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## *VOIR DIRE*



### The Supreme Court's Open-Ended Protection Against Third-Party Retaliation

JESSICA K. FINK\*

For many years, federal courts have struggled with whether to recognize claims of “third-party retaliation” under Title VII of the Civil Rights Act of 1964.<sup>1</sup> Third-party retaliation claims arise when one employee engages in some activity protected under Title VII and the employer takes adverse action not against that employee but rather against another employee with whom the original worker has some relationship. For example, an employee might file a discrimination charge against her employer and the employer might retaliate against the employee’s husband, who works for the same employer. Or, an employee might participate in a workplace discrimination investigation and the employer might demote the employee’s sibling, who works for the same employer.

Until quite recently, the federal courts were split regarding the extent to which they should recognize these claims as falling within Title VII’s prohibitions. Some of the confusion regarding the viability of the third-party retaliation doctrine stemmed from the language of Title VII

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1. 42 U.S.C. §§ 2000e-1 to -17 (2006 & Supp. 2009) (“Title VII”), amended by Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1071, 1072-74 (codified as amended at 42 U.S.C. § 1981a (2006)).

itself. By its very terms, Title VII bars employers from “retaliating” against employees who have engaged in activities protected under Title VII. However, the anti-retaliation language within Title VII seems to bar only “direct” retaliation by employers. Specifically, Section 704 of Title VII states:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because *he* has opposed any practice made an unlawful employment practice by this subchapter, or because *he* has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.<sup>2</sup>

Many courts previously interpreted this language—particularly the term “he” within this provision—to mean that the individual subject to adverse action from an employer must be the *same person* who engaged in some protected activity.<sup>3</sup> As one court observed, “it is hard to imagine a clearer way of specifying that the individual who was discriminated against must also be the individual who engaged in protected activity.”<sup>4</sup> While some courts acknowledged that this narrow reading of Section 704 could stymie the ability of certain plaintiffs to seek relief in the wake of indirect retaliation by their employers,<sup>5</sup> these courts felt constrained by what they saw as Congress’s stated intent with respect to the scope of this statutory provision.<sup>6</sup> Thus, until recently, every federal court to rule on

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2. See *id.* § 2000e-3(a) (emphasis added).

3. 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 VII nor necessary to protect third parties, such as spouses or significant others, from retaliation.”); see also Alex B. Long, *The Troublemaker’s Friend: Retaliation Against Third Parties and the Right of Association in the Workplace*, 59 FLA. L. REV. 931, 949–50 (2007) (“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.” (internal citation omitted)).

4. *Fogelman v. Mercy Hosp., Inc.*, 283 F.3d 561, 568 (3d Cir. 2002) (refusing to allow a third-party retaliation claim under comparable retaliation provisions within the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the state antidiscrimination law). *But see* *EEOC v. Nalbandian Sales, Inc.*, 36 F. Supp. 2d 1206, 1209–11 (E.D. Cal. 1998) (characterizing as “ambiguous” whether Title VII’s retaliation provision covers third-party retaliation).

5. See, e.g., *EEOC v. Wal-Mart Stores, Inc.*, 576 F. Supp. 2d 1240, 1246 (D.N.M. 2008); see also *Fogelman*, 283 F.3d at 568–69.

6. See *Fogelman*, 283 F.3d at 564 (“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.”); see also *Thompson v. N. Am. Stainless, LP*, 567 F.3d 804, 816 (6th Cir. 2009) (“[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.”); *EEOC v. Bojangles Rest., Inc.*, 284 F. Supp. 2d 320, 327 (M.D.N.C. 2003) (“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.” (internal citation omitted)).

this issue held that third-party retaliation claims fell outside the scope of Title VII's prohibitions.<sup>7</sup>

In January 2010, the Supreme Court finally had the opportunity to express its view regarding the viability and scope of the third-party retaliation doctrine. In *Thompson v. North American Stainless, LP*, the Court contradicted the federal appellate courts and unanimously held that Title VII prohibits employers from engaging in third-party retaliation.<sup>8</sup> In many respects, *Thompson* represented a rather straightforward example of alleged third-party retaliation by an employer. The case arose when Eric Thompson, who, along with his then-fiancé, Miriam Regalado, worked for the defendant North American Stainless, LP (“North American”), was terminated shortly after Regalado filed a discrimination charge against North American.<sup>9</sup> Thompson subsequently sued North American, claiming that the company had terminated him in retaliation for Regalado’s protected activity.<sup>10</sup> Notably, the *sole* basis for Thompson’s retaliation claim was Regalado’s discrimination claim: Nowhere in his complaint did Thompson allege that he personally had engaged in *any* protected activity, such as assisting Regalado in filing her discrimination charge or otherwise opposing North American’s alleged treatment of Regalado.<sup>11</sup> Instead, Thompson explicitly alleged that his “relationship to Miriam [Regalado] was the sole motivating factor in his termination.”<sup>12</sup>

The district court granted summary judgment to North American, holding that Title VII did not permit third-party retaliation claims.<sup>13</sup> The Sixth Circuit ultimately agreed with this view,<sup>14</sup> and Thompson appealed

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7. See *Thompson*, 567 F.3d at 811 (“In sum, no circuit court of appeals has held that Title VII creates a claim for third-party retaliation in circumstances where the plaintiff has not engaged personally in any protected activity.”); see also Lawrence L. Lee & Brandon D. Saxon, *The Supreme Court’s 2010 Upcoming Employment Law Docket*, 51 MUN. LAW. MAG., Sept./Oct. 2010, at 24, 26. While the Sixth Circuit Court of Appeals seemed to permit consideration of a third-party retaliation claim in *EEOC v. Ohio Edison Co.*, 7 F.3d 541 (6th Cir.1993), it subsequently characterized as dicta the relevant portion of that decision and distinguished the facts of that case from those involved in a true third-party retaliation situation. *Thompson*, 567 F.3d at 809.

8. 131 S. Ct. 863, 868 (2011).

9. *Thompson*, 567 F.3d at 806.

10. *Id.*

11. *Id.* at 807.

12. *Id.* at 808 (emphasis removed); see also *id.* (observing that Thompson’s “Statement of the Issue” and “Statement of Facts” on appeal made clear that Thompson’s retaliation claim was based upon his fiancée’s protected activity, as opposed to any activity in which he himself had engaged).

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

14. *Thompson*, 567 F.3d at 805. While a three-judge panel of the Sixth Circuit initially reversed the district court, holding that Thompson could pursue his claim against North American, see *Thompson v. N. Am. Stainless, LP*, 520 F.3d 644, 644 (6th Cir. 2007), the full Sixth Circuit, hearing the case en banc, ultimately reached the opposite conclusion, determining that only those individuals who personally engage in protected activity can assert retaliation claims under Title VII. *Thompson*, 567 F.3d at 805–06.

to the Supreme Court. Upon its consideration of Thompson's claim, the Court adopted a distinctly different view than that ultimately adhered to by the lower courts here, finding that Thompson could allege a third-party retaliation claim based upon Regalado's protected activity.<sup>15</sup>

In its opinion, the Court relied in large part on its previous decision in *Burlington Northern & Santa Fe Railway Co. v. White*, in which it had expanded its view of what would constitute an "adverse action" for purposes of Title VII.<sup>16</sup> In any retaliation case, the plaintiff must establish (i) that he or she engaged in some "protected activity" for Title VII purposes, 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.<sup>17</sup> In *Burlington Northern*, the Court focused on the "adverse action" prong, holding that actionable retaliation under Title VII was not limited to employment-related activities or to those affecting the terms and conditions of employment.<sup>18</sup> Rather, according to the Court, Title VII's retaliation provision would bar those retaliatory actions that "a reasonable employee would . . . [find] materially adverse," meaning that conduct which "might . . . dissuade[] a reasonable worker from making or supporting a charge of discrimination."<sup>19</sup> Applying this analysis to Thompson's claim, the Court implied that it might find unlawful retaliation *whenever* an employer engages in conduct that reasonably might change an employee's mind about engaging in protected activity—regardless of whether that employer's conduct was directed at the employee who would have engaged in protected activity or at their coworker.<sup>20</sup>

Thus, the Court made clear in the *Thompson* decision that Title VII does prohibit more than just direct retaliation by an employer, but also indirect, third-party retaliation. Yet while the Court acknowledged the basic viability of the third-party retaliation doctrine, it failed to establish any meaningful boundaries with respect to the scope of this doctrine. *Thompson* makes clear that an employer cannot retaliate against the fiancé of an employee who engages in protected activity, but what about protection for those with more distant relationships, such as the girlfriend, distant cousin, or lunchroom buddy of the employee who has engaged in protected activity? If one employee participates in a discrimination investigation at work and the employer takes adverse

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15. *Thompson v. N. Am. Stainless, LP*, 131 S. Ct. 863, 869–70 (2011).

16. 548 U.S. 53, 67–68 (2006).

17. *Fogelman v. Mercy Hosp., Inc.*, 283 F.3d 561, 567–68 (3d Cir. 2002); *Little v. Windermere Relocation, Inc.*, 301 F.3d 958, 969 (9th Cir. 2002).

18. 548 U.S. at 67–68.

19. *Id.* at 68.

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

action against one of these more distantly related employees, does Title VII provide a federal cause of action? What are the limits of this third-party retaliation doctrine?

In *Thompson*, the Court expressly declined to establish such contours by “identify[ing] a fixed class of relationships for which third-party reprisals are unlawful” and noted that lower courts should examine the “particular circumstances” in any given case to determine whether to recognize a claim of third-party retaliation.<sup>21</sup> In this respect, the Court left it almost entirely to the lower courts to determine which types of relationships will or will not support a third-party retaliation claim. While such open-endedness undoubtedly provides the courts with greater flexibility to address each case of alleged third-party retaliation in its particular facts, this lack of more specific guidance by the Supreme Court not only might lead to a lack of uniformity in how various jurisdictions apply the third-party retaliation doctrine, but also might lead to tremendous uncertainty among both employers and employees regarding the extent of the protections provided by Title VII.<sup>22</sup>

In addition to recognizing the viability of third-party retaliation claims in *Thompson*, the Court addressed an additional issue regarding the practical operation of the third-party retaliation doctrine: *which* individual within a workplace relationship should be permitted to bring a third-party retaliation claim. Should these claims be brought by the individual who engaged in the protected activity but did not personally suffer any adverse action? Should these claims be brought by the individuals who received adverse action, even though these individuals did not engage in protected activity? Or should either party be permitted to sue?

By its terms, Title VII permits a person “claiming to be aggrieved” to bring a civil action.<sup>23</sup> North American argued that this provision should be interpreted to allow only the employee who engaged in protected activity (in this case, Regalado) to sue.<sup>24</sup> 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 statute’s “zone of interests.”<sup>25</sup> Under this zone of interests analysis, the Court would permit a plaintiff to sue so long as the interests she sought to protect in the suit were sufficiently related to the

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21. *Id.*

22. For a more detailed discussion of the implications of the Court’s failure to provide greater detail regarding the scope of the third-party retaliation doctrine, see Jessica Fink, *Protected by Association? The Supreme Court’s Incomplete Approach to Defining the Scope of the Third-Party Retaliation Doctrine*, 63 HASTINGS L.J. (forthcoming January 2012).

23. 42 U.S.C. § 2000e-5(b) (2006 & Supp. 2009).

24. *Thompson*, 131 S. Ct. at 869–70.

25. *Id.* at 870.

purposes of Title VII—regardless of whether she personally engaged in protected activity.<sup>26</sup> Accordingly, employers might face third-party retaliation claims either from an individual who engaged in protected activity and who claims that a colleague subsequently received adverse action as a result, *or* from an individual who claims to have been fired or demoted or otherwise harmed due to the protected activity of a coworker.

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*Thompson*'s ramifications remain to be seen. One likely result of this decision will be an increase in the number of third-party retaliation claims asserted against employers. For several years, retaliation claims generally have been on the rise.<sup>27</sup> Retaliation claims currently make up more than one-third of all charges filed with the Equal Employment Opportunity Commission,<sup>28</sup> and this increase shows no signs of abating. While it is unclear what percentage of these retaliation charges involves claims of third-party retaliation (as opposed to traditional, direct retaliation), the Court's decision in *Thompson* undoubtedly opens the door to an increase in this particular type of retaliation claim. Indeed, with the Court not only recognizing third-party retaliation claims but also leaving the doctrine's contours fairly undefined, employees and those who represent them likely will avail themselves of this evolving cause of action whenever faced with plausible factual circumstances.

Without a doubt, expanding the protection available to employees against employer retaliation will provide a new source of relief for employees who experience indirect employer retaliation. Yet this increase in protection is not without costs. Given the Court's direction that the viability of any particular third-party retaliation claim must "depend upon the particular circumstances" of that case,<sup>29</sup> these cases—even those involving fairly attenuated claims—will largely turn on their facts: The courts will have to scrutinize the facts of any allegation of third-party retaliation to determine, among other things, whether the relationship between the party who engaged in protected activity and the party who received adverse action is sufficient to support a third-party retaliation claim. Accordingly, with the facts playing such a key role, these third-party retaliation cases rarely will be resolved prior to summary judgment. Instead, the parties invariably will have to engage in

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26. *Id.* ("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 inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." (internal citations and quotation marks omitted)).

27. See *Charge Statistics: FY 1997 Through FY 2010*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited September 30, 2011).

28. See *id.*; see also Long, *supra* note 3, at 935.

29. *Thompson*, 131 S. Ct. at 868 (internal citation and quotation marks omitted).

expensive and time-consuming litigation in order to reach a conclusion in these cases.<sup>30</sup> Thus, even if successful third-party retaliation claims comprise a small minority of courts' dockets going forward, employers may be forced to expend vast resources fending off meritless claims of this nature, simply because the Court declined to more clearly define the scope of this doctrine. Whether the benefits of the Court recognizing the third-party retaliation doctrine in *Thompson* outweighs these potential costs remains to be seen.

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30. According to one recent study, it costs, on average, over \$120,000 to defend against a wrongful discharge claim, not including any costs of settling the claim or any judgment that a defendant may ultimately have to pay. See Brief for Chamber of Commerce of the United States of America as Amici Curiae Supporting Respondent, *Thompson v. N. Am. Stainless, LP*, 131 S. Ct. 863 (2011) (No. 09-291), 2010 WL 4339890 at \*1-2; see also Jessica Fink, *Unintended Consequences: How Antidiscrimination Litigation Increases Group Bias in Employer-Defendants*, 38 N.M. L. REV. 333, 340 (2008) ("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.").