



12-14-2022

## Kengerski v. Harper: The Third Circuit Clarifies the Scope of Title VII's Protection for Associational Discrimination Claims

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### Recommended Citation

Maureen O'Kane, *Kengerski v. Harper: The Third Circuit Clarifies the Scope of Title VII's Protection for Associational Discrimination Claims*, 67 Vill. L. Rev. 821 (2022).

Available at: <https://digitalcommons.law.villanova.edu/vlr/vol67/iss4/6>

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2022]

*KENGERSKI v. HARPER: THE THIRD CIRCUIT CLARIFIES THE  
SCOPE OF TITLE VII'S PROTECTION FOR  
ASSOCIATIONAL DISCRIMINATION CLAIMS*

MAUREEN O'KANE\*

I. INTRODUCTION

Before the Third Circuit's opinion in *Kengerski v. Harper* (*Kengerski II*),<sup>1</sup> employees who were friends with co-workers of other races,<sup>2</sup> associated with customers of another race,<sup>3</sup> or had a bi-racial extended family member<sup>4</sup> were not protected against workplace discrimination based on their interracial associations under Title VII in Delaware, New Jersey, or Pennsylvania. In *Kengerski II*, the Third Circuit acknowledged for the first time that Title VII protects against discrimination based on interracial associations and clarified such "associational discrimination" claims can be brought regardless of the degree of relationship between interracial associates.<sup>5</sup>

Title VII protects against workplace discrimination "because of [an] individual's race, color, religion, sex, or national origin."<sup>6</sup> Employees who

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\* J.D. Candidate, 2023, Villanova University Charles Widger School of Law; B.A., 2019, Loyola University Maryland. This Casebrief is dedicated to my family. Thank you for your constant love and support. Thank you also to the members of the *Villanova Law Review* for your thoughtful comments throughout the editing process.

1. 6 F.4th 531 (3d Cir. 2021).

2. *See, e.g.,* Larochelle v. Wilmac Corp., 210 F. Supp. 3d 658, 693–94 (E.D. Pa. 2016) (finding there is no claim for associational discrimination for associations with co-workers of different races because they are not "substantial relationship[s]"); Zielonka v. Temple Univ., No. Civ. A. 99-5693, 2001 WL 1231746, at \*6 (E.D. Pa. Oct. 12, 2001) (suggesting having a friendly relationship with and supporting a co-worker of a different race is insufficient to qualify as a "substantial relationship" for the purposes of an associational discrimination claim).

3. Baker v. Wilmington Trust Co., 320 F. Supp. 2d 196, 202–03 (D. Del. 2004) (finding an associational discrimination claim requires a significant relationship such as a spousal or familial relationship, not a bank-teller and customer relationship).

4. *Kengerski v. Allegheny Cnty. (Kengerski I)*, 435 F. Supp. 3d 671, 677–78 (W.D. Pa. 2020) (finding a relative "as remote as a grand-niece" is not a substantial relationship sufficient to sustain an associational discrimination hostile work environment claim), *vacated and remanded sub nom. Kengerski II*, 6 F.4th 531 (3d Cir. 2021).

5. *Kengerski II*, 6 F.4th at 538–39 ("[W]e agree with our sister circuits that associational discrimination is well grounded in the text of Title VII . . . . This theory of discrimination is not limited to close or substantial relationships.").

6. 42 U.S.C. § 2000e-2(a)(1) ("It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation,

have been discriminated against because of these protected characteristics can bring several claims under Title VII, including “retaliation” claims.<sup>7</sup> Retaliation claims are available to employees who have been subjected to an adverse employment action for opposing another “unlawful employment practice” under Title VII.<sup>8</sup>

Three elements are required to establish a prima facie Title VII retaliation claim.<sup>9</sup> First, plaintiffs must show they were engaged in “protected activity” under Title VII, such as reporting harassment amounting to a hostile work environment.<sup>10</sup> For retaliation purposes, an employee is engaged in a protected activity if the employee has “an objectively reasonable belief, in good faith, that the activity [opposed] is unlawful under Title VII.”<sup>11</sup> Second, plaintiffs must show their employer took an “adverse employment action” against them, such as terminating employment.<sup>12</sup> Third, plaintiffs must show their engagement in a protected activity caused the adverse employment action.<sup>13</sup>

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terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin . . .”).

7. See 42 U.S.C. § 2000e-3(a) (preventing employers from taking adverse employment actions against employees who oppose any employment practice “made [ ] unlawful” by Title VII). Title VII makes it unlawful for employers to take adverse employment actions, such as discriminating in compensation, refusing to promote employees, or firing employees, based on Title VII’s protected characteristics. See PRACTICAL LAW LABOR & EMPLOYMENT, Practical Law Practice Note 6-518-4067, DISCRIMINATION UNDER TITLE VII: BASICS (2022). Additionally, Title VII makes it unlawful for employers to facilitate a hostile work environment for its employees or engage in quid pro quo harassment. *Id.* Thus, if an employee observes discrimination by adverse employment actions or discrimination by harassment and reports it, the employee is protected from being retaliated against by his or her employer under Title VII. *Id.* Title VII only applies to private employers in industries affecting commerce with over fifteen employees and to certain federal employers. *Id.*

8. *Kengerski II*, 6 F.4th at 536 (“Title VII makes it unlawful for an employer to retaliate against an employee ‘because he has opposed any practice made an unlawful employment practice by this subchapter . . .’” (quoting 42 U.S.C. § 2000e-3(a))). “Unlawful employment practices” under Title VII include actions such as refusing to hire an employee or firing an employee because of race. See 42 U.S.C. § 2000e-2. Retaliation claims are also available to those who have “made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.” 42 U.S.C. § 2000e-3(a).

9. See *Kengerski II*, 6 F.4th at 536.

10. See, e.g., *id.* (citing 42 U.S.C. § 2000e-3) (emphasizing that an employee is not protected against retaliation if he or she opposed an employment practice which is not unlawful under Title VII); 42 U.S.C. § 2000e-2 to -3 (detailing “unlawful employment practices” under Title VII, including refusing to hire an employee, firing an employee, or otherwise altering the terms of an employee’s employment because of his race, as well as discriminating against an employee for opposing the preceding unlawful employment practices).

11. See *Kengerski II*, 6 F.4th at 536 (quoting *Moore v. City of Phila.*, 461 F.3d 331, 341 (3d Cir. 2006)).

12. See *id.*

13. See *id.* Title VII Retaliation claims are subject to the *McDonnell Douglas* burden-shifting framework. *Id.* at 536 n.3 (citing *McDonnell Douglas Corp. v.*

Returning to the first prong of a *prima facie* retaliation claim, an employee's conduct is protected if the employee opposes an employment practice which is actually unlawful under Title VII *or* which a reasonable person would believe is unlawful under Title VII.<sup>14</sup> Workplace behavior actually violating Title VII by discriminating because of race may involve discriminatory acts toward an individual with animus based on the individual's race.<sup>15</sup> Racist behaviors toward the individual may be so "severe or pervasive" that they create a hostile work environment for the individual.<sup>16</sup>

However, an employee may also be harassed at work because of his or her association with a third party of a different race.<sup>17</sup> Since 1986, other circuit courts have recognized that discrimination because of one's interracial relationships *is* discrimination because of race and is thus prohibited by Title VII.<sup>18</sup> Courts refer to this discrimination based on one's

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Green, 411 U.S. 792 (1973)). Under the *McDonnell Douglas* framework, once a plaintiff has proven a *prima facie* retaliation claim the burden shifts to the employer to produce a legitimate non-retaliatory reason for the adverse employment action. *Id.* If the employer satisfies this burden by producing a legitimate non-retaliatory reason, to prevail the plaintiff must then produce evidence the provided reason is pre-textual. *Id.*

14. *See id.* at 536–37 (explaining the first element of a *prima facie* retaliation claim requires proving engagement in activity protected by Title VII, which is satisfied if the plaintiff holds an objectively reasonable belief the reported activity violates Title VII).

15. *See Race/Color Discrimination*, U.S. EEOC, <https://www.eeoc.gov/racecolor-discrimination> [<https://perma.cc/AD8G-ML8Y>] (last visited Oct. 18, 2022) ("Race discrimination involves treating someone . . . unfavorably because he/she is of a certain race or because of personal characteristics associated with race . . .").

16. *See Kengerski II*, 6 F.4th at 537. Retaliation claims and Hostile Work Environment claims differ in important ways. *Id.* For instance, if employees believe they are experiencing a hostile work environment and they report it, as long as the beliefs are objectively reasonable the employees satisfy the first prong of a retaliation claim. *Id.* However, if the employee wants to bring a hostile work environment claim, the plaintiff must show the environment was actually hostile: the unlawful conduct was actually "severe or pervasive." *Id.*

17. *See, e.g., Holiday v. Belle's Rest.*, 409 F. Supp. 904, 908 (W.D. Pa. 1976) (describing a situation where a white plaintiff claimed she was discriminated against because she was married to a Black man).

18. *See, e.g., Holcomb v. Iona Coll.*, 521 F.3d 130, 139 (2d Cir. 2008) ("[W]here an employee is subjected to adverse action because an employer disapproves of interracial association, the employee suffers discrimination because of the employee's *own* race."); *Tetro v. Elliot Popham Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc.*, 173 F.3d 988, 994 (6th Cir. 1999) (recognizing for the first time in the Sixth Circuit that discharging an employee "because his child is biracial is discriminat[ion] . . . on the basis of his race"); *Drake v. Minn. Mining & Mfg. Co.*, 134 F.3d 878, 884 (7th Cir. 1998) (recognizing associational discrimination claims and finding the "degree of association" is irrelevant to determining whether employees have been discriminated against because of their interracial associations); *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581, 589 (5th Cir. 1998) (finding that discriminating against a white woman for her relationship with a Black man is discrimination because of her race being different than her Black associate's race), *vacated in part on other grounds*, 182 F.3d 333 (5th Cir. 1999); *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986) ("Where a plaintiff claims discrimination upon an interracial marriage or associa-

interracial relationships as “associational discrimination.”<sup>19</sup> In these circuits, workplace behavior discriminating against an employee for an interracial association is an unlawful employment practice under Title VII.<sup>20</sup> Since federal circuit courts began to recognize that Title VII protects against associational discrimination, a few courts have gone further and emphasized that the degree of association is irrelevant to determine whether plaintiffs have been discriminated against because of their association with people of another race.<sup>21</sup>

Despite other circuits recognizing associational discrimination, before July 29, 2021, the Third Circuit had not validated Title VII claims based on associational discrimination, even with a recent opportunity to.<sup>22</sup> District court judges within the Third Circuit have recognized the possibility of associational discrimination claims under Title VII since as early as 1976.<sup>23</sup> But without guidance from the Third Circuit, district court judges within the circuit developed a pattern of dismissing associational discrimination claims under Title VII.<sup>24</sup> This pattern developed in part because the

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tion, he alleges, by definition, that he has been discriminated against because of *his* race.”). *See also Race/Color Discrimination*, *supra* note 15 (“Race/color discrimination also can involve treating someone unfavorably because the person is married to (or associated with) a person of a certain race or color.”).

19. *See Kengerski II*, 6 F.4th at 538 (explaining that referring to discrimination because of one’s interracial relationships as associational discrimination is a “misnomer” because discriminating “against an employee because of his association with someone of a different race” is “discriminating against him ‘because of [his own] race’ in violation of Title VII” (quoting 42 U.S.C. § 2000e-2(a)(1))).

20. *See cases cited supra* note 18 (discussing other circuit courts recognizing associational discrimination); 42 U.S.C. § 2000e-2.

21. *See Barrett v. Whirlpool Corp.*, 556 F.3d 502, 512 (6th Cir. 2009) (explaining the focus of a Title VII inquiry should be whether the employee was discriminated against because of his or her race, not on the depth of the interracial association which may have prompted the discrimination); *accord Drake*, 134 F.3d at 884.

22. *See Kengerski I*, 435 F. Supp. 3d 671, 677 (W.D. Pa. 2020) (“[S]ome courts (though not the Third Circuit) have recognized that a plaintiff can assert such a claim based on an association with a member of a protected class.”), *vacated and remanded sub nom. Kengerski II*, 6 F.4th 531 (3d Cir. 2021); *Larochelle v. Wilmac Corp.*, 769 F. App’x 57, 59 n.4 (3d Cir. 2019) (declining to decide whether a party’s associational discrimination claim was viable because it was “not squarely argued” on appeal (quoting *John Wyeth & Bro. Ltd. v. CIGNA Int’l Corp.*, 119 F.3d 1070, 1076 n.3 (3d Cir. 1997))).

23. *See Holiday v. Belle’s Rest.*, 409 F. Supp. 904, 905, 908–09 (W.D. Pa. 1976) (denying employer’s motion to dismiss because discrimination against an employee because of her interracial marriage is discrimination because of race and thus can be actionable under Title VII).

24. *Cf. Kengerski I*, 435 F. Supp. 3d at 677–78 (granting summary judgment for the County because the Third Circuit does not recognize associational discrimination claims, and even if they did, Mr. Kengerski’s relationship with his bi-racial grand-niece was not substantial enough such that it was “objectively unreasonable to believe that Mr. Kengerski suffered from a hostile work environment under an associational theory of discrimination”); *Larochelle v. Wilmac Corp.*, 210 F. Supp. 3d 658, 694 (E.D. Pa. 2016) (granting summary judgment for the employer because the plaintiff only had an interracial co-worker relationship and “courts have

judges understood successful associational discrimination claims to require a “substantial [interracial] relationship” and because the Third Circuit had not yet recognized Title VII’s protections include those discriminated against because of their interracial associations.<sup>25</sup>

Most recently in 2020, a district judge in the Western District of Pennsylvania dismissed a jail employee’s Title VII retaliation claim because his interracial relationship with his bi-racial grand-niece was not substantial enough for a reasonable person to believe the employee was subjected to a hostile work environment.<sup>26</sup> The employee appealed to the Third Circuit, which recognized and clarified the scope of associational discrimination claims under Title VII and thus expanded Title VII’s protections for employees within the Circuit.<sup>27</sup>

Part II of this Casebrief will describe *Kengerski II*’s new legal standard for Title VII associational discrimination claims within the Third Circuit. Part III provides *Kengerski II*’s facts and the Third Circuit’s reasoning. Part IV argues that *Kengerski II* was correctly decided, but that the court missed an important opportunity to address Title VII’s function in today’s workplace. Part V points out that although *Kengerski II* was the Third Circuit’s first recognition of associational discrimination claims under Title VII, the case’s most significant impact is the emphasis that the degree of an interracial association is irrelevant to Title VII associational discrimination claims within the Third Circuit.

## II. APPLICABLE LEGAL STANDARD

For the first time, the Third Circuit held that workplace behavior violates Title VII by creating a hostile work environment when an employee is harassed for associating with a person of another race, regardless of the

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not found that the relationship between co-workers is a ‘substantial relationship’ as would give rise to an associational discrimination claim”); *Baker v. Wilmington Trust Co.*, 320 F. Supp. 2d 196, 202–03 (D. Del. 2004) (granting summary judgment for Wilmington Trust because “association discrimination claims must have as their basis a much more significant relationship” than an employee-customer relationship while suggesting only a spousal or familial relationship would suffice); *Zielonka v. Temple Univ.*, No. CIV. A. 99-5693, 2001 WL 1231746, at \*6 (E.D. Pa. Oct. 12, 2001) (granting summary judgment for Temple because having a friendly relationship with and supporting a co-worker of a different race in intra-departmental elections is not substantial enough alone to support an associational discrimination claim, while leaving open the possibility of this relationship sustaining a claim if there is enough evidence of discrimination).

25. See *supra* note 24 (discussing Third Circuit district court opinions deciding against plaintiffs with associational discrimination claims in part because the plaintiffs’ relationships with their interracial associates were not substantial enough).

26. See *Kengerski I*, 435 F. Supp. 3d at 677–78 (finding there is no “substantial” interracial relationship with “a relative as remote as a grand-niece”).

27. See *Kengerski II*, 6 F.4th 531, 538 (3d Cir. 2021).

degree of association.<sup>28</sup> The Third Circuit also emphasized that “Title VII protects all employees from retaliation when they reasonably believe that behavior at their work violates [Title VII] and they make a good-faith complaint.”<sup>29</sup> Thus, the panel held that the first prong of a Title VII retaliation claim is satisfied if an employee reports harassment based on an interracial association which (a) actually violates or which (b) a reasonable person would believe violated Title VII by creating a hostile work environment.<sup>30</sup>

### III. *KENGERSKI II*'S FACTS AND NARRATIVE ANALYSIS

Mr. Jeffrey Kengerski had worked at the Allegheny County (County) Jail for approximately thirteen years when he filed a written complaint to the Warden in April 2015 detailing exchanges with his superior, Ms. Robyn McCall, where she harassed him for having a bi-racial grand-niece and sent him racist text messages.<sup>31</sup>

Mr. Kengerski's complaint first described an exchange with Ms. McCall that occurred in early 2014.<sup>32</sup> Mr. Kengerski, who is white, alleged he was speaking with a group of his co-workers, which included then-Captain McCall, regarding the possibility that he and his wife might assume care of his grand-niece Jaylynn.<sup>33</sup> Ms. McCall then asked Mr. Kengerski whether Jaylynn was Black.<sup>34</sup> Upon learning Jaylynn was bi-racial, Ms. McCall pro-

28. See *Kengerski II*, 6 F.4th at 534, 538–39 (“[H]arassment against an employee because he associates with a person of another race . . . may violate Title VII by creating a hostile work environment.”).

29. See *id.* at 534.

30. See *id.* (explaining that a reasonable person could believe a workplace creates a hostile environment for employees who associate with persons of another race).

31. See *id.*; see also Appellant's Brief at 2, *Kengerski II*, 6 F.4th 531 (3d Cir. 2021) (No. 20-1307), 2020 WL 2316493 at \*2 (noting Mr. Kengerski had worked at the Allegheny County Jail for over thirteen years when the Warden fired him). As the panel observed, when viewing the record in a light most favorable to Mr. Kengerski, Ms. McCall and Mr. Kengerski had a superior-inferior relationship when she made her comments about Mr. Kengerski's grand-niece, Jaylynn. *Kengerski II*, 6 F.4th at 539. Ms. McCall was a captain, and accordingly was part of the jail's management system, and Mr. Kengerski was ranked below her as a sergeant. *Id.* Both received promotions following the incidents alleged in Mr. Kengerski's complaint. See *id.*

32. *Kengerski II*, 6 F.4th at 534–35.

33. *Id.* at 535.

34. *Id.* The complaint alleges Ms. McCall said: “[W]hat kind of name is Jaylynn? Is she [B]lack?” *Id.* (quoting Joint Appendix at 236, *Kengerski II*, 6 F.4th 531 (3d Cir. 2021) (No. 20-1307)). This Casebrief capitalizes the “B” in Black when referring to people of African descent. This Casebrief will not capitalize the “w” in white in accordance with current capitalization conventions and to avoid association with the capitalization choices of white supremacists. Leaving the “w” in white lowercase is not intended to perpetuate racist structures by refusing to recognize whiteness as a racial and cultural identity in American society. See, e.g., Kwame Anthony Appiah, *The Case for Capitalizing the B in Black*, THE ATLANTIC (June 18, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/time-to->

ceeded to refer to Jaylynn as a “monkey.”<sup>35</sup> Specifically, Mr. Kengerski’s complaint alleges Ms. McCall said that if Mr. Kengerski began caring for Jaylynn, he would “be that guy in the store with a little monkey on his hip like Sam Pastor,” another jail employee who had a bi-racial child.<sup>36</sup> Mr. Kengerski asked Ms. McCall “not to speak like that” about him and Jaylynn and left the room.<sup>37</sup> After Ms. McCall learned Mr. Kengerski’s grand-niece was bi-racial, Ms. McCall proceeded to send Mr. Kengerski racist text messages with offensive images between February and June 2014.<sup>38</sup> Ms. McCall’s texts even compared some of the racist images to their Black or Asian co-workers.<sup>39</sup>

Mr. Kengerski complained that Ms. McCall had created a hostile environment for Mr. Kengerski *himself* where he felt he was “in a hostile environment and [would] be disciplined, harassed[,] and possibly ridiculed by Major McCall on any occasion.”<sup>40</sup> After receiving Mr. Kengerski’s complaint, the Warden forwarded it to the County law department and placed Ms. McCall on administrative leave in May 2015.<sup>41</sup> Ms. McCall resigned in

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capitalize-blackand-white/613159/ [https://perma.cc/24L4-BCDQ] (“To not name ‘[w]hite’ as a race is, in fact, an anti-Black act which frames [w]hiteness as both neutral and the standard . . . We believe that it is important to call attention to [w]hite as a race as a way to understand and give voice to how [w]hiteness functions in our social and political institutions and our communities. Moreover, the detachment of ‘[w]hite’ as a proper noun allows [w]hite people to sit out of conversations about race and removes accountability from [w]hite people’s and [w]hite institutions’ involvement in racism.” (omission in original) (quoting Ann Thúy Nguyen & Maya Pendleton, *Recognizing Race in Language: Why We Capitalize “Black” and “White”*, CTR. FOR STUDY SOC. POL’Y (Mar. 23, 2020), <https://cssp.org/2020/03/recognizing-race-in-language-why-we-capitalize-black-and-white/> [https://perma.cc/52Z2-B4M4])); Nguyen & Pendleton, *supra* (“While we condemn those who capitalize “W” for the sake of evoking violence, we intentionally capitalize ‘[w]hite’ in part to invite people, and ourselves, to think deeply about the ways [w]hiteness survives—and is supported both explicitly and implicitly.”); Eve L. Ewing, *I’m a Black Scholar Who Studies Race. Here’s Why I Capitalize “White”*, ZORA (July 2, 2020), <https://zora.medium.com/im-a-black-scholar-who-studies-race-here-s-why-i-capitalize-white-f94883aa2dd3> [https://perma.cc/9DK4-QVRE] (“Whiteness remains invisible, and as is the case with all power structures, its invisibility does crucial work to maintain its power.”).

35. *Kengerski II*, 6 F. 4th at 535.

36. *Id.* (quoting Joint Appendix at 236, *Kengerski II*, 6 F.4th 531 (3d Cir. 2021) (No. 20-1307)).

37. *Id.*

38. *Id.*

39. *Id.* The Third Circuit also noted that whether Ms. McCall’s text messages were sent to Mr. Kengerski individually or in a group-text was irrelevant to its analysis. *Id.* at 535 n.1.

40. *Id.* at 535 (quoting Joint Appendix at 236, *Kengerski II*, 6 F.4th 531 (3d Cir. 2021) (No. 20-1307)). Mr. Kengerski also alleged Major McCall “punitive[ly] assign[ed]” him to the night shift. *Id.* Mr. Kengerski may have been protected for whistle blowing on harassment amounting to a hostile work environment for his Black and Asian co-workers, but the panel focused on Mr. Kengerski’s allegation that his own work environment became hostile because of Ms. McCall’s behavior. *Id.* at 537 n.6.

41. *Id.* at 535.



August 2015, which Mr. Kengerski claimed the Warden forced her to do because of his complaint.<sup>42</sup>

Mr. Kengerski alleged other officers “retaliat[ed]” against him in the wake of Ms. McCall’s resignation.<sup>43</sup> The County fired Mr. Kengerski in November 2015, seven months after he filed his complaint and three months after Ms. McCall resigned.<sup>44</sup> Mr. Kengerski sued the Warden and the Allegheny County Jail for Title VII retaliation two months after he was fired.<sup>45</sup> Mr. Kengerski claimed the Warden fired him because he reported Ms. McCall’s discriminatory behavior.<sup>46</sup>

The district court judge only addressed the first element of Mr. Kengerski’s retaliation claim: whether his complaint to the Warden constituted “protected conduct” under Title VII.<sup>47</sup> The judge held Mr. Kengerski’s retaliation claim failed at summary judgment because Mr. Kengerski was not engaged in protected conduct when he reported Ms. McCall’s behavior.<sup>48</sup> The judge found Mr. Kengerski was not engaged in protected conduct because Ms. McCall’s comment and text messages did not create a hostile work environment for Mr. Kengerski and a reasonable person would not think that they did because Mr. Kengerski is white and Ms. McCall’s conduct targeted Black and Asian people.<sup>49</sup>

The judge also noted it was “objectively unreasonable” for Mr. Kengerski to think he was subjected to a hostile work environment because of his interracial relationship with his grand-niece given that the Third Circuit had not recognized associational discrimination claims.<sup>50</sup> The judge found that even if the Third Circuit had recognized associa-

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42. *Id.*

43. *Id.*

44. *Id.* There was a factual dispute regarding why the County fired Mr. Kengerski. *Id.* The County claims it fired Mr. Kengerski because he “mishandled a sexual harassment complaint,” while Mr. Kengerski argues this is pretextual and the real reason the County fired him was in “retribution” for filing the complaint against Ms. McCall that prompted her resignation. *Id.*

45. *Id.* at 535–36. Mr. Kengerski’s only surviving claim was his Title VII retaliation claim. *Id.* at 536. His claims for due process violations, race and sex discrimination, and retaliation under the Family and Medical Leave Act were eliminated through pleading amendments and motions. *Id.*

46. *Id.*

47. *Id.*

48. *Kengerski I*, 435 F. Supp. 3d 671, 677 (W.D. Pa. 2020) (citing *Moore v. Phila.*, 461 F.3d 331, 342 (3d Cir. 2006); *Longoria v. New Jersey*, 168 F. Supp. 2d 308, 318 (D.N.J. 2001)) (finding “[t]here is no hostile work environment . . . when [the plaintiff] is not the member of the protected class allegedly harassed” and that Mr. Kengerski “could not have held an objectively reasonable, good-faith belief that he [as a white man] was subject to a hostile work environment” because of racist comments made to him about his Black and Asian co-workers), *vacated and remanded sub nom. Kengerski II*, 6 F.4th 531 (3d Cir. 2021).

49. *Id.*

50. *Id.* at 677–78 (“[I]t would be objectively unreasonable to believe that Mr. Kengerski suffered from a hostile work environment under an associational theory of discrimination.”).

tional discrimination claims, Mr. Kengerski did not have a substantial enough relationship with Jaylynn for him to reasonably believe he suffered from a hostile work environment because of his relationship with her.<sup>51</sup>

Finally, the judge found that even if Mr. Kengerski could have been subjected to a hostile work environment because of his interracial association, Ms. McCall's comment and text messages were not "severe or pervasive" enough such that a reasonable person would think those actions violated Title VII.<sup>52</sup> The judge held that one racist comment is "insufficient to constitute [a] hostile work environment" as a matter of law and thus Mr. Kengerski was not reporting an "unlawful employment practice" under Title VII and could not bring a retaliation claim.<sup>53</sup>

Mr. Kengerski appealed the district court judge's decision to grant summary judgment for the County on his Title VII retaliation claim.<sup>54</sup> The Third Circuit began its analysis by finding Title VII protects employees against discrimination because of their interracial associations.<sup>55</sup> The court explained that the term "associational discrimination" is a misnomer: discrimination against an interracial relationship is because of *both* parties' races being different from each other. Thus, this type of discrimination *is* discrimination based on race violating Title VII.<sup>56</sup> Associational discrimination is possible even where the association is not a close or substantial relationship because it is not based on the associate's race alone: the discrimination is because of *both* the plaintiff's race and the associate's race.<sup>57</sup>

Having asserted that associational discrimination violates Title VII when it amounts to a hostile work environment, the Third Circuit progressed to decide whether Mr. Kengerski's retaliation claim should have survived summary judgment.<sup>58</sup> The Third Circuit held Mr. Kengerski's retaliation claim could have survived summary judgment on the first prong because Mr. Kengerski was engaged in protected conduct when he

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51. *Id.*

52. *Id.* at 678.

53. *Id.* at 678–79.

54. *Kengerski II*, 6 F.4th 531, 536 (3d Cir. 2021).

55. *See id.* at 538 (“[W]e agree with our sister circuits that associational discrimination is well grounded in the text of Title VII.”).

56. *See id.* (explaining the discrimination is because the individual is not the same race as his associate, rather than because the individual is associating with a person of the particular race).

57. *See id.* at 539. The Third Circuit reached this conclusion without much explanation other than citing the Sixth Circuit's decision in *Barrett* and the Seventh Circuit's decision in *Drake*. *Id.* (citing *Barrett v. Whirlpool Corp.*, 556 F.3d 502, 513 (6th Cir. 2009); *Drake v. Minn. Mining & Mfg. Co.*, 134 F.3d 878, 884 (7th Cir. 1998)). The panel explained discrimination is likely to be more severe the closer the interracial relationship, but Title VII protects against even distant associations between people of different races if they face discrimination because of the association. *Id.*

58. *See id.* at 539–41.

reported Ms. McCall's behavior.<sup>59</sup> Reporting Ms. McCall was protected conduct because Ms. McCall's bigoted comment combined with the racist text messages she sent to Mr. Kengerski could be enough for a reasonable person to think she was subjecting Mr. Kengerski to a hostile work environment because of his interracial association.<sup>60</sup> Though the district judge found that one comment and a few text messages cannot actually meet the "severe or pervasive" standard for a hostile work environment claim, the Third Circuit did not address this conclusion and remanded the case on another issue.<sup>61</sup>

#### IV. CRITICAL ANALYSIS

The Third Circuit's holding that Title VII protects against associational discrimination regardless of the degree of the interracial association was correct because it adheres to Title VII's text and furthers its purpose to "end[ ] racial discrimination in the workplace."<sup>62</sup> Title VII's text prohibits discrimination against employees because of their "race, color, religion, sex, or national origin."<sup>63</sup> Discrimination against an employee for an

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59. *Id.*

60. *See id.* at 539–40. Viewing the record in a light favorable to Mr. Kengerski, Ms. McCall was his superior when she made her comment and sent the text messages. *Id.* at 539. Notably, the Third Circuit also suggested it can be reasonable for an employee to think that even a single discriminatory comment from a supervisor creates a hostile work environment for the purposes of a retaliation claim. *Id.* at 540.

61. *See Kengerski I*, 435 F. Supp. 3d 671, 679 (W.D. Pa. 2020) ("Ms. McCall made a comment and sent text messages to Mr. Kengerski that were offensive, unprofessional, and even racist; still, no reasonable jury could find that Mr. Kengerski had an objectively reasonable, good-faith belief that they constituted an unlawful employment practice under Title VII."), *vacated and remanded sub nom. Kengerski II*, 6 F.4th 531 (3d Cir. 2021). The district judge cited several cases showing "offhand" remarks cannot be severe or pervasive enough to amount to a hostile work environment. *Id.* at 678–79 (citing *Faragher v. Boca Raton*, 524 U.S. 775, 786–88 (1998) ("Simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to a hostile work environment."); *see also Kengerski II*, 6 F.4th at 540 ("We express no view whether [Ms.] McCall's conduct would support a hostile-work-environment claim if [Mr.] Kengerski were to bring one.")). The Third Circuit then remanded the case to the district judge to determine whether Mr. Kengerski's claim survives summary judgment on the third prong of a prima facie retaliation claim: causation. *Id.* at 541. *But see Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 280 (4th Cir. 2015) (recognizing the extremely offensive nature of using the term "monkey" to describe a Black person and finding that a "reasonable jury could find that . . . two uses of the [term] 'porch monkey' . . . whether viewed as a single incident or as a pair of discrete instances of harassment—were severe enough to engender a hostile work environment").

62. *See Barrett*, 556 F.3d at 512 (explaining Congress' purpose in passing Title VII was to end "racial discrimination in the workplace"); *see also* 29 C.F.R. § 1608.1(b) (explaining Title VII's purpose was to "establish[ ] a national policy against discrimination in employment on grounds of race, color, religion, sex, and national origin" in the context of Equal Employment Opportunity Commission guidance on Affirmative Action under Title VII).

63. 42 U.S.C. § 2000e-2(a)(1).

interracial association is discrimination because of race: the discrimination is because the employee's race is different than his or her associate's race.<sup>64</sup> The Third Circuit's decision in *Kengerski II* thus does not add a new protected class to Title VII's language, but rather recognizes another scenario which qualifies as discrimination because of race.<sup>65</sup>

One author argues this characterization is inaccurate: that this line of reasoning does not lead to "a finding of discrimination based on the plaintiff's race alone."<sup>66</sup> But Title VII's language prohibits discrimination because of race without qualification.<sup>67</sup> Thus, recognizing that discrimination against an employee because his or her race is different from his or her associate's race *is* discrimination because of the employee's race and does not conflict with Title VII's text.<sup>68</sup> Because the main inquiry underlying Title VII race discrimination claims is whether the employee has been discriminated against and whether it was because of race, the Third Circuit correctly held the "degree of association" is irrelevant to the validity of an associational discrimination claim.<sup>69</sup>

The *Kengerski II* decision also furthers Title VII's purpose. Though Title VII was generally intended to eliminate discrimination and provide equal employment opportunities in the workplace, Congress passed it with a special focus on prohibiting discrimination to ultimately "improve the economic and social conditions of minorities and women."<sup>70</sup> Even though associational discrimination plaintiffs so far have largely been white, allowing associational discrimination claims still expands Title VII's protections for people of color by prohibiting discriminatory workplace conduct directed at people with interracial associations which may have a "root animus" toward people of color.<sup>71</sup> This expanded protection

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64. *Kengerski II*, 6 F.4th at 538.

65. *Id.*

66. See Lihi Yona, Comment, *Whiteness at Work*, 24 MICH. J. RACE & L. 111, 130 (2018).

67. See 42 U.S.C. § 2000e-2(a)(1).

68. See *supra* note 18 (citing circuit courts already recognizing associational discrimination claims); *Kengerski II*, 6 F.4th at 538 ("[A]ssociational discrimination is well[-]grounded in the text of Title VII.").

69. See *Drake v. Minn. Mining & Mfg. Co.*, 134 F.3d 878, 884 (7th Cir. 1998) (explaining that because Title VII allows employment discrimination claims if the discrimination is because of race, "the key inquiries should be whether the employee has been discriminated against and whether that discrimination was 'because of' the employee's race . . . we do not believe that an objective 'degree of association' is relevant to this inquiry."); *Barrett v. Whirlpool Corp.*, 556 F.3d 502, 513 (6th Cir. 2009) (noting degree of association "goes to the question of whether the plaintiff has established a hostile work environment, not whether he is eligible for the protections of Title VII in the first place").

70. 29 C.F.R. § 1608.1(b) (discussing Title VII's purpose in the context of guidance from the Equal Employment Opportunity Commission on Affirmative Action under Title VII).

71. See *supra* notes 2–4 (discussing associational discrimination cases within the Third Circuit with white plaintiffs); *Barrett*, 556 F.3d at 512 (explaining discrimination against a man with a bi-racial child is discrimination because of his race

grounded in Title VII's text thus furthers Title VII's purpose to eliminate employment-based racial discrimination by allowing more avenues for plaintiffs to hold employers accountable for racist behaviors in the workplace.<sup>72</sup>

Not only did the Third Circuit rightly validate associational discrimination claims and their parameters, but the Third Circuit was also correct to decide the associational discrimination issue when it could have avoided answering the question.<sup>73</sup> The United States and affiliates of the National Employment Lawyers Association raised the associational discrimination argument on appeal; Mr. Kengerski did not argue it in his initial brief.<sup>74</sup> Typically, this means the appellate court cannot decide the argument because of a rule preventing amici from “fram[ing] the issues for appeal.”<sup>75</sup>

Just two years earlier, another Third Circuit panel in *Larochelle v. Wilmac Corp.*<sup>76</sup> faced a similar procedural rule preventing it from deciding the validity of an associational discrimination claim.<sup>77</sup> Unlike the *Larochelle* panel, the *Kengerski II* panel rightfully chose to bypass the rule bar-

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and his race's difference from his daughter's, “even though the root animus for the discrimination is a prejudice against the biracial child” (quoting *Tetro v. Elliot Popham Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc.*, 173 F.3d 988, 994 (6th Cir. 1999))). Though plaintiffs so far have largely been white, associational discrimination claims are available to plaintiffs of any race who have been discriminated against for having an interracial association. *Cf.* 42 U.S.C. § 2000e-2(a)(1) (stating it is an unlawful employment practice to discriminate against an employee because of his or her race without qualification); *Kengerski II*, 6 F.4th at 538 (holding discriminating against an employee “because of his association with someone of a different race” violates Title VII without finding the plaintiff must be a certain race).

72. *See* 29 C.F.R. § 1608.1(b) (explaining Title VII's purpose was to “establish [ ] a national policy against discrimination in employment on grounds of race, color, religion, sex, and national origin” in the context of Equal Employment Opportunity Commission guidance on Affirmative Action under Title VII).

73. *See Kengerski II*, 6 F.4th at 538 (referencing a “general rule” that “amic[i] may not frame the issues for appeal” (quoting *DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 731 (3d Cir. 1995))); *see also* *Larochelle v. Wilmac Corp.*, 769 F. App'x 57, 59 n.4 (3d Cir. 2019) (declining to decide whether the Third Circuit recognizes associational discrimination claims because the plaintiff did not “squarely argue [ ]” them just two years before the circuit decided *Kengerski II*).

74. *Kengerski II*, 6 F.4th at 537–38 (“Amici . . . ask us to hold that an employee may be protected from retaliation when he reports a work environment that he reasonably believes is hostile *to him* because of his association with persons of another race.”).

75. *See id.* at 538 (quoting *DiBiase*, 48 F.3d at 731) (“We ordinarily would not consider this [associational discrimination] argument, which was not raised explicitly by Kengerski in his opening brief, because an ‘amicus may not frame the issues for appeal.’” (quoting *DiBiase*, 48 F.3d at 731)).

76. 769 F. App'x 57 (3d Cir. 2019).

77. *See id.* at 59 n.4 (“[The plaintiff] waived any challenge to her claims of associational race discrimination under Title VII . . . because they were ‘not squarely argued.’” (quoting *John Wyeth & Bro. Ltd. v. CIGNA Int'l Corp.*, 119 F.3d 1070, 1076 n.6 (3d Cir. 1997))).

ring amici from framing the issues for appeal because “substantial public interests” justified it.<sup>78</sup> As the panel observed, “this issue could affect the behavior of countless employers and employees in situations ranging from interracial marriage to intra-office friendships.”<sup>79</sup> The *Kengerski II* panel was correct: substantial public interests did not just justify, but demanded addressing this argument to protect against additional forms of racist behavior and racial discrimination in the workplace.<sup>80</sup>

Though the *Kengerski II* opinion was correctly decided, it did not answer a few questions the district judge’s opinion raised.<sup>81</sup> First, the Third Circuit did not decide whether Ms. McCall’s comment alone could “support a reasonable belief of a Title VII violation” for retaliation purposes.<sup>82</sup> Second, the Third Circuit did not address the district judge’s conclusion that Ms. McCall’s racist comment and text messages “could not possibly rise to the level of ‘severe or pervasive’ to constitute a hostile work environment towards Mr. Kengerski.”<sup>83</sup>

Though the Third Circuit did not explicitly answer these questions, the court included language and citations that suggest racial slurs alone could be sufficient to sustain retaliation and hostile work environment

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78. *Kengerski II*, 6 F.4th at 538 (quoting *DiBiase*, 48 F.3d at 731). The court further noted that deciding the associational discrimination issue would not “unduly prejudice” the County because Mr. Kengerski raised the “general substance” of an associational discrimination claim in his initial brief by focusing on the comments Ms. McCall made to him about Jaylynn. *Id.* The County also had the opportunity to reply to Amicus’ briefs in its response brief. *Id.*

79. *Id.*

80. If *Larochelle* had recognized associational discrimination claims in the Third Circuit, Mr. Kengerski might not have been subjected to the appeals process. *Compare Kengerski I*, 435 F. Supp. 3d 671, 677 (W.D. Pa. 2020) (noting in 2020 that the Third Circuit had not recognized associational discrimination claims to support decision to grant summary judgment for the County), *vacated and remanded sub nom. Kengerski II*, 6 F.4th 531 (3d Cir. 2021), *with Larochelle*, 769 F. App’x at 59 n.4 (declining in 2019 to decide the plaintiff’s associational discrimination claims).

81. *Kengerski II*, 6 F.4th at 540 (declining to decide whether Ms. McCall’s comment alone could support a reasonable belief of a Title VII violation and whether the combined comment and texts could support a hostile work environment claim).

82. *Id.* (“[W]e need not decide whether this isolated comment, standing alone, is enough to support a reasonable belief of a Title VII violation because [Ms.] McCall subsequently made numerous additional racist comments in text messages over a period of several months.”). *But see id.* at 539–40 (citing *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 280 (4th Cir. 2015)) (explaining that the court in *Boyer-Liberto* found two uses of “porch monkey” in a single incident was enough for a reasonable jury to find there was a hostile work environment, not just a reasonable belief that a Title VII violation had occurred for retaliation purposes).

83. *Kengerski I*, 435 F. Supp. 3d at 678–79 (concluding both that the comment and text messages did not actually create a hostile work environment *and* that a reasonable person would not think they did); *Kengerski II*, 6 F.4th at 540 (“We express no view whether [Ms.] McCall’s conduct would support a hostile-work-environment claim if [Mr.] Kengerski were to bring one.”).

claims today. First, the Third Circuit wrote an employee may be protected from retaliation for reporting a supervisor's single discriminatory comment because a reasonable person may think the comment violated Title VII.<sup>84</sup> Though the Third Circuit ultimately did not decide whether Ms. McCall's comment alone was enough to sustain a retaliation claim, this language suggests that the reasonableness standard under Title VII may be shifting.<sup>85</sup> Additionally, the Third Circuit referenced a Fourth Circuit decision that concluded the term "porch monkey" used twice in a single incident "could be found by a reasonable jury to be 'severe enough to engender a hostile work environment.'"<sup>86</sup>

The Third Circuit's language and citations to the Fourth Circuit's decision show the court might be persuaded that racial slurs alone can support both retaliation claims and hostile work environment claims today.<sup>87</sup> Though these passages suggest evolving standards for retaliation and hostile work environment claims, the Third Circuit did not confirm any shifts; the panel did not decide whether an isolated comment can support a retaliation claim or further address the district judge's conclusion.<sup>88</sup> Declining to answer these questions is a missed opportunity for the Third Circuit.<sup>89</sup> By leaving them unanswered, the Third Circuit has neglected to guide practitioners on what type of workplace conduct may be used to support retaliation and hostile work environment claims today.

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84. See *Kengerski II*, 6 F.4th at 539–40. The court made this comment even though it did not discuss whether a reasonable person would have thought Ms. McCall's comment about Jaylynn alone actually violated Title VII. *Id.* But cf. *Kengerski I*, 435 F. Supp. 3d at 678 (citing *James*, which observed "racial slurs . . . alone are generally not enough to create a hostile work environment" and found that six racist comments over eleven months were not enough for a reasonable jury to find there was a hostile work environment) (quoting *James v. Tri-Way Metalworkers, Inc.*, 189 F. Supp. 3d 422, 439–40 (M.D. Pa. 2016))). The Third Circuit missed an opportunity to directly respond to the district judge's opinion on this matter.

85. Compare *Kengerski I*, 435 F. Supp. 3d at 678–79 (finding a few racial slurs alone are not enough to create a hostile work environment and that no reasonable jury could find Mr. Kengerski had a reasonable belief that Ms. McCall's behavior amounted to a hostile work environment), with *Kengerski II*, 6 F.4th at 540 (suggesting racial slurs alone might support a reasonable belief of a hostile work environment without concluding Ms. McCall's slur alone was enough).

86. *Kengerski II*, 6 F.4th at 540 (quoting *Boyer-Liberto*, 786 F.3d at 280).

87. Cf. *id.* (choosing to cite a Fourth Circuit opinion holding a reasonable jury could find racial slurs alone support a hostile work environment claim).

88. *Id.* at 540.

89. The panel could have addressed whether a reasonable jury might find Ms. McCall's comment and texts were severe or pervasive enough to amount to a hostile work environment because the district judge expressly concluded they did not. Cf. *id.* at 541 ("Because the District Court did not expressly rule on the causation issue, we 'decline to consider [it]. . . choosing instead to allow that court to consider [it] in the first instance.'" (alterations in original) (quoting *Forestal Guarani S.A. v. Daros Int'l, Inc.*, 613 F.3d 395, 401 (3d Cir. 2010))). Instead, the panel only concluded that Ms. McCall's combined actions support a reasonable belief of a Title VII violation for a retaliation claim. See *id.* at 540.

## V. IMPACT

The most impactful portion of the *Kengerski II* opinion was the court's assertion that the degree of relationship between interracial associates is irrelevant to evaluating an associational discrimination claim. Though *Kengerski II* marks the first time the Third Circuit has validated associational discrimination claims, district court judges within the Third Circuit, several other circuit courts, and the United States Equal Employment Opportunity Commission (EEOC) have all previously recognized these claims.<sup>90</sup> Even though recognizing associational discrimination alone may not significantly alter Third Circuit practice, *Kengerski II*'s dismantling of the "substantial relationship" test within the Third Circuit is critical for two reasons.

First, before *Kengerski II* district court judges within the Third Circuit were actively applying the "substantial relationship" test: in both 2016 and 2020 district court judges within the Third Circuit emphasized a plaintiff must have a substantial interracial relationship to sustain an associational discrimination claim.<sup>91</sup> *Kengerski II*'s holding that degree of association is irrelevant to associational discrimination claims thus represents a marked departure from associational discrimination cases within the circuit to date.<sup>92</sup> With the Third Circuit's holding, plaintiffs like Mr. Kengerski will no longer automatically lose at summary judgment because the association which the alleged harassment or discrimination is based on is not a close family relationship.<sup>93</sup>

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90. See, e.g., *Larochelle v. Wilmac Corp.*, 210 F. Supp. 3d 658, 693 (E.D. Pa. 2016) ("It is true that federal courts have recognized claims for associational discrimination under Title VII. However, those same courts have limited associational discrimination claims under Title VII to causes of action which 'involved more substantial relationships.'" (citation omitted) (quoting *Zielonka v. Temple Univ.*, No. 99-5693, 2001 WL 1231746, \*5 (E.D. Pa. Oct. 12, 2001))); see *supra* note 18 (discussing circuit court decisions and EEOC guidance recognizing associational discrimination); but see *Kengerski I*, 435 F. Supp. 3d at 677 (noting only that "some courts (though not the Third Circuit)" have recognized associational discrimination claims despite at least five other circuits having acknowledged their validity).

91. See *Larochelle*, 210 F. Supp. 3d at 693–94 (comparing decisions within the Third Circuit district courts and external circuit and district courts to determine "spousal or familial relationship[s]" are the sort of "substantial relationship" which would support an associational discrimination claim (citing *Zielonka*, 2001 WL 1231746 at \*5; *Baker v. Wilmington Trust Co.*, 320 F. Supp. 2d 196, 203 (D. Del. 2004))); see also *Kengerski I*, 435 F. Supp. 3d at 677 (citing *Larochelle* for the proposition that "[a]ssociational discrimination claims arise where there is a 'substantial relationship' between the plaintiff and someone of a protected class, such as a marital or parent-child relationship").

92. See *supra* note 24 (discussing Third Circuit district court opinions deciding against plaintiffs with associational discrimination claims in part because the plaintiffs' relationships with their interracial associates were not substantial enough).

93. On remand, Mr. Kengerski's claim survived summary judgment. See *Kengerski v. Cnty. of Allegheny*, No. 2:17-cv-1048-NR, 2021 WL 4864289, at \*1 (W.D. Pa. Oct. 19, 2021).



Second, of the circuits which had recognized associational discrimination under Title VII before the Third Circuit in *Kengerski II*, only two had held that a substantial relationship is not required to sustain a claim.<sup>94</sup> By recognizing that plaintiffs can bring an associational discrimination claim regardless of the degree of an interracial association, the Third Circuit has bolstered support for associational discrimination claims and has provided another avenue to eliminate racist attitudes and racial discrimination in the workplace.<sup>95</sup>

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94. See *Barrett v. Whirlpool Corp.*, 556 F.3d 502, 513 (6th Cir. 2009) (“If a plaintiff shows that 1) she was discriminated against at work 2) because she associated with members of a protected class, then the degree of the association is irrelevant. The absence of a relationship outside of work should not immunize the conduct of harassers who target an employee because she associates with African-American co-workers.” (citation omitted)); *Drake v. Minn. Mining & Mfg. Co.*, 134 F.3d 878, 884 (7th Cir. 1998) (“[W]e believe that the key inquiries should be whether the employee has been discriminated against and whether that discrimination was ‘because of’ the employee’s race . . . . [W]e do not believe that an objective ‘degree of association’ is relevant to this inquiry.” (footnote omitted)).

95. The holding that degree of association is irrelevant to whether a plaintiff can be discriminated against for the interracial association is vital: it impacts “the behavior of countless employers and employees in situations ranging from interracial marriage to intra-office friendships.” *Kengerski II*, 6 F.4th 531, 538 (3d Cir. 2021).