

# Casenote

## **Thy Fiancé Doth Protest Too Much: Third-Party Retaliation Under Title VII After *Thompson v. North American Stainless, LP***

### I. INTRODUCTION

“To retaliate against a man by hurting a member of his family is an ancient method of revenge . . . .”<sup>1</sup> In *Thompson v. North American Stainless, LP*,<sup>2</sup> the United States Supreme Court reversed the United States Court of Appeals for the Sixth Circuit by holding that Title VII of the Civil Rights Act of 1964 (Title VII)<sup>3</sup> confers standing to sue upon an individual who suffers unlawful retaliation, even though that individual did not engage in any statutorily-protected conduct.<sup>4</sup> Prior to *Thompson*, lower courts disagreed about whether third-party retaliation victims had proper standing to file suit under Title VII.<sup>5</sup> In

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1. NLRB v. Advertisers Mfg. Co., 823 F.2d 1086, 1088 (7th Cir. 1987).

2. 131 S. Ct. 863 (2011).

3. 42 U.S.C. §§ 2000e–2000e-17 (2006 & Supp. IV 2010).

4. *Thompson*, 131 S. Ct. at 870.

5. *Compare, e.g., Smith v. Riceland Foods, Inc.*, 151 F.3d 813, 819 (8th Cir. 1998) (noting that proper standing to vindicate a claim under § 704 requires that the plaintiff actually engaged in some protected conduct), *with Anjelino v. New York Times Co.*, 200 F.3d 73, 90-91 (3d Cir. 2000) (holding that standing to sue under Title VII extends to the

*Thompson*, the Supreme Court acknowledged the expansive standard applied in various lower courts that explicitly permitted third-party retaliation claims under Title VII,<sup>6</sup> but ultimately rejected the extreme positions advocated by the parties in favor of a more moderate analytical framework.<sup>7</sup> The Court applied the zone of interests test<sup>8</sup> to identify the class of individuals who have proper standing to pursue Title VII third-party retaliation claims.<sup>9</sup> Given the recent increase in retaliation claims,<sup>10</sup> *Thompson* potentially exposes employers to more retaliation liability than ever before. However, significant litigation is still necessary to determine which combinations of adverse employment actions and third-party relationships Title VII protects.

## II. FACTUAL BACKGROUND

In 1997, North American Stainless, LP (NAS) hired Eric Thompson.<sup>11</sup> Three years later, Thompson initiated a romantic relationship with a co-worker, Miriam Regalado. By early 2003, Thompson and Regalado were engaged to be married, and NAS management was aware of their engagement. On February 13, 2003, the United States Equal Employment Opportunity Commission (EEOC) informed NAS that Regalado filed a charge alleging unlawful sex discrimination and, on March 7, 2003, NAS terminated Thompson's employment. Thompson subsequently filed a charge with the EEOC, alleging NAS unlawfully retaliated against him because of Regalado's statutorily-protected conduct.<sup>12</sup>

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limits established by Article III of the United States Constitution).

6. See, e.g., *Hackett v. McGuire Bros., Inc.*, 445 F.2d 442, 447 (3d Cir. 1971) (concluding that mere Article III standing is sufficient to bring suit under Title VII).

7. *Thompson*, 131 S. Ct. at 868-70.

8. See *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 152-53 (1970) (holding that, assuming a potential litigant satisfies the Constitutional standing requirements of injury, causation, and redressability, to maintain proper prudential standing, the party's interests must arguably be within the zone of interests Congress intended the applicable statute to protect).

9. *Thompson*, 131 S. Ct. at 870.

10. Press Release, *EEOC Reports Job Bias Charges Hit Record High of Nearly 100,000 in Fiscal Year 2010*, EEOC.GOV (Jan. 11, 2011), <http://www.eeoc.gov/eeoc/newsroom/release/1-11-11.cfm>. For the first time since Congress enacted Title VII, retaliation claims surpassed race discrimination claims as the charge most commonly filed with the EEOC. *Id.* In fiscal year 2010, individuals filed 36,258 retaliation claims, compared to 35,890 race discrimination claims. *Id.*

11. *Thompson v. N. Am. Stainless, LP*, 567 F.3d 804, 806 (6th Cir. 2009), *rev'd*, 131 S. Ct. 863 (2011).

12. *Id.*

After completing an investigation, the EEOC found “reasonable cause to believe that [NAS] violated Title VII.”<sup>13</sup> Thompson filed suit against NAS, alleging the company violated the anti-retaliation provision of Title VII<sup>14</sup> by terminating his employment in retaliation for his fiancé’s EEOC charge.<sup>15</sup> The United States District Court for the Eastern District of Kentucky granted summary judgment in favor of NAS because Thompson did not personally engage in any statutorily-protected conduct.<sup>16</sup> On appeal, a three-judge panel of the Sixth Circuit reversed, holding that Title VII prohibits employers from retaliating against employees who are closely associated with an individual engaged in protected conduct, even when the employee who was the target of the retaliation did not.<sup>17</sup>

The court of appeals granted a rehearing en banc and affirmed the district court’s decision, holding that Thompson did not have proper standing to pursue a Title VII retaliation claim because he did not personally engage in any protected conduct.<sup>18</sup> The en banc majority relied upon precedent from other circuits that refused to recognize § 704<sup>19</sup> retaliation claims where the individual plaintiff did not personally engage in any protected conduct.<sup>20</sup> To resolve the split amongst the circuits,<sup>21</sup> the Supreme Court granted certiorari.<sup>22</sup> Subsequently, the Court reversed the court of appeals decision, holding

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13. *Id.*

14. 42 U.S.C. § 2000e-3(a) (2006).

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

16. *Thompson v. N. Am. Stainless, LP*, 435 F. Supp. 2d 633, 636-40 (E.D. Ky. 2006).

17. *Thompson v. N. Am. Stainless, LP*, 520 F.3d 644, 646 (6th Cir. 2008), *rev’d en banc*, 567 F.3d 804 (6th Cir. 2009), *rev’d*, 131 S. Ct. 863 (2011).

18. *Thompson*, 567 F.3d at 811.

19. 42 U.S.C. § 2000e-3(a).

20. *Thompson*, 567 F.3d at 809-11 (citing *Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561 (3d Cir. 2002); *Smith v. Riceland Foods, Inc.*, 151 F.3d 813 (8th Cir. 1998); *Holt v. JTM Indus.*, 89 F.3d 1224 (5th Cir. 1996)).

21. In addition to those circuits that refused to recognize retaliation claims where the victim did not engage in any protected conduct, *see* sources cited, *supra* note 20, several other circuits have articulated standards that protect third parties from retaliation, even if those parties did not engage in any protected conduct. *See, e.g.*, *Wu v. Thomas*, 863 F.2d 1543, 1545-50 (11th Cir. 1989) (permitting a husband’s retaliation claim to proceed where he alleged retaliation because his wife filed discrimination charges against their mutual employer); *McDonnell v. Cisneros*, 84 F.3d 256, 258, 262-63 (7th Cir. 1996) (holding that a cause of action for retaliation exists when the defendant reassigned the plaintiff as punishment for failing to prevent his subordinate from filing a sexual harassment complaint).

22. *Thompson v. N. Am. Stainless, LP*, 131 S. Ct. 863 (2011), *cert. granted*, 130 S. Ct. 3542 (U.S. June 29, 2010) (No. 09-291).

that Title VII confers standing upon “person[s] aggrieved”<sup>23</sup>—those whose interests are “arguably [sought] to be protected by the statutes”—and that Thompson was such a person.<sup>24</sup> The Supreme Court remanded the case to the trial court to determine whether Thompson suffered unlawful retaliation under § 704.<sup>25</sup>

### III. LEGAL BACKGROUND

#### A. *The Elements of a Title VII § 704 Retaliation Claim*

Congress enacted Title VII<sup>26</sup> to eliminate employment discrimination on the basis of certain immutable characteristics.<sup>27</sup> Section 703(a) prohibits covered employers from discriminating against employees or potential employees on the basis of race, color, national origin, religion, or sex.<sup>28</sup> Further, § 704 prohibits employers from retaliating against individuals who oppose any unlawful employment practice or participate in an investigation into allegedly unlawful employment practices under Title VII.<sup>29</sup> Specifically, Congress enacted § 704 to protect individuals who exercise their rights under § 703 by prohibiting retaliation that would dissuade similarly-situated, reasonable employees from engaging in statutorily-protected conduct.<sup>30</sup> To establish a prima facie case of retaliation under § 704, the plaintiff must (1) have engaged in some type

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23. 42 U.S.C § 2000e-5(f) (2006).

24. *Thompson*, 131 S. Ct. at 870 (alteration in original) (quoting *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust*, 522 U.S. 479, 495 (1998)).

25. *Id.* at 871.

26. 42 U.S.C §§ 2000e-2000e-17 (2006 & Supp. IV 2010).

27. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989).

28. 42 U.S.C § 2000e-2(a). The statute provides:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

29. 42 U.S.C § 2000e-3(a). The statute provides that:

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.

30. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 77 (2006) (Alito, J., concurring).

of protected conduct, (2) suffered an adverse employment action, and (3) demonstrate a causal link between the statutorily-protected conduct and the adverse employment action.<sup>31</sup>

Title VII protects two distinct varieties of employee conduct: “opposition,” where an employee reasonably opposes a plausibly unlawful employment practice; and “participat[ion],” where an employee files an administrative charge, levels an official internal complaint, or otherwise participates in any investigation or proceeding under Title VII.<sup>32</sup> Thus, an employer may not take an adverse employment action against an employee because he opposed an employment practice prohibited under Title VII.<sup>33</sup> But, the method of opposition must be reasonable<sup>34</sup> and based on an objectively reasonable, good-faith belief that the employer’s conduct violated Title VII.<sup>35</sup> However, § 704 “participation” protection is broader, prohibiting employers from retaliating against an individual for any participation in any investigation, proceeding, or hearing governed by Title VII.<sup>36</sup> Because the participation clause safeguards the essential “machinery set up by Title VII,”<sup>37</sup> it shields a broader range of conduct than the opposition clause.<sup>38</sup> Consequently, the breadth of participation clause protection encompasses many situations that do not immediately appear to warrant protection.<sup>39</sup>

In *Burlington Northern & Santa Fe Railway Co. v. White*,<sup>40</sup> the Supreme Court resolved a circuit split when it defined an “adverse employment action” as any materially adverse action, including those not affecting the terms and conditions of employment, that “might have

31. See *Brown v. Ala. Dep’t of Transp.*, 597 F.3d 1160, 1181 (11th Cir. 2010).

32. 42 U.S.C § 2000e-3(a).

33. See *Crawford v. Metro. Gov’t of Nashville & Davidson Cnty.*, 555 U.S. 271, 273-74 (2009) (extending § 704 protection to employees who oppose another employee’s sexual harassment during the employer’s investigation of the other employee’s complaint).

34. *Laughlin v. Metro. Wash. Airports Auth.*, 149 F.3d 253, 259-60 (4th Cir. 1998).

35. *Butler v. Ala. Dep’t of Transp.*, 536 F.3d 1209, 1213 (11th Cir. 2008) (requiring plaintiffs to demonstrate both a subjective belief that an employer’s conduct violated Title VII, and that that belief was objectively reasonable, given the totality of the circumstances).

36. 42 U.S.C § 2000e-3(a).

37. *Hashimoto v. Dalton*, 118 F.3d 671, 680 (9th Cir. 1997) (quoting *Silver v. K.C.A., Inc.*, 586 F.2d 138, 141 (9th Cir. 1978)).

38. *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1312 (6th Cir. 1989) (recognizing that even individuals who file malicious and defamatory EEOC charges are protected from retaliation by the participation clause).

39. See, e.g., *Dey v. Colt Const. & Dev. Co.*, 28 F.3d 1446, 1457-58 (7th Cir. 1994) (noting that, provided the plaintiff has a reasonable belief that the opposed conduct violates Title VII, filing a claim with the EEOC about an ultimately permissible employment practice is classified as protected participation under § 704).

40. 548 U.S. 53 (2006).

dissuaded a reasonable worker from making or supporting a charge of discrimination.<sup>41</sup> Textual distinctions between § 703 and § 704 motivated the Court to conclude that unlawful employment practices under § 704 are “not limited to discriminatory actions that affect the terms and conditions of employment.”<sup>42</sup> Also, the Court established an objective standard under which a plaintiff must prove that the adverse employment action would have deterred a similarly-situated, reasonable employee from engaging in protected conduct.<sup>43</sup> Requiring this distinction between significant and trivial workplace harms echoed the Court’s jurisprudence concerning § 703 discrimination, which rejects claims alleging garden-variety workplace insults.<sup>44</sup>

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41. *Id.* at 68 (quoting *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2006)). Prior to *Burlington Northern*, ten circuit courts of appeal had considered this issue and articulated three different standards. Under the restrictive standard, employers were only prohibited from utilizing an “ultimate employment decision” to retaliate against an individual. *See, e.g.*, *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997) (quoting *Dollis v. Rubin*, 77 F.3d 777, 782 (5th Cir. 1995) (limiting actionable retaliation to circumstances involving “hiring, granting leave, discharging, promoting, and compensating”); *Manning v. Metro. Life Ins. Co.*, 127 F.3d 686, 692 (8th Cir. 1997). Under the intermediate standard, employers were prohibited from taking “materially adverse action” that negatively impacted an individual’s “terms, conditions, or benefits of employment.” *See, e.g.*, *Von Gunten v. Maryland*, 243 F.3d 858, 865-66 (4th Cir. 2001) (emphasis omitted) (quoting *Munday v. Waste Mgmt. of N. Am.*, 126 F.3d 239, 242 (4th Cir. 1997); *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1300 (3d Cir. 1997) (internal quotation marks omitted). Under the expansive approach, which the Supreme Court adopted in *Burlington Northern*, employers were prohibited from taking materially adverse employment actions that could be reasonably expected to dissuade similarly-situated employees from exercising statutorily-protected rights. *See, e.g.*, *Washington v. Ill. Dep’t of Revenue*, 420 F.3d 658, 662 (7th Cir. 2005) (noting that refusing to grant flexible scheduling could constitute actionable retaliation because that flexibility was specifically implemented to accommodate an employee’s duty as primary caretaker for her disabled son); *Rochon v. Gonzales*, 438 F.3d 1211, 1217-18 (D.C. Cir. 2006); *Ray v. Henderson*, 217 F.3d 1234, 1242-43 (9th Cir. 2000).

42. *Burlington Northern*, 548 U.S. at 62-64 (explaining that § 703 prohibits unlawful discrimination “with respect to . . . compensation, terms, conditions, or privileges of employment” as well as unlawful employment practices that “deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee,” while § 704 prohibits unlawful retaliation, without explicitly prohibiting any particular employer conduct).

43. *Id.* at 69.

44. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) (noting that judicial standards under Title VII must “filter out complaints attacking the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing”) (citations and internal quotation marks omitted).

Causation, accurately described as “the linchpin of a retaliation claim,”<sup>45</sup> is often the most vigorously contested issue in Title VII retaliation cases.<sup>46</sup> Because most modern employers are savvy enough not to blatantly reveal discriminatory motivations,<sup>47</sup> plaintiffs must often prove causation via circumstantial evidence.<sup>48</sup> While many forms of circumstantial evidence exist, retaliation plaintiffs often rely on the temporal proximity between the protected conduct and the adverse employment action.<sup>49</sup> As a result, courts and commentators have identified temporal proximity as extremely powerful circumstantial evidence in § 704 retaliation claims.<sup>50</sup>

The Supreme Court has not yet established a bright-line rule addressing when temporal proximity alone is sufficient to satisfy § 704 causation requirements.<sup>51</sup> In *Clark County School District v. Breeden*,<sup>52</sup> while acknowledging the general consensus that temporal proximity is strong evidence of causation, the Court held that to establish causation on temporal proximity alone, an individual’s protected conduct and adverse employment action must be “very close.”<sup>53</sup> Since *Breeden*, lower courts have clarified when temporal proximity alone satisfies causation, illustrating that a period of days or weeks is sufficient, but a period of months or years is not.<sup>54</sup> Neverthe-

45. Justin P. O’Brien, Note, *Weighing Temporal Proximity in Title VII Retaliation Claims*, 43 B.C. L. REV. 741, 748 (2002).

46. See Donna Smith Cude & Brian M. Steger, *Does Justice Need Glasses? Unlawful Retaliation Under the Title VII Following Mattern: Will Courts Know It When They See It?*, 14 LAB. LAW. 373, 380 & n.37 (1998) (noting that the absence of a bright-line rule often makes establishing causation “the most hotly contested element of a retaliation lawsuit”).

47. *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 534 (1993) (Souter, J., dissenting) (noting that “employers who discriminate are not likely to announce their discriminatory motive”).

48. Ann Clarke Snell & Lisa R. Eskow, *What Motivates the Ultimate Decisionmaker? An Analysis of Legal Standards for Proving Causation and Malice in Employment Retaliation Suits*, 50 BAYLOR L. REV. 381, 396 (1998).

49. Melissa A. Essary & Terence D. Friedman, *Retaliation Claims Under Title VII, the ADEA, and the ADA: Untouchable Employees, Uncertain Employers, Unresolved Courts*, 63 MO. L. REV. 115, 143 (1998).

50. See Debbie Rodman Sandler & Laura W. Brewer, *Retaliation Claims Under the Civil Rights Acts: Treacherous Waters for Employers*, 13 LAB. LAW. 107, 119 (1997) (identifying temporal proximity as the critical element in most circumstantial retaliation case).

51. See *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273-74 (2001).

52. 532 U.S. 268 (2001).

53. *Id.* at 273 (quoting *O’Neal v. Ferguson Constr. Co.*, 237 F.3d 1248, 1253 (10th Cir. 2001)).

54. Compare, e.g., *Stegall v. Citadel Broad. Co.*, 350 F.3d 1061, 1064-65 (9th Cir. 2003) (nine days sufficient), and *El Sayed v. Hilton Hotels Corp.*, 627 F.3d 931, 932 (2d Cir. 2010)

less, courts still permit retaliation claims in the absence of close temporal proximity, provided parties demonstrate causation with other sufficient evidence.<sup>55</sup>

### B. *Standing to Pursue Title VII Claims in Federal Court*

Plaintiffs in federal court must satisfy three Constitutional standing requirements to avoid dismissal, each of which flow directly from Article III of the United States Constitution:<sup>56</sup> injury, causation, and redressability.<sup>57</sup> Additionally, plaintiffs must often satisfy several non-constitutional, prudential standing requirements.<sup>58</sup> These prudential standing requirements include the prohibition against third-party standing,<sup>59</sup> the prohibition against generalized grievances,<sup>60</sup> and the zone of interests test.<sup>61</sup> However, legislation may relax or totally negate these prudential standing requirements; for example, Congress may authorize the enforcement of federal law by private citizens who would otherwise possess no legal right to do so.<sup>62</sup> Congress achieves this objective by

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(less than four weeks “arguably” sufficient), *with* *Thomas v. Cooper Lighting, Inc.*, 506 F.3d 1361, 1364 (11th Cir. 2007) (three months insufficient), *Hughes v. Derwinski*, 967 F.2d 1168, 1174-75 (7th Cir. 1992) (four months insufficient), *and Velazquez-Ortiz v. Vilsack*, 657 F.3d 64, 72-73 (1st Cir. 2011) (six years insufficient).

55. *See, e.g., Burnell v. Gates Rubber Co.*, 647 F.3d 704, 709-10 (7th Cir. 2011) (acknowledging causation existed where a supervisor accused the plaintiff of “playing the race card”); *Hicks v. Baines*, 593 F.3d 159, 170 (2d Cir. 2010) (relying on supervisor’s alleged statements demonstrating retaliatory animus to establish causation).

56. U.S. CONST. art. III, § 2.

57. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (requiring plaintiffs to plead that they have suffered, are suffering, or will imminently suffer: (1) an injury in fact (2) caused by the defendant that (3) is “likely” to be redressed by an award of the requested relief).

58. *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (noting that proper standing implicates both Article III restrictions on federal court jurisdiction and the Supreme Court’s prudential limitations on the exercise of that jurisdiction). Courts articulate both the Constitutional and prudential standing requirements, maintaining that only the former are constitutionally compelled.

59. LARRY W. YACKLE, *FEDERAL COURTS* 362 (3d ed. 2009) (“[T]he Court typically insists that litigants are equally barred from advancing legal rights that belong to a third party—that is, someone who is *not* a formal ‘party’ to the dispute at hand.”).

60. *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (noting that standing is not permitted where “the asserted harm is a ‘generalized grievance’ shared in substantially equal measure by all or a large class of citizens”).

61. YACKLE, *supra* note 59, at 370 (noting that a plaintiff must show the injuries he has suffered, or will imminently suffer, implicate an interest that is “arguably within the zone of interests” protected by the statute he seeks to enforce) (quoting *Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970)).

62. *See, e.g., Bennett*, 520 U.S. at 164-66 (holding that the “citizen-suit” provision of the Endangered Species Act, 16 U.S.C. § 1540(g)(1) (2006 & Supp. IV 2010), relaxes the

conferring standing upon specific classes of potential litigants via legislation.<sup>63</sup> To effectuate various statutory schemes, Congress confers standing to sue as it deems most appropriate to the extent permitted under the Constitution.<sup>64</sup> Therefore, Congress's Article I<sup>65</sup> power challenges the judiciary to interpret exactly how far statutory language expands standing and, thus, what classes of persons are entitled to bring suit under these various statutes.<sup>66</sup>

Title VII provides that "a civil action may be brought . . . by the person claiming to be aggrieved."<sup>67</sup> Prior to *Thompson v. North American Stainless, LP*,<sup>68</sup> the Supreme Court had not interpreted how broadly this language conferred standing to sue upon individual citizens.<sup>69</sup> However, in *Hackett v. McGuire Bros., Inc.*,<sup>70</sup> the United States Court of Appeals for the Third Circuit interpreted this language to include any individual who satisfied minimal Article III standing.<sup>71</sup> In *Hackett*, the plaintiff, Ozzie Hackett, was a former employee alleging race discrimination in discharge and pension benefits.<sup>72</sup> Because Hackett was already retired when he filed suit, the District Court for the Eastern District of Pennsylvania refused to classify him as an "employ-

prudential standing requirement by authorizing that "any person may commence a civil suit"). Such broad language entitles any individual person seeking to enforce the Endangered Species Act to file suit, provided that person satisfy minimal Article III standing. *See id.* at 162-64.

63. Robert A. Anthony, *Zone-Free Standing for Private Attorneys General*, 7 GEO. MASON L. REV. 237, 244 (1999).

64. *See, e.g.*, 7 U.S.C. § 2305(c) (2006) (authorizing a person "injured in his business or property" to seek enforcement of fair trade statutes via litigation in federal court); 15 U.S.C. § 298(b) (2006) (authorizing "competitors, customers, or subsequent purchasers" to enforce gold and silver standards via litigation). While Congress may confer standing to sue as it deems fit, Constitutional standing requirements are unassailable. *Ass'n of Data Processing Orgs., Inc. v. Camp*, 397 U.S. 150, 154 (1970); *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982).

65. *See* U.S. CONST. art. I, § 8.

66. *Compare, e.g.*, 42 U.S.C. § 2000e-5(f)(1) (Title VII enforcement provision permitting private enforcement by a "person aggrieved"), *with* 42 U.S.C. § 12117(a) (2006) (Americans with Disabilities Act enforcement provision permitting private enforcement by "any person alleging discrimination on the basis of disability in violation of [the statute]"). Congress's decision to incorporate different statutory language implies different classes of private individuals are entitled to enforce statutory rights via litigation.

67. 42 U.S.C. § 2000e-5(f)(1).

68. 131 S. Ct. 863 (2011).

69. *See* *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209 & n.8 (1972).

70. 445 F.2d 442 (3d Cir. 1971).

71. *Id.* at 446 (articulating that "the language 'a person claiming to be aggrieved' shows a congressional intention to define standing as broadly as is permitted by Article III of the Constitution").

72. *Id.* at 445-46.

ee” pursuant to § 701(f);<sup>73</sup> thus denying him standing to sue under Title VII.<sup>74</sup> The Third Circuit reversed, noting that the district court was incorrect to apply § 701(f)<sup>75</sup> and should have applied § 706(f)(1)<sup>76</sup> instead.<sup>77</sup> The court interpreted § 706(f)(1) to extend standing to the limit permissible under Article III.<sup>78</sup> The court also noted that this interpretation was consistent with congressional intent to confer standing to sue under Title VII as expansively as permitted under Article III.<sup>79</sup> Furthermore, the decision in *Hackett* facilitated statutory policy objectives by preventing procedural technicalities from impeding the substantive work of Title VII.<sup>80</sup> Subsequently, the majority of circuit courts that analyzed this issue adopted the broad *Hackett* interpretation of § 706(f)(1).<sup>81</sup>

While the Supreme Court had never addressed the scope of § 706(f)(1), the Court relied on *Hackett* in a case arising under Title VIII of the Civil Rights Act of 1968, more commonly known as the Fair Housing Act (FHA).<sup>82</sup> In *Trafficante v. Metropolitan Life Insurance Co.*,<sup>83</sup> two tenants filed a complaint alleging race discrimination in their apartment complex’s tenant selection process.<sup>84</sup> The plaintiffs in *Trafficante* relied

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73. See 42 U.S.C. § 2000e(f) (“The term ‘employee’ means an individual employed by an employer.”).

74. *Hackett*, 445 F.2d at 445.

75. 42 U.S.C. § 2000e(f). While this statute defines who is an “employee,” the language does not address who has standing to file suit under Title VII. *Hackett*, 445 F.2d at 445.

76. 42 U.S.C. § 2000e-5(f)(1) (conferring standing to sue upon any individual who is a “person aggrieved” by some conduct prohibited under Title VII).

77. *Hackett*, 445 F.2d at 445-46 (reasoning that the district court’s application of § 701(f) was inappropriate because that definitional statute “does not speak to the issue of standing to invoke the remedies of [Title VII]”).

78. See *id.* at 446-47 (concluding that “[i]f the plaintiff is sufficiently aggrieved so that he claims enough injury in fact to present a genuine case or controversy in the Article III sense, then he should have standing to sue”).

79. *Id.* at 446.

80. *Id.* at 446-47 (opining that “[t]he national public policy reflected . . . in Title VII . . . may not be frustrated by the development of overly technical judicial doctrines of standing or election of remedies”).

81. Compare, e.g., *Kyles v. J.K. Guardian Sec. Servs., Inc.*, 222 F.3d 289, 295 (7th Cir. 2000) (noting that § 706(f)(1) standing extends to the limits of Article III), *Anjelino v. New York Times Co.*, 200 F.3d 73, 91 & n.25 (3d Cir. 2000), *Childress v. City of Richmond*, 120 F.3d 476, 480-81 (4th Cir. 1997), *EEOC v. Miss. Coll.*, 626 F.2d 477, 482-83 (5th Cir. 1980), *EEOC v. Bailey Co.*, 563 F.2d 439, 452-54 (6th Cir. 1977), *Clark v. Valeo*, 559 F.2d 642, 691-92 (D.C. Cir. 1977), and *Waters v. Heublein, Inc.*, 547 F.2d 466, 469-70 (9th Cir. 1976), with *Leibovitz v. New York City Transit Auth.*, 252 F.3d 179, 187 (2d Cir. 2001) (declining to acknowledge that Title VII standing is as broad as Article III).

82. 42 U.S.C. §§ 3601-3631 (2006).

83. 409 U.S. 205 (1972).

84. *Id.* at 206-07.

upon the language of the FHA enforcement provision, which confers standing to sue upon “[a]ny person who claims to have been injured.”<sup>85</sup> The Court interpreted this language to confer standing upon “all in the same housing unit who are injured by racial discrimination in the management of those facilities.”<sup>86</sup> Most importantly, in *Trafficante*, the Court quoted approvingly from *Hackett*, which interpreted “a person claiming to be aggrieved” under § 706(f)(1) to “define standing as broadly as is permitted by Article III of the Constitution.”<sup>87</sup> However, the Court’s holding in *Trafficante* included qualifying language that only acknowledged proper standing for certain individuals affected by the defendant’s conduct.<sup>88</sup> Nevertheless, dictum in *Trafficante* illustrated that the Court interpreted “person aggrieved” under § 706(f)(1) to include any person possessing minimal Article III standing.<sup>89</sup>

### C. Prudential Standing and the Zone of Interests Test

Acknowledging the proliferation of statutes and variations in statutory language that confer standing upon potential litigants, the Supreme Court developed a framework to identify classes of individuals who have proper standing to sue.<sup>90</sup> In *Association of Data Processing Organizations, Inc. v. Camp*,<sup>91</sup> the Court articulated the zone of interests test, which provided plaintiffs a less stringent mechanism to satisfy prudential standing requirements.<sup>92</sup> In *Data Processing*, the plaintiffs challenged a Comptroller of the Currency administrative ruling that allowed banks to offer data processing services, alleging that such an action negatively impacted their economic interests.<sup>93</sup> Prior to *Data Processing*, the Court interpreted Section 702 of the Administrative

85. *Id.* at 207 n.1; Civil Rights Act of 1968, tit. VIII, § 810(a) (codified as amended at 42 U.S.C. § 3610(a)) (section 810(a) articulates that “[a]ny person who claims to have been injured by a discriminatory housing practice or who believes that he will be irrevocably injured by a discriminatory housing practice that is about to occur (hereafter ‘person aggrieved’) may file a complaint”).

86. *Trafficante*, 409 U.S. at 212.

87. *Id.* at 209 (quoting *Hackett*, 445 F.2d at 446).

88. *Id.* (stating that “person aggrieved” under Title VIII is synonymous with Article III standing, “insofar as tenants of the same housing unit that is charged with discrimination are concerned”).

89. *Thompson*, 131 S. Ct. at 869; see *Trafficante*, 409 U.S. at 209 (dictum).

90. *Data Processing*, 397 U.S. at 154-55.

91. 397 U.S. 150 (1970).

92. *Id.* at 153; see YACKLE, *supra* note 59, at 329-31.

93. *Data Processing*, 397 U.S. at 151-52 (challenging an action by the Comptroller of the Currency allowing that “a national bank may make available its data processing equipment or perform data processing services on such equipment for other banks and bank customers”).

Procedure Act (APA)<sup>94</sup> to afford judicial review of agency action only to individuals who had suffered a “legal wrong”; that is, suffered an invasion of a personal, legal right.<sup>95</sup> However, *Data Processing* articulated a more lenient, harm-based test, permitting suit by any individual whose interests suffered injury, regardless of whether the injury involved that individual’s personal, legal right, provided the interest was arguably within the zone of interests Congress intended the statute to protect.<sup>96</sup> The Court justified its relaxed test by distinguishing between proper standing and the merits of a case.<sup>97</sup> Making this distinction, the Court stated that while the rights-based test addressed the merits of a case, “standing is different. It concerns, apart from the [constitutional] case or controversy test, the [prudential] question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.”<sup>98</sup>

Initially, the Court applied the zone of interests test only to cases arising under § 702 of the APA; however, since *Data Processing*, courts have applied the zone of interests test to grant standing to injured persons without express legal rights to sue under a variety of statutory provisions.<sup>99</sup> This deferential standard denied standing only to plaintiffs whose claims were not reasonably included in those Congress intended to permit.<sup>100</sup> Nevertheless, the zone of interests test does occasionally bar suit by plaintiffs whose interests are not even arguably related to those interests Congress intended the statute to protect.<sup>101</sup>

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94. 5 U.S.C. § 702 (2006).

95. See *Ala. Power Co. v. Ickes*, 302 U.S. 464, 479 (1938) (punctuation omitted) (stating that “if the act complained of does not violate any of [the plaintiff’s] legal rights, it is obvious, that he has no cause to complain. Want of right and want of remedy are justly said to be reciprocal”).

96. *Data Processing*, 397 U.S. at 153.

97. *Id.*

98. *Id.* (internal quotation marks omitted).

99. See, e.g., *Bennett*, 520 U.S. at 164 (applying the zone of interests test to the Endangered Species Act, 16 U.S.C. §§ 1531-44 (2006 & Supp. IV 2010)); *Dennis v. Higgins*, 498 U.S. 439, 449-50 (1991) (applying the zone of interests test to 42 U.S.C. § 1983 (2006)).

100. *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 399-400 (1987) (holding that “the test denies 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”).

101. See, e.g., *Air Courier Conference of Am. v. Am. Postal Workers Union*, 498 U.S. 517, 530 (1991). When the United States Postal Service voluntarily surrendered its monopoly over “extremely urgent” mail delivery on certain domestic routes, the postal workers’ union filed suit claiming the decision harmed the interests of postal workers. *Id.* at 519-20. The Supreme Court rejected this position noting relevant statutory language that indicated “congressional concern was not with opportunities for postal workers but

The test distinguished between potential litigants by focusing exclusively on the “link” between the plaintiff’s interest and the interests Congress intended the statute to serve.<sup>102</sup>

#### IV. COURT’S RATIONALE

In *Thompson v. North American Stainless, LP*,<sup>103</sup> the United States Supreme Court unanimously reversed the decision of the United States Court of Appeals for the Sixth Circuit, holding that some plaintiffs had standing to sue under § 704,<sup>104</sup> even though they did not personally engage in any statutorily-protected conduct.<sup>105</sup> Justice Scalia, writing for the majority, identified two distinct issues. First, under Title VII,<sup>106</sup> was Thompson’s termination unlawful retaliation?<sup>107</sup> Second, if North American Stainless, LP (NAS) unlawfully retaliated against Thompson, did Title VII grant him standing to sue?<sup>108</sup>

##### A. Was Thompson’s Termination Unlawful Retaliation under § 704?

Justice Scalia first recounted the critical distinction between how courts interpret the substantive<sup>109</sup> and anti-retaliation<sup>110</sup> provisions of Title VII.<sup>111</sup> Justice Scalia noted that courts must interpret § 704 more broadly than § 703<sup>112</sup> to include a range of employer conduct that does not directly impact an individual’s terms and conditions of employment.<sup>113</sup> Applying these principles, and assuming the facts as Thompson alleged them to be true, the Court had “little difficulty concluding . . . NAS’s firing of Thompson violated Title VII.”<sup>114</sup> Even NAS acknowledged that Thompson’s termination satisfied the expansive

with the receipt of necessary revenues for the Postal Service.” *Id.* at 525-26.

102. See, e.g., *Nat’l Credit Union Admin. v. First Nat’l Bank & Trust Co.*, 522 U.S. 479, 492-94 n.7 (1998) (internal quotation marks omitted) (noting that the “unmistakable link between § 109’s express restriction on credit union membership and the limitation on the markets that federal credit unions can serve” creates some objective indication that the respondent’s interest was “arguably within the zone of interests to be protected by § 109”).

103. 131 S. Ct. 863 (2011).

104. 42 U.S.C. § 2000e-3(a) (2006).

105. *Thompson*, 131 S. Ct. at 870.

106. 42 U.S.C. §§ 2000e-2000e-17 (2006 & Supp. IV 2010).

107. *Thompson*, 131 S. Ct. at 867.

108. *Id.*

109. 42 U.S.C. § 2000e-2.

110. *Id.* § 2000e-3(a).

111. *Thompson*, 131 S. Ct. at 867-68.

112. 42 U.S.C. § 2000e-2(a).

113. *Thompson*, 131 S. Ct. at 867-68 (relying on *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 62 (2006)).

114. *Id.* at 867.

*Burlington Northern* standard.<sup>115</sup> However, NAS argued that permitting third-party retaliation would create unreasonable difficulty for employers, exposing them to litigation for imposing an adverse employment action against an employee who had any connection with another employee who had engaged in statutorily-protected conduct.<sup>116</sup>

While acknowledging the force of that argument, the Court determined that such a difficulty did not justify categorically excluding third-party retaliation from Title VII protection.<sup>117</sup> Relying on *Burlington Northern*, the Court found no textual or practical justification to craft a wholesale exception for third-party retaliation.<sup>118</sup> Furthermore, considering the variety of third-party retaliation methods and potential targets available to employers, the Court declined to “identify a fixed class of relationships” protected by Title VII.<sup>119</sup> The Court noted that while “firing a close family member will almost always” satisfy the standard articulated in *Burlington Northern*, “inflicting a milder reprisal on a mere acquaintance will almost never” be sufficient.<sup>120</sup> Because “the significance of any given act of retaliation will often depend upon the particular circumstances,”<sup>121</sup> and given the many ways third-party retaliation might occur, the Court concluded that § 704 is “simply not reducible to a comprehensive set of clear rules.”<sup>122</sup>

*B. Does Title VII Grant Thompson Standing to Pursue a Claim Under § 704?*

Because NAS, assuming Thompson’s allegations to be true, committed unlawful retaliation, Justice Scalia turned to “[t]he more difficult question in th[e] case”<sup>123</sup>—whether Title VII granted Thompson standing to sue.<sup>124</sup> Under Title VII, “a civil action may be brought . . . by

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115. *Id.* at 868; *see also Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006).

116. *Thompson*, 131 S. Ct. at 868 (recognizing this potential difficulty, Justice Scalia opined rhetorically, “perhaps retaliating against an employee by firing his fiancée would dissuade the employee from engaging in protected activity, but what about firing an employee’s girlfriend, close friend, or trusted co-worker?”).

117. *Id.*

118. *Id.* (noting that “there is no textual basis for making an exception to [the broad *Burlington Northern* interpretation of § 704] for third-party reprisals, and a preference for clear rules cannot justify departing from statutory text”).

119. *Id.*

120. *Id.*

121. *Id.* (quoting *Burlington Northern*, 548 U.S. at 69).

122. *Id.*

123. *Id.* at 869.

124. *Id.*

the person claiming to be aggrieved.”<sup>125</sup> Thompson urged the Court to interpret § 706(f)(1)<sup>126</sup> broadly, conferring standing upon any individual satisfying mere Article III<sup>127</sup> standing, thereby eliminating any additional prudential standing requirements.<sup>128</sup> Thompson relied on *Trafficante v. Metropolitan Life Insurance Co.*<sup>129</sup> and its supporting citation to *Hackett v. McGuire Bros., Inc.*,<sup>130</sup> because these cases interpreted § 706(f)(1) to extend Title VII standing to the limits permitted under Article III.<sup>131</sup> Furthermore, Thompson supported his argument by drawing the Court’s attention to similarities in statutory language<sup>132</sup> and enforcement mechanisms<sup>133</sup> between Title VII and Title VIII.<sup>134</sup> Thompson argued that the *Trafficante* opinion bound the Court to the extremely broad interpretation of §706(f)(1).<sup>135</sup>

However, the Court qualified the holding in *Trafficante* for two reasons.<sup>136</sup> First, Justice Scalia pointed out that, despite its broad

125. *Id.*; 42 U.S.C. § 2000e-5(f)(1).

126. 42 U.S.C. § 2000e-5(f)(1) (2006).

127. U.S. CONST. art. III, § 2.

128. Brief for Petitioner, *Thompson*, 131 S. Ct. 863 (No. 09-291), 2010 WL 3501186 at \*35-36. Thompson cited court of appeals precedent, arguing that “by using the phrase ‘person . . . aggrieved’ in section 706(f)(1) Congress authorized suit by any plaintiff with Article III standing.” *Id.*; see, e.g., *Anjelino v. New York Times Co.*, 200 F.3d 73, 92 (3d Cir. 2000) (holding that the plaintiffs stated a valid claim for retaliation by demonstrating some nexus between their concrete injury and an alleged violation of Title VII, even though they were not the intended target of the retaliatory conduct).

129. 409 U.S. 205 (1972).

130. 445 F.2d 442 (3d Cir. 1971).

131. Brief for Petitioner, *supra* note 128, at \*36-38.

132. *Id.* Thompson relied on *Hackett*, a case in which the Third Circuit held a “person claiming to be aggrieved” under Title VII was any individual who satisfied mere Article III standing. *Id.* (citing *Hackett*, 445 F.2d at 446); 42 U.S.C. § 2000e-5(f). Because the enforcement provision of the Fair Housing Act, 42 U.S.C. § 3613(a)(1)(A) (2006), states that “[a]n aggrieved person may commence a civil action,” Thompson argued *Trafficante* equates prudential standing under both Title VII and Title VIII with mere Article III standing. *Id.* at \*37-39.

133. *Id.* at \*37-39. Thompson drew upon the similarity of enforcement schemes originally employed under Title VII and Title VIII. Congress enacted both statutes without authorizing the administrative agency charged with their enforcement, the EEOC and the United States Department of Housing and Urban Development respectively, to initiate litigation. *Id.* at \*37-38. Under both statutes, enforcement was left up to the Attorney General in cases alleging a “pattern or practice” of discrimination, and private citizens in all other contexts. *Id.* at \*37. Thompson argued that this similarity in original enforcement strategy further illustrates that because *Hackett* held a Title VII “person aggrieved” must only satisfy Article III, and the Court in *Trafficante* found that reasoning persuasive, the Court in *Thompson* should also find it persuasive. *Id.* at \*37-39.

134. See *id.* at \*37-39; Civil Rights Act of 1968, tit. VIII, 42 U.S.C. §§ 3601-3631 (2006).

135. Brief for Petitioner, *supra* note 128, at \*36-38.

136. *Thompson*, 131 S. Ct. at 869.

language, the actual *Trafficante* holding was not nearly as broad.<sup>137</sup> The qualifying clause—“insofar as tenants of the same housing unit that is charged with discrimination are concerned”—actually excludes persons who are within the outer boundaries of Article III standing.<sup>138</sup> The Court did acknowledge that subsequent decisions had interpreted the Title VIII language “aggrieved” to extend standing to the full Article III limits.<sup>139</sup> However, the Court quickly noted that these decisions were not incompatible with the zone of interests test.<sup>140</sup> Second, the Court reasoned that if it adopted the reasoning described in *Trafficante*, “absurd consequences would follow.”<sup>141</sup> In addition, Justice Scalia observed that the Court was not bound by *Trafficante* because that decision interpreted Title VIII, not Title VII.<sup>142</sup> By declining to apply *Trafficante* to Title VII, the Court concluded that “the term ‘aggrieved’ must be construed more narrowly than the outer boundaries of Article III.”<sup>143</sup>

After rejecting Thompson’s position that a “person aggrieved” under Title VII included every plaintiff who satisfies Article III, the Court considered NAS’s position that only individuals who engaged in protected conduct can be “aggrieved” under Title VII.<sup>144</sup> Justice Scalia

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137. *Id.* (quoting *Trafficante*, 409 U.S. at 209) (noting that the Court in *Trafficante* held that the Title VII and Article III definitions of “person aggrieved” were identical, “*insofar as tenants of the same housing unit that is charged with discrimination are concerned*”).

138. *See id.* For example, there may be individuals who suffer concrete, redressable injuries, as a result of unlawful housing discrimination, who still fail to satisfy prudential standing requirements; for instance, the proprietor of local grocery that caters to the ethnic group suffering housing discrimination. This individual suffers an economic injury as a result of unlawful housing discrimination, but that interest is so far attenuated from those interests Congress intended Title VIII to protect that, while this individual satisfies Article III standing, he fails to satisfy the zone of interests test.

139. *Id.* (citing *Bennett v. Spear*, 520 U.S. 154, 165-66 (1997)).

140. *Id.* In *Bennett*, the Court noted that the enforcement provision of the Endangered Species Act conferred standing to sue on “any person.” 520 U.S. at 166; 16 U.S.C. § 1540(g)(1) (2006 & Supp. IV 2010). While this standard is exceptionally broad, especially when compared to language used in other statutory enforcement provisions, this case illustrates that occasionally every person who has mere Article III standing will also have proper standing under the “zone of interests” test.

141. *Thompson*, 131 S. Ct. at 869 (illustrating the point by offering a hypothetical corporate shareholder who would have standing to sue a corporation for terminating a valuable employee for unlawful, racially discriminatory reasons—under *Trafficante*, the hypothetical shareholder would have proper standing to sue provided he could prove the value of his stock decreased as a result of the allegedly unlawful employment action).

142. *Id.*

143. *Id.*

144. *Id.* at 869-70 (noting that “[a]t the other extreme from the position that ‘person aggrieved’ means anyone with Article III standing, NAS argues that it is a term of art that refers only to the employee who engaged in the protected activity”).

relied on statutory interpretation<sup>145</sup> and precedent<sup>146</sup> to reject this “artificially narrow meaning.”<sup>147</sup> Ultimately, the Court adopted an intermediate standard that “avoids the extremity of equating [person aggrieved] with Article III and yet is fully consistent with . . . *Trafficante*.”<sup>148</sup>

The Court held that the language “person aggrieved” under Title VII permits suit by any individual whose interests are “arguably [sought] to be protected by the statutes.”<sup>149</sup> Justice Scalia reasoned that applying the zone of interests test was appropriate because it was compatible with precedent,<sup>150</sup> yet not overbroad.<sup>151</sup> Unfortunately, the Court’s hypothetical third-party plaintiffs provided only minimal guidance regarding what individuals may fall within this zone of interests.<sup>152</sup> Applying this standard in *Thompson*, the Court determined that Thompson’s claim “falls within the zone of interests protected by Title VII” because he “was an employee of NAS, and the purpose of Title VII is to protect employees from their employers’ unlawful actions.”<sup>153</sup> The Court reasoned that Thompson was “well within the zone of interests” protected by Title VII

145. *Id.* at 870. Justice Scalia noted there was “no basis in text” to support the words carrying the “artificially narrow meaning.” Additionally, he stated, presuming Congress had intended a more limited interpretation, the text “would more naturally have said ‘person claiming to have been discriminated against’ rather than ‘person claiming to be aggrieved.’”

146. *Id.* (reasoning that such a narrow interpretation was actually incompatible with *Trafficante*, in which all residents of a certain apartment complex were “person[s] aggrieved” by unlawful racial discrimination against prospective tenants, despite not personally suffering any unlawful discrimination).

147. *Id.*

148. *Id.*

149. *Id.* (quoting *Nat’l Credit Union Admin. v. First Nat’l Bank & Trust Co.*, 522 U.S. 479, 495 (1998)).

150. *Id.* (describing the Court’s application of the zone of interests test to the phrase “person aggrieved” in *Thompson* as “fully consistent with [the Court’s] application of the term in *Trafficante*”).

151. *Id.* (emphasizing that while the zone of interests test is deferential, it still excludes “plaintiffs who might technically be injured in an Article III sense but whose interests are unrelated to the statutory prohibitions in Title VII;” for example, the hypothetical corporate shareholder, *supra* text accompanying note 141).

152. *See id.* at 868. The majority opinion discussed two hypothetical third-party retaliation scenarios that illuminate the combinations of third-party relationship and adverse employment action that may satisfy the *Burlington* standard. *Id.* The Court noted that “firing a close family member will almost always” satisfy *Burlington*, while “inflicting a milder reprisal on a mere acquaintance will almost never do so.” *Id.* Because the reasonable reader could reach these conclusions upon reviewing the Court’s § 704 precedent, these examples provide only minimal substantive guidance to practitioners arguing third-party retaliation under Title VII.

153. *Id.* at 870.

because he was not an innocent casualty of unlawful discrimination, but rather, the intended target of unlawful discrimination.<sup>154</sup> Given these circumstances, the Court held that Thompson was “a person aggrieved with standing to sue” under Title VII.<sup>155</sup>

### C. Justice Ginsburg’s Concurrence

Justice Ginsburg joined the Court’s opinion but wrote separately to offer two “fortifying observation[s].”<sup>156</sup> She first observed that the majority opinion aligned neatly with the EEOC’s interpretation of § 706(f)(1).<sup>157</sup> Justice Ginsburg relied upon the EEOC Compliance Manual,<sup>158</sup> which prohibits retaliation against a close relative or associate of an individual who engaged in protected conduct.<sup>159</sup> Therefore, she reasoned that the EEOC’s interpretation was entitled to deference from the Court.<sup>160</sup> Second, Justice Ginsburg pointed out that the interpretation of § 706(f)(1) adopted by the EEOC parallels the interpretation that other federal agencies have given other labor and employment statutory provisions regarding standing.<sup>161</sup>

## V. IMPLICATIONS

The unanimous decision in *Thompson v. North American Stainless, LP*<sup>162</sup> illustrated the Supreme Court’s continued commitment to protect employees by broadly interpreting statutes that prohibit workplace

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154. *Id.* (“Thompson is not an accidental victim of the retaliation-collateral damage, so to speak, of the employer’s unlawful act. To the contrary, injuring him was the employer’s intended means of harming Regalado.”).

155. *Id.*

156. *Id.* (Ginsburg, J., concurring).

157. *Id.* at 870-71.

158. 2 EEOC COMPLIANCE MANUAL § 8(c) (1998).

159. *Thompson*, 131 S. Ct. at 871 (Ginsburg, J., concurring) (specifically prohibiting “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”); 2 EEOC COMPLIANCE MANUAL § 8-II(C).

160. *Thompson*, 131 S. Ct. at 871 (Ginsburg, J., concurring); *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 399-400 (2008) (quoting *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998)) (noting that the EEOC’s interpretation merits deference because it reflects “a body of experience and informed judgment to which courts and litigants may properly resort for guidance”).

161. *Thompson*, 131 S. Ct. at 871 (Ginsburg, J., concurring) (citing *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 127-28 (D.C. Cir. 2001)) (noting the National Labor Relations Board’s position that retaliation against a relative violates the National Labor Relations Act).

162. 131 S. Ct. 863 (2011).

retaliation.<sup>163</sup> The *Thompson* decision is significant because it injects another variable into the *Burlington Northern & Santa Fe Railway Co. v. White*<sup>164</sup> adverse employment action analysis in third-party retaliation cases.

In traditional cases like *Burlington Northern*, where retaliation is directed at the plaintiff-protester, a sufficiently adverse employment action is one that “might have dissuaded a reasonable worker from making or supporting a charge of discrimination.”<sup>165</sup> In *Burlington Northern*, the Court relied on the plaintiff’s gender and family responsibilities to determine that the employment action at issue was sufficiently adverse.<sup>166</sup> These considerations illustrate that the *Burlington Northern* majority intended its “reasonable worker” to share some personal characteristics with the plaintiff.<sup>167</sup> Unfortunately however, this standard provided little guidance as to what other personal characteristics of the plaintiff trial courts should attribute to the similarly-situated, reasonable employee.

Given the *Burlington Northern* majority’s scant guidance on this point, Justice Alito, concurring in the judgment, wrote separately to argue that courts must naturally consider at least one other factor: the severity of the original discriminatory act.<sup>168</sup> Justice Alito reasoned that plaintiffs who suffer extreme underlying discrimination will not readily be deterred from exercising their Title VII<sup>169</sup> rights.<sup>170</sup> Conversely,

163. Since Justice Roberts’s confirmation in September, 2005, the Court has consistently interpreted retaliation provisions broadly, affording significant protection to individuals seeking redress for retaliation. *See, e.g.*, *Crawford v. Metro. Gov’t of Nashville & Davidson Cnty.*, Tenn., 555 U.S. 271, 273 (2009) (extending Title VII protection from retaliation to employees who oppose another employee’s discrimination during an employer’s investigation of the other employee’s complaint); *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 457 (2008) (recognizing that § 1981 prohibits workplace retaliation); *Gomez-Perez v. Potter*, 553 U.S. 474, 491 (2008) (acknowledging that the Age Discrimination in Employment Act provides a cause of action for retaliation to federal employees); *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53,57 (2006) (holding that the application of the Title VII retaliation provision is not limited to employer’s employment-related or workplace actions).

164. 548 U.S. 53 (2006).

165. *Id.* at 68 (quoting *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (2006)).

166. *Id.* at 57, 72-73 (emphasizing the following two facts to conclude that White’s suspension without pay was a sufficiently adverse employment action: (1) that Sheila White was “the only woman working in the Maintenance of Way department at Burlington’s Tennessee Yard,” and (2) that because of the suspension, “White and her family had to live for 37 days without income”).

167. *Id.* at 78-79 (Alito, J., concurring).

168. *Id.* at 77-78.

169. Civil Rights Act of 1964, tit. VII, 42 U.S.C. §§ 2000e-2000e-17 (2006 & Supp. IV 2010).

individuals who suffer less severe discrimination might be more easily dissuaded from exercising their Title VII rights.<sup>171</sup> Justice Alito concluded that juries must consider the nature and severity of the underlying discrimination to determine whether an employer's allegedly retaliatory employment action was sufficiently adverse to dissuade a similarly-situated, reasonable employee from engaging in protected conduct.<sup>172</sup>

In the context of third-party retaliation cases, the Court's decision in *Thompson* injects another necessary factor into the *Burlington Northern* adverse employment action analysis: the identity of the intended target of the allegedly retaliatory conduct. In traditional retaliation cases, the plaintiff engaged in some protected conduct and suffered the adverse employment action. However, in third-party retaliation cases, one person, the protestor, engaged in some protected conduct, while a different person, the target, suffered the adverse employment action. This distinction requires courts to consider the intended target of an adverse employment action when assessing *Burlington Northern* adversity in third-party retaliation claims.

The Court's decision in *Thompson* effectively reduces the adverse employment action element of third-party retaliation claims to a two-part test: is the vector-sum combination of an adverse employment action and that action's intended third-party target sufficiently adverse to dissuade a reasonable, similarly-situated employee from exercising his statutory rights? Courts should include the intended target of third-party retaliation in the *Burlington Northern* adverse employment action analysis because the adversity of a particular retaliatory act could vary considerably depending on who will suffer that retaliatory act.<sup>173</sup> This may result in courts applying a sliding scale to the severity of the adverse employment action and the proximity of relationship between

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170. *Burlington Northern*, 548 U.S. at 78 (noting that the "reasonable employee who is subjected to the most severe discrimination will not easily be dissuaded from filing a charge by the threat of retaliation").

171. *Id.* (reasoning that for an employee who suffers mild discrimination "the costs of complaining, including possible retaliation, will not have to be great to outweigh the lesser benefits that might be obtained by filing a charge").

172. *Id.* at 78 n.2 ("Without gauging the severity of the initial alleged discrimination, a jury cannot possibly compare the costs and benefits of filing a charge and, thus, cannot possibly decide whether the employer's alleged retaliatory conduct is severe enough to dissuade the filing of a charge.").

173. The reasoning that supports considering the target of the retaliatory action in the adverse employment action analysis is identical to the logic Justice Alito employed in his *Burlington Northern* concurrence—that an individual's willingness to pursue statutorily-protected conduct may fluctuate depending upon who will suffer an act of retaliation. *See id.* at 78.

the protester and the plaintiff. For example, an extreme adverse employment action—termination—imposed upon a third-party more remote than a fiancé—a significant other—might well establish a third party’s protection under *Thompson*.<sup>174</sup> Similarly, a milder adverse employment action—suspension without pay—imposed upon a third-party more closely related than a fiancé—for example, a spouse—might also warrant Title VII protection for the third-party under *Thompson*.<sup>175</sup> However, retaliation involving more mild reprisals—for example, a letter of reprimand or placing an employee on a performance improvement plan—directed at more attenuated targets—for example, a random co-worker—will probably not warrant Title VII protection.

Unfortunately for practitioners litigating third-party claims, the Court understandably refrained from articulating any specific combinations of adverse employment actions and third-party relationships that satisfy or fall short of *Burlington Northern* adversity.<sup>176</sup> While the *Thompson* opinion’s language provides some guidance, it stops predictably short of articulating any fixed point of reference for practitioners and courts to evaluate third-party retaliation, thus requiring further litigation to flesh out the skeleton of third-party retaliation claims under Title VII.

Since *Thompson*, several district courts have analyzed third-party retaliation claims.<sup>177</sup> These decisions illustrate expansive interpretations of *Burlington Northern* and a willingness to apply *Thompson* to factual scenarios beyond those presented before the Supreme Court. In *EEOC v. Willamette Tree Wholesale, Inc.*,<sup>178</sup> the United States District Court for the District of Oregon recognized a third-party retaliation claim by an individual who was terminated after his sister filed a sexual harassment charge with the EEOC.<sup>179</sup> The district court interpreted *Thompson* to permit third-party retaliation claims when a plaintiff’s

174. See, e.g., *Harrington v. Career Training Inst. Orlando, Inc.*, No. 8:11-cv-1817-T-33MAP, 2011 WL 4389870 at \*2 (M.D. Fla. Sept. 21, 2011).

175. See, e.g., *Willis v. Cleco Corp.*, No. 09-2103, 2011 WL 4443312 at \*10 (W.D. La. Sept. 22, 2011).

176. *Thompson*, 131 S. Ct. at 868. At one extreme, the Court noted that terminating “a close family member will almost always” satisfy *Burlington Northern*, while alternatively, the Court opined that subjecting “a mere acquaintance” to a less severe adverse employment action “will almost never do so.” *Id.*

177. See, e.g., *Willis*, 2011 WL 4443312; *Harrington*, 2011 WL 4389870; *Zamora v. City of Houston*, No. 4:07-4510, 2011 WL 4067860 (S.D. Tex. Sept. 13, 2011); *EEOC v. Willamette Tree Wholesale, Inc.*, No. CV 09-690-PK, 2011 WL 886402 (D. Ore. Mar. 14, 2011).

178. No. CV 09-690-PK, 2011 WL 886402 (D. Ore. Mar. 14, 2011).

179. *Id.* at \*12.

family member engaged in statutorily-protected conduct.<sup>180</sup> Similarly, in *Harrington v. Career Training Institute Orlando, Inc.*,<sup>181</sup> the United States District Court for the Middle District of Florida found that *Thompson* applied where individuals were only dating, as opposed to engaged to be married.<sup>182</sup> The court reasoned that the combination of a dating relationship and a termination was sufficient to warrant third-party protection because the Supreme Court did not specifically bar such a claim.<sup>183</sup>

Furthermore, courts have countenanced third-party retaliation claims where individuals suffered much less severe adverse employment actions. In *Willis v. Cleco Corp.*,<sup>184</sup> the United States District Court for the Western District of Louisiana recognized a third-party retaliation claim where the employer suspended the plaintiff five days without pay, allegedly in response to her husband filing a charge of race discrimination with the EEOC.<sup>185</sup> Also, in *Zamora v. City of Houston*,<sup>186</sup> the United States District Court for the Southern District of Texas approved a third-party claim where the defendant reassigned the plaintiff from a prestigious special unit to a regular patrol unit in response to his father filing an age discrimination charge with the EEOC.<sup>187</sup>

Despite innumerable scenarios in which third-party retaliation may occur, *Thompson* does provide some practical guidelines for litigating third-party retaliation claims. Practitioners representing employers should construct arguments confining the holding of *Thompson* to the termination of an individual within the first degree of relationship to the protester.<sup>188</sup> This application appears to be the most narrow, reasonable construction of the Court's language. Conversely, the only

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180. *Id.* at \*9 (noting that a plaintiff satisfies *Thompson* when he or she "is in a family relationship with another employee who engaged in protected activity").

181. No. 8:11-cv-1817-T-33MAP, 2011 WL 4389870 (M.D. Fla. Sept. 21, 2011) (applying *Thompson* to suit under § 1981).

182. *Id.* at \*2 (noting that "the Court's ruling in *Thompson* does not exclude third party reprisal claims for individuals who are merely dating").

183. *Id.*

184. No. 09-2103, 2011 WL 4443312 (W.D. La. Sept. 22, 2011).

185. *Id.* at \*3, \*10.

186. No. 4:07-4510, 2011 WL 4067860 (S.D. Tex. Sept. 13, 2011).

187. *Id.* at \*1, \*5 (recounting the plaintiff's allegations that "in early 2008, he was forced by his [Houston Police Department] superiors to transfer out of the prestigious Crime Reduction Unit ("CRU") and to accept a less desirable position as a "patrol officer" because his father, also a Houston Police Department employee, filed a charge of discrimination with the EEOC in December 2007).

188. The first degree of relationship would include the protester's fiancé or spouse, parents, children, and siblings. For example, those within the "family relationship" mentioned in *Willamette Tree*. See 2011 WL 886402 at \*9.

combination of retaliatory act and third-party relationship identified by the Court as insufficient is “inflicting a milder reprisal on a mere acquaintance.”<sup>189</sup> Because this language does not explicitly prohibit cognizable third-party retaliation claims on behalf of more distantly-related, or unrelated, individuals, practitioners representing both employees and the EEOC should urge courts to recognize third-party retaliation claims for a variety of third parties<sup>190</sup> associated with protesting employees or former employees who have suffered a variety of less severe retaliatory adverse employment actions.<sup>191</sup> Urging courts to apply *Thompson* to more distantly-related, or unrelated, third parties who suffer retaliatory actions less severe than termination embodies the Court’s broad adverse employment action standard articulated in *Burlington Northern*.

Only time, and future decisions, will identify where the nuanced boundaries of third-party retaliation liability lie. As courts continue to interpret and apply *Thompson*, these decisions will clarify exactly what combinations of adverse employment actions and third-party relationships Title VII protects. Until then, practitioners litigating third-party retaliation claims would be wise to exploit the malleable language in the Court’s opinion in *Thompson* to achieve desired outcomes for their clients.

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

190. Aside from those individuals in the first degree of relationship to the protester, plaintiffs’ counsel would be wise to advocate applying *Thompson* to any third party that is related to the protester by either blood or marriage. Further, under proper circumstances, *Thompson* would also protect individuals unrelated to the protester, such as friends and co-workers. Appropriate facts and skilled advocacy could entice courts to afford Title VII protection to a plethora of third parties, provided the third-party relationship is close enough that the adverse employment action would be sufficiently adverse under *Burlington Northern*.

191. For example, common less extreme adverse actions than termination include demotion, suspension, reassignment, denial of training or support, and modification of work schedules.