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THE TROUBLEMAKER'S FRIEND: RETALIATION AGAINST THIRD PARTIES AND THE RIGHT OF ASSOCIATION IN THE WORKPLACE

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"To retaliate against a man by hurting a member of his family is an ancient method of revenge, and is not unknown in the field of labor relations." *NLRB v. Advertisers Manufacturing Co.*[1]

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1. 823 F.2d 1086, 1088 (7th Cir. 1987).

I. INTRODUCTION

Individuals who complain about workplace discrimination are frequently labeled as troublemakers by those in positions of authority within the organization.[2] As troublemakers, such individuals potentially face various forms of retaliation. Eugene Mestas was one such troublemaker.[3] After leaving his employment, Mestas hired an attorney, who sent a letter to Mestas's former employer, informing the employer of Mestas's intent to file a charge of discrimination with the Equal Employment Opportunity Commission (EEOC).[4] The employer was somewhat limited in its ability to retaliate against Mestas, a former employee. However, Mestas's fiancé, Revonda Mickle, remained an employee.[5] Mickle was on maternity leave after having given birth to Mestas's child when Mestas's attorney contacted the employer about Mestas's impending EEOC charge.[6] When Mickle inquired about ending her leave early and returning to work, she was informed that her services were no longer needed.[7]

Section 704(a) of Title VII of the Civil Rights Act of 1964 (Title VII) prohibits an employer from retaliating against an employee who opposes an employer's discriminatory conduct or who testifies, assists, or participates in any manner in an investigation related to a charge of discrimination.[8] Despite the protection afforded by Title VII, situations such as Mickle's, in which an employer targets a friend, relative, or other associate in order to retaliate against a workplace troublemaker, are surprisingly common in federal decisions.[9] These are cases of "pure" third-

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2. Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 32 (2005).
3. EEOC v. Bojangles Rests., Inc., 284 F. Supp. 2d 320, 324 (M.D.N.C. 2003).
4. *Id*.
5. *Id.* at 324–25.
6. *Id.* at 324.
7. *Id.* at 324–25.
8. 42 U.S.C. § 2000e-3(a) (2000).
9. *See generally* 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, 130 (1998) ("Aside from the issue of how much retaliation an employer may permissibly carry out against an employee before it counts as an 'adverse employment action,' there is no more uncertain area of the case law on retaliation than that of retaliation against employees who work in the same workplace as spouses, relatives, or other closely related third parties who

party retaliation, in which a coworker—who has committed no offense other than having a relationship with the workplace troublemaker—is the victim of the employer's wrath. The courts have split on the question whether § 704(a) of Title VII prohibits an employer from discriminating against a third party in retaliation for the protected activities of another individual, with a clear majority concluding that no such cause of action exists.[10]

As these cases of pure third-party retaliation make clear, it may be dangerous to an individual's employment prospects simply to associate with a workplace troublemaker. However, it may be equally dangerous to actually *assist* a troublemaker who files an internal complaint of discrimination with the employer prior to filing a formal discrimination charge with the EEOC. The federal courts have consistently held that employees who participate in an employer's internal investigation process are entitled to significantly less protection from retaliation than employees

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have themselves engaged in protected conduct." (footnote omitted)).

10. The issue also comes up in the context of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634 (2000). For ease of reference, this Article discusses the issue in the context of Title VII. However, the issues presented are essentially the same. For decisions holding that employers are generally not prohibited from taking action against a third party, see Bell v. Safety Grooving & Grinding, LP, No. 03-3902, 107 F. App'x. 607, 609–10 (6th Cir. 2004); Fogleman v. Mercy Hosp., Inc., 283 F.3d 561, 564 (3d Cir. 2002); Smith v. Riceland Foods, Inc., 151 F.3d 813, 819 (8th Cir. 1998); Holt v. JTM Indus., Inc., 89 F.3d 1224, 1226 (5th Cir. 1996); Washco v. Fed. Express Corp., 402 F. Supp. 2d 547, 556 (E.D. Pa. 2005); Singh v. Green Thumb Landscaping, Inc., 390 F. Supp. 2d 1129, 1138 (M.D. Fla. 2005); Higgins v. TJX Co., 328 F. Supp. 2d 122, 124 (D. Me. 2004); Sukenic v. Maricopa County, No. Civ. 02-02438, 2004 WL 3522690, at *12 (D. Ariz. Jan. 7, 2004); *Bojangles Rests., Inc.*, 284 F. Supp. 2d at 327; Horizon Holdings, LLC v. Genmar Holdings, Inc., 241 F. Supp. 2d 1123, 1143 (D. Kan. 2002); *see also* Ripp v. Dobbs Houses, Inc., 366 F. Supp. 205, 210 (N.D. Ala. 1973) (holding that a white employee who associated with black coworkers whom he believed were being discriminated against did not have a claim under Title VII's anti-retaliation provisions). For decisions reaching the opposite conclusion, see Gonzalez v. N.Y. State Dep't. of Corr. Servs., 122 F. Supp. 2d 335, 347 (N.D.N.Y. 2000); EEOC v. Nalbandian Sales, Inc., 36 F. Supp. 2d 1206, 1213 (E.D. Cal. 1998); Murphy v. Cadillac Rubber & Plastics, Inc., 946 F. Supp. 1108, 1119 (W.D.N.Y. 1996); McKenzie v. Atl. Richfield Co., 906 F. Supp. 572, 575 (D. Colo. 1995); Thurman v. Robertshaw Control Co., 869 F. Supp. 934, 941 (N.D. Ga. 1994); De Medina v. Reinhardt, 444 F. Supp. 573, 581 (D.D.C. 1978). *See generally* EEOC v. Ohio Edison Co., 7 F.3d 541, 544 (6th Cir. 1993) (stating in dicta that "a plaintiff's allegation of reprisal for a relative's antidiscrimination activities states a claim upon which relief can be granted under Title VII"); Genao v. N.Y. City Dept. of Parks & Recreation, No. 04 CV 2893 JG, 2005 WL 1220899 (E.D.N.Y. May 23, 2005) (involving a retaliation claim by the brother of an employee who had filed a discrimination claim); Reiter v. Metro. Transp. Auth., No. 01 Civ. 2762(JGK), 2002 WL 31190167 (S.D.N.Y. Sep. 30, 2002) (involving a retaliation claim by the husband of an employee who had filed discrimination complaint). The issue also occasionally comes up under state law. *See* Sweeney v. City of Ladue, 25 F.3d 702, 703 (8th Cir. 1994) (involving Missouri statutory law); Craig v. Suburban Cablevision, Inc., 660 A.2d 505, 508 (N.J. 1995); Dias v. Goodman Mfg. Co., L.P., 214 S.W. 3d 672, 677 (Tex. Ct. App. 2007) (holding that the Texas Commission on Human Rights Act does not permit such claims).

who participate in formal EEOC proceedings or lawsuits.[11] For the same reason, it may be hazardous to an individual's employment prospects for the individual to seek to protect coworkers from discrimination by complaining internally about a hostile work environment that affects other employees, complaining about harassment directed at a coworker, or participating in an employer's internal investigation into such conduct.

Despite the fact that retaliation claims have reportedly doubled in the last decade and now comprise 25% of all EEOC charges,[12] Title VII's anti-retaliation provision has received far less attention in legal scholarship than has the statute's substantive anti-discrimination provision.[13] What criticism there has been of the courts' treatment of § 704(a) has typically focused on the limited protection that the majority interpretations have afforded those who complain about workplace discrimination. The courts' critics assert that this limited protection diminishes the ability of Title VII to carry out its mission of combating workplace discrimination.[14] This Article eventually arrives at a similar discussion, but it reaches that point through a somewhat different route. This Article focuses on the effect that the majority interpretations of Title VII's anti-retaliation provision may have on employees' right of workplace association, and ultimately how this effect impacts the ability of § 704(a) to combat discrimination. In other words, the Article focuses not on the workplace troublemaker but on the troublemaker's friend.

In analyzing whether to permit retaliation claims based on an individual's association with or assistance to a coworker who has possibly been the victim of workplace discrimination, the only policy value courts typically discuss is the goal of maintaining access to the statute's remedial mechanisms.[15] While courts occasionally raise questions about the fundamental fairness of permitting an employer to take adverse action against an associate of a workplace troublemaker,[16] the primary focus is usually on the effect that allowing such employer behavior will have on Title VII's enforcement mechanism.[17] It is beyond question that maintaining access to such mechanisms is the primary purpose of anti-

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11. *See, e.g.*, EEOC v. Total Sys. Servs., Inc., 221 F.3d 1171, 1174 (11th Cir. 2000); Laughlin v. Metro. Wash. Airports Auth., 149 F.3d 253, 259 (4th Cir. 1998).

12. Thomas H. Barnard & Adrienne L. Rapp, *Are We There Yet? Forty Years After the Passage of the Civil Rights Act: Revolution in the Workforce and the Unfulfilled Promises That Remain*, 22 HOFSTRA LAB. & EMP. L.J. 627, 658 (2005).

13. Brake, *supra* note 2, at 19.

14. *See id.* at 23.

15. *See, e.g.*, *Ohio Edison Co*., 7 F.3d at 543.

16. Fogleman v. Mercy Hosp., Inc., 283 F.3d 561, 564 (3d Cir. 2002); Anita G. Schausten, Comment, *Retaliation Against Third Parties: A Potential Loophole in Title VII's Discrimination Protection*, 37 J. MARSHALL L. REV. 1313, 1313 (2004).

17. *See Ohio Edison Co.*, 7 F.3d at 543.

retaliation provisions.[18] However, this Article argues that there is another, related value that is implicated in these cases and that routinely goes unmentioned: the policy in favor of encouraging (or, at a bare minimum, not discouraging) employees from associating with one another.

To be sure, no "right" of association is explicitly mentioned in Title VII. But as this Article argues, the principle that an employer may not interfere with the ability of its employees to associate with one another to discuss workplace matters, provide mutual aid or protection, or other similar purposes is deeply embedded in the fabric of federal employment law.[19] Moreover, this Article argues that there is an inherent value in employee interaction and solidarity, particularly with regard to its potential to combat workplace discrimination. Indeed, just as Title VII's prohibition on discrimination would be an empty shell without the protection afforded by its anti-discrimination provision,[20] § 704(a)'s protection from retaliation would be an empty promise without the ability and willingness of coworkers to assist and associate with whomever they choose, including workplace troublemakers, without fear of employer reprisal.

Therefore, this Article analyzes these types of cases within the broader context of employees' rights to associate freely with one another. It argues that in addition to the goal of permitting unfettered access to remedial mechanisms, one of the goals of anti-retaliation provisions in employment discrimination statutes should be not just to permit but to actually encourage workers to meet and discuss management-employee relations and to assist one another. Therefore, to the extent possible, courts should interpret anti-retaliation provisions so as to encourage, or at least not discourage, employees from associating with and assisting one another. Part II examines the varying conceptions of the "right" of association in the workplace, including in the public employment setting, the labor law context, and in employment discrimination statutes. Part III discusses in greater detail the anti-retaliation provisions found in employment discrimination statutes and the tendency of courts to interpret the provisions in a way that discourages employee interaction. Part IV discusses the ways in which the majority interpretations of § 704(a) hinder the fight against discrimination once such discrimination has occurred and how encouraging greater employee interaction may help prevent the creation of hostile work environments from developing in the first place. Finally, Part V advances several arguments in favor of a broader interpretation of § 704(a) that would encourage greater employee interaction, including an approach that utilizes the U.S. Supreme Court's recent decision in *Burlington Northern & Santa Fe Railway Co. v. White*.[21]

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18. Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997).
19. *See infra* Part II.B.
20. *See* Brake, *supra* note 2, at 20.
21. 126 S. Ct. 2405 (2006).

II. THE RIGHT OF EMPLOYEE ASSOCIATION IN FEDERAL EMPLOYMENT LAW

A. *The First Amendment Right of Association and the Workplace*

It is impossible to discuss an employee's interest in workplace associations without first discussing the constitutional right of association and its role in public workplaces. Although not expressly mentioned in the text of the First Amendment, the Supreme Court recognized a constitutional right to associate with others as an implicit part of the freedoms protected by the First Amendment and necessary for the advancement of those freedoms.[22]

The Court has recognized two distinct types of interests protected by this broad right of association. In the first type of case, the Court recognizes a personal liberty interest in choosing "to enter into and maintain certain intimate human relationships," such as marriage.[23] Thus, for example, discharging a white female employee for her association with black males violates the female employee's right of association.[24] In the second type of case, "the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion."[25] The ability to associate in this context is essential because "collective effort on behalf of shared goals"[26] actually enhances "[e]ffective advocacy of both public and private points of view, particularly controversial ones."[27] Thus, the ability to join together to promote important but sometimes controversial ideas is a way of amplifying an individual's voice in the marketplace of ideas.[28]

Both versions of the right of association have been tested in the public employment sector. Unfortunately, no clear consensus exists as to how to treat claims that an employer has infringed on an employee's constitutional right of association.[29] Some courts apply the balancing test

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22. Marshall v. Allen, 984 F.2d 787, 799 (7th Cir. 1993) (citing NAACP v. Alabama, 357 U.S. 449, 460 (1958)).

23. Roberts v. U.S. Jaycees, 468 U.S. 609, 617 (1984).

24. Langford v. City of Texarkana, 478 F.2d 262, 266 (8th Cir. 1973).

25. *Roberts*, 468 U.S. at 618.

26. *Id.* at 622.

27. NAACP v. Alabama, 357 U.S. 449, 460 (1958).

28. Buckley v. Valeo, 424 U.S. 1, 22 (1976).

29. *See* Hudson v. Craven, 403 F.3d 691, 696–98 (9th Cir. 2005) (detailing different approaches among the circuits); Paul Cerkvenik, Note, *Who Your Friends Are Could Get You Fired!: The Connick "Public Concern" Test Unjustifiably Restricts Public Employees' Associational Rights*, 79 MINN. L. REV. 425, 427 (1994) (noting the division in the federal courts).

adopted by the Supreme Court in free speech cases, which requires that an employee's speech or association involve a matter of public concern before the Court will balance the employee's interests against those of the employer.[30] Under this approach, an employer can take adverse action against an employee for the employee's purely private associations, such as her marriage, unless the employer's action violates some other aspect of the Constitution.[31] Other courts have rejected this approach, arguing that it is inconsistent with Supreme Court precedent and fails to adequately protect public employees' association rights.[32]

Which approach a court uses could be significant in the case of an employer that takes action against a third party for that party's association with a perceived troublemaker. Suppose, for example, that a public employer discharges an employee based on some internal workplace dispute and then takes action against the employee's friend, who continues to associate with the former employee. It is doubtful that the friend would have a claim based on the constitutional right of association in a circuit that requires the association involve a matter of public concern. Unless the original firing involved, in the Supreme Court's words, a public employee acting as a citizen in a matter of public concern, the friend's association with her former coworker in the face of the employer's disapproval would not be constitutionally protected.[33]

To qualify as a matter of public concern, the issue must involve "government policies that are of interest to the public at large,"[34] rather than a mere "internal workplace grievance[]."[35] In contrast, a public employee who is punished for associating with other employees for the purpose of pursuing some goal of public concern or for the purpose of expressing himself on a matter of public concern may have an association claim under either test. For example, the Fourth Circuit Court of Appeals has held that a police officer who was allegedly punished for joining an organization of fellow black officers for the purpose of discussing concerns over racial problems in the department had an association claim.[36] The existence of racism in a police department was a matter of public concern because it affected the ability of a department to carry out its mission.[37] Similarly, the Seventh Circuit Court of Appeals has held that

30. Connick v. Myers, 461 U.S. 138, 146–47 (1983); Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968); Cerkvenik, *supra* note 29, at 436.

31. Balton v. City of Milwaukee, 133 F.3d 1036, 1039 (7th Cir. 1998).

32. *See* Hatcher v. Bd. of Pub. Educ. & Orphanage, 809 F.2d 1546, 1558 (11th Cir. 1987).

33. Garcetti v. Ceballos, 126 S. Ct. 1951, 1958 (2006).

34. City of San Diego v. Roe, 543 U.S. 77, 80 (2004).

35. *Id.* at 83.

36. Cromer v. Brown, 88 F.3d 1315, 1320, 1331 (4th Cir. 1996).

37. *Id.* at 1325–26.

an employee who intentionally associated with female employees who had alleged sex discrimination against the employer "for the purpose of collective expression aimed at protesting their treatment and at eradicating systemic discriminatory and retaliatory policies" at the workplace had an association claim following his discharge.[38] According to the court, "there is no question that the right to associate in order to show support for and to promote political and social causes has long been protected by the First Amendment."[39] Thus, as alleged, the plaintiff's expressive conduct, designed to demonstrate support for his coworkers, was a constitutionally protected form of association.[40]

The only time a claim of third-party retaliation involving a matter of public concern is likely to be rejected out of hand is when some compelling government interest is at stake.[41] For example, government employees need the loyalty of those in policymaking or confidential positions to fulfill their missions. Thus, when a discharged employee occupies a policymaking or confidential position, the employer can discharge the employee regardless whether the firing would otherwise violate the employee's right of association.[42] This is true even when the association in question is intimate in nature, such as that of relatives or spouses.[43] When the employee does not occupy such a policymaking or confidential position, however, the employee's right of association may ultimately trump any legitimate interest the employer may have.

B. *Federal Labor Law and the Right of Association*

1. Mutual Aid or Protection and the Right of Association

In the words of Professor Charles J. Morris, the right of association is "the hallmark of the design of American industrial relations."[44] Section 7 of the National Labor Relations Act (NLRA) famously guarantees

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38. Marshall v. Allen, 984 F.2d 787, 798 (7th Cir. 1993).

39. *Id.* at 800.

40. *Id.*

41. *See* Garcetti v. Ceballos, 126 S. Ct. 1951, 1973 (2006) (Breyer, J., dissenting).

42. *See* Branti v. Finkel, 445 U.S. 507, 518 (1980); Elrod v. Burns, 427 U.S. 347, 367–68 (1976) (plurality opinion).

43. Biggs v. Best, Best & Krieger, 189 F.3d 989, 992 (9th Cir. 1999); Soderstrum v. Town of Grand Isle, 925 F.2d 135, 136–37 (5th Cir. 1991); Soderbeck v. Burnett County, 752 F.2d 285, 287 (7th Cir. 1985); Shondel v. McDermott, 775 F.2d 859, 862 (7th Cir. 1985); *see also* McCabe v. Sharrett, 12 F.3d 1558, 1569–70 (11th Cir. 1994) (declining to adopt any of the competing tests in a case involving a plaintiff's claim that she was transferred to a less desirable position due to her marriage because plaintiff's claim failed under all of the competing tests).

44. Charles J. Morris, *NLRB Protection in the Nonunion Workplace: A Glimpse at a General Theory of Section 7 Conduct*, 137 U. PA. L. REV. 1673, 1686 (1989).

employees the right to form or join labor organizations.[45] However, § 7 does more than simply protect the ability of employees to join unions and engage in collective bargaining. The NLRA itself expressly states that one of its purposes is to guarantee "the exercise by workers of full freedom of association."[46] Indeed, the Norris-LaGuardia Act[47] actually declares that it is "the public policy of the United States" that workers "have full freedom of association,"[48] a theme that is repeated in § 7.[49] To that end, § 7 also guarantees employees "the right to . . . engage in . . . concerted activities for the purpose of collective bargaining *or other mutual aid or protection*."[50] Thus, an association with other coworkers does not necessarily have to be directed toward union organization to be protected.[51]

Historically, the National Labor Relations Board (NLRB) interpreted the terms of this guarantee fairly broadly. The term "concerted activities" has not been defined so broadly so as to cover individual action that is merely *intended* to benefit coworkers. But, according to the NLRB, the term does cover situations in which other employees are simply *aware* of the individual's action on their behalf even if they do not necessarily approve of the individual's actions.[52] The NLRB has held that concerted activity does not include mere complaints from one employee to another about a personal matter, but such griping can nonetheless amount to concerted activity when the matter is of common interest to all employees and implicit in the communication is the solicitation of support or the attempt to incite collective action.[53]

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45. 29 U.S.C. § 157 (2000).
46. *Id.* § 151.
47. *Id.* §§ 101–115.
48. *Id.* § 102.
49. *Id.* § 151. Specifically, the Act provides as follows:

> It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Id.

50. *Id.* § 157 (emphasis added).
51. Morris, *supra* note 44, at 1752.
52. Meyers Indus., Inc. (*Meyers II*), 281 N.L.R.B. 882, 886 (1986); John B. O'Keefe, *Preserving Collective-Action Rights In Employment Arbitration*, 91 VA. L. REV. 823, 833 (2005).
53. Timekeeping Sys., Inc., 323 N.L.R.B. 244, 248 (1997); Nat'l Wax Co., 251 N.L.R.B. 1064, 1065 (1980).

The term "mutual aid or protection" has traditionally been interpreted even more broadly.[54] Importantly, the concept of concerted activity for the purpose of mutual aid or protection is broad enough to protect not only the employee who instigates the concerted activity, but also the other employee who may take a less active role in the activity. For example, an employee who shows solidarity with a single, aggrieved coworker engages in concerted activity for the purpose of mutual aid or protection, even though the coworker is, in the words of Judge Learned Hand, "the only one of them who has any immediate stake in the outcome."[55] Likewise, a coworker "who comes or is called to the aid of a fellow employee" acts for the purpose of mutual aid or protection.[56] And inherent in the NLRB's repeated conclusion that a communication between a speaker and listener may qualify as concerted activity for the purpose of mutual aid or protection is the notion that § 7 protects not only the speaker who attempts to incite collective action, but the listener who receives the speaker's message.[57]

While lawyers frequently tend to view labor law exclusively as "union law," nothing within § 7 limits the extension of § 7 rights to unionized employees.[58] On several occasions, the NLRB has reaffirmed that § 7 protects non-union employees.[59] Perhaps the most famous example is the NLRB's ruling that § 7 protects the ability of non-union employees to discuss their wages with one another.[60] According to the NLRB, the right to engage in concerted activities for the purpose of mutual aid or protection "encompasses the right of employees to ascertain what wage rates are paid by their employer, as wages are a vital term and condition

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54. *See* O'Keefe, *supra* note 52, at 832 (stating that the term has been broadly defined "to encompass virtually any lawful activity that could be characterized as potentially benefiting workers"); Rita Gail Smith & Richard A. Parr II, *Protection of Individual Action As "Concerted Activity" Under the National Labor Relations Act*, 68 CORNELL L. REV. 369, 374 (1983) (stating that "[c]ourts have construed 'mutual aid or protection' so broadly that employee action invariably satisfies this requirement"); *see also* Richard Michael Fischl, *Self, Others, and Section 7: Mutualism and Protected Protest Activities Under the National Labor Relations Act*, 89 COLUM. L. REV. 789, 790–91 (1989) (explaining that "the [NLRB] and the courts have almost invariably rejected" as literalist reading of the "mutual aid or protection" language that would require reciprocity or true "mutuality" of aid or protection).

55. NLRB v. Peter Cailler Kohler Swiss Chocolates Co., 130 F.2d 503, 505 (2d Cir. 1942).

56. Fischl, *supra* note 54, at 791.

57. *Meyers II*, 281 N.L.R.B. at 887.

58. *See* William R. Corbett, *Waiting for the Labor Law of the Twenty-First Century: Everything Old is New Again*, 23 BERKELEY J. EMP. & LAB. L. 259, 267 (2002) ("The scope of coverage of § 7 and its application to nonunion employees may have been one of the best-kept secrets of labor law.").

59. *See, e.g.*, DuBose Masonry, Inc., 279 N.L.R.B. 909, 914 (1986); Triana Indus., 245 N.L.R.B. 1258, 1258 (1979).

60. *Triana Indus*., 245 N.L.R.B. at 1258.

of employment."[61]

The degree to which § 7 advances an employee's right to associate for the purpose of mutual aid or protection is perhaps best illustrated by the ongoing debate over a non-union employee's right to have a representative present during an investigatory interview by the employer that the employee reasonably believes could result in discipline. In *NLRB v. J. Weingarten, Inc.*,[62] the Supreme Court upheld the NLRB's conclusion that an employee has a § 7 right to have a union representative present during such an interview.[63] According to the Supreme Court, "[t]he action of an employee in seeking to have the assistance of his union representative at a confrontation with his employer" qualifies as concerted activity for the purpose of mutual aid or protection because the employee's representative safeguards "not only the particular employee's interest, but also the interests of the entire bargaining unit by exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly."[64] While the employee's right to have a representative present during an investigation is crucial to fulfilling the NLRA's purposes, equally important is the right of the employee's representative to be free from retaliation for providing aid or protection.[65] Without such a corresponding right to provide aid or protection, the *Weingarten* right would be meaningless.

In this respect, the Supreme Court acknowledged that the recognition of such a right is important in fulfilling the purposes of the NLRA, namely "'exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of . . . mutual aid or protection.'"[66] The decision, therefore, is a recognition that the ability of employees to associate with one another for the purpose of mutual aid or protection helps eliminate some of the inherent inequality in power between management and employees.[67]

Professor Richard Michael Fischl has suggested a slightly different, but nonetheless related explanation behind the "mutual aid or protection" language.[68] Fischl argued that the term "represented a forthright embrace of an ethic of solidarity 'rooted in working-class bondings and struggles.'"[69] Thus, a faithful reading of the mutual aid or protection

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61. *Id.*

62. 420 U.S. 251 (1975).

63. *Id.* at 265–67.

64. *Id*. at 260–61.

65. *See supra* note 55 and accompanying text.

66. *J. Weingarten, Inc*., 420 U.S. at 261–62 (omission in original) (quoting 29 U.S.C. § 151 (2000)).

67. *Id.* at 262.

68. Fischl, *supra* note 54, at 850–51.

69. *Id.* at 851 (quoting DAVID MONTGOMERY, THE FALL OF THE HOUSE OF LABOR 171

requirement should advance this goal of solidarity.[70] This solidarity theme appears in *Weingarten* as well when the Court relied on Judge Learned Hand's observation about the importance of being able to seek the assistance of coworkers: A worker who comes to the aid of another "assures himself, in case his turn ever comes, of the support of the one whom [he is] then helping; and the solidarity so established is 'mutual aid' in the most literal sense, as nobody doubts."[71]

Throughout the years, the NLRB has flip-flopped on the question whether the *Weingarten* right applies in the non-union context.[72] In recent years, the NLRB also has departed from its historically broad reading of the phrases "concerted activities" and "mutual aid or protection."[73] Despite this, the policy in favor of encouraging employees not just to assist one another but to associate with one another more generally remains a bedrock principle of labor-management relations.

2. Third-Party Retaliation Claims

The federal courts have also protected employees' association rights under the NLRA in situations quite analogous to those described in Part I. Courts have consistently upheld the NLRB's ruling that § 8(a)(1) of the NLRA prohibits an employer from taking adverse action against a supervisor because of a family member's union activities, despite the fact that supervisors would not be entitled to protection under a literal interpretation of the NLRA's definition of "employee."[74] In such cases, the

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(1987)).

70. *See id.* at 842; *see also* Morris, *supra* note 44, at 1706 (stating that mutual aid or protection "includes the aphorism, 'misery loves company'").

71. *J. Weingarten*, *Inc.,* 420 U.S. at 261 (quoting NLRB v. Peter Cailler Kohler Swiss Chocolates Co., 130 F.2d at 505–06).

72. Epilepsy Found., 331 N.L.R.B. 676, 677 (2000); Sears, Roebuck & Co., 274 N.L.R.B. 230, 230–31 (1985); Materials Research Corp., 262 N.L.R.B. 1010, 1010 (1982); Christine Neylon O'Brien, *The NLRB Waffling on Weingarten Rights*, 37 LOY. U. CHI. L.J. 111, 114 (2005). The NLRB's most recent decision on the subject in *IBM Corp*., 341 N.L.R.B. 1288, 1288 (2004), concluded that no such right exists.

73. Holling Press, Inc., 343 N.L.R.B. 301, 301 (2004) (holding that an employee who solicited a coworker to testify on her behalf in a sexual harassment claim at a state agency proceeding did not engage in concerted activity for the purpose of mutual aid or protection); Adelphi Inst., Inc. 287 N.L.R.B. 1073, 1073 (1988) (holding that an employee who was placed on probation by her employer and who inquired of a coworker whether he had ever been placed on probation did not engage in concerted activity for the purpose of mutual aid or protection).

74. Tasty Baking Co. v. NLRB, 254 F.3d 114, 127–28 (D.C. Cir. 2001); Kenrich Petrochemicals, Inc. v. NLRB (*Kenrich I*), 893 F.2d 1468, 1477–78 (3d Cir.), *vacated on other grounds*, 907 F.2d 400, 402 (3d Cir. 1990) (en banc); NLRB v. Advertisers Mfg. Co., 823 F.2d 1086, 1088–89 (7th Cir. 1987); *see also* Dewey Bros., Inc., 187 N.L.R.B. 137, 141–42 (1970), *enforced without opinion sub nom*. NLRB v. Gen. Plastics Corp., 457 F.2d 511 (5th Cir. 1972) (concluding that an employer violated § 8(a)(1) of the Act by firing a supervisor because of his

NLRB has held that the supervisor is entitled to reinstatement or other appropriate remedies.[75]

The conclusion that such third-party retaliation violates § 8(a)(1) requires no great feat of interpretation. Section 8(a)(1) makes it an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of their § 7 rights.[76] Employer retaliation directed at third parties amounts to an attempt to coerce or restrain other employees from exercising their rights, because such retaliation is an attempt, in the words of the Seventh Circuit Court of Appeals, to intimidate other employees "by showing the lengths to which the company would go to punish one of them."[77]

More interesting is the question of the appropriate remedy. As stated, supervisors are not entitled to the protection of the NLRA.[78] Moreover, because supervisors' should theoretically crry out the wishes of management, several courts that have considered the issue have questioned whether reinstatement of a supervisor is appropriate when the supervisor is a union supporter.[79] However, when there is no evidence that the supervisor actively sided with a union, these courts have concluded that the remedy of reinstatement is an appropriate and necessary exercise of the NLRB's remedial power.[80] Reinstatement in such instances, the Third Circuit Court of Appeals has explained, "serves to dispel employees' fears and concomitant reluctance to fully exercise their rights, by demonstrating that the law sets boundaries on employers' abilities to engage in this sort of conduct with impunity."[81]

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spouse's union activities); Consol. Foods Corp., 165 N.L.R.B. 953, 959 (1967), *enforcement denied in part sub nom.* Consol. Foods Corp. v. NLRB, 403 F.2d 662, 664 (6th Cir. 1968) (per curiam); Golub Bros. Concessions, 140 N.L.R.B. 120, 120 (1962).

75. *See, e.g.*, *Tasty Baking Co*., 254 F.3d at 130; Kenrich Petrochemicals, Inc. v. NLRB (*Kenrich II*), 907 F.2d 400, 410–11 (3d Cir. 1990) (en banc); *Advertisers Mfg. Co*., 823 F.2d at 1089.

76. 29 U.S.C. § 158(a)(1) (2000).

77. *Advertisers Mfg. Co.*, 823 F.2d at 1088.

78. *Id.*

79. *Tasty Baking Co.*, 254 F.3d at 130; *Advertisers Mfg. Co*., 823 F.2d at 1089.

80. *See Tasty Baking Co*., 254 F.3d at 130.

81. *Kenrich II*, 907 F.2d at 411; *see also Advertisers Mfg. Co.*, 823 F.2d at 1089 (upholding the NLRB's order of reinstatement so that other employees "will not be deterred from exercising their rights under § 7 by fear that if they do the company will try to get back at them in any way it can, including by firing their relatives").

C. *The Right of Association and the Americans with Disabilities Act*

1. Section 12112(b)(4) of the ADA and Associational Discrimination

The most explicit recognition found in federal anti-discrimination law of an employee's right of association is the Americans with Disabilities Act's (ADA) prohibition against discrimination based on one's association with an individual with a disability. Typically, to have standing under Title I of the ADA, an employee must be a "qualified individual with a disability."[82] However, § 12112(b)(4) of the ADA expressly prohibits an employer from discriminating against a non-disabled individual because of the individual's association with a qualified individual with a disability.[83]

The only indication from the legislative history as to the genesis of § 12112(b)(4) is a reference to a mother who was fired from her job after moving in to care for her son, who had AIDS.[84] Given the widespread misperceptions and fears surrounding certain infectious diseases (and most notably AIDS) at the time of the ADA's consideration, it seems likely that § 12112(b)(4) reflected Congress's recognition that "society's accumulated myths and fears about disability and disease"[85] are just as pernicious when directed at those who associate with individuals with disabilities as when they are directed at those with disabilities themselves.[86]

As case law involving § 12112(b)(4) has developed, however, there have been relatively few published cases involving such forms of pure discrimination. Instead, ADA plaintiffs most frequently assert a violation of § 12112(b)(4) when an employer takes adverse action against the plaintiff based on the plaintiff's attendance problems resulting from having to care for an individual with a disability.[87] In other words, § 12112(b)(4)

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82. 42 U.S.C. § 12112(a) (2000).

83. *Id.* § 12112(b)(4).

84. *Americans With Disabilities Act of 1988: Joint Hearing on S. 2345 Before the Subcomm. on the Handicapped of the S. Comm. on Labor and Human Resources and the Subcomm. on Select Education of the H.R. Comm. on Education and Labor*, 100th Cong. 77 (1988); Lawrence D. Rosenthal, *Association Discrimination Under the Americans With Disabilities Act: Another Uphill Battle for Potential ADA Plaintiffs*, 22 HOFSTRA LAB. & EMP., L.J. 132, 137 (2004).

85. Sch. Bd. of Nassau County v. Arline, 480 U.S. 273, 284 (1987).

86. *See generally* Rosenthal, *supra* note 84, at 137 (explaining that the inclusion of the association provision reflects Congress's belief that employers should not be permitted to discriminate against an individual based on the employer's fear of another's illness).

87. In this respect, § 12112(b)(4) closely resembles the anti-retaliation mandate of the Family Medical Leave Act (FMLA), which likewise prohibits an employer from taking adverse action against an employee who exercises his statutory right to take unpaid leave to care for a relative with a serious health condition. 29 U.S.C. § 2612(a)(1) (2000); *id.* § 2615(a). ADA plaintiffs have experienced significant difficulty prevailing on such claims for a host of reasons, including the fact

operates in practice not so much as a tool to protect an employee whose association with an individual whose physical or mental impairment might provoke fear or discomfort on the part of an employer, but as more of a social welfare measure related to family responsibilities and regular attendance. Still, as originally conceived, § 12112(b)(4) is a powerful statement that affirms the importance of protecting third parties from the harmful consequences of discriminatory attitudes.

2. Section 12203(b) of the ADA and Associational Discrimination

Another portion of the ADA also addresses employer action targeted at third parties. Section 12203(a) of the ADA parallels § 704(a) of Title VII in that both provisions make it unlawful to retaliate against an individual because the individual opposed an employer's unlawful practices or participated in a proceeding under the ADA.[88] However, § 12203(b) goes on to make it unlawful

> to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.[89]

The language of § 12203(b) differs from Title VII's anti-retaliation provision in several respects.

Although the line between retaliation and intimidation is often blurry at best, § 12203(b) is more accurately described as an anti-coercion or anti-intimidation measure than an anti-retaliation measure.[90] In addition, § 12203(a) protects not just those who oppose unlawful conduct or participate in a proceeding but also those who simply exercise their rights under the ADA or who assist others in doing so.[91] Thus, for example, the provision has been held to cover a husband who spoke to his wife's supervisor about his wife's need for a reasonable accommodation at work.[92]

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that employers are not required to modify a leave policy for an employee who needs time off to care for a relative with a disability. *See* Rosenthal, *supra* note 84, at 169–70.

88. 42 U.S.C. § 12203(a) (2000) ; *id*. § 2000e-3(a).

89. *Id.* § 12203(b).

90. *See generally* Rosenthal, *supra* note 84, at 135 (distinguishing between the ADA's "anti-coercion" and "anti-retaliation" provisions).

91. *See* 42 U.S.C. § 12203(a).

92. Barker v. Int'l Paper Co., 993 F. Supp. 10, 16 (D. Me. 1998).

Section 12203(b) also is broader than § 704(a) of Title VII in that it probably protects those individuals who are the victims of pure third-party retaliation. The language of § 12203(b) is actually derived from pre-existing labor law.[93] In *Fogleman v. Mercy Hospital, Inc.*,[94] the Third Circuit Court of Appeals acknowledged the obvious similarity with § 8(a)(1) of the NLRA, which likewise prohibits an employer from interfering with or coercing employees in the exercise of their § 7 rights.[95] *Fogleman* involved a retaliation claim filed by a son who alleged that he was discharged in retaliation for his father's suit against the same employer.[96] The court previously concluded that an employer violates § 8(a)(1) by discharging a supervisor because of a family member's union activities, and that the supervisor in such a case may be entitled to reinstatement.[97] Recognizing the similarity of statutory texts, the court concluded that a retaliation plaintiff may proceed under § 12203(b) just as he would under § 8(a)(1).[98] Thus, the court permitted the plaintiff to proceed with his claim of pure third-party retaliation under § 12203(b).[99]

III. THE ANTI-RETALIATION PROVISION OF TITLE VII AND THE TROUBLEMAKER'S FRIEND

The implicit and sometimes explicit recognition of the value of employees' association interest that is present in many federal decisions stands in marked contrast to the federal courts' treatment of retaliation claims that involve the associates of individuals who have engaged in protected activity under Title VII or who are contemplating such action. While courts have interpreted Title VII's anti-discrimination provision in a way that at least indirectly protects employees' association interest, the courts have been less generous in their interpretation of the statute's anti-retaliation provision.

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93. *See* Mark C. Weber, *Workplace Harassment Claims Under the Americans with Disabilities Act: A New Interpretation*, 14 STAN. L. & POL'Y REV. 241, 257 (2003) (stating that § 12203(b)'s language originated in the National Industrial Recovery Act (NIRA) and continued through the NLRA and Railway Labor Act, 45 U.S.C. § 152(3)–(4)).

94. 283 F.3d 561 (3d Cir. 2002).

95. *Id.* at 564; *see* 29 U.S.C. § 158(a)(1).

96. *Fogleman*, 283 F.3d at 564.

97. Kenrich Petrochemicals, Inc. v. NLRB (*Kenrich II*), 907 F.2d at 411 (3d Cir. 1990) (en banc); Kenrich Petrochemicals, Inc. v. NLRB (*Kenrich I*), 893 F.2d 1468, 1477–78 (3d Cir.), *vacated on other grounds*, 907 F.2d 400, 402 (3d Cir.1990) (en banc).

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

99. *Id.*

A. *Title VII's Indirect Protection of the Right of Association*

Unlike the NLRA and the ADA, Title VII does not directly address an individual's right to associate with coworkers. Instead, to the extent that Title VII protects employees' freedom of association, the statute does so in less obvious and more indirect ways. One situation in which Title VII protects an individual's right of association is when an employer objects to an employee's association with another individual of a particular race, gender, or religion, and the employer takes adverse action against the employee.[100] Initially, courts were somewhat reluctant to allow a plaintiff to proceed under Title VII after suffering an adverse employment action because, for example, she was involved in romantic relationship with a person of another race or because she was friends with such individuals.[101] Courts reasoned that the employer in such a case was discriminating on the basis of the other party's race, not the plaintiff's.[102] Thus, a white employee who was fired after continuing to associate with his black coworkers after having been ordered not to do so did not have a claim under Title VII.[103]

In time, courts began to recognize the fallacy of such reasoning. In *Whitney v. Greater New York Corp. of Seventh-Day Adventists*,[104] the U.S. District Court for the Southern District of New York explained that discrimination against a plaintiff stemming from an employer's disapproval of the plaintiffs' interracial association was, in fact, discrimination because of the plaintiff's race.[105] In *Whitney*, the plaintiff alleged she had been fired because her employer disapproved of her "casual social relationship" with a black male.[106] The court rejected the defendant's argument that, if true, such conduct amounted only to discrimination against the friend, explaining that "if [the plaintiff] was discharged because, as alleged, the defendant disapproved of a social relationship between a white woman and a black man, the plaintiff's race was as much a factor in the decision to fire her as that of her friend."[107] Based on the logic of *Whitney*, it is now well-established that such discrimination violates Title VII.[108]

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100. 42 U.S.C. § 2000e (2000).

101. Parr v. United Family Life Ins. Co., Civ. No. C-83-26-6, 1983 WL 1774, at *1–2 (N.D. Ga. June 15, 1983); Adams v. Governor's Comm. on Post-Secondary Educ., 504 F. Supp. 30, 31 (N.D. Ga. 1980); Ripp v. Dobbs Houses, Inc., 366 F. Supp. 205, 207, 214–15 (N.D. Ala. 1973).

102. *Parr*, 1983 WL 1774, at *2.

103. *Ripp*, 366 F. Supp. at 208–09.

104. 401 F. Supp. 1363 (S.D.N.Y. 1975).

105. *Id.* at 1366.

106. *Id.* at 1365.

107. *Id.* at 1366.

108. *See, e.g.*, Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888, 892 (11th Cir.

To be sure, most of the courts that have held that discrimination on the basis of interracial associations violates Title VII have not expressly done so on the ground of protecting employees' association interests. In such cases, courts typically refer to the right to be free from racial discrimination as the right being protected in such instances.[109] Prohibiting such employer conduct does, however, at least indirectly advance employees' right to associate with whomever they choose, at least when their employers' reasons for opposing such relationships are discriminatory in nature.[110] On occasion, courts actually address such cases explicitly in terms of a right of association.[111] In *Johnson v. University of Cincinnati*,[112] the Sixth Circuit Court of Appeals held that "in order to state a cognizable claim under Title VII, the plaintiff . . . need only allege that he was discriminated against on the basis of his association with a member of a recognized protected class."[113] According to the Sixth Circuit, a plaintiff complaining of such associational discrimination need not even allege that he was discriminated against on the basis of race in order to state a claim under Title VII because the race of the individual with whom the plaintiff associated is "imputed" to the plaintiff.[114] Therefore, *Johnson* exemplifies how Title VII can at least indirectly protect the right of association in the workplace.

B. *The Troublemaker's Friend and the Current Split Involving Pure Third-Party Retaliation Claims*

One area where courts have been less willing to protect employees' association interests is in the case of pure third-party retaliation. Courts occasionally present the question whether § 704(a) of Title VII prohibits an employer from discriminating against a third party in retaliation for the protected activities of another individual as a question whether to read into the statute a third-party retaliation cause of action.[115] The relevant portion of Title VII provides that it is unlawful

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1986).

109. *See, e.g.*, Deffenbaugh-Williams v. Wal-Mart Stores, Inc., 156 F.3d 581, 589 (5th Cir. 1998).

110. *See, e.g.*, Chandler v. Fast Lane, Inc., 868 F. Supp 1138, 1143–44 (E.D. Ark. 1994).

111. *See id.* at 1143 ("A white person's right to associate with African-Americans is protected by § 1981.").

112. 215 F.3d 561 (6th Cir. 2000).

113. *Id.* at 574.

114. *Id.* at 575 (citing Tetro v. Elliott, Popham, Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc., 173 F.3d 988, 995 (6th Cir. 1999)).

115. EEOC v. Bojangles Rests., Inc., 284 F. Supp. 2d 320, 326 (M.D.N.C. 2003).

> 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.[116]

The statute's use of the word "he" clearly seems to indicate that the person complaining of unlawful retaliation also must have been the person participating in the protected activity.[117]

This language contrasts with similar provisions in the NLRA and the ADA, which do afford protection for the "innocent bystanders" who associate with an individual engaging in protected activity.[118] Given Title VII's failure to specifically address discrimination against third parties, the most natural reading of the statutory text would seem to lead to the conclusion that no claim lies for merely being associated with an individual who has engaged in protected activities.[119] An employee who somehow assists a coworker who is herself engaging in protected activities is protected.[120] But the language of § 704(a) does not expressly cover the situation when an employer takes action against the employee simply because the employee happens to have some relationship with the troublemaking coworker.

Courts that have been willing to read such a cause of action into Title VII have done so largely on the premise that not permitting such claims would, in effect, make a mockery of the goals of anti-discrimination law. According to the Supreme Court, the purpose of statutory anti-retaliation

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116. 42 U.S.C. § 2000e-3 (2000). The Age Discrimination in Employment Act (ADEA) contains a similar provision. The relevant portion of the ADEA provides as follows:

> It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment . . . because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

29 U.S.C. § 623(d) (2000).

117. Robert J. Gregory, *Overcoming Text in an Age of Textualism: A Practitioner's Guide to Arguing Cases of Statutory Interpretation*, 35 AKRON L. REV. 451, 484 (2002).

118. *See supra* notes 74–80 and accompanying text (discussing labor law); *supra* notes 94–99 and accompanying text (discussing ADA cases).

119. *See* Gregory, *supra* note 117, at 484–85 (stating that the "language of the statute cannot be read as plainly supporting the position that the statute prohibits third-party retaliations," but that "the literal terms of the statute might support" the opposite reading).

120. 42 U.S.C. § 2000e-3(a) (2000).

provisions is to "maintain[] unfettered access to statutory remedial mechanisms."[121] Several courts have recognized that permitting an employer to retaliate against a third-party would allow an employer to accomplish indirectly what it is prohibited from accomplishing directly.[122] Such associational retaliation would deter individuals who believe they have been discriminated against from exercising their statutory rights, thus frustrating the purpose of statutory anti-retaliation provisions.[123]

The arguments in favor of permitting the ultimate victims of an employer's pure third-party retaliation to sue under Title VII are compelling. However, to adopt this position, one must still contend with the language of the provisions, the most natural reading of which would preclude such claims. Moreover, courts that have rejected such claims of pure third-party retaliation have suggested several possible reasons why Congress might have chosen not to extend to third parties the right to be free from retaliation. These include the argument that many individuals who assert such claims will already be protected because they "will have participated *in some manner* in a coworker's charge of discrimination"[124] and the argument that permitting such suits "would open the door to frivolous lawsuits and interfere with an employer's prerogative to fire at-will employees."[125] In *Fogleman v. Mercy Hospital, Inc.*, the Third Circuit Court of Appeals acknowledged that while it did not find these possible policy justifications "particularly convincing," they were "at least plausible policy reasons why Congress might have intended to exclude third-party retaliation claims."[126] Other courts have raised slippery-slope arguments in the Title VII context, questioning, if a spouse may bring a third-party retaliation claim, whether "other relatives, close friends, life-partners or long-time co-workers" could as well.[127]

Regardless of the justification offered, the majority of courts to consider the question have concluded that a plaintiff who alleges

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121. Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997).

122. Gonzalez v. N.Y. State Dep't. of Corr. Servs., 122 F. Supp. 2d 335, 347 (N.D.N.Y. 2000); EEOC v. Nalbandian Sales, Inc., 36 F. Supp. 2d 1206, 1210 (E.D. Cal. 1998).

123. De Medina v. Reinhardt, 444 F. Supp. 573, 580 (D.D.C. 1978); *see also* Fogleman v. Mercy Hosp. Inc., 283 F.3d 561, 568–69 (3d Cir. 2002) (recognizing that permitting an employer to engage in such action would deter employees from exercising their statutory rights, but nonetheless concluding by refusing to recognize third-party retaliation claims).

124. Holt v. JTM Indus., Inc., 89 F.3d 1224, 1227 (5th Cir. 1996).

125. *Fogleman*, 283 F.3d at 569–70; Singh v. Green Thumb Landscaping, Inc., 390 F. Supp. 2d 1129, 1138 (M.D. Fla. 2005).

126. *Fogleman*, 283 F.3d at 569.

127. Sukenic v. Maricopa County, No. Civ. 02-02438, 2004 WL 3522690, at *12 (D. Ariz. Jan. 7, 2004); *see also* EEOC v. Bojangles Rest., Inc., 284 F. Supp. 2d 320, 326 (M.D.N.C. 2003) ("The number of lawsuits which could spawn from this rule could be enormous in a company of any size.").

retaliation based solely upon the plaintiff's association with another individual who has engaged in protected statutory activities does not have a claim under Title VII.[128] Therefore, while the "sins" of the troublemaker may be imputed to a friend or relative by the employer, the *protection* afforded the troublemaker by federal law is not imputed to friends or relatives under the majority approach. As a result, the friends, cousins, siblings, children, and spouses of workplace troublemakers are likely to be denied coverage under Title VII when they have been retaliated against for their association with an individual who has opposed an employer's allegedly unlawful discrimination or who has participated in a proceeding related to such behavior on the part of an employer.

C. *The Troublemaker's Friend and the Lack of Coverage Under Section 704(a) for Participation in an Employer's Internal Investigation Process*

Federal courts have also lessened employees' association interests in other ways. By employing a demanding standard with regard to what qualifies as protected conduct for purposes of a retaliation claim, some federal courts have left employees who assist their coworkers with respect to charges of discrimination vulnerable to employer retaliation. And by classifying an employee's participation in an employers process for investigating discrimination complaints as opposition conduct for purposes of Title VII, courts have left employees more vulnerable to employer retaliation than they otherwise might be.

1. Participation in an Employer's Internal Investigation Process and Coverage of the Troublemaker Under the Opposition Clause

The predominant approach of the federal courts also lessens employees' association interests when employees seek the assistance of coworkers during internal investigations of workplace harassment. The Supreme Court has provided employers with a strong incentive to establish an internal mechanism for investigating and resolving employee complaints of harassment. In *Faragher v. City of Boca Raton*[129] and *Burlington Industries, Inc. v. Ellerth*,[130] the Supreme Court established a two-part affirmative defense by which employers may cut off liability for harassment by a supervisor that does not result in a tangible employment action, such as termination or demotion.[131] To satisfy the first prerequisite, an employer must have "exercised reasonable care to prevent and correct

128. *See supra* note 8 and accompanying text.
129. 524 U.S. 775 (1998).
130. 524 U.S. 742 (1998).
131. *Id.* at 765; *Faragher*, 524 U.S. at 807.

promptly any harassing behavior."[132] This is typically satisfied by having in place an effective internal investigation process that can address the complaint of harassment.[133] To satisfy the second prerequisite, an employer must establish that the employee "unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise."[134]

In addition to creating a strong incentive for employers to establish effective internal mechanisms for addressing harassment complaints, the *Ellerth–Faragher* affirmative defense also gives employees a strong incentive to report instances of workplace harassment because the failure to do so is likely to prevent the employee from holding the employer liable. The problem, however, is that the most common reason for *not* reporting harassment is the fear of employer retaliation.[135] Indeed, given the prevalence of retaliation in the workplace for just such behavior,[136] employees' reluctance may be justified in many instances. However, the federal courts generally have been unsympathetic to plaintiffs who have not reported instances of workplace harassment to an employer out of "generalized fears of retaliation."[137] Courts typically classify the failure to use an employer's internal mechanism for such reasons as unjustified for purposes of the *Ellerth–Faragher* defense.[138] It is only when the employee's fears are grounded on a more specific basis, such as prior retaliation by the employer, that the failure to report is likely to be excused.[139]

Moreover, employees also have an incentive to report objectionable behavior as soon as it occurs. In one instance, a Title VII plaintiff waited several months before reporting her supervisor's alleged harassment

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132. *Ellerth*, 524 U.S. at 765.

133. *See* Lissau v. S. Food Serv., 159 F.3d 177, 182 (4th Cir. 1998) (stating the fact that an employer has "disseminated an effective anti-harassment policy provides compelling proof of its efforts to prevent workplace harassment").

134. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

135. *See* Louise F. Fitzgerald et al., *Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment*, 51 J. SOC. ISSUES 117, 122 (1995).

136. *Id.* at 122–23 (describing results of surveys finding that between 1/3 and 62% of individuals who filed internal complaints of harassment experienced some form of retaliation); s*ee* Barnard & Rapp, *supra* note 12, at 658 (stating that retaliation claims have doubled in the last decade and now comprise 25% of EEOC charges).

137. Edward A. Marshall, *Excluding Participation in Internal Complaint Mechanisms from Absolute Retaliation Protection: Why Everyone, Including the Employer, Loses*, 5 EMPLOYEE RTS. & EMP. POL'Y J. 549, 579 (2001). *See generally* Martha Chamallas, *Title VII's Midlife Crisis: The Case of Constructive Discharge*, 77 S. CAL. L. REV. 307, 374 (2004) (noting the high standard to which courts hold employees with respect to the reporting requirement).

138. Marshall, *supra* note 137, at 579.

139. *Id.*

because, she said, "she needed time to collect evidence against [the superior] so company officials would believe her" and because she thought the superior might simply be an "'interested man' who could be politely rebuffed."[140] The Fourth Circuit Court of Appeals, rejected this excuse for the delay, concluding that the plaintiff had unreasonably failed to avail herself of the employer's internal complaint procedure.[141] The message from the Fourth Circuit then, is when in doubt, report.

Unfortunately, employees who *report* internally run the very real risk that the act of reporting will not be protected conduct for purposes of a retaliation claim, thus leaving them vulnerable to employer retaliation. Section 704(a) contains two distinct clauses: the opposition clause, which applies when an employee opposes unlawful conduct, and the participation clause, which applies when an employee participates in a proceeding.[142] The federal courts uniformly have held that resort to an employer's internal procedures for handling discrimination does not fall under the participation clause for purposes of a retaliation claim, at least prior to the filing of an EEOC charge, because such conduct does not relate to an investigation, proceeding, or hearing authorized by Title VII.[143] Instead, such activity is protected, if at all, under the opposition clause.[144] The only time that participation in an internal investigation or proceeding is likely to be characterized as protected activity falling under the participation clause is when the internal proceeding occurs pursuant to a previously filed EEOC charge.[145]

The rationale underlying the dominant approach is based almost entirely on statutory construction. Under the participation clause, an individual is protected from retaliation when "he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing *under this subchapter*."[146] Relying on this language, the courts have concluded that the "investigation, proceeding, or hearing" language refers only to those mechanisms that are authorized by statute and are part of the "machinery available to seek redress for civil rights

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140. *Id.*

141. Matvia v. Bald Head Island Mgmt., 259 F.3d 261, 269–70 (4th Cir. 2001).

142. 42 U.S.C. § 2000e-3(a) (2000).

143. *See, e.g.*, EEOC v. Total Sys. Serv., Inc., 221 F.3d 1171, 1174 (11th Cir. 2000).

144. *Id.*; Laughlin v. Metro. Wash. Airports Auth., 149 F.3d 253, 259 (4th Cir. 1998); Vasconcelos v. Meese, 907 F.2d 111, 113 (9th Cir. 1990); Booker v. Brown & Williamson Tobacco Co., 879 F.2d 1304, 1313 (6th Cir. 1989). At least one state appellate court has reached the contrary result when interpreting an identically worded statute. McLemore v. Detroit Receiving Hosp. & Univ. Med. Ctr., 493 N.W.2d 441, 443 (Mich. Ct. App. 1992).

145. Abbott v. Crown Motor Co., 348 F.3d 537, 543 (6th Cir. 2003); Dorothy E. Larkin, *Participation Anxiety: Should Title VII's Participation Clause Protect Employees Participating in Internal Investigations*, 33 GA. L. REV. 1181, 1197–98 (1999).

146. 42 U.S.C. § 2000e-3(a) (emphasis added).

violations."[147] Other courts have defined the concept in a slightly looser fashion, stating that conduct falls under the participation clause if it is "an intimately related and integral step in the process of making a formal charge."[148] Ultimately, however, under the overwhelming majority approach, the investigation, proceeding, or hearing must have its basis in the statutory framework of Title VII.

This distinction between coverage under the opposition clause versus coverage under the participation clause is significant. The scope of protection for activity falling under the participation clause is significantly broader than for activity falling under the opposition clause.[149] Indeed, protection under the participation clause is virtually absolute. While the participation clause protects those who participate "in *any* manner" in a Title VII proceeding,[150] protection under the opposition clause is more limited. Some forms of opposition, such as illegal acts, will be unprotected.[151]

Perhaps the most significant limitation to coverage under the opposition clause is the requirement that an individual must have a good faith, objectively reasonable belief that the conduct she is opposing is unlawful.[152] In some instances, courts appear to hold employees to the standard of what a reasonable labor and employment attorney would believe, rather than what a reasonable employee would believe.[153] In *Talanda v. KFC National Management Co.*, for example, the plaintiff complained to his supervisor and refused to follow her order that the plaintiff remove a coworker with dental problems and missing teeth from a front-counter position because the supervisor was afraid of how customers would react to the presence of the individual.[154] The employer fired the plaintiff allegedly in response to the plaintiff's reaction to the

147. *Booker*, 879 F.2d at 1313.

148. Croushorn v. Bd. of Trs., 518 F. Supp. 9, 23 (M.D. Tenn. 1980).

149. *Booker*, 879 F.2d at 1312. The rationale for the distinction is that the language of the participation clause is linked directly to Title VII's remedial framework, thereby implying that activities under the participation clause are essential to that remedial framework. *Laughlin*, 149 F.3d at 259 n.4; Hashimoto v. Dalton, 118 F.3d 671, 680 (9th Cir. 1997).

150. 42 U.S.C. § 2000e-3(a) (emphasis added).

151. Hochstadt v. Worcester Found., 545 F.2d 222, 231–32 (1st Cir. 1976).

152. *See, e.g.*, Wallace v. DTG Operations, Inc., 442 F.3d 1112, 1125 (8th Cir. 2006); Byers v. Dallas Morning News, Inc., 209 F.3d 419, 428 (5th Cir. 2000).

153. *See generally* Little v. United Techs., 103 F.3d 956 (11th Cir. 1997) (concluding that the plaintiff lacked an objectively reasonable belief that he was opposing unlawful conduct by reporting to management a coworker's statement, "Nobody runs this team but a bunch of niggers and I'm going to get rid of them"); Brake, *supra* note 2, at 99 (criticizing the good–faith, reasonable belief standard on the grounds that the standard is "self-consciously narrowed to that of a person with 'the' perfect understanding of law and legal reasoning—that is, the judge who applies the reasonable belief standard in that particular case").

154. Talanda v. KFC Nat'l Mgmt. Co., 140 F.3d 1090, 1093 (7th Cir. 1998).

order.[155] The Seventh Circuit Court of Appeals held that the plaintiff could not reasonably have believed that he was opposing unlawful conduct because there was no way he could reasonably have believed his coworker had a disability under the ADA.[156] The court reached this conclusion despite the fact that the EEOC has used a nearly identical scenario to illustrate when an employer illegally discriminates against an individual the employer regards as having a disability. According to the EEOC's Interpretive Guidance, an employer regards an individual as having a disability when the individual has an impairment (such as a disfigurement or anatomical loss) that is substantially limiting only because of the attitudes of others toward the condition.[157] The Guidance goes on to state that "[i]f an employer discriminates against such an individual because of the negative reactions of others, the employer would be regarding the individual as disabled and acting on the basis of that perceived disability."[158] So, despite the fact that this is almost exactly what happened in *Talanda*, the court said, based on ADA case law, that the plaintiff lacked a reasonable belief that the conduct he was opposing was unlawful under the ADA.[159]

In *Jordan v. Alternative Resources Corp.*,[160] the Fourth Circuit Court of Appeals took a similarly restrictive approach. Robert Jordan, a black employee, overheard a white employee say of two recently arrested criminal suspects, "They should put those two black monkeys in a cage with a bunch of black apes and let the apes f-k them."[161] After discussing the incident with coworkers, Jordan learned that the employee had made similar statements in the past.[162] He subsequently reported the incident to management and was fired a month later.[163] When Jordan sued on a retaliation theory, the Fourth Circuit held that his internal complaint did not constitute protected opposition conduct.[164] The court concluded that "no objectively reasonable person could have believed" that a racially hostile work environment existed or was about to develop.[165]

As *Jordan* illustrates, individuals who face what they believe to be workplace discrimination face a difficult choice. If they fail to report, they lose the ability to hold the employer liable in a future lawsuit. If they

155. *Id.* at 1094.
156. *Id.* at 1097.
157. *See* 29 C.F.R. § 1630.2(*l*) (2007).
158. *Id.*
159. *Talanda*, 140 F.3d at 1098.
160. 447 F.3d 324 (4th Cir.), *vacated*, 2006 U.S. App. LEXIS 16794 (4th Cir. July 5, 2006).
161. *Id.* at 326.
162. *Id.*
163. *Id.*
164. *Id.* at 333–34.
165. *Id.* at 332.

report, they cannot claim the protection of Title VII's expansive participation clause and may be held to a demanding standard of reasonableness that may leave them without the protection of the more narrow opposition clause.[166] And, as *Jordan* illustrates, this lack of protection may be significant. By using the employer's procedures, the employee may quickly be labeled a troublemaker who is overly sensitive, disagreeable, or incapable of handling the situation on his own, thereby making him a more likely target of retaliation.[167]

The majority approach also allows employers to preemptively retaliate against an employee prior to the filing of a formal charge of discrimination. An employee who files an internal complaint regarding workplace discrimination certainly raises at least the specter of a formal discrimination claim.[168] With an internal complaint pending, it is not difficult for the employer to imagine that a formal EEOC charge may be forthcoming. Thus, under the majority rule, the employer could take action against the employee before such action comes to pass and theoretically be immune from a future retaliation claim.[169] The employer who does so may be unable to rely upon the existence of its internal process as satisfying the *Ellerth–Faragher* defense in a future case because the employer's actions tend to establish that its process is not effective and that an employee would be justified in not using the process.[170] However, the purpose of retaliation is often less about punishing the troublemaking employee than it is about sending a message to future troublemakers. And the employer who can retaliate with impunity can send a very clear message to its employees regarding its tolerance for dissent.

2. Participation in an Employer's Internal Investigation Process and Coverage of the Troublemaker's Friend Under the Opposition Clause

To be sure, the Catch-22 at issue in these cases is one faced mainly by the troublemaking employee. However, the federal courts' interpretations

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166. *See id.* at 336 (King, J., dissenting) (disagreeing with the majority's conclusion that an African-American employee who heard a coworker refer to other African-Americans as "black monkeys" in a roomful of other employees could not reasonably have believed that such conduct violated Title VII).

167. *See generally* Brake, *supra* note 2, at 32, 39 (stating that "women and racial minorities are perceived as troublemakers and hypersensitive when they confront discrimination" and that retaliation is most likely to occur against those who lack the support of organizational powerbrokers).

168. McLemore v. Detroit Receiving Hosp. & Univ. Med. Ctr., 493 N.W.2d 441, 443 (Mich. Ct. App. 1992).

169. *Id.*

170. *See supra* note 33 and accompanying text (explaining that a failure to report harassment may be viewed as justified by courts when there is a history of prior retaliation by the employer).

of the *Ellerth–Faragher* affirmative defense and Title VII's anti-retaliation provision also have significant implications for coworkers of the troublemaker and the right of workplace association more generally. There are at least two ways in which the friends of workplace troublemakers may be adversely affected by these decisions.

a. The Lack of Protection Under the Opposition Clause for Providing Assistance During an Internal Investigation

First, the majority approaches potentially may expose the troublemaker's friend to the possibility of retaliation if the friend provides assistance related to the troublemaker's internal complaint. In many instances, an employee will have little way of knowing whether her concerns over treatment by a supervisor or other individual are valid and whether the supervisor's actions approach the level of discrimination without obtaining more information.[171] Because an employee's belief that the employer has engaged in unlawful discrimination must be objectively reasonable, an employee actually has an incentive to ask around the workplace to better understand her situation before invoking the employer's internal mechanism for addressing workplace discrimination.[172] Coworkers may have greater information than the troublemaker—either about the incident in question or the law of the workplace more generally—that may be valuable to the troublemaker. Indeed, in *Jordan*, the plaintiff actually discussed the "black apes" incident with coworkers and learned of similar incidents before deciding to report the incident to management. Simply asking coworkers whether they have experienced similar treatment at the hands of a supervisor, however, is unlikely to rise to the level of opposition conduct.[173] While an employee's opposition to unlawful conduct need not take any particular form, to fall under the opposition clause, the conduct must indicate in some manner that the employee is complaining about or is in some manner taking a stand against perceived unlawful conduct.[174] Absent such behavior, a discussion

171. *See* Matvia v. Bald Head Island Mgmt., 259 F.3d 261, 269–70 (4th Cir. 2001) (rejecting an employee's explanation that she needed more time to ascertain whether supervisor was a "predator" before taking advantage of her employer's anti-harassment policy).

172. Larkin, *supra* note 145, at 1184 (stating that employees should be wary about participating in their employer's internal investigations in light of the differing levels of protection afforded protection and opposition conduct).

173. Jordan v. Alternative Res. Corp., 447 F.3d 324, 327 (4th Cir.), *vacated*, 2006 U.S. App. LEXIS 16794 (4th Cir. July 5, 2006).

174. *See* Laughlin v. Metro. Wash. Airports Auth., 149 F.3d 253, 259 (4th Cir. 1998) (stating that opposition conduct encompasses "staging informal protests and voicing one's opinions in order to bring attention to an employer's discriminatory activities"); Sumner v. U.S. Postal Serv., 899 F.2d 203, 209 (2d Cir. 1990) (explaining that opposition conduct includes "informal protests of discriminatory employment practices, including making complaints to management, writing critical

with a coworker about past events that occurs prior to the filing of an internal complaint or an EEOC charge is unlikely to qualify as either opposition or participation conduct.

As importantly, in seeking information from a coworker, an employee concerned about possible discrimination may potentially be subjecting that coworker to adverse action by the employer. Expressing support for coworkers who oppose discrimination may constitute opposition conduct, as may assisting coworkers in their formal discrimination claims.[175] But if an employee who seeks information from coworkers in an attempt to better understand whether the employee has been discriminated against has not engaged in protected opposition conduct, neither is it likely that the coworker who simply responds to the inquiring employee's request without expressing an opinion about the employer's conduct has engaged in protected opposition activity under Title VII. Likewise, if, as is the prevailing approach, an employee who resorts to an employer's internal anti-discrimination process is not engaging in protected participation conduct,[176] neither is a coworker who provides assistance to the troublemaker contemplating the filing of an internal complaint of discrimination.

Nor is an employee likely to be covered when she assists a coworker after the filing of an internal complaint but prior to the filing of a formal charge with the EEOC. For example, in *Laughlin v. Metropolitan Washington Airports Authority*,[177] Kathy LaSauce filed an internal complaint with her employer, alleging that her supervisor had retaliated against her for providing testimony in another employee's EEOC action.[178] LaSauce eventually resigned and sued the employer. Prior to LaSauce's lawsuit, however, Karen Laughlin, a coworker who also happened to be the secretary to an individual who had been involved in the internal complaint process, uncovered potentially damaging evidence concerning the employer's alleged retaliation against LaSauce. Laughlin found an unsigned, written warning letter from her boss to the individual who had allegedly retaliated against LaSauce. The warning letter criticized the individual for his retaliatory actions against LaSauce and was dated prior to LaSauce's resignation. The fact that the letter was never sent, along with

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letters to customers, protesting against discrimination by industry or by society in general, and expressing support of co-workers who have filed formal charges"); Booker v. Brown & Williamson Tobacco Co., 879 F.2d 1304, 1313 (6th Cir. 1989) ("An employee may not invoke the protections of the Act by making a vague charge of discrimination."); Comiskey v. Auto. Indus. Action Group, 40 F. Supp. 2d 877, 898 (E.D. Mich. 1999) (stating that to qualify as opposition conduct, an employee needs to make "an overt stand against suspected illegal discriminatory action").

175. McDonnell v. Cisneros, 84 F.3d 256, 262 (7th Cir. 1996); *Sumner*, 899 F.2d at 209.

176. *See supra* note 143.

177. 149 F.3d 253 (4th Cir. 1998).

178. *Id.* at 256.

some other circumstances, led Laughlin to conclude that a cover-up was taking place to prevent LaSauce from obtaining relevant information for any future lawsuit. Consequently, Laughlin photocopied the letter and some other documents and sent them to LaSauce. When Laughlin's actions were discovered, she was discharged.[179]

After the employer prevailed on its summary judgment motion, Laughlin appealed and argued that her assistance to LaSauce was absolutely privileged under the participation clause.[180] The Fourth Circuit Court of Appeals rejected Laughlin's argument, concluding, in accordance with the majority rule, that because LaSauce had not yet filed a formal discrimination complaint, Laughlin was not assisting in an investigation, proceeding, or hearing under Title VII.[181] Instead, her actions fell under the less-expansive opposition clause.[182] Weighing the employer's interest in maintaining the security and confidentiality of sensitive personnel documents against Laughlin's interest in providing the documents to LaSauce, the court "easily conclude[d]" that Laughlin's actions were unprotected under the opposition clause.[183]

While one may take issue with Laughlin's actions, the majority position with respect to coverage under the participation clause for assistance rendered prior to the filing of a charge of discrimination would apply with equal force to a more sympathetic plaintiff. Without the assurance of absolute protection from retaliation provided by the participation clause, workplace troublemakers are not the only individuals left vulnerable to employer retaliation. Coworkers may also be less willing to assist or perhaps even associate with the victims of workplace discrimination prior to the filing of a formal charge of discrimination. Given the fact that the *Ellerth–Faragher* affirmative defense strongly encourages employers to adopt internal complaint procedures,[184] it is likely that these types of issues will appear with increasing frequency in the coming years.

b. Discouraging Troublemakers From Complaining on Behalf of Coworkers

The majority approaches also disadvantage a troublemaker's coworkers by discouraging the troublemaker from standing up for coworkers' rights.

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179. *Id.*

180. *Id.* at 257–58.

181. *Id.* at 259. Indeed, because LaSauce already had resigned by the time Laughlin photocopied the letter, there arguably was not even an internal investigation or proceeding that was taking place. Laughlin v. Metro. Wash. Airports Auth., 952 F. Supp. 1129, 1134 (E.D. Va. 1997).

182. *Laughlin*, 149 F.3d at 259.

183. *Id.* at 260.

184. *See supra* notes 129–33 and accompanying text.

Majority group employees have had virtually no success in their discrimination claims premised upon the argument that an employer's treatment of minority group employees resulted in a hostile working environment for members of the majority group.[185] When, however, these troublemakers have allegedly been retaliated against for complaining about working environments that are hostile toward their coworkers, courts have been more willing to allow such claims to proceed under a retaliation theory.[186] Nothing in Title VII's anti-retaliation provision requires that the hostile environment an employee opposes be hostile toward that employee.[187] Therefore, the opposition clause protects *selfless* as well as *selfish* acts of opposition.

Employees who act, at least in part, out of a desire to protect their coworkers from unlawful discrimination have hardly enjoyed unqualified success in pursuing retaliation claims, however.[188] In addition to the often difficult task of showing that there was a causal connection between the employer's action and the protected activity, internal troublemakers face the initial difficulty of establishing that they possessed a good faith, reasonable belief that the complained-of conduct was unlawful.[189] In *Jordan*, for example, the plaintiff claimed to have filed an internal complaint because he feared that a hostile work environment either existed or was about to develop.[190] While the plaintiff himself had heard the other employee make only one racist comment, his belief was based in part on the fact that two of his coworkers told the plaintiff that they had heard the other employee make racist statements "many times before."[191] Therefore, a plausible interpretation of the events is that the plaintiff complained not just because he believed that a hostile environment existed or was developing toward him, but because a hostile environment already existed or was developing toward his coworkers.

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185. Noah D. Zatz, *Beyond the Zero-Sum Game: Toward Title VII Protection for Intergroup Solidarity*, 77 IND. L.J. 63, 67 (2002).

186. *Id.* at 93.

187. *Id.*

188. *See* Lewis v. St. Cloud State Univ., 467 F.3d 1133, 1138 (8th Cir. 2006) (affirming summary judgment in favor of an employer when an employee was allegedly retaliated against for "advocating or supporting rights of minorities and faculty of color"); Talanda v. KFC Nat'l Mgmt. Co., 140 F.3d 1090, 1098 (7th Cir. 1998) (affirming summary judgment against an employee who was allegedly retaliated against after raising the possibility that treatment of a coworker violated ADA); Little v. United Techs., 103 F.3d 956, 958–59 (11th Cir. 1997) (affirming summary judgment against a white employee who was allegedly retaliated against after complaining about racist statements about African-Americans by a coworker).

189. *See supra* note 152 and accompanying text.

190. Jordan v. Alternative Res. Corp., 447 F.3d 324, 329 (4th Cir.), *vacated*, 2006 U.S. App. LEXIS 16794 (4th Cir. July 5, 2006).

191. *Id.* at 336 (King, J., dissenting).

As *Jordan* illustrates, however, an employee who complains internally runs the risk of being labeled a troublemaker and being left unprotected by Title VII's anti-retaliation provision. This certainly would have the tendency to discourage selfless acts of opposition. As a result, the victims of such discrimination may be less likely to receive the assistance of coworkers.

IV. THE IMPACT OF THE MAJORITY APPROACHES ON THE RIGHT OF ASSOCIATON IN THE WORKPLACE AND THE FIGHT AGAINST WORKPLACE DISCRIMINATION

The majority approaches regarding Title VII's anti-retaliation provision described above undercut the policy in favor of freedom of association in the workplace. At a minimum, they tend to discourage employees from associating with and assisting one another. Ultimately, this has adverse consequences for the ability of Title VII to combat workplace discrimination.

A. *The Impact on Employees' Association Interests*

The "right of association" may be defined in various ways. The concept may be broad enough to include the protection of intimate associations simply for their own sake.[192] Alternatively, it may be defined so as to include the encouragement of worker solidarity or more narrowly so as to protect only those associations that are entered into for the purpose of providing assistance or otherwise effectuating change.[193] Regardless of how the concept is defined, the majority interpretations of § 704(a) tend to offend the notion of freedom of association.

Federal law has generally taken a dim view of the ability of an employer to dictate with whom its employees may associate with when the associations touch upon matters of public concern beyond the individual workplace in question. Admittedly, one must be cautious about overgeneralizations when comparing public workplace law with private workplace law and unionized settings with non–unionized settings. But the theme of protecting employees' ability to associate with whomever they choose when the association somehow impacts broader policy concerns occurs too frequently to ignore in labor and employment law.

The broadest conception of this "right" of association can be found in federal labor law, which explicitly touts as one of the nation's goals the encouragement of employees to join together for the purpose of collective

192. *See supra* notes 22–23 and accompanying text.

193. *See supra* notes 54–56 and accompanying text; *supra* notes 66–67 and accompanying text.

bargaining and mutual aid or protection.[194] Moving farther along the spectrum, many of the public employment cases take a more conservative view of employees' associational rights in that they limit employee claims to situations when the association involves expressive conduct related to a matter of public concern.[195] However, these cases nonetheless recognize that public values are offended when employers take adverse action against individual employees based on associations that themselves implicate matters of concern beyond a particular workplace.[196]

The requirement that an association must somehow advance or relate to a matter of importance beyond the immediate parties to merit legal protection is also consistent with the common law's recognition of limited exceptions to an employer's absolute right to discharge employees for any reason. State courts have not been receptive to wrongful discharge claims based upon an employer's disapproval of an employee's relationship with another, absent special circumstances. Thus, for example, plaintiffs have generally had little success in claiming protection under state common law when they have been discharged for marrying or dating someone of whom the employer disapproves.[197] By the same token, state legislatures have been reluctant to create statutory causes of action premised upon a broad right of association.[198] Where such statutes exist, they sometimes limit employees' association rights to situations involving matters of broader public importance or have been interpreted by state courts in a manner that limits the overall reach of the statute.[199] When, however, an employer takes adverse action against an employee on the basis of the employee's association with another, and that action somehow offends the public's interest in combating discrimination or thwarts some other clearly

194. *See supra* Part II.B.1.

195. *See supra* notes 29–43 and accompanying text.

196. Admittedly, the associations in these cases need not involve associations with coworkers for an individual employee's action to be protected. But neither have courts hesitated to protect employees' associational interests when the association is with a coworker and the employer's action somehow offends public values. *See supra* notes 33–34 and accompanying text (discussing the constitutional protection afforded to a public employee who seeks to make a statement through the act of associating with other employees who have allegedly been the victims of discrimination).

197. *See, e.g.*, Patton v. J.C. Penney Co., 719 P.2d 854, 857 (Or. 1986) (rejecting a wrongful discharge claim based upon the employer's discharge of an employee for dating coworker), *abrogated by* McGanty v. Staudenraus, 901 P.2d 841 (Or. 1995); McClusky v. Clark Oil & Ref. Co., 498 N.E.2d 559, 561 (Ill. App. Ct. 1st Dist. 1986).

198. *See generally* Marisa Anne Pagnattaro, *What Do You Do When You Are Not At Work?: Limiting the Use of Off-Duty Conduct as the Basis for Adverse Employment Decisions*, 6 U. PA. J. LAB. & EMP. L. 625, 646–70 (2004) (discussing the few state statutes that provide comprehensive protection for employees for their off-duty conduct, including their associations).

199. *See id.* at 669–70 (discussing Connecticut's statute, which protects employees who exercise rights guaranteed by the First Amendment but which has been interpreted to protect only speech related to matters of public concern).

articulated public goal, state law will often recognize a cause of action.[200]

If one looks carefully, one can see a similar theme in certain areas of federal employment discrimination law. At least in an indirect manner, federal law protects an employee's interest in intimate association by prohibiting an employer from taking adverse action based on an employee's association with an individual of another race.[201] The policy can be seen more directly in the language of § 12203(b) of the ADA, which, as discussed, prohibits taking action against an individual who has aided or encouraged another individual in the exercise or enjoyment of her rights under the ADA.[202] As mentioned, the language of § 12203(b) is derived from pre-existing labor law.[203] The fact that the policy of protecting full freedom of association that was at the foundation of early labor law continues in modern individual rights statutes is significant. It is a reminder that despite the clear distinction between traditional labor law and more modern individual rights statutes drawn by many attorneys,[204] "labor law" and "employment law" are not necessarily mutually exclusive terms. The fact that labor law's stated goal of protecting employees' "right of association" lives on in the ADA, a statute with direct application to the workplace, is yet another reminder that labor law and anti-discrimination statutes are, in the words of one court, "'part of a wider statutory scheme to protect employees in the workplace nationwide.'"[205]

As part of this wider statutory scheme, the anti-retaliation provision of Title VII should, to the extent possible, be interpreted in a manner consistent with the general approach of other areas of the law governing the workplace. To be sure, attorneys and courts have generally failed to develop a unified vision of the law of workplace.[206] All too often, there is no attempt to reconcile "labor law" with "employment law," and the result

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200. *See, e.g.*, MINN. STAT. § 363A.15(2) (2006) (making it illegal to retaliate against a person because that person "associated with a person or group of persons who are disabled or who are of different race, color, creed, religion, sexual orientation, or national origin"); Cole v. Seafare Enters. Ltd., 1996 WL 60970, at *2 (Ohio Ct. App. Feb. 14, 1996) (concluding that discrimination against an individual based on her association with a person of another race qualifies as unlawful discrimination).

201. *See supra* notes 109–14 and accompanying text.

202. *See supra* note 83 and accompanying text.

203. *See* Weber, *supra* note 93, at 257. (stating that § 12203(b)'s language originated in the National Industrial Recovery Act (NIRA) and continued through the NLRA and Railway Labor Act, 45 U.S.C. § 152(3)–(4) (2000)).

204. *See* Corbett, *supra* note 58, at 263–64 (noting the dichotomy between labor and employment law).

205. Fogleman v. Mercy Hosp., Inc., 283 F.3d 561, 570 (3d Cir. 2002) (quoting McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 357 (1995)).

206. Corbett, *supra* note 58, at 264; *see* Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1592 (2002).

is a sometimes disjointed approach to the problems of the modern workplace.[207] Admittedly, there will be times when, for example, due to labor law's focus on collective bargaining over the terms and conditions of employment,[208] the two areas will be incapable of reconcilation. Therefore, courts must be cautious about importing wholesale concepts from one area that do not necessarily fit neatly within the other area.[209] But, for reasons explained in greater detail below, there is nothing inherently inconsistent about interpreting individual rights statutes so that they can, to the extent possible, encourage an increased level of association and sense of attachment among coworkers, just as labor law has traditionally sought to do.

One of the more offensive effects of the majority interpretations of § 704(a) is that they permit an employer to use an employee's intimate association with another as a weapon to silence opposition. There is at least some disagreement as to whether public employees have association claims based upon an employer's interference with their intimate associations, rather than those associations related to First Amendment guarantees.[210] Regardless, it hardly seems a stretch to conclude that permitting employers to use their employees' intimate associations against them in response to a complaint of discrimination conflicts with the notion of encouraging full freedom of association. Indeed, it is difficult to think of a more effective device for suppressing dissent and complaints of unlawful employer behavior than to take action against an employee's friends or family.

The majority approaches also tend to discourage coworkers from assisting or possibly even associating with a workplace troublemaker. An employer who takes action against a third party based on the actions of a workplace troublemaker is essentially sending a message to the rest of the workforce that "disloyalty" will not be tolerated.[211] While the employer's actions could be classified as retaliation, they may just as easily be described as intimidation. Coworkers can hardly be blamed if they recognize the employer's signals and choose not to assist the troublemaker in the pursuit of an internal or formal charge of discrimination, despite the protection Title VII supposedly provides for victims of retaliation. In

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207. *See* Ann C. Hodges, *The Limits of Multiple Rights and Remedies: A Call for Revisiting the Law of the Workplace*, 22 HOFSTRA LAB. & EMP. L.J. 601, 603 (2005) (noting that the "distinct but overlapping systems" contained in the NLRA and individual rights statutes "often collide").

208. *See supra* notes 44–45 and accompanying text.

209. *See* Rebecca Hanner White, *Modern Discrimination Theory and the National Labor Relations Act*, 39 WM. & MARY L. REV. 99, 156 (1997) (stating that courts that have borrowed from Title VII when interpreting § 8(a)(1) of the NLRA are "correct to think about and to examine labor law more globally," but are incorrect in their approach in this instance).

210. *See supra* Part II.A.

211. *See supra* notes 135–36 and accompanying text.

addition, a coworker might very well decide not to associate with the troublemaker altogether, thereby removing himself as a potential target for the employer's actions.

Finally, the majority approaches tend to discourage potential troublemakers from complaining about unlawful discrimination in an attempt to assist the victims of discrimination. Nothing in § 704(a) requires the person engaging in the protected activity to be the victim of unlawful conduct.[212] Therefore, § 704(a) recognizes the possibility that an employee may feel a sense of loyalty to coworkers sufficient to compel the employee to take it upon himself to complain about the mistreatment of others. The process of *working* together may tend to heighten these feelings of inter-connectedness and loyalty. Professor Cynthia L. Estlund has suggested that the process of working together and being part of the same "team" tends to heighten feelings of inter-connectedness and loyalty.[213] In other words, "getting the job done together tends to create common ground and to cultivate mutual affinity."[214]

But, just as the associates of a troublemaker may be dissuaded from assisting the troublemaker for fear of employer retaliation, a potential troublemaker who, out of a sense of loyalty, otherwise might raise concerns about mistreatment on behalf of a coworker may be disinclined to raise these concerns. On a more basic level, the majority approaches would seem to lead to greater isolation and mistrust, rather than a greater sense of inter-connectedness. Therefore, to the extent that a sense of solidarity is a benefit of freedom of association in the workplace, the majority rules tend to discourage protected activity motivated by a sense of solidarity and desire to assist the victims of discrimination.

B. *The Importance of Freedom of Association in Combating Workplace Discrimination*

To the extent there are questions whether the policy in favor of employee association that is expressed in constitutional law and federal labor law does or should apply in the private, non-union context, the benefits of encouraging, or at least not discouraging such association are almost self-evident. The willingness of coworkers to come forward and participate in the process of investigating an employee's discrimination claim is crucial to the operation of Title VII.[215] Unless individuals feel free

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212. *See* Zatz, *supra* note 185, at 93 (discussing instances in which plaintiffs were successful in claiming retaliation based on complaints about mistreatment of coworkers).

213. Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1, 9 (2000).

214. *Id.* at 11.

215. Brake, *supra* note 2, at 20.

to oppose unlawful discrimination and participate in attempts to address it without fear of retaliation, the goals of anti-discrimination law cannot be fulfilled.[216] And even more broadly, the willingness on the part of coworkers to speak out against workplace harassment before it rises to the level of a hostile work environment may play an important role in combating discrimination.

Title VII's anti-retaliation provision clearly contemplates that coworkers and other third parties will play a role in weeding out discrimination. Section 704(a) protects not only the troublemaker who complains about discrimination, but anyone who opposes an unlawful practice or who participates in a proceeding related to a complaint.[217] Assuming coworkers are less likely to provide assistance to an employee who is contemplating filing an internal complaint where the fear of retaliation exists, the potential troublemaker may potentially be deprived of the information necessary to establish a good faith, objectively reasonable belief that the conduct in question is actually unlawful. Likewise, once an investigation has begun, coworkers may be less likely to assist the troublemaker or testify against the employer if retaliation is a realistic threat. As a result, the majority rules tend to impede the operation of Title VII's remedial mechanism by preventing full and complete investigation into the underlying facts of a discrimination claim.

The tendency of the majority approaches to discourage participation in an internal investigation is particularly distressing in light of the Supreme Court's explicit statements as to the desirability of having employers establish internal complaint procedures. In *Ellerth*, the Court stated that "Title VII is designed to encourage the creation of anti-harassment policies and effective grievance mechanisms."[218] The establishment of such policies and mechanisms should be encouraged because the availability of such measures "could encourage employees to report harassing conduct before it becomes severe or pervasive," thereby furthering Title VII's deterrent purpose.[219] Instead, by potentially exposing complaining employees to employer retaliation by offering them the sometimes paper-thin protection of the opposition clause,[220] the federal courts have made it more likely that isolated acts of discrimination will go unreported, only to lead to more serious discriminatory acts in the future. Alternatively, the federal courts encourage employees to bypass any internal alternative dispute resolution mechanisms an employer may have in place and proceed directly to filing a charge with the EEOC to obtain the absolute

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216. *Id.*
217. 42 U.S.C. § 2000e-3 (2000).
218. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764 (1998).
219. *Id.*
220. *See supra* notes 149–52 and accompanying text.

protection of the participation clause.[221] Consequently, the majority approach tends to encourage litigation rather than conciliation in many cases.[222]

The majority rules also adversely impact the fight against workplace discrimination in more subtle ways. To the extent the majority approaches lead to greater isolation among employees in the workplace, they make some workers more vulnerable to discrimination and the threat of retaliation. The threat of retaliation tends to be most effective against individuals who are somehow "different" or are otherwise already isolated in the workplace.[223] These are precisely the individuals who need the moral support and other forms of assistance coworkers can provide when deciding to pursue a claim. Yet, because the majority rules turn would-be allies into potential targets, they have the potential to discourage coworkers from assisting those who are most vulnerable to discrimination and retaliation.

Finally, the majority rules tend to inhibit development of a culture of opposition to discrimination. Because employment discrimination is often a matter of shared concern, workplace solidarity may be an effective device in combating such discrimination.[224] Employees frequently take their cues with respect to the treatment of others from superiors and coworkers.[225] For a culture of discrimination to flourish, there usually must be acquiescence among management. But discrimination is even more likely to flourish where rank-and-file employees remain silent in the face of the mistreatment and marginalization of coworkers.[226] Where a sense of solidarity is permitted to flourish, employees are more likely to oppose discriminatory treatment of coworkers before it becomes severe or pervasive.[227] Where, however, legal rules exist that permit employers to retaliate against the friends and relatives of workplace troublemakers and, in some cases, the troublemakers themselves, increased isolation, instead of solidarity, is the more likely result.

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221. *See supra* note 143.

222. *Cf. Ellerth*, 524 U.S. at 764 ("[I]t would effect Congress' intention to promote conciliation rather than litigation in the Title VII context . . . .").

223. Brake, *supra* note 2, at 40.

224. Zatz, *supra* note 185, at 70.

225. *See generally id.* at 71–73 (discussing group dynamics and their effects on attitudes toward discrimination in the workplace); *see also* Brake, *supra* note 2, at 41 ("Like discrimination, retaliation is a product of an organization's existing climate and structures.").

226. *See* Zatz, *supra* note 185, at 77 (discussing rank and file opposition to discrimination as an effective complement to "top-down approaches," such as sensitivity training).

227. *Id.*

V. PROTECTING THE RIGHT OF ASSOCIATION WHILE PROTECTING THIRD PARTIES FROM RETALIATION

To varying degrees, the courts' approach to retaliation claims involving third parties conflicts with the remedial purposes of Title VII. The best course of action would involve legislative amendment of § 704(a). To address instances of pure third-party retaliation, Congress could add to Title VII language similar to that of § 12203(b) of the ADA.[228] To address the problem of reduced coverage for individuals who participate in an employer's internal investigation process, Congress could clarify that the participation clause protects those who participate or assist in an investigation, proceeding, or hearing under the statute, including any internal process an employer uses to address workplace discrimination.

Assuming, however, such congressional action is unlikely, a resort to the courts is inevitable. Given the fact that it remains the express policy of the United States that workers should enjoy full freedom of association,[229] one is tempted to simply point out this fact and state that the interpretation of any law related to the workplace should be interpreted in a manner consistent with that policy. However, there are a number of text-based and policy-based arguments in favor of the current majority approaches. In this age of textualism, these obstacles in some cases may be formidable. Nonetheless, in the following Part, I advance several arguments in favor of a broader reading of the anti-retaliation provisions of Title VII in the context of employer retaliation directed at a third party. In addition, in the event that courts refuse to depart from the majority approaches to the various problems described in this Article, this Part offers several other ways in which courts may conscientiously interpret the anti-retaliation provisions in a manner that furthers the goal of full freedom of association.

A. *Direct Challenges to the Majority Approaches*

1. The Suggested Policy Reasons Behind the Majority Approaches are Unconvincing

a. Pure Third-Party Retaliation Claims

As mentioned, courts have offered several possible explanations for why Congress might have chosen not to permit claims of pure third-party retaliation under Title VII.[230] When one considers Title VII's third-party

228. *See supra* Part II.C.
229. *See supra* notes 46–50 and accompanying text.
230. *See supra* note 110 and accompanying text.

retaliation issue within the broader contexts of the right of association in the workplace and retaliation claims in the workplace, the flimsiness of the courts' reasoning in this respect becomes more readily apparent.

The Third Circuit Court of Appeals' decision in *Fogleman v. Mercy Hospital, Inc.*[231] best illustrates this flimsiness. In *Fogleman*, the court concluded that the plain language of the Age Discrimination in Employment Act's (ADEA) anti-retaliation provision (which is virtually identical to § 704(a) of Title VII)[232] foreclosed the possibility of a retaliation claim premised solely upon a plaintiff's association with a coworker who was engaged in protected activities.[233] The court acknowledged that this reading of the statute was in conflict with the purpose of the ADEA's anti-retaliation provision.[234] Nonetheless, the court offered several "plausible" (if, by the court's own admission, not particularly convincing) policy reasons why Congress might have intentionally chosen not to permit such claims.[235]

The court first suggested that Congress might reasonably have believed that instances of pure third-party retaliation would be rare given the likelihood that "'the relatives and friends who are at risk for retaliation will have participated *in some manner* in a co-worker's charge of discrimination.'"[236] Therefore, most individuals who are at risk of retaliation will already be protected under the literal language of the anti-retaliation provisions of Title VII and the ADEA. However, a quick reading of the case law demonstrates that the number of instances in which coworkers become the victims of pure third-party retaliation is greater than the *Fogleman* court supposes.[237] Employer retaliation in general is hardly uncommon, with retaliation complaints having doubled in the last decade and now comprising 25% of EEOC charges.[238] Furthermore, the number of instances in which plaintiffs allege instances of pure third-party retaliation in the public employment,[239] union,[240] and private, non-union[241]

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231. 283 F.3d 561 (3d Cir. 2002).

232. *See supra* note 116.

233. *Id.* at 569–70.

234. *Id.* at 569.

235. *Id.* at 569–70.

236. *Id.* at 569 (quoting Holt v. JTM Indus., 89 F.3d 1224, 1227 (5th Cir. 1996)).

237. *See* NLRB v. Advertisers Mfg. Co., 823 F.2d 1086, 1088 (7th Cir. 1987) ("To retaliate against a man by hurting a member of his family is an ancient method of revenge, and is not unknown in the field of labor relations.").

238. Barnard & Rapp, *supra* note 12, at 658.

239. *See* cases cited *supra* notes 31–32.

240. *Advertisers Mfg. Co.*, 823 F.2d at 1088 ("To retaliate against a man by hurting a member of his family is an ancient method of revenge, and is not unknown in the field of labor relations."); *see id.* (listing examples from labor law).

241. *See* cases cited *supra* note 72.

contexts strongly undercuts any notion that retaliation against friends and relatives who have not participated in a charge of discrimination is a rare occurrence.

In addition, the Third Circuit suggested that Congress may have been concerned that by permitting claims of pure third-party retaliation, it would be opening the door to frivolous claims and interfering with an employer's prerogative to fire at-will employees.[242] As a result, the employer might be subjected to virtually unlimited liability in large workplaces.[243] As a preliminary matter, any concerns over an increase in the number of frivolous claims are greatly reduced by the requirement that an individual claiming retaliation must establish the existence of a causal link between the employer's action and the protected conduct.[244] Thus, it is unlikely that a claim of retaliation by a casual acquaintance of a coworker who has filed an EEOC charge would withstand an employer's summary judgment motion.

But even assuming as the court suggested, that Congress was concerned about limiting employer discretion and expanding the potential class of plaintiffs, there remains another question: Why was Congress not equally concerned about this possibility in the ADA context? In *Fogleman*, the court concluded that § 12203(b) of the ADA prohibits an employer from taking action against a coworker because another employee has filed a charge of discrimination.[245] Permitting the friends and relatives of the victims of disability discrimination to bring retaliation claims would seem to present exactly the same problems of limiting employer discretion and increasing claims that the court postulated may have motivated Congress to limit the class of plaintiffs in the Title VII and ADEA contexts. Why would Congress consciously open the door to such problems in one context but not the other?

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242. Fogleman v. Mercy Hosp. Inc., 283 F.3d 561, 570 (3d Cir. 2002).

243. *See* EEOC v. Bojangles Rests., Inc., 284 F. Supp. 2d 320, 326 (M.D.N.C. 2003) ("The number of lawsuits which could spawn from this rule could be enormous in a company of any size.").

244. It is for this reason that the concern expressed by some courts over the difficulty of determining which third parties should be permitted to bring third-party retaliation claims hold little weight. For instance, one court suggested that "expanding the breadth of the retaliation provisions to include spouses begs the question of who else is protected. Would other relatives, close friends, life-partners or long-time co-workers be protected?" Sukenic v. Maricopa County, No. Civ. 02-02438, 2004 WL 3522690, at *12 (D. Ariz. Jan. 7, 2004). The clear answer to each of these questions is yes, assuming each of these individuals can allege the elements of a prima facie case of retaliation. While retaliation directed at a longtime coworker is unlikely to be as painful to a complaining employee as is retaliation directed at a spouse, it may nonetheless still have the desired deterrent effect.

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

In some instances, it is easy to see why Congress might have chosen to treat disability discrimination claims differently. For example, Congress might reasonably have assumed that some individuals with disabilities might need assistance in asserting their rights[246]; hence § 12203(b)'s protection for those who have "aided or encouraged" an individual in the exercise of his statutory rights.[247] Likewise, it would have been entirely reasonable for Congress to believe that an associate of an individual with a disability might be at risk based on an employer's fears or misperceptions regarding certain disabilities; hence § 12112(b)(4)'s protection from associational discrimination.[248] However, once an individual has asserted a statutory right under the ADA—by requesting a reasonable accommodation, filing a charge of discrimination, or some other action—it is difficult to see how the associates of such individuals are any more vulnerable to instances of pure third-party retaliation than are the associates of Title VII and ADEA plaintiffs. Discrimination against individuals with disabilities may be different than other forms of discrimination, but it is difficult to see any meaningful difference that would justify the different treatment in this context.

With the two posited explanations (the rare nature of instances of pure third-party retaliation and the potential increase in the number of frivolous claims) debunked, it is difficult to think of any reason why Congress would have chosen to prohibit pure third-party retaliation in one instance, but not another. In short, it strains common sense to suggest that Congress had some reason for affording more protection for the associates of disability discrimination victims than the associates of race or age discrimination. Accordingly, there are strong arguments that clinging to the literal language of the anti-retaliation provisions in Title VII and the ADEA in the face of conflicting precedent in the analogous context of the ADA leads to absurd results.

b. Coverage Under the Participation Clause After Resort to an Employer's Internal Complaint Mechanism

The policy-based justifications offered by courts for the exclusion of internal complaints from the coverage of the participation clause are likewise few in number[249] and only slightly more persuasive in nature. Courts sometimes attempt to downplay the dilemma employees face in deciding whether to report perceived instances of discrimination to their

246. For example, in the case of an individual with a psychiatric or other mental impairment.
247. 42 U.S.C. § 12203(b) (2000).
248. *See supra* notes 82–86 and accompanying text.
249. Marshall, *supra* note 137, at 592.

employers.[250] According to these courts, truthful and reasonable employees face no dilemma at all in deciding whether to file an internal complaint.[251] As long as the employee is honest in his allegations and could reasonably believe that the alleged discriminatory conduct is actually unlawful, the employee will be covered under the opposition clause.[252] Given the exacting standard of reasonableness employed by some courts, however, the reality is often much different.

The Eleventh Circuit Court of Appeals has suggested one possible reason why Congress might have chosen to exclude participation in an internal investigation from the coverage of the participation clause:

> Congress could have believed that including such investigations under the participation clause might have a chilling effect on an employer's willingness to conduct internal investigations, and that the risk that employers would take adverse employment action against employees who cooperate in internal investigations that the employers themselves initiate was minimal.[253]

However, given the widespread fear of retaliation among employees and the large number of retaliation complaints,[254] it would take an almost willful act of blindness on the part of Congress to conclude that the risk of retaliation is minimal. Moreover, in light of the Supreme Court's creation of the *Ellerth–Faragher* affirmative defense, which provides employers with strong incentives to establish internal mechanisms for dealing with harassment complaints,[255] the Eleventh Circuit's "chilling effect" hypothesis seems plainly wrong. In addition to limiting vicarious liability, an employer that uses an effective internal remedial mechanism may be able to prevent workplace harassment from becoming so severe or pervasive that it becomes actionable in the first place.[256] The creation of such a process also drastically reduces the potential for a punitive damages award, and potentially limits attorney's costs as well.[257] In short, most rational employers would view the benefits of conducting internal investigations as far outweighing the costs.

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250. *See, e.g.*, Jordan v. Alternative Res. Corp., 447 F.3d 324, 333 (4th Cir.), *vacated*, 2006 U.S. App. LEXIS 16794 (4th Cir. July 5, 2006).

251. *See id.*

252. *See id.*

253. Clover v. Total Sys. Servs., Inc., 157 F.3d 824, 830 (11th Cir. 1998), *vacated*, 172 F.3d 795 (11th Cir.), *and superseded by* 176 F.3d 1346 (11th Cir. 1999).

254. *See* Barnard & Rapp, *supra* note 12, at 669.

255. *See supra* notes 129–34 and accompanying text.

256. Marshall, *supra* note 137, at 594.

257. *Id.*

Deprived of its "chilling effect" theory, the Eleventh Circuit has subsequently advanced the assertion that it did not believe "Congress intended to protect absolutely every . . . harassment complaint made to an employer—no matter how informal or knowingly false—as a protected activity under the participation clause."[258] The court is almost certainly correct that Congress did not intend that every informal gripe be treated as conduct absolutely protected under the expansive participation clause. But no one is seriously suggesting that they should be.

When, however, an employer has established an internal process designed to address workplace discrimination that purports to satisfy the first prong of the *Ellerth–Faragher* affirmative defense, there is no particularly strong reason why Congress would have objected to classifying participation in the machinery of such a process as protected participation conduct. Admittedly, Congress may have had reservations about overburdening private employers with frivolous or false complaints of discrimination. However, the problem with internal complaint procedures has long been one of *under-reporting*, not over-reporting.[259] Moreover, in the case of truly frivolous complaints (i.e., those that involve conduct that no reasonable person could believe to be unlawful), the employer should recognize the complaint as such and resolve the matter quickly. Finally, the argument against burdening private employers loses much of its teeth when one considers that under the majority approach, participation in an employer's internal investigation is absolutely protected under the participation clause if the employee has first filed a formal charge of discrimination with the EEOC.[260] By first paying a visit to the EEOC before complaining internally, an employee can immunize herself from employer retaliation even if her allegations are false or frivolous. Thus, the majority rule simply trips up the employee who foolishly complains internally before visiting the EEOC, but immunizes the wily employee who sees the EEOC first. Ultimately, because an employee must complain internally *at some point* if she wishes to hold the employer liable,[261] the majority approach does little to discourage false or frivolous claims. In short, while Congress could have rationally decided that the costs of burdening employers with the investigation of false or frivolous claims outweighed the benefits of including participation in an internal complaint process within the protection of the participation clause, it would have been remarkably short-sighted on Congress's part given the numerous benefits associated with such internal processes.

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258. EEOC v. Total Sys. Servs., Inc., 221 F.3d 1171, 1175 n.3 (11th Cir. 2000).

259. Chamallas, *supra* note 137, at 374.

260. *See supra* note **__[DLH: this is the footnote added between original 19 and 20]** and accompanying text.

261. *See* Larkin, *supra* note 145, at 1210.

2. Text-Based Challenges to the Majority Approaches

Ultimately, the most difficult arguments to overcome in calling for a rejection of the majority approaches to the issues discussed in this Article are primarily textual in nature. To varying degrees, the most natural reading of Title VII's anti-retaliation provision supports the conclusion that claims of pure third-party retaliation are not available and that participation in an employer's internal investigative process is not protected participation conduct. However, courts have not hesitated in other contexts to interpret anti-retaliation provisions in a more liberal manner to effectuate the purposes of such provisions. In light of the fact that the majority approaches have so little to recommend on their behalf in terms of the purposes of anti-discrimination law, courts should be more willing to follow the established approach of liberal construction of anti-retaliation provisions.

a. The Courts' History of Liberal (and Sometimes Non-Literal) Construction of Anti-Retaliation Provisions

Congress's handiwork in the retaliation area has hardly been a model of draftsmanship. For example, despite the proscription against sex discrimination contained in Title IX of the Education Amendments of 1972,[262] Title IX contains no explicit provision providing protection from retaliation for those who oppose unlawful discrimination under the statute. This glaring hole in the statute recently forced the Supreme Court in *Jackson v. Birmingham Board of Education*[263] to consider whether to imply a retaliation claim as implicit in the statute's prohibition against discrimination.[264] Ultimately, the Court held that retaliation based upon a complaint of sex discrimination is prohibited under Title IX, concluding that "[r]etaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination" prohibited by Title IX.[265]

Similar shortcomings exist with respect to § 704(a) of Title VII. With the opposition clause, Congress made it unlawful for employers to retaliate against their employees for opposing unlawful discrimination but failed to place any limits on just how far employees can go in opposing discrimination.[266] Is a peaceful sit-in permissible? Blocking access to the employer's premises as a means of protest? Writing a letter critical of the

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262. 20 U.S.C. § 1681 (2000).
263. 544 U.S. 167 (2005).
264. *Id.* at 172.
265. *Id.* at 173.
266. *See* 42 U.S.C. § 2000e-3(a).

employer's practices to the employer's customers?[267] This failure to define the boundaries of protected opposition conduct has required courts to devise fact-intensive and unpredictable tests to help address such issues.[268]

It is well-established that courts should construe the language of Title VII in a broad manner, consistent with the Act's remedial purpose.[269] In some instances, the courts have construed § 704(a) in a manner clearly at odds with the literal language so as to effectuate the purpose of the statutes. With regard to the opposition clause, for example, the courts have almost unanimously concluded that the practice an individual opposes does not have to *actually* be unlawful in order for the opposition to be protected.[270] This, despite the fact that the opposition clause literally makes it unlawful only for an employer to retaliate against an individual who has "opposed any practice *made* an unlawful employment practice by this subchapter."[271] A literal reading, the courts have explained, "would not only chill the legitimate assertion of employee rights under Title VII but would tend to force employees to file formal charges rather than seek conciliation or informal adjustment of grievances."[272] In other instances, Congress's poor draftsmanship has caused courts to construe the anti-retaliation provisions of Title VII and the ADEA in an expansive fashion so as to further the purposes of the statutes. Congress's failure to define the term "employee" led the Supreme Court in *Robinson v. Shell Oil Co*.[273] to hold that the anti-retaliation provisions prohibit employers from retaliating against both current employees and former employees.[274] A contrary reading, the Court explained, would impede access to statutory remedial mechanisms.[275]

In a Seventh Circuit Court of Appeals decision, Judge Richard Posner suggested two possible scenarios

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267. *Cf.* EEOC v. Crown Zellerbach Corp., 720 F.2d 1008, 1015–16 (9th Cir. 1983) (concluding that writing a letter to local school board, a customer of the employer, protesting an affirmative action award to the employer was a permissible form of protected opposition). The leading case in this area is *Hochstadt v. Worcester Found. for Experimental Biology*, 545 F.2d 222 (1st Cir. 1976), involving an employee who engaged in numerous disruptive activities to protest her employer's actions.

268. *See* R. Bales, *A New Standard for Title VII Opposition Cases: Fitting the Personnel Manager Double Standard into a Cognizable Framework*, 35 S. TEX. L. REV. 95, 112–17 (1994) (noting the various balancing tests and problems associated with them).

269. Culpepper v. Reynolds Metals Co., 421 F.2d 888, 891 (5th Cir. 1970).

270. *See, e.g.*, Wallace v. DTG Operations, Inc., 442 F.3d 1112, 1125 (8th Cir. 2006) (Colloton, J., dissenting); EEOC v. Navy Fed. Credit Union, 424 F.3d 397, 406 (4th Cir. 2005); *see also* Marshall, *supra* note 137, at 561.

271. 42 U.S.C. § 2000e-3(a) (2000) (emphasis added).

272. *See, e.g.*, Sias v. City Demonstration Agency, 588 F.2d 692, 695 (9th Cir. 1978).

273. 519 U.S. 337 (1997).

274. *Id.* at 346.

275. *Id.*

> in which a literal interpretation of the provision [protecting those who have made a charge or participated in any manner in a proceeding] would leave a gaping hole in the protection of complainants and witnesses. The first situation . . . is where the employer either does not know who the complainant is and decides therefore to retaliate against a group of workers that he knows includes the complainant, or makes a mistake and retaliates against the wrong person. The second situation . . . is where the employer retaliates against an employee for having failed to prevent the filing of a complaint.[276]

The only possible explanation for Congress's failure to address such cases, the court stated, was "pure oversight."[277] The case in question actually involved the second situation, thus leading the court to liberally construe Title VII's anti-retaliation provision to prohibit employers from retaliating against not only those who, in accordance with the statutory language, have "made a charge," but those who are "suspected of having made a charge" and those who have "allowed a charge to be made."[278]

b. Pure Third-Party Discrimination Claims

Given the fact that courts have already been forced on a number of occasions to construe the language of other anti-retaliation provisions in a manner not necessarily obvious from the statutory text so as to further their purpose,[279] reading a right to bring a third-party association claim into the statute would hardly represent a dramatic departure from the courts' current approach to such statutes. Without a plausible justification to support the majority approach and with a long history of liberal construction in the anti-retaliation field supporting a contrary approach, a federal court could in good conscience reject the majority approach and recognize a claim of pure third-party retaliation. The most obvious approach would be to recognize such claims based on the conclusion that a literal reading of the statute produces results that are so "absurd or glaringly unjust" (particularly when considered against the backdrop of labor and employment law more generally) that such a reading should be rejected.[280] Because it is difficult to fathom why Congress would have chosen the results that the majority approaches dictate, a court could, in

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276. McDonnell v. Cisneros, 84 F.3d 256, 262 (7th Cir. 1996).
277. *Id.*
278. *Id.*
279. *See supra* notes 262–65 and accompanying text (construing the Title IX provision).
280. Sorrells v. United States, 287 U.S. 435, 450 (1932).

keeping with standard methods of statutory construction, conclude that the right of an associate to be free from discrimination derives from the troublemaker's right to be free from discrimination for having engaged in protected activity. [281]

c. The Participation Clause and Participation in an Employer's Internal Investigation Process

The statutory construction argument in favor of classifying participation in an employer's internal process for resolving discrimination complaints is actually somewhat easier to make. While § 704(a) protects those who have participated in an investigation, proceeding, or hearing "under" the statute, § 704(a) fails to define the terms "investigation, proceeding, or hearing."[282] Given Congress's incorporation of federal judicial decisions into the machinery of employment discrimination law in other respects, one could argue that the relevant phrase is broad enough to include investigations, proceedings, or hearings that are part of federal decisional law.

Ultimately, decisional law interpreting statutory law becomes part of that statutory law.[283] Sometimes, a legislature will explicitly react to and incorporate decisional law into a statutory framework.[284] As part of the Civil Rights Act Amendments of 1991, for example, Congress reacted to a string of Supreme Court rulings and explicitly declared its intent to "to codify the concepts . . . enunciated by the Supreme Court in" previous decisions.[285] In other instances, decisional law is implicitly incorporated into a statutory framework and future controversies are decided "under" that framework. To be sure, the statutory language of Title VII authorizes investigations, proceedings, and hearings and provides some details as to how that machinery is to operate.[286] However, the Supreme Court has also had some say as to the operation of that machinery, having ruled on a number of procedural matters.[287] Thus, an EEOC investigation into a

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281. *See* Pub. Citizen v. U.S. Dept. of Justice, 491 U.S. 440, 454–55 (1989).

282. 42 U.S.C. § 2000e-3(a) (2000).

283. Douglass v. County of Pike, 101 U.S. 677, 686 (1879).

284. *See, e.g.*, CAL. GOV'T CODE § 12926.1(d) (West 2007) ("Notwithstanding any interpretation of law in [*Cassista v. Cmty. Foods*, 856 P.2d 1143 (Cal. 1993)], the Legislature intends (1) for state law to be independent of the Americans with Disabilities Act. . . ."); 23 PA. CONS. STAT. ANN § 3501 cmt. (West 2007) ("The first sentence of this subsection essentially codifies the decision in *Litmans v. Litmans*, 449 Pa. Super. 209, 673 A.2d 382 (1996), as it pertains to when to measure the increase in value of nonmarital property.").

285. Civil Rights Act of 1991 § 3, 42 U.S.C. 1981 note (2000) (Purposes of 1991 Amendments).

286. 42 U.S.C. § 2000e-5; *id.* § 2000e-8.

287. Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 105 (2002) (considering the timeframe within which alleged discriminatory acts are actionable); Del. State Coll. v. Ricks, 449

charge of discrimination or a formal legal proceeding is conducted "under" the decisional law of Title VII as well as the text of the statute itself.

Accordingly, it hardly seems a great stretch to conclude that an internal investigation, proceeding, or hearing that would enable an employer to avoid the imposition of vicarious liability per *Ellerth* and *Faragher* could constitute an investigation, proceeding, or hearing under Title VII. As a result of the Supreme Court's decisions in *Ellerth* and *Faragher*, the absence or availability of an effective internal process helps determine the relative rights and liabilities of parties to an employment discrimination suit.[288] In addition, the Supreme Court and the lower courts have developed a substantial body of law relating to what constitutes an effective internal process for purposes of the *Ellerth–Faragher* affirmative defense.[289] Accordingly, any investigations, proceedings, or hearings occurring as part of such a process are governed "under" the decisional law of Title VII.

Moreover, when an employer has in place an effective process for resolving internal harassment issues, an employee cannot bypass the process without forfeiting the ability to hold the employer vicariously liable unless the employee has a good reason for doing so. Regardless whether the employee first complains internally or files a formal EEOC charge, unless the employee has a valid excuse for not doing so, she *must* complain internally if she wishes to recover from her employer.[290] As a result of the Supreme Court's creation of the *Ellerth–Faragher* affirmative defense, the filing of an internal discrimination complaint is an act, in the words of one court, that is "an intimately related and integral step in the process of making a formal charge"[291] for any employee in a workplace that has an internal process for addressing workplace discrimination.

In short, there is at least a plausible argument that the statutory language in question is ambiguous. Once one concludes that the statutory language could be interpreted to include participation in an internal complaint, it becomes clear for the reasons discussed previously that the purpose of the participation clause can be furthered only by adopting such a construction. It is difficult to see a logical basis for affording an employee protection under the participation clause when she proceeds directly to the EEOC and files a formal discrimination charge and then returns to file an internal complaint with the employer, but not when the order is reversed. Indeed, as a matter of policy, we want to encourage the employee to use whatever internal measures an employer may have in

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U.S. 250, 256 (1980) (determining when the limitations period commences).

288. *See supra* notes 129–34 and accompanying text.

289. *See, e.g.*, Croushorn v. Bd. of Trs., 518 F. Supp. 9 (M.D. Tenn. 1980).

290. *Id.* at 23.

291. *Id.*

place before filing a formal charge. The use of such procedures may obviate the need for a visit to the EEOC and the lawyer's office. For these reasons, a conclusion that participation in an employer's internal anti-harassment process is conduct falling under the participation clause is warranted as a matter of statutory interpretation.

B. *Alternative Interpretive Approaches to Narrow the Existing Gap in Coverage*

There may be instances in which, due to existing precedent or other factors, courts are reluctant to depart from the majority approaches in the types of cases discussed in this Article. Alternatively, there may be instances in which workplace troublemakers and their friends and family fall through the cracks even when a court interprets Title VII in a more generous manner. Accordingly, courts can narrow some of the gaps in statutory coverage through a more liberal interpretation of the anti-retaliation provisions in other respects.

1. Reinstating the Troublemaker's Friend as a Remedy for the Troublemaker

One possibility would be for courts to provide a workplace troublemaker with the remedy of reinstating the troublemaker's friend in the event the friend is discharged as a result of the troublemaker's protected activity. One potential deterrent to an employer taking action against a friend or relative of a workplace troublemaker is that such action could lead to a viable retaliation claim by the *troublemaker*. For years, a circuit split existed regarding the question of what employer action constituted actionable retaliation under Title VII.[292] Some courts asserted that the retaliation must be related to the plaintiff's employment to constitute actionable retaliation. Thus, the retaliation had to "'resul[t] in an adverse effect on the 'terms, conditions, or benefits' of employment,'"[293] or, even more restrictively, result in an "'ultimate employment decisio[n],'" such as hiring or firing.[294] Other courts did not restrict retaliation claims to situations in which the retaliatory action was related to the plaintiff's employment or workplace. Thus, retaliation would be actionable if the employer's action "would have been material to a reasonable employee" or would be "reasonably likely to deter the charging

292. Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2410 (2006).

293. *Id.* (quoting Von Gunten v. Maryland, 243 F.3d 858, 866 (4th Cir. 2001)) (summarizing the position of the Third, Fourth, and Sixth Circuit Courts of Appeals).

294. *Id.* at 2410–11 (quoting Mattern v. Eastman Kodak Co., 104 F.3d 702, 707 (5th Cir. 1997)) (summarizing the position of the Fifth and Eighth Circuit Courts of Appeals).

party or others from engaging in protected activity."[295]

The Supreme Court's 2006 decision in *Burlington Northern & Santa Fe Railway Co. v. White*[296] resolved the issue. The Court concluded that actionable retaliation is not limited to employment-related actions or actions that otherwise affect the terms, conditions, or status of employment.[297] Instead, the Court concluded that "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, 'which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'"[298] The Court observed that limiting retaliation claims to situations resulting in employment-related actions "would not deter the many forms that effective retaliation can take," including actions resulting in "harm *outside* the workplace."[299]

The standard articulated by the Court is almost certainly broad enough to include a situation in which an employer discharged or otherwise took action against a friend or loved one of a party who had opposed discrimination in the workplace or who was pursuing a charge of discrimination. The knowledge that an employer would resort to taking action against a friend or loved one would undoubtedly dissuade many reasonable employees from making or supporting a charge of discrimination. In this respect, those courts in the majority on the question whether to permit a claim of pure third-party retaliation might find support for their positions in the Court's decision; the specter of a retaliation claim by the troublemaker stemming from employment retaliation directed at a friend or relative could serve as a deterrent to such retaliation.

Ultimately, however, there is reason to question how effective of a deterrent the Court's decision in *Burlington Northern* is likely to be in these instances. Except perhaps in those limited instances in which the troublemaker is denied the financial support that a friend or loved one provides as a result of the employer's retaliation, in most instances the troublemaker's compensatory damages will consist exclusively of emotional distress damages. The distress an individual suffers from knowing that she is the cause of a loved one's discharge from employment may well be substantial; however, in those instances in which the retaliation amounts to something less than outright discharge (demotion,

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295. *Id.* (quoting Washington v. Ill. Dep't of Revenue, 420 F.3d 658, 662 (7th Cir. 2005); Ray v. Henderson, 217 F.3d 1234, 1242–43 (9th Cir. 2000)) (summarizing the positions of the Seventh, D.C., and Ninth Circuit Courts of Appeals).

296. 126 S. Ct. 2405 (2006).

297. *Id.* at 2414–15.

298. *Id.* at 2415 (quoting Rochon v. Gonzales, 438 F.3d 1211, 1219 (D.C. Cir. 2006) (internal citations omitted)).

299. *Id.* at 2412.

reassignment with less desirable duties, etc.), the distress suffered by the troublemaker is less likely to be severe. In short, while the Court's interpretation of Title VII's anti-retaliation provision may help preserve employees' access to the statute's remedial mechanisms, its value in limiting employer action directed specifically at third parties may prove to be limited.

The more appropriate remedy in such cases would be to order the employer to reinstate or, where appropriate, award backpay to the troublemaker's friend. Section 706(g) of Title VII "vest[s] broad equitable discretion in the federal courts" to remedy the effects of discrimination.[300] A court may "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other relief as the court deems appropriate."[301] Reinstatement is actually "the preferred equitable remedy" under Title VII.[302] Given the chilling effect on other employees that retaliation may cause, reinstatement is a particularly appropriate remedy in the case of retaliation.[303]

Employer retaliation is particularly harmful to the aims of Title VII because of the effect it may have on the willingness of third parties to oppose unlawful conduct or otherwise participate in an investigation into unlawful discrimination. Consequently, it is appropriate to consider the adverse effects to third parties stemming from employer retaliation when fashioning a response. For example, in cases in which retaliation plaintiffs have sought an injunction to prevent an employer from firing them based on their protected conduct, at least one court has been willing to hold that the chilling effect on *other* employees resulting from permitting the employer to fire the troublemaker might constitute an "irreparable injury" necessary to support an injunction.[304]

When it is established that an employer took action against the friend or relative of a troublemaker because the troublemaker engaged in protected activity, the only meaningful remedy in some cases will involve undoing the effects of the employer's adverse action. If this cannot be accomplished by granting the troublemaker's friend a right to bring his own retaliation claim, the purposes of the statute may still be effectuated by granting equitable relief to the troublemaker in the form of reinstating, compensating, or otherwise undoing the employer's action with respect to

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300. Franks v. Bowman Transp. Co., Inc., 424 U.S. 747, 763 (1976).

301. 42 U.S.C. § 2000e-5(g) (2000).

302. Fuhr v. Sch. Dist. of City of Hazel Park, 364 F.3d 753, 761 (6th Cir. 2004).

303. 1 BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 679 (Paul W. Crane, Jr. ed., 3d ed. 1996); *supra* note 81 and accompanying text.

304. Bonds v. Heyman, 950 F. Supp. 1202, 1214–15 (D.D.C. 1997); Segar v. Civiletti, 516 F. Supp. 314, 320 (D.D.C. 1981).

the troublemaker's friend. Such an approach is consistent with the Court's reasoning in *Burlington Northern* and with the purposes of anti-retaliation provisions more generally.

Moreover, there is actually precedent for ordering this type of equitable relief in retaliation cases. In the labor cases discussed previously in which an employer discharged a supervisor–spouse in response to an employee–spouse's protected union activities, the federal courts upheld the NLRB's order to reinstate the supervisor.[305] The courts have been willing to reach this result, despite the fact that supervisors are technically not entitled to protection under the NLRA, so that other employees are not deterred from exercising their rights for fear that their employer might retaliate by going after a loved one.[306] Courts have likewise affirmed the NLRB's orders to reinstate a supervisor when the supervisor was disciplined for opposing unlawful employer conduct, refusing to participate in such conduct, or participating in an NLRB proceeding involving a charge of such conduct.[307] In addition, the remedy in some of these cases has not always been limited to reinstatement. In *Kenrich Petrochemicals Inc. v. NLRB*,[308] for example, the Third Circuit Court of Appeals affirmed the NLRB's order to reinstate the supervisor with backpay.[309] Other courts have done the same in similar situations.[310] Because the dangers inherent in permitting employers to engage in these types of actions are identical in both situations, the remedy of reinstatement with backpay of the troublemaker's friend should be available in Title VII cases as well.

2. Recognizing the "Perception Theory" of Retaliation

The "perception theory" of retaliation employed by several courts may also prove highly important in combating retaliation and discrimination. Under this approach, what is significant is not whether an employee actually engaged in protected activity but whether the employer, correctly

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305. *See supra* notes 74–75 and accompanying text.

306. NLRB v. Advertisers Mfg. Co., 823 F.2d 1086, 1088–89 (7th Cir. 1987).

307. *See* Delling v. NLRB, 869 F.2d 1397, 1397 (10th Cir. 1989) (reinstating a supervisor who refused to falsify termination slips to establish a pretexual reason for an unlawful discharge); Howard Johnson Co. v. NLRB, 702 F.2d 1, 1–2 (1st Cir. 1983) (reinstating a supervisor who failed to identify coworkers at a union meeting); Russell Stover Candies, Inc. v. NLRB, 551 F.2d 204, 206 (8th Cir. 1977) (reinstating a supervisor who refused to continue surveillance of union activities); NLRB v. Electro Motive Mfg. Co., 389 F.2d 61, 62 (4th Cir. 1968) (reinstating supervisor who provided a statement to the NLRB regarding threats to employees).

308. 907 F.3d 400 (3d Cir. 1990) (en banc).

309. *Id.* at 402.

310. *Russell Stover Candies, Inc*., 551 F.2d at 206 (enforcing the NLRB's order that a supervisor be reinstated and be made whole "for any loss of earnings"); *Electro Motive Mfg. Co.*, 389 F.2d at 62 (enforcing the NLRB's order to reinstate a supervisor with backpay).

or incorrectly, believed the employee did so and took action because of that belief.[311] Application of this perception theory of retaliation, which has also been used in the labor law context,[312] may help to limit the number of instances of retaliation directed at third parties.

For example, in *Fogleman v. Mercy Hospital, Inc.*, the Third Circuit Court of Appeals held that the plain language of the ADEA's anti-retaliation provision prevented the court from recognizing a claim of pure third-party retaliation on behalf of a son who had allegedly been fired in retaliation for his father's filing of an age discrimination complaint.[313] The son also claimed, however, that even if he personally had not been engaged in protected activity that the employer perceived him to have been so engaged and that an adverse action based on such perception was unlawful.[314] The court read the ADEA as "directly supporting" the son's perception theory of retaliation.[315] The court's language is instructive:

> "Discriminat[ion]" refers to the practice of making a decision based on a certain criterion, and therefore focuses on the decisionmaker's subjective intent. What follows, the word "because," specifies the criterion that the employer is prohibited from using as a basis for decisionmaking. The laws, therefore, focus on the employer's subjective reasons for taking adverse action against an employee, so it matters not whether the reasons behind the employer's discriminatory animus are actually correct as a factual matter.[316]

Therefore, the court concluded, if the son could establish that the employer's decision to fire him was "because" of its perception that he was assisting his father, he was entitled to recover under the ADEA's anti-discrimination provision.[317] As *Fogleman* suggests, recognizing the perception theory would help to narrow the current gap in coverage for the troublemaker's friend.

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311. Fogleman v. Mercy Hosp., Inc., 283 F.3d 561, 571 (3d Cir. 2002); EEOC v. Bojangles Rests., Inc., 284 F. Supp. 2d 320, 328 (M.D.N.C. 2003); Grosso v. City Univ. of N.Y., No. 03 Civ. 2619NRB, 2005 WL 627644, at *3 (S.D.N.Y. Mar. 16, 2005). *But see* Salay v. Baylor Univ., 115 S.W.3d 625, 627 (Tex. App. 2003) (refusing to adopt such an approach on the grounds that it would conflict with the plain language of the statute and would encroach on the employment at-will rule).

312. *Fogleman*, 283 F.3d at 571. The theory also has been applied with respect to the anti-retaliation provision of the Fair Labor Standards Act (FLSA). Saffels v. Rice, 40 F.3d 1546, 1549 (8th Cir. 1994); Brock v. Richardson, 812 F.2d 121, 125 (3d Cir. 1987).

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

314. *Id.* at 571.

315. *Id.*

316. *Id.* The son also was asserting retaliation under the ADA and state law, so the court's holding applies with equal force to those statutes as well. *Id.* at 568.

317. *Id.* at 572.

3. Recognizing the "Anticipatory Retaliation" Theory

Another approach that might help narrow the gap in coverage, particularly in the case of the filing of an internal complaint, is adoption of the "anticipatory retaliation" theory. As another example of how a literal reading of § 704(a) can lead to absurd results, § 704(a) is written in the past tense;[318] thus, under a literal reading, an employer could take preemptive action against an employee who the employer knew was about to file a charge with the EEOC and not face a retaliation claim.[319] Because such a result would obviously thwart the purposes of the anti-retaliation provisions, several federal courts have held that such anticipatory retaliation is actionable.[320]

By filing an internal complaint of discrimination, an employee has signaled the possibility, if not the likelihood, that a formal EEOC charge may be forthcoming if the matter is not resolved to the employee's satisfaction.[321] As the Tenth Circuit Court of Appeals has stated, "Action taken against an individual in anticipation of that person engaging in protected opposition to discrimination is no less retaliatory than action taken after the fact."[322] Either form of retaliation is likely to have a chilling effect on the willingness of employees to use the statutes' remedial mechanisms. Therefore, courts should adopt this theory of anticipatory retaliation, despite the fact that the literal language of the statutes permits retaliation claims only *after* an individual has engaged in protected conduct.

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318. 42 U.S.C. § 2000e-3 (2000) (prohibiting an employer from retaliating against an individual "because he has *made a charge, testified, assisted, or participated* in any manner in an investigation, proceeding, or hearing") (emphasis added).

319. Sauers v. Salt Lake County, 1 F.3d 1122, 1128 (10th Cir. 1993).

320. Beckel v. Wal-Mart Assocs., Inc., 301 F.3d 621, 624 (7th Cir. 2002); *Sauers*, 1 F.3d at 1128; EEOC v. Bojangles Rests., Inc., 284 F. Supp. 2d 320, 328 (M.D.N.C. 2003). *See generally* Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997) (stating that Title VII should not be interpreted to "provide a perverse incentive for employers to fire employees who might bring Title VII claims"). *But see* Attieh v. Univ. of Tex. at Austin, No. 03-04-00450-CV, 2005 WL 1412124, at *7 (Tex.App. June 16, 2005) (mem.) (rejecting this approach in applying provisions of the Texas labor code).

321. McLemore v. Detroit Receiving Hosp. & Univ. Med. Ctr., 493 N.W.2d 441, 443 (Mich. Ct. App. 1992) (advancing this reasoning in support of a conclusion that participation in an employer's internal complaint procedure constitutes protected participation conduct under identical state statute).

322. *Sauers*, 1 F.3d at 1128.

4. Relaxing the "Good-Faith, Reasonable Belief" Standard

As the Fourth Circuit's decision in *Jordan v. Alternative Resources Corp.* illustrates,[323] courts sometimes hold employees to an extremely demanding standard of reasonableness when assessing whether an employee had a good-faith, reasonable belief that the conduct being opposed was unlawful. As discussed, this approach can discourage participation in internal complaint procedures and chill complaints by troublemakers on behalf of their coworkers.[324] If courts are going to force participants in an employer's internal investigation procedure to seek the more limited protection the opposition clause affords, they should be willing to take a reasonable view of what the "reasonable" employee might believe with respect to the complained-of discrimination.

A reasonable Title VII lawyer may understand the legal rules that have developed regarding single, isolated incidents or employer liability for a supervisor's discriminatory conduct as opposed to coworker discrimination. But these are subtleties that are likely to be lost on all but the most sophisticated of employees. When the Supreme Court has provided employers with a strong incentive to adopt internal mechanisms for dealing with workplace discrimination, and when employers have created such mechanisms and publicized their existence to employees, courts should hardly be surprised when employees report conduct that falls short of the standard a reasonable Title VII plaintiff's attorney would want to see before agreeing to accept the matter. Indeed, this is arguably what the Supreme Court contemplated when it suggested that one of the benefits of establishing such mechanisms would be that employees could complain about harassment *before* it became actionable.[325] Therefore, the "reasonableness" of an employee's belief should be assessed less with regard to the existing state of Title VII law and more in keeping with traditional common–law notions of what the "reasonable person" might think under the same circumstances.[326] Under this standard, the fact that a supervisor or coworker made only one racist statement, for example, would not automatically prevent an employee from possessing a good-faith, reasonable belief regarding the unlawfulness of the behavior.[327] Existing Title VII case law would not necessarily always be irrelevant under this approach. If, for example, the plaintiff's claim that

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323. *See supra* notes 160–67 and accompanying text.

324. *See supra* Part II.B.2.

325. *See supra* note 219 and accompanying text.

326. Brake, *supra* note 2, at 102–03.

327. *Cf.* Alexander v. Gerhardt Enters., Inc., 40 F.3d 187, 190, 195–96 (7th Cir. 1994) (concluding that an employee had a reasonable, good-faith belief that a Title VII violation was in progress when a coworker, on a single occasion, used a racial slur and apologized shortly thereafter).

discrimination had occurred would amount to the assertion of a frivolous claim in reference to existing Title VII case law, a court might be justified in concluding as a matter of law that the plaintiff lacked a good-faith, reasonable belief that the complained-of conduct was unlawful.[328] But defining the reasonableness of an individual employee's belief as to the unlawful nature of another's conduct solely or even predominately by reference to existing Title VII case law is an unrealistic approach that is ultimately contrary to the aims of Title VII.

5. Broadly Construing the "Assist" Language

A broad reading of the "assist[]" language in § 704(a) may also help narrow the gap in coverage. As discussed, one reason why courts have suggested that there is no need to recognize claims of pure third-party retaliation is because they view the language of the participation clause as being exceedingly broad to begin with; there is no need to recognize claims of pure third-party retaliation, the argument goes, because in most instances friends or family members are likely to "'have participated *in some manner* in a coworker's charge of discrimination.'"[329] If courts are going to deny claims of pure third-party retaliation based on the assumption that the language of the participation clause is sufficiently broad to protect friends or family members in most instances, then the language should, in fact, be given an expansive interpretation that reflects that assumption.

The concept of assistance should not be limited to situations in which an employee provides *active* assistance in an investigation, such as helping a coworker draft a statement regarding an alleged incident of discrimination. "Assistance" can take on many forms. From time to time, courts equate moral support with assistance,[330] most notably in tort law's recognition that moral support may be the equivalent of participation or physical assistance in a tortious act.[331] The NLRB has recognized the important role that a coworker's moral support may play in the context of

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328. Wallace v. DTG Operations, Inc., 442 F.3d 1112, 1118 (8th Cir. 2006).

329. Fogleman v. Mercy Hosp., Inc., 283 F.3d 561, 569 (3d Cir. 2002) (quoting Holt v. JTM Indus., Inc., 89 F.3d 1224, 1227 (5th Cir. 1996)).

330. *See* Baltimore Scrap Corp. v. David J. Joseph Co., 237 F.3d 394, 401 (4th Cir. 2001) ("[N]onparties often provide aid to litigants, whether through financial backing, legal assistance, amicus briefs, or moral support."); Doe I v. Unocal Corp., 395 F.3d 932, 950 (9th Cir. 2002) (quoting Prosecutor v. Furundzija, No. IT-95-17/IT, Judgment, para 235 (Int'l Crim. Trib. for the Former Yugo. (1998)), *reprinted in* 38 I.L.M. 317, 365 (1999) (noting that "the *actus reus* of aiding and abetting in international criminal law requires practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime").

331. RESTATEMENT (SECOND) OF TORTS § 876 cmt. d (1979) ("Advice or encouragement to act operates as a moral support to a tortfeasor and if the act encouraged is known to be tortious it has the same effect upon the liability of the adviser as participation or physical assistance.").

an employee's request for the presence of a coworker during an employer's investigation that could result in discipline. According to the NLRB, the requested employee's mere presence during an investigation can advance the goal of insuring that a lone employee is not overpowered by management.[332] In *NLRB v. J. Weingarten*, *Inc.*, the Supreme Court similarly recognized that the presence of a coworker during an investigation may be beneficial to an employee given the fact that "[a] single employee confronted by an employer . . . may be too fearful or inarticulate to relate accurately the incident being investigated."[333] Likewise, the NLRB has recognized the useful role that the moral support of coworkers may play in addressing workplace inequality in non–union settings.[334]

Perhaps the act of remaining friends with a workplace troublemaker may not amount to protected activity.[335] But surely subtle words of encouragement and assurances of support can qualify as assistance in *some* manner. The simple knowledge that one is part of a group and has the continued support of that group may give aid and comfort to an individual employee even if the group does not more actively assist the individual employee in confronting an employer or pursuing a claim.[336] The moral support of friends and relatives almost unquestionably plays an important role in encouraging an individual to pursue a charge of discrimination. Those who are perceived as workplace troublemakers often face institutional pressure based on the organization's tolerance for discrimination that can dissuade them from pursuing their discrimination charges.[337] The support of coworkers then plays an important countervailing role in encouraging a claimant to soldier on. As Professor Ann C. Hodges has concluded, "The support of coworkers can make the difference for employees between pursuing claims or giving up."[338] Because such moral support has at least some tendency to further the investigation, it should be classified as assistance "*in any manner* in an

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332. Materials Research Corp., 262 N.L.R.B. 1010, 1015 (1982).

333. NLRB v. J. Weingarten, Inc., 420 U.S. 251, 262–63 (1975).

334. *Materials Research Corp.*, 262 N.L.R.B. at 1015 ("[W]ithout the benefit of a grievance-arbitration procedure to check unjust or arbitrary conduct, an employee in an unorganized plant may experience even greater apprehension than one in an organized plant and need the moral support of a sympathetic fellow employee.").

335. *See* Drake v. Minn. Mining & Mfg. Co., 134 F.3d 878, 886 (7th Cir. 1998) ("[W]e do not believe that . . . friendship . . . constitutes protected activity.").

336. *See* Morris, *supra* note 44, at 1706 (noting the "'aid' or perceived 'protection' that a group of employees may feel by virtue of their being part of a group, even when the group does not make overtures to management").

337. Brake, *supra* note 2, at 38–39.

338. Hodges, *supra* note 207, at 614–15 (stating that "a collective system . . . requires [workers] to interact with one another creating a more communal system").

investigation, proceeding, or hearing" under Title VII or the ADEA.[339]

Similarly, the simple act of discussing an instance of perceived discrimination with a coworker should qualify as protected participation or assistance, at least after the filing of a charge of discrimination. Listening to a coworker describe an instance of perceived discrimination and engaging in conversation with the coworker about that situation may aid the coworker in better understanding not only her legal rights but the nuances of the conflict with the employer and the potential impact the charge of discrimination may have on the employee and others in the workplace. A conversation may also simply help a charging employee develop a tighter grasp of the relevant facts.[340] In any event, such conversations tend to aid in the proceeding and should therefore qualify as protected conduct.[341]

6. An Illustration

In some instances, a court may need to employ more than one of these approaches in order to provide protection to the troublemaker's friend. For example, consider the case of *EEOC v. Bojangles Restaurants, Inc.*,[342] the case discussed in Part I. In that case, former employee Eugene Mestas was threatening to sue the employer while his fiancée, Revonda Mickle, was on maternity leave.[343] Six days after Mestas's lawyer sent the employer a demand letter, Mickle called her supervisor and asked to end her maternity leave early and return to work "in light of Mr. Mesta's termination and the couple's need for income."[344] Instead, Mickle was never permitted to return to work, allegedly in retaliation for her fiancé's actions.[345] In ruling on the employer's 12(b)(6) motion, the trial court concluded, in keeping with the majority of federal courts, that an associate of an individual engaging in protected activity under Title VII who was allegedly retaliated against due to the actions of the other individual does not automatically have a retaliation claim.[346] Nonetheless, the court concluded "by construing the existing language in a natural, unstrained fashion, albeit broadly," that the plaintiff had stated a claim for retaliation under Title VII.[347]

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339. *See* 42 U.S.C. § 2000e-3 (2000) (emphasis added).

340. *See supra* note 144 and accompanying text.

341. *Cf.* Adelphi Inst., Inc., 287 N.L.R.B. 1073, 1075 (1988) (Member Johansen, dissenting) (stating that "it can scarcely be doubted" that an employee facing probation was seeking the aid of a coworker "at least in determining the impact of probation" by initiating a discussion about the coworker's past probation).

342. 284 F. Supp. 2d 320 (M.D.N.C. 2003).

343. *Id.* at 324.

344. *Id.* at 324–25.

345. *Id.* at 325.

346. *Id.* at 325–26.

347. *Id.* at 327.

To reach this conclusion, the court first had to contend with the fact that Mickle had not assisted an individual who had already "made a charge" of illegal discrimination as seemingly required by the statutory language of Title VII.[348] However, because the court concluded that, despite the literal language of the statute, Title VII allows for charges of anticipatory retaliation, the fact that Mestas had not yet filed a charge did not pose a problem.[349] Nor, according to the court, was it necessary that an employer actually be correct about whether an employee plans to assist another employee.[350] Instead, "an employer's perception or even misperception can lead to potential liability."[351]

Also, the court concluded that "the word 'assisted' means providing voluntary or involuntary support in any manner to a person the employer believes to have engaged, or fears will be engaging, in protected activity."[352] Based on that definition, the court found that Mickle's desire to return to work early could amount to assisting Mestas in his claim, or at least that the employer could have perceived her desire as such.[353] "Without the financial support from Mickle," the court suggested, "Mestas could well be forced to accept a quick and/or small settlement," or might have difficulty retaining counsel.[354]

Alternatively, given Mickle's employment at the restaurant, which "gave her possible direct knowledge of the truth or falsity of Mestas' allegations," the employer could reasonably expect Mickle to be interviewed as part of any investigation.[355] And, given the relationship between Mickle and Mestas, the employer could easily perceive that Mickle would provide favorable testimony that would aid Mestas's claim.[356] According to the court, providing favorable testimony can amount to assisting "in any manner" a coworker.[357] Indeed, the court said, merely serving as a witness could potentially amount to protected participation under the participation clause.[358] Accordingly, the court concluded that even though Mickle had no retaliation claim simply as a result of her close relationship to Mestas, Mickle had at least stated a cause of action for retaliation under Title VII.[359]

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348. *See supra* notes 132–33 and accompanying text.
349. *Bojangles Rests., Inc.*, 284 F. Supp. 2d at 328.
350. *Id.*
351. *Id.*
352. *Id.* at 329.
353. *Id.*
354. *Id.*
355. *Id.*
356. *Id.* at 329–30.
357. *Id.* at 329.
358. *Id.* at 330.
359. *Id.*

VI. CONCLUSION

Employer action taken against third parties in retaliation for complaints of discrimination is a problem that undermines the effectiveness of the anti-discrimination mandates of Title VII and the ADEA. Under the prevailing trend, employees who are the victims of such retaliation have few remedies.[360] Aside from the fundamental unfairness of such a result, not permitting the victims of pure third-party retaliation and those who have assisted or otherwise participated in an internal investigation of discrimination to bring claims of pure third-party retaliation has several negative consequences. It discourages the willingness of coworkers to participate in an investigation or proceeding pursuant to the statutes for fear of incurring the employer's wrath. It similarly discourages coworkers from associating with a perceived troublemaker for fear that they may become associated with the troublemaker in the mind of the employer. The right of association has often produced meaningful changes in American society. Protecting the ability of employees to associate with one another may likewise potentially reduce the number of instances of discrimination in the workplace.

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360. It is possible that in some instances state law might provide a remedy for cases of pure third-party retaliation. *See* MO. REV. STAT. § 213.070(4) (2006) (prohibiting discrimination against a person "because of such person's association with any person" who engages in protected activity); McLemore v. Detroit Receiving Hosp. & Univ. Med. Ctr., 493 N.W.2d 441, 443 (Mich. Ct. App. 1992) (holding that the anti-retaliation provision of Michigan's Civil Rights Act, which employs language identical to Title VII's anti-retaliation provision, prohibits retaliation against an employee who files an internal complaint of discrimination); Craig v. Suburban Cablevision, Inc., 660 A.2d 505, 509 (N.J. 1995) (concluding that New Jersey's Law Against Discrimination, which parallels § 12203(b) of the ADA, permits claims of third-party retaliation); Texas Dep't of Assistive & Rehabilitative Servs. v. Abraham, 2006 WL 191940, at *6 (Tex. App. Jan. 26, 2006) (concluding that the participation clause of Texas's anti-retaliation provision, which protects a person who "files a complaint," covers a person who files an internal complaint). *See generally* Alex B. Long, *"If the Train Should Jump the Track . . . ": Divergent Interpretations of State and Federal Employment Discrimination Statutes*, 40 GA. L. REV. 469 (2006) (discussing the potential for state courts to interpret state statutes in a manner contrary to the interpretation of identical or similarly worded federal statutes).