CASE NO. 07-5040

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ERIC L. THOMPSON,
PLAINTIFF-APPELLANT,

v.

NORTH AMERICAN STAINLESS, L.P.,
DEFENDANT-APPELLEE

On Appeal from the United States District Court
for the Eastern District of Kentucky

BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND KENTUCKY CHAMBER OF COMMERCE AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE NORTH AMERICAN STAINLESS, L.P., AND SEEKING TO AFFIRM THE DECISION OF THE DISTRICT COURT

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to Sixth Circuit Rule 26.1, the Chamber of Commerce of the United States of America and the Kentucky Chamber of Commerce make the following disclosures:

1. Is said party a subsidiary or affiliate of a publicly-owned corporation?

Answer: No

2. Is there a publicly-owned corporation, not a party to the appeal, that has a financial interest in the outcome?

Answer: No

So sworn, this 3rd day of October, 2008.

Nelson D. Cary /per authorization DKL

Nelson D. Cary

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STATEMENT OF INTEREST

The Chamber of Commerce of the United States of America ("U.S. Chamber") is the world's largest business federation, representing an underlying membership of more than three million businesses and organizations of every size and in every industry sector and geographical region of the country. The Kentucky Chamber of Commerce ("Kentucky Chamber") is the largest business organization in the Commonwealth of Kentucky. With over 2,700 member companies that employ over half of Kentucky's private workforce, the Kentucky Chamber's mission is to be a leader and consensus builder in an effort to create a public policy and legal climate conducive to job growth and a higher standard of living for all Kentuckians.

Many of the members of the U.S. Chamber and the Kentucky Chamber are employers subject to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2003), *et seq.*, and other equal employment statutes and regulations. Member companies routinely make and implement millions of employment decisions each year, including hires, promotions, transfers, disciplinary actions, terminations, and establishment of compensation rates and structures. These member companies devote extensive resources to developing employment practices and procedures, and to developing compliance programs designed to ensure that all of their employment actions are consistent with Title VII and other applicable legal

requirements. Accordingly, the U.S. Chamber and the Kentucky Chamber have a strong interest in the outcome of this litigation.

ARGUMENT

I. INTRODUCTION

Title VII jurisprudence has long struck a balance between eliminating discrimination in the workplace and respecting the legitimate interests of employers. Extending Title VII's retaliation cause of action to employees who have not engaged in any protected activity upsets that balance in a myriad of ways.

Employers can only abide by the law if they can ascertain it. Unlike all other categories of employees protected by Title VII, however, third-party retaliation plaintiffs cannot be identified by any objective criteria such as race, gender, or the exercise of protected activity. They are instead identifiable only by subjective relationships with co-workers who engage in protected activity around the same time as the alleged retaliatory act. The lack of objective criteria makes employers guess whether an employee is protected by Title VII before imposing discipline. The panel's opinion in this case creates an unknowable standard and thus chills legitimate employment decisions because it makes employers fear that a retaliation claim will follow even appropriate personnel actions.

Not only would third-party retaliation claims interfere with an employer's right to maintain discipline, it would create a substantial burden on the courts as well. Courts would struggle to determine who may bring third-party retaliation claims because the subjective nature of the interpersonal relationships upon which

those claims rely do not lend themselves to easy evaluation through the judicial process. The subjectivity would open the courts to an influx of frivolous claims from employees who incurred discipline around the time a co-worker engaged in protected activity. Combined with the lack of a corresponding objective method to screen out those frivolous claims, courts would bear a substantial new burden.

It has never been the purpose of Title VII to halt legitimate discipline in the workplace or to impose unreasonable or unknowable standards on employers. But extending retaliation claims to those who do not even engage in protected activity does precisely that. This Court should affirm the decision of the District Court.

II. THE PANEL'S DECISION UPSETS THE TITLE VII BALANCE BETWEEN EMPLOYEE AND EMPLOYER RIGHTS

The Supreme Court recognizes that, although Title VII prohibits employers from basing employment decisions on prohibited characteristics, it also preserves "employers' freedom of choice," and strikes a "balance between employee rights and employer prerogatives." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989), *superseded by statute on other grounds*, 42 U.S.C. § 2000e-2(m). This Circuit has followed suit, acknowledging that Title VII represents a "delicate balance between employee and employer rights." *Prather v. Dayton Power & Light Co.*, 918 F.2d 1255, 1257 (6th Cir. 1990). This balance is manifested throughout case law interpreting Title VII and other antidiscrimination statutes,

where courts have weighed antidiscrimination goals against an employer's legitimate interests in the workplace.

For example, the after-acquired-evidence doctrine balances the goal of eradicating discrimination against an employer's right to terminate employees who violate neutral workplace rules. The seminal case involving the doctrine explicitly noted the balance, stating that, "[t]he employee's wrongdoing must be taken into account . . . lest the employer's legitimate concerns be ignored." *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 361 (1995). Without the doctrine, even employees fired for legitimate reasons would have a viable Title VII claim for back pay damages.

In cases involving a facially neutral employment policy that has adverse impact, the Court has likewise acknowledged the competing interests of employers in hiring qualified workers and of employees in avoiding discrimination veiled as objective qualifications. As the Court framed it, the law balances antidiscrimination against an "employer's legitimate interest in efficient and trustworthy workmanship." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975) (quotation omitted). *Albemarle* recognizes that Title VII lawsuits must be tempered by legitimate employer interests in a qualified workforce.

Similarly, when the Court illuminated the proper standards for employer liability in harassment cases, it explicitly balanced the employer's responsibility to

prevent Title VII harassment and the employee's "coordinate duty" to avoid or mitigate damages from harassment by using the employer's established procedures. The duty to avoid or mitigate harm reflects an equally obvious policy imported from the general theory of damages, that a victim has a duty "to use such means as are reasonable under the circumstances to avoid or minimize the damages" that result from violations of the statute. *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998). An employer's duty to fight harassment is not unqualified; the employee has a corresponding duty to report harassment through the proper channels.

This Circuit also frequently identifies the balance inherent in the antidiscrimination laws between employee and employer interests. A recent FMLA case explained that Congress passed the Family and Medical Leave Act, in part, "to balance the demands of the workplace with the needs of families . . . in a manner that accommodates the legitimate interests of employer[s]. . . ." *Grace v. USCAR*, 521 F.3d 655, 661 (6th Cir. 2008) (quotation omitted). The FMLA extends the Title VII lesson by balancing employee protection and employer prerogatives.

This Circuit's acknowledgment of the balancing required by the antidiscrimination laws includes retaliation cases. The recent decision in *Niswander v. Cincinnati Ins. Co.*, 529 F.3d 714 (6th Cir. 2008), is particularly

instructive. At issue in *Niswander* was whether an employee's disclosure of her employer's confidential and proprietary information to further a Title VII class action against the employer was protected activity. Resolving that question, the Court recognized that ascertaining what constitutes protected activity requires a "careful balancing of competing interests." *Id.* at 722. The Court explained: "A balance must be achieved between the employer's recognized, legitimate need to maintain an orderly workplace and to protect confidential business and client information, and the equally compelling need of employees to be properly safeguarded against retaliatory actions." *Id.* at 722. In order to achieve the necessary balance, the Court held that an employee's dissemination of confidential documents is protected by Title VII only if it "was reasonable under the circumstances." *Id.* at 725.

The holding in *Niswander* follows the anti-retaliation jurisprudence used by courts nationwide, which have held that Title VII protects employee opposition to allegedly unlawful employer conduct only when that opposition is "reasonable." *See Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 579 (6th Cir. 2000); *see also Rollins v. State of Florida Dep't of Law Enforcement,* 868 F.2d 397, 400-401 (11th Cir. 1989); *Pendelton v. Rumsfeld*, 628 F.2d 102, 108 (D.C. Cir. 1980). Underlying that limitation is the notion that "Courts are required to balance the purpose of the Act to protect persons engaging reasonably in activities opposing . .

. discrimination, against Congress' equally manifest desire not to tie the hands of employers in the objective selection and control of personnel. . . ." *Booker v. Brown & Williamson Tobacco Co., Inc.*, 879 F.2d 1304, 1312 (6th Cir. 1989) (quotation omitted). Congress never intended that Title VII's antidiscrimination objective would subvert employers' legitimate interest in selecting and administering their workforces.

The antidiscrimination laws—including the anti-retaliation provisions—balance employer and employee rights over a fulcrum far from the point where the federal judiciary would be thrust into the workplace as a second-level human resources department. *See, e.g.*, *Bender v. Hecht's Dep't Stores*, 455 F.3d 612, 627–28 (6th Cir. 2006) (holding that this Court should not act as a "'super personnel department,' overseeing and second guessing employers' business decisions"); *Hedrick v. Western Reserve Care Sys.*, 355 F.3d 444, 462 (6th Cir. 2004) ("As we have oft times stated, 'it is inappropriate for the judiciary to substitute its judgment for that of management.'") (quoting *Smith v. Leggett Wire Co.*, 220 F.3d 752, 763 (6th Cir. 2000)); *cf. Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) (holding that Title VII does not create "a general civility code for the American workplace"). Title VII leaves employers significant administrative latitude because it restricts only certain discriminatory actions.

Title VII also balances its antidiscrimination goals against a background of state employment-at-will policies. Title VII is "not meant to transform 'at-will' employment into perpetual employment where equal treatment is guaranteed to all employees and termination is legal only 'for cause.'" *Hill v. St. Louis Univ.*, 123 F.3d 1114, 1120 (8th Cir. 1997). The panel decision pushes Title VII significantly closer to enveloping all personnel decisions and closer to eliminating state policy that employment is at-will unless otherwise agreed.

Permitting third-party retaliation claims disrupts the appropriate balance in the antidiscrimination laws and inserts federal courts into the workplace to a degree Congress did not intend. The degree of disruption to this carefully managed Title VII balance can be readily observed in three distinct areas. In each of these areas, discussed in detail below, the impact of the panel's decision on the employers' interests will move the fulcrum on which the Title VII balance has historically been struck closer to the point where employees will inevitably start asking courts to second–guess employer decisions.

A. The Panel's Decision Upsets a Delicate Title VII Balance Because It Creates the First Class of Employees Protected by Title VII Not Measured by Objective Criteria

Title VII protects only those groups identifiable by some objective criteria. Its general anti-discrimination provision applies to individuals on the basis of their "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a). The anti-

retaliation provision similarly provides an objective basis for determining who comes under its coverage by limiting protection to employees who have engaged in protected activity. 42 U.S.C. § 2000e-3(a); *e.g.*, *DiCarlo v. Potter*, 358 F.3d 408, 420 (6th Cir. 2004). As the U.S. Supreme Court stated, the anti-retaliation provision "seeks to prevent harm to individuals based on what they do, i.e., their conduct." *Burlington N. and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006) (emphasis added). In this way, the anti-retaliation provision, like the general anti-discrimination provision, balances employer and employee interests by providing an objective marker for employers to determine whether an employee is protected.

The Supreme Court has emphasized the importance of "objective standards" when interpreting the anti-retaliation provision and other aspects of Title VII. *Burlington*, 548 U.S. at 68 (citing *Pennsylvania State Police v. Suders*, 542 U.S. 129, 141 (2004); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993)). Third-party retaliation claims jettison these objective criteria for employers to identify a protected employee before taking an adverse employment action. A third-party retaliation plaintiff is not identifiable by any specific demographic characteristic, nor by any activity in which the employee has engaged. Rather, potential third-party retaliation plaintiffs are identifiable only by their association with another employee who has engaged in protected activity. *See Thompson v. North*

American Stainless, L.P., 520 F.3d 644, 646 (6th Cir. 2008). No objective line distinguishes the unprotected employees from the protected ones.

B. Third-Party Retaliation Claims Upset Balanced Title VII Policy by Severely Burdening Employers' Administration of the Workplace

Because employers lack any objective means to know whether discipline might result in a lawsuit, they will hesitate to impose legitimate discipline—and may decline to impose any discipline at all. If the panel decision becomes law, whenever some employee engages in protected activity, the specter of a third-party retaliation claim looms over employment decisions for everyone else. This Court has cautioned that permitting an employee to allege retaliation simply because another has engaged in protected activity at the same time "would stretch the boundaries of . . . [Title VII] beyond its purpose." *E.E.O.C. v. Ohio Edison Co.*, 7 F.3d 541, 546 (6th Cir. 1993). But the panel's decision does precisely that, creating a retaliation claim for any employee whose discipline closely follows the unrelated protected activity of a coworker. By expanding potential Title VII liability, the panel decision dramatically shifts the inherent balance between eliminating discrimination and offering federal-court review of every employment decision.

Under these circumstances, any employment decision subsequent to protected activity leaves the employer with the task of divining whether any

employee has a sufficient relationship with the protected employee to herself come under the protection of Title VII. To avoid breaking the law as the panel viewed it, employers would have to map the web of associations among all employees, including all the changes to those relationships over time. Tracking these relationships is only the first step. Employers would then have to decide which relationships insulate which employees from decision. The burden on an employer's management staff, human resource department, and those who advise them would be severe.

The panel decision offers employers and their counselors little guidance about they should tackle this daunting task. How much consanguinity is enough to shield a relative when a relation files a complaint or participates in a protected activity? What non-work socializing brings an employee under the anti-retaliation umbrella? How often must employers reevaluate their associational judgments? If the panel decision stands, all employers will need to make these judgment calls. The number and complexity of these decisions grow exponentially with the size of the workforce. Further, measuring Title VII protection by objective indicia such as employee complaints, participation, or public filings with governmental agencies, contrasts sharply with measuring protection by employee relationships that may develop outside the workplace and would not likely leave the document trail

routine in today's workplaces for complaints or participation related to alleged discrimination.

Title VII represents a "balance between employee rights and employer prerogatives." *Price Waterhouse*, 490 U.S. at 239. Although eliminating retaliatory conduct is a purpose of Title VII's anti-retaliation provision, this Court has made clear that purpose must not be considered without respect for "the employer's recognized, legitimate need to maintain an orderly workplace." *Niswander*, 529 F.3d at 722. Allowing third-party retaliation claims undermines that legitimate need. Through uncertainty, the panel's decision chills an employer's right to take legitimate management action to keep its workforce productive and efficient.

C. Title VII Already Protects Third Parties by Balancing Employees' Rights to Protection Against Employers' Rights to Avoid Federal Oversight for All Employment Decisions

The umbrella of protection the panel decision creates is an unnecessary addition to the protections in place under current law. Under Title VII, if third parties assist or participate in the protected activity of a co-worker, Title VII offers them "broad protection" through their own retaliation cause of action. *Smith v. Riceland Foods, Inc.*, 151 F.3d 813, 819 (8th Cir. 1998); 42 U.S.C. § 2000e-3(a). As noted by sister circuits addressing the question presented here, in drafting the anti-retaliation provision, Congress may have believed "'[i]n most cases, the

relatives and friends who are at risk for retaliation will have participated *in some manner* in a co-worker's charge of discrimination,' having themselves engaged in protected activity." *Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 569 (3d Cir. 2002) (quoting *Holt v. JTM Indus., Inc.*, 89 F.3d 1224, 1227 (5th Cir. 1997)). Extending retaliation claims to those who have not engaged in protected activity is therefore unnecessary to protect the friends and relatives of those who have. *Smith*, 151 F.3d at 819.

Title VII and similar statutes aim first for prevention and only second at federal lawsuits. Requiring that employees engage in protected activity before Title VII extends protection encourages employees to do so, and preserves the balance between employer and employee rights. As the Supreme Court noted in *Faragher*, a Title VII plaintiff "should not recover" if she "unreasonably failed to avail herself of the employer's preventive or remedial apparatus." 524 U.S. 775, 806-07.

Affording employees Title VII protection regardless of whether they undertake any protected activity gives employees the wrong incentive. Under the panel's rule, employees no longer have the incentive to participate in employer investigations regarding discrimination because an employee who does not participate in reporting or opposing discrimination or harassment gets the same protection as an employee who does. At the same time, the panel decision

penalizes employers by forcing them to track ever-shifting employee interrelationships. In short, the panel's decision trades a useful incentive for an ambiguous one, upsetting the delicate balance between employer and employee interests. It should, therefore, be rejected.

III. THIRD-PARTY RETALIATION CLAIMS CANNOT BE EFFECTIVELY ADMINISTERED BY COURTS

Employers are not the only ones the panel's decision burdens. Recognizing third-party retaliation claims would also impose hardships on the courts. Applying the panel's decision, employees would be able to bring retaliation suits based upon the nature of their relationships and associations with a co-worker who has engaged in protected activity. *See Thompson*, 520 F.3d at 646. Yet courts are ill-equipped to measure interpersonal relationships as statutory thresholds. Such relationships are inherently subjective and do not lend themselves to manageable judicial scrutiny. For this very reason, courts prefer objective lines when interpreting Title VII. The Supreme Court in *Burlington* recently emphasized that point, noting that "[a]n objective standard is judicially administrable. It avoids the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff's unusual subjective feelings." *Burlington N. and Santa Fe Ry. Co.*, 548 U.S. at 68–69.

Administering third-party retaliation claims based on subjective relationships invites uncertainty and inconsistency. Courts would struggle from

case to case to determine whether the nature of the association between the plaintiff and the employee who engaged in protected activity was sufficiently close—and sufficiently genuine—to support a retaliation claim. Testimony in such cases could get far afield from the ultimate issue of whether retaliation occurred. By contrast, allowing retaliation claims only by those employees who have engaged in protected activity provides courts an objective standard. When an employee reports discrimination or participates in an investigation about discrimination, those acts leave a record. Personnel departments routinely track complaints, witness statements, and other tangible indicia of employee complaints and participation. Employers do not—and cannot—record and track all employee relationships that might trigger anti-retaliation liability under the panel's proposed rule.

Finally, third-party retaliation claims also open the door to frivolous lawsuits by employees whose discipline coincides with the unrelated protected activity of a co-worker. Because it is difficult to examine the good faith nature of a claimed relationship or association between two employees, courts could not effectively screen out the frivolous claims. Courts addressing the availability of third-party retaliation claims acknowledge Congress may have held that concern when drafting the language of the anti-retaliation provision. As the Third Circuit has noted: "Congress may have 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." *Fogleman*, 283 F.3d at 570 (emphasis added); *accord Singh v. Green Thumb Landscaping, Inc.*, 390 F. Supp. 2d 1129, 1138 (M.D. Fla. 2005); *Higgins v. TJX Cos., Inc.*, 328 F. Supp. 2d 122, 124 (D. Me. 2004); *Horizon Holdings, L.L.C. v. Genmar Holdings, Inc.*, 241 F. Supp. 2d 1123, 1144 (D. Kan. 2002). If the panel decision stands, it risks opening a door that Congress intended to keep closed.

In 2007, 23,271 of the 82,792 charges filed with the Equal Employment Opportunity Commission were Title VII retaliation claims, accounting for 28.3% of all individual charge filings. *http://www.eeoc.gov/stats/charges.html* (last visited September 24, 2008). Extending a retaliation cause of action to individuals who have not engaged in protected activity could dramatically increase the number of retaliation charges, and by extension, civil suits. At least one court has made that point explicitly, noting that "[t]he number of lawsuits which could spawn from this rule could be enormous. . . ." *E.E.O.C. v. Bojangles Restaurants, Inc.*, 284 F. Supp. 2d 320, 326 (M.D.N.C. 2003). The influx of these new claims—and the corresponding absence of an objective method to screen out the frivolous ones—

would add an untold additional burden on top of heavy court dockets. This Circuit should not invite such an unnecessary burden.

CONCLUSION

Allowing third-party retaliation claims from individuals who have not engaged in protected activity undermines the purposes of Title VII. This Court should affirm the decision of the District Court and decline to recognize them.

Respectfully submitted,

Nelson D. Cary / per authorization DKL

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing Brief of Chamber of Commerce of the United States of America and Kentucky Chamber of Commerce as Amici Curiae in Support of Defendant-Appellee North American Stainless, L.P., and Seeking to Affirm complies with Federal Rules of Appellate Procedure 29(d) and 32(a)(7) because it contains 3,564 words.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Brief of Chamber of Commerce of the United States of America and Kentucky Chamber of Commerce as Amici Curiae in Support of Defendant-Appellee North American Stainless, L.P., and Seeking to Affirm was served via U.S. mail this 3rd day of October, 2008 upon:

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