Protected by Association? The Supreme Court’s Incomplete Approach to Defining the Scope of the Third-Party Retaliation Doctrine

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63 HASTINGS L. J. ____ (2011) (forthcoming)

ABSTRACT

For decades, courts have struggled with how to treat claims of “third party retaliation” – situations where one employee engages in some protected activity for purposes of Title VII but where the employer retaliates not against that employee, but rather against one of his or her coworkers – his or her spouse, or sibling, or mere workplace acquaintance. While some courts have permitted these third-party retaliation claims in order to ensure robust safeguards against workplace discrimination, other courts have deemed this type of employer conduct to be outside the scope of Title VII’s retaliation provision. With its January 2011 decision in Thompson v. North American Stainless, LP., the United States Supreme Court finally has weighed in on this issue, deeming employees protected against third-party retaliation under Title VII.

This Article stands as one of the first in-depth examinations of Thompson and its potential impact on both employers and employees. While this Article approves of the Supreme Court’s decision to deem third-party retaliation claims viable under Title VII, this Article proposes a different framework for analyzing these claims than that applied by the Supreme Court in this case. Specifically, this Article argues that courts should apply jurisprudence from negligent infliction of emotional distress cases to conduct a more structured analysis of third-party retaliation claims. In addition, this Article argues that courts should define the class of plaintiffs who can assert third-party retaliation claims by requiring that only individuals who have engaged in some protected activity can sue. Other employees affected by employer retaliation – those who receive adverse treatment from their employer, but who did not themselves engage in any protected activity – should not be permitted to bring third-party retaliation claims. In articulating this framework, this Article seeks to strike a balance between deterring employers from engaging in retaliatory behavior while avoiding the negative consequences that could result from failing to place reasonable limits on the third-party retaliation doctrine.

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INTRODUCTION

For some time, one of the most perplexing areas of antidiscrimination law has involved how courts should treat claims of “third party retaliation” — situations where one employee engages in some protected activity but where his or her employer takes adverse action not against that employee, but rather against one of his or her coworkers. For example, an employee files a discrimination charge against her employer, and the employer seeks to retaliate against the employee for filing this charge. However, instead of taking adverse action against the employee, the employer takes action against one of her coworkers — her spouse, or sibling or perhaps a mere workplace friend. For many years, the courts reached varying conclusions regarding the extent to which Title VII of the Civil Rights Act of 1964 should bar this type of “third-party retaliation.” On the one hand, some courts emphasized the importance of providing robust safeguards against discrimination and retaliation in the workplace, including by enacting broad protections with respect to employers retaliating against employees who opposed workplace discrimination. On the other hand, some courts expressed concerns about creating a slippery-slope of liability for employers, whereby every time an employee complained of workplace discrimination, the employer would be exposed to liability not only for subsequent actions taken against that employee, but also for actions taken against anyone in the workplace associated with that employee.

Finally, the U.S. Supreme Court has weighed in on this issue. In its recent decision in Thompson v. North American Stainless, LP, the Supreme Court unanimously held that Title VII bars employers from engaging in third-party retaliation. In so doing, the Court took an important step toward resolving long-standing ambiguity with respect to the scope of Title VII’s retaliation provision. Yet while the Court’s decision in Thompson made clear that at least some third-party retaliation claims will be viable, it ultimately failed to sufficiently define the scope of the third-party retaliation doctrine, both with respect to the types of claims that should be recognized by the courts and with respect to who should be able to bring these types of claims.

This Article examines the impact of the Supreme Court’s decision in Thompson, analyzing the strengths and weaknesses of the Court’s position and proposing a different framework for analyzing third-party retaliation claims. Specifically, while this Article agrees

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with the Court’s decision to deem third-party retaliation claims viable (at least in some circumstances), it asserts that the Supreme Court did not go far enough in articulating the outer boundaries of this doctrine. In that vein, this Article makes two suggestions for further establishing the parameters of the third-party retaliation doctrine. First, this Article suggests that courts should analyze third-party retaliation claims through a framework applied in cases alleging negligent infliction of emotional distress (“NIED”). As discussed further below, many of the same concerns that arise in an NIED context – regarding frivolous claims and excessive liability – also emerge in cases involving third-party retaliation. Thus, the same factors that courts use to define the scope of the NIED doctrine also can be applied to claims alleging third-party retaliation. Second, this Article argues that courts should limit which parties can instigate a third-party retaliation claim by holding that only individuals who engage in some protected activity should be permitted to sue. Other employees affected by employer retaliation – those who receive adverse treatment from their employer but who did not themselves engage in any protected activity – should not be permitted to bring a third-party retaliation claim.

Part I of this Article provides background regarding the third-party retaliation doctrine, describing how various courts – including, most recently, the U.S. Supreme Court – have treated cases asserting this cause of action. Part II expands upon the above-mentioned suggestions for defining the scope of the third-party retaliation doctrine, first explaining how courts could apply an NIED analysis to these third-party retaliation claims, and then explaining why only individuals who personally have engaged in protected activity should be permitted to serve as plaintiffs in these cases. Part III anticipates and responds to potential objections to these proposed changes to the third-party retaliation framework, focusing in particular on the suggestion that only individuals who have engaged in protected activity can sue. Finally, Part IV provides some concluding thoughts regarding the implications of the Supreme Court’s decision in Thompson, including the Court’s failure to establish firmer limits on the scope of the third-party retaliation doctrine.

I. WHAT IS “THIRD PARTY RETALIATION” UNDER TITLE VII?

A. The History of the Third-Party Retaliation Doctrine Prior to Thompson

In enacting Title VII of the Civil Rights Act of 1964, Congress created sweeping protections for employees against workplace discrimination. In addition to prohibiting employers from discriminating against employees on the basis of race, gender, color, religion or national origin, Title VII also bars employers from “retaliating” against employees who have exercised certain rights under Title VII. Specifically, Title VII’s retaliation provision (found in


4 See id. at § 2000e-3(a) (“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”). Some of the cases cited herein deal with retaliation alleged under other federal antidiscrimination statutes, such as the Age Discrimination in Employment Act (“ADEA”) or the Americans with Disabilities Act (“ADA”). Because the retaliation provisions in the ADEA and ADA are virtually
Section 704(a) of the law) protects two types of activities by employees: First, the “participation clause” within Title VII’s retaliation provision bars employers from taking adverse action against employees who “ha[ve] made a charge, testified, assisted, or participated in any manner” in the investigation or litigation of any discrimination complaint. Second, the “opposition clause” of the statute protects employees who have “opposed any practice made an unlawful employment practice” under Title VII. With respect to both of these clauses, the Supreme Court has observed that the underlying purpose of Title VII’s Section 704(a) is to “maintain[] unfettered access to statutory remedial mechanisms.” In this respect, the Supreme Court seems to have recognized that part of preventing unlawful workplace discrimination in the first place is ensuring that the potential victims of this conduct have an unimpeded ability to expose and combat this type of illegal employer behavior. Employees who fear reprisal for reporting alleged discrimination may never come forward, thus allowing the unlawful activity to continue.

This retaliation provision within Title VII has taken on greater significance in recent years. Retaliation claims comprise a rapidly growing percentage of the total number of Title VII claims filed by individuals. Indeed, retaliation claims have increased exponentially in the past decade, and now comprise more than one-third of all EEOC charges. For example, in 1999, the EEOC received 19,694 charges of retaliation, constituting 25.4% of the total charges received identical to that within Title VII, courts generally use precedent under any one of these antidiscrimination statutes interchangeably with interpretations under one of the other antidiscrimination statutes. See Fogelman v. Mercy Hosp., Inc., 283 F.3d 561, 567 (3rd Cir. 2002) (citation omitted).


6 Id.


8 See Equal Employment Opportunity Commission, Charge Statistics, http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited ___) (hereinafter “EEOC Charge Statistics website”); see also Long, supra note 7, at 935; Carrie B. Temm, Third Party Retaliation Claims: Where to Draw the Line, 54 U. KAN. L. REV. 865, 867 (2006) (citation omitted) (“While the total number of Title VII charges has not shown a recent growth trend, Title VII retaliation charges have doubled in the past ten years”). It is unclear what percentage of these retaliation charges involve claims of third-party retaliation.

9 The “total retaliation charges” described in this section refer to charges of retaliation under all relevant statutes – Title VII, the ADEA, the ADA, and the Equal Pay Act.
by the agency. A mere decade later, in 2009, the EEOC received 33,613 charges of retaliation, comprising 36% of the total charges received.

In most cases, a plaintiff seeking to establish a prima facie case of retaliation under Title VII will face a fairly straightforward task. The plaintiff must show: (i) that he or she engaged in some “protected activity” for purposes of Title VII, either under the statute’s “participation” or “opposition” framework; (ii) that he or she suffered some adverse employment action; and (iii) that there is some causal connection between the protected activity and the adverse action. Thus, an employee could assert a retaliation claim against his or her employer if the employee was terminated or denied a promotion because that employee had engaged in some “protected activity,” perhaps by filing a charge of discrimination or bringing a Title VII lawsuit against his or her employer. Similarly, an employee could assert a retaliation claim against his or her employer if the employer took adverse action against the employee because the employee actively supported the discrimination allegations of a coworker, such as by assisting in an EEOC investigation of the coworker’s discrimination allegations or by testifying in support of the coworker at his or her Title VII trial.

Third-party retaliation claims arise in a different context, however. Sometimes an employee may not have engaged in any protected activity of his or her own – may not have filed his or her own charge of discrimination or done anything actively to support a coworker’s allegations of discrimination. However, this employee might receive adverse action from an employer in the wake of protected activity by a coworker, due to the employee’s relationship with the coworker who engaged in protected activity. For example, Joe Senior gets fired because his son, Joe Junior, filed a discrimination charge against their mutual employer; Wendy Wife is demoted because her spouse and coworker, Harry Husband, called the EEOC to report workplace discrimination. In these situations, an employee (the “Target”) receives adverse action from an employer not because of his or her own protected activity, but rather because of

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10 See EEOC Charge Statistics website, supra note 8.

11 See id.; see also Transcript of Oral Argument at 47, Thompson v. N. Am. Stainless LP, 131 S. Ct. 863 (2011) ( No. 09-291) (hereinafter, “Thompson Oral Argument Transcript”) (“According to the EEOC statistics, in 1992… 14.5 percent of charges filed with the EEOC were retaliation claims. By 2009 that had risen by 31 percent.”)

12 See Fogelman, supra note 4, at 567-58 (citation omitted); Little v. Windermere Relocation, Inc., 301 F.3d 958, 969 (9th Cir. 2002) (citation omitted).

13 See e.g., Decker v. Andersen Consulting, 860 F. Supp. 1300 (N.D. Ill.1994) (allowing retaliation claim to proceed where employee presented genuine issue of material fact that employer reduced her responsibilities and terminated her employment in response to her filing EEOC charge of discrimination and informing employer of intent to pursue discrimination claim).

14 Glover v. S. Carolina Law Enforcement Div., 170 F.3d 411 (4th Cir. 1999) (allowing retaliation claim to proceed where plaintiff claimed that employer discharged her in retaliation for testimony against employer in gender discrimination suit filed by another employee).
the protected activity of some other employee (the “Actor”), with whom this Target has some type of relationship.\(^{15}\)

Despite suffering from adverse employment action, these Targets of employer retaliation historically have faced problems in their efforts to assert Title VII retaliation claims. Joe Senior did not himself engage in any protected activity; Wendy Wife did not herself engage in any protected activity. While these potential plaintiffs can demonstrate that they have suffered from some adverse employment action, satisfying the second prong of the \textit{prima facie} case, they may not be able to satisfy the first prong of this test, in that they themselves have not engaged in the type of active “participation” or “opposition” contemplated by Title VII’s retaliation provision, and may not be able to show that their adverse action was caused by some protected activity. Accordingly, courts have split regarding whether to recognize a retaliation claim in this context.

1. Courts Opposed to the Third-Party Retaliation Doctrine

Prior to the Supreme Court’s recent decision in \textit{Thompson}, federal courts of appeal faced with third-party retaliation claims uniformly had refused to recognize these claims, deeming them outside the scope of Title VII’s retaliation provision.\(^{16}\) These courts relied substantially on the text of Title VII in refusing to recognize third-party retaliation claims. Title VII’s retaliation provision, Section 704(a), provides that

\begin{quote}
“[i]t 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.”\(^{17}\)
\end{quote}

Courts interpreting this language had held that the use of the term “he” within this provision meant that the individual receiving adverse action from an employer must be the same person who engaged in some protected activity.\(^{18}\) As one court observed, “it is hard to imagine a clearer

\(^{15}\) The terms “Actor” and “Target” will be used throughout this Article to describe, respectively, the individual who engaged in a protected activity for purposes of Title VII and the third party who received adverse action from his or her employer as a result of the Actor’s protected activity.

\(^{16}\) \textit{See Thompson v. N. Am. Stainless LP}, 567 F.3d 804, 811 (6th Cir. 2009) (“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 protected activity”); \textit{see also} Lawrence L. Lee and Brandon D. Saxon, \textit{The Supreme Court’s 2010 Upcoming Employment Law Docket, Municipal Lawyer}, at 26 (September/October 2010). While the Sixth Circuit Court of Appeals seemed to permit consideration of a third-party retaliation claim in \textit{EEOC v. Ohio Edison Co.}, 7 F.3d 541 (6th Cir. 1993), that same court subsequently characterized as \textit{dicta} the relevant portion of this decision and distinguished the facts of that case from those involved in a true third-party retaliation situation. \textit{See Thompson}, 567 F.3d at 809.

\(^{17}\) 42 U.S.C. § 2000e-3(a) (emphasis added).

\(^{18}\) \textit{See Smith v. Riceland Foods, Inc.}, 151 F.3d 813, 819 (8th Cir. 1998) (“We believe that the 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
way of specifying that the individual who was discriminated against must also be the individual who engaged in protected activity.”

While courts acknowledged that this narrow reading of Section 704(a) could stymie the ability of some plaintiff’s to seek relief in the wake of employer retaliation, these courts felt constrained by what they saw as Congress’s stated intent with respect to the scope of this provision. As one court observed, “[the court] must look to what Congress actually enacted, not what [it] believe[s] Congress might have passed were it confronted with the facts at bar.”

In addition to focusing on the text of Title VII, courts that rejected third-party retaliation claims also expressed concern about opening the floodgates to frivolous litigation, whereby “anyone who suffered an adverse action close in time after another employee engaged in a protected activity would have a cause of action [under Title VII].” Every time an employee engaged in protected activity, his or her employer might face a retaliation claim for taking adverse action against any of that employee’s relatives, friends, or even mere acquaintances in the workplace. From this perspective, for every Actor in the workplace that engaged in

\[\text{VII nor necessary to protect third parties, such as spouses or significant others, from retaliation} \]; see also Long at 949-950 (citation omitted) (“The statute’s use of the word ‘he’ clearly seems to indicate that the person complaining of unlawful retaliation also must have been the person participating in the protected activity”).

\[\text{19 Fogelman, supra note 4, at 564 (refusing to allow third-party retaliation claim under comparable retaliation provisions within Age Discrimination in Employment Act, Americans with Disabilities Act and state antidiscrimination law); but see EEOC v. Nalbandian Sales, Inc., 36 F. Supp. 2d 1206, 1210-11 (E.D. Cal. 1998) (characterize Title VII retaliation provision as “ambiguous” with respect to whether it covers third-party retaliation).}\]


\[\text{21 See Wal-Mart, supra note20, at 1246-47 (citation omitted); Fogelman, supra note 4, at 569.}\]

\[\text{22 Thompson, supra note 16, at 816; see also Brief in Opposition to Certiorari at *25, Thompson v. N. Am. Stainless LP, No. 09-291 (U.S. Nov. 9, 2009) (“If Congress had intended to allow third-party retaliation claims under Title VII, it certainly knew how to do so”); U.S. E.E.O.C. v. Bojangles Rest., Inc., 284 F. Supp. 2d 320, 327 (M.D. N.Car. 2003) (citation omitted) (“It is entirely possible that Congress could have written the statute as it did to eliminate frivolous suits by friends, relatives, or acquaintances of persons who do fall within the language of the statute”); Fogelman, supra note 4, at 568 (“Although we recognize that allowing an employer to retaliate against a third party with impunity can interfere with the overall purpose of the anti-discrimination laws, we believe that by referencing to ‘such individual,’ the plain text of these statutes clearly prohibits only retaliation against the actual person who engaged in protected activity”).}\]

\[\text{23 Temm, supra note 8, at 878; Thompson v. N. Am. Stainless LP, 520 F.3d 644, 649 (6th Cir. 2007), vacated, 567 F.3d 804 (6th Cir. 2009) (citation omitted) (noting that courts faced with third-party retaliation claims “have expressed concerns as to whether this decision will result in a flood of suits from relatives and associates of those who file EEOC charges”); see also Thompson, supra note 16, at 813 (citing concerns expressed in concurring opinion in Crawford v. Metro Gov’t of Nashville and Davidson County, Tenn., 129 S. Ct. 846, 854 (2009) (Alito, J. concurring) about “open[ing] the door to retaliation claims by employees who never expressed a word of opposition to their employers” and opining that this is “exactely the conundrum presented in the instant case”).}\]

\[\text{24 See e.g., Wychock v. Coordinated Health Sys., No. CIV.A 01-3873, 2003 WL 927794, at *7 (E.D. Pa. Mar. 4, 2003) (rejecting third-party retaliation claim where plaintiff was not even distantly related to the individual who had filed discrimination complaints and where she “d[id] not even appear to be close friends with the claimants”); O’Connell v. Isocor Corp., 56 F. Supp. 2d 649, 654 (E.D. Va. 1999) (worrying that if the third-party retaliation}\]
protected activity, there could be endless numbers of Targets – endless numbers of employees associated in some way with the Actor who might claim third-party retaliation upon receiving any future adverse treatment at work. Courts feared that, without any clear limits on this doctrine, employers likely would be hesitant to take any adverse action in the workplace, thus stymieing employer operations in a significant way. 25

Finally, courts that refused to recognize third-party retaliation claims frequently argued that allowing such claims was not necessary to protect employees from workplace retaliation. According to these courts, this was because parties alleging third-party retaliation typically will have experienced some direct retaliation. In other words, the employee likely will have played some “active” role in his or her coworker’s discrimination claim – whether in the filing of the claim itself or in the subsequent investigation of the claim. 26 Wendy Wife likely helped Harry Husband file his discrimination charge against their shared employer; Joe Senior probably assisted the EEOC in its investigation of Joe Junior’s discrimination charge, or assisted the employer in its gathering of evidence with respect to this charge. These employees not only may have experienced adverse treatment at work because of their coworker’s protected activity, but also because of their own protected activity. Accordingly, it may not be necessary to stretch Section 704(a) to accommodate this scenario of third-party retaliation, because the Target may have a straightforward, traditional retaliation claim.

2. Courts that Have Permitted Third-Party Retaliation Claims

In contrast to those courts that have refused to recognize third-party retaliation claims, various lower courts (as well as the EEOC) have long permitted these claims to proceed. 27 To a large extent, courts that have allowed third-party retaliation claims have relied primarily on the broader purpose of Title VII’s retaliation provision. As noted above, the purpose of anti-retaliation provisions like that found in Section 704(a) is to “maintain[] unfettered access to

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25 For a more detailed discussion of this argument, see supra notes 110-11 and accompanying text.

26 See Thompson, supra note 16, at 810 (citing a previous 5th Circuit decision for the idea that “[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.” (emphasis in original) (citation omitted); see also Bojangles Rest., supra note 22, at 327-29 (declining to recognize third-party retaliation claim of plaintiff fired after her fiancé engaged in protected activity, but finding that plaintiff might have retaliation claim based on own protected activity via “participation” in fiancé’s protected activity).

27 See Temm, supra note 8, at 870-71; see also Singh v. Green Thumb Landscaping, Inc., 390 F. Supp. 2d 1129, 1135-36 (M.D. Fla. 2005) (citations omitted) (collecting cases). The EEOC’s Compliance Manual states that the retaliation provisions within various federal anti-discrimination statutes, including Title VII, “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. . . .” EEOC Compliance Manual at §8-II(C)(3), available at http://www.eeoc.gov/policy/compliance.html (issued 5/12/00, last visited _____) (citation omitted).
statutory remedial mechanisms.” In other words, in creating Section 704(a), Congress apparently was concerned that employees would forego availing themselves of statutory remedial mechanisms if they feared that doing so would lead to reprisals by their employers.

With this statutory purpose in mind, courts that have recognized third-party retaliation claims “have done so largely on the premise that not permitting such claims would, in effect, make a mockery of the goals of antidiscrimination law.” If employers had free reign to retaliate against employees who reported alleged workplace discrimination, then fewer individuals likely would bring this type of behavior to light. While this recognition of third-party retaliation claims might create tension with the literal terms of Section 704(a), “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.”

3. The Supreme Court’s Decision in Thompson v. North American Stainless, LP

Faced with these competing arguments for and against the third-party retaliation doctrine, and with a split of authority in the lower courts, the Supreme Court finally weighed in on this debate. On January 24, 2011, the Court issued an opinion in Thompson v. North American Stainless, LP, a case that placed the viability and scope of the third-party retaliation doctrine squarely at issue. In a unanimous 8-0 decision, the Court held that (i) Title VII would bar an employer for retaliating against an employee’s protected activity by taking adverse action against a third-party in the workplace, and (ii) that this third party (the “Target” of the employer’s adverse action) could assert a retaliation claim in these circumstances.

Thompson involved a claim brought by Eric Thompson, who – along with his then-fiancé, Miriam Regalado – worked for the defendant North American Stainless, LP (“North

28 Long, supra note 7, at 950 (citing Robinson v. Shell Oil. Co, 519 U.S. 337, 346 (1997)).

29 Long, supra note 7, at 950; see also Temm, supra note 8, at 885-86 (asserting that interpreting Title VII to allow third-party retaliation claims would be consistent with the overall purpose of Title VII because “if the claims were not allowed, employees who did not engage in protected activity but who were retaliated against would be left without a remedy….This would produce the absurd result of allowing employers to do indirectly what they cannot do directly”) (citations omitted); Nalbandian, supra note 19, at 1212 (“To hold otherwise, would thwart congressional intent and produce an absurd result”).


31 Thompson v. N. Am. Stainless, 520 F.3d 644, 648 (6th Cir. 2008), rev’d 567 F.3d 804 (6th Cir. 2009) (quoting EEOC v. Ohio Edison Co., 7 F.3d 541 (6th Cir. 1993)).

32 See Thompson, supra note 2.

33 Justice Kagan took no part in the consideration of this case, having previously recused herself. See id. at 8.

34 Id. at 2, 7.
American”). 35 Thompson claimed that shortly after Regalado filed a discrimination charge against North American, North American terminated Thompson’s employment. 36 According to Thompson, North American terminated him solely in retaliation for Regalado’s protected activity. 37

Notably, Thompson cast his case as a fairly straightforward third-party retaliation claim: Thompson did not claim that he himself engaged in any protected activity, such as by assisting Regalado in filing her discrimination charge or otherwise opposing North American’s alleged treatment of Regalado. 38 Rather, Thompson explicitly alleged in his complaint that his “relationship to Miriam Thompson [née Regalado] was the sole motivating factor in his termination.” 39

Based upon these allegations, the district court granted summary judgment to North American, finding that Title VII “does not permit a retaliation claim by a plaintiff who did not himself engage in protected activity.” 40 While a three-judge panel of the Sixth Circuit initially reversed the district court, holding that Thompson could pursue his claim against North American, 41 the full Sixth Circuit ultimately reached the opposite conclusion, holding that Thompson could not proceed with his retaliation claim. 42 According to the en banc court, “the authorized class of claimants [under § 704(a)] is limited to persons who have personally engaged in protected activity…. 43 Because Thompson did not claim to personally have engaged in any protected activity, but rather merely claimed to have been retaliated against as a result of Regalado’s protected activity, the Sixth Circuit held that his retaliation claim could not proceed. 44

In reaching this conclusion, the Sixth Circuit – like other courts that have rejected third-party retaliation claims – relied in large part on what it deemed to be the plain meaning of the statute, noting that “[c]ertainly it was Congress’s prerogative to create – or refrain from creating

35 See Thompson, supra note 16, at 806 (citation omitted).
36 See id. (citation omitted).
37 See id. (citation omitted).
38 See id. at 807.
39 Id. at 808 (emphasis removed); see also id. (observing that Thompson’s “Statement of the Issue” on appeal and “Statement of Facts” also made clear that Thompson’s retaliation claim was based upon the protected activity of his fiancée, as opposed to any activity that he engaged in himself).
41 See Thompson v. North American Stainless, LP, 520 F.3d 644 (6th Cir. 2007).
42 See Thompson, supra note 16.
43 See id. at 805.
44 See id. at 805-06.
– a federal cause of action for civil rights retaliation and to mold the scope of such legislation. The court concluded that it “must look to what Congress actually enacted, not what we believe Congress might have passed were it confronted with the facts at bar.” In addition, the court seemed troubled by the potential “slippery-slope” that could arise if it allowed a claim like Thompson’s to proceed, whereby the court would “open the door to retaliation claims by employees who never expressed a word of opposition to their employers.”

The Supreme Court, however, took a different approach than that adopted by the en banc Sixth Circuit, finding that Thompson could allege a third-party retaliation claim based upon Regalado’s protected activity. First, relying in large part on its previous Burlington Northern decision, where the Court had expanded its view of what would constitute an “adverse action” for purposes of Section 704(a), the Court emphasized that the retaliation provision of Title VII (unlike the statute’s substantive provision) “is not limited to discriminatory actions that affect the terms and conditions of employment,” but rather “prohibits any employer action that might well have dissuaded a reasonable worker from making or supporting a charge of discrimination.” In other words, the Court will ask whether the employer conduct in question – whether directed at the Actor who engaged in protected activity or at a coworker of that Actor – might reasonably have changed the Actor’s mind about engaging in protected activity in the first place.

The Court also responded to concerns regarding the “difficult line-drawing problems” that might emerge from allowing third-party retaliation claims. While the Court acknowledged the existence of these concerns, it declined to let such worries preclude the viability of third-party retaliation claims generally. Moreover, the Court declined to provide any specific guidance regarding the types of relationships that could support a third-party retaliation claim.

Instead, the Court indicated that the courts should examine the “particular circumstances” in any

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45 See id. at 807.
46 See id. at 816.
47 See id. at 813 (citing Crawford v. Metro Gov’t of Nashville and Davidson County, Tenn., --- U.S. ----, 129 S.Ct. 846, 854 (2009) (Alito, J. concurring)).
48 Thompson, supra note 2, at 7.
49 Burlington Northern and Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006); see also infra notes 140-50 and accompanying text.
50 Thompson, supra note 2, at 3 (citation and internal quotations omitted).
51 Id. (citation and internal quotations omitted).
52 Id.
53 See id. at 4.
54 See id. (“We must also decline to identify a fixed class of relationships for which third-party reprisals are unlawful”).
given case to determine whether to recognize a claim of third-party retaliation,\textsuperscript{55} emphasizing only that “the provision’s standard for judging harm must be objective,” as opposed to relying upon a plaintiff’s subjective feelings.\textsuperscript{56} In other words, the Court merely indicated that third-party retaliation claims could (sometimes) be brought, without outlining any guidelines for defining the scope such claims.

In addition to deeming third-party retaliation claims generally cognizable under Title VII, the Thompson Court also addressed who should be permitted to bring these types of claims. Title VII permits a person “claiming to be aggrieved” to bring a civil action,\textsuperscript{57} which North American had argued should be interpreted to allow only the employee who engaged in protected activity to sue.\textsuperscript{58} The Court, however, rejected this view, drawing upon a body of administrative law to conclude that a “person aggrieved” for purposes of Title VII would be anyone within the “zone of interests” of the statute.\textsuperscript{59} Applying this “zone if interests” test, the Court held that so long as the interests that a plaintiff sought to protect were sufficiently related to the purposes of Title VII, that individual would be permitted to bring a third-party retaliation claim, regardless of whether the employee personally had engaged in protected activity.\textsuperscript{60}

\section*{II. WHERE THE SUPREME COURT FALLS SHORT: THE NEED TO FURTHER DEFINE WHEN A THIRD-PARTY RETALIATION CLAIM EXISTS AND WHO HAS THE POWER TO LITIGATE THIS CLAIM}

Those courts that have recognized third-party retaliation claims – including, most recently, the U.S. Supreme Court – have articulated compelling reasons for permitting these types of claims to proceed, generally pointing out the tremendous loophole that would arise if employers – barred from retaliating directly against employees who engage in some protected activity – simply could take out their ire on those “associated” with such employees. However, no court (not even the Supreme Court) adequately has addressed the concerns raised by opponents to third-party retaliation claims, including the need to articulate some limit on these types of claims. Absent any such limits, many fear that courts will be inundated with frivolous suits brought by any employee who receives adverse action after one of his or her coworkers has engaged in some protected activity. Yet when it came to confronting these concerns in its most

\textsuperscript{55} Id.

\textsuperscript{56} Id. (citation and internal quotations omitted) (parenthesis in original).

\textsuperscript{57} 42 U.S.C. § 2000e-5(b).

\textsuperscript{58} See id. at 6.

\textsuperscript{59} Id. at 7 (citations omitted).

\textsuperscript{60} See id. (citations an internal quotations omitted) (“We have described the zone of interests test as denying a right of review if the plaintiff’s interests are so marginally related to or in-consistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit”).
recent decision, the Supreme Court essentially punted, expressly declining to provide lower courts with significant guidance regarding what logical limits might be placed on third-party retaliation claims.

This section addresses this void in the Supreme Court’s opinion by articulating two sets of limits that should apply to third-party retaliation claims. While this Article agrees with the Supreme Court that courts should not close the door entirely to claims of third-party retaliation, it asserts that courts should define the scope of the third-party retaliation doctrine in two ways: (1) by applying a framework used in negligent infliction of emotional distress claims to identify viable third-party retaliation claims; and (2) by requiring that only a party who engaged in protected activity (the Actor) be permitted to bring a third-party retaliation claim.

A. How a Negligent Infliction of Emotional Distress Analysis Can Inform Courts Considering Third-Party Retaliation Claims

1. Background Regarding Negligent Infliction of Emotional Distress

As noted above, a primary concern raised by courts that oppose recognition of third-party retaliation claims is the fear of boundless liability for employers. Many worry that, once an employee engages in some protected activity in the workplace – files a discrimination charge against an employer, or cooperates with an internal investigation into workplace harassment – the employer will face exposure under Title VII’s retaliation provision if it takes adverse action against anyone in the workplace who is associated with that first employee, no matter the length of time that has passed since the first employee’s protected activity, and no matter the relationship between these two employees. In this vein, even some proponents of the third-party retaliation doctrine have recognized the need to place some limits on this doctrine. Yet the scholarship in this area thus far has failed to articulate a framework that properly balances the need to punish and deter third-party retaliation while still imposing appropriate boundaries on this doctrine.

This Article attempts to establish such boundaries by drawing upon a seemingly unrelated area of the law: cases alleging negligent infliction of emotional distress (“NIED”). This Article asserts that the factors applied by many courts in analyzing NIED claims also can define the scope of the third-party retaliation doctrine. Specifically, just as courts in an NIED context often apply a multi-factor “bystander analysis” to ensure a sufficient link between the plaintiff’s mental injury and the defendant’s alleged wrongful conduct, courts could apply these same factors to a plaintiff’s third-party retaliation claim to define the contours of Section 704(a).

61 See, e.g., Temm, supra note 8, at 865 (advocating that “third-party retaliation claims should be allowed but . . . a line must be drawn to limit these claims,” and focusing on the relationship between the plaintiff and third-party to limit the scope of this doctrine); see also O’Connell, supra note 24, at 654 (citations omitted) (recognizing viability of third-party retaliation doctrine but declining to extend doctrine to cover unrelated workplace coworkers); Thomas v. Am. Horse Shows Assoc., No. 97-CV-3513 JG, 1999 WL 287721 at *1, *12-13 (E.D. N.Y Apr. 23, 1999) (citations omitted) (recognizing potential for plaintiffs to assert third-party retaliation claims but rejecting plaintiff’s claim due to lack of causal nexus between sister’s protected activity and adverse action toward plaintiff)
Negligent infliction of emotional distress claims arise when an actor’s unintentional, negligent conduct inflicts emotional harm on another individual. One common scenario in which this claim will occur involves a plaintiff who was not the target of negligence by the defendant, but who suffers emotional distress upon observing or otherwise perceiving harm to a third party. Notably, courts reviewing NIED claims frequently have expressed the same types of concerns as courts analyzing third-party retaliation claims: Just as when dealing with allegations of third-party retaliation, courts in NIED cases express wariness of the potential for unwarranted, excessive exposure for defendants and regarding the potential for fraudulent or frivolous claims.

Thus, just as in the context of third-party retaliation claims, a looming question for courts in the NIED context involves how to limit the scope of the NIED doctrine — how to decide which plaintiffs properly can seek judicial relief versus which plaintiffs’ harm should be deemed too remote. Some courts previously imposed a “physical impact” requirement as a prerequisite to bringing an NIED claim, insisting that a mental injury must result from some contemporaneous physical impact, or must manifest into actual physical symptoms in order for the NIED claim to proceed. Later decisions have adhered to a “zone of danger” test, allowing a

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62 See BLACK’S LAW DICTIONARY (9th ed. 2009).
63 The tentative draft of the Restatement (Third) Torts proposes three specific scenarios in which this scenario could arise: First, an actor’s negligent conduct might have created the potential for bodily harm to the emotionally-harmed plaintiff, but ultimately only caused emotional harm; second, the negligent conduct might involve activity that does not create any risk of bodily harm, but nevertheless poses a risk of serious emotional harm; or third, an actor’s negligence might cause emotional harm to a bystander through the mechanism of bodily harm to another person. See RESTATEMENT (THIRD) TORTS: PHYS. & EMOT. HARM §§ 46, 47 (TENTATIVE DRAFT NO. 5, 2007). This Article focuses on the third type of NIED, where emotional distress is the indirect result of bodily harm to another individual.
65 See id.
66 See Meredith E. Green, Who Knows Where the Love Grows?: Unmarried Cohabitants and Bystander Recovery for Negligent Infliction of Emotional Distress, 44 WAKE FOREST L. REV. 1093, 1094 (2009) (noting that courts limit the scope of NIED claims due, among other things, to “concern about the potential flood of litigation resulting from recognition of stand-alone emotional harm as a cognizable injury…” and to “concern over the lack of objective verification of emotional distress and the resulting potential for fraudulent claims”) (internal citations and quotations omitted).
67 See Rhee, supra note 64, at 813-2; Green, supra note 66, at 1094-97; see also Dan B. Dobbs, Undertakings and Special Relationships in Claims for Negligent Infliction of Emotional Distress, 50 ARIZ. L. REV. 49, 51-53 (2008).
68 See Rhee, supra note 64, at 815-16 (citation omitted).
69 See Dobbs, supra note 67, at 52 (citation omitted) (noting that courts adhering to the physical impact test “insist[] that the plaintiff must prove the reality of emotional distress by showing that it resulted in physical harm or physical symptoms”).
plaintiff to recover for mental injuries that result from witnessing harm to another individual, or from the fear of harm to himself or herself, so long as the plaintiff was in sufficient physical proximity to this potential harm.\textsuperscript{70}

Other jurisdictions, finally, have adopted a “bystander theory” for NIED claims.\textsuperscript{71} First recognized by the California Supreme Court in the seminal case of \textit{Dillon v. Legg},\textsuperscript{72} and now widely accepted (including within the tentative draft of the Restatement (Third) of Torts),\textsuperscript{73} the bystander theory for NIED recovery focuses on three elements to determine whether to allow compensation to an emotionally-injured plaintiff under a NIED theory: First, the court will examine the plaintiff’s physical proximity to the event giving rise to the emotional distress (hereinafter, “Spatial Proximity”).\textsuperscript{74} Was the emotionally-distressed plaintiff “located near the scene of the accident, as contrasted with one who was a distance away from it”?\textsuperscript{75} Second, the court will examine whether the plaintiff’s emotional distress resulted from a sensory and contemporaneous observation of the accident or injury (hereinafter, “Temporal Proximity”).\textsuperscript{76} Was the emotionally-distressed plaintiff present at the time that the defendant’s negligent act took place, or did the plaintiff arrive on the scene long after the fact? Finally, the court will examine the relationship between the emotionally-distressed plaintiff and the individual who suffered physical harm (hereinafter, “Relational Proximity”).\textsuperscript{77} Were these parties spouses? Blood relatives? Mere friends or acquaintances?

\textsuperscript{70} See Rhee, supra note 64, at 817 (citations omitted). While some courts applying this “zone of danger” test have required that the plaintiff actually fall within the “zone of danger” in order to proceed with an NIED claim, other courts have deemed it sufficient for a plaintiff merely to have been present to perceive an injury to his or her child or family member. See Dobbs, supra note 67, at 53 (citations omitted).

\textsuperscript{71} See Dobbs supra note 67, at 52-52 (citations omitted); Rhee, supra note 64, at 819-23 (citations omitted).

\textsuperscript{72} \textit{Dillon v. Legg}, 68 Cal.2d 728 (Cal. 1968).

\textsuperscript{73} See Green, supra note 66, at 1095-96; see also \textit{id.} at n.27 (citation omitted) (noting that twenty-nine jurisdictions currently follow the \textit{Dillon} “bystander theory” or some version thereof when analyzing NIED claims). Section 47 of the Restatement (Third) of Torts describes this test in a somewhat different manner, and condenses its analysis into two (as opposed to three) inquiries: “An actor who negligently causes serious bodily injury to a third person is subject to liability for serious emotional disturbance thereby caused to a person who (a) perceives the event contemporaneously, and (b) is a close family member of the person suffering the bodily injury.” \textit{See RESTATEMENT (THIRD) TORTS: PHYS. & EMOT. HARM} § 47.

\textsuperscript{74} See \textit{Dillon}, supra note 72, at 740; see also Green, supra note 66, at 1096 (citation omitted).

\textsuperscript{75} \textit{Dillon}, supra note 72, at 740.

\textsuperscript{76} See \textit{id.} at 740-41; see also Green, supra note 66, at 1096 (citation omitted).

\textsuperscript{77} See \textit{Dillon}, supra note 72, at 741; see also Green, supra note 66, at 1096 (citation omitted).
2. Applying a Negligent Infliction of Emotional Distress Framework to Third-Party Retaliation Claims

This three-factor “bystander” theory for analyzing NIED claims provides a viable framework for courts seeking to define the scope of the third-party retaliation doctrine. Each of the three factors used by courts to decide whether an NIED claim can proceed could be applied to third-party retaliation claim to determine which potential plaintiffs should be permitted to sue based upon an employer’s alleged third-party retaliation.

At first blush, it may seem unusual to apply a common law doctrine to a federal statutory claim. Yet the Supreme Court has done this in the past, including in the context of Title VII itself. In describing the framework for sexual harassment liability under Title VII, the Court relied in large part on common law agency principles, looking to the agency relationship between the particular employee accused of harassing behavior and the employer of that employee.\(^78\) Applying these agency principles, the Court was able to hold that, in some circumstances, an employer may be vicariously liable for the unlawful harassing conduct of its employees.\(^79\) Common law notions of agency expanded the scope of employer liability for the unlawful behavior of the employer’s employees.

An additional challenge in applying these NIED factors to a third-party retaliation claim involves whether one properly should apply a negligence framework to what consistently is seen as an intentional wrong by employers. Unlike a negligence claim, an allegation of retaliation under Title VII focuses in large part on an employer’s intent: retaliation is seen as an intentional harm.\(^80\) Negligence, of course, presumes a lack of any intent to cause harm.\(^81\)

Yet despite this difference in the mental states of the wrongdoers in each of these claims, this NIED framework provides a useful framework for defining the scope of the third-party retaliation doctrine. Both NIED claims and third-party retaliation claims raise complicated questions of causation for a court to resolve. In the NIED context, the court must sort out whether a sufficient connection exists between a plaintiff’s mental injury and some physical


\(^79\)See Ellerth, supra note 78, at 755.

\(^80\)See, e.g., Gomez-Perez v. Potter, 553 U.S. 474, 480-81 (2008) (citations and internal quotations omitted) (ellipses in original) (citing with approval language from Jackson v. Birmingham Bd. Of Ed., which analyzed Title IX of the Education Amendments of 1972 and held that “[r]etaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination . . . Retaliation is, by definition, an intentional act”).

\(^81\)See BLACK’S LAW DICTIONARY, supra note 62 (defining “negligence,” inter alia, as “. . . any conduct that falls below the legal standard established to protect others against unreasonable risk of harm, except for conduct that is intentionally, wantonly, or willfully disregardful of others' rights . . . ”).
harm or act that did not directly impact the plaintiff. In other words, the court must determine whether this physical act was the cause of the plaintiff’s mental injury. In a way, the three factors cited above – Spatial Proximity, Temporal Proximity and Relational Proximity – serve as a proxy for testing causation, by determining whether a close enough relationship exists between the external physical harm and the plaintiff’s mental injury.

Third-party retaliation claims raise similar concerns about attenuated causation, and these three factors therefore may serve a similar function in this context. Even in a straightforward, “traditional” retaliation claim, causation often presents complicated questions for the court due to conflicting arguments by the plaintiff and defendant regarding the real reason for the adverse action toward the plaintiff. However, causation is even more complex in a third-party retaliation case, where an even greater distance inherently exists between the protected activity engaged in by one party and the adverse action experienced by another. The link between the protected activity and the adverse action is even harder to sort out. These NIED factors can help in this respect. Just as the three NIED factors help courts analyze causation in an NIED context, so too can they help courts to structure the causation inquiry in a third-party retaliation context, by providing courts with some structure for conducting this causation analysis. The fact that NIED claims require mere negligence while retaliation claims require intent becomes largely irrelevant when one focuses on the basic idea that in both contexts, the plaintiff must prove causation.

a) Spatial Proximity

In the context of an NIED claim, courts that adhere to the “bystander” theory will focus upon how physically-close the mentally-injured plaintiff was to the accident or event that caused harm to someone else. For example, one court permitted a plaintiff to proceed with her NIED claim where she claimed to have been in an adjoining room in her house – presumably, mere feet away – to where a propane explosion killed one of her daughters and severely injured another. In contrast, another court refused to permit an NIED claim by a father who was at least a half-mile away when his son accidentally was shot. According to the court, this physical distance between the plaintiff and the accident causing harm to his son meant that the plaintiff could not be deemed a “bystander” for purposes of his NIED claim.

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82 See Cohen v. Nuvasive, Inc., Nos. B194078, B196905, 2010 WL 1380447, at *1, *9 (Cal. App. 2 Dist. Apr. 7, 2010) (citation and internal quotations omitted) (“A plaintiff seeking to recover damages for the negligent infliction of emotional distress must establish a direct causal connection between the defendant’s misconduct and the plaintiff’s emotional distress”), see also Rhee, supra note 64, at 808-09 (citations omitted) (discussing the difficulty in verifying mental injuries and in gauging individual emotional responses to horrendous circumstances).

83 See supra notes 74-75 and accompanying text.


85 See Lehmann v. Wieghat, 917 S.W.2d 379, 384 (Tex. App. 14th Dist. 1996), reh’g overruled, (Mar. 21, 1996), writ denied, (June 6, 1996); see also Thing v. LaChusa, 48 Cal. 3d 644 (1989) (refusing to permit NIED claim by mother who was not at scene when defendant’s car hit her child, but rather arrived at scene several moments later).
In this way, courts faced with NIED claims apply this notion of Spatial Proximity to ensure that a mentally-injured plaintiff was “close enough” to the physical harm so as to find a connection between these two injuries. Courts analyzing third-party retaliation claims could apply this same Spatial Proximity analysis to determine causation with respect to a retaliation claim. Spatial Proximity would be one part of the courts’ inquiry in determining whether an Actor’s protected activity caused the adverse action toward the Target. The closer the Spatial Proximity between the Actor and the Target, the more inclined the Court should be to find this connection. In conducting this analysis, courts would examine the “spatial distance” between the Actor and the Target on various levels, both concrete and physical as well as metaphorical. Did these two individuals simply work for the same employer, or were they located in the same building? Did these two employees work within the same department or division? Were they working on projects together? Did they happen to share the same supervisor? All of these questions might be very relevant to deciding whether an Actor should be able to sue for third-party retaliation based upon adverse action to a Target.

In other words, courts examining Spatial Proximity not only would focus on the physical distance between the Actor and Target but also on other types of “separation” in the workplace between the Actor and the Target, such as their respective locations within the company hierarchy and supervisory structures. A Target within the same “chain of command” as an Actor would be better positioned to bring a third-party retaliation claim, because the same decisionmaker who received notice of the Actor’s protected activity likely would be involved in taking adverse action against the Target. For example, if Joe Senior and Joe Junior worked in the same department and reported to the same supervisor, a court understandably might be somewhat suspicious if Joe Junior was fired a short time after Joe Senior filed a discrimination complaint. However, where businesses may have thousands of employees and operations all over the world, a greater “distance” between an Actor and Target might cast doubt on a plaintiff’s third-party retaliation claim. If Joe Junior worked across the country from his father, in a different department reporting to different superiors, a court looking only at the Spatial Proximity between these two individuals might question whether some protected activity by Joe Senior would have any bearing on Joe Junior’s treatment at work.

Thus, courts could use the distance in the workplace (both physical and otherwise) between the Actor and Target as one means of limiting the scope of the third-party retaliation doctrine. The closer the distance between these two individuals, the more plausible it should seem to find a connection between the Actor’s protected activity and subsequent adverse action experienced by the Target.

b) Temporal Proximity

A second factor that courts should apply in adopting the NIED “bystander” theory to third-party retaliation claims is the above-described notion of Temporal Proximity. As previously discussed, courts that apply the bystander theory to NIED claims will examine

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86 *Lehmann, supra* note 85, at 384 (citation omitted).
whether the plaintiff’s alleged emotional distress resulted from a “sensory and contemporaneous observance of the accident,” as opposed to situations where a plaintiff merely learned about the accident from others after-the-fact.\textsuperscript{87} Courts will be less likely to entertain NIED claims from plaintiffs who did not observe the accident in question personally, as it occurred.\textsuperscript{88}

Just as with the Spatial Proximity criterion, this Temporal Proximity analysis from NIED could be applied to a third-party retaliation claim – again, to test for adequate causation between the Actor’s protected activity and the employer’s adverse action toward the Target. Specifically, in the context of a third-party retaliation claim, a court would want to evaluate the amount of time between the Actor engaging in protected activity and the Target receiving adverse action from his or her employer. Was the Target fired within hours or days of the employer learning that a co-worker – the employee’s spouse or sibling or friend – engaged in some protected activity?\textsuperscript{89} Or did months, or even years, pass between the Actor’s protected activity and the Target suffering any adverse workplace action?\textsuperscript{90} The more time that has passed between the Actor engaging in a protected activity and the Target receiving some adverse action, the less likely the Actor’s conduct caused the Target’s adverse action.

c) Relational Proximity

Finally, courts could apply the Relational Proximity factor from the NIED bystander framework to define the scope of permissible third-party retaliation claims. As noted above, in the NIED context, courts examine the relationship between the individual who suffered from some physical injury and the plaintiff who suffered mental harm from exposure to this other person’s physical injury.\textsuperscript{91} Notably, courts analyzing this factor for purposes of NIED claims have adopted differing views regarding precisely how close these two parties must be before the court will allow the NIED claim to proceed.\textsuperscript{92} Most jurisdictions, however, require fairly close

\textsuperscript{87} See supra note 76 and accompanying text; see also Dillon, supra note 72, at 740-41.

\textsuperscript{88} See, e.g., Lehmann, supra note 85, at 384 (noting that plaintiff did not learn of son’s accident until five or ten minutes after it occurred).

\textsuperscript{89} Cf. Mickey v. Zeidler Tool and Die Co., 516 F.3d 516 (6th Cir. 2008) (reversing summary judgment for defendant in direct (as opposed to third-party) retaliation case where employer terminated employee on the same day that it learned of employee’s EEOC charge).

\textsuperscript{90} See, e.g., Thomas, supra note 61, at *13 (granting summary judgment for defendant on third-party retaliation claim where 18 months passed between plaintiff’s sister engaging in protected activity and alleged adverse action toward plaintiff); see also Zuk v. Onondaga Cty., No. 5:07-CV-732 (GTS/GJD), 2010 WL 3909524, at *1, *18 (N.D. N.Y. Sept. 30, 2010) (rejecting plaintiff’s third-party retaliation claim because, \textit{inter alia}, plaintiff experienced adverse action approximately eight years after his future fiancé engaged in protected activity).

\textsuperscript{91} See Dillon, supra note 72, at 741 (stating that courts should inquire “[w]hether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship”); see also \textsc{Restatement (Third) Torts: Phys. \\& Emot. Harm}, supra note 63, at § 47 (finding liability for negligent infliction of emotional disturbance only where the person suffering emotional distress “is a close family member of the person suffering the bodily injury”).
ties between the mentally injured plaintiff and the individual who suffered physical harm – generally something akin to immediate family.\(^{93}\)

Just as with the other two criteria from the NIED bystander framework, this Relational Proximity component also could help courts determine the viability of a plaintiff’s third-party retaliation claim. A court would look at the nature of the relationship between the Actor who engaged in the protected activity and the Target who later received adverse action. Were these two parties immediate family – spouses, siblings, or parent and child?\(^{94}\) Or were they mere casual workplaces acquaintances?\(^{95}\) The closer the relationship between the plaintiff-Actor and the third-party-Target, the more likely a court would be to allow the plaintiff’s third-party retaliation claim to proceed.

In trying to pin down this criterion in particular, scholars and courts have fretted about the particular types of relationships that should be able to support a third-party retaliation claim. A truly unlimited third-party retaliation doctrine – one that did not place a limit on the relationship between these two parties – would mean that every time an employee engaged in protected activity for purposes of Title VII, his or her employer would have exposure for a retaliation claim under Title VII for taking adverse action against \(\text{any}\) relative, friend or acquaintance of this original employee.\(^{96}\) In this respect, some courts have been wary of applying the third-party retaliation doctrine in cases involving relatively attenuated relationships between the Actor and Target. In \textit{O’Connell v. Isocor Corp.}, for example, the plaintiff claimed third-party retaliation based upon the protected activity of a mere co-worker – someone with whom the plaintiff shared little more than the fact that they both worked for the same company.\(^{97}\)

\(^{92}\) See Green, \textit{supra} note 66, at 1097-98 (citations omitted) (discussing debate among courts regarding the required “closeness of the relationship” between the plaintiff and injured third-party victim for purposes of an NIED claim).

\(^{93}\) See \textit{id.} (citations omitted) (noting that many American jurisdictions adhere to a rule that limits recovery to relatives residing in the same household or other immediate family members, such as parents, siblings, children or grandparents of the injured third-party); \textit{but see \textit{Restatement (Third) Torts: Phys. & Emot. Harm, supra} note 63, at \(\S\) 47 \textit{Cmnt. e} (citation omitted) (“When defining what constitutes a close family relationship, courts should take into account changing practices and social norms and employ a functional approach to determine what constitutes a family”).

\(^{94}\) See, e.g., \textit{Fogelman, supra} note 4 (refusing to allow third-party retaliation claim where son claim to have been terminated due to protected activities of his father); \textit{Murphy v. Cadillac Rubber & Plastics, Inc.}, 946 F. Supp. 1108 (W.D.N.Y. 1996) (permitting third-party retaliation claim where husband claimed to have been retaliated against for protected activity of his wife); \textit{Nalbandian, supra} note 19 (permitting third-party retaliation claim where employee claimed not to have been rehired in retaliation for protected activity of his sister).


\(^{96}\) Temmm, \textit{supra} note 8, at 878; \textit{see also Thompson v. N. Am. Stainless, LP}, 520 F.3d 644, 654 (6th Cir. 2007), \textit{vacated}, 567 F.3d 804 (6th Cir. 2009) (“criticizing the majority as creating a situation where “[a]ll persons, no matter how loosely related or ‘associated’ to the person who engaged in 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”).

\(^{97}\) \textit{O’Connell, supra} note 24, at 653-54.
Rejecting the plaintiff’s third-party retaliation claim, the court observed that “[i]f the doctrine stretched that far, any employee who is terminated around the time that another employee files a discrimination suit would have standing to sue the employer.” 98 In Morgan v. Napolitano, the plaintiff stretched this argument in a different direction, claiming retaliation based upon the protected activity of his wife, who was not even employed by the same employer as the plaintiff. 99

During the oral argument before the Supreme Court in Thompson, Justice Alito focused upon these types of concerns regarding the scope of the relationships covered by the third-party retaliation doctrine, inquiring of Thompson’s counsel, “[s]uppose Thompson were not Regalado’s fiancée at the time. Suppose they were… just good friends…. The way the company wanted to get at her was by firing her friend. Would that be enough?” 100 Advocating for what he called a “clear line” in this area, Justice Alito observed, “I can imagine a whole spectrum of cases in which there is a lesser relationship between these two persons, and… unless there’s a clear line there someplace, this theory is rather troubling.” 101 Chief Justice Roberts similarly expressed trepidation, inquiring of the Deputy Solicitor General (who was arguing in favor of the Petitioner, Thompson), “[h]ow are we supposed to tell, or how is an employer supposed to tell, whether somebody is close enough or not?” 102

Faced with these types of “line-drawing” concerns, some scholars and courts have proposed limiting third-party retaliation claims to parties with particular types of relationships – spouses, siblings, parents and children. 103 However, while one can understand the desire for a hard-and-fast rule regarding the types of relationships that will support third-party retaliation claims, this Article adopts a somewhat different perspective, declining to articulate particular relationships that should (or should not) qualify for protection in the context of a third-party retaliation claim. Indeed, the evolution and complexity of modern familial relationships may stymie any attempt at drawing clear lines in this context. For example, given that spouses likely would qualify for protection under a third-party retaliation framework, one might wonder whether such protection should apply equally to same-sex domestic partners, particularly in a

98 Id. at 654; see also Freeman, supra note 95, at *1, *5, *7 (rejecting third-party retaliation claim where plaintiff “[w]as not related, even distantly, to the employees who filed complaints,” and “[d]id not even appear to be close friends with the claimants”).

99 Morgan, supra note 30, at *1, *5, *8 (finding that plaintiff may state a claim for third-party retaliation based upon the conduct of his non-employee lawyer-wife, who represented plaintiff’s coworkers in discrimination suits).

100 Thompson Oral Argument Transcript, supra note 11, at 10-11.

101 Id. at 12.

102 Id. at 20.

103 See, e.g. Wychock, supra, note 24, at *1, *6 (citations omitted) (stating that retaliation provision of ADA allows for third-party retaliation claim only where plaintiff is “[a] close relative[] of an individual who did in fact engage in protected activity”); see also Temm, supra note 8, at 865-66 (advocating to limit third-party retaliation claims to “[p]laintiffs who have a relationship so close with the employee who took the protected action that deterrence may be presumed, such as spouses, siblings, and parents and children….”).

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jurisdiction that recognizes same-sex civil unions. Given the large number of couple who now live together prior to marriage, some reasonably might question whether protection should extend to individuals in those relationships – even if the couple has no intention of marrying. Extended family members are living together in increasing numbers; should protection extend to grandparents and children who reside in the same household? It is unlikely that these types questions could be answered satisfactorily by an opinion that established “bright lines” regarding the types of relationships eligible for protection under the third-party retaliation doctrine. In this respect, this Article approves of the Supreme Court’s election in Thompson to “decline to identify a fixed class of relationships for which third-party reprisals are unlawful.” To be sure, the Supreme Court is correct that “the significance of any given act of retaliation will often depend on the particular circumstances.” Yet by refusing to provide any further guidance on this issue – other than to observe that “firing a close family member will almost always meet the… standard, and inflicting a milder reprisal on a mere acquaintance will almost never do so” – the Court missed an opportunity to provide direction to lower courts that will be faced with claims falling between these two ends of the spectrum. While it is true that these cases must be resolved on their facts, lower courts need some roadmap for analyzing these often complex situations.

This is where the application of the NIED bystander theory will play an important role in providing guidance to lower courts. Courts faced with claims of third-party retaliation should examine the relationship between the Actor and Target in light of the other NIED criteria mentioned above – Spatial Proximity and Temporal Proximity. For example, assume that Tammy Target was demoted after Alice Actor – a mere workplace friend – filed a discrimination claim against their mutual employer. Under an all-or-nothing framework that requires close “family-like” relationships between Actors and Targets, many courts likely would reject a third-party retaliation claim brought under these facts. (Indeed, as noted above, even the Supreme

104 Jeremy Olson, More couples opting for apartment before altar, CHI. TRIB. 13, 10/18/10 (noting an increase nationally to 7.5 million unmarried couples living together in 2010, up from 6.7 million couples in 2009); Janice Shaw Crouse, Cohabitation nation: Growing trend results in declining household stability, WASH. TIMES, Nov. 22, 2010, at B1 (noting a dramatic increase of nearly 1000% percent in the 1970’s in couples living together without marriage).

105 Grandparents raising grandchildren: Skipping a generation, ECONOMIST, June 16, 2007, at 84 (noting that in 2000, 2.4 million grandparents were raising their children’s children); cf. Reporter’s Notebook, CRAIN’S CLEV. BUS 27, Vol. 31, Iss. 37, 9/20/10 (discussing increase in non-traditional families as basis for amending Family Medical Leave Act, including by highlighting grandparents who have taken in grandchildren and same-sex partners raising children together).

106 Thompson, supra note 2, at 4. Notably, this stance is consistent with the EEOC’s view that Title VII should “prohibit 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.” EEOC Compliance Manual, supra note 27, at §8-II(C)(3) (emphasis added).

107 Id. (citing Burlington Northern, supra note 49, at 69) (internal quotations omitted).

108 Id.
Court expressed skepticism regarding this type of claim. But this perspective might change if Tammy Target and Alice Actor not only worked for the same employer, but also worked in the same department, for the same supervisor, and this supervisor made the demotion decision. It also might change if Tammy’s demotion took place within hours or days of her supervisor learning about Alice’s discrimination claim. Suddenly, the employer’s conduct seems much more suspicious under Section 704(a), despite the otherwise “distant” relationship between Tammy and Alice. By accounting for all of the NIED bystander theory factors – Spatial Proximity, Temporal Proximity and Relational Proximity – a court could conduct a more nuanced analysis of this claim. The close Spatial and Temporal Proximity in this scenario could raise sufficient suspicion by a court to allow Alice to bring a third-party retaliation claim, despite the attenuated Relational Proximity between her and Tammy.

Thus, one significant benefit of applying this three-factor NIED bystander framework to third-party retaliation claims is that it gives courts a clear outline for analyzing third-party retaliation claims, while still leaving courts with sufficient flexibility to apply the facts within each part of this framework. Rather than having to come up with bright-line rules regarding the required distance in the workplace between the Target and the Actor, or regarding how much time can pass between the Actor’s protected activity and the Target’s experiencing of adverse action, or regarding the type of relationship that must exist between the Actor and Target, courts would have leeway to examine the totality of a situation, using these three factors as a framework. In this way, the NIED bystander framework would allow courts to take into account all of the circumstances surrounding an employee’s third-party retaliation claim, before deciding whether to permit that claim to proceed.

Moreover, in addition to providing more flexibility to courts analyzing third-party retaliation claims, this framework could help to placate the concerns expressed by employers, courts, and other commentators about creating a slippery-slope of liability for employers in this area. This slippery-slope flows from the reality that, in the modern workplace, employers often act in prophylactic ways to avoid violating the law – taking measures not otherwise required by law in order to minimize their potential liability. Among other measures, employers will adopt extra precautions before taking adverse action against employees who fall within Title VII’s protections. For example, an employer might hesitate before terminating a particular employee who happens to be female or Hispanic. In the same respect, the employer might think twice before demoting a particular worker who previously complained of workplace discrimination. Even where the termination or demotion has nothing to do with the employee’s gender or nationality or previous discrimination complaint, savvy employers know that it might

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109 See supra note 108 and accompanying text.

110 See Tristin K. Green, Targeting Workplace Context: Title VII as a Tool for Institutional Reform, 72 FORDHAM L. REV. 659, 705 (2003) (acknowledging that Title VII enforcement litigation can provide a foundation for increased compliance with the law, but noting that it often leads to the “adoption of merely symbolic reform”); Audrey J. Lee, Comment, Unconscious Bias Theory in Employment Discrimination Litigation, 40 HARV. C.R.-C.L. L. REV. 481, 488 (2005) (“[E]mployers’ heightened awareness of the legal ramifications for discriminatory transgressions – learned through litigation, among other means – suggests that employers will be increasingly savvy in not documenting, outwardly expressing, or retaining anything that is potentially damaging.”).
cost them well-into the six-figures to defend against a Title VII discrimination or retaliation suit – even where the suit ultimately proves to be without merit.\footnote{According to one recent study, it costs, on average, over $120,000 simply to defend against a wrongful discharge claim, not including any costs of settling the claim nor any judgment that a defendant may ultimately have to pay. See Brief of Chamber of Commerce of the United States of America as Amicus Curiae in Support of Respondent, Thompson v. N. Am. Stainless, LP, 2010 WL 4339890, No. 09-291, (Nov. 1, 2010), at *1, *2 (citation omitted); see also Jessica Fink, Unintended Consequences: How Antidiscrimination Litigation Increases Group Bias in Employer-Defendants, 38 N. MEX. L. REV. 333, 340 (2008) (citations omitted) (“Some estimate that an employer may spend close to $100,000 to defend against an individual claim of discrimination, and more than $460,000 to defend against a discrimination class action”).} By more thoroughly articulating the factors that lower courts should examine in evaluating a third-party retaliation claim, the Supreme Court would allow employers to better predict their potential exposure from taking (presumably-legitimate) adverse action against an employee.

### 3. Application of the Bystander Framework to the Thompson case

How would this framework affect the Thompson case? If the Supreme Court applied these NIED bystander factors to Thompson’s claim, would the Court still find a viable third-party retaliation claim? First, in terms of Spatial Proximity, both Regalado and Thompson worked as Quality Control Engineers for North American.\footnote{See Plaintiff’s Memorandum in Opposition to Defendant’s Motion for Summary Judgment, Thompson v. N. Am. Stainless, LP, 2006 WL 1493341 (April 26, 2005), No. 3:05-02-JMH.} While North American was a fairly large company, with approximately 500 to 600 employees by 2003 (the year that Thompson was terminated),\footnote{Id.} both Regalado and Thompson worked in the technical department, which was “a small department” according to North American’s head of human resources at the time of Thompson’s suit.\footnote{See Thompson, supra note 16, at 806 (citation omitted).} Moreover, both Regalado and Thompson reported to the same supervisors,\footnote{See id.} further strengthening this argument of close Spatial Proximity.

In terms of Temporal Proximity, the facts also weigh in favor of permitting Regalado to sue. According to Thompson’s Complaint, Regalado filed her gender discrimination charge with the EEOC in September 2002, and the EEOC notified North American of this charge on February 13, 2003. Slightly more than three weeks later, on March 7, 2003, North American terminated Thompson’s employment, allegedly for performance-based reasons.\footnote{See id.} Unlike those cases where many months (or even years) may have elapsed between an Actor engaging in protected activity and a Target receiving adverse action from an employer,\footnote{See supra note 90 and accompanying text.} this relatively short...
time span would likely raise a court’s suspicions about a link between North American learning of Regalado’s protected activity and then making the decision to terminate Regalado’s fiancée.

Finally, the Relational Proximity between Thompson and Regalado likely would pass muster under this NIED bystander framework. To be sure, many third-party retaliation cases involve relationships closer than that in this case, such as where a child is fired in retaliation for the acts of a parent, 119 or where a husband is punished in retaliation for the acts of his wife. 120 But if the purpose of a court’s inquiry under this factor is to determine whether the relationship between the Actor and Target is such that the Actor reasonably would be deterred from engaging in protected activity based upon adverse affects for the Target, then the relationship between Thompson and Regalado would likely suffice. Certainly, a court reasonably could assume that an individual might have second thoughts about complaining of workplace discrimination if he or she thought that such a complaint might lead to adverse action for his or her soon-to-be spouse. 121

B. A Further Limit on this Proposed Framework: Permitting Only the Actor to Sue

Using the NIED bystander framework to define the scope of the third-party retaliation doctrine could go a long way toward balancing the desire to prevent employers from engaging in third-party retaliation, while still imposing reasonable limits on the scope of this doctrine. However, in addition to applying the NIED bystander framework to these claims, courts should adopt an additional step to define the scope of the third-party retaliation doctrine. Specifically, courts should mandate that only the Actor – the party who actually engaged in some protected activity – will have the power to bring a third-party retaliation claim. The party who merely was the Target of the employer’s subsequent ire, but who did not personally engage in any protected activity, should not be permitted to sue.

Admittedly, the Supreme Court expressly rejected this approach in its recent Thompson decision. In analyzing the provision of Title VII that provides that a “civil action may be brought… by the person claiming to be aggrieved,” 122 the Court held that being a “person… aggrieved” required something more than mere Article III standing. 123 However, the Court declined to adopt North American’s view that a “person… aggrieved” for purposes of this provision could only be the individual who engaged in protected activity, finding no basis in the

119 See Fogelman, supra note 4.

120 See Holt v. JTM Indus., Inc., 89 F.3d 1224 (5th Cir. 1996).

121 See Thompson, supra note 2, at 3 (“We think it obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired”); see also Temm, supra note 8, at 889-91 (citations omitted) (asserting that a deterrent effect may exist, but should not be presumed to exist, where the Actor and Target are fiancés).


123 Thompson, supra note 2, at 5-6.
text of the statute or in the Court’s past practice for construing this phase in this manner. Rather, the Court interpreted this “person… aggrieved” limitation using its “zone of interests” doctrine – a doctrine commonly applied in administrative law. In essence, this doctrine will bar a plaintiff from suing if his or her “interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.” In other words, in applying this “zone of interests” doctrine, a court will ask itself whether a particular plaintiff falls within the class of individuals whom Congress intended to protect when it enacted a particular statute. Applying the “zone of interests” doctrine to the circumstances here, the Court held that a plaintiff should be able to bring a third-party retaliation claim if he or she has an interest that Congress arguably sought to protect in enacting Title VII. According to the Court, Thompson fell into that category, because (1) he was an employee of North American; (2) the purpose of Title VII was to protect employees from unlawful action by employers; and (3) North American intended to harm Regalado, the Actor, by taking action against Thompson here.

While the Supreme Court’s holding in this respect is appealing in its simplicity, the Court’s argument ignores various nuances regarding the nature of a Title VII retaliation claim and regarding the impact that this holding could have on employers more generally. In fact, several justifications would support holding that third-party retaliation claims, while permissible, only should be brought by the party who actually engaged in protected activity, and not by the non-Actor “Target” of the employer’s retaliation.

First, mandating that only the Actor can bring a third-party retaliation claim would be consistent with the purpose of the retaliation doctrine more generally. As previously noted, Congress included this prohibition on retaliation within Title VII to ensure that employees would not be chilled in exercising their rights under Title VII. In application, however, Congress’s mission seems to have been interpreted somewhat more specifically. Title VII does not bar employers from engaging in any “retaliatory” action in response to employee protected activity. Rather, the Supreme Court has made clear that Section 704(a) bars “only those [actions] which courts believe would chill a reasonable person from coming forward with a complaint.” Specifically, a retaliation plaintiff “must show that a reasonable employee would have found the

124 See id. at 6.
125 See id. at 6-7.
126 Id. at 7 (citation omitted).
127 See id. (citation omitted).
128 See id.
129 See supra note 7 and accompanying text.
130 Deborah L. Brake, Perceiving Subtle Sexism: Mapping the Social-Psychological Forces and Legal Narratives the Obscure Gender Bias, 16 COLUM. J. GENDER & L. 679, 718 (2007) (citation omitted); see also Burlington Northern, supra note 49, at 2414 (“The anti-retaliation provision protects an individual not from all retaliation, but from retaliation that produces an injury or harm.”)
challenged action materially adverse, which … means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.”\textsuperscript{131} In describing the purpose and scope of Section 704(a) in this manner, the Supreme Court seems to support the idea that Congress’s primary concern in enacting this law was with protecting the rights of the employee who \textit{actually engaged} in protected activity and ensuring that he or she is not deterred from pursuing this behavior, as opposed to protecting the rights of those employees who might be \textit{associated} with this Actor. Congress wanted to protect the individuals who actually object to perceived discriminatory conduct in the workplace.

Notably, while the purpose of Title VII’s retaliation provision may be to encourage individuals to report workplace discrimination, in reality employees frequently decide whether or not to come forward with these types of concerns only after weighing the costs and benefits of doing so.\textsuperscript{132} An Actor only will engage in protected activity if he or she thinks that the potential benefits of engaging in this type of protected activity outweigh the potential costs to the Actor.\textsuperscript{133} These “costs” not only could include harm suffered by the Actor personally, but also harm to the Actor’s friends and coworkers in the workplace. In other words, an employee may decide not to report workplace discrimination if the employee believes that his or her employer will respond by taking negative action against one of this employee’s coworkers. The \textit{Actor} is the one who will make this calculation – who will decide whether or not to come forward with concerns about discrimination, based in part upon who the Actor thinks his or her employer may react. Accordingly, it makes sense to let the \textit{Actor} bring a third-party retaliation claim when an employer does respond adversely to the Actor’s behavior, since the Actor is the one whose protected activity the courts want to encourage.\textsuperscript{134}

In addition, allowing the Actor to bring the third-party retaliation claim reflects the social reality that the Actor may need this type of legal protection to a far greater degree than the Target. A wealth of social science evidence has demonstrated that individuals who complain of discrimination suffer a broad range of negative consequences – both internally and externally. Complaining about discrimination can threaten an individual’s sense of control and invulnerability, undermining their belief that the world is a “just place.”\textsuperscript{135} The tendency for employees who are exposed to discrimination – particularly women and racial minorities – is to “look inward and blame themselves” for unfair treatment, rather than to attribute a negative situation to discrimination.\textsuperscript{136} Moreover, a significant body of social science evidence has

\textsuperscript{131} \textit{Burlington Northern}, supra note 49, at 2415 (citations and internal quotations omitted).
\textsuperscript{132} See Brake, supra note 7, at 36-37 (citations omitted).
\textsuperscript{133} See id.
\textsuperscript{134} See Thompson, supra note 16, at 816 (footnote omitted) (arguing that barring Thompson (the “Target”) from suing under Section 704(a) would “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”) (emphasis added).
\textsuperscript{135} \textit{Id.} at 28 (citations omitted).
\textsuperscript{136} Watson, supra note 7, at 233 (citation omitted).
documented the severe social penalties incurred by individuals who complain about discrimination.\textsuperscript{137} Indeed, those who do step forward to report discrimination often find themselves labeled as “troublemakers” or as “hypersensitive” – even when discrimination in fact has occurred.\textsuperscript{138} In this way, an Actor may suffer significant social and psychological costs from engaging in protected activity, even when the Actor was justified in taking this step. In the wake of this protected activity, the Actor may experience the ire of his or her employer, hostility from other coworkers, and internal doubts about engaging in this behavior.

Thus, there are significant pressures, both internal and external, that may prevent individuals from reporting workplace discrimination. Even for an employee who fervently believes that he or she has suffered from workplace discrimination, the decision to step forward and expose this illegality may be rife with conflict. Accordingly, this potential Actor – this employee on the cusp of reporting discrimination – may need some extra assurance that reporting will be the right move. He or she may need the additional comfort of knowing that, in the event of any negative ramifications from his or her employer following this report, the employee will have the option to sue. Even if the employer’s adverse action is directed at some third party, the \textit{Actor} will be able to respond to this adverse action. For an employee wrestling with how to respond to perceived workplace discrimination – worrying about how his or her employer and/or coworkers will respond to this charge – simply knowing that another employee might be able to sue if the employer retaliates against some third party might not be sufficient comfort for this conflicted employee. Only by keeping the cause of action with the individual who engages in the protected activity do we sufficiently encourage such Actors to step forward.

By holding that only the Actor can sue, the Court would strike the proper balance between discouraging employers from engaging in this type of “indirect” retaliation, while providing employers with sufficient certainty regarding the legal landscape to allow them to make important business decisions. An employer engaging in third-party retaliation would remain liable under Title VII. However, rather than face an endless number of potential lawsuits for every adverse action taken in the workplace against any individual who has any relationship to an Actor, the employer simply would face potential suits brought by the Actor.

\textbf{III. ADDRESSING POTENTIAL CRITICISMS OF THIS PROPOSED FRAMEWORK}

Despite the compelling arguments in favor of limiting the third-party retaliation doctrine in the manner discussed above, these limits understandably might raise some concerns among those who support a different view of this doctrine. In fact, both employers and employees might raise objections to this proposed framework, because while it potentially limits the scope of the third-party retaliation doctrine in some contexts – something to which employees might object – it also carves out areas where third-party retaliation claims clearly would be deemed

\textsuperscript{137} See Brake, \textit{supra} note\textsuperscript{7}, at 32-36 (citations omitted).

\textsuperscript{138} See \textit{id}. at 33 (citations omitted); \textit{see also} Fink, \textit{supra} note 111, at 341 (citations omitted); Watson, \textit{supra} note 7, at 234.
viable, to the likely chagrin of many employers. This Section fleshes out some of the common objections raised in response to the types of limits articulated above (particularly the requirement that only an Actor can assert a third-party retaliation claim) and responds to those objections.

A. Requiring an Actor to Assert a Third-Party Retaliation Claim Will Create Problems With Respect to the “Adverse Action” Requirement for Retaliation

As noted above, in order to prevail in asserting a retaliation claim under Title VII, a plaintiff typically must show, among other things, that he or she suffered from some adverse action, and that this adverse action was causally-connected to the employee engaging in some protected activity. Accordingly, in order for the Actor to be able to sue for retaliation based upon adverse action to a coworker (i.e., the Target), an Actor would have to show that this negative treatment of a coworker also constituted adverse action as to him or her. Those opposed to permitted third-party retaliation claims (i.e., employers) may assert that interpreting “adverse action” in this manner goes beyond the permissible bounds Title VII precedent.

Fortunately, the Supreme Court’s own prior retaliation jurisprudence would support this somewhat expansive interpretation of “adverse action.” The Court has indicated that courts should define “adverse” fairly broadly, including in the Court’s recent decision in Burlington Northern. Specifically, in defining what constitutes “adverse action” for purposes of a retaliation claim, the Supreme Court has instructed courts to inquire whether an action is “materially adverse,” meaning that it “might well have dissuaded a reasonable worker from making or supporting a charge of discrimination.” In other words, courts will bar as retaliatory those actions that chill the types of behavior that Title VII was designed to protect. Applied to the context of a third-party retaliation claim, a court would determine whether harm to a Target should constitute adverse action toward the Actor by asking: “If the Actor had known that the consequences for his or her protected activity would be this negative impact on the employment of his or her coworker, would the Actor still have proceeded in the same way? Would he or she still have filed a charge of discrimination against the employer, or otherwise objected to discrimination in the workplace?”

In some third-party retaliation cases, this question will be fairly easy to answer, as it may be obvious that negative treatment directed toward a Target would likely alter the conduct of a coworker-Actor. For example, if Husband and Wife work for the same employer and Wife is demoted after Husband files a discrimination charge, this demotion readily could be viewed as an adverse action affecting both Wife and Husband: Husband like would suffer negative financial consequences from Wife’s demotion, due to their now-reduced overall household income. Husband also likely would be directly affected by the emotional impact of Wife’s demotion, and would play a large role in providing emotional support to Wife in the wake of this disappointment. For these reasons, Wife’s demotion likely would have the very chilling effect

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139 See supra note 12 and accompanying text.

140 Burlington Northern, supra note 49, at 68, 126 S.Ct. at 2415 (citations omitted).

141 Id. (citations and internal quotations omitted).
on Husband that Title VII’s retaliation clause was designed to prevent. Husband understandably would be less likely to complain about workplace discrimination if he feared that Wife would suffer negative consequences of this nature. Thus, a court might well view Wife’s firing as an adverse action to Husband.142

Stepping outside of this fairly common-sense example, such as where the Actor and Target are mere workplace friends, it may be more difficult to see how adverse action directed toward one employee (the Target) could be seen as adverse action toward the Actor as well. The impact of this action on the Actor is much less direct. Yet there are various legal and/or doctrinal bases upon which courts could rely to deem a Target’s termination or demotion to be an adverse action with respect to an Actor.

First, the Supreme Court has demonstrated a general trend of defining Title VII’s retaliation provision in a rather broad manner in order to effectuate the statute’s remedial purpose.143 Indeed, in the Court’s recent decision in Thompson, it reaffirmed this broad view of Title VII’s retaliation provision, noting that “Title VII’s antiretaliation provision must be construed to cover a broad range of conduct.”144 This flexible interpretation of the retaliation doctrine has included adopting a broad definition of “adverse action.” In Burlington Northern & Santa Fe Railway Co. v. White, the Supreme Court held that actionable retaliation would not be limited to employment-related activities, or to those affecting the terms and conditions of employment.145 Rather, the Court held that Title VII’s anti-retaliation provision could reach beyond the employee’s workplace.146 Moreover, the Court defined the types of actions that could constitute “adverse actions” for purposes of Title VII. While not every retaliatory action by an employer necessarily would implicate Section 704(a), this provision would bar retaliatory actions that “a reasonable employee would have found… materially adverse,” meaning that the conduct “might have dissuaded a reasonable worker from making or supporting a charge of discrimination.”147 In other words, as noted above, the court will ask whether the employer’s conduct was sufficiently serious or harmful so as to deter a reasonable employee from engaging in the type of conduct that Title VII is designed to protect.

Significantly, in examining whether conduct by an employer rises to this level of deterring an employee from engaging in his or her Title VII rights, the courts do not simply ask

142 Of course, Wife’s firing would remain an adverse action to Wife as well.
143 See Long, supra note 7, at 947-75; Watson, supra note 7, at 215; cf. Michael J. Zimmer, A Pro-Employee Supreme Court?: The Retaliation Decisions, 60 S.C. L. REV. 917, 918 (2009) (citations omitted) (asserting that the Supreme Court has adopted a pro-employee stance in retaliation cases by adopting a “pragmatic” approach to judicial decision-making in such cases).
144 Thompson, supra note 2, at 2 (citing Burlington Northern, supra note 49).
146 See id.
147 Id. at 2415 (citation and internal quotation omitted).
what the average, “reasonable” employee would do when faced with certain conduct by an employer. Rather, as Burlington Northern directs, the courts will examine the employee’s actions from the perspective of a “reasonable person in the plaintiff’s position, considering all the circumstances.”148 According to at least one commentator in this area, this standard “is almost certainly broad enough to include a situation in which an employer discharged or otherwise took action against a friend or loved one of a party who had opposed discrimination in the workplace, 149 because the knowledge that an employer would take such action against a friend or loved one “would undoubtedly dissuade many reasonable employees from making or supporting a charge of discrimination.”150

In this vein, while the full Sixth Circuit rejected the plaintiff’s third-party retaliation claim in Thompson, one concurring judge emphatically supported the notion that Regalado could have brought suit against North American based upon the company’s termination of her fiancée, observing that “[i]n 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 [under Title VII].’”151 Thus, this judge opined that “defendant’s termination of Thompson potentially could be deemed an ‘adverse employment action against her.”152 In this judge’s view, a reasonable employee might well be dissuaded from engaging in protected activity knowing that such conduct would bring negative consequences in the workplace for her beloved fiancée.

Social science evidence also supports viewing negative conduct directed toward a Target not only as adverse action to that employee, but also as adverse action with respect to an Actor. Professor Cynthia Estlund has described the extent to which employees working together as part of the same “team” can heighten feelings of inter-connectedness and loyalty.153 According to Estlund, “we spend much of our time in a social environment that, to varying degrees, is governed by norms of civility and reciprocity and fosters experiences of cooperation and feelings of solidarity, trust, and mutual responsibility….“154 Our workplace becomes a mini-community, with its own powerful set of rules and relationships. Therefore, Estlund observes, “working together in this environment also engenders personal feelings of affection, sympathy, empathy, and friendship among coworkers.”155 Rather than working as isolated automatons, holding each

148 Id. at 2417 (citation and internal quotation omitted).
149 See Long, supra note 7, at 979.
150 Id.
151 Thompson, supra note 16, at 816 (J. Rogers, Concurring)) (citation omitted) (first bracket in original, second bracket added by author).
152 Thompson, supra note 16, at 816.
153 Cynthia L. Estlund, Working Together: The Workplace, Civil Society, and the Law, 89 GEO. L. J. 1, 9 (2000); see also Long, supra note 7, at 965 (citing Estlund).
154 Estlund, supra note 153, at 12.
155 Id.
other at arms’ length, the modern workplace can foster significant positive relationships and emotions among employees. If Estlund’s observations are true, then they support the idea that harm to one employee in a workplace also might cause harm to others in the workplace – particularly those who are related or who share an especially-close relationship. Adverse action toward one employee could breach this sense of community, causing pain to other employees who have ties to this harmed individual. The adverse action to one individual may be experienced by many others.

**B. What if the Actor Does Not Want to Sue?**

In addition to concerns about stretching the definition of “adverse action,” another potential criticism of allowing only the Actor to bring a third-party retaliation claim involves how one can be sure that an Actor would pursue this type of claim. According to the framework advocated herein, the Target of an employer’s retaliatory behavior – the individual who actually has suffered from some concrete harm, and thus likely has the most obvious incentive to sue – would be barred from bringing a third-party retaliation claim. Rather, he or she would have to rely upon the Actor to bring this claim. Yet those who support permitting (and expanding) the third-party retaliation doctrine (i.e., employees) might wonder how we can be sure that an Actor will go to the trouble of suing? While this might not be an issue in some scenarios, such as where the Actor and Target were spouses or parent and child, it might be difficult to persuade other Actors to sue – such as where the Target is a mere workplace friend or casual acquaintance of the Actor. Few Actors might be willing to undertake the rigors of litigation out of a mere altruistic concern for the co-worker who was harmed as a result of the Actor’s protected activity.\(^{156}\) Thus, a significant aspect of the framework proposed herein involves motivating Actors to bring these retaliation claims.

Without a doubt, the most effective way of encouraging an Actor to sue based upon harm done to a Target would be to allow the Actor to receive some tangible benefit from the suit. While an Actor’s options might be fairly limited in this respect – indeed, the Actor may have suffered minimal damages himself or herself as a result of adverse action directed toward the Target – some Actors might be able to assert claims for intentional infliction of emotional distress based upon an employer’s unlawful retaliation toward a Target. In *Gore v. Trustees of Deerfield Academy*, for example, the plaintiff claimed that the defendant, an independent secondary school where the plaintiff had worked, denied admission to the plaintiff’s daughter in retaliation for the plaintiff’s complaints regarding unlawful discrimination.\(^{157}\) In response to this alleged retaliation directed at plaintiff’s *daughter*, the plaintiff claimed personal damages for emotional distress.\(^{158}\) The court permitted this claim to proceed, finding a sufficient link

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\(^{156}\) Indeed, even Justice Scalia seemed to recognize this potential problem during the oral arguments in *Thompson*, asking – in a somewhat different context than that raised by a third-party retaliation claim – “why would [an Actor] bring a lawsuit if these people really are nothing to her? She just has a guilt of conscience or something? I mean, I don’t see why she would bring the lawsuit. If it was her fiancée, maybe, but this – …” *Thompson* Oral Argument Transcript, *supra* note 11, at 31-32.


\(^{158}\) *See id.* at 70.
between the plaintiff’s complaints and the defendant’s denial of admission to the plaintiff’s daughter to withstand the defendant’s motion for summary judgment. Thus, while the bulk of the damages associated with a third-party retaliation claim likely would go to the Target who suffered adverse action, an Actor potentially could receive his or her own monetary recovery, if the facts of the case supported emotional distress damages to the Actor.

Even without a financial “stake” in the outcome of a retaliation suit, however, an Actor still likely would proceed with a third-party retaliation claim in most cases (at least, in those cases that would pass muster under the NIED bystander framework). Under this framework, as noted above, courts would examine the spatial distance between the Actor and Target; the “time lag” between the Actor’s protected activity and the Target’s receipt of adverse action; and the relationship between the Target and Actor. Each of these criteria might play a role in encouraging an Actor to bring such a claim. For example, an Actor who worked in close Spatial Proximity with a Target – who worked on the same team as the Target and/or frequently collaborated with the Target – likely would experience greater personal ire upon learning of the Target’s termination or demotion. This Actor therefore would be more likely to sue. Similarly, an Actor who discovered that a Target was fired within hours of the employer learning of the Actor’s protected activity might more readily shoulder responsibility for this unfortunate result, and might feel compelled to help alleviate this burden by bringing a suit. Finally, an Actor with close Relational Proximity to a Target, such as the Target’s spouse or immediate family member, certainly would be hard-pressed to sit idly by in the wake of this loved one’s adverse treatment at work. A proper application of the NIED bystander factors would mean that Actors who claims could satisfy this framework likely would not need much encouragement to sue; they would be those Actors with the closest links to the adverse action in the first place.

In this respect, this concern about the Actor’s reluctance to sue might “prove too much” in many cases. As noted above, the Supreme Court has held that an “adverse action” for purposes of the retaliation doctrine is one that would dissuade a reasonable worker in the plaintiff’s position from making or supporting a charge of discrimination. The Actor must perceive

159 See id. at 73-74. Significant to the court’s ruling, however, was the fact that the defendant had presumed for purposes of the summary judgment motion a causal connection between the plaintiff’s protected activity and the defendant’s denial of admission to the plaintiff’s daughter.

160 In addition, jurisdictions seeking an additional motivation to encourage Actors to sue could enhance the financial incentives for Actors to do so by enacting legislation that would permit individuals to act as “private attorney generals” with respect to employer retaliation, whereby such individuals could collect some portion of any damages, fines or penalties that result from a successful suit. See e.g., Cal. Lab. Code § 2698 et seq.

161 See supra notes 83-86 and accompanying text.

162 See supra notes 87-90 and accompanying text.

163 See supra notes 91-95 and accompanying text.

164 See supra notes 153-55 and accompanying text (describing how employees who work closely together as part of the same “team” can experience increased feelings of inter-connectedness and loyalty toward one another).

165 See supra notes 49-51 and accompanying text (citing Burlington Northern, supra note 49, at 2415.
some “harm” before he or she can claim to have suffered retaliation by an employer. Accordingly, the argument that an Actor might need to be persuaded to sue based upon an alleged harm to a coworker undercuts the notion that the Actor has been harmed by this conduct. In other words, an Actor who lacks the motivation to object to harm to a coworker arguably would not have changed his or her own behavior as a result of such conduct – including his or her decision to engage in protected activity to begin with.\(^{166}\)

The point is that it might not be necessary to find a “financial” incentive to encourage Actor’s to sue for harms done to Targets. The “bystander” framework may create equally powerful incentives that will motivate Actors to litigate these claims. By using the factors discussed above to require various types of “closeness” between the Actor and the Target, the bystander framework attempts to ensure that those Actors who have sufficient ties to Targets will pursue third-party retaliation claims.\(^{167}\)

C. Assuming that the Actor does Sue, Can the Actor Obtain Adequate Relief for the Target?

An additional critique of allowing only the Actor to bring a third-party retaliation claim involves the relief available to the Actor who brings such a suit. Those opposed to implementing this type of limit on who can sue (again, employees) might question whether the Actor will be able to secure meaningful relief for the Target has been fired or demoted or had his or her pay cut. Thompson’s attorney made this very assertion during oral arguments before the Supreme Court: When asked why Regalado had not brought the claim in this case, Thompson’s attorney cited the concern that “this Court’s Article III jurisprudence would have precluded her from getting any remedy.”\(^{168}\) While such concerns are not entirely unfounded, the Actor should be able to make the Target whole in most cases.

\(^{166}\) Moreover, even if an Actor declined to sue based upon adverse action to the Target, the EEOC still could bring a retaliation claim here. Title VII not only authorizes private individuals to sue based upon perceived violations of this statute, but also permits the EEOC to bring its own suits and to seek a broad range of relief, including injunctions, reinstatement, backpay, compensatory damages and punitive damages. See E.E.O.C. v. Waffle House, Inc., 534 U.S. 279, 286 (2002) (citations and internal quotations omitted) (noting that Congress amended Title VII in 1972 to authorize the EEOC to bring its own actions, and observing that those amendments “created a system in which the EEOC was intended to bear the primary burden of litigation”) see also EEOC Compliance Manual, supra note 27, at § 2-V(C) (noting that “[a]n EEOC Commissioner may file a charge with the Commission under Title VII or the ADA”). Many Actors who might be reluctant to engage in full-blown litigation likely would be much more willing simply to notify the EEOC of concerns regarding unlawful retaliation, presumably allowing the EEOC to take on the litigation if it found sufficient evidence of third-party retaliation.

\(^{167}\) In addition, as discussed further below, in many cases a Target may be able to bring his or her own retaliation suit, based upon the Target’s own protected activity. See infra notes 181-89 and accompanying text.

\(^{168}\) Thompson Oral Argument Transcript, supra note 11, at 4-5; see also Thompson, supra note 2, at 822 n.5 (J. Moore, Dissenting) (observing that “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…”); see also Long, supra note 7, at 980 (questioning whether a suit by the Actor could obtain appropriate relief for a Target in most cases).
Perhaps the most obvious remedy that many Targets would desire (at least, those who have been terminated or demoted due to a friend or family member’s protected activity) would be reinstatement into their previous positions. Therefore, one might question whether an Actor suing for third-party retaliation could obtain this type of relief for a Target – could seek the reinstatement or promotion of someone else. In fact, there is a strong basis for permitting Actors to obtain this type of relief under Title VII itself. The very text of this statute authorizes a court in a Title VII case to award “such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without backpay,” as well as “any other equitable relief as the court deems appropriate.”

The Supreme Court has stated that a central purpose of Title VII is “to make persons whole for injuries suffered on account of unlawful employment discrimination.” Thus, the Court has held that this remedial language within Title VII grants the federal courts “broad equitable discretion” to take appropriate steps to remedy workplace discrimination. Certainly, a court exercising this broad statutory discretion could order relief not just for the Actor-plaintiff, but also for the Target who suffered adverse action. Moreover, as various courts have observed, reinstatement, where feasible, is the preferred equitable remedy under Title VII. Thus, courts should be particularly willing to order the reinstatement of an employee who was terminated due to a coworker’s protected activity.

Caselaw under the National Labor Relations Act (“NLRA”) provides further support for allowing an Actor-plaintiff to obtain relief for a third-party Target. The Supreme Court previously has indicated that jurisprudence developed under the NLRA can serve as a guide for interpreting remedies under Title VII as well. Under the NLRA, supervisory employees are not deemed “employees” entitled to protection under the statute. Yet where an employer has terminated a supervisory employee in retaliation for a family member’s protected union

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170 Id.


172 Franks v. Bowen Transp. Co., Inc., 424 U.S. 747, 763 (1951) (citations omitted); see also id. (examining legislative history of Title VII and finding “emphatic confirmation that federal courts are empowered to fashion such relief as the particular circumstances of a case may require to effect restitution”); see also Brief of United States as Amicus Curiae on Petition for Writ of Certiorari, Thompson v. N. Am. Stainless LP, 2010 WL 2101919, at *1, *12 (May 25, 2010) (No. 09-291) (citations omitted) (“[If] Regalado had brought such a suit and established a violation, the district court could have used its broad equitable power to fashion an appropriate remedy, which could have included recompense for [Thompson]”).

173 See, e.g., Valentin-Almeyda v. Municipality of Aguadilla, 447 F.3d 85, 105 (1st Cir. 2006) (citation omitted); Bruso v. United Airlines, Inc., 239 F.3d 848, 861 (7th Cir. 2001) (citations omitted); Caudle v. Bristow Optical Co., Inc., 224 F.3d 1014, 1020 (9th Cir. 2000) (citation omitted); see also Long, supra note 7, at 981 (citation omitted).


175 29 U.S.C. § 152(3).
activities, the courts consistently have supported the NLRB’s decision to award reinstatement and/or other appropriate relief to this supervisory employee.\footnote{See Kenrich Petrochemicals, Inc. v. NLRB, 907 F.2d 400, 407 (3rd Cir.1990) (citations omitted) (listing cases in which courts have recognized the power of the National Labor Relations Board to order the reinstatement of a supervisor discharged due to the protected activities of non-supervisory employees).} As one court observed, “[w]hile it is uncontestably true that the Act does not protect a supervisor from being discharged for engaging in concerted activity, this does not deprive the [National Labor Relations] Board of the authority to order the reinstatement of a supervisor whose firing resulted not from her own pro-union conduct, but from the employer’s efforts to thwart the exercise of section 7 rights by protected rank-and-file employees.”\footnote{Kenrich, supra note 176, at 406.} In other words, even though supervisory employees – like the Target in a third-party retaliation case – would not otherwise be protected under the relevant statute, this employee can receive relief from the court.

Providing relief to the otherwise-unprotected supervisory employee in the NLRA context serves a similar purpose to allowing an Actor to obtain relief for a Target in a third-party retaliation case. In the NLRA context, one court observed that reinstating the supervisory employee would protect the rights of covered, non-supervisory employees “by assuring them that they need not fear that the exercise of their rights will give the company a license to inflict harm on their family.”\footnote{Id. at 409.} The same argument could apply under Title VII’s retaliation provision: Allowing the restatement of the Target in a suit by an Actor ensures other employees that their employer will not have free reign to respond to their protected activity actions by retaliating against friends and family in the workplace.

During the oral argument in Thompson, Justice Breyer challenged the idea that Regalado (the Actor) could not obtain relief for Thompson (the Target) via her own retaliation suit:

Why couldn’t she bring this suit? And she says, I was discriminated against because they did A, B, C, D to him, and the remedy is, cure the way in which I was discriminated against. And to cure that way, you would have to make the man whole in respect to those elements that we're discriminating against. Do you give him back pay? Do you restore him? You do everything you would normally have to do because otherwise, she is suffering the kind of injury, though it was to him, that amounts to discrimination for opposing a practice. What's wrong with that theory?\footnote{Thomson Oral Argument Transcript, supra note 11, at 12-13.}
Drawing analogies to trust law, Breyer inquired, “if you’re a trustee, you certainly can sue to get the beneficiary put back. There are dozens of cases where you can sue to get somebody else paid back money as – and why isn’t this one of them?”

Thus, there is a strong basis for finding that an Actor who brings a third-party retaliation claim could obtain relief for a Target. However, an additional layer of protection exists for Targets in these cases: If a Target is not satisfied with the relief that an Actor obtains in his or her third-party retaliation suit, the Target in most cases may be able to bring a retaliation suit of his or her own. As noted above, most Targets not only will experience adverse treatment in the workplace because of some “passive” relationship to the protected activity of a coworker. Rather, most Targets will have played some active role in this coworker’s protected activity, whether by assisting in the filing of the Actor’s discrimination charge or participating in the investigation or litigation of that charge. As the Sixth Circuit recently noted in its decision in Thompson, “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.”

The Supreme Court’s decision in Crawford v. Metro. Gov’t of Nashville and Davidson County, Tenn., supports the ability of a third party to bring his or her own “direct” retaliation suit in these circumstances. Crawford established a fairly loose standard regarding what will constitute a “protected activity” for purposes of Section 704(a), stating that “opposition” for purposes of Section 704(a) need not involve active and consistent, “instigating” behavior by an employee. Rather, an employee may “oppose” discrimination for purposes of Section 704(a) merely by participating in an employer’s internal investigation of discrimination allegations, such as by responding to questions regarding such alleged workplace discrimination. While the Court’s willingness to extend this holding into other scenarios of passive opposition or participation remains unclear, Crawford indicates some flexibility on the part of the Court in its interpretation regarding what constitutes “protected activity” for purposes of Title VII.

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180 See id. at 14; see also George Gleason Bogert et al., BOGERT’S TRUSTS AND TRUSTEES, § 869 (citations omitted) (“Although the beneficiary is adversely affected by such acts of a third person, no cause of action inures to him on that account. The right to sue in the ordinary case vests in the trustee as representative”).

181 See Thompson, supra note 16, at 811.


183 Id. at 851-52 (citations omitted).

184 See id. at 851-53.

185 See Watson, supra note 7, at 221 n.46.

186 But see Long, supra note 7, at 953-54 (citations omitted) (discussing challenges of asserting retaliation under Title VII’s “opposition clause”). Accordingly, Professor Long argues for a broader reading of Section 704(a)’s participation clause, proposing that “[t]he concept of assistance should not be limited to situations in which an employee provides active assistance in an investigation…,” id. at 986, and that “subtle words of encouragement and assurances of support” should qualify as assistance for purposes of Title VII. Id. at 987.
Indeed, under the facts of Thompson itself, Thompson may have been able to bring his own, “direct” retaliation claim. Thompson apparently “helped [Regalado] synthesize her experiences for the EEOC investigator and shared his perspective when the investigator questioned him about [Regalado’s] complaint.” He also sent a memo to both he and Regalado’s supervisors, in which he appeared to have included complaints regarding the alleged discrimination that Regalado was experiencing at work. In this light, Thompson’s failure to bring a “direct” retaliation claim – one based upon his own protected activity – seems curious to say the least. Thus, the scenario alleged in Thompson – where an individual with close ties to a victim of workplace discrimination had no involvement in the discrimination allegations of his or her spouse or parent or (as here) fiancée – may in fact be relatively rare. Rather than representing a pervasive gap in the coverage of Title VII, perhaps Thompson stemmed from little more than sloppy pleading by Thompson’s attorney.

IV. THE FUTURE OF THIRD-PARTY RETALIATION CLAIMS IN A POST-THOMPSON WORLD

While the Supreme Court has provided lower courts with some much-needed guidance regarding the viability of the third-party retaliation doctrine generally, the Court in Thompson failed to fully articulate the scope of this doctrine, and failed to place proper limits on this doctrine. To be sure, the Court provided additional protection to employees who wish to assert their rights under federal anti-discrimination laws – a laudable and important goal. Its decision properly closed a potential loophole in previously-existing federal anti-retaliation jurisprudence, making clear that just as employers cannot take action directly against an employee for engaging in protected activity, so too are employers barred from getting back at an employee by harming those in the workplace with whom that employee is close.

Yet the Court failed to balance these important protections for employees against the legitimate concerns of employers – particularly, employers’ fears that any adverse action taken in the wake of this decision, against any employee in the workplace, could create exposure for liability under the third-party retaliation doctrine, even if the Target of the adverse action never personally has engaged in protected activity, and even if he or she has a fairly attenuated relationship with a coworker who has engaged in protected activity.


188 See id. (citation omitted).

189 In addition, depending on the facts of a particular case and/or on the laws in the relevant jurisdiction, there might be other claims that a Target could bring besides a Title VII retaliation claim, such as a common law wrongful discharge claim.

190 Indeed, the Court has been more broadly criticized for its failure to provide sufficient guidance to lower courts in a broad range of decisions. See Adam Liptak, Justice Are Long on Words but Short on Guidance, NEW YORK TIMES, Nov. 17, 2010, at A1.
Much of the concern that employers might harbor in this respect stems from the gaping hole in the Supreme Court’s decision regarding how lower courts should apply this analysis. While this Article does not advocate that the Court should have articulated some comprehensive list of the types of claims that will qualify for protection under the third-party retaliation doctrine, it does assert that lower courts should be given a more detailed framework regarding the factors to be used in conducting this analysis (i.e., the NIED bystander factors). Moreover, this Article asserts that the Court could have tamped down some anxiety among employers about exposure in this area by limiting the class of plaintiffs who are able to sue (i.e., by only allowing Actors to sue). The Court’s failure to adopt either of these approaches may have significant implications for future third-party retaliation cases, as well as for employers more generally.

First, as noted above, while the Court made clear that Title VII will protect against third-party retaliation in some circumstances, the Court was surprisingly vague regarding what those circumstances might be. While the Court outlined the outer bounds of this decision, specifying that the doctrine almost always will cover retaliation against the coworker-spouse of an employee who engages in protected activity and will not likely cover a reprisal on a mere workplace friend, the decision left open a wide gulf of situations that might fall between these two extremes. As one attorney-blogger observed in the wake of this decision, the doctrine covers “[s]ome people sometimes and other people other times. Sorry employers, it depends on the circumstances.” In the words of another observer: “The details of how this all works? The practical, decision-making paradigm for employers dealing in daily in the trenches with these issues? It’s anybody’s guess.” While the criticisms of internet bloggers may represent little more than the unregulated (and often self-serving) rants of those who disagree with the Court’s reasoning, the underlying premise of these complaints has significant merit: Instead of fully resolving the ambiguity that for years has plagued courts faced with third-party retaliation claims, the Court’s decision merely resolved one small part of this complex inquiry.

This vagueness in the Court’s opinion is not without consequences. As previously noted, retaliation claims already swamp other Title VII complaints with respect to filings with the EEOC, and the prevalence of these claims seems to be on the rise. While third-party retaliation claims likely make up a small fraction of retaliation claims generally (precise statistics on this point not being readily available), third-party retaliation claims likely will increase in the wake of this decision, due to the absence of clear guidance from the Court regarding the outer

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191 See Thompson, supra note 2, at 4.
192 Philip Miles, SCOTUS Decides “Fire the Fiancé” 3rd Party Retaliation, LAWFFICE SPACE EMPLOYMENT LAW BLOG (Jan. 24, 2011), www.lawfficespace.com (last visited ___);
194 See supra notes 8-11 and accompanying text.
195 See id.
boundaries of this doctrine. Indeed, without any clear limits here, an employer may face liability (or, at a minimum, costly litigation) for third-party retaliation upon taking adverse action against any employee with the slightest of connection to a coworker who previously has engaged in protected activity. And, given that the Supreme Court has made the viability of this claim a factual issue — one that will “depend on the particular circumstances” of a case employers will be hard-pressed to resolve even the most seemingly-preposterous of third-party claims via an early motion to dismiss. Rather, employers will have to litigate these claims at least through summary judgment, an expensive and time-consuming undertaking for both employers and the courts. In other words, even if viable third-party retaliation claims make up a small minority of courts’ dockets going forward, employers may be forced to expend vast resources finding off meritless claims of this nature, simply because the Court declined to more clearly define the scope of this doctrine.

Finally, perhaps the most interesting potential effect of the Court’s decision in this case involves its potential to impact employee privacy in a significant way. As explained in detail above, the Court’s decision in Thompson means that employers may be liable for taking adverse action against an employee if the employee has a sufficiently close relationship with a coworker who has engaged in protected activity. As previously discussed, the reality is that many prudent and risk-averse employers want to guard against even the potential for liability before taking adverse action against an employee. Even where an employer has perfectly legitimate reasons for firing an employee, the employer likely will want to know — prior to taking adverse action — what potential claims the employee can bring in the wake of his or her termination. Rather than evidencing some “sinister” motive, this stance merely reflects the reality that many employees will protest a termination decision, that such protests often take the form of a lawsuit, and that even where such suits are ultimately found to lack merit, they may cost an employer tens of thousands of dollars to defend. As Justice Alito observed during the oral arguments in Thompson (despite ultimately signing on to the Majority’s decision):

Put yourself in the — in the shoes of an employer, and you… want to take adverse employment action against employee A. You think you have good grounds for doing that, but you want — before you do it, you want to know whether you’re potentially opening yourself up to a retaliation claim. Now, what is the employer supposed to do then? They say… we need to survey everybody

196 See Amy Joseph Pedersen, Supreme Court Holds Title VII Can Cover Third Party Retaliation Claims, STOEL RIVES WORLD OF EMPLOYMENT (Jan. 24, 2011), http://www.stoelrivesworldofemployment.com/tags/thompson-v-north-american-stai/, Jan. 24, 2011 (last visited ___) (observing that “[e]mployers probably didn’t need another reminder that the potential claims they face only are limited by the imagination of plaintiffs’ attorneys).

197 Thompson, supra note 2, at 4 (citation and internal quotation omitted).

198 See FED. R. CIV. P. 56.

199 See supra note 111 and accompanying text (describing the exorbitant cost of litigating Title VII claims).

200 See id.
who is engaged in protected conduct, and now we need to see whether this person who we’re thinking of taking adverse employment action against has a… ‘close relationship’ with any of those people.201

As Justice Alito’s comments imply, a cautious employer may seek to minimize its liability before firing an employee (or at least get a handle on its potential exposure) by thoroughly exploring the relationships among its employees. While an employee’s membership in other protected categories typically will be fairly obvious – in most cases, the employer will know an employee’s race, gender, age, and/or possibly disability status – discovering an employee’s relationships with coworkers will take much more work. Employers will want to know whether an employee is married to, engaged to, or even dating another employee; they will want to know whether the employee is the parent, child, or perhaps more distant relative of another employee; and they may even want to know whether the employee is close friends with other employees, and may want details regarding the extent of those friendships.202 At a time when employees increasingly are concerned about preventing unwarranted intrusions by employers into their private lives, a decision like this could lead to the opposite result.203

To be sure, as counsel for Thompson pointed out during oral arguments in this case, an employer should not be liable for third-party retaliation under Section 704(a) if the employer was not aware of the Target-employee’s relationship with a coworker-Actor.204 In that vein, one could argue that employer need not – and perhaps should not – make these types of inquiries prior to taking adverse action against an employee. However, particularly in a large company, it may be difficult to keep track of whether someone in management might have known about the Target-employee’s relationship with a coworker-Actor, such that this knowledge could be attributed to the decisionmaker in the Target’s adverse action.205 Moreover, the mere fact that an employee’s claim ultimately might fail because an employer can show that it had no knowledge of the Target’s relationship with the co-worker-Actor will not prevent the employer from having

201 Thompson Oral Argument Transcript, supra note 11, at 17-18.

202 See Doran, supra note 1 93.

203 See id.

204 See Thompson Oral Argument Transcript, supra note 11, at 19 (“I think if the employer doesn’t know about the relationship, any allegation like the allegation we have in this case simply isn’t going to be plausible. It isn’t going to be a plausible contention that there is a relationship between one employee’s protected activity and an adverse action visited on the plaintiff”).

205 See E.E.O.C. v. BCI Coca-Cola Bottling Co. of Los Angeles, 450 F.3d 476, 484-85 (10th Cir. 2006) (citation omitted) (describing “cat’s paw” theory of discrimination and/or retaliation as “a situation in which a biased subordinate, who lacks decisionmaking power, uses the formal decisionmaker as a dupe in a deliberate scheme to trigger a discriminatory employment action”); see also id. (collecting cases applying “cat’s paw” theory to Title VII claims).
to expend tremendous resources (financial and otherwise) to establish this point and obtain dismissal of the claim. 206

Finally, a further concern is not just what employers may ask in an effort to limit their exposure in these cases, but also how employers may try to gather this information. Employers have become increasingly adept at using technology to gather information about employees, from using internet sources like Google or Facebook to monitoring employees’ use of employer-provided cell phones and computers. 207 Faced with uncertainty regarding the scope of the third-party retaliation doctrine, employers understandably (and perhaps advisably) may step up this monitoring: If it is unclear whether co-workers who are mere “Facebook friends” could serve as Actor and Target in a successful third-party retaliation claim, then an employer may want to cover its bases by reviewing all of the Facebook friends of its employees. If the Court hasn’t indicated the level of contact between an Actor and Target necessary to support a third-party retaliation claim, then a cautious employer might want to know the names of all of the co-workers who an employee texted in some given period before the employer considers firing that employee. Such information-gathering measures by employers might seem extreme, but many employers – faced with uncertainty regarding their exposure under this evolving third-party retaliation doctrine – might well choose to take such proactive steps in order to minimize their potential liability.

The point is not that the Supreme Court “got it wrong” in Thompson. To the contrary, on the essential question – whether third-party retaliation should be barred under Title VII – the Supreme Court got it just right. Given that Title VII bars employers from taking adverse action directly against an employee who engages in protected activity, employers should not be able to circumvent this prohibition by taking action against a relative or friend of that employee. Yet the Supreme Court fell short here in two respects. First, by refusing to give lower courts more detailed criteria regarding when the third-party retaliation doctrine will apply – by merely outlining the outside parameters of the doctrine while failing to give courts the tools to resolve the vast gulf of cases in between – the Court did little to eliminate the inconsistency and confusion that currently pervades this area of the law. Second, by making this claim available not just to those employees who have engaged in protected activity but also to others who merely might be associated with such employees, the Court missed an opportunity to balance the important protections that it was providing to employees in this case against the realities that employers face on the ground when making difficult but important workplace decisions.

206 See supra notes 198-99 and accompanying text (noting that courts likely will not resolve these claims prior to summary judgment).

207 See Jill Schachner Chanen, The Boss is Watching, ABA JOURNAL, Jan. 2008, at 49; see also Andrea Coombes, Privacy at Work? Don’t Count on It: Employers are Tracking Email, Marketwatch, July 1, 2005, http://www.marketwatch.com/story/e-mail-internet-privacy-at-work-dont-count-on-it (last visited ___).