2022

Third-Party Retaliation Problems

Alex B. Long

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[*] Williford Gragg Distinguished Professor of Law, University of Tennessee College of Law. Thanks to Dalton Howard and Emily Gould for their research assistance. Thanks also to my co-panelists and the participants at the 2021 Colloquium on Scholarship in Labor and Employment Law for their comments on an earlier draft.

INTRODUCTION

In *Thompson v. North American Stainless, LP*, the United States Supreme Court dealt with a particularly pernicious form of employer retaliation.[1] The case involved the surprisingly common fact pattern in which an employer retaliates against an employee who has complained about employment discrimination by taking action against a *different* employee, usually a relative or friend.[2] The employer in this case would obviously recognize that it would be illegal to fire the complaining employee. But if the employer was angered by the charge of

[1] 562 U.S. 170 (2011).

[2] *Id.* at 172; *see* Alex B. Long, *The Troublemaker's Friend: Retaliation Against Third Parties and the Right of Association in the Workplace*, 59 FLA. L. REV. 931, 934 n.10 (2007) (citing cases).

discrimination and wished to deter other employees from making such charges in the future, retaliating against the complaining employee by targeting a *coworker* might be an effective, cold-blooded solution. Indeed, prior to the Court's decision in *Thompson*, the majority of courts held that Title VII did not prohibit an employer from doing so.[3] But in *Thompson*, the Court held that Title VII prohibits this form of third-party retaliation.[4]

One might have thought that this decision would have limited the number of instances of employer retaliation involving third parties. But the human impulse to retaliate against those who have wronged us is strong.[5] Therefore, it should not be surprising to find that some employers have devised other ways to retaliate against employees when third parties are somehow involved. Consider the case of an employee who complains to her employer about workplace discrimination. The employer responds not by firing the complaining employee or even a coworker *à la Thompson*, but by taking against action a *nonemployee* friend or relative—for example by pressuring the friend or relative's employer to fire that employee. Or perhaps an employee is fired in response to reporting to his employer that a coworker has been sexually harassing an employee of a different employer with whom the coworker comes into contact as a result of his employment. Would either individual have a retaliation claim under Title VII?

As this Article discusses, neither employee has a valid Title VII retaliation claim under the majority approaches to these situations.[6] Stated succinctly, this Article argues that these outcomes are wrong, both as a matter of law and policy. But this Article also uses these scenarios in order to make a broader point about the shortcomings of employment retaliation law in general and its specific failure to adequately take into account the interests of third parties.

The primary goal of employment discrimination statutes is to end workplace discrimination on the basis of race, sex, or other enumerated characteristics.[7] Title VII, like most statutes regulating the workplace, also contains a provision limiting an employer's ability to retaliate against an employee who somehow opposes unlawful conduct or participates in a legal action concerning such

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[3] *See* Long, *supra* note 2, at 934.

[4] *Thompson*, 562 U.S. at 174.

[5] Alex B. Long, *Using the IIED Tort to Address Discrimination and Retaliation in the Workplace*, 2022 U. ILL. L. REV. 1325, 1358 (2022).

[6] *See infra* notes 67–85, 102–117 and accompanying text.

[7] *See* Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53, 63 (2006) (referring to ending workplace discrimination as the primary objective of Title VII); 42 U.S.C. § 2000e-2(a).

conduct.[8] In this respect, statutory anti-retaliation provisions serve the broader, primary goal of the statute in question. Title VII's anti-retaliation provision exists to protect the willingness and ability of individuals to oppose or otherwise participate in the attempt to eliminate employment discrimination.[9] Thus, Title VII's anti-retaliation provision plays a crucial support role in the fight against employment discrimination.

Currently, however, courts tend to treat retaliation cases involving third parties to the employer-employee relationship as strange outliers in the area of employment retaliation law. Indeed, as this Article discusses, courts frequently treat such cases as having little connection to employment discrimination law more generally, despite the vital role that preserving the ability of employees to sue in the event of retaliation can play in the fight against employment discrimination. Rather than treating these kinds of retaliation claims—and retaliation claims more generally—as part and parcel of Title VII's quest to eliminate workplace discrimination, courts tend to view such claims as involving a narrow dispute between the parties in question, instead of having broader implications.

As the cases involving employer retaliation directed at nonemployees illustrate, the courts' often limited view of the role of Title VII's anti-retaliation provision tends to prevent the provision from reaching its full potential in the fight against workplace discrimination. These cases illustrate the broad tendency of courts to adopt narrow interpretations of statutory provisions and judicial decisions involving employment retaliation. They also illustrate the tendency of courts to ignore some of the third-party effects of retaliation. This includes the immediate impact on the individual who suffers an adverse action when an employee complains about unlawful discrimination occurring in the workplace, the increased potential for other employees to be subjected to workplace discrimination when the law permits an employer to engage in retaliation, and the effects upon society more generally when the law permits workplace discrimination and retaliation to flourish.

In order to fulfill Title VII's anti-discrimination purpose, courts need to approach retaliation cases starting from the premise that robust protection from retaliation is essential to effectuating the statute's anti-discrimination purpose.

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[8] 42 U.S.C. § 2000e-3(a); *see* Alex B. Long, *Employment Retaliation and the Accident of Text*, 90 OR. L. REV. 525, 580 (2011) (listing statutes and summarizing their anti-retaliation provisions).

[9] *See Burlington N.*, 548 U.S. at 63 ("[Title VII's] antiretaliation provision seems to secure that primary objective [of eliminating discrimination] by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees.").

This is as true for cases in which third parties are swept up in a dispute as it is for other kinds of retaliation cases. A court that keeps the interconnected nature of Title VII's anti-retaliation and anti-discrimination goals in mind is more likely to give a fair reading to the relevant legal concepts in a retaliation case, including cases involving third parties.

This Article focuses on these kinds of third-party problems. Part I discusses the legal principles that are most relevant in the case of employment retaliation that impacts a third party. Part II discusses the two recurring fact patterns that serve as the primary focus of this Article: (1) employer retaliation against an employee for opposing discrimination against a nonemployee; and (2) employer retaliation against an employee that targets nonemployees. Part III explores some of the specific problems with the judicial and statutory approaches to these kinds of retaliation cases. Part IV then addresses how these problems illustrate some of the broader problems with retaliation law and how those problems limit the ability of statutory provisions to facilitate the effort to eliminate workplace discrimination. Part V concludes by offering several suggestions that would enable courts to more effectively deal with these specific kinds of retaliation cases as well as retaliation cases more generally.

I. AN INTRODUCTION TO THIRD-PARTY RETALIATION PROBLEMS IN EMPLOYMENT DISCRIMINATION STATUTES

In the typical case in which an employer fires its employee for having engaged in protected activity, the elements of a Title VII retaliation claim are fairly straightforward. However, there are sometimes subtleties that may pose challenges for courts and litigants, particularly where the employer retaliation involves third parties. These include defining who qualifies as an "employee" for purposes of the statute, what qualifies as actionable retaliation, and who has standing to bring a retaliation claim.

A. Retaliation: The Prima Facie Case

Title VII and other employment discrimination statutes prohibit employers from retaliating against employees who have opposed unlawful employment discrimination or have made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing.[10] In order to establish a prima facie case in the typical retaliation case, the plaintiff must engage in protected activity, either by opposing what the plaintiff reasonably believes to

[10] 42 U.S.C. § 2000e-3(a); *see also* Americans with Disabilities Act, 42 U.S.C. § 12203(a).

be discrimination prohibited by the statute ("opposition conduct") or participating in an investigation or proceeding pursuant to the statute ("participation conduct").[11] In addition, the plaintiff must suffer a materially adverse action, a concept discussed in greater detail below.[12] Finally, the plaintiff must establish a causal link between the protected activity and the adverse action, specifically, that "but for" the plaintiff's protected activity, the adverse action would not have occurred.[13]

B. Robinson v. Shell Oil Co.*: Who is an Employee?*

In the 1997 case of *Robinson v. Shell Oil Co.*, the Supreme Court dealt with the issue of who qualifies as an "employee" for purposes of Title VII's anti-retaliation provision.[14] In *Robinson*, an individual filed a charge of race discrimination with the Equal Employment Opportunity Commission ("EEOC") after being fired by his employer, Shell Oil, Co.[15] Meanwhile, the individual applied for a new job.[16] When the prospective employer contacted Shell Oil, Co., the company provided a negative reference, allegedly because of the former employee's EEOC charge.[17] The issue facing the Supreme Court was whether Title VII's anti-retaliation provision applies to retaliation against former employees as well as current employees.[18]

In a unanimous decision, the Court concluded that former employees are included within the coverage of Title VII's anti-retaliation provision.[19] The Court concluded that the term "employee" was ambiguous but that the text of Title VII suggested that the term was more naturally read to include former employees.[20] The Court cited the fact that Title VII specifically references "discharge" as an unlawful employment practice that gives rise to a discrimination claim.[21] Of course, only former employees can sue for being wrongfully discharged, thus lending support to the Court's conclusion that the

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11 42 U.S.C. § 2000e-3(a).

12 *See infra* notes 28–36 and accompanying text.

13 *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 360 (2013) ("Title VII retaliation claims must be proved according to traditional principles of but-for causation . . . ."); Rodríguez-Vives v. P.R. Firefighters Corps of P.R., 743 F.3d 278, 283 (1st Cir. 2014) (summarizing the prima facie case).

14 519 U.S. 337, 339 (1997).

15 *Id.*

16 *Id.*

17 *See id.*

18 *See id.* at 340.

19 *Id.* at 346.

20 *Id.* at 345.

21 *Id.*

term "employee" included former employees.[22] Similarly, the Court noted that Title VII's anti-retaliation provision protects an employee who files a charge with the EEOC.[23] Again, this would logically include a former employee who filed a charge of wrongful discharge.[24]

Importantly, the Court also looked to the purpose of Title VII's anti-retaliation provision in support of its reading of the statutory text. The Court observed that the primary purpose of anti-retaliation provisions is to maintain "unfettered access to statutory remedial mechanisms."[25] If the statutory protections were limited to only current employees, victims of discrimination might be deterred from seeking redress for fear of post-employment retaliation like that alleged in *Robinson*.[26]

The *Robinson* decision is significant for several reasons. First, the decision reflects an expansive view of Title VII's anti-retaliation provision that relies heavily on the policy of preventing employers from deterring employees from speaking out about unlawful employment discrimination. This theme would reappear repeatedly in subsequent Court decisions involving retaliation.[27] In addition, the decision is significant because it illustrates the point that retaliation may occur in a variety of ways, not just in the typical situation in which an employer takes action against a current employee for engaging in protected activity. By the time the *Robinson* defendant retaliated against the plaintiff, the defendant was essentially a third party to the prospective employment relationship between the plaintiff and her prospective employers. Thus, *Robinson* makes clear that retaliation may be actionable under Title VII even when it occurs outside of the traditional ongoing employer-employee relationship.

C. Burlington Northern & Santa Fe Railway v. White*: What Qualifies as Actionable Retaliation?*

The second Supreme Court decision with particular relevance for instances of retaliation involving third parties is *Burlington Northern & Santa Fe Railway v. White*, a 2006 decision.[28] There, employer had allegedly retaliated against an employee for complaining about discrimination by reassigning her to an

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22 *See id.*
23 *See id.*
24 *See id.*
25 *Id.* at 346.
26 *See id.*
27 *See infra* notes 34–35, 45 and accompanying text.
28 548 U.S. 53 (2006).

objectively less desirable position, but one that still fell under the same job description.[29] The issue facing the Court was whether employer retaliation against an employee that did not affect the employee's compensation, terms, conditions, or privileges of employment was actionable under Title VII.[30]

The Court held that actionable retaliation under Title VII was not limited to employment-related or workplace actions.[31] In addition to the strong text-based justifications for the holding, the Court again relied heavily upon the purposes underlying the anti-retaliation provision. The Court observed that the primary objective of Title VII is to eliminate workplace discrimination.[32] The anti-retaliation provision exists so that employees are not deterred by their employers from seeking to oppose or otherwise redress such discrimination.[33] Citing *Robinson*, the Court noted that the "primary purpose" of the anti-retaliation provision is to "ensure unfettered access to statutory remedial mechanisms."[34] Thus, the anti-retaliation provision serves to further Title VII's overarching anti-discrimination goal. In light of this purpose, the most logical way to define what constitutes "actionable retaliation" was in terms of employer conduct that is likely to deter the willingness of employees to access these mechanisms. Therefore, the Court held that employer retaliation is actionable "when 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."[35]

Another important aspect of the decision for purposes of this Article is that this standard potentially includes employer actions that impact employees outside of the workplace. As an example of employer conduct that might dissuade a reasonable employee from engaging in protected activity, the Court cited an employer's filing of false criminal charges against a former employee.[36] This feature of the decision illustrates the important principle that employer retaliation is not always confined to actions impacting individuals within the employer's own workplace. but may still be highly effective in deterring future employees from complaining about unlawful discrimination.

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29 *See id.* at 70.
30 *See id.* at 61.
31 *Id.* at 64.
32 *Id.* at 63.
33 *See id.*
34 *Id.* at 64 (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997)).
35 *Id.* at 68 (quoting Rochon v. Gonzales, 438 F.3d 1211, 1219 (D.C. Cir. 2006)).
36 *Id.* at 64 (citing Berry v. Stevinson Chevrolet, 74 F.3d 980, 984, 986 (10th Cir. 1996)).

D. Thompson v. North American Stainless, LP*: Who is an Aggrieved Person?*

Thompson v. North American Stainless, LP,[37] a 2011 decision, represents the first and only time the Supreme Court has confronted a Title VII retaliation case involving harm to a third party. In *Thompson*, the plaintiff and his fiancée were both employed by the same employer.[38] The plaintiff's fiancée filed an EEOC charge alleging sex discrimination on the part of the employer.[39] The employer, allegedly in response, fired the plaintiff.[40]

The issue facing the Court was whether the plaintiff was within the class of individuals protected by Title VII's anti-retaliation provision when he was not the one who had engaged in protected activity.[41] Courts were split on this issue prior to *Thompson*, with the majority concluding that the affected third party in these cases did not have a claim under Title VII or other discrimination statutes.[42] In reaching this conclusion, courts tended to focus on the language of the anti-retaliation provision itself:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because *he* has opposed any practice made an unlawful employment practice by this subchapter, or because *he* has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.[43]

According to the majority of courts at the time, the plain language of the provision requires that the person retaliated against also be the person who engaged in the protected activity.[44] Citing its prior decision in *Burlington Northern*, the *Thompson* court made short work of this argument. The Court recognized that an employer could retaliate against an employee who had engaged in protected activity by taking action against a loved one of that individual rather than the individual herself. And the Court thought it "obvious"

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[37] 562 U.S. 170 (2011).

[38] *Id.* at 172.

[39] *Id.*

[40] *Id.*

[41] *See id.* at 173.

[42] *See* Long, *supra* note 2, at 934 (stating that the clear majority of courts had reached this conclusion).

[43] 42 U.S.C. § 2000e-3(a) (emphasis added).

[44] *See* Freeman v. Barnhart, No. C 06-04900 JSW, 2008 WL 744827, at *5 (N.D. Cal. Mar. 18, 2008) ("A majority of courts, including the three circuit courts that have examined this issue, have concluded such claims are not cognizable; only employees that have personally engaged in statutorily protected activity may bring retaliation claims."); Fogleman v. Mercy Hosp., Inc., 283 F.3d 561, 568 (3d Cir. 2002) (reaching this conclusion with respect to the ADA's anti-retaliation provision); Smith v. Riceland Foods, Inc., 151 F.3d 813, 819 (8th Cir. 1998) (stating that the contrary argument is not supported by the plain language of Title VII).

under the reasoning of *Burlington Northern* "that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fianceé would be fired."[45]

Instead, "the more difficult question" was whether the plaintiff, who had not engaged in any protected activity, had standing under the statute to sue for his discharge.[46] Title VII provides that "a civil action may be brought . . . by the person claiming to be aggrieved."[47] In a unanimous decision, the Court held that the plaintiff could be a person aggrieved by the employer's illegal retaliation against his fiancée even though he had not engaged in protected activity himself.[48] Drawing upon decisional law under the Administrative Procedure Act, the Court held that a person is "aggrieved" when the individual "falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for [the individual's] complaint."[49] A plaintiff lacks standing "if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit."[50]

Applying that standard to the plaintiff's situation, the Court cited two reasons why it believed the plaintiff fell within the zone of interests sought to be protected by Title VII's anti-retaliation provision. First, the plaintiff was an employee of the defendant, "and the purpose of Title VII is to protect employees from their employers' unlawful actions."[51] Second, the employer targeted the plaintiff specifically in order to harm its other employee for having complained about the employer's discrimination.[52] Thus, the plaintiff was not merely an "accidental victim" or "collateral damage" of the employer's retaliation.[53] As a result, the Court concluded that the plaintiff was "well within the zone of interests sought to be protected by Title VII."[54]

The remedy provisions of several other federal anti-discrimination statutes employ the same "aggrieved" person language or incorporate Title VII's remedy

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45 Thompson v. N. Am. Stainless, LP, 562 U.S. 170, 174 (2011).
46 *Id.* at 175.
47 42 U.S.C. § 2000e-5(f)(1).
48 *Thompson*, 562 U.S. at 178.
49 *Id.* at 177 (quoting Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 883 (1990)).
50 *Id.* at 178 (quoting Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 399–400 (1987)).
51 *Id.*
52 *Id.*
53 *Id.*
54 *Id.*

provision.[55] Following *Thompson*, employees who have suffered some type of adverse action due to the protected activity of a related coworker have generally been able to at least establish standing.[56] Also, consistent with *Thompson*, courts have been willing to recognize that employer action targeted at a non-relative employee with whom an employee is romantically involved, or is at least close friends with, is likely to deter an employee from engaging in protected activity and that the third-party employee has standing.[57] Where, however, the relationship between the two employees is more attenuated or the adverse action is not materially adverse, courts have been unwilling to recognize the claim of the third-party employee.[58] In addition, where an employer does not take action

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[55] *See* Age Discrimination in Employment Act, 29 U.S.C. § 626(c)(1) ("Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter."); Eric Schnapper, *Review of Labor and Employment Law Decisions from the United States Supreme Court's 2010–11 Term*, 27 ABA J. LAB. & EMP. L. 329, 344 (2012) ("A number of statutes . . . authorize suit by a person or party 'aggrieved.' . . . Several statutes, such as the Americans with Disabilities Act and the Genetic Information Nondiscrimination Act, allow for enforcement under Title VII itself . . . .").

[56] *See, e.g.*, Norfolk v. GEO Grp., Inc., No. 3:17-cv-204, 2020 WL 1873991, at *13 (W.D. Pa. Apr. 15, 2020) (concluding wife had standing to bring retaliation claim under Title VII based on adverse action stemming from husband's protected activity); Ehmann v. Oshkosh Corp., No. 19-C-1128, 2019 WL 6173671, at *3 (E.D. Wis. Nov. 20, 2019) (concluding wife had standing to bring retaliation claim under Fair Labor Standards Act based on adverse action stemming from husband's protected activity); Ferguson v. Fairfield Caterers, Inc., No. 3:11-cv-01558, 2015 WL 2406156, at *4 (D. Conn. May 20, 2015) (concluding daughter could have standing to bring retaliation claim under Age Discrimination in Employment Act based on adverse action stemming from father's protected activity); Vormittag v. Unity Elec. Co., No. 12 CV 4116, 2014 WL 4273303, at *5 (E.D.N.Y. Aug. 28, 2014) (concluding father had standing to bring Title VII retaliation claim based on adverse action stemming from daughter's protected activity); O'Donnell v. Am. At Home Health Care & Nursing Servs. Ltd., No. 12-C-6762, 2013 WL 1686972, at *3 (N.D. Ill. Apr. 18, 2013) (concluding wife had standing to bring retaliation claim under Fair Labor Standards Act based on adverse action stemming from husband's protected activity).

[57] *See, e.g.*, Cobb v. Atria Senior Living, Inc., No. 3:17-cv-00291, 2018 WL 587315, at *6 (D. Conn. Jan. 29, 2018) (concluding for purposes of motion to dismiss that a relationship "of friendship and confidence" was sufficient); Lard v. Ala. Alcoholic Beverage Control Bd., No. 2:12-cv-452-WHA, 2012 WL 5966617, at *4 (M.D. Ala. Nov. 28, 2012) (recognizing claim where plaintiff was dating coworker who engaged in protected activity); Harrington v. Career Training Inst. Orlando, Inc., No. 8:11-cv-1817-T-33MAP, 2011 WL 4389870, at *2 (M.D. Fla. Sept. 21, 2011) (finding standing where action was taken against the fiancé of the employee who engaged in protected action). There are also the claims in which the employee who engages in protected activity brings a retaliation claim based on the fact that the employer took action against a friend or loved one. *See generally* Ali v. D.C. Gov't, 810 F. Supp. 2d 78, 88 (D.D.C. 2011) (holding that employer's threat to discipline and likely discharge employee-friend of plaintiff satisfied *Burlington Northern*'s material adversity standard); Crawford v. Nat'l R.R. Passenger Corp., No. 3:15-cv-131, 2015 WL 8023680, at *11 (D. Conn. Dec. 4, 2015) (holding that employer's refusal to hire plaintiff's daughter-in-law satisfied *Burlington Northern*'s material adversity standard); Davis v. Ricketts, No. 8:11CV221, 2011 WL 9369010, at *6 (D. Neb. Nov. 14, 2011) (holding that employer's termination of plaintiff's son's employment satisfied *Burlington Northern*'s material adversity standard).

[58] *See, e.g.*, Gipson v. Hyundai Power Transformers USA, Inc., No. 2:19cv224-MHT, 2020 WL 1429694, at *4 (M.D. Ala. Mar. 17, 2020) (granting defendant's motion to dismiss where plaintiff did not suffer any injury due to employer's retaliation against coworker); Fleming v. Norfolk S. Corp., No. 1:17CV418, 2018 WL 1626523, at *3 (M.D.N.C. Mar. 31, 2018) (granting employer's motion to dismiss where plaintiff was merely a

against an employee with the intent to affect the plaintiff, the plaintiff is not likely to be classified as an aggrieved person and is instead merely an "accidental victim" who is outside the statute's zone of interests.[59]

II. THIRD-PARTY PROBLEMS

Thompson addressed the most common situation in which third parties become wrapped up in employment discrimination disputes. But since the decision, new issues involving third parties and employer retaliation have emerged. To date, there have been two recurring fact patterns that have caused courts to split.

A. Retaliation Against an Employee for Opposing Discrimination Against a Nonemployee

One situation in which the presence of a third party has complicated the typical analysis of a retaliation claim is the situation in which an employer retaliates against an employee for reporting a coworker's discrimination toward a nonemployee, such as a customer or the employee of a different employer.[60]

"closely affiliated" coworker); Mackall v. Colvin, No. ELH-12-1153, 2015 WL 412922, at *24 (D. Md. Jan. 29, 2015) (denying claim where plaintiff-employee was merely an acquaintance of employee who engaged in protected activity); Assariathu v. Lone Star HMA LP, No. 3:11-cv-99-O, 2012 WL 12897341, at *9 (N.D. Tex. Mar. 12, 2012) (granting summary judgment to employer, in part, because two of the plaintiffs did not show they had anything beyond friendly working relationships with employees who engaged in protected activity).

[59] *See* Cochran v. Five Points Temps., LLC, 907 F. Supp. 2d 1260, 1268 (N.D. Ala. 2012) (concluding plaintiff was not within zone of interests because employer did not intend to injure plaintiff).

[60] *See generally* Stimson v. Stryker Sales Corp., 835 F. App'x 993, 996 (11th Cir. 2020) (involving alleged harassment of employee of a different employer); Edwards v. Ambient Healthcare of Ga., Inc., 674 F. App'x 926, 928 (11th Cir. 2017) (involving alleged harassment of patients and caregiver of patient); Jackson v. Motel 6 Multipurpose, Inc., 130 F.3d 999, 1007 n.16 (11th Cir. 1997) (involving alleged discrimination against customers); Bonn v. City of Omaha, 623 F.3d 587, 592 (8th Cir. 2010) (involving alleged police discrimination against citizens); Crowley v. Prince George's Cnty., 890 F.2d 683, 687 (4th Cir. 1989) (involving alleged police harassment of citizens); Cooper-Hill v. Hancock Cnty., No. 5:18-CV-23, 2018 WL 6496775, at *4 (M.D. Ga. Dec. 10, 2018) (involving alleged discrimination against voters); Neely v. City of Broken Arrow, No. 07-CV-0018-CVE-FHM, 2007 WL 1574762, at *3 (N.D. Okla. May 29, 2007) (involving harassment against members of the public). This scenario differs from the relatively common fact pattern in which a coworker or third party harasses an employee. *See, e.g.*, Lockard v. Pizza Hut, Inc., 162 F.3d 1062, 1072–74 (10th Cir. 1998) (citing cases); Einat Albin, *Customer Domination at Work: A New Paradigm for the Sexual Harassment of Employees by Customers*, 24 MICH. J. GENDER & L. 167, 202 (2017) (noting that numerous employees have complained about customer harassment); Robert J. Aalberts & Lorne H. Seidman, *Sexual Harassment of Employees by Nonemployee: When Does the Employer Become Liable?*, 21 PEPP. L. REV. 447, 449 (1994) (stating that this type of harassment is common). One of the most famous cases involving this scenario is *Folkerson v. Circus Enterprises Inc.*, which involved an employee who performed as a "living doll" and was harassed by casino patrons. 107 F.3d 754, 755 (9th Cir. 1997). It is not uncommon for the complaining employee in these cases to face retaliation for having made a complaint. *See, e.g.*, Riggs v. DXP Enters., Inc., No. 6:18-cv-00729, 2019 WL

Where a nonemployee harasses an employee, the employer may be held liable if the employer knew or should have known of the conduct and failed to take appropriate corrective action.[61] Thus, an employer is liable if the employer is negligent in discovering or preventing the harassment.[62] Liability in these cases is based on an employer's negligence and is "direct[,] [not] derivative."[63] The same standard applies to harassment by a coworker.[64] In contrast, liability in the case of supervisor harassment is based on agency principles and is derivative in nature.[65] Because permitting a hostile work environment to exist is an unlawful employment practice under Title VII, an employee who makes an internal complaint or files a formal charge concerning workplace harassment by a coworker or third party has engaged in protected activity.[66]

But employee harassment of a nonemployee presents a different problem. For example, in *Stimson v. Stryker Sales Corp.*, an unpublished decision from the Eleventh Circuit Court of Appeals, an employee who sold medical equipment to a hospital reported to his employer that a coworker had sexually harassed a nurse at the hospital.[67] When his employer allegedly retaliated against him for making this report, the employee brought a retaliation claim under Title VII.[68] The Eleventh Circuit affirmed summary judgment in favor of the employer on the grounds that the employee had not engaged in protected activity.[69] Reporting one coworker's harassment of another coworker would

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5682897, at *2 (W.D. La. Oct. 31, 2019); Thompson v. Panos X Foods, Inc., No. 14-10620, 2016 WL 1615702, at *1 (E.D. Mich. Apr. 22, 2016) (involving such an allegation).

[61] *See, e.g.*, Gardner v. CLC of Pascagoula, L.L.C., 915 F.3d 320, 322 (5th Cir. 2019) (involving harassment by resident of assisted living facility); EEOC v. Costco Wholesale Corp., 903 F.3d 618, 627–28 (7th Cir. 2018) (involving harassment by customer); Dunn v. Washington Cnty. Hosp., 429 F.3d 689, 691 (7th Cir. 2005) (involving harassment by independent contractor); 29 C.F.R. § 1604.11(e) (2021) ("An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action."); *see also* Beckford v. Dep't of Corr., 605 F.3d 951, 957–58 (11th Cir. 2010) (involving harassment by prison inmates).

[62] *See* Erickson v. Wis. Dep't of Corr., 469 F.3d 600, 605–06 (7th Cir. 2006).

[63] *Dunn*, 429 F.3d at 691.

[64] *See* Faragher v. City of Boca Raton, 524 U.S. 775, 799–800 (1998) (noting that courts uniformly judge employer liability for coworker harassment under a negligence standard).

[65] *See* Noah D. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 COLUM. L. REV. 1357, 1381 (2009) ("[T]he Court grounded vicarious liability in the agency law principle of 'misuse of supervisory authority,' in which the agent is 'aided in accomplishing the tort by the existence of the agency relation.'" (internal citations omitted)).

[66] *See Riggs*, 2019 WL 5682897, at *4; *Thompson*, 2016 WL 1615702, at *4.

[67] Stimson v. Stryker Sales Corp., 835 F. App'x 993, 995 (11th Cir. 2020).

[68] *Id.*

[69] *Id.* at 998.

easily qualify as protected opposition conduct.[70] But here, the employer did not employ the victim.[71] The court reasoned that the plaintiff had not opposed conduct that was actually unlawful under Title VII because the victim of the discrimination was not an employee of the employer who is alleged to have violated Title VII.[72]

The employee also alleged that he had engaged in protected activity because he reasonably believed the employer's conduct was unlawful under Title VII even if it was not actually unlawful.[73] As interpreted by courts, Title VII's anti-retaliation provision protects an individual who opposes what the individual *reasonably believes* is unlawful discrimination under Title VII, even if conduct does not actually amount to unlawful discrimination.[74] Therefore, the plaintiff in *Stimson* also argued that he engaged in protected activity because he reasonably believed that his coworker's harassment of the nonemployee was unlawful under Title VII.[75] But, in granting summary judgment to the employer, the trial court held, without explanation, that the plaintiff could not have reasonably believed that this harassment was unlawful under Title VII.[76] Ultimately, because the victim of the coworker's harassment was a third party to the employment relationship between the plaintiff and his employer, the plaintiff had not engaged in protected activity.[77] Other courts have reached this same conclusion.[78]

In a similar instance, an employer allegedly retaliated against an employee for reporting that a coworker had sexually harassed the employer's customers.[79] In concluding that the plaintiff had not engaged in protected activity, the

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[70] *See* EEOC, *Enforcement Guidance on Retaliation and Related Issues*, at II.A.2.e. Example 4 (Aug. 25, 2016) (explaining that an employee who complains to her supervisor about graffiti in her workplace that is derogatory toward women has engaged in protected activity), https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues#li_Complaining.

[71] *Stimson*, 835 F. App'x at 996.

[72] *See id.*

[73] *See* Stimson v. Stryker, No. 1:17-CV-00872-WMR-JFK, 2019 WL 2240444, at *12 (N.D. Ga. Jan. 24, 2019).

[74] *See* Clark Cnty. Sch. Dist. v. Breeden, 532 U.S. 268, 271 (2001) (applying a reasonable person standard).

[75] *Stimson*, 2019 WL 2240444 at *12.

[76] *Id.*

[77] *Id.*

[78] *See, e.g.*, Edwards v. Ambient Healthcare of Ga., Inc., No. 1:15-CV-0411-TCB-LTW, 2015 WL 13298082, at *6 (N.D. Ga. Oct. 23, 2015) (holding that employee could not have had a reasonable belief that coworker's harassment of customer was unlawful under Title VII), *aff'd*, 674 F. App'x 926 (11th Cir. 2017); Bonn v. City of Omaha, 623 F.3d 587, 592 (8th Cir. 2010) (concluding that public safety officer could not have reasonably believed that her reports of discriminatory police traffic stops that also referenced potential impact on hiring practices were in opposition to any conduct actually unlawful under Title VII).

[79] Edwards v. Ambient Healthcare of Ga., Inc., 674 F. App'x 926, 927 (11th Cir. 2017).

Eleventh Circuit pointed out that the language in Title VII's anti-retaliation provision only protects employees who oppose an "'employment practice made unlawful' by Title VII."[80] Since sexual harassment of a customer is not an unlawful employment practice under Title VII, the employer's conduct was not actually unlawful.[81] Nor, according to the trial court, could the plaintiff have reasonably believed that such conduct was unlawful.[82] Thus, the employee's opposition conduct was not protected.[83]

In another case, a federal court found that a deputy fire chief had not engaged in protected activity because he could not have reasonably believed that it was an unlawful employment practice under Title VII for other firefighters to sexually harass a member of the public while participating in a work-related training program or while traveling in a fire department vehicle.[84] According to the court, "it is only reasonable to believe that the underlying conduct was unlawful under Title VII if 'the person against whom the hostility is directed [is] in an employment relationship with the employer.'"[85]

Employees who allegedly faced retaliation after having opposed unlawful discrimination directed at third parties have also lost on related grounds. Under some state employment discrimination statutes, an employee is protected from retaliation when the employee engages in activity that is protected under a more general whistleblower statute, as opposed to simply an employment discrimination statute.[86] In such cases, an employee may be protected from retaliation if the employee reports employer conduct made unlawful by some other statute. In contrast, Title VII only prohibits retaliation against one who opposes conduct made unlawful specifically under Title VII.[87] Some employees have lost their retaliation claims because they opposed unlawful discriminatory conduct occurring during the course of their jobs, but the conduct was not unlawful under Title VII.[88]

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[80] *See id.* at 930 (quoting 42 U.S.C. § 2000e-3(a)).

[81] *Id*.

[82] *See Edwards*, 2015 WL 13298082, at *6.

[83] *See Edwards*, 684 F. App'x at 930.

[84] Neely v. City of Broken Arrow, No. 07-CV-0018-CVE-FHM, 2007 WL 1574762, at *4 (N.D. Okla. May 29, 2007).

[85] *Id.* (quoting Wimmer v. Suffolk Cnty. Police Dep't, 176 F.3d 125, 136 (2d Cir. 1999)).

[86] *See* ME. REV. STAT. ANN. tit. 5, § 4572(1)(A) (2019) (providing that it is "unlawful employment discrimination . . . [f]or any employer . . . to discharge an employee or discriminate with respect to . . . transfer, . . . terms, [or] conditions" because of actions taken that are protected by Whistleblower Protection Act).

[87] 42 U.S.C. § 2000e-3(a).

[88] *See, e.g.*, Bonn v. City of Omaha, 623 F.3d 587, 592 (8th Cir. 2010) (concluding that a public employee who complained about police department's biased policing practices did not engage in protected activity under Title VII); Crowley v. Prince George's Cnty., 890 F.2d 683, 687 (4th Cir. 1989) (concluding that a public

For example, in *Cooper-Hill v. Hancock County*, a case from a federal district court in Georgia, an employee of a local elections board alleged that her employer retaliated against her after she complained about another employee's discriminatory actions in an attempt to increase the white vote in the area.[89] In effect, the employee complained about the fact that a coworker was engaging in discrimination in the performance of her job.[90] While racially discriminatory election practices may be unlawful under another statute, they are not unlawful under Title VII.[91] And, in *Cooper-Hill*, the court concluded that the employee could not have had an objectively reasonable belief that she was opposing conduct made unlawful under Title VII, even though the employee's job revolved around election practices.[92] As such, she had not engaged in protected activity under Title VII.[93] Summing up its reasoning, the court observed that "[a]lleged discriminatory actions toward nonemployee third parties is not an employment practice made unlawful by Title VII."[94]

B. Employer Retaliation Targeting Nonemployee Third Parties

Thompson involved the situation in which an employer retaliates against one employee by targeting another employee.[95] The other third-party retaliation scenario that has emerged since *Thompson* involves the employer who takes action against a *nonemployee* third party in order to retaliate against an employee who engages in protected activity.[96] Such action could range from seeking to harm the nonemployee's business[97] to inducing another employer to discharge the individual.[98] In this respect, these kinds of claims resemble the tort law

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employee who investigated claims of racial harassment of citizens by police officers had not engaged in protected activity under Title VII).

89 No. 5:18-CV-23, 2018 WL 6496775, at *3 (M.D. Ga. Dec. 10, 2018).

90 *Id.*

91 *Id.* at *4.

92 *Id*.

93 *Id.*; *see also* Jackson v. Motel 6 Multipurpose, Inc., 130 F.3d 999, 1007 n.16 (11th Cir. 1997) (concluding plaintiffs could not proceed on a Title VII retaliation claim for opposing employer's unlawful discrimination with respect to public accommodations because Title VII did not prohibit such discrimination).

94 *Cooper-Hill*, 2018 WL 6496775, at *4.

95 *See supra* notes 38–40 and accompanying text.

96 *Cf., e.g.*, Simmons v. UBS Fin. Servs., Inc., 972 F.3d 664, 665 (5th Cir. 2020); Tolar v. Bradley Arant Boult Cummings, No. 2:13-cv-00132-JEO, 2014 WL 3974671, at *1 (N.D. Ala. Aug. 11, 2014), *aff'd*, 997 F.3d 1280 (11th Cir. 2021); Underwood v. Dep't Fin. Servs. Fla., No. 4:11cv466-RH/CAS, 2012 WL 12897085, at *1, *3 (N.D. Fla. Aug. 8, 2012); Crawford v. George & Lynch, Inc., No. 10-949-GMS-SRF, 2012 WL 2674546, at *1 (D. Del. July 5, 2012); McGhee v. Healthcare Servs. Grp., No. 5:10-cv-279-RS-EMT, 2011 WL 5299660, at *3 (N.D. Fla. Nov. 2, 2011).

97 *Cf. Tolar*, 2014 WL 3974671, at *3–4.

98 *Cf. McGhee*, 2011 WL 5299660, at *3.

theory of interference with contract.[99] In an effort to retaliate against its own employee, an employer interferes with the existing relationship between the nonemployee and the nonemployee's employer or other contracting partner.[100] So far, courts have split on the question of whether Title VII provides protection from retaliation to a nonemployee third party in these kinds of cases.[101]

1. The Majority Approach: A Narrow Interpretation of the Aggrieved Person Concept

The Fifth Circuit's 2020 decision in *Simmons v. UBS Financial Services, Inc.*[102] represents the narrow—and the majority—approach to this issue. In *Simmons*, the plaintiff was employed by a company as a third-party wholesaler of life insurance products to clients of the defendant, UBS Financial Services.[103] Given the nature of his job, the plaintiff frequently worked out of UBS's offices, where his daughter was employed.[104] The plaintiff's daughter filed an internal complaint and EEOC charge alleging pregnancy discrimination on the part of UBS.[105] UBS allegedly retaliated by revoking the plaintiff's access to its premises and forbidding him from doing business with UBS's clients, thereby effectively ending his employment with his own employer.[106]

The question facing the Fifth Circuit was whether the plaintiff had standing to bring a Title VII retaliation claim when he had not personally engaged in protected activity and, unlike in *Thompson*, was not an employee of the defendant.[107] Consistent with the Supreme Court's prior decision, the court determined whether the plaintiff was a "person aggrieved" by the employer's retaliation.[108] In other words, were his interests "within the zone of interests" sought to be protected by Title VII's anti-retaliation provision?[109] In answering

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99 *See id.* at *2–3 (detailing the plaintiff's interference and statutory retaliation claims).

100 *See* RESTATEMENT (SECOND) OF TORTS § 766 (1977) ("One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.").

101 Applicants for employment who have been denied employment, allegedly based on the fact that an employee who happened to be a family member had engaged in protected activity, have been found to have standing. *See* EEOC v. Wal-Mart Assocs., Inc., No. 07–CV–0300 JAP/LFG, 2011 WL 8076831, at *6–8 (D.N.M. Oct. 26, 2011).

102 972 F.3d 664 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 1382 (2021).

103 *Id.* at 665.

104 *Id.*

105 *Id.*

106 *Id.*

107 *Id.* at 666–67.

108 Thompson v. N. Am. Stainless, LP, 562 U.S. 170, 177 (2011).

109 *Id.* at 178; *see supra* note 49–50 and accompanying text.

this question, the Fifth Circuit relied most heavily on the *Thompson* Court's observation that the plaintiff in *Thompson* was an employee of the defendant, "and the purpose of Title VII is to protect employees from their employers' unlawful actions."[110] To the Fifth Circuit, this largely resolved the issue: "It would be a remarkable extension of *Thompson*—and of Title VII generally—to rule that a nonemployee has the right to sue."[111]

To the court, the language of Title VII also pointed to the conclusion that "the zone of interests that Title VII protects is limited to those in employment relationships with the defendant."[112] The court observed that Title VII's anti-retaliation provision prohibits an employer from retaliating against "*his* employees or applicants."[113] The court further noted that Title VII's anti-discrimination provision—which speaks of discrimination concerning "the terms, conditions, or privileges of *employment*"—sheds further light on the statute's overall purpose.[114] To the court, these provisions pointed to the conclusion that the interests covered by Title VII are "the interests of those in employment relationships with the defendant."[115] As such, the plaintiff's interests, as a nonemployee, were, "at best, only 'marginally related to' the purposes of Title VII."[116] Other courts have similarly relied heavily on the fact that the plaintiff was not an employee of the employer in concluding that the plaintiff was outside the zone of interests for purposes of a retaliation claim.[117]

2. The Minority Approach: A More Expansive Interpretation of the Aggrieved Person Concept

Under the minority approach, a nonemployee third party who suffers an adverse action as a result of the protected activity of an employee can be a person

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110 *Id.*

111 *Simmons*, 972 F.3d at 668.

112 *Id.*

113 *Id.* at 669 (quoting 42 U.S.C. § 2000e-3(a)) (alteration in original).

114 *Id.* (quoting 42 U.S.C. § 2000e-2(a)(1)).

115 *Id.* (citing *Thompson*, 562 U.S. at 178).

116 *Id.* (citation omitted).

117 *See, e.g.*, Underwood v. Dep't Fin. Servs. Fla., No. 4:11cv466-RH/CAS, 2012 WL 12897085, at *3 (N.D. Fla. Aug. 8, 2012) ("[U]nless the plaintiffs [sic] own employer has committed an 'unlawful employment practice,' the plaintiff has no claim under the Title VII antiretaliation provision."); Crawford v. George & Lynch, Inc., No. 10-949-GMS-SRF, 2012 WL 2674546, at *3, *8 (D. Del. July 5, 2012) (recommending granting motion to dismiss for employer and stating that the Supreme Court in *Thompson* "held that the plaintiff fell within the zone of interests protected by Title VII because he was an employee of the defendant"); Russell v. City of Tupelo, 544 F. Supp. 3d 741, 752 (N.D. Miss. 2021) (finding the fact that the plaintiff was, unlike in *Simmons*, an employee to be critical in concluding that plaintiff had standing).

aggrieved by the employer's unlawful retaliation.[118] The EEOC's 2016 *Enforcement Guidance on Retaliation and Related Issues* adopts this approach.[119] In its *Enforcement Guidance*, the EEOC notes that "if an employer punishes an employee for engaging in protected activity by cancelling a vendor contract with the employee's husband (even though he was employed by a contractor, not the employer), it would dissuade a reasonable worker from engaging in protected activity."[120] In such a case, "both the employee who engaged in the protected activity and the third party who is subjected to the materially adverse action may state a claim."[121] The employee would clearly have a claim under *Thompson*.[122] But, according to the EEOC, the third party would also fall within the zone of interests sought to be protected by Title VII and would qualify as an aggrieved person.[123]

A few courts have also adopted this view. In *Tolar v. Bradley Arant Boult Cummings*, an employee filed discrimination and retaliation claims against her employer, alleging that her superior had sexually harassed her and that she had been fired after complaining about the harassment.[124] The employer also allegedly retaliated by taking action against the employee's family, including discouraging customers from doing business with her father, pursuing an allegedly baseless fraud claim against the father and other family members, publicizing the existence of the fraud action within the community, and garnishing the father's wages.[125] These actions allegedly resulted in, among other things, the father being forced to shut down his business and file for bankruptcy.[126] Claiming to be aggrieved persons under the logic of *Thompson*, the affected family members filed their own retaliation claim against the employer under Title VII.[127]

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[118] *See, e.g.*, Tolar v. Bradley Arant Boult Cummings, No. 2:13-cv-00132-JEO, 2014 WL 3974671, at *10 (N.D. Ala. Aug. 11, 2014), *aff'd*, 997 F.3d 1280 (11th Cir. 2021); McGhee v. Healthcare Servs. Grp., No. 5:10-cv-279-RS-EMT, 2011 WL 5299660, at *3 (N.D. Fla. Nov. 2, 2011); EEOC, *Enforcement Guidance on Retaliation and Related Issues* (Aug. 25, 2016), https://perma.cc/2LTJ-EHJY; *see also* City of Los Angeles v. Wells Fargo & Co., 22 F. Supp. 3d 1047, 1056–57 (C.D. Cal. 2014) (reaching similar conclusion under Fair Housing Act Amendments).

[119] EEOC, *supra* note 118.

[120] *Id.*

[121] *Id.*

[122] Thompson v. N. Am. Stainless, LP, 562 U.S. 170, 178 (2011).

[123] EEOC, *supra* note 118.

[124] No. 2:13–cv–00132–JEO, 2014 WL 3974671, at *2 (N.D. Ala. Aug. 11, 2014), *aff'd*, 997 F.3d 1280 (11th Cir. 2021).

[125] *See id.* at *3–4.

[126] *Id.* at *4. One of the other family members was a law student, who was forced to report the fraud action against him on his bar application. *Id.*

[127] *Id.* at *8.

The employer argued that the plaintiffs could not establish a violation of Title VII's anti-retaliation provision and that they were not aggrieved persons because there was no employment relationship between them and the employer.[128] The *Tolar* court acknowledged that Title VII's anti-retaliation provision requires that the employer retaliated against "his employee[] or applicant[]" because that individual engaged in protected activity.[129] The family members were, of course, neither employees nor applicants. But the court observed that *Thompson* had already made clear that this provision may be satisfied when an employer retaliates against an employee who has engaged in protected activity by taking action against a third party.[130] In addition, the court observed that the Supreme Court had previously decided in *Robinson* that Title VII's anti-retaliation provision prohibits an employer from retaliating against a former employee for engaging in protected activity.[131] This was essentially the same situation as alleged in the case at bar—by taking action against the family member, the employer was retaliating against a former employee. Finally, the court observed, the Supreme Court's *Burlington Northern* decision made clear that retaliation may be actionable even where "its effects are felt only outside the workplace," which, again, was the situation in the plaintiff's case.[132] Based on prior Supreme Court precedent, the court found the question of whether an employer may violate Title VII's anti-retaliation provision by taking action against a nonemployee to be a "relatively simple one" and held that such conduct may be actionable.[133]

The employer also argued that the plaintiffs were not "aggrieved" under Title VII because they were not employees and had not sustained injuries in their status as employees.[134] The *Tolar* court began by noting that the zone of interests test employed in *Thompson* "is not meant to be especially demanding."[135] Provided a plaintiff has an interest "*arguably* sought to be protected by the statutes," the plaintiff has statutory standing.[136] In addition, the court rejected any argument that Title VII standing is contingent on the existence of an employer-employee relationship between the defendant and plaintiff.[137] While

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128 *Id.* at *9.
129 *Id.* at *10 (quoting Underwood v. Dep't Fin. Servs. Fla., 518 F. App'x 617, 642–43 (11th Cir. 2013)).
130 *See id.*
131 *Id.* at *9 (citing Robinson v. Shell Oil Co., 519 U.S. 337, 345–46 (1997)).
132 *Id.* at *10.
133 *Id.* at *9–10.
134 *See id.* at *11.
135 *Id.* (quoting Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 567 U.S. 209, 225 (2012)).
136 *Id.* (quoting Thompson v. N. Am. Stainless, LP, 562 U.S. 170, 178 (2011)).
137 *See id.* at *11.

the Supreme Court did identify the existence of an employment relationship as a relevant consideration in *Thompson*, the Court also identified as relevant the fact that the plaintiff in *Thompson* was not "an accidental victim of the retaliation."[138] And, like the *Tolar* plaintiffs, "the employer's intended means of harming" the *Thompson* plaintiff was to harm a third party.[139]

Even if, as *Thompson* said, the purpose of Title VII "is to protect employees from their employers' unlawful actions," the *Tolar* court argued that purpose could still be furthered by permitting nonemployees to recover for retaliation targeted at an employee.[140] "The essence of [Title VII's anti-retaliation provision] is that it safeguards the right of employees (and applicants for employment) to engage in protected activity by punishing employers who would take materially adverse action in retaliation."[141] This is precisely what allegedly occurred in *Tolar*: the defendant's employee engaged in protected activity and the employer retaliated by taking action—harming the employee's loved ones—that would dissuade a reasonable person from engaging in the protected activity. While the plaintiffs' situation may not have been what Congress primarily had in mind when it approved Title VII, their injuries were still within the zone of interests protected by the statute.[142]

It bears mentioning that despite this more expansive reading of the "zone of interests" test by the district court in *Tolar*, the Eleventh Circuit Court of Appeals subsequently expressed serious doubt on appeal about the district court's conclusion.[143] Specifically, the Eleventh Circuit echoed the Fifth Circuit's observation in *Simmons* that the plaintiffs were not employees of the employer, and, therefore, it was debatable whether they were within Title VII's zone of interests.[144] Ultimately, the Eleventh Circuit assumed, without deciding, that the plaintiffs had standing, and granted summary judgment in favor of the defendants on other grounds.[145]

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138 *Id.* at *11–12 (quoting *Thompson*, 562 U.S. at 178).

139 *Id.* at *12 (quoting *Thompson*, 562 U.S. at 178).

140 *Id.* (quoting *Thompson*, 562 U.S. at 178).

141 *Id.*

142 *See id.* ("Plaintiffs . . . are not who the anti-retaliation provision has primarily in mind. Nonetheless, *Thompson* makes clear that injuries to such a party may be within the zone of interests where an employer has purposefully targeted him because of his close association with an employee that has engaged in protected activity.").

143 Tolar v. Bradley Arant Boult Cummings, LLP, 997 F.3d 1280, 1297 (11th Cir. 2021).

144 *Id.*

145 *Id.*

III. SOME PRELIMINARY PROBLEMS REGARDING THE NARROW APPROACH TO THIRD-PARTY RETALIATION CASES

The decisions taking a narrow approach to these types of third-party retaliation cases are problematic for a number of reasons. Before considering how these decisions are flawed on a broad, policy-based level, it is worth noting how the decisions are arguably flawed on a doctrinal level. In both of the situations previously described, the majority of courts have engaged in an excessively cramped interpretation of existing retaliation jurisprudence and Title VII's statutory text as it applies to third-party retaliation cases.

A. Preliminary Problems with Decisions Involving Retaliation Against an Employee for Opposing Discrimination Against a Nonemployee

Consider the decisions in which an employee witnesses a coworker harass a customer or the employee of a customer.[146] Courts have held that the complaining employee has not engaged in protected activity because the conduct complained of is not unlawful under Title VII.[147] Nor, according to some courts, could an employee reasonably believe that such conduct is unlawful under Title VII.[148] There are two fundamental problems with these decisions.

The first is simply that, contrary to the conclusion of these courts, one employee's harassment of a third party potentially can be unlawful under Title VII if the harassment contributes to the hostile work environment of another employee. An employer may violate Title VII by permitting a workplace "permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."[149] It is an unlawful employment practice for an employer to permit a hostile work environment to exist as the result of harassment by employees and customers.[150] In addition, it is well-established that an employee may experience a hostile work environment when the workplace is filled with racial slurs or misogynistic behavior, even if the employee is not specifically targeted for harassment.[151] Logically, then, an

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146 *See supra* notes 60–83 and accompanying text.

147 *See supra* notes 60–83 and accompanying text.

148 *See supra* notes 84–85 and accompanying text.

149 *See, e.g.*, Hall v. U.S. Dep't of Lab., Admin. Rev. Bd., 476 F.3d 847, 851 (10th Cir. 2007) (quoting Davis v. U.S. Postal Serv., 142 F.3d 1334, 1341 (10th Cir. 1998)).

150 *See supra* note 61 and accompanying text.

151 *See* McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1117 (9th Cir. 2004) ("[I]f racial hostility pervades a workplace, a plaintiff may establish a violation of Title VII, even if such hostility was not directly targeted at the plaintiff.").

employee who is required to be in the presence of a coworker could experience a hostile work environment as a result of the coworker's harassment of a third party. Indeed, there is decisional law under Title VII to the effect that discrimination targeted at a nonemployee may give rise to a claim by an employee over the resulting discriminatory work environment.[152] Therefore, an employee who complains about such conduct could very well be engaging in protected activity.

In addition, the decisions are flawed because they take a remarkably strict view of what a reasonable employee could or could not believe when it comes to harassment of a nonemployee. An employee engages in protected activity when the employee reasonably believes the conduct complained of is unlawful under Title VII or other applicable statute, even if the conduct is not actually illegal.[153] Even if a court incorrectly adopts a bright-line rule that harassment directed at a third party cannot ever amount to an unlawful employment practice, an employee would hardly be unreasonable in believing that it was unlawful. For example, there is authority under state anti-discrimination law for the proposition that an employer may be held liable for an employee's harassment of a nonemployee who is working at the employer's facilities.[154] While the decision involved a state statute as opposed to Title VII, it is difficult to see how an employee could be unreasonable in believing that Title VII might reach such conduct when such conduct is actually unlawful under an analogous statute.

B. Preliminary Problems with Decisions Involving Employer Retaliation Impacting Nonemployee Third Parties

The main problem with the decisions refusing to recognize nonemployees as capable of being persons aggrieved by an employer's retaliation is the exceedingly cramped view of the Supreme Court's decision in *Thompson* and the zone of interests test more generally.[155] As the district court in *Tolar* noted, the zone of interests test is not meant to be an especially demanding standard.[156] The Supreme Court has explicitly stated as much, and there are numerous appellate decisions expressing some variation on this theme.[157] A plaintiff must

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[152] *See* Rogers v. EEOC, 454 F.2d 234, 238–39 (5th Cir. 1971); Reeves v. C.H. Robinson Worldwide, Inc., 594 F.3d 798, 807 (11th Cir. 2010).

[153] *See supra* note 74 and accompanying text.

[154] Neal v. Manpower Int'l Inc., No. 3:00-CV-277/LAC, 2001 WL 1923127, at *9 (N.D. Fla. Sept. 17, 2001).

[155] Thompson v. N. Am. Stainless, LP, 562 U.S. 170, 177–78 (2011).

[156] *See supra* note 135 and accompanying text.

[157] *E.g.*, Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 567 U.S. 209, 225 (2012) (quoting Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 399 (1987)); Fla. Transp. Servs., Inc. v. Miami-Dade Cnty.,

only show that he is "*arguably* within the zone of interests sought to be protected."[158] The Court has explained that its inclusion of the word "arguably" was meant "to indicate that the benefit of any doubt goes to the plaintiff."[159]

The courts that take the position that only one who is in an employment relationship with an employer may be a person aggrieved by the employer's retaliatory conduct pay little attention to these ideas. The text of Title VII's anti-retaliation provision and the text of the entire statute certainly suggest that nonemployees were not on Congress's mind when it enacted Title VII.[160] But the Supreme Court has observed that "there need be no indication of congressional purpose to benefit the would-be plaintiff" in order to satisfy the test.[161] The primary purpose of Title VII's anti-retaliation command is to ensure the willingness and ability of individuals to come forward in the fight against workplace discrimination. There can be no doubt that taking action against a loved one of an employee—regardless of whether the loved one is an employee—can be an effective way of deterring employees from opposing unlawful discrimination or filing charges. The fact that the plaintiff in *Thompson* fell "*well within* the zone of interests sought to be protected by Title VII" suggests that the Court viewed *Thompson* as an easy case in view of the purposes of Title VII.[162] Therefore, it is difficult to see how, under the appropriate facts, a nonemployee who suffers harm as a result of an employer's retaliation against an employee could not arguably fall within the zone of interests protected by Title VII.

IV. HOW THE NARROW APPROACH TO RETALIATION CASES INVOLVING THIRD PARTIES ILLUSTRATES THE SHORTCOMINGS OF EMPLOYMENT RETALIATION LAW MORE GENERALLY

The failure of some courts to provide a remedy in the types of third-party retaliation cases described in this Article also highlights broader problems with

703 F.3d 1230, 1256 (11th Cir. 2012) ("[The 'zone of interests'] test 'requires only that the relationship between the plaintiff's alleged interest and the purposes implicit in the substantive provision be more than marginal.'" (quoting Church of Scientology Flag Serv. Org., Inc. v. City of Clearwater, 2 F.3d 1514, 1526 (11th Cir. 1993))); Howard R.L. Cook & Tommy Shaw Found. *ex rel* Black Emps. of Libr. of Cong., Inc. v. Billington, 737 F.3d 767, 771 (D.C. Cir. 2013) (stating that the "zone of interests" test "poses a low bar").

158 *Patchak*, 567 U.S. at 224 (quoting Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970) (emphasis added)).

159 *Id.* at 225.

160 For example, Title VII's anti-retaliation provision itself speaks only of "employees or applicants for employment." 42 U.S.C. § 2000e-3(a).

161 *Clarke*, 479 U.S. at 399–400.

162 Thompson v. N. Am. Stainless, LP, 562 U.S. 170, 178 (2011).

the current approach to workplace retaliation. Providing robust protection from retaliation is an effective means of addressing employment discrimination. But, as these types of third-party cases illustrate, the effectiveness of statutory anti-retaliation provisions in general is limited by the narrow language of such provisions and the often-cramped judicial interpretation given to them.

A. The Shortcomings of the Reasonable Belief Standard

One of the rules that does the most to limit the reach of Title VII's anti-retaliation provision is the rule requiring that an employee must have a reasonable belief that the conduct the employee opposes is unlawful. As discussed, when some employees have faced retaliation for reporting discrimination occurring in the workplace that was directed at nonemployees, they have lost on the their retaliation claims on the grounds that the employees could not have reasonably believed that such discrimination was unlawful under Title VII.[163] While the conduct an employee opposes does not need to be actually unlawful under Title VII for the opposition to be protected, the employee's belief that the conduct is unlawful must be reasonable.[164] But many courts have adopted a highly demanding standard of reasonableness.[165]

For example, the Eleventh Circuit Court of Appeals takes the position that "[w]here binding precedent squarely holds that particular conduct is not an unlawful employment practice by the employer, and no decision of this Court or of the Supreme Court has called that precedent into question or undermined its reasoning, an employee's contrary belief that the practice is unlawful is unreasonable."[166] Ignorance of the substantive law is not an excuse.[167] As Professors Deborah L. Brake & Joanna L. Grossman note, "[t]he reasonableness

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[163] *See supra* notes 89–94 and accompanying text.

[164] *See* Lawrence D. Rosenthal, *To Report or Not to Report: The Case for Eliminating the Objectively Reasonable Requirement for Opposition Activities Under Title VII's Anti-Retaliation Provision*, 39 ARIZ. ST. L.J. 1127, 1129 & n.7 (2007) (noting that every federal circuit recognizes this standard).

[165] *See* Matthew W. Green, Jr., *What's So Reasonable About Reasonableness? Rejecting a Case-Law Centered Approach to Title VII's Reasonable Belief Doctrine*, 62 U. KAN. L. REV. 759, 793 (2014) ("The case-law litmus test is also problematic because employees have been required to understand the law as interpreted by a particular court even if there is conflicting authority from another court or the EEOC."); Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859, 919 (2008) ("Perhaps the most problematic turn in the reasonable belief cases . . . is the increasing stringency of courts in measuring the reasonableness of employee beliefs in discrimination as a matter of law."); Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18 (2005) ("The reasonable belief requirement has generated a highly problematic body of case law."); Long, *supra* note 2, at 955 ("[C]ourts appear to hold an employee to the standard of what a reasonable labor and employment attorney would believe, rather than what a reasonable employee would believe.").

[166] Butler v. Ala. Dep't of Transp., 536 F.3d 1209, 1214 (11th Cir. 2008).

[167] *Id.*

of the employee's belief is measured by existing law, and courts charge employees with full knowledge of existing law—including circuit-specific precedents—even if an employee had a good faith belief that the law reached farther."[168] The burdens that this standard imposes on employees might not be so difficult if employment discrimination law was clear and intuitive. But the reality is that employment discrimination law is so complex that it is difficult for non-lawyer employees—and even some lawyers—to know what qualifies as an unlawful employment practice even if it were assumed that the employees actually have some familiarity with existing law.[169] In some instances, courts have found an employee's belief about the unlawful nature of an employer's behavior to be unreasonable, despite the fact that there is decisional law or EEOC guidance suggesting that the conduct in question really was unlawful.[170] If courts were being intellectually honest when explaining what standard they actually employ, they would say that employees must be correct or substantially correct in their beliefs or that an employee's belief must be that of a reasonable labor and employment lawyer.[171]

Compounding the difficulty for some retaliation plaintiffs is the fact that they have received messages from their employers on the subject of discrimination that actually encourages them to err on the side of reporting suspected unlawful conduct. One way that employers seek to limit their liability for workplace harassment is by providing training to employees on the subject.[172] More than half of employers currently provide such training.[173] Virtually all employers have also adopted written policies encouraging employees to report instances of coworker harassment to management.[174] As Professor Deborah L. Brake has noted, some of these policies define harassment in ways broader than what

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168 *See* Brake & Grossman, *supra* note 165, at 919.

169 *See* Brianne J. Gorod, *Rejecting "Reasonableness": A New Look at Title VII's Anti-Retaliation Provision*, 56 AM. U. L. REV. 1469, 1494–95 (2007) (noting how conflicting legal standards concerning what qualifies as sexual harassment make it difficult for employees to understand what qualifies as an unlawful employment practice for purposes of the reasonable belief requirement).

170 *See* Long, *supra* note 2, at 955 (citing a court decision that the employee lacked a reasonable belief that conduct complained of was unlawful when the EEOC *Interpretive Guidance* had concluded that similar conduct was unlawful).

171 *Id.*

172 *See* Susan Bisom-Rapp, *Sex Harassment Training Must Change: The Case for Legal Incentives for Transformative Education and Prevention*, 71 STAN. L. REV. ONLINE 62, 62–63 (2018) (noting the use of training as a means of addressing workplace harassment).

173 *See* Joanna Grossman, *Sexual Harassment in the Post-Weinstein World*, 11 U.C. IRVINE L. REV. 943, 970 (2021).

174 *See id.* (stating that within one year of the Supreme Court's decisions in *Ellerth* and *Faragher*, 97% of employers had such policies); Deborah L. Brake, *Retaliation in an EEO World*, 89 IND. L.J. 115, 133–34 (noting employers' reliance on internal reporting mechanisms).

would be deemed actionable under existing law.[175] She notes that these types of policies "have expanded popular understanding of the meaning of discrimination."[176] The EEOC's regulations also expressly encourage employers to sensitize their employees to the issue of harassment and inform employees of their right to raise the issue of harassment.[177]

Through their training and policies, employers not only provide their employees with broad definitions of employment discrimination, but they strongly encourage employees to report suspected discrimination before it becomes severe or pervasive.[178] Therefore, it would hardly be surprising for some employees, after having been sensitized to the issue of workplace harassment, to believe that a coworker's harassment of a nonemployee in the course of the coworker's duties is unlawful and should be reported. Yet, as Brake notes, many courts "have neglected to consider how employer harassment policies influence employees' perceptions and responses."[179] All too often, the result is that courts are quick to conclude that no reasonable employee could have believed that the conduct they reported to their employers was unlawful.[180]

Employees have other incentives to err on the side of making an internal report of possible harassment. As the law is currently structured, an employee who fails to utilize an employer's internal complaint procedure concerning discrimination may be precluded from recovering damages. Under the test devised by the Supreme Court in *Faragher v. City of Boca Raton*[181] and *Burlington Industries, Inc. v. Ellerth*,[182] an employer may avoid liability for a supervisor's harassment not resulting in a tangible employment action where the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to otherwise avoid harm.[183] This would naturally include the failure to report suspected harassment in accordance with an employer's internal complaint policy. Thus, employees are told that the failure to report what they suspect to be harassment may mean they

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175 Brake, *supra* note 174, at 144.

176 *Id.* at 157.

177 29 C.F.R. § 1604.11(f) (2021).

178 *See* Brake, *supra* note 174, at 144 ("[E]mployer policies typically encourage or even require employees to report any harassing behaviors right away, without waiting for the incidents to accumulate until they become severe or pervasive.").

179 *Id.* at 139.

180 *See id.* ("Courts applying the reasonable belief doctrine to harassment complaints give scant attention to how employer policies define harassment and direct employees to handle it.").

181 524 U.S. 775 (1998).

182 524 U.S. 742 (1998).

183 *Faragher*, 524 U.S. at 807–08; *Ellerth*, 524 U.S. at 765.

lose the right to recover damages. But, if they do complain, and their belief that the conduct was unlawful is unreasonable, the employer is free to retaliate in any manner the employer sees fit.[184]

While these rules apply most often in the case of an employee who is the actual victim of perceived discrimination, they may also apply in the case of an employee who complains about discrimination against a third party or assists a coworker who complains about such discrimination.[185] In some cases, the third-party victim may be another employee. But the victim could also be a nonemployee. In such cases, courts unrealistically expect the reporting employee to know, for example, that harassment directed at an independent contractor is not an unlawful employment practice under Title VII or that harassment directed at some other nonemployee is not unlawful even when it occurs within the scope of an employee's employment.[186] The effect is to deny coverage to the employee who, in good faith, reports such conduct on the grounds that the employee did not engage in protected activity.

In one strange example, an employee of one employer who was assigned to work at another employer's facility experienced a pattern of harassment by the other employees.[187] Her own employer fired her after she complained about this harassment.[188] The plaintiff sued her employer on the grounds that it did not adequately respond to her complaints about a hostile work environment and that it retaliated against her for her complaints about the hostile work environment.[189] The trial court made quick work of the hostile work environment claim, granting summary judgment on the grounds that the conduct of the nonemployees was not severe or pervasive.[190] Even if the conduct of the third parties was not severe or pervasive, the employee could have engaged in protected activity if she reasonably believed that it was.[191] But the fissured nature of the workforce presented a special problem for the employee's retaliation claim. According to the trial court, the employee could not have reasonably believed that she had engaged in protected activity when she reported the harassment by third parties to her employer because her employer lacked the ability and authority to correct

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184 *See* Rosenthal, *supra* note 157, at 1129–30 (discussing this conundrum).

185 *See* Long, *supra* note 2, at 957–60 (discussing this scenario).

186 *See supra* notes 67–85 and accompanying text.

187 Roy v. Correct Care Sols., LLC, 914 F.3d 52, 57 (1st Cir. 2019).

188 *Id.* at 61.

189 *See id.* at 56.

190 Roy v. Correct Care Sols., LLC, 321 F. Supp. 3d 155, 168–69 (D. Me. 2018), *aff'd in part, rev'd in part*, 914 F.3d 52 (1st Cir. 2019).

191 *Id.* at 169.

the alleged harassing behavior.[192] Only the other employer's supervisors had the ability and authority to discipline or discharge offending employees.[193] Therefore, the plaintiff did not engage in protected activity, and the trial court granted summary judgment in favor of the employer.[194]

The reasonable belief standard may also work to limit recovery where an employer takes action against the nonemployee friend or family member of an employee who complains about perceived discrimination. If a complaining employee's belief that she was discriminated against is determined to be unreasonable, the employee's complaint is not protected.[195] Logically, this would also mean that a friend or family member who suffered harm as a result of an employer's retaliation would not have a claim. Thus, not only does the reasonable belief standard adversely impact employees who complain about discrimination targeted at third parties, it may also adversely impact third parties who are themselves the victims of employer retaliation.

B. The Shortcomings of Title VII's Narrow Statutory Language

Cases involving retaliation and third parties illustrate another, broader shortcoming of current employment retaliation law: the often-narrow nature of the language employed in anti-retaliation provisions. In some respects, the anti-retaliation provisions found in Title VII and other major employment discrimination statutes are fairly broad. But in other respects, the statutory language is, by its nature, fairly limited.

1. Language Prohibiting an Employer from Retaliating Against "His Employees"

Title VII's anti-retaliation provision prohibits "an employer" from retaliating against "any of *his* employees" because the employee has engaged in protected activity.[196] This language limits the reach of the provision, particularly in the kinds of scenarios discussed in this Article. For example, in a federal decision from Florida, the plaintiff sued his employer, a state agency, alleging that his employer fired him because his wife had filed a discrimination charge against a different state agency.[197] The court treated the two agencies as separate

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192 *See id.*

193 *See id.*

194 *Id.* at 170.

195 *See id.* at 169–70.

196 42 U.S.C. § 2000e-3(a) (emphasis added).

197 Underwood v. Dep't Fin. Servs. Fla., No. 4:11cv466-RH/CAS, 2012 WL 12897085, at *1 (N.D. Fla. Aug. 8, 2012).

employers.[198] According to the court, "[t]here [was] simply no way" to read Title VII's anti-retaliation provision so that it prohibits an employer from taking action against an employee because a nonemployee engaged in protected activity concerning a different employer.[199]

Under a literal reading of Title VII's anti-retaliation provision, the court's conclusion is probably correct. To use the language of the statute, the plaintiff's employer may have discriminated against one of "his employees," but it did not do so "because *he*"—the employee—had engaged in protected activity.[200] Instead, the employer discriminated against the plaintiff because his wife had accused a separate employer of discrimination. In addition, the case is distinguishable from *Thompson* insofar that the plaintiff and the employee engaging in the protected activity were not both employed by the same employer.[201] And, under the majority approach to retaliation cases involving retaliatory acts directed at nonemployees, the plaintiff would not be a person aggrieved by the employer's conduct because, according to these courts, the inclusion of the "his employees" language in Title VII's anti-retaliation provision indicates a congressional intent to exclude nonemployees from the protection of the statute in these instances.[202]

The anti-retaliation language of other statutes, however, is sometimes not so limited. For example, the ADA's anti-retaliation prohibits "a person"—not just an employer—from retaliating against "any individual" who has engaged in protected activity.[203] Some state statutes take a similar approach.[204] This type of language has been held to apply to the situation in which a third party persuades an employer to fire one of its employees for having engaged in protected activity, such as the situation in which a business demands that a contractor fire one of its employees for complaining about discrimination by the business.[205] This type of language has also been held to extend coverage to an independent contractor when an employer retaliates against the contractor for opposing harassment by

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198 *Id.*

199 *Id.* at *3.

200 42 U.S.C. § 2000e-3(a) (emphasis added).

201 Thompson v. N. Am. Stainless, LP, 562 U.S. 170, 170 (2011).

202 *See supra* notes 112–117 and accompanying text.

203 *See* 42 U.S.C. § 12203(a). Despite the inclusion of the "person" language, courts have consistently held that there is no individual liability under the ADA. *See, e.g.*, Wathen v. Gen. Elec. Co., 115 F.3d 400, 404 n.6 (6th Cir. 1997).

204 *See, e.g.*, ME. REV. STAT. ANN. tit. 5, § 4633(1) (2022); WASH. REV. CODE § 49.60.210(1) (2022).

205 *See, e.g.*, Roy v. Correct Care Sols., LLC, 914 F.3d 52, 71 (1st Cir. 2019) (involving this scenario); Me. Hum. Rts. Comm'n v. Saddleback, Inc., No. CV-06-219, 2008 WL 6875449, at *8 (Me. Super. Ct. Oct. 31, 2008) (holding that ski resort violated statute by demanding that contractor fire one of its employees because the employee had engaged in protected activity).

a coworker, including where that coworker is another contractor.[206] These kinds of statutes illustrate the limited nature of Title VII's anti-retaliation provision in an age in which the traditional workplace consisting merely of an employer and its employees is increasingly becoming outdated.

2. The Absence of Language Providing a Remedy to an Individual Aggrieved by an Employer's Retaliation

The Title VII cases involving an employer who retaliates against an employee by taking action against a nonemployee illustrate another shortcoming of the language of the anti-retaliation provisions of some statutes. As discussed, Title VII and some other major employment discrimination statutes contain the aggrieved person standard, which, at least under the minority approach, might provide a remedy to a third party who is made to suffer for the "sins" of an employee who engages in protected activity.[207] But not all statutes contain this language.[208] The result under such a statute is likely to be twofold: (1) unlike in *Thompson*, a nonemployee who suffers harm because an employee engaged in protected activity is unlikely to have a retaliation claim, and (2) a nonemployee who actually engages in an otherwise protected activity is also unlikely to have a claim.

For example, the Family and Medical Leave Act ("FMLA") does not contain Title VII's aggrieved person language, and only provides a remedy to an "employee."[209] In an unpublished opinion, the Sixth Circuit Court of Appeals held that a nonemployee does not have an FMLA retaliation claim when an employer takes action against the nonemployee for opposing unlawful discrimination against an employee.[210] The case involved an individual who was appointed by an elected official to serve in a position.[211] The individual refused

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[206] *See* Sambasivan v. Kadlec Med. Ctr., 338 P.3d 860, 872–73 (Wash. Ct. App. 2014) (holding statute that prohibited an employer from discriminating against "any person" because he or she engaged in protected activity encompassed claim by independent contractor against employer); *cf.* Currier v. Northland Servs., Inc., 332 P.3d 1006, 1011–12 (Wash. Ct. App. 2014). An independent contractor may also bring a race discrimination and retaliation claim under 42 U.S.C. § 1981. *See, e.g.*, CBOCS W., Inc. v. Humphries, 553 U.S. 442, 455 (2008); Brown v. J. Kaz, Inc., 581 F.3d 175 (3d Cir. 2009). Since Section 1981 only prohibits discrimination on the basis of race and color, its reach is more limited. *See* 42 U.S.C. § 1981.

[207] *See supra* note 55 and accompanying text.

[208] *See, e.g.*, West v. Wayne Cnty., 672 F. App'x 535, 539 (6th Cir. 2016) (Family and Medical Leave Act); Gibbs v. Norfolk S. Ry. Co., CIV.A. No. 3:14-cv587-DJH, 2015 WL 4273208, at *5 (W.D. Ky. July 14, 2015) (Federal Railroad Safety Act); Su v. Siemens Indus., Inc., No. 12-cv-03743-JST, 2014 WL 3615582, at *3–4 (N.D. Cal. July 22, 2014) (California Labor Code).

[209] 29 U.S.C. § 2617(a)(1).

[210] *West*, 672 F. App'x at 539.

[211] *Id.* at 540.

to fire an employee because he believed that doing so would violate the FMLA; thus, he had engaged in what would ordinarily qualify as protected opposition conduct.[212] His supervisor then fired him, allegedly for this protected activity.[213] But, because the individual was appointed to his position, he did not qualify as an "eligible employee" under the FMLA's definition.[214] The individual attempted to place his situation within the holding of *Thompson*, which extended a remedy under Title VII to nonemployees.[215] But the Sixth Circuit explicitly rejected the plaintiff's reliance on *Thompson*, pointing to the fact that the FMLA does not contain similar aggrieved person language.[216] Other courts have also relied on this same reasoning in rejecting retaliation claims that more closely resemble the claim at issue in *Thompson*, where an employer allegedly retaliates against one employee who has engaged in protected activity by taking action against another employee.[217]

3. *Statutory Language that Defines Unlawful Employer Action in a Narrow Manner*

Numerous state and federal statutes speak of employer retaliation in terms of "discharging" an employee or discriminating against an employee in terms of pay, terms, conditions, or privileges of employment.[218] These statutes are most naturally read to limit actionable retaliation to actions impacting an individual's job in a material way.[219] Indeed, as discussed, the Supreme Court relied heavily upon the absence of such language, concluding in *Burlington Northern* that Title VII's anti-retaliation provision should be construed broadly to prohibit retaliation that might well dissuade a reasonable employee from engaging in protected activity, even if the retaliation does not impact the terms or conditions of employment.[220]

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[212] *Id.* at 537.

[213] *Id.*

[214] *Id.* at 538.

[215] *Id.* at 539.

[216] *Id.*

[217] *See, e.g.*, Gibbs v. Norfolk S. Ry. Co., No. 3:14-cv-587-DJH, 2015 WL 4273208, at *5 (W.D. Ky. July 14, 2015); Su v. Siemens Indus., Inc., No. 12-cv-03743-JST, 2014 WL 3615582, at *3–4 (N.D. Cal. July 22, 2014).

[218] *See* Long, *supra* note 8, at 547 (discussing federal statutes employing such language); Alex B. Long, Viva *State Employment Law! State Law Retaliation Claims in a Post*-Crawford/Burlington Northern *World*, 77 TENN. L. REV. 253, 272 (2010) (discussing state statutes employing similar language).

[219] *See* Long, *supra* note 8, at 548 ("[T]he more natural reading of this kind of statutory language would be to limit retaliation to adverse employment actions or ultimate employment actions.").

[220] Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 61–62 (2006).

On its face, the language in Title VII's anti-retaliation provision prohibiting discrimination and its accompanying material adversity standard appear quite broad. But the reality is oftentimes quite different. Many courts have adopted a highly demanding standard as to what qualifies as a materially adverse action.[221] In applying the Supreme Court's standard from *Burlington Northern*, these courts have held as a matter of law that various forms of employer retaliation, including threatened termination, negative evaluations, disciplinary write-ups, threatened criminal prosecution, and even the actual filing of a police report, would not deter a reasonable employee from engaging in protected activity.[222] Thus, Title VII's material adversity standard is often quite demanding in practice.

The limited nature of Title VII's anti-retaliation language becomes even more apparent when one compares it to other statutes that are sometimes implicated in the cases concerning employer retaliation involving third parties, as described in this Article. The National Labor Relations Act ("NLRA") and the Fair Housing Act Amendments ("FHAA") contain language that makes it unlawful for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" by the respective acts.[223] Similar language was also incorporated into the ADA, which, in addition to language that tracks Title VII's anti-retaliation provision, makes it "unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise" of his or her rights under the statute.[224] The FMLA contains similar language, making it unlawful for an employer to "interfere" with any individual in the exercise of any rights provided by the statute, such as the right to medical leave.[225] Several state statutes employ similar language.[226]

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[221] *See* Sandra F. Sperino, *Retaliation and the Reasonable Person*, 67 FLA. L. REV. 2031, 2033 (2015) (discussing problems posed by narrow judicial interpretations).

[222] *See* Dick v. Phone Directories Co., Inc., 397 F.3d 1256, 1269 (10th Cir. 2005) (holding that causing an employee to file a police report that does not lead to criminal charges does not constitute unlawful retaliation under Title VII); Sperino, *supra* note 221, at 2041 ("[C]ourts dismiss cases when workers allege that employers subjected them to threatened termination; negative evaluations; disciplinary write-ups; threatened suspensions; disciplinary and administrative leave; shift changes; threatened criminal prosecution; removal from an office; threatened disciplinary action; and reports of poor performance.").

[223] 29 U.S.C. § 158(a)(1); *accord* 42 U.S.C. § 3617.

[224] 42 U.S.C. § 12203(b). The D.C. Circuit Court of Appeals has clarified that the two provisions are separate and that different proof structures may apply. *See* Menoken v. Dhillon, 975 F.3d 1, 9–10 (D.C. Cir. 2020) (concluding that § 12203(b) of the ADA provides distinct protection from the ADA's anti-retaliation provision but declining to adopt a specific framework for dealing with such claims).

[225] 29 U.S.C. § 2615(a)(1).

[226] *See, e.g.*, ARK. CODE ANN. § 16-123-108(b) (2022); ARIZ. REV. STAT. ANN. § 41-1492.10(B) (2022); N.D. CENT. CODE § 14-02.5-45(2) (2021); WYO. STAT. ANN. § 40-26-144(b) (2022); *see also* ME. REV. STAT. ANN. tit. 5, § 4553(10)(D) (2021) (prohibiting a party from "compelling or coercing another" to retaliate against an individual for engaging in protected activity).

This type of language may prohibit more forms of employer action than Title VII's material adversity standard. On its face, the "coerce, intimidate, threaten, or interfere" language articulates a broader standard than *Burlington Northern*'s material adversity standard.[227] For instance, under the plain language of the provision, a defendant who "threaten[s]" to impose an adverse action—such as a legal action or demotion—upon an individual who exercised a right guaranteed by the relevant statute has violated this provision, even if the threat goes unfulfilled.[228] In contrast, numerous courts have held that unfulfilled threats alone do not meet Title VII's material adversity standard.[229] Courts also have generally construed the interference clause broadly.[230] Some courts have held that employer coercion, intimidation, threats, or interference is actionable when it "tends to chill" an employee's exercise of rights.[231] While this language is similar to the material adversity standard, which prohibits employer conduct that might dissuade a reasonable employee from engaging in protected activity, courts have often given an expansive reading to the "tends to chill" language that is broader than the reading given in Title VII cases.[232]

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[227] Mondzelewski v. Pathmark Stores, Inc., 162 F.3d 778, 789 (3d Cir. 1998) (stating that ADA provision prohibiting a defendant from coercing, intimidating, threatening, or interfering with another's exercise of rights "arguably sweeps more broadly" than anti-retaliation provision) (quoting 42. U.S.C. § 12203(b)); *see* Brown v. City of Tucson, 336 F.3d 1181, 1192 (9th Cir. 2003) (stating that the ADA's interference provision "protects a broader class of persons" than the anti-retaliation provision).

[228] *See Brown*, 336 F.3d at 1193 ("[T]he plain language . . . clearly prohibits a supervisor from threatening an individual with transfer, demotion, or forced retirement unless the individual foregoes a statutorily protected accommodation."); Neudecker v. Boisclair Corp., 351 F.3d 361, 364 (8th Cir. 2003) (holding that FHAA plaintiff stated a claim where landlord threatened to evict plaintiff for complaining that tenants were engaging in disability harassment); Lovejoy-Wilson v. NOCO Motor Fuel, Inc., 263 F.3d 208, 222–24 (2d Cir. 2001) (holding employer's threat to initiate legal action if plaintiff continued to request a reasonable accommodation amounted to unlawful threats or intimidation).

[229] *See* Sperino, *supra* note 221, at 2041 ("[C]ourts dismiss cases when workers allege that employers subjected them to threatened termination; negative evaluations; disciplinary write-ups; threatened suspensions; disciplinary and administrative leave; shift changes; threatened criminal prosecution; removal from an office; threatened disciplinary action; and reports of poor performance.").

[230] *See, e.g.*, Walker v. City of Lakewood, 272 F.3d 1114, 1129 (9th Cir. 2001) ("'[I]nterference,' in particular, 'has been broadly applied to reach all practices which have the effect of interfering with the exercise of rights under the federal fair housing laws.'" (quoting United States v. Hayward, 36 F.3d 832, 835 (9th Cir. 1994))); Mich. Prot. & Advoc. Serv., Inc. v. Babin, 18 F.3d 337, 347 (6th Cir. 1994) (stating the FHAA's language has been interpreted broadly).

[231] *See* Three D, LLC v. NLRB, 629 F. App'x 33, 38 (2d Cir. 2015) ("A rule violates [the NLRA's interference provision] if it would reasonably tend to chill employees in the exercise of their [rights]."); Bachelder v. Am. W. Airlines, Inc., 259 F.3d 1112, 1123 (9th Cir. 2001) (stating defendant violated FMLA by engaging in conduct that tends to chill an employee's freedom to exercise employee's rights); *see also* N.Y. Univ. Med. Ctr. v. NLRB, 156 F.3d 405, 410 (2d Cir. 1998) ("An employer's conduct violates [the NLRA's interference provision] if under all the existing circumstances, the conduct has a reasonable tendency to coerce or intimidate employees, regardless of whether they are actually coerced.").

[232] *See, e.g.*, Cal. Acrylic Indus., Inc. v. Nat'l Lab. Rels. Bd., 150 F.3d 1095, 1099 (9th Cir. 1998) (noting that filming and photographing of employees engaged in union activities violates the NLRA); F.W. Woolworth

While this type of provision most naturally applies when an employer takes action against an individual who has asserted a substantive right under the applicable statute,[233] some courts have held that this language covers an individual's right to oppose unlawful conduct and the more general right to work in a workplace free from discrimination.[234] Consistent with decisional law under the NLRA, at least one court has held that this provision applies where, as in *Thompson*, an employer takes action against an employee who has filed a discrimination claim against the employer by taking action against a relative of the complaining employee, including even where the relative is a nonemployee.[235]

In a case from Maine, an employee was fired after complaining about unlawful conduct on the part of employees of a different employer at the same jobsite.[236] According to the plaintiff, this other employer had hired the plaintiff's employer to perform work at the site and threatened to fire the plaintiff's employer unless it fired the plaintiff for having made the complaints.[237] The court concluded that the other employer had unlawfully coerced or compelled the plaintiff's employer to fire the plaintiff in retaliation for having engaged in protected activity.[238] The fact that this type of language potentially provides some plaintiffs with a remedy when the majority approach under Title VII does not highlights the comparatively limited nature of Title VII's retaliation provision.

Co., 310 NLRB 204, 2014 (1993) (finding that taking pictures of employees without justification has a tendency to chill employees in the exercise of their rights under the NLRA). At least one court has adopted Title VII's material adversity standard for use in cases brought pursuant to this "coerce, intimidate, threaten, or interfere" language in other statutes. *See* Marks v. BLDG Mgmt. Co., No. 99 CIV. 5733, 2002 WL 764473, at *9–11 (S.D.N.Y. Apr. 26, 2002) (adopting this standard).

233 *See Bachelder*, 259 F.3d at 1124 (holding that FMLA's "interference" language, not its anti-retaliation language, applies when employer takes negative action against employees who used FMLA leave).

234 *See, e.g.*, Fogleman v. Mercy Hosp., Inc., 283 F.3d 561, 570–71 (3d Cir. 2002) (recognizing claim where employer allegedly took action against father who filed a discrimination claim under the ADA against employer by firing son); Lopez v. Commonwealth, 978 N.E.2d 67, 78 (Mass. 2012) ("Among the rights protected by [Massachusetts's employment relation statute] is the right to be free from discrimination in the terms, conditions, and privileges of employment, which includes the right to equal opportunities for promotion without discrimination on the basis of race, color, or national origin.").

235 *See Fogleman*, 283 F.3d at 570–71 (recognizing ADA claim by son who was allegedly fired because of his father's opposition to discrimination by the same employer); Kenrich Petrochemicals, Inc. v. NLRB, 907 F.2d 400, 407 (3d Cir. 1990) (recognizing such a claim under the NLRA where employer fired a supervisor who was not a covered employee under the Act).

236 Me. Hum. Rts. Comm'n v. Saddleback, Inc., No. CV-06-219, 2008 WL 6875449, at *1–2 (Me. Super. Ct. Oct. 31, 2008).

237 *Id.* at *4–5.

238 *Id.* at *8.

C. The Failure to Reflect the Realities of the Modern Workplace

Another problem with existing workplace retaliation law that the third-party retaliation cases discussed in this Article highlight is the failure of the law to reflect the realities of the modern workplace. The employment law field as a whole is wrestling with the increasing prevalence of independent contractors and other nonemployees in the workplace. While the traditional workplace was likely to consist almost exclusively of an employer and its employees, the modern workplace increasingly consists of employees, independent contractors, and workers provided by staffing agencies.[239] This increase in the number of "fissured" workplaces in which multiple employers may have influence over an employee's work environment raises challenging questions concerning the scope of an employer's liability for the misconduct of nonemployee workers.[240]

1. The Problem of Multiple Employers and the Presence of Third Parties in the Workplace

Title VII protects employees from discrimination and retaliation by their employers. The statute does not extend protection to independent contractors.[241] But employers' increasing reliance on independent contractors and other nonemployee workers has spurred controversy concerning the ability of employers to avoid liability for harassment and other forms of discrimination targeted at contractors and other nonemployee workers.[242]

The issues are made even more difficult by the reality of today's workplace that more than one employer may have influence over an employee's work environment. To establish liability for discrimination or retaliation against an entity that is not technically the employee's employer, but that exerts considerable influence or control over the employee's job performance, the employee would need to rely on a joint employer theory. A joint employer

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[239] *See* Ruben Alan Garcia, *Modern Accountability for a Modern Workplace: Reevaluating the National Labor Relations Board's Joint Employer Standard*, 84 GEO. WASH. L. REV. 741, 749 (2016) (stating that the modern workplace is "a 'fissured' collection of franchises, subcontractors, and staffing agencies").

[240] *See* Charlotte Garden and Joseph E. Slater, *Comments on the Restatement (Third) of Employment Law, Chapter 1*, 21 EMP. RTS. & EMP. POL'Y J. 265, 266 (2017) ("'Fissured' work arrangements in which multiple entities are responsible for different aspects of employees' working conditions are becoming increasingly common.").

[241] *See* Proa v. NRT Mid Atl., Inc., 618 F. Supp. 2d 447, 458 (D. Md. 2009) ("Title VII does not apply to independent contractors.").

[242] *See* Seth D. Harris & Alan B. Krueger, *A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The "Independent Worker"* 7 (Hamilton Project, Discussion Paper No. 2015-10, 2015), https://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf.

relationship may exist when two separate employers are "not sufficiently related to qualify as an integrated enterprise, but . . . exercise sufficient control of an individual to qualify" as the individual's employer.[243]

There are numerous Title VII discrimination and retaliation cases involving plaintiffs who are technically employed by one employer but who interact with another entity, and in which the issue of joint employer status is at issue.[244] Courts have recognized that two entities can be considered the same employer of an employee in the Title VII context when they "share or co-determine those matters governing the essential terms and conditions of employment."[245] But, unfortunately, there is considerable disagreement among the federal courts concerning the appropriate test for making this determination.[246] Regardless of

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[243] *Section 2 Threshold Issues*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, at III(B)(1)(a)(iii)(b), https://www.eeoc.gov/laws/guidance/section-2-threshold-issues.

[244] *See, e.g.*, Tillman v. Hammond's Transp., LLC, No. 20-1656, 2021 WL 1733995, at *1 (E.D. La. May 3, 2021); Smith v. SpiriTrust Lutheran, No. 1:20-cv-00174, 2021 WL 1103571, at *7 (M.D. Pa. Mar. 23, 2021).

[245] Butler v. Drive Auto. Indus. Am., Inc., 793 F.3d 404, 408 (4th Cir. 2015) (quoting Bristol v. Bd. of Cnty. Comm'rs, 312 F.3d 1213, 1218 (10th Cir. 2002) (en banc)).

[246] Courts have adopted three different tests to determine joint employer status under Title VII. Courts applying the control test tend to apply the following factors:

> 1) authority to hire and fire employees, promulgate work rules and assignments, and set conditions of employment, including compensation, benefits, and hours;
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> 2) day-to-day supervision of employees, including employee discipline; and
>
> 3) control of employee records, including payroll, insurance, taxes and the like.

Butterbaugh v. Chertoff, 479 F. Supp. 2d 485, 491 (W.D. Pa. 2007) (quoting Cella v. Villanova Univ., No. 01–7181, 2003 WL 329147, at *7 (E.D. Pa. Feb. 12, 2003)). This test gives considerable weight to whether the second employer maintains control over the formalities of the working relationship, such as whether the second employer has the authority to promulgate work rules and assignments; set compensation, benefits, and hours; and maintain control over employee records, such as payroll and taxes. *See* Carter v. Dutchess Cmty. Coll., 735 F.2d 8, 12 (2d Cir. 1984); *see also* 29 C.F.R. § 791.2 (2021) (employing similar rule under the FLSA). "[The economic realities test] differs from the control test in that it focuses on 'degree of economic dependence of alleged employees on the business with which they are connected that indicates employee status.'" *Butler*, 793 F.3d at 411–12. (quoting EEOC v. Zippo Mfg. Co., 713 F.2d 32, 37 (3d Cir. 1983)). As the Fourth Circuit Court of Appeals has explained, "the economic realities test focuses less on the legal parameters of employment, but more on the entity (or entities) on which the employee relies on for work and remuneration—irrespective of who is actually writing the paychecks and determining work status." *Id.* at 412. Finally, some courts have adopted a hybrid test, which focuses on a host of factors:

(1) authority to hire and fire the individual;
(2) day-to-day supervision of the individual, including employee discipline;
(3) whether the putative employer furnishes the equipment used and the place of work;
(4) possession of and responsibility over the individual's employment records, including payroll, insurance, and taxes;
(5) the length of time during which the individual has worked for the putative employer;
(6) whether the putative employer provides the individual with formal or informal training;
(7) whether the individual's duties are akin to a regular employee's duties;
(8) whether the individual is assigned solely to the putative employer; and

the test a court employs, the law in this area lacks a touchstone or unifying theme to help guide courts.[247] The result is a considerable amount of unpredictability on the issue of whether a court will classify a particular entity as a joint employer.[248]

2. The Likelihood for More Retaliation Involving Third Parties

As Professor Dallan Flake has argued, "[e]mployees are more vulnerable to discrimination by non-employees than ever before. This is due to the fact that in the modern workplace[,] employees are more likely to interact regularly with non-employees, thus heightening the possibility of discrimination."[249] By the same logic, employees are more vulnerable to retaliation for complaining about discrimination than ever before.

Flake identifies two main reasons why employees are more likely to interact with nonemployees in today's workplace.[250] The first is the fact that that the U.S. economy has become service-based, thus creating more opportunities for employees to interact with customers and clients.[251] Second, modern workplaces "often house more than just a single organization's workers; vendors, suppliers, temporary employees, employees of other entities, independent contractors, and many others are also regularly present."[252] The increasing complexity of the modern workplace also makes it more difficult to identify which employer employs an employee in given cases. When one also takes into account "the proliferation of professional employer organizations, employee management companies, temporary employment and staffing agencies, joint-employment agreements, and work-sharing arrangements," the issue of who qualifies as an "employee" in a given case becomes increasingly complex.[253]

While the increased interaction between employees and nonemployees creates more potential for discrimination by nonemployees, it also necessarily means more potential for employer retaliation involving third parties. For

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(9) whether the individual and putative employer intended to enter into an employment relationship.

Id. at 414.

247 *See* Kati L. Griffith, *The Fair Labor Standards Act at 80: Everything Old is New Again*, 104 CORNELL L. REV. 557, 599 (2010) ("Administrators and courts struggle to identify a touchstone in these cases that would lead to more consistency and predictability.").

248 *See id.* at 563–65 (noting the lack of predictability on this issue).

249 Dallan F. Flake, *Employer Liability for Nonemployee Discrimination*, 58 B.C. L. REV. 1169, 1176 (2017).

250 *Id*

251 *Id.*

252 *Id.*

253 *Id.* at 1180.

example, the fact that many workplaces now regularly contain a mix of employees and nonemployees makes it more likely that an individual will complain to *someone*—either the individual's own employer or the employer who actually controls the workplace—about the harassment by s*omeone*—either an employee or a nonemployee—against someone else—either an employee or a nonemployee. This, in turn, increases the likelihood that an employer will take action in response against *someone*—either the employer's own employee or a third party.

3. *The Failure of the Law to Address the Realities of the Modern Workforce as Applied to Workplace Retaliation*

If the realities of the modern workplace increase the likelihood of retaliation involving third parties, the reality is also that the law as it currently exists is unlikely to afford a remedy to the victims. The narrow language contained in some anti-retaliation provisions, the cramped judicial interpretation of some of that language, and the increased interaction between employees and nonemployees in the workplace necessarily means that more individuals involved in these types of retaliation cases involving third parties will be without an effective remedy.

In some cases, resorting to the joint employer rules may enable an individual to proceed on a retaliation claim against an entity that is not technically the individual's employer.[254] But, by and large, these rules have only limited application to the situations described in this Article. In some cases in which an employee reports a coworker's harassment of a nonemployee, there may be no argument at all that the nonemployee is an "employee" at all, such as where the nonemployee is a customer.[255] As such, the joint employer rule would not aid the reporting employee, and the employee would be at the mercy of whether a court concludes that the employee could reasonably believe that it is unlawful for a coworker to harass a nonemployee.

The joint employer theory is even less likely to apply in the second category of cases in which an employer takes action against a nonemployee in retaliation for the protected conduct of an employee. In many of these cases, the friend or family member who is targeted by the employer to pay for the "sins" of the

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[254] *See, e.g.*, Peterkin v. Prospect Airport Servs., Inc., No. 21-490, 2021 WL 2400753, at *9–10 (E.D. Pa. June 11, 2021) (concluding plaintiff plausibly alleged entities were joint employers for purposes of Title VII claim).

[255] *See supra* notes 79–83 and accompanying text.

employee will not even work in the employer's workplace.[256] As a result, there is likely to be little argument that the third party is an employee of the employer.

D. The Failure of Courts to Treat Retaliation and Discrimination as Being Connected

A final shortcoming of retaliation law that is illustrated by the types of cases discussed in this Article is the tendency of some courts to treat the problems of retaliation and discrimination as being unrelated in purpose. The Supreme Court has repeatedly stressed the role that Title VII's anti-retaliation provision plays in furthering the statute's overarching goal of eliminating discrimination.[257] Yet, courts that take a narrow view of the anti-retaliation provision tend to consider retaliation claims in isolation, making only infrequent reference to the role that employer retaliation plays in furthering discrimination.

For example, decisions holding that no claim exists when an employer retaliates against an employee by targeting a nonemployee are often premised on the view that the only interests covered by Title VII are the interests of those in employment relationships with the defendant.[258] The plaintiff's interests, as a nonemployee, are, "at best, only 'marginally related to' the purposes of Title VII."[259] This represents a disturbingly narrow vision of the purposes of Title VII. Title VII's anti-retaliation provision exists to further the statute's anti-discrimination goal. By taking the position that one of the victims of an employer's retaliation is only marginally related to the goals of the statute is to treat the question of whether one qualifies as an aggrieved person as some sort of sterile, intellectual inquiry divorced from the purposes of the statute.

The same is true of the decisions holding that no unlawful retaliation has occurred when an employer takes action against an employee for reporting a coworker's harassment of a nonemployee or for complaining about discrimination that is unlawful under some other statute but not Title VII. These decisions proceed from the underlying assumption that such conduct is so far removed from the scope of Title VII that the reporting employee could not even reasonably believe that such conduct was unlawful under Title VII.[260] This mindset is particularly jarring in light of the law's treatment of claims involving

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[256] *See supra* notes 124–139 and accompanying text.

[257] *See supra* notes 34–35, 45 and accompanying text.

[258] *See supra* notes 110–111 and accompanying text.

[259] Simmons v. UBS Fin. Servs., Inc., 972 F.3d 664, 668 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 1382 (2021).

[260] *See supra* notes 73–94 and accompanying text.

harassment by a third party to the employment relationship, such as a customer. In such cases, not only can an employer be held liable for permitting such harassment, but the employer can also be held liable for retaliating against the employee who complains about such harassment.[261]

Retaliation cases involving third parties are but one example of the narrow view of the purpose of anti-retaliation provisions that some courts take. For example, the Supreme Court's decision in *Burlington Northern* explicitly noted that a broad standard for determining when retaliation is actionable was consistent with Title VII's anti-discrimination purpose.[262] The standard the Court adopted—whether the action was materially adverse (*i.e.*, whether the action might deter a reasonable employee from complaining about discrimination)—directly ties Title VII's anti-retaliation provision to its anti-discrimination goal. Yet, numerous courts have interpreted the Court's standard in a highly restrictive manner.[263] In general, the decisions that take this restrictive approach tend to be more likely to omit any specific reference to the issue of whether the action would be likely to deter a reasonable employee from complaining about discrimination than are the decisions that apply the Court's material adversity standard in a manner consistent with the Court's decision.[264] In short, courts that recognize the connection between the two provisions are more likely to apply the Court's material adversity standard in a manner consistent with the Court's decision.

This tendency to view the purpose of Title VII's anti-retaliation provision in a limited manner keeps with the approach of some courts that treat Title VII as a statutory tort—the primary goal of which is to provide a remedy to an

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[261] *See, e.g.*, Riggs v. DXP Enters., Inc., No. 6:18-cv-00729, 2019 WL 5682897, at *4 (W.D. La. Oct. 31, 2019) (recognizing that an employee who files an EEOC charge about such conduct has engaged in protected activity); Thompson v. Panos X Foods, Inc., No. 14-10620, 2016 WL 1615702, at *4 (E.D. Mich. Apr. 22, 2016) (recognizing that complaining internally about such conduct is protected activity).

[262] *See supra* notes 32–35 and accompanying text.

[263] *See* Sperino, *supra* note 221, at 2035.

[264] *Compare* Emami v. Bolden, 241 F. Supp. 3d 673, 685 (E.D. Va. 2017) (stating that a negative performance review, standing alone, does not constitute a materially adverse action but failing to mention possible deterrent effect of such conduct), *and* Bhatti v. Trs. of Bos. Univ., 659 F.3d 64, 73 (1st Cir. 2011) (concluding that employer who issued written warnings to employee in response to complaint of discrimination had not engaged in materially adverse action but failing to mention possible deterrent effect of such conduct), *with* Mazur v. Sw. Veterans Ctr., No. CV17-826, 2018 WL 3957410, at *12 (W.D. Pa. Aug. 17, 2018) (referencing possible deterrent effect of supervisor's berating of plaintiff in front of other employees in denying defendant's motion to dismiss), *and* Hallmon v. Advance Auto Parts, Inc., 921 F. Supp. 2d 1110, 1118 (D. Colo. 2013) (referencing possible deterrent effect that repeated threats to issue a written warning, even if not acted upon, might have in concluding that such conduct may qualify as materially adverse).

individual plaintiff.[265] Increasingly lost is the notion that Title VII's mission is to end discrimination in the workplace.[266] As courts take a narrower view of the statute's purposes, they tend also to see Title VII's anti-retaliation provision as having only limited connection to the statute's broad anti-discrimination goals. All too often, the result is a narrow interpretation or application of Title VII's language in the retaliation context.

V. SOLUTIONS

Courts need to approach all retaliation cases with the idea that robust protection from retaliation is essential to fulfilling Title VII's anti-discrimination purpose. Regardless of whether a retaliation case involves a third party to the employer-employee relationship, courts should remain mindful of how employment retaliation may ultimately impact third parties if Title VII and other statutory anti-retaliation provisions are to serve their purposes. The following Part elaborates upon these ideas and applies them to the scenarios involving third parties in order to illustrate how courts and legislatures might put them into effect.

A. Interpreting Title VII's Anti-Retaliation Provision to Take into Account the Third-Party Effects of Discrimination

As the notion that Title VII is effectively a statutory tort has taken hold among courts, courts have increasingly viewed the primary purpose of the statute as to provide a remedy to an individual victim of discrimination.[267] Under this compensation-based conception of the statute, courts view disputes under Title VII as being limited to the parties involved. But it is important to recognize that the original goal of Title VII was to eliminate discrimination in the workplace

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[265] *See* Martha Chamallas, *Two Very Different Stories: Vicarious Liability Under Tort and Title VII Law*, 75 OHIO ST. L.J. 1315, 1316 (2014) ("Title VII has been reshaped [by courts] from an enterprise liabililty scheme to a 'statutory tort,' capable of redressing a limited number of wrongs done to individual employees, but largely incapable of achieving Title VII's broad purpose of deterring and eradicating workplace discrimination.").

[266] Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and its Effects*, 81 TEX. L. REV. 1249, 1252 (2003) ("There is no longer any concerted effort to eliminate discrimination; instead, efforts are directed at providing monetary compensation for past discrimination without particular concern for preventing future discrimination, or even remedying past discrimination, through injunctive relief.").

[267] *See* William R. Corbett, *Unmasking a Pretext for Res Ipsa Loquitur: A Proposal to Let Employment Discrimination Speak for Itself*, 62 AM. U. L. REV. 447, 462 (2013) (noting that the view of employment discrimination laws as "essentially federal statutory torts, the primary purpose of which is to compensate individuals for the personal injuries they suffer as a result of discrimination" has become the primary perception of the laws among courts).

in general.[268] When considering the problems of employment discrimination and retaliation, it is helpful to keep in mind the costs that permitting such conduct imposes on third parties and society more generally.

As others have noted, one of the most effective ways of preventing workplace harassment and discrimination is to provide robust protection from retaliation.[269] The ability of Title VII to combat workplace harassment and discrimination depends in no small measure on the willingness of employees to speak out about such behavior. Whether it is an employee who reports such conduct internally through an employer's established complaint process or an employee who files an EEOC charge or otherwise participates in a formal proceeding involving workplace discrimination, employees play a vital role in bringing discrimination to light.

The harms borne by the victims of employment discrimination—both economic and emotional—are well-documented.[270] And, obviously, the victims of employment retaliation—whether employees of the employer or third parties—experience their own harms. But when considering the harms that employment discrimination and retaliation cause, it is worth noting that the harms are not necessarily restricted to the immediate victims.

For example, employment discrimination causes economic harm beyond that experienced by direct victims. According to a 2020 study by Citigroup, the U.S. economy lost $2.7 trillion in income due to disparity in wages suffered by African Americans.[271] Other studies report significant losses in gross domestic product due to employment discrimination against older workers, LGBTQ employees, and the victims of sexual harassment.[272]

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[268] *See id.* at 456–57 (stating that, as originally conceived, "Title VII was primarily a public policy and civil rights statute aimed at eradicating" employment discrimination).

[269] Nicole Buonocore Porter, *Ending Harassment by Starting with Retaliation*, 71 STAN. L. REV. ONLINE 49, 50 (2018) ("[E]nding harassment must start with preventing retaliation.").

[270] *See* Press Release, Am. Ass'n of Univ. Women, Report: The Long-term Toll of Sexual Harassment: Research Shows that Women's Health, Job Security and Earnings are Impacted (Nov. 18, 2019), https://www.aauw.org/resources/news/media/press-releases/report-explores-the-long-term-toll-of-sexual-harassment/ (stating that sexual harassment is a factor in the pay gap between men and women and reporting that 27% of women who were harassed reported that the harassment disrupted their career advancement).

[271] *See* Adedayo Akala, *Cost of Racism: U.S. Economy Lost $16 Trillion Because of Discrimination, Bank Says*, NPR (Sept. 23, 2020), https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/09/23/916022472/cost-of-racism-u-s-economy-lost-16-trillion-because-of-discrimination-bank-says.

[272] *See* Kenneth Terrell, *Age Discrimination Costs the Nation $850 Billion, Study Finds*, AARP (Jan. 30, 2020), https://www.aarp.org/politics-society/advocacy/info-2020/age-discrimination-economic-impact.html (reporting results of study authored by the American Association for Retired Persons and the Economist Intelligence Unit); Crosby Burns, *The Costly Business of Discrimination*, CTR. AM. PROGRESS (Mar. 20, 2012),

One of the clearest examples of how the costs of employment discrimination may be borne by third parties is the case of disability discrimination. When the ADA was first introduced in Congress, supporters touted the economic benefits of the Act.[273] According to supporters, outright exclusion from the workplace of individuals with disabilities and the failure of employers to make reasonable accommodations to the disabilities of employees and applicants cost U.S. taxpayers billions of dollars annually in terms of unemployment and underemployment of individuals with disabilities.[274] Statistics showed that two-thirds of individuals with disabilities between the ages of sixteen and sixty-four wanted to work, but were unable to find work.[275] By requiring employers to make modest adjustments to their workplaces or the manner in which work is performed, supporters of the ADA argued that the Act would help reduce unemployment among people with disabilities.[276] Thus, in addition to the moral case for a law prohibiting discrimination against qualified individuals with disabilities, supporters of the ADA explicitly advanced an economic argument that noted the benefits to society as a whole.

An employer that retaliates against one who opposes discrimination occurring in the workplace contributes to these kinds of third-party harms. For example, the employer that is in a position to address harassment occurring in connection with the employer's business—regardless of whether the perpetrator or victim is an employee—who instead retaliates against one who brings such harassment to the employer's attention contributes to a workplace culture that allows discrimination and harassment to flourish. In such a case, the employer is contributing to the direct costs of discrimination and retaliation suffered by the victims as well as the costs to future victims and society more generally.

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https://www.americanprogress.org/issues/lgbtq-rights/reports/2012/03/22/11234/the-costly-business-of-discrimination/ (stating that the annual estimated cost of losing and replacing more than 2 million American workers who leave their jobs each year due to unfairness and discrimination is $64 billion and that 42% of gay workers report having experienced workplace discrimination); DELOITTE, THE ECONOMIC COSTS OF SEXUAL HARASSMENT IN THE WORKPLACE: FINAL REPORT 5 (Mar. 2019), https://www2.deloitte.com/content/dam/Deloitte/au/Documents/Economics/deloitte-au-economic-costs-sexual-harassment-workplace-240320.pdf (estimating costs of $3.5 billion in lost productivity and other costs due to sexual harassment in Australia).

273 *See* Samuel R. Bagenstos, *The Americans with Disabilities Act as Welfare Reform*, 44 WM. & MARY L. REV. 921, 926–27 (2003) ("[S]upporters of the proposed ADA argued that the statute was necessary to reduce the high societal cost of dependency—that people with disabilities were drawing public assistance instead of working, and that a regime of 'reasonable accommodations' could move people with disabilities off of the public assistance rolls and into the workforce in a way that would ultimately save the nation money.").

274 *See id.* at 966–67 (citing legislative history).

275 *See* BERNARD D. REAMS, JR., PETER J. MCGOVERN & JON S. SHULTZ, DISABILITY LAW IN THE UNITED STATES: A LEGISLATIVE HISTORY OF THE AMERICANS WITH DISABILITIES ACT OF 1990, PUBLIC LAW 101-336, at 9 (1992).

276 *See* Bagenstos, *supra* note 273, at 969–70 (citing legislative history).

B. Interpreting Title VII's Anti-Retaliation Provision to Advance the Statute's Anti-Discrimination Purpose

Courts that interpret Title VII and other anti-discrimination statutes in a manner that permits retaliation to thrive—regardless of whether the direct effects of the retaliation are borne solely by an employee or whether they extend to nonemployees like friends and family—also contribute to the problem of discrimination in the workplace. The Supreme Court has repeatedly emphasized the important role that anti-retaliation provisions play in the fight against discrimination. Lower courts need to do a better job of giving effect to this guidance.

1. Retaliation Against an Employee for Opposing Discrimination Against a Nonemployee: Revisiting the Reasonable Belief Standard

A court that keeps the interconnected nature of Title VII's anti-retaliation and anti-discrimination goals in mind is more likely to give a broad reading to the relevant legal concepts in a retaliation case. One example is the decisional law requiring an employee to have a reasonable belief that the conduct being opposed was unlawful before the employee is entitled to protection under the statute. As discussed, some courts, while paying lip service to the notion of a "reasonable belief" standard, in reality apply a much more demanding standard.[277] The effect is often to limit the scope of Title VII's anti-retaliation provision, including in the situations described in this Article. A court that views robust protection from retaliation as a crucial means of advancing the statute's anti-discrimination purpose is more likely to give a broad—or at least a good faith—reading of this requirement.

Several authors have suggested doing away altogether with the reasonable belief standard.[278] Under this approach, opposition conduct would be protected provided an employee has a good faith belief that the conduct opposed was unlawful.[279] Indeed, numerous state whistleblower and discrimination statutes employ such a good faith standard.[280] There is much to recommend in adopting a subjective, good faith standard, but given the fact that every federal circuit employs the reasonable belief standard, it is perhaps too much to expect courts to completely jettison the objective standard.

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[277] *See supra* notes 163–171 and accompanying text.

[278] *See* Rosenthal, *supra* note 164, at 1149; Gorod, *supra* note 169, at 1502.

[279] *See* Rosenthal, *supra* note 164, at 1149.

[280] *See, e.g.*, 43 PA. STAT. AND CONS. ANN. § 1423(a) (West 2020); LA. STAT. ANN. § 23:967 (2020); ME. REV. STAT. ANN. tit. 26, § 833 (2020).

Instead, courts could maintain the objective standard but alter its focus to better comport with existing law. Ordinarily, when the law adopts a generic reasonableness standard, it does so on the assumption that the person required to meet that standard has the requisite knowledge or experience to make an objectively reasonable determination as to a course of action. For example, tort law generally assumes that every adult individual has the requisite life experience to make a determination as to how to proceed when driving a car, handling hot beverages, or confronting slippery floors. These are all situations in which the average individual has the knowledge or life experience to make an objectively reasonable decision as to how to proceed.

In assessing whether the individual acted reasonably when engaging in such activities, tort law adopts a generic "reasonable person" standard. In other words, did the individual exercise the care that a reasonable person would exercise under the circumstance?[281] When the individual has some relevant special knowledge, skill, or training, tort law often takes that characteristic into account in assessing reasonableness.[282] Thus, a lawyer must act as a reasonable *lawyer* under the same circumstances, not a reasonable *person*.[283] A professional driver must act as a reasonable professional driver under the same circumstances, a teacher must act as a reasonable teacher, a farmer must act as a reasonable farmer, and so on.[284] In each instance, the individual's conduct is measured against that of the hypothetical individual in the same class, and the individual is presumed to have the same general knowledge as others within that class.[285]

In other instances, tort law recognizes that an individual may *lack* the sort of specialized knowledge that another may have. Thus, in a medical case, a court may inquire as to what a reasonable patient or a reasonable client would have understood about a medical procedure.[286] In a legal malpractice action, a court may inquire as to what a reasonable client would have understood about a legal

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[281] *See, e.g.*, Bailey v. Lenord, 625 P.2d 849, 856 (Alaska 1981) (recognizing the standard of care as that which a reasonable person would observe).

[282] *See* RESTATEMENT (THIRD) OF TORTS § 12 (AM. L. INST. 2010) ("If an actor has skills or knowledge that exceed those possessed by most others, these skills or knowledge are circumstances to be taken into account in determining whether the actor has behaved as a reasonably careful person.").

[283] *See, e.g.*, Stewart v. Elliott, 239 P.3d 1236, 1239 (Alaska 2010) (referencing the standard of care as being that of a reasonable attorney).

[284] *See* RESTATEMENT (THIRD) OF TORTS § 12 cmt. a (AM. L. INST. 2010) (discussing the standard to which a professional driver is held, as well as professionals in general); *see also* Dakter v. Cavallino, 866 N.W.2d 656, 668–69 (Wis. 2015) (discussing the standard to which a professional truck driver is held).

[285] *See, e.g.*, Grams v. Milk Prod., Inc., 699 N.W.2d 167, 180 (Wis. 2005) ("A reasonable farmer would know that switching to an unmedicated milk replacer could cause some increase in calf mortality.").

[286] *See* Tye v. Beausay, 156 N.E.3d 331, 343 (Ohio Ct. App. 2020) ("Ohio recognizes the informed consent doctrine in medical malpractice cases and applies an objective (or reasonable patient) standard . . . .").

question.[287] In the case of children, who typically cannot be expected to meet the same standard as that of a reasonable adult, the relevant standard of care is that of a reasonable minor of the same age, intelligence, and experience.[288]

Logically, if one is going to adopt a reasonableness standard when assessing an employee's conduct, one would ask whether the individual acted as a reasonable *employee* under the circumstances. Indeed, this is the language courts use in other Title VII contexts. For example, when assessing whether retaliation is actionable, courts routinely ask whether the employer's conduct would dissuade a reasonable employee from engaging in protected activity.[289] This standard takes into account the fact that the relevant actor in this case is, in fact, an employee, with whatever special characteristics and concerns attendant to that category of individuals. When assessing whether an employer has constructively discharged an employee, courts typically consider whether a reasonable employee would have felt compelled to resign.[290] In short, Title VII decisional law in other contexts often focuses on what the reasonable employee would do or think in a given situation.

In contrast, when considering whether an employee's opposition conduct is protected, courts do not usually speak in terms of what a reasonable employee would believe or have done. Instead, they typically speak of whether the employee has *a reasonable belief* or *reasonably believed* the conduct to be unlawful without any reference to the reasonable employee.[291] The distinction is subtle but potentially significant. The current approach of courts puts the

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[287] *See* Frederick v. Wallerich, 907 N.W.2d 167, 177 (Minn. 2018) (assessing what a reasonable client would have expected); Nguyen v. Ford, 49 Cal. App. 5th 1, 15–16 (2020) (inquiring as to what an objectively reasonable client would have understood); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 19, cmt. c (2000) ("[A]ny contract limiting the representation is construed from the standpoint of a reasonable client.").

[288] *See* RESTATEMENT (SECOND) OF TORTS § 283A (AM. L. INST. 1965) ("If the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable person of like age, intelligence, and experience under like circumstances.").

[289] *See supra* note 35 and accompanying text.

[290] *See* Kegerise v. Delgrande, 183 A.3d 997, 1001 (Pa. 2018).

[291] While some federal courts of appeals add the requirement that an employee must have a "good faith" reasonable belief, every federal appellate court employs this "reasonable belief" standard. *See* Heisler v. Nationwide Mut. Ins. Co., 931 F.3d 786, 798 (8th Cir. 2019); Owens v. Old Wis. Sausage Co., 870 F.3d 662, 668 (7th Cir. 2017); Cooper v. N.Y. State Dep't Lab., 819 F.3d 678, 681 (2d Cir. 2016); Hansen v. Skywest Airlines, 844 F.3d 914, 926 (10th Cir. 2016); Furcron v. Mail Ctrs. Plus, LLC, 843 F.3d 1295, 1312 (11th Cir. 2016); Yazdian v. ConMed Endoscopic Tech., Inc., 793 F.3d 634, 646 (6th Cir. 2015); Grosdidier v. Broad. Bd. of Governors, Chairman, 709 F.3d 19, 24 (D.C. Cir. 2013); Daniels v. Sch. Dist. of Phila., 776 F.3d 181, 193–94 (3d Cir. 2015); Collazo v. Bristol-Myers Squibb Mfg., Inc., 617 F.3d 39, 48 (2010); Savage v. Maryland, 896 F.3d 260, 276 (4th Cir. 2018); Allen v. Admin. Rev. Bd., 514 F.3d 468, 477 (5th Cir. 2008); Freitag v. Ayers, 468 F.3d 528, 541 (9th Cir. 2006).

emphasis on the reasonableness of the *belief*, thus prompting courts to look to existing law to help determine whether the plaintiff's belief was reasonable; the reasonableness of the employee's belief is measured against existing law.[292] The employee's lack of knowledge of Title VII is no excuse (despite the fact that few employees have reason to know the details of Title VII).[293]

In contrast, a reasonable employee standard puts the primary focus on the employee. In other words, the employee's belief is measured against the belief of other employees. In assessing the reasonableness of an individual's actions or beliefs, tort law teaches that a reasonable person is only expected to have the knowledge that an average person possesses on the subject.[294] There is relatively little empirical evidence concerning employees' knowledge of Title VII, but what little evidence there is suggests that employees know little about employment law in general and tend to overestimate the limits that it places on employers' actions.[295]

Any reasonable judge would assume that most employees have little substantive knowledge of employment discrimination law. Therefore, a standard that measures an employee's knowledge against that of the hypothetical reasonable employee is more likely to result in a finding that the employee engaged in protected activity. More importantly, such a standard better enables Title VII's anti-retaliation provision to further Title VII's anti-discrimination goals.

Ultimately, the focus of a court should be on whether the conduct in question would lead a reasonable employee to oppose the conduct. This would necessarily require an assessment from the perspective of a reasonable employee in the same circumstances. The important question should ultimately be whether a reasonable employee *could* have believed that Title VII prohibited the conduct in question. Consistent with tort law's reasonable person standard, the fact that a particular employee has special experience, education, or training when it comes to Title VII would be relevant to the determination.

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292 *See* Howard v. Walgreen Co., 605 F.3d 1239, 1244 (11th Cir. 2010).

293 *See* Weeks v. Harden Mfg. Corp., 291 F.3d 1307, 1317 (11th Cir. 2002).

294 *See* State v. Manjares, No. 36846-7-III, 2020 WL 5437740, at *4 (Sept. 10, 2020) ("[W]e require a reasonable person to know matters 'in so far as they are matters of common knowledge at the time and in the community.'" (citations omitted)); Richardson v. Floyd, No. S-4048, 1991 WL 11657762, at *3 (Alaska Sept. 5, 1991) (discussing the reasonableness of an individual's belief in terms of what a reasonable person, with the average person's knowledge, would have believed).

295 *See* Jesse Rudy, *What They Don't Know Won't Hurt Them: Defending Employment-at-Will in Light of Findings that Employees Believe They Possess Just Cause Protection*, 23 BERKELEY J. EMP. & LAB. L. 307, 317–38 (2002); Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 105–06 (1997).

A court that applied these principles to the kinds of scenarios discussed in this Article would almost certainly conclude that the conduct of the plaintiff is protected. For the reasons discussed, a reasonable employee could certainly believe that it is unlawful for a coworker to harass a nonemployee while in the performance of the employee's job duties. Likewise, an employee who observes job-related discrimination might reasonably believe that such discrimination is unlawful under Title VII, even if it is actually only unlawful under a different statute. Accordingly, such opposition conduct should be protected under Title VII.

2. *Employer Retaliation Targeting Nonemployee Third Parties: Recognizing Third-Party Harms*

A court that views providing robust protection from retaliation as a means of furthering Title VII's anti-discrimination mandate is also more likely to arrive at the conclusion that a third party who is harmed by an employer's retaliatory acts is an aggrieved person who is entitled to a remedy. As discussed, *Thompson*'s "zone of interests" test for determining aggrieved person status is not meant to be particularly demanding and should cover an individual who has interests arguably sought to be protected by the statute.[296] To paraphrase *Thompson*, hurting a nonemployee is the unlawful act by which the employer punishes an employee who has engaged in protected conduct related to Title VII's anti-discrimination mission.[297] By taking action against the nonemployee victim, the employer sends a message to other employees to think twice before complaining about unlawful discrimination. Providing a remedy in this case quite clearly furthers the interest in eliminating discrimination. Therefore, courts need to approach this issue with the broader purpose of Title VII's anti-retaliation provision in mind.

CONCLUSION

There are numerous shortcomings that prevent statutory anti-retaliation provisions from reaching their full potential in the typical kinds of retaliation cases. These include inconsistent and sometimes restrictive statutory language, restrictive judicial interpretations of that language, and a tendency on the part of courts to treat retaliation cases as having little connection to the goals of anti-discrimination law. All too often, the result is that employer retaliation goes unchecked. In addition to the harm to the immediate victims of retaliation, the

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296 *See supra* note 135 and accompanying text.

297 Thompson v. N. Am. Stainless, LP, 562 U.S. 170, 174 (2011).

failure of statutory anti-retaliation provisions to reach their full potential results in harm to third parties more generally, including subsequent victims who have been deterred from reporting workplace discrimination and society in the form of the undermining of the purposes of anti-retaliation law.

Changes to the conception of the modern workplace present new challenges for employment discrimination law. As this Article illustrates, one of those challenges is how to deal with nontraditional forms of employment retaliation. The shortcomings that prevent employment retaliation law from reaching its full potential are only magnified in situations in which a nonemployee is either the victim of discrimination or retaliation. In order to fulfill the fundamental purposes of statutory anti-retaliation provisions, courts should interpret Title VII's anti-retaliation provision to take into account the third-party effects of discrimination and in a manner that advances the statute's anti-discrimination purpose.