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But I Love Him! Why the Sixth Circuit Erred In Thompson v. North American Stainless, LP by Denying a Third Party Retaliation Claim Under Title VII

Angela J. Schnell

American University Washington College of Law

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BUT I LOVE HIM!
WHY THE SIXTH CIRCUIT ERRED IN
THOMPSON V. NORTH AMERICAN
***STAINLESS, LP* BY DENYING A THIRD**
PARTY RETALIATION CLAIM UNDER
TITLE VII

ANGELA J. SCHNELL *

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* Publications Editor, *American University Journal of Gender, Social Policy & the Law*; J.D. Candidate, May 2011, American University, Washington College of Law; B.A. 2006, William Smith College. Thank you to Professor Teresa Godwin Phelps, Nicholas Federico, and Diane DeGroat, for their editorial guidance and advice; to my family—to my better half, for unconditionally believing in me; to my sisters, for inspiring me every day; and especially to my parents, Rene & Michael Marinucci, for instilling in me a strong faith and for always being proud of me, no matter how big or small the accomplishment—you are the reason for all of my successes.

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I. INTRODUCTION

Imagine: you and your fiancée worked at the same company for several years, during which time your fiancée was repeatedly passed over for promotions and raises because she was female.¹ You encourage your fiancée to file a Title VII lawsuit alleging sex discrimination, but shortly after the Equal Employment Opportunity Commission (“EEOC”) informs your employer of her lawsuit, you are fired.² Your employer claims you were fired for “performance reasons,” despite a recent favorable evaluation, but you feel the action was in retaliation for your fiancée’s lawsuit.³ Should you be able to sue your employer for retaliation in violation of Title VII?

The Supreme Court has long and repeatedly held that the primary purpose of Title VII of the Civil Rights Act of 1964 (“Civil Rights Act”) is to avoid employee harm, not to provide redress for injuries.⁴ The Court recently decided that the retaliation protection within Title VII furthers this

1. See *Thompson v. N. Am. Stainless, LP*, 435 F. Supp. 2d 633, 634 (E.D. Ky. 2006), *aff’d en banc*, 567 F.3d 804 (6th Cir. 2009) (showing the plaintiff and the Title VII complainant were engaged at the time the plaintiff filed his charge).

2. See Brief for Plaintiff-Appellant at 2, *Thompson*, 567 F.3d 804 (6th Cir. 2007) (No. 07-5040) (contending that plaintiff was fired less than two weeks after his fiancée filed a Title VII charge against their employer).

3. See *id.* (stating that plaintiff had received a favorable review and a raise three months prior to his termination).

4. See, e.g., *Faragher v. City of Boca Raton*, 524 U.S. 775, 805-06 (1998) (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975)) (permitting an employee to sue under Title VII when a supervisor, not the employer, created a hostile environment).

objective by protecting employees who voice concerns about workplace bias and discrimination.⁵ The Supreme Court, acknowledging that fear of retaliation is the principal reason why employees remain silent about workplace discrimination, expanded Title VII's anti-retaliation provision to protect employees other than the initiator of a complaint.⁶ It remains unclear, however, how far the anti-retaliation protection of Title VII extends as the circuit courts deal with the issue of third party protection.⁷

The Sixth Circuit examined this confusing issue of third party protection from retaliatory firing in *Thompson v. North American Stainless, LP*.⁸ Eric L. Thompson, with the support of the EEOC, filed a lawsuit in the U.S. District Court for the Eastern District of Kentucky alleging that North American Stainless fired him in retaliation for his then-fiancée's gender discrimination lawsuit against the company.⁹ The district court granted summary judgment to North American Stainless because the court, using a plain language interpretation of Title VII's anti-retaliation provision, found that Thompson lacked standing because he had not personally participated in statutorily protected activities.¹⁰ The U.S. Court of Appeals for the Sixth Circuit first reversed the district court's decision, holding that because Thompson was so closely associated with his fiancée, his firing in retaliation for her complaint violated the purposes of Title VII.¹¹ However, upon rehearing the case, the Sixth Circuit reversed its earlier decision and upheld the district court's grant of summary judgment, holding that there is not a third party retaliation cause of action under Title VII for individuals not personally engaged in protected activity.¹² Thus, the Sixth Circuit held

5. See *Crawford v. Metro. Gov't*, 129 S. Ct. 846, 852 (2009) (broadening the retaliation protection of Title VII to encompass an employee who spoke out about sexual harassment).

6. See *id.* at 852 (quoting Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 20 (2005)) (providing protection to an employee that answered employer questions about workplace harassment).

7. Compare *Wu v. Thomas*, 863 F.2d 1543, 1547 (11th Cir. 1989) (allowing a husband and the EEOC to seek redress for retaliation as part of the wife's gender discrimination charge against the University of Alabama), with *Holt v. JTM Indus., Inc.*, 89 F.3d 1224, 1227 (5th Cir. 1996) (ruling that a husband lacked standing to claim retaliation because he had not personally engaged in statutorily protected behavior when his wife filed a claim alleging age discrimination).

8. See 567 F.3d 804, 805 (6th Cir. 2009) (deciding whether the fiancé of a Title VII complainant can sue for retaliation).

9. See *Thompson v. N. Am. Stainless, LP*, 435 F. Supp. 2d 633, 634 (E.D. Ky. 2006), *aff'd en banc*, 567 F.3d 804 (6th Cir. 2009) (explaining that the plaintiff asked the court to extend Title VII retaliation protection to closely associated third parties).

10. See *id.* at 637 (holding that Title VII only protects the employee filing the complaint from retaliation).

11. See *Thompson v. N. Am. Stainless, LP*, 520 F.3d 644, 649-50 (6th Cir. 2008), *rev'd en banc*, 567 F.3d 804 (2009) (asserting that protecting closely associated third parties furthers the purpose of securing a non-discriminatory workplace).

12. See *Thompson*, 567 F.3d at 805 (affirming the district court's decision to

that because Thompson's retaliation claim was not based on his own behavior but on his fiancée's statutorily protected activity of filing a sex discrimination lawsuit against their employer, Thompson did not have a cause of action for retaliation under Title VII.¹³

This Note argues that the U.S. Court of Appeals for the Sixth Circuit erred in *Thompson* when it prohibited third party retaliation claims and that granting protection against third party retaliation supports the objectives of Title VII.¹⁴ Part II examines the interpretation of the anti-retaliation provisions by United States federal courts and the EEOC.¹⁵ Part III asserts that the U.S. Court of Appeals for the Sixth Circuit misinterpreted the statute when deciding *Thompson*.¹⁶ Part III further contends that in accordance with legislative intent, anti-retaliation protection should include closely associated third parties because negative employment repercussions for those who are so closely connected to complainants are similar to negative employment consequences for the complainants themselves.¹⁷ Part IV presents a policy argument that supports amending Title VII's anti-retaliation provision to include third party protection.¹⁸ Finally, Part V concludes that allowing closely associated third parties to bring retaliation claims against employers advances the true purposes of the anti-retaliation provision of Title VII, which are to eliminate fear of negative consequences when filing discrimination charges and to eradicate bias and discrimination from the workplace.¹⁹

narrowly interpret Title VII's anti-retaliation provision); *see also* Equal Opportunity Employment Act of 1972, 42 U.S.C. § 2000e-3(a) (2006) (protecting opposition to an unlawful employment practice; making a charge; testifying; assisting; and participating in any manner in an investigation, proceeding, or hearing in accordance with a Title VII claim); *Crawford v. Metro. Gov't*, 129 S. Ct. 846, 852 (2009) (holding that an employee is protected under Title VII's anti-retaliation provision if they have formally or informally opposed unlawful workplace practices).

13. *See Thompson*, 567 F.3d at 805-06 (maintaining that close association with a Title VII complainant is not enough to warrant protection).

14. *See id.* (disregarding the intent of the legislators and applying Title VII retaliation protection only to individuals engaged in statutorily protected behavior).

15. *See infra* Part II (highlighting how some circuits use the intent of Title VII to allow third party retaliation claims, while others follow the plain language to deny them).

16. *See infra* Part III.A (arguing that the anti-retaliation provision is ambiguous when interpreted based on its plain language and that courts should decide third party retaliation claims using the intent of Title VII).

17. *See infra* Part III.B (describing how denying protection to closely associated third parties prevents complainants from coming forward with claims due to fear of retaliation).

18. *See infra* Part IV (arguing that refusing closely associated third parties retaliation protection frustrates the purpose of Title VII by failing to fully protect complainants from negative consequences for filing claims).

19. *See infra* Part V (concluding that third party retaliation is a barrier to a non-discriminatory workplace).

II. BACKGROUND

A. *The Procedural Posture of Thompson*

In *Thompson v. N. Am. Stainless, LP*, Eric Thompson brought a Title VII suit against his former employer claiming that he was retaliated against for his then-fiancée's sex discrimination charge.²⁰ Thompson believed that he was not discharged for legitimate cause, but that he was fired in retaliation for his fiancée's lawsuit against the company that employed both him and his fiancée.²¹ The EEOC agreed with Thompson and granted him a Right to Sue Notice to sue North American Stainless under Title VII.²²

The district court, however, disagreed with Thompson and the EEOC and granted North American Stainless summary judgment because Thompson was not protected under Title VII.²³ The U.S. Court of Appeals for the Sixth Circuit's initial ruling in *Thompson* reversed the district court's decision and held that a person claiming retaliation need not be the one who engaged in the protected activity.²⁴ The Sixth Circuit found support for its ruling in the EEOC Compliance Manual's reading of Title VII's anti-retaliation provision.²⁵ The court also relied on its decision in *Johnson v. University of Cincinnati*, which used language from the Compliance Manual.²⁶

However, upon rehearing *en banc*, the Sixth Circuit found that summary judgment was properly granted by the district court because Title VII does not create a cause of action for retaliation when the individual claiming retaliation is not personally engaged in a protected activity.²⁷ The court

20. See 435 F. Supp. 2d 633, 634, 639-70 (E.D. Ky. 2006), *aff'd en banc*, 567 F.3d 804 (6th Cir. 2009) (refusing to decide on plaintiff's argument that his firing was in violation of Title VII's anti-retaliation provision because plaintiff did not have standing to bring the cause of action).

21. See Complaint for Damages Demand for Jury Trial at 2, *Thompson v. N. Am. Stainless, LP*, 435 F. Supp. 2d 633 (E.D. Ky. 2006) (No. 05-02) (alleging that the defendant's claim that the plaintiff was fired due to poor performance was pretext for retaliation).

22. See *id.* at 2-3 (showing that the EEOC determined there was cause to substantiate Thompson's retaliation claim).

23. See *Thompson*, 435 F. Supp. 2d at 639-40 (holding that because Thompson did not engage in protected activity he did not have a cause of action under Title VII).

24. See *Thompson v. N. Am. Stainless, LP*, 520 F.3d 644, 647 (6th Cir. 2008), *rev'd en banc*, 567 F.3d 804 (2009) (allowing Thompson to sue for retaliation under Title VII).

25. See *id.* (stating that, while not controlling, EEOC guidelines and interpretations are entitled to great deference).

26. See *id.* at 647-48 (quoting *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 580 (6th Cir. 2000)) (summarizing an EEOC Compliance Manual guideline that protects closely associated third parties from retaliation under Title VII).

27. See *Thompson v. N. Am. Stainless, LP*, 567 F.3d 804, 816 (6th Cir. 2009) (reasoning that because Thompson's fiancée solely filed a discrimination claim against

stated that the plain language of the anti-retaliation provision protects only a limited class of persons.²⁸ The court, therefore, rejected Thompson's anti-retaliation claim holding that being the fiancé of a complainant is not a statutorily protected behavior that receives retaliation protection under Title VII.²⁹

B. Title VII's Retaliation Protection

1. The Passage and Intent of Title VII

Congress passed Title VII as part of the Civil Rights Act in July of 1964.³⁰ Title VII protects an employee from discrimination based upon the individual's race, color, religion, sex, or national origin.³¹ President Lyndon Johnson stated that the Act's purpose was "to promote a more abiding commitment to freedom, a more constant pursuit of justice, and a deeper respect for human dignity."³² Courts have held that the Civil Rights Act intends to remove discriminatory barriers to employment in order to provide a more equal workplace.³³ Since the EEOC has had enforcement power, the Supreme Court has repeatedly referred to the agency's recommendations and Compliance Manual for guidance in deciding Title VII cases.³⁴

North American Stainless, only she personally engaged in statutorily protected behavior).

28. *See id.* at 807 (holding that the anti-retaliation provision protects only those that have filed a discrimination claim or personally opposed a discriminatory workplace practice).

29. *See id.* at 816 (holding that the only statutorily protected behaviors are personally opposing discriminatory practices or directly participating in a Title VII investigation).

30. *See* Civil Rights Act of 1964, 42 U.S.C. § 1971 (2006) (protecting employees from discrimination in employment, defined as refusing to hire, discharging, or segregating employees based upon their membership in a protected class).

31. *Id.* § 2000e-2.

32. *See* Lyndon B. Johnson, President, U.S., Radio and Television Remarks upon Signing the Civil Rights Bill (July 2, 1964), in PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: LYNDON B. JOHNSON, 1963-1964, VOL. II 842 (U.S. Gov't Printing Office 1965), available at <http://www.lbjlib.utexas.edu/Johnson/archives.hom/speeches.hom/640702.asp> (emphasizing the importance of civil rights legislation in making all U.S. citizens equal).

33. *See, e.g.,* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (striking down facially neutral employment tests that were discriminatory in practice because the purpose of Title VII is to promote hiring based on qualifications).

34. *See* Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-5(a) (2006) (necessitating a Right to Sue Notice from the EEOC before allowing Title VII claims to be brought in court); *see, e.g.,* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986) (using the EEOC definition of sexual harassment as a form of sex discrimination in deciding a harassment case under Title VII).

2. *An Explanation of Title VII's Anti-Retaliation Provision*

The anti-retaliation provision of Title VII provides that it shall be unlawful for an employer to discriminate against any individual because she has opposed a discriminatory employment practice or because she made a complaint or participated in the investigation of a complaint.³⁵ In January 2009, the Supreme Court held in *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee* that an employee's protection against retaliatory firing extended beyond official complaints made to the EEOC and included complaints made through internal workplace procedures.³⁶ The Court broadened the meaning of the word "oppose" in Title VII's anti-retaliation provision to include informal opposition, continuing the Court's trend of broadly interpreting Title VII.³⁷ Though the Supreme Court has extended the definition of "oppose" in *Crawford*, it has not yet determined whether Title VII's anti-retaliation protections reach closely associated third parties.³⁸

C. Interpreting Title VII's Anti-Retaliation Provision

1. Rules for Statutory Interpretation of Title VII

The Sixth Circuit's interpretation of Title VII's anti-retaliation provision in *Thompson* only protects the individual filing a Title VII discrimination charge and does not protect third parties that are closely associated to Title VII complainants; here, *Thompson's* fiancée was protected because she was the Title VII complainant, but *Thompson* was not protected because he had not personally engaged in protected behavior.³⁹ The Supreme Court has held that in the absence of a statutory definition, courts are to interpret

35. See § 2000e-3(a) (providing a cause of action for retaliation against an employee for her involvement in a Title VII claim).

36. See 129 S. Ct. 846, 852 (2009) (allowing an employee to seek redress for being fired after speaking out about sexual harassment during an employer investigation, even though she had not personally filed a Title VII discrimination claim).

37. See *id.* at 851 (holding that an individual who internally complains about discriminatory practices is entitled to the same protection as if she had officially complained to the EEOC); see, e.g., *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) (expanding the interpretation of Title VII to hold employers liable for supervisor harassment even if the harassment does not result in a tangible job consequence).

38. See Alex. B. Long, *The Troublemaker's Friend: Retaliation Against Third Parties and the Right of Association in the Workplace*, 59 FLA. L. REV. 931, 974 (2007) (arguing that Title VII's anti-retaliation provision should be construed broadly in accordance with other Title VII interpretations).

39. See *Thompson v. N. Am. Stainless, LP*, 567 F.3d 804, 816 (6th Cir. 2009) (finding no cause of action for the retaliatory firing of a Title VII complainant's fiancée).

a statutory term in accordance with its plain language meaning.⁴⁰ Courts have preferred using the ordinary meaning of words because judges presume that unless there is contrary legislative intent, the plain meaning of a word is the meaning the legislature meant to denote.⁴¹ In addition to plain meaning, courts look to the legislative history of statutes to determine intent.⁴² Specifically, when interpreting Title VII claims, the courts have used EEOC guidelines for direction.⁴³

2. The EEOC's Interpretation of Title VII's Anti-Retaliation Provision

Congress tasked the EEOC with interpreting and enforcing workplace anti-discrimination laws.⁴⁴ In order to sue one's employer under Title VII, a potential plaintiff must first bring her claim to the EEOC for investigation and the EEOC must then inform the employer of the complaint.⁴⁵ If the EEOC determines that there is reasonable cause for the charge, it will try to rectify the situation before the charge is filed in court.⁴⁶ Only when the employer and the employee cannot reach an agreement will the EEOC issue a Right to Sue Notice, which will give the complainant the opportunity to file his or her claim in federal district court.⁴⁷

The EEOC allows a third party to file a retaliation charge when the third party is so closely related to the Title VII complainant that fear of a retaliatory action against the third party would discourage the complainant from filing a claim.⁴⁸ In *Thompson*, the EEOC determined that Thompson

40. *See, e.g.*, *F.D.I.C. v. Meyer*, 510 U.S. 471, 476 (1994) (interpreting "cognizable" according to its ordinary meaning because it is not otherwise defined in the statute).

41. *See, e.g.*, *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 75 (1982) (holding that, absent clearly expressed legislative intent to the contrary, the plain language of Title VII did not allow plaintiffs a cause of action for discrimination due to a bona fide seniority or merit system).

42. *See, e.g.*, *United States v. Bryan*, 339 U.S. 323, 340 (1950) (referring to the legislative history of 2 U.S.C. § 192 in determining that the plain meaning of the statute contradicted Congress' intent).

43. *See, e.g.*, *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986) (quoting *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976)) (calling the EEOC guidelines a "bod[y] of experience" that should be used to assist courts in deciding Title VII cases).

44. *See* Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-5(a) (2006) (delegating to the EEOC enforcement power to prevent any employer from engaging in an unlawful employment practice).

45. *See* § 2000e-5(b) (stating that when investigating a charge, the EEOC must notify the employer within ten days).

46. *See id.* (instructing the EEOC to use "informal methods of conference, conciliation, and persuasion" to remedy a Title VII charge they find to be credible prior to seeking legal remedies).

47. *See* § 2000e-5(f)(1) (stating that if the EEOC and the respondent cannot reach a conciliation within thirty days, the complainant or the EEOC may bring a civil action).

48. *See* EQUAL EMPLOYMENT OPPORTUNITY COMM'N, EEOC COMPL. MAN., § 8-II B(3)c (1998), available at <http://www.eeoc.gov/policy/docs/retal.html>

was sufficiently associated with his fiancée and that he had been retaliated against under its interpretation of Title VII's anti-retaliation provision.⁴⁹ Thus, according to the EEOC's interpretation of Title VII's anti-retaliation provision, the significant other of a Title VII complainant is protected from retaliatory action.⁵⁰

3. The Test to Determine Whether an Administrative Agency's Interpretation of a Statute Is Permissible

In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Supreme Court held that when a statute is unclear, the courts should use the administrative agency's interpretation of the statute unless (1) the statute unambiguously forbids the agency's interpretation; or (2) the agency's interpretation exceeds permissible bounds for other reasons.⁵¹ For example, in the case *Barnhart v. Walton*, the Court used this test to determine that the Social Security Administration's construction of the term "inability" was permissible under the statute.⁵²

4. Application of the McDonnell Douglas Burden Shifting Test to Evaluate the Merits of Title VII Claims

In *McDonnell Douglas Corporation v. Green*, the Supreme Court established a test for evaluating whether a complainant has a retaliation claim under Title VII.⁵³ The first prong of the test requires the plaintiff to establish a prima facie case of retaliation.⁵⁴ Most third party retaliation claims fail on the first prong of the *McDonnell Douglas* test because they

[hereinafter EEOC COMPL. MAN.] (stating that Title VII prohibits retaliation that would discourage the complainant from pursuing her rights).

49. See *Thompson v. N. Am. Stainless, LP*, 567 F.3d 804, 808 (6th Cir. 2009) (stating that Thompson filed and argued his Title VII retaliation claim with the support of the EEOC).

50. See Brief of the United States Equal Employment Opportunity Commission as Amicus Curiae Supporting Respondents, *Thompson v. N. Am. Stainless, LP*, 567 F.3d 804 (6th Cir. 2009) (No. 07-5040), 2007 WL 2477626 [hereinafter EEOC Amicus Brief] (arguing that allowing third party retaliation claims is consistent with statutory context and intent).

51. See 467 U.S. 837, 842-43 (1984) (holding that a court must sustain an agency's interpretation if it is based on a permissible construction of the statute).

52. See 535 U.S. 212, 219 (2002) (determining that the Social Security Administration's construction of inability was permissible because the interpretation made "considerable sense in terms of the statute's basic objectives").

53. See 411 U.S. 792, 802 (1973) (allowing an individual to sue for discrimination when the individual could prove that he was qualified for his position and that the defendant's reasons for not hiring him were a pretext for discrimination).

54. See, e.g., *Kobrin v. Univ. of Minn.*, 34 F.3d 698, 704 (8th Cir. 1994) (holding that a grant of summary judgment in favor of the defendant would be improper where there exist genuine issues of material fact regarding the prima facie case).

do not meet the standards for stating a prima facie case.⁵⁵ In order to make out a prima facie case, a plaintiff must show that (1) she engaged in a statutorily protected activity; (2) she suffered an adverse employment action; (3) she was qualified for the position; and (4) this adverse employment action was causally connected to the statutorily protected activity.⁵⁶

If the plaintiff succeeds in establishing a prima facie case, then the burden of production shifts to the defendant, who must provide a non-discriminatory and non-retaliatory reason for the adverse employment action.⁵⁷ If the defendant can provide a legitimate reason for the alleged retaliation, the burden of proof shifts back to the plaintiff to show that the defendant's reason is merely a pretext for the retaliation alleged.⁵⁸

The district court found that because Thompson did not personally engage in statutorily protected activity, he could not set out a prima facie case of retaliation, thus failing the first prong of the *McDonnell Douglas* test.⁵⁹ The court said that Thompson's retaliation claim was based on his fiancée filing a sex discrimination lawsuit, which constituted her statutorily protected activity, but not his own.⁶⁰ The court granted summary judgment in favor of the defendant.⁶¹

5. Resolving the Circuit Court Split on Interpreting Title VII's Anti-Retaliation Provision to Protect Third Parties

When interpreting Title VII's anti-retaliation provision, the Supreme Court has decided on expansive definitions of the statutory terms when seeking their meaning.⁶² The Supreme Court held in *Burlington Northern*

55. See, e.g., *Smith v. Riceland Foods, Inc.*, 151 F.3d 813, 819 (8th Cir. 1998) (dismissing plaintiff's retaliation claim because he failed to engage directly in protected behavior).

56. See *Thompson v. N. Am. Stainless, LP*, 435 F. Supp. 2d 633, 635 (E.D. Ky. 2006), *aff'd en banc*, 567 F.3d 804 (6th Cir. 2009) (using the *McDonnell Douglas* test to grant summary judgment due to plaintiff's failure to make a prima facie case as he did not personally engage in statutorily protected behavior).

57. See *Kobrin*, 34 F.3d at 705 (analyzing the legitimacy of defendant's statement that a lack of funds was the defendant's reason for not continuing the plaintiff's employment for another school year as a non-tenured lecturer).

58. See *id.* (evaluating the plaintiff's claim that the defendant's reason was a pretext for discrimination because the defendant never sought funds to continue her position).

59. See *Thompson*, 435 F. Supp. 2d at 637-38 (interpreting the Title VII anti-retaliation provision narrowly to include only individuals that had filed claims alleging discrimination).

60. *Id.*

61. See *id.* at 640.

62. See *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 60 (2006) (overturning several cases that narrowly interpreted Title VII's anti-retaliation provision); see also *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986)

and *Santa Fe Railway Company v. White* that the purpose of Title VII's anti-retaliation provision is to provide "unfettered access" to Title VII's remedial mechanisms by prohibiting employer actions that are likely to deter the filing of Title VII claims by victims of workplace discrimination.⁶³ The circuit courts, nonetheless, have grappled with whether Title VII's retaliation protection extends to third parties and are currently split on the proper interpretation.⁶⁴

The Eleventh Circuit, like the Supreme Court, has interpreted Title VII's anti-retaliation provision broadly.⁶⁵ In *Wu v. Thomas*, the U.S. Court of Appeals for the Eleventh Circuit allowed a husband to sue for retaliation even though he had not personally filed a discrimination suit with the EEOC.⁶⁶ The court found that the retaliation threatened against the claimant's husband affected his wife, the Title VII complainant, and therefore, violated Title VII.⁶⁷

Other circuits, however, including the Sixth Circuit, have interpreted the anti-retaliation provision of Title VII to protect only individuals bringing causes of action.⁶⁸ In *Smith v. Riceland Foods, Inc.*, the Eighth Circuit held that an individual must personally engage in a statutorily protected activity in order to be afforded protection from retaliation.⁶⁹ Thomas lived with Smith, who filed the discrimination charge, and Thomas argued that he had helped Smith file her claim.⁷⁰ The court found this unpersuasive, holding that living together is not enough evidence to prove that an individual had

(allowing sexual harassment as a claim under Title VII, despite its non-inclusion in the statute's text).

63. See *Burlington N. & Santa Fe Ry. Co.*, 548 U.S. at 68 (holding that a plaintiff must only show that a reasonable employee would have found the challenged action materially adverse in order for the action to be considered retaliation under Title VII).

64. See Carrie B. Temm, Comment, *Third-Party Retaliation Claims: Where to Draw the Line*, 54 U. KAN. L. REV. 865, 882 (2006) (contending that the Supreme Court should grant certiorari to resolve the circuit split over whether third parties are protected from retaliation under Title VII).

65. *Wu v. Thomas*, 863 F.2d 1543, 1548 (11th Cir. 1989).

66. See *id.* at 1547-48 (allowing a husband's retaliation charge because his wife's EEOC claim mentioned the retaliation threatened against her husband).

67. See *id.* at 1547 (holding that an employer telling the husband that he would be happier teaching elsewhere constituted retaliation against the wife because his departure would mean she would also have to leave).

68. See, e.g., *Thompson v. N. Am. Stainless, LP*, 567 F.3d 804, 807 (6th Cir. 2009) (interpreting Title VII narrowly to protect only a "limited class of persons" engaging in protected behavior).

69. See 151 F.3d 813, 819 (8th Cir. 1996) (stating that broadly interpreting Title VII is unnecessary since those who aid a complainant in filing a claim are already protected).

70. See *id.* at 815, 819 (dismissing Thomas' argument that Riceland should have known he helped Smith with her claim because Riceland knew they were living together).

participated in a protected activity.⁷¹

Similarly, in *Holt v. JTM Industries*, the Fifth Circuit held that Holt lacked standing for a retaliation claim because he had not engaged in statutorily protected behavior.⁷² Holt's complaint fell under the anti-retaliation provision of the Age Discrimination in Employment Act ("ADEA") because his wife's discrimination charge was based on age; however, the court found the Title VII and ADEA provisions similar because both provisions deal with retaliation for lawsuits alleging workplace discrimination against a protected class.⁷³ Holt argued that being the spouse of a complainant automatically gives the non-complaining spouse standing for a retaliation claim.⁷⁴ The court disagreed, ruling that protection of spouses contradicts the plain language of the statute, which already protects a large class of people and does not need to be expanded to fulfill legislative intent.⁷⁵

III. ANALYSIS

A. Prohibiting Third Party Retaliation Claims Contradicts the Legislative Intent of Title VII

1. The Plain Meaning of Title VII's Anti-Retaliation Provision Contradicts Its Legislative Intent

The Sixth Circuit erred when it prohibited Thompson's third party retaliation claim, because, by basing its decision on the plain language of Title VII's anti-retaliation provision, the Sixth Circuit contradicted the legislative intent of the statute.⁷⁶ The Supreme Court has held that when the plain meaning of a statute defeats its purpose, courts should go beyond the literal language.⁷⁷ The Supreme Court has also held that the main

71. *See id.* at 819 (holding that Riceland must know that Thomas helped Smith file her claim for Thomas to be protected).

72. *See* 89 F.3d 1224, 1227 (5th Cir. 1996) (dismissing a husband's claim that his employer retaliated against him because of his wife's age discrimination charge).

73. *See id.* at 1226 (applying Title VII's anti-retaliation provision jurisprudence to the ADEA's similar anti-retaliation provision to determine that the husband did not have standing).

74. *See id.* (rejecting Holt's argument because protection for a non-complaining spouse does not fall within the plain language of the statute).

75. *See id.* at 1226-27 (finding that the protection of any person that engages "in any manner" of protected activity was broad enough to be consistent with Congress' goals in enacting ADEA).

76. *See* *Thompson v. N. Am. Stainless, LP*, 567 F.3d 804, 816 (6th Cir. 2009) (Rogers, J., concurring) (asserting that the court must look at what Congress actually enacted, not what they would have decided had they been presented with the *Thompson* facts).

77. *See* *Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (1983) (analyzing the

purpose of Title VII's anti-retaliation provision is to provide unrestricted access to Title VII's remedial mechanisms.⁷⁸ Prohibiting *Thompson's* third party retaliation claim narrowly construes Title VII's anti-retaliation provision and defeats the purpose of the provision.⁷⁹ The Sixth Circuit, therefore, erred by not looking beyond the plain language of the statute because the plain language defeats the clear purpose of the provision.⁸⁰

The Sixth Circuit similarly erred in relying on the decisions in *Smith v. Riceland Foods* and *Holt v. JTM Industries* because both of these cases rely solely on the plain meaning of Title VII's anti-retaliation provision.⁸¹ Although both *Smith* and *Holt* deal with the same issue as *Thompson*—whether closely associated third parties are protected under Title VII's anti-retaliation provision—neither of these cases ventured beyond the plain language of the statute, even though its plain meaning defeated its purpose.⁸² The Eighth Circuit in *Smith* quoted the *Holt* opinion in its holding that the plain language of the statute did not support extending the protection of Title VII's anti-retaliation provision.⁸³ The *Smith* court however, failed to acknowledge that in the *Holt* opinion, the Fifth Circuit recognized that not *all* closely associated third parties would be protected under the plain language of Title VII, even though Congress intended the anti-retaliation provision of the ADEA to enable employees to engage in protected activity without fear of economic retaliation.⁸⁴ Failing to

Internal Revenue Code against the background of congressional intent because tax exempt status relies on a certain common law standard of charity not explicit in the plain language of the statute).

78. See *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (providing that a limited construction of Title VII's anti-retaliation provision would fail to achieve its purposes).

79. See *Thompson v. N. Am. Stainless, LP*, 520 F.3d 644, 649 (6th Cir. 2008), *rev'd en banc*, 567 F.3d 804 (6th Cir. 2009) (citing *Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 569 (3d Cir. 2002)) (positing that allowing employers to retaliate against the friends and family of a complainant is in tension with the overall purpose of the anti-retaliation provision).

80. *Contra Thompson*, 567 F.3d at 811 (holding that the language of Title VII's anti-retaliation provision is not ambiguous and does not need to be investigated beyond its plain meaning).

81. See *id.* at 809–10 (using *Smith* and *Holt* as support for finding that Title VII's anti-retaliation provision does not extend to third party claimants).

82. See *id.* at 805 (deciding whether Title VII creates a cause of action for third party retaliation victims who have not engaged in protected activity); *Smith v. Riceland Foods, Inc.*, 151 F.3d 813, 819 (8th Cir. 1998) (determining whether the significant other of a Title VII complainant had the right to sue under Title VII); *Holt v. JTM Indus., Inc.*, 89 F.3d 1224, 1224 (5th Cir. 1996) (deciding whether the husband of a Title VII complainant is protected from the retaliatory action of being placed on administrative leave).

83. See *Smith*, 151 F.3d at 819 (quoting *Holt*, 89 F.3d at 1226–27) (denying a third party's anti-retaliation claim under Title VII because an extension of the anti-retaliation protection of Title VII is unnecessary to protect third parties).

84. See *Holt*, 89 F.3d at 1226–27 (stating that a rule protecting third party employee

investigate beyond the plain language of the statute when it contradicts the statute's purpose contradicts Supreme Court precedent; the Sixth Circuit, therefore, erred in using these cases to support its reasoning.⁸⁵

The Fifth Circuit acknowledged that its decision in *Holt* may have been contrary to legislative intent when it admitted that Congress likely intended a broader interpretation of the ADEA's anti-retaliation provision than the court permitted.⁸⁶ The Sixth Circuit should have declined to follow the Fifth Circuit's ruling in *Holt* because it relied only on the plain language of the statute and because the Fifth Circuit's decision was not likely in accordance with the legislative intent of Title VII.⁸⁷ Conversely, the Sixth Circuit should have looked beyond the plain language, as Supreme Court precedent dictates, because the plain language meaning was contrary to Congress' intent.⁸⁸ Thus, the Sixth Circuit erred in using *Holt* as support for prohibiting third party claims based on the plain language of the anti-retaliation provision.⁸⁹

2. Prohibiting Third Party Anti-Retaliation Claims Incorrectly Gives Meaning to Legislative Silence

The Sixth Circuit erred when deciding *Thompson* because it incorrectly gave meaning to statutory silence by prohibiting third party anti-retaliation

spouses against retaliation for their spouse's protected activities would "rarely" be necessary).

85. *Cf. Thompson*, 567 F.3d at 810 (using language from *Smith* and *Holt* to determine that a broad construction of Title VII's anti-retaliation provision is unnecessary). *But see* *Barnhart v. Walton*, 535 U.S. 212, 217 (2002) (holding that when a statute is "silent or ambiguous with respect to [an] issue," an agency's interpretation must be sustained if it is a permissible construction of the statute); *Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (1983) (holding that it is a "well-established canon of statutory construction" that courts look beyond the plain language if the plain language meaning defeats the purpose of the statute).

86. *See Holt*, 89 F.3d at 1227 (stating that the language employed by Congress in the ADEA's anti-retaliation provision will protect most third parties and will provide better protection for employees than a list of protected relationships).

87. *See Thompson*, 567 F.3d at 809, 811 (using *Holt*, among other cases, as support for the assertion that no circuit court of appeals has allowed third party retaliation claims where the plaintiff has not personally engaged in protected behavior); *see also Holt*, 89 F.3d at 1227 (recognizing that using the plain language of anti-retaliation provisions to prohibit third party retaliation claims leaves the door open for potential employer discrimination).

88. *See Bob Jones Univ.*, 461 U.S. at 586 (holding that the court should not merely examine a particular clause, but look at the policy objectives of the whole statute); *see also Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (citing *Rochon v. Gonzalez*, 438 F.3d 1211, 1219 (D.C. Cir. 2006)) (considering retaliatory actions that are materially adverse as those which might "dissuade[] a reasonable worker from making or supporting a charge of discrimination") (emphasis added).

89. *See Thompson*, 567 F.3d at 810 (citing *Holt*, 89 F.3d at 1227) (rationalizing that third party protection does not need to be expanded to include all possible claimants because most cases of third party retaliation will fall within the protection of the plain language of the statute).

claims even where the statute fails to address such claims.⁹⁰ The Supreme Court held in *Barnhart v. Walton* that when a statute is silent on an issue, ambiguity is created, not resolved.⁹¹ In *Barnhart*, the Supreme Court used the Social Security Administration's interpretation of "inability" because the statute was silent on its definition.⁹² Similarly, Title VII's anti-retaliation provision is silent on whether closely associated third parties are protected from retaliation, referencing protection only for those who "oppose" discriminatory practices in the workplace and those involved in Title VII investigations.⁹³ Title VII's anti-retaliation provision is, therefore, ambiguous because its silence on the issue of third party protection makes it unclear whether it can be applied to retaliation claims of closely associated third parties.⁹⁴ The Sixth Circuit erred when deciding *Thompson* by not properly acknowledging this statutory silence and consequent ambiguity, and by relying only on the plain language.⁹⁵

3. Chevron and Its Progeny Should Be Used to Determine Whether the EEOC Guidelines Are a Permissible Interpretation of Title VII's Anti-Retaliation Provision

The Sixth Circuit should have used the EEOC interpretation of Title VII's anti-retaliation provision as a permissible reading of the ambiguous statutory language under *Chevron*.⁹⁶ First, Title VII's anti-retaliation provision is silent on the issue of third party retaliation claims and therefore does not unambiguously forbid the EEOC interpretation that closely

90. See EEOC Amicus Brief, *supra* note 50, at 4 (contending that the District Court relied too heavily on the plain language of Title VII's anti-retaliation provision, as the provision is silent on third party retaliation protection).

91. See *Barnhart v. Walton*, 535 U.S. 212, 217-18 (2002) (stating that ambiguity occurs when an issue is not explicitly dealt with in a statute and a statute does not unambiguously forbid a certain interpretation).

92. See *id.* at 215, 218-19 (deciding, in the face of statutory silence, whether the definition of "inability" includes a certain length of time for which that problem must persist in order to qualify a person for benefits).

93. See 42 U.S.C. § 2000e-3(a) (2006) (explicitly protecting only those employees who have "opposed" an unlawful employment practice or who have "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" as defined under the statute).

94. See *Barnhart*, 535 U.S. at 218 (holding that statutory silence on an issue does not resolve the issue, but instead makes the statute ambiguous as it pertains to that issue); see also *United Servs. Auto. Ass'n v. Perry*, 102 F.3d 144, 146 (5th Cir. 1996) ("A statute is ambiguous if it is susceptible of more than one accepted meaning.").

95. See *Thompson v. N. Am. Stainless, LP*, 567 F.3d 804, 818 (6th Cir. 2009) (Martin, J., dissenting) (contending that Title VII's anti-retaliation provision is ambiguous, at a minimum).

96. See § 2000e-5(a) (giving the EEOC power to enforce and interpret Title VII); see also *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) (giving deference to the agency tasked with interpreting the statute).

associated third parties should be protected from retaliation.⁹⁷ Second, the EEOC interpretation does not exceed the bounds of what is statutorily permissible because not only is the statute silent on this issue, but it does not expressly prohibit protection of closely associated third parties from retaliation.⁹⁸ Finally, the Supreme Court has broadly interpreted Title VII to allow all possible complainants to file claims of workplace discrimination, and thus, has been in line with EEOC interpretation generally.⁹⁹ The Sixth Circuit, thus erred in not using the EEOC interpretation of Title VII's anti-retaliation provision.¹⁰⁰

B. The EEOC Guidelines Indicate Congressional Intent Should Be Used for Interpretative Guidance

The Sixth Circuit erred in narrowly applying Title VII's anti-retaliation provision in *Thompson* because Congress intended for anti-discrimination laws to be applied broadly in the interest of eradicating workplace discrimination.¹⁰¹ The EEOC is tasked by Congress with interpreting and enforcing Title VII in order to best protect employees from all workplace discrimination.¹⁰² Congress relies on EEOC expertise to guide the courts in deciding Title VII claims and occasionally codifies EEOC guidelines when passing legislation to eliminate further workplace discrimination.¹⁰³ Due to Congress' reliance on the EEOC to interpret Title VII, courts regularly use EEOC guidelines when determining congressional meaning, as the Sixth Circuit did in *Johnson v. University of Cincinnati* when it used the EEOC Compliance Manual to aid in interpreting the meaning of "opposed" under Title VII's anti-retaliation provision.¹⁰⁴ This reliance on EEOC guidance is

97. § 2000e-3(a).

98. See *Thompson*, 567 F.3d at 820 (Moore, J., dissenting) (contending that both Supreme Court precedent and the Court's recent pronouncements support the EEOC's interpretation that Title VII's anti-retaliation provision encompasses Thompson's claim).

99. See *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (holding that Title VII's anti-retaliation provision should allow "unfettered access" to Title VII's remedial processes without any fear of retaliation).

100. Cf. *EEOC v. Edison*, 7 F.3d 541, 543 (6th Cir. 1993) (holding that Congress likely did not include third party retaliation simply because it had not considered the possibility of third party claims).

101. Cf. § 2000e-5(a) (delegating to the EEOC the power to prevent any person from engaging in an unlawful employment practice).

102. See Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. § 1971 (2006 & Supp. 2009)) (creating a federal commission to ensure equal employment opportunity).

103. See, e.g., ADA Amendments Act of 2008, Pub. L. No. 110-325, §§ 2(b)(2)-(3), 4(a), 122 Stat. 3553, 3554-56 (codified as amended at 42 U.S.C. § 12101 (2006 & Supp. 2009)) (codifying the EEOC definition of disability previously rejected by the Supreme Court in *Sutton v. United Air Lines, Inc.* (citation omitted)).

104. See 215 F.3d 561, 579 n.8 (6th Cir. 2000) (using examples from the EEOC

particularly relevant, since it involved the exact same statutory provision at issue in *Thompson*.¹⁰⁵

It follows that the Sixth Circuit should have used the EEOC guidelines as evidence of congressional intent in determining the scope of Title VII's anti-retaliation provision.¹⁰⁶ Congress entrusts great power to the EEOC to define and enforce anti-workplace discrimination laws and has explicitly overturned a case that disregarded EEOC determinations.¹⁰⁷ For example, in *Sutton v. United Air Lines, Inc.*, the Supreme Court declined to apply the EEOC definition of disability, going against Congress' intent of broad interpretation.¹⁰⁸ Congress directly overturned *Sutton* in passing the Americans with Disabilities Act ("ADA") Amendments Act of 2008, saying that the Supreme Court unnecessarily narrowed the scope of the ADA.¹⁰⁹ The Supreme Court's narrow interpretation, without deference to the EEOC recommendation, is similar to the Sixth Circuit narrowly interpreting Title VII's anti-retaliation provision in defiance of the EEOC Compliance Manual.¹¹⁰ Thus, the Sixth Circuit should have used the EEOC recommendations, as Congress has shown that it intended a broad scope for anti-workplace discrimination laws and because Congress overturned *Sutton* for declining to follow the EEOC interpretation.

Congress' passage of the ADA Amendments Act shows that Congress did not intend a narrow interpretation of laws prohibiting workplace discrimination and that Congress relies on the EEOC's proper interpretation and enforcement of anti-discrimination laws.¹¹¹ Thus, the EEOC interpretation of anti-discrimination law is arguably the best barometer of congressional intent, more so than the plain language of the statute.¹¹² The Sixth Circuit erred when discarding EEOC guidelines in

Compliance Manual to determine what constituted "opposing conduct" protected by Title VII's anti-retaliation provision).

105. *Id.*

106. *See* ADA Amendments Act of 2008 § 2(b)(2)-(3) (reinstating the intended broad scope of the ADA as interpreted by the EEOC).

107. *See id.* (overturning *Sutton* for denying the EEOC its interpretative authority to issue regulations for the generally applicable provisions of the ADA).

108. *See* 527 U.S. 471, 479 (1999) (finding that the EEOC was not given the authority to define disability, and thus, that the EEOC definition did not need to be followed).

109. *See* § 2(a)(4)-(5) (stating that Congress intended a broad scope when passing the ADA that should not have been narrowed by the Supreme Court).

110. *See* *Thompson v. N. Am. Stainless, LP*, 567 F.3d 804, 808 (6th Cir. 2009) (declining to follow the EEOC recommendation to protect closely associated third parties from retaliation).

111. *See id.* (rejecting the Supreme Court's interpretation of "substantially limits" that required a greater degree of limitation than Congress originally intended).

112. *See* § 4(a) (including the definition of disability that the EEOC argued for in *Sutton* in the text of the ADA).

Thompson since the guidelines provide the best evidence of congressional intent, which should be used when determining if an ambiguous provision applies to a complainant.¹¹³

Additionally, the Sixth Circuit erred in not using the EEOC Compliance Manual for interpretive guidance because the Supreme Court has held that the EEOC recommendations should be given great deference, even though they are not controlling.¹¹⁴ The Supreme Court held in *Griggs v. Duke Power Co.* that EEOC guidelines are to be used when courts are unsure of how to decide a Title VII claim.¹¹⁵ In *Griggs*, the Supreme Court relied on EEOC guidelines when determining the use of job-related tests in the workplace, which, like third party retaliation claims, are not addressed within the text of Title VII.¹¹⁶ Following this precedent, circuit courts have regularly used the EEOC guidelines for guidance, including the Sixth Circuit, which has previously quoted the EEOC Compliance Manual for support in Title VII decisions.¹¹⁷ Thus, the Sixth Circuit erred by not following the EEOC guidelines in accordance with Supreme Court precedent.¹¹⁸

If the Sixth Circuit had given the EEOC Compliance Manual proper deference, the court would have allowed Thompson's third party retaliation claim.¹¹⁹ The EEOC Compliance Manual states that Title VII's anti-retaliation provision protects any individual so closely associated to the complainant that the possibility of retaliation against her would discourage

113. See *Thompson*, 567 F.3d at 811 (citing *Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 569 (3d Cir. 2002)) (noting the Third Circuit conceded that the issue "present[ed] a conflict between [the] statute's plain meaning and its general policy objectives").

114. See *id.* at 808 (declining to follow the EEOC guidelines because the guidelines contradict the plain language of the statute); cf. *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971) (holding that the administrative interpretation of an act by the agency given enforcement power, such as the EEOC interpreting Title VII, is to be given great regard).

115. See *Griggs*, 401 U.S. at 434 (explaining that if the Act and its legislative history support the EEOC construction, this "affords good reason" to treat the agency's construction as expressing the intent of Congress).

116. See *id.* at 433 (citing the EEOC's guidelines to determine that hiring criteria unrelated to workplace performance are discriminatory under Title VII).

117. See, e.g., *Sandoval v. Am. Bldg. Maint. Indus., Inc.*, 578 F.3d 787, 793 (8th Cir. 2009) (using the EEOC Compliance Manual's interpretation of Title VII to find that separate entities forming an integrated enterprise are treated as one employer under Title VII); see also *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 580 (6th Cir. 2000) (stating in dicta that due to the EEOC guidelines, a person charging retaliation need not be personally engaged in protected behavior to be protected under Title VII's anti-retaliation provision).

118. See *Thompson*, 567 F.3d at 808 (dismissing the EEOC guidelines and asserting that the plain language of the statute is not ambiguous).

119. See *Thompson v. N. Am. Stainless, LP*, 520 F.3d 644, 645 (6th Cir. 2008), *rev'd en banc*, 567 F.3d 804 (6th Cir. 2009) (finding that allowing a third party retaliation claim is in accordance with Congress' intent in passing Title VII).

the complainant from filing her discrimination charge.¹²⁰ The EEOC established that Thompson was a closely associated third party because he was engaged and later married to a complainant and, as such, that he should be given protection under Title VII's anti-retaliation provision.¹²¹

The EEOC agreed that the retaliation against Thompson violated Title VII because the possibility of an adverse employment action against Thompson, a closely associated third party, would likely have discouraged his fiancée, the complainant from ever bringing her complaint to the EEOC.¹²² If it had given the EEOC's interpretation of Title VII's anti-retaliation provision proper deference, the en banc Sixth Circuit would have found that Thompson was entitled to protection, as the panel did in its first hearing of *Thompson*.¹²³ Thus, the Sixth Circuit erred in not allowing Thompson to sue for retaliation under Title VII because, if it had given the EEOC guidelines proper respect, the court would have found that Thompson's status as the fiancé of a complainant made him closely associated enough to a Title VII complainant that his firing would affect her decision to file a discrimination charge—a consequence which violates Title VII.¹²⁴

C. Courts Should Allow Third Party Retaliation Claims when the Retaliation Can Have a Direct Effect on the Title VII Complainant

The Sixth Circuit eventually upheld the district court's grant of summary judgment because it found that Thompson did not establish a prima facie case based on the *McDonnell Douglas* test, thereby excluding both third parties and employees fearing retaliation against their loved ones from Title VII protection.¹²⁵ The main hurdle for a closely associated third party in attempting to establish a prima facie case is that she is not personally

120. See EEOC COMPL. MAN., *supra* note 48, at 9 (outlining which third parties are protected from retaliation under Title VII).

121. See EEOC Amicus Brief, *supra* note 50, at 10 (arguing that allowing third party retaliation to escape without redress would discourage complainants from filing discrimination charges against employers).

122. See *Thompson*, 567 F.3d at 807-08 (stating that the plaintiff argued his fiancée's lawsuit was the sole reason for his termination and thus, constituted retaliation).

123. See *Thompson*, 520 F.3d at 648-49, *rev'd en banc*, 567 F.3d at 804 (highlighting that allowing third party retaliation claims was in line with the EEOC recommendation and congressional intent).

124. See Brief of Plaintiff-Appellant, *supra* note 2, at 18 (arguing that not protecting Thompson from retaliation was an "absurd" result that subverts the purpose of the anti-retaliation provision).

125. See *Thompson*, 567 F.3d at 813 (maintaining that because Thompson's claim did not allege that he was personally involved in statutorily protected activity, he did not establish a *prima facie* case).

involved in protected behavior.¹²⁶ In *Wu v. Thomas*, however, the Eleventh Circuit expanded the *McDonnell Douglas* test to include a third party who proved a relationship close enough such that a retaliatory action against the third party would directly affect the Title VII complainant.¹²⁷

The Sixth Circuit should have found that Thompson had established a prima facie case, because other circuits have correctly allowed similar third party retaliation claims.¹²⁸ In *Wu*, the United States Court of Appeals for the Eleventh Circuit used an improved and more nuanced line of reasoning when it evaluated the prima facie case requirements for a husband's retaliation claim based on his wife's Title VII lawsuit.¹²⁹ The Eleventh Circuit held that a third party establishes a prima facie case by being closely associated to a complainant, even though this protection is not explicitly allowed by Title VII's anti-retaliation provision.¹³⁰ The Eleventh Circuit allowed *Wu*'s claim of retaliation because the retaliation threatened against him amounted to retaliation threatened against his wife, which is the same reasoning as the rewritten *McDonnell Douglas* test advocated by this Note.¹³¹ In deciding *Thompson*, the Sixth Circuit should have followed the Eleventh Circuit's rationale in *Wu* because the facts of the two cases are very similar.¹³²

Furthermore, the Sixth Circuit should have found that Thompson established a prima facie case because, in some respects, *Thompson* is a stronger case than *Wu*.¹³³ In *Burlington Industries Inc., v. Ellerth*, the

126. *But see* *Fogleman v. Mercy Hosp. Inc.*, 283 F.3d 561, 569 (3d Cir. 2002) (observing that arguments advocating that third parties should not be protected under Title VII are not completely convincing).

127. *See* 863 F.2d 1543, 1548 (11th Cir. 1989) (allowing the husband's retaliation claim because retaliation against him affected his wife, the Title VII complainant).

128. *See, e.g.*, *Murphy v. Cadillac Rubber & Plastics, Inc.*, 946 F. Supp. 1108, 1118 (W.D.N.Y. 1996) (deciding that a third party is protected from retaliation under Title VII if a close relative is involved in protected behavior); *De Medina v. Reinhardt*, 444 F. Supp. 573, 580 (D.D.C. 1978) (holding that third party retaliation claims are allowed under Title VII because tolerance of third party retaliation would deter complainants from exercising their protected rights).

129. *See Wu*, 863 F.2d at 1545 (permitting the husband of a Title VII complainant to pursue his cause of action for retaliation when he was urged by his employer to look for another job after his wife filed a Title VII discrimination charge).

130. *See id.* at 1548 (declaring that a retaliatory action against a third party that affects a complainant violates Title VII's anti-retaliation provision).

131. *See id.* (allowing *Wu* to "piggy-back" his retaliation claim on his wife's discrimination and retaliation claims).

132. *Compare id.* at 1545 (explaining how *Wu* was advised to search for another job after his wife filed a discrimination charge), *with Thompson v. N. Am. Stainless, LP*, 567 F.3d 804, 806 (6th Cir. 2009) (describing how Thompson was fired shortly after his employers were notified of his fiancée's discrimination charge).

133. *Compare Thompson*, 567 F.3d at 806 (restating the facts of the case that include Thompson's termination without legitimate cause), *with Wu*, 863 F.2d at 1545 (describing *Wu*'s "invitation" to apply elsewhere for faculty positions, but no termination).

Supreme Court has made it more difficult for employers to defend themselves against a Title VII charge when there is a tangible workplace consequence.¹³⁴ Being fired, as Thompson was, is a tangible workplace consequence because the employer acted affirmatively to change the employee's status, whereas in *Wu*, retaliation was only threatened, making a retaliatory purpose harder to prove.¹³⁵ Thus, the Sixth Circuit erred in granting summary judgment because Thompson's case for retaliation was stronger than Wu's case, as Thompson actually was fired from his job, the epitome of employer retaliation.¹³⁶

Thompson and *Wu* differ from each other in that Wu's cause of action was contained within his wife's EEOC complaint, but this difference is not meaningful enough to concede that the Sixth Circuit decided *Thompson* correctly.¹³⁷ The difference between *Wu* and *Thompson* arises out of the fact that Wu's wife had filed three different Title VII retaliation claims, and in her last claim, she included the threatened retaliation against her husband even though the retaliation was not against her.¹³⁸ Wu's inclusion in his wife's filing as a Title VII complainant allowed the claim to pass the prima facie case standard under its current phrasing of *McDonnell Douglas*.¹³⁹ Thompson's fiancée did not file repeated claims against their employer that would have led to her including Thompson in her claim, as Wu's wife did.¹⁴⁰ Because Thompson was terminated slightly more than two weeks after his employers were notified of his fiancée's retaliation claim, he did not have time to cultivate a retaliation claim, as Wu did.¹⁴¹ However, the passage of the prima facie prong of the *McDonnell Douglas* test was not dependant on Wu's personal engagement in statutorily protected behavior; Wu's claim relied on retaliation against him, not against his wife, the Title

134. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) (holding that no defense is allowed when there is a tangible consequence due to discrimination under Title VII).

135. See Brief of Plaintiff-Appellant, *supra* note 2, at 2 (contending that plaintiff was fired without cause shortly after his fiancée filed a Title VII claim against their employer).

136. See *Thompson*, 567 F.3d at 806 (stating that the EEOC found that the defendant's reason for terminating Thompson was pretextual).

137. See *Wu*, 863 F.2d at 1547-48 (extending retaliation protection to the complainant's husband partially because his cause of action stemmed from the same facts as the original complaint).

138. See *id.* at 1546-47 (holding that intervening plaintiffs, like Wu, need not have personally pursued the administrative requirements of Title VII).

139. See *id.* (dealing with Ms. Wu's third Title VII charge for retaliation stemming from her original discrimination claim).

140. See *Thompson v. N. Am. Stainless, LP*, 520 F.3d 644, 645 (6th Cir. 2008), *rev'd en banc*, 567 F.3d 804 (6th Cir. 2009) (noting that Thompson's fiancée did not have a retaliation claim, just a sex discrimination charge).

141. See *id.* (showing how quickly the retaliation took place after North American Stainless found out about Thompson's fiancée's sex discrimination suit).

VII complainant.¹⁴² Thus, the Sixth Circuit should have found that Thompson had established a prima facie case because, like Wu's, Thompson's retaliation claim was based on his significant other's statutorily protected behavior.¹⁴³

Furthermore, the Sixth Circuit should have allowed Thompson's claim under the reasoning used by the Eleventh Circuit because neither Wu nor Thompson asserted individual discrimination claims under Title VII.¹⁴⁴ Wu's only claim, like Thompson's, was that he was retaliated against because his wife filed a gender discrimination suit against their employer.¹⁴⁵ Therefore, allowing Wu's claim while prohibiting Thompson's claim denies Thompson the same protection under Title VII's anti-retaliation provision.¹⁴⁶

Finally, the Sixth Circuit erred in granting summary judgment in *Thompson* because Thompson, unlike Wu, made use of the congressionally sanctioned EEOC Right to Sue process thus receiving the EEOC's support in pursuing his retaliation against North American Stainless.¹⁴⁷ Gaining a Right to Sue Notice is intended to be the only way to file a Title VII claim and without such Notice, a Title VII claim cannot be brought in federal court.¹⁴⁸ Thompson's claim is stronger than Wu's claim in this respect because Thompson used the proper, congressionally mandated channels to bring his own Title VII retaliation charge and to receive EEOC support for his lawsuit, separate from his fiancée's Title VII claim.¹⁴⁹ The Sixth Circuit should have allowed Thompson's claim because it possessed proper support from the EEOC and his retaliation was due to the filing of a Title

142. See *Wu*, 863 F.2d at 1548 (holding that the threatened retaliation against Wu is reasonably related to his wife's Title VII charge and is therefore allowed).

143. See *Thompson*, 567 F.3d at 810 (barring Thompson's claim because it did not rely on his own protected behavior).

144. See *Wu*, 863 F.2d at 1545 (recounting how Wu's retaliation claim arose out of his wife's Title VII charge); see also *Thompson*, 567 F.3d at 806 (explaining that Thompson's sole argument relies on being the fiancé of a Title VII complainant).

145. Compare *Wu*, 863 F.2d at 1545 (allowing Wu's retaliation claim against his and his wife's employer after his wife filed a Title VII discrimination charge), with *Thompson*, 567 F.3d at 809 (denying Thompson's claim for retaliatory firing because he failed to personally engage in statutorily protected behavior).

146. See *Wu*, 863 F.2d at 1548 (stating that threats of retaliation against the husband amounted to retaliation against the complainant).

147. Compare *Thompson*, 567 F.3d at 806 (referring to Thompson's use of the EEOC process and its filing of an amicus brief), with *Wu*, 863 F.2d at 1547 (relying on Ms. Wu's EEOC charge to allow her husband's claim).

148. Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-5 (2006).

149. See § 2000e-5(a) (requiring an EEOC investigation of Title VII claims before they can be brought in court); see also *Thompson*, 567 F.3d at 806 (stating that the EEOC had investigated Thompson's retaliation claim and determined that there was reasonable cause to believe that North American Stainless violated Title VII).

IV. POLICY RECOMMENDATION

Congress should amend Title VII's anti-retaliation provision to include language that protects closely associated third parties because doing so would remove the courts' reluctance to allow third party claims.¹⁵¹ The circuit courts have used different approaches to determine if a third party has standing to bring a cause of action for retaliation under Title VII, but if Congress amended Title VII's anti-retaliation provision to state clearly that a closely associated third party should be protected from retaliation, the courts would be able to decide cases appropriately.¹⁵² If Congress amended the statutory language to align with legislative intent, Thompson's cause of action would have been allowed because he would be considered a closely associated third party.¹⁵³

Retaliation claims by closely associated third parties should be allowed because prohibiting them could lead to increased workplace discrimination, as employees may fear filing Title VII complaints and exposing those with whom they are closely associated to retaliation.¹⁵⁴ Prohibiting third party retaliation claims denies Title VII complainants their right to unfettered access to the remedial resources of Title VII because possible complainants will be discouraged from filing complaints for fear of economic repercussions.¹⁵⁵ Thus, Congress should amend Title VII's anti-retaliation provision to instruct courts on how to apply the provision and eliminate confusion.¹⁵⁶

V. CONCLUSION

The Sixth Circuit erred in *Thompson* by denying Eric Thompson a cause

150. See EEOC Amicus Brief, *supra* note 50, at 4 (supporting Thompson's claim as a closely associated third party for retaliation under Title VII).

151. See *Holt v. JTM Indus., Inc.*, 89 F.3d 1224, 1227 (5th Cir. 1996) (recognizing that the plain language of the Title VII's anti-retaliation provision protects most, but not all, employees that are closely associated to a complainant from retaliation).

152. Compare *Wu*, 863 F.2d at 1547-48 (allowing the husband's retaliation claim based on retaliation for his wife's discrimination suit), with *Holt*, 89 F.3d at 1226 (using the plain language of the statute to deny the retaliation claim of the husband of a Title VII complainant).

153. See *Thompson*, 567 F.3d at 808 (deciding that Thompson did not have a cause of action based on the plain language of Title VII's anti-retaliation provision).

154. EEOC COMPL. MAN., *supra* note 48, at 8-9.

155. See *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (holding Title VII complainants are entitled to unfettered access to the remedial mechanisms of Title VII).

156. See ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended at 42 U.S.C. § 12101 (2006 & Supp. 2009)) (defining the term "disability" to remedy judicial uncertainty).

of action under Title VII's anti-retaliation provision.¹⁵⁷ The Sixth Circuit defied Supreme Court precedent by prohibiting third party retaliation claims, contrary to congressional intent.¹⁵⁸ Using the EEOC guidelines and following congressional intent, the Sixth Circuit should have found that Thompson was protected from retaliation under Title VII's anti-retaliation provision because he was a closely associated third party to a Title VII complainant.¹⁵⁹

Additionally, the Sixth Circuit erred in finding that Thompson did not establish a prima facie case.¹⁶⁰ The *McDonnell Douglas* test should be reconceived to allow establishment of a prima facie case based on closeness of a third party's relationship with a Title VII complainant.¹⁶¹ The Sixth Circuit should have found that Title VII's anti-retaliation provision included protection for a third party complainant.¹⁶²

Therefore, the Sixth Circuit erred in denying Thompson's third party retaliation claim because it incorrectly relied on the statute's plain language, ignored congressional intent and EEOC recommendation, and inappropriately applied the *McDonnell Douglas* test.

157. See *Thompson*, 567 F.3d at 820 (Moore, J., dissenting) (saying that the majority opinion downplays important Supreme Court precedent by relying on plain language).

158. See *Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (1983) (holding that courts must look beyond the plain language of a statute if the plain language meaning defeats the purpose of the statute); see also *Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 569 (3d Cir. 2002) (characterizing arguments explaining why Congress failed to include third par as unconvincing).

159. See EEOC COMPL. MAN., *supra* note 48, at 8-9 (providing Title VII anti-retaliation protection to closely related third parties).

160. See *Thompson*, 567 F.3d at 816 (dismissing Thompson's retaliation claim for failing to establish a prima facie case because Thompson was not engaged in protected behavior).

161. See *Wu v. Thomas*, 863 F.2d 1543, 1547-48 (11th Cir. 1989) (allowing a husband's retaliation claim because retaliation against him directly affects his wife, the Title VII complainant, making it similar to retaliation against a complainant).

162. See *id.* (allowing a husband to seek redress for retaliation as part of his wife's gender discrimination charge).