

LIAR LIAR, RETALIATION CLAIM ON FIRE:  
*EGEI V. JOHNSON*: PROTECTING AN EMPLOYEE’S RIGHT TO DISHONESTY

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## I. INTRODUCTION

An employee named Kathy filed a complaint with the Equal Employment Opportunity Commission (EEOC) alleging sexual harassment. In her complaint, Kathy described the sexual advances her employer made. He stared at her breasts, made provocative comments about her heels and business skirts, and on several occasions, he grabbed her from behind. Kathy experienced a seemingly egregious case of sexual harassment. There was only one problem with her claim: it was make-believe. None of the events ever occurred. On the proverbial playground of life, the children would chant to Kathy, “*Liar Liar, Pants on Fire.*”

When her employer became aware of Kathy’s claim, he was furious. He had never touched her, never commented on her appearance, and never stared at her breasts when addressing her. He immediately fired Kathy. In response to her firing, Kathy filed a second claim with the EEOC, this time, alleging she had been retaliated against for filing a Title VII claim. In one sense, she had been fired for her Title VII claim. If not for the Title VII claim, she would presumably not have been fired. But in another sense, she was fired not for the Title VII claim, but for her dishonesty.

Kathy’s sexual harassment claim would undoubtedly result in a finding for her employer. It is, after all, the plaintiff’s burden to prove his or her employer violated Title VII, and if the events never occurred, then Kathy would have no evidence to prove that sexual harassment occurred.<sup>1</sup> The retaliation claim is different, however. An individual can be retaliated against even if the plaintiff does not prove his or her underlying claim, in this case, sexual harassment.<sup>2</sup>

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<sup>1</sup> *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (“The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination.”).

<sup>2</sup> *White v. Wash. Nursing Facility*, No. 14–CV–00871 (APM), 2016 WL 4544516, at \*4 (D.D.C. Aug. 31, 2016).

The result of Kathy's retaliation claim hinges on the jurisdiction in which the case is heard. In some jurisdictions, Kathy's filing of an untruthful Title VII claim would be considered protected activity under the Title VII anti-retaliation provision, and thus, a firing for the same would be retaliatory.<sup>3</sup> But in other jurisdictions, Kathy's filing of an untruthful claim would not be a protected activity. Thus, Kathy could be fired for her untruthful Title VII claim.<sup>4</sup>

This Note evaluates whether Kathy's dishonesty should be protected. It analyzes whether an employee who participates in a Title VII proceeding in bad faith should be protected from retaliation by his or her employer. Part II provides a background of the purpose and complaint procedure of Title VII of the Civil Rights Act. Part II also examines the existence of a circuit split in determining whether an employee's dishonest participation in a Title VII proceeding is protected activity. Part III analyzes which circuit's approach is best. Part III argues that the D.C. District Court's holding in *Egei v. Johnson*, which protects bad faith participation from retaliation, is incorrect. Part III argues instead for the adoption of the 7<sup>th</sup> Circuit's standard requiring good faith in participation clause matters, but not the 7<sup>th</sup> Circuit's standard requiring reasonableness in participation clause matters. The proposed standard does not protect an employee's dishonesty but it ensures that an employer cannot unilaterally determine whether an employee has been dishonest. Part IV completes this Note with a summary of why this standard offers maximum protection to an employee while allowing employers to set a false *retaliation claim on fire*.

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<sup>3</sup> *Egei v. Johnson*, No. 15-434 (RDM), 2016 WL 3566190 (D.D.C. June 24, 2016); *Pettway v. Am. Cast Iron Pipe Co.*, 411 F.2d 998 (5<sup>th</sup> Cir. 1969); *Glover v. S.C. Law Enf't Div.*, 170 F.3d 411 (4<sup>th</sup> Cir. 1999); *Proulx v. Citibank, N.A.*, 659 F. Supp. 972 (S.D.N.Y. 1987); *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304 (6<sup>th</sup> Cir. 1989) (interpreting a state statute almost identical to Title VII's federal statute).

<sup>4</sup> *Hatmaker v. Mem'l Med. Ctr.*, 619 F.3d 741 (7<sup>th</sup> Cir. 2010); *Mattson v. Caterpillar, Inc.*, 359 F.3d 885 (7<sup>th</sup> Cir. 2004); *Gilooly v. Mo. Dep't of Health & Senior Servs.*, 421 F.3d 734 (8<sup>th</sup> Cir. 2005), *but see* inconsistent 8<sup>th</sup> Circuit holding in *Womack v. Munson*, 619 F.2d 1292 (8<sup>th</sup> Cir. 1980). *See also* *Ray v. Ropes & Gray LLP*, 799 F.3d 99, 108 (1<sup>st</sup> Cir. 2015) (The lower court instructed the jury that Title VII required good faith. The appellate court held in part that, by not raising the issue until the appeal, the employee waived the argument).

## II. BACKGROUND

The workplace environment has changed substantially over the course of the United States' history. The agrarian economy at the time of the Constitutional founding rarely employed women or minorities.<sup>5</sup> Women were typically not employed outside of the home<sup>6</sup>, and African Americans were not employed; they were enslaved.<sup>7</sup> The Civil War and three constitutional amendments eliminated slavery.<sup>8</sup> Although black men were incorporated into the workforce, they were not paid what white men were paid.<sup>9</sup> Women didn't enter the workforce in significant numbers until they followed Rosie the Riveter into the industrial workplace during World War II.<sup>10</sup> The post-war economy required both women and minorities to rebuild an economy devastated by the Great Depression and two world wars.<sup>11</sup> Both groups were willing and able to provide much needed labor for the world economy, however, they met discrimination as they sought to gain equal footing with their white male counterparts.<sup>12</sup> Thankfully, the employment context has changed

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<sup>5</sup> Michael Stokes Paulson & Luke Paulsen, *THE CONSTITUTION: AN INTRODUCTION 189-195* (Basic Books 2015).

<sup>6</sup> Claudia Goldin, *The Quiet Revolution that Transformed Women's Employment, Education, and Family*, AM ECON. ASS'N, May 2016, at 5. Only eight percent of married women were employed outside of the home in 1890. The percentage increased to twenty-six in 1930, and again, to forty-seven percent by 1950. *Id.* Since the 1990s, women's labor force participation rates have hovered around seventy percent, with some sub-classes, such as women 25–29 reaching ninety percent participation. *Id.* at 15.

<sup>7</sup> Paulsen & Paulsen, *supra* note 5 at 155–56. Though the word “slavery” is not mentioned in the United States Constitution, it was certainly recognized and protected. African Americans were considered 3/5 of a person and the fugitive slave clause ensured that if a slave escape, he or she was not free. It took a civil war, three Constitutional amendments, and several United States Supreme Court decisions for the nation to end to slavery and treat African Americans as “created equal [and] endowed... with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness.” THE DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776).

<sup>8</sup> Paulsen & Paulsen, *supra* note 5 at 155–56.

<sup>9</sup> William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311, 1324 (2007).

<sup>10</sup> Goldin, *supra* note 6, at 18. Though the impact of World War II on female employment is often exaggerated, it did serve to show employers that women could be valuable as employees.

<sup>11</sup> Paulsen & Paulsen, *supra* note 5, at 234.

<sup>12</sup> Carter, Jr. *supra* note 9; Stefanie Cohen, *Why Women Writers Still Take Men's Names*, WALL ST. J., Dec. 6, 2012. The English classic “Wuthering Heights”, published in 1847, was authored by sisters, Charlotte and Emily Brontë under the male pseudonyms, “Curren Bell” and “Ellis Bell.” The American classic “The Outsiders”, published 1967 was authored by S.E. Hinton who chose to use her initials instead of her full name, Susan Eloise Hinton. Hinton feared her publishers and readers would discredit a book with male main character that was written by a female.

substantially over the more than two-hundred years since the founding of the United States.<sup>13</sup> Title VII of the Civil Rights Act of 1964 (Title VII) has contributed to the ongoing shift toward equality in the workplace.

## A. Title VII: A Brief Summary

### 1. Purpose

Title VII was designed to promote equality in the workplace through two primary functions: (a) preventing discrimination in the workplace and (b) preventing retaliation for claiming or opposing discrimination.

#### a. Preventing Discrimination in the Workplace

Section 703(a) of Title VII of the Civil Rights Act of 1964 protects employees from discrimination on the basis of sex, race, color, national origin, age, religion, or disability.<sup>14</sup> With the passage of Title VII, an employer can no longer treat an employee differently because he or she is a member of one or more of these protected classes.<sup>15</sup> For instance, an employer cannot refuse to hire an individual because she is a female.<sup>16</sup> An employer cannot fire an employee

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<sup>13</sup> See generally Stanley Lebergott, *Labor Force and Employment, 1800–1960*, in Output, Employment, and Productivity in the United States After 1800 117–204 (Dorothy S. Brady ed., 1966), <http://www.nber.org/books/brad66-1> for an extensive discussion of the employment history of the United States from 1800–1960.

<sup>14</sup> 42 U.S.C. § 2000e-2(a) (2012); Kurtis A. Kemper, *Who has “Participated” in Investigation, Proceeding, or Hearing and is Thereby Protected from Retaliation under § 704(a) of Title VII of Civil Rights Act of 1964* (42 U.S.C.A. § 2000e-3(a)), 149 A.L.R. FED. 431, § 5 (2016). See Cheryl L. Anderson & Leonard Gross, *Discrimination Claims Against Law Firms: Managing Attorney-Employees from Hiring to Firing*, 43 TEX. TECH L. REV. 515, 517, 550 (2011) (Job applicants and former employees are also protected.). For ease, this Note uses the term employee.

<sup>15</sup> U.S. EQUAL OPPORTUNITY EMP. COMM’N, *Prohibited Employment Policies/Practices*, <https://www.eeoc.gov/laws/practices/> (last visited Nov. 2, 2016) [hereinafter EEOC, *Policies*].

<sup>16</sup> *Id.* Discrimination on the basis of sex is unlawful. This includes discrimination against an individual based on his or her gender (male or female), gender identity (whether the individual sees themselves as a male or female), sexual orientation (which gender(s) the individual is attracted to), and pregnancy. For example, an employer cannot discriminate against an individual because “he” is transitioning to a “she” through sexual reassignment surgery. Neither can an employer discriminate against an individual because she is pregnant. See Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (2012) (amending Title VII of the Civil Rights Act of 1964).

because the employer discovers the employee is Jewish.<sup>17</sup> An employer cannot pay a black employee less than what the employer pays a white employee in the same position with the same experience level.<sup>18</sup> Nor can an employer publish a job advertisement recruiting employees who are “recent college graduates.”<sup>19</sup>

In order to allege a successful discrimination claim, an employee must show: (1) he or she is a member of a protected class, (2) he or she was qualified for the position, (3) he or she was rejected for the position, and (4) an employee outside of the protected class was selected for the position or the employer continued to look for candidates.<sup>20</sup> Once the employee has made a prima facie case of discrimination, the burden then shifts to the employer to show there was a legitimate, non-discriminatory reason for the employee’s adverse employment action.<sup>21</sup> If the employer alleges such reason, the burden shifts back to the employee to show that the employer’s non-discriminatory reason was merely a pretext.<sup>22</sup>

b. Preventing Retaliation for Claiming or Opposing Discrimination

Section 704(a) of Title VII also prohibits an employer from retaliating against an employee because of his or her involvement with Title VII.<sup>23</sup> For instance, an employer cannot fire an employee for speaking out against the sexual harassment of another employee.<sup>24</sup> An employer cannot demote an employee for filing a complaint with the EEOC when the allegations in the

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<sup>17</sup> EEOC, *Policies*, *supra* note 15. This law also requires that an employer “reasonably accommodate an employee’s religious beliefs or practices, unless doing so would cause difficulty or expense for the employer.”

<sup>18</sup> *Id.* Wage payments and employee benefits must be equal for comparable positions and levels of experience. Employee benefits include: “sick and vacation leave, insurance, access to overtime as well as overtime pay, and retirement programs.”

<sup>19</sup> *Id.* This law prohibits discrimination on the basis of age. An individual must be at least forty years old to be protected against age discrimination. An advertisement that seeks “recent college graduates” has a discriminatory effect of discouraging people older than forty to apply.

<sup>20</sup> *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> 42 U.S.C. § 2000e-3(a) (2012).

<sup>24</sup> U.S. EQUAL OPPORTUNITY EMP. COMM’N, *Facts About Retaliation*, <http://www.eeoc.gov/laws/types/retaliation.cfm> (last visited Nov. 2, 2016).

complaint are truthful.<sup>25</sup> An employer cannot reduce the pay of an individual who truthfully testified in an EEOC Title VII hearing for another employee.<sup>26</sup>

In order to allege a successful retaliation claim, an employee must show: he or she (1) engaged in a protected activity<sup>27</sup>, (2) suffered an adverse employment action,<sup>28</sup> and (3) the adverse employment action was causally connected to the employee's protected activity.<sup>29</sup> Once an employee has made a prima facie case of retaliation, the same burden-shifting applies.<sup>30</sup> The burden shifts to the employer to show there was a legitimate, non-discriminatory reason for the employee's adverse employment action.<sup>31</sup> If the employer alleges such reason, the burden shifts back to the employee to show that the employer's non-discriminatory reason was merely a pretext.<sup>32</sup>

## 2. Procedure

Should an employee feel they have been a victim of discrimination or retaliation, he or she has 180 days in most cases to file a claim with the Equal Employment Opportunity Commission

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

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* General forms of protected activity include: complaining to anyone about alleged discrimination, picketing in opposition to discrimination, refusing to obey an order reasonably believed to be discriminatory, filing a charge with the EEOC, and cooperating or testifying in an EEOC proceeding. This Note focuses primarily on whether false statements are protected activity for purposes of an employee's prima facie retaliation claim.

<sup>28</sup> *Id.* Adverse employment actions include: termination, refusal to hire, denial of promotion, removal of responsibility, and increased surveillance; *Wyatt v. City of Boston*, 35 F.3d 13, 15–16 (1<sup>st</sup> Cir. 1994) (Adverse actions also include: “demotions, disadvantages transfers or assignments, refusals to promote, unwarranted negative job evaluations and toleration of harassment by other employees.”); *Burlington N. & Santa Fe R. Co. v. White*, 548 U.S. 53, 68–69 (2006) (The Supreme Court defined what constitutes an adverse employment action, holding the standard is whether a reasonable employee in a similar circumstance would have felt injured or harmed.).

<sup>29</sup> *Slagle v. Cty. of Clarion*, 435 F.3d 262, 265 (3<sup>rd</sup> Cir. 2006). *See* *Clover v. Total Sys. Servs., Inc.*, 176 F.3d 1346 (11<sup>th</sup> Cir. 1999) (awarding judgment as a matter of law for employer because plaintiff employee failed to establish causation. A plaintiff must at least establish that the employer who decided to fire was aware of the plaintiff's protected activity.); *Wyatt v. City of Boston*, 35 F.3d at 14 (A plaintiff can show the employer's knowledge by circumstantial evidence, such as the fact that the adverse employment action was temporally proximate to the protected activity.); *Univ. of Tex. Sw. Med. Ctr. V. Nassar*, 133 S. Ct. 2517 (2013) (holding Title VII retaliation claims require “but-for” causation).

<sup>30</sup> *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

<sup>31</sup> *Laughlin v. Metro. Wash. Airports Auth.*, 149 F. 3d 253, 258 (4<sup>th</sup> Cir. 1998).

<sup>32</sup> *Id.*

(EEOC), the administrative agency that investigates and enforces Title VII's employment discrimination and retaliation laws.<sup>33</sup> The EEOC will investigate the complaint to determine the factual record.<sup>34</sup> The agency may dismiss the complaint in whole or in part for a variety of reasons.<sup>35</sup> Should the complaint proceed, the aggrieved employee will receive the investigative report and can request an immediate final decision by the EEOC or a hearing before an Administrative Judge (AJ).<sup>36</sup> If the case is heard by an AJ, the AJ will issue its decision and the agency will issue a final order either fully implementing the decision of the AJ or explaining why the AJ's decision will not be fully implemented and simultaneously filing an appeal with the EEOC.<sup>37</sup> Should the complaint not be heard by an AJ for reasons such as a dismissal or the requested immediate final decision, the EEOC will still issue a final order.<sup>38</sup> The aggrieved employee may appeal to the EEOC's Office of Federal Operations (OFO) within 30 days of

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<sup>33</sup> U.S. EQUAL OPPORTUNITY EMP. COMM'N, *How to File a Charge of Employment Discrimination*, <https://www.eeoc.gov/employees/howtofile.cfm> (last visited Nov. 2, 2016) [hereinafter EEOC, File]. Some states and localities have their own antidiscrimination laws with agencies to enforce the law and grant relief. In these jurisdictions, the aggrieved employee has a longer time frame with which to file a claim with the EEOC, the earlier of 300 days from the discriminatory act or 30 days after receiving notice the state or local agency has completed processing the charge.

<sup>34</sup> U.S. EQUAL OPPORTUNITY EMP. COMM'N, *Federal EEO Complaint Processing Procedures*, <https://www.eeoc.gov/eeoc/publications/fedprocess.cfm> (last visited Nov. 2, 2016).

<sup>35</sup> *Id.* Reasons to dismiss a claim prior to an EEOC hearing are as follows: "(1) failure to state a claim, or stating the same claim that is pending or has been decided by the agency or the EEOC; (2) failure to comply with the time limits; (3) filing a complaint on a matter that has not been brought to the attention of an EEO counselor and which is not like or related to the matters counseled; (4) filing a complaint which is the basis of a pending civil action, or which was the basis of a civil action already decided by a court; (5) where the complainant has already elected to pursue the matter through either the negotiated grievance procedure or in an appeal to the Merit Systems Protection Board; (6) where the matter is moot or merely alleges a proposal to take a personnel action; (7) where the complainant cannot be located; (8) where the complainant fails to respond to a request to provide relevant information; (9) where the complaint alleges dissatisfaction with the processing of a previously filed complaint; (10) where the complaint is part of a clear pattern of misuse of the EEO process for a purpose other than the prevention and elimination of employment discrimination." 29 C.F.R. § 1614.107 (2012).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

receiving a final order.<sup>39</sup> Only after the aggrieved employee has exhausted the administrative process can he or she file a civil action.<sup>40</sup>

### 3. Protection

This Note discusses the first prong of an employee's prima facie case of retaliation: protected activity. An individual must have engaged in statutorily protected activity in order to be protected against retaliation by his or her employer.<sup>41</sup> The relevant statutory language of Title VII provides:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has *opposed* any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or *participated* in any manner in an investigation, proceeding, or hearing under this subchapter.<sup>42</sup>

This section has been referred to as the “Anti-Retaliation Provision” and has been divided into two parts: (a) the opposition clause and (b) the participation clause.<sup>43</sup>

#### a. Protected Activity under the Opposition Clause

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<sup>39</sup> *Id.* The OFO will conduct a de novo review, “except that the review of the factual findings in a decision by an AJ is based on a substantial evidence standard of review.” 29 C.F.R. § 1614.405(a) (2012). The standard of proof on appeal is preponderance of the evidence.

<sup>40</sup> *Id.* Exhaustion for the purposes of filing a civil action may occur at different stages of the process. The regulations provide that civil actions may be filed in an appropriate federal court: (1) within 90 days of receipt of the final action where no administrative appeal has been filed; (2) after 180 days from the date of filing a complaint if an administrative appeal has not been filed and final action has not been taken; (3) within 90 days of receipt of EEOC's final decision on an appeal; or (4) after 180 days from the filing of an appeal with EEOC if there has been no final decision by the EEOC. 29 C.F.R. § 1614.408 (2012).

<sup>41</sup> Recall that protected activity is not the only element to a successful relation claim. *See supra* notes 27-31 and accompanying text.

<sup>42</sup> 42 U.S.C. § 2000e-3(a) (2012) (emphasis added).

<sup>43</sup> *Id.* (see emphasis); Mark J. Oberti, *New Wave of Employment Retaliation and Whistleblowing*, 38 T. MARSHALL L. REV. 43, 66–67 (2012) [hereinafter Oberti, *New Wave*].

The opposition clause functions to protect employees who vocalize concerns about their employer's unlawful employment practices.<sup>44</sup> For instance, an employee cannot be fired for telling her boss that she is uncomfortable with the company's discriminatory hiring practices.<sup>45</sup> The participation clause functions in much the same way. It protects employees who make charges or otherwise participate in Title VII proceedings.<sup>46</sup> For instance, an employee cannot be demoted for filing a Title VII claim alleging racial discrimination by his or her employer.<sup>47</sup>

Although both opposition and participation are protected activities, the extent of the protection offered has been treated differently by the courts.<sup>48</sup> An employee's opposition protection has been interpreted more narrowly than an employee's participation protection.<sup>49</sup> In order to engage in protected oppositional activity, the employee's actions must be reasonable and based on a good faith, reasonable belief that unlawful employment practices had occurred.<sup>50</sup> This narrow protection of the opposition clause stems from the fact that if all opposition activities were protected against retaliation, an employer could lose control of the workplace.<sup>51</sup> For instance, if it were protected activity for an employer to oppose an employment practice by not showing up to work, then an employer could not take adverse employment action against the individual without fear of a retaliation claim.<sup>52</sup> The employer would risk a retaliation claim for firing an employee who, in his or her opposition, was not doing his or her job.<sup>53</sup>

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<sup>44</sup> Oberti, *New Wave*, *supra* note 43.

<sup>45</sup> David Anthony Rutter, *Title VII Retaliation, A Unique Breed*, 36 J. MARSHALL L. REV. 925, 928 (2003)

<sup>46</sup> Oberti, *New Wave*, *supra* note 43.

<sup>47</sup> Rutter, *supra* note 45.

<sup>48</sup> Oberti, *New Wave*, *supra* note 43.

<sup>49</sup> *Id.* Opposition activity must be reasonable. The employee must also have a good faith, reasonable belief that unlawful employment practices have occurred. *See infra* note 124–28 and accompanying text.

<sup>50</sup> Andrew J. Ruzicho, Louis A. Jacobs & Andrew J. Ruzicho II, *Scope of Protection*, EMP. L. CHECKLISTS & FORMS, Sept. 2016, at § 8:1 (The belief that unlawful discrimination is occurring must be objectively reasonable). *See Pasqua v. Metro. Life Ins. Co.*, 101 F.3d 514 (7<sup>th</sup> Circuit 1996); Oberti, *New Wave*, *supra* note 43, at 71.

<sup>51</sup> *King v. Ill. Bell Tel. Co.*, 476 F. Supp. 495 (N.D. Ill. 1978) (holding an employee's strike in violation of the collective bargaining agreement was not protected opposition activity).

<sup>52</sup> *Id.*

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

a. Protected Activity under the Participation Clause

The participation clause functions to protect employees who are involved in Title VII proceedings.<sup>54</sup> This involvement can be making a charge, testifying, or assisting in a Title VII proceeding.<sup>55</sup> Contrary to the narrow protection given to an employee's opposition activity, an employee's participation activity has been given broad protection.<sup>56</sup> The majority of courts have held that the participation clause does not require good faith or reasonableness.<sup>57</sup> Unlike an employee's opposition to an unlawful employment practice, and employee's participation in a Title VII proceeding does not, at least in theory, interfere as much with the employee's job performance.<sup>58</sup> Participation can mean many things, but even the most extreme participation does not equate to the most extreme opposition of failing to show up for work at all.<sup>59</sup> Almost all participation in a Title VII proceeding is protected.<sup>60</sup> This Note explores the limits of an employee's participation protection.

**B. *Egei v. Johnson***

In *Egei v. Johnson*, No. 15-434 (RDM), 2016 WL 3566190 (D.D.C. June 24, 2016), a federal district court for the District of Columbia held in June of 2016 that an employee who made false or misleading statements during a Title VII proceeding was still protected by the participation clause.<sup>61</sup> Egei was a temporary worker with the Federal Emergency Management Agency

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<sup>54</sup> Oberti, *New Wave*, *supra* note 43

<sup>55</sup> 42 U.S.C. § 2000e-3(a) (2012).

<sup>56</sup> Edward A. Marshall, *Title VII's Participation Clause and Circuit City Stores v. Adams: Making the Foxes Guardians of the Chickens*, 24 BERKELEY J. EMP. & LAB. L. 71, 86-89 (2003).

<sup>57</sup> Oberti, *New Wave*, *supra* note 43.

<sup>58</sup> King v. Illinois Bell Tel. Co., 476 F. Supp. 495 (N.D. Ill. 1978).

<sup>59</sup> See Marshall, *supra* note 56, at 86. Participation activity includes: "fil[ing] a charge, testify[ing], or participat[ing] in an EEOC, state administrative, or court proceeding or investigation." An employee can still do his job if he has, for instance, filed a claim. An employee cannot do his job if he is on strike. See King v. Ill. Bell Tel. Co., 476 F. Supp. 495.

<sup>60</sup> Marshall, *supra* note 56.

<sup>61</sup> Egei v. Johnson, No. 15-434 (RDM), 2016 WL 3566190, at \*1 (D.D.C. June 24, 2016)

(FEMA).<sup>62</sup> While on a disaster relief assignment in Houston, Egei alleges she was sexually harassed.<sup>63</sup> On October 16<sup>th</sup>, 2008 Egei alleges that her supervisor, Fequiere asked her to remain in his hotel room when the other employees were leaving in order to give him a massage.<sup>64</sup> The following day, October 17<sup>th</sup>, Egei alleges that she arrived at Fequiere's hotel room to find him naked, asking her to shower with him. Egei alleges that when she refused, he threatened her with termination.<sup>65</sup> He then asked Egei to drive him to a nearby strip club.<sup>66</sup> When the club was closed, she drove him to a nearby Walmart and then back to his hotel.<sup>67</sup> Shortly after the alleged incident, Egei was "right-sized."<sup>68</sup> After Egei received notice of her right-sizing, she reported the incident that had occurred with Fequiere. A month after she reported the incident internally, Egei filed a formal complaint with the EEOC alleging discrimination on the basis of sex and national origin.<sup>69</sup>

Egei's testimony during the EEOC hearing differed from her previous account. FEMA's counsel impeached Egei when it presented a government travel voucher showing she was renting a car on the night of October 17<sup>th</sup>, when she was alleged to have been propositioned in Fequiere's hotel room.<sup>70</sup> There were also discrepancies in her testimony. For instance, at the hearing she testified Fequiere was only half-naked, not completely naked as she had alleged before.<sup>71</sup> At the hearing she also testified at the hearing that Fequiere had made inappropriate advances prior to October 16<sup>th</sup>, though Egei had not reported such incidents in her original report.<sup>72</sup>

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

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

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

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

<sup>68</sup> *Id.* at \*2. Right-sizing is a process by which FEMA employees are sent home from their current assignment to await re-deployment to another job site.

<sup>69</sup> *Id.* To avoid confusion, it is important to note that Egei did not claim retaliation in this complaint.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

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

The AJ noted the changes in Egei's testimony, and although the AJ refused FEMA's request for sanctions, the AJ denied Egei's complaint, finding that Egei "did not show prima facie cases of national origin, race, sex, or sexual harassment" and that FEMA "showed that the alleged events did not occur."<sup>73</sup> The AJ speculated that Egei may have filed the EEOC complaint in order to keep her job.<sup>74</sup>

Nearly eighteen months after the AJ dismissed Egei's claim, Egei was terminated.<sup>75</sup> She was presented with a termination notice which cited "(1) falsification of records, (2) lack of candor, and (3) failure to comply with the conditions of her employment" as the basis of her termination.<sup>76</sup> The notice specifically addressed Egei's inaccurate statements in the 2008 EEOC proceeding, noting the AJ's conclusions.<sup>77</sup>

Egei then filed a second EEOC complaint, alleging she had been retaliated against on the basis of her participation in the EEOC proceeding.<sup>78</sup> Egei maintained her statements were truthful.<sup>79</sup> Had Egei's statements been truthful, there is no question that Egei's participation in an EEOC proceeding was protected activity for which she could not be retaliated.<sup>80</sup> However, because Egei's statements were false, FEMA argued that the participation clause does not protect those statements.<sup>81</sup> They argued that bad faith participation in a Title VII proceeding is not protected activity.<sup>82</sup>

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<sup>73</sup> *Id.* at \*3.

<sup>74</sup> *Id.* The AJ was skeptical of the timing of Egei's report and noted that Egei changed her testimony when she became aware of FEMA's evidence.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> Marshall, *supra* note 56, at 86. Egei's activity of making a good faith discrimination charge would constitute protected activity.

<sup>81</sup> *Egei*, 2016 WL 3566190, at \*4.

<sup>82</sup> *Id.*

Noting persuasive precedent, the text of the participation clause, the purpose of the Title VII's anti-retaliation provision, and several policy concerns which will be discussed in later sections of this Note, the District Court for the District of Columbia found that Egei was entitled to protection from retaliation under Title's VII participation clause regardless of whether her statements made during the EEOC hearing were true or false.<sup>83</sup>

### C. Circuit Split

Other courts have held similarly.<sup>84</sup> In *Pettway v. Am. Cast Iron Pipe Co.*, 411 F.2d 998 (5<sup>th</sup> Cir. 1969), an employee filed a charge of race discrimination for his employer's policies that sought to limit the employment opportunities of black employees.<sup>85</sup> Employees made several efforts to end the employer's practices to no avail.<sup>86</sup> After investigation, the EEOC found no evidence of a Title VII violation.<sup>87</sup> In a letter to the EEOC Chairman, an aggrieved employee asked the EEOC to re-consider. The letter asserted at least four truthful instances of racially discriminatory practices.<sup>88</sup> The letter then asserted that the employer bribed or otherwise improperly influenced EEOC officials.<sup>89</sup> The employee was fired for the false statements about the employer, presumably those related to accusations of bribery.<sup>90</sup> The 5<sup>th</sup> Circuit found that

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<sup>83</sup> *Id.* at \*4–\*9.

<sup>84</sup> *See Pettway v. Am. Cast Iron Pipe Co.*, 411 F.2d 998 (5<sup>th</sup> Cir. 1969). *See Glover v. S.C. Law Enf't Div.*, 170 F.3d 411 (4<sup>th</sup> Cir. 1999). *See Proulx v. Citibank, N.A.*, 659 F. Supp. 972 (S.D.N.Y. 1987). *See Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304 (6<sup>th</sup> Cir. 1989) (interpreting a state statute almost identical to Title VII's federal statute). *See Womack v. Munson*, 619 F.2d 1292 (8<sup>th</sup> Cir. 1980), *but see Gilooly v. Mo. Dep't of Health & Senior Servs.*, 421 F.3d 734 (8<sup>th</sup> Cir. 2005) (holding inconsistently).

<sup>85</sup> *Pettway*, 411 F.2d at 1000. The employer only hired blacks for certain positions and refused to promote them. Board membership was also divided by racial classification. Only white individuals could serve on the Board of Management, while only black individuals could serve on the Auxiliary Board. The aggrieved employee was Chairman of the Auxiliary Board when the actions occurred.

<sup>86</sup> *Id.*

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

<sup>88</sup> *Id.* at 1001–02.

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

<sup>90</sup> *Id.* at 1002.

even false statements are protected activity under the participation clause.<sup>91</sup> Thus, the employee's firing was retaliatory.

The 4<sup>th</sup> Circuit held similarly in *Glover v. S.C. Law Enft Div.*, 170 F.3d 411 (4<sup>th</sup> Cir. 1999). A disgruntled employee was called to testify in a gender discrimination proceeding. Without much prompting from the investigator, the employee began to rant about her employer, at one point accusing him of destruction of office documents, wasting funds, inappropriate behavior, dishonesty, as well as discrimination.<sup>92</sup> Her employer reprimanded her at least in part for her "poor judgment" in her deposition testimony.<sup>93</sup> The 4<sup>th</sup> Circuit held that all of the employee's deposition statements, even if they were unreasonable, were protected activity. Terminating an employee for the same constituted retaliation.<sup>94</sup>

However, some courts have held to the contrary.<sup>95</sup> The 7<sup>th</sup> Circuit has held that an employee who participates in a Title VII proceeding is only protected if that participation is in good faith.<sup>96</sup> An employee in the 7<sup>th</sup> circuit who participates in a Title VII proceeding in bad faith can be fired for the same. Thus, an employee who makes false statements in a Title VII proceeding is deemed to have participated in bad faith and is not entitled to participation protection.<sup>97</sup>

The 7<sup>th</sup> Circuit further held in *Mattson v. Caterpillar, Inc.*, 359 F.3d 885 (7<sup>th</sup> Cir. 2004) that an employee's participation must not only be in good faith but must also be reasonable. A male

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<sup>91</sup> *Id.* at 1004, 1007–08. There was no evidence to support the bribery charge.

<sup>92</sup> *Glover v. S.C. Law Enft Div.*, 170 F.3d 411, 413 (4<sup>th</sup> Cir. 1999).

<sup>93</sup> *Id.* The employee was terminated for three reasons: (1) quality of work, (2) priorities inconsistent with those of the employer, and (3) "poor judgment" in deposition. Her employer admitted that her deposition testimony was turning point that led to her termination.

<sup>94</sup> *Id.*

<sup>95</sup> *See Hatmaker v. Mem'l Med. Ctr.*, 619 F.3d 741 (7<sup>th</sup> Cir. 2010). *See Mattson v. Caterpillar, Inc.*, 359 F.3d 885 (7<sup>th</sup> Cir. 2004). *See Gilooly v. Mo. Dep't of Health & Senior Servs.*, 421 F.3d 734 (8<sup>th</sup> Cir. 2005), *but see Womack v. Munson*, 619 F.2d 1292 (8<sup>th</sup> Cir. 1980) (holding inconsistently). *See also Ray v. Ropes & Gray LLP*, 799 F.3d 99, 108 (1<sup>st</sup> Cir. 2015) (The lower court instructed the jury that Title VII required good faith. The appellate court held that, by not raising the issue until the appeal, the employee waived the argument).

<sup>96</sup> *Hatmaker*, 619 F.3d 741; *Mattson*, 359 F.3d 885.

<sup>97</sup> *Hatmaker*, 619 F.3d 741; *Mattson*, 359 F.3d 885.

employee claims his female supervisor sexually harassed him in two instances: once when her breasts allegedly touched him during a conversation in a noisy factory room where employees must stand close to converse and once when she allegedly reached around him to get a clipboard and made slight contact with him.<sup>98</sup> The employee acknowledged that the contact may have been inadvertent. Another employee signed an affidavit stating that the supervisor's breasts did not touch the employee who claimed sexual harassment and that said employee's sole goal in filing a Title VII claim was to cause his supervisor to be fired.<sup>99</sup> The employer fired the charging employee for his bad faith statements in a Title VII proceeding.<sup>100</sup> The 7<sup>th</sup> Circuit held that unreasonable statements made in bad faith in a Title VII proceedings are not protected activity and thus, the adverse employment action was not retaliatory.<sup>101</sup> Herein, the 7<sup>th</sup> Circuit has also included a reasonableness requirement to participation activity.<sup>102</sup>

### III. ANALYSIS

Part III of this note will analyze whether an employee's false statements should be considered protected activity. The D.C. Circuit Court's holding in *Egei* is incorrect. The 7<sup>th</sup> Circuit's good faith standard should be applied, but the 7<sup>th</sup> Circuit's reasonableness standard should not be applied. An employee's bad faith participation should not constitute protected activity, however, an employee's good faith but unreasonable participation should constitute protected activity. In other words, an employer should be able to fire<sup>103</sup> an employee for bad faith participation but not for unreasonable, good faith participation in a Title VII proceeding.

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<sup>98</sup> *Mattson*, 359 F.3d at 887–88.

<sup>99</sup> *Id.* at 888.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 889–90.

<sup>102</sup> *Id.*

<sup>103</sup> For clarification, the term “firing” in this sentence encompasses all types of adverse employment actions. Firing is just one type of adverse employment actions. *See supra* note 28.

## A. Statutory Interpretation

In interpreting a statutory provision, courts generally employ one of two different approaches: the plain meaning approach or the purposive approach. The plain meaning approach focuses on the literal meaning of the statute's text.<sup>104</sup> Courts using this method consult "dictionaries and grammar books ... analogous provisions in other statutes, canons of construction, and the common sense God gave us."<sup>105</sup> The purposive approach focuses on the legislative purpose and intent behind the statute.<sup>106</sup> Both methods of statutory interpretation lead to the conclusion that the participation clause does not protect employees who participate in bad faith.

### 1. Plain Language

Title VII's participation clause provides:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment... because he has made a charge, testified, assisted, or *participated in any manner* in an investigation, proceeding, or hearing under this subchapter.<sup>107</sup>

In interpreting the text of the participation clause, some courts have held that the text protects an employee's right to make dishonest statements, while others have held to the contrary.<sup>108</sup> The contradiction revolves around the interpretation of the phrase "participated in any manner."

#### a. "Participated in Any Manner"

Although it does not appear that any court has fully addressed the difficulty in the interpretation of the phrase "participated in any manner," it is important to recognize that some of the confusion may lie in two different definitions for the word manner. The term "manner" can

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<sup>104</sup> Ronald Turner, *Title VII, the Third-Party Retaliation Issue, and the "Plain Language" Mirage*, 5 ALA. C.R. & C.L.L. REV. 77, 81–83 (2013).

<sup>105</sup> May M. Mansour, *Why Title VII's Participation Clause Needs to Be Broadly Interpreted to Protect Those Involved in Internal Investigations*, 88 ST. JOHN'S L. REV. 825, 840 (2014) (citations omitted).

<sup>106</sup> Turner, *supra* note 104, at 86–87.

<sup>107</sup> 42 U.S.C. § 2000e-3(a) (2012) (emphasis added).

<sup>108</sup> See *supra* notes 84, 95 and accompanying text.

mean: (1) “the way that something is done or happens” or (2) “the way that a person normally behaves especially while with other people.”<sup>109</sup> Herein reveals the difficulty courts have had in interpreting the phrase. Courts are adhering to different definitions of the term “manner.” Courts like the 4<sup>th</sup> and 5<sup>th</sup> Circuits are adhering to the second definition of manner relating to the way a person behaves.<sup>110</sup> These courts reason that the phrase “participated in any manner” means that all ways a person can behave, even unreasonable and bad faith behavior, are protected.<sup>111</sup> Courts also note that “the word “testified” is not preceded or followed by any restrictive language that limits its reach”<sup>112</sup> and the word “any,” as in “participated in *any* manner,” indicates “great breadth.”<sup>113</sup>

Other courts adhere to the first definition of the term “manner” relating to a way in which things are done.<sup>114</sup> There are many ways in which an individual could participate in a Title VII proceeding. A few ways are explicitly recognized in the statute: making a charge, testifying, and assisting.<sup>115</sup> The phrase “participated in any manner” that follows the explicitly listed types of participation is simply a qualifier, indicating that the explicitly listed forms of participation are not inclusive.<sup>116</sup> According to these courts, making a charge, testifying, assisting, or any other *type* of participation constitutes protected activity.<sup>117</sup> Because “participated in any manner” means only

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<sup>109</sup> *Manner*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/manner> (last visited Nov. 2, 2016) [hereinafter *Manner*, MERRIAM].

<sup>110</sup> *Id.*

<sup>111</sup> *Glover v. S.C. Law Enft Div.*, 170 F.3d 411 (4<sup>th</sup> Cir. 1999); *Pettway v. Am. Cast Iron Pipe Co.*, 411 F.2d 998 (5<sup>th</sup> Cir. 1969).

<sup>112</sup> *Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1186 (11<sup>th</sup> Cir. 1997).

<sup>113</sup> *United States v. Wildes*, 120 F.3d 468, 470 (4<sup>th</sup> Cir. 1997).

<sup>114</sup> *Manner*, MERRIAM, *supra* note 109.

<sup>115</sup> 42 U.S.C. § 2000e-3(a) (2012).

<sup>116</sup> *Hatmaker v. Mem'l Med. Ctr.*, 619 F.3d 741, 746 (7<sup>th</sup> Cir. 2010); *Mattson v. Caterpillar, Inc.*, 359 F.3d 885, 890 (7<sup>th</sup> Cir. 2004).

<sup>117</sup> *Hatmaker*, 619 F.3d at 746; *Mattson*, 359 F.3d at 890.

the type of participation, such as testifying, claiming, and assisting, these courts conclude that the statute on its face does not protect bad faith participation.<sup>118</sup>

The textual interpretation of the 7<sup>th</sup> Circuit must be correct. To deduce the plain and ordinary meaning of the phrase “participated in any manner”, it is necessary to read the phrase in the context of the sentence in which it is placed.<sup>119</sup> An employer cannot retaliate against an individual, “because he has made a charge, testified, assisted, or *participated in any manner* in an investigation, proceeding, or hearing...”<sup>120</sup> The 4<sup>th</sup> and 5<sup>th</sup> Circuits reason that bad faith participation is encompassed in the phrase “participated in any manner.”<sup>121</sup> However, to insert “bad faith participation” in the text of the sentence would be illogical. For instance, a statute that prohibited an employer from retaliating against an individual, “because he has made a charge, testified, assisted, or *participated in bad faith*...” changes topics midway through the sentence. It’s as if the sentence read, “For dinner we will have chicken, beef, steak, or car parts.” Because making a charge, testifying, and assisting all constitute types of participation, it is only logical that the phrase “participated in any manner” refers to other types of participation. Other types of participation may include an employee’s contact with an EEOC counselor or his or her disclosure of confidential documents to his or her lawyer.<sup>122</sup> Given the context of the sentence, the plain and ordinary meaning of the phrase “participated in any manner” indicates “participation in machinery

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<sup>118</sup> *Hatmaker*, 619 F.3d at 746; *Mattson*, 359 F.3d at 890.

<sup>119</sup> David A. Forkner & Kent M. Kostka, *Unanimously Weaving a Tangled Web: Walters, Robinson, Title VII, and the Need for Holistic Statutory Interpretation*, 36 HARV. J. LEGIS. 161 (1999).

<sup>120</sup> 42 U.S.C. § 2000e-3(a) (2012).

<sup>121</sup> *Pettway v. Am. Cast Iron Pipe Co.*, 411 F.2d 998 (5<sup>th</sup> Cir. 1969); *Glover v. S.C. Law Enf’t Div.*, 170 F.3d 411 (4<sup>th</sup> Cir. 1999)

<sup>122</sup> *See Hashimoto v. Dalton*, 118 F.3d 671, 680 (9<sup>th</sup> Cir. 1997) (“Even assuming [the employee’s] concerns were ‘personal’ in nature, we conclude that this contact with the EEO[C] counselor was itself ‘protected activity.’”); *Niswander v. Cincinnati Ins. Co.* 529 F.3d 714 (6<sup>th</sup> 2008) (noting in dicta that if the documents that the employee had given to her lawyers had been relevant to the claims in the discrimination lawsuit, her delivery of those documents would clearly constitute participation).

set up by Title VII to enforce its provisions.”<sup>123</sup> It means all other types of participation are protected activity under the participation clause; it does not indicate bad faith participation is protected, because bad faith is not a type of participation like those explicitly listed: making a charge, testifying, and assisting.

b. Good Faith and Reasonableness Requirement in Opposition Clause

In addition to courts using dictionaries and syntax to interpret statutory language, courts applying the plain meaning approach can also examine how other provisions of the same statute have been interpreted. Title VII’s opposition clause provides:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment..., because he has opposed any practice made an unlawful employment practice by this subchapter.<sup>124</sup>

The opposition clause has been interpreted to require good faith and reasonable opposition.<sup>125</sup> Although the statute does not explicitly mention good faith or reasonableness, even the United States Supreme Court in *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268 (2001) acknowledged that opposition activity must be reasonable and in good faith.<sup>126</sup> In its holding, the Supreme Court

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<sup>123</sup> Hashimoto v. Dalton, 118 F.3d 671, 680 (9<sup>th</sup> Cir. 1997).

<sup>124</sup> 42 U.S.C. § 2000e-3(a) (2012).

<sup>125</sup> Clark Cty. Sch. Dist. v. Breeden, 532 U.S. 268 (2001). See Brianne J. Gorod, *Rejecting “Reasonableness”*: A New Look at Title VII’s Anti-Retaliation Provision, 56 AM. U. L. REV. 1469 (2007).

To avoid confusion, it is necessary to explain there are technically two reasonableness requirements read into the opposition clause. First, an employee’s opposition activity must be reasonable. See *supra* footnote 51–53 and accompanying text discussing why an employee’s opposition activity cannot be simply not showing up to work. Second, although the provision’s language says an employee must have opposed an employment practice “unlawful under Title VII,” the employee must only have had a reasonable, good faith belief the employment practice was unlawful. To hold otherwise would be to charge the employee with knowledge of the law. See *infra* notes 165–170 and accompanying text discussing why participation activity should not have a reasonableness requirement, but noting why opposition activity may be subjected to such reasonableness requirement.

<sup>126</sup> *Breeden*, 532 U.S. 268. See *Mattson v. Caterpillar, Inc.*, 359 F.3d 885, 892 (7<sup>th</sup> Cir. 2004) (noting the Supreme Court’s failure to distinguish between the two clauses regarding the reasonableness requirement left open the possibility that reasonableness is required in the participation clause as well as the opposition clause), *but see* Lawrence D. Rosenthal, *Reading Too Much into What the Court Doesn’t Write: How Some Federal Courts Have Limited Title VII’s Participation Clause’s Protections After Clark County School District v. Breeden*, 83 WASH. L. REV. 345 (2008) (arguing that the Supreme Court’s failure to distinguish between the two clauses regarding the

did not discuss the participation clause, however, it did leave open the possibility that the good faith and reasonableness requirement would apply to all Title VII retaliation claims, not just opposition clause matters.<sup>127</sup> Neither clause on its face says anything about bad faith opposition or participation. To impose a good faith requirement to the opposition clause, yet protect bad faith participation under the participation clause is inconsistent.<sup>128</sup> The participation clause and the opposition clause should, at the very least, not be interpreted wholly inconsistently. Similar statutory provisions should be interpreted consistently.<sup>129</sup> Requiring good faith in both clauses would create consistency.

### c. Limited Scope of Participation Clause

It is also necessary to examine how courts have interpreted the participation clause in matters unrelated to bad faith or unreasonable participation. The participation clause has been broadly interpreted to provide maximum protection for employees, however, in at least one other instance courts have limited the scope of the participation clause's protection. For instance, every circuit that has considered the issue has held that the participation clause does not protect an employee who participates in an internal investigation where no formal EEOC charge was made.<sup>130</sup>

The relevant language provides:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment... because he

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reasonableness requirement does not indicate the Court's desire to read a reasonableness requirement into the participation clause).

<sup>127</sup> *Mattson*, 359 F.3d at 891–92.

<sup>128</sup> *Hatmaker v. Mem'l Med. Ctr.*, 619 F.3d 741, 746 (7<sup>th</sup> Cir. 2010) (noting that if lying in an investigation is protected participation activity it is in “tension with the requirement that opposition be based on an honest and reasonable belief that the employer may be violating Title VII”).

<sup>129</sup> *Forkner & Kostka*, *supra* note 119.

<sup>130</sup> *Oberti*, *New Wave*, *supra* note 43, at 76; *Ruzicho, Jacobs & Ruzicho II*, *supra* note 50. Many companies have procedures in place that encourage employees to report to individuals within the company first before filing a claim with the EEOC. These companies will conduct their own investigations to determine whether wrongful conduct occurred. If it did, these companies may attempt to settle with the aggrieved employee prior to their filing of a Title VII claim. For example, studies showed that even in 1993, 95% of all large employees had grievance procedures in place for employees to report sexual harassment. Deborah L. Brake, *Retaliation in an EEO World*, 89 *IND. L.J.* 115, 132–33 (2014).

has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing *under this subchapter*.<sup>131</sup>

Courts have interpreted the language “under this subchapter” to mean only those official complaints filed with and proceedings before the EEOC and not to include informal reporting and investigation of Title VII complaints.<sup>132</sup> Not only have these courts limited the scope of the participation clause, but they have also decided the matter against the EEOC’s position. The EEOC explicitly recognizes “involvement in internal investigations of alleged discrimination as a protected activity under the participation clause.”<sup>133</sup> While courts are not bound by the positions of the EEOC, courts often use the EEOC’s position for guidance and give deference to it.<sup>134</sup> Here, however, the majority of courts have decided against the EEOC’s position and held that participation in internal investigations are not protected activity.<sup>135</sup> Courts could have held that because internal investigations often lead to official Title VII activity, participation in internal investigations are protected participation activity, however, they did not. These holdings that draw distinctions between an employee’s participation in an internal investigation and a formal EEOC investigation demonstrate that the protection secured by the employee in the participation clause is not unlimited.

Using the plain meaning approach, a court should find that an employee’s bad faith participation is not protected activity under Title VII. The plain and ordinary meaning of the phrase “participated in any manner” is a qualifier describing the types of participation that would constitute protected activity. It does not protect bad faith participation. Additionally, courts have

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<sup>131</sup> 42 U.S.C. § 2000e-3(a) (2012) (emphasis added).

<sup>132</sup> *Townsend v. Benjamin Enter., Inc.*, 679 F.3d 41, 49 (2<sup>nd</sup> Cir. 2012) (However, participation in an internal investigation becomes protected activity if it is in conjunction with a formal EEOC charge of discrimination.); Mark J. Oberti, *New Wave*, *supra* note 43, at 76.

<sup>133</sup> Mansour, *supra* note 105, at 847.

<sup>134</sup> *Id.* at 828.

<sup>135</sup> Mark J. Oberti, *Recent Developments in Retaliation and Whistleblowing Law*, 69 THE ADVOC. (TEXAS) 31, 34–35 (2014).

created a good faith, reasonableness requirement to the opposition clause, which should aid in our interpretation of the participation clause, so they are not interpreted inconsistently. Finally, the participation clause itself is not unlimited. Courts in at least one other context have decided contrary to the EEOC's position and limited the scope of the participation clause.

## 2. *Purposive Approach: Congressional Intent*

The purposive approach focuses on the legislative purpose and intent behind the statute.<sup>136</sup>

### a. Remedial Statute

The purpose of Title VII was “to prevent and remedy discrimination.”<sup>137</sup> Supreme Court Justices Ruth Bader Ginsburg and the late Antonin Scalia both commented on the statute's broad remedial purpose.<sup>138</sup> Title VII's anti-retaliation provision has not received the attention that other Title VII provisions have.<sup>139</sup> While there is little evidence of the legislative intent behind Title VII's anti-retaliation provision, courts have routinely held that the goal of the anti-retaliation provision is facilitate enforcement of Title VII's discrimination laws by prohibiting employers from punishing employees who seek to oppose or remedy discrimination.<sup>140</sup> The anti-retaliation provision has been interpreted broadly to provide employees with the maximum protection to redress their grievances. The Supreme Court, which generally favors employers' interests, found in favor of the employee in five of its six recent retaliation cases.<sup>141</sup> Courts have indicated that the participation clause provides unlimited protection to employees.<sup>142</sup> For example, the 2<sup>nd</sup> Circuit

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<sup>136</sup> Turner, *supra* note 104, at 86–87; Mansour, *supra* note 105, at 843–44.

<sup>137</sup> Mansour, *supra* note 105, at 838. *See supra* note 14–19 and accompanying text.

<sup>138</sup> *Id.* at 845 (Scalia noted the purpose of the statute supports a broad interpretation); *The Supreme Court, 2006 Term—Leading Cases*, 121 HARV. L. REV. 185, 355, 60 (2007) [hereinafter *Leading Cases*] (Ginsburg noted the statute's “broad remedial purpose.”).

<sup>139</sup> Gorod, *supra* note 125.

<sup>140</sup> *Id.*; Mansour, *supra* note 105, at 844 (Some speculate that Congress intended to make the statute ambiguous and open to a liberal interpretation.).

<sup>141</sup> Richard Moberly, *The Supreme Court's Antiretaliation Principle*, 61 CASE W. RES. L. REV. 375 (2010).

<sup>142</sup> *Clover v. Total Sys. Servs., Inc.*, 176 F.3d 1346, 1353 (11<sup>th</sup> Cir. 1999); *Glover v. S.C. Law Enf't Div.*, 170 F.3d 411, 414 (4<sup>th</sup> Cir. 1999); *Deravin v. Kerik*, 335 F.3d 195, 203 (2<sup>nd</sup> Cir. 2003).

held the participation clause is “expansive and seemingly contains no limitations.”<sup>143</sup> While Congress may have sought to broadly protect employees who acted against discriminatory employment practices, the purpose of Title VII was to provide certain limited rights for individuals seeking to remedy discriminatory employment practices.

b. Limited Scope of Employee Protection

Under Title VII, employees do not enjoy unlimited protection. There are several procedural provisions of Title VII that are evidence the statute was not designed to provide the employee with unlimited protection. First, the EEOC, unlike other administrative bodies, has no power to enforce the law. It has been referred to as a “toothless tiger” of an enforcement agency.<sup>144</sup> If Congress would have wanted the EEOC to provide unlimited rights to the employee, it would certainly have given the EEOC teeth to enforce Title VII. Furthermore, Congress has also “severely limited the statute of limitations for discrimination cases...”<sup>145</sup> Whereas the statute of limitations for many civil actions spans two to four years, the statute of limitations for most Title VII claims is 180 days from the most-recent violation.<sup>146</sup> Congress has also imposed restrictions on the amount an employee can recover. The amount an employee can recover in compensatory and punitive damages is capped depending on the size of the employer.<sup>147</sup> This damages cap is

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<sup>143</sup> Deravin v. Kerik, 335 F.3d at 203.

<sup>144</sup> Michael Z. Green, *Proposing A New Paradigm for EEOC Enforcement After 35 Years: Outsourcing Charge Processing by Mandatory Mediation*, 105 DICK. L. REV. 305, 312 (2001) (arguing that Congress intended the EEOC to be a powerful administrative agency but “faulty compromise” and partisan politics resulted in the its weakness). *Id.* at 352). This Note argues that the best indicator of the Congressional intent behind the statute is the Act that was passed. The Act that was passed created a weak administrative agency, not a powerful agency as it is clear some congressional representatives wanted.

<sup>145</sup> Moberly, *supra* note 141, at 416.

<sup>146</sup> EEOC, File, *supra* note 33. *But see* Leading Cases, *supra* note 138 (arguing that Title VII’s short statute of limitations runs contrary to Title VII’s purpose).

<sup>147</sup> U.S. EQUAL OPPORTUNITY EMP. COMM’N, *Remedies for Employment Discrimination*, <https://www.eeoc.gov/employees/remedies.cfm> (last visited Nov. 2, 2016). Compensatory and punitive damages are capped at \$50,000 for employers with 15–100 employees, \$100,000 for employers with 101–200 employees, \$200,000 for employers with 201–500 employees, and \$300,000 for employers with more than 500 employees. Note that Title VII is only applicable to employers with 15 or more employees.

the total permissible amount of recovery for all claims; it is not as applied to each Title VII claim.<sup>148</sup> Although Congress may have sought to protect employees with the passes of Title VII, a weak administrative body, a harsh statute of limitations, and a restrictive damage cap is evidence that an employee's protection under Title VII is not unlimited.

c. Good Faith Filing Requirement

More relevant to an employee's dishonest participation, the fact there is a good faith requirement imposed on all employees filing Title VII complaints is evidence that Congress intended Title VII's retaliation provision only to protect good faith employees. When a complainant signs a Charge of Discrimination form with the Nebraska Equal Opportunity Commission and the EEOC, he or she "swear[s] or affirm[s] that [he or she] ha[s] read the above [form] and that it is true to the best of my knowledge, information and belief."<sup>149</sup> Furthermore, when an aggrieved employee files a civil action, he or she is bound by the *Federal Rules of Civil Procedure*. Rule 11 provides that in filing a lawsuit, the complainant is certifying to the court that "to the best of the person's knowledge, information, and belief... the factual contentions have evidentiary support..."<sup>150</sup> Herein, Congress has included a good faith requirement in the filing of any lawsuit for if a claim is false or otherwise in bad faith, there is no evidentiary support behind it and the complainant has violated Rule 11.<sup>151</sup> If Rule 11 has been violated, courts have the ability to impose sanctions on an attorney or a party who is responsible for the violation.<sup>152</sup> This is strong

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<sup>148</sup> 2 EMPLOYMENT DISCRIMINATION COORDINATOR § 65:8 (Nov. 2016 Update). The damages cap does not apply to state law claims. Thus, an employee can recover the maximum amount under the federal damages cap plus the maximum amount, if any, of any state law claims.

<sup>149</sup> NEB. EQUAL OPP. COMM'N, Charge of Discrimination (last visited Nov. 2, 2016) (on file with author).

<sup>150</sup> FED. R. CIV. P. 11(b)(3). A claimant is also certifying to the court that the complaint or other written motion is not being presented for any improper purpose, and the claims and defenses are supported by non-frivolous argument. FED. R. CIV. P. 11(b)(1)-(2).

<sup>151</sup> FED. R. CIV. P. 11(b)(3).

<sup>152</sup> FED. R. CIV. P. 11(c).

evidence that Congress sought to limit Title VII's retaliation protection to only those employees acting in good faith.

It could be argued that the imposition of court-ordered sanctions is evidence that Congress intended the courts to punish bad faith employees, not their employers, and thus, Congress sought to protect bad faith participation from employer retaliation. This argument simply does not comport with common sense. Congress would not have explicitly include a good faith requirement in the filing of a Title VII claim with the penalty of sanctions only to later seek to protect such activity from retaliation. Even if Congress had not added any good faith requirement, Judge Posner questioned why Congress would ever have sought to protect an employee's dishonest participation.<sup>153</sup> Title VII may be a pro-employee statute that seeks to equalize the bargaining power of David, the employee, to that of Goliath, the employer, however, it is unlikely that Congress intended to protect the David who acted unreasonably or in bad faith.<sup>154</sup> A lying, scheming David is far less sympathetic of character. At the very least, dishonest participation in Title VII is an outcome that Congress overlooked. At the very most, Congress intended to impose a good faith requirement in order for activity to be protected under Title VII when they imposed a penalty of sanctions for those individuals who did not participate in good faith. Whether Congress predicted these situations or not, it runs contrary to common sense that Congress would have wished to protect employees who sought Title VII protection for improper motives.

With Congressional good faith requirement to filing claims and the threat of sanctions for bad faith participation, it seems likely that Congress intended an employee's Title VII participation must be in good faith in order for it to constitute protected activity. Under a purposive approach,

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<sup>153</sup> *Hatmaker v. Mem'l Med. Ctr.*, 619 F.3d 741, 745–46 (7<sup>th</sup> Cir. 2010) (“[W]hy do [some courts] think lying is protected? Lying in an... investigation is disruptive of workplace discipline...”).

<sup>154</sup> *See Pettway v. Am. Cast Iron Pipe Co.*, 411 F.2d 998, 1005 (5<sup>th</sup> Cir. 1969) (analogizing the relationship between the poor, ignorant employee and the powerful employer to a “David and Goliath confrontation”).

which also considers congressional intent in statutory interpretation, bad faith participation should not be protected from retaliation.

## **B. Policy Objectives**

Protecting only an employee's good faith participation is sensible from a policy standpoint. Employees' rights are preserved, while employers' interests are protected.

### *1. Employees' Rights Protected*

The rights of employees are preserved under a standard that requires good faith but not reasonableness. Though the 7<sup>th</sup> Circuit has imposed both a good faith requirement and a reasonableness requirement to the participation clause, this Note advocates only for the imposition of a good faith requirement.<sup>155</sup> The policy implications of a good faith requirement and a reasonableness requirement will be discussed in turn.

#### a. Advocating for a Good Faith Requirement

Courts and scholars have expressed concern with the good faith requirement, arguing that such requirement will deter employees from coming forward, because they fear retaliation.<sup>156</sup> Employers often "attribute some sinister, underhanded, bad faith, strategic motive to employees who complain about alleged discrimination."<sup>157</sup> Employers may attribute bad faith incorrectly and retaliate against honest employees.<sup>158</sup> The EEOC has expressed concern with an employer's

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<sup>155</sup> *Mattson v. Caterpillar, Inc.*, 359 F.3d 885 (7<sup>th</sup> Cir. 2004).

<sup>156</sup> *Moberly*, *supra* note 141, at 425 (2010) (noting "employees will come forward... only if they are protected from retaliation"); *Gilooly v. Mo. Dep't of Health & Senior Servs.*, 421 F.3d 734 (8<sup>th</sup> Cir. 2005) ("It cannot be the case that any employee who files a Title VII claim and is disbelieved by his or her employer can be legitimately fired..."); *See Ruzicho, Jacobs & Ruzicho II*, *supra* note 50 (Most Title VII claims are retaliation claims.). *See Mansour*, *supra* note 105, at 826 (Fear of retaliation is the biggest deterrent to filing Title VII claims.).

<sup>157</sup> *Oberti, New Wave*, *supra* note 43, at 43–44.

<sup>158</sup> *Id.* at 43.

ability to “unilateral[ly] determin[e]” whether their employee’s participation is in good faith, arguing this will have a deterrent effect.<sup>159</sup>

First and foremost, the threat of sanctions should have already deterred some participation. If an employee was unsure whether a neutral body would find the factual contentions alleged have evidentiary support, then the threat of sanctions should already have made them less likely to make the charge.<sup>160</sup>

Secondly, an honest employee should take comfort in knowing that an employer will not be permitted to make a unilateral decision regarding the truthfulness of their participation. Instead of requiring an aggrieved employee to present evidence of good faith as part of his or her prima facie retaliation claim, good faith would be presumed.<sup>161</sup> A good faith requirement could be presumed because of the sanctions imposed under Title VII for alleging a claim in bad faith. If good faith were presumed, then the burden of proof would shift to the employer. The employer, not the employee, will have the burden of proving the employee’s participation was in bad faith. Courts can also set a high bar for establishing bad faith. An employer could be required to show that the employee’s actions were in bad faith by the high standard of clear and convincing evidence.<sup>162</sup> If the employer cannot show that the employee’s actions were in bad faith, then the employer will be liable for any adverse employment action they subjected the aggrieved employee

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<sup>159</sup> Mansour, *supra* note 105, at 833; U.S. EQUAL OPPORTUNITY EMP. COMM’N, *EEOC Enforcement Guidance on Retaliation and Related Issues*, <https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm> (last visited Nov. 2, 2016) (“It is the Commission's position, however, that an employer can be liable for retaliation if it takes it upon itself to impose consequences for actions taken in the course of participation.”). It is important to note that because the plain and ordinary meaning of the statute is clear and unambiguous, there is no need to apply Chevron deference and yield to the EEOC’s position unless it is unreasonable. *Chevron, U.S.A., Inc. v. Nat. Resources Def. Council, Inc.*, 467 U.S. 837 (1984). See William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1100 (2008).

<sup>160</sup> See *supra* notes 150–152 and accompanying text.

<sup>161</sup> An employee will still need to allege a prima facie case of retaliation. See *supra* notes 27–29 and accompanying text.

<sup>162</sup> See also *White v. Burlington N. & Santa Fe R. Co.*, 364 F.3d 789, 808 (6<sup>th</sup> Cir. 2004), *aff'd* 548 U.S. 53 (2006) (discussing burden of proof in proving punitive damages under Title VII).

to. This procedure will cause employers to be cautious. Although they will have the ability to subject an employee whom they believe is participating in bad faith to an adverse employment action, they will likely decide to exercise great caution in firing an employee unless they think they have sufficient evidence to prove this employee has acted dishonestly.

An honest employee, then, should not be deterred from participating when their good faith is presumed and their employer will have a high burden of proof to establish anything to the contrary. The employee would never have to contemplate the good faith requirement because he or she would not have the burden of establishing their participation was in good faith. The honest employee would have no hesitation in participation in a Title VII proceeding, because he or she would know with certainty that the employer could not present evidence of his or her dishonesty.

While the imposition of a good faith standard will not deter the claims of honest employees, it may deter the claims of dishonest employees. Not only could they be subjected to sanctions by the EEOC, but now they could also be fired by their employer.<sup>163</sup> Deterring bad faith participation does not harm the purpose of Title VII if dishonest employees are not protected. The purpose of Title VII is to protect those who have experienced discrimination.<sup>164</sup> If the employee has fabricated a claim of discrimination, then the purpose of Title VII is not served by allowing the claim to continue.

#### b. Arguing Against a Reasonableness Requirement

While Title VII's anti-retaliation provision should not protect the employee who participates in bad faith, it should protect the employee who is considered unreasonable in the eyes

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<sup>163</sup> *Hatmaker v. Mem'l Med. Ctr.*, 619 F.3d 741 (7<sup>th</sup> Cir. 2010) (holding employees are not protected from retaliation when they make false statements during a Title VII proceeding). For clarification, the term "firing" in this sentence encompasses all types of adverse employment actions. Firing is just one type of adverse employment actions. *See supra* note 28.

<sup>164</sup> *Mansour*, *supra* note 105, at 838.

of the court. The most criticized point in retaliation law is the reasonableness requirement.<sup>165</sup> This Note will not delve deep into the reasonableness requirement in the opposition clause, but it is enough to mention the discrepancy in the need for a reasonableness requirement between the two clauses. Even the Supreme Court has held that an employee's opposition activity must be reasonable.<sup>166</sup> As previously discussed, opposition activity is fundamentally different from an employee's participation.<sup>167</sup> Unreasonable participation would not disrupt an employee's job like unreasonable opposition could. For instance, the most unreasonable participation may be ranting in a deposition like Glover<sup>168</sup> or falsifying a claim like Egei.<sup>169</sup> Whereas the most unreasonable opposition would be to strike for a period of time. The employee whose participation is unreasonable could be fired for not showing up to work, whereas the employee whose opposition is unreasonable could not be fired for the same if striking was his opposition.<sup>170</sup> This Note does not take a stance on whether the reasonable requirement should be read into the opposition clause. It merely argues that the reasonableness requirement should not be read into the participation clause. The two provisions could have different standards because of the underlying differences between opposition and participation.

The problem with a reasonableness requirement is that reasonableness is a subjective standard.<sup>171</sup> Though it is well-established that an employee's retaliation claim is not to be judged on the merits of their underlying claim, the reasonableness requirement does just that.<sup>172</sup> An employee's actions would look much more reasonable once a court determines the employee's

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<sup>165</sup> Brake, *supra* note 130, at 136 (describing the reasonableness requirement as "reasonable belief doctrine")

<sup>166</sup> Clark Cty. Sch. Dist. v. Breeden, 532 U.S. 268 (2001).

<sup>167</sup> See *supra* notes 51–53 and accompanying text.

<sup>168</sup> Glover v. S.C. Law Enft Div., 170 F.3d 411, 413 (4<sup>th</sup> Cir. 1999).

<sup>169</sup> Egei v. Johnson, No. 15–434 (RDM), 2016 WL 3566190 (D.D.C. June 24, 2016).

<sup>170</sup> See *supra* notes 51–53 and accompanying text.

<sup>171</sup> Brake, *supra* note 130, at 136.

<sup>172</sup> *Id.* at 152.

claim has merit than when it does not. Imagine, for instance, a factory worker, such as Mattson<sup>173</sup> who does not have a college education, let alone a legal education. One allegation of a touch against his buttock may lead him to believe he is being sexual harassed. Although a court would conclude that there is no merit to his underlying sexual harassment, a court should not allow an employer to retaliate against the individual simply because he had a good faith, but uninformed and perhaps unreasonable belief that he was subjected to unlawful discrimination.

An inquiry into the merits of the claim would charge an employee, who is often a layperson, with knowledge of the substantive law behind their claim.<sup>174</sup> What may seem unreasonable to a lawyer who understands the substantive law may seem quite reasonable to a layperson.<sup>175</sup> For example, the substantive law behind sexual harassment is often complex. If employees knew they could lose their job because they misunderstand the law, they would be less inclined to file a claim.<sup>176</sup> Under these circumstances, there would be significant underreporting which would undermine the purpose of Title VII to prevent discrimination and address grievances.<sup>177</sup> The employee who is simply ignorant of the law should be protected from retaliation as long as he or she participates in good faith.

## 2. *Employers' Interests Protected*

A good faith requirement in participation clause matters protects an employer's interests as well.

### a. Same Procedure

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<sup>173</sup> Mattson v. Caterpillar, Inc., 359 F.3d 885 (7<sup>th</sup> Cir. 2004) (holding that no reasonable employee could have believed that two seemingly sexual contacts with his supervisor was sexual harassment).

<sup>174</sup> Gorod, *supra* note 125, at 1492.

<sup>175</sup> *Id.*; Marshall, *supra* note 56, at 89–91.

<sup>176</sup> Marshall, *supra* note 56, at 89–91.

<sup>177</sup> *Id.*

The procedure would remain unchanged. The burden of proof will already have shifted to the employer after the employee alleges a prima facie case of discrimination or retaliation.<sup>178</sup> The employer must then prove a legitimate non-discriminatory reason for the adverse employment actions.<sup>179</sup> In these cases, the legitimate non-discriminatory reason would be the employee's bad faith participation. The employer will not incur additional trial costs in defending a Title VII claim while now having the benefit of being able to punish dishonest employees.

b. Recourse against *Liar, Liars*

Whereas an employee who lies or acts in bad faith would otherwise be reprimanded, employees who do so in the context of a Title VII proceeding enjoy immunity under *Egei*. Courts have often held that anti-retaliation laws are “a shield against employer retaliation, not a sword with which [an employee] may threaten or curse supervisors.”<sup>180</sup> To protect bad faith participation is to permit an employee to brandish a sword against their employer. Under the standard this Note proposes, employers will now have recourse against an employee who participates in bad faith. Otherwise, employers would be left with “no ability to fire employees for defaming other employees or the employer through their complaint when the allegations are without any basis in fact.”<sup>181</sup>

Some scholars argue that an employer has other recourse against bad faith participation. They argue that an employer can file a defamation claim.<sup>182</sup> The employer's defamation action would prove unsuccessful, because the employee would be immune.<sup>183</sup> In most states, a plaintiff

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<sup>178</sup> See *supra* notes 20–22, 27–32 and accompanying text.

<sup>179</sup> *Id.*

<sup>180</sup> Oberti, *New Wave*, *supra* note 43, at 48 (citations omitted).

<sup>181</sup> *Hatmaker v. Mem'l Med. Ctr.*, 619 F.3d 741, 745 (7<sup>th</sup> Cir. 2010).

<sup>182</sup> *Proulx v. Citibank, N.A.*, 659 F. Supp. 972, 979 (S.D.N.Y. 1987).

<sup>183</sup> Piper M. Willhite, *Defamation Law: Privileges from Liability: Distinguishing Quasi-Judicial Proceedings from Proceedings Which Are Preliminary to Judicial Hearings*, 47 OKLA. L. REV. 541, 557 (1994).

has an absolute privilege to make defamatory statements in a judicial proceeding.<sup>184</sup> Thus, an employer defending a false civil action which damages his reputation would have no recourse through a defamation action against the employee.<sup>185</sup> In states where the privilege is not absolute, a defamation action would still prove largely unhelpful. Lawsuits are costly, and even if successful, seldom would employees have ample funds to pay judgments that are worth the cost of the attorneys.<sup>186</sup> Defamation claims are also difficult to prove. An employer would have to show injury to their reputation.<sup>187</sup> Title VII proceedings are confidential, but even if they became public, it would often be difficult for a sizeable employer to prove the statements of a single employee had a damaging effect.<sup>188</sup> Finally, the employer does not seek financial gain from the employee, nor is the employer concerned with what the employee said. The problem is having an untruthful employee. Having an untruthful employee does not build trust in the workplace. It creates an “awkward’ and perhaps ‘counterproductive’” working environment.<sup>189</sup> The employer simply seeks to dismiss or otherwise reprimand the dishonest employee without penalty.

Others argue that employers have recourse against untruthful employees by defeating their claims on the merits.<sup>190</sup> It is well-established law that employees do not lose protection from retaliation simply because their claim is defeated on the merits.<sup>191</sup> Thus, an employer who defeats their employee’s bad faith claim on the merits will still be liable for any disciplinary actions taken against the employee for their bad faith participation. The proposed alternatives of a defamation

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<sup>184</sup> *Id.* In this states, there is also absolute immunity for defamatory statements made in quasi-judicial proceeding. Such proceedings, although not well-defined, are at least preliminary proceedings which involve an oath. An example of a quasi-judicial proceeding would be a deposition. *Id.* at 557–58.

<sup>185</sup> *Id.* at 557.

<sup>186</sup> *Id.* at 552. The cost bringing a libel suit is at a minimum \$20,000.

<sup>187</sup> Earl L. Kellett, *Proof of Injury to Reputation as Prerequisite to Recovery of Damages in Defamation Action – Post-Gertz Cases*, 36 A.L.R.4<sup>TH</sup> 807, § 3 (2016).

<sup>188</sup> *Id.* (emphasizing the difficulty that plaintiff’s claiming defamation have in proving actual injury).

<sup>189</sup> Ruzicho, Jacobs & Ruzicho II, *supra* note 50.

<sup>190</sup> Proulx v. Citibank, N.A., 659 F. Supp. 972, 979 (S.D.N.Y. 1987).

<sup>191</sup> Sias v. City Demonstration Agency, 588 F.2d 692, 695 (9<sup>th</sup> Cir. 1978).

claim or defeating the claim on its merits are unhelpful. The solution proposed in this Note is best; an employer should not be held liable for retaliation if they prove by clear and convincing evidence that the employee's participation in a Title VII proceeding was in bad faith.

#### IV. CONCLUSION

The District Court for the District of Columbia incorrectly held that an employee who lies during a Title VII proceeding is protected from retaliation on the basis of his or her lies. A better approach to Title VII participation matters is to impose a requirement that the participation be in good faith with the burden on the employer to prove with clear and convincing evidence that the employee's participation was bad faith. This approach follows the holdings of the 7<sup>th</sup> Circuit, imposing a good faith requirement on participation clause matters. However, the 7<sup>th</sup> Circuit also imposes a reasonableness requirement that is argued against.

A good faith requirement is consistent with the statutory language of Title's VII participation clause, which did not protect bad faith participation. It is also consistent with the congressional intent behind the anti-retaliation provision and policy objectives. Employers should be able to punish their employees for their bad faith participation in a Title VII proceeding. Kathy's employer should be able to set her "*Liar, Liar, Retaliation Claim on Fire.*"