THE EMPATHETIC, WHITE MALE: AN AGGRIEVED PERSON UNDER TITLE VII?

INTRODUCTION

Should courts grant standing to sue for individuals outside the class which the law protects?[1] Should those under forty be entitled to raise claims under the Age Discrimination in Employment Act?[2] Should whites be able to bring discrimination claims when the defendant targets his discrimination against Black and Spanish-surnamed individuals?[3] Are white males aggrieved when discrimination targets Black persons and females?[4] More importantly, should Title VII afford remedy to individuals indirectly harmed by the discriminatory acts of the employer or supervisor? In some contexts, the courts have addressed such issues. However, in the case of Title VII, much remains unresolved for matters of indirect discrimination issues.

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1. For a definition and discussion of standing principals, see *infra,* notes 29-44 and accompanying text.

2. Under the Age Discrimination in Employment Act [hereinafter ADEA], section 623, Congress makes it unlawful:

> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; [or] (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age . . . .

29 U.S.C. § 623(a) (1994). Section 631 further states that "[t]he prohibitions in this chapter shall be limited to individuals who are at least 40 years of age." 29 U.S.C. § 631 (1994).

3. *See, e.g.*, Waters v. Heublein, Inc., 547 F.2d 466, 467 (9th Cir. 1976). *See also* discussion, *infra* notes 77-79 and accompanying text.

4. *See, e.g.*, Childress v. City of Richmond, 134 F.3d 1205, 1208 (4th Cir. 1998). *See also infra* notes 94-110 and accompanying text.

While courts trumpet Title VII as legislation that enables them to eradicate discrimination, they disagree about how broadly to grant standing to those who are not direct targets of discrimination but are exposed to and offended by such harassment directed toward their coworkers.[5] Courts have broadened their interpretation of "persons aggrieved," but few have gone so far as to assert that those who are not targeted by discrimination and who may even be the beneficiaries of such harassment have standing. This note will refer to this group as the "empathetic white males" the class of persons that the courts have struggled with in recent Title VII jurisprudence.[6]

Courts affording standing to those outside the protected victimized class rationalize that granting standing broadly supports Title VII's purpose.[7] This note suggests that such permissive standing is contrary to Title VII's process and structure, which actually requires those outside the protected victimized class to oppose personally such practices before obtaining standing.[8]

Part I of this note explores the background of standing in the Title VII context. It considers the theories courts have used to decide whether those indirectly affected by prohibited activity should have standing to sue as if they were the targets of that activity. Part II of this note analyzes the circuit split. Through this analysis, it attempts to decipher the incongruencies of the civil rights statutes in an attempt to evaluate clearly the congressional intent regarding standing for indirect victims of harassment in the workplace under Title VII. Finally, Part III attempts to resolve the dual problem of eradicating discrimination while remaining faithful to the goals of Title VII by proposing a separate system of punitive fines against the

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5. Title VII, 42 U.S.C. § 2000e *et seq* (1994). Whether or not standing is granted is central to this issue. Without standing, the court will not hear the merits of the empathetic white male's case. *See generally* N. Morrison Torrey, *Indirect Discrimination Under Title VII: Expanding Male Standing to Sue for Injuries Received as a Result of Employer Discrimination Against Females*, 64 WASH. L. REV. 365, 369-72 (1989) (discussing general standing principles).

6. *See* Torrey, *supra* note 5, for a comprehensive discussion of this issue. Torrey presents a position contrary to this note's contention that standing should be restricted, not broadened. *Id.*

7. *See infra* notes 63-80 and accompanying text. *See also infra* notes 19-23; and *infra* notes 10-11 and accompanying text. *See, e.g.*, Hackett v. McGuire Bros., 445 F.2d 442, 446-47 (3d Cir.1971) (interpreting Title VII to grant standing broadly).

8. *See infra* notes 128-41 and accompanying text.

employer to compensate society for the damage caused by its discriminatory conduct.

I. BACKGROUND

A. Title VII

Congress enacted Title VII of the Civil Rights Act of 1964 expressly to eradicate discrimination in "any aspect of the employment relation including hiring, promotion, transfer, or firing"[9] on the basis of "race, color, sex, religion or national origin."[10] Proponents of Title VII theorized that the elimination of discriminatory employment practices would result in the consideration of people based on their individual merit, thereby producing the additional benefit of improved efficiency in the marketplace.[11] However, Title VII affords standing only to "persons aggrieved."[12] Historically, courts have struggled to define "persons aggrieved" and eventually resorted to Title VIII of the Civil Rights Act of 1968, Title VII's housing discrimination counterpart, for its definition.[13]

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9. RICHARD A. EPSTEIN, FORBIDDEN GROUNDS 160-61 (1992).

10. 42 U.S.C. § 2000e-2(a)(1) (1994). Interestingly, "sex" was a last minute addition to the final version of Title VII. *See* Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 441-42 (1966) (noting that the Congressional Record is an inadequate source of legislative intent because Congress was rushed to pass Title VII and sacrificed meaningful discussion in the Congressional Record to meet their deadline). According to Vaas,

> Mr. Smith, long-time Chairman of the House Committee on Rules—and not a civil rights enthusiast—offered his amendment in a spirit of satire and ironic cajolery . . . The amendment was agreed to 168 to 133 . . . . It was proposed and quickly adopted after hasty debate in the House under the "five minute" rule . . . . The House debate thereon covers no more than nine pages of the Congressional Record.

Id at 441-42. Congress provided little guidance to courts applying Title VII. *See id.* at 431, 457-58.

11. Vaas, *supra* note 10, at 444-45 (citing Senator Humphrey's remarks on Title VII, 110 Cong. Rec. 6528 (1964)). Congress considered primarily racial discrimination as the focus of Title VII. *See* H. Rep. No. 88-914, at 28 (1963) (stating that the "failure of our society to extend job opportunities to the Negro is an economic waste").

12. Section 706(f)(1) of Title VII provides that: "a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice." 42 U.S.C. § 2000e-5(f)(1).

13. 42 U.S.C. § 3601 *et seq* (1994). For additional discussion of defining "persons

B. Title VIII

Whether courts adopt Title VIII's definition of "persons aggrieved"[14] may determine whether the Court grants standing to the empathetic white male under Title VII.[15] Courts struggle to decide whether to extend the language and subsequent interpretation of Title VIII's definition of "persons aggrieved" to Title VII.[16] Such an extension is desirable to courts that wish to apply Title VII broadly because Title VIII provides a specific definition of "persons aggrieved," while Title VII does not.[17] Title VIII further creates a private right of action for persons aggrieved by a violation of Title VIII, thereby allowing Congress to expand standing to those who otherwise would be barred under prudential standing rules.[18]

Those advocating the extension of Title VIII's interpretation of "persons aggrieved" to Title VII rely on several factors including the similarities between the language,[19] design, and purposes[20] of both

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aggrieved" under Title VII, see SULLIVAN ET AL., EMPLOYMENT DISCRIMINATION § 11.8.3, 498-501 (1988).

14. *See infra* note 17.

15. Because Title VIII's definition and interpretation of the phrase "persons aggrieved" is broader than Title VII's corresponding definition, the empathetic white male qualifies under the Title VIII definition. *See* EEOC v. Mississippi College, 626 F.2d 477, 482 (5th Cir. 1980) (stating that *Trafficante*, a Title VIII case, will not permit a bar to every charge of discrimination against a group of which the plaintiff is not a member); Waters v. Heublein, Inc., 547 F.2d 466, 469-70 (9th Cir. 1976) (extending Title VIII definition of "persons aggrieved" to Title VII case and granting standing to white woman who complained of discrimination against Black persons and Hispanics). *But see* Childress v. City of Richmond, 134 F.3d 1205, 1209 (4th Cir. 1998) (J. Luttig, concurring) (refusing to apply Title VIII interpretation to Title VII cases and denying standing to empathetic white males); Patee v. Pacific Northwest Bell Tel. Co., 803 F.2d 476, 478-79 (9th Cir. 1986) (denying empathetic white male standing because plaintiffs failed to assert *Trafficante*-type damages, which would have allowed extension of the Title VIII interpretation).

16. *See* EEOC v. Bailey Co., 563 F.2d 439, 451-52 (6th Cir. 1977) (providing a thorough explanation of dissention in the courts over the empathetic white male's inclusion in the "persons aggrieved definition).

17. Section 3602(i) defines "aggrieved person" as "any person who (1) claims to have been injured by a discriminatory housing practice; or (2) believes that such person will be injured by a discriminatory housing practice that is about to occur." 42 U.S.C. § 3602(I) (1994).

18. Hernandez v. Ruiz, 812 F. Supp. 734, 737 (S.D. Tex. 1993). *See* 42 U.S.C. § 3613(a)(1)(A) (1994).

19. *See infra* note 75 and accompanying text. Courts have compared section 706(b) of Title VII, which provides an action "[w]henever a charge if filed by or on behalf of a person claiming to be aggrieved . . ." to section 801(a) of Title VIII, which allows for "an aggrieved person" to commence action. *Id.*; 42 U.S.C. § 2000e-5(b) & 3610(a).

Title VII and Title VIII.[21] Furthermore, at least one court holds that because Title VIII jurisprudence relies upon Title VII interpretations to form Title VIII's definition of "persons aggrieved,"[22] such a definition should be transposed to Title VII.[23]

However, a strong dissenting group refers to the incongruent legislative history of Title VII and Title VIII to deny application of Title VIII's definition to Title VII.[24] During Congressional hearings on Title VIII, members of Congress specifically recited Congress' intent that Title VIII benefit those indirectly affected by discriminatory conduct.[25] More plainly, the Fourth Circuit notes that "persons aggrieved" is a term of art incorporating a presumption that the term carries its understood definition unless otherwise specified.[26] While Title VIII provided a specific definition to exclude such a presumption, Title VII's absence of a specific definition requires courts to read "persons aggrieved" as Congress normally understood the phrase.[27] Those opposing application of Title VIII jurisprudence

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20. *See* EEOC v. Bailey Co., 563 F.2d 439, 453 (6th Cir. 1977) (noting that both Titles VII and VIII seek to "outlaw[] discrimination based on race, religion, national origin, and sex by providing equal employment and fair housing opportunities").

21. *See* EEOC v. Mississippi College, 626 F.2d 477, 482 (5th Cir. 1980) (citing EEOC v. Bailey Co., 563 F.2d at 450-54, and Waters v. Heublein, 547 F.2d 466, 469-70 (9th Cir. 1976)).

22. Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 209 (1972).

23. *Bailey Co.*, 563 F.2d at 453 (noting that the Supreme Court in *Trafficante*, cited with approval Hackett v. McGuire Bros., Inc., 445 F.2d 442 (3d Cir. 1971)). Thus, the *Bailey* court concluded that "the Supreme Court does not conceive Titles VII and VIII to be different." 563 at 453.

24. *See* Childress v. City of Richmond, 134 F.3d 1205, 1210 n.3 (4th Cir. 1998) (Luttig, J., concurring).

25. *See Trafficante*, 409 U.S. at 210 (stating that "[w]hile members of minority groups were damaged the most from discrimination in housing practices, the proponents of the legislation emphasized that those who were not the direct objects of discrimination had an interest in ensuring fair housing, as they too suffered").

The Supreme Court supported this proposition citing Hearings before the Subcommittee on Housing and Urban Affairs of the Senate Committee on Banking and Currency on sections 1358, 2114 and 2280, during the first session of the ninetieth Congress.

26. *Childress*, 134 F.3d at 1208 (Luttig, J., concurring). Specifically, general statutory interpretation requires the court to apply the term of art definition unless the term is defined differently by Congress in the statute. *Id.* at 1208-09.

27. Justice Luttig quoted, *OWCP v. Newport News* where the Supreme Court stated that, "[t]he phrase 'person adversely affected or aggrieved' is a term of art used in many statutes to designate those who have standing to challenge or appeal an agency decision, within the agency or before the courts . . . ." *Id.* at 1208 (quoting OWCP v. Newport News, 514 U.S. 122, 125 (1995)) (citations omitted in original).

note further that Congress enacted Title VIII with a specific definition of "aggrieved person" four years after it enacted Title VII without a specific definition of the very same term.[28]

C. General Constitutional Standing Principles[29]

If courts apply the "term of art" definition of "persons aggrieved" rather than the definition provided by Title VIII, the plaintiff must fulfill both constitutional and prudential requirements of standing.[30] In the Title VII context, the court makes a two-pronged inquiry to determine whether an individual has standing to pursue his claim in federal court. First, the plaintiff must meet the case or controversy requirement of Article III of the Constitution.[31] The individual must point to an "injury in fact" that is likely redressable by a favorable ruling by the court.[32] The plaintiff further must assert a concrete or tangible harm that is fairly traceable to the unlawful conduct.[33]

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28. 134 F.3d at 1210. Generally, when Congress applies a definition excluded from the statute in question, the courts must infer that Congress specifically intended to exclude such a definition for that statute. *Id.*

29. For a comprehensive analysis of general standing principals, see Torrey, *supra* note 5, at 373-74. *See also* HAROLD S. LEWIS, JR., CIVIL RIGHTS AND EMPLOYMENT DISCRIMINATION LAW § 13.10 at 509-15 (1997).

30. *Infra* note 41.

31. United States Constitution Article III Section 2 reads:

> The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different states . . . .

U.S. CONST. art. III, § 2. The Article III requirements are immutable. *See generally,* Allen v. Wright, 468 U.S. 737 (1984).

32. Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 152 (1970). *See also* Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38-39 (1976); *Trafficante*, 409 U.S. at 211 (alleging a particular injury is necessary to prevent court from addressing only an abstract question).

33. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 485 (1982) (reasoning that "[plaintiffs] fail to identify any personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees"); *Allen v. Wright*, 468 U.S. 737, 753 n.19 (1983) (defining the "fairly traceable" requirement of the constitutional standing inquiry through an examination of the "causal

The Court also places default prudential limitations on standing.[34] Under these prudential limitations, standing is not afforded generally to vindicate the rights of third parties.[35] Further, the plaintiff lacks standing if he merely asserts a "generalized grievance."[36] Moreover, the prudential limitations require that the plaintiff fall within the "zone of interests" protected by the legislation.[37] At a minimum, the plaintiff must satisfy the court that his interest is arguably within the zone of interests protected by the statutory framework supporting his claim.[38] Title VII affords standing to any "person claiming to be aggrieved" by an activity prohibited by Title VII.[39] Additional Title VII provisions afford redress to individuals who are not directly attacked by discriminatory activity but are the victims of retaliation for their opposition to such activity.[40]

Congress can override the default prudential standing requirements and authorize anyone who satisfies Constitutional standing requirements to bring a claim.[41] Absent such an exception, the plaintiff must fulfill both the Constitutional and prudential standing requirements.[42] In the case of the empathetic white male, some courts rely on Title VIII's broad definition of "persons aggrieved" to loosen the prudential limitations, and apply a more permissive approach to Title VII.[43] This reading has resulted in more empathetic white males surviving initial standing requirements,

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connection between the assertedly unlawful conduct and the alleged injury").

34. For detailed discussion of prudential limitations, see LEWIS, *supra* note 29, at 512.

35. *See* Tileston v. Ullman, 318 U.S. 44 (1943).

36. Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 216-27 (1974). *See also* Flast v. Cohen, 392 U.S. 83, 102-03 (1968).

37. Allen v. Wright, 468 U.S. at 751.

38. *See* Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. at 153. In creating the zone of interests test, the Supreme Court rejected the "legal interest" test because it required a finding on the merits of the case rather than a pure standing decision, therefore, it enlarged the class of plaintiffs eligible to sue. *Id.* at 154-56.

39. *Supra* note 12.

40. *Infra* note 114 and accompanying text.

41. Childress v. City of Richmond, 134 F.3d 1205, 1208 (4th Cir. 1998) (Luttig, J., concurring).

42. *Id* Both requirements must be fulfilled under the term of art definition because Congress did not provide a provision overriding the prudential limitations. *Id.*

43. *Infra* notes 63-80 and accompanying text. *See generally*, Chandler v. Fast Lane, Inc., 868 F. Supp. 1138 (E.D. Ark. 1994) (permitting white plaintiff to challenge discriminatory hiring and promotion practices directed only against African-American employees).

allowing courts to hear the merits of their cases.

D. Hostile Environment

Empathetic white male plaintiffs raise Title VII actions exclusively under the hostile environment theory of harassment or retaliation.[44] No determinative rationale exists for the empathetic white male bringing exclusively hostile environment claims. However, this result may be explained by the hostile environment claim's status as the only action in the employment context that specifically refers to the environment created by discrimination. As a result, it opens doors to those working in such an environment, who are not targeted.[45]

Although Title VII's statutory language does not expressly prohibit harassment, courts have broadened Title VII's scope by recognizing harassment as a prohibited form of discrimination.[46] No court considered hostile environment[47] claims actionable under Title VII[48] until the 1981 case of *Bundy v. Jackson*.[49] Prior to this decision

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44. Harassment in violation of Title VII occurs in two forms: quid pro quo and hostile environment. Under quid pro quo, "sexual harassment occurs whenever an individual explicitly or implicitly conditions a job, a job benefit, or the absence of a job detriment, upon an employee's acceptance of sexual conduct." Nichols v. Frank, 42 F.3d 503, 511 (9th Cir. 1994). *See infra* notes 113-14 and accompanying text. *See also* Torrey, *supra* note 5, at 376-82 (noting that there are two ways in which the empathetic white male can bring an action for indirect discrimination).

45. Consequently, empathetic white males theorize that exposure to such environment is sufficient when accompanying by harm to such exposure. *See infra* note 63 and accompanying text.

46. For requirements under hostile environment claims, see *infra* notes 51-57 and accompanying text. *See generally* Katherine H. Flynn, *Same-Sex Sexual Harassment: Sex, Gender and the Definition of Sexual Harassment Under Title VII*, 13 GA. ST. U. L. REV. 1099 (1997). *See also* MACKINNON, *infra* note 50, at 57-99.

47. 29 C.F.R. § 1604.11(a) (1981). The E.E.O.C. regulations define sexual harassment as "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . when . . . such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment." *Id.*

48. *See, e.g.*, Tomkins v. Public Serv. Elec. & Gas Co., 422 F. Supp. 553, 556 (D.N.J. 1976), *rev'd*, 568 F.2d 1044 (3d Cir. 1977) (holding sexual harassment and sexual assault are not actionable as discrimination under Title VII); Miller v. Bank of Am., 418 F. Supp. 233, 235-36 (N.D. Cal. 1976), *rev'd*, 600 F.2d 211 (9th Cir. 1979); Corne v. Bausch & Lomb, 390 F. Supp. 161, 163 (D. Ariz. 1975).

49. 641 F.2d 934, 943-45 (D.C. App. 1981). The Supreme Court affirmed the principal of

plaintiffs relied on traditional tort theories to argue harassment.[50]

In hostile environment claims,[51] the plaintiff must prove the following elements: 1) plaintiff belongs to a protected class;[52] 2) the conduct in question was unwelcome;[53] 3) the harassment was based on a prohibited classification—sex, race, or national origin;[54] 4) the harassment was sufficiently severe or pervasive to create an abusive

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hostile environment claims in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 66 (1986) (stating that "a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive working environment.").

The Supreme Court noted that sexual harassment is an equally "arbitrary barrier" to workplace equality. *Id.* at 67 (quoting Henson v. City of Dundee, 682 F.2d 897, 902 (11th Cir. 1982)). Furthermore, the Court held that because Title VII covered all terms and conditions of employment, the language of Title VII sufficiently reached harassment. *Meritor*, 477 U.S. at 64-65. *See also*, EPSTEIN, *supra* note 9, at 360.

Initially, hostile environment claims were available only to victims of sexual harassment, but the courts have subsequently allowed the harassment theory to apply to all protected classes. *See, e.g.*, Davis v. Monsanto Chemical Co., 858 F.2d 345, 349 (6th Cir. 1988) (allowing racial harassment claims). However, the requirements for racial harassment are not completely congruent. According to *Davis*, "all that the victim of racial harassment need show is that the alleged conduct constituted an unreasonably abusive or offensive work-related environment or adversely affected the reasonable employee's ability to do his or her job." *Id.* at 349.

50. EPSTEIN, *supra* note 9, at 352-57. Epstein noted that under traditional tort theories, harassment could be tried under assault and battery, insult, offensive battery, intentional infliction of emotional distress, or invasion of privacy, depending on the severity of the harassment. *Id.* at 352-53. *See* CATHERINE MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 57-99(1979) (explaining why harassment constitutes discrimination in the workplace). *But cf.* Ellen Paul, *Sexual Harassment as Sex Discrimination: A Defective Paradigm*, 8 YALE L. & POL. REV. 333 (1990).

51. The EEOC guidelines on discrimination define hostile environment harassment as conduct that "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment." 29 C.F.R. § 1604.11(a)(3) (1998).

52. *Id.*

53. Unwelcome conduct includes "sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature." C.F.R. § 1604.11(a) (1998). Such conduct also includes "non-sexual harassing acts" directed though physical force or verbal attacks because of a prohibited classification. *Meritor*, 477 U.S. at 68. *But see* Carr v. Allison Gas Turbine Div. Gen. Motors Corp., 32 F.3d 1007, 1008 (7th Cir. 1994) (calling "welcome sexual harassment" an "oxymoron").

The requirement that the conduct be unwelcome in itself is problematic for the empathetic white male, even if the court affords him standing. "Welcomeness" itself presumes targeting, to which the empathetic white male is not subject by definition as a victim of "indirect discrimination."

54. Jones v. Flagship Int'l, 793 F.2d 714, 719 (5th Cir. 1986) (stating that the plaintiff must show "but for the fact of her sex [or race] the plaintiff would not have been the object of harassment").

working environment;[55] and 5) there is some basis for imputing liability to the employer.[56] Furthermore, the harassing conduct must affect a term, condition, or privilege of employment.[57]

E. Application of Standing Principles Under Title VII Hostile Environment Claims[58]

While the federal courts generally afford standing to people of all classifications under Title VII, they are split on whether to grant standing to white males where the only targets of the unlawful activity are minorities and females.[59] Generally, empathetic white males who assert a denial of tangible benefits, such as pay[60] or denial of a promotion,[61] have more success on the standing issue than those

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55. In *Harris v. Forklift Systems*, the Supreme Court articulated a totality of the circumstances approach to determine the existence of a hostile environment:

> [W]hether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.

510 U.S. 17, 23 (1993). The *Harris* test is echoed by the E.E.O.C.'s sexual harassment guidelines. *See* 29 C.F.R. § 1604.11(b).

Prior to the Supreme Court's decision in *Harris v. Forklift Systems*, some circuit courts required plaintiffs alleging hostile environment to establish that such harassment seriously impaired their psychological well being. *See* Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir.1982). *See also* Scott v. Sears, Roebuck & Co., 798 F.2d 210, 213-14 (7th Cir. 1986) (finding that the "demeaning conduct and sexual stereotyping [did not] cause such anxiety and debilitation to the plaintiff that working conditions were 'poisoned' within the meaning of Title VII").

56. *See* Collins v. Baptist Memorial Geriatric Ctr., 937 F.2d 190, 195 (5th Cir. 1991); Swentek v. USAir, Inc., 830 F.2d 552, 557 (4th Cir. 1987); Henson v. City of Dundee, 682 F.2d at 905.

The appropriate standard for employer liability in hostile environment cases is widely disputed. For a comprehensive presentation of recent case law, see Debra L. Raskin, *Sexual Harassment in Employment*, *in* ALI-ABA COURSE OF STUDY: EMPLOYMENT DISCRIMINATION AND CIVIL RIGHTS ACTIONS IN FEDERAL AND STATE COURTS, at 1288-97 (1997).

57. *Meritor*, 477 U.S. at 67 (citing Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972)).

58. See generally Torrey, *supra* note 5, for another perspective of who should be afforded standing under Title VII.

59. Torrey, *supra* note 5, at 365.

60. Peters v. City of Shreveport, 818 F.2d 1148, 1165-66 (5th Cir. 1987); Patee v. Pacific Northwest Bell Tel. Co., 803 F.2d 476, 478 (9th Cir. 1986).

61. *See, e.g.*, Bastian v. Barnes & Reinecke, Inc., No. 85 C. 8041 (N.D. Ill. Dec. 5, 1985)

asserting harm to vital relationships and working conditions.[62]

1. Broad Approach To Standing

Many courts hold that any plaintiff who suffers an injury due to an employer's unlawful business practice is sufficiently aggrieved to have standing to file a civil action.[63] These courts adopt the belief that standing for civil rights violations should be as broad as possible.[64]

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62. *See* Childress v. City of Richmond, 134 F.3d 1205 (4th Cir. 1998). *Cf.* However, courts relying solely on Title VIII require some assertion that loss of associational benefits occurred due to the harassment of the other classes of persons. *See infra* note 84 and accompanying text.

63. Novotny v. Great Am. Fed. Sav. & Loan Ass'n, 584 F.2d 1235, 1244-45 (3d Cir. 1978) (affording male standing to sue following discharge because "his actions and advocacy stood in the path of a plan to deprive women of their equal opportunity rights"); EEOC v. Bailey, 563 F.2d 439, 452 (6th Cir. 1977) (holding that EEOC could bring suit based on white female's charge of discrimination against blacks); Waters v. Hueblein, 547 F.3d 466, 469-70 (9th Cir. 1976) (affording standing to white female to redress discrimination against blacks and Spanish-surnamed employees); Hackett v. McGuire Bros. Co., 445 F.2d 442, 446 (3d Cir. 1971) (granting standing to pensioner for an unlawful employment practices under Title VII even though he was no longer an employee); Donnelly v. Rhode Island Bd. of Governors for Higher Educ., 929 F. Supp. 583, 590 (D.R.I. 1996) (granting standing to various professionals who brought suit against university system for discriminatory wage structure); Allen v. American Home Foods, Inc., 644 F. Supp. 1553, 1557-58 (N.D. Ind. 1986) (affording standing to workers under the age of forty to sue under the ADEA); Bartleson v. Dean Witter Co., 86 F.R.D. 657, 665 (E.D. Pa. 1980) (affording standing to white female to sue for discrimination against blacks).

Several lower courts follow the general rationale to permit standing to non-attacked individuals. *See* Torrey, *supra* note 6, at 400 (citing Avagliano v. Sumitomo Shoji Am., Inc., 103 F.R.D. 562, 572 n.15 (S.D.N.Y. 1984); Smithberg v. Merico, Inc., 575 F. Supp. 80, 82-83 (C.D. Cal. 1983); Richardson v. Restaurant Mktg. Ass'n, 527 F. Supp. 690, 694-95 (N.D. Cal. 1981); Bartelson v. Dean Witter & Co., 86 F.R.D. 657, 665 (E.D. Pa. 1980); NOW v. Sperry Rand Corp., 457 F. Supp. 1338, 1344-47 (D. Conn. 1978); EEOC v. McLemore Food Stores, Inc., 25 Fair Empl. Prac. Cas. (BNA) 1356, 1357 (W.D. Tenn. 1977)); *Cf.* Badillo v. Central Steel & Wire Co., 495 F. Supp. 299, 305 (N.D. Ill. 1980).

64. *See* Huff v. N.D. Cass Co., 485 F.2d 710, 714 (5th Cir. 1973); Rosen v. Public Serv. Elec. and Gas Co., 477 F.2d 90, 94 (3d Cir. 1973).

See also Hackett v. McGuire Bros., Inc. 445 F.2d 442, 446-47 (3d Cir. 1971). In *Hackett*, the court discussed its approach to the standing doctrine in Title VII litigation, stating:

> The national public policy reflected . . . in Title VII of the Civil Rights Act of 1964 . . . may not be frustrated by the development of overly technical judicial doctrines of standing or election of remedies. If the plaintiff is sufficiently aggrieved so that he claims enough injury in fact to present a genuine case or controversy in this Article III sense, then he should have standing to sue in his own right and as a class representative.

Additionally, the Equal Employment Opportunity Commission ("EEOC") consistently confers standing to any person "aggrieved" under Title VII, including individuals who are not members of the class targeted by unlawful employment practices.[65]

Those courts that do grant broad standing believe that males and Caucasians have a protectable interest in harmonious relationships with members of another gender or race.[66] This camp of opinion justifies its holding with Title VIII jurisprudence.[67] The most notable case in this line of Title VIII precedent is the Supreme Court's decision in *Trafficante v. Metropolitan Life Insurance Co.*[68] In *Trafficante*, the Court held that white tenants of an apartment complex had standing to sue under Title VIII for their landlord's discriminatory housing practices against minorities.[69] The Court recognized the white tenants' loss of the social benefit of living in an integrated community.[70] Such advantages included loss of business and professional advantages that would have accrued from living with members of minority groups.[71] Furthermore, the Court recognized the stigmatization of the plaintiffs as residents of a white ghetto as a tangible harm resulting from the landlord's

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Id. at 446-47.

A majority of the circuits adopts a broad view of standing in Title VII litigation. *See generally* Senter v. General Motors Corp., 532 F.2d 511, 517 (6th Cir. 1976) (citing Hadnott v. Laird, 463 F.2d 304, 311 n.21 (D.C. Cir. 1972); Graniteville Co. v. EEOC, 438 F.2d 32, 36 (4th Cir. 1971); Carr v. Conoco Plastics, Inc. 423 F.2d 57, 65 (5th Cir. 1970)).

65. EEOC Decision No. 70-09, 1973 EEOC Decision (CCH) ¶ 6026, at 4049 (July 8, 1969) . The EEOC has stated that it believed it clear then an employee's legitimate interest in the terms and conditions of his employment comprehends his right to work in an atmosphere free from unlawful employment practices and their consequences. Under the original provisions of Title VII, the EEOC played only the roles of investigation and conciliation. *See* SULLIVAN ET AL., *supra* note 13, § 12.1 at 539-40. However, under the 1972 amendments to Title VII, Congress substantially altered the structure of the EEOC, granting the EEOC the power to bring suits themselves to challenge discrimination. *Id.* at 540.

66. Childress v. City of Richmond, 120 F.3d 476, 481 (4th Cir. 1997); EEOC v. Mississippi College, 626 F.2d 477, 482 (5th Cir. 1980); EEOC v. Bailey Co., 563 F.2d 439, 452 (6th Cir. 1977). The *Bailey* court stated that "[f]or several reasons, *Trafficante* requires us to hold that the definition of 'a person claiming to be aggrieved' under Title VII includes a white person . . . who may have suffered from the loss of benefits from the lack of association with racial minorities at work." 563 F.2d at 452.

67. For a detailed discussion of Title VIII, see *supra* notes 14-18 and accompanying text.

68. 409 U.S. 205 (1972).

69. *Id.* at 208.

70. *Id.* at 209-10.

71. *Id.* at 208.

discrimination.[72] The harm resulting from discriminating against Black persons in the apartment community qualified the white plaintiffs as "persons aggrieved"[73] under the Civil Rights Act of 1968 because they were injured by a discriminatory housing practice.[74]

Courts granting standing to the empathetic white male find that *Trafficante* compels them to read the language of Title VII as broadly as that of Title VIII.[75] This is not only because both Title VII and Title VIII are part of the Civil Rights Acts, but also because both incorporate the language "persons aggrieved."[76] Furthermore, courts adopting this broad approach view the language of Title VII and Title

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72. 409 U.S. at 208.

73. *Id.* at 209-10. The Supreme Court held that the definition of "person aggrieved" contained in section 810(a) of Title VIII "showed 'a congressional intention to define standing as broadly as is permitted by Article III of the Constitution.'" *Id.* at 209 (quoting Hackett v. McGuire Bros., 445 F.2d 442 (3d Cir. 1971)).

74. 409 U.S. at 212.

75. *See* EEOC v. Bailey Co., Inc., 563 F.2d at 452 (stating that "*Trafficante* requires to hold that the definition of 'a person claiming to be aggrieved' under Title VII includes a white person . . . who may have suffered from the loss of benefits from the lack of association with racial minorities at work"). *See also* Stewart v. Hannon, 675 F.2d 846, 848-50 (7th Cir. 1982); Winston v. Lear Siegler, 558 F.2d 1266 (6th Cir. 1977); Waters v. Heublein, 547 F.2d 466, 469-70 (9th Cir.1976).

76. The definition of the prohibited conduct in Title VII differs slightly from that in Title VIII. Title VII makes it illegal to discriminate against any individual "because of such individual's race . . . [or] sex . . . ." 42 U.S.C. § 2000e2(a)(1). Title VIII, the housing statute, makes it unlawful "[t]o refuse to sell or rent . . . to any person because of race . . . [or] sex . . ." or "[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling . . . because of race . . . [or] sex." 42 U.S.C. 3601(a)(2). *See* Childress v. City of Richmond, 120 F.3d 476, 481 n.6 (4th Cir. 1997), *rev'd,* 134 F.3d 1205, 1209 ("Because the only reasonable reading of [Title VIII] is a prohibition against discrimination 'against any person because of that person's race or sex,' we attach no significance to this difference in wording")

See also Brief of the Equal Employment Opportunity Commission as *Amicus Curiae* at 15-16 [hereinafter EEOC Br.]; Childress v. City of Richmond, Va., 120 F.2d 476 (4th Cir. 1997) (No. 96-1585). The EEOC cites five reasons why *Trafficante* compels adoption in the Title VII context: 1) the aggrieved person language in Title VII and Title VIII are "strikingly similar," EEOC Br at 15-16 (*citing* EEOC v. Bailey Co., 563 F.2d 439, 452 (6th Cir. 1977)); 2) the design of Title VII and Title VIII are similar, and place particular importance in the empowering individuals to compel the end of discrimination, *id.* at 15-16, (citing Bailey Co., 563 F.2d at 453); 3) *Trafficante* cited Title VII cases with approval, *id.* (citing Hackett v. McGuire Bros. Co., 445 F.2d 442 (3rd Cir. 1971) (holding that Congress meant to define standing under Title VII as broadly as Article III would permit)); 4)the general purpose of outlawing discrimination is the same and the face that one applies to employment and the other to housing does not warrant a difference in standing requirements, *id.*; and 5) the agencies empowered in both Title VII and Title VIII have permitted whites to challenge discrimination against blacks. *Id.*

VIII as sufficiently similar to afford the same interpretation to each.[77] Therefore, after *Trafficante's* textual interpretation, the lower courts extended the definition of "persons aggrieved" in Title VII cases to include plaintiffs asserting harm from indirect discrimination.[78]

The empathetic individual need not always be male in those jurisdictions where courts loosely grant standing. In *Waters v. Heublein, Inc.*, the Ninth Circuit granted standing to a white female who sued her employer for discrimination against women, as well as Black and Spanish-surnamed individuals.[79] Finding Title VII employment actions similar to Title VIII housing actions, the court rationalized its grant of standing under the premise that interpersonal contacts with people of other races is as important in the workplace as it is in the home.[80]

2. Middle Approach to Granting Title VII Standing

Under Title VII, most courts have broadened their interpretation of the statute only moderately. These courts generally hold that if a plaintiff establishes a tangible harm, then he or she is a person aggrieved under Title VII, regardless of whether he or she was the actual target of the harassment.

The Fifth Circuit adopted this moderate approach in *EEOC v. Mississippi College*, holding that a person can make a discrimination charge based on actions taken against a group of which he is not a

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77. *See supra* notes 14-28 and accompanying text.

78. *See supra* note 19 and accompanying text.

79. 547 F.2d 466 (9th Cir. 1976). Plaintiff, like the plaintiff in *EEOC v. Mississippi College*, 626 F.2d 477 (5th Cir. 1980), originally filed a complaint to the EEOC solely for sex discrimination and later added claims in an amended complaint. *Waters*, 547 F.2d at 467-68.

80. *Id.* at 469. Subsequent decisions widely quote the Ninth Circuit's holding that:

> [I]nterpersonal contacts—between members of the same or different races—are no less a part of the work environment than of the home environment. Indeed, in modern America, a person is as likely, and often more likely to know his fellow workers than the tenants next door or down the hall. The possibilities of advantageous personal, professional or business contacts are certainly great at work as at home. The benefits of interracial harmony are as great in either local. The distinction between laws aimed at desegregation and laws aimed at equal opportunity are illusory. These goals are opposite sides of the same coin.

Id.

member.[81] In *Mississippi College*, the Fifth Circuit found the plaintiff, a white female, to be a "person aggrieved" because she claimed that the defendant infected her work environment with racial discrimination.[82] The Court did not decide the sufficiency of her claim.[83] It did state, however, that a plaintiff must allege a specific injury relating to the deprivation of the benefits of a working environment free from discrimination.[84]

However, even if a plaintiff does allege a specific injury, most courts departing from the broad grant of standing also require the plaintiff to allege that his employer deprived him of such benefits because of his gender or race. In *Patee v. Pacific Northwest Bell Telephone Co.*, a male employee brought a sex discrimination action against his employer, alleging that because he worked in a predominantly female group he received less pay than those in a predominantly male group performing similar functions.[85] In *Patee*, the Ninth Circuit refused to apply *Trafficante,* limiting *Trafficante's* application to cases where the plaintiff asserts a harmful impact because of the denial of association with members of other groups.[86]

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81. 626 F.2d 477, 483 (5th Cir. 1980). However, the Court limited its holding stating, "Our decision today does not allow [plaintiff] to assert the rights of others. We hold no more than that, provided she meets the standing requirements imposed by Article III, [plaintiff] may charge a violation of her own personal right to work in an environment unaffected by racial discrimination." *Id.* The Court further limited its decision exclusively to racial discrimination. *Id.*.

82. For discussion of the definition of "persons aggrieved," see *supra* note 12 and accompanying text. 626 F.2d at 481.Mississippi College is a religious educational institution that had a written policy affording hiring preference to Baptists except where necessary to maintain academic standards. *Id.* In her amended complaint, the plaintiff alleged that the College where she worked discriminated against blacks in the recruitment and hiring of faculty. *Id*

However, originally, plaintiff filed a complaint based on sex discrimination in hiring because the college denied her a position for which she believed she was qualified. *Id.* at 480. Pursuant to her complaint, the EEOC issued a "Subpoena Ad Testificandum/Duces Tecum." After which, plaintiff amended her complaint to allege racial discrimination. *Id.* at 480-81.

83. 626 F.2d at 477. The Fifth Circuit vacated the Southern District of Mississippi's decision and remanded the case to the district court for factual findings under Title VII principals. *Id.* at 489.

84. *Id.* at 483. *See also* Stewart v. Hannon, 675 F.2d 846, 849 (7th Cir. 1982) (recognizing the district court's denial of a cause of action similar to the approach taken in *EEOC v. Mississippi College*, "because [plaintiff] had failed to allege that the discrimination deprived her of the benefits of an integrated working environment").

85. 803 F.2d 476, 479 (9th Cir. 1986).

86. *Id.* at 478-79.

The court required, in the alternative that the males assert discrimination against them "because they were men."[87]

3. Narrow Approach To Granting Title VII Standing

Before courts extended the analysis in *Trafficante* to Title VII, the presumption underlying Title VII harassment actions was that only those who were targets of such harassment had an actionable claim.[88] The pre-*Trafficante* premise was that only those who were the actual focus of the harassment had suffered a tangible harm, and that Congress did not intend Title VII to be so broad as to provide associational rights.[89] Today, a minority of courts adheres to this interpretation and requires the plaintiff to be a direct, targeted victim of the illegal activity or to be a member of the identified protected class.[90]

One principal justification under this strict approach lies in same-sex harassment jurisprudence, under which some courts deny sexual harassment standing to a heterosexual male harassed by another heterosexual male.[91] These courts reason that because the plaintiff

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87. *Id.* The court said that its prior precedent in *Spaulding v. University of Washington*, 740 F.2d 686, 709 (9th Cir. 1984), required it "to conclude that the male workers cannot assert the right of their female co-workers to be free from discrimination based on their [the female's] sex." 803 F.2d at 478.

88. *See supra* note 68 and accompanying text. *See, e.g.*, Linskey v. Heidelberg Eastern, Inc., 470 F. Supp. 1181, 1187 (E.D.N.Y. 1979) ("Since plaintiff is a male, he lacks standing under Title VII to present that claim").

89. See discussion of *Rodkey v. Trans World Airlines*, 1997 WL 823568 (W.D. Mo. Oct. 7, 1997), *infra* notes 93-95 and accompanying text. An exception is made for retaliation claims, which many view as associational by definition. *See infra* notes 113-20 and accompanying text.

90. *See* Allen v. Wright, 468 U.S. 737 (1984) (denying standing to parents of black children who attended public schools in districts undergoing desegregation because the alleged injury was not fairly traceable to the government's alleged unlawful conduct); Robinson v. PPG Indus., 23 F.3d 1159 (7th Cir. 1994) (requiring plaintiff to fall within the protected age class of persons between the ages of 40 and 70 to have standing under ADEA); Patee v. Pacific Northwest Bell Telephone Co., 803 F.2d 476, 479 (1986) (denying standing to male employees of a predominantly female department to sue because of sex-based wage discrimination against women); AFL-CIO v. Nassau County, 664 F. Supp. 64 (E.D.N.Y. 1987) (denying standing to "male county civil service employees who alleged they were underpaid because they worked at 'traditionally female jobs'" because "males did not claim they were discriminated against because they were men").

91. McWilliams v. Fairfax County Bd. Of Supervisors, 72 F.3d 1191 (4th Cir. 1996) (holding that harassment that is sexual in nature, but committed by heterosexual males against heterosexual males is not harassment because of sex). However, same-sex harassment

could not bring the suit on direct discrimination theory, there should be no standing for indirect discrimination.[92]

Similar to courts adopting the moderate or middle ground approach, courts that deny standing strictly rely on the theory that "the male [or white] workers do not claim that they have been discriminated against because they are men [or white]."[93] In *Rodkey v. Trans World Airlines,* a male plaintiff sued his employer for a hostile environment targeting and harassing his wife.[94] The Western District of Missouri granted Trans World Airlines summary judgment on the grounds that hostile environment claims must be gender-based.[95] While the disparaging remarks and pornographic material were personally offensive, the plaintiff failed to show that he was the

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jurisprudence is quickly evolving and determination on this theory may be altered once the Supreme Court issues its opinion in *Oncale v. Sundowner Offshore Services*, 83 F.3d 118 (5th Cir. 1996) (holding that Title VII does not allow a claim for same-sex sexual harassment).

92. Many courts have denied standing because the male or Caucasian has failed to assert a direct injury for the discrimination against others. *See* Torrey, *supra* note 5, at 381 n.85 (citing Ruffin v. County of Los Angeles, 607 F.2d 1276, 1281 (9th Cir. 1979), *cert. denied*, 445 U.S. 951 (1980) (prohibiting male plaintiffs from bootstrapping claims based upon alleged past discrimination against women in a distinguishable position); Linskey v. Heidelberg Eastern, Inc., 470 F. Supp. 1180, 1187 (S.D. 1981) (holding a male could not present claim of discrimination against women); EEOC v. Quick Shop Mkts., 396 F. Supp. 133 (E.D. Mo. 1975), *aff'd*, 526 F.2d 802 (8th Cir. 1975) (denying standing to parties attempting to enforce subpoenas in race discrimination investigation); EEOC v. National Mine Serv. Co., 8 Fair Empl. Prac. Cas. (BNA) 1233, 1234 (E.D. Ky. 1974) (prohibiting white union president from representing a class action based on discrimination against Black persons); Thomas v. Ford Motor Co., 396 F. Supp. 52, 62 (E.D. Mich. 1973), *aff'd*, 516 F.2d 902 (6th Cir.), *cert. denied*, 421 U.S. 988 (1975) (holding white plaintiff was not qualified to represent a class asserting discrimination against Black persons); Martin v. Safeway Trails, Inc., 59 F.R.D. 683, 684 (D.D.C. 1973) (finding that black male had no standing to represent female or national origin class in sex discrimination suit)). Torrey finds that discussion about plaintiffs' standing in these cases is either thin or non-existent. *Id.* at 381 n.85.

93. *Patee*, 803 F.2d at 478. *See supra* notes 79-85 and accompanying text. However, unlike the middle approach, which allows for the possibility that a victim of indirect discrimination allege facts that assert that he was discriminated against "because of his gender," courts following a strict approach find by definition that the empathetic white male was *not* discriminated against because of his gender, because the discrimination is targeted against those of a different gender. *See* Rodkey v. Trans World Airlines, 1997 WL 823568, at *8 (W.D. Mo. Oct. 7, 1997) (requiring plaintiff to show that he was the victim of "gender-based discrimination").

94. *Rodkey*, 1997 WL 823568, *1, *7 (W.D.Mo. Oct. 7, 1997). James Rodkey joined his wife's suit against Trans World Airlines alleging that the presence of pictures of nude and semi-nude females, sexually-oriented graffiti and snide remarks from coworkers about his wife constituted a hostile environment. *Id.*

95. *Id.* at *8.

victim of gender-based discrimination through differential treatment.[96]

The most recent decision adopting this strict approach to Title VII standing came out of the Fourth Circuit in *Childress v. City of Richmond.*[97] In *Childress*, white-male police officers sued the City of Richmond, Virginia for hostile environment and retaliation in violation of Title VII.[98] The officers alleged that their supervisor made several discriminatory remarks to and about female and Black police officers.[99] After complaining to the supervisor about his conduct through a complaint letter, the supervisor pulled the plaintiffs away from their police duties and advised them to retract the letter.[100] He further warned that failure to do so would result in harm to their jobs.[101]

The plaintiffs based their hostile environment claim on loss of teamwork and alleged that the supervisor's comments "created a chilling effect and a destruction of teamwork between officers of different races and sexes."[102] They also alleged that "the fulfillment of the teamwork concept [was] a vital and necessary term and condition of their employment contracts."[103]

The district court denied standing to the male police officers, finding that the officers were asserting the civil rights of others.[104] The court found this claim analogous to same-sex harassment claims

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96. *Id.*

97. 120 F.3d 476 (4th Cir. 1997), *rev'd en banc*, 134 F.3d 1205 (4th Cir.1998).

98. *Id.* at 478.

99. *Id.* The alleged remarks included the supervisor calling his female officers his "pussy posse" and "vaginal vigilantes" in front of both male and female officers. *Childress*, 907 F. Supp. 934, 938 (E.D. Va. 1995). The plaintiffs also alleged that the supervisor referred to a black female officer as a "mother-fucking worthless black bitch," a "no good black bitch" and a "most useless nigger." *Id.* The plaintiffs also allege that the supervisor said to three female officers, "Well, I see all my bitches are here, it must not be that time of the month." *Id.* at 937-38.

100. *Childress*, 907 F. Supp. at 938. The officers wrote a complaint letter to the precinct captain explaining the conduct. The letter did not mention the specific instances, but rather questioned the supervisor's mental stability and requested that he submit to an independent psychiatric exam. *Id.*

101. *Id.*

102. *Id.* The officers alleged that teamwork was a "'vital and indispensable working condition,' without which police officers and the public will be endangered." *Id.*

103. *Childress*, 907 F. Supp. at 938.

104. *Id.* at 939 (citing Inmates v. Owens, 561 F.2d 560, 561 (4th Cir. 1977)).

and granted summary judgment to the employer because the Fourth Circuit did not recognize same-sex harassment as a valid basis for a Title VII claim.[105] The district court rejected the notion of indirect discrimination holding that "[i]f 'protected class' is to have any definition other than 'all of humanity,' it must mean a class which is defined against, and protected with respect to, the alleged discriminator."[106]

In affirming the district court's opinion in its entirety, the Fourth Circuit rejected the popular notion that Title VII and Title VIII are congruent.[107] In his concurring opinion, Justice Luttig noted that Title VIII defines aggrieved person while Title VII does not.[108] Further, he inferred that Congress intended different meanings for the term "aggrieved person" across the two statutes.[109] Justice Luttig noted that "aggrieved person" has long been a "term of art" understood to identify only those who satisfy both prudential and constitutional standing limitations, which includes a general prohibition against third-party standing.[110] As a result, Justice Luttig concluded that because Congress included no specific definition of "persons aggrieved," the Court is compelled to read the term as it is ordinarily understood and not as Congress defined it in another context.[111] Such

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105. *Childress*, 907 F. Supp. at 939 (citing Mayo v. Kiwest Corp., 898 F. Supp. 335 (E.D. Va 1995) (prohibiting "same-sex claims because same-sex does not amount to discrimination 'because of' the plaintiff's gender"). *See supra* notes 91-92.

106. *Childress*, 907 F. Supp. at 939.

107. *Childress*, 134 F.3d 1205 (4th Cir.1998). It should be noted, however, that the Fourth Circuit originally reversed the district court's opinion, subscribing majority of the circuits granting standing under Title VII to empathetic white males and adopting Title VIII interpretation of "persons aggrieved." 120 F.3d 476, 481 (4th Cir. 1997). *Supra* notes 19-21, 75-78 and accompanying text.

108. For Title VIII's definition of "aggrieved person," see *supra* note 10 and accompanying text.

109. *Childress*, 134 F.3d 1205, 1210 (Luttig, J., concurring).

110. *Id.* at 1208-09. *See also supra* notes 19-21 for a discussion of Justice Luttig's aversion to the application of Title VIII to Title VII interpretation. *See supra* notes 33-44 and accompanying text.

111. 134 F.3d at 1210. Justice Luttig states:

> In notable contrast to Title VIII, Title VII does not define the term "aggrieved person." Not only does the complete absence of a definition in Title VII imply that Congress chose to incorporate the "term of art" definition of "aggrieved person," which as discussed, includes prudential standing limitation; but the presence of a definition of the term in Title VIII juxtaposed with the absence of such a definition in Title VII strongly evidences that Congress intended different meanings for the term "aggrieved

a reading of "persons aggrieved" therefore compelled the court to deny standing because the empathetic white male asserts the rights of a third party.[112]

F. Associational Rights Under Other Civil Rights Legislation

Even under traditionally narrow standing principles, those outside the protected class would have standing, particularly if they took specific action.[113] Section 704 of Title VII protects employees from retaliation when they seek to enforce their Title VII rights or oppose practices believed to be prohibited by Title VII.[114]

At the same time, Title VII protects employees who oppose discriminatory practices by encouraging employees who witness discrimination to approach their employer first without fear of economic retaliation.[115] The promulgators of Title VII envisioned

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person" across the two statutes, further reinforcing the conclusion that "aggrieved person" in Title VII must be interpreted to incorporate prudential standing limitations.

Id.

112. *Id.* at 1210-11.

113. *See supra* notes 88-112 and accompanying text.

114. Section 704(a) provides that:

> (a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . to discriminate against any member thereof or applicant for membership because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

42 U.S.C. § 2000e-3. While section 703, *supra* note 10 and accompanying text, covers "any individual," Title VII's provision for retaliation only applies to "any employee or applicant for employment." *See infra* note 85. *See also* Robinson v. Shell Oil Co, 117 S. Ct. 843, 848 (1997) (holding that former employees are included within section 704(a)'s coverage); LEWIS, *supra* note 29 at 212.

See Chandler v. Fast Lane, 868 F. Supp. 1138, 1144 (E.D. Ark. 1994) (broadly defining section 704(a) opposition stating, "[A]n employee who exercises her authority to promote and employ African-Americans engages in protected 'opposition' to her employer's unlawful employment practice which seeks to deprive African-Americans of such benefits.").

The plaintiff need not demonstrate that the protested conduct actually violated Title VII, however, plaintiffs must have a reasonable belief that the conduct was unlawful. *See* Berg v. LaCrosse Cooler Co., 612 F.2d 1041 (7th Cir. 1980). *Accord,* Trent v. Valley Elec. Assoc. Inc., 41 F.3d 524 (9th Cir. 1994). 42 U.S.C. § 2000e-3.

115. *See* De Medina v. Reinhardt, 444 F. Supp. 573, 580 (D.D.C. 1978) (concluding that "tolerance of third-party reprisals would, no less than tolerance of third-party reprisals, deter persons from exercising their protected rights under Title VII," which would be contrary to

cooperation and voluntary compliance to be the preferred methods of eliminating discriminatory employment practices.[116] Furthermore, it is in society's best interest to afford the employer an opportunity to resolve the dispute before an employee heads to court for remedy.[117] Consequently, Congress envisioned that the individuals in the workplace would be the primary combatants to unlawful discrimination, not the courts.

Under the theory of retaliation, the plaintiff does not have to allege victimization from the actual harassment but only for the repercussions of opposing the harassment of the female and/or minority coworkers.[118] For example, in *Berg v. LaCrosse Coller Co.*, the Seventh Circuit held that it is a violation of Title VII section 704(a) for an employer to fire an employee because he opposed discrimination against a fellow employee.[119] After the plaintiff establishes the initial retaliation requirements, the case proceeds similarly to an individual disparate treatment case.[120]

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legislative intent); *and* EEOC v. Ohio Edison Co., 7 F.3d 541, 544 (6th Cir. 1993) (stating that the purpose of the ADEA "is to prevent fear of economic retaliation from inducing employees 'quietly to accept [unlawful] conditions'") (alteration in original) (quoting Mitchell v. Robert DeMario Jewelry, 361 U.S. 288, 292 (1960)).

116. Jones v. Flagship Int'l, 793 F.2d 714, 726 (5th Cir. 1986) (citing Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974)).

117. *Jones*, 793 F.2d at 726. "An employer has a strong interest in having an opportunity to settle equal employment disputes through conference, conciliation and persuasion before an aggrieved employee resorts to a lawsuit." *Id.*

118. *See, e.g.*, Maynard v. City of San Jose, 37 F.3d 1396 (9th Cir. 1994). In *Maynard*, the male plaintiff testified about alleged discriminatory hiring practices by defendant. *Id.* at 1399-1400. However, the plaintiff in *Maynard*, was never subject to the discrimination to which he testified. *Id.*

See also Holt v. JTM Indus., 89 F.3d 1224, 1226 (5th Cir. 1996) (holding that the anti-retaliation provision of the ADEA, 29 U.S.C. § 623(a), which is identical to Title VII's provision, "permits third parties to sue under [section] 623(d) if they have engaged in the enumerated conduct, even if the conduct was on behalf of another employee's claim of discrimination.").

119. 612 F.2d 1041 (7th Cir. 1980). *See also* Rucker v. Higher Educ. Aids Bd., 669 F.2d 1179, 1182 (7th Cir. 1982) (holding that it is unlawful to retaliate against an individual who opposed discrimination against a co-worker).

120. To proceed under section 704, plaintiff must produce evidence of

> (1) participation in proceedings or opposition protected by section 704; (2) employer's awareness of plaintiff's participation or opposition; (3) sustaining an adverse condition of employment thereafter; and (4) a causal connection between the participation or opposition and the adverse employment condition.

LEWIS, *supra* note 29, at 210 (1997) (citing EEOC v. Crown Zellerbach Corp., 720 F.2d 1008,

Indeed, courts have dismissed claims of indirect discrimination while allowing claims for retaliation to proceed. In *Lyman v. Nabil's, Inc.* a male employee brought action against his former employer alleging hostile environment and retaliation in violation of Title VII.[121] The court dismissed the plaintiff's claim for discrimination.[122] However, the court granted standing to the plaintiff for retaliation because he resisted the employer's attempts to retaliate against the complaining women.[123] The court further supported its grant of standing because the plaintiff supported women who complained to him about their employer's unlawful conduct.[124] The court held that this conduct amounted to an informal complaint and granted the plaintiff standing for retaliation in violation of Title VII.[125]

Congress has not left the notion of associational harm in the civil rights context unaddressed for the conjecture of the court. Other civil rights legislation does afford a remedy for the deprivation of associational rights. Through the Americans with Disabilities Act ("ADA"), Congress specifically protected individuals who have a known relationship or association with a disabled individual by prohibiting discrimination against such individuals.[126] As previously

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1012 (9th Cir. 1983)).

For a comprehensive discussion of section 704 and Title VII in general, see LEWIS, *supra* note 29. *See also* Douglas E. Ray, *Title VII Retaliation Cases: Creating a New Protected Class*, 58 U. PITT. L. REV. 405, 422-24 (1997).

121. 903 F. Supp. 1443, 1445 (D. Kan. 1995). A male plaintiff, Lyman, specifically alleged that he was present when the employer touched female employees and directed offensive language toward them. Plaintiff further alleged that the women complained to him, which caused emotional distress. *Id.*

122. *Id.* at 1446-49. The court, in a lengthy discussion, rejected Title VII standing in cases where the men attempt to assert a tangible harm where they were not personally victimized.

123. 903 F. Supp. at 1448.

124. *Id.*

125. *Id.*

126. 42 U.S.C. 12100 *et seq* (1990). The statute provides that:

> (a) No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.
>
> (b) As used in subsection (a), the term "discrimination" includes . . .
>
> (4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability or an *individual with whom the qualified individual is known to have a relationship or association[.]*

demonstrated, Title VII jurisprudence extends additional associational rights, to some extent, to individuals targeted because of their personal associations with protected individuals outside of the employment relationship.[127]

II. ANALYSIS

The analysis adopted by the majority of the circuits that affords standing to those not directly discriminated against because of their race, sex, or national origin is flawed.[128] First, Title VII specifically affords a remedy to those who are not the direct targets of discrimination but have been deprived of associational privileges under section 704 of Title VII.[129] Consequently, the empathetic white male is not left without remedy for his exposure to a hostile environment. However, this remedy is available only if he specifically opposes the discriminatory conduct and is subsequently subjected to retaliation.[130] This remedy essentially limits the scope of Title VII to discrimination, which continues despite warning of its illegality. As a result, there is an imputed condition in Title VII that non-targeted individuals must speak against the prohibited conduct.[131] Providing remedy where that condition is not met restricts the fundamental purpose of Title VII to eradicate discrimination.[132] Furthermore, providing standing to the empathetic, white male who has turned directly to the courts for remedy, rather than exercising a personal effort to eradicate the conduct that he witnessed, is contrary

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Id § 12112(a) & (b) (emphasis added).

127. *See* Parr v. Woodmen of the World Life Insurance Co, 791 F.2d 888 (11th Cir. 1986) (constructing Title VII liberally to provide standing to a white man who was not hired as an insurance salesman due to his interracial marriage); Chacon v. Ochs, 780 F. Supp. 680 (C.D. Ca. 1991) (affording standing to caucasian woman who brought Title VII action alleging that she was subjected to hostile work environment because she was married to a Latino man).

128. *See supra* notes 63-65 and accompanying text.

129. 42 U.S.C. § 2000e-3. *See also supra* note 114 and accompanying text.

130. 903 F. Supp. 1443, 1448. *See* Lyman v. Nabil's, 903 F. Supp. 1443 (1986). *See also supra* notes 121-25 and accompanying text.

131. *See supra* notes 115-17 and accompanying text.

132. This is because such a broad grant of standing disables the internal remedy of employee opposition without the need of judicial intervention. *See supra* note 116 and accompanying text.

to Congress's intent.[133]

Second, Courts should look to the ADA and reject any inferred congressional intent to incorporate associational rights in the ADA as grounds for standing under Title VII.[134] As *expresio unius,* the fact that Congress expressly included associational rights in the ADA infers that it intended to exclude such privileges under Title VII unless specifically provided.

Third, even if those courts granting the broadest standing have a legitimate reason for doing so, their analysis of the empathetic, white male's facts are flawed.[135] While it is plausible to analogize the harm suffered by the empathetic, white male to that of the direct target, the courts failed to make any inquiry into whether the empathetic, white male simultaneously *benefited* from the harassment toward the targeted victims.[136] Consequently, these courts may have provided remedy where there existed not only a speculative harm, but also a tangible benefit arising from the unlawful activity.[137]

Finally, almost all of the courts that have chosen to extend Title VIII interpretation to Title VII's definition of "persons aggrieved" wrote their opinions before Congress amended Title VII in 1991.[138] Knowing that such a definition as inclusion would allow for exceptions to prudential standing limitations, Congress still failed to incorporate their own definition of "persons aggrieved" into Title VII or provide a reference to Title VIII for guidance on the standing issue.[139]

With the knowledge of the "persons aggrieved" term of art definition used outside the context of Title VII, courts exceeded their authority to extend Title VIII jurisprudence to Title VII.[140] Such an

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133. *See supra* note 117 and accompanying text.

134. *See* 42 U.S.C. § 12112(a). *See also supra* notes 80-127 and accompanying text.

135. *See supra* notes 63-80 and accompanying text.

136. *See* Childress v. City of Richmond, 907 F. Supp. 934, 939 (E.D. Va.). "Where, as here a male supervisor is of the same sex as the male plaintiffs, and is actually alleged to be biased in their favor, those male plaintiffs cannot be said to be within a protected class with respect to the supervisor." *Id.*

137. *Id.*

138. *See generally supra* notes 63-67 and 75-78. The range of dates of the cases in the classification of "Broad Approach to Standing" is 1972 to 1986.

139. Childress v. City of Richmond, 134 F.3d 1205, 1209 (4th Cir. 1998) (J. Luttig, concurring). *See also supra* note 28 and accompanying text.

140. *See supra* notes 26-28 and accompanying text.

expansion of Title VII may support its goals of eradication of discrimination in the workplace, but it is Congress's role to effectuate such an expansion, not the courts.[141]

III. PROPOSAL

Unlawful discrimination targeted at women and Black persons infects the workplace harming many beyond those whom the violator has targeted.[142] Particularly in the case of hostile environment actions, all persons present in such an environment suffer harm. Furthermore, even those who traditionally would be viewed as beneficiaries of discrimination, such as white males, are increasingly enlightened about the ramification of discrimination and feel personally harmed.

However, the notion that the empathetic, white male appreciates the harm suffered by targets of harassment should not be a rationale for broadening standing. This is particularly true when Congress has imputed a condition precedent that the empathetic, white male oppose such activity before he may turn to the courts for relief.

The most obvious remedy to this conflict among the courts would be a return to strict interpretation of Title VII.[143] This proposal would include adopting an exclusive use of the term of art definition of "persons aggrieved," and a requirement that the empathetic, white male allege facts sufficient to show that he suffered from harassment "because of his sex."[144]

If Congress should desire to provide such standing, it could proceed along two avenues: 1) Congress could amend Title VII to include a right to assert claims for those present in the hostile environment, or those who are indirect victims of discrimination; or 2) Congress could provide a separate system of remedies in which perpetrators are forced to pay a separate fine for the harm that they have inflicted generally on society. This proposal would be consistent

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141. *See supra* notes 10-11 and accompanying text.

142. *See, e.g.*, Childress v. City of Richmond, 120 F.3d 476 (4th Cir. 1997); Patee v. Pacific Northwest Bell Telephone Co., 803 F.2d 476 (9th Cir. 1986).

143. *See supra* notes 88-112 and accompanying text.

144. *See supra* notes 26-28 and accompanying text. *See, e.g.*, Rodkey v. Trans World Airlines, 1997 WL 823568, *8 (W.D. Mo. Oct. 7, 1997).

with fines for violation of environmental standards or the like.

However, even if Congress grants such standing, the courts should require additionally that empathetic, white males rebut an inference that they benefited tangibly from the harassment directed at others. This procedure would help to prevent a windfall of unjust remedies being granted to opportunistic and passive witnesses to illegal conduct. Such an approach would provide a safeguard until the courts can refine their inquiries or until Congress provides more guidance in this vague area of Title VII.

CONCLUSION

Although Title VII created a unique mechanism to provide remedy to those outside the victimized class, the courts consistently undermine the retaliation provision by failing to require non-targeted individuals to oppose the illegal activity before the courts will intervene. The loosening of standing requirements under Title VII has incapacitated the pre-judicial remedies Congress anticipated to be the primary force to eradicate discrimination in the workplace. Unless Congress specifically implements a definition of "persons aggrieved" to include the empathetic white male, the courts are not doing society any favors by eliminating the personal responsibility of those in the workplace to oppose that which is unlawful.

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