

## Employment Retaliation and the Accident of Text

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## INTRODUCTION

Employees have enjoyed remarkable success in front of the Supreme Court on statutory retaliation claims in the past few years.<sup>1</sup> At a time when the success rate of employment discrimination plaintiffs has been, at best, mixed, the Court has consistently interpreted statutory prohibitions on employer retaliation in a broad manner.<sup>2</sup> Heading into its 2010 term, the Court had in nearly every case adopted an interpretation of a statutory antiretaliation provision that favors employees.<sup>3</sup> With its decisions in *Thompson v. North American Stainless, LP*<sup>4</sup> and *Kasten v. Saint-Gobain Performance Plastics Corp.*,<sup>5</sup> the Court kept the winning streak of retaliation plaintiffs intact.

In *Thompson*, an employer was accused of retaliating against an individual who had filed a sex discrimination charge with the Equal Employment Opportunity Commission (EEOC) against the employer

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<sup>1</sup> See Richard Moberly, *The Supreme Court's Antiretaliation Principle*, 61 CASE W. RES. L. REV. 375, 375 (2011) (noting the success rate of plaintiffs in cases involving statutory retaliation claims).

<sup>2</sup> *Id.*

<sup>3</sup> *Crawford v. Metro. Gov't of Nashville & Davidson Cnty.*, 129 S. Ct. 846 (2009); *CBOCS West, Inc. v. Humphries*, 553 U.S. 442 (2008); *Gomez-Perez v. Potter*, 553 U.S. 474 (2008); *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997). The one exception to this trend was *Clark County School District v. Breeden*, 532 U.S. 268 (2001) (per curiam). In *Garcetti v. Ceballos*, the Court ruled against a public employee on his claim that his First Amendment rights had been violated when the employer allegedly retaliated against him on the basis of his speech. 547 U.S. 410, 426 (2006).

<sup>4</sup> 131 S. Ct. 863 (2011).

<sup>5</sup> 131 S. Ct. 1325 (2011).

by firing the employee's fiancé.<sup>6</sup> The question facing the Court was whether Title VII provides a remedy to an employee who has not engaged in any type of protected activity but has nonetheless suffered harm at the hands of the employer based on the protected activity of another. Reasoning that an employee who is fired as a result of an employer's unlawful retaliation against another employee has been "aggrieved" within the meaning of Title VII, the Court held that the statute provides a remedy in such cases.<sup>7</sup>

*Kasten* involved the meaning of the antiretaliation provision found in the Fair Labor Standards Act (FLSA). The plaintiff in *Kasten* had been fired after repeatedly raising concerns with his supervisor and others about a perceived violation of the FLSA wage and hour standards.<sup>8</sup> The plaintiff alleged retaliation under § 215(a)(3) of the FLSA, which prohibits retaliation against an employee who has "filed any complaint."<sup>9</sup> All of the plaintiff's complaints about the perceived violations were verbal in nature. Thus, the question was whether the plaintiff had "filed" a complaint within the meaning of the Act. The Court concluded that although the word "filed" could be interpreted to refer only to written complaints, the word was also expansive enough to include oral complaints.<sup>10</sup>

At first glance at least, these decisions would seem to bode well for retaliation plaintiffs proceeding under other federal employment statutes. The decisions obviously help future, similarly situated plaintiffs proceeding under the same statutes. But the decisions might also assist similarly situated plaintiffs proceeding under other federal workplace statutes. After all, courts frequently note their preference for interpreting statutes governing the workplace so as to produce consistency and uniformity.<sup>11</sup> Thus, a favorable Title VII or FLSA retaliation decision from the Court might help a plaintiff alleging retaliation under the Employee Retirement Income Security Act<sup>12</sup>

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<sup>6</sup> *Thompson*, 131 S. Ct. at 867.

<sup>7</sup> *Id.* at 870.

<sup>8</sup> *Kasten*, 131 S. Ct. at 1330.

<sup>9</sup> 29 U.S.C. § 215(a)(3) (2006).

<sup>10</sup> *Kasten*, 131 S. Ct. at 1336.

<sup>11</sup> See *Darveau v. Detecon, Inc.*, 515 F.3d 334 (4th Cir. 2008) (noting the general practice of federal courts in interpreting other statutes consistently with Title VII); *Phillips v. M.I. Quality Lawn Maint., Inc.*, No. 10-20698, 2010 WL 4237619, at \*4 n.7 (S.D. Fla. Oct. 21, 2010) ("[C]ourts routinely examine FLSA retaliation claims under the same standards as Title VII retaliation claims.").

<sup>12</sup> Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of 26 and 29 U.S.C.).

(ERISA) or the Family and Medical Leave Act<sup>13</sup> (FMLA).<sup>14</sup> So, with plaintiffs winning once again in front of the Court, and with federal courts laboring to produce consistency, now hardly seems like the appropriate time to suggest that federal workplace retaliation law needs serious revision.

I disagree. I think the string of good luck that retaliation plaintiffs have enjoyed in front of the Court may be lulling proponents of robust protection from retaliation into a false sense of security. Others have noted how lower courts sometimes take a narrow view of statutory antiretaliation provisions, even in the face of the Supreme Court's ostensibly broad reading of the same language.<sup>15</sup> The concern I identify in this Article is different. My concern is that the text of many antiretaliation provisions, coupled with the Court's textualist approach to interpretation, will leave courts with little choice but to adopt narrow constructions of other antiretaliation provisions in the future.

The majority of the Court's retaliation decisions so far have involved Title VII, the major player among federal employment statutes. All of the other major federal employment statutes either contain explicit prohibitions on employer retaliation or have been held to prohibit employer retaliation.<sup>16</sup> But there are also a host of other federal statutes—some well known, some relatively obscure—that contain specific prohibitions on retaliation.<sup>17</sup> There is certainly some superficial similarity between all of these statutes in terms of the language they use to address retaliation, and, in some instances, the language used is functionally identical. A closer examination of the statutory language reveals, however, that there is remarkably little in the way of consistency of language among federal statutes

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<sup>13</sup> Pub. L. No. 103-3, 107 Stat. 6 (codified at 29 U.S.C. §§ 2601–2654 (2006)).

<sup>14</sup> See *Duckworth v. Pratt & Whitney, Inc.*, 152 F.3d 1, 6 (1st Cir. 1998) (stating in the context of an FMLA retaliation case that “[w]e regard Title VII, ADEA, ERISA, and FLSA as standing *in pari passu* and endorse the practice of treating judicial precedents interpreting one such statute as instructive in decisions involving another”) (internal quotations omitted); see also Phillips, 2010 WL 4237619, at \*4 n.7 (“[C]ourts routinely examine FLSA retaliation claims under the same standards as Title VII retaliation claims.”).

<sup>15</sup> See Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859, 905 (2008) (criticizing the lower courts for their interpretation of the Court's “material adversity” standard from *Burlington Northern*).

<sup>16</sup> See generally Lynn Ridgeway Zehrt, *Retaliation's Changing Landscape*, 20 GEO. MASON U. C.R. L.J. 143, 161–64 (2010) (discussing different statutory approaches to retaliation).

<sup>17</sup> *Id.* at 162–63.

prohibiting workplace retaliation.<sup>18</sup> The statutes employ a bewildering variety of language, with the differences in text ranging from the subtle (yet meaningful) to the dramatic. Accordingly, it is exceedingly difficult to transfer interpretations and standards from one statute to another.

As this Article attempts to illustrate, it is only a matter of time before employment retaliation plaintiffs who are similarly situated to plaintiffs who have won before the Court start losing. Indeed, some of them are already losing in lower courts. And, as this Article further attempts to illustrate, there is no good reason for the disparate treatment. As the law currently exists, statutory retaliation plaintiffs win or lose largely due to the accident of statutory text rather than the fact that the law is operating as Congress envisioned or as part of a coherent scheme of regulation. In short, the federal approach to workplace retaliation is inefficient, unnecessarily complex, and in need of major reform.

To that end, Part I catalogs the Supreme Court's decisions on employment retaliation and its relentless focus on statutory text. Part II examines situations in which retaliation plaintiffs who are similarly situated to those who have prevailed previously before the Court are likely to eventually lose should the Court ever tackle the interpretive issues in question. Part III discusses the unnecessary complexity and lack of a coherent rationale that underlies the federal approach to employment retaliation. In order to address these problems, Part IV concludes by arguing in favor of a single antiretaliation provision that would apply to all federal statutes that prohibit retaliation in private, nonunion workforces.

## I

### WHY RETALIATION PLAINTIFFS HAVE WON SO FAR

#### A. *The Fairness and Pragmatism Explanations*

There are any number of plausible explanations for the Court's apparent sympathy for the victims of workplace retaliation. One can be "pro-employer" and still be offended at the idea that an employer took action against an employee because the employee did something that the law allows or even encourages the employee to do. Cases like *Thompson*, in which an employee is punished for the supposed

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<sup>18</sup> See generally *id.* at 162 ("[T]here are significant differences in the language of the various retaliation provisions.").

sins of another, tend to provoke a visceral response that cuts across ideological lines.<sup>19</sup> Another explanation is that the Justices have recognized the obvious reality that if employers are free to retaliate against employees who have taken action that tends to further the substantive goals of a particular statute, the substantive goals of the statute are less likely to be attained.<sup>20</sup> In the employment discrimination context, this means that giving employers a broad license to retaliate against employees who complain about or oppose discrimination would undermine the goal of eliminating discrimination in the workplace.<sup>21</sup> Thus, perhaps the Justices' pragmatic concerns over the effect of retaliation on the operation of statutes regulating the workplace are what drive the outcome of retaliation cases before the Court.<sup>22</sup>

Surveying fifty years of Supreme Court retaliation jurisprudence, Professor Richard Moberly has concluded that the Court's decisions are premised upon a belief that "employees must be protected from retaliation in order to further the enforcement of society's civil and criminal laws."<sup>23</sup> According to Moberly, the principle that ties together the various retaliation decisions over the years is the Court's view that antiretaliation protection serves "as a law-enforcement tool that benefits society" as a whole rather than simply the employees in question.<sup>24</sup> Because the Court views antiretaliation provisions primarily as devices that further the ability of civil and criminal laws to operate effectively, Moberly argues, the Court has been willing to interpret the provisions broadly to further the societal interests.<sup>25</sup>

These explanations certainly have a ring of truth to them and may, to a large extent, explain the outcome of many of the retaliation cases decided to date. But fairness and pragmatic concerns will permit a judge to go only so far. Ultimately, a judge's discretion is bounded

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<sup>19</sup> See David L. Hudson, Jr., *Back at Ya*, A.B.A. J., June 2011, at 21, 22 (noting that "retaliation claims lack politically potent wording").

<sup>20</sup> See Matthew W. Green, Jr., *Express Yourself: Striking a Balance Between Silence and Active, Purposive Opposition Under Title VII's Anti-Retaliation Provision*, 28 HOFSTRA LAB. & EMP. L.J. 107, 120 (2010) (noting the Court's rejection that permitting retaliation undermines the statutory goal of eliminating discrimination).

<sup>21</sup> *Crawford v. Metro. Gov't of Nashville & Davidson Cnty.*, 129 S. Ct. 846, 852 (2009).

<sup>22</sup> See Michael J. Zimmer, *A Pro-Employee Supreme Court?: The Retaliation Decisions*, 60 S.C. L. REV. 917, 918 (2009) (arguing that the Court's retaliation decisions "are primarily a product of a pragmatic approach to judicial decision making").

<sup>23</sup> Moberly, *supra* note 1, at 380.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 381.

by the text of whatever statute is at issue.<sup>26</sup> For a textualist or formalist judge, the text is of primary concern and, in theory, fairness or pragmatic concerns are not enough to overcome the plain meaning of clear language.<sup>27</sup> In contrast, a purposivist judge is primarily concerned with effectuating the legislative purpose underlying a statute when interpreting statutory language;<sup>28</sup> however, even a purposivist judge concedes that the starting point of interpretation is the text of the statute.<sup>29</sup>

Historically, courts were more willing to gloss over statutory language that seemed inconsistent with a clear legislative purpose or that, if interpreted literally, might produce undesirable effects. When interpreting a remedial statute, courts would frequently rely upon the canon of construction calling for expansive interpretation of remedial statutes.<sup>30</sup> This was as true of statutes regulating the workplace as it was of other types of statutes.<sup>31</sup> But as Professor Michael Zimmer has noted, this canon has fallen out of favor in recent decades.<sup>32</sup> In the ADA context, for example, some of the more purposivist-minded Justices on the Court could be found advancing this canon while dissenting from the majority's hyperliteral interpretation of the ADA's definition of disability in *Sutton v. United Air Lines, Inc.* in 1999.<sup>33</sup>

The rise of the textualist approach to statutory interpretation during the 1980s and 1990s has had a dramatic impact on how judges interpret statutes. Even the most devoted purposivist Justices on the Court now feel compelled to emphasize text at the expense of legislative purpose.<sup>34</sup> Nowhere is the emphasis on text more apparent than in the Court's interpretation of antiretaliation provisions.

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<sup>26</sup> RICHARD A. POSNER, *HOW JUDGES THINK* 13 (2008) (stating that a pragmatic judge's discretion is restrained by "a due regard for the integrity of the written word in . . . statutes").

<sup>27</sup> See WILLIAM N. ESKRIDGE, JR. ET AL., *LEGISLATION AND STATUTORY INTERPRETATION* 228 (2000).

<sup>28</sup> *Id.* at 221.

<sup>29</sup> John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2011 (2009).

<sup>30</sup> See *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967).

<sup>31</sup> See *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 13 (1980) (relying upon the canon in interpreting a workplace safety statute).

<sup>32</sup> Zimmer, *supra* note 22, at 949.

<sup>33</sup> 527 U.S. 471, 504 (1999) (Stevens, J., dissenting).

<sup>34</sup> See Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 3 (2006) ("[T]extualism has so succeeded in discrediting strong purposivism that it has led even nonadherents to give great weight to statutory text.").

### B. *The Text-Based Explanation*

Judges unquestionably bring their own judicial philosophies and sensibilities to the task of statutory interpretation. A judge who is most interested in effectuating the legislative purpose underlying a particular statute may find ambiguity in statutory text more often than a textualist.<sup>35</sup> However, the ability of judges to stray from seemingly clear language is limited, particularly in the modern age of interpretive theory. As the following Part illustrates, the interpretive issues the Court has faced thus far with respect to antiretaliation provisions have all involved situations in which the textual impediments to an expansive interpretation have posed, at most, weak obstacles to the ultimate interpretations provided by the Court.

#### 1. *Retaliation and Adverse Employment Actions*

In *Burlington Northern & Santa Fe Railway Co. v. White*, the Supreme Court dealt with the scope of § 704(a), Title VII's antiretaliation provision. Specifically, the Court had to address "whether Title VII's antiretaliation provision forbids only those employer actions and resulting harms that are related to employment or the workplace" or whether it also covers nonemployment-related actions.<sup>36</sup> A circuit split existed at the time of the decision. Some courts took a restrictive view of the provision, concluding that, to be actionable, the retaliation must "resul[t] in an adverse effect on the "terms, conditions, or benefits" of employment."<sup>37</sup> Other courts took an even more restrictive view and adopted an "ultimate employment decisio[n] standard, which limits actionable retaliatory conduct to acts such as hiring, granting leave, discharging, promoting, and compensating."<sup>38</sup>

Ultimately, the Court held unanimously that retaliation need not affect the terms, conditions, or benefits of employment to be actionable under Title VII.<sup>39</sup> Instead, "a plaintiff must show that a

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<sup>35</sup> See Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521 (noting the tendency of "strict constructionists" to find that the meaning of a statute is apparent from its text); Molot, *supra* note 34, at 46 (suggesting "that neither textualism nor purposivism is inherently more likely to find ambiguity or clarity in the law," but noting that "some textualists have sought to equate textualism with just such a rush to clarity").

<sup>36</sup> *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 61 (2006).

<sup>37</sup> *Id.* at 60 (quoting *Von Gunten v. Maryland*, 243 F.3d 858, 866 (4th Cir. 2001)).

<sup>38</sup> *Id.* (quoting *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997)) (internal quotation marks omitted).

<sup>39</sup> See *id.* at 68.



reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.”<sup>40</sup> Thus, for example, an employer’s filing of false criminal charges against an employee in retaliation for the employee’s filing of a complaint of discrimination could be actionable.<sup>41</sup>

In reaching this decision, the Court focused heavily on the textual differences between § 704(a) and § 703(a), Title VII’s antidiscrimination provision.<sup>42</sup> Section 703(a), the antidiscrimination provision, makes it unlawful for an employer “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment.”<sup>43</sup> In contrast, § 704(a), Title VII’s antiretaliation provision, contains no reference to hiring, firing, or the “compensation, terms, conditions, or privileges of employment.” Instead, the provision simply provides that it is unlawful for an employer to “discriminate” against an employee for engaging in protected activity without qualifying the word “discriminate” in any manner.<sup>44</sup> Thus, the logical implication, according to the Court, was that Congress intended for the two provisions to carry different meanings.<sup>45</sup>

After dismissing any text-based objections to a broader reading of the statutory text, the Court explained why, as a matter of policy, the broader reading made more sense.<sup>46</sup> The Court explained that the inclusion of the antiretaliation provision in Title VII was necessary to effectuate the statute’s overarching goal of eliminating discrimination in the workplace.<sup>47</sup> Without an antiretaliation provision, the antidiscrimination provision could not operate because employees would be hesitant to assert their rights.<sup>48</sup> From this premise, the Court quite correctly observed that employer retaliation need not necessarily involve employment-related actions to be effective in

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<sup>40</sup> *Id.* (quoting *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2006)) (internal quotation marks omitted).

<sup>41</sup> *See id.* at 64 (citing *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 984, 986 (10th Cir. 1996)).

<sup>42</sup> *Id.* at 61–62.

<sup>43</sup> 42 U.S.C. § 2000e-2(a)(1) (2006).

<sup>44</sup> *Id.*

<sup>45</sup> *Burlington Northern*, 548 U.S. at 63.

<sup>46</sup> *Id.* at 65–66.

<sup>47</sup> *Id.* at 63–64.

<sup>48</sup> *See supra* notes 20–21 and accompanying text.

discouraging employee participation in the process of rooting out discrimination.<sup>49</sup> Nonemployment-related forms of retaliation can be just as effective in silencing employees. So, because the statutory text could easily be construed in a manner consistent with these goals, the Court so construed it.

To be clear, the Court's material adversity standard was not required by the text of the statute. A broader or narrower construction might have been permissible.<sup>50</sup> But before Justice Breyer—perhaps the leading proponent of a more purposivist-oriented approach to interpretation<sup>51</sup>—could pick and choose from the range of permissible constructions, he first had to contend with the textual obstacles to those constructions. And, in this instance, the text presented little in the way of obstacle and strongly suggested a more expansive interpretation of § 704(a) of the sort the Court ultimately adopted.

## 2. *Internal Complaints and Other Forms of Opposition Conduct*

### a. *Kasten v. Saint-Gobain Performance Plastics Corp.*

Justice Breyer, again writing for the Court, took a similar approach in the *Kasten* decision from 2011. As mentioned above, the *Kasten* Court, in a six-to-two decision,<sup>52</sup> held that the FLSA affords protection from retaliation to an employee who makes an oral complaint of a violation of the Act. In reaching this decision, the Court explained why it would make more sense, from a policy perspective, to interpret the statute in this manner rather than limit coverage to the filing of written complaints. The Court reasoned that restricting application of § 215(a)(3) to the filing of written complaints would reduce the effectiveness of the Act in accomplishing one of its main goals: deterring unhealthy working conditions.<sup>53</sup> A requirement that complaints must be in writing before an employee can be protected would limit the ability of illiterate, uneducated, or overworked employees to take advantage of the Act's complaint procedure.<sup>54</sup> The Court also suggested that a written-complaint requirement would impede the government's ability to receive complaints through the use of hotlines and other oral

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<sup>49</sup> *Burlington Northern*, 548 U.S. at 63–64.

<sup>50</sup> See Zimmer, *supra* note 22, at 927.

<sup>51</sup> Mark Tushnet, *Heller and the Critique of Judgment*, 2008 SUP. CT. REV. 61, 77 n.57.

<sup>52</sup> 131 S. Ct. 1325, 1328–29 (2011). Justice Kagan did not participate.

<sup>53</sup> *Id.* at 1333.

<sup>54</sup> *Id.*

methods of gathering information.<sup>55</sup> Finally, the Court noted that a written-complaint requirement “would discourage the use of desirable informal workplace grievance procedures.”<sup>56</sup>

But before the Court allowed itself to expound on the benefits of a construction favoring protection of the filing of oral complaints, it first had to satisfy itself and readers that such a construction was permissible. Thus, the Court devoted considerable time to explaining why the language at issue was subject to competing interpretations. To do this, Justice Breyer provided three different dictionary definitions of the word “file,” multiple examples from state statutes, examples from federal regulations, examples from state and federal judicial opinions, other usages of the term within the FLSA itself, and other usages of the term in other federal statutes containing antiretaliation provisions.<sup>57</sup> Only after exhausting these varied sources and establishing that the term “file” could plausibly have different meanings did the Court look to the “functional considerations” supporting its ultimate construction of the Act.<sup>58</sup>

Justice Breyer’s opinion drew a dissent from Justice Scalia, who was joined by Justice Thomas. According to Justice Scalia, Justice Breyer’s reading of 29 U.S.C. § 215(a)(3) impermissibly divorced the “filed any complaint” language from the rest of the language in the section.<sup>59</sup> In full, § 215(a)(3) provides that it is unlawful for an employer

to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to [the Act], or has testified or is about to testify in any such proceeding,<sup>60</sup> or has served or is about to serve on an industry committee.

Justice Scalia noted that “the phrase ‘filed any complaint’ appears alongside three other protected activities: ‘institut[ing] or caus[ing] to be instituted any proceeding under or related to this chapter,’ ‘testif[y]ing in any such proceeding,’ and ‘serv[ing] . . . on an industry committee.’”<sup>61</sup> As each of these activities “involves an

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<sup>55</sup> *Id.* at 1334.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 1331–33.

<sup>58</sup> *Id.* at 1333.

<sup>59</sup> *See id.* at 1337 (Scalia, J., dissenting) (criticizing the majority’s interpretation).

<sup>60</sup> 29 U.S.C. § 215(a)(3) (2006).

<sup>61</sup> *Kasten*, 131 S. Ct. at 1338 (Scalia, J., dissenting) (citation omitted).

interaction with governmental authority,” the phrase “filed any complaint” should be similarly construed to require interaction with governmental authority.<sup>62</sup> Thus, in Justice Scalia’s view, it is only when an employee files a complaint with a judicial or administrative authority that § 215(a)(3) protects the employee.<sup>63</sup>

Justice Scalia’s reading of the statutory language is certainly a permissible one. However, in light of the fact that the phrase “filed any complaint” is removed from the other activities listed in § 215(a)(3) and the fact that § 215(a)(3) as a whole is hardly a model of grammatical clarity,<sup>64</sup> his is not the only reading of the language. Therefore, because the text provided only a weak obstacle to Justice Breyer’s reading of the statute, a majority of Justices perhaps felt comfortable enough to adopt the construction that best complied with their own views as to the proper role of antiretaliation provisions.

*b. Crawford v. Metropolitan Government of Nashville & Davidson County*

The Court’s interpretive method in *Kasten* was somewhat similar to its earlier approach in *Crawford v. Metropolitan Government of Nashville & Davidson County*.<sup>65</sup> In *Crawford*, an employee alleged that her employer retaliated against her after she provided information about prior instances of harassment involving a supervisor as part of the employer’s internal investigation into another employee’s similar allegations against the supervisor.<sup>66</sup> In response to the employer’s questions, the employee gave “an ostensibly disapproving account” of the supervisor’s past behavior.<sup>67</sup> The question, then, was whether the employee’s actions amounted to protected activity.

Title VII’s antiretaliation provision, § 704(a), provides protection for two types of plaintiffs: those who have opposed unlawful conduct and those who have “made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 1337. Technically, the Court did not rule on the question of whether § 215(a)(3) protects the filing of intracompany complaints, citing the employer’s failure to raise the argument in response to *Kasten*’s petition for certiorari. *Id.* at 1336. However, as Justice Scalia noted in his dissent, the Court seemed to assume that such complaints could be protected. *Id.* at 1341.

<sup>64</sup> Congress’s strange use of commas—or lack thereof—in § 215(a)(3) makes the provision particularly difficult to comprehend.

<sup>65</sup> 129 S. Ct. 846 (2009).

<sup>66</sup> *Id.* at 849.

<sup>67</sup> *Id.* at 850.

subchapter.”<sup>68</sup> In concluding that the employee’s actions were protected, the Court could have held that voluntary participation in an employer’s internal investigation is protected under the second clause of § 704(a), the so-called “participation” clause. However, the text of § 704(a) presented the Court with a significant hurdle in that respect. Virtually every federal court has concluded that filing an internal complaint or participating in an employer’s internal investigation is not protected under Title VII’s participation clause.<sup>69</sup> These courts have pointed out that, under the language of § 704(a), the “investigation, proceeding, or hearing” in which an employee participates must be one that arises “under this subchapter.” The participation clause, in the view of these courts, is therefore designed to protect an employee who has participated in the “machinery available to seek redress for civil rights violations,” not those who have participated in internal investigations.<sup>70</sup>

Faced with this textual hurdle in *Crawford*, Justice Souter, writing for a unanimous Court, instead chose to categorize the employee’s act of providing information as part of an internal investigation as “opposition” conduct and expressly declined to consider whether the conduct might also be classified as “participation” conduct.<sup>71</sup> Justice Souter first looked to dictionary definitions of the term “oppose.”<sup>72</sup> He was then able to conclude fairly quickly that the *Crawford* plaintiff’s act of providing “an ostensibly disapproving account” of the supervisor’s past behavior amounted to “opposition,” even if she provided the information in response to a question rather than volunteering it.<sup>73</sup>

### 3. Third-Party Retaliation

*Thompson* provides another recent example of the Court’s focus on text in the retaliation context. As discussed above, *Thompson* involved a case of third-party retaliation under Title VII. There was

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<sup>68</sup> 42 U.S.C. § 2000e-3(a) (2006).

<sup>69</sup> Alex B. Long, *The Troublemaker’s Friend: Retaliation Against Third Parties and the Right of Association in the Workplace*, 59 FLA. L. REV. 931, 953–54 (2007) (“Federal courts uniformly have held that resort to an employer’s internal procedures for handling discrimination does not fall under the participation clause for purposes of a retaliation claim, at least prior to the filing of an EEOC charge, because such conduct does not relate to an investigation, proceeding, or hearing authorized by Title VII.”).

<sup>70</sup> *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1313 (6th Cir. 1989).

<sup>71</sup> *Crawford*, 129 S. Ct. at 853.

<sup>72</sup> *Id.* at 850.

<sup>73</sup> *Id.*; *accord id.* at 852.

little dispute in the years following *Burlington Northern* that it was unlawful for an employer to take action against one employee in retaliation of another employee's protected activity under Title VII.<sup>74</sup> The question was whether the actual victim of this type of third-party retaliation had a remedy in such cases. In *Thompson*, the Court had two options from which to choose in concluding that a victim of third-party retaliation has a remedy under Title VII. The first approach was to use § 706, Title VII's remedies section, as the statutory hook. Section 706(f)(1) provides that any person aggrieved by unlawful employer conduct can file a complaint. As discharging one employee in retaliation for another employee's protected activity is unlawful, the argument goes, the first employee is aggrieved by the employer's unlawful conduct and is entitled to a remedy.

The second approach was to interpret § 704(a), Title VII's antiretaliation provision, to provide a remedy to the victim of third-party retaliation. This option would have provided the most direct solution to the problem of third-party retaliation. However, it was also a solution that presented the Court with a potentially significant textual hurdle. Section 704(a) provides that it is unlawful for an employer to retaliate against an individual "because *he* has opposed any practice made an unlawful employment practice by this subchapter, or because *he* has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."<sup>75</sup> Read literally, the statute requires that the person who is retaliated against also be the person who engaged in the protected activity. This is how the majority of federal courts interpreted the language prior to *Thompson*.<sup>76</sup>

A few federal courts had been willing prior to *Thompson* to read the statutory language in a manner consistent with the obvious purpose of the statute so as to prevent employers from deterring employees from taking protected activity for fear that a friend or loved one might suffer.<sup>77</sup> Importantly, the EEOC had long taken the position that the retaliation in such cases could be challenged by

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<sup>74</sup> See *Freeman v. Barnhart*, No. C 06-04900 JSW, 2008 WL 744827, at \*7 (N.D. Cal. Mar. 18, 2008); *Mutts v. S. Conn. State Univ.*, No. 3:04 CV 1746(MRK), 2006 WL 1806179, at \*11 (D. Conn. June 28, 2006).

<sup>75</sup> 42 U.S.C. § 2000e-3(a) (2006) (emphasis added).

<sup>76</sup> Long, *supra* note 69, at 934.

<sup>77</sup> See, e.g., *Gonzalez v. N.Y. State Dep't of Corr. Servs.*, 122 F. Supp. 2d 335, 347 (N.D.N.Y. 2000); *EEOC v. Nalbandian Sales, Inc.*, 36 F. Supp. 2d 1206, 1210 (E.D. Cal. 1998).

either the party who engaged in the protected activity or the party who suffered the adverse action.<sup>78</sup> Thus, the Court could have also relied on principles of agency deference in support of a broad construction of § 704(a). However, in order to construe the language in this manner, the Court would have had to give short shrift to the actual text and rely heavily on a combination of policy-based arguments, agency deference, and absurdity arguments.<sup>79</sup>

Not surprisingly, the Court, in a unanimous, eight-Justice decision authored by Justice Scalia, chose the path of least resistance offered by § 706.<sup>80</sup> The only obstacle to concluding that the victim of third-party retaliation is a “person aggrieved” within the meaning of Title VII was the possibility that the term could be construed to mean anyone with Article III standing, a result Justice Scalia deemed to be extreme and too expansive.<sup>81</sup> There was decisional law from the Court in another context suggesting such an interpretation.<sup>82</sup> However, this precedent posed only a minor obstacle to a more narrow interpretation of the “person aggrieved” language insofar as the Court was able to characterize the decision as dicta (and dicta that was “ill-considered” at that).<sup>83</sup> Thus, the text of § 706 and relevant decisional law provided little obstacle to the Court’s ultimate conclusion.

#### 4. Other Examples of the Court’s Textualist Approach

In the other recent cases involving construction of statutory antiretaliation provisions, the Court has repeatedly stressed the idea that its broad interpretations have been grounded in the text or at least are permissible under the text. In *Jackson v. Birmingham Board of Education*,<sup>84</sup> the Court held that Title IX of the Education Amendments of 1972<sup>85</sup> prohibits recipients of federal education funding from retaliating against an individual who complains about unlawful sex discrimination, despite the absence of any express

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<sup>78</sup> *Thompson v. N. Am. Stainless, LP*, 131 S. Ct. 863, 871 (2011) (Ginsburg, J., concurring) (quoting the EEOC compliance manual).

<sup>79</sup> See *Nalbandian Sales*, 36 F. Supp. at 1212 (advancing an absurdity argument in support).

<sup>80</sup> *Thompson*, 131 S. Ct. at 870. Justice Kagan did not participate.

<sup>81</sup> *Id.* at 869.

<sup>82</sup> *Id.* (citing *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205 (1972)).

<sup>83</sup> *Id.* at 869–70.

<sup>84</sup> 544 U.S. 167 (2005).

<sup>85</sup> Pub. L. No. 92–318, 86 Stat. 373 (codified as amended at 20 U.S.C. § 1681–1688 (2006)).

statutory prohibition on retaliation.<sup>86</sup> Relying upon Title IX's prohibition on sex discrimination, the Court neatly concluded that "[r]etaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination encompassed by Title IX's private cause of action."<sup>87</sup> Thus, when a defendant retaliates against an individual because the individual complained of sex discrimination, the defendant has discriminated on the basis of sex in violation of Title IX.<sup>88</sup>

The Court conceivably could have relied upon a Department of Education regulation that prohibited retaliation in this context. Yet the Court expressly disavowed *any* reliance on the regulations, stating, "[W]e do not rely on the Department of Education's regulation at all, because the statute *itself* contains the necessary prohibition."<sup>89</sup> The Court's conclusion drew a stinging response from Justice Thomas, who was joined by Chief Justice Rehnquist and Justices Scalia and Kennedy.<sup>90</sup> Thomas and Scalia again dissented in two subsequent cases, *Gomez-Perez v. Potter* and *CBOCS West, Inc. v. Humphries*, when the Court employed a similar analytical approach in concluding that § 1981 and the federal-sector provision of the ADEA prohibit retaliation despite the absence of any express prohibition.<sup>91</sup> Justices Thomas and Scalia were joined by Chief Justice Roberts in the latter case.<sup>92</sup>

In these cases, the text provided a greater impediment to an expansive interpretation concerning protection from retaliation than in other cases in that the statutes were silent on the subject of retaliation. This perhaps explains the greater division within the Court and the dissents of the more textualist-minded members of the Court in particular. However, silence is an obstacle more easily overcome than actual language that is contrary to a particular construction. In these cases, the more significant hurdle to an expansive interpretation was existing precedent. In each case, there were prior decisions of the

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<sup>86</sup> *Jackson*, 544 U.S. at 171.

<sup>87</sup> *Id.* at 173.

<sup>88</sup> *Id.* at 174.

<sup>89</sup> *Id.* at 178.

<sup>90</sup> *See id.* at 184 (Thomas, J., dissenting) (criticizing the majority for ignoring statutory text).

<sup>91</sup> *Gomez-Perez v. Potter*, 553 U.S. 474, 506 (2008) (Thomas, J., dissenting) (discussing the federal-sector provision of the ADEA); *CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 457 (2008) (Thomas, J., dissenting) (discussing § 1981).

<sup>92</sup> *Gomez-Perez*, 553 U.S. at 492 (Roberts, C.J., dissenting).



Court that were in tension with the Court's ultimate interpretation.<sup>93</sup> But precedent can be distinguished more easily than language can be read to mean something contrary to what it seems to say. Thus, a majority of Justices were willing to sign on to each of these opinions and recognize the existence of statutory protection from retaliation.

### C. Summary

Textualism has won the war with respect to the interpretation of statutory antiretaliation provisions. Justice Breyer perhaps said it best in *Burlington Northern* when, in construing § 704(a), he noted that “purpose reinforces what language already indicates”—in that instance, that § 704(a) provided broad coverage from retaliation.<sup>94</sup> Breyer's use of the word “reinforces” is instructive.<sup>95</sup>

*Jackson*, *CBOCS West*, and *Gomez-Perez* are as close as the Court has come to departing from statutory text in order to recognize a plaintiff's right to recover for employer retaliation. And, even in these cases, the Court has stressed its fidelity to the text. The statutes in question presented the Court with interpretive problems in the sense that they did not specifically speak to the question of retaliation. However, the Court has yet to confront statutory antiretaliation language that strongly suggests a restrictive interpretation with respect to protection from retaliation.<sup>96</sup>

This emphasis on text is, of course, consistent with the rise of textualism in other contexts. But textualism's triumph in the statutory retaliation field is noteworthy in at least two respects. First, it stands

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<sup>93</sup> See Zimmer, *supra* note 22, at 922–23, 929–32 (noting the important role precedent played in the decisions).

<sup>94</sup> *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 64 (2006) (emphasis added).

<sup>95</sup> See generally Zehrt, *supra* note 16, at 177 (noting the Court's reliance on text and precedent rather than policy in interpreting antiretaliation provisions).

<sup>96</sup> The plaintiff in *Clark County School District v. Breeden* lost before the Court, but the Court's decision did not require interpretation of the statute. 532 U.S. 268, 274 (2001) (per curiam). Instead, the Court assumed that the lower court's interpretation was correct, but held that, as applied, the interpretation still precluded the plaintiff from winning. *Id.* at 270–71. The only noteworthy exception to the winning streak of retaliation plaintiffs is *Garcetti v. Ceballos*. 547 U.S. 410 (2006). There, an employee claimed he had been retaliated against after speaking out about unlawful activity on the part of a prosecutor's office. *Id.* at 415. In a five-to-four decision, the Court held that the employee's claim failed because the employee's allegedly protected activity arose out of his job duties. *Id.* at 424. Although an employment retaliation case, *Garcetti* is also a constitutional case. *Id.* at 417–20. Thus, the rules with which the Court had to contend were largely judge-made as opposed to statutory in nature.

in contrast to the Court's interpretive approach with respect to the antidiscrimination provisions contained in first-generation employment discrimination statutes like Title VII. As one author has noted, Title VII's basic directive amounts to little more than "Thou shalt not discriminate."<sup>97</sup> Title VII is a broadly worded statute that leaves judges with significant room to shape policy.<sup>98</sup> Given the lack of specificity in Title VII's language, it is not surprising that many of the landmark Title VII cases—including *McDonnell Douglas Corp. v. Green*<sup>99</sup> and *Griggs v. Duke Power Co.*<sup>100</sup>—make only passing reference to the statutory text, and the tests that emerged from these cases were almost totally judge-made.<sup>101</sup> And at the time of some of the most important decisions, textualism had not yet gained ascendancy.<sup>102</sup> Even with the rise of textualism, the broadly worded text of Title VII still sometimes forces the Court to engage in common-law rulemaking that has only a limited connection to the text.<sup>103</sup>

Even when a discrimination statute employed more specific language, federal courts sometimes paid relatively little attention to that language. For example, the Rehabilitation Act of 1973<sup>104</sup> employed the same definition of disability that was later used in the Americans with Disabilities Act (ADA).<sup>105</sup> For several years prior to the passage of the ADA, federal courts sometimes barely paused to

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<sup>97</sup> Robert L. Burgdorf, Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 413 (1991) (explaining that many earlier civil rights statutes took this approach).

<sup>98</sup> See *id.* at 515.

<sup>99</sup> 411 U.S. 792 (1973).

<sup>100</sup> 401 U.S. 424 (1971).

<sup>101</sup> See generally Charles A. Sullivan, *The World Turned Upside Down?: Disparate Impact Claims by White Males*, 98 NW. U. L. REV. 1505, 1507 (2004) (referring to the Supreme Court's disparate impact jurisprudence as "judicially-created").

<sup>102</sup> See generally Molot, *supra* note 34, at 24 (identifying the 1980s and 1990s as the starting point for modern textualism).

<sup>103</sup> Alex B. Long, "If the Train Should Jump the Track . . .": *Divergent Interpretations of State and Federal Employment Discrimination Statutes*, 40 GA. L. REV. 469, 486–89 (2006) (explaining how the Supreme Court's approach to some employment discrimination statutes "resembles common law rulemaking and constitutional interpretation more than traditional statutory interpretation").

<sup>104</sup> 29 U.S.C. §§ 701–794 (2006).

<sup>105</sup> Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 3(2)(A), 104 Stat. 327, 330 (codified as amended at 42 U.S.C. § 12102(2)(A) (2006)); Stephen F. Befort, *Let's Try This Again: The ADA Amendments Act of 2008 Attempts to Reinvent the "Regarded as" Prong of the Statutory Definition of Disability*, 2010 UTAH L. REV. 993, 998.

even question whether an individual satisfied the same statutory definition employed in the Rehabilitation Act.<sup>106</sup> The Act's definition of disability was packed with terms in need of interpretation, yet federal courts often failed to parse the language. Indeed, in *School Board of Nassau County v. Arline*,<sup>107</sup> the Court quickly glossed over the same language that it would later focus intently on in the ADA context and adopted an expansive interpretation of the Rehabilitation Act's definition of disability.<sup>108</sup> However, in a series of decisions in 1999, the Supreme Court engaged in a painstaking (and painful) parsing of the ADA's statutory definition of disability and adopted a strict construction of the terms within that definition.<sup>109</sup>

In contrast to the Court's discrimination decisions, the Court's retaliation decisions have all taken place since textualism's rise to power. And in general, antiretaliation provisions tend to be wordier than the antidiscrimination provisions with which the Court has historically dealt. There have been several cases in which the relevant provision contained no explicit mention of protection from retaliation.<sup>110</sup> But aside from these cases, the Court has been required to parse text to determine the scope of an individual's protection from retaliation.

The other noteworthy feature of textualism's triumph in the field of statutory antiretaliation law is the fact that plaintiffs have had far greater success in their statutory retaliation claims than have discrimination plaintiffs. Discrimination plaintiffs have had less success under broadly worded statutes like Title VII than have retaliation plaintiffs. But discrimination plaintiffs have fared even worse in the case of the ADA, which contains far more textual detail.<sup>111</sup> Indeed, the Court's increasingly textual approach has repeatedly been identified as one of the main culprits behind ADA

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<sup>106</sup> See Long, *supra* note 103, at 529 ("Initially, relatively few individuals were denied coverage under section 504 of the Rehabilitation Act.").

<sup>107</sup> 480 U.S. 273 (1987).

<sup>108</sup> See *id.* at 281 (concluding that the fact that plaintiff's impairment was serious enough to require hospitalization was "more than sufficient" to satisfy the statutory definition of disability).

<sup>109</sup> *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 565–67 (1999); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516, 519 (1999); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 478–80 (1999) (Stevens, J., dissenting).

<sup>110</sup> See *supra* notes 84–92 and accompanying text.

<sup>111</sup> Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 108–10 (1999).

plaintiffs' lack of success.<sup>112</sup> It seems odd, therefore, that a textualist approach could produce such completely different outcomes in the retaliation cases.

Perhaps this is why some have looked for some other explanation for why the members of the Court seem to have particular sympathy for the victims of employment retaliation.<sup>113</sup> To be sure, these theories may go a long way toward explaining the outcomes of some of the decisions. The Justices' generally favorable views as to the purpose of antiretaliation provisions or generally sympathetic views of retaliation plaintiffs may, for example, explain how the plaintiffs in *Jackson*, *CBOCS West*, and *Gomez-Perez* were able to garner a majority in these decisions, which, given the absence of statutory text, could easily have been decided differently. They might also help explain how the plaintiff in *Kasten* was able to get several members of the Court's conservative wing to side with Justice Breyer's more expansive interpretation of the FLSA's antiretaliation provision than Justice Scalia's more limited interpretation when either interpretation, based on text alone, would have been plausible.

But, given the current composition of the Court, sympathy and unifying theories will not permit a retaliation plaintiff to prevail when the statutory language affirmatively suggests a contrary outcome. A majority of Justices are of a textualist bent, and those who are not still heavily stress statutory language.<sup>114</sup> For purposes of this Article, there are two particularly noteworthy aspects to the Court's retaliation decisions. First is the extent to which the decisions emphasize text. Culminating in Justice Breyer's multipaged inquiry into the meaning of the word "file" in *Kasten*, the Court has grounded its retaliation decisions on statutory language even when that language has provided only limited support for the Court's conclusion. Subtle differences in statutory text and single words have been decisive in the Court's

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<sup>112</sup> See, e.g., Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB. L. 91, 93 (2000) (discussing the different interpretation and struggles to define the protected class of ADA plaintiffs); Michael Selmi, *Interpreting the Americans with Disabilities Act: Why the Supreme Court Rewrote the Statute, and Why Congress Did Not Care*, 76 GEO. WASH. L. REV. 522, 525 (2008) (acknowledging "that the Supreme Court has read the ADA narrowly, and in a manner that is generally inconsistent with congressional intent").

<sup>113</sup> See *supra* notes 20–21 and accompanying text.

<sup>114</sup> See Zimmer, *supra* note 22, at 955–57 (classifying the interpretive approaches of the members of the Court).

analysis. Thus, the Court has established an interpretive template for future decisions involving antiretaliation decisions.

Second, in each of the statutory retaliation cases in which plaintiffs have prevailed, the text posed a relatively weak obstacle to an interpretation that would provide protection from retaliation. In other words, the texts permitted a majority of Justices in each case to interpret the provision in a manner consistent with their natural sympathies or their views as to the proper role of antiretaliation provisions. When the text posed only a weak obstacle to an expansive interpretation—as in *Crawford*—a clear majority formed around the expansive interpretation. When, however, the language posed a more formidable obstacle—as in *Jackson*, *CBOCS West*, and *Gomez-Perez*—the more textualist-minded Justices were unable to look past the obstacles; yet, the obstacles were formidable enough to peel away the fifth vote necessary to provide for more expansive coverage. As the rest of this Article argues, retaliation plaintiffs are unlikely to enjoy this same success in future decisions.

## II

### WHY STATUTORY RETALIATION PLAINTIFFS WILL EVENTUALLY START LOSING IN FRONT OF THE COURT

There are limits to a judge's ability to find ambiguity or certainty in statutory text. A judge's inclination to follow congressional purpose or take pragmatic concerns into account can overcome a textual impediment if the text amounts only to a speed bump to the judge's approach. But when the text strongly suggests a particular interpretation, a judge's desire to further the perceived underlying purpose of a statute or foster a desirable policy outcome tends to give way. This is especially likely when a court has previously given great weight to the presence or absence of particular language when interpreting one statute, and the court then confronts a different statute with the same language.

All of the major federal employment statutes have been held to prohibit employer retaliation.<sup>115</sup> However, with the exception of Title VII and the Age Discrimination in Employment Act (ADEA),

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<sup>115</sup> However, not every statute provides for a private right of action. See *George v. Aztec Rental Ctr., Inc.*, 763 F.2d 184, 187 (5th Cir. 1985) (concluding that no private cause of action exists for retaliatory discharge under OSHA); *Hernandez v. Mohawk Indus., Inc.*, No. 6:08-cv-927-Orl-28GJK, 2009 WL 3790369, at \*5 (M.D. Fla. Nov. 10, 2009) (concluding that the Surface Transportation Assistance Act does not provide for a private right of action).

virtually none of them use the same language.<sup>116</sup> In some cases, these linguistic differences may not present courts with any meaningful challenges in interpretation. In others, however, the differences are fairly substantial and are likely to mean that individuals who engage in action that would clearly be protected under Title VII or the ADEA will be unprotected. While there are any number of unresolved issues involving the meaning of statutory antiretaliation provisions, the following Part explores those situations in which the luck of retaliation plaintiffs in front of the Supreme Court is most likely to run out.

*A. No Protection for Retaliation Not Amounting to an Ultimate Employment Action*

A clear example of how retaliation victims may be at the mercy of the text of whatever the relevant statute may be is the situation in which an employer retaliates against an employee but does not fire, demote, or take similar employment-related actions. In *Burlington Northern & Santa Fe Railway Co. v. White*, the Court held that Title VII prohibits other forms of retaliation not necessarily connected to the workplace.<sup>117</sup> As discussed, the Court was able to reach this decision because the text of § 704(a) permitted and actually created at least a weak presumption in favor of this construction of the statutory text.<sup>118</sup> Whereas the statutory provision outlawing employment discrimination specifically referred to employer actions affecting an employee's "compensation, terms, conditions, or privileges of employment," § 704(a), the antiretaliation provision, contained no such limiting language.<sup>119</sup> Since the text of § 704(a) allowed for and arguably encouraged a broad reading, the Court was able to also rely on the strong policy arguments favoring the broad reading.

Most of the major federal employment statutes resemble § 704(a) in that they are not limited to retaliation affecting "the compensation, terms, conditions, or privileges of employment." The FMLA, for

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<sup>116</sup> The ADA's antiretaliation provision employs language substantially similar to that of Title VII and the ADEA. 42 U.S.C. § 12203(a) (2006). However, the ADA contains an additional section that makes it unlawful for an employer to "coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter." *Id.* § 12203(b).

<sup>117</sup> See *supra* notes 39–40 and accompanying text.

<sup>118</sup> See *supra* notes 43–45 and accompanying text.

<sup>119</sup> *Id.*

example, provides that it is unlawful for an employer “to discharge *or in any other manner* discriminate against any individual” who has engaged in protected activity.<sup>120</sup> As a result, federal courts have consistently held that *Burlington Northern*’s material adversity standard applies to FMLA retaliation claims.<sup>121</sup> Courts have similarly relied on the absence of any limiting language in concluding that the *Burlington Northern* standard applies in ERISA and FLSA retaliation cases.<sup>122</sup>

Many of the lesser-known federal statutes that prohibit employer retaliation, however, are by their terms limited to retaliation affecting the terms, conditions, or privileges of employment. For example, the Asbestos School Hazard Detection and Control Act<sup>123</sup> prohibits an employer from “discharg[ing] any employee or otherwise discriminat[ing] against any employee with respect to the employee’s compensation, terms, conditions, or privileges of employment” because the employee has engaged in protected activity.<sup>124</sup> The Surface Transportation Assistance Act of 1982 similarly provides that it is unlawful to “discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment” because the employee has engaged in protected activity.<sup>125</sup> A host of other federal statutes contain similar language.<sup>126</sup> The same interpretive issue has arisen under parallel state statutes with mixed results.<sup>127</sup>

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<sup>120</sup> 29 U.S.C. §§ 2615(a)(2), (b) (2006) (emphasis added).

<sup>121</sup> See, e.g., *Millea v. Metro-N. R.R.*, Nos. 10-409-cv (L); 10-564-cv (XAP), 2011 WL 3437513, at \*6 (2d Cir. Aug. 8, 2011); *Metzler v. Fed. Home Loan Bank of Topeka*, 464 F.3d 1164, 1171 n.2 (10th Cir. 2006).

<sup>122</sup> *Darveau v. Detecon, Inc.*, 515 F.3d 334, 343 (4th Cir. 2008) (adopting *Burlington Northern*’s material adversity standard for use in FLSA retaliation claims); *Mohamed v. Sanofi-Aventis Pharm.*, No. 06 Civ. 1504, 2009 WL 4975260, at \*22–24 (S.D.N.Y. Dec. 22, 2009) (stating, “In light of *Burlington Northern*, it would seem that retaliation under ERISA section 510 is not limited to discriminatory actions that affect the terms and conditions of employment,” but deciding the case on other grounds); *Mercier v. Boilermakers Apprenticeship & Training Fund*, No. 07-cv-11307-DPW, 2009 WL 458556, at \*23 (D. Mass. Feb. 10, 2009) (concluding that retaliation under ERISA is not limited to adverse employment actions).

<sup>123</sup> Pub. L. No. 96-270, 94 Stat. 487 (codified at 20 U.S.C. §§ 3601–3611 (2006)).

<sup>124</sup> 20 U.S.C. § 3608.

<sup>125</sup> 49 U.S.C. § 31105 (2006).

<sup>126</sup> See *infra* Appendix.

<sup>127</sup> See Alex B. Long, *Viva State Employment Law! State Law Retaliation Claims in a Post-Crawford/Burlington Northern World*, 77 TENN. L. REV. 253, 272–73 (2010) (noting conflicting results in decisions in Washington and California). Thus far, decisional law on this issue involving the lesser-known federal statutes is sparse. Some courts have noted that the difference in language poses an interpretive issue but have assumed, without

The fact that a statute contains language specifically referring to an employee's pay, terms, conditions, or privileges of employment does not necessarily mean that it is limited to retaliation involving employment-related actions. A court could, as one has, conclude that Congress's use of these terms represented a "kitchen-sink attempt at comprehensiveness, rather than a limitation by way of *expressio unius*, and should be construed to mean 'any adverse action.'"<sup>128</sup> However, the more natural reading of this kind of statutory language would be to limit retaliation to adverse employment actions or ultimate employment actions.

The fact that the Supreme Court placed such great emphasis on the absence of the "compensation, terms, conditions, or privileges of employment" language in reaching the opposite conclusion in the Title VII context only supports this narrow reading of this kind of statutory language; the Court's focusing so heavily on the absence of the language may prove exceedingly difficult to subsequently overlook the presence of the same language in a different statute. The likely result will be that employees who are unfortunate enough to have to sue under these kinds of statutes will be denied protection.<sup>129</sup>

*B. No Protection for Making Internal Complaints or Providing Information to an Employer*

Another area in which some retaliation plaintiffs are currently losing in the lower courts and are likely to lose in front of the Supreme Court is where an employee complains or notifies an employer about unlawful conduct. At first, this seems counterintuitive. An employee who complains internally to an

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deciding, that *Burlington Northern*'s material adversity standard applies. See *Melton v. U.S. Dep't of Labor*, 373 F. App'x 572, 577 (6th Cir. 2010) (per curiam) (noting the difference in statutory language between Title VII and the Surface Transportation Assistance Act, but declining to decide whether Title VII's material adversity standard applies).

<sup>128</sup> See *Mattei v. Mattei*, 126 F.3d 794, 806 (6th Cir. 1997) (concluding the same result about ERISA's antiretaliation provision).

<sup>129</sup> On their face, some statutes provide expansive protection from retaliation. For example, the FMLA prohibits an employer from discharging "or in any other manner" discriminating against an individual for engaging in protected activity. 29 U.S.C. § 2615 (2006). If given a literal interpretation, these statutes would establish a different standard than the material adversity standard adopted by the Court in *Burlington Northern* in Title VII cases. Despite this difference in text, some courts have adopted *Burlington Northern*'s material adversity standard for use in FMLA retaliation cases. See, e.g., *Wierman v. Casey's Gen. Stores*, 638 F.3d 984, 999 (8th Cir. 2011); *Metzler v. Fed. Home Loan Bank of Topeka*, 464 F.3d 1164, 1171 n.2 (10th Cir. 2006).



employer about unlawful discrimination is protected from retaliation under § 704(a) of Title VII, which protects one who has “opposed” unlawful employer discrimination.<sup>130</sup> Even prior to the Court’s decision in *Kasten*, the majority of federal appellate courts had concluded that the FLSA’s antiretaliation provision protects an employee who filed a written complaint internally,<sup>131</sup> and now the Supreme Court has held that this protection extends to oral complaints as well. One might logically assume then that, given the preference of federal courts for uniform construction of the array of federal employment statutes, making an internal, oral complaint of unlawful conduct or providing information about such conduct is *per se* protected conduct under federal law. However, a quick examination of the language of ERISA and some of the other federal statutes regulating the workplace should quickly dispel such confidence.<sup>132</sup>

### 1. No Protection for Internal Complaints

In *Kasten*, the Court was able to conclude that filing an internal oral complaint is protected conduct under the FLSA, in part, because the “filed any complaint” language was sufficiently removed from the language requiring interaction with the government to permit the conclusion that an employee need not file a formal complaint with a court or government agency in order to be protected.<sup>133</sup> Not every antiretaliation provision is structured in this manner. To the extent some statutes protect the filing of complaints or the providing of

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<sup>130</sup> 42 U.S.C. § 2000e-3(a) (2006); *Abramson v. William Paterson Coll. of N.J.*, 260 F.3d 265, 268 (3d Cir. 2001); *Sumner v. U.S. Postal Serv.*, 899 F.2d 203, 209 (2d Cir. 1990); B. Glenn George, *Revenge*, 83 TUL. L. REV. 439, 448 (2008). The FMLA also contains this “opposition” language, and several courts have concluded that one who complains internally to an employer is protected from retaliation under the FMLA. See *Schrieber v. Fed. Express Corp.*, 698 F. Supp. 2d 1266 (N.D. Okla. 2010) (denying the defendant’s summary judgment motion as to the plaintiff’s retaliation claim when the plaintiff had filed an internal complaint related to alleged discrimination under the FMLA and the ADEA); *Mahoney v. Ernst & Young LLP*, 487 F. Supp. 2d 780 (S.D. Tex. 2006) (concluding that a letter to the employer from the employee’s attorney complaining about denial of FMLA rights was protected under the FMLA’s opposition clause).

<sup>131</sup> See *Kasten v. Saint-Gobain Performance Plastics Corp.*, 570 F.3d 834, 838 (7th Cir. 2009) (noting the “vast majority of circuit courts to consider this issue” had reached this conclusion), *rev’d on other grounds*, *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1336 (2011).

<sup>132</sup> There are some federal statutes—such as the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § 1855(a)—that contain antiretaliation provisions that closely resemble the FLSA’s and will therefore probably be interpreted consistent with *Kasten*.

<sup>133</sup> See *supra* note 64 and accompanying text.

information, they do so with language that is closely connected to language describing interaction with the government or a connection to the formal mechanisms employed to enforce the relevant statute. Thus, there is a strong chance that the Supreme Court would construe any number of statutes so that providing information or filing a complaint are protected activities only when conducted in connection with a judicial or administrative proceeding.

The most obvious example of this type of statute is Title VII. Title VII's participation clause prohibits retaliation against an employee because the employee "has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."<sup>134</sup> Each protected activity in the clause—making a charge, testifying, assisting, and participating—is closely linked to language referring to proceedings associated with Title VII. Perhaps not surprisingly, virtually every federal court to consider the issue has concluded that an employee who provides information as part of an employer's internal process or investigation into unlawful discrimination is not protected under Title VII because the participation clause extends only to conduct related to a formal proceeding under Title VII.<sup>135</sup>

Of course, the Supreme Court had the chance in *Crawford v. Metropolitan Government of Nashville & Davidson County* to expand the scope of protection from retaliation by holding that those who participate in an internal proceeding or investigation are entitled to protection under Title VII's participation clause.<sup>136</sup> Instead, the Court chose to categorize the employee's act of providing information as part of an internal investigation as "opposition" conduct and expressly declined to consider whether the conduct might also be classified as "participation" conduct.<sup>137</sup> While *Crawford* was considered a victory for Title VII retaliation plaintiffs, it was not the kind of resounding victory that would assist all similarly situated plaintiffs outside the Title VII context. The Court's silence on the question of whether providing information as part of an internal investigation could be protected "participation" conduct was deafening in the face of overwhelming precedent among the lower courts that such conduct is not protected under the participation clause. Thus, the Supreme Court's conspicuous silence in the face of the overwhelming majority

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<sup>134</sup> 42 U.S.C. § 2000e-3(a).

<sup>135</sup> See *supra* note 69 and accompanying text.

<sup>136</sup> 129 S. Ct. 846 (2009).

<sup>137</sup> *Id.* at 853.

approach in the Title VII context has obvious repercussions for similarly situated plaintiffs who claim protection under similarly worded antiretaliation provisions.

At least in the Title VII context, an employee who complains internally about a possible Title VII violation may still be protected under Title VII's opposition clause. However, most statutes governing the workplace do not contain any "opposition" language.<sup>138</sup> Thus, other retaliation plaintiffs may not be so fortunate.

The majority of courts to consider the issue have concluded that the filing of an internal complaint is not protected activity under ERISA.<sup>139</sup> ERISA's antiretaliation provision provides that it is unlawful for an employer to retaliate "against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act."<sup>140</sup> An employee who complains internally about a possible ERISA violation has certainly "given information" as the Act requires. However, a slight majority of federal appellate courts to consider the issue have concluded that an employee who, unsolicited, complains internally to another employer has not engaged in protected activity.<sup>141</sup> These courts have reasoned that in the absence of an employer's request for information, an employee who complains internally is not giving information as part of an "inquiry" or "proceeding."<sup>142</sup> In addition, according to these courts, the term "proceeding" refers to the formal process for obtaining a remedy under the statute, not something as informal as the making of an internal complaint.<sup>143</sup>

In reaching these conclusions, courts have turned the different language of Title VII and the FLSA against ERISA retaliation plaintiffs. Title VII explicitly protects one who opposes unlawful

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<sup>138</sup> See *infra* Appendix.

<sup>139</sup> *Edwards v. A.H. Cornell & Son, Inc.*, 610 F.3d 217, 223 (3d Cir. 2010); *Nicolaou v. Horizon Media, Inc.*, 402 F.3d 325, 329 (2d Cir. 2005) (per curiam); *King v. Marriott Int'l, Inc.*, 337 F.3d 421, 427 (4th Cir. 2003). The Fifth and Ninth Circuits have held that such conduct is protected under ERISA. *Anderson v. Elec. Data Sys. Corp.*, 11 F.3d 1311, 1314 (5th Cir. 1994); *Hashimoto v. Bank of Haw.*, 999 F.2d 408, 411 (9th Cir. 1993); see also Jessica Barclay-Strobel, Comment, *Shooting the Messenger: How Enforcement of FLSA and ERISA Is Thwarted by Courts' Interpretations of the Statutes' Antiretaliation and Remedies Provisions*, 58 UCLA L. REV. 521, 533–36 (2010) (discussing the circuit split on the issue).

<sup>140</sup> 29 U.S.C. § 1140 (2006).

<sup>141</sup> See Barclay-Strobel, *supra* note 139.

<sup>142</sup> *Edwards*, 610 F.3d at 223.

<sup>143</sup> *Id.*

discrimination. According to the U.S. Court of Appeals for the Third Circuit, Congress could have chosen to include similar “opposition” language in ERISA’s antiretaliation provision but declined to do so. Characterizing Congress’s inaction as a conscious choice, the court concluded that Congress chose not to provide protection to those who oppose or otherwise raise concerns internally about an ERISA violation.<sup>144</sup> The Third Circuit has similarly turned the FLSA’s language against ERISA retaliation plaintiffs. The court noted that the FLSA prohibits retaliation against one who has “filed any complaint,” which could include an internal complaint.<sup>145</sup> The words “any complaint” are noticeably absent from ERISA’s language. Therefore, while *Kasten* might suggest a more expansive reading of ERISA’s language, *Kasten*’s conclusion that internal complaints are protected under the FLSA does not necessarily require a parallel conclusion under ERISA’s distinct statutory language.<sup>146</sup>

ERISA and the FLSA actually use somewhat similar language in their antiretaliation provisions. Thus, it may be that ERISA’s text does not pose the sort of textual hurdle that is virtually insurmountable if one desires a broad interpretation. However, other statutes have similar gaps in coverage and contain language that is perhaps more resistant to an expansive interpretation. For example, the Immigration Reform and Control Act’s (IRCA)<sup>147</sup> antiretaliation provision prohibits retaliation against one who has “filed a charge or a complaint, testified, assisted, or participated in any manner *in an investigation, proceeding, or hearing under this section.*”<sup>148</sup> This language is obviously quite similar to Title VII’s participation clause, thus suggesting a similarly restrictive interpretation. Outside of the Title VII context, however, some courts have been more generous in their interpretation of similarly worded statutes and have concluded that internal complaints are protected.<sup>149</sup> But the differences in

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<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 224.

<sup>146</sup> *Id.* at 225.

<sup>147</sup> 8 U.S.C. §§ 1324a, 1324b (2006).

<sup>148</sup> *Id.* § 1324b(a)(5) (emphasis added).

<sup>149</sup> See *Passaic Valley Sewerage Comm’rs v. U.S. Dep’t of Labor*, 992 F.2d 474, 478 (3d Cir. 1993) (interpreting § 507(a) of the Clean Water Act to permit a retaliation claim based on an internal complaint); *Rayner v. Smirl*, 873 F.2d 60, 64 (4th Cir. 1989) (concluding that the Federal Railroad Safety Act protects the filing of internal complaints); *Phillips v. Interior Bd. of Mine Operations Appeals*, 500 F.2d 772, 779 (D.C. Cir. 1974) (concluding that internal complaints are protected under the Federal Coal Mine Health & Safety Act, while recognizing that the holding extended beyond the literal language of the

outcomes are sometimes dependent on minor variations among the statutes, and the decisions are mixed.<sup>150</sup>

There are strong arguments on both sides regarding the interpretation of IRCA's antiretaliation provision. The most natural reading of the text would seem to require that the employee file a complaint in connection with some type of formal process.<sup>151</sup> However, this is not the only possible reading of the text, and a contrary reading certainly makes more sense as a policy matter. The IRCA is designed, in part, to address employers' discrimination against "documented workers" because of their national origin or citizenship and to criminalize the employment of undocumented workers.<sup>152</sup> In many instances, the individuals most likely to be affected by or have knowledge of such practices are those who, in the words of one author, "often lack even the most rudimentary understanding of their legal rights, are vulnerable to exploitation, and are all but invisible to most of the citizenry."<sup>153</sup> For example, in one of the few reported IRCA retaliation cases, the employee who complained to authorities spoke no English.<sup>154</sup> When interpreting the FLSA's ambiguous statutory language in *Kasten*, the Court noted that it would undermine Congress's purpose in protecting workers from exploitive practices to limit the protection of the antiretaliation provision to when an employee filed a written complaint. "Why," the Court asked, "would Congress want to limit the enforcement scheme's effectiveness by inhibiting use of the Act's complaint

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Act); *Neal v. Honeywell, Inc.*, 826 F. Supp. 266, 273 (N.D. Ill. 1993) (concluding that the False Claims Act prohibits retaliation based on the filing of an internal complaint).

<sup>150</sup> Compare *Brown & Root, Inc. v. Donovan*, 747 F.2d 1029, 1031-32 (5th Cir. 1984) (concluding that internal complaints are not protected under the Energy Reorganization Act as originally codified), with *Mackowiak v. Univ. Nuclear Sys., Inc.*, 735 F.2d 1159, 1163 (9th Cir. 1984) (reaching the opposite conclusion). The Third Circuit concluded in *Passaic Valley Sewerage Commissioners v. United States Department of Labor* that the Clean Water Act protected internal complaints. 992 F.2d at 480. Nearly twenty years later, the same court was forced to distinguish the language of the Clean Water Act from the similarly worded language of ERISA while concluding that ERISA did not protect one who complains internally about an ERISA violation. *Edwards v. A.H. Cornell & Son, Inc.*, 610 F.3d 217, 223 (3d Cir. 2010).

<sup>151</sup> See generally *Phillips*, 500 F.2d at 779 (concluding that internal complaints are protected under the similarly worded Federal Coal Mine Health & Safety Act, while recognizing that the holding extended beyond literal language of the Act).

<sup>152</sup> *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892 (1984); *Jie v. Liang Tai Knitwear Co.*, 107 Cal. Rptr. 2d 682, 687 (Ct. App. 2001).

<sup>153</sup> Fran Ansley, *Standing Rusty and Rolling Empty: Law, Poverty, and America's Eroding Industrial Base*, 81 GEO. L.J. 1757, 1771 (1993).

<sup>154</sup> *Jie*, 107 Cal. Rptr. 2d at 685.

procedure by those who would find it difficult to reduce their complaints to writing, particularly illiterate, less educated, or overworked workers?”<sup>155</sup> One might make a similar argument with respect to the IRCA: why would Congress want to limit the enforcement scheme’s effectiveness by inhibiting use of the Act’s complaint procedure by those who frequently lack an understanding of their legal rights and the structures that protect those rights?

The difficulty with making this type of argument is that the text of the IRCA poses a fairly significant obstacle to what is clearly the better policy approach. Indeed, the interpretation of the IRCA presents a classic illustration of the battle between text-based and more pragmatic forms of interpretation. But given the Court’s past approach to the interpretation of antiretaliation provisions, the textual obstacles involving the IRCA and similarly worded statutes are likely to prove too pronounced to permit a majority of the Court to adopt the type of expansive interpretation it has adopted in the past.

## 2. *No Protection for Providing Information to an Employer*

A closely related problem involves the coverage of an employee who provides information to an employer about a possible violation of the law but does so in a nonconfrontational manner. *Kasten* clearly provides protection for employees who affirmatively complain about unlawful behavior under the FLSA. And *Crawford* held that an employee who provides a “disapproving account” of an employee’s behavior in response to employer questioning as part of an internal investigation is entitled to protection under Title VII’s opposition clause. The Court also approvingly quoted an EEOC guideline expressing the view that an employee is protected under the opposition clause when the “employee communicates to her employer a belief that the employer has engaged in . . . a form of employment discrimination.”<sup>156</sup> But what if the information the employee provides is more neutral in character, or what if the employee is acting as more of a facilitator, mediator, or intermediary? Is such an employee covered if the employee incurs the employer’s wrath?

As was the case in *Crawford*, an employee may be dragged involuntarily into an employer’s internal investigation or a coworker’s

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<sup>155</sup> *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1333 (2011).

<sup>156</sup> *Crawford v. Metro. Gov’t of Nashville & Davidson Cnty.*, 129 S. Ct. 846, 851 (2009) (citing 2 EEOC Compliance Manual § 8-II(B)(1) (1998), available at <http://www.eeoc.gov/policy/docs/retal.html>).

lawsuit.<sup>157</sup> When the employee provides information in response to questioning, the employee may not convey a belief that discrimination has taken place and may even have no idea that the information she is providing is damaging to the employer's case. In such a case, an employee would be providing information that is relevant to a charge of unlawful activity but might not be "opposing" unlawful conduct within the meaning of Title VII or another statute.

In one case, an employee was identified in discovery material as a potential witness in a coworker's FMLA lawsuit against an employer.<sup>158</sup> The employer instructed the employee to notify the employer if the coworker's attorney contacted the employee about the coworker's FMLA claim.<sup>159</sup> The employee replied that he would not tell the employer if he was contacted and that he would "tell the truth" if subpoenaed.<sup>160</sup> The district court concluded that these statements were too equivocal in nature to qualify as opposition conduct.<sup>161</sup> Nor, the court concluded, had the employee engaged in protected activity by participating in an FMLA proceeding because simply being listed as a witness did not amount to participation.<sup>162</sup> Thus, the court dismissed the employee's retaliation claim on a Rule 12(b)(6) motion.<sup>163</sup>

There are also numerous cases in which one employee has assisted another by helping to bring the coworker's concerns over discrimination to the attention of management. Yet, in all of these cases, the courts have held that facilitating someone else's complaint or acting as an intermediary does not qualify as "opposing" unlawful conduct.<sup>164</sup> It is only when the plaintiff's assistance crosses the fine

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<sup>157</sup> See *Harris v. Fulton-DeKalb Hosp. Auth.*, 255 F. Supp. 2d 1347, 1356 (N.D. Ga. 2002) (concluding that an employee who refused to participate in the employer's internal investigation into the coworker's discrimination claim did not engage in protected activity).

<sup>158</sup> *Lehmann v. Aramark Healthcare Support Servs., LLC*, 630 F. Supp. 2d 388, 391 (D. Del. 2009).

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 393.

<sup>162</sup> *Id.* at 394.

<sup>163</sup> *Id.* at 394–95. The decision seems wrong on its face in light of the fact that the FMLA's antiretaliation provision protects not only those who provide information or testify in a formal proceeding but also those who are "about to" provide information or testify. 29 U.S.C. §§ 2615(b)(2)–(3) (2006). The fact that the employee had been listed as a potential witness in the FMLA lawsuit seems like it should suffice to establish that the employee was about to provide information or testify.

<sup>164</sup> *Moore v. City of Phila.*, 461 F.3d 331, 350 (3d Cir. 2006); *Wells v. Securitas Sec. Servs. USA, Inc.*, No. 07-15500, 2009 WL 818005, at \*6 (E.D. Mich. Mar. 27, 2009);

line into being more openly adverse to the employer's interests that the conduct amounts to opposition.<sup>165</sup> Accordingly, it is unlikely that this type of plaintiff would be protected under the opposition clause.

This conclusion is largely bolstered by the *Crawford* decision. Nearly all of the examples the Court used in attempting to explain what qualifies as "opposing" unlawful conduct involved expressions of disapproval communicated directly to the employer. From providing a disapproving account to the employer of an employee's behavior, to communicating a belief to the employer that the employer's conduct was unlawful, to refusing to obey the employer's orders, the examples the Court relied upon involved expressions of disapproval.<sup>166</sup> Admittedly, the Court's opinion hints at the likelihood that an employee who is involuntarily drawn into an internal investigation and "report[s] discrimination in response to the [employer's] enquiries" should be considered to have opposed the employer's conduct.<sup>167</sup> But even here, the Court's sympathy is premised on the assumption that the employee expresses her belief to the employer that discrimination has occurred. This is certainly the view of Justices Alito and Thomas, who concurred in the judgment but argued that the term "opposition" should include only "active and purposive" conduct.<sup>168</sup> In sum, *Crawford* does not provide much

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Sawicki v. Am. Plastic Toys, Inc., 180 F. Supp. 2d 910, 917–18 (E.D. Mich. 2001); Guess v. City of Miramar, 889 So. 2d 840, 847 (Fla. Dist. Ct. App. 2004); see also Isler v. Keystone Sch. Dist., No. 07cv1335, 2008 WL 3540603, at \*11 (W.D. Pa. Aug. 12, 2008) (rejecting a bus driver's ADA retaliation claim that he was "advoca[ting] for a disabled student" on his route by describing an incident and offering an alternative route because there was no evidence "that he ever explicitly or implicitly opposed some discriminatory practice").

<sup>165</sup> See *Collazo v. Bristol-Myers Squibb Mfg., Inc.*, 617 F.3d 39, 49 (1st Cir. 2010) (concluding that a supervisor who assisted and supported a subordinate in pursuing her internal complaint had taken action adverse to employer and had engaged in protected opposition conduct); *Sumner v. U.S. Postal Serv.*, 899 F.2d 203, 209 (2d Cir. 1990) (discussing protected opposition conduct in terms of "informal protests of discriminatory employment practices, including making complaints to management, writing critical letters to customers, protesting against discrimination by industry or society in general, and expressing support of co-workers who have filed formal charges").

<sup>166</sup> *Crawford v. Metro. Gov't of Nashville & Davidson Cnty.*, 129 S. Ct. 846, 850–51 (2009).

<sup>167</sup> See *id.* at 852 (noting the unfairness of permitting an employer to fire an employee who reports discrimination in response to employer-initiated questioning).

<sup>168</sup> *Id.* at 854 (Alito, J., concurring in the judgment).



comfort to employees who do not openly express disapproval of an employer's actions to the employer.<sup>169</sup>

While Title VII's opposition clause and the *Crawford* decision provide Title VII retaliation plaintiffs with at least some hope that their efforts to assist another employee in conjunction with an internal grievance of unlawful conduct might be classified as protected opposition conduct, other retaliation plaintiffs do not have even this hope. Title VII and its progeny are rare in their inclusion of statutory protection for opposing unlawful conduct. Most federal statutes that prohibit employer retaliation, including the FLSA, ERISA, and the Uniformed Services Employment and Reemployment Rights Act (USERRA) of 1994,<sup>170</sup> do not contain an opposition clause.<sup>171</sup> Thus, the employee who provides information to an employer as part of an internal process or who otherwise provides information to the employer in a neutral fashion must look elsewhere for protection.

Under the majority interpretations of these statutes, the employee will probably look in vain. For example, numerous pre-*Kasten* decisions from the lower courts concluded that when an employee's job duties involve ensuring compliance with the relevant law, the employee does not "file any complaint" for purposes of a FLSA retaliation claim simply by notifying the employer of potential wage and hour law violations. Because the employee has not taken a position adverse to the employer's, the employee's actions do not qualify as filing a complaint.<sup>172</sup> While the Court in *Kasten* held that the filing of an internal complaint was protected activity under the FLSA, the Court emphasized that the purported complaint must be formal enough to put the employer on notice "that a *grievance* has

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<sup>169</sup> See generally *Calhoun v. U.S. Dep't. of Labor*, 576 F.3d 201, 212 (4th Cir. 2009) (concluding that an employee did not engage in protected activity under OSHA's complaint clause because his complaints were not communicated to his supervisors).

<sup>170</sup> 38 U.S.C. § 4311 (2006).

<sup>171</sup> See *infra* Appendix.

<sup>172</sup> The leading case is *McKenzie v. Renberg's, Inc.*, 94 F.3d 1478, 1486-87 (10th Cir. 1996). Other decisions include *Claudio-Gotay v. Becton Dickinson Caribe, Ltd.*, 375 F.3d 99, 102 (1st Cir. 2004) (concluding that an employee who reported potential overtime violations to an employer did not engage in protected activity because the employee was protecting the company rather than asserting rights adverse to the company), *EEOC v. HBE Corp.*, 135 F.3d 543, 554 (8th Cir. 1998) (stating that an employee must "'step outside' his employment role" to be protected), and *Muniz v. United Parcel Service, Inc.*, 731 F. Supp. 2d 961, 970 (N.D. Cal. 2010) (concluding under an analogous state statute that an employee's act of reporting possible wage and hour law violations was not protected activity because making such reports was part of her job).

been lodged.”<sup>173</sup> The Court’s decision, therefore, arguably requires that the employee take some type of adversarial stance before a complaint is deemed to have been filed. Nor is it likely that any language in a statute that protects those who testify or give information in a proceeding will protect such employees because, as discussed, courts have interpreted the relevant language to apply only when an employee testifies or gives information in connection with a formal proceeding of some kind.<sup>174</sup>

### C. No Protection for Third-Party Retaliation

The Supreme Court’s decision in *Thompson* resolved the issue of whether an individual who faces an adverse action due to a coworker’s protected activity under Title VII is an “aggrieved person” entitled to a remedy under the statute. Both the ADEA and the ADA employ § 706’s “aggrieved person” standard.<sup>175</sup> Therefore, the *Thompson* decision should apply with equal force to these statutes.<sup>176</sup> However, the problem of third-party retaliation has also arisen under other federal employment statutes, including the FMLA and ERISA.<sup>177</sup> Given the differences in statutory language, it is questionable whether the victims of third-party retaliation will have any remedy under these and other federal statutes.

In *Thompson*, the plain language of § 704(a) of Title VII may have precluded the Court from holding that this section authorized the victims of third-party retaliation to recover damages. As discussed, § 704(a) speaks directly only to the individual who has engaged in protected activity, not the employee who is fired as a consequence of another individual engaging in protected activity.<sup>178</sup> Not surprisingly, the Court looked to a different portion of Title VII to find the

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<sup>173</sup> *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1334 (2011) (emphasis added).

<sup>174</sup> See *supra* note 135 and accompanying text.

<sup>175</sup> 29 U.S.C. § 626(c)(1) (2006); 42 U.S.C. § 12117(a)(1) (2006).

<sup>176</sup> See *Leavitt v. SW & B Constr. Co.*, 766 F. Supp. 2d 263, 283 (D. Me. 2011) (stating that *Thompson*’s holding likely extends to the ADA).

<sup>177</sup> *Elsensohn v. St. Tammany Parish Sheriff’s Office*, 530 F.3d 368, 373 (5th Cir. 2008) (FMLA); *Reich v. Cambridgeport Air Sys., Inc.*, 26 F.3d 1187, 1188 (1st Cir. 1994) (OSHA); *McKinnon v. Blue Cross & Blue Shield of Ala.*, 935 F.2d 1187, 1188 (11th Cir. 1991) (ERISA); *Fitzgerald v. Codex Corp.*, 882 F.2d 586, 589 (1st Cir. 1989) (ERISA). See generally *Leavitt*, 766 F. Supp. at 283 (involving an allegation that a husband was retaliated against because he testified on behalf of his wife in a workers’ compensation hearing).

<sup>178</sup> See *supra* notes 75–76 and accompanying text.

statutory hook to permit recovery. In doing so, however, the Court may have limited the ability of employees to succeed on similar claims brought under other statutes.

Most federal employment statutes suffer from the same textual limitations as § 704(a). For example, the Occupational Safety and Health Act's (OSHA) antiretaliation provision prohibits an employer from retaliating against an employee "because *such* employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this [Act] or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this [Act]."<sup>179</sup> ERISA and the FLSA both include similar language, as do many of the lesser-known federal statutes.<sup>180</sup> Thus, those who have faced an adverse employment action due to a coworker's protected activity under these other statutes must hope that the relevant statute contains language similar to Title VII's "person aggrieved" language or contains some other statutory hook permitting recovery. Some statutes contain this kind of language;<sup>181</sup> others, like USERRA, do not.<sup>182</sup>

If the statute in question does not contain the "aggrieved person" language or something similar, the victim of third-party retaliation would be forced to hope that the Court would gloss over the unfavorable statutory text in favor of the policy against permitting such employer behavior. But the fact that the Court in *Thompson* never even considered this possibility and focused exclusively on Title VII's "aggrieved person" language would seem to undercut the chances of this approach succeeding. Ironically, the Court's single-minded focus in *Thompson* on Title VII's "aggrieved person" language may actually be a hindrance to retaliation plaintiffs outside

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<sup>179</sup> 29 U.S.C. § 660(c)(1) (emphasis added).

<sup>180</sup> See *infra* Appendix. The IRCA's antiretaliation provision contains broader language that might cover third-party retaliation. See 8 U.S.C. § 1324b(a)(5) (2006) (prohibiting retaliation "against any individual for the purpose of interfering with any right or privilege secured under this section").

<sup>181</sup> See, e.g., Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § 1854(a) (containing "aggrieved person" language); *Hernandez v. Ruiz*, 812 F. Supp. 734, 735 (S.D. Tex. 1993) (establishing a right of action under the Migrant and Seasonal Agricultural Protection Act for the children of farm workers even though the children were not employees of the employer); see also, e.g., Occupational Safety and Health Act, 29 U.S.C. § 660(c)(2) (providing that "[a]ny employee who believes that he has been discharged or otherwise discriminated against . . . in violation of this subsection" may file a complaint) (emphasis added).

<sup>182</sup> 38 U.S.C. §§ 4322(a), 4323(d) (2006).

of the Title VII context. Alternatively, the victim might be forced to argue that denying recovery in such cases would produce absurd results. But the Court has declared that it rarely invokes the absurdity doctrine,<sup>183</sup> and textualist judges in particular tend to disfavor the doctrine.<sup>184</sup>

Even when a statute contains such language, the availability of a remedy will not always be clear. For example, the FMLA provides that “any eligible employee affected” by an employer’s unlawful retaliation may recover damages or obtain equitable relief.<sup>185</sup> An employee who is fired as a result of a coworker’s protected activity would presumably be an “employee affected” by the employer’s unlawful conduct under the reasoning of *Thompson*. However, only employees who have worked for at least twelve months and for at least 1250 hours in that twelve-month period are “eligible” under the FMLA, thus effectively excluding some new or part-time employees from coverage.<sup>186</sup> ERISA allows a “participant, beneficiary, or fiduciary” to bring a civil action to enjoin an unlawful practice or obtain equitable relief to address an unlawful practice.<sup>187</sup> ERISA places no other restrictions on who may bring a civil action, so an employee who has been discharged because a coworker engaged in a protected act might be able to pursue a remedy based upon the statutory language and the logic of *Thompson*. However, based on prior Supreme Court precedent, some courts have concluded that compensatory and punitive damages are not authorized for a violation since the term “equitable relief” has been held not to encompass monetary damages.<sup>188</sup> Thus, the victim of third-party retaliation might be unable to obtain a monetary remedy under ERISA.

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<sup>183</sup> *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 459 (2002).

<sup>184</sup> *See, e.g.*, Frank H. Easterbrook, *Judges as Honest Agents*, 33 HARV. J.L. & PUB. POL’Y 915, 921 (2010) (noting “the textualist position that the absurdity doctrine should be limited to linguistic problems; otherwise the judiciary can assume too much power by waving its hand and declaring ‘absurdity’ whenever the law produces an unpleasant result”).

<sup>185</sup> 29 U.S.C. § 2617(a)(1).

<sup>186</sup> *See, e.g.*, *Nance v. Goodyear Tire & Rubber Co.*, 527 F.3d 539, 557 (6th Cir. 2008) (concluding that an employee who failed to meet the 1250-hour requirement was not covered under FMLA); *Plumley v. S. Container, Inc.*, 303 F.3d 364, 372 (1st Cir. 2002) (reinforcing the strict application of the requirement of 1250 hours within twelve months and denying equitable arguments to the contrary).

<sup>187</sup> 29 U.S.C. § 1132(a)(3); *accord id.* § 1140.

<sup>188</sup> *Allinder v. Inter-City Prods. Corp.*, 152 F.3d 544, 552 (6th Cir. 1998); *Barclay-Strobel*, *supra* note 139, at 559. Similarly, the FLSA provides that an employer who engages in unlawful retaliation is “liable for such legal or equitable relief as may be appropriate to effectuate the purposes” of the provision. 29 U.S.C. § 216(b). The fact that

#### D. Other Unresolved Issues

There are also a number of other interpretive issues that have yet to be resolved by the Court. In some of these instances, it is possible to imagine a majority of the Court concluding that the relevant text does not pose a serious impediment to broader protection from retaliation. In other instances, the relevant language may present significant challenges to such an interpretation.

##### 1. Anticipatory Retaliation

In the Title VII context, employers have sometimes taken action against an employee before the employee has filed a charge because the employer believes the employee may, or is about to, file a charge of discrimination.<sup>189</sup> As a matter of strict construction, this type of “anticipatory retaliation” would not be unlawful under § 704(a). That is because, as written, § 704(a) protects only one who “has opposed” (past tense) or “has made a charge, testified, assisted, or participated” (past tense) in a proceeding, not one whom the employer believes is about to do these things.<sup>190</sup> Nonetheless, several courts have concluded that anticipatory retaliation is actionable under Title VII’s participation clause, despite the statute’s use of the past tense.<sup>191</sup> However, some courts have stuck to the literal language of § 704(a) and concluded that anticipatory retaliation is not prohibited by the participation clause.<sup>192</sup> The same issue has arisen with respect to other statutes with similarly mixed results.<sup>193</sup>

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the ADEA and FLSA remedies provisions track each other might potentially assist a plaintiff in such cases. *See Johnson v. Martin*, 473 F.3d 220, 222 (5th Cir. 2006). Some statutes do not provide for a private right of action in the event of retaliation. *See Hernandez v. Mohawk Indus., Inc.*, No. 6:08-cv-927-Orl-28GJK, 2009 WL 3790369, at \*5 (M.D. Fla. Nov. 10, 2009) (stating that the Surface Transportation Assistance Act of 1982 does not provide for a private right of action).

<sup>189</sup> *See, e.g., Beckel v. Wal-Mart Assocs., Inc.*, 301 F.3d 621, 624 (7th Cir. 2002); *Sauers v. Salt Lake Cnty.*, 1 F.3d 1122, 1128 (10th Cir. 1993).

<sup>190</sup> 42 U.S.C. § 2000e-3(a) (2006).

<sup>191</sup> *Beckel*, 301 F.3d at 624; *Sauers*, 1 F.3d at 1128; *EEOC v. Bojangles Rests., Inc.*, 284 F. Supp. 2d 320, 328 (M.D.N.C. 2003). When the employee openly threatens to file a charge of discrimination, the employee might also be protected because the employee has “opposed” unlawful conduct. *Reeder-Baker v. Lincoln Nat’l Corp.*, 649 F. Supp. 647, 656 (N.D. Ind. 1986).

<sup>192</sup> *See Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1313 n.3 (6th Cir. 1989) (stating in dicta that threatening to file a charge is not protected participation conduct); *Beyah v. Dodaro*, 666 F. Supp. 2d 24, 38 n.15 (D.D.C. 2009) (stating that an employee could not claim to be protected under the retaliation claim after telling his supervisors that he was documenting their discriminatory behavior); *Reeder-Baker*, 649 F. Supp. at 656 (holding that the participation clause does not cover one who intends to file a

In contrast, the FMLA specifically protects one who “has given, *or is about to give*, any information” or testify in connection with a proceeding.<sup>194</sup> A number of other statutes contain similar language.<sup>195</sup> However, there are at least two reasons why this type of statutory language provides less protection than might appear at first glance. First, the U.S. Court of Appeals for the Fourth Circuit has interpreted the “about to give” language quite strictly, concluding that the language protects an employee who is about to testify only in a *pending* proceeding; thus, if an employer fears an employee may testify in a proceeding related to a yet-to-be-filed lawsuit, the employee would not be protected.<sup>196</sup> Second, some statutes—like the FMLA—protect an individual who is retaliated against because he is about to testify or provide information in connection with a formal proceeding or inquiry but not to the individual who is retaliated against because he was about to file a complaint or institute some type of formal proceeding.<sup>197</sup> In contrast, the Title VII decisions recognizing the viability of an anticipatory retaliation claim have done so in the context of an employee who was fired because the employer believed the employee was about to file a complaint or institute a formal proceeding.<sup>198</sup> Thus, on its face, Title VII provides no protection from anticipatory retaliation but, as interpreted by some courts, actually provides greater protection in some respects than

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discrimination charge); *Burns v. Republic Sav. Bank*, 25 F. Supp. 2d 809, 828 (N.D. Ohio 1998) (stating that the threat to file a charge is not protected activity under the participation clause); *EEOC v. Johnson Co.*, No. 1-75-Civ. 317, 1978 WL 197, at \*9 (D. Minn. Apr. 27, 1978) (same).

<sup>193</sup> *See Hill v. Mr. Money Fin. Co.*, 491 F. Supp. 2d 725, 736 (N.D. Ohio 2007) (dismissing an employee’s retaliation claim because, even though the employee had threatened to file a complaint under the Federal Deposit Insurance Act, he was fired before he did so); *Mascioli v. Arby’s Rest. Grp., Inc.*, 610 F. Supp. 2d 419, 430 (W.D. Pa. 2009) (noting that several courts have treated termination of an employee in anticipation of future leave, or exercising FMLA rights, as an actionable form of anticipatory retaliation).

<sup>194</sup> 29 U.S.C. § 2615(b)(2) (2006) (emphasis added).

<sup>195</sup> *See infra* Appendix.

<sup>196</sup> *Ball v. Memphis Bar-B-Q Co.*, 228 F.3d 360, 364 (4th Cir. 2000) (FLSA). *But see Macktal v. U.S. Dep’t of Labor*, 171 F.3d 323 (5th Cir. 1999) (concluding that a plaintiff who expressed to his employer an intent to file a complaint with the Nuclear Regulatory Commission was protected under similar language in the Energy Reorganization Act).

<sup>197</sup> *See infra* Appendix. An exception would be the IRCA, which protects an employee who “intends to file or has filed a charge or a complaint, testified, assisted, or participated” in a proceeding. 8 U.S.C. § 1324b(a)(5) (2006).

<sup>198</sup> *See, e.g., Beckel v. Wal-Mart Assocs., Inc.*, 301 F.3d 621, 624 (7th Cir. 2002); *Sauers v. Salt Lake Cnty.*, 1 F.3d 1122, 1128 (10th Cir. 1993); *EEOC v. Bojangles Rests., Inc.*, 284 F. Supp. 2d 320, 329 (M.D.N.C. 2003).

those statutes that expressly address the problem of anticipatory retaliation.<sup>199</sup>

## 2. *The Need for a Reasonable, Good-Faith Belief When Participating in a Proceeding*

Another issue yet to be resolved by the Court involves an employee's belief about the illegality of the employer's conduct. An employee is protected under Title VII when the employee has opposed "any practice made an unlawful employment practice" by the Act.<sup>200</sup> Read literally, an employee is protected only when the practice in question is actually illegal. However, courts have uniformly held that to be protected, an employee must simply have a reasonable, good-faith belief that the conduct in question was unlawful.<sup>201</sup> *Crawford* involved the issue of coverage under the opposition clause, yet the Court never raised the issue of whether the conduct that was opposed was actually unlawful under Title VII.<sup>202</sup> Therefore, it seems that, as a matter of established practice, an employee need establish only that her belief as to the unlawful nature of the employer's conduct was reasonable in order to be protected under the opposition clause.<sup>203</sup>

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<sup>199</sup> A related issue is whether an employee is entitled to protection when an employer takes action against the employee on the basis of a mistaken belief that the employee has engaged in protected activity. There is a split of authority in the Title VII and FLSA contexts as to whether an employee is protected under these circumstances. *See Brock v. Richardson*, 812 F.2d 121, 123 (3d Cir. 1987) (recognizing such claims under the FLSA); *Ackel v. Nat'l Commc'ns, Inc.*, 339 F.3d 376, 385 (5th Cir. 2003) (refusing to recognize such claims in the Title VII context); *Aguilar v. Arthritis Osteoporosis Ctr.*, No. M-03-243, 2006 WL 2478476, at \*9 (S.D. Tex. Aug. 25, 2006) (rejecting such claims in the Title VII context). Read literally, most antiretaliation provisions would apply only when an employee actually engaged in protected activity. *Aguilar*, 2006 WL 2478476, at \*9. However, a few statutes explicitly provide protection when an employer believes an employee has engaged in protected activity, regardless of whether the employee has actually done so. *See infra* Appendix.

<sup>200</sup> 42 U.S.C. § 2000e-3(a) (2006).

<sup>201</sup> *Brake & Grossman, supra* note 15, at 914.

<sup>202</sup> *See Crawford v. Metro. Gov't of Nashville & Davidson Cnty.*, 129 S. Ct. 846 (2009).

<sup>203</sup> Lower courts have also read this same requirement into other statutes with similar language. *See, e.g., Selenke v. Med. Imaging of Colo.*, 248 F.3d 1249, 1264 (10th Cir. 2001) (concluding that "a reasonable, good faith belief that the statute has been violated suffices" to bring an ADA retaliation claim); *Burnette v. Northside Hosp.*, 342 F. Supp. 2d 1128, 1134 (N.D. Ga. 2004) (stating that under the FLSA, "the complaining employee must have an objectively reasonable, good-faith belief that the employer's conduct is unlawful").

In recent years, however, some courts have concluded that in order to be protected under Title VII's participation clause when filing a charge of discrimination, an employee must also have a reasonable, good-faith belief that the employer's conduct was unlawful.<sup>204</sup> The participation clause is silent on the question, but most courts have not imposed a reasonableness requirement. Indeed, courts have expressly held that the participation clause covers those who make "false, malicious, or even frivolous complaints."<sup>205</sup> These courts have reasoned that imposing a reasonableness requirement on employees would create a chilling effect and deter victims from coming forward with what might be potentially valid claims.<sup>206</sup> Title VII is silent on the issue, but statutory silence poses, at best, only a minor obstacle to a pragmatic interpretation that furthers the goals of antiretaliation provisions. Therefore, it is easy to envision the Supreme Court adopting the majority interpretation. Indeed, given the fact that § 704(a) provides protection to one who has participated "in any manner"—a phrase suggesting an expansive interpretation<sup>207</sup>—adoption of the majority interpretation is probably the most likely outcome.

But not all statutes present obstacles that are so easily overcome. Several other statutes governing the workplace explicitly provide that an employee who files a complaint or provides information to a government agency about a possible violation of the relevant law is protected only when the employee acted with just cause or with a reasonable belief that the conduct was unlawful.<sup>208</sup> Thus, a reviewing

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<sup>204</sup> See Lawrence D. Rosenthal, *Reading Too Much Into What the Court Doesn't Write: How Some Federal Courts Have Limited Title VII's Participation Clause's Protections After Clark County School District v. Breeden*, 83 WASH. L. REV. 345, 349 (2008).

<sup>205</sup> *Id.* at 370 (citing *Gilooly v. Mo. Dep't of Health & Senior Servs.*, 421 F.3d 734, 742 (Colloton, J., concurring in part and dissenting in part) (recognizing that some courts hold that Title VII protects "even false and malicious allegations, or the filing of frivolous complaints")); see also *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1312 (6th Cir. 1989) (stating that under the participation clause, protection "is not lost if the employee is wrong on the merits of the charge, nor is protection lost if the contents of the charge are malicious and defamatory as well as wrong") (internal citations omitted); *Womack v. Munson*, 619 F.2d 1292, 1298 (8th Cir. 1980) ("The merits of a charge made against an employer is irrelevant to its protected status."); *Pettway v. Am. Cast Iron Pipe Co.*, 411 F.2d 998, 1007 (5th Cir. 1969) (concluding that the fact that the charge contains malicious material does not deprive an employee of protection under the participation clause).

<sup>206</sup> Rosenthal, *supra* note 204, at 395.

<sup>207</sup> *EEOC v. Bojangles Rests., Inc.*, 284 F. Supp. 2d 320, 328 (M.D.N.C. 2003).

<sup>208</sup> Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § 1855(a) (2006) (prohibiting retaliation "against any migrant or seasonal agricultural worker



court might have little choice but to apply the text in a literal fashion when dealing with these statutes. As a result, coverage under Title VII may be more expansive than under other statutes in this respect.

### 3. Participation Involving Disloyal or Illegal Conduct

The “in any manner” language of Title VII’s participation clause raises another interpretive issue. In some cases, retaliation plaintiffs have engaged in illegal or disloyal conduct—such as wrongfully copying an employer’s records—in anticipation of filing a formal complaint<sup>209</sup> or have lied during the course of a formal proceeding or lawsuit.<sup>210</sup> Thus, one question that has arisen is whether such an employee has engaged in protected participation conduct.

While Title VII’s participation clause protects one who participates “in any manner” in a formal proceeding, its opposition clause lacks this expansive language. As a result, courts have consistently concluded that the participation clause affords greater protection from retaliation than does the opposition clause.<sup>211</sup> Thus, an employee who engages in disloyal or illegal behavior may not be entitled to protection under the opposition clause, whereas an employee who engages in disloyal or illegal conduct while participating in a proceeding could be protected if the “in any manner” language is read literally.<sup>212</sup>

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because such worker has, with just cause, filed any complaint or instituted, or caused to be instituted, any proceeding under or related to this chapter, . . . or because of the exercise, with just cause, by such worker on behalf of himself or others of any right or protection afforded by this chapter”); Federal Food, Drug, and Cosmetic Act, Pub. L. No. 111-353, § 402, 124 Stat. 3885 (codified at 21 U.S.C.A. § 399d(a)(1) (West 2011)) (prohibiting retaliation against an employee who “provided, caused to be provided, or is about to provide or cause to be provided to the employer, the Federal Government, or the attorney general of a State information relating to any violation of, or any act or omission the employee reasonably believes to be a violation of any provision of this chapter or any order, rule, regulation, standard, or ban under this chapter, or any order, [or] rule”); *see infra* Appendix.

<sup>209</sup> *See, e.g.*, Lord v. City of Ozark, No. 1:10cv451-WHA, 2010 WL 4780680, at \*6 (M.D. Ala. Nov. 17, 2010) (involving an employee who disobeyed her employer’s order not to communicate with another employee regarding a pending investigation).

<sup>210</sup> *See* Rosenthal, *supra* note 204, at 369 (citing Gilooly v. Mo. Dep’t of Health & Senior Servs., 421 F.3d 734, 740 (8th Cir. 2005)) (explaining that “employees cannot gain protection under Title VII after filing false charges, lying to investigators, or making defamatory statements”).

<sup>211</sup> *See* Vaughn v. Epworth Villa, 537 F.3d 1147, 1152 (10th Cir. 2008) (noting the general approach).

<sup>212</sup> *See id.* (reaching this conclusion); *see also* Deravin v. Kerik, 335 F.3d 195 (2d Cir. 2003) (“[R]ead naturally, the word ‘any’ has an expansive meaning, and thus, so long as

At the same time, some courts have taken the position that there must be *some* limit to the participation clause's protection. Thus, some courts have held or suggested that an employee who lies in the course of an EEOC proceeding or who engages in illegal or disloyal conduct in the course of a proceeding is subject to dismissal, either because the conduct is not protected under the participation clause<sup>213</sup> or because the employer has a legitimate, nondiscriminatory reason for firing the employee.<sup>214</sup>

Once again, Title VII's language differs from that of many other federal statutes that lack the "in any manner" language. While most statutes addressing the workplace contain antiretaliation provisions that protect employees who participate or provide information to a government agency, few contain Title VII's expansive "in any manner" language.<sup>215</sup> Thus, there is an additional level of difficulty present when construing one of these statutes in a case involving disloyal or illegal employee behavior.<sup>216</sup>

#### 4. Assistance

Another potential interpretive problem results from the failure of several major federal employment statutes to prohibit retaliation against those who assist other employees. A Title VII retaliation plaintiff who has provided assistance in connection with some type of

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Congress did not add any language limiting the breadth of that word, the term 'any' must be given literal effect." (internal quotations omitted)).

<sup>213</sup> See *Niswander v. Cincinnati Ins. Co.*, No. 5:06CV1086, 2007 WL 1189350, at \*10 (N.D. Ohio Apr. 19, 2007); see also *O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 763–64 (9th Cir. 1996) (concluding that an employee's act of rummaging through the employer's records in an attempt to uncover evidence is not protected under the opposition clause); *Jefferies v. Harris Cnty. Cmty. Action Ass'n*, 615 F.2d 1025, 1036 (5th Cir. 1980) (concluding that an employee's act of copying and disseminating personnel records is not protected opposition conduct); *Watkins v. Ford Motor Co.*, No. C-1-03-033, 2005 WL 3448036 (S.D. Ohio Dec. 15, 2005) (concluding that an employee's act of copying personnel records and providing them to his attorney was not protected activity under a parallel state statute). See generally *Martin v. Mecklenburg Cnty.*, 151 F. App'x 275, 280–81 (4th Cir. 2005) (expressing reluctance "to conclude that an employer can *never* dismiss an employee for lying during a Title VII investigation, proceeding, or hearing").

<sup>214</sup> *Vaughn*, 537 F.3d at 1153; *Lord*, 2010 WL 4780680, at \*6; see also *Mattson v. Caterpillar, Inc.*, 359 F.3d 885 (7th Cir. 2004) (explaining that the defendant's warning to the plaintiff that "making false accusations of sexual harassment could lead to disciplinary action and discharge" was a legitimate interest to the company rather than retaliation).

<sup>215</sup> See *infra* Appendix.

<sup>216</sup> See generally Federal Credit Union Act, 12 U.S.C. § 1790b(d)(2) (2006) (providing that the protections of the whistleblower section of the Act do not apply to an employee who "knowingly or recklessly provides substantially false information" to a federal examiner).

formal proceeding related to a discrimination claim is expressly entitled to protection under Title VII's participation clause.<sup>217</sup> This language has been held to protect an employee who assists another employee in connection with a proceeding.<sup>218</sup> The ADEA and ADA each contain similar language.<sup>219</sup> Some other federal statutes are even more explicit, providing protection to one who acts or exercises a right on behalf of another.<sup>220</sup> In contrast, the FLSA, the FMLA, and ERISA do not explicitly provide protection from retaliation to those who provide assistance in connection with their discrimination claims.<sup>221</sup> These statutes do protect those who testify or give information in connection with a proceeding under the statutes.<sup>222</sup> However, "assistance" may take other forms apart from providing testimony.

An employee might "assist" a coworker by providing financial assistance in conjunction with a lawsuit.<sup>223</sup> An employee might assist in a proceeding by accompanying a coworker to a proceeding<sup>224</sup> or providing encouragement to a coworker who is pursuing a claim.<sup>225</sup> The fact that Title VII's antiretaliation provision protects those who provide assistance "in any manner" only bolsters these conclusions.<sup>226</sup> But none of these actions would probably be protected under the FLSA, ERISA, or any number of other statutes that prohibit employer retaliation but lack comparable assistance language.

For example, one federal court held prior to *Kasten* that the FLSA's antiretaliation provision protected an employee who circulated a petition requesting assistance to stop an alleged FLSA

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<sup>217</sup> 42 U.S.C. § 2000e-3(a) (2006).

<sup>218</sup> *Owens v. Rush*, 654 F.2d 1370, 1379 (10th Cir. 1981).

<sup>219</sup> 29 U.S.C. § 623(d) (2006); 42 U.S.C. § 12203(a).

<sup>220</sup> See *infra* Appendix.

<sup>221</sup> The FMLA protects an individual who "has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under this subchapter." 29 U.S.C. § 2615(b)(2). This language might cover various forms of "assistance." However, as explained *infra*, other forms of assistance might not be covered.

<sup>222</sup> 29 U.S.C. § 215(a)(3) (FLSA); 29 U.S.C. § 2615(b)(2) (FMLA); 29 U.S.C. § 1140 (ERISA).

<sup>223</sup> *EEOC v. Bojangles Rests., Inc.*, 284 F. Supp. 2d 320, 329 (M.D.N.C. 2003).

<sup>224</sup> *Owens v. Rush*, 654 F.2d 1370, 1379 (10th Cir. 1981).

<sup>225</sup> See Long, *supra* note 69, at 987 (arguing that providing moral support to an individual pursuing a discrimination charge should qualify as assisting "in any manner").

<sup>226</sup> See *Bojangles Rests.*, 284 F. Supp. 2d at 329 (noting the expansive nature of this phrase).

overtime violation.<sup>227</sup> Such conduct might conceivably amount to the filing of a complaint under *Kasten*, but it would not be an easy argument to make. Instead, what the employee was expressly doing was requesting assistance. But what if a coworker had taken the employee up on his request? Would the coworker be protected under the FLSA? The coworker's actions might be viewed as a form of opposition under *Crawford's* reasoning, but opposition is not a protected form of conduct under the FLSA. Even if opposition is protected under a statute, assisting a coworker would probably not amount to opposition unless, at a minimum, the employer was aware of the assistance.<sup>228</sup> And it would be quite a stretch to conclude that an employee who comes to the aid of a coworker has filed a complaint. Thus, the likely result in such a case is that the employer would be free to retaliate against the assisting coworker.

Other forms of coworker assistance may be left unprotected by § 704(a) of Title VII. For example, an employee who is considering filing an internal complaint of a supervisor's discrimination might want to gather as much information as possible about the supervisor's actions. A coworker who provides the employee with information about other instances of discriminatory conduct on the part of the supervisor may have "assisted" the employee or "given information" to the employee. But, as discussed above, the coworker has not assisted or given information in connection with a formal proceeding, so the coworker's actions would probably not be protected under § 704(a)'s participation clause.<sup>229</sup> Unless the coworker's assistance was open and obvious to the employer, it probably would not qualify as opposition conduct under Title VII.<sup>230</sup> For the same reasons, it is unlikely that the assisting coworker would be protected under most other federal statutes.

### III

#### THE ACCIDENT OF TEXT

As Part II illustrates, the law regarding employment retaliation is complicated. Nearly every statute employs different language, forcing the parties, their lawyers, and the courts to engage in

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<sup>227</sup> *Legutko v. Local 816, Int'l Bhd. of Teamsters*, 606 F. Supp. 352 (E.D.N.Y. 1985), *aff'd on other grounds*, 853 F.2d 1046 (2d Cir. 1988).

<sup>228</sup> See *supra* notes 166–67 and accompanying text.

<sup>229</sup> See *supra* note 69 and accompanying text.

<sup>230</sup> See *supra* notes 165–170 and accompanying text.

sometimes difficult undertakings to discern their meanings. But more importantly, the law regarding employment retaliation is *unnecessarily* complicated.

Inconsistency abounds with respect to protection from retaliation in federal statutes regulating the workplace.<sup>231</sup> To provide just one more example, consider the interplay of several federal safety statutes as compared to Title VII. As discussed, the employee who provides information in a neutral manner internally to an employer about a violation of Title VII is not protected from retaliation, but the employee who is more adversarial in providing the information is protected, unless it is part of the employee's job to provide this kind of information.<sup>232</sup> Turning to the safety statutes, the employee who, in a neutral manner, provides information to the employer about a violation of the Toxic Substances Control Act<sup>233</sup> (an act that deals with, among other things, the disposal of asbestos) or the Asbestos School Hazard Detection and Control Act<sup>234</sup> is probably not protected from retaliation because those statutes explicitly protect only those who make an external report about a violation or participate in formal governmental proceedings. However, an employee who provides information in a neutral manner internally to the employer about a violation of the Federal Food, Drug, and Cosmetic Act *is* protected from retaliation, *even if* it is part of the employee's job to provide the information.<sup>235</sup>

If there is logic here, it is difficult to see. One might attempt to justify the different outcomes under Title VII and the Federal Food, Drug, and Cosmetic Act by arguing that those who provide

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<sup>231</sup> See Richard R. Carlson, *Citizen Employees*, 70 LA. L. REV. 237, 243 (2009) (“[W]hile the number and variety of laws protecting citizen employees seems impressive, these laws form an incomplete, inconsistent, and unreliable patchwork.”); Christopher Wiener, Note, *Blowing the Whistle on Van Asdale: Analysis and Recommendations*, 62 HASTINGS L.J. 531, 537 (2010) (“In effect, Congress has enacted whistleblower protections on a somewhat ad hoc basis as it has considered various regulatory schemes.”); Trystan Phifer O’Leary, Note, *Silencing the Whistleblower: The Gap Between Federal and State Retaliatory Discharge Laws*, 85 IOWA L. REV. 663, 670–71 (2000) (noting the tendency of some federal statutes to provide insufficient protection from retaliation). See generally Orly Lobel, *Lawyering Loyalties: Speech Rights and Duties Within Twenty-First-Century New Governance*, 77 FORDHAM L. REV. 1245, 1249 (2009) (noting whistleblower protection at the state and federal law level and concluding that “whistleblower protections have developed as a patchwork and, as a consequence, vary significantly in their scope and application”).

<sup>232</sup> See *supra* note 165 and accompanying text.

<sup>233</sup> 15 U.S.C. § 2622(a) (2006).

<sup>234</sup> 20 U.S.C. § 3608 (2006).

<sup>235</sup> 21 U.S.C.A. § 399d(a) (West 2011).

information to an employer about a violation of the law that poses a serious risk to public health or safety should be entitled to greater protection than others who provide information about other types of violations of the law, such as discrimination. But if the primary concern is in bringing to the employer's attention threats to safety and health, why is the employee whose job requires the reporting of violations of the Food, Drug, and Cosmetic Act entitled to protection but the employee whose job it is to report violations of an employer's illegal disposal of asbestos likely not entitled to the same protection under the Toxic Substances Control Act and Asbestos School Hazard Detection and Control Act?

And, to be clear, this is not an isolated instance of inconsistency. Randomness pervades the federal approach to employer retaliation. In *Burlington Northern*, the Court emphasized that one of the purposes of Title VII's antiretaliation provision—to prevent harm to individuals based on their protected activity—could not be achieved “by focusing only upon employer actions and harm that concern employment and the workplace.”<sup>236</sup> Thus, to be effective, an antiretaliation provision must also reach nonemployment-related retaliation. Surely that principle should apply to *any* antiretaliation provision. Yet, the antiretaliation provisions of numerous federal statutes, by their terms, would seem to be limited to employment-related actions, whereas others provide greater protection.<sup>237</sup> As importantly, there seems to be no unifying theme that would explain why the language varies; some safety statutes, by their terms, are seemingly limited to employment-related forms of retaliation, whereas others provide more expansive protection from retaliation.<sup>238</sup>

In some instances, courts have justified their strict reading of antiretaliation provisions by speculating as to why Congress might have inserted or omitted a particular word or phrase that results in an employee being denied a remedy in the case of employer retaliation.

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<sup>236</sup> *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006).

<sup>237</sup> See *supra* notes 125–128 and accompanying text.

<sup>238</sup> Compare Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(1) (2006) (prohibiting employers from discharging “or in any manner” discriminating against an individual who engages in protected activity), with Toxic Substances Control Act, 15 U.S.C. § 2622(a) (prohibiting employers “from discharg[ing] any employee or otherwise discriminat[ing] against any employee with respect to the employee’s compensation, terms, conditions, or privileges of employment”); see also Richard Moberly, *Protecting Whistleblowers by Contract*, 79 U. COLO. L. REV. 975, 982 (2008) (noting that the federal antiretaliation “statutory framework results in a network of narrow protections that evolved on an ad hoc basis to support specific statutory schemes”).

But the most that can usually be said for these supposed rationales is that they provide judges with a means of rebutting any potential argument that a literal reading of the statutory language leads to an absurd result. Rarely are the explanations persuasive.<sup>239</sup> For example, prior to *Thompson*, some lower courts offered two possible explanations for why Congress might have consciously chosen not to protect the victims of third-party retaliation. First, given Title VII's protection for those who provide assistance "in any manner" to one who has filed a complaint, Congress might have assumed that these victims might already be covered under this provision; therefore, there was no need for a separate provision prohibiting third-party retaliation.<sup>240</sup> Whatever force this argument may have carried with respect to Title VII, it carries absolutely no weight with respect to a statute that does not provide protection to one who provides assistance to another, and it has only limited application to a statute lacking the "in any manner" language. Second, lower courts have suggested that Congress may have been concerned about the potential for virtually unlimited liability if one could claim protection from retaliation simply because a coworker engaged in protected activity, thereby interfering with an employer's ability to fire an employee at will.<sup>241</sup> This is certainly a possible explanation. But it isn't at all likely, if for no other reason than that a jury is unlikely to believe that an employer fired a virtual stranger in order to retaliate against an employee who engaged in protected activity. Instead, the most likely reason for the lack of any explicit protection for the victims of third-party retaliation is that Congress simply failed to consider the possibility.

There have been numerous theories advanced in an attempt to explain the purpose of antiretaliation provisions. The Supreme Court has emphasized that one benefit of protecting employees who provide information to an employer about a possible violation of a law regulating the workplace is that it encourages informal internal dispute resolution.<sup>242</sup> The Court has repeatedly emphasized the desirability of allowing employers to address potential violations of the law internally instead of promoting the more expensive, time-

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<sup>239</sup> See *Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 569 (3d Cir. 2002) (acknowledging that proffered justifications were not "particularly convincing").

<sup>240</sup> See *Holt v. JTM Indus., Inc.*, 89 F.3d 1224, 1227 (5th Cir. 1996).

<sup>241</sup> *E.g.*, *Fogleman*, 283 F.3d at 570.

<sup>242</sup> *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1334 (2011).

consuming, and adversarial route of agency enforcement.<sup>243</sup> The Court's justification has the benefit of being consistent with human behavior. In general, employees prefer to voice their concerns over suspected misconduct internally rather than going outside the confines of the employer's organization to law-enforcement authorities.<sup>244</sup> Employees who report wrongdoing often do so not in a confrontational manner but out of a sense of loyalty or duty to the employer.<sup>245</sup> Thus, to the extent antiretaliation provisions are premised on the desire to encourage the most efficient means of uncovering and addressing wrongdoing,<sup>246</sup> they should protect not just those who oppose or complain internally about unlawful conduct, but those who simply provide, in a nonadversarial manner, information about illegal behavior to the employer.

The Court has also emphasized the important role that antiretaliation provisions play in furthering the substantive goals of the relevant statutory scheme. As Richard Moberly has argued, it seems clear that the Court views protection from retaliation as essential to furthering the enforcement of law designed to benefit the public at large.<sup>247</sup> In *Kasten*, for example, the Court emphasized that limiting protection from retaliation to situations in which an employee filed a written complaint with an employer would undermine Congress's goal of protecting worker safety when it enacted the Fair Labor Standards Act.<sup>248</sup>

Yet to the extent federal law seeks to promote these values, it does so in an inconsistent fashion. No unifying theory can explain the patchwork of federal statutory antiretaliation provisions. If, for example, robust protection from employer retaliation is essential to furthering Congress's law-enforcement goals, there should be across-the-board protection for employees who are the victims of third-party retaliation. Instead, Congress provided a statutory remedy to some "aggrieved" persons but not to others. If internal reporting of safety

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<sup>243</sup> *Id.*; see also *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

<sup>244</sup> See Richard E. Moberly, *Sarbanes-Oxley's Structural Model to Encourage Corporate Whistleblowers*, 2006 BYU L. REV. 1107, 1142 (noting the tendency of whistleblowers to report internally).

<sup>245</sup> *Id.* at 1143 (noting that employees' sense of loyalty often prevents them from blowing the whistle externally).

<sup>246</sup> See Moberly, *supra* note 1, at 380 (stating that Supreme Court retaliation decisions are premised upon, *inter alia*, the assumption that "employees are in the best position to know about illegal conduct").

<sup>247</sup> *Id.*

<sup>248</sup> *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1333 (2011).



violations is an important aspect of promoting public safety, those who raise concerns with their employer about such safety violations should be protected from retaliation. Yet protection for those who raise internal concerns about safety hazards is spotty. If employees need assurance that they will not be retaliated against for bringing wrongdoing to light, then all antiretaliation provisions should include protection from anticipatory retaliation. Yet, while some do, most do not.

To its credit, the Court may have attempted to impose some order upon the statutory mishmash. But the reality is that the statutory framework allows for disparate treatment of similarly situated individuals, and this disparate treatment undermines the purposes of affording protection from retaliation. And unlike in other situations, it is virtually impossible to ascribe logic to the existing patchwork of protection. The Supreme Court was heavily criticized for its highly restrictive interpretations of the ADA—interpretations that appeared inconsistent with what seemed to be the purposes of the Act.<sup>249</sup> But at least in the ADA context, it was possible to articulate *some* argument for why Congress might have wanted to make it more difficult for individuals with physical or mental impairments to state a discrimination claim than other individuals.<sup>250</sup> The same cannot be said for the disparity of treatment of retaliation plaintiffs. No unifying theory can explain why an employee who is fired because his spouse filed a claim of race discrimination against the employer is entitled to a remedy but an employee who is fired because his spouse filed a complaint alleging a violation of consumer fraud laws is not.

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<sup>249</sup> See *supra* note 114 and accompanying text.

<sup>250</sup> In *Sutton v. United Air Lines, Inc.*, the Court interpreted the ADA so as to limit the number of individuals who could claim disability status under the Act. See 527 U.S. 471 (1999). In *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, the Court concluded that the terms within the ADA's definition of disability must be "interpreted strictly to create a demanding standard for qualifying as disabled." 534 U.S. 184, 197 (2002). Samuel R. Bagenstos has argued that the Supreme Court's restrictive readings of the ADA's definition of disability are less troubling if the purpose of the ADA is viewed more as a form of welfare reform, designed to get individuals with disabilities off of disability benefit rolls and into the workforce, than as a civil rights statute. Samuel R. Bagenstos, *The Americans with Disabilities Act as Welfare Reform*, 44 WM. & MARY L. REV. 921, 976–78 (2003). Similarly, others have argued that the fact that the ADA imposes costs on employers in the form of workplace alterations and other types of accommodations designed to allow individuals with disabilities to perform the essential functions of their jobs helps explain the Court's narrow reading of the definition of disability. See Samuel Issacharoff & Justin Nelson, *Discrimination with a Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act?*, 79 N.C. L. REV. 307, 336–37 (2001) (discussing this theory).

This problem is not confined to workplace retaliation claims. Federal employment discrimination law is also filled with a host of conflicting standards.<sup>251</sup> Judges, juries, the parties, and their lawyers must navigate their way through a maze of proof structures and causation standards that vary depending upon the type of evidence of discriminatory intent a plaintiff possesses, what the plaintiff's allegations are with respect to the defendant's motive, and whether the plaintiff is alleging discrimination on the basis of age, disability, race, or some other protected characteristic.<sup>252</sup> The current state of the law is, to put it mildly, confusing. But what is especially remarkable about the complex framework for analyzing discrimination claims is how *unnecessarily* complex it all is. As Professor Sandra Sperino has observed, "there is nothing especially complex about employment discrimination law that suggests it should work differently than other kinds of cases,"<sup>253</sup> a fact confirmed by the reality that many of the elaborate frameworks that have been constructed and deconstructed *ad nauseam* are abandoned when a case actually reaches trial.<sup>254</sup>

But the problem of conflicting statutory and judicial standards is exacerbated in the case of antiretaliation provisions just given the sheer number of such provisions in the U.S. Code. Reading a representative sample, one is left with the firm conclusion that the landscape of federal antiretaliation provisions is the way it is because

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<sup>251</sup> See William R. Corbett, *Babbling About Employment Discrimination Law: Does the Master Builder Understand the Blueprint for the Great Tower?*, 12 U. PA. J. BUS. L. 683, 690–91 (2010) (noting the current complexity in employment discrimination law); Martin J. Katz, *Gross Disunity*, 114 PENN ST. L. REV. 857, 858 (2010) (noting the Court's shift away from interpreting discrimination statutes to bring about uniformity); Sandra F. Sperino, *Rethinking Discrimination Law*, 110 MICH. L. REV. 69, 75 (2011) (noting the complexity in disparate treatment and disparate impact law). See generally Jeffrey M. Hirsch, *The Law of Termination: Doing More with Less*, 68 MD. L. REV. 89, 89 (2008) ("The laws and regulations governing the American workplace reveal a level of complexity and uncertainty that rivals virtually any other area of law.").

<sup>252</sup> See Catherine T. Struve, *Shifting Burdens: Discrimination Law Through the Lens of Jury Instructions*, 51 B.C. L. REV. 279, 315–19 (2010) (discussing the possible application of burden-shifting schemes depending upon the type of discrimination alleged); see also *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957, 962 (7th Cir. 2010) (holding that mixed-motives proof structure available in Title VII cases is not available in ADA cases). A similar issue may arise in retaliation cases given the fact that different statutes employ different causation standards. See generally Katz, *supra* note 251, at 860–62 (noting the different causation standards employed in federal law).

<sup>253</sup> Sperino, *supra* note 251, at 118.

<sup>254</sup> *Id.* at 120–21.

of inattentive drafting on the part of Congress.<sup>255</sup> Ultimately, whether a retaliation plaintiff wins or loses is more likely to be the result of an accident of text than it is part of a coherent legislative scheme or purpose.<sup>256</sup>

Retaliation victims may sometimes avoid some of the pitfalls of unfriendly statutory text through creative pleading.<sup>257</sup> In other instances, they might encounter judges who are willing to look to the purposes underlying antiretaliation provisions and overlook what appears to be the obvious meaning of statutory language.<sup>258</sup> But there are costs to these approaches, just as there are costs resulting from the current level of complexity in the area. And even if my conclusions about the likely outcomes of some of the interpretive issues included in this Article prove to be incorrect, the costs that accrue in the interim are significant. These costs include the expenditure of resources by parties in an attempt to understand the law and predict the outcome of future behavior and litigation. There are also costs to the judiciary in terms of the expenditure of judicial resources in an attempt to reconcile the conflicting standards.<sup>259</sup> There is also a cost in terms of the loss of judicial credibility as courts attempt to offer plausible explanations for the differing outcomes in these cases.<sup>260</sup> And if I am correct in my predictions, the most significant cost to the current statutory framework is the inability of retaliation law to carry out its purposes. All too often the result may be that individuals who—under virtually any conception of the purpose of antiretaliation laws—should be protected from retaliation will go unprotected, while

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<sup>255</sup> Professor Jeff Hirsch has argued that the same problem exists with regard to the rules governing termination of the employment relationship. *See* Hirsch, *supra* note 251, at 90 (stating that the termination rules governing the workplace “have developed over time, with little to no attention focused on the regulatory structure as a whole”).

<sup>256</sup> *See generally* Carlson, *supra* note 231, at 243 (“A citizen employee’s protection against retaliation and interference depends as much on the luck of geography, occupation, and the law the employer violated as on the merits of the employee’s conduct or the value of his action to the community.”).

<sup>257</sup> *See* Long, *supra* note 69, at 988–89 (discussing how victims of third-party retaliation might prevail).

<sup>258</sup> *See supra* note 77 and accompanying text (noting that some courts prior to *Thompson* had permitted claims of third-party retaliation despite statutory language).

<sup>259</sup> *See* Hirsch, *supra* note 251, at 96.

<sup>260</sup> *See* Jack L. Landau, *Some Observations About Statutory Construction in Oregon*, 32 WILLAMETTE L. REV. 1, 10 n.30 (1996) (“Reliance on interpretive fictions . . . undermines the credibility of the judicial decision-making process, particularly when the fictions are at odds with the realities of ordinary experience.”); *see also* Corbett, *supra* note 251, at 691 (arguing in favor of symmetry in employment discrimination law because “the laws should be perceived by the public to be sensible and fair”).

their counterparts who are fortunate enough to be able to sue under a different statute are able to state a claim.

#### IV

##### THE NEED FOR A UNIFORM STANDARD

Stated simply, the use of multiple antiretaliation standards consisting of language seemingly adopted in a haphazard manner produces more costs than it does benefits. The solution to the problem is actually quite simple. Congress could, with relative ease, adopt one antiretaliation provision that would apply to virtually all forms of employer retaliation.

When a particular federal statute raises special concerns, Congress could specify that the model antiretaliation provision would not apply. For example, there is voluminous decisional law under the National Labor Relations Act (NLRA)<sup>261</sup> dealing with employer retaliation.<sup>262</sup> Imposing a new standard for employer retaliation in this setting might add unnecessary confusion. Thus, NLRA retaliation cases might be exempted. Perhaps statutes implicating national security might be exempted. But absent some compelling reason why a federal statute should employ its own unique retaliation standard, all federal statutes regulating the workplace that currently contain antiretaliation provisions should be subject to one unifying standard.

Any standard should promote the policy values underlying antiretaliation provisions that the Court has already identified. These include the desirability of encouraging internal resolution of disputes and possible violations of law, preserving employee access to the statutory mechanisms designed to deal with possible violations of the substantive law, and ensuring employer compliance with the applicable statute's substantive provisions. In order to promote consistency, any standard should also incorporate any existing

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<sup>261</sup> 29 U.S.C. §§ 151–169 (2006).

<sup>262</sup> Of course, retaliation against employees for exercising their rights under federal labor law has its own set of problems. See Benjamin I. Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 HARV. L. REV. 655, 681 (2010) (“[W]orkers bear a substantial risk of losing their jobs should they support a unionization effort, and among those union supporters who are not discharged or formally disciplined for their activity, many face softer forms of retaliation that are nonetheless quite significant and can diminish career prospects.”); see also Michael H. Gottesman, *In Despair, Starting Over: Imagining a Labor Law for Unorganized Workers*, 69 CHI.-KENT L. REV. 59, 62 (1993) (arguing that the main reason employees do not unionize is fear of employer retaliation and that “[t]he NLRA does not protect workers meaningfully against employer reprisal for attempts to unionize”).

Supreme Court holdings that clarify the scope of an employee's entitlement to protection from retaliation.

While the exact language of such a provision can be left to the drafters, any antiretaliation measure should protect employees when retaliation occurs in any of the following situations:

(1) Because the individual has provided information to the employer, law enforcement, or government official about a violation of federal law applicable to the workplace that the employee reasonably believes has occurred, is occurring, or is about to occur, including when it is part of the employee's job to provide such information.

(2) Because the individual has opposed, in a reasonable manner, a violation of law that the employee reasonably believes has occurred, is occurring, or is about to occur.

(3) Because the individual has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the relevant statute.

(4) Because the individual has assisted another in any of these actions.

(5) Because the employer believes the individual has done any of the above or may do any of the above.

(6) Because of the individual's association with an individual described in (1)–(5) above.

In addition, protection should not be limited to instances involving retaliation occurring in the workplace. In keeping with the Court's holding in *Burlington Northern*, retaliation should be prohibited when it is materially adverse (that is, when it might dissuade a reasonable employee from engaging in the protected conduct).<sup>263</sup>

There are few downsides to this approach. The adoption of one unifying antiretaliation provision would provide employers and employees with a better ability to predict the future consequences of a particular act, and it would reduce the need for the parties and judges to devote substantial resources to trying to distinguish and reconcile the conflicting standards that presently apply. Admittedly, more employees who are unable to recover under existing law would be able to recover under the proposed standard. However, employer concerns over the possibility of increased litigation and liability are somewhat muted by at least two realities.

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<sup>263</sup> *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006).

First, the benefits of predictability should somewhat offset some of these increased costs. In 2008, Congress amended the ADA's definition of disability.<sup>264</sup> The new definition is far more expansive and should make it significantly easier for plaintiffs to establish the existence of a disability and thereby potentially claim entitlement to protection under the statute.<sup>265</sup> Congress accomplished this result with cooperation from business interests.<sup>266</sup> At the time, however, employers were obtaining a significant benefit from the existing definition of disability, as evidenced by the fact that employers were consistently winning the overwhelming majority of disability discrimination cases.<sup>267</sup> Thus, employers seemingly had little incentive to go along with any change that would make it easier for plaintiffs to claim protection. Yet go along they did. While business interests may have seen the writing on the wall with regard to an amended definition of disability after the election of a Democratic Congress around that time, it is also entirely possible that business interests recognized the value of greater predictability. According to the legislative history of the ADA Amendments Act, the relevant stakeholders recognized the need for a framework that would be "more predictable, consistent, and workable for all entities subject to responsibilities under the ADA."<sup>268</sup> The new definition of disability provides greater clarity in many respects,<sup>269</sup> thus limiting the potential for costly disagreements, *ex* and *post ante*, as to coverage.

Second, in order to prevail, an employee still must establish a causal connection between the employer action and the protected employee activity.<sup>270</sup> This is not always an easy task. A substantial delay between employee action and employer response may make it difficult for the employee to establish a connection.<sup>271</sup> Similarly, jurors may find it difficult to believe there was a causal connection in

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<sup>264</sup> ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2, 122 Stat. 3553 (codified as amended at 42 U.S.C.A. § 12101 (West 2011)).

<sup>265</sup> Sharon Hoffman, *The Importance of Immutability in Employment Discrimination Law*, 52 WM. & MARY L. REV. 1483, 1493 (2011).

<sup>266</sup> See David G. Savage, *Job Discrimination Bill to Widen Who's Covered*, L.A. TIMES, Sept. 8, 2008, at 13 (noting the support of the Chamber of Commerce).

<sup>267</sup> See Sharon Hoffman, *Settling the Matter: Does Title I of the ADA Work?*, 59 ALA. L. REV. 305, 308-09 (2008) (discussing plaintiffs' "extremely low win rates under Title I of the ADA").

<sup>268</sup> 154 Cong. Rec. 19,098 (2008) (Manager's Statement).

<sup>269</sup> Hoffman, *supra* note 265, at 1493.

<sup>270</sup> Clark Cnty. Sch. Dist. v. Breeden, 532 U.S. 268, 272 (2001).

<sup>271</sup> See *id.* at 273-74 (concluding that causation was not established when there was a twenty-month gap between the protected activity and the adverse employer's action).

some instances. For example, while employers have expressed concern about the scope of the Court's holding in *Thompson* that the victims of third-party retaliation have a remedy under Title VII, the reality is that it will be difficult for a plaintiff to convince a jury that an employer retaliated against the employee for the employee's protected conduct by firing a coworker unless there was some type of close connection between the employee and the coworker. Likewise, the human resources manager whose job it is to inform management of possible violations of law may have a difficult time convincing a jury that she was fired for doing her job rather than for some other legitimate, nondiscriminatory reason. Ultimately, the causation element of a retaliation claim serves to limit an employer's potential liability.

#### CONCLUSION

A majority of the Supreme Court may take an expansive view of the role of antiretaliation provisions. But the Court has also established a practice of focusing first and foremost on the text of statutory antiretaliation provisions. It is only after the Court can plausibly assert that the text permits a particular reading that the Court is willing to discuss the functional considerations supporting that interpretation. Therefore, despite the success that retaliation plaintiffs have enjoyed before the Court in recent years, future retaliation plaintiffs are unlikely to prevail if the statutory language strongly suggests a contrary outcome.

The reality is that there are many federal antiretaliation provisions—some contained in prominent statutes, others in lesser-known statutes—that contain potentially strong obstacles to an expansive interpretation. And while there may be a unifying interpretive principle underlying the Supreme Court's retaliation jurisprudence, there is no unifying principle underlying the *statutory* antiretaliation framework at the federal level. The statutory language in many instances seems to have been borrowed from other sources in some instances and created *sua sponte* in others, with no apparent rhyme or reason. The result is that similarly situated victims of retaliation are likely to be treated differently due to the accident of text. In order to address the costs resulting from the current state of affairs, Congress should adopt a single antiretaliation provision that would apply to all federal statutes that currently contain workplace retaliation provisions.

## APPENDIX

	Retaliation prohibition linked to compensation, terms, conditions, or privileges of employment?	Contains an opposition clause?	Express protection for providing information about unlawful conduct to employer?	Express protection for providing information about unlawful conduct to employer as part of job?	Express protection from anticipatory retaliation?	Express requirement of good-faith, reasonable belief of unlawful conduct when filing a formal complaint?	Express protection for participating "in any manner" in a proceeding?	Express protection for providing assistance?
Title VII, 42 U.S.C. § 2000e-3(a)	No	Yes	No	No	No	No	Yes	Yes
ADEA, 29 U.S.C. § 623(d)	No	Yes	No	No	No	No	Yes	Yes
ADA, 42 U.S.C. § 12203(a) & (b)	No	Yes	No	No	No	No	Yes	Yes
FLSA, 29 U.S.C. § 215(a)(3)	No	No	No	No	Yes (for testifying in connection with a proceeding or serving on an industry committee; no for other activities)	No	No	No
FMLA, 29 U.S.C. § 2615	No	Yes	No	No	Yes (for giving information or testifying in connection with a proceeding; no for filing a charge)	No	No	No
ERISA, 29 U.S.C. § 1140	No	No	No	No	Yes (for giving information or testifying in connection with a proceeding; no for other activities)	No	No	No
OSHA, 29 U.S.C. § 660	No	No*	No	No	Yes (for testifying in connection with a proceeding; no for other activities)	No	No	Yes (exercise of rights on behalf of others)
Asbestos School Hazard Detection and Control Act, 20 U.S.C. § 3608	Yes	No	No	No	No	No	No	No
Surface Transportation Assistance Act of 1982, 49 U.S.C. § 31105	Yes	Yes (refusal to perform task)	No	No	Yes	No	No	Yes
Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § 1855(a); <i>id.</i> § 1854(a)	No	No	No	No	No	Yes ("with just cause")	No	Yes
Immigration Reform and Control Act, 8 U.S.C. § 1324(a)(5)	No	No	No	No	Yes	No	Yes	No
Federal Credit Union Act, 12 U.S.C. § 1790b(a) (employees of credit unions)	Yes	No	No	No	No	No	No	Yes
Consumer Product Safety Act, 15 U.S.C. § 2087	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes
Toxic Substances Control Act, 15 U.S.C. § 2622	Yes	No	No	No	Yes	No	Yes	Yes



	Retaliation prohibition linked to compensation, terms, conditions, or privileges of employment?	Contains an opposition clause?	Express protection for providing information about unlawful conduct to employer?	Express protection for providing information about unlawful conduct to employer as part of job?	Express protection from anticipatory retaliation?	Express requirement of good-faith, reasonable belief of unlawful conduct when filing a formal complaint?	Express protection for participating "in any manner" in a proceeding?	Express protection for providing assistance?
Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C. § 42121	Yes	No	Yes	No	Yes	No	No	Yes
Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 399d	Yes	Yes	Yes	Yes	Yes	No	No	Yes
Asbestos Hazard Emergency Response Act, 15 U.S.C. § 2651	No	No	Yes, (for providing information "to any other person")	No	No	No	No	No
The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815	No	No	Yes	No	No	No	No	Yes (exercising rights on behalf of another)
Energy Reorganization Act (ERA), 42 U.S.C. § 5851	Yes	Yes (refused to engage in action)	Yes	No	Yes	No	Yes	Yes
Pipeline Safety Improvement Act (PSIA), 49 U.S.C. § 60129	Yes	Yes (refused to engage in action)	Yes	No	Yes	No	Yes	Yes
Clean Air Act (CAA), 42 U.S.C. § 7622	Yes	No	No	No	No	No	Yes	Yes
Safe Drinking Water Act (SDWA), 42 U.S.C. § 300j-9	Yes	No	No	No	Yes	No	Yes	Yes
Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9610	No	No	No	No	Yes (but only for testifying, not filing a complaint)	No	No	No
Federal Water Pollution Prevention and Control Act (FWPPCA), 33 U.S.C. § 1367	No	No	No	No	No	No	No	No
Solid Waste Disposal Act (SWDA), 42 U.S.C. § 6971	No	No	Yes	No	Yes (but only for testifying, not filing a complaint)	No	No	No
Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. § 4311	Yes ("any adverse employment action")	No	No	No	No	No	No	Yes

\* Indicates the existence of Supreme Court precedent suggesting a different outcome.

