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Closing the Floodgates: Defining a Class of Third-Party Plaintiffs for Title VII Retaliation Claims

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I. INTRODUCTION

Being sued is bad enough when you expect it, but a surprise lawsuit is even worse. Suppose that you are a senior manager of a company that has just conducted its annual employee performance appraisals. Jane and Jeff, two of the employees whose appraisals you have just examined, are married to each other and work in the same office. After reading unfavorable performance reviews about each of them, you add their names to a potential termination list. A few hours after you read the reviews, however, you learn that Jeff has filed a Title VII lawsuit against your company alleging religious discrimination.[1] Having a basic grasp of Title VII from your general counsel's previous advice, you recognize that firing Jeff so shortly after learning of his discrimination claim would potentially expose you to additional liability.[2] Despite your legitimate basis for terminating him, doing so could result in his suing your company on additional grounds, claiming that you terminated him in retaliation for his initial complaint.

Perhaps you may even refrain from terminating Jane during this period. While you probably would not assume that firing her would expose your company to a retaliation claim, you may nevertheless feel some concern over the appearance that her termination would create. At the very least, you may worry that terminating her would heighten any tension between your company and Jeff resulting from his lawsuit. You may fear that as a consequence of Jane's termination, the already disgruntled Jeff would become even more displeased with the company and perhaps even more aggressive with his suit.

Now, suppose that a year later your company again completes performance appraisals. Upon reading a poor review of your employee Mark, you decide to fire him. Mark works in a different office than Jeff and Jane, and, as far as you know, he has no affiliation with either spouse. Soon after you fire Mark, though, you receive notice that he has filed a Title VII retaliation suit against your company. You are surprised to learn that he is a friend of Jeff. You are also shocked by Mark's allegation that he was fired in retaliation for Jeff's initial discrimination claim. Based on everything that you know about Title VII, you never expected to face a retaliation claim from a third party who engaged in no Title VII-protected activity himself.

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1. *See* 42 U.S.C. § 2000e-2(a) (2006).
2. *See id.* § 2000e-3(a).

In 2011, the United States Supreme Court opened the floodgates for this type of unexpected claim when it allowed a third-party plaintiff to recover for a Title VII retaliation claim in *Thompson v. North American Stainless, LP*.[3] In this case, the Court recognized a retaliation claim brought by the fiancé of a woman who had filed a prior Title VII discrimination claim.[4] However, the Court refused to designate classes of third-party plaintiffs who may recover under Title VII's antiretaliation provision, thereby exposing employers to unprecedented liability from an unpredictable array of potential plaintiffs.[5] To limit its liability effectively, an employer must know not only which behavior may form the basis of a claim but also who can file it. The law after *Thompson* fails to provide employers with this basic level of certainty, though, because any third party can currently file a Title VII retaliation claim against his employer. Accordingly, employers need a standard defining which third parties can file these claims.

This Comment proposes a standard for determining which third-party plaintiffs can bring Title VII retaliation claims against their employers. The proposed standard is rooted in principles of tort law, which are appropriate both because of Title VII's evolution into a statutory tort and because of the Supreme Court's application of tort law principles to other employment discrimination issues.[6] Specifically, the requirements for the tort of negligent infliction of emotional distress (NIED), or bystander damages, may be used as a model for third-party retaliation claims. Claims for NIED must satisfy the elements of familial relationship, temporal proximity, and spatial proximity.[7] These elements also address considerations pertinent to third-party Title VII retaliation claims. This Comment analyzes different states' requirements for NIED claims and ultimately proposes a standard for determining which third-party plaintiffs may bring Title VII retaliation claims.

Part I of this Comment describes the origin, evolution, and substance of Title VII's antiretaliation provision. This Part also discusses the United States Supreme Court's recent expansion of Title VII retaliation claims by broadening the definition of retaliation, the categories of actions deemed retaliatory, and the class of plaintiffs eligible to file retaliation claims. Part II discusses the Supreme Court's expansion of Title VII retaliation claims to

3. Thompson v. North American Stainless, LP, 131 S. Ct. 863 (2011).
4. *Id.* at 868.
5. *Id.*
6. *See* discussion *infra* Part I.A; Staub v. Proctor Hosp., 131 S. Ct. 1186 (2011); *see also* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998).
7. RESTATEMENT (SECOND) OF TORTS § 436 (1977).

recognize third-party plaintiffs in its 2011 decision, *Thompson v. North American Stainless, LP*.[8] Then, Part III explores *Thompson*'s ramifications and asserts the need for establishing a standard for third-party Title VII retaliation claims.[9] Finally, Part IV proposes a standard rooted in principles of NIED to govern these retaliation claims.

A synthesis of various states' requirements for these claims forms the basis of the proposed standard for third-party Title VII retaliation claims. This standard examines the relationship between the third-party plaintiff and the coworker who engaged in the initial Title VII-protected activity. It also considers the elapsed time between the initial protected activity and the alleged retaliation, as well as the proximity in which the two employees worked. The proposed standard will balance Title VII's policy goals against employers' concerns and will ultimately satisfy both competing interests.

II. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964: ITS DEVELOPMENT AND APPLICATION

A. Evolution of Title VII

While Congress had considered a bill supporting civil rights each year between 1945 and 1957, it did not pass the first civil rights bill of the twentieth century until the 1957 Civil Rights Act, which focused on voting rights.[10] The next Civil Rights Act followed in 1960 and expanded the rights provided by the 1957 legislation.[11] Soon afterwards, Congress enacted the Civil Rights Act of 1964 to eradicate discrimination in both employment and public accommodations.[12] The Act did not, however, extend to gender discrimination until the day before the House of Representatives voted on the legislation, when an opponent proposed an amendment to extend its protections to women.[13] This

8. 131 S. Ct. at 868.

9. *Id.*

10. *Major Features of the Civil Rights Act of 1964*, THE DIRKSEN CONG. CTR., http://www.congresslink.org/printbasicshistmatscivilrights64text.htm (last visited October 12, 2011).

11. *Id.*

12. Anita G. Schausten, *Retaliation Against Third Parties: A Potential Loophole in Title VII's Discrimination Protection*, 37 J. MARSHALL L. REV. 1313, 1314 (2004).

13. Robert Stevens Miller, Jr., *Sex Discrimination and Title VII of the Civil Rights Act of 1964*, 51 MINN. L. REV. 877, 880–81 (1967). While African Americans uniquely endured some forms of oppression forbidden by the Act, women of the era faced similar discrimination in employment. *Id.*

was an unsuccessful attempt to thwart the bill's passage, but it resulted in a Civil Rights Act that protected individuals based on race, color, religion, national origin, and gender.[14]

Since its enactment, the purpose and application of Title VII of the Civil Rights Act of 1964 have undergone dramatic change.[15] Congress' goal when enacting Title VII was threefold: (1) to effect broad social change; (2) to boost productivity through increasing the country's human capital; and (3) to repair the country's international reputation, which had been blighted by persistent racial discrimination.[16] The initial purpose of Title VII's provision for attorney's fees was to incentivize individuals' enforcement of the statute.[17] In effect, "the Title VII plaintiff acted 'not for himself alone but also as a "private attorney general," vindicating a policy that Congress considered of the highest priority.'"[18] Even after Title VII's 1972 amendment granted litigation authority to the Equal Employment Opportunity Commission (EEOC), the private right of action continued to play an important role beyond mere reparation of individual damages because it furthered the public interest of eradicating discrimination.[19]

Despite its lofty origins, Title VII has grown to resemble a statutory tort through the evolution of several facets of employment discrimination claims.[20] For example, while the majority of early Title VII plaintiffs complained of employers' widespread refusal to hire, since the 1980s, employees have more

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14. *Id.* at 877.

15. Cheryl Krause Zemelman, *The After-Acquired Evidence Defense to Employment of Title VII and the Contours of Social Responsibility*, 46 STAN. L. REV. 175, 196 (1993).

16. *Id.* at 189; Paulette M. Caldwell, *Reaffirming the Disproportionate Effects Standard of Liability in Title VII Litigation*, 46 U. PITT. L. REV. 555, 580–83 (1985); Mary L. Dudziak, *Desegregation As a Cold War Imperative*, 41 STAN. L. REV. 61, 62–63 (1988) (proposing that the apparent contradictions between American political ideology and American race relations created problems in foreign policy); Schausten, *supra* note 12; *Major Feature*s, *supra* note 10 (describing the rampant racial discrimination prior to the passage of the Civil Rights Acts of the late 1950s and early 1960s, elaborating that segregation in public facilities and schools was so pervasive throughout the South that even by 1963, only 12,000 of the 3,000,000 Southern African Americans attended integrated schools, and that racism similarly pervaded many employers' hiring decisions).

17. Zemelman, *supra* note 15, at 189.

18. *Id.* at 189 (internal quotation marks omitted); Newman v. Piggie Park Enters., 390 U.S. 400, 402 (1968).

19. Zemelman, *supra* note 15, at 189–90; Alexander v. Gardner-Denver Co., 415 U.S. 36, 45 (1974); EEOC v. Associated Dry Goods Corp., 449 U.S. 590, 595 (1981).

20. Zemelman, *supra* note 15, at 196.

frequently protested individual termination or promotion decisions.[21] This transformation contributed to the sentiment that the statute had succeeded in reducing employment discrimination so that it ceased to pose a serious problem.[22] Following this paradigm shift, the EEOC of the 1980s turned its focus from increasing the percentage of minorities in labor markets to advocating victim-specific relief.[23]

Similarly, the Supreme Court changed its stance on employment discrimination, no longer considering it "a class based phenomenon with societal causes, but [instead a] series of discrete, aberrant acts by individuals harboring personal hostility toward the victim."[24] Through strengthening its support for victim-specific outcomes, the Court demonstrated its changed views. Early Title VII plaintiffs frequently filed their claims as class actions, conforming to the initial view that the purpose of Title VII was to eliminate pervasive discrimination in employment.[25] However, class action discrimination suits began to lose favor with the Court in the 1970s,[26] and by the 1980s individual suits comprised the overwhelming majority of Title VII claims.[27] This shift led courts to examine "individuals' private circumstances, rather than . . . systematic business practices" to grant individual damages.[28] This modern practice starkly contrasts with the Supreme Court's

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21. John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 983–84 (1991).

22. Zemelman, *supra* note 15, at 194.

23. *Id.* at 196. *See also Statements Before House Labor Subcommittee on Employment Opportunities on Use of Goals and Timetables by EEOC*, 1986 Daily Lab. Rep. (BNA) No. 48, at E-1 (Mar. 12, 1986); Kenneth B. Noble, *Anger and Elation at Ruling on Affirmative Action*, N.Y. TIMES, Mar. 29, 1987, § 4, at 1; *Policy Changes: Aggressive Enforcement Will Mark Next Term at EEOC, Thomas Says*, 1984 Daily Lab. Rep. (BNA) No. 221, at A-6 (Nov. 15, 1984).

24. Mark S. Brodin, *The Role of Fault and Motive in Defining Discrimination: The Seniority Question Under Title VII*, 62 N.C. L. REV. 943, 945 (1984).

25. *See* Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 338–39 (1980) (restricting attorney fee awards in class actions because of the Court's opinion that they promote frivolous litigation); *see also* Gen. Tel. Co. v. Falcon, 457 U.S. 147 (1982) (requiring all members of a class, along with their representative, to claim injury arising from the same employment practice); E. Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395 (1977) (decertifying a class because some of its representatives had been unqualified for the positions that they were discriminatorily denied, even though the employer rejected them without examining their qualifications).

26. *See Deposit*, 445 U.S. at 338–39; *see also Gen. Tel. Co.*, 457 U.S. at 147; *E. Tex. Motor Freight Sys., Inc.*, 431 U.S. at 395.

27. Zemelman, *supra* note 15, at 196.

28. *Id.*

original rejection of a tort model for Title VII and denial of compensatory damages to Title VII plaintiffs.[29]

At one time, the Supreme Court denied compensatory damages under Title VII, considering them too unrelated to the statute's mission of eliminating widespread employment discrimination.[30] Congress, however, disagreed with this position, as evidenced by its enactment of the Civil Rights Act of 1991, which changed the law to allow recovery of even punitive damages.[31] Accordingly, the Court now embraces Title VII individual damages.[32] In fact, the Court even acknowledges that Title VII functions as a statutory tort, even referring to it as such.[33] Since its enactment, Title VII has thus, through the actions of the Supreme Court and Congress, transformed into a legislatively created tort in terms of its stated purpose and application.[34]

B. Overview of Title VII

While some aspects of Title VII have changed over the years, its basic goal of eliminating discrimination has remained constant. Title VII contains two distinct prohibitions: one against discrimination

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29. *Id.*

30. *Id.* ("Title VII was 'regarded as a mechanism to furnish relief and restitution to victims of a social evil, not to create a new cause of action for personal injuries "otherwise actionable."'") (quoting Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists, 401 F. Supp. 1363, 1369 (S.D.N.Y. 1975)).

31. Stephen A. Plass, *Bedrock Principles, Elusive Construction, and the Future of Equal Employment Laws*, 21 HOFSTRA L. REV. 313, 358–60 (1992).

32. Zemelman, *supra* note 15, at 196.

33. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998) (providing an affirmative defense to supervisor harassment claims). *See also* Staub v. Proctor Hosp., 131 S. Ct. 1186, 1187 (2011) (calling USERRA (Uniformed Services Employment and Reemployment Rights Act) a "federal tort"); Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 57 (2006) (analyzing Title VII claim under tort framework); Price Waterhouse v. Hopkins, 490 U.S. 228, 264 (1989) (O'Connor, J., concurring) (referencing "the statutory employment 'tort' created by Title VII"), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in* Landgraf v. USI Film Prods., 511 U.S. 244 (1994); United States v. Burke, 504 U.S. 229, 249 (1992) (O'Connor, J., dissenting) ("The purposes and operation of Title VII are closely analogous to those of tort law . . . ."); 42 U.S.C. § 2000 (2006).

34. This Comment takes no position on whether Title VII's transformation was a positive or negative change. Instead, it merely acknowledges the current tort-like state of the law and accordingly suggests that tort law principles serve as a useful and logical basis for defining a class of third-party Title VII retaliation plaintiffs.

and the other against retaliation.[35] The antidiscrimination provision stipulates that an employer may not "fail or refuse to hire or to discharge any individual, or otherwise 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."[36] The antiretaliation provision, in turn, prohibits employers from

> discriminat[ing] 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.[37]

The Supreme Court has held that the primary purpose of the antiretaliation provision is to ensure the enforcement of Title VII's substantive provision.[38] This proposition is certainly logical—if employees had no remedy against their employers' retaliation, they would derive no real benefit from antidiscrimination laws. Any remedy granted to such unprotected plaintiffs for their employers' discrimination would be mitigated by employers' unrestricted ability to penalize complaining employees. The Court has further described the purpose of the antiretaliation provision as ensuring "unfettered access to statutory remedial mechanisms."[39] Beyond merely maintaining access to Title VII's remedial mechanisms, however, the Supreme Court has actually increased the availability of these mechanisms in recent years by taking an increasingly expansive view of retaliation claims.[40]

C. The Supreme Court's Expansion of Retaliation Claims in Recent Years

Employees are filing a rapidly increasing number of retaliation claims. Between 1997 and 2009, the percentage of Title VII retaliation claims rose from 20% to 31% of all claims filed with the

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35. The Civil Rights Act of 1964 also includes a provision creating the Equal Employment Opportunity Commission (EEOC) to govern its enforcement. 42 U.S.C. § 2000e-2(a) (2006).
36. *Id.*
37. 42 U.S.C. § 2000e-3(a) (2006).
38. *Burlington N. & Santa Fe Ry. Co.*, 548 U.S. at 57.
39. Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997).
40. *See* discussion *infra* Part I.C.

EEOC.[41] This trend correlates with the Supreme Court's increasingly broad construction of Title VII's antiretaliation provision. The Court justifies this liberal interpretation based on differences in wording between Title VII's substantive ban on discrimination and its ban on retaliation.[42]

1. Expansion of the Definition of Employee—Robinson v. Shell Oil

The Supreme Court first expanded its protection of employees under Title VII in *Robinson v. Shell Oil*, in which it held that the term *employee* includes former employees.[43] In this case, Charles Robinson, a former Shell Oil (Shell) employee, initially filed an EEOC charge claiming that Shell had fired him in violation of Title VII.[44] Subsequently, Mr. Robinson applied for a position with another company, to which Shell gave a negative reference.[45] Mr. Robinson proceeded to file a retaliation claim against Shell, alleging that the company had provided the negative reference in retaliation for his initial complaint.[46] He prevailed on this retaliation claim because the Supreme Court held that the term *employee* in Title VII's antiretaliation provision encompassed both current and former employees.[47] In so holding, the Court departed from prior

41. *Charge Statistics, FY 1997 Through FY 2009*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://www1.eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited Aug. 18, 2011).

42. *Burlington N. & Santa Fe Ry. Co.*, 548 U.S. at 62–63. *Compare* 42 U.S.C. § 2000e-2(a) (2006) (prohibiting an employer from "fail[ing] or refus[ing] to hire or to discharge any individual, or otherwise . . . discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment" or "limit[ing], segregat[ing], or classify[ing] 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" based on a protected characteristic), *with* 42 U.S.C. § 2000e-3(a) (2006) (prohibiting an employer from "discriminat[ing] *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") (emphasis added). *See also* Susan M. Omilian & Jean P. Kamp, SEX-BASED EMPLOYMENT DISCRIMINATION § 12.06 (1990).

43. *Robinson*, 519 U.S. at 337.

44. *Id.* at 339.

45. *Id.*

46. *Id.* at 340.

47. *Id.* at 346.

jurisprudence, which had only included current employees within the scope of the provision.[48]

2. Expansion of the Definition of Discrimination—Burlington Northern & Santa Fe Railway v. White

After broadening the definition of *employee* under Title VII's antiretaliation provision, the Supreme Court turned to another element of these claims, namely, *discrimination*. The circuits were split over the term's definition prior to the Supreme Court's *Burlington Northern & Santa Fe Railway v. White* decision.[49] The Fifth and Eighth Circuits applied the most restrictive standard to the term—the "ultimate employment decision" standard.[50] This standard considered retaliatory conduct to constitute *discrimination* under Title VII's antiretaliation provision only when it rose to the level of decisions "such as hiring, granting leave, discharging, promoting, and compensating."[51] Other circuits, including the Sixth, instead applied the same definition of *discrimination* for retaliation claims that they applied to the underlying discrimination claims.[52] This more expansive standard only required plaintiffs to show that the employer's retaliatory action caused "an adverse effect on the 'terms, conditions, or benefits' of employment."[53]

Because of the conflicting approaches, the Supreme Court stepped in to resolve the circuit split. In *Burlington Northern*, the Supreme Court defined *discrimination* under Title VII's antiretaliation provision to include "any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity."[54] This definition of *discrimination* encompasses an even broader range of activities than those covered under Title VII's substantive

48. *Id.*

49. Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006).

50. *Id.* at 60 (quoting Von Gunten v. Maryland, 243 F.3d 858, 866 (4th Cir. 2001)).

51. *Burlington N. & Santa Fe Ry. Co.*, 548 U.S. at 60 (quoting Mattern v. Eastman Kodak Co., 104 F.3d 702, 707 (5th Cir. 1997)).

52. *Id.* at 60.

53. *Id.* at 60–61 (quoting *Von Gunten*, 243 F. 3d at 866).

54. *Id.* at 66 (quoting EEOC COMPLIANCE MANUAL § 8-13 (1998)) [hereinafter EEOC MANUAL], *available at* http://www.eeoc.gov/policy/docs/retal.pdf). *See also* EEOC INTERPRETIVE MANUAL, REFERENCE MANUAL TO TITLE VII LAW FOR COMPLIANCE PERSONNEL § 491.2 (1972) (Section 704(a) "is intended to provide 'exceptionally broad protection' for protestors of discriminatory employment practices.").

antidiscrimination provision.[55] So, the *Burlington Northern* definition reaches further than even the more expansive of the two interpretations previously followed by the circuits.[56] Under the *Burlington* standard, therefore, employer activities that do not constitute discrimination under Title VII's substantive provision may nonetheless constitute discrimination under the antiretaliation provision.[57]

III. THE CREATION OF THIRD-PARTY STANDING FOR TITLE VII RETALIATION CLAIMS

The next logical step after the Supreme Court's expansion of the definitions of *employee* and *discrimination* under Title VII's antiretaliation provision was the expansion of the class of plaintiffs who may file retaliation claims. Prior to *Thompson*, the circuits were split over the proper standard for analyzing third-party retaliation claims under Title VII.[58] Some circuits rejected these claims altogether, instead adhering to the plain language of Title VII, which does not specifically provide for third-party plaintiffs.[59] Others recognized third-party retaliation claims, considering them supported by the legislative intent underlying Title VII.[60] In

55. 42 U.S.C. § 2000e-2(a) (2006) ("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.").

56. *Burlington N. & Santa Fe Ry. Co.*, 548 U.S. at 60–61.

57. 42 U.S.C. § 2000e-3(a) (2006) ("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." (emphasis added)). The Supreme Court held that Burlington Northern & Santa Fe Railway Company unlawfully retaliated against Sheila White for her previously filed discrimination complaint against the company by suspending her without pay and reassigning her duties. *Burlington*, 548 U.S. at 73. Though Burlington reassigned White to perform tasks that were within her job description, the Court determined that the change in duties was "materially adverse" because the new duties were less desirable than her former ones. *Id.*

58. Thompson v. North American Stainless, LP, 567 F.3d 804, 808–11 (6th Cir. 2009), *rev'd*, 131 S. Ct. 863 (2011).

59. *See* discussion *infra* Part II.A.2.

60. *See* discussion *infra* Part II.A.1.

accordance with its previous expansion of retaliation claims, the Supreme Court ultimately adopted the latter approach in *Thompson*.[61] It reasoned that withholding the cause of action from third parties would constitute an "artificially narrow reading" of Title VII and thus permitted third-party Title VII retaliation claims.[62]

*A. Third-Party Retaliation Claims—The Pre-*Thompson *Circuit Split*

Third-party retaliation claims differ markedly from traditional retaliation claims. A traditional plaintiff seeking redress under Title VII's antiretaliation provision establishes a prima facie case by demonstrating that (1) he took part in an activity protected by Title VII; (2) his employer committed an adverse employment action against him; and (3) his protected activity motivated the employer's adverse employment action.[63] A third-party retaliation claim, in contrast, arises when one employee engages in Title VII-protected activity, but the employer retaliates against a different employee, who then files suit.[64] While the Supreme Court had previously established that Title VII protects third parties who engage in protected behavior on behalf of their coworkers, "pure" third-party plaintiffs fall short of this criteria.[65] These plaintiffs necessarily fail to meet the first prong of a retaliation claim—participation in a protected activity—because a third-party plaintiff did not previously engage in protected activity.[66]

Because third-party plaintiffs do not fit the conventional criteria for Title VII retaliation claims, different circuit courts took different approaches when determining whether to allow third-

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61. *See* discussion *infra* Part II.A.1.

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

63. Stevens v. St. Louis Univ. Med. Ctr., 97 F.3d 268, 270 (8th Cir. 1996).

64. Thompson v. North American Stainless, LP, 520 F.3d 644, 647 (6th Cir. 2008), *rev'd*, 131 S. Ct. 863 (2011).

65. *See* Crawford v. Metro. Gov't of Nashville & Davidson Cnty., Tenn., 555 U.S. 271 (2009) (extending Title VII protection from retaliation to employees who oppose discrimination on behalf of coworkers in certain circumstances). When discussing third-party Title VII retaliation plaintiffs, this Comment refers to these "pure" third-party plaintiffs who have personally engaged in no protected activity.

66. Alex B. Long, *The Troublemaker's Friend: Retaliation Against Third Parties and the Right of Association in the Workplace*, 59 FLA. L. REV. 931, 933–34 (2007).

party retaliation claims.[67] Prior to the Supreme Court's grant of certiorari in *Thompson*, the circuit courts had applied two main standards to these claims, either adhering to the plain language of Title VII or adopting a more expansive approach, such as interpreting it purposively.[68]

1. Purposive Interpretation of Title VII

Some circuits, espousing a purposive approach, liberally construed Title VII. These circuits allowed third-party retaliation claims because they deemed the claims to further Title VII's purpose of providing "'unfettered access' to [the statute's] remedial mechanisms."[69] The Eleventh Circuit and, initially, the Sixth Circuit utilized a purposive approach and allowed third-party Title VII retaliation claims.[70] Some district courts and the EEOC subscribed to this philosophy as well.[71]

The Eleventh Circuit in *Wu v. Thomas*, for instance, recognized a husband's claim for retaliation under Title VII even though he had not personally engaged in activity protected by Title VII.[72] The court decided that he could sue under Title VII's antiretaliation provision because his wife, and coworker, had previously filed a

67. John J. Feeney, *An Inevitable Progression in the Scope of Title VII's Antiretaliation Provision: Third-Party Retaliation Claims*, 38 CAP. U.L. REV. 643, 652–55 (2010).

68. *Id*. In addition to cases specifically addressing the antiretaliation provision of Title VII, this Comment refers to cases interpreting the antiretaliation provisions of the ADA and ADEA for additional guidance on the interpretation of Title VII's antiretaliation provision. *See* Schausten, *supra* note 12, at 1322–23 ("Because cases under Title VII, the Americans with Disability Act ('ADA') [42 U.S.C. §12206], and Age Discrimination in Employment Act ('ADEA') [29 U.S.C. §623(d)] all tend to be analyzed similarly in relation to retaliation, courts use cases from all three statutes as precedent in making their decisions."); *see also* Fogleman v. Mercy Hosp., Inc., 283 F.3d 561, 567 (3d Cir. 2002) ("[P]recedent interpreting any one of these statutes is equally relevant to interpretation of the others.").

69. Angela J. Schnell, *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*, 18 AM. U. J. GENDER SOC. POL'Y & L. 909, 919 (2010).

70. Thompson v. North American Stainless, LP, 520 F.3d 644, 647 (6th Cir. 2008), *rev'd*, 131 S. Ct. 863 (2011).

71. Murphy v. Cadillac Rubber & Plastics, Inc., 946 F. Supp. 1108 (W.D.N.Y. 1996); Wu v. Thomas, 863 F.2d 1543 (11th Cir. 1989); DeMedina v. Reinhardt, 444 F. Supp. 573 (D.D.C. 1978); EEOC v. Nalbandian Sales, Inc., 36 F. Supp. 2d 1206 (E.D. Cal. 1998); Thomas v. Am. Horse Shows Assoc., Inc., No. 97-CV-3513 JG, 1999 WL 287721 (E.D.N.Y. April 23, 1999); EEOC MANUAL § 8-10, *supra* note 54.

72. *Wu*, 863 F.2d at 1547–48.

Title VII discrimination claim.[73] Even though the husband was a third party, the court recognized his claim because the employer's retaliatory action impacted his wife, the initial Title VII claimant.[74]

Similarly, a three-judge panel of the Sixth Circuit initially applied a purposive approach to Title VII retaliation claims in *Thompson*.[75] The court determined that the purpose of Title VII supports third-party retaliation claims.[76] It held that "Title VII prohibit[s] employers from taking retaliatory action against employees not directly involved in protected activity, but who are so closely related to or associated with those who are directly involved, that it is clear that the protected activity motivated the employer's action" because "such conduct would undermine the purposes of Title VII."[77] The court additionally noted that a literal reading of Title VII's antiretaliation provision runs contrary to the intent of Title VII.[78] It concluded that, under the *Burlington* standard, an employer's retaliation against a family member would discourage "reasonable workers" from filing discrimination claims.[79]

Like the Eleventh and Sixth Circuits, several district courts have allowed spouses to file third-party retaliation claims.[80] A few district courts have even extended these claims to siblings.[81] The EEOC also supports third-party retaliation claims, considering them to be covered by Title VII's prohibition against "retaliation against someone so closely related to or associated with the person exercising his or her statutory rights that it would discourage that person from pursuing those rights."[82]

2. Literal Interpretation of Title VII

Instead of following a purposive approach, the Eighth, Third, Fifth, and, eventually, Sixth Circuit Courts of Appeals interpreted

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73. *Id.*
74. *Id*. at 1548.
75. *Thompson*, 520 F.3d at 647.
76. *Id.*
77. *Id.* at 646.
78. *Id.* at 647.
79. *Id.*
80. Murphy v. Cadillac Rubber & Plastics, Inc., 946 F. Supp. 1108 (W.D.N.Y. 1996); Wu v. Thomas, 863 F.2d 1543 (11th Cir. 1989); DeMedina v. Reinhardt, 444 F. Supp. 573 (D.D.C. 1978).
81. EEOC v. Nalbandian Sales, Inc., 36 F. Supp. 2d 1206 (E.D. Cal. 1998); Thomas v. Am. Horse Shows Assoc., Inc., No. 97-CV-3513 JG, 1999 WL 287721 (E.D.N.Y. April 23, 1999).
82. EEOC MANUAL, *supra* note 54, at § 8-10.

Title VII's antiretaliation provision literally.[83] These circuits reached the conclusion that third-party retaliation claims were invalid because the express language of Title VII does not provide for them.[84] As an additional rationale for prohibiting these claims, the Third Circuit cites the potentially limitless liability to which third-party retaliation claims would subject employers.[85]

The Eighth Circuit, in *Smith v. Riceland Foods, Inc.*, refused to recognize third-party retaliation claims, holding steadfastly that only the person who took part in the initial protected activity may file a Title VII retaliation claim.[86] In *Riceland*, an employee who lived with a coworker filed discrimination charges against her employer, which later fired the coworker.[87] The coworker, in turn, filed suit under Title VII's antiretaliation provision; however, the Eighth Circuit held that he did not have a valid claim because he had not engaged in any protected activity himself.[88]

The Third Circuit likewise rejected third-party retaliation claims in *Fogleman v. Mercy Hospital, Inc.*[89] The court acknowledged that Title VII's purpose could potentially support the recognition of third-party retaliation claims.[90] However, because it did not find "that adherence to the statute's plain text would be absurd," it determined that the plain language of the statute should control.[91] Using similar logic, the Fifth Circuit rejected third-party retaliation claims in *Holt v. JTM Industries*.[92] The court

> recognize[d] that there is a possible risk that an employer will discriminate against a complaining employee's relative or friend in retaliation for the complaining employee's

83. Smith v. Riceland Foods, Inc., 151 F.3d 813 (8th Cir. 1998); Fogleman v. Mercy Hosp., Inc., 283 F.3d 561, 569 (3d Cir. 2002); Holt v. JTM Indus., 89 F.3d 1224, 1227 (5th Cir. 1996) (addressing retaliation under the ADEA); Thompson v. North American Stainless, LP, 567 F.3d 804, 816 (6th Cir. 2009), *rev'd* 131 S. Ct. 836 (2011).

84. Feeney, *supra* note 67, at 665–66. *See also Thompson*, 567 F.3d at 808; *Fogleman*, 283 F.3d at 570; *Holt*, 89 F.3d at 1226; *Smith*, 151 F.3d at 819.

85. *Fogleman*, 283 F.3d at 570.

86. *Smith*, 151 F.3d at 813.

87. *Id.* at 815–16.

88. *Id.* at 813.

89. *See Fogleman*, 283 F.3d at 571.

90. *Id.* at 569.

91. *Id.* at 570.

92. Holt v. JTM Indus., 89 F.3d 1224, 1227 (5th Cir. 1996) (addressing retaliation under the ADEA). *But see* Jones v. Flagship Int'l, 793 F.2d 714, 727 (5th Cir. 1986) (commenting that "employee opposition to discriminatory employment practices directed against a fellow employee" could be considered protected activity under Title VII's antiretaliation provision).

> actions . . . [but] . . . believe[d] that the language that Congress has employed . . . will better protect employees against retaliation than [the court] could by trying to define the types of relationships that should render automatic standing [for third parties].[93]

Finally, after briefly recognizing third-party retaliation claims, the Sixth Circuit reversed its position.[94] Upon its rehearing en banc of *Thompson*, the court vacated its original decision and affirmed the district court's holding "that § 704(a) of Title VII does not create a cause of action for third-party retaliation for persons who have not personally engaged in protected activity."[95] The Sixth Circuit based its decision on the established principle that "[w]hen the statutory language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms."[96] The court determined that the antiretaliation provision's plain wording limits the class of antiretaliation plaintiffs to individuals who have personally engaged in protected activities, a result that it did not consider absurd.[97] Because Thompson had not engaged in any protected activity, the Sixth Circuit concluded that the district court correctly granted summary judgment in favor of the defendant corporation.[98]

B. Thompson v. North American Stainless—*The Recognition of Third-Party Standing in Title VII Retaliation Claims*

Relying on its *Burlington Northern* definition of *discrimination*, the Supreme Court continued its expansion of Title VII's protections by allowing third-party retaliation claims in *Thompson*.[99] Eric Thompson and his then-fiancée Miriam Regalado both worked for North American Stainless until 2003. That year, the corporation fired Thompson three weeks after receiving notice that Regalado had filed a Title VII discrimination claim against their employer.[100] Subsequently, Thompson filed a Title VII retaliation claim against North American Stainless, alleging that his termination was

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93. *Holt*, 89 F.3d at 1227.

94. Thompson v. North American Stainless, LP, 567 F.3d 804, 816 (6th Cir. 2009), *rev'd*, 131 S. Ct. 863 (2011).

95. *Id.*

96. *Id.* at 807 (quoting Arlington Cent. Sch. Dist. Bd. v. Murphy, 548 U.S. 291 (2006)).

97. *Thompson*, 567 F.3d at 805.

98. *Id.* at 805–06.

99. Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006); Thompson v. North American Stainless, LP, 131 S. Ct. 863, 868 (2011).

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

retaliation for Regalado's discrimination charge.[101] The district court dismissed Thompson's retaliation claim on summary judgment, reasoning that Title VII "does not permit third party retaliation claims."[102] The Sixth Circuit initially reversed the district court,[103] but on rehearing en banc the court vacated its previous decision.[104] The court ultimately affirmed the district court's decision granting summary judgment to North American Stainless.[105] In a unanimous decision, the Supreme Court reversed and remanded, holding that third parties may, in fact, file suit under Title VII's antiretaliation provision even when they do not engage in any protected activity.[106]

The Supreme Court first examined whether North American's alleged retaliation against Thompson violated Title VII.[107] It answered this question in the affirmative, citing *Burlington* for the proposition that the statute's antiretaliation provision encompasses a wide range of employer conduct.[108] The Court explained that Title VII "prohibits any employer action that well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."[109] Further, the Court reasoned that a reasonable worker may be discouraged from engaging in protected activity if he knew that his fiancée would be fired as a result.[110] The Supreme Court declined to define a category of third parties against whom retaliation would be unlawful.[111] Instead, it surmised that "firing a close family member" would "almost always" be unlawful, while "inflicting a milder reprisal on a mere acquaintance . . . almost never" would.[112] The Court stated that the circumstances of each case must determine whether retaliation against a third party constituted a Title VII violation.[113] It did, however, emphasize that an objective determination of injury is necessary to "avoi[d] the

101. *Id.*
102. Thompson v. North American Stainless, LP, 435 F. Supp. 2d 633, 639 (E.D. Ky. 2006), *rev'd*, 520 F.3d 644 (6th Cir. 2008).
103. Thompson v. North American Stainless, LP, 520 F.3d 644, 647 (6th Cir. 2008), *rev'd*, 131 S. Ct. 863 (2011). *See* discussion *supra* Part I.D.2
104. Thompson, v. North American Stainless, LP, No. 07-5040, 2008 WL 6191996 (6th Cir. Jul. 28, 2008). *See* discussion *supra* Part I.D.2
105. Thompson v. North American Stainless, LP, 567 F.3d 804, 805–06 (6th Cir. 2009), *rev'd*, 131 S. Ct. 863 (2011).
106. Thompson v. North American Stainless, LP, 131 S. Ct. 863 (2011).
107. *Id.* at 867–68.
108. *Id.*; Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 53 (2006).
109. *Thompson*, 131 S. Ct. at 868 (quoting *Burlington N. & Santa Fe Ry. Co.*, 548 U.S. at 68) (internal quotation marks omitted).
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.* at 868–69 (quoting *Burlington N. & Santa Fe Ry. Co.*, 548 U.S. at 68–69).

uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff's unusual subjective feelings."[114]

In its analysis of third-party standing for Title VII retaliation claims, the Supreme Court admitted that *person*[*s*] *aggrieved* who may sue under the statute must encompass a narrower class than mere Article III standing.[115] The term excludes plaintiffs "who might technically be injured in an Article III sense but whose interests are unrelated to Title VII's statutory prohibitions."[116] On the other hand, the Court advised that limiting *person aggrieved* to the initial participant in Title VII-protected activity is an artificially narrow reading.[117] Between the two extremes, the Court offered the standard applied by the Administrative Procedure Act,[118] allowing any "person . . . adversely affected or aggrieved . . . within the meaning of a relevant statute" to sue a federal agency.[119] The Court reasoned that this language allows a plaintiff to sue if his claim falls within the "zone of interests" protected by the statute, the violation of which gives rise to the complaint.[120] The Supreme Court noted that Title VII is intended to protect employees from their employers' illegal actions.[121] Because Thompson suffered from his employer's illegal retaliation, the Court explained, he fell within the zone of interests protected by Title VII. It therefore concluded that Thompson had standing for his Title VII retaliation claim.[122]

IV. PROPOSED STANDARD FOR THIRD-PARTY STANDING IN TITLE VII RETALIATION CLAIMS

The Supreme Court decided *Thompson* in accordance with scholars' predictions that the Court would continue its recent trend of broadening Title VII retaliation claims.[123] This jurisprudential expansion follows the notion that third-party retaliation claims should be permitted because their prohibition would limit employees' access to Title VII due to the fear of reprisal.[124] In fact,

114. *Id.* at 868–69 (citation omitted).
115. *Id.* at 869.
116. *Id.* at 870.
117. *Id.* at 869–70.
118. 5 U.S.C. § 702 (2006).
119. *Thompson*, 131 S. Ct. at 870 (quoting 5 U.S.C. § 702).
120. *Id. See also* Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 883, n.110 (1990) (proposing *zone of interests* test for plaintiffs suing under federal statutes).
121. *Thompson*, 131 S. Ct. at 869–70.
122. *Id.*
123. Feeney, *supra* note 67, at 652–55.
124. Schnell, *supra* note 69, at 921.

the decision "closes a loophole some courts—and employers—had found in Title VII's antiretaliation provision."[125] The Court's liberalization of retaliation claims also represents a welcome step for those who argued in favor of further expansion of Title VII retaliation claims.[126] Finally, it satisfies those who support retaliation claims because they maintain the "integrity of the rule of law" and should thus be broadly construed to provide greater protection.[127]

In broadening Title VII retaliation claims, the *Thompson* Court rejected the defendant corporation's argument that allowing third parties who engaged in no protected activity to file Title VII retaliation claims would "place the employer at risk any time it fires any employee who happens to have a connection to a different employee who filed a charge with the EEOC."[128] The Court dismissed this position, stating that an employer's desire for predictability did not justify the preclusion of all third-party reprisals.[129] Employers' concern about unexpected plaintiffs may not merit a blanket prohibition on all third-party retaliation claims, but there is no reason to preclude a standard governing these claims. On the contrary, such guidelines are necessary for the limitation of the otherwise infinite range of third-party plaintiffs.

A. The Need for a Standard Governing Third-Party Standing in Title VII Retaliation Claims

Presently, any employee who has had any contact with a coworker who has engaged in Title VII-protected activity may bring a Title VII retaliation claim.[130] The absence of a standard governing these claims leaves employers vulnerable to lawsuits from any number of unforeseen plaintiffs.[131] This development, coupled with the recent increase in Title VII retaliation claims, could cause employers to incur substantial legal fees defending

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125. David L. Hudson, Jr., *Back at Ya: Employee Retaliation Claims Play Big Before the High Court*, 97 A.B.A. J. 21, 21 (2011) (quoting Lawrence Rosenthal, professor of employment discrimination law at Northern Kentucky University's Salmon P. Chase College of Law).

126. *Id.*

127. R. George Wright, *Retaliation and the Rule of Law in Today's Workplace*, 44 CREIGHTON L. REV. 749, 749–57 (2011).

128. Thompson v. North American Stainless, LP, 131 S. Ct. 863, 868 (2011).

129. *Id.*

130. *See id.* ("Firing a close family member" would "almost always" be unlawful, while "inflicting a milder reprisal on a mere acquaintance" would "almost never" be.).

131. *Id.*

baseless allegations that they could never have anticipated.[132] Some scholars suggest that merely requiring "the third party to meet all of the normal requirements of a retaliation claim" would eliminate the potential for abuse through frivolous lawsuits.[133] However, the merits of retaliation claims are often indeterminable upon a preliminary showing.[134] Because these claims frequently entail analysis of suspect timing and witness credibility, judges often leave these factual determinations to juries.[135] Even if such a claim is unfounded, the employer may nevertheless expend considerable resources before it is dismissed. While employers may, of course, have to defend themselves against some baseless claims in any area of the law, the potential number of meritless third-party retaliation claims is staggering after *Thompson.*[136] Now *any* employee has standing to sue for retaliation based on *any* coworker's Title VII-protected activity. For a large corporation, that translates into a myriad of potential retaliation claims. Employers need to be able to make employment decisions, including those to take adverse actions against employees. If the risk of retaliation suits is too nebulous, it may alter employer's decisions, impairing the business's daily operations. Therefore, employers need a standard for determining third parties' standing in Title VII retaliation claims.

B. Rationale for Applying Tort Standard

Over the years, Title VII has evolved from a "private attorney general" mechanism into, essentially, a statutory tort.[137] Accordingly, tort law principles provide an appropriate source for a standard governing third-party Title VII retaliation claims. Recently, the Supreme Court borrowed from tort law to devise a standard for employment discrimination claims in *Staub v. Proctor*

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132. *Charge Statistics*, *supra* note 41.

133. Feeney, *supra* note 67, at 669–70 (A plaintiff meeting the "normal requirements" of a retaliation claim must show that he engaged in Title VII-protected activity and that his employer consequently retaliated against him.).

134. *See* Gregory P. Kult, *Retaliation Claims Take Center Stage*, EMPLOYMENT LAW IN BRIEF, 2 (May 31, 2011), http://www.martindale.com/members/ArticleAtachment.aspx?od=814019&id=1291842&filename=asr-1291846.docx.pdf.

135. The term *suspect timing* refers to "close timing between an employee's protected activity and an adverse employment action." *See* Shackelford v. DeLoitte & Touche, LLP, 190 F.3d 398, 408 (5th Cir. 1999) (describing suspect timing); *see also* Kult, *supra* note 134, at 2.

136. Thompson v. North American Stainless, LP, 131 S. Ct. 863, 868 (2011).

137. Zemelman, *supra* note 15, at 189; Newman v. Piggie Park Enters., 390 U.S. 400, 402 (1968). *See also* discussion *supra* Part I.A.

Hospital.[138] This cat's-paw discrimination case involved an alleged violation of The Uniformed Services Employment and Reemployment Rights Act (USERRA), a federal statute that closely resembles Title VII.[139] The Court initially noted that when examining federal torts, it applies general tort law principles.[140] Thus, it determined that the tort theory of proximate cause was the appropriate standard for determining employers' liability in cat's-paw discrimination cases.[141] Proximate cause "requires only 'some direct relation between the injury asserted and the injurious conduct alleged,' and excludes only those 'link[s] that are too remote, purely contingent, or indirect.'"[142] So, an employer is liable under USERRA if (1) a supervisor is motivated by antimilitary sentiment; (2) that supervisor takes an adverse employment action; and (3) the antimilitary sentiment proximately caused the action.[143]

The *Staub* Court's proclaimation that "when Congress creates a federal tort it adopts the background of general tort law" applies

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138. Staub v. Proctor Hosp., 131 S. Ct. 1186 (U.S. 2011).

139. Staub v. Proctor Hosp., 560 F.3d 647 (7th Cir. 2009), *rev'd*, 131 S. Ct. 1186 (2011) (This case addressed a cat's-paw discrimination claim. This type of claim arises when an employee's supervisor, acting with a discriminatory motivation, instigates the employer, who may have had no discriminatory feelings toward the employee, to terminate or implement an adverse employment decision against the employee. A lack of any discriminatory sentiments on the part of the employer is irrelevant; instead, the discriminatory motive of the supervisor, who himself lacks the authority to terminate or adversely affect the employee's terms of employment, is imputed to the employer. The term *cat's paw* comes from the fable "The Monkey and the Cat," written by the 17th century French poet Jean de La Fontaine, which references a monkey manipulating a cat to fulfill the monkey's goal.). *See also Staub*, 131 S. Ct. at 1191 ("A person who is a member of . . . or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership . . . or obligation."). *Compare* 38 U.S.C. § 4311(a) (2006) (USERRA provides that "an employer shall be considered to have engaged in actions prohibited . . . under subsection (a), if the person's membership . . . is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership."), *with* 42 U.S.C. §§ 2000e-2(a), (m) (2006) (Title VII prohibits discrimination "because of . . . race, color, religion, sex, or national origin" and provides that discrimination occurs when one of these factors "was a motivating factor for any employment practice, even though other factors also motivated the practice.").

140. *Staub*, 131 S. Ct. at 1191.

141. *Id.* at 1193.

142. *Id.* at 1192 (quoting Hemi Group, LLC v. City of New York, 130 S. Ct. 983, 989 (2010)).

143. *Id.* at 1194.

equally to Title VII as to USERRA.[144] Because Title VII has become increasingly tort-like through the actions of Congress and the Supreme Court, the Court should analogize to general tort law for Title VII claims.[145] The Court in *Staub* sought to determine a party's liability for an injury caused by more than one actor—precisely the type of situation in which a proximate cause determination is applied in tort law. Similarly, third-party standing for Title VII retaliation claims hinges on whether a particular plaintiff may sue for an injury inflicted on someone else.[146] This potential plaintiff is not the intended subject of retaliation; he merely incurs the collateral damage of the employer's intended retaliation against a coworker.[147]

Like a third-party retaliation plaintiff, an NIED plaintiff, by definition, suffers no physical damage from the incident that causes injury but sustains only secondary effects of the occurrence. Therefore, the bystander-damages standard serves as an appropriate model for the third-party plaintiff's standard. It accomplishes the same objective as a standard for third-party standing in a Title VII retaliation claim. Courts developed the NIED standard because they "have realized that recognition of a cause of action for [NIED] holds out the very real possibility of nearly infinite and unpredictable liability for defendants."[148] Similar reasons necessitate a standard for third-party standing in Title VII retaliation claims. Without such a standard, employers are subject to an immeasurable number of Title VII retaliation claims and have no ability to predict which classes of plaintiffs may file them. Employers, therefore, need a standard determining third-party standing for Title VII retaliation claims, and principles of NIED make it an appropriate source from which to extract this standard because of their applicability to third-party retaliation claims.

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144. *Id.* at 1191.

145. *See* discussion *supra* Part I.A.

146. Admittedly, NIED is a standard governing claims of negligence; whereas, Title VII retaliation claims result from intentional behavior. However, this difference does not affect the applicability of the NIED to Title VII retaliation claims because the proposed standard merely addresses standing. Further judicial proceedings, therefore, entail the factual determination of the claim's underlying merits, including the defendant's fault. This standard, in contrast, only governs the eligibility of plaintiffs to file claims.

147. In a third-party retaliation claim, the employer intends to retaliate against the employee who initially engaged in the protected action by taking action to harm the third party.

148. Consol. Rail Corp. v. Gottshall, 512 U.S. 532, 546 (1994).

C. Tort Standard for NIED Claims and Its Application to Third-Party Title VII Retaliation Plaintiffs

The United States Supreme Court assessed claims for negligent infliction of emotional distress under the Federal Employers' Liability Act in *Consolidated Rail Corp. v. Gottshall.*[149] The Court commented that "most States recognize a common-law cause of action for [NIED], but limit recovery to certain classes of plaintiffs or categories of claims through the application of one or more tests."[150] The Court described three tests for bystander-damage claims that the states apply: (1) the *physical impact* test; (2) the *zone of danger* test; and (3) the *relative bystander* test.[151] Most states have abandoned the once prevalent *physical impact* test in favor of the *zone of danger* test or the *relative bystander* test. While the *zone of danger* test emerged in 1908 and remains the law in several states, a plurality of states now follows the *relative bystander* test first articulated in 1968.[152]

The *relative bystander* test for NIED claims originated with the 1968 California case *Dillon v. Legg*, in which a plaintiff recovered for emotional distress after observing the death of her daughter.[153] In *Dillon*, the California Supreme Court established that a defendant would be liable for bystander damages to a plaintiff (1) who was at the location of the incident when it occurred; (2) who was closely related to the victim; and (3) whose emotional distress was caused by his contemporaneous observation of the accident.[154]

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149. *Id.* at 537.

150. *Id.*

151. *Id.* (The *physical impact* test requires a plaintiff claiming NIED to have contemporaneously suffered a physical impact or injury because of the defendant's negligence.); Dillon v. Legg, 441 P.2d 912 (Cal. 1968) (A plaintiff seeking damages for NIED under the *zone of danger* test, must have been in sufficiently close proximity to the negligent actor to have a reasonable fear for his own safety to result in a physical injury arising from his emotional distress.).

152. *Consol. Rail*, 512 U.S. at 547.

153. *Dillon*, 441 P.2d 912.

154. *Id. See also* RESTATEMENT (SECOND) OF TORTS § 436 (1977) (providing that a plaintiff may recover against a negligent actor when the plaintiff suffers a physical injury as a result of his emotional distress, which was prompted by the actor's negligent infliction of harm or peril on a member of the plaintiff's immediate family in the plaintiff's presence). Illustration 3 in the relevant *Restatement* section explains this point as follows:

> A negligently leaves a truck insecurely parked at the top of a hill. Because of this negligence the truck starts down the hill. B and C, her child, are in the street in the path of the truck. The truck swerves, misses B, and strikes C. B, who is watching C, does not see the truck coming, and is not alarmed for her own safety, but suffers severe shock

These three *Dillon* factors neatly apply to third-party Title VII retaliation claims because retaliation claims likewise entail spatial, relational, and temporal analyses.[155] Thus, a third party who fulfills spatial, relational, and temporal requirements derived from those applied to NIED claims should have standing to file Title VII retaliation claims. Finally, the prevalence and relative modernity of the *Dillon* test[156] support the use of its elements as a basis for a standard for third-party retaliation claims.

1. Relational Requirement

The *Dillon* test provides that a plaintiff may only recover against a defendant whose negligence caused harm or danger to the plaintiff's immediate family member.[157] This NIED requirement limits the tortfeasor's otherwise indefinite liability.[158] Similarly, a relational requirement for third-party retaliation plaintiffs would ameliorate employers' current plight of unpredictable liability. The *Thompson* Court's statement that "firing a close family member" would "almost always" be unlawful, while "inflicting a milder reprisal on a mere acquaintance" would "almost never" be unlawful further supports this element's application to third-party retaliation plaintiffs.[159] Because of the close relationship that family members can be presumed to share, an employer would likely assume that an employee will be most significantly affected by retaliation targeting his family members, rather than other coworkers. Thus, family members are the most likely third parties to suffer retaliation. Similarly, because of family members' close relationships, a family member is more likely than any other bystander to suffer severe emotional distress at observing a victim sustain an injury. It is therefore logical and appropriate to apply the standard of familial relationship utilized in bystander-damage claims to third-party retaliation plaintiffs.

Because NIED is a state law claim, the familial relationship that must exist between the bystander and the actual victim varies from state to state.[160] While *Dillon* created the tort and laid out its

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and resulting serious illness at the sight of the injury to C. A is subject to liability to B for the shock and her illness.

Id. at. illus. 3.

155. *Dillon*, 441 P.2d at 920.
156. *Consol. Rail*, 512 U.S. at 548–49.
157. *Dillon*, 441 P.2d at 920.
158. *Consol. Rail*, 512 U.S. at 546.
159. Thompson v. North American Stainless, LP, 131 S. Ct. 863, 868 (2011).
160. *See* discussion *infra* Part IV.C.1(a–c).

basic elements,[161] its ambiguity as to the required relationship has prompted most states to define precisely which relationships qualify.[162] For example, when Louisiana first adopted a cause of action for bystander damages in *Lejeune v. Rayne Hospital*, the Louisiana Supreme Court failed to specify a class of potential plaintiffs,[163] as did the United States Supreme Court in *Thompson*.[164] With language similar to that included in *Thompson*,[165] the *Lejeune* court chose to "leave for another day a decision whether recovery should be allowed only for close relatives (and if so, which ones), or rather, for those with simply a close relationship to the victim."[166] Shortly after this decision, the Louisiana Legislature enacted Louisiana Civil Code article 2315.6, which specified the particular relationships that would qualify for bystander damages.

a. Blood Relatives within the Second Degree of Consanguinity

New York and Michigan apply the strictest standard to the relationship requirement of bystander-damage claims, allowing spouses, children, and parents to recover, while barring more distant relatives from recovery.[167] In addition to plaintiffs in these classes, Iowa, Louisiana, New Mexico, and Wisconsin also allow siblings, grandparents, and grandchildren to recover.[168]

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161. *Dillon*, 441 P.2d at 912. Prior to this case, plaintiffs could only recover for bystander damages when they were within the "zone of danger," meaning that they were in sufficiently close proximity to the negligent actor to have a reasonable fear for their own safety to result in a physical injury arising from their emotional distress.

162. *See* Dale J. Gilsinger, *Relationship Between Victim and Plaintiff-Witness As Affecting Right to Recover Under State Law for Negligent Infliction of Emotional Distress Due to Witnessing Injury to Another Where Bystander Plaintiff Is Not Member of Victim's Immediate Family*, 98 A.L.R. 5TH 609 (2002).

163. Lejeune v. Rayne Branch Hosp., 556 So. 2d 559, 570–71 (La. 1990).

164. Thompson v. North American Stainless, LP, 131 S. Ct. 863, 868 (2011).

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

166. *Lejeune*, 556 So. 2d at 570–71.

167. Bovsun v. Sanperi, 461 N.E.2d 843, 849–50 (N.Y. 1984); Trombetta v. Conkling, 593 N.Y.S.2d 670, 671 (N.Y. App. Div. 1993) (denying bystander damages to victim's aunt), *aff'd*, 626 N.E.2d 653 (N.Y. 1993). *See also* Blanyar v. Pagnotti Enters., Inc., 679 A.2d 790, 793–94 (Pa. 1996), *aff'd*, 710 A.2d 608 (1998) (suggesting that Pennsylvania may apply New York's relationship standard in claims of NIED); Gustafson v. Faris, 241 N.W.2d 208, 211 (Mich. Ct. App. 1976); Nugent v. Bauermeister, 489 N.W.2d 148, 150 (Mich. Ct. App. 1992); Maldonado v. Nat'l Acme Co., 73 F.3d 642, 645 (6th Cir. 1996).

168. LA. CIV. CODE art. 2315.6 (2012); Barnhill v. Davis, 300 N.W.2d 104, 108 (Iowa 1981); Fernandez v. Walgreen Hastings Co., 968 P.2d 774, 781

b. Relatives of Varying Degrees of Consanguinity

In addition to spouses, parents, siblings, children, and grandparents, California and Texas permit NIED recovery by other relatives as long as they live in the same household as the victim.[169] Nebraska specifically includes aunts and uncles, with no requirement of residency, but cautions that they, along with grandparents, shoulder "a heavier burden of proving a significant attachment" to the victim.[170] Alaska,[171] Arizona,[172] Connecticut,[173] Florida,[174] Indiana,[175] Maine,[176] Nebraska,[177] Nevada,[178] and West

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(N.M. 1998); Ramirez v. Armstrong, 673 P.2d 822, 825 (N.M. 1983); Bowen v. Lumbermens Mut. Cas. Co., 517 N.W.2d 432, 444 (Wis. 1994).

169. Elden v. Sheldon, 758 P.2d 582, 584 (Cal. 1988); Thing v. La Chusa, 771 P.2d 814, 829 n.10 (Cal. 1989); Garcia v. San Antonio Hous. Auth., 859 S.W.2d 78, 81 (Tex. App. 1993).

170. James v. Lieb, 375 N.W.2d 109, 115 (Neb. 1985).

171. Kallstrom v. U.S., 43 P.3d 162, 163 (Alaska 2002).

172. Hislop v. Salt River Project Agric. Improvement & Power Dist., 5 P.3d 267, 269 (Ariz. Ct. App. 2000) (In dicta, the court suggested that "something closely akin" to a familial relationship may also suffice.); Keck v. Jackson, 593 P.2d 668, 670 (Ariz. 1979) (establishing Arizona's bystander-damages law).

173. Biercevicz v. Liberty Mut. Ins. Co., 865 A.2d 1267, 1271–72 (Conn. 2004) (denying bystander damages to victim's fiancée); Batista v. Backus, No. CV000159533, 2000 WL 1862879, at *2 (Conn. Super. Ct. Nov. 27, 2000) (denying bystander damages to victim's friend).

174. Reynolds v. State Farm Mut. Auto. Ins. Co., 611 So. 2d 1294, 1297 (Fla. Dist. Ct. App. 1992) (denying bystander damages to victim's fiancée); Champion v. Gray, 478 So. 2d 17, 19 (Fla. 1985) (requiring close relationship between victim and bystander).

175. Smith v. Toney, 862 N.E.2d 656, 661–62 (Ind. 2007) (denying bystander damages to a fiancée).

176. Nelson v. Flanagan, 677 A.2d 545, 548 (Me. 1996) (allowing spouse's claim of bystander damages). *See also* Michaud v. Great N. Nekoosa Corp., 715 A.2d 955, 959 (Me. 1998) (barring recovery by plaintiff unrelated to the victim). *But see* Magruder v. Sawyer, No. CIV. 99-0077-B, 1999 WL 33117074, at *1 (D. Me. Dec. 6, 1999) (denying motion to dismiss fiancé's claim of NIED).

177. James v. Lieb, 375 N.W.2d 109, 115 (Neb. 1985). Though the court stated that aunts, uncles, and grandparents have a higher burden of proof than closer relatives, it left the relationship standard open to any plaintiff who can prove to be a victim's close relative or spouse.

178. Grotts v. Zahner, 989 P.2d 415, 416 (Nev. 1999) ("Immediate family members of the victim qualify for standing to bring NIED claims as a matter of law," whereas, "when the family relationship between the victim and the bystander is beyond the immediate family, the fact finder should assess the nature and quality of the relationship and, therefrom, determine as a factual matter whether the relationship is close enough to confer standing.").

Virginia[179] additionally limit recovery to spouses or relatives but do not require a specific degree of consanguinity for recovery.

c. Close but Unrelated Parties

Some states allow even unrelated parties to recover bystander damages.[180] Hawaii courts adopt a more liberal construction of bystander damages, holding that the absence of a blood relationship between a victim and bystander does not foreclose recovery.[181] Rejecting formalism, Connecticut, New Hampshire, and New Jersey allow a fiancé who cohabitates with the victim to sue for NIED.[182] Additionally, Massachusetts acknowledges that a party who is unrelated to the victim may nevertheless be eligible to recover bystander damages, emphasizing that only a "familial *or other* relationship" is required.[183] Finally, Tennessee does not require any relationship between the plaintiff and victim and instead considers the nature of the relationship as part of the calculation of damages.[184]

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179. Heldreth v. Marrs, 425 S.E.2d 157, 162–63 (W. Va. 1992).

180. Leong v. Takasaki, 520 P.2d 758, 766 (Haw. 1974) (allowing plaintiff to prove nature of relationship with victim); Yovino v. Big Bubba's BBQ, LLC, 896 A.2d 161, 165–67 (Conn. 2006); Graves v. Estabrook, 818 A.2d 1255, 1262 (N.H. 2003) (allowing recovery by victim's fiancée who had lived with him for seven years). *But see* St. Onge v. MacDonald, 917 A.2d 233, 235 (N.H. 2007) (denying recovery by victim's boyfriend of six months when the couple had made no commitments to marry or cohabitate); Dunphy v. Gregor, 642 A.2d 372, 380 (N.J. 1994).

181. *Leong*, 520 P.2d 758, 766 (allowing plaintiff to prove nature of relationship with victim).

182. *Yovino*, 896 A.2d at 165–67; *Graves*, 818 A.2d at 1260–62. *But see St. Onge*, 917 A.2d at 235; *Dunphy*, 642 A.2d at 380; Thurmon v. Sellers, 62 S.W.3d 145, 164 (Tenn. Ct. App. 2001); Camper v. Minor, 915 S.W.2d 437, 439–40, 496 (Tenn. 1996) (allowing recovery by plaintiff who was complete stranger to victim).

183. Dziokonski v. Babineau, 380 N.E.2d 1295, 1302 (Mass. 1978) (emphasis added) (establishing that bystander-damage plaintiff must have "a close familial or other relationship" with victim to recover); Richmond v. Shatford, No. CA 941249, 1995 WL 1146885 (Mass. Aug. 8, 1995) (suggesting that a victim's fiancé may be eligible to recover bystander damages).

184. *Thurmon*, 62 S.W.3d at 164. *See also Camper*, 915 S.W.2d at 437. The listing of states whose requirements are discussed throughout Part IV.C.1(a–c) is not exhaustive but is instead illustrative of the approaches followed by the majority of states.

d. Proposed Relational Requirement for Third-Party Title VII Claims

By allowing a fiancé to file a Title VII retaliation claim, the *Thompson* Court adopted a broader relational requirement than states that require bystander-damages plaintiffs and victims to be second-degree blood relatives.[185] Fiancés are nearly family members but are not yet technically related; thus, courts that allow fiancés' bystander-damage claims also allow claims by both close and more distant relatives. Therefore, *a fortiori*, all classes of relatives, in addition to fiancés, should be able to file Title VII retaliation claims.[186] The inclusion of this class adheres to the Supreme Court's broad construction in *Thompson*.[187] It is, however, imperative to balance the Court's intent against the policy objective of establishing a class of plaintiffs whose claims employers can reasonably expect. Therefore, the adoption of Tennessee's liberal approach, allowing any party to file claims and only considering relationship as a factor in the calculation of damages, would fail to satisfy this objective.[188] Granting an unspecified "other relationship" automatic standing for third-party retaliation claims would likewise fall short.[189] Based on the rationale behind underlying states' relational requirements for NIED claims, and the Court's articulated intent in *Thompson*, relatives and fiancés of the initial Title VII claimants should be eligible to file Title VII retaliation claims against their employers.[190] This standard will create a sufficiently broad class of third-party plaintiffs that will effectively strike a balance between Title VII's and employers' competing interests.

2. Temporal Requirement

In addition to its relational requirement, the *Dillon* test requires that a plaintiff have contemporaneously observed the accident.[191] This constraint serves to increase the foreseeability of the

185. Thompson v. North American Stainless, LP, 131 S. Ct. 863, 868 (2011).
186. The term *relative*, as used in the proposed relational requirement, should be read to include both blood and legal relatives, i.e., relatives through adoption or marriage.
187. *Thompson*, 131 S. Ct. at 868.
188. *Thurmon*, 62 S.W.3d at 164. *See also Camper*, 915 S.W.2d at 437.
189. Dziokonski v. Babineau, 380 N.E.2d 1295, 1302 (Mass. 1978); Richmond v. Shatford, No. CA 941249, 1995 WL 1146885 (Mass. Aug. 8, 1995).
190. *See* discussion s*upra* Part IV.1(a–c); *Thompson*, 131 S. Ct. at 863.
191. Dillon v. Legg, 441 P.2d 912, 920–21 (Cal. 1968).

plaintiff's harm (and, thereby, future claim), as well as to decrease the possibility of fraudulent claims.[192] These considerations also apply to Title VII retaliation claims, but a contemporaneous-observation requirement would be arbitrary and useless for Title VII claims. First, the Title VII-protected activity forming the basis of the retaliation complaint might have easily been performed privately. Furthermore, in most cases, employees file EEOC complaints before employers even receive notice of them. Additionally, even if a retaliation plaintiff did observe his coworker's participation in protected activity, the plaintiff's presence or absence would not likely affect the employer's decision to retaliate.

A more relevant temporal consideration instead examines the time that has elapsed between the employer's receipt of notice that an employee engaged in a Title VII-protected activity and the alleged retaliation. Common sense suggests that the probability that an employer acted with a retaliatory motive is greater when a short time passes between the two events than when more time has elapsed. Therefore, courts should consider the length of time between notice of the protected activity and the alleged retaliation when determining the facial validity of a third-party plaintiff's Title VII retaliation claim.

3. Spatial Requirement

The remaining element of the *Dillon* test requires a plaintiff's presence at the scene of the accident.[193] This element is relevant to third-party retaliation claims, but less so than relationship and time. A bystander who witnesses a traumatic accident would be more likely affected by it if he observed it from nearby, rather than from a great distance. Observing a gruesome accident would logically be more likely to cause anguish to the bystander if he watches in clearer detail than if he could see only a hazy image. Similarly, it is more probable that an employer would act with a retaliatory motive against a coworker who works more closely with the Title VII claimant's coworker than against an employee who works in a different office. Therefore, courts should note the proximity in which the employees work when deciding whether to allow a third-party plaintiff's Title VII claim. The proximity of the employees, however, is not dispositive of retaliation, and should thus be treated as a consideration, rather than a strict requirement.

192. *Id.*
193. *Id.*

4. Standing for Third-Party Title VII Retaliation Plaintiffs

In *Thompson*, the Court addressed two questions: whether Thompson's retaliation claim was actionable and whether Thompson had standing to bring the claim.[194] The standard proposed by this Comment addresses the Court's second inquiry.[195] In granting third-party plaintiffs standing for Title VII retaliation claims, the Court created a new class of plaintiffs, so this Comment seeks to set parameters for that class.[196] Based on this proposed standard, a third-party plaintiff should have standing if he satisfies the relational, temporal, and spatial requirements—that is, if (1) he is a relative or fiancé of the initial claimant; (2) the alleged retaliation occurred shortly after the initial protected activity; and (3) he worked closely with the initial claimant. These factors were drawn from NIED, and, while the tort principle serves as a useful basis for defining third-party standing for Title VII retaliation claimants, a significant distinction between the two exists.

Whereas NIED defendants inflict injury negligently, Title VII retaliation defendants cause damage intentionally. Thus, while it is important to limit employers' liability for Title VII retaliation claims to protect employers from unpredictable frivolous allegations, employers should not be given free rein to retaliate against individuals not covered by this standard. If an employer retaliates against an employee whom this standard excludes, that employee should nevertheless have the opportunity to sue if he can prove the facial validity of his claim.

The purpose of the proposed standard is to instill more certainty for third-party Title VII retaliation claims than presently exists in the wake of *Thompson*.[197] Admittedly, permitting a plaintiff excluded by this standard to file a Title VII retaliation claim based on some other justification will preserve some measure of uncertainty in these claims. Allowing a narrow exception to this standard, however, conforms to the Supreme Court's expansive construction of Title VII retaliation claims because it will prevent employers from retaliating with impunity against employees excluded by the proposed standard.[198] The policy considerations supporting the need for a precaution against this type of employer behavior therefore warrant the slight measure

194. *Thompson*, 131 S. Ct. at 868.
195. *See* discussion *supra* Part I.C; *Thompson*, 131 S. Ct. at 868.
196. *See* discussion *supra* Part I.C; *Thompson*, 131 S. Ct. at 868.
197. *Thompson*, 131 S. Ct. at 868.
198. *See id.*

of uncertainty inherent in this exception. This justification is further bolstered by the common-sense notion that an employer should reasonably anticipate Title VII claims from employees against whom it actually does retaliate. Finally, the inherent concern for employee protection espoused by Title VII underscores the need for an avenue of relief for employees who do not satisfy the proposed standard but who can nevertheless prove retaliation. Accordingly, courts should presume that third-party plaintiffs who fail to meet the proposed standard lack standing for Title VII retaliation claims unless they can present sufficient evidence of retaliation. Because these plaintiffs must overcome their presumed lack of standing, their claims will only be recognized if a court deems their circumstances compelling enough to merit standing. Allowing plaintiffs this opportunity, then, will not undermine the rationale underlying the proposed relational, temporal, and spatial requirements because it will still support the ultimate goal of shielding employers from unpredictable claims.

Courts should therefore apply the standard proposed by this Comment as a rebuttable presumption. If a third-party plaintiff does not meet the stated criteria, he should be presumed to lack standing for a Title VII retaliation claim. He may, however, rebut this presumption if he can make a prima facie showing that his claim is valid based on any of the following factors: (1) evidence of employer's knowledge of a close relationship between the plaintiff and the coworker who engaged in protected activity;[199] (2) comparative evidence indicating that no reason other than retaliation motivated the employer's action; (3) evidence of pretext for retaliation; or (4) direct evidence of retaliation.

In "declin[ing] to identify a fixed class of relationships for which third-party reprisals are unlawful," the *Thompson* Court refused to exclude plaintiffs who may have valid claims based on "particular circumstances."[200] Relatives and fiancés are more likely targets of retaliation than other individuals; however, unrelated coworkers may also share an extremely close relationship of which their employer is aware. So, a plaintiff should be able to rebut the presumption that he lacks standing by demonstrating his employer's knowledge of a relationship similarly close to a familial one between the plaintiff and the initial Title VII claimant.

Similarly, a third-party plaintiff may rebut his presumed lack of standing with comparative evidence indicating retaliation.

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199. This factor refers to a close relationship other than a familial one—for example, an unmarried but cohabitating couple. *See* discussion *supra* Part III.C.1.d.

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

Comparative evidence consists of similarly situated individuals receiving different treatment from their employers such that no reason other than discrimination could have caused the difference.[201] Plaintiffs commonly use this form of evidence to prove allegations of employment discrimination.[202] Thus, a third-party plaintiff should be allowed to present comparative evidence to demonstrate that his employer's only possible motivation for an adverse employment action was retaliation.

A third-party plaintiff may additionally establish standing by demonstrating that his employer's articulated reason for taking adverse action against him is a pretext for retaliation. Employment discrimination plaintiffs can recover if they prove that their employers' stated motives are pretexts for discrimination.[203] Third-party plaintiffs should also have standing for Title VII retaliation claims if they can likewise establish that their employers' justification for the alleged retaliation is, in fact, a pretext.

Finally, a third-party plaintiff should be able to establish standing with direct evidence of retaliation. Direct evidence consists of "explicit statements or smoking gun memos"—that is, an employer's explicit acknowledgement of a retaliatory motive.[204] Courts frequently allow plaintiffs to use direct evidence to prove allegations of employment discrimination.[205] Accordingly, a third-party plaintiff's Title VII claim certainly should not be excluded if he has direct evidence, such as an email discussing a plan to fire him in retaliation for his coworker's protected activity.

IV. CONCLUSION

While the Supreme Court's expansion of Title VII retaliation claims to include third-party plaintiffs in *Thompson* may have surprised some courts, the decision nevertheless conforms to its recent trend of increasing the types of claims that plaintiffs may bring under Title VII.[206] In failing to propose a standard for these third-party retaliation claims, however, the Court unfairly exposed

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201. William R. Corbett, *The "Fall" of* Summers*, the Rise of "Pretext Plus," and the Escalating Subordination of Federal Employment Discrimination Law to Employment at Will: Lessons from* McKennon *and* Hicks, 30 GA. L. REV. 305, 324–25 (1996).

202. William R. Corbett, *Fixing Employment Discrimination Law*, 62 SMU L. REV. 81, 98 (2009).

203. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (discussing pretext analysis in discrimination case).

204. Corbett, *supra* note 201, at 323–25.

205. *Id.* at 323.

206. *See* discussion *supra* Part I.C.

employers to liability for an immeasurable number of potential lawsuits from an unpredictable range of plaintiffs. Employers thus need a standard governing third-party retaliation claims.

Tort law principles determining which plaintiffs are eligible to sue for bystander damages provide a logical basis for defining permissible third-party retaliation plaintiffs. Following tort law principles of various states, a sufficiently broad group of third-party plaintiffs becomes evident. Under this standard, then, third parties who should be able to sue their employers for Title VII retaliation claims include relatives and fiancés. When determining whether a third-party plaintiff may file a Title VII retaliation claim, courts should also consider the time that elapsed between the employer's notice of the employee's protected activity and the alleged retaliation. Finally, courts should consider the proximity in which the coworkers work.

If a plaintiff fails to satisfy this standard, he should nevertheless have the ability to rebut his presumed lack of standing. A third-party plaintiff should then have standing if he demonstrates (1) evidence of employer's knowledge of a close relationship between the plaintiff and the coworker who engaged in protected activity; (2) comparative evidence indicating that no reason other than retaliation motivated the employer's action; (3) evidence of pretext for retaliation; or (4) direct evidence of retaliation. Limiting the class of third-party plaintiffs to this group of individuals will simultaneously fulfill the policy goals of Title VII and protect employers from unforeseen litigation. This will allow employers to implement the employment decisions necessary for the effective facilitation of their business operations.

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