No Protection for Fiancés Under


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ABSTRACT

To encourage employees to bring forward claims of discrimination under Title VII, Congress included § 704(a), which prohibits employers from discriminating against employees because they “opposed any . . . unlawful employment practice.” However, it is unclear whether § 704(a) protects a third-party spouse, relative, or friend based solely on their close relationship with an employee who engaged in protected activity. The Sixth Circuit Court of Appeals recently dealt with this issue in Thompson v. North American Stainless, LP. The plaintiff sued his employer alleging his termination was in retaliation for his fiancée’s sex discrimination complaint. The Sixth Circuit found that the plain meaning of § 704(a) barred these types of third-party retaliation claims and that it was not “absurd” for Congress to have limited § 704(a) in this way.

Part I of this Comment provides an overview of Title VII and retaliation claims. Part II examines the Sixth Circuit’s decision in Thompson. Part III argues that the Sixth Circuit should have allowed a third-party retaliation claim. It further argues that the Sixth Circuit failed to accurately follow U.S. Supreme Court precedent and argues that the term “oppose” should be read to encompass “silent opposition” of family members, spouses, and individuals in other intimate relationships.

INTRODUCTION

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against their employees on the basis of “race, color, religion, sex, or national origin.” In order to encourage employees to bring forward claims of discrimination without fear of retaliation from their employers, Congress included § 704(a) of Title VII, which prohibits employers from discriminating against employees because they “opposed any practice made an unlawful employment practice by this subchapter, or because [they had] made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.” Courts have held that this anti-retaliation provision covers third parties that actively and personally engage in protected activity on behalf of another employee. However, it remains unclear whether a third-party spouse, relative, or friend may bring a claim of retaliation under § 704(a) based solely on their close relationship with an employee who engaged in protected activity against their mutual employer. Although retaliating “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,” courts have failed to recognize retaliation claims brought by these harmed family members.

The Sixth Circuit Court of Appeals recently dealt with the issue of third-party retaliation claims. In Thompson v. North American Stainless, LP, the plaintiff sued his employer alleging his termination was in retaliation for his fiancée’s sex discrimination complaint against their mutual employer. He argued that the anti-retaliation provision, § 704(a), prohibited his employer from terminating him based on the protected activity of his fiancée. The Sixth Circuit affirmed the lower court’s summary judgment for the employer, finding that the plain meaning of §

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2 Id. § 2000e-3(a).
3 Holt v. JTM Indus., Inc., 89 F.3d 1224, 1226 (5th Cir. 1996) (citing Jones v. Flagship Int’l, 793 F.2d 714, 727 (5th Cir. 1986)).
4 See infra Part I.C.
5 NLRB v. Advertisers Mfg. Co., 823 F.2d 1086, 1088 (7th Cir. 1987).
6 See infra Part II.
8 567 F.3d at 806.
9 Id. at 805-06.
704(a) barred these types of third-party retaliation claims.\textsuperscript{10} The court further held that it was not “absurd” for Congress to have limited the class of persons who are entitled to sue in this way.\textsuperscript{11}

Part I of this Comment will provide an overview of Title VII and the cause of action for retaliation under § 704(a). It will also discuss relevant case law and how other courts have ruled on third-party claims prior to Thompson. Part II will take a detailed look at the Sixth Circuit’s decision in Thompson. Part III will argue that the Sixth Circuit erred in denying the plaintiff’s third-party retaliation claim against his employer. This section will further argue that the Sixth Circuit failed to accurately follow U.S. Supreme Court precedent after the recent decision in Crawford v. Metropolitan Government.\textsuperscript{12} It will discuss how the Court in Crawford greatly expanded the meaning of the term “oppose” under § 704(a) and will argue that this expansion should be read to encompass “silent opposition” of family members, spouses, and individuals in other intimate relationships with those who engaged in protected activity.

I. Background

A. The Civil Rights Act of 1964 and the Cause of Action for Retaliation in the Employment Setting

Title VII of the Civil Rights Act forbids discrimination in employment against individuals based on their “race, color, religion, sex, or national origin.”\textsuperscript{13} Discrimination is prohibited in hiring applicants and discharging employees; it is also prohibited in the compensation, terms, conditions, and privileges of employment.\textsuperscript{14} Under § 704(a) of the Civil Rights Act, also known as the anti-retaliation provision, Congress made it unlawful for an employer to discriminate against an employee 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.”\textsuperscript{15} For example, an employer cannot retaliate against employees who report discrimination in the workplace.\textsuperscript{16} The purpose of this provision is to enable employees to secure the enforcement of the Act’s

\textsuperscript{10} Id.
\textsuperscript{11} Id. at 816.
\textsuperscript{12} 129 S. Ct. 846, 851(2009).
\textsuperscript{14} Id. § 2000e-2(a)(1).
\textsuperscript{15} Id. § 2000e-3(a).
\textsuperscript{16} Id.
basic guarantees \(^{17}\) by allowing “unfettered access to statutory remedial mechanisms,” and by removing the fear of retaliation so that more employees speak out against unlawful conduct by their employer. \(^{18}\)

B. The Meaning of the Term “Oppose” in § 704(a)

The anti-retaliation provision contains two clauses, the “opposition clause” and the “participation clause.” \(^{19}\) This Comment focuses on the “opposition clause.” This clause is expansive; employees who “oppose” unlawful action by their employer that affects either themselves or their coworkers are protected under this clause, as well as employees who refuse to discriminate against other individuals in the workplace. \(^{20}\) Cases interpreting the opposition clause have offered a wide range of protection to employees who “oppose” unlawful conduct by the employer in order to further the statutory purpose of Title VII. \(^{21}\) The term “oppose” under this clause is undefined by the statute, and the Supreme Court has stated that the term should therefore carry its ordinary meaning. \(^{22}\)

In Crawford, the most recent Supreme Court case interpreting the opposition clause, the Court rejected the Sixth Circuit’s \(^{23}\) interpretation of the term “oppose.” \(^{24}\) The Supreme Court referred to the Sixth Circuit’s definition of “oppose” — “active, consistent, ‘opposing’ activities” — as a “freakish rule.” \(^{25}\) The Court explained that although this definition of “oppose” is a common understanding, it is not the only way to define opposition, and thus, it should not be limited in that way. \(^{26}\) In the Supreme

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\(^{19}\) Crawford v. Metro. Gov’t, 129 S. Ct. 846, 850 (2009). The opposition clause makes it “unlawful . . . for an employer to discriminate against any . . . employee[] . . . because he has opposed any practice made . . . unlawful . . . by this subchapter.” Id. The participation clause makes it “unlawful . . . for an employer to discriminate against any . . . employee[] . . . because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.” Id.


\(^{21}\) Id. at 1232.

\(^{22}\) Crawford, 129 S. Ct. at 850 (citing Perrin v. United States, 444 U.S. 37, 42 (1979)).

\(^{23}\) The Sixth Circuit is the same circuit that decided Thompson, the case focused on in this Comment.

\(^{24}\) See Crawford, 129 S. Ct. at 851.

\(^{25}\) Id.

\(^{26}\) Id.
Court’s list of other possible definitions for the term, the Court included “to be hostile or adverse to, as in opinion.”27 As an example, the Supreme Court stated that the term “oppose” is often used to refer to “someone who has taken no action at all to advance a position beyond disclosing it.”28 The Supreme Court stated that “[c]ountless people were known to ‘oppose’ slavery before Emancipation, or are said to ‘oppose’ capital punishment today, without writing public letters, taking to the streets, or resisting the government.”29 The Supreme Court in Crawford therefore gave a very broad meaning of what “oppose” should entail.30

C. Third-Party Retaliation Claims

The most uncertain area of retaliation law involves third-party retaliation claims brought by individuals who are retaliated against because of the protected activities of another.31 There is currently disagreement among the circuits on whether a cause of action exists for these individuals under § 704(a) of Title VII.32 The circuits that recognize the claim have argued that failing to protect these individuals would be inconsistent with the purpose of Title VII.33 Those circuits that do not recognize the claim have found that the plain language of § 704(a) bars it.34

The Fourth, Seventh, Eleventh, and the District of Columbia Circuits recognize at least some forms of third-party retaliation claims.35 One reason for allowing these claims is because without the protection of third parties, employees would be deterred from bringing claims against their employer for fear that their employer would fire a spouse or close relative.36 This, in

27 Id. at 850.
28 Id. at 851.
29 Id.
30 See Crawford, 129 S. Ct. at 850-51.
31 Temm, supra note 18, at 869.
32 See id.
34 Id.
35 Baird ex rel. Baird v. Rose, 192 F.3d 462, 471 n.10 (4th Cir. 1999) (stating that the plaintiff had a retaliation claim based on the protected activities of her mother because her mother was acting on the plaintiff’s behalf); McDonnell v. Cisneros, 84 F.3d 256, 262 (7th Cir. 1996) (holding that “opposition” includes failing to carry out an employer’s order to prevent his subordinates from filing discrimination cases); Wu v. Thomas, 863 F.2d 1543, 1548 (11th Cir. 1989) (allowing husband of employee who had brought a sex discrimination action against their employer to maintain an action for retaliation); De Medina v. Reinhardt, 444 F. Supp. 573, 581 (D.D.C. 1978) (holding that the plaintiff’s claim of retaliation based on her husband’s anti-discrimination activities is allowed under Title VII).
36 De Medina, 444 F. Supp. at 580.
turn, would defeat the purpose of the anti-retaliation provision. The circuits have also stated that a literal interpretation of § 704(a) creates a “gaping hole” in the protection of employees, giving employers immunity from certain retaliatory actions.

The Third, Fifth, and Eighth Circuits prohibit these types of third-party retaliation claims. These circuits have argued that the claim is inconsistent with the plain language of § 704(a), interpreting the language to require the employees themselves to engage in protected activity. Furthermore, the circuits have reasoned that it is too difficult to define what relationships would give plaintiffs automatic standing for third-party retaliation claims. These courts have also argued that allowing the claims would create many frivolous lawsuits and would prevent employers from taking any legitimate adverse action against an employee after another employee engaged in protected activity. Lastly, the circuits have argued that this claim would rarely be necessary because most relatives and friends would have already participated in the coworker’s protected activity.

The Equal Employment Opportunity Commission ("EEOC") Compliance Manual supports third-party retaliation claims based on association. The manual prohibits “retaliation against someone so closely related to or associated with the person exercising his or her statutory rights that it would discourage that person from pursuing those rights.” The manual goes on to explain that “retaliation against a close relative of an individual who opposed discrimination can be challenged by both the

37 Id.
38 McDonnell, 84 F.3d at 262.
39 Fogleman v. Mercy Hosp., Inc., 283 F.3d 561, 570 (3d Cir. 2002) (holding that because adherence to the plain meaning of the statute would not be absurd, third-party retaliation claims are not allowed); Smith v. Riceland Foods, Inc., 151 F.3d 813, 819 (8th Cir. 1998) (holding that a plaintiff bringing a retaliation claim under Title VII must establish that she personally engaged in the protected conduct); Holt v. JTM Indus., Inc., 89 F.3d 1224, 1227 (5th Cir. 1996) (holding that a plaintiff did not have a retaliation claim simply because his spouse had engaged in protected activity). Some of these cases involved the interpretation of retaliation under the Americans with Disabilities Act and the Age Discrimination in Employment Act, rather than under Title VII. However, because all three statutory provisions are nearly identical in language, "precedent interpreting any one of these statutes is equally relevant to [the] interpretation of the others." Fogleman, 283 F.3d at 567.
40 See Holt, 89 F.3d at 1226.
41 Id. at 1227.
42 See Fogleman, 283 F.3d at 570.
43 Holt, 89 F.3d at 1227.
45 Id.
individual who engaged in protected activity and the relative, where both are employees.”46 However, although the EEOC is given some deference because it is an agency interpreting a federal statute that it also enforces, courts are not bound by it.47

II. Thompson v. North American Stainless, LP

In Thompson, the Sixth Circuit considered en banc48 whether an employee could bring a third-party retaliation claim based on a sex discrimination complaint filed by his then-fiancée (now-wife) against their mutual employer.49 The employee appealed when the District Court for the Eastern District of Kentucky granted summary judgment for the employer.50 The Sixth Circuit affirmed this judgment, holding that §704(a) of Title VII did not create a third-party retaliation cause of action for persons who have not personally engaged in protected activity.51 The Sixth Circuit held that the employee did not have a claim under Title VII because he failed to allege that he had “opposed” the discrimination or “made a charge” as required by the statute.52 The Sixth Circuit also rejected the argument that the statute should protect persons closely related to or associated with those who engaged in protected activity.53

A. Facts

In Thompson, the plaintiff, Eric Thompson, worked as a metallurgical engineer for the defendant, North American Stainless, from 1997 to 2003.54 In 2000, Thompson met Miriam Regalado when she was hired by the defendant; Thompson and Regalado started dating shortly thereafter.55 In 2002, Regalado filed a complaint with the EEOC against the defendant, alleging sex discrimination by her supervisors.56 The EEOC notified the defendant of this complaint on February 13, 2003.57 On March 7, 2003,
approximately three weeks after this notification, the defendant terminated Thompson.58 By the time Thompson was terminated, he and Regalado were engaged, and their relationship was widely known within the company.59 Thompson filed a complaint with the EEOC, alleging that his termination was in retaliation for his then-fiancée’s sex discrimination complaint against the company.60 The defendant, however, argued that Thompson was terminated for “performance-based reasons.”61

B. Procedural History

The EEOC found “reasonable cause to believe that [the defendant] violated Title VII.”62 The EEOC issued a right-to-sue letter,63 and Thompson filed a claim against the defendant in the United States District Court for the Eastern District of Kentucky.64 The defendant filed a motion for summary judgment on the basis that Thompson’s claim “was insufficient as a matter of law to support a cause of action under Title VII.”65 The district court granted the defendant’s motion for failure to state a claim under either 42 U.S.C. § 2000e-2(a) or the anti-retaliation provision set forth in 42 U.S.C. § 2000e-3(a).66 Thompson appealed this judgment in the United States Court of Appeals for the Sixth Circuit, claiming that the termination of an employee based on the protected activity of his fiancée within the same company is prohibited by the anti-retaliation provision of Title VII.67 The EEOC filed an amicus curiae brief supporting the plaintiff’s position in the appeal.68

58 Id.
59 Id.
60 Id.
61 Thompson, 567 F.3d at 806.
62 Id.
63 The EEOC may issue a right-to-sue letter, which entitles the plaintiff to pursue his complaint in district court after determining that no hearing has been held in the case and that it has been twelve months since the complaint was filed. See, e.g., 5 EMPLOYMENT DISCRIMINATION COORDINATOR ANALYSIS OF STATE LAW § 30:90 (2009) (describing the protocol in Montana).
64 Thompson, 567 F.3d at 806.
65 Id.
66 Id.
67 Id.
68 Id.
C. Sixth Circuit’s Opinion Denying Third-Party Retaliation Claims

The Sixth Circuit, reviewing the lower court’s judgment de novo,69 held that Thompson did not have a claim under Title VII because he failed to allege that he had “opposed” discrimination or made a charge as required by the retaliation provision.70 In so holding, the Sixth Circuit rejected the argument that the statute should protect persons “closely related [to] or associated [with]” those who are engaged in protected activity.71

In its analysis, the Sixth Circuit focused on the “plain language” of the text set out in § 704(a), concluding that the statute is unambiguous, and therefore the plain meaning of the text must be applied.72 The court stated that because the statutory language of § 704(a) is plain, “the sole function of the court [was] to enforce it according to its terms.”73 The Sixth Circuit ruled that the text of § 704(a) is “plain in its protection of a limited class of persons” and that Thompson was not included in this class of persons under the retaliation provision.74 The Sixth Circuit articulated that because he did not “oppose” an unlawful employment practice or “make a charge” under the statutory language, he did not meet the requirement that he engage in protected activity under Title VII.75 The court reasoned that, unlike the lack of limiting words in § 704(a) regarding the scope of actionable retaliation by the employer, § 704(a) is not silent about who falls under its protection.76 The section expressly defined the class of protected employees as those who “oppose” unlawful employment or “participated” in an investigation, hearing, or proceeding.77 Therefore, the class of claimants is restricted “to those who actually engaged in the protected activity.”78 Furthermore, the Sixth Circuit stated that Congress intended to limit this class of claimants by using “qualifying words of action” rather than “words of association.”79

The Thompson court acknowledged the Supreme Court’s expanded definition of “oppose” in Crawford, but reasoned that Crawford’s reach did

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69 In a de novo appeal, “the appellate court uses the trial court’s record but reviews the evidence and law without deference to the trial court’s rulings.” BLACK’S LAW DICTIONARY 112 (9th ed. 2009).
70 Thompson, 567 F.3d at 808.
71 Id.
72 See id. at 807-08.
73 Id. at 807 (quoting Caminetti v. United States, 242 U.S. 470, 485 (1917)).
74 Id. at 807-08.
75 Id.
76 Thompson, 567 F.3d at 815.
77 Id.
78 Id.
79 Id. at 816.
not extend to the circumstances of the case at bar.\textsuperscript{80} The Supreme Court in \textit{Crawford} expanded the Sixth Circuit’s previous interpretation of “oppose” under § 704(a) beyond “active, consistent, ‘opposing’ activities” to include employees who are terminated after involuntarily testifying in an internal investigation.\textsuperscript{81} However, in \textit{Thompson}, the Sixth Circuit argued that it should not extend any further, relying on Justice Alito’s concurrence in \textit{Crawford}.\textsuperscript{82} In his concurrence, Justice Alito stated that the issue, whether the opposition clause also protected employees who did not communicate their views to the employer through purposeful conduct, was not decided by the Supreme Court.\textsuperscript{83} Justice Alito also noted that to allow this would have serious practical implications and would open courtroom doors for cases where the employee never expressed opposition.\textsuperscript{84} The Sixth Circuit concluded that even under the broadest interpretation of \textit{Crawford}’s definition of “oppose” — “to be hostile or adverse to, as in opinion” — a plaintiff must still engage in an identifiable act of opposition.\textsuperscript{85}

The court concluded its analysis by stating that the plain text of the statute “cannot be read to encompass ‘piggyback’ protection of employees like Thompson who, by his own admission, did not engage in protected activity, but who . . . merely associated with another employee who did oppose an alleged unlawful employment practice.”\textsuperscript{86}

D. Dissenting Opinions in Thompson\textsuperscript{87}

In his dissenting opinion, Judge Martin strongly disagreed with the majority’s reliance on the “plain meaning” of § 704(a) and its conclusion that the meaning of “oppose” is unambiguous.\textsuperscript{88} The judge argued that the majority failed to realize that the term is broader than they interpreted it, and at the very least, it is ambiguous.\textsuperscript{89} In his reasoning, the judge pointed to the \textit{Crawford} decision that reversed the Sixth Circuit’s previous application of “plain meaning” to the term “oppose.”\textsuperscript{90} In correcting the

\textsuperscript{80} See id. at 812-13.


\textsuperscript{82} \textit{Thompson}, 567 F.3d at 813.

\textsuperscript{83} \textit{Id.} (citing \textit{Crawford}, 129 S. Ct. at 855 (Alito, J., concurring)).

\textsuperscript{84} \textit{Id.} (citing \textit{Crawford}, 129 S. Ct. at 855 (Alito, J., concurring)).

\textsuperscript{85} See id. at 813-14, 816.

\textsuperscript{86} Id. at 816.

\textsuperscript{87} In \textit{Thompson}, there was a concurrence by Judge Rogers and dissenting opinions by Judge Martin, Judge Moore, and Judge White. This Comment will only discuss the dissenting opinions by Judge Martin and Judge Moore, as they are the most relevant to the discussion.

\textsuperscript{88} \textit{Thompson}, 567 F.3d at 818 (Martin, J., dissenting).

\textsuperscript{89} Id.

\textsuperscript{90} Id.
Sixth Circuit, the Crawford decision greatly broadened the term. In Judge Martin’s conclusion, he wrote, “[b]ased on the text, structure, history, and Congressional purpose, I would hold these claims cognizable: I cannot conceive that Congress wanted to categorically bar them through the ambiguous, undefined term ‘oppose.’”

Another dissenting judge, Judge Moore, focused on the majority’s dismissal of important Supreme Court precedent in this area, which she argued supports a reading of § 704(a) that includes Thompson’s claim. Judge Moore cited several Supreme Court cases to demonstrate the Court’s broad approach when interpreting statutes that are designed to protect employees against employer retaliation. She pointed out that the majority’s narrow interpretation of “oppose,” on the other hand, contradicts the purpose of the statute to allow “unfettered access to statutory remedial mechanisms.” Judge Moore stated that Crawford changed the law of retaliation, and therefore Thompson’s claim should be considered in light of this case. Instead the court “slams the door on Thompson’s claim while paying mere lip service to Crawford’s expansive holding,” which is improper in light of binding Supreme Court precedent.

### III. The Sixth Circuit’s Incorrect Rejection of a Third-Party Retaliation Claim

Thompson should have a valid retaliation claim under the opposition clause. This interpretation is supported by past Supreme Court decisions applying a broad approach to retaliation statutes and the expanded interpretation of “oppose” in Crawford. Third-party retaliation claims would also further the purpose of the statute. Lastly, third-party retaliation claims based on “silent opposition” still meet the statutory requirement of “oppose” without adding additional language, and therefore, allowing these claims would be consistent with the text of the

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91 See id.
92 Id. at 819.
93 Id. at 820 (Moore, J., dissenting).
94 Thompson, 567 F.3d at 824 (Moore, J., dissenting).
95 Id. at 820-21 (quoting Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 64 (2006)).
96 Id. at 824.
97 Id.
98 Id. at 820.
A. The Sixth Circuit Erred in Applying the “Plain Meaning” of § 704(a).

Based on Supreme Court precedent and the principles for applying the “plain meaning” of a statute, the Sixth Circuit incorrectly relied on the “plain meaning” standard in its interpretation of § 704(a). When analyzing statutory language, if the language of a statute is plain in its meaning, courts must enforce the statute according to its terms, unless to do so would have absurd results. However, the plainness of a statute “is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.”

In its application of the “plain language” of the statute, the Sixth Circuit found that based on the text alone, it was plain that the plaintiff was not in the class of persons for whom Congress created a right because he had not “opposed” an unlawful practice. The court relied on the Third Circuit decision in Fogleman v. Mercy Hospital Inc. in its conclusion that the language of § 704(a) was plain. The Third Circuit in Fogleman focused on the phrase “such individual” in the statute, which requires the person discriminated against to also be the person who engaged in protected activity. The Thompson court agreed with the conclusion in Fogleman that the statute is unambiguous because it was clear from the language that an individual must engage in protected activity.

However, the statutory language is not unambiguous, and the Sixth Circuit was wrong to apply this statutory interpretation. Although it is

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101 See Crawford, 129 S. Ct. at 850-51.
102 See id. at 850 (stating that the term “oppose” is undefined); Lamie v. U.S. Tr., 540 U.S. 526, 534 (2004) (“The starting point in discerning congressional intent is the existing statutory text. . . . It is well established that when the statute’s language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.”) (citations omitted) (internal quotation marks omitted); United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221 (1952) (“[W]e may utilize, in construing a statute not unambiguous, all the light relevantly shed upon the words and the clause and the statute that express the purpose of Congress.”).
103 Thompson, 567 F.3d at 807.
104 Id. at 820 (Moore, J., dissenting) (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997)).
105 Id. at 808 (majority opinion).
106 See id. at 810-11.
107 Id. at 811 (citing Fogleman v. Mercy Hosp. Inc., 203 F.3d 561, 568 (3d Cir. 2002)).
108 See id.
plain that an individual must engage in protected activity himself, the
court ignored a broader interpretation of the term “oppose” in its analysis
and as a result failed to consider to what extent an individual must engage
in protected activity.\textsuperscript{110} There is no set statutory definition for “oppose”
under § 704(a), and therefore the text is not plain in discerning the extent to
which a plaintiff must “oppose” unlawful activity under the statute.\textsuperscript{111} It is
clear from\textit{Crawford} that the issue of third-party retaliation claims is not
resolved based solely on the “plain language” of § 704(a).\textsuperscript{112} According to
Judge Martin’s dissent in\textit{Thompson}, “\textit{Crawford} . . . drastically undercut the
majority’s tunnel vision view that this case concerns only a straightforward
debate about whether clear statutory text controls over some unexpressed
Congressional purpose.”\textsuperscript{113} Therefore, the Sixth Circuit erred in using
the “plain meaning” of the statute because the term “oppose” is not plain.\textsuperscript{114}

\textbf{B. Crawford Suggests an Inclusion of “Silent Opposition” Under
§ 704(a).}

The Supreme Court’s discussion in\textit{Crawford} suggests an inclusion of
“silent opposition” in the statutory term “oppose.”\textsuperscript{115} This interpretation
would open the door for third-party retaliation claims brought by close
relatives, partners, and possibly friends.\textsuperscript{116} The Court stated that one
definition of the term “oppose” is “to be hostile or adverse to, as in
opinion.”\textsuperscript{117} The Court gave an example of people opposing slavery
“without writing public letters, taking to the streets, or resisting
government.”\textsuperscript{118} The Sixth Circuit failed to consider this broader view of
“oppose.”\textsuperscript{119} Instead, without further analysis, the court concluded that
“\textit{Crawford’s} reach does not extend to the present circumstances.”\textsuperscript{120}

\textsuperscript{110} See \textit{Thompson}, 567 F.3d at 818 (Martin, J., dissenting).
\textsuperscript{111} See \textit{Crawford}, 129 S. Ct. at 850.
\textsuperscript{112} See id. at 850-51 (stating that the term “oppose” is undefined and the Sixth Circuit’s
previous definition of the term was too narrow); Kevin P. McGowan, \textit{Sixth Circuit’s Denial of
(BNA) No. 3, at 82 (Jul. 15, 2009) (“By insisting § 704(a)’s ‘plain language’ disposed of
Thompson’s claim, it ignored \textit{Crawford’s} larger message that Title VII’s retaliation clause is
ambiguous and should be construed broadly in favor of protection.” (quoting a plaintiffs’
attorney with Elvin & Bessent)).
\textsuperscript{113} \textit{Thompson}, 567 F.3d at 818 (Martin, J., dissenting).
\textsuperscript{114} See id.
\textsuperscript{115} See \textit{Crawford}, 129 S. Ct. at 850-51.
\textsuperscript{116} See id.
\textsuperscript{117} \textit{Id.} at 850.
\textsuperscript{118} \textit{Id.} at 851.
\textsuperscript{119} See \textit{Thompson}, 567 F.3d at 824 (Moore, J., dissenting).
\textsuperscript{120} \textit{Id.} at 813 (majority opinion).
Furthermore, the Sixth Circuit misused the concurrence in \textit{Crawford};\footnote{121}{See supra text accompanying notes 82-85.} nothing in the concurrence alleged that the term “oppose” barred “silent opposition.”\footnote{122}{See \textit{Thompson}, 567 F.3d at 819 (Martin, J., dissenting).} As support that \textit{Crawford} did not extend to the facts in \textit{Thompson}, the Sixth Circuit quoted Justice Alito’s \textit{Crawford} concurrence, which stated that “the question whether the opposition clause shields employees who do not communicate their views to their employers through purposive conduct is not before us in this case.”\footnote{123}{Id. at 813 (majority opinion) (quoting \textit{Crawford}, 129 S. Ct. at 855 (Alito, J., concurring)).} However, this statement suggests nothing about whether the term “oppose” would explicitly bar “silent opposition.”\footnote{124}{See \textit{id.} at 819 (Martin, J., dissenting).} Furthermore, Justice Alito conceded that, in fact, the term “oppose” is not plain.\footnote{125}{Id. (citing \textit{Crawford}, 129 S. Ct. at 854-55 (Alito, J., concurring)).} He acknowledged that it “is far from clear” whether “silent opposition” is excluded from the term “oppose.”\footnote{126}{Id.} Therefore, the Sixth Circuit should have analyzed whether “silent opposition” is allowed under § 704(a) in light of the \textit{Crawford} decision.\footnote{127}{Id.}

C. Third-Party Retaliation Claims Would Be Consistent with Supreme Court Precedent Interpreting Retaliation Provisions Broadly.

The Sixth Circuit also erred by failing to consider the pattern of Supreme Court precedent holding that a broad approach should be applied when interpreting anti-retaliation provisions.\footnote{128}{See id.} The Supreme Court has consistently interpreted § 704(a) liberally in order to comply with the statute’s overall purpose.\footnote{129}{See \textit{Thompson}, 567 F.3d at 820 (Moore, J., dissenting).} For example, the Supreme Court in \textit{Robinson v. Shell Oil, Co.}, held that former employees are covered by the anti-retaliation provision even though it is not explicitly stated in the statute.\footnote{130}{See Alex B. Long, \textit{The Troublemaker’s Friend: Retaliation Against Third Parties and the Right of Association in the Workplace}, 59 Fla. L. Rev. 931, 973 (2007).} The Court explained that reading the statute narrowly would eliminate protection against employment discharge retaliation.\footnote{131}{Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997); see Schausten, supra note 33, at 1332.} Because this would be contrary to the purpose of the statute, the Supreme Court instead interpreted the statute broadly.\footnote{132}{Schausten, supra note 33, at 1332.} More recently, the Supreme Court in \textit{Burlington Northern & Santa Fe Railway Co. v. White} again construed § 704(a)
in a broad manner. The Court interpreted § 704(a) broadly in order to increase the scope of individuals who can bring claims under the provision and to further the provision’s purpose. The Court held that the anti-retaliation provision covers employer actions that would have been materially adverse to a reasonable employee or job applicant, not just those actions that are related to employment. Other Supreme Court decisions, although not dealing specifically with § 704(a), also demonstrate the Court’s dedication to furthering the purpose of protective statutes. Despite this precedent, the Thompson court interpreted § 704(a) narrowly in a way that directly contradicts the purpose of the statute.

D. Retaliation Claims Based on “Silent Opposition” Further the Purpose of the Anti-Retaliation Provision.

Third-party retaliation claims further the purpose of the anti-retaliation provision by providing “unfettered access to statutory remedial mechanisms.” By interpreting the statute narrowly, the Sixth Circuit provided a loophole for employers to discriminate against employees. Barrning these claims allows employers to do indirectly what they cannot do directly. By allowing employers to fire someone close to an employee without consequence, employees are deterred from bringing a complaint in the first place. This defeats the purpose of the statute to end

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134 See id. at 63-64.
135 Id. at 57.
136 See generally CBOCS W., Inc. v. Humphries, 553 U.S. 442, 452, 457 (2008) (holding retaliation claims are allowed under 42 U.S.C. § 1981 even though the statute does not mention retaliation); Gomez-Perez v. Potter, 553 U.S. 474, 491 (2008) (interpreting the ADEA to include retaliation claims under “discrimination based on age” even though the statute does not mention retaliation).
138 Schausten, supra note 33, at 1330 (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997)). Although the Sixth Circuit stated that Thompson’s fiancée could still bring a claim for retaliation, this is an insufficient remedy because it would not enable Thompson to receive back pay or to be reinstated. See Thompson, 567 F.3d at 822 n.5 (Moore, J., dissenting); De Medina v. Reinhardt, 444 F. Supp. 573, 580 (D.D.C. 1978). This in turn would frustrate the “make whole” purpose of Title VII. Id.
139 See Temm, supra note 18, at 870 (explaining that without protection for third parties, employers could fire anyone when another employee engaged in protective activity and would not be held liable).
140 Long, supra note 129, at 950.
141 See id. at 944.
discrimination and provide “unfettered access” to remedies. The failure to recognize third-party retaliation claims has a chilling effect on the enforcement of civil rights because employees will fear that by bringing a complaint against their employer, they risk retaliation against their family members and loved ones. Conversely, allowing such a claim exposes employers to greater liability and encourages individuals to voice their complaints against their employers. As a result, employers would have an incentive to remedy discrimination in the workplace. Therefore, third-party retaliation claims should be recognized.

E. “Silent Opposition” Under § 704(a) Should be Limited in Its Application.

The expansion of “silent opposition” should be limited to cases involving spouses, intimate relationships, and family members—not friends, acquaintances, and mere co-workers. In cases involving spouses, intimate relationships, and family members, it is reasonable to infer that a plaintiff opposed discrimination against a loved one. It is also reasonable to infer that in these cases, employers would fear or suspect that the plaintiff participated in the protected activity of his or her loved one. Therefore, in these cases there should be a presumption of opposition. Employers would have the opportunity to rebut this presumption because there is always the possibility that the relationship is weak or nonexistent upon a closer look. The employer could also set out as a defense that it

142 See id.
143 Id.
145 See Schauten, supra note 33, at 1334.
146 Cf. Temm, supra note 18, at 889 (arguing that certain relationships are presumed to deter individuals from engaging in protected activity and third-party retaliation claims should be allowed based on these relationships, unless the relationship is in fact nonexistent).
was unaware of the relationship.\textsuperscript{150}

The limits set out above would assuage the fear of “flooding” the courts with frivolous claims.\textsuperscript{151} Only a limited number of relationships would qualify under “silent opposition,” and even in these cases, the presumed opposition could be rebutted.\textsuperscript{152} Furthermore, the employer could still take legitimate adverse action against an employee who is related to another employee engaged in protected activity.\textsuperscript{153} Frivolous claims brought by employees against their employers who partook in a legitimate adverse action generally will not get beyond summary judgment.\textsuperscript{154} The employee must still show the requirements of a retaliation claim itself—specifically, “a causal link between the employer’s action and the protected conduct.”\textsuperscript{155} In addition, the courts themselves have said that reliance on “silent opposition” would be a rare scenario because, in most cases, relatives and friends will have participated in some manner in their co-worker’s complaint against the employer.\textsuperscript{156} Therefore, allowing “silent opposition” in certain cases would provide better protection for employees and further the purpose of the statute; at the same time, frivolous claims would be minimized by limiting the individuals who qualify under “silent opposition.”\textsuperscript{157}

\textbf{CONCLUSION}

The Sixth Circuit erred in its conclusion that no retaliation cause of action exists for the fiancé of an employee who engaged in protected activity.\textsuperscript{158} Considering the history of the Supreme Court’s broad interpretation of retaliation provisions in order to further the statutes’ purposes,\textsuperscript{159} and especially in light of the Supreme Court’s Crawford decision that greatly expanded the meaning of “oppose” in § 704(a),\textsuperscript{160} the Sixth Circuit did not accurately follow Supreme Court precedent. Instead, the Sixth Circuit erroneously applied “plain meaning” to the statute,
ending its analysis, when it was clear that the term “oppose” is not unambiguous.\textsuperscript{161} The Supreme Court in \textit{Crawford} greatly expanded the term “oppose” so that it could reasonably be understood to include “silent opposition” by an employee’s close relatives and intimate partners.\textsuperscript{162} Therefore, the Sixth Circuit, based on the \textit{Crawford} decision, should have allowed Thompson’s third-party retaliation claim due to his employer’s adverse actions after his fiancée filed a sex discrimination complaint.\textsuperscript{163}

\textsuperscript{161} \textit{See supra} Part III.A.
\textsuperscript{162} \textit{See supra} Part III.B.
\textsuperscript{163} \textit{See supra} Part III.