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No. 09-291

IN THE
Supreme Court of the United States

ERIC L. THOMPSON,

Petitioner,

v.

NORTH AMERICAN STAINLESS, LP,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

The anti-retaliation provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-3(a) [section 704(a)], forbids an employer from discriminating against an employee because he or she engaged in protected conduct. At the time of his dismissal from employment, Petitioner had not engaged in any protected conduct under Title VII, although his fiancée at the time had. The questions presented are:

(1) Whether discrimination occurs under the anti-retaliation provision of Title VII when an employer discharges an employee who has not engaged in protected conduct, but who is closely associated with another employee who engaged in the protected conduct.

(2) If the employer's action above constitutes discrimination under the anti-retaliation provision, whether the discharged employee, who did not engage in any protected conduct, may pursue a cause of action for retaliation under Title VII's anti-retaliation provision.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent North American Stainless, formerly known as North American Stainless LP, pursuant to Supreme Court Rule 29.6, hereby discloses that, as of October 22, 2010, it is a general partnership with no parent corporation. The managing general partner of North American Stainless is Stainless Steel Invest, Inc., a Delaware corporation which is not a publicly held corporation. The only other partner of North American Stainless is Stainless Alloys, Inc., a Delaware corporation, which is not a publicly held corporation. The two partners of North American Stainless are owned by North American Stainless, Inc., a Delaware corporation, which is owned by Acerinox S.A., shares of which are publicly traded on the Madrid Stock Exchange.

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STATEMENT OF THE CASE

The question presented in this case is whether Eric Thompson, who is not a protected party and did not engage in any protected activity, may pursue a claim for discrimination under Title VII's anti-retaliation provision. On June 20, 2006, the United States District Court for the Eastern District of Kentucky granted summary judgment to North American Stainless against Eric Thompson on his Title VII retaliation claim based solely upon this question of law. Despite Thompson's attempt to depict North American Stainless as an unfair and retaliatory employer, there are no factual findings by a jury or the district court to support such self-serving allegations. The district court and the Sixth Circuit Court of Appeals assumed Thompson's allegations of retaliation to be true for purposes of ruling on the purely legal question presented below.

Thompson was discharged from his employment as a metallurgical engineer with North American Stainless on March 7, 2003. Thompson's discharge followed his submission of an unsolicited memorandum to a senior level executive of North American Stainless. App. 22-23, Record 12, Exhibit C to North American Stainless Motion for Summary Judgment. This memorandum was derogatory to North American Stainless' management practices. Thompson's supervisors testified in their depositions that Thompson was discharged due to this memorandum and his poor performance. Record 16-3, Eric Hess depo. 126, Record 16-9, Anil Yadav depo. 109-110.

Thompson's Complaint does not allege that he was discharged because he engaged in any protected activity

or due to his race, color, religion, sex or national origin. Instead, Thompson claims to be protected under Title VII by virtue of his "close association" with his then fiancée, Miriam Regalado. Regalado had filed a charge of discrimination with the EEOC against North American Stainless before Thompson's discharge. Thompson's Complaint alleges that his "relationship with Miriam [Regalado] Thompson was the sole motivating factor in his termination." App.12-13.

The EEOC did not find any basis to support Miriam Regalado's initial charge of discrimination against North American Stainless. The EEOC issued a "Dismissal and Notice of Rights" statement to Miriam Regalado dated September 8, 2003. App. 19-21. After investigating Regalado's charge of discrimination, the EEOC was "unable to conclude that the information obtained established a violation of the statutes." App. 19-21.

Miriam Regalado filed a second charge of discrimination with the EEOC after Thompson's discharge.[1] The EEOC dismissed Regalado's second charge as well. Resp. App., Regalado depo. 44, Exh. 4 Neither the EEOC nor Miriam Regalado pursued any claims against North American Stainless based upon

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1. In her deposition, Miriam Regalado provided different accounts of the basis for the second charge of discrimination that she filed against North American Stainless. She first testified that the second charge alleged retaliation. She then claimed that the second charge was for hostile work environment. She finally conceded that she could not recall the basis for the second charge. Resp. App, Regalado depo. 45, 48, 49. In either event, the charge was dismissed by the EEOC. Resp. App., Regalado depo. Exh. 4.

Regalado's charges. Regalado continued working for North American Stainless until January 2004, when she voluntarily resigned. Resp. App., Regalado depo. 9.

According to Regalado, the issue of whether Thompson's discharge was due to her relationship with Thompson came first from her EEOC investigator, not from Thompson. Resp. App., Regalado depo. 59. Thompson did not initiate discussions with the EEOC regarding his discharge. *Id.* Rather, Regalado's investigator voluntarily sent Thompson the "paper work" to file the EEOC charge which led to this case. *Id.*

Thompson is asserting the rights of Regalado under the anti-retaliation provision, and not his own. Pet. Br. 39-40. Prior to Thompson's discharge, he never complained of discriminatory treatment of himself or his co-workers, including his then fiancée Miriam Regalado. He never filed a charge of discrimination (written or verbal) or testified in any proceedings. He did not oppose any practices of North American Stainless which were alleged to be discriminatory. If he participated in any investigation proceedings on behalf of Regalado, he did not advise North American Stainless that he had done so.

Thompson's Complaint alleges a violation of Title VII's substantive and anti-retaliation provisions, as set forth in 42 U.S.C. § 2000e-2(a) and 42 U.S.C. 21 § 2000e-3, respectively. Thompson asked the district court to allow him to pursue a retaliation claim despite his lack of protected activity because of his "close association" with Regalado. The district court determined that Thompson was not in a protected category and thus

could not pursue a claim under Title VII's substantive provision. The district court also held that Thompson failed to state a cause of action for retaliation under 42 U.S.C. § 2000e-3 because Thompson had not engaged in any protected activity. Pet. App. 108a. The district court granted summary judgment in favor of North American Stainless. Thompson has not appealed the dismissal of his substantive discrimination claim under 42 U.S.C. § 2000e-2(a). He has only appealed the dismissal of his retaliation claim under 42 U.S.C. § 2000e-3.

On Thompson's initial appeal to the Sixth Circuit Court of Appeals, the issue was framed as whether "Title VII prohibit[s] employers from taking retaliatory action against employees not directly involved in protected activity, but who are so closely related to or associated with those who are directly involved, that it is clear that the protected activity motivated the employer's action[.]" Pet. App. 68a. The panel majority recognized that the plain language of the statute indicates that the only individual protected by 704(a) is the one who conducted the protected activity, but concluded that given Title VII's remedial scheme the literal reading of the statute should not be followed and that Thompson could pursue a cause of action for retaliation under 704(a).[2]

North American Stainless filed a Petition for Rehearing and Suggestion for Rehearing *En Banc*. The Petition was granted and the full Sixth Circuit Court of Appeals reviewed Thompson's "friends and family"

2. The author of the panel majority's decision was a district court judge who was sitting by designation. Pet. App. 65a.

association argument. In a lengthy and divisive opinion, the summary judgment against Thompson and dismissal of his retaliation claim was affirmed. App. 64a-90a.

The majority of the *en banc* Sixth Circuit Court of Appeals described the issue before the Court as "whether § 704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-3(a), creates a cause of action for third-party retaliation for persons who have not personally engaged in protected activity." Pet. App. 2a. A majority of the *en banc* court held that "[b]ecause Thompson does not claim that he personally engaged in any protected activity, we affirm the judgment of the district court granting summary judgment in favor of defendant North American Stainless, LP." *Id.* at 2-3a.

The majority recognized that Thompson, not Regalado, is the plaintiff in this case and that Thompson did not engage in any protected conduct. The majority further recognized that the plain text of the anti-retaliation provision limits the class of persons entitled to seek protection under that section to persons who engage in statutorily protected activity. Pet. App. 7a. The Court of Appeals declined Thompson's "invitation to rewrite the law" and affirmed the district court's award of summary judgment to North American Stainless. *Id.* at 9a. Thompson now asks this Court to rewrite the anti-retaliation provision to allow third persons to bring retaliation claims based solely upon their relationship with a protected party.

Thompson never argued in any of the proceedings below that he could pursue his retaliation claim under Title VII's enforcement provision, 42 U.S.C. § 2000e-

5(f), as a "person aggrieved." Thompson presents this issue for the first time to this Court. Likewise, the "prudential standing" analysis of *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972), was not presented to the lower courts or briefed by the parties. Thompson and the EEOC, as his amicus, argued that the protection of the anti-retaliation provision should be broadened to include "close associations" of protected parties, not that Thompson could pursue his claim as a "person aggrieved." Thompson should be barred from raising this issue for the first time at this final appellate level.

SUMMARY OF ARGUMENT

Eric Thompson seeks to recover under Title VII's anti-retaliation provision, 42 U.S.C. § 2000e-3(a). This Court clearly stated in *Burlington N. & Sante Fe Ry. v. White*, 548 U.S. 53 (2006), that Title VII's anti-retaliation provision protects employees based upon their conduct. Thompson admits that he did not engage in any protected conduct, however. He seeks refuge as a "close association" of a third-party who engaged in the protected conduct. Thompson's attempt to broaden the scope of Title VII's anti-retaliation provision is not supported by the language of the statute or this Court's clear expression in *Burlington*. Broadening the statute to the extent argued by Thompson would rewrite the statute to create a cause of action not established by Congress. The impact of rewriting the statute will be far reaching and wreak havoc on employers' legitimate needs to implement lawful warranted discipline. The decision of the court of appeals should be affirmed.

1. This Court determined in *Burlington* that Title VII's "anti-retaliation provision seeks to prevent harm to individuals based upon what they do, i.e., their conduct." *Burlington*, 548 U.S. at 63. Thompson does not allege to be a member of a class of persons protected by Title VII. He did not engage in any protected conduct. He relies solely upon his relationship with his fiancée. Thompson alternatively argues that he is a "person aggrieved" under Title VII because he was injured by the alleged retaliation.

2. The express language of the anti-retaliation provision of Title VII provides an employee the right to be free from discrimination because that employee engaged in protected conduct. The plain language requires a connection between the alleged discrimination and the protected conduct in order for the discrimination to be deemed unlawful. Plaintiffs asserting third-party associations are not persons who have engaged in protected conduct and, hence, are not the persons against whom the retaliation is directed. If Congress had intended to grant protection to every conceivable injured person, Congress could have defined "aggrieved persons" to include "any person injured" by a violation of the statute as it did in the Fair Housing Act. Congress did not extend the broad definition to Title VII.

3. Thompson's concern that employers will be free to retaliate against family members if third-party associations are not afforded protection is unfounded. Regalado could have, but chose not to, pursue a retaliation claim under Title VII. She engaged in protected conduct and, according to Thompson, was the

intended target of the alleged retaliation. The summary judgment of the district court left Regalado's right to pursue a retaliation claim intact.

4. The majority of the lower courts addressing this issue have refused to recognize third-party retaliation claims as valid causes of action. The Third, Fifth and Eighth Circuits have each considered this issue in the context of either Title VII or the similarly worded Age Discrimination in Employment Act. Each of the courts determined that third-party retaliation claims were not permitted under Title VII. These courts recognized some of the negative practical implications from broadening the scope of the statute, including (a) opening the door to frivolous lawsuits, (b) interfering with an employer's prerogative to discipline at-will employees, and (c) creating uncertainty as to which persons have standing to pursue retaliation claims based upon close associations.

5. As recognized by the appellate courts addressing this issue, there will be a significant negative impact to employers if third-party associations are afforded protection under the anti-retaliation statute. Title VII retaliation claims are the fastest growing category of claims filed with the EEOC. Under Thompson's approach, employees who claim a close association will be entitled to automatic job protection. Employers will be left to guess which relationships are entitled to protection or forced to inquire into the sensitive nature of relationships when making necessary disciplinary actions. Courts will also be left guessing which relationships are afforded protection, and mini-trials to determine this issue will necessarily result from this expansion.

6. The issue of whether Thompson may proceed as a "person aggrieved" under Title VII is not properly before this Court. Thompson never raised this issue below. Thus, North American Stainless never had the opportunity to address the issue before the court of appeals. Thompson should not be allowed to raise this issue for the first time at this final appellate level.

7. Title VII's enforcement provision does not apply to "any injured person." It applies to "the person aggrieved" by a violation of the statute. Because Thompson has not been discriminated against based upon his conduct, as prohibited by the anti-retaliation provision, he is not "aggrieved" under the statute. Thompson's reliance upon *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972), and *Blue Shield of Va. v. McCready*, 457 U.S. 465 (1982), is misplaced. The plaintiffs in those cases alleged that their rights under the statutes in question had been violated. Thompson does not make that allegation; he only claims to have been injured by the violation of Regalado's rights. Moreover, the statutes at issue in those cases defined the term "person aggrieved" to include "any person injured." Title VII does not contain that broad definition.

8. Prudential standing jurisprudence limits Thompson's right to pursue a claim based upon an alleged violation of his fiancee's rights. Thompson has not shown that the anti-retaliation provision provides him – as a non-protected party – the right to pursue a claim for judicial relief for violation of the statute.

9. The burden shifting analysis set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), is well-established. Third-party retaliation claims are not consistent with this framework. Under *McDonnell Douglas*, the plaintiff is required to show that he is in a protected category as the first element of a prima facie case. Here, however, Thompson completely avoids this element. Presumably, the plaintiff would have to show that someone was a protected party and show that there was a close relation with that person. As set forth above, however, Thompson has not offered any guidance as to what relationships would be afforded protection or what standard should be applied.

10. The issue of whether Thompson's discharge violated the retaliation standard under *Burlington* is not properly before this Court. The issue of unlawful retaliation was presumed by the district court and court of appeals. Further, it is not necessary to resolve this question in order to address the issue in this appeal of whether Thompson may pursue a cause of action for retaliation.

11. The EEOC Compliance Manual is not entitled to deference. The EEOC Compliance Manual has not been submitted to public comment and scrutiny. Moreover, courts that have evaluated the specific portion of the Manual relied upon by Thompson have rejected its interpretation of the anti-retaliation provision.

ARGUMENT

I. THE PURPOSE OF TITLE VII'S ANTI-RETALIATION PROVISION IS TO PROTECT EMPLOYEES WHO EXERCISE THEIR RIGHTS UNDER TITLE VII; THOMPSON IS NOT A MEMBER OF THAT CLASS.

This Court determined in *Burlington Northern & Sante Fe Rwy. Co. v. White*, 548 U.S. 53 (2006), that Title VII's "anti-retaliation provision seeks a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender based status." *Id.* at 63. The Court further recognized the anti-retaliation provision's design to secure that objective: "[T]he anti-retaliation provision seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees." *Id.* Consistent with this stated purpose, there are two distinct protections against discrimination provided to employees in Title VII. The first is contained in the substantive provision, 42 U.S.C. § 2000e-2(a), and the second is set forth in the anti-retaliation provision, 42 U.S.C. § 2000e-3(a). "The substantive provision seeks to prevent injury to individuals based upon who they are, i.e., their status. The anti-retaliation provision seeks to prevent harm to individuals based upon **what they do, i.e., their conduct.**" *Burlington,* 548 U.S. at 63 (emphasis added). The protection of the anti-retaliation provision has also been described as "a prophylactic measure to guard the primary right." *CBOS West, Inc. v. Humphries*, 553 U.S. 442, 462-63 (2008)(Thomas, J., dissenting) (quoting

Jackson v. Birmingham Board of Education, 544 U.S. 167, 189 (2005)). *See also Great American Fed. Sav.& Loan Ass'n v. Novotny*, 442 U.S. 366, 287 (1979) (White, J., dissenting)(recognizing that the "right under § 704(a) [is] to be free from retaliation for efforts to aid others asserting Title VII rights").

Eric Thompson does not allege to be a member of a class of persons protected by Title VII. Thompson does not allege that he was discriminated against due to his race, gender, national origin, or religion, i.e., his status. Likewise, he does not allege to have been discriminated against based upon any actions he took, i.e., his conduct. Thompson did not undertake any "efforts to secure or advance enforcement" of any provision of Title VII. He did not engage in any of the activities which are deemed to be protected activities under the anti-retaliation provision. He did not oppose any unlawful employment practice under Title VII. He did not make a charge of discrimination under Title VII. He did not testify, assist or participate in any investigation, hearing or proceeding. Thompson relies solely upon his relationship with a protected party as the basis for his Title VII anti-retaliation provision.

The risk of efforts to broaden the scope of retaliation claims to include claims made by close associations was foreshadowed by Justice Thomas' dissent in *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005). Justice Thomas cautioned:

> The Court establishes a prophylactic enforcement mechanism designed to encourage whistleblowing about sex discrimination. The language of Title IX does

> not support this holding. The majority also offers nothing to demonstrate that its prophylactic rule is necessary to effectuate the statutory scheme. Nothing prevents students-or their parents-from complaining about inequality in facilities or treatment. [citations omitted] Under the majority's reasoning, courts may expand liability as they, rather than Congress, see fit. This is no idle worry. **The next step is to say that someone closely associated with the complainer, who claims he suffered retaliation for those complaints, likewise has a retaliation claim under Title IX. See 2 Equal Employment Opportunity Commission, Compliance Manual § 8-11, p. 8-10 (1998) ("It would be unlawful for respondent to retaliate against an employee because his or her spouse, who is also an employee, filed an EEOC charge").**

Id. at 195 (Thomas, J., dissenting, joined by Scalia and Kennedy, JJ.)(emphasis added). In this case, Thompson relies upon the same passage from the EEOC Compliance Manual in support of his claim that Title VII permits third-party associations to pursue retaliation claims based upon the protected conduct of another employee. Pet. Br. 22-23.

Expansion of Title VII's anti-retaliation provision to include a cause of action for close associations is not consistent with the statute's express language, nor is the expansion necessary to effectuate the statutory scheme of the anti-retaliation provision. Thompson recognizes the absence of rights afforded to third-party

associations under the anti-retaliation provision. Hence, he relies upon the enforcement mechanism set forth in 42 U.S.C. § 2000e-5 as the basis to pursue his claim. This conflation of the enforcement mechanism with the substantive right is not supported by the statute's text. *Cf. Jackson*, 544 U.S. at 189 (Thomas, J., dissenting) (holding that the majority had conflated the enforcement provision of Title IX with the substantive provision by allowing retaliation claim under Title IX). Additionally, the negative impact to employers of providing automatic job protection to employees based upon their "close association" should be considered a part of the determination of whether the statute should be expanded.

II. THE EXPRESS LANGUAGE OF THE ANTI-RETALIATION PROVISION PROVIDES AN EMPLOYEE THE RIGHT TO BE FREE FROM AN EMPLOYER'S DISCRIMINATION BECAUSE THE EMPLOYEE ENGAGED IN PROTECTED CONDUCT; CLOSE ASSOCIATIONS ARE NOT PROTECTED BY THE EXPRESS LANGUAGE.

The plain language of the anti-retaliation provision does not provide a cause of action to an employee based upon his association with a protected party. The plain language provides a cause of action to employees who engage in protected conduct. The wording of the anti-retaliation provision is consistent with the stated purpose in *Burlington* that the legislative intention of 42 U.S.C. § 2000e-3(a) is to protect employees based upon their conduct. Thompson's attempt to fashion a cause of action for himself requires the Court to look beyond the plain language of the statute.

The issue of whether a statutory cause of action exists presents a question of statutory construction. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979). This Court has clearly rejected the notion that a person who is harmed by the violation of a statute has an automatic right to pursue a cause of action under the violated statute. *Cannon v. University of Chicago*, 441 U.S. 677, 688 (1979) ("[T]he fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person."). "Instead, [the Court's] task is solely limited to determining whether Congress intended to create the private right of action asserted by [the plaintiff]." *Touche*, 442 U.S. at 568. *See also Cannon*, 441 U.S. at 689 (holding that the "threshold question" to be answered is "whether the statute was enacted for the benefit of a special class of which the plaintiff is a member.")

The question of whether the anti-retaliation provision was enacted for the benefit of close associations, as alleged by Thompson, was answered by this Court in *Burlington*. The "anti-retaliation provision seeks to prevent harm to individuals based upon **what they do, i.e. their conduct**." *Burlington*, 548 U.S. at 63 (emphasis added). Persons like Thompson alleging close associations do not seek protection based upon their conduct. Because Thompson cannot establish that the anti-retaliation provision was enacted to benefit him, his attempt to broaden the statute should be rejected.

The statutory language of the anti-retaliation provision supports the *Burlington* conclusion that the anti-retaliation provision protects parties based upon

their conduct, not upon their associations. *See Touche*, 442 U.S. at 568 (recognizing that "as with any case involving the interpretation of a statute, our analysis must begin with the language of the statute itself."). The anti-retaliation provision provides as follows:

> 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, proceedings, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a) (emphasis added). The plain language of the statute requires a connection between the alleged discrimination and the protected conduct in order for the discrimination to be deemed unlawful under this provision. The use of the conjunction "because" clearly links the two elements. *See Gross v. FBL Financial Services, Inc.*, 129 S.Ct. 2343, 2350 (2009) ("The words 'because of' mean 'by reason of: on account of.' 1Webster's Third New International Dictionary 194 (1966); see also 1 Oxford English Dictionary 746 (1933) (defining 'because of' to mean 'By reason *of*, on account *of*' (italics in original)); The Random House Dictionary of the English Language 132 (1966) (defining 'because' to mean 'by reason; on account')). Thompson ignores this plain language, however.

In *Crawford v. Metropolitan Government Ass'n of Nashville and Davidson County*, 129 S.Ct. 846 (2009), this Court described the first clause of the anti-retaliation provision as the "opposition clause" and the second clause as the "participation clause." These descriptions recognize that the statute contemplates action on the part of the protected party and some connection between the employer's alleged retaliation and the employee's protected conduct. Justice Alito cautioned in his concurring opinion that providing protection to a person who is "silent" in their opposition would "open the door to retaliation claims by employees who never expressed a word of opposition to their employers." *Id.* at 854 (Alito, J., concurring). In the hypothetical of the silent opposition in *Crawford*, there was at least some opposition by the hypothetical plaintiff. Here, however, Thompson relies solely on his association. Under Thompson's analysis, no opposition or participation is required, and there is no requirement of a connection between the plaintiff's conduct and the employer's retaliation.

The term "retaliate" is not used in 42 U.S.C. § 2000e-3(a). This provision, however, is well known as the "anti-retaliation provision" of Title VII. The term "retaliate" has meaning. Webster's Dictionary defines "retaliate" to mean: "to repay (as an injury) in kind" and "to return like for like; especially: to get revenge." Webster's Dictionary (online http: //www. Merriam-webster.com/diction/retaliate) (last visited October 20, 2010). Under the express statutory language, the party engaging in the protected conduct is the party who is being protected from repayment by the employer "in kind" and "like for like" for the employer's injury. Clearly, a plaintiff alleging

only a third-party association is not the party against whom the retaliation is directed.[3]

In *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005), this Court examined the meaning of the term "retaliate" as it related to allegations of discrimination under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.*, which prohibits discrimination by recipients of federal education funding. The Court's description of the right to be free from retaliation under Title IX emphasized the connection between the unlawful discrimination and the plaintiff's protected conduct as an element of the protected right: "Retaliation is, by definition, an intentional act. It is a form of 'discrimination' **because the complainant** is being subjected to different treatment." *Id.* at 173 (emphasis added). The Court determined that "retaliation" is an "intentional response to the nature of the complaint." *Id.* at 174. Thus, the context in which the term "retaliation" is used is that of the person who engaged in the protected conduct – not a third-party association.

If Congress had intended to grant protection to third-party associations under Title VII's anti-retaliation provision, it could have easily included associational language as it did in the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, *et seq.* The Americans with Disabilities Act specifically defines

3. Judge Rogers' concurring opinion below recognized that "[t]he intended beneficiaries of the anti-retaliation provision of §2000e-3(a) are obviously the persons retaliated against, not persons who are incidentally hurt by the retaliation." Pet. App. 32a.

"discrimination" to include "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." 42 U.S.C. § 12112(b)(4). Likewise, the regulations promulgated under the ADA provide that "[i]t is unlawful for a covered entity to exclude or deny equal jobs or benefits to, or otherwise discriminate against, a qualified individual because of a known disability of an individual with whom the qualified individual is known to have a family, business, social or other relationship or association." 29 C.F.R. § 1630.8. This associational protection is not contained in Title VII.

The text of the anti-retaliation provision does not reach as far as Thompson and the United States desire. The question before the Court is whether the anti-retaliation provision provides a cause of action for third-party associations of protected parties, not whether providing that right makes good policy. The answer is that the plain language of the anti-retaliation provision does not so provide.

III. THE RIGHT OF REGALADO TO PURSUE A RETALIATION CLAIM UNDERMINES THOMPSON'S CONCERN OF AN EMPLOYER USING FAMILY MEMBERS TO EFFECTUATE RETALIATION.

Thompson devotes a substantial portion of his brief explaining the sound policy of Title VII's anti-retaliation provision and the importance of ensuring that employers are not permitted "to retaliate against a man by hurting a member of his family [which] is an ancient method of

revenge, and is not unknown in the field of labor relations." Pet. Br. 17. Thompson's concern that employers will be given a license to retaliate against employees if third-party association claims are not permitted is wholly undermined by the failure of Regalado – the alleged intended target - to pursue a claim for retaliation against North American Stainless. Regalado was capable of pursuing her own claim for retaliation, but did not do so. Regalado obviously knew how to avail herself of the protections of the EEOC. She filed two charges of discrimination against North American Stainless – one before and one after Thompson's discharge. Resp. App., Regalado depo. 44, 45, 48, 49, 60. Notably, both charges were dismissed by the EEOC, and the EEOC never initiated proceedings against North American Stainless on her behalf. *Id.*

The summary judgment granted by the district court left completely intact the rights of employees who engage in protected conduct to pursue retaliation claims. Neither the district court nor the court of appeals expressed any opinion on whether retaliating against a protected party by injuring the protected party's "close association" was lawful. The decision of the district court was limited to whether the close association could pursue a claim for that retaliation. Thus, the arguments by Thompson and his amici that employees will be fearful of coming forward to complain of Title VII violations occurring in the workplace for fear of retaliation by the employer are unfounded. The prohibition of employer retaliation against an employee because the employee engages in protected conduct remains intact and unaffected by the summary judgment.

IV. THE MAJORITY OF LOWER COURTS ADDRESSING THIS ISSUE HAVE REFUSED TO RECOGNIZE THIRD-PARTY RETALIATION CLAIMS AS VALID CAUSES OF ACTION UNDER FEDERAL ANTI-RETALIATION LAWS.

The Sixth Circuit Court of Appeals is not the only court to refuse to recognize the right of a third-party to bring a cause of action for retaliation based upon the protected conduct of another employee. The Third, Eighth and Fifth Circuits are in agreement with the Sixth Circuit. In *Smith v. Riceland Foods*, 151 F.3d 813 (8th Cir. 1998), the court of appeals refused to recognize a right for an employee to bring a Title VII retaliation claim where the plaintiff/employee alleged that he was discharged due to his girlfriend's statutorily protected activity. The court held that bringing a third-party retaliation claim when the plaintiff did not engage in any statutorily protected activity "is neither supported by the plain language of Title VII nor necessary to protect third parties, such as spouses or significant others from retaliation." *Id.* at 819. The court further held that "Title VII already offers broad protection to such individuals by prohibiting employers from retaliating against employees for 'assist[ing] or participat[ing] in any manner' in a proceeding under Title VII." *Id.*

In *Fogleman v. Mercy Hospital*, 283 F.3d 561 (3rd Cir. 2002), the court rejected an employee's attempt to bring a third-party retaliation claim under the Age Discrimination in Employment Act's anti-retaliation provision, 29 U.S.C. § 623(d), based upon an allegation that the plaintiff employee was discharged because his

father, who also worked for the defendant employer, filed an age discrimination claim against the employer. The court relied upon the language of the ADEA's retaliation provision, which the court recognized is almost identical to Title VII's anti-retaliation provision, as the basis for its decision.[4] *Id.* at 568. Part of the court's concern in allowing parties who had not engaged in protected conduct to pursue third-party retaliation claims was the potential for abuse of the protection by employees. The court held that "Congress may have also feared that expanding the class of potential anti-discrimination plaintiffs beyond those who have engaged in protected activity to include anyone whose friends or relatives have engaged in protected activity would open the door to frivolous lawsuits and interfere with an employer's prerogative to fire at-will employees." *Id.* at 570.

In *Holt v. JTM Industries, Inc.*, 89 F.3d 1224 (5th Cir. 1996), the plaintiff was placed on administrative leave from his job by the defendant employer two weeks after the employer received notice that the plaintiff's wife, also an employee of the defendant, had filed a charge of age discrimination with the EEOC. The plaintiff alleged that he was discharged in retaliation for his wife having filed the age discrimination charge. Like Thompson, the plaintiff admitted that he did not

4. The ADEA's retaliation provision provides:

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

29 U.S.C. § 623(d).

engage in any protected activity. The Fifth Circuit rejected the plaintiff's attempt to broaden the protection of the ADEA's anti-retaliation provision to persons based solely upon their association with an employee who has engaged in protected activity. The court held that "such a rule would contradict the plain language of the statute and will rarely be necessary to protect employee spouses from retaliation." *Id.* at 1226. The court also recognized the practical difficulties that would arise from granting protection based upon an association:

> [W]e believe that the language that Congress has employed in § 623(d) will better protect employees against retaliation than we could by trying to define the types of relationships that should render automatic standing under § 623(d). If we hold that spouses have automatic standing to sue their employers for retaliation, the question then becomes, which other persons should have automatic standing to guard against the risk of retaliation?

Id. at 1227. The court recognized that "[t]he anti-retaliation provisions of the ADEA and Title VII are similar and 'cases interpreting the latter provision are frequently relied upon in interpreting the former.'" *Id.* at n. 1.

A significant number of district courts have also considered the issue of third-party retaliation claims and have refused to allow plaintiffs who have not engaged in protected conduct to pursue the claims. *See Parker v. AECOM USA, Inc.*, 2010 WL 625417 (D. Conn. 2010); *Rainer v. Refco, Inc.*, 464 F. Supp.2d 742 (S.D. Ohio

2006); *Singh v. Green Thumb Landscaping*, 390 F. Supp.2d 1129, 1136 (M.D. Fla. 2005); *Sukenic v. Maricopa County*, 2004 WL 3522690 (D. Ariz. 2004); *Higgins v. TJX Cos., Inc.*, 328 F. Supp.2d 122, 123 (D. Me. 2004); *U.S. EEOC v. Bojangles Rest. Inc.*, 284 F. Supp.2d 320, 327 (M.D.N.C. 2003); *Horizon Holdings, LLC v. Genmar Holdings, Inc.*, 241 F. Supp.2d 1123, 1143 (D. Kan. 2002); *Freeman v. Barnhart*, 2008 WL 744827 (N.D.Cal. 2008); *Dawn L. v. Greater Johnstown School District*, 586 F.Supp.2d 332 (W.D.Pa. 2008); *EEOC v. Wal-Mart Stores, Inc.*, 576 F.Supp.2d 1240 (D.N.M. 2008). State courts, likewise, have examined this issue regarding state equivalent Title VII statutes and agree that no cause of action exists. *See Dias v. Goodman Manufacturing Co.*, 214 S.W.3d 672 (Tex.App. 2007); *Pope v. Motel 6,* 114 P.3d 277 (Nev. 2005); *Gagliardi v. Ortho-Midwest, Inc.*, 733 N.W.2d 171 (Minn.App. 2007); *Shoecraft v. Univ. of Houston-Victoria*, 2006 WL 870432 (S.D.Tex. 2006) (interpreting Texas state law claims).

V. THERE WILL BE A SIGNIFICANT NEGATIVE IMPACT TO EMPLOYERS IF THIRD-PARTY ASSOCIATIONS ARE AFFORDED PROTECTION UNDER THE ANTI-RETALIATION STATUTE.

Retaliation claims are the fastest growing category of Title VII claims filed with the EEOC. From 1997 to 2009, the number of Title VII retaliation claims filed annually increased by over ten percent. Title VII retaliation claims represent the second highest category of claims filed, second only to race discrimination claims. U.S. Equal Employment Opportunity Commission, Charge Statistics FY 1997 through FY 2009 (statistics available at http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm) (last visited October 21, 2010).

See also Crawford, 129 U.S. at 855 (Alito, J., concurring) ("The number of retaliation claims filed with the EEOC has proliferated in recent years. . . . [R]etaliation charges filed with the EEOC doubled between 1992 and 2007[.] An expansive interpretation of protected opposition conduct would likely cause this trend to accelerate.")

Under Thompson's proposal to expand the anti-retaliation provision to include third person association claims, an employee who claims a close association with a protected party will be entitled to automatic job protection. Thompson does not define the scope of the relationships entitled to protection nor does he offer guidance on a standard to be applied. Employers and courts will be left guessing at what relationships are entitled to protection. Employers will not know whether employees are protected and, hence, whether at-will employment decisions may be taken against the employee. Likewise, courts will be left to decide on a case-by-case basis whether the relationship between the plaintiff and the protected party rises to the level warranting protection. This will lead to mini-trials on whether the protection should be recognized.

Remarkably, Thompson relies upon the status of his relationship with Regalado **at the time the complaint was filed** (i.e., married) rather than when the alleged retaliation occurred (i.e., engaged) in support of his third-party standing argument. Pet. Br. 41-42 ("[T]here undeniably was a 'close relationship' between Thompson and his then fiancée Regalado; by the time this lawsuit was filed, Thompson and Regalado were married. The relationship of husband and wife is certainly closer than the relationships this Court has previously held sufficient to satisfy this element."). Conducting a post-

retaliation examination of the relationship status would obviously create a huge potential for abuse and provide no notice to employers of an employee's protected status. While it is unlikely that employees would marry in order to establish third-party standing to support a retaliation claim, it is certainly foreseeable that a party could create a relationship in an effort to present an ostensible prima facie claim of retaliation.

The increased scope of this protection places a significant burden upon employers in taking necessary disciplinary action. It is a reality in the workplace that the first question considered by many employers before deciding whether to take necessary disciplinary action is whether the employee is in a protected category. If the employee is protected, the employer who does not have the appropriate paperwork in place or has not undertaken progressive discipline will likely delay or forego the necessary discipline based upon the legal risk associated with the discipline, despite the merits of the discipline.

If third-party retaliation claims based upon close associations are permitted to proceed, the legal risk associated with necessary discipline will increase exponentially. The employer's ability, as a practical matter, to take the necessary discipline is going to be severely diminished. Moreover, employers who are contemplating disciplinary measures against an employee are going to be placed in the position of inquiring into the nature of an employee's relationships in order to determine the risk of imposing legitimate disciplinary measures. Or, more significantly, employers may be placed in the position of defending a

discrimination or retaliation claim even though the employee was not in a protected class at the time discipline was imposed.

Additionally, given the automatic protection that will arise by claiming an association with a protected party, there is a real risk of employees falsely claiming a close association to limit the risk of discipline. As set forth above, the Third, Fifth and Eighth Circuits recognized some of these practical difficulties that will arise from affording protection to close associations.

Thompson offers no insight as to what standards will guide courts in determining whether the relationship between the employee plaintiff and the protected party is worthy of protection. That uncertainty creates a significant burden upon employers. Retaliation cases will be infused with mini-trials where the sufficiency of the relationship between the plaintiff and the protected party will have to be determined. Additionally, these mini-trials will very likely lead to factual questions and substantially eliminate the possibility of summary judgment in these cases. *See Crawford*, 129 S.Ct. at 854 (Alito, J., concurring).[5] It is entirely reasonable to

5. Justice Alito stated in his concurring opinion that "[a]n interpretation of the opposition clause that protects conduct that is not active and purposive would have important practical implications. It would open the door to retaliation claims by employees who never expressed a word of opposition to their employers. To be sure, in many cases, such employees would not be able to show that management was aware of their opposition and thus would not be able to show that their opposition caused the adverse actions at all. But in other cases, such employees might well be able to create a genuine factual issue on the question of causation." *Crawford*, 129 S.Ct. at 854 (Alito, J., concurring).

believe that Congress was cognizant of these practical implications when it did not define aggrieved persons to include "any person injured."

VI. THE ISSUE OF WHETHER THOMPSON MAY PROCEED UNDER TITLE VII'S ENFORCEMENT PROVISION AS A "PERSON AGGRIEVED" IS NOT PROPERLY BEFORE THIS COURT.

The issue before the district court and the court of appeals was whether the scope of the anti-retaliation provision, 42 U.S.C. § 2000e-3(a), should be broadened to allow "friends and family" to file retaliation claims even though the plaintiff's "friends and family" did not engage in protected conduct. Pet. App. 2a. Thompson never argued in the courts below that he should be permitted to pursue his claim as a "person aggrieved" under Title VII's enforcement provision, 42 U.S.C. § 2000e-5.[6] The issue was raised for the first time during the Sixth Circuit *en banc* oral arguments by the court, not Thompson.

The decision by the *en banc* majority does not mention the enforcement provision. The majority only considered the issue of "whether §704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2003-3(a),

6. Courts have widely recognized the distinction between the issue of whether a party has standing and whether a party has a cause of action. *See e.g., In re Olympia Holding Corp.*, 88 F.3d 952, 959 n.12 (11th Cir. 1996); *Mulhall v. Unite Here Local 355*, 618 F.3d 1279, 1286 (11th Cir. 2010); *The Wilderness Society v. Kane County, Utah*, 581 F.3d 1198, 1215-1216 (10th Cir. 2009); *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 868 n. 4 (9th Cir. 2002).

creates a cause of action for third-party retaliation for persons who have not personally engaged in protected activity." Pet. App. 2a. The enforcement provision is discussed by Judge Rogers in his concurring opinion. He concludes that Thompson is not a "person aggrieved" by the alleged retaliation because "[t]he intended beneficiaries of the anti-retaliation provision are obviously the persons retaliated against, not persons who are incidentally hurt by the retaliation." Pet. App. 32a. The issue is not discussed in the dissenting opinion of Judge Martin. Pet. App. 33a-38a. The issue was discussed as a response to Judge Rogers' concurrence in the dissent of Judges Moore and White. Pet. App. 50a-53a and 58a-63a.

Because the issue was not raised until the *en banc* oral arguments, and not by Thompson, North American Stainless never had the opportunity to brief this issue for the district court or the court of appeals. In its brief in opposition to certiorari, North American Stainless specifically objected to the inclusion of this issue by Thompson and continues to object herein. *See* Brief in Opposition 26-27.

This Court has demonstrated on numerous occasions its refusal to hear arguments made for the first time before it unless there are exceptional circumstances warranting this approach.[7] As this Court

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7. *See Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 168-169, 125 S.Ct. 577, 585 (2004) ('We ordinarily do not decide in the first instance issues not decided below."); *TRW Inc. v. Andrews*, 54 U.S. 19, 35, 122 S.Ct. 441, 451 (2001) ("We do not reach this issue because it was not raised or briefed below"); *Clingman v. Beaver*, 544 U.S. 581, 598 125 S.Ct. 2029, 2041-2042 (Cont'd)

recognized in *Federal Communications Commission v. Fox Television Stations, Inc.*, 129 S.Ct. 1800, 1819 (2009), it "is [a court] of final review, not of first review . . . ." (Internal citations omitted). Even though a few of the court of appeals judges considered the issue, it was clearly not addressed by the majority nor by North American Stainless. Moreoever, Thompson has not argued that any exceptional circumstances exist which require the Court to hear the issue for the first time.

(Cont'd)

(2005) ("We ordinarily do not consider claims neither raised nor decided below, and respondents have pointed to no unusual circumstances that would warrant considering other portions of Oklahoma's electoral code this late in the day") (internal citations omitted); *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 194 (2007) ("Regardless, the lower court did not consider the claims, and we decline to reach them in the first instance"); *Travelers Casualty & Surety Co. of America v. Pacific Gas & Electric Co.*, 549 U.S. 443 (2007) ("In any event, we ordinarily do not consider claims that were neither raised nor addressed below . . . ."); *Neely v. Martin K. Eby Construction Co., Inc.*, 386 U.S. 317, 330 (1967) ("Under these circumstances, we see no cause for deviating from our normal policy of not considering issues which have not been presented to the Court of Appeals and which are not properly presented for review here."); *Christian Legal Society Chapter of the University of California v. Martinez*, 130 S.Ct. 2971, 2995 (2010) ("[T]his Court is not the proper forum to air the issue in the first instance."); *City of Springfield, Massachusetts v. Kibbe*, 480 U.S. 257, 259 (1987) ("We ordinarily will not decide questions not raised or litigated in the lower courts."); *U.S. v. Alvarez-Sanchez*, 511 U.S. 350, 360, n. 5 (1994) ("Finding no exceptional circumstances that would warrant reviewing a claim that was waived below, we adhere to our general practice and decline to address respondent's Fourth Amendment argument.").

VII. TITLE VII'S ENFORCEMENT PROVISION DOES NOT PROVIDE THOMPSON THE RIGHT TO PURSUE A RETALIATION CLAIM WITHOUT HAVING ENGAGED IN ANY PROTECTED CONDUCT.

Even if the issue of Thompson's ability to pursue his third-party retaliation claim under Title VII's enforcement provision, 42 U.S.C. § 2000e-5(f)(1), were properly before this Court, Thompson's argument is without merit. Title VII's enforcement provision does not afford the right to pursue a retaliation claim to "any person injured" by a violation of the anti-retaliation provision. The language used by Congress is more restrictive. The enforcement provision provides a private right of enforcement to "the person claiming to be aggrieved." 42 U.S.C. § 2000e-5f(1).

The statutory scheme of Title VII's enforcement provision is contained in 42 U.S.C. § 2000e-5. Subsection (f)(1) of the enforcement provision sets forth the procedure for a private party to pursue a cause of action under Title VII. A civil action against a non-governmental party may be initiated by the Commission. In an action filed by the Commission, "[t]he person or persons aggrieved shall have the right to intervene in the civil action brought by the Commission." The Commission is required to "notify the person aggrieved" if the Commission (1) dismisses the charge of discrimination, (2) has not filed a civil action within 180 days, or (3) has not facilitated a conciliation agreement. This notification provides a 90-day period in which "a civil action may be brought against the respondent named in the charge (A) by **the person claiming to be**

aggrieved or (B) if such charge was filed by the Commission, **by any person whom the charge alleges was aggrieved** by the alleged unlawful employment practice." 42 U.S.C. § 2000e-5(f)(1) (emphasis added).

A. The term "aggrieved" is not a substitute for the term "injured."

Congress chose to use the phrase "person claiming to be aggrieved" rather than the phrase "any person injured" in the enforcement section. The term "aggrieved" is not defined in Title VII, and Thompson cites no authority to equate the terms "aggrieved" and "injured." This Court has clearly recognized the distinction between the terms "aggrieved" and "injured" and has explained the significance of the term "aggrieved" in statutory construction.

In *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990), the Court provided the following illustration to demonstrate the distinction between these words:

> [W]e have said that to be "adversely affected or aggrieved … within the meaning" of a statute, the plaintiff must establish that the injury he complains of (*his* aggrievement, or the adverse effect *upon him*) falls within the "zone of interests" sought to be protected by the statutory provision whose violation forms the legal basis for his complaint. *See Clarke v. Securities Industry Assn.*, 479 U.S. 388, 396-397 (1987). Thus, for example, the failure of an agency to comply with a statutory provision requiring "on the record" hearings would

> assuredly have an adverse effect upon the company that has the contract to record and transcribe the agency's proceedings; but since the provision was obviously enacted to protect the interests of the parties to the proceedings and not those of the reporters, that company would not be "adversely affected within the meaning" of the statute.

Id. at 883. Thompson's position in this case is similar to the recording company's position in the above illustration. The recording company lost business as a result of the recording violation; Thompson alleges that he lost his job as a result of a violation of the anti-retaliation provision (i.e., the retaliation against Regalado.) While Thompson may have been injured by the alleged statutory violation, just as the recording company was injured, Thompson is not "aggrieved" within the meaning of the anti-retaliation provision. He is not aggrieved within the meaning of the statute because he is not the intended beneficiary of Title VII's anti-retaliation protections. He is not the intended beneficiary because he did not engage in any protected conduct. *See Burlington*, 548 U.S. at 63 (holding that "the anti-retaliation provision seeks to prevent harm to individuals based upon what they do, i.e., their conduct"). Accordingly, even if Thompson's allegation that his discharge was an "indirect retaliation" against Regalado due to her protected conduct, and even if this action violates Title VII's anti-retaliation provision, Thompson was not "adversely affected or aggrieved … within the meaning" of the anti-retaliation provision. That is, he has not shown that "*his* aggrievement, or the adverse effect *upon him*, falls within the 'zone of

interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint" as required. *See Lujan*, 497 U.S. at 883.

B. The term "aggrieved," as used by Congress, is a term of art.

The term "aggrieved" contained in Title VII's enforcement provision is not an uncommon statutory term. This Court explained in *Director, Office of Workers' Compensation Programs, Dept. of Labor v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 126 (1995), that this term has been used by Congress to mean those persons who could satisfy both prudential and constitutional standing limitations:

> The phrase "person adversely affected or aggrieved" is a term of art used in many statutes to designate those who have standing to challenge or appeal any agency decision, within the agency or before the courts. . . . We have thus interpreted § 702 [the judicial review provision of the APA] as requiring a litigant to show, at the outset of this case, that he is injured in fact by agency action and that the interest he seeks to vindicate is arguably within the "zone of interests to be protected or regulated by the statute."

Id. at 127. Thus, "Congress [] was not writing on a clean slate when it authorized 'aggrieved persons' to bring Title VII actions." *Childress v. City of Richmond Virginia*, 134 F.3d 1205, 1208 (4th Cir. 1998) (Luttig, J. concurring). Judge Luttig in *Childress* further explained that:

> because Congress used the term of art 'aggrieved person' in Title VII, and chose not to define that term for purposes of that statute; because the background understanding of "aggrieved person" includes prudential limits on standing; and because one of the primary prudential limitations is that a plaintiff cannot enforce the rights and interests of another," the term "person aggrieved" in Title VII should be interpreted "so as to incorporate the prudential rule against third-party standing.

Id. Thompson has not cited any authority that would require the Court to broaden the construction of the phrase "aggrieved person" under Title VII to mean "any injured person."

C. Congress could have provided the right of enforcement to "any person injured" or defined "the person aggrieved" to mean any person injured.

If Congress intended Title VII to be enforced by any person conceivably injured as a result of statutory violation, it could have written the enforcement scheme to provide a right of action "to any injured person." Likewise, it could have defined the term "aggrieved person" to include "any injured person" if it intended to broaden the term beyond the ordinary meaning. There are statutes in which Congress has included a definition of the term "aggrieved person" when Congress intended to provide a cause of action to all injured persons. For example, the enforcement provision

for private persons in the Fair Housing Act, 42 U.S.C. § 3613, states that "an aggrieved person may commence a civil action . . ." The phrase "aggrieved person" is defined in the Act as follows:

> "Aggrieved person" includes any person who – (1) claims to have been injured by a discriminatory housing practice; or (2) believes that such person will be injured by a discriminatory housing practice that is about to occur.

42 U.S.C. § 3602(i)(1)-(2).

If Congress understood the phrase "person aggrieved" to have a meaning of "any person injured," then the broader definition set forth in the Fair Housing Act would not have been necessary. Clearly that is not the case, however. Congress has chosen to broaden the scope of the Fair Housing Act beyond the ordinary meaning of "person aggrieved" to include "any person who claims to have been injured."

VIII. THOMPSON LACKS STANDING TO PURSUE A CLAIM FOR VIOLATION OF THE ANTI-RETALIATION PROVISION.

Thompson has not cited any precedent which would require this Court to ignore prudential standing principles when considering whether third-party retaliation claims should be permitted under Title VII. Prudential standing jurisprudence embodies "judicially self-imposed limits on the exercise of federal jurisdiction." *Elk Grove Unified School District v.*

Newdow, 542 U.S. 1, 11-12 (2004). It also encompasses "the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interest protected by the law invoked." *Id.* at 12. *See also Warth v. Seldin*, 422 U.S. 490, 499 (1975) (holding that "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties"). Prudential standing limitations are consistent with Title VII's enforcement scheme which limits the person who may bring a claim to "the person claiming to be aggrieved" and not to "any person claiming to be injured" by violation of the statute.

This Court explained in *Warth* that "the source of the plaintiff's claim to relief assumes critical importance with respect to the prudential rules of standing that, apart from Art. III's minimum requirements, serve to limit the role of the courts in resolving public disputes." *Id.* at 500. The Court explained that "[e]ssentially, the standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood **as granting persons in the plaintiff's position** a right to judicial relief." *Id.* (emphasis added). Here, the source of Thompson's claim to relief is Title VII's anti-retaliation provision. As set forth above, the anti-retaliation provision protects parties who engage in protected conduct, not those associated with that person. *Burlington*, 548 U.S. at 63. Thus, Title VII's anti-retaliation provision cannot be understood to grant Thompson a right to judicial relief.

A. Thompson's reliance upon *Trafficante* and *Blue Shield* is misplaced.

Thompson and the United States cite two cases interpreting statutes other than Title VII which use the term "aggrieved" in support of the argument that Thompson should be entitled to pursue a claim for his injuries under the anti-retaliation provision. In *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972), the plaintiff alleged violation of his right under the Fair Housing Act to live in housing which was free from discriminatory housing practices. In *Blue Shield of Va. v. McCready*, 457 U.S. 465 (1982), the plaintiff alleged violation of her right under the Sherman Act to be protected from a failure of market due to an unlawful restraint of trade. She sought damages under the Clayton Act for the alleged violations.

Thompson's reliance upon these two cases is misplaced. The plaintiffs in these cases were asserting statutory violations of **their own** rights, not a third-party's rights. This Court has cautioned that "[w]hen conducting statutory interpretations, we 'must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination.'" *Gross v. FBL Financial Services, Inc.*, 129 S.Ct. 2343, 2349 (2009) (quoting *Federal Express Corp. v. Holowecki*, 552 U.S. 389 (2008)). The facts of *Trafficante* and *Blue Shield* are distinguishable from the facts in this case because Thompson is not asserting a violation of his right under the anti-retaliation statute. Furthermore, the language in Title VIII and the Clayton Act differ from the language used in Title VII.

1. Trafficante.

In *Trafficante*, two tenants of an apartment complex, one white and one African American, filed complaints under Title VIII of the Civil Rights Act of 1968 (the Fair Housing Act) against the owners of their apartment complex for intentionally discriminating against non-whites in the renting of units in the apartment complex. The plaintiff tenants were not denied housing based upon their race. Each of the plaintiffs argued, nonetheless, that they had been injured by the discriminatory housing practices of the defendants because they had (1) lost the social benefits of living in an integrated community; (2) missed business and professional advantages which would have accrued if they had lived with members of minority groups, and (3) suffered embarrassment and economic damage from being stigmatized as residents of a white ghetto. *Id.* at 207-08.

As in this case, the district court did not reach the merits of the claim as to whether discrimination had occurred. The district court dismissed the plaintiffs' claims on the basis that the plaintiffs were not within the class of persons entitled to sue. The district court found that they had not been denied application for housing based upon their race and, therefore, could not pursue a cause of action under Title VIII. The Third Circuit Court of Appeals agreed. This Court reversed.

This Court determined that the plaintiff tenants alleged the "loss of important benefits from interracial associations," and that they were entitled to receipt of those benefits under Title VIII. *Id.* at 209-10. The Court

determined that Title VIII's definition of "person aggrieved" as "**any person** who claims to have **been injured** by a discriminatory housing practice" to evidence "a congressional intention to define standing as broadly as is permitted by Article III of the Constitution." *Id* at 209. (emphasis added).

The distinction between the facts in *Trafficante* and in this case is significant. The plaintiffs in *Trafficante* argued that **they** had a right under Title VIII to live in integrated housing and that **their right** to live in integrated housing had been violated by the defendant. That is, they argued that they were "aggrieved" within the meaning of Title VIII. In stark contrast, Thompson does not claim to be "aggrieved" within the meaning of Title VII's anti-retaliation provision. Thompson has a right under Title VII's anti-retaliation provision to "oppose" or "participate" in protected activity and to be protected from retaliation by his employer if he does so. Thompson, however, did not undertake any "opposition" or "participation" activities which are protected by the anti-retaliation provision. Thompson does not allege that North American Stainless retaliated against him. He alleges retaliation against his close association. Thompson does not allege to have been denied the right afforded to him by the anti-retaliation provision. There is a significant distinction between Thompson's allegations in this case and the plaintiffs' allegations in *Trafficante*.

In Judge Rogers' concurring opinion in the Sixth Circuit below, he recognized that *Trafficante* does not reach as far as Thompson now contends. Judge Rogers wrote that *Trafficante* could not "properly be read to

say that any person affected by the imposition of retaliation should be deemed sufficiently aggrieved to bring a Title VII claim." Pet. App. 31a., n. 1. Judge Rogers explained that "[w]hile Title VII can be interpreted to protect the right of people to associate with people of different races, it can hardly be interpreted to protect the right of people to associate with people who have been retaliated against." Pet. App. 31a, n. 1.

Not only are the facts in *Trafficante* distinguishable, but there also are substantial material differences between the statutory language in Title VII and Title VIII. In 1972, when *Trafficante* was decided, the Fair Housing Act's enforcement provision provided the right to pursue a claim by "the person aggrieved." That term was specifically defined in the statute to mean "[a]ny person who claims to have been injured by a discriminatory housing practice or who believes that he will be irrevocably injured by a discriminatory housing practice that is about to occur."[8] Title VII does not contain the expansive definition of "person claiming to be aggrieved" that the Fair Housing Act contains. This

8. The language from the Fair Housing Act set forth in this section is the language as the statute existed in 1972 at the time *Trafficante* was decided. See 3610, Pub.L. No. 90-284, Title VIII, § 810, Apr. 11, 1968, 82 Stat. 85. Section 810 of Title VIII was repealed in 1988 by Pub.L. No.100-430, § 8(2), Sept. 13, 1988, 102 Stat. 1625. Public Law 100-430 added a definition section defining "person aggrieved" to include "any person who (1) claims to have been injured by a discriminatory housing practice; or (2) believes that such person will be injured by a discriminatory housing practice that is about to occur." Pub.L. No. 100-430, § 5, 102 Stat. 1619, which is codified at 42 U.S.C § 3602(i).

Court in *Trafficante* specifically noted that the statutory definition of "person aggrieved" given by Congress in the Fair Housing Act was "broad and inclusive." *Trafficante*, 409 U.S. at 209. The Court found that the broad statutory definition was also necessary because HUD had no power of enforcement under the statute. *Id.* at 210. The Attorney General's authority to bring suit under the statute was limited to correcting "a pattern or practice" violating the Act. *Id.* at 211. Thompson cannot point to any similar definition in Title VII that would allow him to enforce the provision as broadly as he seeks.

Given the factual distinctions, the difference in statutory language between Title VII and the Fair Housing Act, and the difference in the enforcement mechanisms, reliance upon *Trafficante* as a basis to allow third-party association claims to be pursued by a "person injured" by the alleged retaliation is misplaced.

2. Blue Shield.

In *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982), the plaintiff alleged that her group health plan engaged in an unlawful conspiracy with a group of psychiatrists to restrain competition of psychotherapy services. The plaintiff was a consumer of psychotherapy services and, thus, claimed to have been injured by the refusal to provide reimbursement for services provided to her by her psychologist. The plaintiff alleged the conspiracy violated § 1 of the Sherman Act, 15 U.S.C. § 1. She sought treble damages and attorney's fees under § 4 of the Clayton Act. The district court dismissed her claim on the basis that she had no standing under the

Clayton Act. The Court of Appeals reversed, and this Court affirmed.

The purpose of the Sherman Act is "to protect the public from failure of the market." *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993). McCready alleged that the Act was violated by the conspiracy to restrict trade engaged in by Blue Shield and the defendant psychiatrists. She asserted that **she had been injured by violation of the right afforded to her under the Sherman Act**. She was not, like Thompson in this case, asserting that she had been injured by the violation of some third-party's rights. The facts in *Blue Shield* are not sufficiently similar to have any precedential value in this case.

Further, the language of Section 4 of the Clayton Act is considerably different than the language of Title VII's enforcement provision as well. The Clayton Act contains broad remedial language which provides treble-damages to "**[a]ny person who shall be injured** in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15 (emphasis added). Title VII's enforcement provision does not contain this broad language. Title VII violations may be enforced by "the person claiming to be aggrieved" by the alleged unlawful employment practice. Given the factual distinctions in *Blue Shield* and the significantly broader language the Clayton Act's enforcement provision, reliance upon *Blue Shield* as a basis to allow Thompson to proceed with a claim under Title VII based upon his association with Regalado is misplaced.

IX. THIRD-PARTY ASSOCIATION RETALIATION CLAIMS ARE NOT CONSISTENT WITH THE *MCDONNELL DOUGLAS* FRAMEWORK.

Thompson has not offered any framework by which third-party retaliation claims would be established at trial and for summary judgment purposes. Clearly, the *McDonnell Douglas* framework could not be followed or would have to be modified because the plaintiff will not be able to establish the first element of the prima facie case that he or she engaged in protected conduct. The burden of persuasion and order for the presentation of proof in a Title VII disparate treatment cases was set forth by this Court in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973). Under *McDonnell Douglas*, a plaintiff must first establish a prima facie case of discrimination. Establishing a prima facie case creates a presumption that the employer unlawfully discriminated against the employee. The burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for its employment action. If the employer meets this burden, then the presumption of intentional discrimination disappears. The plaintiff may rebut the presumption by demonstrating that the employer's proffered reason is pretextual. *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 254 (1981).

This Court has never decided the issue of whether the *McDonnell Douglas* framework is applicable in Title VII retaliation cases. Title VII's anti-retaliation provision prohibits "discrimination," and the Court determined in *Jackson* that retaliation was discrimination. Thus, there is no reason to anticipate that a different framework would be applied in a

retaliation claim. Every circuit court of appeals has applied the burden shifting analysis in retaliation cases.[9]

Under the *McDonnell Douglas* scheme, in order to satisfy the minimal requirements of a prima facie case, the plaintiff must prove (1) that he was a member of the protected class, (2) that he was qualified for the position, (3) that, despite his qualifications he was rejected, and (4) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainants qualifications. *McDonnell Douglas*, 411 U.S. 802. In the context of a retaliation claim, the plaintiff demonstrates membership in a protected class by showing that she participated in protected activity. Under Thompson's proposal, the plaintiff would no longer be required to demonstrate that she was a protected party or engaged in protected activity.

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9. The *McDonnell Douglas* burden shifting analysis to Title VII retaliation claims was applied in the following cases: *Fennell v. First Step Designs, Ltd.*, 83F.3d 526, 535 (1st Cir. 1996), *Quinn v. Green Tree Credit Corp.*, 159 F.3d 759, 769 (2nd Cir. 1998), *Moore v. City of Philadelphia*, 461 F.3d 331, 341 (3d Cir. 2006), *Carter v. Ball*, 33 F.3d 450, 460 (4th Cir. 1994), *Baker v. American Airlines, Inc.*, 430 F.3d 750, 754 (5th Cir. 2005), *EEOC v. Ohio Edison Co.*, 7 F.3d 541, 543 (6th Cir. 1993), *Haywood v. Lucent Technologies, Inc.*, 323 F.3d 524, 531 (7th Cir. 2003), *Eliserio v. United Steelworkers of America*, 398 F.3d 1071, 1079 – 80 (8th Cir. 2005), *Ray v. Henderson*, 217 F.3d 1234, 1240 (9th Cir. 2000), *Stover v. Martinez*, 382 F.3d 1064, 1071 (10th Cir. 2004), *Gregory v. Georgia Dept. of Human Resources*, 355 F.3d 1277, 1279 (11th Cir. 2004), *Morgan v. Federal Home Loan Mortgage Company*, 328 F.3d 647, 651 (D. D.C. 2003), *Haddon v. Executive Residence at White House*, 313 F.3d 1352, 1359 (Fed. Cir. 2002).

Presumably, although Thompson has not offered this guidance, the plaintiff would be required to demonstrate as part of his proof that a close relationship existed between the plaintiff and the party who engaged in protected conduct. The plaintiff would also be required to establish that the adverse action taken against the plaintiff was intended to invoke retribution against the party who engaged in the protected conduct.

X. THE ISSUE OF WHETHER NORTH AMERICAN STAINLESS' ACTIONS VIOLATED REGALADO'S RIGHTS UNDER *BURLINGTON* IS NOT AT ISSUE IN THIS CASE AND NEED NOT BE DECIDED.

From the outset of this case, North American Stainless has denied the allegation that Thompson's discharge was motivated by an intent to retaliate against Regalado. North American Stainless continues to maintain that position. The question presented to the district court and the Sixth Circuit Court of Appeals presumed for purposes of ruling on the purely legal question in this case that the discharge was motivated by unlawful retaliation.[10] The legal issue presented in the lower courts was whether Thompson may pursue a claim for retaliation under 42 U.S.C. § 2000e-3 when he did not engage in any protected conduct. The unlawful retaliation was presumed for purposes of the summary judgment motion.

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10. Thompson stated at page 6 of his Brief to the Sixth Circuit in the statements of facts: "Thompson was terminated in retaliation for his fiancée's protected activity." [cite – to p. 6]

North American Stainless argued to the district court that summary judgment was proper even if the discharge was motivated by retaliation because Thompson did not have a cause of action to pursue under the anti-retaliation provision. Record 12-2. Thompson's response in the district court also presumed retaliatory motive. Record 15-2. Thomspon argued that he was entitled to protection due to his close association with Regalado. In the court of appeals, Thompson argued that the anti-retaliation provision should be construed to include claimants who are "closely related [to] or associated [with]" a person who has engaged in protected conduct. Pet. App. 8a. Writing for the majority of the *en banc* court, Judge Griffin wrote "[t]he sole issue raised in this rehearing *en banc* is whether § 704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a) creates a cause of action for third-party retaliation for persons who have not personally engaged in protected activity." Pet. App. 2a.

Thompson and the United States now ask this Court to resolve the question of whether Thompson's discharge meets the criterion of being materially adverse under 42 U.S.C. § 2000e-3 based upon the standard set forth in *Burlington*. As set forth above, this issue has been presumed for purposes of resolving whether Thompson could pursue a cause of action for retaliation. Because the *Burlington* issue was never resolved in the courts below and is not necessary to the outcome of this case, the issue should not be resolved for the first time at this level of final appellate review.

Even if the Court were to resolve the *Burlington* issue, the determination of whether Thompson's discharge was retaliatory must be viewed from "the

perspective of a reasonable person" in Regalado's position. *Burlington*, 126 S.Ct. at 2416. Regalado, however, is not a party to this case, and this question was never answered below. Furthermore, North American Stainless should be entitled to present the legitimate non-discriminatory reasons to its employment decision as a defense to Thompson's allegation of retaliatory motive. *Burlington* was decided two days after the district court originally granted summary judgment to North American Stainless. Thompson filed a motion to alter or amend the summary judgment with the district court citing *Burlington,* but the district court overruled the motion. The district court held:

> The *Burlington Northern* decision did not address the issue currently before this Court which is whether Title VII permits a retaliation claim by a plaintiff who did not himself engage in protected activity. Accordingly, the Court will not alter its June 20, 2006 Opinion and Order in light of the Supreme Court's decision in *Burlington Northern*.

Record 31, Order p. 3. It is not appropriate to address this issue now for the first time.

XI. THE EEOC COMPLIANCE MANUAL IS NOT ENTITLED TO DEFERENCE.

Thompson argues that this Court should look to the EEOC's Compliance Manual for "guidance" on whether Thompson may pursue a claim for retaliation. Pet. Br. 23. Reliance upon the EEOC's Compliance Manual is not warranted. The general rule regarding statutory

interpretations by administrative agencies was announced by this Court in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 164 (1944). Thompson does not allege that the substantial deference afforded to certain other administrative determinations under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837(1984), should be afforded to the EEOC Compliance Manual. Indeed, in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 112, n.6 (2002), this Court specifically recognized that EEOC interpretative guidelines, including those contained in the EEOC Compliance Manual, do not receive *Chevron* deference and are entitled only "to respect" under *Skidmore*.[11] Chief Justice Burger previously cautioned against a "wooden application" of EEOC Guidelines or "slavish adherence" to them in Title VII cases, as "they are not federal regulations which have been submitted to public comment and scrutiny . . . ."*Albemarle Paper Co. v. Moody*, 422 U.S. 405, 452, (1975) (Burger, C.J., concurring in part and dissenting in part).

The courts that have evaluated the specific portions of the EEOC Compliance Manual relied upon by Thompson herein have explicitly rejected its interpretation of § 2000e-3(a). See *Singh v. Green Thumb Landscaping, Inc.*, 390 F.Supp.2d 1129, 1137 (M.D. Fla. 2005) ("The EEOC's interpretation of Title VII's anti-retaliation provision is not based on a thorough consideration of the issues presented to the Court."); *Ranier v. Refco, Inc.*, 464 F.Supp.2d 742, 750

11. *See also EEOC v. SunDance Rehabilitation Corp.*, 466 F.3d 490 (6th Cir. 2006); *Taylor v. Federal Express Corp.*, 429 F.3d 461 (4th Cir. 2005).

(S.D.Ohio 2006) (refusing to defer to the same part of the EEOC Compliance Manual and holding that "the [EEOC's Compliance] manual's interpretation is not entitled to significant deference because it does not appear to be well-reasoned and is not supported by a thorough consideration of the various legal decisions which have reached the opposite conclusion."). *See also Ebbert v. DaimlerChrysler Corp.*, 319 F.3d 103, 114 (3rd Cir. 2003) (holding that that the EEOC's statutory interpretations do not "contain reasoning or any hallmark of deliberation that could be persuasive to a court.")

As noted in *Singh*, the EEOC Compliance Manual references three cases as support for the position that claims by persons such as Thompson are cognizable under § 2000e-3(a): *Murphy v. Cadillac Rubber & Plastics, Inc.*, 946 F.Supp. 1108 (W.D.N.Y. 1996); *EEOC v. Ohio Edison Co.*, 7 F.3d 541 (6th Cir. 1993); *Thurman v. Robertshaw Control Co.*, 869 F.Supp. 934 (N.D.Ga. 1994). Not only are these cases distinguishable from the instant matter, but the EEOC's view is contrary to the holdings of the circuits which have addressed the specific issue before this Court.

In *Murphy*, the court repeatedly stated in its findings that the husband, who asserted the retaliation claim, had "assisted and supported" his wife in her complaints of discrimination. 946 F. Supp. at 1113, 1114, 1117. Here, Thompson never claimed to have assisted Regalado in this case. In *Ohio Edison*, the court specifically noted that the issue was one of "retaliation against an employee when he has asked another employee to act on his behalf in protesting allegedly

discriminatory practices." 7 F.3d at 543. Here, Thompson never alleged that he was acting on Regalado's behalf or serving as her representative, let alone that he protested any discriminatory practices. Finally, despite the EEOC's contention that *Thurman* supports the recognition of third-party retaliation claims, the court there ultimately granted summary judgment to the employer on those claims. 869 F.Supp. at 941.

The EEOC misplaces reliance on this authority. The Manual dismisses the holding of *Holt v. JTM Indus.*, 89 F.3d 1224 (5th Cir. 1996), in which the Fifth Circuit refused to recognize a third-party retaliation claim based solely on association. Yet, *Holt* is in accordance with all of the circuits that have addressed this issue, as discussed above. Not only have various courts refused to defer to the EEOC's statutory interpretations, but they have also repeatedly recognized that this role is better suited to the courts than the EEOC. *See e.g., Crumley v. Delaware State College*, 797 F.Supp. 341, 347 (D. Del. 1992) ("Because the EEOC's expertise does not encompass analysis of Supreme Court cases, this Court will not rest its holding on deference to the EEOC's Policy Statement.") In *Chevron*, this Court recognized that "[t]he judiciary is the final authority on issues of statutory construction . . . ." 467 U.S. at 843. The Third Circuit similarly acknowledged that "the interpretation of statutes is the prerogative of the courts" rather than the EEOC. *Ebbert*, 319 F.3d at 111 n. 8. The court further noted that:

> [T]he courts are the final authorities on issues of statutory construction. They must reject administrative constructions of the statute,

> whether reached by adjudication or by rulemaking, that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement.

Id. (*quoting Federal Election Commission v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981)).[12] "Questions of law that can be answered with 'traditional tools of statutory construction' are within the special expertise of courts, not agencies . . . ." *Lee v. Sullivan*, 787 F.Supp. 921, 937 (N.D. Cal. 1992).

The fact that the EEOC has filed amicus briefs in various cases does not lend any greater credence to its position either. As the District of Columbia Circuit Court of Appeals has noted:

> The brief is obviously not the product either of formal adjudication or notice-and-comment rule-making, and accordingly has no more status than the opinion letters, policy statements, agency manuals, and enforcement guidelines that the Court said were undeserving of such deference in *Christensen v. Harris County*, 529 U.S. 576, 587, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000).

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12. *See also Ferroni v. Teamsters, Chauffeurs & Warehousemen Local No. 222*, 297 F.3d 1146, 1151 (2nd Cir. 2002) (rejecting an EEOC interpretation that was "directly contrary to the statute's plain language"); *Leonard F. v. Israel Discount Bank of New York*, 199 F.3d 99, 106 (2nd Cir. 1999)(no deference is required when the agency's interpretation is at odds with the statute).

Fogg v. Ashcroft, 254 F.3d 103, 109 (D. D.C. 2001). *See also In re Union Pacific Railroad Employment Practices Litigation*, 479 F.3d 936, 943 (8th Cir. 2007). The Tenth Circuit similarly recognized in *Shikles v. United Mgmt. Co.*, 426 F.3d 1304, 1315 (10th Cir. 2005), that "amicus briefs, opinion letters, and policy guidances do not reflect the deliberate exercise of interpretive authority that regulations and guidelines demonstrate." Clearly, the EEOC's statutory interpretation has not enjoyed widespread acceptance by the courts, but mixed results at best.[13]

Finally, Thompson relies upon other agencies' interpretations of their own anti-retaliation statutes to argue for deference to the EEOC's position herein. However, there are fundamental differences between the deference afforded to those interpretations, as well as the statutes they have interpreted, which prevent such a comparison. Particularly, Thompson focuses upon interpretations of the NLRA by the NLRB, and the Department of Labor's interpretations of OSHA, MSHA, the Fair Labor Standards Act, and the Equal Pay Act. His reliance is misplaced, as courts have afforded those agencies a much greater level of deference than that afforded to the EEOC. *See e.g., CH2M Hill, Inc. v. Herman*, 192 F.3d 711 (7th Cir. 1999) (interpretation of OSHA standard); *United Food and*

13. *See e.g.Fogleman v. Mercy Hospital*, 283 F.3d 561 (3rd Cir. 2002); *EEOC v. Wal-mart Stores, Inc.*, 576 F.Supp.2d 1240 (D.N.M. 2008); *U.S. EEOC v. Bojangles Rest. Inc.*, 284 F.Supp.2d 320 (M.D.N.C. 2003), in which the courts rejected the EEOC's position that third-party causes of action are valid under federal anti-retaliation laws.

Commercial Workers Union, Local 1036 v. NLRB, 307 F.3d 760, 766 (9th Cir. 2002) ("Courts are required to defer to the NLRB on statutory interpretation under *Chevron*"); *Olson v. Federal Mine Safety and Health Review Commission*, 381 F.3d 1007 (10th Cir. 2004) (interpretation of MSHA); *Wal-mart Stores, Inc. v. Secretary of Labor*, 406 F.3d 731 (D. D.C. 2005) (interpretation of OSHA); *SEIU, United Healthcare Workers-West v. NLRB*, 574 F.3d 1213, 1214 (9th Cir. 2009) ("The *Chevron* doctrine requires that this court defer to the NLRB's interpretation of the NLRA"); *General Service Employees Union, Local No. 73, SEIU, AFL-CIO, CLC v. NLRB* , 230 F.3d 909, 913 (7th Cir. 2000)("The Court has made it clear in a number of decisions that the NLRB is one of the agencies to which *Chevron* deference is owed.").

Conversely, federal courts have acknowledged the EEOC's limited role in Title VII proceedings. As the United States District Court for the District of New Jersey has recognized, "[t]he EEOC merely processes complaints pursuant to the federal regulations. Any EEOC determination is non-final and non-binding . . . . The EEOC is merely a conduit which funnels employment discrimination claims to the federal court." *Connor v. U.S. EEOC*, 736 F.Supp. 570, 573 (D.N.J. 1990). *See also Hill v. Rayboy-Brauestein*, 467 F.Supp.2d 336, (S.D.N.Y. 2006) ("[E]very court that has considered the issue has found that EEOC determinations have no preclusive effect."); *Barnett v. Revere Smelting & Refining Corp.*, 67 F.Supp.2d 378, 390 n. 5 (S.D.N.Y. 1999) (recognizing that EEOC findings are not binding on the court); *Krasner v. HSH Nordbank AG*, 680 F.Supp.2d 502, 515 (S.D.N.Y. 2010) (recognizing that the EEOC's

position set forth in its Policy Guidance is not binding on the courts); *Hamilton v. Texas Department of Transportation*, 206 F.Supp.2d 826, 834 (S.D. Tex. 2001); *Jones v. Berge*, 172 F.Supp.2d 1128, 1132 (W.D.Wisc. 2001); *Sherwood v. Evans*, 422 F.Supp.2d 181, 187 (D. D.C. 2006); *Antrum v. Washington Metropolitan Area Transit Authority*, 2010 WL 1840838 at *5 (D. D.C. 2010); *Francis v. District of Columbia*, 2010 WL 3257368 at *8 n. 7 (D. D.C. 2010). No credible comparison can be made between the deference afforded to these agency interpretations and those of the EEOC. Hence, it is improper to look to the EEOC Compliance Manual for Guidance on this issue.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

APPENDIX A — STATUTES INVOLVED

Title VII
42 U.S.C. § 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer—

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

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

42 U.S.C. § 2000e-3. Other unlawful employment practices

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings.

Appendix A

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . to discriminate against any individual . . . 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.

42 U.S.C. § 2000e-5. Enforcement provisions

(a) Power of Commission to prevent unlawful employment practices

The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.

(b) Charges by persons aggrieved or member of Commission of unlawful employment practices by employers etc . . .

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer . . . has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge . . . on such employer . . . within ten days, and shall make an investigation thereof. . . .

Appendix A

(f) Civil action by Commission . . . or person aggrieved . . . .

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. . . . The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission . . . . If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section . . . the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. . . .

Appendix A

Fair Housing Act, Title VIII:

3610, Pub. L. No. 90-284, Title VIII, § 810, Apr. 11, 1968, 82 Stat. 85, *repealed* by Pub. L. No. 100-430, § 8(2), Sept. 13, 1988, 102 Stat. 1625.

(a) Any person who claims to have been injured by a discriminatory housing practice or who believes that he will be irrevocably injured by a discriminatory housing practice that is about to occur (hereafter "person aggrieved") may file a complaint with the Secretary. . . .

(c) If within 30 days after a complaint is filed with the Secretary or within thirty days after expiration of any period of reference under subsection (c), the Secretary has been unable to obtain voluntary compliance with this title, the person aggrieved may, within thirty days thereafter, commence a civil action in any appropriate United States district court, against the respondent named in the complaint, to enforce the rights granted or protected by this title, insofar as such rights relate to the subject of the complaint.

Appendix A

42 U.S.C. § 3602(i) (1988)

(i) "Aggrieved person" includes any person who –

(1) claims to have been injured by a discriminatory housing practice; or

(2) believes that such person will be injured by a discriminatory housing practice that is about to occur.

42 U.S.C. § 3613(a) (1988)

(a) Civil Action

(1)(A) An aggrieved person may commence a civil action in an appropriate United States district court or State court not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice, or breach of the conciliation agreement entered into under this subchapter, whichever occurs last, to obtain appropriate relief with respect to such discriminatory housing practice or breach.

APPENDIX B — DEPOSITION TRANSCRIPT AND EXHIBIT

EXHIBIT 4

Equal Employment Opportunity Commission

DISMISSAL AND NOTICE OF RIGHTS

To:	From:
Miriam Regalado 118 South Ash Drive Hanover, IN 47243	Equal Employment Opportunity Commission (EEOC) Louisville Area Office 600 Dr. Martin Luther King Jr. Place, Suite 268 Louisville, Kentucky 40202

On behalf of a person aggrieved whose identity is CONFIDENTIAL (29 CFR § 1601.7(a))

Charge No.
241-2003-00828

EEOC Representative
Kenneth Jackey, Investigator

Telephone No.
502-582-5746

THE EEOC IS CLOSING ITS FILE ON THIS CHARGE FOR THE FOLLOWING REASON:

Appendix B

* * *

[X] The EEOC issues the following determination: Based upon its investigation, the EEOC is unable to conclude that the information obtained establishes violations of the statutes. This does not certify that the respondent is in compliance with the statutes. No finding is made as to any other issues that might be construed as having been raised by this charge.

The EEOC has adopted the findings of the state or local fair employment practices agency that investigated this charge.

* * * *

On behalf of the Commission

s/ Susan Ryan
for
Marcia Hall-Craig, Director

12-17-03
(Date)

* * * *

Q. Okay. Eric Thompson, your husband, does not work for the same employer; is that correct?

A. Yes, that's correct.

Q. What was the name of his employee?

A. Schlosser Forge.

Q. Okay. When did -- when did you leave NAS, North American Stainless?

A. January 15th, 2004.

Q. Between that -- that time and the time that you became employed by TAMCO Steel did you hold other employment?

A. Yes. I was at Trinity Industries in Navasota, Texas.

Q. How long?

A. Ten months.

Q. What did you do there?

A. I was Quality Control Engineer -- or, I'm sorry, Quality Control Manager.

Q. What type of a facility is Trinity Industries?

A. They make forgings, they make -- their primary product is heads for railcar industry, pressure vessels.

* * *

[WHEREUPON, document referred to is marked Exhibit 4 for identification.]

BY MR. MONGE:

Q. Now, the -- the numbers don't seem to -- to match up; okay. I mean, I'll -- I will tell you that -- that they -- they appear to have carried the same number on to both of the charges, but they're showing a different charge number up here.

A. [examines document] Yes.

Q. Did you receive what's now marked Exhibit Number 4?

A. Yes, I did.

Q. And it's on or about, it looks like December the 17th of 2003; correct?

A. Yes.

Q. And you were still employed at North American Stainless?

A. Yes.

Q. Okay. Do you know if this related the second complaint that you filed?

A. Yes, I know that for a fact.

Q. Okay. Who told you that?

A. Mr. Ken Jackey.

Q. Okay. Did -- when you filed that second complaint against North American Stainless, did you talk to Mr. Jackey prior to filing that complaint?

A. Yes, I did.

Q. Did he offer you any suggestions about filing that, whether you should or should not file it?

A. He suggested that I should go ahead and file the second charge.

Q. What do you remember telling him that prompted him to suggest that you file that second charge?

A. What I do remember is that I told them that I noticed that the workplace environment went hostile. And I told him that I figured it was due to the first charge I had filed.

* * *

Q. Okay. The second one, you said, related to retaliation. And I asked you about -- and I think you said there had been hostile workplace. But then you said that -- that Eric Thompson had not yet been terminated when you filed that. What retaliation was going on before Eric Thompson was terminated? Does that help you at all?

A. I'm trying to remember. I -- I can't recall.

Q. Okay. Well, you see my dilemma is this, that -- that if -- if you're trying to say the workplace became more hostile when they started having these personnel improvement programs, that didn't happen until the fall of 2003. And yet you -- you clearly had filed your second complaint before that because North American Stainless gets a notice in March of two thousand and -- March of 2003.

A. Yeah, I see the date.

Q. Let me ask you this, Mrs. Thompson: Did -- did you file a third complaint?

A. No.

Q. Well, I'm not going to -- if all of a sudden you have a vision as to what that was about, just pipe up and say it, because I -- I don't know how else to -- we'll just have to leave the record the way it is, if she doesn't know. Let's move on.

MR. MONGE: 6?

THE REPORTER: No, 5.

MR. MONGE: 5.

[WHEREUPON, document referred to is marked Exhibit 5 for identification.]

BY MR. MONGE:

Appendix B

* * *

Q. Okay. Did you continue to try to figure it out?

A. No. It -- it didn't take us long because Ken Jackey phone called me -- or, you know, called me on the phone later.

Q. Mr. Jackey from the EEOC?

A. Yes.

Q. Okay. And when did he call you?

A. It was the following week after Eric was terminated.

Q. And what was the purpose of his call?

A. He was just updating me on what had happened with, you know, these -- this -- actually, being that the second letter is dated 3/10/2003, which is the second charge. And that's when I told him that Eric, you know, had been terminated.

Q. Okay. And what did he say to you, "he," Mr. Jackey?

A. He said, "Well, are you thinking what I'm thinking?" And I said, "I -- yeah, think so." He's like, "Yeah." And he said, "Well, I think it's due to his association with you, being that you're engaged to be

married, and since you had first filled out a complaint." That's when, you know, their second target was Eric and he was fired due to, you know, being associated me. It's a form of retaliation.

Q. Now, am I correct, though, in understanding that, as we sit here today, both of the charges that you filed with the EEOC have been dismissed?

A. Yes.

Q. Okay. So, Mr. Jackey, I think your words were, "Are you thinking what I'm thinking." Did he make some suggestion as to what -- what should be done?

A. He just said, "Well, let me mail you a questionnaire, you know, it'll be for Eric, and you-all get it in the mail."

* * * *