a charge and that person's relative.... The National Labor Relations Board in similar circumstances has frequently held that discrimination against an employee because he or she has a familial relationship with a union activist violates the National Labor Relations Act.[26]

The EEOC has extended this interpretation to the other federal statutes which it enforces, and has codified that construction in its Compliance Manual.

> The retaliation provisions of Title VII, the ADEA, the EPA and the ADA prohibit retaliation against someone so closely related to or associated with the person exercising his or her statutory rights that it would discourage or prevent the person from pursuing those rights. For example, it would be unlawful for a respondent to retaliate against an employee because his or her spouse, who is also an employee, filed an EEOC charge.

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[26] EEOC Decision No. 77-34, 1977 WL 5345 at *1.

2 EEOC Compliance Manual § 8.II(B)(3)(c) (footnote omitted). The Commission has consistently advanced that interpretation of section 704(a) by filing suit on behalf of the victims of third party reprisals[27] and by submitting amicus briefs in support of private lawsuits raising such claims.[28]

The EEOC is not alone in construing federal anti-retaliation statutes in this manner. Since at least 1962 the National Labor Relations Board has consistently interpreted the National Labor Relations Act to forbid reprisals against third parties because of protected activities by union members, officials or supporters.

> A restraint on the exercise of employee rights is readily apparent where ... the supervisor is discharged because she is the wife of an employee who has engaged in union or other protected activities.... Under these circumstances, the rank-and-file employees ... can

[27] *EEOC v. Wal-Mart Stores, Inc.*, 576 F.Supp.2d 1240 (D.N.Mex.2008) (retaliation against children because of protected activity of mother); *EEOC v. Nalbandian Sales, Inc.*, 36 F.Supp.2d 1206 (E.D.Cal.1998) (retaliation against brother because of protected activity of sister); *EEOC v. V & J Foods, Inc.*, 2006 WL 3203713 (E.D.Wis.) (retaliation against daughter because of protected activity of mother).

[28] Brief of the EEOC as Amicus in Support of Thompson and for Reversal, *Thompson v. North American Stainless, LP* (No. 07-5040) (6th Cir.), available at 2007 WL 2477626; Brief of the EEOC as Amicus Curiae in Support of the Appellant, *Fogelman v. Mercy Hosp.* (No. 00-2263) (3d Cir.), available at 2001 WL 34119171.

> "reasonably ... fear that the employer would take similar action against them if they continued to support the Union." *Jackson Tile Manufacturing Co*. [122 NLRB 764 (1958)].

Golub Bros. Concessions, 140 NLRB 120, 127 (1962). The NLRB has applied this interpretation of the NLRA in cases in which the injured third party was a non-supervisory employee, a supervisory employee, or an independent contractor.[29] This longstanding construction of the NLRA is important because this Court has repeatedly looked to the NLRA in interpreting Title VII. *Burlington Northern*, 548 U.S. at 66-67.

The Department of Labor has repeatedly interpreted in the same manner the federal employment laws which it enforces. In *Reich v. Cambridgeport Air Systems, Inc.*, the Department of Labor advanced a

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[29] *Advertisers Mfg. Co.*, 280 NLRB 1185, 1186 (1986) (retaliation against mother because of protected activities of son); *International Union of Operating Engineers, Local 400*, 265 NLRB 1316, 1320 (1982) (retaliation against wife for protected activities of husband; independent contractor); *Hickman Garment Co.*, 216 NLRB 801 (1975) (retaliation against daughter-in-law because of protected activities of mother-in-law); *American Buslines, Inc.*, 211 NLRB 947, 948 (1974) (retaliation against wife for protected activities of husband); *Forest City Containers, Inc.*, 212 NLRB 38, 40 (1974) (retaliation against worker because of protected activity of her fiancé's mother); *Ridgely Mfg. Co.*, 207 NLRB 83, 88-89 (1973) (retaliation against wives because of protected activities of husbands).

similar construction of the anti-retaliation provision of the Occupational Safety and Health Act. (See 29 U.S.C. § 660(c)(1)). Relying on precedents regarding section 704(a) and the NLRA, the Department argued that the anti-retaliation provision of OSHA forbids third party reprisals.[30] In *Marshall v. Georgia Southwestern College*, 489 F.Supp. 1322 (M.D.Ga.1980), the Department successfully brought suit under the Equal Pay Act arguing that the anti-retaliation provision of that statute forbad forcing a male employee to resign his position because his wife had filed a complaint about discrimination in compensation. (See 29 U.S.C. § 215(a)(3)). The Department interprets the anti-retaliation provision of the Federal Mine Safety and Health Act in the same way, there too relying on cases holding that third party reprisals violate the NLRA and Title VII.[31] (See 30 U.S.C. § 815(c)).

(3) The en banc court clearly erred in holding that section 704(a) does not afford a plaintiff like Thompson a cause of action. The cause of action accorded to Thompson, and to all other Title VII plaintiffs, is in section 706(f)(1), not section 704(a). Section 706(f)(1) of Title VII provides that "a civil action may be brought against the respondent named in the charge ... by the person claiming to be

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[30] Brief for the Secretary of Labor, *Reich v. Cambridgeport Air Systems, Inc.* (1st Cir.1994) (No. 93-2287) at 18-21, available at 1994 WL 16506060.

[31] *Secretary of Labor v. Leeco, Inc.*, 24 FMSHRC 589, 591, 2002 WL 31412752 at *3 (F.M.S.H.R.C.).

aggrieved." The en banc majority acknowledged that Thompson was a "person aggrieved" within the meaning of section 706(f)(1). (App. 9a n.1). Because Thompson was a person aggrieved, section 706(f)(1) expressly provided him with a cause of action.

The en banc court erred in relying on *Davis v. Passman*, 442 U.S. 228 (1979). (App. 6a). The issue in *Davis* was "whether a private cause of action should be implied from a federal statute," or in that case a constitutional provision, that did not contain an express cause of action. 442 U.S. at 241; see *Cort v. Ash*, 422 U.S. 66 (1975). But *Davis* and *Cort v. Ash* are of no application here, because Title VII itself contains in section 706(f)(1) just such an express cause of action.

The concurring opinion below contended that Thompson is not a "person aggrieved" under section 706(f)(1), arguing that this phrase should be narrowly interpreted so that it encompasses, not every plaintiff with Article III standing, but only the particular individual whose rights under Title VII – in this case under section 704(a) – were violated. (App. 30a-32a). That narrow construction of the phrase "person aggrieved" in section 706(f)(1), however, is precluded by this Court's decision in *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972). *Trafficante* held that the phrase "person aggrieved" in Title VIII of the Civil Rights Act of 1968 encompasses all individuals with Article III standing, and expressly relied on a construction of that same phrase in Title VII.

> *Hackett v. McGuire Bros., Inc.*, 445 F.2d 442 (CA 3), which dealt with the phrase that allowed a suit to be started "by a person claiming to be aggrieved" under the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(a), concluded that the words used showed "a congressional intention to define standing as broadly as is permitted by Article III of the constitution." *Id*. at 446. With respect to suits brought under the 1968 Act, we reach the same conclusion....

409 U.S. at 366-67 (footnote omitted). The very purpose of legislation that broadly defines in this manner the persons authorized to seek judicial relief is to permit claims by individuals such as petitioner Thompson who might otherwise be precluded by the prudential standing requirement that a plaintiff "must assert his own legal interests rather than those of third parties." *Gladstone v. Village of Bellwood*, 441 U.S. 91, 100 (1979).

II. There Are Inter-Circuit Conflicts Regarding The Questions Presented

The lower courts are divided about the legal sufficiency of claims by the victims of third party reprisals. As Judge Moore noted below, the majority decision in the instant case is contrary to decisions in several other circuits. (App. 44a n.6). "Among the ... courts that have addressed the issue no consensus has emerged." *Fogelman v. Mercy Hospital, Inc.*, 283 F.3d 561, 568 (3d Cir.2002); see *Holt v. JTM*

Industries, Inc., 89 F.3d 1224, 1233 (5th Cir.1996) (Dennis, J., dissenting) (majority decision precluding third party reprisal claims "flies in the face of ... federal court decisions ... [and] ignores the overwhelming weight of decisions construing the anti-retaliation provision of Title VII.")[32]

As several of the opinions below correctly recognized, the confusion among the lower courts is aggravated by the fact that third party reprisal claims actually pose two distinct legal questions:

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[32] *Elsensohn v. Parish of St. Tammany*, 2007 WL 1799684 *4 (E.D.La.) ("[a]t the very least, ... it is apparent that there exists a divergence of opinion on the viability of third party retaliation claims in general"); *Strickland v. Aaron Rents, Inc.*, 2006 WL 770578 at *7 (W.D.Tex.) ("while the law of most other Circuits supports [the plaintiff's claim], that is not so in the Fifth Circuit"); *Rubin v. Kirkland Chrysler-Jeep, Inc.*, 2006 WL 1009338 at *8 (W.D.Wash.) ("[t]he case law appears conflicted"); *Mutts v. Southern Connecticut State University*, 2006 WL 1806179 at *8 (D.Conn.) ("[c]ourts have split on whether merely being related to another person who engages in protected activity is sufficient"); *Sacay v. The Research Foundation of the City University of New York*, 193 F.Supp.2d 611, 633 (E.D.N.Y.2002) ("Courts of Appeals for other circuits ... have split on the issue"); *Reiter v. Metropolitan Transportation Authority of New York*, 2002 WL 31190167 at *7 (S.D.N.Y.); *Horizon Holdings, LLC v. Genmar Holdings, Inc.*, 241 F.Supp.2d 1123, 1143 (D.Kan.2002) ("circuit and district courts ... fall into two camps"); *Miller v. Bed, Bath & Beyond*, 185 F.Supp.2d 1253, 1273 (N.D.Ala.2002) ("courts appear split on the ... issue"); *Dias v. Goodman Mfg. Co., L.P.*, 214 S.W.2d 672, 677 (Ct.App.Tex. 14th Dist.2007) ("[t]here is a split of authority among federal courts"); *Millstein v. Henske*, 722 A.2d 850, 854 (D.C.Ct.App. 1999) ("federal courts have divided").

whether such reprisals are unlawful, and whether the law authorizes the third party victims of such reprisals to obtain judicial redress. The second question, as the highly splintered Sixth Circuit decision makes clear, requires the courts to grapple with the important distinctions among Article III standing, prudential standing, and the existence of a cause of action.

The en banc decision of the Sixth Circuit compounds the existing divisions among the lower courts regarding these questions by adopting a new legal standard that differs from the positions of all sides in these ongoing judicial controversies.

A. There Is An Inter-Circuit Conflict Regarding Whether Third Party Reprisals Are Unlawful

The federal agencies responsible for the enforcement of federal anti-retaliation statutes have for decades consistently insisted that those laws forbid the use of third party reprisals as a method of retaliating against a person who engaged in protected activities. The courts of appeals, however, have reached conflicting conclusions regarding whether such a prohibition exists.

The courts of appeals have repeatedly concluded that the anti-retaliation provisions of the National Labor Relations Act do forbid third party reprisals. In *NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086 (7th Cir.1987), the Seventh Circuit held that reprisals

against supervisory officials violate the NLRA – even though those supervisors by definition have no protected rights under the Act – because such reprisals, unless corrected, would deter protected activity by non-supervisors. In ordering reinstatement of a female supervisor who had been fired in reprisal for the pro-union actions of her son, the court of appeals acknowledged that

> supervisory employees ... have no statutory right to engage in concerted activities.... If, as the Board found ... , the company fired [the mother] because of her son's union activities, there could be only one purpose, and that was to intimate union supporters ... If the company had fired [the son] in retaliation for his election as chief shop steward, there would be no question that it had violated the Act. Instead it fired his mother. If he loves his mother, this had to hurt him as well.... An effective method of getting at him, a protected worker, it is barred by the statute.... [The mother] is ... being reinstated so that ... protected employees will not be deterred from exercising their rights ... by fear that if they do the company will try to get back at them in any way it can, including firing their relatives.

823 F.3d at 1088-89. In *Kenrich Petrochemicals, Inc. v. NLRB*, 907 F.3d 400 (3d Cir.1990) (en banc), the Third Circuit ordered the reinstatement of a supervisor who had been dismissed because of the pro-union activities of her father, sister and daughters.

> [The supervisor] did not in any way aid the union's cause, and her reinstatement was not ordered to protect her right to participate in union activities. Rather, her reinstatement was ordered to demonstrate to the employees and supervisors at Kenrich that our labor laws do not permit employers to intimidate protected employees by using family members as hostages.

907 F.2d at 410. The District of Columbia Circuit construes the NLRA in the same manner. *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 127 (D.C. Cir.2001) (retaliation against wife for protected activities of her husband).

The circuit courts have interpreted a number of other federal employment laws to protect the victims of third party reprisals. In *Reich v. Cambridgeport Air Systems, Inc.*, 26 F.3d 1187 (1st Cir.1994), the First Circuit upheld a retaliation claim under OSHA regarding the dismissal of a worker who was a "particularly close friend[ ]" of a worker who had complained about health and safety problems. That reprisal, the trial court had concluded, was inflicted to "'impress the other employees' not to associate with health and safety advocates." 26 F.3d at 1189. In *Brock v. Georgia Southwestern College*, 765 F.2d 1026, 1037-38 (11th Cir.1985), the Eleventh Circuit upheld the imposition of liability under the Equal Pay Act against an employer which had retaliated against a husband because of his wife's protected activity.

In *Fitzgerald v. Codex Corp.*, 882 F.2d 586 (1st Cir.1989) (opinion joined by Breyer, J.), the First Circuit upheld a third party reprisal claim under Employee Retirement Income Security Act. Section 510 of Employee Retirement Income Security Act, in language similar to section 704(a) of Title VII, forbids a plan to "discriminate against a participant or beneficiary for exercising any right to which *he* is entitled under the provisions of an employee benefit plan." 29 U.S.C. § 1140 (emphasis added). The plaintiff alleged that he had been dismissed because his wife had filed suit to enforce her rights under the employer's medical plan. 882 F.2d at 589. The First Circuit rejected the employer's argument that section 510 did not forbid reprisals against the spouse of a beneficiary who had exercised such rights.

> Codex ... advocates a painfully strict construction of 29 U.S.C. § 1140.... Codex maintains that a suit can only be brought by a participant or beneficiary who has been retaliated against for exercising his or her *own* rights under a plan.... Neither logic nor the language of the statute support such a cramped interpretation. Under the theory advanced by Codex, it would be illegal for an employer to discharge an employee in retaliation for exercising rights under a plan but legal to fire an employee if it is the participant's spouse ... who exercises those rights. We reject this narrow construction. It clashes with the congressional intent of protecting ... the exercise of rights under an ERISA plan.

Id. (emphasis in original).

The illegality of third party reprisals under Title VII was initially unquestioned by the courts of appeals. In *Wu v. Thomas*, 863 F.2d 1543 (11th Cir.1989), the Eleventh Circuit overturned the dismissal of a complaint filed by a husband who alleged he had been removed from his position because of the protected activities of his wife. The court of appeals rejected the defendant's contention that the complaint should be dismissed because only the wife, the employee who had engaged in protected activities, had filed an EEOC charge. 863 F.2d at 1547-48. A substantial number of district courts rely on *Wu v. Thomas* as establishing the viability of third party reprisal claims.[33] In *Iturbe v. Wandel & Golterman Technologies, Inc.*, 1994 WL 118103 (4th Cir.), the Fourth Circuit resolved on the merits a claim that a husband had been transferred in retaliation for protected activities by his wife.

In *McDonnell v. Cisneros*, 84 F.3d 256 (7th Cir.1996), the Seventh Circuit refused to limit the application of section 704(a) to reprisals against the

[33] *Riley v. UOP LLC*, 244 F.Supp.2d 928, 940 (N.D.Ill.2003); *Palisano v. City of Clearwater*, 219 F.Supp.2d 1249, 1259 (M.D.Fla.2002); *Reiter v. Metropolitan Transportation Authority*, 2002 WL 31190167 at *7 (S.D.N.Y.); *Gonzalez v. New York State Dept. of Correctional Services*, 122 F.Supp.2d 335, 347 (N.D.N.Y.2000); *Thomas v. American Horse Shows Assoc., Inc.*, 1999 WL 287721 at *12 (E.D.N.Y.); *Murphy v. Cadillac Rubber & Plastics, Inc.*, 946 F.Supp. 1108, 1117 (W.D.N.Y.1996).

particular individual who had engaged in protected activity.

> [I]n the ordinary case an employer would have no reason to retaliate against someone who did *not* file a complaint, testify, etc. Generally, one retaliates against someone because of something he did rather than because of something someone else did. Not always. There is such a thing as collective punishment.... [A] literal interpretation of the provision would leave a gaping hole in the protection....

84 F.3d at 262 (emphasis in original). Section 704(a), the court held, should be construed to reach cases of "genuine retaliation," even where the reprisal is directed at someone who did not engage in protected activity. In *Drake v. Minnesota Mining & Mfg. Co.*, 134 F.3d 878 (7th Cir.1998), the Seventh Circuit assumed that the *McDonnell* view that section 704(a) prohibits "collective punishment" meant that a wife was protected from reprisals because of the protected activity of her husband. 134 F.3d at 886. District courts in the Seventh Circuit treat *McDonnell* and *Drake* as establishing that third party reprisals violate section 704(a).[34]

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[34] *Wegeng v. Papa John's USA, Inc.*, 2006 WL 1207259 (S.D.Ill.) (holding actionable retaliation against wife because of protected activity of husband); *Whittaker v. Northern Illinois University*, 2003 WL 21403520 (N.D.Ill.) (holding actionable retaliation against husband because of protected activity of ex-wife).

In *Fogelman v. Mercy Hospital, Inc.*, 283 F.3d 561 (3d Cir.2002), the Third Circuit held that third party reprisals violate a provision of the Americans With Disabilities Act, but are not unlawful under the Age Discrimination in Employment Act. The ADA forbids an employer to

> coerce, intimidate, threaten or interfere with any individual in the exercise or enjoyment of or on account of *his or her* exercising or enjoyed ... any right ... protected by this chapter.

42 U.S.C. § 12203(b) (emphasis added). The Third Circuit explained that this provision forbids third party reprisals because

> action taken against the third party employee can have the effect of coercing the employee engaged in protected activity, and may also coerce other employees of the company from engaging in protected activity in the future.

283 F.3d at 570 n.5. The Third Circuit also held, on the other hand, that the anti-retaliation provision of the ADEA, "only prohibit[s] retaliation against a person who himself engaged in protected activity." 283 F.3d at 568; see *id*. at 568 (reprisals against third parties not "actionable" under the ADEA), 568-70.

In *Smith v. Riceland Foods, Inc.*, 151 F.3d 813 (8th Cir.1998), the Eighth Circuit concluded that section 704(a) of Title VII does not "prohibit employer from taking adverse action against employees whose

spouses or significant others have engaged in statutorily protected activity against the employer." 151 F.3d at 819.

B. There Is An Inter-Circuit Conflict Regarding Whether Third Party Reprisals Can Be Redressed In An Action Brought by The Third Party Victim

The courts of appeals disagree as to whether, if third party reprisals are unlawful, the third party victims of such reprisals can sue for redress. That question implicates three distinct issues: constitutional standing, prudential standing, and the existence of a cause of action.

First, any claimant in federal court must have constitutional standing, a sufficient interest in the outcome of the dispute that it presents a genuine case or controversy. The irreducible minimum of constitutional standing is that the claimant must show that he or she will in fact benefit if the courts award the requested relief. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). That is not in doubt in this case or any action in which a third party victim seeks monetary relief or reinstatement in a job from which he or she was dismissed.

Second, in some instances a plaintiff must also satisfy the prudential standing requirement that the injury complained of must have arisen from a violation of his or her own rights, rather than from a violation of the rights of some other party. This requirement, however, is not constitutional in nature;

Congress may if it wishes authorize suit by plaintiffs who have been injured by the violation of the rights of others. Several provisions of the Fair Housing Act of 1968, for example, provide for suit by any "person aggrieved" by discrimination; this Court has repeatedly held that that language authorizes suit by any individual with Article III standing, even though his or her injury was the result of the violation of someone else's rights. *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 (1979); *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972). Section 706(f)(1) uses the same language, providing for suit under Title VII by any "person ... aggrieved."

Third, an individual who files a claim in federal court must also have a private cause of action to enforce the underlying statute. On a number of occasions Congress has enacted statutes without including an express right of action; in such situations the courts must decide whether to infer the existence of a cause of action. Whether the courts will infer such a private right of action for a particular plaintiff depends in part on whether the he or she is within the class of persons whom the statute was enacted to protect. *Cort v. Ash*, 422 U.S. 66 (1975). With regard to Title VII, however, there is no need to apply this line of cases, because the statute has an express cause of action; section 706(f)(1) provides that "a civil action may be brought ... by the person claiming to be aggrieved."

Against that background, several courts of appeals have concluded that third party victims are

entitled to maintain an action for redress. Thus in *Fitzgerald v. Codex Corp.* the First Circuit, having held that third party reprisals violate Employee Retirement Income Security Act, ruled that the third party victim "is entitled to sue." 882 F.2d at 590. In *Fogelman v. Mercy Hospital* the Third Circuit, having concluded that such reprisals violate a provision of the ADA, held that the plaintiff "may assert his third-party retaliation claim under this section of the ADA." 283 F.3d at 570; see *id.* at 570 n.5 (third party plaintiffs have a "cause[ ] of action.")

With regard to prudential standing, four circuits have concluded more generally that section 706(f)(1), in providing for suits by any "person aggrieved," authorizes suit by any individual with Article III standing, regardless of whether his or her injury stemmed from a violation of the rights of another party. *Anjelino v. The New York Times Co.*, 200 F.3d 73 (3d Cir.2000); *Kyles v. J.K. Guardian Sec. Services, Inc.*, 222 F.3d 289, 296 (7th Cir.2000); *Horne v. Firemen's Retirement System of St. Louis*, 69 F.3d 233, 235 (8th Cir.1995); *Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corp.*, 28 F.3d 1268, 1278 (D.C. Cir.1994). Under this interpretation, because Thompson clearly has Article III standing, section 706(f)(1) would authorize Thompson to sue for redress of injuries he suffered as a result of a violation of Regalado's section 704(a) rights.

In *Holt v. JTM Industries, Inc.*, on the other hand, a divided panel of the Fifth Circuit ruled that a third party subjected to retaliatory reprisals cannot

sue under the ADEA. The victims of such reprisals, it held, do not have "standing to sue for retaliation when a relative or friend engages in protected activity." 89 F.3d 1224, 1226 (5th Cir.1996). "[T]he plain language of the statute," the majority insisted, precluded suits by those injured. 89 F.3d at 1226. The dissenting member of the panel, relying on this Court's decision in *Trafficante,* argued that actual language of the ADEA authorizing suit by "[a]ny person aggrieved" encompassed claims by such third party victims. 89 F.3d at 1228-29 (Dennis, J., dissenting). Subsequent Fifth Circuit decisions applying *Holt* have held that the direct victims of third party reprisals do not have standing to sue under Title VII[35] or the Family and Medical Leave Act.[36]

In the instant case the Sixth Circuit adopted an interpretation of Title VII different from all of these circuits. The court below expressly rejected the holding of the Fifth Circuit decision in *Holt*.

> To the extent that the *Holt* court characterized the viability of the plaintiff's claim as an issue of "standing," ... we disagree with its analysis. *See* ... *Holt*, 89 F.3d at 1228-30 (Dennis, J., dissenting).

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[35] *Ramirez v. Gonzales*, 225 Fed.Appx. 203, 209 (5th Cir.2007).

[36] *Elsensohn v. St. Tammany Parish Sheriff's Office*, 530 F.3d 368, 374 (5th Cir.2008).

(App. 13a n.4). Unlike the courts which have concluded that Title VII authorizes suit by any person with Article III standing, on the other hand, the Sixth Circuit held that the victims of third party reprisals do not have a "cause of action." It reasoned that "Congress created a retaliation cause of action" only for those who "oppose an unlawful employment practice, made a charge, testify, assist, or participate in an investigation." (App. 8a).

The decision of the en banc court is at odds with the circuits that have correctly recognized that it is section 706(f)(1) – which applies to any "person aggrieved" – that provides the cause of action to enforce Title VII. *Smith v. Casellas*, 119 F.3d 33, 34 (D.C. Cir.1997) ("the private right of action provided for in section 706(f)(1)"); *Etemad v. United States*, 1993 WL 114831 at *1 (9th Cir.) ("[t]he private right of action ... under section 706(f)(1)"); *Turner v. Texas Instruments, Inc.*, 556 F.2d 1349, 1351 (5th Cir.1977) ("section 706(f)(1)'s ... private cause of action").

The Sixth Circuit may leave open the possibility that an employee who engaged in protected activity might have a cause of action to seek redress for the victim of a third party reprisal. The Fourth Circuit, however, has rejected just such a claim, holding that an individual who engaged in protected activity does not have Article III standing to seek relief for the victim of a third party reprisal. *Smith v. Frye*, 488 F.3d 263, 272-73 (4th Cir.2007) (son lacks Article III standing to maintain action to redress reprisals against mother).

III. This Case Is An Appropriate Vehicle for Resolving The Questions Presented

This case presents an excellent vehicle for resolving the questions presented. The decisions of the courts below dismissing Thompson's complaint rest squarely and exclusively on those issues. The complaint itself clearly alleged that Thompson was dismissed as a reprisal for Regalado's action in filing a charge with the EEOC. The asserted retaliation strikes at the very heart of the Title VII enforcement scheme, because if successful it would both obstruct the EEOC's access to information about substantive violations and imperil the willingness of discrimination victims to pursue the administrative process that is a prerequisite to access to the courts. The close relationship between Regalado, who engaged in the protected activity, and her then-fiancé (now husband) Thompson, who was the victim of the alleged reprisal, starkly illustrates the type of situation in which third party reprisals would be particularly effective.

The legal issues raised by the questions presented have been aired with unusual thoroughness in the five opinions of the en banc court, supplemented by the two panel opinions and the two district court decisions. The discussion in those nine opinions of the range of statutory and interpretative considerations posed by the problem of third party reprisals is substantially more exhaustive than any of the scores of earlier lower court decisions that have considered this problem.

The uniquely fractured nature of the en banc court is an additional consideration supporting a grant of certiorari. En banc decisions resulting in five different appellate opinions are exceptionally uncommon. In this instance those divisions mirror the widespread division and confusion that exists among the lower courts, and make apparent the need for guidance from this Court.

This splintered en banc decision highlights the uncertainty that exists regarding whether section 704(a) – and the other anti-retaliation provisions in federal employment statutes – provide enforceable protection against third party reprisals. Delay in the definitive resolution of these issues by this Court will force workers in the Sixth Circuit and elsewhere to run the risk of third party reprisals whenever they complain to federal agencies or to the federal courts about violations of federal law.

Under the decision of the court below, the very act of cooperating with EEOC investigators now carries a clear and unredressable risk of harm. EEOC officials in the Sixth Circuit who investigate charges of discrimination under Title VII, the ADEA, the ADA, or the Equal Pay Act have been placed in the untenable position of having to choose between warning witnesses that their cooperation may lead to unredressable reprisals against their families or close associates – an admonition likely to deter cooperation with the Commission's investigations – or deliberately withholding that information from witnesses,

and encouraging those employees to assist the Commission unaware of the risks that they run.

Certiorari should be granted to eliminate this dilemma now faced by federal officials, and to prevent the specter of third party reprisals from impeding employee access to and the availability of information to the federal agencies that enforce the nation's employment statutes.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Sixth Circuit. In the alternative, the Solicitor General should be invited to file a brief expressing the views of the United States.

Respectfully submitted,

ERIC SCHNAPPER*
School of Law
University of Washington
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167

DAVID SUETHOLZ
3666 S. Property Rd.
Eminence, KY 40019
(859) 466-4317

Counsel for Petitioner

**Counsel of Record*

United States Court of Appeals,
Sixth Circuit.

Eric L. THOMPSON, Plaintiff-Appellant,
v.
NORTH AMERICAN STAINLESS, LP,
Defendant-Appellee.

No. 07-5040.

Argued Dec. 10, 2008.

Decided and Filed June 5, 2009.

ARGUED: David O'Brien Suetholz, Segal, Lindsay & Janes, Louisville, Kentucky, for Appellant. Leigh Gross Latherow, VanAntwerp, Monge, Jones, Edwards & McCann, LLP, Ashland, Kentucky, for Appellee. Gail S. Coleman, U.S. Equal Employment Opportunity Commission, Washington, D.C., for Amici Curiae. ON BRIEF: David O'Brien Suetholz, Joseph Delano Wibbels, Jr., Segal, Lindsay & Janes, Louisville, Kentucky, for Appellant. Leigh Gross Latherow, Gregory L. Monge, VanAntwerp, Monge, Jones, Edwards & McCann, LLP, Ashland, Kentucky, for Appellee. Gail S. Coleman, U.S. Equal Employment Opportunity Commission, Washington, D.C., Rae T. Vann, Norris, Tysse, Lampley & Lakis, LLP, Washington, D.C., Nelson D. Cary, Alexandra T. Schimmer, Vorys, Sater, Seymour & Pease LLP, Columbus, Ohio, for Amici Curiae.

Before: BOGGS, Chief Judge; MARTIN, BATCHELDER, DAUGHTREY, MOORE, COLE, CLAY, GILMAN, GIBBONS, ROGERS, SUTTON,

COOK, McKEAGUE, GRIFFIN, KETHLEDGE, and WHITE, Circuit Judges.

GRIFFIN, J., delivered the opinion of the court, in which BOGGS, C.J., BATCHELDER, GILMAN, GIBBONS, SUTTON, COOK, McKEAGUE, and KETHLEDGE, JJ., joined. ROGERS, J. (pp. 816-18), delivered a separate opinion concurring in the result. MARTIN, J. (pp. 818-20), delivered a separate dissenting opinion, in which DAUGHTREY, MOORE, COLE, CLAY, and WHITE, JJ., joined, with MOORE, J. (pp. 820-26), joined by MARTIN, DAUGHTREY, COLE, CLAY, and WHITE, JJ., and WHITE, J. (pp. 826-30), joined by Judge DAUGHTREY, also delivering separate dissenting opinions.

OPINION

GRIFFIN, Circuit Judge.

The sole issue raised in this rehearing en banc is whether § 704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a), creates a cause of action for third-party retaliation for persons who have not personally engaged in protected activity. After applying the plain and unambiguous statutory text, we join the Third, Fifth, and Eighth Circuit Courts of Appeal in holding that the authorized class of claimants is limited to persons who have personally engaged in protected activity by opposing a practice, making a charge, or assisting or participating in an investigation. Because plaintiff Eric L. Thompson does not claim that he personally engaged in any

protected activity, we affirm the judgment of the district court granting summary judgment in favor of defendant North American Stainless, LP.

I.

The relevant facts are recited in our vacated panel opinion, *Thompson v. North American Stainless, LP,* 520 F.3d 644, 645-46 (6th Cir.2008), *reh. en banc granted, opinion vacated* (July 28, 2008):

From February 1997 through March 2003, the plaintiff, Eric L. Thompson, worked as a metallurgical engineer for defendant North American Stainless, LP, the owner and operator of a stainless steel manufacturing facility in Carroll County, Kentucky. Thompson met Miriam Regalado, currently his wife, when she was hired by the defendant in 2000, and the couple began dating shortly thereafter. At the time of Thompson's termination, he and Regalado were engaged to be married, and their relationship was common knowledge at North American Stainless.

According to the complaint, Regalado filed a charge with the Equal Employment Opportunity Commission (EEOC) in September 2002, alleging that her supervisors discriminated against her based on her gender. On February 13, 2003, the EEOC notified North American Stainless of Regalado's charge. Slightly more than three weeks later, on March 7, 2003, the defendant terminated Thompson's employment. Thompson alleges that he was terminated in

retaliation for his then-fiancée's EEOC charge, while North American Stainless contends that performance-based reasons supported the plaintiff's termination.

Thompson filed a charge with the EEOC, which conducted an investigation and found "reasonable cause to believe that [the Defendant] violated Title VII." After conciliation efforts were unsuccessful, the EEOC issued a right-to-sue letter and Thompson filed a cause of action against North American Stainless in the Eastern District of Kentucky.

North American Stainless moved for summary judgment, contending that the plaintiff's claim, that his "relationship to Miriam Thompson [née Regalado] was the sole motivating factor in his termination," was insufficient as a matter of law to support a cause of action under Title VII. The district court granted the defendant's motion, holding that Thompson failed to state a claim under either the anti-discrimination provision contained in 42 U.S.C. § 2000e-2(a) or the anti-retaliation provision set forth in 42 U.S.C. § 2000e-3(a).

The plaintiff appeals from this judgment, contending that the anti-retaliation provision of Title VII prohibits an employer from terminating an employee based on the protected activity of his fiancée who works for the same employer. The EEOC has filed an *amicus curiae* brief in support of plaintiff's position.

II.

We review de novo the district court's order granting summary judgment. *Kleiber v. Honda of Am. Mfg., Inc.,* 485 F.3d 862, 868 (6th Cir.2007). Summary judgment is warranted "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." FED.R.CIV.P. 56(c).

III.

When Congress enacted the Civil Rights Act of 1964, it created a new and limited cause of action for retaliation in the employment setting. The relevant language of the statute provides:

> 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 subchapter, or *because he has made a charge, testified, assisted, or participated* in any manner in an investigation, proceeding, or hearing under this subchapter.

Title VII of the Civil Rights Act of 1964, § 704(a), 42 U.S.C. § 2000e-3(a) (emphasis added).

Certainly it was Congress's prerogative to create – or refrain from creating – a federal cause of action for civil rights retaliation and to mold the scope of

such legislation, making the boundaries of coverage either expansive or limited in nature: "Statutory rights and obligations are established by Congress, and it is entirely appropriate for Congress, in creating these rights and obligations, to determine in addition, who may enforce them and in what manner." *Davis v. Passman,* 442 U.S. 228, 240, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979).

When we, in turn, are called upon to review and interpret Congress's legislation, "[i]t is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the lawmaking body which passed it, the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States,* 242 U.S. 470, 485, 37 S.Ct. 192, 61 L.Ed. 442 (1917). "If the words are plain, they give meaning to the act, and it is neither the duty nor the privilege of the courts to enter speculative fields in search of a different meaning." *Id.* at 490, 37 S.Ct. 192. Recognizing the consequences of unbridled judicial forays into the legislative sphere, the Supreme Court has admonished "'time and again that a legislature says in a statute what it means and means in a statute what it says there.'" *Arlington Cent. Sch. Dist. Bd. of Ed. v. Murphy,* 548 U.S. 291, 126 S.Ct. 2455, 165 L.Ed.2d 526 (2006) (quoting *Connecticut Nat. Bank v. Germain,* 503 U.S. 249, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992)). Accordingly, "[w]hen the statutory language is plain, the sole function of the

courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms." *Id.* (internal citations and quotation marks omitted). *See also Robinson v. Shell Oil Co.,* 519 U.S. 337, 340, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997) ("[The courts'] inquiry must cease if the statutory language is unambiguous and the statutory scheme is coherent and consistent.") (internal citation and quotation marks omitted); *Rubin v. United States,* 449 U.S. 424, 430, 101 S.Ct. 698, 66 L.Ed.2d 633 (1981) ("When we find the terms of a statute unambiguous, judicial inquiry is complete, except in rare and exceptional circumstances.").

In our view, the text of § 704(a) is plain in its protection of a limited class of persons who are afforded the right to sue for retaliation. To be included in this class, plaintiff must show that his employer discriminated against him "because *he has opposed* any practice made an unlawful employment practice by this subchapter, or because *he has made a charge, testified, assisted, or participated* in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a) (emphasis added).

Significantly, Thompson does not claim that he engaged in any statutorily protected activity, either on his own behalf or on behalf of Miriam Regalado. In Paragraph 13 of his complaint, Thompson alleges that "[d]efendant has intentionally retaliated against Plaintiff because his wife, Miriam Thompson, filed a charge with the [EEOC] based on gender

discrimination prohibited by 42 U.S.C. § 2000e-2(a). *Plaintiff's relationship to Miriam Thompson was the sole motivating factor in his termination.*" (Emphasis added.) In his appellate brief to our three-judge panel, Thompson framed his "Statement of the Issue" on appeal as follows: "Whether § 704(a) of Title VII, 42 U.S.C. § 2000e-3(a), prohibits an employer from terminating an individual in retaliation for the protected activity of his fiancée who also works for the employer." Further, he alleged in his "Statement of Facts" that "Thompson was terminated in retaliation for his fiancée's protected activity."

By application of the plain language of the statute, Thompson is not included in the class of persons for whom Congress created a retaliation cause of action because he personally did not oppose an unlawful employment practice, make a charge, testify, assist, or participate in an investigation. Nonetheless, with the support of the EEOC, he argues that the statute should be construed to include claimants who are "closely related [to] or associated [with]" a person who has engaged in protected activity. Thompson and the EEOC offer various reasons why we should disregard the text of the statute in favor of their public policy preferences. The primary contention is that a "narrow" interpretation of § 704(a) would create an "absurd" result. Further, they argue that we should defer to the EEOC's interpretation of the statute. These assertions are dependent upon the premise that the statutory language is ambiguous. It is not.

In essence, plaintiff and the EEOC request that we become the first circuit court to hold that Title VII creates a cause of action for third-party retaliation on behalf of friends and family members who have not engaged in protected activity. However, we decline the invitation to rewrite the law.

IV.

The central issue before this court is whether Thompson has asserted a proper cause of action under § 704(a) of Title VII – that is, whether he "is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court" to enforce legislatively created rights or obligations. *Davis,* 442 U.S. at 239 n. 18, 99 S.Ct. 2264.[1] It is well

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[1] Distinct from the question whether Thompson has asserted a cause of action under § 704(a), his *standing* to assert his Title VII retaliation claim is not at issue in this appeal. *See Davis,* 442 U.S. at 239 n. 18, 99 S.Ct. 2264 (distinguishing the separate concepts of standing and cause of action and noting that "*standing* is a question of whether a plaintiff is sufficiently adversary to a defendant to create an Art. III case or controversy, or at least to overcome prudential limitations on federal-court jurisdiction. . . ."). The remedial section of Title VII, 42 U.S.C. § 2000e-5(f)(1), empowers a "person claiming to be aggrieved" to bring a civil action to enforce the prohibitions against unlawful employment practices contained in the substantive provisions of the statute. "What it means to be 'aggrieved' is a question of standing. . . ." *Leibovitz v. New York City Transit Auth.,* 252 F.3d 179, 185 (2d Cir.2001).

There is no question that "[t]his Court has taken a broad view of standing in Title VII actions." *Senter v. Gen. Motors Corp.,* 532 F.2d 511, 517 (6th Cir.1976); *see also Christopher v.*

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established that to prevail upon a Title VII retaliation claim, "a plaintiff must establish that: (1) [he] engaged in activity protected by Title VII; (2) this exercise of protected rights was known to the defendant; (3) the defendant thereafter took an adverse employment action against the plaintiff; and (4) there was a causal connection between the protected activity and the adverse employment action." *Martin v. Toledo Cardiology Consultants, Inc.,* 548 F.3d 405, 412 (6th Cir.2008).

The district court ruled correctly that Thompson failed to establish the first element because his

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Stouder Mem. Hosp., 936 F.2d 870, 876 (6th Cir.1991) ("The fact that [§ 2000e-5] purports to provide remedies for a class broader than direct employees is a strong indication that the proscriptions contemplated by [§ 2000e3] reach beyond the immediate employment relationship.") (quoting *Sibley Mem. Hosp. v. Wilson,* 488 F.2d 1338, 1341 (D.C.Cir.1973)). We have held that the "person claiming to be aggrieved" language of § 2000e-5 shows a congressional intent to define standing under Title VII as broadly as is permitted by Article III of the Constitution. *EEOC v. Bailey Co., Inc.,* 563 F.2d 439, 452-54 (6th Cir.1977); *Senter,* 532 F.2d at 517.

Defendant does not challenge Thompson's standing as an "aggrieved" person, and we are satisfied in our own right that Thompson meets the "irreducible constitutional minimum of standing" required for his Title VII claim, *i.e.,* (1) he suffered an injury-in-fact (termination of his employment), (2) as a result of defendant's putatively illegal conduct, and (3) it is possible, instead of merely speculative, that his injury is redressable. *Cf. Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992); *Club Italia Soccer & Sports Org., Inc. v. Charter Twp. of Shelby, Michigan,* 470 F.3d 286, 291-92 (6th Cir.2006).

complaint did not allege that he personally engaged in any sort of protected activity. Instead, Thompson's retaliation claim is that he was punished for a discrimination complaint brought by his then-fiancée. The district court reviewed the statutory text and held that, "under its plain language, the statute does not authorize a retaliation claim by a plaintiff who did not himself engage in protected activity." We agree.

Previously, our only discussion of a similar issue had been limited to the dicta in *EEOC v. Ohio Edison Co.,* 7 F.3d 541 (6th Cir.1993), and *Bell v. Safety Grooving & Grinding, L.P.,* 107 Fed.Appx. 607 (6th Cir.2004) (unpublished).[2] However, neither of these cases resolved the present question. In Ohio Edison, we held that an employee may engage vicariously in protected activity by and through the actions of his agent, and, in Bell, we held that the plaintiff's non-specific complaints to management were insufficient to trigger protection for him in connection with his girlfriend's EEOC discrimination charge.

Although we have not addressed directly the precise issue at hand, the Third, Fifth, and Eighth Circuit Courts of Appeal have unanimously rejected such third-party retaliation claims.

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[2] Unpublished opinions of this court are not precedentially binding under the doctrine of stare decisis. *United States v. Sanford,* 476 F.3d 391, 396 (6th Cir.2007).

In *Holt v. JTM Industries,* 89 F.3d 1224 (5th Cir.1996), a former employee claimed that he was fired because his wife, who worked for the same company, filed a complaint under the Age Discrimination in Employment Act ("ADEA").[3] The plaintiff in *Holt* relied upon *De Medina v. Reinhardt,* 444 F.Supp. 573 (D.D.C.1978), in support of his position that protecting one spouse from retaliation for the other spouse's protected complaint was necessary to preserve the intent of Congress. *Holt,* 89 F.3d at 1226. The Court of Appeals for the Fifth Circuit rejected this argument, reasoning that while such a holding "might eliminate the risk that an employer will retaliate against an employee for their spouse's protected activities," it would "contradict the plain language of the statute and will rarely be necessary to protect employee spouses from retaliation." *Id.* at 1226.

The *Holt* court "recognize[d] that there is a possible risk that an employer will discriminate against a complaining employee's relative or friend in retaliation for the complaining employee's actions," but concluded that "the language that Congress has employed in [the ADEA] will better protect employees against retaliation than we could by trying to define

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[3] The test for retaliation under the ADEA is the same as the test for Title VII retaliation. *Compare Shirley v. Chrysler First, Inc.,* 970 F.2d 39, 42 (5th Cir.1992) (elements of ADEA retaliation claim) *with Ohio Edison,* 7 F.3d at 543 (elements of Title VII retaliation claim); *see also* 29 U.S.C. § 623(d).

the types of relationships that should render automatic standing under [the ADEA]." *Id.* at 1227. The court noted that the plain language of the statute will protect most close relationships because

> [i]n most cases, the relatives and friends who are at risk for retaliation will have participated *in some manner* in a co-worker's charge of discrimination. The plain language of [the ADEA] will protect these employees from retaliation for their protected activities. However, when an individual, spouse or otherwise, has not participated "in any manner" in conduct that is protected by the ADEA, we hold that he does not have automatic standing to sue for retaliation under [the ADEA] simply because his spouse has engaged in protected activity.

Id. (footnote omitted).[4]

In Holt's case, the evidence did not establish that he participated in his wife's protected activities or that he opposed his employer's alleged discriminatory practice. *Holt,* 89 F.3d at 1227. "At best, [Holt] was a passive observer of [his wife's] protected activities." *Id.* The Fifth Circuit therefore concluded that he was not entitled to sue for retaliation under the ADEA. *Id.*

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[4] To the extent that the *Holt* court 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. *See* text at note 1, *supra; Holt,* 89 F.3d at 1228-30 (Dennis, J., dissenting).

The Eighth Circuit employed a similar rationale in *Smith v. Riceland Foods, Inc.,* 151 F.3d 813 (8th Cir.1998). The plaintiff in *Smith* alleged that he was discharged in retaliation for the filing of a discrimination charge by a female employee who lived with him. He argued in pertinent part that he was not required to show that he personally engaged in protected activity in order to establish a prima facie case of retaliation under Title VII and urged the court to expand the protection of the statute "to prohibit employers from taking adverse action against employees whose spouses or significant others have engaged in statutorily protected activity against the employer." *Id.* at 819. The court rejected such a construction, concluding that it "is neither supported by the plain language of Title VII nor necessary to protect third parties, such as spouses or significant others, from retaliation." *Id.* (citing *Holt,* 89 F.3d at 1226-27). "Title VII already offers broad protection to such individuals by prohibiting employers from retaliating against employees for 'assist[ing] or participat[ing] in any manner' in a proceeding under Title VII. Accordingly, we hold that a plaintiff bringing a retaliation claim under Title VII *must establish that [ ]he personally engaged in the protected conduct.*" *Id.* (emphasis added).

In *Fogleman v. Mercy Hosp., Inc.,* 283 F.3d 561 (3d Cir.2002), the Court of Appeals for the Third Circuit addressed the issue of third-party retaliation in comparable circumstances. The plaintiff sued under the Americans with Disabilities Act ("ADA"),

the ADEA, and a Pennsylvania statute, alleging that he was fired in retaliation for his father's discrimination complaint filed against their joint employer. As a preliminary matter, the *Fogleman* court noted that the anti-retaliation provisions of the ADA and the ADEA are nearly identical to each other and to the anti-retaliation provision of Title VII. *Id.* at 567 (citing *Krouse v. Am. Sterilizer Co.,* 126 F.3d 494, 500 (3d Cir.1997)). Thus, the "precedent interpreting any one of these statutes is equally relevant to interpretation of the others." *Id.* The *Fogleman* court emphatically rejected the notion of ambiguity:

> The plain text of the anti-retaliation provisions requires that the person retaliated against also be the person who engaged in the protected activity: Each statute forbids discrimination against an individual because "such individual" has engaged in protected conduct. By their own terms, then, the statutes do not make actionable discrimination against an employee who has not engaged in protected activity. Read literally, the statutes are unambiguous – indeed, it is hard to imagine a clearer way of specifying that the individual who was discriminated against must also be the individual who engaged in protected activity.

Id. at 568.[5]

[5] The EEOC filed an amicus brief in *Fogleman* and unsuccessfully raised the same arguments before the Third

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The Third Circuit conceded that the case "presents a conflict between a statute's plain meaning and its general policy objectives," but held that when presented with such a conflict, respect for the constitutional separation of powers required it to implement the statutory text. *Id.* at 569. The court also rejected the notion that enforcement of the plain meaning of the statute would lead to dire results and, in fact, stated that there "are at least plausible policy reasons why Congress might have intended to exclude third-party retaliation claims." *Id.* For instance, Congress may have thought that friends or relatives who would be at risk of retaliation typically would have participated in some manner in the protected discrimination charge. *Id.* "If this is true, then the occurrence of pure third-party retaliation will be rare, so that not allowing claims to proceed in these few instances would not necessarily 'defeat the plain purpose' of the anti-discrimination laws." *Id.* (quoting *Bob Jones Univ. v. United States,* 461 U.S. 574, 586, 103 S.Ct. 2017, 76 L.Ed.2d 157 (1983)). Congress also may have feared that allowing third-party retaliation claims would "open the door to frivolous lawsuits and interfere with an employer's prerogative to fire at-will employees." *Id.* at 570.

Circuit that it makes in the present case. *See* Brief of the EEOC as Amicus Curiae in Support of the Appellant, *Fogleman v. Mercy Hosp.,* 283 F.3d 561 (3d Cir.2002) (No. 00-2263), *available at* 2001 WL 34119171.

In sum, no circuit court of appeals has held that Title VII creates a claim for third-party retaliation in circumstances where the plaintiff has not engaged personally in any protected activity. Although plaintiff and the EEOC argue that the language of § 704(a) is ambiguous and that enforcement of the statutory text will lead to absurd results, we disagree, as do the Third, Fifth, and Eighth Circuits, which have soundly rejected such a cause of action.[6]

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[6] *See also Rainer v. Refco, Inc.,* 464 F.Supp.2d 742 (S.D.Ohio 2006) (holding that the plaintiff employee's Title VII retaliation claim was not cognizable where he did not allege that he engaged in protected activity, but rather claimed that he was terminated because his co-worker mother opposed what she believed to be unlawful sex discrimination in employment); *Singh v. Green Thumb Landscaping, Inc.,* 390 F.Supp.2d 1129 (M.D.Fl.2005) (holding that a former employee did not have a cause of action for alleged retaliation under Title VII based solely on his close association with his co-worker wife who engaged in protected activity); *Horizon Holdings, L.L.C. v. Genmar Holdings, Inc.,* 241 F.Supp.2d 1123 (D.Kan.2002) (rejecting third-party retaliation claim under Title VII where the plaintiff alleged that the defendant retaliated against him based on the protected activity of his family members). *But see Gonzalez v. New York State Dept. of Corr. Servs.,* 122 F.Supp.2d 335, 346-47 (N.D.N.Y.2000) (permitting third-party Title VII retaliation claim by employee who alleged that she suffered adverse employment action because of her husband's complaints of discrimination against common employer); *EEOC v. Nalbandian Sales, Inc.,* 36 F.Supp.2d 1206 (E.D.Cal.1998) (holding that the plaintiff's claim that his former employer refused to rehire him in retaliation for discrimination charge filed by the employee's sister was actionable under Title VII's anti-retaliation provision); *De Medina,* 444 F.Supp. 573 (holding

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V.

A.

The Supreme Court's recent decisions addressing retaliation claims do not require that we alter our analysis or change our conclusion. In *Crawford v. Metro. Gov't of Nashville and Davidson County, Tenn.*, ___ U.S. ___, 129 S.Ct. 846, 172 L.Ed.2d 650 (2009), the Court held that the protection of the opposition clause of § 704(a) extends to an employee who was terminated after she testified involuntarily in an internal investigation of alleged sexual harassment. The plaintiff "did 'not claim to have instigated or initiated any complaint prior to her participation in the investigation, nor did she take any further action following the investigation and prior to her firing.'" 129 S.Ct. at 850 (quoting *Crawford v. Metro. Gov't of Nashville and Davidson County, Tenn.,* 211 Fed.Appx. 373, 376 (6th Cir.2006)). Rather, she simply cooperated in the investigation, responded to questions posed by her employer and, in doing so, testified unfavorably against a supervisor who was the subject of the investigation triggered by another coworker's complaints.

The Court abrogated this Circuit's view that the opposition clause "'demands active, consistent "opposing" activities to warrant . . . protection against retaliation'" and that an employee must "instigat[e]

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that Title VII prohibited retaliation against the plaintiff employee in reprisal for the protected activities of her spouse).

or initiat[e]" a complaint to be protected under § 704(a). *Id.* at 851 (quoting *Crawford,* 211 Fed.Appx. at 376 (citation and internal quotation marks omitted)). Instead, the Court held that in this context, the "ordinary meaning" of the undefined statutory term "oppose" should be utilized, which includes the definitions "confront[ing]," "resist[ing]," and "withstand[ing]" discriminatory conduct; or, "to be hostile or adverse to, as in opinion." *Id.* (quoting Webster's New International Dictionary 1710 (2d ed.1958)) and Random House Dictionary of the English Language 1359 (2d ed.1987). The Court explained:

> "Oppose" goes beyond "active, consistent" behavior in ordinary discourse, where we would naturally use the word to speak of someone who has taken no action at all to advance a position beyond disclosing it. . . . There is . . . no reason to doubt that a person can "oppose" by responding to someone else's questions just as surely as by provoking the discussion, and nothing in the statute requires a freakish rule protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when her boss asks a question.

Id. at 851. The Court concluded that:

> [t]he statement Crawford says she gave to [her employer] is thus covered by the opposition clause, as an ostensibly disapproving account of sexually obnoxious

> behavior toward her by a fellow employee, an answer she says antagonized her employer to the point of sacking her on a false pretense. Crawford's description of the louche goings-on would certainly qualify in the minds of reasonable jurors as "resist[ant]" or "antagoni[stic]" to [the supervisor's] treatment, if for no other reason than the point argued by the Government and explained by an EEOC guideline: "When an employee communicates to her employer a belief that the employer has engaged in . . . a form of employment discrimination, that communication" virtually always "constitutes the employee's *opposition* to the activity." Brief for United States as *Amicus Curiae* 9 (citing 2 EEOC Compliance Manual §§ 8-II-B(1), (2), p. 614:0003 (Mar.2003)); see also *Fed. Express Corp. v. Holowecki,* ___ U.S. ___, 128 S.Ct. 1147, 170 L.Ed.2d 10 (2008) (explaining that EEOC compliance manuals "reflect 'a body of experience and informed judgment to which courts and litigants may properly resort for guidance'") (quoting *Bragdon v. Abbott,* 524 U.S. 624, 118 S.Ct. 2196, 141 L.Ed.2d 540 (1998)).

Id. at 850-51.

The Court reasoned that to limit the protection of § 704(a) to "active, consistent" behavior would undermine the primary objective of the statute of avoiding harm to employees, because "[i]f it were clear law that an employee who reported discrimination in answering an employer's questions could be penalized

with no remedy, prudent employees would have a good reason to keep quiet about Title VII offenses against themselves or against others." *Id.* at 852.

However, *Crawford*'s reach does not extend to the present circumstances. As Justice Alito accurately noted in his concurring opinion in *Crawford,* "[t]he question whether the opposition clause shields employees who do not communicate their views to their employers through purposive conduct is not before us in this case." *Crawford,* 129 S.Ct. at 855 (Alito, J., concurring). As he further opined, to extend the Court's holding beyond employees who testify in internal investigations or engage in analogous purposive conduct "would have important practical implications" and "would open the door to retaliation claims by employees who never expressed a word of opposition to their employers" – exactly the conundrum presented in the instant case. *Id.* at 854.

Indeed, the present factual circumstances are even further removed from *Crawford.* As we have emphasized, Thompson does not allege in his complaint that he *personally* engaged in *any* statutorily protected activity or "opposition" to discrimination.[7]

[7] In dissent, Judge Moore advocates an issue that has not been pled, argued, or presented. She contends that, despite plaintiff's admissions to the contrary, had plaintiff anticipated the Supreme Court's *Crawford* decision, he may have pled, argued, and appealed an issue regarding his alleged personal protected activity. However, plaintiff has forfeited the issue. The sole question raised and decided in the vacated panel opinion signed by Judge Moore for which rehearing en banc was granted

(Continued on following page)

Moreover, as Judge Moore concedes in her dissent, "[i]t does not appear that Thompson himself informed any of his supervisors that he aided Regalado with filing her complaint." (Moore, J., dissenting, p. 823 n. 7).[8] Thus, even in the wake of *Crawford,* Thompson has failed to raise a genuine issue of material fact that he engaged in protected activity by personally "opposing" a discriminatory practice under Title VII's anti-retaliation provision.

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is "[w]hether § 704(a) of Title VII, 42 U.S.C. § 2000e-3(a), prohibits an employer from terminating an individual in retaliation for the protected activity of his fiancee who also works for the employer." (Plaintiff-Appellant's Brief, "Statement of the Issue."). In the panel opinion, Judge Moore and Judge Tarnow framed the issue and their holding as follows:

> We are asked whether section 704(a)'s protections extend to persons not expressly described in the statute. Specifically, does Title VII prohibit employers from taking retaliatory action against employees not directly involved in protected activity, but who are so closely related to or associated with those who are directly involved, that it is clear that the protected activity motivated the employer's action? As such conduct would undermine the purposes of Title VII, we hold that such retaliatory action is prohibited.

Thompson v. North Am. Stainless, LP, 520 F.3d 644, 646 (6th Cir.2007), reh'g en banc granted, opinion vacated (July 28, 2008).

[8] As we have noted, an essential element of a prima facie case of retaliation is that the plaintiff's exercise of his protected rights was known to the defendant in order to establish the requisite causal connection between the opposition and the adverse action at issue. *Martin,* 548 F.3d at 412.

B.

In *Burlington Northern & Santa Fe Ry. Co. v. White,* 548 U.S. 53, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006), the Court settled a circuit court split regarding the scope of Title VII's anti-retaliation provision, specifically, the reach of its phrase "discriminate against": "Does that provision confine actionable retaliation to activity that affects the terms and conditions of employment? And how harmful must the adverse actions be to fall within its scope?" *Burlington Northern,* 548 U.S. at 57, 126 S.Ct. 2405. The Court answered these questions as follows:

> We conclude that the anti-retaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace. We also conclude that the provision covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant. In the present context that means that the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination.

Id.

In *Burlington Northern,* the petitioner-employer suspended an employee without pay for insubordination, but later rescinded the suspension and awarded her back pay. The employee alleged that the

employer's actions were in retaliation for her complaints about gender discrimination in the workplace. Noting that Title VII's substantive provision, § 703(a), protects an individual only from employment-related discrimination, the employer argued that § 704(a) should be read *in para materia* with § 703(a) to similarly require a link between the challenged retaliatory action and the terms, conditions, or status of employment. *Id.* at 61, 126 S.Ct. 2405.

In rejecting the employer's contention, the Court scrutinized carefully the statutory language of the two provisions and found that they differed in significant respects. *Id.* Unlike § 703(a), the anti-retaliation provision does not contain words limiting its scope to actions that affect employment or alter the conditions of the workplace. *Id.* at 62., 126 S.Ct. 2405 Applying statutory construction principles, the Court presumed that "where words differ as they differ here, 'Congress acts intentionally and purposely in the disparate inclusion or exclusion,'" *id.* at 63, 126 S.Ct. 2405 (quoting *Russello v. United States,* 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983)), and therefore concluded that the substantive and anti-retaliation provisions are not coterminous:

> [T]he two provisions differ not only in language but in purpose as well. The anti-discrimination provision seeks a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status. The

> anti-retaliation provision seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees. The substantive provision seeks to prevent injury to individuals based on who they are, *i.e.,* their status. The anti-retaliation provision seeks to prevent harm to individuals based on what they do, *i.e.,* their conduct.
>
> * * *
>
> [O]ne cannot secure the second objective by focusing only upon employer actions and harm that concern employment and the workplace. Were all such actions and harms eliminated, the anti-retaliation provision's objective would *not* be achieved. An employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm *outside* the workplace. A provision limited to employment-related actions would not deter the many forms that effective retaliation can take. Hence, such a limited construction would fail to fully achieve the anti-retaliation provision's "primary purpose," namely, "[m]aintaining unfettered access to statutory remedial mechanisms." *Robinson,* 519 U.S. at 346, 117 S.Ct. 843.

Id. at 63-64, 126 S.Ct. 2405 (internal citations omitted).

The Court concluded that "purpose reinforces what language already indicates, namely, that the anti-retaliation provision, unlike the substantive provision, is not limited to discriminatory actions that affect the terms and conditions of employment." *Id.* at 64, 126 S.Ct. 2405.

Thompson argues that, in light of the Court's determination in *Burlington Northern* that the phrase "discriminated against" should be generously interpreted to preserve "unfettered access to [Title VII's] statutory remedial mechanisms," *id.* at 64, 126 S.Ct. 2405, the statutory language at issue in the present case also should be construed broadly, for the same reason. Thompson asserts that if we engage in a restrictive literal reading of § 704(a) and require that the person filing the retaliation claim be the same person who either engaged in or assisted in the protected activity, this narrow construction will defy the statute's purpose and deter individuals from exercising their protected rights. We disagree.

First, we state the obvious – the Court in *Burlington Northern* addressed the scope of actionable retaliation committed by the employer under § 704(a), an issue that is separate and distinct from whether § 704(a) permits an employee who did not himself engage in protected activity to bring a retaliation claim and that requires interpretation of

entirely different language.[9] Moreover, in concluding that § 704(a) does not confine retaliatory acts to those related to employment or the workplace, the Court noted that "no such limiting words" appear in the statute and thus declined to incorporate restrictions *not expressly set forth* in the plain language of the text.

The statutory language of § 704(a) pertinent to the present case is not silent regarding who falls under the umbrella of its protection. It explicitly identifies those individuals who are protected-employees who "opposed any practice made an unlawful employment practice" or who "made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing" under Title VII. Section 704(a) thus clearly limits the class of claimants to those who actually engaged in the protected activity.

As the Court concluded in *Burlington Northern,* unlike Title VII's substantive provision that bars employment based on an individual's *status* as a member of a protected class, "the anti-retaliation

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[9] Two other recent Supreme Court decisions, *CBOCS West, Inc. v. Humphries,* ___ U.S. ___, 128 S.Ct. 1951, 170 L.Ed.2d 864 (2008), and *Gomez-Perez v. Potter,* ___ U.S. ___, 128 S.Ct. 1931, 170 L.Ed.2d 887 (2008), upheld retaliation claims brought under entirely different statutes (42 U.S.C. § 1981(a) and 29 U.S.C. § 633a(a), respectively) and rested upon the interpretation of specific statutory language authorizing the suits. These cases do not compel a contrary resolution of the narrow unrelated issue presented in Thompson's appeal.

provision seeks to prevent harm to individuals based on *what they do, i.e., their conduct*." *Burlington Northern,* 548 U.S. at 63, 126 S.Ct. 2405 (emphasis added). In other words, Congress carefully chose qualifying words of *action* ("opposed," "testified," "made a charge," "participated," "assisted"), not words of *association*. Even under the most generous definition of "oppose" recognized by the Court in *Crawford* – "to be hostile or adverse to, as in opinion" – a plaintiff must engage in a discrete, identifiable, and purposive act of opposition to discrimination. *Crawford,* 129 S.Ct. at 850. Thus, such action is a critical component of a prima facie case of retaliation under Title VII. The plain text simply cannot be read to encompass "piggyback" protection of employees like Thompson who, by his own admission, did not engage in protected activity, but who is merely associated with another employee who did oppose an alleged unlawful employment practice.

C.

We must look to what Congress actually enacted, not what we believe Congress might have passed were it confronted with the facts at bar. For the reasons we have laid out, it was not "absurd" for Congress to limit the class of persons who are entitled to sue to employees who personally opposed a practice, made a charge, assisted, or participated in an investigation. Our interpretation does not undermine the anti-retaliation provision's purpose because retaliation is still actionable, but only in a suit by a

primary actor who engaged in protected activity and not by a passive bystander.[10]

VI.

For these reasons, we affirm the judgment of the district court and hold that § 704(a) of Title VII does not create a cause of action for third-party retaliation for persons who have not personally engaged in protected activity.

ROGERS, Circuit Judge, concurring.

I concur in the result but my reasoning differs somewhat from that of the majority.

In my view, "discrimination against" an employee may include hurting that employee's relative or friend, and imposing such a hurt would be unlawful if it is imposed "because [the employee] has opposed any practice made an unlawful employment practice by this subchapter, or because [the employee] has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or

[10] All of the parties in this case agreed at oral argument 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 pursuant to § 704(a) and, under *Burlington Northern,* defendant's termination of Thompson potentially could be deemed an "adverse employment action" against her.

hearing under this subchapter." 42 U.S.C. § 2000e-3(a). At the very least, a contrary reading is neither plain, nor unambiguous. Indeed, as the majority recognizes, "[a]ll of the parties in this case agreed at oral argument 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 pursuant to § 704(a) and, under *Burlington Northern* [*& Santa Fe Railway. Co. v. White,* 548 U.S. 53, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006)], defendant's termination of Thompson potentially could be deemed an 'adverse employment action' against her." Maj. op. at 816 n. 10. Such a conclusion would *require* that the retaliatory termination of Thompson was "unlawful" under § 2000e-3(a).

In other words, § 2000e-3(a) dictates what practices amount to unlawful retaliation, not who may sue. And when the person bringing suit is the employee who has sufficiently opposed an unlawful employment practice, § 2000e-3(a) may well render unlawful the firing of the employee's spouse.

The question of who may sue is simply not addressed by § 2000e-3(a). Rather, the procedural provisions of Title VII provide that "person[s] claiming to be aggrieved" and "person[s] aggrieved" may sue for Title VII violations. §§ 2000e-5(b), -5(e)(1). While these terms should be interpreted broadly, they should not be interpreted to extend to

every person who has something to gain by challenging the employer's unlawful action.[1] If

[1] Language in cases like *Senter v. General Motors Corp.,* 532 F.2d 511 (6th Cir.1976), and *EEOC v. Bailey Co.,* 563 F.2d 439 (6th Cir.1977), that standing under Title VII was intended to be as broad as Article III permits, must be taken in context.

Senter involved a challenge to standing to maintain a class action, and we explicitly refrained from reaching a third-party standing issue by noting "that the interests asserted by Appellant in his complaint unquestionably fall within the parameters of Title VII." 532 F.2d at 517 n. 6.

Bailey Co. dealt with whether a white woman could challenge her employer's discrimination against blacks. 563 F.2d at 442. We held that she could, not because a person unprotected by Title VII could sue, but because a white woman was protected by virtue of her interest in an integrated workplace. *Id.* at 452. This conclusion was supported by the Supreme Court's *Trafficante* decision, which held that a white tenant had standing to challenge discrimination against blacks by an apartment complex. *Trafficante v. Metro. Life Ins. Co.,* 409 U.S. 205, 93 S.Ct. 364, 34 L.Ed.2d 415 (1972). Indeed, we stated that were it not for *Trafficante*, we would be inclined to hold that the plaintiff lacked standing. *Bailey Co*., 563 F.2d at 452. As one reason for saying *Trafficante* made a difference, we noted that "the EEOC has interpreted Title VII to confer upon every employee the right to a working environment free from unlawful employment discrimination. Under the EEOC's interpretation of Title VII, whites are aggrieved by discrimination against blacks at their place of employment and have standing to file charges with the EEOC and sue in court." *Id.* at 454. Neither *Bailey Co.* nor *Trafficante* can properly be read to say that any person affected by the imposition of retaliation should be deemed sufficiently aggrieved to bring a Title VII claim. While Title VII can be interpreted to protect the right of people to associate with people of different races, it can hardly be interpreted to protect the right of people to associate with people who have been retaliated against.

interpreted that broadly, all sorts of persons who are not the intended beneficiaries of Title VII's protections could sue. For instance, someone interested in the financial health of a company (such as a shareholder or partner) could challenge the firing of a particularly productive employee. Or a dismissed employee's creditor could challenge the dismissal even when the employee does not want to. To avoid such results obviously not intended by Congress, "persons aggrieved" must be interpreted to include those persons who are the intended beneficiaries of the protection enacted in the substantive provision. *See Kowalski v. Tesmer,* 543 U.S. 125, 129, 125 S.Ct. 564, 160 L.Ed.2d 519 (2004).

The intended beneficiaries of the anti-retaliation provision of § 2000e-3(a) are obviously the persons retaliated against, not persons who are incidentally hurt by the retaliation. It follows that in the retaliation context "persons aggrieved" must be interpreted to be the persons retaliated against. While that might not be the only interpretation of "person aggrieved," it is doubtless the best interpretation. The person bringing the claim to the EEOC, and subsequently to court, should be the person alleging that the harm was directed at him or her. That will focus the inquiry where it belongs: on the allegedly unlawful aspect of the employer's retaliatory action, and the extent to which the action is directed against (and harmful to) the protected person.

The reasoning and precedent relied upon by the majority in Part IV generally support this conclusion

as well. My difference with the majority is founded on a concern that by relying on the language of the provision stating what is unlawful, rather than on the language of the provision regarding who can sue, the holding may be misinterpreted to preclude Title VII claims by protected persons, like Regalado, for retaliation in the form of harm imposed on people that (the employer knows) the protected persons care about.

BOYCE F. MARTIN, JR., Circuit Judge, dissenting.

I join Judge Moore's dissent in full but write separately to emphasize how misplaced the majority's relentless reliance on "plain meaning" is: its analysis flows entirely from a flawed and unexamined *ipse dixit*.

In an approach that can hardly be described as exegetical, the majority declares that the meaning of "oppose" – an undefined term in section 704(a), *see* 42 U.S.C.2000e-3(a) – is "plain and unambiguous," Maj. Op. at 805. Sometimes, of course, the meaning of a statutory term is plain. In those cases, a detailed discussion of the text and underlying Congressional purpose would only cloud the statute's clear dictates. But that is not so here, and the majority fails to recognize that the meaning of "oppose" in section 704(a) is broader than it thinks and, at minimum, ambiguous.

But don't take my word for it. The Supreme Court recently told us so in *Crawford v. Metropolitan Government of Nashville,* ___ U.S. ___, 129 S.Ct. 846, 172 L.Ed.2d 650 (2009). There, the Court reversed one of our prior decisions which had held – under the same uncritical "plain meaning" approach used by today's majority – that "oppose" encompasses only the performance of certain activities. In correcting this Court's misguided interpretation, *Crawford* reinforced a broad reading of "oppose" in several key respects. First, it rejected a definition of "oppose" that included only "active, consistent 'opposing' activities" – the Court referred to such a rule as "freakish." *Id.* at 851. Second, in listing dictionary definitions, the Court included one that defined "oppose" as "to be hostile or adverse to, *as in opinion*." *Id.* at 850 (quoting Random House Dictionary of the English Language 1359 (2d ed.1987)) (emphasis added). Third, and most importantly, the Court stated:

> "Oppose" goes beyond "active, consistent" behavior in ordinary discourse, where we would naturally use the word to speak of someone who has taken no action at all to advance a position beyond disclosing it. Countless people were known to "oppose" slavery before Emancipation, or are said to "oppose" capital punishment today, *without* writing public letters, taking to the streets, or resisting the government.

Crawford, 129 S.Ct. at 851 (emphasis added). In other words, "oppose," in common everyday usage ("plain meaning"?), includes the silent opposition of

everything from gay marriage to the death penalty, without requiring anyone to shout it from the rooftops. *Crawford* thus drastically undercut the majority's tunnel vision view that this case concerns only a straightforward debate about whether clear statutory text controls over some unexpressed Congressional purpose. See Maj. Op. at 811. Were it so simple.

Aside from ruling that Thompson is not personally covered by the statute (more on that later), the majority claims that Thompson "forfeited" the issue. Maj. Op. at 813 n. 7. Yet it misunderstands forfeiture's significance. A plaintiff cannot forfeit a statute's inherent ambiguity; the meaning of "oppose" is not "plain" and Thompson cannot make it so via forfeiture. And make no mistake, the majority does not say that Thompson has forfeited his right to make this argument and therefore the issue remains open to be decided in some future case (as would be proper). Instead it invokes forfeiture but nevertheless *decides the question. See* Maj. Op. at 814 ("[E]ven in the wake of *Crawford,* Thompson has failed to raise a genuine issue of material fact that he engaged in protected activity[.]"). If the majority wants to decide this question (it clearly does), it may not hide behind a purported forfeiture to deflect contrary arguments while doing so. The majority accuses the dissents of "advocat[ing] an issue that has not been plead,

argued, or presented." Maj. Op. at 813 n. 7. Maybe so, but that's only because the majority decides one.[1]

Furthermore, in concluding that "oppose" does not encompass Thompson's conduct, the majority purports to agree with Justice Alito's concurring opinion in *Crawford.* Maj. Op. at 813. Yet the majority's reasoning, already at odds with the *Crawford* majority's reasoning, is also inconsistent with Justice Alito's. Specifically, Justice Alito, joined by Justice Thomas, expressed doubt about whether "oppose" should be interpreted to cover what he called "silent opposition." *Crawford,* 129 S.Ct. at 854 (Alito, J., concurring). But he did so not because he thought "oppose" explicitly barred that result – as the majority asserts today – but instead because of that interpretation's potentially "important *practical* implications." *Id.* at 854 (Alito, J., concurring) (emphasis added) (citing the possibility of litigation "by employees who never expressed a word of opposition to their employers," though observing that "in many cases, such employees would not be able to show that management was aware of their opposition and thus would not be able to show that their opposition caused the adverse actions at issue").

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[1] On the other hand, if the majority's forfeiture point is to be believed, then future courts and litigants should treat the majority's discussion of the scope of "oppose" and the impact of *Crawford* as mere dicta and the issue open going forward.

Indeed, at no point in Justice Alito's concurrence did he invoke that interpretive bogeyman, "plain meaning"; in fact he conceded that the meaning of "oppose" is not plain: "The question whether the opposition clause shields employees who do not communicate their views to their employers through purposive conduct is not before us in this case; *the answer to that question is far from clear;* and I do not understand the Court's holding to reach that issue here." *Id.* at 854-55 (Alito, J., concurring) (emphasis added). The majority pretends that this statement somehow supports its view that the statute is "plain and unambiguous." Maj. Op. at 813-14. In any event, regardless of how it has been presented so far, our Court cannot decide this question by invoking "plain meaning" unless "oppose" actually is "plain."

So, because the meaning of "oppose" is ambiguous, determining whether plaintiffs like Thompson should be allowed to sue ought to depend on how much weight Congress would have given the "important practical implications" Justice Alito and Judge Moore identify, which the majority ignores. Based on the text, structure, history, and Congressional purpose, I would hold these claims cognizable: I cannot conceive that Congress wanted to categorically bar them through the ambiguous, undefined term "oppose." This is not a case about abstract third-party claims; it is about an employee who was fired because, he says, the company retaliated against him for his opposition to an unlawful employment practice.

That said, this does not mean Thompson automatically wins. We do not know whether he could meet his evidentiary burden, though I am certain he should be given the opportunity to try to prove that his employer knew of his unexpressed opposition and fired him for that reason. Today, however, the majority sidesteps the traditional framework – which includes causation and discriminatory intent requirements – for deciding discrimination claims, *see McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); *Crawford v. TRW Auto. U.S.,* 560 F.3d 607, 612 (6th Cir.2009), and replaces it with a complete, indiscriminate bar on valid and invalid claims alike on the basis of textual analysis that fails to analyze the text.

I respectfully dissent.

KAREN NELSON MOORE, Circuit Judge, dissenting.

I am baffled by the majority opinion's downplaying of important Supreme Court precedent in this arena. Both long-standing Supreme Court decisions and more recent pronouncements by the Court support a reading of § 704(a) of Title VII, 42 U.S.C. 2000e-3(a),[1] that encompasses Thompson's claim.

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[1] Section 704(a) states in pertinent part that:

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

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Older Supreme Court cases, such as *Bob Jones University v. United States,* 461 U.S. 574, 103 S.Ct. 2017, 76 L.Ed.2d 157 (1983), highlight the primacy of statutory purpose, while more recent decisions, such as *Crawford v. Metropolitan Government of Nashville,* ___ U.S. ___, 129 S.Ct. 846, 172 L.Ed.2d 650 (2009), demonstrate the Court's belief that a broad approach should apply in interpreting statutes meant to protect employees against employer retaliation for protected activity. These cases reinforce the correctness of the panel majority's approach in this case. Moreover, even under the approach advocated by the concurrence, Thompson may sue under § 704(a). Therefore, and for the reasons stated below, I respectfully dissent.

I. *Bob Jones University v. United States* and other Long-Standing Supreme Court Precedent

The majority contends that "the text of § 704(a) is plain in its protection of a limited class of persons who are afforded the right to sue for retaliation," and that we are precluded from considering whether application of the plain language of the statute "would create an 'absurd' result." Majority Op. at 807. As the vacated panel majority opinion properly held, this assertion is incorrect.

> . . . because he has opposed any practice made an unlawful employment practice by this subchapter. . . .

42 U.S.C.2000e-3(a).

"The 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." *Robinson v. Shell Oil Co.,* 519 U.S. 337, 341, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997). Furthermore, whether a statute is plain and unambiguous must be determined "with regard to the particular dispute in the case." *Id.* at 340, 117 S.Ct. 843. Moreover, "[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,* 461 U.S. at 586, 103 S.Ct. 2017.

The Supreme Court has noted that the "'primary purpose'" of § 704(a) is "'[m]aintaining unfettered access to statutory remedial mechanisms.'" *Burlington N. & Santa Fe Ry. Co. v. White,* 548 U.S. 53, 64, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006) (quoting *Robinson,* 519 U.S. at 346, 117 S.Ct. 843). Clearly, the majority's narrow interpretation of § 704(a) squarely contradicts this purpose. *Cf. Fogleman v. Mercy Hosp., Inc.,* 283 F.3d 561, 569 (3d Cir.2002) ("Allowing employers to retaliate via friends and family, therefore, would appear to be in significant tension with the overall purpose of the anti-retaliation provisions, which are intended to promote the reporting, investigation, and correction of discriminatory conduct in the workplace."). However, rather than analyzing this issue directly, the majority implies that these cases are "'rare, so

that not allowing claims to proceed in these few instances would not necessarily defeat the plain purpose of the antidiscrimination laws.'" Majority Op. at 812 (second set of internal quotation marks omitted) (quoting *Fogleman,* 283 F.3d at 569). Neither the majority nor *Fogleman* cites any authority for this sweeping assertion, thus demanding that the reader accept this claim based on nothing more than blind faith. I am not prepared to make such a leap.[2]

Because the majority's plain-language interpretation of the statute defeats the Congressional purpose, it is proper to consider sources beyond the text to determine the correct interpretation of § 704(a). *Bob Jones,* 461 U.S. at 586, 103 S.Ct. 2017. This is the reality that the vacated panel majority opinion recognized, and I fully agree with both the conclusion reached in that opinion and the approach utilized therein. Clearly, the purpose behind the statute provides the best guide as to how the statute should be interpreted. Thus, I believe that § 704(a) should be interpreted broadly to allow for "unfettered access to statutory remedial mechanisms.'" *Burlington,* 548 U.S. at 64, 126 S.Ct. 2405 (quoting *Robinson,* 519 U.S. at 346, 117 S.Ct. 843).[3] Such a

[2] In fact, not even the Fogleman panel found this rationale persuasive. Fogleman, 283 F.3d at 569 (noting that it did not find this asserted reason to restrict § 704(a) "particularly convincing").

[3] I am not the first in our circuit to take such an approach to interpreting antiretaliation provisions.

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broad interpretation demands that third parties such as Thompson be given the opportunity to bring a § 704(a) retaliation claim for the harm visited upon them in retaliation for protected actions undertaken by close associates.[4] If Thompson cannot bring this

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> In *EEOC v. Ohio Edison Co.,* 7 F.3d 541 (6th Cir.1993), a panel of this court noted that courts have routinely adopted interpretations of retaliation provisions in employment statutes that might be viewed as outside the literal terms of the statute in order to effectuate Congress's clear purpose in proscribing retaliatory activity. Contrary to defendant's assertions, courts have frequently applied the retaliation provisions of employment statutes to matters not expressly covered by the literal terms of these statutes where the policy behind the statute supports a non-exclusive reading of the statutory language.

Id. at 545.

[4] Further support for this position is found in the EEOC Compliance Manual, which 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.' " 2 EEOC Compliance Manual § 8.II(B)(3)(c), 614:0005 (BNA 2003); *Johnson v. Univ. of Cincinnati,* 215 F.3d 561, 580 (6th Cir.2000). The Supreme Court has relied on the EEOC Manual in several decisions interpreting § 704(a). *See Burlington,* 548 U.S. at 65-66, 126 S.Ct. 2405; *Robinson,* 519 U.S. at 345-46, 117 S.Ct. 843; *see also Crawford,* 129 S.Ct. at 851 (referencing the EEOC Compliance Manual). Although not controlling, this manual "do[es] constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Meritor Sav. Bank, FSB v. Vinson,* 477 U.S. 57, 65, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986) (internal quotation marks omitted); *see also Crawford,* 129 S.Ct. at 851 (same).

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action, then he has no recourse for the harm that North American Stainless has caused him by retaliating through Thompson against Thompson's then fiancee/now wife Miriam Regalado for Regalado's protected activity of filing a Title VII discrimination claim.[5] Under the majority's view, employers can use

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The Compliance Manual further notes that "[r]etaliation against a close relative of an individual who opposed discrimination can be challenged by both the individual who engaged in protected activity and the relative, where both are employees." 2 EEOC Compliance Manual § 8.II(B)(3)(c). This statement suggests that the EEOC may view North American Stainless's action of firing Thompson as retaliation against Thompson for Regalado's filing of a discrimination charge. Thus, the Compliance Manual provides yet another light in which to view Thompson's claim that renders the claim meritorious. *See also* 2 EEOC Compliance Manual § 8.II(C)(3) ("The retaliation provision[] of 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 or prevent the person from pursuing those rights. For example, it would be unlawful for a respondent to retaliate against an employee because his or her spouse, who is also an employee, filed an EEOC charge. Both spouses, in such circumstances, could bring retaliation claims." (footnote omitted citing *Ohio Edison Co.,* 7 F.3d at 544)).

[5] The majority attempts to alleviate this concern by noting 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 pursuant to § 704(a)." Majority Op. at 816 & n. 10. However, Regalado's ability to sue in this matter does not solve the instant problem because the relief Regalado would be able to seek would appear to differ substantially from the relief that Thompson can seek. Specifically, it is unclear whether Regalado would be able to sue to have Thompson reinstated. Thus, Regalado's suit might not completely remedy Thompson's harm. Therefore, contrary to the

(Continued on following page)

Thompson, and others like him, as swords to keep employees from invoking their statutory rights with no redress for the harms suffered by those individuals. *Cf. Fogleman,* 283 F.3d at 569 ("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." (internal quotation marks omitted)). Clearly, this was not Congress's intent in passing Title VII, *see Burlington,* 548 U.S. at 64, 126 S.Ct. 2405, and I cannot support such a construction of § 704(a).[6]

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majority's assertion, the fact that Regalado can sue does not prevent the majority's interpretation from undermining the purpose behind the antiretaliation provision.

[6] Contrary to the majority's assertion that "no circuit court of appeals has held that Title VII creates a claim for third-party retaliation," Majority Op. at 811, two other circuits have recognized the need to interpret § 704(a) broadly to include third-party retaliation claims, *see Wu v. Thomas,* 863 F.2d 1543, 1547-48 (11th Cir.1989) (allowing a husband's claim – that the university employing a couple engaged in retaliatory conduct towards the husband in retaliation for his wife's filing of an EEOC sex-discrimination charge – to proceed as a "wrongful retaliatory conduct" claim); *McDonnell v. Cisneros,* 84 F.3d 256, 262 (7th Cir.1996) (citing *Wu* with approval and noting the need to read § 704(a) broadly to ensure that its purpose is satisfied) (Posner, C.J.). Moreover, we have previously noted, albeit in dicta, that "a plaintiff's allegation of reprisal for a relative's antidiscrimination activities states a claim upon which relief can be granted under Title VII." *Ohio Edison Co.,* 7 F.3d at 544 (adopting the view espoused in *DeMedina v. Reinhardt,* 444 F.Supp. 573 (D.D.C.1978), *aff'd in part and remanded in part,* 686 F.2d 997 (D.C.Cir.1982)).

II. *Crawford v. Metropolitan Government of Nashville and Recent Supreme Court Decisions*

The Supreme Court has recently emphasized the need to interpret protective statutes, including § 704(a), in a broad manner in order to ensure that the purposes behind these statutes are satisfied. The most recent of these pronouncements came in *Crawford v. Metropolitan Government of Nashville,* a case that originated from our circuit and that involves an employee who was fired after she participated in an internal investigation into harassment. *Crawford* concerns the scope of the "opposition clause" of § 704(a). *Crawford,* 129 S.Ct. at 850 ("The opposition clause makes it 'unlawful . . . for an employer to discriminate against any . . . employe[e] . . . because he has opposed any practice made . . . unlawful . . . by this subchapter.' § 2000e-3(a)."). A panel of this circuit had held that the opposition clause "'demands active, consistent "opposing" activities to warrant . . . protection against retaliation.'" *Crawford v. Metro. Gov't of Nashville,* 211 Fed.Appx. 373, 376 (6th Cir.2006) (unpublished opinion) (omission in original) (quoting *Bell v. Safety Grooving & Grinding, LP,* 107 Fed.Appx. 607, 610 (6th Cir.2004) (unpublished opinion)). The Supreme Court rejected this narrow definition of "oppose," calling such an interpretation "freakish," and embraced a more expansive "ordinary meaning" of "oppose." *Crawford,* 129 S.Ct. at 850-51. Such an

approach shows the Supreme Court's diligence in guaranteeing that § 704(a)'s purpose is fulfilled.

Besides demonstrating the Court's commitment to interpreting § 704(a) consistent with its purpose, *Crawford* opens the door to § 704(a) claims that are based on a broad definition of "oppose." *Crawford* states that the "ordinary meaning" of "oppose" includes the following Random House Dictionary definition: "'to be hostile or adverse to, *as in opinion.*'" *Crawford,* 129 S.Ct. at 850 (emphasis added). The Supreme Court explained that

> "[o]ppose" goes beyond "active, consistent" behavior in ordinary discourse, where we would naturally use the word to speak of someone who has taken no action at all to advance a position beyond disclosing it. Countless people were known to "oppose" slavery before Emancipation, or are said to "oppose" capital punishment today, *without* writing public letters, taking to the streets, or resisting the government.

Id. at 851 (emphasis added).

The vacated panel majority opinion in *Thompson* did not focus on the definition of "oppose," because the Supreme Court had not yet issued its opinion in *Crawford.* However, now that *Crawford* has expanded the landscape of the opposition clause, it is appropriate to consider whether Thompson has met his burden on summary judgment by raising a genuine issue of material fact as to whether he participated in the type of opposition protected by

Crawford. I believe that Thompson has met this burden.

According to his complaint, Thompson maintained a relationship with Miriam Regalado (engagement and then marriage) during the time in which she claims that she was being discriminated against by North American Stainless. Joint Appendix ("J.A.") at 14 (Compl.¶ 13). Moreover, Thompson aided Regalado in preparing and filing her discrimination complaint and participated in an interview with the EEOC regarding the matter. J.A. at 29-30, 35-36 (Thompson Dep. at 56-57, 80, 85).[7] When "view[ing] the factual evidence and draw[ing] all reasonable inferences in favor of the non-moving party," as we must on summary judgment, it is reasonable to infer that Thompson opposed the discrimination against Regalado. *Nat'l Enters., Inc. v. Smith,* 114 F.3d 561, 563 (6th Cir.1997). Such an inference not only is reasonable, but also is likely the most accurate description of Thompson's involvement. Moreover, it is reasonable to infer that, given North American Stainless's knowledge regarding Regalado and Thompson's intimate relationship, North American Stainless believed that Thompson opposed the discrimination against Regalado and fired Thompson for that opposition. Reading the facts in this light, I

[7] It does not appear that Thompson himself informed any of his supervisors that he aided Regalado with filing her complaint; however, other coworkers were aware of his assistance. J.A. at 29, 35-37 (Thompson Dep. at 56, 80, 85, 118).

conclude that the district court erred in granting summary judgment against Thompson.

The majority insists that *Crawford* "do[es] not require that [it] alter [its] analysis or change [its] conclusion" in this case, Majority Op. at 812, because "Thompson does not allege in his complaint that he *personally* engaged in *any* statutorily protected activity or 'opposition' to discrimination," Majority Op. at 813-14. While it may be true that Thompson's complaint focuses on North American Stainless's retaliation against Regalado through Thompson, such an approach is not surprising given the state of the law in this circuit during Thompson's district court proceedings. *Crawford* changed that law while Thompson's direct appeal was pending. Thompson should not be punished now because he relied on our prior erroneous and crabbed position. At the very least, Thompson should be given an opportunity to make a *Crawford* "opposition" argument before the district court, giving the district court an opportunity to consider fully the effect of *Crawford* on the actual facts involved in this case. Rather than allow for more consideration of this issue, the majority slams the door on Thompson's claim while paying mere lip service to *Crawford*'s expansive holding. In my view, this is an unacceptable manner in which to treat pertinent Supreme Court precedent that is binding on direct appeal in Thompson's case. Moreover, the Supreme Court's willingness to embrace such an encompassing meaning of "oppose" illustrates the

Court's commitment to ensuring that § 704(a)'s reach is broad enough to effectuate the purpose of Title VII.

Crawford is not the first indication the Court has given that protective statutes such as Title VII should not be read narrowly. Notably, the Supreme Court has recently interpreted several protective statutes broadly to include retaliation claims in order to achieve the purposes of those statutes, even though the texts of those statutes say nothing about retaliation. *See Gomez-Perez v. Potter,* ___ U.S. ___, 128 S.Ct. 1931, 1936, 170 L.Ed.2d 887 (2008) (holding that the phrase "discrimination based on age" in the Age Discrimination in Employment Act, 29 U.S.C. § 633a(a), includes retaliation claims, even though the statute makes no mention of retaliation); *CBOCS West, Inc. v. Humphries,* ___ U.S. ___, 128 S.Ct. 1951, 1954-55, 170 L.Ed.2d 864 (2008) (holding that 42 U.S.C. § 1981 encompasses retaliation claims, even though the statute does not explicitly mention retaliation). Even though these cases do not address § 704(a), they still demonstrate the Supreme Court's dedication to satisfying the purpose of protective statutes, rather than rigid adherence to the text when doing so would not fulfill the clear legislative purpose. Additionally, in both *Crawford* and *Burlington,* the Supreme Court broadly construed language in § 704(a) to increase the number of persons who can bring claims under the statute. Although each of these cases involved slightly different issues than the instant appeal, these decisions further evidence the Supreme Court's

determination that § 704(a) should be interpreted in favor of inclusivity rather than exclusivity. The majority simply brushes these guiding signals aside. I do not believe that these Supreme Court decisions can be so cavalierly dismissed. Given the majority's clear disregard for the purpose of § 704(a) and the guiding principles that the Supreme Court has provided in this area, I must dissent.

III. 42 U.S.C. § 2000e-5 STANDING

The concurrence asserts that § 704(a) "dictates what practices amount to unlawful retaliation, not who may sue." Concurrence at 18. It contends that the proper inquiry in this case is whether Thompson has standing to sue under 42 U.S.C. § 2000e-5. As even the majority recognizes, the concurrence's conclusion that Thompson lacks standing is flawed.

At the outset, the concurrence correctly concedes that North American Stainless committed an unlawful employment act, as defined by the anti-retaliation clause, when it fired Thompson.[8] However, the concurrence then suggests that Thompson lacks standing to bring this claim under 42 U.S.C. § 2000e-5 because Thompson has not been "sufficiently

[8] As the concurrence correctly notes, such a concession is implicit in the majority's assertion that Regalado could bring a retaliation claim against North American Stainless based on Thompson's firing. Concurrence at 816; *see also* Majority Op. at 816 & n. 10.

aggrieved." Concurrence at 818 n. 1. This latter assertion confuses the harm at issue in the instant case and is in error. Although North American Stainless may have retaliated against Regalado, North American Stainless harmed Thompson in order to effectuate this retaliation. Thompson is thus not asserting Regalado's harm, but rather is seeking redress for the harm done directly to him by North American Stainless.

"Aggrieved" is not defined by Title VII and thus should be given its ordinary meaning. *See Crawford,* 129 S.Ct. at 850 (citing *Perrin v. United States,* 444 U.S. 37, 42, 100 S.Ct. 311, 62 L.Ed.2d 199 (1979)). According to the Oxford English Dictionary, to be "aggrieved" is to be "[i]njured or wronged in one's rights, relations, or position." Oxford English Dictionary Online, www. dictionary. oed. com (last visited April 20, 2009) (defining "aggrieved"). Applying this definition and assuming, as the concurrence does, that firing Thompson was an unlawful act, it is obvious that Thompson is "a person claiming to be aggrieved . . . alleging that an employer . . . has engaged in an unlawful employment practice." 42 U.S.C.2000e-5(b).

Furthermore, there is no authority to support the concurrence's attempt to narrow the scope of § 2000e-5 to encompass only "those persons who are the intended beneficiaries of the protection enacted in the substantive provision" of Title VII, Concurrence at 817, particularly because the case cited in support of that proposition, *Kowalski v. Tesmer,* 543 U.S. 125,

129, 125 S.Ct. 564, 160 L.Ed.2d 519 (2004), pertains to the issue of third-party standing, which is not the basis of Thompson's claim. However, even if the concurrence's restrictive reading of § 2000e-5 were correct, it does not follow that Thompson would not have standing to bring his claim. As explained above, Congress intended for individuals to have "unfettered access to statutory remedial mechanisms," *Burlington,* 548 U.S. at 64, 126 S.Ct. 2405, and to honor such intent, Thompson must be counted among the class of individuals protected by the antiretaliation clause. Therefore, it is not at all "obvious[ ] [that] the persons retaliated against, not [the] persons who are incidentally hurt by the retaliation" are the only intended beneficiaries of the antiretaliation clause. Concurrence at 19. To the contrary, for the reasons discussed above, the intended beneficiaries of the antiretaliation clause include employees, such as Thompson, who are fired allegedly because of their intimate relationships with other employees who have filed EEOC charges of discrimination.

Moreover, we previously have held that Title VII standing is as broad as Article III standing. *See EEOC v. Bailey Co.,* 563 F.2d 439, 452 (6th Cir.1977); *see also Kyles v. J.K. Guardian Sec. Servs., Inc.,* 222 F.3d 289, 295 (7th Cir.2000) (holding that the language of § 2000e-5 "signals a congressional intent to extend standing to the outermost limits of Article III"). No one has asserted that Thompson lacks Article III standing, nor could they given the fact that Thompson has an injury-in-fact caused by North

American Stainless that can be redressed if Thompson is victorious in this action. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). Thus, even approaching this case in the way that the concurrence suggests, I would still conclude that Thompson can sue under Title VII.

IV. CONCLUSION

For the reasons expressed in this opinion, in the panel's opinion, and in Judge Martin's dissenting opinion, which I join fully, I would permit Thompson's retaliation action to proceed.

WHITE, Circuit Judge, dissenting.

All members of the en banc panel appear to agree that the firing of an employee's co-worker-spouse (or co-worker-fiancée) in retaliation for the employee's opposition to an unlawful employment practice is unlawful under § 704(a), 42 U.S.C. § 2000e-3(a). The majority does not agree, however, that the fired spouse has a right to sue under Title VII. Like the other dissenting judges, I disagree. I write separately to make clear that I do not rely on Title VII's broad remedial purpose to reach this conclusion. Although recognizing Thompson's right to maintain an action is consistent with Title VII's remedial purpose, I would not find such a right were it contrary to the plain meaning of the statute. In short, while I join in Judge

Moore's and Judge Martin's dissenting opinions, I come to that point after rejecting the majority's conclusion that § 704(a), which makes it unlawful to discriminate against an employee because he has opposed an unlawful employment practice, unambiguously provides that only the person who opposed the violation can maintain the action.[1]

I

The majority states that in its view,

> the text of § 704(a) is plain in its protection of a limited class of persons who are afforded the right to sue for retaliation. To be included in this class, plaintiff must show that his employer discriminated against him "because *he has opposed* any practice made an unlawful employment practice by this subchapter, or because *he has made a charge, testified, assisted, or participated* in any manner in an investigation, proceeding or hearing under this subchapter." 42 U.S.C. § 2000e-3(a).

* * *

[1] Two issues of statutory interpretation are implicated here. The first is whether Thompson can maintain an action on the basis that Defendant North American Stainless fired him as a means of retaliating against Regalado for her opposition; the second is whether, under the recently decided case of *Crawford v. Metropolitan Government of Nashville,* ___ U.S. ___, 129 S.Ct. 846, 172 L.Ed.2d 650 (2009), Thompson can maintain an action on the basis that he was fired because he supported Regalado's opposition. I first address the former issue.

> By application of the plain language of the statute, Thompson is not included in the class of persons for whom Congress created a retaliation cause of action because he personally did not oppose an unlawful employment practice, make a charge, testify, assist, or participate in an investigation.

Majority Op. at 808 (emphasis in original). The majority correctly observes that "*Burlington Northern* [*& Santa Fe Ry. Co. v. White,* 548 U.S. 53, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006),] addressed the scope of actionable retaliation committed by the employer under § 704(a), an issue that is separate and distinct from whether § 704(a) permits an employee who did not himself engage in protected activity to bring a retaliation claim. . . ." Majority Op. at 815. The majority then contrasts § 704(a)'s lack of limiting language regarding retaliatory discrimination (at issue in *Burlington Northern*) with the language of § 704(a) it finds pertinent to this case:

> The statutory language of § 704(a) pertinent to the present case is not silent regarding who falls under the umbrella of its protection. It explicitly identifies those individuals who are protected-employees who "opposed any practice made an unlawful employment practice" or who "made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing" under Title VII. Section 704(a) thus clearly limits the class of claimants to

> those who actually engaged in the protected activity.

Id.

Thus, the majority looks to the plain language of § 704(a) and finds in it the answer to the question whether § 704(a) permits an employee who did not himself engage in protected activity to bring a retaliation claim. But, the plain language of § 704(a) is addressed to declaring that particular conduct by an employer constitutes an unlawful employment practice. Contrary to the majority's characterization, the statutory language does not tell us "*who* falls under the umbrella of its protection," Majority Op. at 815, but rather, *what* conduct is prohibited. The plain language of § 704(a) simply declares that it is unlawful to discriminate against an employee because that employee opposed an unlawful employment practice. The focus is on the prohibited retaliatory conduct. This, I believe, is the point made by the concurrence. It is true that by prohibiting the retaliatory conduct, Congress protected the employee, but the fact remains that § 704(a) speaks in terms of unlawful *conduct,* albeit as a means of protecting employees.

Because the language of § 704(a) addresses *what* is forbidden, rather than *who* is protected, the majority must make an inference to reach its conclusion that § 704(a) tells us who is and is not protected against the actions it prohibits, and then, more importantly, deduce from that inference who

may and may not maintain a cause of action. Conceding, arguendo, that the majority's inference is reasonable, it is not the only reasonable inference to be made. This, in my view, undermines the majority's reliance on the plain language of § 704(a) as a barrier to recognizing Thompson's right to maintain an action.

Section 704(a) tells us that it is an unlawful employment practice for an employer to discriminate against an opposing employee by firing that employee's co-employee-fiancée in retaliation for the opposing employee's opposition to an unlawful practice. To be sure, the unlawful employment practice prohibited by § 704(a) is discrimination against an employee who has opposed an unlawful practice, or supported another's opposition. *See Burlington Northern,* 548 U.S. at 56, 126 S.Ct. 2405. It does not follow, however, that an employer cannot commit an unlawful employment practice under § 704(a) by discriminating against the opposing employee through the vehicle of firing that employee's co-employee spouse. As the separate opinions have noted, it appears that all of us recognize that this would be unlawful conduct under *Burlington Northern.*

The majority goes beyond the language of § 704(a), concluding that even if Thompson can prove such a case, he cannot maintain the action because he is not the person who opposed the unlawful practice. The majority bases this conclusion on the plain meaning it ascribes to § 704(a), notwithstanding that

§ 704(a) does not purport to address the question who can bring a charge or maintain an action based on a violation. Essentially, the majority concludes that Thompson does not have a right not to be harmed in his employment by this particular unlawful employment practice because although the unlawful practice harmed him, and although the harm was the intended consequence of the unlawful practice (albeit an intermediate harm in path to the ultimate goal of harming Regalado), only the opposing employee is protected by § 704(a).

In contrast, the statutory provisions can reasonably be understood to mean that certain retaliatory conduct by an employer (such as that allegedly involved here) is unlawful; that when an employer engages in such conduct, it violates § 704(a); and once the employer's conduct is found to violate § 704(a), there is no reason to look back to that section to determine who may maintain an action based on the violation. As noted by the concurrence, the provisions addressing the filing of charges and civil actions are found in a different section, 42 U.S.C. § 2000e-5(b), which refers to persons "aggrieved." Thus, to answer the question whether Thompson can sue based on the § 704(a) violation, we need ask whether Thompson is aggrieved by the unlawful employment practice.

Accepting the allegations as pled, Thompson, himself, is unquestionably a person claiming to be aggrieved by an unlawful employment practice – the retaliation against Regalado. As Judge Moore ably

discusses, there is no support for the conclusion that Thompson is not sufficiently aggrieved.

The concurrence rejects the plain meaning of "aggrieved" – to be "injured or wronged in one's rights"[2] – which would clearly include Thompson, in favor of a policy-based meaning that restricts the word's scope to "those persons who are the intended beneficiaries of the protection enacted in the substantive provision," Concurring Op. at 817, thus linking the definition of "aggrieved" to the substantive violation. Through this linkage, the concurrence reaches the same ultimate conclusion as the majority – that the person aggrieved must be the person who opposed the unlawful practice. The concurrence fears that persons who are not the intended beneficiaries of Title VII might sue. But this broader concern need not be satisfied by artificially restricting the plain meaning of "aggrieved" and declaring that only the person who opposed the unlawful practice can be aggrieved within the meaning of the statute. Title VII deals with discrimination in employment. The concurrence's hypothetical creditor-plaintiff and shareholder-plaintiff can clearly be eliminated as not being within the scope of Title VII's protections. Moreover, Title VII is already limited in scope – a co-employee plaintiff such as Thompson must prove that he was discriminated against in his employment

[2] Oxford English Dictionary Online, http://www.dictionary.oed.com (defining "aggrieved").

either because he opposed his employer's unlawful employment practice with respect to his co-employee/fiancée or because his employer sought to retaliate against his co-employee/fiancée by firing him. If the co-employee plaintiff proceeds according to the latter theory – the one at issue here – he must establish that the employer's motivation for the employment action by which he was aggrieved was to retaliate against the person who opposed the unlawful practice. Where the relationship between the two employees is more attenuated, it will be more difficult to prove this unlawful motivation.

To be sure, lines must be drawn. And despite our differences, all members of the panel agree that Congress should draw those lines, not the courts. The majority concludes that Congress drew the line at issue here in § 704(a) by describing the unlawful practice in terms that refer to the opposing employee. I conclude that Congress described the unlawful practice in terms that refer to the opposing employee because it is discrimination against the opposing employee that is unlawful, and that Congress intended to protect employees who are aggrieved by unlawful employment practices. To be sure, every employee is not aggrieved when one employee is retaliated against. But sometimes the employer may retaliate in such a way that other employees will be directly and intentionally harmed. It is more consistent with the statutory language and purpose to draw the line by determining if there has been an unlawful employment practice and then asking if the

plaintiff is aggrieved within Congress's use of the term, than it is to draw the line by, in effect, turning an otherwise unlawful practice into an acceptable one by declaring that the person aggrieved by the practice is not within the protection of the provision that makes the undeniably unlawful conduct unlawful. The former approach, which views conduct as either unlawful under § 704(a) or not, and proceeds from that point forward asking if a claimant is aggrieved, thus respecting the plain language of both statutory provisions at issue here, is preferable to the approach that restricts the plain language of these provisions in anticipation of cases yet to come. At the very least, the statutory provisions can be reasonably construed in this fashion. It does no violence to the plain meaning of § 704(a), and is consistent with it, to hold that Thompson can establish an unlawful employment practice under § 704(a) if he proves that he was fired as an act of retaliation against Regalado. Having reached this point, I concur in Judge Moore's opinion.

II

The preceding discussion has been addressed to the issue whether Thompson can maintain an action based on his being fired as an act of retaliation against Regalado, as this is the posture in which the case has been litigated thus far. I agree with the majority that this claim is not directly affected by the *Crawford* decision because it does not rest on Thompson's opposition. Nevertheless, I agree with

Judge Moore and Judge Martin that we should not ignore *Crawford*'s effect on Thompson's rights under § 704(a); that post-*Crawford,* the record is sufficient to create a genuine issue whether Thompson himself "opposed" an unlawful employment practice; that he should be permitted to amend his complaint to allege such opposition should he choose to do so; and that if the case raises no issues concerning his opposition under *Crawford,* the majority has no reason to reach the issue.

III

In sum, the question before us is whether Thompson's action, which is consistent with the intent of the statute, is in fact authorized. The majority concludes that it is precluded by the language of § 704(a), but § 704(a) does not present the plain-meaning problem identified by the majority. The relevant questions are whether defendant violated § 704(a) and whether Thompson is a person aggrieved by that violation. Thompson has made a sufficient showing to survive summary judgment as to both. While an overly broad construction of "aggrieved" might be problematic if taken to the extreme, one need not go down that path here because Thompson lost his job and it is difficult to conceive of a potential plaintiff being more aggrieved. Because we are reviewing the grant of a motion for summary judgment and the intervening case of *Crawford* has significantly changed how Thompson

might be able to proceed, he should be permitted to amend should he choose to do so.

520 F.3d 644

United States Court of Appeals,
Sixth Circuit.

Eric L. THOMPSON, Plaintiff-Appellant,
v.
NORTH AMERICAN STAINLESS, LP,
Defendant-Appellee.

No. 07-5040.

Argued: Sept. 18, 2007.

Decided and Filed: March 31, 2008.

Rehearing En Banc Granted,
Opinion Vacated July 28, 2008.

ARGUED: David O'Brien Suetholz, Segal, Lindsay & James, Louisville, Kentucky, for Appellant. Leigh G. Latherow, VanAntwerp, Monge, Jones, Edwards & McCann, LLP, Ashland, Kentucky, for Appellee. Gail S. Coleman, Equal Employment Opportunity Commission, Washington, DC, for Amicus Curiae. ON BRIEF: David O'Brien Suetholz, Joseph Delano Wibbels, Jr., Segal, Lindsay & James, Louisville, Kentucky, for Appellant. Leigh G. Latherow, Gregory L. Monge, VanAntwerp, Monge, Jones, Edwards & McCann, LLP, Ashland, Kentucky, for Appellee. Gail S. Coleman, Equal Employment Opportunity Commission, Washington, DC, for Amicus Curiae.

Before: MOORE and GRIFFIN, Circuit Judges; TARNOW, District Judge.*

TARNOW, D.J., delivered the opinion of the court, in which MOORE, J., joined. GRIFFIN, J. (pp. 650-56), delivered a separate dissenting opinion.

OPINION

TARNOW, District Judge.

Shortly after Appellant Eric Thompson's fiancée filed a discrimination charge with the EEOC against their common employer, the Appellee, Thompson was terminated. The parties to this appeal ask whether the anti-retaliation provisions in Title VII of the Civil Rights Act protect a related or associated third party from retaliation under such circumstances. We hold that that they do, and REVERSE the district court's grant of summary judgment to the employer.

I.

From February 1997 through March 2003, the plaintiff, Eric L. Thompson, worked as a metallurgical engineer for defendant North American Stainless, LP, the owner and operator of a stainless steel manufacturing facility in Carroll County, Kentucky. Thompson met Miriam Regalado, currently his wife,

* The Honorable Arthur J. Tarnow, United States District Judge for the Eastern District of Michigan, sitting by designation.

when she was hired by the defendant in 2000, and the couple began dating shortly thereafter. At the time of Thompson's termination, he and Regalado were engaged to be married, and their relationship was common knowledge at North American Stainless.

According to the complaint, Regalado filed a charge with the Equal Employment Opportunity Commission (EEOC) in September 2002, alleging that her supervisors discriminated against her based on her gender. On February 13, 2003, the EEOC notified North American Stainless of Regalado's charge. Slightly more than three weeks later, on March 7, 2003, the defendant terminated Thompson's employment. Thompson alleges that he was terminated in retaliation for his then-fiancée's EEOC charge, while North American Stainless contends that performance-based reasons supported the plaintiff's termination.

Thompson filed a charge with the EEOC, which conducted an investigation and found "reasonable cause to believe that [the Defendant] violated Title VII." After conciliation efforts were unsuccessful, the EEOC issued a right-to-sue letter and Thompson filed a cause of action against North American Stainless in the Eastern District of Kentucky.

North American Stainless moved for summary judgment, contending that the plaintiff's claim, that his "relationship to Miriam Thompson [née Regalado] was the sole motivating factor in his termination," was insufficient as a matter of law to support a cause of action under Title VII. The district court granted

the defendant's motion, holding that Thompson failed to state a claim under either the anti-discrimination provision contained in 42 U.S.C. § 2000e-2(a) or the anti-retaliation provision set forth in 42 U.S.C. § 2000e-3(a).

The plaintiff appeals from this judgment, contending that the anti-retaliation provision of Title VII prohibits an employer from terminating an employee based on the protected activity of his fiancée who works for the same employer. The EEOC has filed an *amicus curiae* brief in support of plaintiff's position.

II.

A.

A district court's grant of summary judgment is reviewed *de novo*. *Cicero v. Borg-Warner Automotive, Inc.,* 280 F.3d 579, 583 (6th Cir.2002) (citing *Doren v. Battle Creek Health Sys.,* 187 F.3d 595, 597 (6th Cir.1999)). In reviewing the decision, we apply the same legal standard as the lower court. *Cline v. Catholic Diocese of Toledo,* 206 F.3d 651, 657 (6th Cir.2000). Summary judgment is only appropriate when the evidence submitted shows "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Cicero,* 280 F.3d at 583 (quoting Fed.R.Civ.P. 56(c)).

B.

Section 704(a) of Title VII of the Civil Rights Act prevents retaliation by employers for two types of activity, opposition, and participation.

> 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 by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3.

We are asked whether section 704(a)'s protections extend to persons not expressly described in the statute. Specifically, does Title VII prohibit employers from taking retaliatory action against employees not directly involved in protected activity, but who are so closely related to or associated with those who are directly involved, that it is clear that the protected activity motivated the employer's action? As such conduct would undermine the purposes of Title VII, we hold that such retaliatory action is prohibited.

C.

Defendant argues that the statute is unambiguous. That is, the plain language of the statute indicates that the only individual protected by 704(a) is the one who conducted the protected activity.

However, "[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 University v. United States,* 461 U.S. 574, 586, 103 S.Ct. 2017, 2025, 76 L.Ed.2d 157 (1983). Further, "it is well settled that, in interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but *will take in connection with it the whole statute . . . and the objects and policy of the law. . . .*" *Id.* (alterations in original) (quoting *Brown v. Duchesne,* 19 How. 183, 194, 15 L.Ed. 595 (1857)).

Robinson v. Shell Oil, 519 U.S. 337, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997), which also interpreted section 704(a), stated that whether a statute is plain and unambiguous can only be evaluated "with regard to the particular dispute in the case." *Id.* at 340, 117 S.Ct. 843. A court must evaluate not only the contested statutory language, but also "the specific context in which that language is used, and the broader context of the statute as a whole." *Id.* at 341, 117 S.Ct. at 846.

Burlington Northern and Santa Fe Railway Co. v. White, 548 U.S. 53, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006), discussed that broader context and the object of Title VII: "The anti-retaliation provision seeks to secure [a non-discriminatory workplace] by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees." *Id.* at

2412. It characterized section 704(a)'s primary purpose as "[m]aintaining unfettered access to statutory remedial mechanisms." *Id.* (quoting *Robinson,* 519 U.S. 337, 346, 117 S.Ct. 843, 136 L.Ed.2d 808). *Burlington* held that a plaintiff must demonstrate a "materially adverse" retaliatory action, which it defined as one that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.* at 2415 (quotation marks and citations omitted).

Here, a literal reading of section 704(a) suggests a prohibition on employer retaliation only when it is directed to the individual who conducted the protected activity. Such a reading, however, "defeats the plain purpose" of Title VII. There is no doubt that an employer's retaliation against a family member after an employee files an EEOC charge would, under *Burlington,* dissuade "reasonable workers" from such an action.

Support for our holding is found as well in the EEOC Compliance Manual. *See Meritor Sav. Bank, FSB v. Vinson,* 477 U.S. 57, 65, 106 S.Ct. 2399, 2404, 91 L.Ed.2d 49 (1986) ("[EEOC] Guidelines, while not controlling . . . do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.") (quotation marks and citations omitted); *Griggs v. Duke Power Co.,* 401 U.S. 424, 433-34, 91 S.Ct. 849, 854-55, 28 L.Ed.2d 158 (1971) ("The administrative interpretation of the [Civil Rights] Act by the enforcing agency is entitled to great deference."). The *Burlington* decision also

found support in the Compliance Manual for its interpretation of section 704(a), *see* 126 S.Ct. at 2413-14, as did *Robinson, see* 117 S.Ct. at 848.

The Compliance Manual expressly states that a person claiming retaliation need not be the one who conducted the protected activity. "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." *Johnson v. University of Cincinnati,* 215 F.3d 561, 580 (6th Cir.2000) (emphasis added) (quoting EEOC Compliance Manual (CCH) ¶ 8006).

D.

Our holding today is consistent with Circuit precedent, as well as interpretive practices of both this Court and the Supreme Court. In *EEOC v. Ohio Edison Co.,* 7 F.3d 541 (6th Cir.1993), we observed that

> courts have routinely adopted interpretations of retaliation provisions in employment statutes that might be viewed as outside the literal terms of the statute in order to effectuate Congress's clear purpose in proscribing retaliatory activity. Contrary to defendant's assertions, courts have frequently applied the retaliation provisions of employment statutes to matters not expressly covered by the literal terms of these statutes where the policy behind the

> statute supports a non-exclusive reading of the statutory language.

Id. at 545. We expressly stated, albeit in dicta, that "[w]e agreed with the reasoning of the DeMedina court that a plaintiff's allegation of reprisal for a relative's anti-discrimination activities states a claim upon which relief can be granted under Title VII." *Id.* at 544 (referring to *DeMedina v. Reinhardt,* 444 F.Supp. 573 (D.D.C.1978), *aff'd in part and remanded in part,* 686 F.2d 997 (D.C.Cir.1982)).

Other cases have gone beyond literal language to support a construction that corresponded with a statute's purpose. *Robinson, supra,* interpreted section 704(a)'s prohibition against an employer "discriminat[ing] against any of his employees" to include *former* employees, because such an interpretation was "more consistent with the broader context of Title VII and the primary purpose of § 704(a)." 117 S.Ct. at 849.

In *Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, and GMC Trucks, Inc.* 173 F.3d 988 (6th Cir.1999), a white former employee sued his employer for discrimination, alleging he had been discharged because he had a biracial child. *Id.* at 994. After reviewing both the purpose of Title VII and EEOC interpretations, we held that Title VII's prohibition against discrimination "because of such individual's race," 42 U.S.C. § 2000e-2(a), extended to *indirect* discrimination, despite the term's absence from the statute. *Id.* at 995.

In *NLRB v. Scrivener,* 405 U.S. 117, 121, 92 S.Ct. 798, 801, 31 L.Ed.2d 79 (1972),[1] the Court interpreted section 8(a) of the National Labor Relations Act, which prohibited employers from "discharg[ing] or otherwise discriminat[ing] against an employee because he has filed charges or given testimony under this Act." *Id.* at 118, 92 S.Ct. 798 (quoting 29 U.S.C. § 158). Despite the plain language, the Court reversed a court of appeals ruling that an employee enjoyed no protection from reprisals for other than formal charges or formal testimony. *Id.* at 121, 92 S.Ct. 798. It reasoned that the broader purpose of section 8(a) required protection for any participation in the investigative process. *Id.* Freedom from retaliation was necessary "to prevent the Board's channels of information from being dried up by employer intimidation of prospective complainants and witnesses." *Id.* at 122, 92 S.Ct. 798 (quoting *John Hancock Mut. Life Ins. Co. v. NLRB,* 191 F.2d 483, 485, 89 U.S.App.D.C. 261, 263 (1951)).

E.

The district court relied in part on our ruling in *Bell v. Safety Grooving & Grinding, LP.,* 107 Fed.Appx. 607 (6th Cir.2004). In *Bell,* the Court affirmed a dismissal of a case under both 42 U.S.C.

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[1] The Supreme Court has relied on the National Labor Relations Act to "draw[ ] analogies . . . in other Title VII contexts." *Burlington,* 126 S.Ct. at 2414.

§§ 2000e-2 and 2000e-3. Contrary to the lower court's characterization, *Bell,* an unpublished disposition, only considered plaintiff's association with his girlfriend as it related to the discrimination claim. *Id.* at 609. The basis the court considered for the retaliation claim, under § 2000e-3, was Bell's "opposition" activities. *Id. Bell* did not analyze or decide whether § 2000e-3(a) reached retaliation claims brought under a third-party association theory.

However, the lower court acknowledged that its ruling would undermine the purposes of Title VII. That is, it recognized "that retaliating against a spouse or close associate of an employee will deter the employee from engaging in protected activity just as much as if the employee were himself retaliated against." *Thompson v. North American Stainless, LP,* 435 F.Supp.2d 633, 639 (E.D.Ky.2006).

Other courts ruling similarly have made the same observation. *See, e.g., Fogleman v. Mercy Hosp., Inc.,* 283 F.3d 561, 569 (3rd. Cir.2002) ("Allowing employers to retaliate via friends and family, therefore, would appear to be in significant tension with the overall purpose of the anti-retaliation provisions, which are intended to promote the reporting, investigation, and correction of discriminatory conduct in the workplace."); *Holt v. JTM Industries, Inc.,* 89 F.3d 1224, 1227 (5th Cir.1996) ("We recognize that there is a possible risk that an employer will discriminate against a complaining employee's relative or friend in retaliation for the complaining employee's actions."). *Fogleman* even noted that "as the Seventh Circuit

sagely observed, '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.'" *Id.* (quoting *NLRB v. Advertisers Mfg. Co.,* 823 F.2d 1086, 1088 (7th Cir.1987)).

The dissent asserts that "before today, no circuit court of appeals has held that Title VII creates a claim for third-party retaliation," *infra* p. 654. In fact, the Eleventh Circuit characterized as "wrongful retaliatory conduct" an EEOC claimant's charge that her husband was called by the university (their common employer) and told he would be happier teaching elsewhere. *Wu v. Thomas,* 863 F.2d 1543, 1547 (11th Cir.1989). In addition, the Seventh Circuit's decision in *McDonnell v. Cisneros,* 84 F.3d 256, 262 (7th Cir.1996) supports a broader reading of section 704(a), and cites *Wu* with approval. *Id.* at 262 *("Wu v. Thomas,* 863 F.2d 1543, 1547-48 (11th Cir.1989), goes even further in liberally interpreting section 2000e-3(a) to accomplish its evident purpose . . . ").

Other courts have expressed concerns as to whether this decision will result in a flood of suits from relatives and associates of those who file EEOC charges. *See, e.g., Fogleman,* 283 F.3d at 570 ("Congress may have feared that expanding the class of potential anti-discrimination plaintiffs beyond those who have engaged in protected activity to include anyone whose friends or relatives have engaged in protected activity would open the door to frivolous lawsuits and interfere with an employer's prerogative to fire at-will employees.").

However, *Ohio Edison, supra,* opened that door in this Circuit in 1993, and very few cases asserting a similar cause of action have been seen. Furthermore, as a decision which permitted the brother of an EEOC claimant to maintain such an action observed, "[t]hat Plaintiff can state a claim does not establish the EEOC can prove the elements of its case." *EEOC v. Nalbandian Sales, Inc.,* 36 F.Supp.2d 1206, 1213 (E.D.Cal.1998). As part of a prima facie retaliation case, all such claimants must demonstrate, *inter alia,* "that there was a causal connection between the protected activity and adverse employment action." *Balmer v. HCA, Inc.,* 423 F.3d 606, 614 (6th Cir.2005). The requirement of a prima facie case in general, and a causal link specifically protect employers from defending against meritless suits.

Of greater concern to the court would be the result of a contrary ruling. That is, permitting employers to retaliate with impunity for opposition to unlawful practices, filing EEOC charges or otherwise participating in such efforts, as long as that retaliation is only directed at family members and friends, and not the individual conducting the protected activity. As *DeMedina* put it, "tolerance of third-party reprisals would, no less than the tolerance of direct reprisals, deter persons from exercising their protected rights under Title VII." 444 F.Supp. at 580.

We REVERSE.

GRIFFIN, Circuit Judge, dissenting.

From time to time, we should remind ourselves that we are judges, not legislators. This is such a time. Because the majority has rewritten the Civil Rights Act of 1964 to conform it to their notion of desirable public policy, I respectfully dissent.

I.

Often, when judges stray from the text of a statute and legislate from the bench, they do so ostensibly to implement their perceived intent of Congress. Were judges empowered to revise and amend statutes to further what we believe to be the "purpose" of the law, there would be no limit on judicial legislation and little need for Congress. Recognizing the consequences of such unbridled judicial forays into the legislative sphere, the Supreme Court has admonished "'time and again that a legislature says in a statute what it means and means in a statute what it says there.'" *Arlington Cent. Sch. Dist. Bd. of Ed. v. Murphy,* 548 U.S. 291, 126 S.Ct. 2455, 2459, 165 L.Ed.2d 526 (2006) (quoting *Connecticut Nat. Bank v. Germain,* 503 U.S. 249, 253-54, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992)). Accordingly, "[w]hen the statutory language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms." *Id.* (internal citations and quotation marks omitted). *See also Robinson v. Shell Oil Co.,* 519 U.S. 337, 340, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997) ("[The courts']

inquiry must cease if the statutory language is unambiguous and the statutory scheme is coherent and consistent.") (internal citation and quotation marks omitted); *Rubin v. United States,* 449 U.S. 424, 430, 101 S.Ct. 698, 66 L.Ed.2d 633 (1981) ("When we find the terms of a statute unambiguous, judicial inquiry is complete, except in rare and exceptional circumstances.").

II.

When Congress enacted the Civil Rights Act of 1964, it created a new and limited federal cause of action for retaliation in the employment setting. The relevant language of the statute provides:

> 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 subchapter, or *because he has made a charge, testified, assisted, or participated* in any manner in an investigation, proceeding, or hearing under this subchapter.

Title VII of the Civil Rights Act of 1964, § 704(a), 42 U.S.C. § 2000e-3(a) (emphasis added).

It was Congress's prerogative to create – or refrain from creating – a federal cause of action for civil rights retaliation. Congress likewise was entitled to mold the scope of such legislation, making the boundaries of coverage either expansive or limited in

nature. In enacting § 704(a), Congress chose the latter. The text of § 704(a) is plain and unambiguous in its protection of a limited class of persons who are afforded the right to sue for retaliation. To be included in this class, the plaintiff must show that his employer discriminated against him "because *he* has opposed any practice made an unlawful employment practice by this subchapter, or because *he* has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a) (emphasis added).

By application of the plain language of the statute, plaintiff Eric L. Thompson is clearly not included in the class of persons for whom Congress created a retaliation cause of action because Thompson, *himself,* did not oppose an unlawful employment practice, or make a charge, testify, assist, or participate in an investigation.

Plaintiff and the EEOC acknowledge that the text of the statute does not create a federal cause of action for third-party retaliation. Moreover, they concede that there is no evidence that Congress intended to establish such a new federal cause of action. Nonetheless, they offer various reasons why we should disregard the text of the statute in favor of their public policy preferences. The primary contention is that a "narrow" interpretation of § 704(a), limited to the statutory text, would create an "absurd" result. Further, we should defer to the EEOC's interpretation of the statute. These assertions are

dependent upon the premise that the statutory language is ambiguous. It is not.

In essence, plaintiff and the EEOC request that we become the first circuit court to hold that Title VII creates a cause of action for third-party retaliation on behalf of friends and family members who have not engaged in protected activity. The majority has accepted this dubious invitation. In doing so, the majority rewrites the law. Although the majority admits begrudgingly that "a literal reading of section 704(a) suggests a prohibition on employer retaliation only when it is directed to the individual who conducted the protected activity," the majority refuses to implement the unambiguous text of the statute because, in their view, to do so would "defeat [ ] the plain purpose of Title VII." Majority slip op. at 647.

I disagree with the majority's faulty assumption that affirmance of the district court's order necessarily contradicts the underlying objectives of § 704(a). More fundamentally, I respectfully dissent because I would enforce the plain language of the law, rather than its perceived purpose.

III.

It is well established that to prevail upon a Title VII retaliation claim, a "plaintiff must show: (1) that he engaged in activity protected by Title VII; (2) that he was the subject of adverse employment action; and (3) that there exists a causal link between his protected activity and the adverse action of his

employer." *EEOC v. Ohio Edison Co.,* 7 F.3d 541, 543 (6th Cir.1993) (citing *Jackson v. RKO Bottlers of Toledo, Inc.,* 743 F.2d 370, 375 (6th Cir.1984)).

In the present case, the district court ruled correctly that Thompson failed to establish the first element because there was no evidence that *he* had engaged in any sort of protected activity. Instead, Thompson's theory of recovery was that he was punished for a complaint brought by his then-fiancée. The district court reviewed the statutory text and held that "under its plain language, the statute does not authorize a retaliation claim by a plaintiff who did not himself engage in protected activity." I agree.

Previously, our only discussion of a similar issue had been limited to the dicta in *EEOC v. Ohio Edison Co.,* 7 F.3d 541 (6th Cir.1990), and *Bell v. Safety Grooving & Grinding, L.P.,* 107 Fed.Appx. 607 (6th Cir.2004) (unpublished).[1] However, neither of these cases resolved the present question. In *Ohio Edison,* we held that an employee may engage vicariously in protected activity by and through the actions of his agent, and, in *Bell,* we held that the plaintiff's non-specific complaints to management were insufficient to trigger protection for him in connection with his girlfriend's EEOC discrimination charge.

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[1] Unpublished opinions of this court are not precedentially binding under the doctrine of stare decisis. *United States v. Lancaster,* 501 F.3d 673, 677 (6th Cir.2007); *United States v. Sanford,* 476 F.3d 391, 396 (6th Cir.2007).

Although our court has not addressed directly the precise issue at hand, the Fifth, Eighth, and Third Circuit Courts of Appeal have unanimously rejected such third-party retaliation claims.

In *Holt v. JTM Industries,* 89 F.3d 1224 (5th Cir.1996), a former employee claimed that he was fired because his wife, who worked for the same company, had filed a complaint under the Age Discrimination in Employment Act ("ADEA").[2] The plaintiff in *Holt* relied upon *De Medina v. Reinhardt,* 444 F.Supp. 573 (D.D.C.1978), *aff'd in part, remanded in part,* 686 F.2d 997 (D.C.Cir.1982), in support of his position that protecting one spouse from retaliation for the other spouse's protected complaint was necessary to preserve the intent of Congress. *Holt,* 89 F.3d at 1226. The Court of Appeals for the Fifth Circuit rejected this argument, reasoning that while "[s]uch a rule of automatic standing might eliminate the risk that an employer will retaliate against an employee for their spouse's protected activities," it would "contradict the plain language of the statute and will rarely be necessary to protect employee spouses from retaliation." *Id.* at 1226.

The *Holt* court recognized the risk of its holding, but found that the statutory language is the law that

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[2] The test for retaliation under the ADEA is the same as the test for Title VII retaliation. *Compare Shirley v. Chrysler First, Inc.,* 970 F.2d 39, 42 (5th Cir.1992) (elements of ADEA retaliation claim) *with Ohio Edison,* 7 F.3d at 543 (elements of Title VII retaliation claim); *see also* 29 U.S.C. § 623(d).

"define[s] the types of relationships that should render automatic standing. . . ." *Id.* at 1227. The court noted that the plain language of the statute will protect most close relationships, because "[i]n most cases, the relatives and friends who are at risk for retaliation will have participated *in some manner* in a co-worker's charge of discrimination." *Id.* If there is any participation, then the relative or friend of the complaining party is protected by the plain language of the statute. *Id.* Thus, the statute denies protection only to those friends or relatives of a complaining employee who have not participated with the complaint. *Id.* In the instant case, Thompson does not claim to have assisted Regalado in preparing her suit. If he had, then he would be protected by the terms of the statute.

The Eighth Circuit employed this rationale in *Smith v. Riceland Foods, Inc.,* 151 F.3d 813 (8th Cir.1998). The plaintiff in *Smith* urged the court to expand Title VII to "prohibit employers from taking adverse action against employees whose spouses or significant others have engaged in statutorily protected activity." *Id.* at 819. The court rejected such a construction, concluding that it "is neither supported by the plain language of Title VII nor necessary to protect third parties, such as spouses or significant others from retaliation." *Id.* (citing *Holt,* 89 F.3d at 1226-27). "Title VII already offers broad protection to such individuals by prohibiting employers from retaliating against employees for assisting or participating in any manner in a proceeding under Title VII.

Accordingly, we hold that a plaintiff bringing a retaliation claim under Title VII must establish that she personally engaged in the protected conduct." *Id.* (internal quotations and alterations omitted).

In *Fogleman v. Mercy Hospital,* 283 F.3d 561 (3d Cir.2002), the Court of Appeals for the Third Circuit addressed the issue of third-party retaliation in a substantially similar context. The plaintiff sued under the Americans with Disabilities Act ("ADA"), the ADEA, and a Pennsylvania statute, alleging that he was fired in retaliation for his father's discrimination complaint against their joint employer. As a preliminary matter, the *Fogleman* court noted that the anti-retaliation provisions of the ADA and the ADEA are nearly identical to each other and to the anti-retaliation provision of Title VII. *Id.* at 567 (citing *Krouse v. American Sterilizer Co.,* 126 F.3d 494, 500 (3d Cir.1997)). Thus, the "precedent interpreting any one of these statutes is equally relevant to interpretation of the others." *Id.* The *Fogleman* court emphatically rejected the notion of ambiguity: "Read literally, the statutes are unambiguous – indeed, it is hard to imagine a clearer way of specifying that the individual who was discriminated against must also be the individual who engaged in protected activity." *Id.* at 568.[3] The court conceded that the case

[3] The EEOC filed an amicus brief in *Fogleman* and unsuccessfully raised the same arguments before the Third Circuit that it makes in the present case. *See* brief of EEOC as Amicus Curiae in support of Appellant, *Fogleman v. Mercy*

(Continued on following page)

"presents a conflict between a statute's plain meaning and its general policy objectives," *id.* at 569, but held that when presented with such a conflict, respect for the separation-of-powers required it to implement the statutory text. *Id.*

The Third Circuit rejected the notion that enforcing the plain meaning of the statute would lead to dire results. In fact, it stated that there "are at least plausible policy reasons why Congress might have intended to exclude third-party retaliation claims."[4] *Id.* For instance, Congress could have thought that friends or relatives who would be at risk of retaliation would have likely participated in some manner in the protected discrimination charge. If so, then the class of people that would be available for employers to retaliate against would be quite small and limited to friends and relatives of employees that filed a protected complaint, but who were not close enough to the protected employee to have assisted with the complaint in any manner. *Id.* Congress also could have feared that allowing third-party retaliation claims would "open the door to frivolous lawsuits and interfere with an employer's prerogative to fire at-will employees." *Id.* at 570.

Hosp., 283 F.3d 561 (3d Cir.2002) (No. 00-2263), 2001 WL 34119171.

[4] The court mentioned that it did not find these plausible policy reasons to be particularly persuasive, but was still required to defer to Congress in the crafting of statutes. *See id.*

In sum, before today, no circuit court of appeals has held that Title VII creates a claim for third-party retaliation. Although plaintiff and the EEOC argue that the language of § 704(a) is ambiguous and that enforcement of the statutory text will lead to absurd results, I disagree, as do the Third, Fifth, and Eighth Circuits, which have soundly rejected such a cause of action. Indeed, the only division that exists is between the circuit courts that have rejected third-party retaliation claims and a handful of district courts that have created this new federal cause of action. The obiter dictum seized upon by the majority from a scattering of these latter cases does not represent an established mode of statutory construction.

In enacting Title VII, Congress addressed the issue of retaliation. The statute at issue is not silent regarding who falls within the scope of its protection. While it does *not* state that third parties are *not* protected, it is framed in the positive identifying those individuals who *are* protected, thus limiting the class of claimants to those who actually engaged in the protected activity. The appropriate question is not whether Congress considered the specific facts at issue in the instant case, but whether plaintiff is included within the class of persons protected by the statute. We must look to what Congress actually enacted, not what we believe Congress might have passed were it confronted with the facts at bar. Congress drew the boundaries of protection from retaliation when it enacted § 2000e-3(a). In creating a new federal cause of action for retaliation, it was not

absurd for Congress to limit the class of persons who are entitled to sue to employees who personally opposed a practice, made a charge, assisted, or participated in an investigation.

IV.

Next, plaintiff argues that the court should defer to the EEOC's interpretation of Title VII in the EEOC Compliance Manual. In effect, the majority has done so by adopting the EEOC's undefined class of "related to or associated with" persons. All persons, no matter how loosely related or "associated" to the person who engaged in the protected activity, may sue for retaliation if they can show that adverse action taken against them would "discourage" the employee who actually engaged in the protected activity from exercising *his* rights. This expanded class of potential plaintiffs could lead to a proliferation of new retaliation lawsuits. Whether public policy warrants such litigation is a decision for Congress, not the courts.

Plaintiff cites *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 842-45, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), for the proposition that "administrative interpretations of ambiguous statutes are entitled to substantial deference." The *Chevron* analysis, colloquially referred to as the "Chevron two-step," requires the following analysis:

> The Chevron two-step process requires the court to ask "whether the statute is silent or ambiguous with respect to the specific issue

> before it; if so, the question for the court [is] whether the agency's answer is based on a permissible construction of the statute."

Singh v. Gonzales, 451 F.3d 400, 404 (6th Cir.2006) (citation and quotation marks omitted). Because, as explained above, § 704(a) is not ambiguous, Chevron deference is not applicable.

Even assuming arguendo that the statute is ambiguous, we should not defer to the EEOC's Compliance Manual to interpret Title VII. Most courts have rejected the notion that the EEOC Compliance Manual deserves deference. *See, e.g., Rainer v. Refco, Inc.,* 464 F.Supp.2d 742, 751 (S.D.Ohio 2006) (refusing to defer to the EEOC's manual because "an agency's interpretation of a statute is not entitled to deference where it conflicts with the plain meaning of the statutory language."); *Singh v. Green Thumb Landscaping, Inc.,* 390 F.Supp.2d 1129, 1137-38 (M.D.Fla.2005) ("This provision of the Manual is entirely lacking in the extensive analysis and thoroughness necessary to be entitled to substantial deference by the Court. Ultimately, the responsibility is with the Court, not with an administrative body, to interpret the provisions of Title VII in accordance with the explicit legislative enactments set out by the Congress.") (citation omitted).

Furthermore, the interpretation proffered by the EEOC is in its own compliance manual, not a regulation that was promulgated after formal notice-and-comment rulemaking. The Supreme Court has noted

that such "interpretations" do not carry the force of law and are not worthy of *Chevron* deference:

> Interpretations such as those in opinion letters – like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant Chevron-style deference. *See, e.g., Reno v. Koray,* 515 U.S. 50, 61, 115 S.Ct. 2021, 132 L.Ed.2d 46 (1995) (internal agency guideline, which is not "subject to the rigors of the Administrative Procedur[e] Act, including public notice and comment," entitled only to "some deference" (internal quotation marks omitted)); *EEOC v. Arabian American Oil Co.,* 499 U.S. 244, 256-258, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991) (interpretative guidelines do not receive *Chevron* deference); *Martin v. Occupational Safety and Health Review Comm'n,* 499 U.S. 144, 157, 111 S.Ct. 1171, 113 L.Ed.2d 117 (1991) (interpretative rules and enforcement guidelines are "not entitled to the same deference as norms that derive from the exercise of the Secretary's delegated lawmaking powers"). *See generally* 1 K. DAVIS & R. PIERCE, ADMINISTRATIVE LAW TREATISE § 3.5 (3d ed.1994). Instead, interpretations contained in formats such as opinion letters are "entitled to respect" under our decision in *Skidmore v. Swift & Co.,* 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944), but only to the extent that those interpretations have the "power to persuade."

Christensen v. Harris County, 529 U.S. 576, 587, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000).

The EEOC cannot expand its own authority by simply publishing a compliance manual and expect the court to defer to its view that the statute means more than what the statutory language supports. Moreover, at oral argument, counsel for the EEOC conceded that, in the present case, its compliance manual is not entitled to *Chevron* deference.

V.

In conclusion, the unambiguous text of the statute, not its anticipated purpose, is the law.[5] By rewriting the Civil Rights Act to conform it to their preference for public policy, the majority has assumed the role of the legislature and usurped the authority granted to Congress by the Constitution.

For these reasons, I respectfully dissent. I would affirm the judgment of the district court.

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[5] *Arlington Central Sch. Dist. Bd. of Ed. v. Murphy,* 126 S.Ct. at 2459; *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.,* 530 U.S. at 6, 120 S.Ct. 1942; *Connecticut Nat. Bank v. Germain,* 503 U.S. at 253-54, 112 S.Ct. 1146.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT

CIVIL ACTION NO. 05-02

ERIC L. THOMPSON, PLAINTIFF,

v.

NORTH AMERICAN STAINLESS, LP, DEFENDANT.

OPINION AND ORDER

* * *

This matter is before the Court on the Motion to Alter or Amend (Rec. No. 29) filed by the Plaintiff, Eric L. Thompson ("Thompson"). For the following reasons, the Court will DENY the motion.

I. FACTS.

In his Complaint, Thompson alleges that he was employed by North American from February, 1997 to March, 2003. (Rec. No. 1, Complaint ¶ 6.) He further asserts that, in September, 2002, his then-fiancé and current wife, who was also employed by North American, filed a charge with the EEOC alleging that the company discriminated against her because of her gender. (Rec.No. 1, Complaint ¶ 8). The EEOC notified North American of the charge in February, 2003. (Rec. No. 1, Complaint ¶ 8.) Thompson alleges that, after receiving notice of his wife's EEOC complaint, North American retaliated against him by terminating him. (Rec. No. 1, Complaint ¶ 9).

Thompson asserted a claim under 42 U.S.C. § 2000e-2(a)(1) against North American. That provision of Title VII makes it unlawful for an employer 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 . . . " 42 U.S.C. § 2000e-2(a)(1).

To establish *a prima facie* case of discrimination under Title VII, a plaintiff must demonstrate that: 1) he was a member of a protected class; 2) he was subject to an adverse employment action; 3) he was qualified for the job; and 4) for the same or similar conduct, he was treated differently from similarly situated non-minority employees. *Perry v. McGinnis,* 209 F.3d 597, 601 (6th Cir. 2000). In its June 20, 2006 Opinion and Order granting North American summary judgement, the Court determined that Thompson was not a member of a protected class for purposes of a discrimination claim under 42 U.S.C. § 2000e-2 and that this claim failed as a matter of law.

Title VII's antiretaliation provisions are found at 42 U.S.C. § 2000e-3 which makes it unlawful for an "employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by" by 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. 42 U.S.C. § 2000e-3(a).

In order to succeed on a Title VII retaliation claim, the plaintiff must show: 1) that he engaged in activity protected by Title VII; 2) that he was the subject of an adverse employment action; and 3) that there exists a causal link between his protected activity and the adverse action of his employer, *Equal Employment Opportunity Commission v. Ohio Edision Co.,* 7 F.3d 541, 543 (6th Cir. 1993).

In its June 30, 2006 Opinion and Order, the Court determined that, to the extent that Thompson claimed that he was retaliated against due to his own activities in opposition to his employer's treatment of his finance´. He had not presented any evidence that he sufficiently opposed any act made unlawful under Title VII to warrant § 2000e-3(a) protection against retaliation.

Likewise, Thompson had not presented any evidence that North American was aware of any assistance he may have provided his fiancé in filing her EEOC complaint.

The Court further determined that, under its plain language, the statute does not permit a retaliation claim by a plaintiff who did not himself engage in protected activity. Given this plain language, and for reasons further detailed in the Court's June 20, 2006 Opinion and Order, the Court dismissed Thompson's retaliation claim.

With his Motion to Alter or Amend, Thompson asks the Court to reconsider its June 20, 2006 decision in light of the Supreme Court's decision in *Burlington Northern & Santa Fe Railway Co. v. White,* 126 S.Ct. 2405 (June 22, 2006). In that case, the Supreme Court addressed the reach of the phrase "discriminate against" in Title VII's anti-retaliation provisions. Specifically, the Court answered whether the provisions confines "actionable retaliation provisions confines "actionable retaliation to activity that affects the terms and conditions of employment? And how harmful must the adverse actions be to fall within its scope?" *Id.* At 2408. The *Burlington Northern* decision did not address the issue currently before this Court which is whether Title VII permits a retaliation claim by a plaintiff who did not himself engage in protected activity. Accordingly, the Court will not alter its June 20, 2006 Opinion and Order in light of the Supreme Court's decision in *Burlington Northern.*

For the above reasons, the Court hereby ORDERS that the Plaintiff's Motion to Alter or Amend (Rec. No. 29) is DENIED.

Dated this 18th day of December, 2006

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435 F.Supp.2d 633

United States District Court,
E.D. Kentucky,
Frankfort.

Eric L. THOMPSON, Plaintiff,
v.
NORTH AMERICAN STAINLESS, LP, Defendant.

Civil Action No. 05-02.

June 20, 2006.

David O'Brien Suetholz, Herbert L. Segal, Segal, Stewart, Cutler, Lindsay, Janes & Berry, PLLC, Louisville, KY, for Plaintiff.

Carl D. Edwards, Jr., Gregory L. Monge, Leigh Gross Latherow, Vanantwerp, Monge, Jones & Edwards, Ashland, KY, for Defendant.

OPINION AND ORDER

CALDWELL, District Judge.

This matter is before the Court on the Motion for Summary Judgment (Rec. No. 12) of the Defendant North American Stainless, FLP ("North American").

I. FACTS.

In his Complaint, the Plaintiff, Eric L. Thompson, alleges that he was employed by North American from February, 1997 to March, 2003. (Rec. No. 1, Complaint ¶ 6). He further asserts that, in September, 2002, his then-fiancé and current wife,

who was also employed by North American, filed a charge with the EEOC alleging that the company discriminated against her because of her gender. (Rec. No. 1, Complaint ¶ 8). The EEOC notified North American of the charge in February, 2003. (Rec. No. 1, Complaint ¶ 8). Thompson alleges that, after receiving notice of his wife's EEOC complaint, North American retaliated against him by terminating him. (Rec. No. 1, Complaint ¶ 9).

II. STANDARD ON SUMMARY JUDGMENT.

Under Fed.R.Civ.P. 56, summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c).

The moving party bears the initial responsibility of "informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrates the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The movant may meet this burden by demonstrating the absence of evidence supporting one or more essential elements of the nonmovant's claim. *Id.* at 322-25, 106 S.Ct. 2548. Once the movant

meets this burden, the opposing party "must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e).

III. ANALYSIS.

A. Discriminatory Termination under § 2000e-2(a).

Title VII makes it unlawful for an employer 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. . . ." 42 U.S.C. § 2000e-2(a)(1).

To establish a *prima facie* case of discrimination under Title VII, a plaintiff must demonstrate that: 1) he was a member of a protected class; 2) he was subject to an adverse employment action; 3) he was qualified for the job; and 4) for the same or similar conduct, he was treated differently from similarly situated non-minority employees. *Perry v. McGinnis,* 209 F.3d 597, 601 (6th Cir.2000).

In *Bell v. Safety Grooving & Grinding, L.P.,* 107 Fed.Appx. 607 (6th Cir.2004), the Plaintiff, Bell, charged that his former employer declined to rehire him after a seasonal layoff because his girlfriend filed a gender discrimination charge against the employer with the EEOC. *Id.* at 609. Bell asserted both a retaliation claim and a discrimination claim under Title VII against the employer, arguing that the

employer discriminated against him because of his association with his girlfriend – a member of a protected class. *Id.* With regard to the plaintiff's discrimination claim under § 2000e-2(a), the Sixth Circuit stated the following:

> This court has found association with a protected party to be relevant under § 2000e-2(a) in just two situations; neither avails Bell's Title VII claim. In *Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc.,* the court reasoned that "a white employee who is discharged because his child is biracial is discriminated against on the basis of his race, even though the root animus for the discrimination is a prejudice against the biracial child." 173 F.3d 988, 994 (6th Cir.1999). The white employee was protected under Title VII not simply because of his relationship to his biracial child but because this relationship made the employee's own race the basis of his employer's discrimination, violating Title VII's prohibition against discrimination on the basis of race. *Id.* at 994-95. Bell, meanwhile, is claiming discrimination based solely on his relationship with his girlfriend, an association that – unlike the plaintiff's relationship with his child in *Tetro* – does not affect Bell's own Title VII status. And in *Johnson v. University of Cincinnati,* the court held that the plaintiff, a university administrator, stated a claim of Title VII discrimination not because of his status as an African-American but because of his advocacy on behalf of

> minorities and women. 215 F.3d 561, 575 (6th Cir.2000). We do not view Bell's actions on behalf of Fetty as analogous to the significant advocacy engaged in by the plaintiff in *Johnson.* Bell discussed neither Fetty's specific discrimination charge nor the general subject of sexual discrimination with Safety management. Moreover, Bell testified that he "didn't think [Fetty's treatment] was fair" but that he "didn't make a big issue out of it, not with anybody [at Safety]." At most, Bell complained to people at Safety about the company's business decision to have its full-time, male employees move traffic barrels instead of having Fetty move them. As he himself put it, "It was a labor issue with us men. It was not a discriminatory [sic] with us men."
>
> Accordingly, Bell has not demonstrated that he is entitled to protection under § 2000e-2(a), and we affirm the district court's grant of summary judgment on this claim.

Id.

In *Johnson,* the plaintiff was an African American who was employed by the University of Cincinnati as its Vice President of Human Resources and Human Relations and managed its affirmative action program. 215 F.3d at 566. He claimed that the University discharged him because of his efforts to insure that the University complied with its affirmative action policies and because of his

advocacy on behalf of women and minorities. *Id.* at 572.

As to the plaintiff's discrimination claim under 42 U.S.C. § 2000e-2, the district court held that the claim failed because he "postur[ed] his protected status, not as a member of a racial minority, but rather as a person who advocates on behalf of women and minorities." *Id.* at 573. The Sixth Circuit reversed, stating that "the fact that Plaintiff has not alleged discrimination because of *his* race is of no moment inasmuch as it was a racial situation in which Plaintiff became involved – Plaintiff's advocacy on behalf of women and minorities in relation to Defendant's alleged discriminatory hiring practices – that resulted in Plaintiff's discharge from employment." 215 F.3d at 575.

Though the plaintiff was an African American, the Court further stated that, "[i]t is clear that a Caucasian high-level affirmative action official could bring a claim under § 1981 and § 2000e-2(a) for discrimination based upon his advocacy on behalf of minorities because the discrimination would be 'because of such individual's race,' where the race of the minorities for which he was advocating would be 'imputed' if you will to the Caucasian high-level affirmative action official." *Id.*

Thompson has not alleged that he engaged in any significant advocacy on behalf of women or minorities. Thus, this is not a case like *Johnson* where the Court can impute a protected race or gender to

Thompson. Further, unlike the plaintiff in *Tetro*, Thompson is not claiming that his relationship with his wife made Thompson's own race or gender the basis of his employer's discrimination. Accordingly, Thompson is not a member of a protected class for purposes of a discrimination claim under 42 U.S.C. § 2000e-2 and this claim fails as a matter of law.

B. Retaliation under 42 U.S.C. § 2000e-3.

Title VII's antiretaliation provisions are found at 42 U.S.C. § 2000e-3 which makes it unlawful for an "employer to discriminate against any of his employees. . . . because he has opposed any practice made an unlawful employment practice" by 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. 42 U.S.C. § 2000e-3(a).

In order to succeed on a Title VII retaliation claim, the plaintiff must show: 1) that he engaged in activity protected by Title VII; 2) that he was the subject of an adverse employment action; and 3) that there exists a causal link between his protected activity and the adverse action of his employer. *Equal Employment Opportunity Commission v. Ohio Edison Co.,* 7 F.3d 541, 543 (6th Cir.1993).

To the extent that Thompson claims that he was retaliated against due to his own activities in opposition to his employer's treatment of his fiancé, he has not presented any evidence that he sufficiently

opposed any act made unlawful under Title VII to warrant § 2000e-3(a) protection against retaliation. Likewise, Thompson has not presented any evidence that North American was aware of any assistance he may have provided his fiancé in filing her EEOC complaint.

Thompson's complaint, however, is not that he was retaliated against because of his own protected activity, but that he was retaliated against because his fiancé filed an EEOC complaint against North American. Again, Title VII prohibits employers from discriminating against an employee "because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a).

Guided by this language, several circuits have held that retaliation against a person who has not himself engaged in protected conduct is not actionable under Title VII. *See Smith v. Riceland Foods, Inc.,* 151 F.3d 813, 819 (8th Cir.1998) ("[T]he rule . . . that a plaintiff bringing a retaliation claim need not have personally engaged in statutorily protected activity if his or her spouse or significant other, who works for the same employer has done so[,] is neither supported by the plain language of Title VII nor necessary to protect third parties, such as spouses or significant others, from retaliation."); *Fogleman v. Mercy Hospital, Inc.,* 283 F.3d 561, 570 (3d Cir.2002) (interpreting similar language in the ADA and

ADEA); *Holt v. JTM Indus., Inc.,* 89 F.3d 1224, 1227 (5th Cir.1996) (ADEA); *see also Higgins v. TJX Companies, Inc.,* 328 F.Supp.2d 122 (D.Me.2004).

Nevertheless, recognizing that retaliating against the friends and relatives of employees who oppose unlawful employment practices will deter employees from exercising their protected rights just as much as retaliating against the employees themselves, other courts and the EEOC have interpreted Title VII to prohibit retaliation against a third-party. *See, e.g., DeMedina v. Reinhardt,* 444 F.Supp. 573, 580 (D.D.C.1978) ("Congress unmistakably intended to ensure that no person would be deterred from exercising his rights under Title VII by the threat of discriminatory retaliation . . . [and] tolerance of third-party reprisals would, no less than the tolerance of direct reprisals, deter persons from exercising their protected rights under Title VII."), *aff'd in relevant part,* 686 F.2d 997 (D.C.Cir.1982); *Gonzalez v. New York State Dep't of Correctional Servs.,* 122 F.Supp.2d 335, 346-47 (N.D.N.Y.2000) ("[B]ecause plaintiff alleges to have suffered adverse employment action by Defendants because of her husband's complaints of discrimination, she has standing to assert a Title VII claim."); *EEOC v. Nalbandian Sales, Inc.,* 36 F.Supp.2d 1206, 1211-12 (E.D.Cal.1998) (recognizing third party retaliation claims asserted under Title VII partly in deference to the EEOC's "long-standing policy" of recognizing and enforcing such claims); E.E.O.C. Compliance Manual § 8-II(B)(3)(c) ("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.")

Looking just to the language of the statute, this Court agrees with those Courts which have determined that, under its plain language, the statute does not permit a retaliation claim by a plaintiff who did not himself engage in protected activity. The statute prohibits an employer from discriminating against any employee because "*he* has opposed any practice made an unlawful employment practice" by 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. 42 U.S.C. § 2000e-3(a) (emphasis added). It is clear that *he* refers to the employee who has suffered discrimination, thus requiring that the person retaliated against be the person who engaged in protected conduct. The statute is not ambiguous in this regard.

Nevertheless, in *Ohio Edison,* the Sixth Circuit quoted approvingly from the D.C. district court's opinion in *De Medina* approving of third party retaliation claims. 7 F.3d at 543-44. Accordingly, some courts have interpreted *Ohio Edison* to indicate the Sixth Circuit's approval of such claims. *See, e.g., McKenzie v. Comcast Cable Communications, Inc.,* 393 F.Supp.2d 362, 380 (D.Md.2005); *But see Gonzalez,* 122 F.Supp.2d at 347 (stating that "arguably," *Ohio Edison* stands for the proposition that one employee may bring a Title VII claim when he is retaliated against for the actions of another

employee but that the decision's holding is limited to situations where "an employee, or his representative, has opposed any practice made an unlawful employment practice."); *Higgins,* 328 F.Supp.2d at 124 n. 2 (*Ohio Edison* is limited to situations where one employee engaged in protected conduct on behalf of another employee).

In *Ohio Edison,* the EEOC filed a complaint under Title VII, alleging that an employer withdrew an offer to reinstate a minority employee ("Whitfield") in retaliation for a co-employee's complaints regarding discriminatory treatment of Whitfield. 7 F.3d at 542. The complaining co-employee was also a minority. *Id.*

The district court dismissed the complaint because Title VII does not specifically cover discrimination against one employee for the acts of another. *Id.* at 543. The Sixth Circuit reversed, recognizing that, while Title VII "makes it unlawful for an employer to discriminate against an employee because the employee opposed an unlawful employment practice, or made a charge, or participated in an investigation, proceeding, or hearing related to Title VII," the statute "does not specifically cover the situation in the present case in which the employee's (or former employee's) representative engages in protected activity on his behalf and the employee, who had his representative act for him, is then retaliated against." *Id.* at 543.

The Court held that the language – "because he has opposed any practice made an unlawful employment practice under this subchapter," – in Title VII should be construed to include a claim "in which an employee, *or his representative,* has opposed any practice made an unlawful employment practice." *Id.* at 545-46.

Thus, the precise issue before the Court in *Ohio Edison* was whether a plaintiff employee who was retaliated against could assert a retaliation claim where a co-employee, *acting as the plaintiff employee's representative and at the plaintiff employee's behest,* opposed an unlawful employment practice of which the plaintiff employee was the victim. The case appears to hold that, in such cases, the protected activity of the plaintiff employee's agent is imputed to the plaintiff employee. Here, Thompson is not claiming that he was retaliated against because another employee engaged in protected activity on Thompson's behalf to protest an unlawful employment action of which Thompson was the victim. Instead, Thompson is claiming that he was retaliated against because his fiancé engaged in protected activity on her own behalf to protest an unlawful employment action of which she was the victim.

After *Ohio Edison,* in *Johnson,* the Sixth Circuit, quoted approvingly from the EEOC Compliance Manual stating that the "person claiming retaliation need not be the person who engaged in the opposition, such 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.'" *Johnson,* 215 F.3d at 580 (quoting from the EEOC Compliance Manual ¶ 8006).

Nevertheless, *Johnson* did not involve a third party retaliation claim. Again, in *Johnson,* the plaintiff was a minority employee who administered the University's affirmative action program. For his retaliation claim under § 2000e-3(a), he claimed he was retaliated against because he himself opposed the University's allegedly illegal hiring practices and because he himself participated in filing an EEOC claim. 215 F.3d at 578. The Court ultimately determined that the plaintiff had established that he had opposed conduct which he reasonably believed to be unlawful. *Id.* at 581. Thus, any statements the Sixth Circuit made in that case regarding third party retaliation claims, while instructive, were dicta and not determinative of any issue before that Court or currently before this Court.

In contrast, in *Bell,* a more recent, albeit unpublished, decision, the Sixth Circuit was faced with the issue that is now before this Court. Again, in *Bell,* the plaintiff charged that his employer failed to rehire him in retaliation for his girlfriend's EEOC charge. 107 Fed.Appx. at 609. In analyzing Bell's retaliation claim under § 2000e-3, the Sixth Circuit considered only the plaintiff's own opposition to his employer's treatment of the plaintiff's girlfriend and determined that the plaintiff had not showed active and consistent opposition. *Id.* at 610. In determining

whether the plaintiff had engaged in protected activity, the Sixth Circuit did not consider the plaintiff's girlfriend's protected activity of filing an EEOC complaint. *Id.*

Accordingly, the Court is faced with a statute which, by its plain language does not permit third party retaliation claims; the EEOC's practice of permitting such claims; Sixth Circuit cases which, in dicta, indicate that such claims are permissible; and a more recent, unpublished Sixth Circuit case which does not permit such a claim. The Court recognizes that retaliating against a spouse or close associate of an employee will deter the employee from engaging in protected activity just as much as if the employee were himself retaliated against. But, the Court also finds persuasive the reasoning that Title VII already offers broad protection in such situations by prohibiting employers from retaliating against employees who oppose unlawful employment actions or who participate in any manner in a proceeding under Title VII. *See, e.g., Riceland Foods,* 151 F.3d at 819.

Given all of these considerations, the Court will dismiss Thompson's retaliation claim. In doing so, however, the Court recognizes the lack of controlling Sixth Circuit law on this issue and is therefore guided most significantly by the unambiguous language of the statute.

IV. CONCLUSION.

For the above reasons, the Court hereby ORDERS that the Defendant's Motion for Summary Judgment is GRANTED (Rec. No. 12) and this action is STRICKEN from the active docket of this Court.

STATUTES INVOLVED

Section 704(a) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-3(a), provides in pertinent part:

> 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 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.

Section 706(b) of Title VII, 42 U.S.C. § 2000e-5(b), provides in pertinent part:

> Whenever a charge is filed by or on behalf of a person claiming to be aggrieved . . . alleging that an employer . . . has engaged in an unlawful employment practice, the Commission shall . . . make an investigation thereof.

Section 706(f)(1) of Title VII, 42 U.S.C. 2000e-5(f)(1), provides in pertinent part:

> If a charge filed with the Commission pursuant to section (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge . . . the Commission has not filed a civil action under this section . . . , the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against

the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice.