

## COMMENTS

### *Crawford's* Expansive Definition of “Oppose” Breathes New Life into Pure Third-Party Retaliation Claims Under Title VII

*Michael Costello*<sup>†</sup>

#### I. INTRODUCTION

Eric Thompson worked as a metallurgical engineer for North American Stainless, LP (Stainless) for six years.<sup>1</sup> Three years into Thompson's employment, Stainless hired Miriam Regalado as a quality-control engineer.<sup>2</sup> Shortly after Thompson met Regalado, the two began dating.<sup>3</sup> Their relationship was common knowledge at the company, and the couple eventually became engaged to be married.<sup>4</sup>

While employed at Stainless, Thompson's fiancée, Regalado, felt that her supervisors treated her differently because she was a woman.<sup>5</sup> The open disrespect Regalado's supervisors displayed led to disrespect by Regalado's subordinate employees.<sup>6</sup> Eventually, Regalado suspected one of her subordinate employees was deliberately sabotaging equipment in order to have Regalado removed.<sup>7</sup> When her concerns were not addressed by Stainless, Regalado filed a complaint with the Equal Em-

---

<sup>†</sup> J.D. Candidate, Seattle University School of Law, 2011; B.A., Business Administration, Gonzaga University, 2006. I would like to thank my parents, Pat and Margie Costello, and my entire family, Kerri, Tom, Meghan, and even Danny for their support. I would also like to thank all the members of the *Seattle University Law Review*, especially the frequenters of the publications office (for making me laugh).

1. *Thompson v. N. Am. Stainless*, 567 F.3d 804, 806 (6th Cir. 2009).

2. Brief of Plaintiff at 6, *Thompson v. N. Am. Stainless*, 435 F. Supp. 2d 633 (E.D. Ky. 2006) (No. 3:05-02-JMH).

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

4. *Id.*

5. Brief of Plaintiff, *supra* note 2, at 8.

6. *Id.* at 9.

7. *Id.*

ployment Opportunity Commission (EEOC).<sup>8</sup> The complaint alleged that Stainless discriminated against her based on her gender.<sup>9</sup> Three weeks after Stainless received Regalado's complaint, the company terminated her fiancé, Thompson, despite giving Thompson a favorable evaluation only three months earlier.<sup>10</sup>

In response, Thompson filed suit in federal district court alleging that Stainless unlawfully retaliated against him in violation of Title VII's anti-retaliation provision.<sup>11</sup> This provision prohibits employers from taking adverse actions against an employee as a result of the employee's opposition to an unlawful employment practice or the employee's participation in an investigation of an unlawful employment practice.<sup>12</sup> If an employee raises a Title VII concern, the employer may not retaliate against that employee.<sup>13</sup>

Despite Thompson's allegations that Stainless fired him because of a Title VII complaint, the district court dismissed his claim.<sup>14</sup> The court held that Title VII's anti-retaliation provision does not protect Thompson because the provision requires that an individual personally engage in a protected activity; that is, the individual must oppose an unlawful employment practice or participate in an investigation.<sup>15</sup> Because Thompson had not personally opposed or participated, the court ruled that Thompson had not done anything that qualified as a protected activity.<sup>16</sup> On appeal, the Sixth Circuit affirmed the district court's reading of the statute.<sup>17</sup> The Sixth Circuit held that while Regalado, by filing a complaint with the EEOC, had engaged in a protected activity and, thus, was protected from any retaliatory action by Stainless, this same provision did not protect her fiancé, Thompson.<sup>18</sup> In so holding, the *Thompson* court joined the majority of circuit courts in the view that Title VII's anti-retaliation provision does not provide protection to close associates and relatives who are victims of adverse employment actions as retaliation against an employee raising a Title VII claim.<sup>19</sup>

---

8. *Id.* at 10.

9. *Id.* at 8.

10. *Id.* at 14.

11. *Thompson v. N. Am. Stainless*, 567 F.3d 804, 806 (6th Cir. 2009).

12. 42 U.S.C. § 2000e-3 (2006).

13. *Id.*

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

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. See *Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 564 (3d Cir. 2002); *Smith v. Riceland Foods, Inc.*, 151 F.3d 813, 820 (8th Cir. 1998); *Holt v. JTM Indus., Inc.*, 89 F.3d 1224, 1227 (5th Cir. 1996).

The *Thompson* court's holding aligns with other courts' narrow reading of the class protected by Title VII's anti-retaliation provision.<sup>20</sup> Although the Supreme Court has recognized that the purpose of the anti-retaliation provision is to encourage employees to bring claims of discrimination and "deter the many forms that effective retaliation can take,"<sup>21</sup> the majority of courts continue to deny the anti-retaliation provision's protection to victims of third-party retaliation such as *Thompson*.<sup>22</sup>

But in *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*, the Supreme Court greatly expanded the scope of protected classes by expanding the definition of how an individual may "oppose" an unlawful employment practice and what individuals qualify for protection under Title VII's anti-retaliation provision.<sup>23</sup> Under *Crawford's* definition, opposing an unlawful employment practice may be accomplished without active behavior, and protection may even be afforded to those who harbor silent opposition.<sup>24</sup>

*Crawford's* expansive definition of the term oppose should be read to extend protection to previously unprotected third-party victims of retaliation. The policy of Title VII—to eradicate discrimination in the workplace<sup>25</sup>—as well as the policy of Title VII's anti-retaliation provision—to foster an environment in which employees will not be dissuaded from bringing forward claims of discrimination<sup>26</sup>—mandates that courts extend the protection of these provisions to those who are victims of retaliation as a result of a relationship with a party who brings forward a Title VII discrimination claim. The expanded definition of oppose provided by *Crawford* allows courts to make such an extension.

This Comment argues that courts should read *Crawford's* expanded definition of oppose to extend the protection of Title VII's anti-retaliation provision to pure<sup>27</sup> third-party victims of retaliation. Part II of this Comment presents a history of Title VII's anti-retaliation provision. Part III discusses the holding of *Crawford* and its potential impact on pure third-party retaliation claims under Title VII. Part IV explains how reading *Crawford* to allow third-party retaliation claims furthers the poli-

---

20. See *Fogleman*, 283 F.3d at 564; *Riceland Foods*, 151 F.3d at 820; *Holt*, 89 F.3d at 1227.

21. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 64 (2006).

22. See *Fogleman*, 283 F.3d 561; *Riceland Foods*, 151 F.3d 813; *Holt*, 89 F.3d 1224.

23. *Crawford v. Metro. Gov't of Nashville & Davidson Cnty., Tenn.*, 129 S. Ct. 846, 850 (2009).

24. *Id.*

25. See *Ricci v. DeStefano*, 129 S. Ct. 2658, 2674 (2009).

26. See *Burlington N.*, 548 U.S. at 63–64.

27. "Pure" third-party retaliation means the victim of the employer's retaliation "has committed no offense other than having a relationship" with the protected employee. Alex B. Long, *The Troublemaker's Friend: Retaliation Against Third Parties and the Right of Association in the Workplace*, 59 FLA. L. REV. 931, 933–34 (2007).

cy goals of Title VII. Part V concludes that courts should read *Crawford* as extending Title VII's anti-retaliation protections to victims of pure third-party retaliation.

## II. REQUIREMENTS OF TITLE VII'S ANTI-RETALIATION PROVISION AND THE HISTORY OF PURE THIRD-PARTY RETALIATION CLAIMS

A principal goal of Title VII is to end discrimination in the workplace.<sup>28</sup> To achieve this goal, Title VII contains several provisions that protect employees facing discrimination, harassment, or retaliation.<sup>29</sup> The anti-retaliation provision of Title VII is essential to accomplishing the purpose of the statute. This Part explains the purpose and language of the anti-retaliation provision, the requirements of a retaliation claim, and the way courts have viewed the anti-retaliation claim provisions as related to pure third-party claims.

### A. Purpose and Language of Title VII's Anti-Retaliation Provision

Title VII prohibits qualified employers<sup>30</sup> from discriminating against any individual on the basis of race, color, religion, sex, or national origin.<sup>31</sup> To achieve the primary goal of Title VII—ending workplace discrimination—the statute relies on individual employees who are willing to bring forward instances of discrimination by filing claims and acting as witnesses.<sup>32</sup>

Section 704(a) of Title VII sets forth the anti-retaliation provision, which protects employees who bring claims of discrimination against an employer.<sup>33</sup> The primary purpose in enforcing the anti-retaliation provision of Title VII is to “maintain[] unfettered access to statutory remedial mechanisms” for employees.<sup>34</sup> Because enforcement of Title VII relies on individuals bringing forth claims, the statute must protect employees who allege an employer is engaged in a discriminatory practice. If an employee who raises a concern about her company's adverse treatment of women is fired or demoted as a result of raising that concern, not only

---

28. See *Ricci*, 129 S. Ct. at 2674.

29. See 42 U.S.C. §§ 2000e-2–2000e-3 (2006). These provisions are often referred to as Section 703 and 704. Section 703 provides the substantive protections of Title VII, while Section 704 provides the anti-retaliation provision.

30. A qualified employer includes a “[1] ‘person,’ [2] ‘engaged in an industry affecting commerce,’ [3] who has at least fifteen employees for twenty weeks during the current or preceding calendar year.” JOEL WM. FRIEDMAN, *THE LAW OF EMPLOYMENT DISCRIMINATION CASES AND MATERIALS* 18 (7th ed. 2009) (quoting 42 U.S.C. § 2000e(b) (2006)).

31. 42 U.S.C. § 2000e-2 (2006).

32. *Burlington N.*, 548 U.S. at 66.

33. 42 U.S.C. § 2000e-3 (2006).

34. *Burlington N.*, 548 U.S. at 54 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997)).

will the affected employee be less likely to maintain her claim, but other employees will also be less likely to bring claims of their own. If not for the anti-retaliation provision, the effectiveness of Title VII would be greatly reduced.<sup>35</sup> By attempting to protect employees who raise claims of discrimination, the anti-retaliation provision aims at fostering an environment in which employees feel comfortable bringing forward claims of discrimination, increasing the effectiveness of the anti-discrimination provisions of Title VII.<sup>36</sup>

The language of the anti-retaliation provision makes it unlawful for an employer to discriminate against an employee because “he has opposed any practice made an unlawful employment practice by this Title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing.”<sup>37</sup> Thus, to qualify for protection, one must oppose an unlawful employment practice or participate in an investigation.<sup>38</sup>

There is no requirement that a party seeking protection under the provision show that actual discrimination took place.<sup>39</sup> As part of the prima facie case for retaliation, the plaintiff need only establish that he had a reasonable belief that the employer’s employment practice was unlawful to qualify for protection.<sup>40</sup> Thus, if an employee believes that her employer is engaged in a discriminatory practice and files a complaint, that employer cannot retaliate, even if an investigation reveals that the employer did not violate Title VII.<sup>41</sup> This broad scope of protection serves the policy goals of Title VII by encouraging employees to invoke the investigative measures triggered by a Title VII claim<sup>42</sup> without fear that their claims must be successful to be protected.<sup>43</sup> This extended protection may make succeeding on a claim of retaliation easier than succeeding on a claim of discrimination under the substantive protections of Title VII, Section 703. That an employee seeking protection under the anti-retaliation provision need not prove the employer actually discrimi-

---

35. *Id.* at 67.

36. *Id.*

37. *Id.* at 62.

38. *See* Vaughn v. Epworth Villa, 537 F.3d 1147, 1151 (10th Cir. 2008).

39. Payne v. McLemore’s Wholesale & Retail Stores, 654 F.2d 1130, 1137 (5th Cir. 1981).

40. *Id.*

41. *See id.*

42. A complaining party cannot bring a private suit unless the party first receives authorization from the Equal Opportunity Employment Commission (EEOC). Johnson v. Nekoosa-Edwards Paper Co., 558 F.2d 841, 847 n.12 (8th Cir. 1977). The EEOC is charged to investigate the allegation and attempt conciliation or other such remedial action. 42 U.S.C. § 2000e-4 (2006). Thus, when a party makes a Title VII claim, it triggers an investigative effort by the EEOC and corresponding attempts to remedy any unlawful employment practice.

43. *See* Hearth v. Metro. Transit Comm’n, 436 F. Supp. 685, 688–89 (D. Minn. 1977).

nated may explain the rise of retaliation claims—10% in the last eleven years.<sup>44</sup> While succeeding on a claim of retaliation may be easier than a claim under the substantive protections of Title VII, a potential plaintiff must still prove a prima facie case.<sup>45</sup>

### *B. Establishing the Prima Facie Case of Retaliation*

To establish a prima facie case of retaliation under Title VII, a plaintiff must show that: (1) he or she engaged in activity protected by Title VII; (2) the employer took an adverse employment action against him or her; and (3) a causal connection exists between the protected activity and the adverse employment action.<sup>46</sup>

#### 1. Protected Activity

The first element of a prima facie case of retaliation requires an employee to show she was engaged in a protected activity.<sup>47</sup> Title VII's anti-retaliation provision uses two clauses to define protected activities: the "participation clause" and the "opposition clause."<sup>48</sup> These two clauses protect different kinds of conduct, and courts have held that the clauses provide different amounts of protection.<sup>49</sup>

The participation clause protects employees who have "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing."<sup>50</sup> This clause protects individuals who either have made claims of discrimination under Title VII or were involved in subsequent investigations of discrimination.<sup>51</sup> The statute uses the language "in any manner," and courts have interpreted this language to mean an inclusive scope of activities fall under the participation clause.<sup>52</sup>

---

44. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, CHARGE STATISTICS: FY 1997–2009, [www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm](http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm) (last visited Nov. 6, 2010).

45. See generally *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006); *Payne*, 654 F.2d at 1130.

46. *Payne*, 654 F.2d at 1136.

47. *Id.*

48. *Crawford v. Metro. Gov't of Nashville & Davidson Cnty., Tenn.*, 129 S. Ct. 846, 850 (2009).

49. "The distinction between participation clause protection and opposition clause protection is significant because the scope of protection is different." *Vaughn v. Epworth Villa*, 537 F.3d 1147, 1151 (10th Cir. 2008) (quoting *Laughlin v. Metro. Wash. Airports Auth.*, 149 F.3d 253, 259 n.4 (4th Cir. 1998)).

50. 42 U.S.C. § 2000e-3 (2006).

51. 42 U.S.C. § 2000e-3 (2006).

52. See *Vaughn*, 537 F.3d at 1151 ("[T]he scope of protection for activity falling under the participation clause is broader than for activity falling under the opposition clause." (quoting *Laughlin*, 149 F.3d at 259 n.4)).

The opposition clause protects employees who have “opposed any practice made an unlawful employment practice” by Title VII.<sup>53</sup> Conduct protected under the opposition clause need not come in the context of an investigation or invoke the formal processes of a Title VII claim.<sup>54</sup> Because the party’s relation to a Title VII claim is less formal, the scope of protection offered under the opposition clause is smaller than the participation clause.<sup>55</sup> For example, if an employee claims protection under the opposition clause, courts will analyze whether the opposing conduct was reasonable under the circumstances.<sup>56</sup> Additionally, courts must balance the interests of the employer in running the business against the employee’s right to express any grievances.<sup>57</sup>

The different standards of protection therefore make classification of an employee’s conduct as either participating or opposing important. The amount of protection afforded to an individual depending on the classification can vary significantly.<sup>58</sup> For example, an employee’s complaints about low pay based on gender are not protected activities under the narrower opposition clause, but an employee’s illegal transmission of unredacted and confidential medical files to the EEOC to support a claim of discrimination is a protected activity under the broader coverage of the participation clause.<sup>59</sup>

## 2. Adverse Employment Action

The second element of a prima facie case of retaliation requires that the employer take an “adverse employment action” against the employee.<sup>60</sup> Section 704(a) of Title VII states that an employer may not “discriminate against” an employee as retaliation for that employee’s engagement in a protected activity.<sup>61</sup> Before 2006, the standard for what actions constituted discriminating against an employee was unclear.<sup>62</sup> The Supreme Court’s decision in *Burlington Northern & Santa Fe Rail-*

---

53. 42 U.S.C. § 2000e-3 (2006).

54. See *Laughlin*, 149 F.3d at 259.

55. See *Vaughn*, 537 F.3d at 1151.

56. *Payne v. McLemore’s Wholesale & Retail Stores*, 654 F.2d 1130, 1142 (5th Cir. 1981).

57. *Id.*

58. Compare *Hochstadt v. Worcester Found. for Experimental Biology*, 545 F.2d 222, 233 (1st Cir. 1976) (woman’s repeated complaints that her salary was low because she was a woman was not a protected activity under opposition clause of 704(a)), with *Vaughn*, 537 F.3d at 1151 (nurse’s copying and transmitting unredacted and confidential medical records to EEOC, though illegal, was a protected activity under the participation clause of 704(a)).

59. *Vaughn*, 537 F.3d at 1151; *Hochstadt*, 545 F.2d at 233.

60. *Payne*, 654 F.2d at 1136.

61. 42 U.S.C. § 2000e-3 (2006).

62. See generally Melissa A. Essary & Terence D. Friedman, *Retaliation Claims Under Title VII, the ADEA, and the ADA: Untouchable Employees, Uncertain Employers, Unresolved Courts*, 63 MO. L. REV. 115, 130 (1998).

way *Co. v. White* clarified the meaning of discriminate against as it relates to Title VII's anti-retaliation provision.<sup>63</sup> The Court held that an action discriminates against an employee who has engaged in a protected activity if the employee "would have found the challenged action materially adverse."<sup>64</sup> An action by an employer qualifies as materially adverse if the action "might well have dissuaded a reasonable worker from making or supporting a charge of discrimination."<sup>65</sup> The Court held the challenged action must be materially adverse to ensure that "petty slights" and "minor annoyances" would not become actionable retaliation claims.<sup>66</sup> Additionally, the definition sets forth an objective standard: a reasonable person in the plaintiff's position, considering all the circumstances, judges the adversity of the employer's action.<sup>67</sup> The Court intentionally left the standard in general terms, adding that when courts determine whether retaliation is present, "context matters."<sup>68</sup>

The broad standard imposed by the Court provides protection from a wide variety of employer actions, including adverse actions that take place outside of the work environment.<sup>69</sup> The Court explained that such an expansive view of adverse actions was necessary because "a provision limited to employment-related actions would not deter the many forms that effective retaliation can take."<sup>70</sup> This expansive view aligns with the anti-retaliation provision's policy objective—to "allow unfettered access to statutory remedial mechanisms"—because it protects employees from retaliatory actions that would likely restrict an employee's access to the protections of Title VII.<sup>71</sup> Because Title VII enforcement relies on employees bringing forth concerns, and retaliation would lessen the likelihood that they would do so, employers must be barred from retaliating against employees outside the workplace. The Court's broad reading of the language of Title VII's anti-retaliation provision indicates a preference towards a generally expansive reading of Title VII to give effect to the statute's policy of ensuring that employees are not deterred from making discrimination claims.

---

63. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (quoting *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2006)).

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 71.

68. *Id.* at 69.

69. *Id.* at 63.

70. *Id.* at 64.

71. *Id.* at 54 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997)).

### 3. Causal Relationship

The third element in the prima facie case requires a plaintiff to show that the employer took the adverse employment action against the employee as a result of the employee's engagement in a protected activity.<sup>72</sup> This requirement is often the most difficult element for a plaintiff to meet because direct evidence of the employer's intent is usually not readily available. To prove such a causal relationship, the plaintiff must show that the employer was aware that the employee was engaged in a protected activity.<sup>73</sup> Generally, a mere showing that the adverse action took place soon after the employee engaged in a protected activity is insufficient to demonstrate a causal connection.<sup>74</sup> Additionally, the employer can avoid liability by showing that the adverse employment action would have occurred even if the employee had not engaged in a protected activity.<sup>75</sup>

#### *C. Third-Party Retaliation Claims*

Most courts have been unwilling to extend the protections of Title VII's anti-retaliation provision to third-party retaliation claims.<sup>76</sup> Third-party retaliation occurs when an employee has engaged in a protected activity, and the employer, in an effort to retaliate against the protected employee, takes an adverse action against an associate or relative of the protected employee.<sup>77</sup> Courts have ruled that these third-parties do not qualify for protection<sup>78</sup> because, under the anti-retaliation provision, an employee must either oppose an unlawful employment practice or participate in an investigation of suspected unlawful employment practices to be engaged in a protected activity.<sup>79</sup> Because third-parties who are associates of a protected employee have not actively opposed or participated in investigations, courts have interpreted the language of the statute to exclude this class of employees from protection.<sup>80</sup>

---

72. *Thomas v. City of Beaverton*, 379 F.3d 802, 811 (9th Cir. 2004).

73. See generally *Salas v. Wis. Dep't of Corr.*, 493 F.3d 913, 924 (7th Cir. 2007); *Shafer v. Kal Kan Foods, Inc.*, 417 F.3d 663, 664–65 (7th Cir. 2005).

74. *Kiel v. Select Artificial, Inc.*, 169 F.3d 1131, 1136 (8th Cir. 1999). But see *Thomas*, 379 F.3d at 812.

75. See *Womack v. Munson*, 619 F.2d 1292, 1297 (8th Cir. 1980).

76. See *Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 564 (3d Cir. 2002); *Smith v. Riceland Foods, Inc.*, 151 F.3d 813, 820 (8th Cir. 1998); *Holt v. JTM Indus., Inc.* 89 F.3d 1224, 1227 (5th Cir. 1996).

77. See *Fogleman*, 283 F.3d at 564; *Smith*, 151 F.3d at 820; *Holt*, 89 F.3d at 1227; Long, *supra* note 27, at 933–34.

78. See *Fogleman*, 283 F.3d at 564; *Smith*, 151 F.3d at 820; *Holt*, 89 F.3d at 1227.

79. 42 U.S.C. § 2000e-3 (2006).

80. See *Fogleman*, 283 F.3d at 564; *Smith*, 151 F.3d at 820; *Holt*, 89 F.3d at 1227.

Yet, allowing employers to retaliate against those who engage in protected activities by taking adverse employment actions against the protected employee's friends, relatives, and close associates, cuts against the policy aim of the anti-retaliation provision.<sup>81</sup> Prior court decisions have broadly interpreted the language of this provision to avoid the "chilling effect" that employer retaliation would have on the likelihood of other employees bringing claims.<sup>82</sup> Additionally, courts have generally held that "anti-discrimination laws are to be liberally construed to effectuate their remedial purposes."<sup>83</sup> The conflict between the interpretation of the language of the retaliation provision and the policy behind the statute's enactment has left courts split regarding whether the protections of Title VII's anti-retaliation provision extend to cover victims of third-party retaliation.<sup>84</sup>

Courts that have refused to extend protection to third-parties have read the language of the anti-retaliation provision narrowly.<sup>85</sup> While acknowledging that such a reading may encourage employers to retaliate against a protected employee's friends and relatives, these courts have maintained that the language of the provision prohibits any other result.<sup>86</sup> Based on a strict reading of the anti-retaliation provision, these courts believe that extending protection to pure third-party retaliation victims would rewrite the law.<sup>87</sup> Courts justify this reading by suggesting that although the interpretation conflicts with the policy of the anti-retaliation provision,<sup>88</sup> failing to provide protection to third-party victims of retaliation is not patently absurd.<sup>89</sup>

Some courts have gone further and suggested at least two reasons why Congress may have intended to narrow the class of protected parties to those who have either participated in an investigation or opposed an unlawful practice.<sup>90</sup> One reason includes speculation that friends and family members "at risk of retaliation typically would have participated

---

81. See *Gonzalez v. N.Y. State Dep't of Corr. Servs.*, 122 F. Supp. 2d 335, 347 (N.D.N.Y. 2000).

82. See *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1140 (5th Cir. 1981); *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63–64 (2006).

83. *Holt*, 89 F.3d at 1231 (Dennis, J., dissenting) (citing *MacDonald v. E. Wyo. Mental Health Ctr.*, 941 F.2d 1115, 1118 (10th Cir. 1991)).

84. Compare *Fogleman*, 283 F.3d at 564, *Smith*, 151 F.3d at 820, and *Holt*, 89 F.3d at 1227, with *Gonzalez*, 122 F. Supp. 2d at 347, and *EEOC v. Nalbandian Sales, Inc.*, 36 F. Supp. 2d 1206, 1213 (E.D. Cal. 1998).

85. See *Fogleman*, 283 F.3d at 564; *Smith*, 151 F.3d at 820; *Holt*, 89 F.3d at 1227.

86. See, e.g., *Holt*, 89 F.3d at 1226–27.

87. See *Thompson v. N. Am. Stainless*, 567 F.3d 804, 808 (6th Cir. 2009); *EEOC v. Bojangles Rest.*, 284 F. Supp. 2d 320, 327–28 (M.D.N.C. 2003).

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

89. *Id.* at 808; *Bojangles*, 284 F. Supp. 2d at 327.

90. See *Thompson*, 567 F.3d at 811; *Fogleman*, 283 F.3d at 569.

in some manner in the discrimination charge.”<sup>91</sup> Thus, this position is based on the hope that all associates and relatives that should be protected from retaliation have participated in preparing a Title VII claim.<sup>92</sup> This viewpoint also assumes that these associates have participated sufficiently to qualify for protection under the participation clause and can sufficiently prove a prima facie case of retaliation.<sup>93</sup> While courts advocating this reason may believe that occasions of pure third-party retaliation in which the victim has not participated in the discrimination charge or performed an action opposing an unlawful employment practice are rare, fact patterns seen in several cases make it clear that these situations do occur.<sup>94</sup> Even if uncommon, it seems absurd that these cases would somehow not violate the purpose of the anti-retaliation provision when courts deny these plaintiffs relief.

Another reason for not allowing third-party retaliation claims to proceed is that such an interpretation may “open the door to frivolous lawsuits and interfere with an employer’s prerogative to fire at-will employees.”<sup>95</sup> But this concern is exaggerated, as seen by a similar provision in the Americans with Disabilities Act,<sup>96</sup> and can also be addressed by the requirement of a causal connection in making a prima facie claim for retaliation.<sup>97</sup>

While some policy objections exist to allowing pure third-party retaliation victims to seek redress in court, these objections are easily overcome. The policy behind the anti-retaliation clause of Title VII clearly supports allowing these plaintiffs to bring claims. Indeed, the Third Circuit stated that interpreting the anti-retaliation provision to prohibit third-party retaliation claims “presents a conflict between a statute’s plain meaning and its general policy objectives.”<sup>98</sup> Nevertheless, the majority of courts do not allow pure third-party retaliation claims under the anti-retaliation provision of Title VII.<sup>99</sup>

---

91. *Thompson*, 567 F.3d at 811 (quoting *Fogleman*, 283 F.3d at 569).

92. *See id.*; *Bojangles*, 284 F. Supp. 2d at 327–28.

93. *See Bojangles*, 284 F. Supp. 2d at 327–28.

94. *See Fogleman*, 283 F.3d at 564; *Smith v. Riceland Foods, Inc.*, 151 F.3d at 820 (8th Cir. 1998); *Holt v. JTM Indus., Inc.*, 89 F.3d 1224, 1227 (5th Cir. 1996); *Bojangles*, 284 F. Supp. 2d at 327–28; *Gonzalez v. N.Y. State Dep’t of Corr. Servs.*, 122 F. Supp. 2d 335, 347 (N.D.N.Y. 2000); *EEOC v. Nalbandian Sales, Inc.*, 36 F. Supp. 2d 1206, 1213 (E.D. Cal. 1998).

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

96. 42 U.S.C. § 12112(b)(4) (2006) (prohibiting an employer from “excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association”).

97. *See infra* Part IV.C.

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

99. *See Fogleman*, 283 F.3d at 564; *Smith*, 151 F.3d at 820; *Holt*, 89 F.3d at 1227.

### III. THE IMPACT OF *CRAWFORD* ON PURE THIRD-PARTY RETALIATION CLAIMS UNDER TITLE VII

The Supreme Court, in *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*, reexamined the definition of oppose as it relates to the opposition clause of the anti-retaliation provision in Title VII.<sup>100</sup> Section A examines the facts and analysis of the *Crawford* decision and section B explores the decision's impact on pure third-party retaliation claims under Title VII.

#### A. *The Crawford Case*

Veronica Frazier, a human resources officer for the Metro School District (Metro), conducted an investigation into alleged sexually harassing behavior of a Metro employee—relations director Gene Hughes.<sup>101</sup> Frazier's investigation was internal to the school district and started as a result of rumors of sexual harassment by Hughes.<sup>102</sup> During the internal investigation, Frazier asked Vicky Crawford, a thirty-year-old Metro employee, whether she had witnessed any "inappropriate behavior" by Hughes.<sup>103</sup> Crawford responded by attesting to several instances of Hughes's sexually explicit behavior.<sup>104</sup> During one incident, Hughes responded to Crawford's question of "Hey Dr. Hughes, what's up?" by grabbing his crotch and saying, "[Y]ou know what's up" as well as putting "his crotch up to [Crawford's bus] window."<sup>105</sup> During another incident, Hughes entered Crawford's office and "grabbed her head and pulled it to his crotch."<sup>106</sup> Two other employees also relayed incidents of being sexually harassed by Hughes.<sup>107</sup>

After finishing the investigation, Metro took no action against Hughes.<sup>108</sup> Instead, Metro fired Crawford and the two other witnesses to Hughes's behavior.<sup>109</sup> Crawford filed a charge of retaliation with the EEOC, followed by a suit in District Court for the Middle District of Tennessee.<sup>110</sup> Crawford claimed that Metro had violated both the oppo-

---

100. *Crawford v. Metro. Gov't of Nashville & Davidson Cnty., Tenn.*, 129 S. Ct. 846, 849 (2009).

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 849–50.

sition clause and the participation clause of Title VII's anti-retaliation provision in terminating her employment.<sup>111</sup>

The district court granted Metro's motion for summary judgment.<sup>112</sup> In dismissing the case, the court held that Crawford did not qualify for protection under the opposition clause because she had not initiated her own complaint but simply answered questions in an internal investigation initiated by someone else.<sup>113</sup> Similarly, the court held that Crawford's claim for protection under the participation clause failed as well.<sup>114</sup> The court reasoned that, pursuant to Sixth Circuit precedent, a participant in an internal investigation qualifies for protection under the participation clause only where the investigation is part of a pending charge by the EEOC.<sup>115</sup> Because the investigation by Metro was internal and not the result of a pending EEOC charge, Crawford's participation in the investigation did not qualify her for protection under the participation clause.<sup>116</sup>

Crawford appealed the district court's decision to the Sixth Circuit, which affirmed.<sup>117</sup> The Sixth Circuit stated that protection under the opposition clause "demands active, consistent 'opposing' activities."<sup>118</sup> The Supreme Court granted certiorari.<sup>119</sup>

The Supreme Court, in a unanimous decision, reversed and remanded the Sixth Circuit's decision.<sup>120</sup> The Court determined that the term oppose, as used in the opposition clause of the anti-retaliation provision of Title VII, carries its ordinary meaning—"to resist or antagonize . . .; to contend against; to confront; resist; withstand."<sup>121</sup> The Court also defined oppose to mean "to be hostile or adverse to, *as in opinion*."<sup>122</sup> The Court criticized the Sixth Circuit's reasoning as undermining the retaliation provision's primary objective of "avoiding harm to employees,"<sup>123</sup> and stated that the Court has never suggested that an employee may "lose statutory protection by failing to speak."<sup>124</sup> By expand-

---

111. *Id.* at 850.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* (quoting *Bell v. Safety Grooving & Grinding, LP*, 107 F. App'x 607, 610 (6th Cir. 2004)).

119. *Id.*

120. *Id.*

121. *Id.* (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY 1710 (2d ed. 1958)).

122. *Id.* (quoting RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1359 (2d ed. 1987)) (emphasis added).

123. *Id.* at 852 (quoting *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975)).

124. *Id.* at 853 n.3.

ing the definition of oppose so broadly, the Court potentially embraces the notion that the opposition clause protects an employee who opposes by virtue of “silent opposition.”<sup>125</sup> Even if the Court did not intend to embrace silent opposition, the definition the Court provides is broad enough to encompass opposition by relationship.

*B. Crawford’s Impact on Pure Third-Party Retaliation Claims*

Courts should read *Crawford*’s expansive definition of the opposition clause to offer protection to previously unprotected third-party victims of retaliation. The majority of courts have not been able to offer protection to pure third-party claimants because the language of the anti-retaliation provision requires a plaintiff to oppose an unlawful employment practice or participate in an investigation, and pure third-party claimants do not raise complaints or participate in investigations prior to suffering an adverse employment action.<sup>126</sup> But the Court’s expansion of the definition of oppose can be read to allow the passive support of friends, relatives, and close associates to qualify as opposing an unlawful employment practice, thus qualifying the third-party for protection under Title VII.

While the Court’s opinion does not explicitly state that pure third-party retaliation claims are covered by the opposition clause, the opinion contains at least two features that support this reading. First, the Court criticizes interpretations of the anti-retaliation provision that fail to accomplish policy objectives.<sup>127</sup> Second, the Court applies the opposition clause to a circumstance in which traditional opposition may not have been present.<sup>128</sup>

In *Crawford*, the Court is critical of the Sixth Circuit’s interpretation of the statute because it failed to take into account certain policy objectives.<sup>129</sup> The Court stated that the Sixth Circuit’s rule largely undermined the statute’s “‘primary objective’ of ‘avoid[ing] harm’ to employees.”<sup>130</sup> Additionally, the Court found that the Sixth Circuit’s holding would undermine incentives put into place by the Court’s decisions in *Farager v. Boca Raton* and *Burlington Industries, Inc. v. Ellerth*.<sup>131</sup> Both *Farager* and *Ellerth* create vicarious liability for employers when

---

125. *Id.* at 854 (Alito, J., concurring).

126. *See, e.g., Holt v. JTM Indus., Inc.*, 89 F.3d 1224, 1226–27 (5th Cir. 1996).

127. *Crawford*, 129 S. Ct. at 851–52.

128. *Id.*

129. *Id.* at 852.

130. *Id.* (quoting *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975)).

131. *Id.*

an employee's supervisor creates a hostile work environment.<sup>132</sup> But these decisions also create an affirmative defense if the employer "exercised reasonable care to prevent and correct" discrimination and the employee did not use certain available processes.<sup>133</sup> This scheme was enacted in part to give employers sufficient motivation to seek out and prevent discrimination in the workplace.<sup>134</sup>

The Court in *Crawford* indicated that the Sixth Circuit's holding—allowing employees who answer questions in internal investigations to be targeted by employers without court protection—would undermine the policy supported by *Faragher* and *Ellerth*.<sup>135</sup> If allowed, this conduct might discourage employees from answering questions about discriminatory conduct or aiding in internal investigations, thereby reducing the effectiveness of the investigations and undermining the rationale for providing an affirmative defense to employers who carry out such investigations.<sup>136</sup> The Court's criticism of the Sixth Circuit's failure to give effect to the broad policy of limiting discrimination should serve as an interpretive guide for subsequent court decisions. This criticism supports a reading of the anti-retaliation clause that would allow pure third-party retaliation claims. Failing to provide protection to victims of pure third-party retaliation is a violation of the policy goals of Title VII—the same type of violation the Court criticized in *Crawford*.

A second feature of *Crawford* that supports allowing pure third-party retaliation claims is the Court's application of the opposition clause to the facts of the case. The Court held that Crawford's response to the investigator's questions constituted opposition to her supervisor's harassing actions.<sup>137</sup> Notably, the Court cited no characteristics of Crawford's responses that qualify her answers as opposition to her supervisor's conduct.<sup>138</sup> Rather, the Court stated that Crawford's responses qualify as opposition to the discriminatory conduct because communication to an employer about the employer's discriminatory conduct "virtually always 'constitutes the employee's *opposition* to the activity.'"<sup>139</sup> Such a presumption of opposition supports the proposition that a third-party—by virtue of the relationship with a complaining employee—opposes the

---

132. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 766 (1998); *Faragher v. Boca Raton*, 524 U.S. 775, 808 (1998).

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

134. See generally *Ellerth*, 524 U.S. 742; *Faragher*, 524 U.S. 775.

135. *Crawford*, 129 S. Ct. at 852–53.

136. *Id.*

137. *Id.* at 850–51.

138. *Id.*

139. *Id.* at 851 (citing 2 EEOC COMPL. MAN. §§ 8-II-B(1), (2), p. 614:0003 (Mar. 2003)).

complained-of unlawful employment practice, thus qualifying for protection under Title VII.

#### IV. READING *CRAWFORD* TO ALLOW PURE THIRD-PARTY RETALIATION CLAIMS FURTHERS THE POLICY OF TITLE VII AND TRUMPS EXISTING REMEDIES AND COUNTERVAILING CONCERNS

While *Crawford's* definition of oppose may allow courts to extend the protection of Title VII's anti-retaliation provision to victims of pure third-party retaliation, it does not necessarily require this extension. This Part argues that courts should extend this protection because it furthers the policy goals of Title VII in general and the anti-retaliation provision in particular. This Part further argues that existing remedies are insufficient for victims of pure-third-party retaliation and that concerns of frivolous lawsuits are exaggerated because sufficient safeguards exist to prevent this result. Using *Crawford's* definition of oppose to reach pure third-party retaliation claims furthers the policy goals of Title VII and will not result in excessive litigation.

##### *A. Allowing Crawford's Definition to Reach Pure Third-Party Retaliation Claims Furthers the Policy of Title VII and Unifies Conflicting Signals to Employers*

Extending the anti-retaliation provision's protection to pure third-party victims is appropriate for several reasons. First, an expansive reading of *Crawford* furthers the policy goals of Title VII. Second, such a reading unifies conflicting authoritative messages sent to employers. Third, expanding the reach of Title VII aligns with recent developments affecting the scope of protection of Title VII.

The policy goal of Title VII's anti-retaliation provision is to "avoid harm to employees"<sup>140</sup> and to "maintain unfettered access to statutory remedial mechanisms."<sup>141</sup> The anti-retaliation provision of Title VII is designed to avoid the "chilling effect" employer retaliation would have on the willingness of other employees to bring forth claims of discrimination.<sup>142</sup> Allowing an employer to retaliate against relatives and close associates of employees who participate in protected activities under Title VII would certainly be enough to deter employees from seeking the protection of remedial statutory mechanisms and chill the willingness of employees to bring forward claims of discrimination. Thus, extending

---

140. *Id.* at 852 (quoting *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975)).

141. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 54 (2006) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997)).

142. *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1140 (5th Cir. 1981).

Title VII's protection to victims of pure third-party retaliation furthers the policy goals of the anti-retaliation provision.

Extending this protection to pure third-party retaliation claimants also unifies the messages courts send to employers. Currently, courts are conflicted about whether pure third-party retaliation victims have a claim under Title VII.<sup>143</sup> Reading *Crawford* to allow such claims based on an expanded interpretation of qualified protected activities would result in a single rule of law and provide a clear message to employers as to what constitutes a lawful employment practice.

Interpreting *Crawford* to allow pure third-party retaliation claims would also clarify a second contradictory message employers receive. The EEOC, the government entity charged with enforcing federal employment discrimination laws,<sup>144</sup> and the courts disagree in their interpretation of the statute. Specifically, before a party can bring a lawsuit against an employer for violation of Title VII, he or she must first file a claim with the EEOC.<sup>145</sup> Upon receipt of a charge of a statutory violation, the EEOC is required to accept and investigate the complaints.<sup>146</sup> If an investigation determines that the employer is engaged in unlawful employment practices, the EEOC is required to engage with the employer in attempts at conciliation in order to rectify the practices.<sup>147</sup> If the attempts fail, the EEOC may bring a lawsuit or allow the aggrieved party to proceed with a private suit.<sup>148</sup> Thus, the EEOC's interpretation of the applicable employment laws is crucial to the outcome of a dispute.

The EEOC publishes a compliance manual that interprets applicable employment laws.<sup>149</sup> The compliance manual states that the provisions of Title VII "prohibit retaliation against someone so closely related to or associated with the person exercising his or her statutory rights that it would discourage that person from pursuing those rights."<sup>150</sup> Thus, the EEOC's own guidelines prohibit the practice of pure third-party retaliation,<sup>151</sup> but many courts have held the practice does not violate the provi-

---

143. Compare *Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 564 (3d Cir. 2002), *Smith v. Riceland Foods, Inc.*, 151 F.3d 813, 820 (8th Cir. 1998), and *Holt v. JTM Indus., Inc.*, 89 F.3d 1224, 1227 (5th Cir. 1996), with *Gonzalez v. N.Y. State Dep't of Corr. Servs.*, 122 F. Supp. 2d 335, 347 (N.D.N.Y. 2000), and *EEOC v. Nalbandian Sales, Inc.*, 36 F. Supp. 2d 1206, 1213 (E.D. Cal. 1998).

144. 42 U.S.C. § 2000e-5 (2006).

145. *Johnson v. Nekoosa-Edwards Paper Co.*, 558 F.2d 841, 847 n.12 (8th Cir. 1977).

146. See 42 U.S.C. § 2000e-5 (2006); FRIEDMAN, *supra* note 30, at 444.

147. 42 U.S.C. § 2000e-5 (2006).

148. *Id.*

149. See generally 2 EEOC COMPL. MAN. (CCH) (1975).

150. 2 EEOC COMPL. MAN. (CCH) §8-II-B(3)(c) (May 20, 1998).

151. *Id.*

sions of Title VII.<sup>152</sup> This disagreement between the government agency charged with enforcing Title VII and the courts' interpretation of the statute sends an unclear message to employers. While the EEOC compliance manual is considered "a body of experience and informed judgment to which courts and litigants may properly resort for guidance,"<sup>153</sup> in the matter of pure third-party retaliation, the majority of courts have ruled against the EEOC's interpretation.<sup>154</sup> Interpreting *Crawford* to allow pure third-party retaliation victims to bring claims would resolve the conflict between the courts and the EEOC and clarify the mixed message currently being sent to employers.

Extending *Crawford* to reach pure third-party retaliation claimants also aligns with amendments and interpretations that have broadened the scope of coverage for Title VII's anti-retaliation provision.<sup>155</sup> For example, the Court in *Burlington Northern* expanded the scope of what constituted "discriminating against" an employee because a lesser scope "would not deter the many forms that effective retaliation can take."<sup>156</sup> Additionally, Congress amended Title VII itself to expand the statute's reach.<sup>157</sup> The Act first required an employer to have twenty-five employees to be subject to the Act's provisions, but Congress amended Title VII to reduce this requirement to only fifteen employees.<sup>158</sup> Following this progression of expanding coverage, courts should expand the scope of protected activities to include opposition by virtue of association with an employee who has availed herself of the protections of Title VII. The *Crawford* decision allows courts to do this by expanding the definition of oppose.<sup>159</sup>

---

152. See *Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 564 (3d Cir. 2002); *Smith v. Riceland Foods, Inc.*, 151 F.3d 813, 820 (8th Cir. 1998); *Holt v. JTM Indus.*, 89 F.3d 1224, 1227 (5th Cir. 1996).

153. *Fed. Express v. Holowecki*, 552 U.S. 389, 399 (2008) (quoting *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998)).

154. See *Fogleman*, 283 F.3d at 564; *Smith*, 151 F.3d at 820; *Holt*, 89 F.3d at 1227.

155. *Crawford v. Metro. Gov't of Nashville & Davidson Cnty., Tenn.*, 129 S. Ct. 846, 852 (2009) (holding that the opposition clause includes passive opposition activities); *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006) (holding that adverse employment actions are not limited to harms in the workplace).

156. *Burlington N.*, 548 U.S. at 63.

157. Compare 42 U.S.C. §2000e (2006), with 42 U.S.C. §2000e (1971); FRIEDMAN, *supra* note 30, at 18.

158. FRIEDMAN, *supra* note 30, at 18.

159. See *supra* Part III.A–B.

*B. Existing Remedy is Insufficient*

Although the majority of courts have not allowed victims of pure third-party retaliation to bring claims,<sup>160</sup> strict adherence to the language of the statute does allow a remedy for these claims, but this remedy is ultimately insufficient. The Court in *Burlington Northern* set the standard for what constitutes retaliatory conduct: if an action “might well have dissuaded a reasonable worker from making or supporting a charge of discrimination,” it is sufficiently adverse to constitute retaliatory conduct under Title VII.<sup>161</sup> Under this standard, a complaining party could conceivably bring a claim for retaliation when an employer takes an adverse employment action against his close associate or relative.<sup>162</sup> Because firing a friend or relative is likely to dissuade a worker from making a claim, this action may give the originally complaining employee a claim for retaliation.<sup>163</sup> The originally complaining employee would be able to show a prima facie case of retaliation: she engaged in a protected activity by complaining, suffered an adverse employment action by having her associate terminated, and that adverse action was caused by her engagement in a protected activity.

Although an employee who makes a claim of discrimination under Title VII could sue an employer who terminates a close associate or relative, such a suit does not sufficiently affect the policy goals of the anti-retaliation provision. The employee bringing suit will not have been directly adversely impacted by the employer’s actions against the associate or relative. Thus, the remedy available in such a suit will be limited to emotional distress damages.<sup>164</sup> This remedy will neither reinstate the associate or relative, nor will it be likely to result in sufficient distress<sup>165</sup> to elicit much in the way of damages from the employer. As a result, this remedy will not deter harm to employees or foster an environment in which employees feel comfortable asserting claims under Title VII.<sup>166</sup> Rather, to affect the policy goals of Title VII and the anti-retaliation pro-

---

160. See *Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561 (3d Cir. 2002); *Smith v. Riceland Foods, Inc.*, 151 F.3d 813 (8th Cir. 1998); *Holt v. JTM Indus., Inc.*, 89 F.3d 1224, 1227 (5th Cir. 1996).

161. *Burlington N.*, 548 U.S. at 68.

162. See Long, *supra* note 27, at 980.

163. *Id.*

164. *Id.*

165. The tort of intentional or reckless infliction of emotional distress requires outrageous conduct. JOHN C. P. GOLDBERG ET AL., *TORT LAW RESPONSIBILITIES AND REDRESS* 647 (2d ed. 2008). Terminating a friend is not likely to rise to the level of outrageous conduct necessary to constitute a viable claim or, if a claim is successful, elicit sufficient damages to compensate for the loss of one’s job or serve as a deterrent to the employer.

166. Avoiding harm to employees and maintaining access to statutory remedial mechanisms are two of the primary goals of Title VII’s anti-retaliation provision. See *supra* Part IV.A.



Yet the third element—causal connection—will serve as an appropriate barrier to frivolous pure third-party retaliation claims because it requires showing that an employer took an adverse employment action against an employee because of the employee's involvement in a protected activity.<sup>173</sup> This element is often difficult for plaintiffs to satisfy. Generally, no direct evidence of the employer's unlawful rationale for the adverse employment action is available. This element also requires that the employer knows the employee is engaged in a protected activity.<sup>174</sup> For a pure third-party retaliation plaintiff, this means the employer must know of the relationship between the originally complaining employee and the third-party victim.

The obstacles in proving the causal connection element make success difficult for a plaintiff claiming retaliation under Title VII. But this difficulty can also serve as a safeguard to protect employers from frivolous claims. Putting the burden on the plaintiff to show that the adverse employment action directly resulted from the employee's engagement in a protected activity blocks employees from proceeding with meritless claims. Even if the employee successfully shows he was engaged in a protected activity, the employee still bears the burden of proving the adverse employment action is causally related to the protected activity.<sup>175</sup> In the case of pure third-party retaliation victims, the protected activity would be opposition by virtue of the relationship to a complaining employee. Thus, the third-party retaliation plaintiff would need to show that an employer took an adverse employment action against the plaintiff as a result of the plaintiff's relationship with a complaining employee, a challenge sufficient to bar frivolous claims from moving forward.

The necessity of establishing a close relationship in third-party retaliation claims serves as a further bar to frivolous lawsuits. Although the concurring opinion in *Crawford* cautioned that such a liberal reading of the opposition clause “would open the door to retaliation claims by employees who never expressed a word of opposition to their employers,”<sup>176</sup> this concern is remedied by requiring a close association or relationship. By requiring that the third-party has a close association or relationship to the original complaining party, the concern that employees who do not express opposition may be protected from retaliation is exaggerated. Allowing pure third-party retaliation victims to bring suit does

---

173. *Thomas v. City of Beaverton*, 379 F.3d 802, 811 (9th Cir. 2004).

174. See generally *Salas v. Wisc. Dep't of Corr.*, 493 F.3d 913, 924 (7th Cir. 2007); *Shafer v. Kal Kan Foods, Inc.*, 417 F.3d 663, 664–65 (7th Cir. 2005).

175. See *Thomas*, 379 F.3d at 811.

176. *Crawford v. Metro. Gov't of Nashville & Davidson Cnty., Tenn.*, 129 S. Ct. 846, 854 (2009) (Alito, J., concurring).

not give every employee who suffers an adverse employment action the ability to bring a lawsuit by claiming the employee harbored silent opposition. Rather, the opposition must exist by *virtue of the relationship* to the original complaining party, and as noted earlier, the employer must be aware of the close association or relationship between the third-party and the original complaining party. Thus, not every employee who suffers an adverse employment action would be able to qualify for protection. The class or parties who qualify for protection under a broad reading of *Crawford* is narrow enough to prevent a multitude of frivolous lawsuits.

Finally, while courts that refuse to offer protection to pure third-party retaliation victims have cited concerns of excessive frivolous litigation,<sup>177</sup> these concerns are exaggerated. The Americans with Disabilities Act (ADA)—an anti-discrimination statute similar to Title VII—demonstrates why these concerns are exaggerated. The ADA contains a provision that expressly allows claims by individuals “with whom the qualified individual is known to have a relationship or association.”<sup>178</sup> For instance, in *Trujillo v. PacifiCorp*, a husband and wife brought a suit under the ADA based on the relationship or association provision. The Trujillos, both employed at PacifiCorp, had a son with a brain tumor.<sup>179</sup> PacifiCorp, a self-insured company, paid all medical costs directly.<sup>180</sup> Eleven days after the Trujillo’s son suffered a relapse, the employer began investigating both Mr. and Mrs. Trujillo for time theft.<sup>181</sup> Eventually, PacifiCorp terminated the couple, removing the Trujillo’s son and his expensive medical care from the company’s insurance plan.<sup>182</sup> The Trujillos were able to sue as victims of discrimination due to their relationship with a member of a protected class, their disabled son.<sup>183</sup> Thus, as *Trujillo* demonstrates, the ADA explicitly allows claims based on an association or relationship.

This ADA provision suffers from the same practical difficulties that concern opponents of extending Title VII’s anti-retaliation provision to pure third-party retaliation. The ADA, by allowing claims to be brought based on a relationship or association, embodies the broad protection that courts opposed to extending protection to third-party retaliation victims

---

177. See *Thompson v. N. Am. Stainless*, 567 F.3d 804, 811 (6th Cir. 2009); *EEOC v. Bojangles Rest.*, 284 F. Supp. 2d 320, 327 (M.D.N.C. 2003).

178. 42 U.S.C. §12112(b)(4) (2006).

179. *Trujillo v. PacifiCorp*, 524 F.3d 1149, 1151 (10th Cir. 2008).

180. *Id.*

181. *Id.* at 1152.

182. *Id.* at 1154.

183. *Id.*

fear,<sup>184</sup> but this provision has not resulted in frivolous lawsuits. According to the EEOC, in 2009 61.3% of all Title VII claims received by the Commission resulted in a finding of no reasonable cause for concern in the allegations.<sup>185</sup> In the same year, only 59.5% of all ADA claims resulted in a finding of no reasonable cause.<sup>186</sup> In fact, Title VII has had a higher percentage of meritless claims than the ADA for the last twelve years.<sup>187</sup> The ADA, with its broad provision covering parties with associations to qualified individuals, had fewer instances of meritless claims than Title VII.<sup>188</sup> Hence, extending similarly broad protections in a Title VII context will not result in a higher occurrence of frivolous claims.

Allowing *Crawford's* expanded definition of oppose to include pure third-party retaliation victims would further the policy objectives of Title VII and not result in excessive litigation. This interpretation would encourage employees to report discrimination, while the causal connection requirement would prevent meritless claims. Similar protections contained in the ADA demonstrate that concerns over excessive litigation are exaggerated.

## V. CONCLUSION

*Crawford's* expansive definition of oppose in the opposition clause of Title VII's anti-retaliation provision should be interpreted to allow pure third-party retaliation claims. When the Supreme Court reduced the effort required to be considered opposing unlawful conduct, it opened the door for victims of pure third-party retaliation to be protected. The primary rationale for withholding protection from pure third-party victims

---

184. This fear is the excessive frivolous litigation that may result from overly broad protected classes. See *Thompson v. N. Am. Stainless*, 567 F.3d 804, 811 (6th Cir. 2009); *EEOC v. Bojangles Rest.*, 284 F. Supp. 2d 320, 327 (M.D.N.C. 2003).

185. U.S. EQUAL EMP'T. OPPORTUNITY COMM'N, TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 CHARGES: FY 1997–2009, <http://www.eeoc.gov/eeoc/statistics/enforcement/titlevii.cfm> (last visited Oct. 18, 2010).

186. U.S. EQUAL EMP'T. OPPORTUNITY COMM'N, AMERICANS WITH DISABILITIES ACT OF 1990 (ADA) CHARGES: FY 1997–2009, <http://www.eeoc.gov/eeoc/statistics/enforcement/ada-charges.cfm> (last visited Oct. 18, 2010).

187. Compare U.S. EQUAL EMP'T. OPPORTUNITY COMM'N TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 CHARGES: FY 1997–2009, <http://www.eeoc.gov/eeoc/statistics/enforcement/titlevii.cfm> (last visited Oct. 18, 2010), with U.S. EQUAL EMP'T. OPPORTUNITY COMM'N, AMERICANS WITH DISABILITIES ACT OF 1990 (ADA) CHARGES: FY 1997–2009, <http://www.eeoc.gov/eeoc/statistics/enforcement/ada-charges.cfm> (last visited Oct. 18, 2010).

188. Compare U.S. EQUAL EMP'T. OPPORTUNITY COMM'N, TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 CHARGES: FY 1997–2009, <http://www.eeoc.gov/eeoc/statistics/enforcement/titlevii.cfm> (last visited Oct. 18, 2010), with U.S. EQUAL EMP'T. OPPORTUNITY COMM'N, AMERICANS WITH DISABILITIES ACT OF 1990 (ADA) CHARGES: FY 1997–2009, <http://www.eeoc.gov/eeoc/statistics/enforcement/ada-charges.cfm> (last visited Oct. 18, 2010).

was that the language of the statute required personal participation in a protected activity.<sup>189</sup> This limitation, which courts have admitted conflicts with the policy goals of Title VII,<sup>190</sup> has been overcome by *Crawford*'s expansion of the definition of oppose, leading to a broader range of protected activities.<sup>191</sup> The *Crawford* decision compels a reading of the anti-retaliation provision to reach pure third-party plaintiffs.<sup>192</sup>

Additionally, the policy goals of Title VII lend support to an interpretation of *Crawford* that would extend protection to victims of pure third-party retaliation.<sup>193</sup> Title VII's anti-retaliation provision encourages employees to bring discrimination claims forward and ensures access to the statute's protections.<sup>194</sup> Allowing this interpretation of *Crawford* limits the ability of employers to suppress Title VII claims through retaliatory conduct and resolves the current contradictory messages regarding pure third-party protection under Title VII. For these reasons, courts should interpret *Crawford*'s expanded definition of the word oppose to extend protection to pure third-party retaliation victims under the anti-retaliation provision of Title VII.

---

189. See *Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 564 (3d Cir. 2002); *Smith v. Riceland Foods, Inc.*, 151 F.3d 813, 820 (8th Cir. 1998); *Holt v. JTM Indus., Inc.*, 89 F.3d 1224, 1227 (5th Cir. 1996).

190. See *Fogleman*, 283 F.3d at 569; *Thompson v. N. Am. Stainless*, 567 F.3d 804, 811 (6th Cir. 2009).

191. *Crawford v. Metro. Gov't of Nashville & Davidson Cnty., Tenn.*, 129 S. Ct. 846, 851 (2009).

192. See *supra* Part III.B.

193. See *supra* Part IV.

194. See *Crawford*, 129 S. Ct. at 852; *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 54 (2006).