WHO IS ENTITLED TO PROTECTION FROM RETALIATION? (Fundamentals)

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I. **TITLE VII ANTI-RETALIATION PROVISIONS**. Title VII makes it an "unlawful employment practice for an employer to discriminate against any of [its] employees or applicants for employment…because he has **opposed** any practice made an unlawful employment practice by [Title VII], or because [the employee] has made a charge, testified, assisted, or **participated** in any manner in an investigation, proceeding, or hearing under [Title VII]." 42 U.S.C. §2000-e3.

A. ***Prima Facie* Elements**. To prove retaliation under Title VII, a plaintiff has to demonstrate the following elements:

1. The employee engaged in statutorily protected activity under Title VII;
2. The employee suffered an adverse employment action; and
3. The adverse employment action is causally related to the employee's statutorily protected activity.

Mestas v. Town of Evansville, Wyoming, No. 17-8092, 2019 WL 4233198, at *4 (10th Cir. Sept. 6, 2019) (*citing Stover v. Martinez*, 382 F.3d 1064, 1071 (10th Cir. 2004)); *Jordan v. United Health Grp. Inc.*, No. 18-2268, 2019 WL 4071943, at *2 (2d Cir. Aug. 29, 2019) *(citing Lore v. City of Syracuse*, 670 F.3d 127, 157 (2d Cir. 2012); *Goldsmith v. Bagby Elevator Co., Inc.*, 513 F.3d 1261, 1277 (11th Cir. 2008).

B. **Protected Activity**. What is protected activity? There are two legally recognized forms of protection: 1) conduct that falls under the opposition clause of Title VII and 2) conduct protected by the participation clause.

1. Opposition Clause. The opposition clause protects employees who oppose unlawful practices under Title VII. In other words, when employees complain internally to management or human resources about unlawful discrimination

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under Title VII. *See Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*, 555 U.S. 271, 129 S. Ct. 846 (2009) ("[w]hen an employee communicates to her employer a belief that the employer has engaged in . . . a form of employment discrimination, that communication '*virtually always*' constitutes the employee's *opposition* to the activity.").

- Examples of opposition:

  - Making an internal written complaint to human resources or pursuant to an employer's internal complaint procedures.

2. Participation Clause. Conversely to the opposition clause, the participation clause of Title VII protects employees who participate in investigations, hearings or a proceeding under Title VII. 42 U.S.C. §2000e-3(a).

- Examples of participation:

  - Filing a charge of discrimination with the United States Equal Employment Opportunity Commission ("EEOC") or otherwise participating in an EEOC investigation of an employer's employment practices.

  - Filing an employment discrimination lawsuit under Title VII.

C. **Who is covered?** Title VII provides that "a civil action may be brought by the person claiming to be aggrieved." 42 U.S.C. §2000e-5. To be aggrieved, the plaintiff must be within the "zone of interests" to be protected by Title VII. *Thompson v. North American Stainless*, 562 U.S. 170 (2011).

II. THE BEGINNING OF THIRD-PARTY RETALIATION CLAIMS - *THOMPSON V. NORTH AMERICAN STAINLESS*

A. **Factual Background**. Thompson and his fiancé both worked for North American Stainless ("NAS"). In 2003, Thompson's fiancé filed a sex discrimination charge with the EEOC. Not coincidentally, three weeks later, NAS terminated Thompson's employment.

B. **Procedural History**.

- Following his termination, Thompson filed his own charge of discrimination for retaliation with the EEOC against NAS alleging that NAS terminated him in retaliation for his fiancé filing her charge of discrimination. 562 U.S. at 172.

- After conciliation efforts through the EEOC failed, Thompson initiated a lawsuit in the district court for retaliation. The district court granted summary

judgment to NAS, finding that Title VII did not permit a third-party retaliation claim. *Id.*

- Thompson appealed to the United States Court of Appeals for the Sixth Circuit.[3] The Sixth Circuit ultimately affirmed the District Court's decision, finding that Thompson had not engaged in activity protected by Title VII—i.e. that Thompson had neither complained about discrimination nor filed a charge of discrimination with the EEOC. 567 F.3d 804.

C. **Supreme Court Grants Certiorari**. The Supreme Court posed two questions:

1. Did NAS's firing of Thompson constitute unlawful retaliation?

2. If it did, does Title VII grant Thompson a cause of action?

The Supreme Court answered both questions in the affirmative, **reversing** the Sixth Circuit. 562 U.S. 170 (J. Scalia).

- As to the first issue, the Court applied the *Burlington North* standard and assumed for purposes of the appeal that such conduct would violate Title VII. Specifically, the Supreme Court stated that "it [was] obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew her fiancé would be fired" because of her protected activity. 562 U.S. at 174. The Court also declined "to identify a fixed class of relationships for which third-party reprisals are unlawful." Although it declined to define a class of relationships, the Court noted that "firing a close family member will almost always meet the *Burlington North* standard" and its expectation that those with mere acquaintance will almost never meet the standard. Thus, courts should examine third-party reprisal cases on a case-by-case basis.

- As to the second issue, the Court examined who had standing to sue under Title VII for unlawful retaliation. Title VII allows those who are **aggrieved** to pursue a claim. Ultimately, the Court relied on prior precedent defining who is "aggrieved" as being one who "falls within the 'zone of interests' sought to be protected by" Title VII. The Court described the "zone of interest" test "as denying a right of review 'if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.'"

- Applying that test in *Thompson*, the Court concluded that Thompson fell within the "zone of interest" because he was an employee of NAS and Title VII is designed to protect employees from unlawful actions. The Court further stated that Thompson was "not an accidental victim of retaliation—of the employer's unlawful act." Rather, the purpose behind firing Thomas was to harm

[3] Initially, the Sixth Circuit reversed the District Court's decision. However, after rehearing *en banc*, the Sixth Circuit affirmed the District Court's decision.

Thompson's fiancé for engaging in protected activity.

III. *THOMPSON'S* PROGENY – WHO IS IN THE ZONE OF INTERESTS?

A. **First Circuit**—Maine, Massachusetts, New Hampshire, Puerto Rico, Rhode Island

1. Courts have found the following types of relationships to be within the zone of interests and protected from retaliation:

- *EEOC v. Fred Fuller Oil Co., Inc.*, 2014 WL 347635, *6 (D. N.H. Jan. 31, 2014) (refusing to dismiss complaint for third-party retaliation claim where a "close friend" who had prior working relationship with plaintiff, was instrumental in getting plaintiff the job with the employer, the plaintiff displayed cards and pictures of the friend's daughter and the two women together on her desk, and spent time outside of work together because the relationship as pled was in the grey-area between close friend and casual acquaintance).

2. Conversely, the following types of relationships have NOT been recognized as within the zone of risk and are NOT protected from retaliation:

- *Afolabi v. Lifespan Corporation*, 2019 WL 2224893 (D. R.I. May 23, 2019) (noting that employee could not pursue third-party retaliation claim based on the protected activity of other employees who appeared more like mere acquaintances).

- *O'Rourke v. Boyne Resorts*, 2014 WL 496859 (D. N.H. Feb. 7, 2014) (employee was not aggrieved and claim for third-party retaliation failed because the employee herself had not suffered an adverse action—instead the employee's fiancé's mother suffered the adverse action based on the plaintiff's protected activity).

- *Rodriguez-Vega v. Policlinica la Familia de Toa Alta, Inc.*, 942 F. Supp. 2d 210 (D. P.R. 2013) ("people that have been suspected of dating each other do not have the type of close relationship that third-party retaliation claims are designed to protect because taking action against a suspected romantic partner is not likely to dissuade a reasonable worker from reporting harassment.").

B. **Second Circuit**—Connecticut, New York, Vermont

1. Courts have held the following types of relationships to be within the zone of interests and protected from retaliation.

- *Barnett v. National Passenger Railroad Corporation*, 2018 WL 6493098 (S.D. N.Y. Dec. 10, 2018) ("Parents also have standing to

bring retaliation claims based on the protected activity of their children.").

- *Cobb v. Atria Senior Living, Inc.*, 2018 WL 587315 (D. Conn. Jan. 29, 2018) ("There is no rule that the relationship must be familial or even romantic." Thus, the court found that a relationship of friendship and confidence was sufficient to plead a third-party retaliation claim.).

- *Crawford v. National Railroad Passenger Corporation*, 2015 WL 8023680 (D. Conn. Dec. 4, 2015) (recognizing a father and daughter-in-law relationship).

- *Vormittag v. Unity Elec. Co., Inc.*, 2014 WL 4273303 (E.D. N.Y. Aug. 28, 2014) (father was aggrieved employee based on daughter's protected activity).

- *Rajaravivarma v. Bd. of Trustees for Conn. State Univ. Sys.*, 862 F. Supp. 2d 127 (D. Conn. 2012) (husband and wife).

C. **Third Circuit**—Delaware, New Jersey, Pennsylvania

1. Courts have found the following types of relationships to be within the zone of risk and protected from retaliation:

   - *Antonelli v. Sapa Extrusions Inc.*, No. 3:14cv2184, 2015 WL 365683, at *3 (M.D. Pa. Jan. 27, 2015) (finding romantically involved co-workers were within *Thompson*'s zone of interests and stating "[n]either the length of their relationship nor the absence of an engagement ring are material").

   - *Sterner v. County of Berks, Pennsylvania*, Civ. A. No. 13-1568, 2014 WL 1281241, at *8 (E.D. Pa. Mar. 28, 2014) (determining the plaintiff's friendship with co-workers who filed complaints against employer was within the zone of interests).

2. Conversely, the following types of relationships have NOT been recognized as within the zone of risk and are NOT protected from retaliation:

   - *Lin v. Rohm and Hass Co.*, Civ. A. No. 11-3158, 2015 WL 273035, at *3–4 (E.D. Pa. 2015) (rejecting the plaintiff's argument that she was entitled to damages for harm caused to her single-member LLC by her former employer's retaliatory conduct).

   - *Crawford v. George & Lynch, Inc.*, Civ. A. No. 10-949-GMS-SRF, 2012 WL 2674546, at *3 (D. Del. July 5, 2012) (declining to allow an entity owned by the plaintiff to pursue a retaliation claim where the

employer terminated a contract with the entity and discharged plaintiff after she reported sexual harassment).

D. **Fourth Circuit—**Maryland, North Carolina, South Carolina, Virginia, West Virginia

1. Courts have found the following types of relationships to be within the zone of risk and protected from retaliation:

- *Cooper v. City of North Myrtle Beach*, Civ. A. No. 4:10-cv-1676-JMC-TER, 2012 WL 1283498, at *7 (D. S.C. Jan. 25, 2012) ("The evidence in the record indicates that Plaintiff and [co-worker] are friends. Further, the harm Plaintiff claims to have suffered as a result [of] her association with [co-worker] is her placement on probation . . . and a hostile work environment. Thus, the circumstances presented here fall somewhere between the 'firing of a close family member' and 'a milder reprisal on a mere acquaintance.'").

2. Conversely, the following types of relationships have NOT been recognized as within the zone of risk and are NOT protected from retaliation:

- *Fleming v. Norfolk Southern Corp.*, 1:17CV418, 2018 WL 1626523, at *3 (M.D. N.C. Mar. 31, 2018) ("[T]here are no allegations in the Complaint to show that the relationship between plaintiff and [co-worker] was anything more than that of co-workers.").

- *Schmidt v. Town of Cheverly, MD*, 212 F. Supp. 3d 573, 579 (D. Md. 2016) ("[I]t was not reasonable for [the plaintiff] to believe that his participation in the sexual discrimination complaint of his spouse, who was not an employee of the Cheverly police department, created an actionable violation under Title VII.").

- *Mackall v. Colvin*, Civ. A. No. ELH-12-1153, 2015 WL 412922, at *24 (D. Md. Jan. 29, 2015) (stating "in the absence of allegations that plaintiff and [co-worker] shared an affiliation, beyond their race and the same chain of supervisors, *Thompson* is distinguishable" and ultimately rejecting the plaintiff's third-party reprisal claim because the plaintiff failed to allege facts establishing she and her co-worker "were anything more than 'mere acquaintances'").

- *Taylor v. Republic Servs., Inc.*, No. 12-cv-00523-GBL-IDD, 2013 WL 487042, at *10–11 (E.D. Va. Feb. 6, 2013) (rejecting third-party reprisal argument where the plaintiff alleged her employer retaliated against her by canceling contracts with her husband's employer).

E. **Fifth Circuit—**Louisiana, Mississippi, Texas

1. Courts have found the following types of relationships to be within the zone of risk and protected from retaliation:

   - *Moore v. Bolivar County, Mississippi*, No. 4:15-CV-145-DMB-JMV, 2017 WL 5973039 (N.D. Miss. Dec. 1, 2017) (father and son).

   - *Chavez v. City of San Antonio*, Civ. A. No. SA-14-CV-527-XR, 2015 WL 5008466, at *12 n.13 (W.D. Tex. Aug. 19, 2015) (stating "dating relationship of over two years that led to marriage six months later" was within the zone of interests).

   - *Martinez v. South San Antonio Indep. Sch. Dist.*, Civ. A. No. SA-11-CA-0971-XR, 2013 WL 3280275, at *5 (W.D. Tex. June 26, 2013) ("[I]t is correct that Plaintiff could pursue a claim that he was fired in retaliation for his father-in-law and spouse's filing of EEOC charges.").

   - *Willis v. Cleco Corp.*, Civ. A. No. 09-2103, 2011 WL 4443312 (W.D. La. Sept. 22, 2011) (husband and wife).

   - *Zamora v. City of Houston*, Civ. A. No. 4:07-4510, 2011 WL 4067860 (S.D. Tex. Sept. 13, 2011) (father and son).

2. Conversely, the following types of relationships have NOT been recognized as within the zone of risk and are NOT protected from retaliation:

   - *Moyer v. Jos. A. Bank Clothiers, Inc.*, Civ. A. No. 3:11-CV-3076-L, 2014 WL 1661211, at *4 (N.D. Tex. Apr. 25, 2014) (finding relationship insufficient where plaintiff and co-worker were not family members or dating; had worked together for less than one year; and there was no evidence proving that they had spent time together outside of work or that plaintiff knew any personal information about co-worker).

   - *Assariathu v. Lone Star HMA LP*, Civ. A. No. 3:11-cv-99-O, 2012 WL 12897341, at *9 (N.D. Tex. Mar. 12, 2012) (concluding "friendly work relations," such as eating meals together during shifts, do not fall within *Thompson*'s zone of interests).

F. **Sixth Circuit**—Kentucky, Michigan, Ohio, Tennessee

   - *Ferrell v. Johnson*, No. 4:09-cv-40, 2011 WL 1225907 (E.D. Tenn. Mar. 30, 2011) (applying *Thompson* and finding that employee who was collaterally harmed by unlawful discrimination towards minority employees was assumed to be an aggrieved person under Title VII).

G. **Seventh Circuit**—Illinois, Indiana, Wisconsin

1. Courts have found the following types of relationships to be within the zone of risk and protected from retaliation:

- *Lugo v. International Brotherhood of Electrical Worker Local 134*, 15-CV-03769, 2017 WL 1151019 (N.D. Ill. Mar. 28, 2017) (plaintiff has standing to assert retaliation claim against employer that failed to hire him because he previously engaged in protected activity against a different entity).

- *Wilcox v. Allstate Corp.*, 11-c-814, 2012 WL 6569729 (N.D. Ill. Dec. 17, 2012) (allowing third-party claim of wife based on husband's protected activity).

2. Conversely, the following case demonstrates where courts have NOT recognized the person to be within the zone of risk and are NOT protected from retaliation:

- *Ray v. Muncie Community Sch. Corp.*, No. 1:17-cv-04552, 2018 WL 4680217 (S.D. Ind. Sept. 28, 2018) (applying *Thompson* in the context of a Title VII discrimination claim, employee who was not the target of the harassment and did not allege a deprivation "of an interracial working environment to be within the "zone of interest" protections of Title VII").

H. **Eighth Circuit**—Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, South Dakota

1. Courts have found the following types of relationships to be within the zone of risk and protected from retaliation:

- *Byars v. Petrol III, LLC*, No. 8:17cv91, 2019 WL 1383796 (D. Neb. Mar. 27, 2019) (recognizing third-party retaliation claim based on romantic relationship at the time of the adverse action, even if the relationship ended after the adverse action).

- *Davis v. Ricketts*, 2011 WL 9369010 (D. Neb. Nov. 14, 2011) (mother's claim for third-party retaliation based on termination of her son because she engaged in protected activity was actionable).

- *Riggs v. Bennet Cty. Hosp. and Nursing Home*, 2019 WL 1441205 (D.S.D. Mar. 31, 2019) (recognizing the viability of a husband/wife relationship to support a third-party retaliation claim, however, claim failed where husband could not show he sufficiently engaged in activities in support of his wife, who had engaged in protected activity).

I. **Ninth Circuit**—Alaska, Arizona, California, Hawaii, Idaho, Nevada, Oregon, Washington

- *EEOC v. Zoria Farms, Inc.*, 1:13–cv–01544, 2016 WL 8677142 (E.D. Cal. May 13, 2016) (alleging retaliation against brother-in-law for brother's protected activity was sufficient to state a third-party retaliation claim).

J. **Tenth Circuit**—Colorado, Kansas, New Mexico, Oklahoma, Utah, Wyoming

- *Barrett v. Salt Lake City*, 754 F.3d 864 (10th Cir. 2014) (allowing third-party retaliation claim of a co-worker who helped a female co-worker pursue a sexual harassment complaint).

K. **Eleventh Circuit**—Alabama, Florida, Georgia

1. Courts have found the following types of relationships to be within the zone of risk and protected from retaliation:

- *Laska v. Kelley Manufacturing Co.*, 2019 WL 4720991 (M.D. Ga. Sept. 26, 2019) (acknowledging husband and wife in the zone of interests, but claim failed because plaintiff failed to show that the husband engaged in any statutorily protected activity.)

- *Tolar v. Marion Bank and Trust, Co.*, 378 F. Supp. 3d 1103 (N.D. Ala. 2019) (father and uncle had standing under Title VII).

- *Tolar v. Bradley Arant Boult Cummings*, 2014 WL 12836011 (N.D. Ala. Nov. 18, 2014) (recognizing that Title VII third-party retaliation claims can only apply to those with an employment relationship—whether as an employee or applicant—because they are closely related to employees who have engaged in statutorily protected activity).

- *McGhee v. Healthcare Services, Group, Inc.*, 2011 WL 818662 (N.D. Fla. Mar. 2, 2011) (husband and a wife are within the zone of interest even if the husband and wife are employed with different entities—one being a contractor of the other).

2. Conversely, the following types of relationships have NOT been recognized as within the zone of risk and are NOT protected from retaliation:

- *Underwood v. Dep't of Fin. Servs of the State of Fla.*, 518 Fed. Appx. 637 (11th Cir. Apr. 25, 2013) (the court declined to extend protection to a state worker who was terminated just one month after the state employee's wife, who worked for a different state agency, settled her

gender and age discrimination claims. The court reasoned that the employer did not fire him as a means of harming or retaliating against his wife, who did not work for the same state agency).

- *Cochran v. Five Points Temporaries, LLC*, 907 F. Supp. 2d 1260 (N.D. Ala. 2012) (When applying the "zone of interests" to a claim for hostile work environment, bystander to the harassment was not aggrieved under Title VII).

L. **D.C. Circuit**—District of Columbia

- *Howard R.L. Cook & Tommy Shaw Foundation, et al v. Billington*, 737 F.3d 767 (D.C. Cir. 2013) (Court found that a foundation and its officers, that assist employees pursue discrimination claims against the defendant, were sufficiently within the zone of interest; however, the claim failed because the foundation failed to allege that the defendant's failure to recognize it as an employee organization was because of any statutorily protected activity by any employee or applicant).

IV. FEDERAL ADMINISTRATIVE AGENCY

The federal agencies such as the EEOC and the Merit Systems Protection Board ("MSPB") that interpret equal opportunity laws have yet to address any third-party retaliation claims post-*Thompson*.

V. INTERPLAY WITH *THOMPSON* AND OTHER ANTI-RETALIATION STATUTES

A. **Americans with Disabilities Act of 1990 ("ADA")**. Since the ADA is modeled after Title VII and uses the same term "aggrieved," it is no surprise that third-party retaliation claims are actionable under ADA. Similar to *Thompson*, the issue is what types of relationships are within the "zone of interest" to have standing to sue under the ADA.

1. Courts have found the following types of relationships to be within the zone of interest and protected from retaliation:

- *Morgan v. Napolitano*, 988 F. Supp. 2d 1162, 1178 (E.D. Cal. 2013) ("Accordingly, while neither [the] Supreme Court nor the Ninth Circuit has explicitly addressed the issue, it would appear that the Court's reasoning in *Thompson* applies equally to the ADA and the ADEA. Third-party retaliation claims therefore appear equally cognizable under those statutes.").

- *Rossley v. Drake Univ.*, 4:17-CV-00058, 2017 WL 5634751, 2017 U.S. Dist. LEXIS 218187 (S.D. Iowa Dec. 20, 2017) (allowing third-party

retaliation claim based on plaintiff who was removed from the board of trustees after advocating for his disabled son, a student of the university).

B. **Age Discrimination in Employment Act ("ADEA"), the Fair Labor Standards Act of 1938 ("FLSA") and the Family and Medical Leave Act of 1993 ("FMLA")**

1. Courts have allowed third-party retaliation claims in the following actions.

FLSA

- *Maier v. Private Mini Storage Manager, Inc.*, Civ. A. No. H-18-0991, 2019 WL 3753810, at *7 (S.D. Tex. Aug. 8, 2019) (noting "it is unclear whether . . . *Thompson* applies to retaliation claims under the FLSA" and stating "[t]he Court assumes, without holding, that [wife]'s protected activity can satisfy the 'protected activity' element for [husband]'s *prima facie* case of FLSA retaliation").

- *O'Donnell v. America at Home Healthcare and Nursing Servs., Ltd.*, No. 12 CV 6762, 2015 WL 684544, at *10–12 (N.D. Ill. Feb. 17, 2015) (allowing the plaintiff's retaliation claim under the FLSA to proceed where she was terminated after her husband asserted his rights to overtime pay).

FMLA

- *Kastor v. Cash Express of Tenn., LLC*, 77 F. Supp. 3d 605, 608–12 (W.D. Ky. 2015) (permitting the plaintiff to pursue a retaliation claim under the FMLA where co-worker was terminated for taking leave, and plaintiff was subsequently terminated when employer realized plaintiff may be helpful to co-worker's FMLA lawsuit).

- *Lopez v. Four Dee, Inc.*, No. 11-CV-1099, 2012 WL 2339289, at *2 (E.D. N.Y. June 19, 2012) (stating "both the text of the FMLA's enforcement provision and the logic of *Thompson* strongly suggest that [plaintiff] is entitled to bring an action alleging third-party retaliation" for being terminated due to her sister's assertion of rights under the FMLA).

ADEA

- *Dembin v. LVI Servs., Inc.*, 822 F. Supp. 2d 436, 438 (S.D. N.Y. 2011) (concluding daughter could raise retaliation claim under the ADEA after being terminated following her father's age discrimination complaint).

2. However, other courts refused to recognize a third-party retaliation claim based on *Thompson* in the following cases:

FLSA

- *Pineda v. JTCH Apartments, L.L.C.*, 843 F.3d 1062, 1066–67 (5th Cir. 2016) (finding spouse could not maintain a retaliation claim under the FLSA because she was not the defendant's employee and therefore not within the zone of interests).

FMLA

- *West v. Wayne Cnty.*, 672 Fed. Appx. 535 (6th Cir. 2016) (declining to apply the *Thompson* standard, holding that the FMLA limits recovery to employees).

- *Gilbert v. St. Rita's Prof'l Servs., LLC*, No. 3:11 CV 2097, 2012 WL 2344583, at *7 (N.D. Ohio June 20, 2012) ("Given the difference in statutory text between the FMLA and Title VII, as well as *Thompson*'s specific focus on language excluded from the FMLA, this Court finds the FMLA does not allow for causes of action under a third-party theory.").

C. **First Amendment Retaliation.** The United States Constitution provides the following protections:

> *"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."*

Thus, a plaintiff can bring a claim for retaliation for engaging in protected speech under the First Amendment. *See Moss v. City of Pembroke Pines*, 782 F.3d 613, 617–18 (11th Cir. 2015) (outlining the elements to prove First Amendment retaliation).

1. Courts are split on whether a third party has standing to sue for retaliation under the First Amendment:

- *Nailon v. University of Cincinnati*, 715 Fed. Appx. 509 (6th Cir. 2017) (unpublished) (holding that an aunt was protected from retaliation based on the protected activity of her student niece).

- *Reed v. Neiheisel*, No. 2:15-cv-57, 2015 WL 4249130 (W.D. Mich. July 13, 2015) (declining to extend third-party retaliation claim under First

Amendment/42 U.S.C. §1983), *compare Benison v. Ross*, 765 F.3d 649 (6th Cir. 2014) (because employer did not dispute standing to sue, court assumed that plaintiff can bring a third-party retaliation claim under the First Amendment based on the protected activity of the plaintiff's spouse).

- *Matus v. Lorain Cnty. Gen. Health Dist.*, 1:13-cv-1029, 2016 WL 194238 (N.D. Ohio Jan. 15, 2016) (assuming that doctor's First Amendment third-party retaliation claim can proceed under §1983, but reasoning that where claim is based upon protected speech by plaintiff's brother-in-law, plaintiff has not proven to be within the "zone of interest" described by the Supreme Court in *Thompson*.)

D. **Title IX of the Education Amendments Act of 1972 ("Title IX")**. Title IX prohibits retaliation for engaging in protected activity under Title IX (i.e. complaining about sex discrimination in education). *See* 20 U.S.C. §1681.

- *Condiff v. Hart Cty. Sch. Dist.*, 770 F. Supp. 2d 876, 883 (W.D. Ky. 2011) (recognizing the viability of a third-party retaliation claim under Title IX because "claims for retaliation under Title IX are analyzed under Title VII standards," a plaintiff may be able to establish protected activity due the plaintiff's husband's activity).

E. **National Labor Relations Act ("NLRA")**. The NLRA is modeled completely different from Title VII and other anti-retaliation statutes. The relevant statutory text is as follows:

> **(a) "Unfair Labor Practice by employer.** It shall be an unfair labor practice for an employer—
> 1. To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
> 2. To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, that subject to the rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;
> 3. By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .
> 4. To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;
> 5. To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)." 29 U.S.C. §158(a).

1. Third-Party Retaliation Claims are Actionable under the NLRA even pre-*Thompson*:

- *Tinney Rebar Servs., Inc.*, 354 NLRB 429 (2009) ("[I]t is clear that an employer may violate the Act by discharging an employee because of his relationship with another person who has engaged in protected activity.")

- *Tasty Baking Co.*, 330 NLRB 560 (2000) (employer violated the Act by demoting employee in retaliation for the protected activities of the employee's relatives) (*citing Parker-Robb Chevrolet, Inc.*, 262 NLRB 404 (1982)).

- *Thorgen Tool & Molding, Inc.*, 312 NLRB 628 (1993) (employer violated §§8(a)(1), (3) and (5) of the NLRA by discharging an employee with familial ties to a union supporter for the purpose of discouraging union support).

- *PJAX and MGR Mgmt. Servs.*, 307 NLRB 1201 (1992) (employer violated §8(a)(3) of the NLRA by discharging the brother of the person it believed was responsible for organizing its facility).

- *See also NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086 (7th Cir. 1987) ("To retaliate against a man by hurting a member of his family is an ancient method of revenge, and is not unknown in the field of labor relations. If the company had fired [a union officer] for his election as chief shop steward, there would be no question that it had violated the Act. Instead, it fired his mother. If he loves his mother, this had to hurt him as well as her. An effective method of getting at him, a protected worker, it is barred by the statute."); *Kenrich Petrochemicals, Inc. v. NLRB*, 907 F.2d 400 (3d Cir. 1990).

F. **Occupational Safety and Health Administration ("OSHA")**. OSHA enforces several whistleblower anti-retaliation statutes, such as OSHA 11(c), the Energy Reorganization Act, and the Surface Transportation Assistance Act, among many others.

1. Whether third-party retaliation claims are actionable under certain anti-retaliation statutes remains undecided.

<u>Energy Reorganization Act of 1974, 42 U.S.C. §5801:</u>

- *Nelson v. Energy Northwest*, ARB Case No. 13-075, 2015 WL 5921330 (U.S. DOL SAROX) (U.S.D.O.L. Admin. Rev. Bd. Sept. 30, 2015). In *Nelson*, the Administrative Review Board ("ARB") declined to address third-party retaliation claims under the Energy Reorganization Act—

which is enforced by OSHA—where the whistleblower engaged in protected activity and his friend suffered the adverse action. However, in *Nelson* the ARB ruled that the complainant had not engaged in protected activity because the statute "does not extend to 'friends of whistleblowers' who do not themselves engage in protected activity."

- On appeal, the ARB noted that the Secretary of Labor has previously discussed the third-party retaliation theory of liability but had not yet resolved the matter. In *Collins v. Fla. Power Corp.*, Case Nos. 1991-ERA-047, 049, slip op. at 7 (Sec'y May 15, 1995), the Secretary reasoned that the complainant could possibly recover because the employer discharged the complainant to "obscure its motives" of retaliating against the complainant's co-worker, who had engaged in whistleblowing activity. In *Collins*, which predated *Thompson,* the Secretary, however, declined to expressly rule on the issue because there was no evidence of causation.

Surface Transportation Assistance Act, 49 U.S.C. §31105:

- *Schindler v. Estenson Logistics*, ALJ No. 2016-STA-00067 (U.S.D.O.L. ALJ Gee Mar. 22, 2017) (analyzing third-party retaliation claim under Surface Transportation Assistance Act and noting that the Department of Labor's ARB had not resolved the issue of third-party retaliation under any of its statutes, including the Surface Transportation Assistance Act).

2. At least one court refused to apply the *Thompson* standard under the Federal Railroad Safety Act, 49 U.S.C. § 20109(d)(1).

- *Gibbs v. Norfolk Southern Ry.*, Civ. A. No. 3:14-cv-587-DJH, 2015 WL 4273208 (W.D. K.Y. July 14, 2015) (refusing to apply *Thompson* to the Federal Railroad Safety Act and stating that "[u]nlike Title VII, which provides a cause of action to 'a person claiming to be aggrieved . . . by the alleged unlawful employment practice . . . [the] FRSA authorizes an enforcement action only by 'an employee who alleges discharge, discipline, or other discrimination' in violation of the Act").

G. **Sarbanes Oxley Act of 2002 ("SOX") and Dodd-Frank Act ("Dodd-Frank")**. Likewise, SOX and Dodd-Frank provide for anti-retaliation provisions and define who is protected:

SOX Relevant Statutory Text:

(a) Whistleblower Protection for Employees of Publicly Traded Companies.

No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934, or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company, or nationally recognized statistical rate organization (as defined in section 3(a) of the Securities Exchange Act of 1934), or any officer employee, contractor, subcontractor, or agent of such company or nationally recognized statistical rating organization, ***may discharge, demote, suspect, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee***—

(1) To provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against the shareholders, when the information or assistance is provided to or the investigation is conducted by:

a. A Federal regulatory or law enforcement agency;

b. Any Member of Congress or any committee of Congress; or

c. A person with supervisory authority over the employee (or such person working for the employer who has the authority to investigate, discover, or terminate misconduct; or

(2) To file cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1342, 1343, 1344 or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against the shareholders.

(b) Enforcement Action.

(1) In general. A person who alleges discharge or other discrimination by any person in violation of subsection (a) may seek relief under subsection (c), by –

a. Filing complaint with the Secretary of Labor; or

b. If the Secretary has not issue a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant, bringing an action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy." 18 U.S.C. §§ 1514A(a) and (b).

<u>Dodd-Frank Statutory Text:</u>

(1) Prohibition against retaliation

(A) In general

No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower--

(i) in providing information to the Commission in accordance with this section;

(ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or

(iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), this chapter, including section 78j-1(m) of this title, section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission." 15 U.S.C. § 78u-6(h).

1. Third-party retaliation claims under SOX are not actionable.

   - *Gifaldi v. Octagon, Inc.*, ALJ No. 2011-SOX-013 (U.S.D.O.L. ALJ May 3, 2013) (in dismissing third-party retaliation complaint based on a close friendship with the supervisor who engaged in protected activity, the ALJ distinguished Title VII as significantly broader than the anti-retaliation provision contained in SOX and held that only the employee who actually engaged in protected activity has standing to sue under SOX).

   - *Menendez v. Halliburton, Inc.*, ARB Nos. 09-002, 09-003, 2011 WL 4915750 (ARB Sept. 13, 2011) (in a third-party retaliation claim under SOX, even though the ARB recognized that retaliating against an employee's relative or close friend would dissuade a reasonable employee from engaging in protected activity, the ARB cautioned that the anti-retaliation provisions of Title VII and SOX are distinguishable, and must be careful to avoid drawing too substantially from Title VII precedent when interpreting SOX).

2. It remains undecide whether third-party retaliation claims are viable under Dodd-Frank. However, given that third-party retaliation claims are not actionable under SOX, it may result in a rejection of third-party retaliation claims under Dodd-Frank, especially that the statutory text of Dodd-Frank says that it is unlawful to take adverse action against a **whistleblower**. Notably, courts may use this statutory language to interpret this to mean that there is no standing for a third party to bring a retaliation claim based on the whistleblower's protected activity.

DISCLAIMER

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