Indirect Discrimination under Title VII: Expanding Male Standing to Sue for Injuries Received as a Result of Employer Discrimination Against Females

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INDIRECT DISCRIMINATION UNDER TITLE VII: EXPANDING MALE STANDING TO SUE FOR INJURIES RECEIVED AS A RESULT OF EMPLOYER DISCRIMINATION AGAINST FEMALES

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Abstract: Historically, both men and women have had the right to seek redress under Title VII of the Civil Rights Act of 1964 for injuries they have received as a result of sex discrimination. In recent years, the federal circuits have split on whether to give men standing in one particular category of such cases: employment discrimination cases where, although both men and women have been injured, the discrimination has been targeted only at women. The author analyzes the recent male standing cases in the context of basic standing principles and their past application to other types of Title VII plaintiffs. The author concludes that a restrictive reading of standing in these cases is inconsistent with traditional standing principles and with Title VII's stated purpose. Throughout the Article, the author offers suggestions to plaintiffs' attorneys who must fight the standing battle in sex discrimination cases.

Who has standing to protest sex discrimination under Title VII of the Civil Rights Act of 1964? Historically, both men and women have had the right to seek redress for injuries they have received as a result of sex discrimination. In recent years, however, the federal circuits have split on whether to give men standing in one particular category of such cases: employment discrimination cases where, although both men and women have been injured, the discrimination has been targeted only at women.3

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1. 42 U.S.C. § 2000e-1 to -17 (1982) [hereinafter "Title VII"]. In general, Title VII prohibits employment decisions based on race, color, religion, sex, or national origin.

2. See, e.g., Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669 (1983) (health insurance plan providing less favorable pregnancy benefits for spouses of male employees than for female employees violates Title VII by discriminating against male employees); City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978) (requiring female employees to make larger contributions to pension fund than male employees violates Title VII by discriminating against female employees).

3. "Traditional" sex discrimination is clearly at issue in the cases discussed in this Article. These cases are distinct from those holding that Title VII's prohibition against sex discrimination does not protect sexual preference, DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327 (9th Cir. 1979), transsexualism, Ulane v. Eastern Airlines, Inc., 742 F.2d 1081 (7th Cir. 1984), cert. denied, 471 U.S. 1017 (1985), effeminacy, Smith v. Liberty Mut. Ins. Co., 569 F.2d 325 (5th Cir. 1978), or transvestism, Sommers v. Budget Mktg, Inc., 667 F.2d 748 (8th Cir. 1982).
Although the Supreme Court has yet to address the issue, some courts, most notably the Ninth Circuit, have held that men do not have standing, but women do, to redress sex discrimination resulting in identical injuries to both under identical circumstances. Other courts, perhaps best represented by the Northern District of Indiana, have held to the contrary, finding that men can sue for injuries they receive as a result of discrimination against their women coworkers.

Conflicting decisions such as these highlight the question of who has standing to protest sex discrimination—a question that gains particular importance in the context of Title VII because that statute is enforced primarily by private plaintiffs. Adverse standing decisions prevent any hearing on the merits of a discrimination charge. Thus, when injured males are denied standing because they are not the direct target of discrimination, a technicality is allowed to frustrate Title VII's central purpose: to eradicate discrimination in the workplace.

One of the great ironies in these cases is that male plaintiffs have long been recognized as more successful than female plaintiffs in the evolution of sex discrimination law. At the Supreme Court level,

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4. The fact that women have standing and men do not is, however, a somewhat droll twist on the Supreme Court's distorted logic that exclusion of pregnancy from an employer's disability plan is not gender-based: "There is no risk for which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not." General Elec. v. Gilbert, 429 U.S. 125, 138 (1976) (quoting Gedulig v. Aiello, 417 U.S. 484, 496-97 (1974)). In many of the instant cases, women are protected from the very same discrimination which men must suffer without the ability to seek a remedy under Title VII.

5. See, e.g., Patee v. Pacific Northwest Bell Tel. Co., 803 F.2d 476, 479 (9th Cir. 1986) (men did not have standing to protest their depressed wages allegedly resulting from their employer's discrimination against women in the same job classification); see also Spaulding v. University of Wash., 740 F.2d 686 (9th Cir.) (male faculty member of nursing school dismissed from suit claiming pay discrimination against predominantly female nursing faculty), cert. denied, 469 U.S. 1036 (1984), overruled on other grounds, Atonio v. Wards Cove Packing Co., 810 F.2d 1477 (9th Cir. 1987); AFSCME v. County of Nassau, 664 F. Supp. 64 (E.D.N.Y. 1987) (court refused to certify class of county civil service workers claiming discrimination against those working in traditionally female jobs because male plaintiffs were included in class); Bastian v. Barnes & Reinecke, Inc., No. 85 C 8041 (N.D. Ill. Dec. 5, 1985) (LEXIS, Genfed library, Dist file) (male plaintiff dismissed from suit claiming deprivation of employment benefits and promotions as a result of his wife's rejection of their employer's sexual advances).

6. See, e.g., Allen v. American Home Foods, Inc., 644 F. Supp. 1553 (N.D. Ind. 1986) (both male and female laid-off employees were granted standing to challenge their employer's decision to close a plant, a decision purportedly based on discrimination aimed at the women employees); see also EEOC v. Beaver Gasoline Co., 584 F.2d 1263 (3d Cir. 1978) (per curiam) (male plaintiff had standing to sue under Title VII when he was demoted as a result of his employer's discriminatory practices towards women).


male plaintiffs have simply dominated the history of landmark sex discrimination decisions.\textsuperscript{10} In fact, much of the initial litigation by the Women's Rights Project of the American Civil Liberties Union\textsuperscript{11} was premised upon a strategy of utilizing male plaintiffs to exploit the Supreme Court's presumed capacity to perceive injustice more readily when it is directed against men.\textsuperscript{12} Furthermore, recent empirical research suggests that, as a practical matter, women are less inclined to file suit than men when confronted with a perceived discriminatory practice.\textsuperscript{13}

Another irony is that the failure to accord injured men standing contradicts the expansive standing granted to any employees who

\footnotesize 10. \textit{Id}. As David Cole suggests, the list of Supreme Court sex discrimination decisions elicited by male plaintiffs could serve as a casebook outline of the entire law in this area. Some of the cases cited by Cole are: Califano v. Goldfarb, 430 U.S. 199 (1977) (widower challenged a provision of the Social Security Act which allowed payment of survivor's benefits to a widow regardless of dependency, but which allowed payment to a widower only if he was receiving at least half of his support from his wife); Craig v. Boren, 429 U.S. 190 (1976) (male challenged Oklahoma law prohibiting the sale of 3.2\% beer to males under 21 years of age and to females under 18); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (widower challenged section of the Social Security Act that provided benefits to a widow and minor children on the death of a husband, but only to minor children upon the death of a wife); Schlesinger v. Ballard, 419 U.S. 498 (1975) (male naval officer challenged federal law which mandated that male officers be honorably discharged if they twice fail to gain promotion while allowing female officers up to thirteen years of service before discharge for want of promotion); and Kahn v. Shevin, 416 U.S. 351 (1974) (widower challenged Florida statute granting widows, but not widowers, a property tax exemption). \textit{Id}. at 34 n.4.

11. The Women's Rights Project ("WRP"), supported by Columbia University Law School, was established in 1971 by the American Civil Liberties Union to establish basic sex equality through litigation. WRP's first case was Reed v. Reed, 404 U.S. 71 (1971), in which the Supreme Court, for the first time, recognized a constitutional protection for sex equality. Since Reed, the WRP has represented plaintiffs in more than 30 cases. For a more complete history of WRP, see Cowan, \textit{Women's Rights Through Litigation: An Examination of the American Civil Liberties Union Women's Rights Project, 1972-1976}, 8 COLUM. HUM. RTS. L. REV. 373 (1976).

12. Cole, \textit{supra} note 9, at 37. One commentator has noted that the "constant thread through 'women's rights' cases is that most of the winners have been men, and that women have won only when it was not at the expense of a man." M. BERGER, \textit{LITIGATION ON BEHALF OF WOMEN: A REVIEW FOR THE FORD FOUNDATION} 19 (1980).

13. Posing a thesis that the limited success of sex discrimination litigation and its marginal effect upon the economic status of women might result from women workers not utilizing legal remedies available to them, two scholars examined which union members, particularly women members, file complaints. Hoyman & Stallworth, \textit{Suit Filing by Women: An Empirical Analysis}, 62 NOTRE DAME L. REV. 61 (1986). The study predicts, on the basis of individual characteristics, which union members (male or female) will file discrimination suits with a government agency or through the court system. It also identifies characteristics linked with filing: race, union activity, and single parent status. \textit{Id}. at 81. The study shows that women do not appear to be filing more than men, even when suits based upon sex discrimination are considered alone. One conclusion reached by the authors is that blacks exercise their rights under discrimination laws but that women, for the most part, do not. \textit{Id}. at 82; see also Hoyman & Stallworth, \textit{Who Files Suits and Why: An Empirical Portrait of the Litigious Worker}, 1981 ILL. L. REV. 115.
claim Title VII violations in other types of employment discrimination cases—suits based on a discriminatory work environment or on a deprivation of the benefits of association with protected classes—even in the absence of a more concrete injury. In reality, the male standing cases fit snugly along side these more abstract theories of standing and injury because all of these theories involve an injury to one person as a result of employment discrimination directed at another. The only distinction is in the nature of the injury: the male standing cases involve the concrete loss of wages or even a job, rather than the intangible loss of a nondiscriminatory work environment or associational benefits.

Finally, it would seem more appropriate on a policy level to grant, rather than deny, expanded male standing to challenge discriminatory actions. To date, Title VII has not transformed the workplace into one of sexual equality, as was the statute's purpose. Women continue to occupy second-class status there. This subordination is apparent in at least two aspects of employment: lower wages and job segregation. Recent statistics show that the problem in 1988 was the same as that acknowledged by Justice Douglas a decade and a half ago: "Whether from overt discrimination or from the socialization process of a male-dominated culture, the job market is inhospitable to the woman seeking any but the lowest paid jobs." Thus, until job

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14. See infra notes 59–87 and accompanying text (discussing discriminatory work environment).
15. See supra note 8 and accompanying text.
17. More than half of women employed work in sex-segregated jobs, which are defined by the Women's Bureau of the Department of Labor as over 70% female. See Chamallas, Exploring the "Entire Spectrum" of Disparate Treatment Under Title VII: Rules Governing Predominantly Female Jobs; 1984 ILL. L. REV. 1, 22–23. More than 25% work in fields which are 95% or more female. Women constitute 98% of all secretaries, 94% of all typists, and 95% of private household workers. Id. These statistics appear to support a conclusion that a job that becomes "female" results in a downgrade of the status, and pay, for that job. Id. at 25–6. In fact, job segregation is so prevalent that at least one commentator has suggested that the litmus test for achieving the end of job segregation will be if a job attract and retain white men in sufficient numbers to overcome the former stigma and identification of a job as "female." Blumrosen, Wage Discrimination and Job Segregation: The Survival of a Theory, 14 U. Mich. J.L. Ref. 1, 7 (1980); see also Wider Opportunities for Women, supra note 16 (majority of all working women whose earnings are below the poverty level are employed in female-dominated jobs, creating a two-tier wage system).
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biases against women are removed, standing under Title VII should be interpreted broadly to encourage as many suits as necessary to achieve the statute's goal of equal employment.

In light of the continuing second-class status of women workers and the many other instances in which Title VII standing is bestowed freely, it is difficult to explain the decisions limiting male standing. However, this Article will scrutinize the male standing cases in an effort to assist future courts and practitioners working in this area of the law. The Article will review the conflict among the courts, concluding that the Ninth Circuit's restrictive reading of standing under Title VII is inconsistent not only with traditional principles of standing but also with achievement of Title VII's stated purpose. Before reaching that conclusion, it is first necessary to articulate basic standing principles, apply them to Title VII, summarize the types of Title VII plaintiffs granted standing in the past, analyze the cases involving the need to expand standing, and evaluate numerous policy concerns in light of the results reached by these decisions.

I. GENERAL STANDING PRINCIPLES

Numerous legal commentators have found standing doctrine confused, and some have disparaged its usefulness. But beginning in

19. One possible explanation for these opinions is the perpetuation of a social, economic, and legal policy of subordinating women. Specifically, men are not allowed to seek redress for actual injuries they have suffered as a result of discrimination against women because they have vitiated their superior position in society by working in a "woman's" job. As Andrea Dworkin succinctly puts it: "Men renounce whatever they have in common with women so as to experience no commonality with women . . ." A. DWORdIN, PORNOGRAPHY: MEN POSSESSING WOMEN 53 (1981). Another possible explanation is that Title VII has played the same role in deradicalizing the civil rights movement of the late 1950's and early 1960's that the Wagner Act did in the labor movement of the 1930's. While the civil rights movement was primarily, if not exclusively, concerned with race relations, Title VII can be viewed as a preemptive strike against an emerging women's movement. This thesis is inspired by Karl Klare's work, particularly his conclusions that New Deal legislation fostered the co-optation of the workers' movement and a diminution of labor's combativeness. He argues that collective bargaining has become an institutional structure not for expressing workers' needs and aspirations, but for controlling and disciplining the labor force and rationalizing the labor market. The more integrated labor becomes in the economic system of advanced capitalism, the more dependent it becomes on its corporate adversaries. Klare finds that the legal consciousness, legal institutions, and legal practice, as revealed by the Supreme Court's early Wagner Act decisions, contributed to the deradicalization and incorporation of the working class. Klare, Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941, 62 MINN. L. REV. 265, 267-69 (1978). However, it is beyond the scope of this Article to review and analyze how the courts and the legal process may have systematically deradicalized and incorporated minorities and women.

20. Even the Supreme Court has admitted the problems with understanding standing: "We need not mince words when we say that the concept of 'Art. III standing' has not been defined with complete consistency in all of the various cases decided by this Court which have discussed
1970, the Supreme Court has attempted to give more definition to the blurred lines. In a series of cases, the Court has declared that plaintiffs must satisfy not only the constitutional limit on standing contained in article III of the Constitution but also "prudential principles by which the judiciary seeks to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those litigants best suited to assert a particular claim."  

First, under the immutable constitutional standing requirement of article III, federal courts are confined to adjudicating actual "cases" and "controversies." Article III effectuates the separation of powers on which the federal government is founded and the limited role of judicial review in a democratic society. This core component of standing requires a plaintiff to "allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief."  


21. It has been suggested that the technical concept of standing is, in reality, a disguised judicial decision on the merits. For example, in Sedler, Standing, Justiciability, and All That: A Behavioral Analysis, 25 VAND. L. REV. 479, 480 (1972), Robert A. Sedler accused many judges of taking a "Gestalt approach" towards standing, with the real concern simply whether they should hear the case on its merits. Taking that accusation one step further, Mark Tushnet has opined that decisions on questions of standing are simply concealed decisions on the merits of the underlying claim. Tushnet, The New Law of Standing: A Plea for Abandonment, 62 CORNELL L. REV. 663 (1977).


23. Article III provides:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, [and] the Laws of the United States . . . 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.


25. Wright, 468 U.S. at 750.

26. Id. at 751 (citing Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982)). However, some scholars argue that the Constitution does not even require this basic allegation of legal injury caused by defendant and susceptible to redress through the litigation. See, e.g., Tushnet, The New Law of Standing: A Plea for Abandonment, 62 CORNELL L. REV. 663, 679 (1977).
Second, beyond the constitutional requirement, the federal judiciary has created a set of prudential principles that bear on the question of standing. The Supreme Court developed the notion of prudential limitations on standing for two primary reasons: (1) to avoid repeated confrontations with other branches of government which upset the delicate separation of powers balance, and (2) to conserve scarce judicial resources that need to be preserved for their most important historical functions. Thus, the Court has decided not to hear: (1) suits by plaintiffs asserting jus tertii, or rights of another; (2) cases involving "abstract questions of wide public significance" which amount to "generalized grievances," pervasively shared and most appropriately addressed in the representative branches; (3) unripe cases; (4) moot cases; and (5) complaints which do not fall within the "zone of interests" to be protected or regulated by a statute or constitutional provision.

However, these court-created prudential limitations may be overruled when Congress enacts legislation that expands or restores standing to the full extent permitted by article III. Congress can do this explicitly in a statutory provision conferring a private cause of action, or implicitly by using the broadest terms possible: "a person claiming to be aggrieved." For instance, in *Trafficante v. Metropolitan Life Insurance Co.*, the Supreme Court found that there is expansive standing under Title VIII of the Civil Rights Act, a sister provision to Title VII. The plaintiffs were two white tenants who alleged that their landlord discriminated against nonwhites and thereby caused the plaintiffs to lose the social benefits of living in an integrated community as well as business and professional advantages accruing from living with members of minor-

28. See *Valley Forge Christian College*, 454 U.S. at 471–76.
36. Id.
ity groups. Based upon the Court's interpretation of the statutory language granting a private cause of action to the "person aggrieved," the white plaintiffs were found to have standing to protest the housing discrimination against minorities.

Justice Douglas, writing for a unanimous Court, referred to various factors in reaching this conclusion: (1) the importance of broad standing when private persons are the primary method of obtaining compliance with the statute, (2) the statutory language indicating a congressional intent to define standing as broadly and inclusively as allowed by article III, (3) legislative history relating to the purpose of the law, and (4) interpretations of the governmental agency responsible for administering the law, which are entitled to great weight if consistent. In the midst of its analysis, the Court even cited with approval a case drawing the identical conclusion under Title VII that standing under that statute should be broadly construed.

II. APPLICATION OF STANDING PRINCIPLES TO CASES ARISING UNDER TITLE VII

Congress incorporated the same magic words that appear in Title VIII, "person claiming to be aggrieved," in the Title VII provision granting a private right of action for violations of the statute. Therefore, a persuasive argument exists that Congress intended to override any prudential limitations and that only article III concerns need be met to achieve standing under Title VII. This position is fully supported not only by the language itself, creating a private cause of action, but also by a simple comparison of that language with the Title VII section defining a violation of the Act. While the Act makes employment practices unlawful if they constitute discrimination against any individual because of "such individual's race, color, religion, sex, or national origin," the private cause of action provision lacks identical words of limitation. Rather than restricting the right to

40. Id. at 209 (citing Hackett v. McGuire Bros., Inc., 445 F.2d 442 (3d Cir. 1971)).
41. 42 U.S.C. § 2000e-5(f)(1) (1982); "[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." (emphasis added).
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sue to an individual discriminated against because of his race, color, religion, sex or national origin, the statute accords that right to "any person claiming to be aggrieved" by a violation of the law. By not repeating the restrictive language, Congress appears to have intended to draw a distinction between the two sections, with the latter clearly being more expansive. Thus, under the statute, anyone injured by sex discrimination should have standing to sue to redress that discrimination, whether or not that person was the direct target of discrimination.

While the Supreme Court has yet to consider this precise issue under Title VII, the above conclusion is entirely consistent with the Court's interpretation of Title VIII, the sister provision to Title VII. Nonetheless, several appellate and lower courts have applied, in addition to article III requirements, one particular prudential standard in Title VII cases: the "zone of interests" test.

The zone of interests test was first articulated by the Supreme Court in a 1970 case, Association of Data Processing Service Organizations, Inc. v. Camp. According to the zone of interests test, plaintiffs arguably must be within the "zone of interests to be protected or regulated by the statute or constitutional guarantee in question." In creating the zone of interests test, the Court rejected the previous "legal interest" test because that test concerned the merits instead of simply ascertaining standing. As a consequence, the class of people eligible to sue under the statute was enlarged. Thus, Association of Data

44. Id. § 2000e-5(f)(1) (emphasis added).
47. 397 U.S. 150 (1970). In Association of Data Processing Service Organizations, the Court conferred standing on a data processing company to enforce a statute prohibiting banks from engaging in any activities other than banking services, finding that the company was within the zone of interests protected by the statute. The statute, on its face, did not state that Congress intended to protect non-bank data processors from bank competition, so the Court resorted to legislative history to determine congressional intent. Id. at 154–56.
48. Id. at 153.
49. Id. at 153–54.
Processing may be viewed as liberalizing prior prudential standing limitations. Although the viability of the zone of interests test has since been questioned, it continues to be de rigueur in reviewing standing.\textsuperscript{50}

While acknowledging the conflict between those courts holding that Title VII standing requires satisfaction only of article III and those courts applying prudential limitations as well, it is nevertheless possible to identify certain situations in which standing has been found regardless of the test applied.\textsuperscript{51} Historically, courts generally have recognized three categories of plaintiffs as having standing under Title VII: Plaintiffs asserting (1) direct discrimination; (2) discriminatory work environment or deprivation of rights of association with protected classifications; and (3) retaliation against third parties.\textsuperscript{52} The

\textsuperscript{50} In Nichol, Rethinking Standing, 72 CAL. L. REV. 68, 70–71 (1984), G.R. Nichol, Jr., states that the Supreme Court itself is inconsistent in applying the zone of interests test. According to Nichol, between 1970 and 1982 the test went unmentioned in 25 Supreme Court cases in which it appeared to be relevant. Id. at 73 n.30; see, eg., INS v. Chadha, 462 U.S. 919 (1983); Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59 (1978). This criticism is somewhat blunted by the fact that, to date, the Court has discussed zone of interests in at least 20 cases since Association of Data Processing. See, e.g., Japan Whaling Ass'n v. American Cetacean Society, 478 U.S. 221, 230 n.4 (1986); Brock v. Pierce County, 476 U.S. 253, 262 (1986); Allen v. Wright, 468 U.S. 737, 751 (1984); Block v. Community Nutrition Inst., 467 U.S. 340, 345–48 (1984). As recently as December 1987, the Supreme Court applied the zone of interests test. Clarke v. Securities Indus. Ass'n, 479 U.S. 388 (1987). In Clarke, Justice White wrote an extensive review of the zone of interests test, specifically acknowledging its applicability beyond agency review cases. Justices Stevens, Rehnquist, and O'Connor did not join in the majority opinion insofar as it engaged in a "wholly unnecessary exegesis on the 'zone of interests' test," but concurred in the result. Id. at 410. Therefore, it is impossible to conclude that the zone of interests test is no longer utilized by the Court.

\textsuperscript{51} This Article is primarily concerned with suits involving individual plaintiffs and excludes issues relating to class actions. Although some of the cases discussed herein may be class actions, that aspect is not relevant to the fundamental issue addressed. In addition to standing issues, class actions involve Federal Rule of Civil Procedure 23 concerns. See, e.g., Harris v. Pan Am. World Airways, Inc., 74 F.R.D. 24 (N.D. Cal. 1977); Greene, Title VII Class Actions: Standing at Its Edge?, 58 U. DET. J. OF URB. L. 645 (1981).

\textsuperscript{52} Other scholars have also noted some of these categories, among others. For instance, L.S. Greene, in Greene, Title VII Class Actions: Standing at Its Edge?, 58 U. DET. J. OF URB. L. 645 (1981), accepts the applicability of the zone of interests test and finds that the arguable zone of interests protected by Title VII is broad, encompassing "freedom from direct and indirect discrimination in the workplace, and freedom from harms to conscience." Id. at 654. Greene isolates five specific types of standing which meet the Title VII zone of interests test: (1) disparate treatment, (2) disparate impact, (3) heterogeneous associative rights, (4) homogeneous associative rights, and (5) freedom from psychological injury as a token. Id. at 654–67. The present Article includes Greene's first and second types, along with direct retaliation, under the first category of direct discrimination; her third, fourth, and fifth types (insofar as the courts have interpreted these as an aspect of a discriminatory work environment or associational deprivation) are included under the category of indirect discrimination. Greene does not address the third-party retaliation concerns or the heart of this Article: standing of an individual who, although not the direct subject of discrimination, suffers pecuniary injury as a result of that discrimination. E.g., Allen v. American Home Foods, Inc., 644 F. Supp. 1553 (N.D. Ind. 1986).
latter two groups involve "indirect" discrimination or discrimination aimed at someone other than the plaintiff. The present Article advocates recognition of an additional form of indirect discrimination, that which occurs when an employer discriminates against a protected class, resulting in pecuniary injury to someone not in that protected class. Men who work in job classifications primarily comprised of females and who receive depressed wages because their employers discriminate against women are striking examples of the victims of this form of indirect discrimination.

A. Direct Discrimination

The first category of plaintiffs having Title VII standing consists of members of a group against whom direct discrimination is alleged. This discrimination can take the form of either disparate treatment or disparate impact. A subcategory, of course, is the "reverse discrimination" plaintiff, usually an individual who complains that ameliorative efforts to correct prior discrimination adversely affect him. Retaliation against a victim of direct discrimination also fits under this grouping.

This concept of direct discrimination can extend to more remote circumstances. For instance, a line of cases involves the issue of whether Title VII protects employees from adverse employment decisions because they have a relationship with someone of a different race. In Whitney v. Greater New York Corp. of Seventh Day Advent-

53. International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977). The Supreme Court stated that this was the most easily understood type of discrimination: "The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin." Id.

54. Id. The Court has explained disparate impact as "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." See also Griggs v. Duke Power Co., 401 U.S. 424, 430-32 (1971). The Court recently has extended disparate impact analysis beyond traditional application to facially neutral, objective employment practices, such as standardized tests, and applied the analysis to a subjective, discretionary promotion system that had a disparate impact on blacks. Watson v. Fort Worth Bank & Trust, 108 S. Ct. 2777 (1988).


56. Title VII expressly prohibits retaliation against an individual exercising her rights under the statute and creates a separate violation for such retaliation. 42 U.S.C. § 2000e-3(a) (1982); see Whatley v. Metropolitan Atlanta Rapid Transit Auth., 632 F.2d 1325 (5th Cir. 1980); Novotny v. Great Am. Fed. Sav. & Loan Ass'n, 584 F.2d 1235 (3d Cir. 1978) (en banc), vacated in part on other grounds, 442 U.S. 366 (1979).
A district court found that a white female who alleged that she was fired because of her social relationship with a black male had a valid claim under Title VII. When the defendant sought dismissal of the action, asserting that the plaintiff was not discharged because of her race, the court decided that if she had been black instead of white the employer would not have objected to the relationship, and she would not have been fired. Therefore, the adverse employment action was based on her race.

B. Indirect Discrimination

The courts have expanded standing beyond plaintiffs who are the direct targets of discrimination. Courts uniformly confer standing on plaintiffs who claim a relatively abstract injury to themselves resulting from a work environment tainted by discrimination against others, as well as plaintiffs who suffer because an employer’s direct retaliation against a friend or a relative spills over to affect them. In other words, courts have recognized the standing not only of plaintiffs with more abstract injuries but also of plaintiffs more attenuated from the direct discriminatory action of the employer.

1. Discriminatory Work Environment

One group of indirect discrimination victims is composed of individuals who assert that discriminatory conduct by their employer against a protected employee other than themselves has resulted in a violation of their own right to a discrimination-free work environment or to association with members of protected classifications. This relatively

58. Id. at 1366; see also Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888 (11th Cir. 1986) (employer refused to hire applicant married to someone of a different race); Reiter v. Center Consol. School Dist., 618 F. Supp. 1458 (D. Colo. 1985) (white teacher’s contract not renewed because of her association with the Hispanic community); Gresham v. Waffle House Inc., 586 F. Supp. 1442 (N.D. Ga. 1984) (rejecting prior precedent in the jurisdiction in order to follow Whitney); Holiday v. Belle’s Restaurant, 409 F. Supp. 904 (W.D. Pa. 1976) (when white female fired because her employer thought she was married to a black man, she had a Title VII claim because if she had been black, she would not have been discharged); Gutwein v. Easton Publishing Co., 272 Md. 563, 325 A.2d 740 (1974) (white discharged for interracial relationship), cert. denied, 420 U.S. 991 (1975). EEOC opinions are also consistent with Whitney. See infra notes 116–23 and accompanying text.
59. See, e.g., EEOC v. Mississippi College, 626 F. 2d 477 (5th Cir. 1980). This type of claim was proposed in a Note following Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972). Note, Work Environment Injury Under Title VII, 82 YALE L.J. 1695, 1695 (1973) (“Under this theory discriminatory practices directed at one group taint the work environment and thereby cause injury to all employees.”). A hostile work environment resulting from discrimination against others is to be contrasted with those actions brought by a protected plaintiff claiming direct discrimination against her, resulting in a hostile work environment. See, e.g., Erebia v.
novel theory evolved from the Title VIII housing discrimination case, *Trafficante v. Metropolitan Life Insurance Co.* The *Trafficante* Court held that the prohibition against discrimination in housing protected not only those persons who were the intended targets of discriminatory activity, but also indirect victims—persons desiring interracial associations whose associative rights, as well as potential business contacts, are undermined by racist housing practices.

In reaching this conclusion, the Court relied upon an earlier Title VII case, *Hackett v. McGuire Brothers, Inc.* in which the Third Circuit had found that a retired employee had standing to represent a class of current employees. As early as 1971, the *Hackett* court had determined that the statutory language of "person aggrieved" showed a congressional intent to define standing as broadly as permitted by article III. This interpretation, coupled with a congressional policy of eradicating discrimination, prompted the court to find standing, 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 the Article III sense, then he should have standing to sue in his own right and as a class representative.

Thus, the Third Circuit early on laid the groundwork for the *Trafficante* decision and for subsequent broad standing decisions under Title VII.

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60. 409 U.S. 205 (1972); see also Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 (1979) (*Trafficante* holding expanded to give standing to third parties not residents of a housing project to challenge discriminatory practices of project); *supra* notes 36-40 and accompanying text.

61. 445 F.2d 442 (3d Cir. 1971).

62. *Id.*

63. *Id.* at 444-47.

64. *Id.* at 1278.
After *Trafficante,* at least six federal courts of appeal have borrowed the Title VIII associational standing concept and applied it to Title VII in order to find a right to work in an environment unaffected by prohibited discrimination. These results are further supported by dicta in the Supreme Court's 1986 decision in *Meritor Savings Bank v. Vinson.* In *Meritor Savings Bank,* the Court declared that Title VII protects female workers from sexual harassment, stating:

In concluding that so-called "hostile environment" (i.e., non *quid pro quo*) harassment violates Title VII, the EEOC drew upon a substantial body of judicial decisions and EEOC precedent holding that Title VII affords employees the *right to work in an environment free from discriminatory intimidation, ridicule, and insult.*

Thus, the Court noted with favor EEOC interpretations of Title VII and the appellate precedent recognizing a cause of action based upon a discriminatory work environment.

One case cited by the *Meritor Savings Bank* Court was the 1976 District of Columbia Circuit court opinion in *Gray v. Greyhound Lines, East.* The D.C. Circuit held that a black plaintiff who slipped through discriminatory screening practices and was hired on his first application had standing under Title VII to sue his employer, based on a theory that his workplace isolation, resulting from being one of the few favored blacks, adversely affected his mental state. The court determined that Congress intended to grant broad standing under Title VII and that the psychological injuries claimed by the plaintiff satisfied the article III requirement of an injury in fact. However, even if Congress had not decided to grant standing under Title VII to all who are constitutionally eligible, the *Greyhound Lines* court noted

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67. *Id.* at 65 (emphasis added).

68. *Id.* at 65–66. The Court cited Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972), as "the first case to recognize a cause of action based upon a discriminatory work environment." *See also infra* note 73 and accompanying text. Subsequent cases cited by the Court were: Cariddi v. Kansas City Chiefs Football Club, 568 F.2d 87 (8th Cir. 1977) (harassment based on national origin); Firefighters Inst. for Racial Equality v. City of St. Louis, 549 F.2d 506 (8th Cir.), cert. denied. 434 U.S. 819 (1977) (harassment based on race); *Greyhound Lines,* 545 F.2d 169 (harassment based on race); Compston v. Borden, Inc., 424 F. Supp. 157 (S.D. Ohio 1976) (harassment based on religion).

69. 545 F.2d 169 (D.C. Cir. 1976).

70. *Id.* at 176.

71. *Id.* at 175.
that it would reach the same result. Finding that the EEOC has consistently interpreted Title VII to give employees the right to a working environment free of racial intimidation, the court decided that an atmosphere of discrimination which causes a plaintiff psychological harm also satisfies prudential standards:

This policy, the congressional determination that standing to challenge unlawful employment practices should be liberally granted, and the consistent administrative interpretation of the scope of the statute all support the conclusion that plaintiffs' claim implicates an interest "at least \ldots 'arguably within the zone of interests to be protected or regulated' " by Title VII. Standing was to be liberally granted to effectuate a congressional purpose "to eliminate the inconvenience, unfairness, and humiliation of ethnic discrimination." The Fifth Circuit followed its own precedent as well as Trafficante when it held in EEOC v. Mississippi College that a white female plaintiff could assert a charge of race discrimination in recruitment and hiring of faculty members. The plaintiff had complained that the discrimination against blacks affected her working environment. Rejecting a defense that the plaintiff was asserting the rights of others, the court declared: "Our decision today does not allow Summers to assert the rights of others. We hold no more than that, provided she meets the standing requirements imposed by Article III, Summers may charge a violation of her own personal right to work in an environment unaffected by racial discrimination." Thus, the white female plaintiff had standing to assert that her employer's racially discriminatory policies against others created a hostile working environment for her.

The Sixth Circuit also has adapted the Trafficante analysis to Title VII. In a 1977 case, EEOC v. Bailey Co., that court held that Trafficante mandated Title VII standing for a white person who suffers

72. Id. at 176.
73. Id.
75. Rogers v. EEOC, 454 F.2d 234 (5th Cir.), cert. denied, 406 U.S. 957 (1971). Even before Trafficante, the Fifth Circuit found that the "relationship between an employee and his working environment is of such significance as to be entitled to statutory protection." 454 F.2d at 237-238. Thus, a female Hispanic professional had standing under Title VII to assert that patient segregation and steering could constitute a subtle scheme designed to create a working environment poisoned with discrimination. Id. at 239.
77. Id.
loss of benefits from lack of association with racial minorities at work. Based on a similarity of statutory language and design, identical purpose to outlaw discrimination, and the EEOC's consistent and persuasive interpretations, the Sixth Circuit held that a white female plaintiff had standing under Title VII to file a charge with the EEOC protesting alleged race discrimination against blacks by her employer.\footnote{Id. at 452–54; see also Senter v. General Motors Corp., 532 F.2d 511, 517 (6th Cir.) (relying on Trafficante, court determined that Congress intended standing under Title VII to be defined as broadly as permitted by article III), cert. denied, 429 U.S. 870 (1976).}

In 1982, the Seventh Circuit acknowledged, in \textit{Stewart v. Hannon},\footnote{675 F.2d 846, 850 (7th Cir. 1982) (rehearing en banc).} that a white plaintiff had standing to assert loss of important benefits from interracial associations in the workplace. Similarly, both the Eighth\footnote{See, e.g., Clayton v. White Hall School Dist., 778 F.2d 457 (8th Cir. 1985). However, even though the Eighth Circuit recognized the "work environment" or "benefits of association" theory, it nonetheless dismissed a white employee's claim that the school district employer applied a policy against her to deprive her child of free tuition so that a black child could also be denied free tuition. \textit{Id.} at 460; see also Taylor v. Jones, 653 F.2d 1193, 1199 (8th Cir. 1981).} and Ninth\footnote{See, e.g., Waters v. Heublein, Inc., 547 F.2d 466 (9th Cir. 1976), cert. denied, 433 U.S. 915 (1977).} Circuits have applied the analysis of \textit{Trafficante} to Title VII cases. As the Ninth Circuit stated:

\textit{[T]he interpersonal 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 as great at work as at home. The benefits of interracial harmony are as great in either locale. The distinction between laws aimed at desegregation and laws aimed at equal opportunity is illusory. These goals are opposite sides of the same coin.} \footnote{Waters, 547 F.2d at 469.}

Expanding Male Standing Under Title VII

There is, however, a series of cases in which courts have denied standing to plaintiffs complaining about discrimination against a group of which they are not members. In these cases plaintiffs, generally seeking class action representative status, do not assert any injury to themselves from the discrimination. Therefore, they do not meet the basic article III requirement that injury be caused by the defendant and redressable by litigation at issue. These cases are distinguishable from work environment standing decisions since the plaintiffs failed to claim that the employer's discrimination against others resulted in an injury to plaintiffs—only that the employer discriminated against others. If the plaintiffs had asserted their own work environment injury, or if the courts had acknowledged other types of injury resulting from the employer's improper discrimination against others, standing would have been found under this theory.

In short, the many federal circuit courts that have considered the hostile work environment theory have all bestowed standing on plaintiffs asserting this form of indirect discrimination. Even though discriminatory work environment standing is explicitly recognized by


86. There are a few cases in which plaintiffs did assert a personal injury as a result of employers' discriminatory attitude toward others, but the opinions ignore the very real injury suffered by plaintiffs to focus solely on the targets of the employers' discrimination in denying standing. Hence, such cases provide no rational precedent. In one case, a male plaintiff stated that his job offer was withdrawn after telling an incumbent female employee about his higher salary offer. The court simply ignored his loss-of-a-job-offer injury and cast the case as plaintiff "in essence claiming that defendant engaged in sex discrimination by offering him a higher wage than defendant paid an already existing female employee." Pecorella v. Oak Orchard Community Health Center, Inc., 539 F. Supp. 147, 149 (W.D.N.Y. 1982), aff'd, 722 F.2d 728 (2nd Cir. 1983). Similarly, in Ripp v. Dobbs House, Inc., 366 F. Supp. 205, 208–09 (N.D. Ala. 1973), disapproved by McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976), even though the white plaintiff claimed he was fired for associating with black coworkers, the court determined that the "employment practices which plaintiff attacks in his complaint are practices which result in disparate treatment of black employees. Plaintiff avers that he is a white citizen. The employment practices, subject to challenge in this action, have no impact upon plaintiff."
courts, many practitioners seem unaware of its availability, as wit-
nessed by the relative dearth of such cases compared to the thousands
of Title VII cases filed. Many plaintiffs could assert such a claim,
either alone or in conjunction with a direct discrimination action. The
scope of discovery, and the likelihood of resisting summary dispositive
motions, would be enlarged greatly, as would the threat perceived by
defending employers. This strategy might also enhance a plaintiff’s
chance of at least partial success on the merits, thereby resulting in a
greater potential for winning attorneys’ fees.\textsuperscript{87}

2. \textit{Third-Party Retaliation}

Another category of indirect victims is composed of third parties
who, while not the direct victims of discrimination, assert that they
were retaliated against as a result of a friend or relative’s protests of
unlawful discrimination under Title VII.\textsuperscript{88} For instance, a husband
who was discharged by his employer following his wife’s protest that
she was not hired by the same employer because of its sex discrimina-
tory policies has been permitted to assert a retaliation claim under
Title VII.\textsuperscript{89} Similarly, a woman who claimed she was discriminated
against by a federal agency in reprisal for her husband’s antidiscrimina-
tory activities had standing, even though she was not the person
whose protected activities were allegedly being impeded by the
employer’s retaliatory actions.\textsuperscript{90} The courts have acknowledged such
third-party standing despite the absence of express statutory language
under Title VII conferring standing. Instead, they have emphasized
that the clear intent of Congress to protect activities protesting dis-

\begin{itemize}
  \item \textsuperscript{87} Under Title VII, the court may allow reasonable attorneys’ fees to the prevailing party.
  \item \textsuperscript{88} 42 U.S.C. § 2000e-5(k) (1982).
  \item \textsuperscript{89} See supra note 56.
  \item \textsuperscript{88} Kornbluh v. Stearns & Foster Co., 73 F.R.D. 307, 312 (S.D. Ohio 1976).
  \item \textsuperscript{90} De Medina v. Reinhardt, 444 F. Supp. 573, 580–81 (D.D.C. 1978), aff’d in part and rev’d
  in part on other grounds, 686 F.2d 997 (D.C. Cir. 1982).
  \item \textsuperscript{91} See, e.g., id. at 580. In its analysis of the standing issue, the court in \textit{De Medina} stated:
    \begin{quote}
    In enacting Section 2000e-3, Congress unmistakably intended to ensure that no person
    would be deterred from exercising his rights under Title VII by the threat of discriminatory
    retaliation. Since tolerance of third-party reprisals would, no less than the tolerance of
direct reprisals, deter persons from exercising their protected rights under Title VII, the
    Court must conclude . . . that section 2000e-3 proscribes the alleged retaliation of which
    plaintiff complains.
    \end{quote}
\end{itemize}

\textit{Id.; see also} Kent v. R.J. Reynolds Tobacco Co., 27 Fair Empl. Prac. Cas. (BNA) 1628, 1634
(E.D. La. 1982).

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3. Male Standing Cases

The final category of indirect victims of discrimination is represented by the cases spurring this Article. Plaintiffs in these cases have challenged traditional notions of standing. They have demanded that standing encompass male employees who, while not the direct target of sex discrimination, are nonetheless injured by unlawful conduct in other than an associational sense. These male plaintiffs have received lower pay because their employers discriminated against women; have been laid off because their employers discriminated against women; have been fired because their employers discriminated against women; and have been denied promotional opportunities because their employers discriminated against women. Extending standing to these male plaintiffs is consistent with emerging doctrine as illustrated by the above discussions of discriminatory work environment and third-party retaliation cases.

In all three situations, plaintiffs are not the direct victims of discrimination; they are injured as a result of their employer’s discrimination against someone else, usually a coworker. For example, in Patee v. Pacific Northwest Bell Telephone Co., one of the male standing cases at issue, the Ninth Circuit denied standing to male employees who worked in what had traditionally been a “woman’s job” and received allegedly depressed wages because of their employer’s discrimination against their women coworkers. At the same time, the Patee court granted standing to women plaintiffs who worked in the very same job.

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93. See supra notes 59–87 and accompanying text (discussing hostile work environment).

94. See, e.g., Peters, 818 F.2d at 1165–66; Patee, 803 F.2d 478; Spaulding, 740 F.2d at 709; AFSCME, 664 F. Supp. at 66–67.

95. See, e.g., Allen, 644 F. Supp. at 1556–57.

96. See, e.g., Beaver Gasoline, 584 F.2d at 1263–64.


98. See supra notes 59–87 and accompanying text.

99. See supra notes 88–91 and accompanying text.

100. 803 F.2d 476, 478 (9th Cir. 1986).
classification as the males.\textsuperscript{101} The only distinction between the hostile work environment cases and cases like \textit{Patee} is the nature of the plaintiffs' injuries: \textit{Patee} involved a loss of wages, a more concrete injury than the relatively abstract right to work in an environment free of discrimination. It seems inequitable that, in the Ninth Circuit, Title VII plaintiffs have standing to assert associational rights but, if they happen to be males, lack standing to assert pecuniary rights as indirect victims of discrimination.

Additionally, there really is no difference between cases like \textit{Patee} and third-party retaliation suits other than the fact that retaliation, and not discrimination per se, is at issue. This, however, is irrelevant as Title VII proscribes both retaliation and discrimination, and the same statutory section provides a private cause of action for both.\textsuperscript{102} Thus, in order to deny standing to these male victims, the courts have either had to ignore completely or to distinguish improperly the established categories of Title VII standing analysis.

As discussed above, a plaintiff under Title VII must satisfy the article III test for standing and, arguably, even the prudential zone of interests test.\textsuperscript{103} The first is satisfied by asserting an injury caused by the defendant which can be redressed through legal action. All of the plaintiffs in the cases discussed herein have been injured, either by depressed wages or lost jobs or benefits, as a result of their employer's discriminatory actions against women allegedly in violation of Title VII. The remedies sought in their complaints would redress the injuries caused by their employers. Therefore, article III has been satisfied. Under persuasive precedent, this alone should be sufficient to find standing.

Nonetheless, under the assumption that prudential concerns are relevant to Title VII claims, it is also necessary to address whether the plaintiff is within the "zone of interests" to be protected by Title VII. This analysis is more complex. Because the statute does not expressly address who is within its zone of interests, legislative history and statutory interpretations by the administrative agency responsible for public enforcement of the Act must be consulted.\textsuperscript{104}

\textsuperscript{101.} \textit{Patee}, 803 F.2d 476; see infra note 166; see also Spaulding v. University of Wash., 740 F.2d 686, 709 (9th Cir.), cert. denied, 469 U.S. 1036 (1984), overruled on other grounds, \textit{Atonio} v. Wards Cove Packing Co., 810 F.2d 1477 (9th Cir. 1987).


\textsuperscript{103.} See supra notes 41–52 and accompanying text (discussing application of standing principles to cases arising under Title VII).

Expanding Male Standing Under Title VII

a. Legislative History Regarding the Purpose of Title VII's Prohibition of Sex Discrimination

Even a microscopic examination of the legislative history of Title VII sheds no light on congressional intent as to who has standing to assert sex discrimination. As the Supreme Court has wryly noted, "[t]he legislative history of Title VII's prohibition of sex discrimination is notable primarily for its brevity."105 Addressing the problem more fully in Meritor Savings Bank v. Vinson, Justice Rehnquist wrote:

The prohibition against discrimination based on sex was added to Title VII at the last minute on the floor of the House of Representatives. The principal argument in opposition to the amendment was that "sex discrimination" was sufficiently different from other types of discrimination that it ought to receive separate legislative treatment. This argument was defeated, the bill quickly passed as amended, and we are left with little legislative history to guide us in interpreting the Act's prohibition against discrimination based on "sex."106

In fact, during months of House committee hearings prior to full floor discussion of Title VII, the issue of sex discrimination was never even considered.107 The amendment adding "sex" to the prohibited classifications was added by Representative Howard Smith of Virginia, the bill's principal opponent, during a two-hour House debate only two days before the House sent the bill to the Senate, in a thinly veiled attempt to defeat the entire bill.108 In support of his amendment, Representative Smith did little more than to read a bizarre letter into the record. The letter was purportedly from a female constituent and claimed that every woman should have the right to a "husband of her own."109 The amendment passed 168 to 133.110

Although the entire bill suffered through several months of debate in the Senate, the sex amendment went without challenge and virtually without comment. As a result, at least one commentator perceives the prohibition against sex discrimination to be "more as an accidental result of political maneuvering than as a clear expression of congressional intent to bring equal job opportunities to women."111 

106. 477 U.S. 57, 63-64 (1986) (citations omitted). Arguably, the inference from Justice Rehnquist's comment is that Title VII treats race and sex discrimination identically.
108. Id. at 2577.
109. Id.
110. Id. at 2584.
quoted comment from a contemporary periodical characterized the amendment as a "mischievous joke perpetrated on the floor of the House of Representatives." However, another view is that the Smith amendment was passed in reliance "on two principal arguments: sex discrimination [is] wrong, and white women should not be left at a disadvantage vis-a-vis black women." Regardless of view, there remains no committee hearing nor report to explain or aid in interpreting the prohibition of sex discrimination and its implications as to standing to enforce private rights.

Even though the legislative history of Title VII's prohibition against sex discrimination is sorely lacking, there appears to be no doubt that Congress intended to "strike at the entire spectrum of disparate treatment of men and women' in employment." At least the Supreme Court has never been timid in declaring that Congress had such an intent in passing Title VII:

We begin by repeating the observation of earlier decisions that in enacting Title VII of the Civil Rights Act of 1964, Congress intended to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex or national origin, and ordained that its policy of outlawing such discrimination should have the "highest priority." Thus, in decisions reviewing Title VII claims, the Court has inferred congressional intent to eradicate sex discrimination in employment. This inference supports a liberal concept of standing—a concept which would dictate the grant of standing to all plaintiffs injured by discrimination, including male plaintiffs in cases like Patee and the other male standing cases discussed in this Article.

b. EEOC Interpretations of Title VII Standing

When the legislative history of a statute is unclear, it is appropriate to look to the administrative interpretation of the act by the enforcing agency, in this instance the Equal Employment Opportunity Commission ("EEOC"). While the EEOC interpretation is not controlling, it does "constitute a body of experience and informed judgement to

which courts and litigants may properly resort for guidance."\textsuperscript{117} Although early decisions ascribed great deference to EEOC rulings,\textsuperscript{118} subsequent cases have looked to see if the EEOC interpretation at issue is consistent, persuasive, and contemporaneous.\textsuperscript{119}

The EEOC has been relentlessly consistent in bestowing standing upon any "aggrieved" employee under Title VII. In 1969, the first EEOC decision addressing this question held that white female complainants could challenge an employer's racially discriminatory pre-employment testing, stating:

The Commission interprets Section 706(a) of Title VII of the Civil Rights Act of 1964, to mean that any employee has standing to file a charge of employment discrimination alleging the commission of any unlawful employment practice by his employer, because it constitutes a term or condition of employment for all employees. Although the charging party is not a member of the class against which the allegedly unlawful employment practices are directly committed, we believe it clear that an employee's legitimate interest in the terms and conditions of his employment comprehends his right to work in an atmosphere free of unlawful employment practices and their consequences.\textsuperscript{120}

Similarly, the EEOC found probable cause of a Title VII violation when an employer discharged a white employee because of his friendly association with black employees.\textsuperscript{121} The EEOC reaffirmed its liberal position yet again in 1971 when it held that every employee has a right to a working environment free from unlawful discrimination; therefore, the EEOC had jurisdiction to consider claims even where they involved racially discriminatory practices which did not directly aggrieve the white complainant.\textsuperscript{122}


\textsuperscript{118} See, e.g., Griggs, 401 U.S. at 433-34.

\textsuperscript{119} See, e.g., Gilbert, 429 U.S. at 141-42. In Gilbert, the Court declined to give great deference to the EEOC Guidelines relating to pregnancy benefits, stating that the Guidelines were not a contemporaneous interpretation of Title VII since they were not promulgated until eight years after Title VII was enacted, and that the EEOC pronouncements regarding the issue were inconsistent. Id. at 142-43.

\textsuperscript{120} EEOC Decision No. 70-09, 1973 EEOC Decisions (CCH) ¶ 6026, at 4049 (July 8, 1969).

\textsuperscript{121} EEOC Decision No. 71-969, 1973 EEOC Decisions (CCH) ¶ 6193, at 4328 (Dec. 24, 1970); see also EEOC Decision No. 79-03, 1983 EEOC Decisions (CCH) ¶ 6734, at 4742 (Oct. 6, 1978) (cognizable claim that adverse employment decision was based on association with another race); EEOC Decision No. 76-23, 1983 EEOC Decisions (CCH) ¶ 6616, at 4513 (Aug. 25, 1975) (white not hired because sister was living with a black and had two interracial children); EEOC Decision No. 71-1902, 1973 EEOC Decisions (CCH) ¶ 6281, at 4498 (Apr. 28, 1971) (female clerk-typist fired for interracial dating).

\textsuperscript{122} EEOC Decision No. 72-0591, 1973 EEOC Decisions (CCH) ¶ 6314, at 4562 (Dec. 21, 1971).
In conclusion, while the EEOC did not confront this particular indirect discrimination standing issue until 1969, its rulings have been consistent and persuasive in support of finding standing even if the Title VII plaintiff is not the direct target of the discrimination. In cases like *Patee*, for example, the plaintiff is in just such a position. While the employer is discriminating directly against women, the male plaintiff invoking standing nevertheless suffers an injury relating to his terms or conditions of employment as a result of that unlawful discrimination. Thus, both congressional intent as inferred by the Court and EEOC interpretations support the recognition of standing in cases like *Patee*. Male plaintiffs invoking standing are within the zone of interests protected by Title VII.

c. Application of Title VII to the Male Standing Cases

The courts have already recognized the standing of plaintiffs in positions relatively attenuated to the protected employee who is subjected to direct discrimination. Specifically, courts have allowed white plaintiffs who complain of a work environment infected with discrimination against minorities to stay in court, as well as a husband who is discharged in retaliation for his wife's protesting the employer's discriminatory practices against women. When standing accrues in these two situations, logic urges that a man who receives the same depressed wage as his female coworkers because of the employer's bias against women—a situation even closer to direct discrimination—also has standing.

Additionally, the legislative history of Title VII and judicial interpretations of congressional intent to eradicate discrimination in the workplace support this extension of standing by finding such injured male plaintiffs to be within the zone of interests protected by Title VII. The EEOC has consistently defined standing as broadly as possible in its internal opinions. Thus, all of the indicia identified in *Trafficante* are present, and all support the finding of standing.

Nonetheless, several courts have denied standing, including the Ninth Circuit in *Patee* and in *Spaulding v. University of Washington*.

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123. 803 F.2d 476 (9th Cir. 1986).
124. See supra notes 59–87 and accompanying text (discussing discriminatory work environment standing).
125. See supra notes 88–91 and accompanying text (discussing third-party retaliation).
126. See supra notes 105–15 and accompanying text (discussing legislative history about the purpose of the sex prohibition of Title VII).
127. See supra notes 116–23 and accompanying text (discussing EEOC interpretations).
128. 409 U.S. 205 (1972); see also supra notes 36–40 and accompanying text.
129. 803 F.2d 476 (9th Cir. 1986).
ton, the Eastern District of New York in AFSCME v. County of Nassau, and the Northern District of Illinois in Bastian v. Barnes & Reinecke, Inc. However, all of these courts rely on three faulty types of reasoning. First, they depend on an unduly and unjustifiably restrictive reading of "person aggrieved." As discussed earlier, all indicators, including Supreme Court dicta, are to the contrary. Congress has used the language "person aggrieved" not to restrict standing but to expand it as far as possible consistent with article III requirements. The courts should do likewise.

Second, the courts denying standing mistakenly perceive male plaintiffs to be asserting the right of their female coworkers to be free from discrimination based on their sex. This variation of jus tertii is a mischaracterization of the male plaintiffs' complaint. Their suit may coincidentally serve to support their female coworkers' claims, but, first and foremost, they are asserting their own right to be free from injury as a result of discrimination prohibited by Title VII.

Third, the courts state that men have no standing because they do not claim to have been discriminated against because they are men. If this were a correct statement of standing under Title VII, only direct victims of discrimination (e.g., women discriminated against because they are women and blacks discriminated against because they are black) would be protected by Title VII. But every court of appeals that has confronted the issue of indirect discrimination in the context of both hostile working environment and third-party retaliation cases has acknowledged standing under these circumstances. There simply is no rational basis for distinguishing the instant male standing question from these other forms of indirect discrimination. If any-

130. 740 F.2d 686 (9th Cir.), cert. denied, 469 U.S. 1036 (1984), overruled on other grounds, Atonio v. Wards Cove Packing Co., 810 F.2d 1477 (9th Cir. 1987).
133. See, e.g., Patee, 803 F.2d at 478-79.
134. Id.
thing, the more concrete injuries suffered in some of the male standing cases more strongly support a finding of standing.

The most articulate and thorough statement in favor of granting indirect male victims standing has been the Northern District of Indiana's majority opinion in Allen v. American Home Foods, Inc. In that case fifty-one employees from the LaPorte plant of American Home Foods asserted, among other things, a sex discrimination action based upon the employer's decision to close the LaPorte plant instead of an alternative site. The plaintiffs claimed that one of the significant and determining factors American Home considered in reaching this decision to close the LaPorte plant and to transfer work to another plant was the predominance of women in the LaPorte plant as compared to all other American Home plants.

Among the potentially dispositive motions filed in response was American Home's motion to dismiss the Title VII claims as to male employees. American Home contended that the five male plaintiffs, who were not part of a protected class under Title VII, lacked standing to assert Title VII claims based on discrimination directed at women. The male plaintiffs responded that Congress intended Title VII's broad standing provision to extend standing to all persons injured by a discriminatory employment practice. Since they were


\[138. \text{Allen, } 644 \text{ F. Supp. at } 1553. \text{ Although it does not contain as complete an analysis of standing as Allen does, the earlier Third Circuit opinion in EEOC v. Beaver Gasoline Co., 584 F.2d 1263 (3d Cir. 1978) (per curiam), rev'd 14 Fair Empl. Prac. Cas. (BNA) 1343 (W.D. Pa. 1977), also supports this type of indirect discrimination standing. In that case, the trial court found that a male employee had no standing under Title VII to challenge his demotion, allegedly for hiring a female, because he was not discriminated against on the basis of being male. Id. By its reversal, the Third Circuit recognized that a male plaintiff has standing to sue under Title VII when he is injured (i.e., demoted) as a result of his employer's discriminatory practices towards women (i.e., refusal to hire). Even though the male plaintiff was not the direct target of the discrimination, he nevertheless suffered harm. The appellate court in Beaver Gasoline based its per curiam order upon its earlier decision in Novotny v. Great American Federal Savings & Loan Association, 584 F.2d 1235 (3d Cir. 1978) (en banc), vacated in part on other grounds, 442 U.S. 366 (1979). The Third Circuit's reliance on Novotny implies that the plaintiff was claiming retaliation for asserting rights under Title VII, the issue in Novotny. But the facts are closer to the circumstances of indirect discrimination standing where the plaintiff is injured because of the employer's discrimination against women which impacts him, not because the employer is retaliating against him for protected activity.}\]


\[140. \text{644 F. Supp. at 1555.}\]
“aggrieved” by American Home’s discriminatory employment practice, they should have standing under Title VII.141

In analyzing the standing issue, the Allen court acknowledged that the male plaintiffs were not alleging reverse discrimination, jus tertii, nor retaliation. Instead, plaintiffs claimed “that American Home’s decision to close the plant at which they worked was based, at least in part, on the sex of their female coworkers. They assert their own injuries; they assert their own rights.”142 Having narrowed the issue, the court then discussed at length the problem of male standing.

First, the court looked to the statutory language of Title VII. Comparing the provision generally defining the employment practices declared unlawful (actions taken against an individual employee due to that employee’s race, color, sex, or national origin) with the section granting a private cause of action (any “person claiming to be aggrieved”),143 the court found no explicit restriction within Title VII against standing for one who, although outside a protected class, suffers real injury due to an unlawful employment practice.144

Next, in seeking guidance as to the correct interpretation of “person claiming to be aggrieved,” the Allen court determined that most jurisdictions 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.”145 However, the cases cited by the court in support of this proposition were all injunctive actions; in Allen, the male plaintiffs sought damages.146 Although Title VII provides for legal and equitable remedies, it does not explicitly impose variable standing requirements. In both work environment standing cases in which injunctive relief is sought and indirect discrimination

141. Id.
144. Allen, 644 F. Supp. at 1556.
146. Allen, 644 F. Supp. at 1556.
cases in which legal relief is sought, the remedy pursued alleviates the wrong. Nevertheless, without indicating why the remedy sought should alter the broad standing test articulated, the court assumed the relevancy of the zone of interests test and proceeded to address that aspect of standing.\textsuperscript{147}

After generally discussing the common law prudential standing concept of zone of interest, the \textit{Allen} court properly analyzed the opinions of the administrative agency responsible for enforcing Title VII, the EEOC. It found the EEOC's position unequivocal: Standing attaches to "anyone protesting any form of alleged employer discrimination, on the theory that all employees have a right to work in an atmosphere free from unlawful employment practices."\textsuperscript{148}

Finally, the Northern District of Indiana in \textit{Allen} reviewed precedent in the Seventh Circuit. The primary case noted was \textit{Stewart v. Hannon},\textsuperscript{149} in which a white assistant principal sued to enjoin a test which allegedly excluded black teachers from positions as principals, resulting in the plaintiff's loss of important benefits from interracial associations in the workplace. While acknowledging the differences between \textit{Allen} and \textit{Stewart},\textsuperscript{150} the court nevertheless found its broad interpretation of "person aggrieved" to be compelling, concluding that:

These males suffered the same injury as did the females that lost their jobs; the injuries of the males and females were occasioned by the same corporate decision; and if, as the plaintiffs allege, considerations of sex motivated the corporate decision to close the LaPorte plant, the corporate decision that injured the male plaintiffs constituted an unlawful employment practice under Title VII.\textsuperscript{151}

Thus, based on a sound consideration of the statutory language of Title VII, precedent, agency interpretations, and associational benefit standing, as well as practical considerations, the Northern District of Indiana in \textit{Allen} determined that men have standing to assert a Title

\textsuperscript{147} Id. at 1556–57.
\textsuperscript{148} Id. at 1557 (citing EEOC v. Rinella & Rinella, 401 F. Supp. 175 (N.D. Ill. 1975)); EEOC Decision No. 72-0591, 1973 EEOC Decisions (CCH) ¶ 6314, at 4562, 4564 (Dec. 21, 1971); EEOC Decision No. 71-969, 1973 EEOC Decisions (CCH) ¶ 6193, at 4328, 4329 (Dec. 24, 1970); EEOC Decision No. 70-09, 1973 EEOC Decisions (CCH) ¶ 6026, at 4049 (July 8, 1969).
\textsuperscript{149} 675 F.2d 846 (7th Cir. 1982) (en banc).
\textsuperscript{150} Id. Compare \textit{Stewart}, which involved race discrimination and sought equitable relief based upon an injury to associational benefits, with \textit{Allen}, 644 F. Supp. at 1555–56, which concerned money damages for sex discrimination in setting wages.
\textsuperscript{151} \textit{Allen}, 644 F. Supp. at 1557.
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VII violation even if they are not the direct target of the discrimination.\textsuperscript{152}

Nonetheless, the Ninth Circuit has taken the opposite position, restricting male standing under Title VII and twice denying standing to male plaintiffs who received depressed wages as a result of their employers’ alleged discrimination against female coworkers. In \textit{Spaulding v. University of Washington},\textsuperscript{153} the Ninth Circuit held that a male plaintiff had no standing under Title VII even though he received the same low salary as female plaintiffs. While comparable worth was the primary issue in \textit{Spaulding},\textsuperscript{154} a male faculty member had joined in pressing the suit, in which the predominantly female nursing faculty claimed they received lower wages than male-dominated faculties of other university departments for substantially equal work. The male plaintiff’s claim was premised on an allegation that he received a salary “infected” by the discrimination the female faculty members suffered in violation of Title VII.\textsuperscript{155} The court denied standing to the male plaintiff in a single paragraph of the eighteen-page decision without ever expressly referring to standing.\textsuperscript{156} Instead, the court stated in conclusory terms that the male plaintiff made “no claim that he received a lower wage because of his sex.”\textsuperscript{157} Obviously, this result would deny standing to all but “direct” victims of discrimination.

\textsuperscript{152} \textit{Id.} at 1557. This result is entirely consistent with earlier Fifth Circuit precedent in the race context. In EEOC v. T.I.M.E.-D.C. Freight, Inc., 659 F.2d 690 (5th Cir. 1981), four truck drivers, two white and two black, alleged that the company had a policy not to allow transfer from city to line jobs in order to prevent blacks who were allowed to hold only city jobs from becoming line drivers. The white drivers articulated a theory that, although this policy was directed against black drivers, they were imbued with the same loss of job opportunity. In a footnote, the court acknowledged their standing to pursue the claim, provided they established a personal injury. \textit{Id.} at 692 n.2. The court relied upon a prior Fifth Circuit case, EEOC v. Mississippi College, 626 F.2d 477 (5th Cir. 1980), \textit{cert. denied}, 453 U.S. 912 (1981), that recognized work environment standing, but found that the injury to the white plaintiffs in \textit{T.I.M.E.-D.C. Freight} was even more substantial. The court stated that not only could each white plaintiff claim a violation of his “‘personal right to work in an environment unaffected by racial discrimination,’ . . . but each can also claim a deprivation of the same employment opportunity denied to the black claimants.” \textit{T.I.M.E.-D.C. Freight}, 659 F.2d at 692 n.2.

\textsuperscript{153} 740 F.2d 686, 709 (9th Cir.), \textit{cert. denied}, 469 U.S. 1036 (1984), \textit{overruled on other grounds}, \textit{Atonio v. Wards Cove Packing Co.}, 810 F.2d 1477 (9th Cir. 1987).

\textsuperscript{154} The concept of “comparable worth” demands that employers cease paying women less than men for work that requires comparable skill, effort and responsibility. Its proponents believe that the pay disparity between female-dominated and male-dominated positions of comparable value constitutes sex discrimination in violation of Title VII. \textit{See Spaulding}, 740 F.2d at 705 n.10.

\textsuperscript{155} \textit{Id.} at 709.

\textsuperscript{156} \textit{Id.}

\textsuperscript{157} \textit{Id.} (emphasis added). Even though the female plaintiffs might be able to frame a cognizable claim, the court decided that the male employee would not be allowed to “bootstrap” his job grievance into a similar federal suit. He was summarily dismissed without a hearing on
The Ninth Circuit entirely failed to address its earlier decision, *Waters v. Heublein, Inc.*,\(^{158}\) in which it found the holding in *Trafficante* to be persuasive in granting work environment standing under Title VII. The opinion in *Waters* emphasized the importance of the workplace in modern society, stating that the “distinction between laws aimed at desegregation and laws aimed at equal opportunity is illusory.”\(^{159}\) With the Ninth Circuit previously recognizing work environment standing accruing to a plaintiff with a less concrete injury than the one asserted in *Spaulding*\(^{160}\) as a result of discrimination directed at someone else, it is difficult to understand the court’s logic in denying standing in *Spaulding*. Certainly, the white plaintiff in *Waters*\(^{161}\) was not asserting a claim based on his race, but rather based on his employer’s discrimination against minorities. The court simply offers no meaningful explanation for its decision.

This issue of indirect standing surfaced again in the Ninth Circuit in 1986. This time, however, the court devoted substantial analysis to the issue. In *Patee v. Pacific Northwest Bell Telephone Co.*,\(^{162}\) three male employees appealed the dismissal of their claim of sex discrimination under Title VII. The male employees had alleged in their complaint that they were paid a lower salary as “maintenance administrators” than they previously received as “test desk technicians” performing the same work.\(^{163}\) The reason for this depressed wage, according to the male plaintiffs, was that Pacific Bell discriminated against women, and the change in job title was accompanied by a change in the predominant sex in the job classification—from men to women.\(^{164}\) The district court, relying on *Spaulding*,\(^{165}\) held that the

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\(^{158}\) 547 F.2d 466, 469 (9th Cir. 1976), *cert. denied*, 433 U.S. 915 (1977).

\(^{159}\) *Id.*

\(^{160}\) *Spaulding*, 740 F.2d 686.

\(^{161}\) 547 F.2d 466.

\(^{162}\) 803 F.2d 476 (9th Cir. 1986).

\(^{163}\) *Id.*

\(^{164}\) *Id.* The underlying facts, which are assumed to be true in conformance with Federal Rule of Civil Procedure 12(b)(6), are that the job performed by the male plaintiffs as maintenance administrators for $422.50 per week was formerly performed by test desk technicians for $527 per week—an almost 20% reduction. Moreover, the diminished wage rate was coincident to a drastic change in the composition of workers performing that job, from
male employees "lacked standing under Title VII to seek redress for wages lost due to alleged discrimination directed at a protected class to which plaintiffs do not belong."[166] Thus, the reason for dismissal was the lack of direct discrimination.

In affirming the dismissal, the Ninth Circuit held that the statutory private cause of action contained in Title VII, which endows standing on a "person claiming to be aggrieved,"[167] must be read restrictively to give standing only to the direct and immediate victims of the discriminatory practices, i.e., women in this particular case. The crux of the Ninth Circuit's opinion was that the male workers did not claim they had been discriminated against because they were men. Rather, they attempted to assert a claim that they received lower pay because of sex-based wage discrimination directed at female employees.[168] And, according to the court, the holding in Spaulding 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 sex."[169] However, contrary to the court's analysis, it is clear that the male plaintiffs were not attempting to vindicate their female coworkers' rights; they were seeking redress for the depressed wages that they received.

After raising the spectre of jus tertii, the court next addressed the concept of associational standing approved by the Supreme Court in

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166. Patee, 803 F.2d at 477. A separate action for a declaratory judgment on the same ground was filed on behalf of female employees who held the position of maintenance administrators. See Forsberg v. Pacific Northwest Bell Tel. Co., 840 F.2d 1409 (9th Cir. 1988). That matter was not before the Ninth Circuit in this appeal from the dismissal of the male employees' suit. In other words, women employees in the identical situation as male employees were allowed to pursue their suit while the men were denied the same opportunity.


168. Patee, 803 F.2d at 478.

169. Id. In a lapse of doctrinal compartmentalization, the Ninth Circuit admitted that appellants were correct in pointing out that the district court specifically relied upon the doctrine of standing to dismiss Patee while the Ninth Circuit itself did not even refer to standing in denying the male faculty member's claim in Spaulding. Nevertheless, the Ninth Circuit stated that this distinction was without substance because Spaulding indicated that the appellants were not entitled to relief, and the court noted that the concepts of standing and entitlement to a remedy overlap, citing Religious Technology Center v. Wollersheim, 796 F.2d 1076, 1079 (9th Cir. 1986), cert. denied, 107 S. Ct. 1336 (1987). Patee, 803 F.2d at 478.
Trafficante. The court correctly opined that associational standing was not squarely on point with Patee because the male employees did not complain about an injury based on a denial of interpersonal contacts with fellow women employees or a deprivation of harmonious relationships. In fact, the male employees asserted their own, personal concrete injury of depressed wages as a result of the employer's discrimination against women. Disregarding the very real injury suffered by the male plaintiffs, the court decided that “[t]he serious consequences that flow from the exclusion of persons because of discrimination in housing and in hiring are not present here.”

This is a peculiar conclusion since other courts have refused to limit work environment standing to discriminatory hiring practices, instead including such varied practices as discriminatory promotion policies and segregation of clients. While the bulk of the discriminatory work environment cases involve fact patterns connected with hiring, none of the cases explicitly limits standing to hiring situations. Rather, in stating the employee's right to a discrimination-free environment, all employment practices will be subjected to scrutiny.

Unfortunately, some other courts have followed the Ninth Circuit's charge in denying standing. In AFSCME v. County of Nassau, the Eastern District of New York relied on Patee even though it acknowledged the Supreme Court's broad interpretation of “person claiming to be aggrieved” in Trafficante to extend standing under Title VII as far as is permitted by article III. The court nevertheless withheld standing from the male plaintiffs because their injuries did not place them within what the court identified as the prudential test of the stat-

170. Patee, 803 F.2d at 479.
171. Id. at 479.
174. 664 F. Supp. 64 (E.D.N.Y. 1987). In AFSCME the trial court was confronted with a request to certify a class of all Nassau County civil service employees who, since July 28, 1982, had worked in “traditionally female jobs.” Plaintiffs defined these jobs as those having 70% or more female employees in 1967, when the County implemented its present classification and compensation system. The certification was sought only for the Title VII claims, and not for Equal Pay Act claims simultaneously being pursued. In opposition to the certification, the defendant argued, among other things, that the proposed class could not be certified because it included men, who lack standing to sue for employment discrimination against women. The two named male plaintiffs alleged that they were underpaid because they work at “traditionally female jobs.” In other words, although they are men, they assert that they are victims of the alleged discrimination by the county against women. As the court aptly noted, the male plaintiffs were not claiming that their associational rights had been violated by being denied interpersonal contacts with women but rather that, but for the defendant’s discrimination against women, they would be paid more. The males asserted their own injuries and their own rights. Id. at 66.
ute's zone of interests: "‘[T]he male workers do not claim that they
have been discriminated against because they are men.'" 175 In doing
so, even the court acknowledged the strangeness of its decision as well
as the appeal of Allen's reasoning:

It may be argued that it is anomalous for title VII plaintiffs to have
standing to assert associational rights while lacking standing to assert
pecuniary rights. As a matter of public policy, it is perhaps strange that
a plaintiff may come to federal court with a complaint that he is losing
associational benefits which are hard to quantify, while he is barred
from complaining of a loss of easily quantifiable dollars. Title VII, how-
ever, focuses on whether the plaintiff suffers discrimination because of
who he is. . . . [The male plaintiffs herein] do not contend that they are
underpaid because they are men. To the contrary, they allege that they
are men who are being mistreated because they are being treated like
women. As such, they have not stated a claim under title VII. Should
this be bad public policy, the remedy is with Congress.176

Still, the court was firm in its interpretation that Title VII focuses on
whether the plaintiff suffers discrimination because of who he is:
"Unlike the Allen court, this court holds that the absence of injury to
the men as men is a fatal flaw for title VII purposes."177

Obviously, this opinion is internally inconsistent. The Eastern Dis-
trict first acknowledges that Trafficante supports a reading that Title
VII standing should be construed as broadly as permitted by article
III and then constricts that standing by applying the prudential zone
of interests test in a limiting fashion.178 Moreover, the court is wrong
in its attempt to distinguish associational benefits standing by implying
that those plaintiffs are denied the benefits of associating with mem-
bers of minority groups because they are white. This is inaccurate.
The guilty employer in a discriminatory work environment case does
not discriminate against white plaintiffs directly—the focus of discrim-
ination is against minorities. The white plaintiffs are hurt only indi-
rectly by the loss of associational and other types of benefits. A cogent
evaluation of work environment standing does not negate but rather
supports recognition of standing under these circumstances.

Another example is Bastian v. Barnes and Reinecke, Inc.,179 in
which both wife and husband plaintiffs asserted injuries under Title

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175. Id. at 66 (quoting Patee, 803 F.2d at 478).
177. Id.
178. Id. at 66.
179. No. 85 C 8041 (N.D. Ill. Dec. 5, 1985) (LEXIS, Genfed library, Dist file) (slip opinion of
Judge McGarr).
VII: She claimed to have been subjected to sexually harassing remarks and demands for sexual favors, and he claimed that the defendant further implied that the wife's acquiescence would also assure the husband's success at the company. The husband, Paul, asserted that the refusal of his wife, Linda, to grant sexual favors resulted in his being denied pay raises and promotions. In dismissing the husband's claim, the judge stated:

Paul only alleges that his wife was subject to sexual harassment and that her failure to acquiesce in the supervisor's demands for sexual favors hurt his employment benefits. The injury to Paul, however, was not because of his sex, but because of his relationship with Linda. In the absence of allegations that Paul was the victim of discrimination based upon his sex, Paul's Title VII claim fails.\(^\text{180}\)

This case illustrates the conceptual proximity of all plaintiffs claiming a personal violation of Title VII as a result of indirect discrimination and the resulting confusion when some plaintiffs are selected for standing and others are not. If attempting theoretical consistency, the Bastian case should be categorized as a type of hostile work environment discrimination, which has been recognized by all courts considering the issue.\(^\text{181}\) Nonetheless, the court failed to make the connection. Instead, it exercised somewhat myopic vision when it dismissed a husband who alleged the very real injury of loss of pay raises and promotions as a result of his employer's discrimination against his coworker spouse.

Paul Bastian would have had standing, pursuant to controlling Seventh Circuit precedent,\(^\text{182}\) if he had expressly claimed that his employer violated Title VII by denying him association with his wife, a member of a protected class discriminated against and constructively discharged by his employer. Attorneys representing plaintiffs like Paul Bastian must learn to aggressively resist dismissal for lack of standing. Their chances of doing so will escalate markedly if they will only recognize the ultimate importance of simply controlling the light in which their claims are cast.

III. CONCLUSION

The Ninth Circuit in Patee and the Northern District of Indiana in Allen, in decisions ten days apart, arrived at opposite conclusions after

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\(^{180}\) Id. (emphasis added). Paul Bastian's wife was allowed to stay in court to press her sexual harassment suit asserting constructive discharge.

\(^{181}\) See supra notes 59–91 and accompanying text.

\(^{182}\) Stewart v. Hannon, 675 F.2d 846 (7th Cir. 1982) (en banc).
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examining whether men, who are injured as a result of their employers' discrimination against women, have standing under Title VII. At the same time that the Ninth Circuit acknowledged a broad concept of standing, it proclaimed that Title VII language ("person claiming to be aggrieved") must be read restrictively to entitle only the direct and immediate victims of the discriminatory practices to pursue their claims in court.183 Meanwhile, the Northern District of Indiana found that the language of Title VII must be read broadly to encompass situations similar to those giving rise to associational or work environment standing. The result reached by the Ninth Circuit is contrary to established precedent in third-party retaliation and discriminatory work environment cases—cases in which discrimination against protected classifications is a Title VII violation that gives standing to all employees, regardless of the plaintiff's sex.

The Allen court's opinion, clearly better reasoned and supported by analogous precedent, should be adopted by future courts for several reasons.184 First and foremost, Title VII was intended to eradicate discrimination in the workplace.185 The statutory language effecting a private cause of action to enforce the law was crafted to be as broad as possible: "any person claiming to be aggrieved" by violations of the Act.186 Arguably, all members of society are hurt by discrimination.187 But even if such a global view is forsaken for a more literal one, workers who themselves suffer an injury at work because their employer discriminates against someone in their workplace should be entitled to sue to redress that injury. Because Title VII is enforced primarily by private individuals, standing should never be converted into a perverse technicality used merely to bar plaintiffs from having their grievances adjudicated and their very real injuries redressed.

185. See supra notes 114–15 and accompanying text.
187. Even from a purely capitalistic perspective, the prohibition of discrimination contained in Title VII may actually enhance rather than impair economic efficiency: "Title VII can be understood to represent wealth-maximizing legislation rather than as some tyrannical or misguided attempt to disregard private preferences." Donohue III, Is Title VII Efficient?, 134 U. PA. L. REV. 1411, 1431 (1986).
Moreover, the courts’ refusal to find standing is questionable in light of prior cases which regularly grant standing not only for victims of direct discrimination, but also for those indirect victims desiring association with minority co-workers in a discrimination-free environment or who are retaliated against as a result of the employer’s discrimination against a friend or relative. Denying indirect standing to men, who historically have been at the forefront of sex discrimination litigation, only serves to restrict yet another avenue for challenging discriminatory employment practices. Consequently, it is more likely that women, shown by empirical studies to be less likely to file suit, will continue to occupy low-paying, predominantly female jobs.

It would be entirely consistent with existing precedent, as well as article III and prudential standing principles, to recognize the form of indirect standing exemplified by the various male standing cases highlighted in this Article. As the Allen court stated, standing should attach to “anyone protesting any form of alleged employer discrimination, on the theory that all employees have a right to work in an atmosphere free from unlawful employment practices.”

At the very least, practitioners should be aware of the multitude of circuits that do recognize a Trafficante-type work environment standing for indirect victims of employment discrimination. To resist summary dismissal, plaintiffs should consider pleading in the alternative allegations that give rise to the indirect type of discrimination at issue in both the male standing cases and the work environment cases. This strategy not only increases the chance of establishing standing but also expands the type of employer practices at issue and, therefore, subject to discovery—an additional advantage. It is ironic that the courts, by engaging in hair-splitting with the apparent result of restricting Title VII standing, may well be forcing plaintiffs to expand the nature of their claims just to stay in court.

188. See supra notes 53–58 and accompanying text.
189. See supra notes 88–91 and accompanying text.
190. See supra notes 8–13 and accompanying text.
191. See supra notes 59–87 and accompanying text.
192. See supra notes 53–58 and accompanying text.
193. See supra notes 16–18 and accompanying text.
195. See supra notes 59–87 and accompanying text.