1   IN THE SUPREME COURT OF THE UNITED STATES

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3   ERIC L. THOMPSON,   :

4   Petitioner   :   No. 09-291

5   v.   :

6   NORTH AMERICAN STAINLESS LP   :

7   - - - - - - - - - - - - - - - - - x

8   Washington, D.C.

9   Tuesday, December 7, 2010

10

11   The above-entitled matter came on for oral

12   argument before the Supreme Court of the United States

13   at 11:04 a.m.

14   APPEARANCES:

15   ERIC SCHNAPPER, ESQ., Seattle, Washington; on behalf of

16   Petitioner.

17   LEONDRA R. KRUGER, ESQ., Acting Principal Deputy

18   Solicitor General, Department of Justice, Washington,

19   D.C.; on behalf of the United States, as amicus

20   curiae, supporting Petitioner.

21   LEIGH GROSS LATHEROW, ESQ., Ashland, Kentucky; on behalf

22   of Respondent.

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1   C O N T E N T S

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1   P R O C E E D I N G S

2   (11:04 a.m.)

3   CHIEF JUSTICE ROBERTS: We will hear

4   argument next in Case 09-291, Thompson v. North American

5   Stainless.

6   Mr. Schnapper.

7   ORAL ARGUMENT OF ERIC SCHNAPPER

8   ON BEHALF OF THE PETITIONER

9   MR. SCHNAPPER: Mr. Chief Justice, and may

10 it please the Court:

11   704(a), Title VII, prohibits the use of

12 third party reprisals as a method of retaliating against

13 a person who complained to the EEOC or otherwise opposed

14 discrimination. The text of Section 704(a) doesn't

15 limit the types of retaliation which are forbidden. The

16 elements of the statute are unrelated to that.

17   The first requirement is that the plaintiff

18 show that discrimination occurred with regards to the

19 individual who engaged in a protected activity. In a

20 case like that, like this, that's shown by -- would be

21 shown by evidence that they singled out Ms. Regalado and

22 Ms. Regalado's fiancée. They didn't go fire anybody

23 else's fiancée. That was the basis on which this

24 particular action was taken.

25   Secondly, the plaintiff must show that the

3

1   conduct was discrimination against the person who

2   engaged in protected activity. That language is easily

3   applicable to a situation where you single out, say, a

4   family member or a fiancée. The purpose of that, the

5   complaint can fairly be read to allege, was to punish

6   the person who had engaged in protected activity.

7   There are a number of Federal statutes that

8   use the word "against" in precisely this way. They say

9   that actions cannot be taken to -- say, against a family

10   member of a sitting judge or other Federal official

11   where the purpose is to act against the official.

12   JUSTICE SCALIA: Is Ms. Regalado still

13   engaged to this fellow?

14   JUSTICE GINSBURG: They're married?

15   MR. SCHNAPPER: I'm sorry. Is she still

16   engaged?

17   JUSTICE SCALIA: Yes.

18   MR. SCHNAPPER: They're married.

19   JUSTICE SCALIA: Oh, they're married.

20   MR. SCHNAPPER: And they have a lovely

21   2-year-old daughter.

22   JUSTICE SCALIA: Oh, good. Well, why didn't

23   she bring this suit?

24   MR. SCHNAPPER: I think, Your Honor, that

25   this Court's Article III jurisprudence would have

4

1   precluded her from getting any remedy. The -- certainly

2   most of the remedies that are needed here, she wouldn't

3   have had Article III standing to win an award of back

4   pay to her now husband. She couldn't have gotten

5   awarded damages to him. I think --

6   JUSTICE KENNEDY: Could she have gotten

7   reinstatement on the grounds that his continuing

8   inability to be employed by the company is an ongoing

9   hurt to her?

10   MR. SCHNAPPER: Perhaps. It would depend on

11   the circumstances. In this particular case, almost

12   certainly not, because of just the course of subsequent

13   events. But she subsequently left the company. At this

14   point, they live nowhere near that. It wouldn't work.

15   JUSTICE KENNEDY: Suppose an employer

16   dismisses an employee on an impermissible ground,

17   impermissible under Title VII, and is a very valuable

18   employee. Can the shareholders sue on the ground that

19   the shareholder is now injured because the company is

20   worth less, having lost this employee, under Title VII?

21   MR. SCHNAPPER: I don't believe so, Your

22   Honor. I don't believe so. But the situation here is

23   different than that.

24   JUSTICE GINSBURG: Because you start with

25   somebody who is unlike the shareholders, there is no

1   Title VII violation as to them. Regalado is complaining

2   of sex discrimination, and then she said, because I made

3   a complaint, they retaliated against me. The

4   shareholders are not in that position, because there was

5   no initial charge.

6   JUSTICE KENNEDY: No, it's the same

7   hypothetical. Regalado, all the same facts, except she

8   is very valuable to the company. The company is now

9   worth less; shareholder sues.

10   MR. SCHNAPPER: I think the thrust of your

11   question was -- is: Are the shareholders like Thompson?

12   And I think that Thompson's situation is quite

13   different. He was the very target of the illegal act.

14   The illegality occurs only by means of dismissing him.

15   JUSTICE ALITO: The question is whether he's

16   aggrieved within the meaning of Title VII.

17   MR. SCHNAPPER: That is the other question.

18   JUSTICE ALITO: And your argument is that if

19   there is injury, in fact, sufficient to satisfy Article

20   III of the Constitution, then the person is aggrieved.

21   MR. SCHNAPPER: The Court's decision in

22   Trafficante goes that far, and in practice it has not

23   proved a problem under Title VIII. That's generally

24   been its understanding here.

25   JUSTICE ALITO: Is it your argument that we

1   have -- that we should go that far?

2   MR. SCHNAPPER: We do not --

3   JUSTICE ALITO: We don't need to go that

4   far?

5   MR. SCHNAPPER: You don't need to go that

6   far.

7   JUSTICE ALITO: Where do we draw the line?

8   MR. SCHNAPPER: Well, I think the

9   Government -- I think as far as you need to go, which is

10   not the same as saying, that's as far as the law goes,

11   is the standard articulated by the Government, as in

12   McCready, where the action against Thompson was the very

13   method by which the law was violated; that that would

14   satisfy the requirement of person aggrieved.

15   JUSTICE ALITO: Where does that come from?

16   Where does that test come from?

17   MR. SCHNAPPER: Your Honor, I don't -- I

18   think that's as far as you need to go in this case. I

19   think the standard of aggrieved is broader than that,

20   but the -- as this has played out in the lower courts

21   since Trafficante, there's a wide range of different

22   kinds of circumstances under which the Trafficante rule

23   has been invoked in Title VII cases. We're not asking

24   you to address all of those.

25   JUSTICE ALITO: I understand the argument.

1   I don't really -- it's not too helpful, at least to me,

2   to say, as far as we need to go in order to reverse.

3   That's really not how the statute ought to be

4   interpreted, I would say. What does it mean?

5   Now, I understand the argument that

6   "aggrieved" means all the way to what's -- all that's

7   necessary is what is necessary to satisfy the

8   Constitution. And I understand that argument. It's a

9   very broad argument with a lot of implications.

10   But if that's not correct, then what is the

11   correct test and where does it come from?

12   MR. SCHNAPPER: Well, Your Honor, I think

13   that there are two other limitations that would be

14   applicable here, as indeed they would have be under

15   Title VIII.

16   First one is proximate cause, which will cut

17   off a lot of injuries down the road. And Title VII is

18   adopted against a background of proximate cause rules,

19   and there, I don't think -- we don't contend that in

20   using the word "person aggrieved" they meant -- Congress

21   meant to set those aside.

22   Secondly, the -- I think a fair reading of

23   the word "aggrieved" is that it is -- "aggrieved" is

24   both, in ordinary English, frankly, broader and narrower

25   than "injured." It is broader -- and that's, of course,

1   not your concern -- in the sense that it covers people

2   who haven't been injured yet but might be injured in the

3   future.

4   But it also has a second element, which is

5   that the action at issue involves some sort of a wrong.

6   If someone deliberately knocks me down, I'm injured, I'm

7   probably aggrieved, but not if I'm carrying a football

8   in the middle of a football game. That's a legitimate

9   thing to do.

10   So I think that there has to be a wrong, and

11   the wrong has to be the basis of the plaintiff's

12   objection. You could have a situation where the

13   plaintiff really didn't care one way or another why that

14   harm had happened. It was -- but in this case, that's

15   precisely why Thompson complains. He's not suggesting

16   that he would be wronged if he were ever fired at all.

17   He is aggrieved because he was fired for a reason that

18   was an improper reason, and we think those are -- those

19   are --

20   JUSTICE GINSBURG: What -- what do you do

21   with the argument that says there's a middle step? You

22   can -- you have the sex discrimination complaint, and

23   then you have Thompson, who is aggrieved in the sense

24   that he was hurt, he was injured. But they say there's

25   no cause of action, there's no statutory cause of

 1   action, for Thompson.

 2   MR. SCHNAPPER: Well, the -- we think that's

 3   just clearly wrong. The statute provides a cause of

 4   action.

 5   If I might go back to how that came up in

 6   the court of appeals, the court of appeals appears to

 7   have assumed that third-party reprisals are unlawful.

 8   That's not entirely clear. Then in footnote 1, the

 9   court of appeals said that Thompson was aggrieved.

10   Notwithstanding that, they then went on to

11   say that -- there's no cause of action in the statute,

12   they said in section 704(a). That really doesn't make

13   any sense. The -- the statute provides an express cause

14   of action that says that individuals -- certain

15   individuals, if the requirements are met, can bring

16   lawsuits.

17   So the question is, as -- as Justice Alito

18   put it and -- and was put before, which is whether the

19   plaintiff is aggrieved. But if he's aggrieved, he's

20   clearly got a cause of action --

21   JUSTICE ALITO: Suppose Thompson were not

22   Regalado's fiancée at the time. Suppose they were

23   just -- they were just good friends. Would -- and

24   everything else happened, and he alleged that he was

25   fired in retaliation for her engaging in protected

1   conduct. The way the company wanted to get at her was

2   by firing her friend. Would that be enough?

3   MR. SCHNAPPER: Well, the -- the plaintiff

4   would have to prove two things. First of all, the

5   plaintiff would have to prove that that was indeed the

6   company's motive for picking him to fire him.

7   Secondly, under this Court's decision in

8   Burlington Northern, the plaintiff would have to show

9   that this is a retaliatory action sufficiently serious

10   that it was -- it would likely persuade a reasonable

11   employee in Regalado's position to dissuade her

12   complaint. And -- and that's why we've agreed with the

13   Respondents' contention that -- that they're entitled to

14   an evidentiary determination about whether that standard

15   was met here.

16   So that's an important limiting principle,

17   and it has --

18   JUSTICE ALITO: How does that translate?

19   How does that Burlington Northern standard translate

20   into this situation in which there is some sort of

21   relationship between the -- the person who engaged in

22   the protected conduct and the person who suffers the

23   adverse employment action?

24   That's what's troubling to me about -- about

25   the theory. Where it's a fiancée, it's -- that's a

1   relatively strong case, but I can imagine a whole

2   spectrum of cases in which there is a lesser

3   relationship between those two persons, and if -- if --

4   if -- unless there's a clear line there someplace, this

5   theory is rather troubling.

6   MR. SCHNAPPER: Well, I think --

7   JUSTICE ALITO: Can you help -- can you help

8   provide where the clear line is? Does it go -- does it

9   include simply a good friend? Does it include somebody

10 who just has lunch in the cafeteria every day with the

11 person who engaged in the protected conduct? Somebody

12 who once dated the person who engaged in the protected

13 conduct? Are these all questions that have to go to a

14 jury?

15   MR. SCHNAPPER: They wouldn't all have to go

16 to a jury. I mean, the -- the problem, as you cast it,

17 is that the standard in Burlington Northern, no offense,

18 isn't a bright line. It is the standard, which it is.

19 And the same question could arise about other methods of

20 retaliation.

21   What about -- what about cutting someone out

22 of five meetings or ten meetings? That same problem

23 exists under Burlington Northern no matter what.

24   JUSTICE BREYER: Well, why can't -- why

25 can't they get -- the first question, to go back, is a

1   confusion in my mind: Why couldn't she bring this suit?

2   And she says, I was discriminated against because they

3   did A, B, C, D to him, and the remedy is, cure the way

4   in which I was discriminated against. And to cure that

5   way, you would have to make the man whole in respect to

6   those elements that we're discriminating against.

7   Do you give him back pay? Do you restore

8   him? You do everything you would normally have to do

9   because otherwise, she is suffering the kind of injury,

10   though it was to him, that amounts to discrimination for

11   opposing a practice. What's wrong with that theory?

12   MR. SCHNAPPER: I think that that kind of

13   remedy would pose very serious problems under Article

14   III.

15   JUSTICE BREYER: Why? Why?

16   MR. SCHNAPPER: Because money isn't going to

17   her.

18   JUSTICE BREYER: So what? She's hurt.

19   Suppose it was a child that they -- what they -- or

20   suppose they robbed -- they robbed the -- the judge's

21   wife in order to get him to do something? And -- and

22   that's a crime, and suppose there was a civil statute.

23   The judge says: The way you cure what you did to get me

24   to do something is you make me whole. And in that

25   instance, it requires making her whole. What's the

1   Article III problem?

2   Well, anyway -- this is crucial, but I'm --

3   I'm -- I'm just saying --

4   MR. SCHNAPPER: Well, I think it -- I think

5   it is of some -- some importance here. I mean, it --

6   it -- the -- ordinarily, Article III would bar me from

7   suing for an award of money to be paid to somebody else.

8   JUSTICE BREYER: But that's because the

9   award of money to be paid for somebody else, their

10   absence of money, didn't hurt you, but where there --

11   for example, if you're a trustee, you certainly can sue

12   to get the beneficiary put back. There are dozens of

13   cases where you can sue to get somebody else paid back

14   money, and -- and why isn't this one of them?

15   But anyway, I'm not -- I don't want to

16   pursue it beyond a quick answer, because there are other

17   things in this case.

18   MR. SCHNAPPER: Well, as -- as I say, I

19   think -- I think Article III would be -- would be a

20   major obstacle there.

21   CHIEF JUSTICE ROBERTS: I understood your

22   brief, and certainly the Government's brief, to take a

23   very expansive view of what type of retaliation would

24   give rise to a cause of action by the -- the directly

25   harmed employee.

1   Now you seem to be suggesting that that

2   employee would not have Article III standing to bring an

3   action.

4   MR. SCHNAPPER: I think we've got a

5   situation here in which this violates the rights of

6   Regalado, but Regalado's ability to herself bring a

7   lawsuit and get a remedy is limited, and that -- that --

8   JUSTICE GINSBURG: You're not taking the

9   position that she could not have sued in retaliation?

10   It would be awkward because he is -- it's his injury

11   that requires compensation, but are you saying that she

12   could not have brought a retaliation suit?

13   MR. SCHNAPPER: It's possible she could

14   bring a suit. The question would be whether she had

15   Article III standing to seek the remedy that she was

16   then seeking, which would often be a problem.

17   JUSTICE GINSBURG: Let me -- because your

18   time is running -- the Americans with Disabilities Act

19   has an explicit provision that allows suits by adversely

20   affected close relatives. You are essentially asking us

21   to read that provision, which is stated expressly in the

22   ADA --

23   MR. SCHNAPPER: If I might respond to that

24   briefly, you're referring to section 12112(b)(4) of the

25   ADA. That is a provision directed at a very different

1   problem, which is not associations between employees.

2   It's -- it's directed at employers who might refuse to

3   hire a worker because, for example, he had or she had a

4   child with a disability.

5   The EEOC's commentaries on the regs about

6   this explain it. It is -- it is not concerned with

7   employee relations. It is concerned with a

8   discrimination against a worker -- prospective worker,

9   typically -- because they have a family member who has a

10   disability, and the employer has preconceptions about

11   whether they will be good workers based on that.

12   CHIEF JUSTICE ROBERTS: Thank you --

13   JUSTICE SOTOMAYOR: But the Fair Housing Act

14   has a definition of injury that would include

15   Mr. Thompson, and that's not in this act, that express

16   language.

17   MR. SCHNAPPER: That's correct, Your Honor.

18   That -- that statute was adopted somewhat later.

19   There are large numbers of statutes that

20   have a general language like "person aggrieved." But I

21   think that in the case, of the Housing Act, that

22   language fairly describes the ordinary English meaning

23   of "aggrieved." Sometimes Congress does that.

24   There are other definitions in the Fair

25   Housing Act like that -- like the definition of

16

1   "dwelling." It doesn't mean "dwelling"; it means

2   something else everywhere else in the U.S. Code.

3   Congress in that instance decided to spell out what

4   everyone, I think, understood what the word would have

5   meant.

6   CHIEF JUSTICE ROBERTS: Thank you, Counsel.

7   Ms. Kruger.

8   ORAL ARGUMENT OF LEONDRA R. KRUGER,

9   ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE

10   SUPPORTING THE PETITIONER

11   MS. KRUGER: Mr. Chief Justice, and may it

12   please the Court:

13   When an employer fires an employee as a

14   means of retaliating against a relative or close

15   associate who has filed an EEOC charge, the employee who

16   has been fired is entitled under Title VII to go to

17   court and seek appropriate remedies, even if he hasn't

18   himself engaged in protected activity.

19   CHIEF JUSTICE ROBERTS: Can I ask you this?

20   Suppose -- go ahead.

21   JUSTICE ALITO: Put yourself in the -- in

22   the shoes of an employer, and you -- you think -- you

23   want to take an adverse employment action against

24   employee A. You think you have good grounds for doing

25   that, but you want -- before you do it, you want to know

1   whether you're potentially opening yourself up to a

2   retaliation claim.

3   Now, what is the employer supposed to do

4   then? They say, well, let's -- we need to survey

5   everybody who is engaged in protected conduct, and now

6   we need to see whether this person who we're thinking of

7   taking the adverse employment action against has a,

8   quote, unquote, "close relationship" with any of those

9   people.

10   So what do you do? Do you call everybody in

11   from the company and you say, now, is -- you know,

12   was -- are these people dating? Did they once date?

13   Are they good friends? What are you supposed to do?

14   MS. KRUGER: Justice Alito, we are not

15   arguing for a test that would create a kind of

16   protection for a so-called right of association under

17   Title VII. It's not the case that so long as somebody

18   is associated with somebody who has complained about

19   discrimination they would be automatically protected

20   under the test that we're advocating.

21   The reason the relationship is important in

22   this case is because it tends to render plausible the

23   argument that there's a causal connection between the

24   adverse action visited on Thompson in this case --

25   JUSTICE ALITO: I understand that. I do

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1   understand that, but I wish you -- I would like you to

2   answer my question.

3   Does the employer have to keep a -- a

4   journal on the intimate or casual relationships between

5   all of its employees, so that it knows what it's -- it's

6   opening itself up to when it wants to take an action

7   against someone?

8   MS. KRUGER: No, I think it's actually quite

9   the contrary. I think if the employer doesn't know

10   about the relationship, any allegation like the

11   allegation we have in this case simply isn't going to be

12   plausible. It isn't going to be a plausible contention

13   that there is a relationship between one employee's

14   protected activity and an adverse action visited on the

15   plaintiff.

16   CHIEF JUSTICE ROBERTS: Well, but you say,

17   but it won't be because of the degree of connection

18   between the -- the retaliated-against employee and the

19   means of retaliating.

20   I understood your brief. I'm just looking

21   at page 6. The limitation you propose is someone --

22   someone close to him. The anti-retaliation prohibition

23   prohibits an employer from firing an employee because

24   someone close to him filed an EEOC complaint.

25   And I guess I have the same concern that we

1   have been discussing for a little while. How are we

2   supposed to tell, or how is an employer supposed to

3   tell, whether somebody is close enough or not?

4   MS. KRUGER: Well, if there's -- I don't

5   think there's any reason for the Court to try to fashion

6   a hard and fast rule that identifies some relationships

7   that are close enough and others that aren't.

8   The question in every case is the question

9   that's posed by this Court's standard in Burlington

10   Northern: Was this an action that a reasonable employee

11   would have considered materially adverse? Would it have

12   been deterred --

13   CHIEF JUSTICE ROBERTS: But Burlington

14   Northern, of course, is quite different, because you're

15   just -- you're dealing with the obvious plaintiff in

16   that case. You -- your -- your concern is confined to a

17   particular person.

18   In this hypothetical, it's an unlimited

19   universe that you don't have any reason to know where it

20   ends.

21   MS. KRUGER: Well, it's certainly going to

22   be important whenever a plaintiff brings a suit like

23   this both to establish that the employer knew of the

24   relationship and the relationship was one that is of

25   sufficient closeness that a reasonable employee might be

1   deterred from making or --

2   JUSTICE SOTOMAYOR: Why does that matter

3   under your theory? Let's assume the different --

4   slightly different, that they're just coworkers, but a

5   coworker who has expressed sympathy for the

6   discriminated person, has spoken about them in a

7   favorable light, or has tried to defend them. Would

8   that person be protected from being fired --

9   MS. KRUGER: Well --

10   JUSTICE SOTOMAYOR: -- if the intent was to

11   retaliate against the person complaining of

12   discrimination by getting rid of their friend who's

13   supporting them?

14   MS. KRUGER: In that scenario, I think that

15   that person would have a cause of action, but for a

16   different reason.

17   Under this Court's decision in Crawford,

18   that person would probably be considered to be a person

19   who had opposed the discrimination, and for that reason

20   would themselves have engaged in a protected activity.

21   JUSTICE SOTOMAYOR: So an opposer is anyone

22   who -- who assists?

23   MS. KRUGER: That's our understanding of

24   what this Court held in -- in the Crawford case.

25   JUSTICE SOTOMAYOR: Let's assume they did it

1   in private, but the employer knew it. They overheard a

2   conversation between the close friend and the employee

3   saying, I really am in support of you; I know you've

4   been treated unfairly. I like you; I like you working

5   here. Would that person be close enough?

6   MS. KRUGER: I think that -- again, I think

7   it's a question that sort of turns on whether a jury

8   would find that a reasonable employee in the position of

9   the person who had engaged in protected activity would

10   be deterred from making or supporting a charge of

11   discrimination if they knew the consequence was that

12   their best friend would be fired.

13   JUSTICE SCALIA: I don't want to have to go

14   before a jury as an employer all the time. I want -- I

15   want a safe harbor. I don't even want to mess with

16   people that might -- that might be buying a lawsuit, and

17   you're telling me, well, you know, I can't help you.

18   You have to go before a jury, say, if this person is

19   close enough.

20   Why can't we say members of family and

21   fiancées? Would -- would --- would that be a nice rule?

22   MS. KRUGER: Well, I think that it would be

23   an essentially arbitrary rule.

24   JUSTICE SCALIA: I know.

25   MS. KRUGER: At end of the day, the question

1   is just the question that the Court assigns under

2   Burlington Northern. It's a question that turns on the

3   specific facts and context of the -- a specific case.

4   JUSTICE SCALIA: Yes, but as --

5   MS. KRUGER: I think, in defense of the

6   Court --

7   JUSTICE SCALIA: As the Chief said, it -- it

8   spreads much further than Burlington Northern.

9   Burlington Northern, at least you know who it is you

10   have to be careful with: The person who's -- you know,

11   who has made a complaint. But -- but with what you're

12   proposing -- my goodness, I don't know who it is I have

13   to be careful with.

14   MS. KRUGER: Well, an employer always is

15   going to have to be careful to some degree not to visit

16   harm on an employee for retaliatory reasons.

17   JUSTICE ALITO: But you're -- you're a

18   reasonable person. What would you say is the degree of

19   closeness that is required?

20   MS. KRUGER: I don't think that there's any

21   way to fashion a hard and fast rule. The fact of the

22   matter is that most of the cases that have arisen that

23   have raised third-party retaliation arguments, which are

24   indeed cognizable under a number of -- of employment

25   statutes, and I don't think Respondent disputes that

1   they are rightly so -- have largely concerned

2   relationships like the relationship between parent and

3   child, between husband and wife.

4   In one case under the Occupational Safety

5   and Health Act, it's involved a relationship between

6   very good friends in the workplace, whereas there is a

7   D.C. Court of Appeals decision that holds that a merely

8   professional relationship that doesn't exhibit that

9   degree of personal affection isn't sufficiently close.

10   JUSTICE ALITO: Very good friends is enough?

11   MS. KRUGER: I think that a reasonable

12   employee who knows that the consequence of making or

13   supporting a charge of discrimination is going to be

14   that their best friend at work is going to be fired may

15   be deterred from engaging in protected activity.

16   JUSTICE KENNEDY: In -- in your view, could

17   Regalado have brought this suit, or brought a suit?

18   MS. KRUGER: Yes, Justice Kennedy, we do

19   think that Regalado could have brought a suit in her own

20   right, because she, too, is a person aggrieved within

21   the meaning of the statute.

22   JUSTICE KENNEDY: Well, if that is so, why

23   doesn't that vindicate the purposes of the act?

24   MS. KRUGER: Well, for two reasons, Justice

25   Kennedy. First of all, Regalado here didn't sue, just

1   like most people in her position didn't sue, because

2   mostly people who are charged with the enforcement of

3   Title VII -- as the private attorney generals -- under

4   the statutory scheme will assume that the person who

5   lost their job --

6   JUSTICE KENNEDY: Well, but I -- I assume

7   that part of the thrust of your argument is that this

8   was designed to hurt this -- Regalado, that she was

9   hurt, that this was injurious; then you say, oh, well,

10   it's not important enough for her to sue. So someone

11   that is more remote can sue. That's an odd rule.

12   MS. KRUGER: Well, I think in that

13   situation, that she certainly -- she might sue, but she

14   also might assume it ought to be her fiancée whose job

15   was actually lost who ought to carry --

16   CHIEF JUSTICE ROBERTS: Well, can't they

17   talk about that?

18   MS. KRUGER: They might --

19   CHIEF JUSTICE ROBERTS: I mean, it's not

20   like you're dealing with strangers. That's the whole

21   point. It's someone close to them.

22   I -- on the one hand you're saying, well,

23   you only have to worry about people really close; and

24   then your response to this line of questioning is, well,

25   the other person might not sue. They're going to sit

 1   and say, "Well, you sue."   "No, you sue."

 2   MS. KRUGER: Well, the fact that they were

 3   close at the time of the retaliatory act doesn't

 4   necessarily mean that they might still be close at the

 5   time that they need to decide whether or not to press

 6   charges.

 7   JUSTICE GINSBURG: The point you were first

 8   making, I thought, was: These are lay people; they

 9   don't have a lawyer; they would naturally think that the

10   person who was hurt would be the one to sue.

11   MS. KRUGER: That's exactly right, Justice

12   Ginsburg.   I think the other --

13   CHIEF JUSTICE ROBERTS: Why is that a

14   problem?   You're dealing with people who are close.

15   They assume the person who was hurt -- the person

16   retaliated against would sue.   Well, why -- why don't

17   they?   You said that person has a valid suit.

18   MS. KRUGER: They may not be close by the

19   time --

20   CHIEF JUSTICE ROBERTS: They are lay people.

21   They don't know about Article III.

22   MS. KRUGER: Well, that is certainly one

23   point.   But I think even if they were perfectly informed

24   and the rule that this Court announced was one that put

25   Regalado in the driver's seat entirely with respect to

1   whether or not to pursue the cause of action under Title

2   VII, there would still be a problem with respect to

3   whether or not she could seek full relief, the relief

4   that's necessary to make him whole.

5   JUSTICE ALITO: Well, if someone in

6   Thompson's position filed a charge with the EEOC,

7   couldn't the EEOC tell him, you're the wrong person to

8   sue?

9   MS. KRUGER: It conceivably could, but that

10   is --

11   JUSTICE GINSBURG: But the EEOC thinks that

12   he's the right person.

13   MS. KRUGER: Well, the EEOC certainly does

14   think he's the right person. If this Court were to say

15   that the EEOC's wrong --

16   JUSTICE ALITO: If the rule is that -- if

17   the rule is otherwise, why couldn't they provide advice?

18   MS. KRUGER: The EEOC is ordinarily not in

19   the business of advising people who filed charges with

20   respect to charges that other people might file, for

21   confidentiality reasons, among other reasons.

22   CHIEF JUSTICE ROBERTS: Thank you,

23   Ms. Kruger.

24   Ms. Latherow.

25   ORAL ARGUMENT OF LEIGH GROSS LATHEROW

27

1   ON BEHALF OF THE RESPONDENT

2   MS. LATHEROW: Mr. Chief Justice, and may it

3   please the Court:

4   Eric Thompson does not allege that he was

5   discriminated against, but Title VII is a discrimination

6   statute. The only person who alleges that they were --

7   that was --

8   JUSTICE SOTOMAYOR: Do you -- if Regalado

9   had sued and said -- assume the fact; I know that you

10 claim it didn't happen -- they fired my fiancée to

11 retaliate against me.

12   MS. LATHEROW: Okay.

13   JUSTICE SOTOMAYOR: Do you agree with your

14 adversary that she wouldn't have Article III standing to

15 seek reinstatement or back pay for her fiancée?

16   MS. LATHEROW: I don't -- I do think she

17 could seek reinstatement to get general equitable relief

18 of the court. In terms of back pay, I don't see why she

19 couldn't recover that for him. But in terms of his

20 coming back to work --

21   JUSTICE SOTOMAYOR: I would like to see that

22 case next --

23   MS. LATHEROW: I'm sorry?

24   JUSTICE SOTOMAYOR: -- and see what position

25 you take the next time. Are you willing to commit your

1   company to that position today? I won't do that to you.

2   MS. LATHEROW: Okay. Thank you, Your Honor.

3   No one is seeking damages for Ms. Regalado

4   in this case. Eric Thompson is here to use her rights

5   to recover for her alleged discrimination based upon her

6   conduct.

7   JUSTICE SCALIA: You know, but if you

8   concede that she could have sued, then what's the big

9   deal? Then we still have the same problem, that the

10   employer doesn't know whom he has to treat with kid

11   gloves.

12   What's the difference whether when the law

13   comes down on him, it's she who brings the suit or her

14   fiancée? He's worried about the suit. He still doesn't

15   know whom he has to be careful with.

16   MS. LATHEROW: I agree that she can bring

17   the cause of action based upon Burlington and the way

18   that the language is written in Burlington. I think

19   it's very, very broad. And so she has -- the Burlington

20   says she has to prove injury, that retaliation without

21   injury is not actionable.

22   JUSTICE SCALIA: Okay. So that's your only

23   point, not that it's going to be very difficult for

24   employers to figure out who can be protected and who

25   can't? You abandon that issue?

1   MS. LATHEROW: No. I think if Regalado has

2   the right to bring a cause of action, it is going to be

3   very difficult.

4   JUSTICE SCALIA: Okay.

5   MS. LATHEROW: But I think that the way that

6   Burlington reads now, and that is whether someone would

7   be dissuaded, if that is harm to her then she could

8   bring the cause of action. What's difficult about

9   applying the Burlington standard is you could have

10   someone who is dissuaded from filing a claim, but may

11   not be harmed.

12   For example, if an employer announced a

13   proposition that it was going to fire an employee at

14   random whenever someone filed an EEOC charge, I might

15   not file a charge because I wouldn't want someone, even

16   someone who I didn't know, to be terminated, but I

17   wouldn't be injured in that scenario.

18   JUSTICE KENNEDY: So you're saying an

19   employer could adopt that policy?

20   MS. LATHEROW: I'm sorry?

21   JUSTICE KENNEDY: Are you saying an employer

22   could adopt that policy?

23   MS. LATHEROW: No, I'm not, because the

24   person who is discriminated against --

25   JUSTICE KENNEDY: So if an employer says,

1   now, if anybody makes a discrimination claim, we're

2   going to fire two other employees just to show you that

3   we run an efficient corporation here, you say that that

4   is proper or improper?

5   MS. LATHEROW: It's improper, because the

6   person who was discriminated against would have the

7   right to sue.

8   CHIEF JUSTICE ROBERTS: Who is the person

9   who is discriminated against in the hypothetical?

10   MS. LATHEROW: The person who -- the person

11   who filed the EEOC charge.

12   CHIEF JUSTICE ROBERTS: Okay.

13   MS. LATHEROW: What makes this case a little

14   cloudy --

15   JUSTICE KENNEDY: But the persons, the two

16   people in the hypothetical that are fired can't sue?

17   MS. LATHEROW: They cannot, not under the

18   discrimination provision of Title VII, because they were

19   not discriminated against based upon their conduct. It

20   wasn't anything that they did. And that's what

21   Burlington Northern says, that the anti-retaliation

22   provision of Title VII seeks to prevent harm to

23   individuals based upon what they do, based upon their

24   conduct. Those two hypotheticals --

25   JUSTICE SCALIA: Why should -- in this World

1   War II Nazi scenario, why would the woman who caused the

2   random firing, why would she bring a lawsuit if these

3   people are really nothing to her? She just has a guilt

4   of conscience or something? I mean, I don't see why she

5   would bring the lawsuit. If it was her fiancée, maybe,

6   but this --

7   MS. LATHEROW: She may not, but the EEOC

8   could.

9   JUSTICE SCALIA: She might not even like the

10   people who were fired.

11   MS. LATHEROW: In which case she wouldn't

12   have been injured, so she would have no claim. If you

13   think about it, if she was not discriminated against,

14   then the other people could not bring a claim for

15   discrimination based upon her.

16   What makes this case a little cloudy is that

17   Eric Thompson is an employee as well, but he doesn't

18   bring this case as an employee. You could very well

19   have Eric Thompson as a spouse who is not employed. So,

20   for example, if Mr. Thompson had been just -- let's make

21   him a spouse, an even closer relationship than a

22   fiancée, and suppose that his job -- he ran an animal

23   shelter in Carrolton, Kentucky, and it was a benevolent

24   organization, but his only source of revenue was a

25   generous gift from North American Stainless at

1   Christmastime.

2   And in 2003, after Regalado filed her claim

3   with the EEOC, filed her charge, North American

4   Stainless said, I'm not going to give money this year to

5   the animal shelter, to Mr. Thompson, and I'm not going

6   to do it because of Regalado, who is our employee,

7   because she filed a charge of discrimination. I'm not

8   going to do anything to help her. I'm not going to do

9   anything to help him.

10   In that case, under Mr. Schnapper's

11   standard, any person aggrieved can bring a claim. That

12   person, who is not even an employee, because they have

13   some kind of injury, could bring a claim.

14   CHIEF JUSTICE ROBERTS: Well, but his point

15   was that "aggrieved" includes not only injury, but

16   wrongfulness. It may not be very -- I don't know, nice,

17   but there's nothing wrongful about North American

18   Stainless deciding it's not going to fund an animal

19   shelter because of some other reason.

20   MS. LATHEROW: But it's -- it's treating

21   Regalado with discrimination. It is treating her

22   differently than it might treat another employee because

23   she brought the cause of action. That would be

24   discrimination against Regalado because it's treating

25   her differently, but under their analysis --

1   JUSTICE BREYER: You couldn't win on that

2   under Burlington. I think that there are three separate

3   issues here that have to be kept straight.

4   No one can win in court unless they show

5   there was a human being -- in this case, the woman --

6   who suffered material -- who suffered serious harm,

7   serious harm. And serious harm is defined as materially

8   adverse action which might well have dissuaded a

9   reasonable worker from making or supporting a charge of

10   discrimination. So unless she suffered that kind of

11   serious harm, nobody wins.

12   Then the next question is suppose in the

13   course of that, somebody else was hurt. And the person

14   aggrieved provision suggests because of the history of

15   the word "aggrieved" that more than just she can bring

16   the lawsuit. That's our first question.

17   And then our third question is, if the

18   second question is yes, why can't the whole world do it?

19   At least the barber who doesn't get the haircut anymore

20   because the person fired doesn't have any money or the

21   landlord who can't get his rent or the -- you know, we

22   can go on indefinitely. Okay?

23   MS. LATHEROW: Yes.

24   JUSTICE BREYER: So why don't we get to the

25   second question?

34

1   The second question is -- the word

2   "aggrieved" has a history. I think it comes out of --

3   what's the case? I think it comes out of FCC v. Sanders

4   Brothers, which is a 1940 case, which said that

5   sometimes where there's a statute using the word "person

6   aggrieved," that that means that a person can bring a

7   lawsuit even though that person does not suffer injury

8   of the type that the statute was meant to prevent

9   against.

10   MS. LATHEROW: Yes, Your Honor.

11   JUSTICE BREYER: That was picked up by the

12   APA.

13   MS. LATHEROW: Yes, Your Honor.

14   JUSTICE BREYER: It says "person aggrieved."

15   So we have a statute that says "person aggrieved."

16   Maybe it means it in a different sense or maybe it means

17   it in the APA sense, Sanders Brothers sense, which means

18   in principle, this plaintiff can sue. You can argue

19   against that if you want, but, I mean, that's where I'm

20   starting from.

21   And then we can have the third part, which

22   is: Is there a way of limiting this?

23   MS. LATHEROW: Yes, Your Honor.

24   JUSTICE BREYER: You don't have to -- I'm

25   just asking a question, quite a long question.

1   JUSTICE SCALIA: You don't even have to

2   agree with his description of what Sanders Brothers and

3   the APA say.

4   JUSTICE BREYER: You don't, but it would be

5   pretty hard to do that, because it's in black and white

6   here.

7   JUSTICE SCALIA: Isn't there a doctrine of

8   the scope of persons protected under a particular

9   statute?

10   MS. LATHEROW: Absolutely, Your Honor.

11   JUSTICE SCALIA: Doesn't the word "person

12   aggrieved" bring that whole lore along with it?

13   MS. LATHEROW: I believe it does, Your

14   Honor.

15   JUSTICE GINSBURG: Can we go back to --

16   first, you agree that it is unlawful to retaliate

17   against a person who filed a complaint under Title VII

18   by dismissing a close relative? It is an unlawful

19   employment practice, is it not?

20   MS. LATHEROW: I believe it could meet the

21   standard under Burlington, yes, Your Honor.

22   CHIEF JUSTICE ROBERTS: Do you want to get

23   back to Justice Breyer's question? I don't think you

24   had a chance to respond to it.

25   MS. LATHEROW: Yes, Your Honor. Thank you.

1   Justice Breyer, I believe your question was

2   the scope, and what does this term "aggrieved" mean?

3   And in the Sanders case, the Court said that this term

4   "aggrieved" means something broad and it is intended to

5   bring a lot of people in.

6   But that case was interpreting the APA,

7   which has specific language. Just like in Trafficante,

8   the Court was considering the Fair Housing Act, both of

9   which have very different -- in the statute in question,

10   the APA says a person suffering a legal wrong because of

11   an agency action or adversely affected or aggrieved by

12   agency action within a meeting of a relevant statute is

13   entitled to judicial review, and that's much broader

14   than what we have in this case.

15   So we have to be looking at whether

16   prudential standing rules apply, and we know that

17   Congress legislates against that prudential standing.

18   JUSTICE SCALIA: I'm not sure it's broader.

19   Why do you say it's broader? It says "adversely

20   affected or aggrieved within the meaning of the relevant

21   statute," and it's that language that says, well, the

22   statute was only meant to protect this group of people,

23   and the fact that somebody else was incidentally harmed

24   would not be covered.

25   I don't know why you say that's broader. If

1   anything, it's narrower than what we have here. We just

2   say "aggrieved." It doesn't say within the meaning of a

3   relevant statute. You want to us read that into it?

4   MS. LATHEROW: Yes, I -- I believe it should

5   be read into Title VII, because that's the term

6   "aggrieved."

7   If someone -- if my husband calls and says,

8   oh, my gosh, we've been involved in a car accident, I

9   don't say: Honey, are you aggrieved? I say: Honey,

10   are you injured? That's exactly -- exactly the

11   definition of "aggrieved" in the Fair Housing Act.

12   So Congress recognized, just 4 years later,

13   after Title VII was adopted, when it enacted the Fair

14   Housing Act. And it defined "aggrieved," and said

15   aggrieved means or includes any person who claims to

16   have been injured. That's really --

17   JUSTICE GINSBURG: That's not -- that's not

18   an altogether novel question, but it has come up under

19   some other statutes. You are -- are suggesting that

20   this is carrying the -- the person aggrieved to new

21   heights, but we have both the NLRB and we have OSHA, and

22   both of those agencies have said it, that to take

23   adverse action against a close relative is an unfair

24   employment practice, and they've done that for sometime,

25   have they not?

1   MS. LATHEROW: Yes, Your Honor. And again,

2   we're not saying that discriminating against an employee

3   in taking some kind of action against someone that they

4   loved is not an unlawful employment action. It can be.

5   That's not the position that North American Stainless is

6   taking. The question is, is the person who was not

7   discriminated against, the person who was injured by the

8   action, can they bring the cause of action.

9   JUSTICE SCALIA: Ms. --

10   MS. LATHEROW: And Title VII --

11   JUSTICE SCALIA: Go on, I'm sorry, finish.

12   MS. LATHEROW: Oh, I'm sorry. Burlington

13   makes clear the interest to be protected of that with

14   the anti-retaliation provision, and that's what we're

15   talking about.

16   JUSTICE BREYER: That's -- that's why this

17   is -- see, what Sanders Brothers did is the interest to

18   be protected against had nothing to do with protecting

19   competitors from competition. The Court says that. And

20   it says but here is a competitor trying to protect

21   himself from competition, can he bring a suit? Well,

22   normally not. But Congress used the word "person

23   aggrieved" or "adversely affected," and therefore they

24   can. Now, that's the precedent that's -- that's --

25   that's harmful to you. I'm not certain.

1   What about the third part? I have a

2   suggestion, and I would like your response, because I'm

3   just playing with the thought. That the way to limit

4   this is to say that where a person is being used, a

5   person B is hurt because in order to retaliate against

6   person A, okay? That that is a person aggrieved where

7   person B is being -- is hurt, the injury, the injury to

8   B, not to A is the means of hurting A. But where it is

9   a consequence of hurting A, that doesn't fall within the

10 statute.

11   That gets rid of the bowling alley, it gets

12 rid of the landlord, it gets rid of the shareholder, it

13 gets rid of all the people who -- who -- who are not the

14 person retaliated against, but they suffer injury

15 because he was retaliated against. It keeps the people

16 who are being used as a means. They can bring the

17 lawsuit.

18   MS. LATHEROW: And I'm sorry, and your

19 question is?

20   JUSTICE BREYER: If, in fact, you set in

21 motion hurting Mrs. Smith, the child, the wife, even the

22 coworker, though that would be hard to get pass

23 Burlington, if you do that in order to hurt A, to

24 retaliate against A, B can bring the suit? But if B is

25 a person who is injured only because you retaliated A,

40

1   but really wasn't the means, B can't bring the suit.

2   MS. LATHEROW: But, Your Honor,

3   respectfully, there's no basis in the statute to adopt

4   that rule.

5   JUSTICE BREYER: That is the problem with my

6   theory.

7   (Laughter.)

8   MS. LATHEROW: I'm glad --

9   JUSTICE BREYER: But there are -- I do -- I

10 think that it isn't so hard to find in some of the

11 sources that Justice Ginsburg mentioned and others

12 instances where the only kinds of suits that have been

13 allowed are where it was like a family member or was

14 being used as a means, and there never have been cases

15 where they allowed somebody who was just suffering

16 consequent injury. So it's quite possible I can be

17 borne out, though I think your criticism is a pretty

18 good one.

19   (Laughter.)

20   MS. LATHEROW: If we look at the kinds of

21 cases, for example, the Trafficante case, and the other

22 cases under the APA where Congress has used this broad

23 language or has interpreted the term "aggrieved"

24 broadly, those cases are -- the nature of those cases,

25 such as with Bennett v. Spear, the environmental species

1   act or the Blue Shield of Virginia case, which was a

2   Sherman Act case, the injury or the act, the

3   violation -- the violation in those cases had the

4   potential to -- to inflict harm on a large group of

5   people.

6   So that, under Trafficante there were over

7   8,000 people who lived in the housing complex. Under

8   Bennett v. Spear with the environmental species act

9   there was more than one person who was adversely

10   affected or potentially was adversely affected. In Blue

11   Cross --

12   JUSTICE SCALIA: I don't see where you're

13   going, the employee has to fire three fiancées or a

14   larger number of --

15   MS. LATHEROW: No, my point is, is that if

16   we're looking at trying to compare Title VII and whether

17   or not we're going to impose some prudential limitations

18   on the ago aggrieved language, those statutes are

19   different than the statutes that we have --

20   JUSTICE SCALIA: But, you know, I don't know

21   what aggrieved means, I don't think anybody does. Why

22   shouldn't we be guided by the EEOC, which has

23   responsibility for implementing this statute? And

24   they've come up with their theory of what it means, and

25   we usually do accede to a reasonable theory proposed by

 1   the implementing agency. Why -- why shouldn't we do

 2   that?

 3   MS. LATHEROW: Your Honor, this is not a

 4   situation like Calleleki, where the Court is trying to

 5   determine on something about a procedure within the

 6   EEOC, and that is, what does it mean for a charge,

 7   because you need some kind of special expertise. Here

 8   the Court is the expert on interpreting. And Thompson

 9   even disagrees with the EEOC.

10   The EEOC would say Regalado and Thompson

11   could bring the claim, but Thompson disagrees with that.

12   So it's hard for Thompson to come and say let's do what

13   the EEOC says when he disagrees with it himself.

14   JUSTICE GINSBURG: It's not a 100 percent --

15   he thought there might be an Article III impediment.

16   But in -- in your brief I think you suggested that the

17   EEOC doesn't get a whole lot of deference, and the --

18   but the other agencies that I mentioned, where there is

19   this claim that can be brought by a close relative, the

20   NLRB gets a lot of deference, the Department of Labor

21   when we're dealing with Occupational Safety and Health

22   Administration or the mine safety, those agencies get a

23   fair degree of deference, and they come to the same

24   conclusion.

25   MS. LATHEROW: I -- I agree with that, Your

                              43

 1   Honor. And in this -- this -- I don't know, but I

 2   believe this to be true that, for example, with the NLRB

 3   and with OSHA, they have their own administrative

 4   agencies where there would be hearings within those

 5   agencies versus with Title VII, the EEOC does not --

 6   they're not a determiner --

 7   JUSTICE GINSBURG: But this is a -- an

 8   interpretation of the substantive meaning of the

 9   statute.

10   MS. LATHEROW: Yes, Your Honor.

11   JUSTICE GINSBURG: It doesn't have to do

12   with the evidence in a particular hearing. Can a person

13   who is a close relative sue on the grounds that he was

14   injured, deliberately so, in order to retaliate against

15   his spouse or his fiancée?

16   MS. LATHEROW: Yes, Your Honor. I -- I

17   don't know the distinction between relying on those --

18   those agencies versus the EEOC, but I do know that in

19   the Burlington court, this Court noted that the EEOC

20   compliance manual -- and that's what we're talking

21   about, is the compliance manual, we're not talking about

22   a regulation, we're not talking something else, but a

23   compliance manual. So in your hypothetical I don't know

24   if we're talking about a compliance manual from the NLRB

25   or OSHA, but this is a compliance manual.

1   And in Burlington, this Court noted there

2   were inconsistencies regarding the anti-retaliation

3   within the compliance manual as to what an adverse

4   action meant or what would constitute an adverse action.

5   JUSTICE SCALIA: What's -- what's the

6   function of the compliance manual? What does it do?

7   Does it say we'll -- we'll leave you alone if you do

8   this?

9   MS. LATHEROW: I don't know --

10   JUSTICE SCALIA: But they have to leave him

11   alone. There's really nothing the EEOC can do to

12   someone, right, except -- what, can the EEOC take them

13   to court?

14   MS. LATHEROW: Yes, they can.

15   JUSTICE SCALIA: So can the Justice

16   Department, but we don't defer, thank goodness, to the

17   Justice Department's interpretation of the criminal law,

18   do we?

19   MS. LATHEROW: No.

20   JUSTICE SCALIA: No.

21   MS. LATHEROW: Your Honor, the concerns from

22   the employment side in this case are substantial. Under

23   Thompson's theory of the case, anyone who is injured or

24   what he says is aggrieved, anyone who receives injury

25   becomes a protected party. It's not just bringing the

1   lawsuit, but it's the protected party.

2   He's not even a silent opposer in this case.

3   There were -- there were concerns in Crawford about the

4   silent opposer and how do we know who they are. He says

5   it's based solely upon his relationship. He has engaged

6   in no protected conduct. The silent opposer, assuming

7   they can have -- bring a claim, at least engaged in some

8   conduct, but Thompson has no protection under this

9   statute. He could have very easily gotten the

10   protection.

11   In our Joint Appendix we submitted the brief

12   that Eric -- or the memo that Eric Thompson submitted to

13   his supervisor just shortly before he was terminated.

14   He complains in that memo about his compensation, and

15   this is on page 22 and 23 of the joint appendix. He

16   says --

17   JUSTICE SCALIA: 22 and 23 of --

18   MS. LATHEROW: The joint appendix.

19   JUSTICE SCALIA: Okay.

20   MS. LATHEROW: He says in this memo: I am

21   disappointed in compensation this year. At the time

22   that he submitted this memo to his supervisor, his

23   fiancée had a complaint or a charge with the EEOC

24   pending. If he had only come forward in this memo,

25   Congress says you would have gotten protection; if he

46

1   had come forward and said, by the way, I think the way

2   you treat my wife is discriminatory, he would have

3   gotten protection.

4   The -- the means by which employees get

5   protection under the statute are not very difficult.

6   All they have to do is to come forward and oppose.

7   Thompson clearly had an avenue and a means to do that

8   because he was taking -- he was action on his own behalf

9   to complain. So Thompson wants to bring a claim under

10   -- for Regalado, but he couldn't at that time come

11   forward and step up to the plate and say to the

12   employer, "Hey, I have a problem with this," but yet he

13   wants to come into court and to claim his right -- or to

14   claim her rights as a basis to bring this suit.

15   According to the EEOC statistics, in 1992,

16   when data first began being collected, 14.5 percent of

17   charges filed with the EEOC were retaliation claims. By

18   2009 that had risen by 31 percent.

19   In the Chamber's brief on page 2, they

20   submit or recite to a study that was published in 1994

21   saying that the average cost to defend an employment

22   litigation in 1994, when the study was published, was

23   $120,000. In this case what Thompson would propose is

24   to give protected party to a wide range of people; and

25   with respect to the government's position today, at the

1   Sixth Circuit Court of Appeals they advocated that there

2   would be no limitation, that everyone would get the

3   protection. That's a broad -- that is a lot of

4   protection for people, and I can tell you that employers

5   who are faced with someone in a protected party, they

6   are -- employers are reluctant to take adverse decisions

7   against them; they're reluctant to implement discipline;

8   they will postpone implementing that decision because

9   they know at some point they're going to have to

10   establish a legitimate nondiscriminatory reason.

11   When we -- when we point out -- when we

12   point this out in our arguments, the response by Eric

13   Thompson as -- as to who gets the protection, it's in

14   his footnote on page 4 at his reply, he says that the

15   identity of individuals who might have a claim is a

16   function of the employer's own intent.

17   So, in other words, in order to determine

18   whether someone has protection, you have to look at the

19   employer's intent. So there are no protected parties

20   anymore until the employer can establish that they had

21   no intent -- or the other way. Everyone is protected

22   party until the employer can show that he had no intent.

23   So what that means at the trial is that there will never

24   be --

25   JUSTICE BREYER: I'm not sure why the

1   employer's intent comes into this. A is the person who

2   is being retaliated against, and the issue would be did

3   the employer take such action against B as the A would

4   think, quite reasonably -- he would have to reasonably

5   think -- that the actions that the employer took was

6   retaliation, was meant to be -- whatever those words

7   were, was -- it might well have dissuaded a reasonable

8   worker from making or supporting a charge of

9   discrimination.

10   MS. LATHEROW: But the position that's set

11   forward by Thompson is you determine whether someone is

12   a protected party by looking at the intent of the

13   employer.

14   JUSTICE BREYER: Well, you would have to

15   show he had a retaliatory intent, that's true, but

16   that's true however he retaliates.

17   MS. LATHEROW: That's true at trial, though,

18   after a plaintiff gets past his initial burden of proof,

19   and in this case the plaintiff is going to be able to

20   establish their burden of proof solely by saying that

21   they were a protected party and there was intent on the

22   other side. That is going to shift the burden to the

23   employer at the outset of the case to prove that there

24   was no retaliation, that there was no intent.

25   Your Honor, in conclusion, the Sixth Circuit

1   Court of Appeals was correct. The Sixth Circuit

2   determined that Eric Thompson who was not discriminated

3   against had no protection under the statute. This Court

4   clearly held in Burlington that the anti-retaliation

5   provision of Title VII is designed to protect employees

6   based upon what they do, based upon their conduct. In

7   this case Eric Thompson engaged in none of that

8   behavior, he had no conduct, he did not come forward on

9   behalf of anyone; yet he is here asking for remedies,

10   remedies that really should belong to Regalado.

11   There is no reason that Regalado could not

12   have brought this case. There -- if the concern is that

13   employers are going to discriminate against employees,

14   the response to that is that employers will still be

15   held liable and can still be held liable, and that is by

16   the person who is discriminated against from bringing

17   the suit.

18   We ask that the Sixth Circuit Court of

19   Appeals decision be affirmed.

20   CHIEF JUSTICE ROBERTS: Thank you, counsel.

21   Mr. Schnapper, you have 3 minutes remaining.

22   REBUTTAL ARGUMENT OF ERIC SCHNAPPER

23   ON BEHALF OF THE PETITIONER

24   MR. SCHNAPPER: Thank you, Your Honor. I

25   just have a couple quick points.

1   JUSTICE GINSBURG: Mr. Schnapper, in the

2   point you are making, would you have an answer to the --

3   this point that was made about the burden of proof? The

4   argument was that you wouldn't have McDonnell Douglas

5   anymore and you wouldn't know how to proceed on this

6   third-party claim.

7   MR. SCHNAPPER: Your Honor, McDonnell

8   Douglas -- the particular formula in McDonnell Douglas

9   was for hiring cases. The courts have readily adapted

10   it to other kind of cases where, depending on the nature

11   of the claim, the plaintiff produces some minimal amount

12   of information and the employer is required to -- to

13   articulate a reason, but I don't think it would be a

14   problem here.

15   Getting back to the question that was

16   asked at the --

17   JUSTICE SOTOMAYOR: I'm not sure why not.

18   MR. SCHNAPPER: What?

19   JUSTICE SOTOMAYOR: I'm not sure why not.

20   Plaintiff comes in and says I engaged in protected

21   activity. They --

22   MR. SCHNAPPER: Well, probably -- the other

23   person did.

24   JUSTICE SOTOMAYOR: The other person did.

25   They retaliated against me.

1   How do you -- then the employer always has

2   the burden to come forth and give an explanation as to

3   why? What would be -- the prima facie case generally is

4   they treated me differently than similarly situated

5   people. I complained at a time close to my firing;

6   there's a whole series of prima facie elements.

7   MR. SCHNAPPER: Well, there has to be --

8   right. There has to be some evidence that could

9   plausibly give rise to -- to an inference of motive.

10   Even if I were complaining that I was retaliated

11   against, I can't just come in and say I engaged in

12   protected activity and was fired. I would need more

13   than that.

14   So you would need that additional amount

15   here, plus you would also have to have some evidence to

16   give rise to an inference that this third party was

17   selected as a victim. So it wouldn't -- you could --

18   you could adapt it.

19   But getting back to what was asked earlier,

20   there's no question the burden of proof is on the

21   plaintiff at all times to establish motive; and as we

22   get particularly far afield from family members, someone

23   closely associated with the plaintiff, it is going to be

24   difficult to -- to establish, to meet that burden.

25   CHIEF JUSTICE ROBERTS: What happens in the

                                52

1   -- what happens in the animal shelter hypothetical that

2   your friend proposed? You know, the North American

3   Stainless -- or -- funds the animal shelter of -- that

4   -- where the wife works, and they cut off their funding,

5   as a means presumably of --

6   MR. SCHNAPPER: I don't -- I don't -- I

7   think this Court's decision in Burlington Northern makes

8   it clear that the plaintiff wouldn't have to be an

9   employee. In that case one of the questions was could

10   you retaliate against an FBI agent by not protecting his

11   wife from being murdered? I think that would be a

12   pretty good way to -- to keep people from complaining.

13   But I think the Burlington Northern

14   limitation would -- you know, would have some traction

15   in these cases. The animal shelter seems unlikely.

16   But the burden of proof is there. As the --

17   as the relationship becomes more attenuated, once you

18   get past family members, I think it's going to be

19   difficult, even at summary judgment for these cases to

20   survive. And --

21   CHIEF JUSTICE ROBERTS: Thank you. Thank

22   you, counsel.

23   The case is submitted.

24   (Whereupon at 12:00 p.m., the case in the

25   above-entitled matter was submitted.)

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