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IS PROTECTING AN EMPLOYEE'S RIGHT TO KNOWINGLY FILE FALSE EEOC CHARGES A NECESSARY EVIL?

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In addition to prohibiting workplace discrimination based on race, color, religion, sex, and national origin, Title VII of the Civil Rights Act of 1964 protects: (1) employees who oppose an employer's discriminatory employment practices, and (2) employees who participate in Title VII's enforcement process. Thus, not only are employees protected from workplace discrimination based on particular traits, but they are also protected from retaliation if they attempt to vindicate their right to be free from workplace discrimination either internally with their employer or externally with the Equal Employment Opportunity Commission (EEOC).

When analyzing retaliation cases, courts agree on several principles. Most importantly, courts agree that the McDonnell-Douglas burden-shifting paradigm applies, which requires (1) the plaintiff to establish a prima facie case; (2) the employer to articulate a legitimate, non-retaliatory reason for the adverse employment action; and then (3) the plaintiff to demonstrate the employer's articulated reason for the adverse employment action was pretext for the real reason: unlawful retaliation.

This Article will focus on the first part of this framework–the prima facie case. When establishing a prima facie case, a plaintiff must prove: (1) he engaged in a protected activity; (2) he suffered an adverse employment action; and (3) there was a causal connection between the protected activity and the adverse employment action. This Article will focus on the first element of the prima facie case–protected activity. Specifically, the Article will address whether an employee who knowingly files a false discrimination charge with the EEOC (or who knowingly provides false testimony during the EEO process) engages in protected activity, or whether he loses protection if he engages in this type of deceptive behavior.

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This Article will argue that, despite the uneasy feeling courts might have protecting individuals who engage in this type of behavior, protecting these individuals might, in fact, be necessary. The reasons behind this pro-employee conclusion are the following: (1) Title VII's language is broad and arguably requires this result; (2) the EEOC believes Title VII covers all employees who file EEOC charges and who testify in EEO proceedings; (3) providing this protection will not result in employees being able to guarantee themselves workplace tenure simply by filing EEOC charges; and (4) providing protection is consistent with Congress's goals of providing access to Title VII's remedial scheme and not wanting to dissuade employees from bringing legitimate discrimination claims or supporting other employees' legitimate claims.

So, while it might seem wrong to protect employees who knowingly file false discrimination charges (or who knowingly provide false testimony in an EEO proceeding), there are several reasons why courts might just have to do that very thing.

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I. INTRODUCTION

In addition to prohibiting workplace discrimination based on race, color, religion, sex, and national origin,[1] Title VII of the Civil Rights Act of 1964 also protects employees who oppose their employers' unlawful discriminatory practices and employees who participate in the statute's enforcement process.[2] Other federal anti-discrimination statutes also prohibit retaliation against employees who engage in similar activities.[3] Thus, not only are employees protected from workplace *discrimination* based on particular traits, but they are also protected from employer *retaliation* if they attempt to vindicate their rights either internally with their employer or externally with the Equal Employment Opportunity Commission (EEOC).[4]

When analyzing retaliation claims, courts agree on several principles. One of the most important issues on which courts agree is that the *McDonnell-Douglas*[5] burden-shifting paradigm applies to retaliation cases, and this paradigm requires the following: (A) the plaintiff must establish a prima facie case; (B) the employer must then articulate a legitimate, non-retaliatory reason for the adverse employment action; and (C) then the plaintiff must demonstrate the employer's articulated reason for the adverse employment action was pretext for the real reason: unlawful retaliation.[6]

This Article will focus on the first part of this framework—the prima facie case. When establishing a prima facie case, a plaintiff must prove: (A) he engaged in a protected activity; (B) he suffered an adverse employment action; and (C) there was a causal connection between the protected activity and the adverse employment action.[7]

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1. 42 U.S.C. § 2000e-2(a) (2018).

2. *Id.* § 2000e-3(a).

3. *See, e.g.*, Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(d) (2018); 42 U.S.C. § 2000e-2(a).

4. *See, e.g.*, 42 U.S.C. § 2000e-2(a) (prohibiting discrimination based upon race, color, religion, sex, and national origin); 42 U.S.C. § 2000e-3(a) (prohibiting retaliation).

5. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

6. *Id.* at 801–04.

7. *See, e.g.*, Noviello v. City of Boston, 398 F.3d 76, 88 (1st Cir. 2005); Calero-Cerezo v. U.S. Dep't of Just., 355 F.3d 6, 25 (1st Cir. 2004). Some courts list a fourth element—employer knowledge of the protected activity. *See, e.g.*, Kwan v. Andalex Grp. LLC, 737 F.3d 834, 844 (2d Cir. 2013); Johnson v. Univ. of Cincinnati, 215 F.3d 561, 578 (6th Cir. 2000). Although not all courts list this element, employer knowledge is critical; if an employer has no knowledge of a protected activity, it cannot have a retaliatory motive for the adverse employment action. *See Noviello*, 398 F.3d at 88 (explaining that in order for a plaintiff to show that he or she suffered an adverse employment action as a result of his or her conduct, it must necessarily be true that the defendant knew about the conduct).

This Article will address the first element of the prima facie case—protected activity. Specifically, the Article will address whether an employee who knowingly files a false discrimination charge with the EEOC engages in protected activity, or whether he loses protection if he engages in that type of behavior.[8] Despite the uneasy feeling courts might have protecting individuals who engage in this behavior, this Article will argue that protecting those individuals might, in fact, be necessary until Congress or the Supreme Court decides otherwise.[9]

Part II of this Article describes Title VII's relevant statutory language, addressing two types of activities the statute protects—opposition and participation.[10] Part III analyzes cases that have addressed the level of protection afforded to employees who knowingly file false charges or engage in other participation activity.[11] Finally, Part IV explains why courts might have to protect employees who engage in this behavior, despite the uneasy feeling doing so might create.[12]

The reasons behind this pro-employee conclusion are the following: (A) Title VII's language is broad and arguably requires this result;[13] (B) the EEOC believes the participation clause covers all employees who file EEOC charges;[14] (C) providing this protection

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8. This Article will also address other types of "participation activity" such as providing testimony in an EEO proceeding. Filing EEOC charges and providing testimony in an EEO proceeding are protected under Title VII's anti-retaliation provision's participation clause, 42 U.S.C. § 2000e-3(a), and thus should receive the same level of protection.

9. Even when judges protect these activities, they have expressed concern over doing so. *See, e.g.*, Proulx v. Citibank, N.A., 659 F. Supp. 972, 978 (S.D.N.Y. 1987) (acknowledging that protecting false and malicious claims might seem "unappealing" but ultimately concluding that not protecting them was a less desirable outcome).

10. *See infra* Part II.

11. *See infra* Part III. Some of these cases addressed similar, but not *identical*, situations; however, those courts' reasonings are also applicable to the filing of false charges.

12. *See infra* Part IV; *see also supra* note 9 (discussing judicial concern over protecting false and malicious claims).

13. *See infra* Section IV.A.

14. *See infra* Section IV.B. The EEOC does not, however, believe false or malicious charges should go without consequences:

> False or bad faith statements by either the employee or the employer should be taken into appropriate account by the factfinder, investigator, or adjudicator of the EEO allegation when weighing credibility, ruling on procedural matters, deciding on the scope of the factfinding process, and deciding if the claim has merit. 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.

Enforcement Guidance on Retaliation and Related Issues, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Aug. 25, 2016), https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues.

will *not* result in bad employees being able to guarantee themselves workplace tenure by filing EEOC charges;[15] and (D) providing protection is consistent with Congress's goals of providing access to Title VII's remedial scheme and not wanting to dissuade employees from pursuing legitimate discrimination claims and/or testifying in connection with other employees' legitimate claims.[16]

Now, and consistent with the canon of statutory construction requiring courts to look first at statutory language when interpreting a statute,[17] this Article will address Title VII's relevant language.

II. TITLE VII'S RELEVANT LANGUAGE

As noted earlier, Title VII and other anti-discrimination statutes contain anti-retaliation provisions that protect employees who engage in EEO activities.[18] These activities include, but are not limited to, lodging internal complaints, filing charges with the EEOC, and testifying in someone else's EEO proceeding.[19] Specifically, Title VII's anti-retaliation provision 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, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.[20]

In this provision, there are two clauses that provide protection: there is the "opposition clause" (which prohibits retaliation "because [a plaintiff] has opposed any practice made an unlawful employment

15. *See infra* Section IV.C.

16. *See infra* Section IV.D.

17. *See, e.g.*, Hardt v. Reliance Standard Life Ins. Co., 560 U.S. 242, 251 (2010); Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997).

18. 42 U.S.C. § 2000e-3(a) (2018); *see also* Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(d) (2018) (prohibiting retaliation against an individual for making a claim or assisting in an investigation under the ADEA); 42 U.S.C. § 12203(a) (prohibiting discrimination against an individual for making a claim or assisting in an investigation under the Americans with Disabilities Act).

19. *See Enforcement Guidance on Retaliation and Related Issues*, *supra* note 14. The Supreme Court has also decided that answering an employer's questions regarding *another* individual's internal EEO complaint qualifies as opposition. Crawford v. Metro. Gov't of Nashville & Davidson Cnty., 555 U.S. 271, 276–78 (2009).

20. 42 U.S.C. § 2000e-3(a).

practice by this subchapter"),[21] and there is the "participation clause" (which prohibits retaliation "because [a plaintiff] has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter").[22] Although each clause provides protection, the types of activities protected under each clause, and the scope of the protection, are different.[23]

When deciding whether an employee's actions qualify as opposition or participation, some courts invoke the opposition clause when an EEOC charge has not yet been filed,[24] and they invoke the participation clause once a charge has been filed.[25] Regardless of how courts make this distinction, this distinction is critical because most courts provide more protection under the participation clause.[26] As a result, many employees try to seek protection under the participation clause, while many employers try to characterize employees' activities as falling under the less protective opposition clause.[27]

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21. *Id.*

22. *Id.*

23. *See, e.g.*, Vaughn v. Epworth Villa, 537 F.3d 1147, 1151 (10th Cir. 2008) ("[T]he scope of protection for activity falling under the participation clause is broader than for activity falling under the opposition clause." (quoting Laughlin v. Metro. Wash. Airports Auth., 149 F.3d 253, 259 n.4 (4th Cir. 1998))); Booker v. Brown & Williamson Tobacco Co., 879 F.2d 1304, 1312 (6th Cir. 1989) (noting the distinction between participation and opposition is "significant because federal courts have generally granted less protection for opposition than for participation in enforcement proceedings"). *But see* Mattson v. Caterpillar, Inc., 359 F.3d 885, 891 (7th Cir. 2004) (concluding that the levels of protection are the same under both clauses).

24. *See, e.g.*, Equal Emp. Opportunity Comm'n v. Total Sys. Servs., Inc., 221 F.3d 1171, 1174 (11th Cir. 2000), *reh'g denied*, 240 F.3d 899 (11th Cir. 2001).

25. *Id.* (noting the participation clause "protects proceedings and activities which occur in conjunction with or after the filing of a formal charge with the EEOC; it does not include participating in an employer's internal, in-house investigation, conducted apart from a formal charge with the EEOC"). The EEOC has taken a different approach, stating:

> The Commission and the Solicitor General have long taken the view that participation and opposition have some overlap, in that raising complaints, serving as a voluntary or involuntary witness, or otherwise participating in an employer's internal complaint or investigation process, whether before or after an EEOC or Fair Employment Practices Agency (FEPA) charge has been filed, is covered under the broad protections of the participation clause, although it is also covered as "opposition."

Enforcement Guidance on Retaliation and Related Issues, *supra* note 14.

26. *See, e.g.*, *Vaughn*, 537 F.3d at 1151; *Laughlin*, 149 F.3d at 259 n.4; *see also* Vasconcelos v. Meese, 907 F.2d 111, 113 (9th Cir. 1990) ("Accusations made in the context of charges before the Commission are protected by statute; charges made outside of that context are made at the accuser's peril.").

27. *See, e.g.*, *Total Sys. Servs.*, 221 F.3d at 1174 (noting that the EEOC argued the employee's activity fell under the participation clause, while the employer argued the activity fell under the opposition clause).

A. The Opposition Clause

The first type of activity Title VII's anti-retaliation provision protects is "opposition" activity.[28] The scope of this protection is broad, protecting activities such as making Title VII complaints to employers, refusing to follow an employer's order that violates Title VII, and engaging in other activities that "oppose" an employer's unlawful discriminatory policies.[29] Although the opposition clause's protection is broad, it is typically less broad than the participation clause's protection.[30] The critical difference between these provisions is that, to be protected, the opposition activity must be based on a reasonable, good-faith belief the employer is violating, or has violated, Title VII.[31] And, as will be addressed, most jurisdictions do not apply this same standard to the participation clause, providing almost unlimited protection for those who engage in participation activities.[32]

One of the most common types of opposition activity is lodging internal discrimination complaints.[33] As previously noted, for those complaints to be protected, the employee's belief the employer is violating, or has violated, Title VII must be a reasonable, good-faith belief.[34] If an employee's belief of unlawful activity is not a reasonable, good-faith belief, the opposition clause will not protect the

28. 42 U.S.C. § 2000e-3(a) (2018).

29. *See Questions and Answers: Enforcement Guidance on Retaliation and Related Issues*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Aug. 26, 2016), https://www.eeoc.gov/laws/guidance/questions-and-answers-enforcement-guidance-retaliation-and-related-issues. As noted *supra* note 25, the EEOC believes lodging internal complaints can qualify as participation. Courts have rejected that approach, *see, e.g.*, *Total Sys. Servs.*, 221 F.3d at 1174, however, after *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), there is a legitimate argument that internal complaints should qualify as participation. In *Faragher*, the Court imposed a requirement that Title VII plaintiffs must, in certain circumstances, first notify the employer of the alleged discrimination. *Id.* at 807–08. As a result, internal complaints have essentially become part of the EEO process and could qualify as participation. The Eleventh Circuit rejected this argument in *Total Sys. Servs.*, 221 F.3d at 1174 n.3. In her dissent from the denial of rehearing of *Total Sys. Servs.*, Judge Barkett acknowledged this argument. Equal Emp. Opportunity Comm'n v. Total Sys. Servs., Inc., 240 F.3d 899, 903–04 (11th Cir. 2001) (Barkett, J., dissenting).

30. *See, e.g.*, *Vaughn*, 537 F.3d at 1151 (quoting *Laughlin*, 149 F.3d at 259 n.4).

31. Clark Cnty. Sch. Dist. v. Breeden, 532 U.S. 268, 271 (2001) (utilizing a reasonable, good-faith-belief test when deciding an opposition case).

32. *See, e.g.*, *Vaughn*, 537 F.3d at 1151–52 (noting the participation clause provides more protection than the opposition clause). *But see* Mattson v. Caterpillar, Inc., 359 F.3d 885, 891 (7th Cir. 2004) (holding both clauses provide the same level of protection).

33. *See Questions and Answers: Enforcement Guidance on Retaliation and Related Issues*, *supra* note 29. As was stated earlier, the Supreme Court has decided answering an employer's questions regarding *another* individual's internal EEO complaint also qualifies as opposition. Crawford v. Metro. Gov't of Nashville & Davidson Cnty., 555 U.S. 271, 276–78 (2009).

34. *Breeden*, 532 U.S. at 270–71.

employee.[35] As a result, employees must be careful when deciding whether to lodge internal discrimination complaints, as doing so without what a court ultimately determines is a reasonable, good-faith belief of unlawful activity could result in an adverse employment action without a remedy.[36] If, however, the employee files an EEOC charge (activity that falls under the participation clause), that employee will most likely receive greater protection.[37] The Article will now address the participation clause.

B. The Participation Clause

The second type of activity the anti-retaliation provision protects is "participation" activity.[38] The scope of this protection is supposed to be very broad (most courts believe this provision's protections are more broad than the opposition clause's protections),[39] and the clause protects actions such as filing EEOC charges, testifying in Title VII proceedings, and assisting other employees in their Title VII proceedings.[40] For reasons that will be discussed throughout this Article, the protection offered by this clause is quite broad, which is why plaintiffs try to cast their activity as participation rather than opposition whenever it is possible for them to do so.[41]

The biggest difference between these two clauses is that while all courts agree opposition activities must be based on a reasonable, good-faith belief the employer is violating, or has violated, Title VII,[42] courts are split as to whether that same standard applies to

35. *Id.*

36. *See* Lawrence D. Rosenthal, *To Report or Not to Report: The Case for Eliminating the Objectively Reasonable Requirement for Opposition Activities Under Title VII's Anti-Retaliation Provision*, 39 ARIZ. ST. L.J. 1127, 1142–44 (2007).

37. Some employees, however, might lose a subsequent lawsuit for not bringing the alleged harassment to the employer's attention prior to filing an EEOC charge. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998).

38. 42 U.S.C. § 2000e-3(a) (2018); *see also Questions and Answers: Enforcement Guidance on Retaliation and Related Issues*, *supra* note 29 (explaining what the participation clause protects).

39. *See, e.g.*, Vaughn v. Epworth Villa, 537 F.3d 1147, 1151 (10th Cir. 2008) (quoting Laughlin v. Metro. Wash. Airports Auth., 149 F.3d 253, 259 n.4 (4th Cir. 1998)).

40. 42 U.S.C. § 2000e-3(a).

41. *See, e.g.*, Equal Emp. Opportunity Comm'n v. Total Sys. Servs., Inc., 221 F.3d 1171, 1174–76 (11th Cir. 2000) (disagreeing with the EEOC's argument that the at-issue activity fell under the participation clause), *reh'g denied*, 240 F.3d 899 (11th Cir. 2001).

42. *See* Clark Cnty. Sch. Dist. v. Breeden, 532 U.S. 268 (2001) (applying the reasonable, good-faith-belief standard to an opposition case).

participation activities.[43] Courts that do *not* limit the participation clause do so because of the participation clause's language, the EEOC's position on this issue, and for policy reasons.[44] Courts that *do* apply the reasonable, good-faith-belief standard to participation cases do so as a result of the Supreme Court's decision in *Clark County School District v. Breeden*[45] (although that case involved *opposition*, not *participation*)[46] and for policy reasons.[47]

This Article will address an issue regarding the scope of the participation clause—whether an employee who knowingly engages in false participation activity such as filing a false EEOC charge receives protection. Courts that use the reasonable, good-faith-belief standard for participation cases reject this type of claim;[48] however, other courts have reached a different conclusion regarding whether the participation clause covers knowingly false participation activities.[49] The Article will now address how the courts have treated this issue.

III. THE SPLIT REGARDING KNOWINGLY ENGAGING IN FALSE PARTICIPATION ACTIVITIES

As previously noted, some courts protect employees who knowingly engage in false participation activities.[50] These courts do so for several reasons, including the participation clause's language,[51] the EEOC's position on the issue,[52] the belief that doing so will not provide workplace tenure for bad employees,[53] and because Title VII's

43. *Compare* Mattson v. Caterpillar, Inc., 359 F.3d 885, 891 (7th Cir. 2004) (holding that the reasonable, good-faith-belief standard applies to all retaliation claims), *with Total Sys. Servs.*, 221 F.3d at 1174–76 (noting different levels of protection under the opposition clause and the participation clause).

44. *See infra* Section III.A.

45. 532 U.S. 268 (2001).

46. *Id.* at 270. For a thorough discussion of *Breeden* and the participation clause, 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).

47. *See, e.g.*, *Mattson*, 359 F.3d at 890–91; *see also infra* Section III.B (discussing court decisions and policy reasons for not extending the participation clause protection).

48. *See, e.g.*, *Mattson*, 359 F.3d at 892.

49. *See infra* Section III.A (discussing cases that have granted broad protection under the participation clause). Some of these cases did not reach this *specific* issue, and some specifically declined to address it; nonetheless, because these courts provided protection under *similar* circumstances, those courts' reasoning could apply to this situation. *See id.*

50. Several of those cases will be discussed in this Section.

51. *See infra* Section IV.A and cases cited therein.

52. *See infra* Section IV.B and cases cited therein.

53. *See infra* Section IV.C and cases cited therein.

purpose and structure support broad protection under the participation clause.[54] Other courts, however, have been less inclined to provide protection under these circumstances, believing Congress could not have intended such a result and that the Supreme Court's *Breeden* decision applies to participation activities.[55] This part will provide examples of cases that have addressed the scope of the participation clause's protection; the first section will discuss cases where the court adopted a pro-employee position, and the second section will discuss cases where the court adopted a pro-employer approach.

A. Courts that Have Taken a Pro-Employee Position

Although it might seem odd to protect employees who knowingly engage in false participation activities, several courts have leaned in that direction.[56] These courts did so for a variety of reasons, including Title VII's language, the EEOC's position regarding this issue, and several policy reasons.[57] These pro-employee cases, at both the appellate level and trial level, will now be addressed.

The opinion on which most courts rely for the proposition that the participation clause protects almost all participation activity is *Pettway v. American Cast Iron Pipe Co*.[58] The question the court answered in *Pettway* was the following: "[W]hether a charge filed pursuant to [Title VII's anti-retaliation provision] prohibits an employer from discharging an employee for having made false statements in a request for reconsideration of his case before the [EEOC]."[59] The district court determined the plaintiff's statements were not protected, but the Fifth Circuit reversed.[60]

In *Pettway*, the plaintiff filed a charge alleging racial discrimination.[61] The EEOC dismissed the charge, believing the employer did not violate Title VII.[62] After the plaintiff received the EEOC's determination, the EEOC informed the plaintiff he could

54. *See infra* Section IV.D and cases cited therein.

55. *See infra* Section III.B and cases cited therein.

56. *See supra* note 9. Those cases will be discussed in this Section.

57. *See infra* Section III.A.

58. 411 F.2d 998 (5th Cir. 1969). As discussed below, the pro-employee cases refer to *Pettway* for the assertion that the participation clause's protection is very broad. *See* Glover v. S.C. L. Enf't Div., 170 F.3d 411 (4th Cir. 1999) (quoting *Pettway*, 411 F.2d at 1006 n.18).

59. *Pettway*, 411 F.2d at 999–1000.

60. *Id.* at 1000.

61. *Id.* at 1001.

62. *Id.*

submit additional information, and it was that submission the plaintiff claimed the participation clause protected.[63] In that submission, the plaintiff suggested there was some type of cover-up or bribery between the EEOC and the employer.[64] Soon after the plaintiff submitted this document, his employer discharged him.[65] Predictably, the plaintiff filed another charge, this time alleging retaliation.[66]

After addressing a preliminary issue, the court addressed Title VII's anti-retaliation provision's scope.[67] The employer argued the plaintiff's letter was not protected because it "constitute[d] a false and malicious accusation that [the employer] bribed or improperly influenced federal officers in the exercise of their official duties[,]"[68] and because of this, the employer's decision to terminate the plaintiff was lawfully based on the plaintiff's knowing and malicious libelous statements.[69] The plaintiff argued the statements were protected, regardless of their truth.[70] The lower court found the statements to be false, but the court was not certain whether the statements were motivated by malice.[71] Regardless, the lower court ruled the termination was justified.[72] As noted earlier, the Fifth Circuit reversed.[73]

The Fifth Circuit started by noting the following regarding the participation clause's purpose: "In unmistakable language[,] it is to protect the employee who utilizes the tools provided by Congress to protect his rights. The Act will be frustrated if the employer may unilaterally determine the truth or falsity of charges and take independent action."[74] The court also focused on the importance of allowing employees to file EEOC charges without fear of retaliation.[75] The court stated the following:

63. *Id.*
64. *Id.* at 1001 n.5.
65. *Id.* at 1002.
66. *Id.*
67. *Id.* at 1003.
68. *Id.*
69. *Id.*
70. *Id.* at 1003–04.
71. *Id.* at 1004.
72. *Id.* The EEOC found the plaintiff's statements were protected because they were made in the exercise of his right to complain to the EEOC and to avail himself of the Title VII process. *Id.*
73. *Id.* at 1000.
74. *Id.* at 1005.
75. *Id.*

> The burden of enforcement rests on the individual through his suit in Federal District Court. But charges must first have been filed with EEOC. Consequently, the filing of charges and the giving of information by employees is essential to the Commission's administration of Title VII, the carrying out of the congressional policy embodied in the Act[,] and the invocation of the sole sanction of Court compulsion through employee instituted suit.[76]

The court noted employee participation was "essential" and should be protected.[77] Relying on *NLRB v. Burnup and Sims, Inc.*[78]—and comparing an employee to David and an employer to Goliath—the court stated "[a] protected activity acquires a precarious status if innocent employees can be discharged while engaging in it, even though the employer acts in good faith."[79] The court also noted that "protection must be afforded to those who seek the benefit of statutes designed by Congress to equalize employer and employee in matters of employment."[80]

Realizing there must be a balance between an employer's right not to be damaged by "maliciously libelous statements" and an employee's right to be free from discrimination, the court struck that balance in the employee's favor.[81] The court held:

> We hold that where, disregarding the malicious material contained in a charge (or petition for reconsideration, or other communication with EEOC sufficient for EEOC purposes, or in a proceeding before EEOC) the charge otherwise satisfies the liberal requirements of a charge, the charging party is exercising a protected right under the Act. He may not be discharged for such writing. The employer may not take it on itself to determine the correctness or consequences of it. Nor may the court either sustain any employer disciplinary action or deny relief because of the presence of such malicious material.[82]

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76. *Id.*
77. *Id.*
78. 379 U.S. 21 (1964).
79. *Pettway*, 411 F.2d at 1005 (quoting *Burnup*, 379 U.S. at 23).
80. *Id.* at 1006.
81. *Id.* at 1007.
82. *Id.*

The court then concluded the plaintiff's communication with the EEOC was protected even though there was material that was probably false and/or malicious.[83] Elaborating, the court noted a plaintiff is not "stripped of . . . protection" because of those allegations, and as long as the plaintiff "says enough," he cannot be subjected to retaliation.[84] Because the employee was terminated because of the contents of the communication with the EEOC, the Fifth Circuit reversed and remanded.[85]

The Fourth Circuit has also acknowledged the participation clause's protection is very broad.[86] In *Glover v. South Carolina Law Enforcement Division*,[87] the plaintiff was fired after giving deposition testimony in another individual's EEO proceeding.[88] The problem, from the employer's perspective, was that the plaintiff's testimony was not only unrelated to the other employee's case, but it was also critical of the office for which the plaintiff had worked prior to her employment with the defendant.[89] The plaintiff accused her previous employer of mismanagement, destruction of documents, inappropriate behavior, and discrimination.[90] This testimony was not related to the case for which the plaintiff was being deposed, and when the "target" of the plaintiff's deposition testimony heard about it, he reported it to the plaintiff's then-current employer.[91] Soon thereafter, the plaintiff was removed from her position, and one of the reasons given was that her deposition testimony "demonstrated poor judgment."[92]

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83. *Id.*

84. *Id.*

85. *Id.* at 1007–08.

86. Glover v. S.C. L. Enf't Div., 170 F.3d 411, 414 (4th Cir. 1999). Although the court provided broad protection, it did state it was *not* answering whether a charge must be filed in good faith to receive protection. *Id.* at 415 n.2. In a pre-*Glover*, unpublished opinion, the Fourth Circuit relied on *Pettway* and stated, "While we may sympathize with the employer having to deal with an employee who has made conflicting and contradictory statements in an important investigation, the employee is protected from discharge because of his statements if they are made in connection with an investigation, proceeding or hearing under Title VII." Arvinger v. Mayor of Balt. City, No. 88-2203, 1990 WL 2198, at *8 (4th Cir. Jan. 12, 1990).

87. 170 F.3d 411 (4th Cir. 1999).

88. *Id.* at 412. Although *Glover* involved a plaintiff who testified in another employee's lawsuit (and did not file her own EEOC charge), both activities fall under the participation clause and should receive the same level of protection. *Id.* at 413–14.

89. *Id.* at 412.

90. *Id.*

91. *Id.* at 413.

92. *Id.*

The plaintiff filed a retaliation claim, and the district court granted the employer's motion for summary judgment.[93] The court decided the employer terminated the plaintiff because of her testimony, but that her testimony was not protected because it was "unresponsive, uncompelled, and gratuitous."[94] Therefore, because of the *substance* of the plaintiff's testimony, the lower court decided she had not engaged in protected activity.[95]

On appeal, the defendant asked the court to apply a reasonableness test when analyzing participation activities, which is what that court had done when analyzing opposition activities.[96] The defendant also asked the court to find the plaintiff's testimony unreasonable and therefore not protected.[97] The court rejected the invitation to adopt a reasonableness test for participation activities, basing this decision on both the text and purpose of Title VII's anti-retaliation provision.[98]

With respect to Title VII's text, the court noted the following: "Reading a reasonableness test into . . . [the] participation clause would do violence to the text of that provision and would undermine the objectives of Title VII."[99] Elaborating on the statutory language, the court stated:

> The plain language of the participation clause itself forecloses us from improvising such a reasonableness test. The clause forbids retaliation against an employee who "has made a charge, testified, assisted, or participated in any manner" in a protected proceeding. [The plaintiff] was fired because she "testified" in a Title VII deposition. The term "testify" has a plain meaning: "[t]o bear witness" or "to give evidence as a witness."[100]

Because the statutory language in no way limited protection, the court was unwilling to read limiting language into it.[101]

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93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.* at 413–14.
98. *Id.* at 414.
99. *Id.*
100. *Id.* (first quoting 42 U.S.C. § 2000e-3(a); and then quoting *Testify*, BLACK'S LAW DICTIONARY (6th ed.1990)).
101. *Id.*

Next, relying on *Pettway*, the court noted participation plaintiffs are afforded "exceptionally broad protection."[102] And when referring back to Title VII's language, the court noted there is nothing in that language that limits the participation clause's reach; in fact, the court believed Congress's use of the phrase "in any manner" demonstrated just the opposite—that the participation clause's protection "is meant to sweep broadly."[103] Wrapping up its analysis of the statutory language, the court noted: "Congress could not have carved out in clearer terms this safe harbor from employer retaliation. A straightforward reading of the statute's unrestrictive language leads inexorably to the conclusion that all testimony in a Title VII proceeding is protected against punitive employer action."[104]

Next, the court addressed the participation clause's purpose, which is to "[m]aintain[] unfettered access to statutory remedial mechanisms."[105] Because participation is critical to Title VII's enforcement, individuals must be comfortable participating in the enforcement process.[106] The court noted: "If a witness in a Title VII proceeding were secure from retaliation only when her testimony met some slippery reasonableness standard, she would surely be less than forth-coming. It follows that the application *vel non* of the participation clause should not turn on the substance of the testimony."[107]

The court then cited *Pettway* again, noting that "[a] protected activity acquires a precarious status if innocent employees can be discharged while engaging in it, even though the employer acts in good faith."[108] Concluding that point, the court noted "Congress has determined that some irrelevant and even provocative testimony must be immunized so that Title VII proceedings will not be chilled. It is not for this court to overturn that judgment."[109]

Next, the court addressed the employer's argument that such a broad interpretation would prevent an employer from ever terminating

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102. *Id.* (quoting Pettway v. Am. Cast Iron Pipe Co., 411 F.2d 998, 1006 n.18 (5th Cir. 1969)).

103. *Id.* (first quoting Merritt v. Dillard Paper Co., 120 F.3d 1181, 1186 (11th Cir. 1997); and then citing United States v. Wildes, 120 F.3d 468, 470 (4th Cir. 1997)).

104. *Id.* As noted earlier, the participation clause covers EEOC charges as well as testimony given during a Title VII proceeding. *See* 42 U.S.C. § 2000e-3(a) (2018).

105. *Glover*, 170 F.3d at 414 (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997)).

106. *Id.*

107. *Id.*

108. *Id.* (quoting Pettway v. Am. Cast Iron Pipe Co., 411 F.2d 998, 1005 (5th Cir. 1969)).

109. *Id.*

an employee who participates in EEO activity.[110] The court rejected that argument, observing that employers can still fire employees who participate in EEO proceedings; they simply cannot fire those employees *because* they participate in those proceedings.[111] Employers can still discipline employees, so long as their motive is not a retaliatory one.[112] The court held: "[w]e merely hold, in accordance with the statute's specific text, that an employer may not fire an employee because of her testimony in a Title VII proceeding."[113]

The court then addressed the defendant's additional arguments, but it rejected all of them.[114] The court opined that imposing a reasonableness standard (1) "would lead the federal courts into a morass of collateral litigation in employment discrimination cases"; (2) would make witnesses unwilling to provide accurate information during depositions; and (3) would lead to discovery disputes that would ultimately waste individual and judicial resources.[115]

Finally, the court distinguished the cases upon which the employer relied.[116] The court did so by noting those cases involved the *opposition* clause rather than the *participation* clause, and that "the scope of protection for activity falling under the participation clause is broader than for activity falling under the opposition clause."[117] According to the court, the "unambiguous and specific" language of the participation clause does not require any balancing and provides extremely broad protection.[118] After rejecting the defendant's other arguments (for reasons not relevant to this Article), the court reversed and remanded.[119]

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110. *Id.*

111. *Id.*

112. *Id.* (citing Jackson v. St. Joseph State Hosp., 840 F.2d 1387, 1390–91 (8th Cir. 1988)).

113. *Id.* at 414–15.

114. *Id.* at 415.

115. *Id.*

116. *Id.*

117. *Id.* (quoting Laughlin v. Metro. Wash. Airports Auth., 149 F.3d 253, 259 n.4 (4th Cir. 1998)).

118. *Id.*

119. *Id.* at 415–16. Judge Williams argued that once the plaintiff started the attacks unrelated to the pending litigation, she was no longer protected. *Id.* at 416 (Williams, J., dissenting). Since *Glover*, at least one court within the Fourth Circuit expressed its belief the Fourth Circuit would reject a reasonableness standard for participation activities. *See* Mezu v. Morgan State Univ., No. WMN-09-2855, 2013 WL 3934013, at *10–11 (D. Md. July 29, 2013) (expressing its belief that "the Fourth Circuit would follow the clear majority rule and not require participation clause plaintiffs to establish reasonable belief in the merits of their underlying charge or complaint").

Another case supporting broad protection for participation activity is *Wyatt v. City of Boston*.[120] In *Wyatt*, the plaintiff alleged his former employer retaliated against him for opposing what he thought was sex discrimination and for filing a charge with the Massachusetts Commission Against Discrimination (the state equivalent of the EEOC).[121] The lower court dismissed the complaint for failure to state a claim, but the First Circuit vacated the judgment and remanded.[122] Although the First Circuit was unsure regarding the nature of the complaint, it concluded the plaintiff was alleging Title VII retaliation.[123]

Although courts have relied on *Wyatt* for the proposition that the participation clause provides almost unlimited protection,[124] the opinion provides only thin analysis.[125] Specifically, the court first noted the difference between opposition activity and participation activity, and while addressing participation activity, the court stated the following: "there is nothing in [the participation clause's] wording requiring that the charges be valid, nor even an implied requirement that they be reasonable."[126] The First Circuit relied on *Sias v. City Demonstration Agency*[127] and on *Pettway*, as well as on Larson's employment discrimination treatise.[128] Ultimately, the court determined the plaintiff could, possibly, prove facts that would allow recovery, and therefore, the lower court had erroneously dismissed the complaint.[129]

The Eleventh Circuit has also opined, at least in passing, that the participation clause's reach is very broad.[130] Although ultimately deciding the employee engaged in *opposition* activity, the court in *Total System Services, Inc.*, noted the following: "[e]ven if false statements made in the context of an EEOC charge (per the participation clause) are protected and cannot be grounds for dismissal

120. 35 F.3d 13 (1st Cir. 1994).
121. *Id.* at 14.
122. *Id.* at 14, 16.
123. *Id.* at 14–16.
124. *See, e.g.*, Booth v. Pasco Cnty., 829 F. Supp. 2d 1180, 1201 (M.D. Fla. 2011).
125. *See Wyatt*, 35 F.3d at 15–16.
126. *Id.* at 15.
127. 588 F.2d 692, 695 (9th Cir. 1978).
128. *Wyatt*, 35 F.3d at 15–16.
129. *Id.*
130. Equal Emp. Opportunity Comm'n v. Total Sys. Servs., Inc., 221 F.3d 1171, 1174–76 (11th Cir. 2000), *reh'g denied*, 240 F.3d 899 (11th Cir. 2001).

or discipline, *this extreme level of protection for untruth* is not afforded to false statements made under the opposition clause."[131] When addressing the difference between participation and opposition, the court noted the participation clause's broad level of protection:

> The statutory retaliation provision has two distinct components. Both offer employees some protection, but that these two components should offer two different levels of protection is consistent with the plain reading and purposes of the statute. The participation clause includes activity done in connection with proceedings conducted by the federal government and its agencies: an employee has invoked the jurisdiction of the federal government through its agency, the EEOC. *And we have held that expansive protection is available for these adjudicative kinds of proceedings run by the government*.[132]

Thus, even though the plaintiff ultimately lost, the court did emphasize the participation clause's broad protection.[133]

Another court that emphasized the participation clause's breadth was the Tenth Circuit.[134] In *Vaughn*, the court rejected the limited interpretation the employer suggested and decided the plaintiff engaged in protected activity when she disclosed unredacted documents to the EEOC, which violated company policy and also possibly state and federal law.[135] Unfortunately for the plaintiff, however, the court also decided her actions constituted a legitimate, non-retaliatory reason for her discharge,[136] and because the plaintiff

131. *Id.* at 1175 (emphasis added) (citation omitted) (first citing Pettway v. Am. Cast Iron Pipe Co., 411 F.2d 998, 1007 (5th Cir. 1969); and then citing Vasconcelos v. Meese, 907 F.2d 111, 113 (9th Cir. 1990)).

132. *Id.* at 1175–76 (emphasis added) (footnote omitted) (citing *Pettway*, 411 F.2d at 1007).

133. *Id.*; *see also* Booker v. Brown & Williamson Tobacco Co., 879 F.2d 1304, 1312 (6th Cir. 1989) (agreeing with *Pettway* that the participation clause provides broad protections) (involving state equivalent to Title VII).

134. *See* Vaughn v. Epworth Villa, 537 F.3d 1147 (10th Cir. 2008).

135. *Id.* at 1152, 1153 n.4.

136. *Id.* at 1154. The court acknowledged that although participation is almost always protected, the employer can terminate the employee for that activity if it violates a company rule. *Id.* at 1152 n.3. The court noted:

> Although the participation clause may be nearly absolute in theory, it may seldom be absolute in fact. When an employee violates an employer's policies, or for that matter the law, it will often be the case that the employer can assert a legitimate, non-retaliatory reason for taking an adverse employment action against the employee. And unless the employee can show that this reason was a pretext for retaliation, the employee will fail

could not prove pretext, the court affirmed the defendant's summary judgment.[137]

United States District Courts have also addressed the participation clause's breadth.[138] For example, the United States District Court for the Northern District of Georgia ruled in favor of an employee who brought a retaliation claim under the Age Discrimination in Employment Act.[139] In *Calhoun v. EPS Corp.*,[140] the plaintiff's employer terminated her fifteen days after she filed a "meritless EEO complaint."[141] The EEOC found reasonable cause to believe the plaintiff was retaliated against for challenging the employer's discriminatory practices, and that "retaliatory animus was the primary motivating factor for [her] discharge."[142]

After addressing the plaintiff's substantive ADEA claim, the court addressed her retaliation claim.[143] The court acknowledged this case presented a strange occurrence—an employment discrimination case in which the *plaintiff* prevails on a motion for summary judgment.[144] The reason for this outcome was the direct evidence of retaliation—the employer conceded it terminated the plaintiff because she filed the EEO complaint.[145] The employer believed the plaintiff knowingly filed a false complaint, and because of this, the employer believed it could terminate her for exercising bad judgment, violating

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to meet her burden under the *McDonnell Douglas* burden shifting framework. Indeed, such a circumstance occurs in this case.

Id. Thus, even though the plaintiff proved she engaged in protected activity, the court found that activity to be an acceptable reason for her termination. *Id.* at 1153–54.

137. *Id.* at 1155. For another case that adopted a broad view of the participation clause, see *Johnson v. University of Cincinnati*, 215 F.3d 561 (6th Cir. 2000).

138. *See infra* discussion remaining in Section III.A.

139. Calhoun v. EPS Corp., 36 F. Supp. 3d 1344, 1363 (N.D. Ga. 2014), *vacated in part*, No. 13-cv-2954, 2014 WL 12799080 (N.D. Ga. Sept. 15, 2014). ADEA retaliation cases are analyzed the same way as Title VII retaliation cases. *See, e.g.*, Wanamaker v. Columbian Rope Co., 108 F.3d 462, 465 (2d Cir. 1997) ("We approach [the plaintiff's] age-based retaliatory discharge claim in the same way as retaliation claims under Title VII of the Civil Rights Act of 1964.").

140. 36 F. Supp. 3d 1344 (N.D. Ga. 2014), *vacated in part*, No. 13-cv-2954, 2014 WL 12799080 (N.D. Ga. Sept. 15, 2014).

141. *Id.* at 1348–49.

142. *Id.* at 1349.

143. *Id.* at 1353.

144. *Id.* at 1354. The court later granted the defendant's motion for reconsideration, deciding a genuine issue of material fact existed. Calhoun v. EPS Corp., No. 13-cv-2954, 2014 WL 12799080, at *4 (N.D. Ga. Sept. 15, 2014). Nonetheless, on reconsideration, the court noted the participation clause grants "near-absolute" protection. *Id.*

145. *Calhoun*, 36 F. Supp. 3d at 1354–55.

company policy regarding filing accurate reports, and risking the loss of a government contract.[146] The court rejected this position.[147]

After addressing the evidence of retaliation, the court addressed the protection afforded by the statute.[148] The court first noted "making an EEO complaint is absolutely protected activity."[149] It also mentioned that "[e]ven filing a false EEO complaint is protected conduct."[150] Relying on *Pettway*, the court noted the participation clause's protection is "nearly absolute."[151] The court also relied on the Second Circuit's statement in *Deravin v. Kerik*[152] that the participation clause "is expansive and seemingly contains no limitations."[153] Finally, relying on *Total Systems Services, Inc.*, the court stated: "Importantly, that near-absolute protection covers even false complaints. As the Eleventh Circuit has held: even 'false statements made in the context of an EEOC charge . . . are protected and cannot be grounds for dismissal or discipline . . . .'"[154] Thus, the court adopted a broad interpretation of the participation clause, and consistent with *Pettway*, the court was unwilling to allow the employer to determine the merits of the employee's EEO complaint.[155]

The court then relied on the EEOC Compliance Manual.[156] It quoted the following passage from the Manual:

> The anti-discrimination statutes do not limit or condition in any way the protection against retaliation for participating in the charge process. While the opposition clause applies only to those who protest practices that they reasonably and in good faith believe are unlawful, the participation clause applies to all individuals who participate in the statutory complaint process. *Thus, courts have consistently held that a respondent is liable for retaliating against an individual for filing an EEOC charge regardless of the validity or*

146. *Id.* at 1354.
147. *Id.* at 1354–61.
148. *Id.* at 1356.
149. *Id.*
150. *Id.*
151. *Id.* (citing Pettway v. Am. Cast Iron Pipe Co., 411 F.2d 998, 1006 n.18 (5th Cir. 1969)).
152. 335 F.3d 195 (2d Cir. 2003).
153. *Calhoun*, 36 F. Supp. 3d at 1356 (citing *Deravin*, 335 F.3d at 203).
154. *Id.* (omissions in original) (quoting Equal Emp. Opportunity Comm'n v. Total Sys. Servs., Inc., 221 F.3d 1171, 1175 (11th Cir. 2000), *reh'g denied*, 240 F.3d 899 (11th Cir. 2001)).
155. *Id.*
156. *Id.* at 1356–57.

> *reasonableness of the charge. To permit an employer to retaliate against a charging party based on its unilateral determination that the charge was unreasonable or otherwise unjustified would chill the rights of all individuals protected by the anti-discrimination statutes.*[157]

And after concluding that the plaintiff's EEO complaint was analogous to an EEOC charge, the court decided she would receive protection.[158] The court rejected the employer's invitation to use a reasonable, good-faith-belief test, concluding such a test applies only to opposition cases.[159] As a result of this legal conclusion and direct evidence of retaliation, the court granted the plaintiff's motion for summary judgment.[160] Only the issue of damages remained.[161]

Another district court opinion providing broad protection under the participation clause comes from the District of Columbia.[162] *Egei v. Johnson*[163] involved a plaintiff who filed false sexual harassment charges.[164] The court framed the issue as being "whether an employer may lawfully fire an employee for making false or malicious accusations during the course of Equal Employment Opportunity ('EEO') proceedings."[165] The court decided the answer was "no," and that the participation clause protects employees who engage in this activity.[166] In denying the employer's motion to dismiss (or in the alternative, summary judgment), the court stated "Title VII's participation clause protects an employee from adverse employment action taken on the basis of the substance of her testimony in a Title VII EEO proceeding."[167]

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157. *Id.* at 1357 (emphasis added) (quoting U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC COMPLIANCE MANUAL § 8-II(C)(2) (1998)). Other courts have also relied on the EEOC's position. *See*, *e.g.*, Wesolowski v. Napolitano, No. CV 211-163, 2013 WL 1286207, at *7 (S.D. Ga. Mar. 25, 2013) ("Additionally, the EEOC Compliance Manual makes a clear distinction between opposition and participation, requiring a reasonable good-faith belief for the former and explicitly not requiring that for the latter.").

158. *Calhoun*, 36 F. Supp. 3d at 1357.

159. *Id.* at 1359–60.

160. *Id.* at 1360–61.

161. *Id.* at 1363; *see supra* note 144.

162. *See* Egei v. Johnson, 192 F. Supp. 3d 81 (D.D.C. 2016).

163. 192 F. Supp. 3d 81 (D.D.C. 2016).

164. *Id.* at 82.

165. *Id.*

166. *Id.*

167. *Id.*

The plaintiff's initial claim was that she was harassed by a supervisor and that she was "right-sized" because she refused to engage in sexual activities with him.[168] At her EEO hearing, she testified inconsistently with her prior statements, and her employer proved those statements were false.[169] As a result, the ALJ ruled the plaintiff could not establish a prima facie case, the alleged incidents did not happen, and the alleged events were not based on any prohibited reasons.[170]

Approximately one and a half years after this decision, the plaintiff was terminated, and it is this termination upon which the plaintiff based her retaliation complaint.[171] The plaintiff claimed she was terminated because of her prior EEO activity, a claim supported by her former employer's statement that she was, in fact, terminated as a result of her earlier complaint and testimony.[172] In fact, the plaintiff's termination letter stated that "[t]he falsification of records, inaccurate statements and lack of candor [constituted] unacceptable behavior which [would] not be tolerated or condoned."[173]

The plaintiff filed a pro se complaint, alleging retaliation.[174] In addressing the defendant's motion to dismiss (or, in the alternative, summary judgment), the court framed the issue as being "[w]hether, as a matter of law, an employee may be subject to an adverse employment action on the basis of false or malicious statements made during the course of equal employment proceedings."[175]

After identifying the relevant statutory provision, the court noted the very different interpretations each party had regarding that provision.[176] The plaintiff's argument was simple—she was terminated because of her earlier EEO charge (and because of the testimony she provided in support of that charge), and Title VII prohibits such a termination.[177] Predictably, the defendant had a different opinion—that it fired the plaintiff because she lied during the

168. *Id.* at 82–83.
169. *Id.* at 83–84.
170. *Id.* at 84.
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.* at 85.
175. *Id.* (alteration in original).
176. *Id.* at 85–86.
177. *Id.* at 85.

EEO process, not because she filed a charge or testified regarding it.[178] The employer argued that while Title VII protects employees from filing charges and testifying regarding those charges, the statute does not protect false or malicious statements made during the EEO process.[179]

The court noted the split of authority, with some courts deciding employees are protected after engaging in this type of behavior, and other courts concluding employees lose protection under these circumstances.[180] The court noted the D.C. Circuit had not yet addressed the issue, but that court had noted in dicta that the participation clause provides significant protection, and that its language "speaks in clear, *absolute terms*."[181] The court then restated the question before it—"whether the participation clause shields an employee from adverse action on the basis of *any* testimony she provides in an EEO proceeding . . . or whether the privilege [is] . . . a qualified one."[182]

The court looked at *Pettway* and at cases that followed it.[183] Included in this review was the Fourth Circuit's opinion in *Glover*, where the court observed that "*all* testimony in a Title VII proceeding is protected against punitive employer action."[184] As noted earlier, the *Glover* decision was based partially on the anti-retaliation provision's language, which does not include limits on the participation clause's scope; in fact, the statutory language suggests the protection is very broad.[185] Quoting *Glover*, the court in *Egei* stated:

> Section 704(a)'s protections ensure not only that employers cannot intimidate their employees into for[ ]going the Title

178. *Id.* at 86.

179. *Id.*

180. *Id.* The court cited to two pro-employee cases, *Glover v. S.C. L. Enf't Div.*, 170 F.3d 411 (4th Cir. 1999), and *Pettway v. Am. Cast Iron Pipe Co.*, 411 F.2d 998 (5th Cir. 1969), and to one pro-employer case, *Mattson v. Caterpillar, Inc.*, 359 F.3d 885 (7th Cir. 2004), to demonstrate the split on this issue. *Egei*, 192 F. Supp. 3d at 86.

181. *Egei*, 192 F. Supp. 3d at 86 (quoting Parker v. Balt. & Ohio R.R. Co., 652 F.2d 1012, 1019 (D.C. Cir. 1981)).

182. *Id.* at 86–87.

183. *Id.* at 87–88.

184. *Id.* at 87 (quoting *Glover*, 170 F.3d at 414). The other cases *Egei* cited were: *Equal Emp. Opportunity Comm'n v. Total Sys. Servs., Inc.*, 221 F.3d 1171, 1175 (11th Cir. 2000), *reh'g denied*, 240 F.3d 899 (11th Cir. 2001); *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1312 (6th Cir. 1989); *Slagle v. County of Clarion*, 435 F.3d 262, 266, 268 (3d Cir. 2006); *Clover v. Total Sys. Servs., Inc.*, 176 F.3d 1346, 1353 (11th Cir. 1999); and *Wyatt v. City of Boston*, 35 F.3d 13, 15 (1st Cir. 1994). *Egei*, 192 F. Supp. 3d at 88.

185. *See supra* Section II.

> VII grievance process, but also that investigators will have access to the unchilled testimony of witnesses. . . . If a witness in a Title VII proceeding were secure from retaliation only when her testimony met some slippery reasonableness standard, she would surely be less than forthcoming. It follows that the application *vel non* of the participation clause should not turn on the substance of the testimony.[186]

The court then noted many courts had adopted *Pettway*, and that the rule from *Pettway* does not apply to the "less protective" opposition clause.[187]

Before deciding which interpretation it would adopt, the court addressed the Seventh Circuit's rejection of *Pettway*.[188] The reasons that court gave for rejecting *Pettway* were the following: "an employee could immunize his unreasonable and malicious" complaints by filing them with a government agency; and the belief that "the panels in *Pettway* and similar cases' [couldn't] actually believe that forging documents and coercing witnesses to give false testimony are protected conduct.'"[189]

The court in *Egei* thus noted that at the time of its opinion, the Fourth and Fifth Circuits adopted the employee-friendly *Pettway* rule, while the Seventh Circuit had rejected it.[190] The court also noted that the other courts that had addressed this issue, including the D.C. Circuit, had either tacitly approved of *Pettway* or had commented on the participation clause's broad protection.[191] The court then decided it would follow *Pettway*.[192]

The court based its conclusion first on the D.C. Circuit's opinion in *Parker*.[193] Specifically, when addressing the participation clause, that court noted the clause "speaks in clear, absolute terms, and has accordingly been interpreted as shielding recourse to the EEOC, regardless of the ultimate resolution of the underlying claim on the

186. *Egei*, 192 F. Supp. 3d at 87–88 (quoting *Glover*, 170 F.3d at 414).

187. *Id.* at 88. See *supra* note 184 for the cases upon which the *Egei* court relied.

188. *Id.*

189. *Id.* (first quoting *Mattson*, 359 F.3d at 891; and then quoting Hatmaker v. Mem'l Med. Ctr., 619 F.3d 741, 746 (7th Cir. 2010) (emphasis omitted)).

190. *Id.* The court also noted there were conflicting opinions on this issue within the Eighth Circuit. *Id.* at 88 n.4.

191. *Id.* at 88.

192. *Id.* at 88–89.

193. *Id.* at 89.

merits."[194] Realizing Congress's goal was to protect employees who speak out against employers, the court noted a limited interpretation would chill employees' willingness to file charges and would thus defeat the goal of combatting discrimination.[195] Because the D.C. Circuit recognized the problems of limiting protection and had favorably cited to *Pettway*, *Egei* concluded affording broad protection was consistent with the D.C. Circuit's position.[196]

The second reason the court protected the plaintiff's behavior was the anti-retaliation provision's language.[197] The language on which the court relied was the part of the participation clause that protects employees who "ha[ve] . . . participated *in any manner*" in an EEO proceeding.[198] According to the court, and relying on *Glover*, "[a] straightforward reading of the statute's unrestrictive language leads inexorably to the conclusion that all testimony in a Title VII proceeding" is protected.[199]The court also noted the Seventh Circuit's pro-employer interpretation was *not* based on statutory language, but rather on the belief Congress could not have intended such an employee-friendly result.[200]

The third reason the court gave was that a broad interpretation was consistent with the purpose behind Title VII, and that "[a]ctivities under the participation clause are essential to the machinery set up by Title VII."[201] Such activities would be "chilled," and Title VII's enforcement scheme would be frustrated, if employees could be terminated if they were unable to prove their claims.[202] In fact, employees would be dissuaded from filing charges if they knew they could be terminated if their charge was not proven.[203]

The court acknowledged the difference between *mistaken* claims of discrimination (ones that should be protected) and *false* claims (ones that perhaps should not be protected), but acknowledged that it

194. *Id.* (quoting Parker v. Balt. & Ohio R.R. Co., 652 F.2d 1012, 1019 (D.C. Cir. 1981)).
195. *Id.* (quoting *Parker*, 652 F.2d at 1019).
196. *Id.*
197. *Id.*
198. *Id.* (quoting 42 U.S.C. § 2000e-3(a) (2018)).
199. *Id.* (quoting Glover v. S.C. L. Enf't Div., 170 F.3d 411, 414 (4th Cir. 1999)).
200. *Id.* (quoting Hatmaker v. Mem'l Med. Ctr., 619 F.3d 741, 746 (7th Cir. 2010)).
201. *Id.* at 89 (quoting Laughlin v. Metro. Wash. Airports Auth., 149 F.3d 253, 259 n.4 (4th Cir. 1998)).
202. *Id.* at 89–90 (quoting Parker v. Balt. & Ohio R.R. Co., 652 F.2d 1012, 1005, 1019 (D.C. Cir. 1981)).
203. *Id.* at 90.

is very difficult to distinguish between the two.[204] And because of that difficulty, providing protection for one, but not the other, would result in employees being unwilling to file charges.[205] The court stated the following:

> A good-faith but mistaken claim of discrimination, of course, is not the same as a *false* claim of discrimination, and those judges who have rejected the *Pettway* rule have emphasized that the two can be distinguished. This might be true in a case where an employee admits to having lied. But absent such an admission, the risk of chilling legitimate claims and testimony remains. It would be cold comfort for claimants if they were nominally protected from adverse action on the basis of their testimony, but only to the extent that a judge, an ALJ, or even an employer concludes in "good faith" that such testimony was false or malicious.[206]

This possibility, which would deter employees from coming forward as victims or as witnesses, was the third reason the court gave a broad interpretation to the participation clause.[207]

The final reason the court gave for adopting this approach was that doing so was consistent with protections afforded to other plaintiffs.[208] Analogizing to tort law, the court noted that individuals are absolutely privileged to make defamatory statements during those proceedings, and the court believed that because the purpose of such privilege is necessary to provide access to legal remedies, EEO complainants should be granted similar protection.[209] Although protecting false testimony certainly has its drawbacks, the court weighed the advantages and disadvantages of that approach and concluded:

> This is not to condone lying or to suggest that false charges and testimony do not take a toll on administrative proceedings. The problem is that, in practice, it is not possible to permit employers to take adverse action against EEO claimants based on false charges or testimony—or

204. *Id.*
205. *Id.*
206. *Id.* (citations omitted).
207. *Id.* at 89–90.
208. *Id.* at 90.
209. *Id.*

> based on charges and testimony that the employer *believes* to be false—without chilling truthful charges and testimony.[210]

The court then decided to tip the balance in favor of providing protection for employees.[211]

The court did acknowledge there were legitimate arguments on the other side of this issue (including the possibility that employees will make more false and defamatory charges), and the court also limited its holding in three ways, including the limitation it placed on intentionally false and malicious statements.[212] Specifically, the court questioned whether its interpretation would apply to that situation:

> Second, this is not a case in which an employee has admitted having made a false or malicious statement in the course of an EEO proceeding. The question whether such an admission would render a false or malicious statement actionable under Title VII, once again, is not before the Court; the question before the Court is simply whether an employer may punish an employee for offering testimony in an EEO proceeding that the employee asserts is true and that the employer disbelieves.[213]

This limitation is, of course, the focus of this Article, and it is possible the court would not reach the same result in a case where it is clear the employee intentionally filed a false charge or provided false testimony.[214]

One other court that adopted a broad interpretation of the participation clause was the United States District Court for the Middle District of Florida.[215] *Booth v. Pasco County*[216] involved two plaintiffs; the first plaintiff alleged retaliation based on his filing of union grievances and EEOC charges, and the second plaintiff alleged retaliation after he was listed as a witness by the first plaintiff.[217] After

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210. *Id.*
211. *Id.* at 90–91.
212. *Id.*
213. *Id.* at 91.
214. If, however, the court wants to protect knowingly false and malicious statements, it could rely on *Proulx v. Citibank, N.A.*, 659 F. Supp. 972, 977–79 (S.D.N.Y. 1987), which decided those statements were protected.
215. *See* Booth v. Pasco Cnty., 829 F. Supp. 2d 1180, 1199 (M.D. Fla. 2011).
216. 829 F. Supp. 2d 1180 (M.D. Fla. 2011).
217. *Id.* at 1186.

addressing preliminary issues, the court addressed whether the plaintiffs engaged in protected activity.[218]

The defendant presented several reasons it believed the charges were not protected, including the argument that the charges were unreasonable and made in bad faith.[219] The court rejected this argument.[220] First, the court correctly concluded that filing a charge qualifies as participation activity.[221] The court then noted that although the reasonable, good-faith-belief standard applies to opposition activity, the parties disputed whether that standard applied to participation activity.[222] The court decided the participation clause does *not* require the same reasonable, good-faith-belief standard.[223]

First, the court acknowledged two recent cases within the Eleventh Circuit that raised this question but did not answer it.[224] The court also noted there was a circuit split on the issue, with more circuits deciding *not* to utilize a reasonable, good-faith-belief standard.[225] The union had asked the court to adopt the Seventh Circuit's approach in *Mattson v. Caterpillar, Inc.*,[226] in which the court ruled in favor of the employer after it presented strong evidence the plaintiff's charges were filed in bad faith and with a malicious purpose.[227] The court in *Mattson* adopted the reasonable, good-faith-belief standard and rejected the plaintiff's participation claim, and the defendant in *Booth* wanted this court to do the same.[228] The court refused to do so, noting the following regarding *Pettway*:

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218. *Id.* at 1198.

219. *Id.*

220. *Id.* at 1199–201.

221. *Id.* at 1199.

222. *Id.* at 1199–200.

223. *Id.* at 1200.

224. *Id.* (first citing Wideman v. Wal-Mart Stores, Inc., 141 F.3d 1453, 1455 (11th Cir. 1998); and then citing Soto v. Bank of Am., No. 04-CV-782-ORL28JGG, 2005 WL 2861116, at *10 (M.D. Fla. Nov. 1, 2005)). In 2007, a court within the Eleventh Circuit rejected a good-faith requirement. *See* Holmes v. Fulton Cnty. Sch. Dist., No. 1:06-CV-2556-CC-AJB, 2007 WL 9650147, at *42 n.54 (N.D. Ga. Dec. 24, 2007). More recently, a different court within the Eleventh Circuit followed *Pettway* and rejected limiting the participation clause. *See* Rodabaugh v. Regions Bank, No. 18-CV-216, 2020 WL 1812299, at *5 (N.D. Ala. Apr. 9, 2020) ("But the Court will not apply the objective reasonableness requirement to [the plaintiff's] participation clause argument because the Court believes that is most consistent with *Pettway* . . . .").

225. *Booth*, 829 F. Supp. 2d at 1200.

226. 359 F.3d 885 (7th Cir. 2004).

227. *Id.* at 889–90. The *Booth* court noted that unlike in *Mattson*, the evidence did not support a finding of malicious intent. *Booth*, 829 F. Supp. 2d at 1200 n.18.

228. *Id.* at 1200.

> Given these and other considerations, the Court ultimately declined to make the protections given to an EEOC charge contingent on the contents of that charge, and held that such a charge would be protected even if it contained false, and/or malicious contents. Thus, the Court declined to read a good faith and reasonableness requirement into the protections afforded to the participation clause.[229]

The *Booth* court also noted the majority of courts that had addressed this issue had not incorporated the reasonable, good-faith-belief test into participation cases.[230] In reaching its decision, the court relied on the following cases in addition to *Pettway*: *Wyatt*; *Slagle v. County of Clarion*;[231] *Johnson v. University of Cincinnati*;[232] and *Glover*.[233] Based on the reasoning in those cases, the court in *Booth* rejected a heightened standard for participation cases, and it concluded the plaintiffs engaged in protected activity.[234]

The opinions addressed in this Section, although not all *specifically* adopting the position that *all* participation activity is protected, certainly provide authority for a very broad interpretation of the participation clause. Not all courts, however, have adopted such a plaintiff-friendly approach.[235] The next Section will discuss cases in

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229. *Id.* at 1200–01 (citation omitted).

230. *Id.* at 1201.

231. 435 F.3d 262 (3d Cir. 2006). The *Slagle* court also relied on the EEOC Compliance Manual, which stated plaintiffs are protected regardless of whether their EEOC charges are valid or reasonable. *Id.* at 268. Since *Slagle*, the Third Circuit appears to have changed its position. *See* Moore v. City of Philadelphia, 461 F.3d 331, 341 (3d Cir. 2006) (citing Clark Cnty. Sch. Dist. v. Breeden, 532 U.S. 268, 271 (2001) for the following proposition: "Whether the employee opposes, *or participates in a proceeding against*, the employer's activity, the employee must hold an objectively reasonable belief, in good faith, that the activity they oppose is unlawful under Title VII." (emphasis added)).

232. 215 F.3d 561 (6th Cir. 2000). Prior to *Johnson*, the court addressed an analogous state-law retaliation claim and relied heavily on *Pettway*. *See* Booker v. Brown & Williamson Tobacco Co., 879 F.2d 1304 (6th Cir. 1989). In *Booker*, the court noted:

> The "exceptionally broad protection" of the participation clause extends to persons who have "participated in any manner" in Title VII proceedings. Protection is not lost if the employee is wrong on the merits of the charge, nor is protection lost if the contents of the charge are malicious and defamatory as well as wrong. Thus, once the activity in question is found to be within the scope of the participation clause, the employee is generally protected from retaliation.

Id. at 1312 (citations omitted).

233. Glover v. S.C. L. Enf't Div., 170 F.3d 411, 414 (4th Cir. 1999).

234. *Booth*, 829 F. Supp. 2d at 1201; *see also* Proulx v. Citibank, N.A., 659 F. Supp. 972, 977–79 (S.D.N.Y. 1987) (assuming that the plaintiff's statements were false and malicious but deciding that the participation clause protected them).

235. *See infra* Section III.B.

which the court was unwilling to provide such broad protection for employees seeking protection under the participation clause.

B. Courts that Have Taken a Pro-Employer Position

Not surprisingly, some courts have decided the participation clause's protections do *not* extend to plaintiffs who knowingly engage in false participation activity.[236] Despite acknowledging the participation clause's broad language, these courts believe that Congress could not have intended to protect these individuals; that doing so would have the effect of providing job security for bad employees;[237] and that the Supreme Court's *Breeden* opinion applies to the participation clause.[238] Some of these pro-employer cases will now be discussed.

One of the most commonly cited opinions for the proposition that the participation clause does not protect false charges is *Mattson.* Unlike some of the cases discussed previously, this case squarely addressed whether knowingly filing false EEOC charges is protected.[239] The court decided it is not.[240] In *Mattson*, the plaintiff filed a charge with the EEOC and with Illinois's equivalent state agency.[241] The charge was based on minor incidents between the plaintiff and his supervisor, incidents in which he alleged his supervisor engaged in physical contact with him.[242] These allegations had previously been investigated internally, with the conclusion being that the plaintiff's complaint was meritless.[243]

Three months after that internal investigation, the plaintiff filed the charge with the EEOC and the equivalent state agency.[244] After conducting a second internal investigation and concluding that not

236. *See, e.g.*, Mattson v. Caterpillar, Inc., 359 F.3d 885, 892 (7th Cir. 2004).

237. *Id.* at 891; *see also* Hatmaker v. Mem'l Med. Ctr., 619 F.3d 741, 745 (7th Cir. 2010) ("[P]articipation doesn't insulate an employee from being discharged for conduct that, if it occurred outside an investigation, would warrant termination."); Gilooly v. Mo. Dep't of Health & Senior Servs., 421 F.3d 734, 740 (8th Cir. 2005) (highlighting that employees cannot lie and file false charges without suffering repercussions because "[t]o do so would leave employers 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").

238. *See, e.g.*, *Mattson*, 359 F.3d at 891–92.

239. *Id.* at 889–92.

240. *Id.* at 892.

241. *Id.* at 888.

242. *Id.*

243. *Id.*

244. *Id.*

only did no harassment take place, but that the plaintiff made the accusations to retaliate against his supervisor, the employer fired the plaintiff.[245] This gave rise to the retaliation claim.[246] The district court granted summary judgment, and the plaintiff appealed.[247] The district court based its opinion on the plaintiff's failure to demonstrate a retaliatory motive, but the Seventh Circuit focused its attention on whether the plaintiff had engaged in protected activity.[248] The court concluded he had not.[249]

The court first concluded the harassment charge was "both objectively and subjectively unreasonable, as well as made with the bad faith purpose of retaliating against his female supervisor."[250] Despite this finding, the plaintiff argued he was protected under the participation clause because, unlike the opposition clause, the participation clause does not impose a reasonable, good-faith-belief standard.[251] The plaintiff relied on several opinions for this argument,[252] but the court rejected it because "none of [the plaintiff's] cases actually involved a plaintiff who filed unreasonable charges, let alone charges that were both unreasonable and made in bad faith."[253]

The case the Seventh Circuit believed was most supportive of the plaintiff's position was *Pettway*, but even that case was unable to save the plaintiff.[254] The court distinguished *Pettway* by noting that although the substance of the *Pettway* plaintiff's allegations was false, there was no evidence the *Pettway* plaintiff was "motivated by malice."[255] The court also distinguished *Pettway* by noting the allegations in that case were not baseless, unlike those before the court in *Mattson*.[256] When wrapping up its discussion of *Pettway*, the court noted the following:

245. *Id.*
246. *Id.*
247. *Id.*
248. *Id.* at 888–92.
249. *Id.* at 891–92.
250. *Id.* at 889.
251. *Id.*
252. The cases upon which the plaintiff relied were *Johnson v. University of Cincinnati*, 215 F.3d 561, 582 (6th Cir. 2000); *Womack v. Munson*, 619 F.2d 1292, 1298 (8th Cir. 1980); *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1312 (6th Cir. 1989); and *Pettway v. Am. Cast Iron Pipe Co.*, 411 F.2d 998, 1007 (5th Cir. 1969). *Mattson*, 359 F.3d at 889–90.
253. *Id.* at 890.
254. *Id.*
255. *Id.*
256. *Id.*

> This stands in stark contrast to Mattson's charges, which as already discussed did not objectively state a claim of sexual harassment. Furthermore, there is evidence that Mattson's claim was filed maliciously. Thus, *Pettway* does not persuade this Court that employees should receive Title VII protection for filing unreasonable charges in bad faith.[257]

After distinguishing *Pettway* and other cases upon which the plaintiff relied,[258] the court cited cases from the Seventh Circuit and concluded that "utterly baseless" claims did not receive protection.[259] The court observed why it was appropriate to include a reasonableness requirement and a good-faith requirement in participation cases:

> The purpose of requiring that plaintiffs reasonably believe in good faith that they have suffered discrimination is clear. Title VII was designed to protect the rights of employees who in good faith protest the discrimination they believe they have suffered and to ensure that such employees remain free from reprisals or retaliatory conduct. Title VII was not designed to "arm employees with a tactical coercive weapon" under which employees can make baseless claims simply to "advance their own retaliatory motives and strategies."[260]

The court acknowledged the Seventh Circuit had not yet approved the "utterly baseless" standard for participation cases, but it also noted the court had not limited that standard only to opposition cases.[261] It then stated the same standard should apply to *all* retaliation cases.[262] The court gave the following reasons for applying the same standard to all of these cases: (1) without adopting the same standard, an employee could "immunize" an unreasonable and malicious internal complaint by making the same allegations with a government agency; (2) an employee could give himself "unlimited tenure" by filing numerous EEOC charges before the employer realizes the internal allegations were false and malicious; and (3) such a standard "would

257. *Id.*
258. *Id.*
259. *Id.* The cases upon which the court relied were *Fine v. Ryan International Airlines*, 305 F.3d 746, 752 (7th Cir. 2002); *McDonnell v. Cisneros*, 84 F.3d 256, 259 (7th Cir. 1996); and *Dey v. Colt Construction & Development Co.*, 28 F.3d 1446, 1458 (7th Cir. 1994). *Mattson*, 359 F.3d at 890.
260. *Id.* (quoting Spadola v. N.Y.C. Transit Auth., 242 F. Supp. 2d 284, 292 (S.D.N.Y. 2003)).
261. *Id.* at 890–91.
262. *Id.* at 891.

encourage the abuse of Title VII and the proceedings that it establishes."[263]

Finally, the court addressed the Supreme Court's opinion in *Breeden*, which rejected a plaintiff's *opposition* claim because her belief she was the victim of sexual harassment was unreasonable.[264] Although acknowledging *Breeden* involved opposition, *Mattson* applied *Breeden* to this participation case.[265] The court explained this in the following manner:

> While we acknowledge that the Supreme Court did not apply the reasonableness requirement in a participation clause context, the Supreme Court also did not hold that the reasonableness requirement only applies to the opposition clause. Because the Supreme Court did not distinguish between opposition and participation claims, we also decline to do so and hold that the good faith, reasonableness requirement applies to all Title VII claims.[266]

Thus, the Seventh Circuit read into the participation clause a reasonableness requirement even though *Breeden* did not address that specific issue (nor did it have a reason to do so).[267]

The court then stated it was not setting a high bar for plaintiffs seeking participation-clause protection.[268] Employees would still be protected if they were mistaken on the merits of their charge, and pro se claimants would still be protected if, despite their best efforts, their self-drafted complaints did not state a legal claim.[269] Nonetheless,

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263. *Id.* The court then distinguished two cases upon which the plaintiff relied: *Johnson v. University of Cincinnati*, 215 F.3d 561 (6th Cir. 2000), and *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453 (11th Cir. 1998). *Mattson*, 359 F.3d at 891. Also see *Hatmaker v. Memorial Medical Center*, 619 F.3d 741, 746 (7th Cir. 2010), where the court relied on *Mattson* for the proposition that such a broad interpretation would "encourage the abuse of Title VII and the proceedings that it established."

264. *Mattson*, 359 F.3d at 891–92.

265. *Id.*at 892. For a discussion of *Breeden* and its application to the participation clause, see Rosenthal, *supra* note 46.

266. *Mattson*, 359 F.3d at 892. *Mattson* is not the only case to apply *Breeden* to participation cases. *See* Moore v. City of Philadelphia, 461 F.3d 331, 341 (3d Cir. 2006) (citing *Breeden*, 532 U.S. at 271) ("Whether the employee opposes, *or participates in a proceeding against*, the employer's activity, the employee must hold an objectively reasonable belief, in good faith, that the activity they oppose is unlawful under Title VII." (emphasis added)); Rosenthal, *supra* note 46, at 365 n.132.

267. *Mattson*, 359 F.3d at 892.

268. *Id.*

269. *Id.*

here, because the plaintiff's charge was unreasonable, meritless, and motivated by malice, the court was unwilling to protect it.[270]

Another court that appeared to adopt a pro-employer position was the Eighth Circuit, which did so in *Gilooly v. Missouri Department of Health and Senior Services*.[271] In *Gilooly*, an investigator concluded the plaintiff's statements made during an investigation into sexual harassment were not credible and that the plaintiff lied during the investigatory process.[272] The plaintiff was ultimately terminated, at least in part because of his "deception" during the investigation.[273] When addressing whether summary judgment in favor of the employer was appropriate, the court noted the following:

> However, it also cannot be true that a plaintiff can file false charges, lie to an investigator, and possibly defame co-employees, without suffering repercussions simply because the investigation was about sexual harassment. To do so would leave employers 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.[274]

This statement, however, was made in the context of deciding whether there was a legitimate, non-retaliatory reason for the adverse employment action, which occurs *after* the plaintiff establishes a prima facie case.[275] Nonetheless, despite appearing to decide the plaintiff established a prima facie case, the above-quoted language provides more limited protection under the participation clause.[276]

As demonstrated in this Section, courts are not unanimous regarding whether Title VII protects individuals who knowingly

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270. *Id.* See also *Hatmaker v. Memorial Medical Center*, 619 F.3d 741, 745–46 (7th Cir. 2010), where the court relied on *Mattson* and stated that the participation clause does not provide absolute protection.

271. 421 F.3d 734 (8th Cir. 2005).

272. *Id.* at 737.

273. *Id.*

274. *Id.* at 740.

275. *Id.* Despite appearing to conclude the plaintiff established a prima facie case, the court indicated it was unwilling to protect knowingly false statements. *Id.* at 741. In a separate opinion, Judge Colloton cited *Mattson* with approval and stated the majority implicitly adopted *Mattson*. *Id.* at 742–43 (Colloton, J., concurring in part). See also *Hatmaker*, 619 F.3d at 745, which utilized the language above from *Gilooly* in deciding Title VII's anti-retaliation provision does not protect frivolous accusations.

276. *Id.* at 739–41. The court then remanded the case because an issue of fact precluded summary judgment. *Id.* at 741.

engage in false participation activities. Although several courts have protected false statements and allegations, some of those courts were careful to note they were not directly confronted with *knowingly* false, malicious, and/or bad-faith charges and/or testimony.[277] The next part will explain why, even though it might seem distasteful to protect this type of activity, doing so might be necessary.[278]

IV. WHY COURTS MIGHT HAVE TO PROTECT KNOWINGLY FALSE PARTICIPATION ACTIVITIES

Although it might seem odd to protect employees who knowingly engage in false participation activities, courts might have to do so. This part explains why protecting these individuals might be a necessary evil with which employers and courts must live.[279] The reasons for this conclusion include: (A) the participation clause's broad language; (B) the EEOC's position on this issue; (C) the incorrect argument that providing protection will prevent employers from being able to fire bad employees; and (D) the purpose of Title VII and the role of the EEOC.[280] These arguments will now be addressed.

A. The Statutory Language Arguably Protects Individuals Who Knowingly Engage in False Participation Activities

When interpreting a statute, the first place courts must look is to the statute's language.[281] Several courts that have given a broad interpretation to the participation clause have done so because of the very broad language Congress used in the participation clause.[282] Specifically, courts have relied on the "or participated in any manner" language in Title VII's anti-retaliation provision's participation clause

277. *See, e.g.*, Egei v. Johnson, 192 F. Supp. 3d 81, 91 (D.D.C. 2016).

278. *See supra* note 9.

279. Although these arguments are based on arguments utilized by courts that addressed false participation activity, future courts could distinguish some of those cases the way the court in *Mattson* did, which is to point out that some of them did not involve false charges made in bad faith. Mattson v. Caterpillar, Inc., 359 F.3d 885, 890 (7th Cir. 2004).

280. Another reason for protecting these employees is that protecting EEOC complaints, even those that are malicious or untrue, is "consistent with protections afforded complainants in other legal regimes." *Egei*, 192 F. Supp. 3d at 90.

281. Hardt v. Reliance Standard Life Ins. Co., 560 U.S. 242, 251 (2010); Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997).

282. *See supra* Section III.A.

when providing very broad protection to participation-clause plaintiffs.[283]

Because of the "participated in any manner" language Congress used when describing what the participation clause protects, several courts have interpreted the statute to mean an employee will be protected as long as he is engaging in *any* participation activity.[284] Several of the cases discussed earlier relied on this statutory language when deciding to provide broad protection under the participation clause.[285] For example, the Fifth Circuit in *Pettway* stated the following:

> There can be no doubt about the purpose of § 704(a). *In unmistakable language* it is to protect the employee who utilizes the tools provided by Congress to protect his rights. The Act will be frustrated if the employer may unilaterally determine the truth or falsity of charges and take independent action.[286]

Thus, Title VII's language was one reason why the *Pettway* court provided broad protection under the participation clause.[287]

The Fourth Circuit also addressed the statutory language when it protected a plaintiff's unnecessary and unresponsive deposition testimony in another employee's EEO case.[288] In *Glover*, the court assumed the plaintiff's testimony was unreasonable, but it relied on Title VII's language when deciding the testimony was still protected.[289] Relying on that language, the court stated the following:

> Reading a reasonableness test into section 704(a)'s participation clause *would do violence to the text of that provision* and would undermine the objectives of Title VII.

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283. *See, e.g.*, *Egei*, 192 F. Supp. 3d at 89 (quoting 42 U.S.C. § 2000e-3(a) (2018)). Some of the employee-friendly cases that focused on this language were addressed previously, and some of those cases will also be discussed in this Section.

284. *See supra* Section III.A and cases cited therein. In addition to the cases that will be addressed herein, the court in *Proulx v. Citibank, N.A.*, 659 F. Supp. 972, 978 (S.D.N.Y. 1987), also acknowledged there is a textual argument that supports the proposition that false and malicious claims are protected.

285. *See supra* Section III.A and cases cited therein.

286. Pettway v. Am. Cast Iron Pipe Co., 411 F.2d 998, 1004–05 (5th Cir. 1969) (emphasis added).

287. *Id.* at 1004–07.

288. Glover v. S.C. L. Enf't Div., 170 F.3d 411 (4th Cir. 1999).

289. *Id.* at 414–16.

> *The plain language of the participation clause itself forecloses us from improvising such a reasonableness test*. The clause forbids retaliation against an employee who "has made a charge, testified, assisted, or participated in any manner" in a protected proceeding. Glover was fired because she "testified" in a Title VII deposition. The term "testify" has a plain meaning: "[t]o bear witness" or "to give evidence as a witness."[290]

The court then cited to other courts that granted broad protection under the participation clause, all of which focused on the statutory language.[291] The *Glover* court observed the activities listed in the participation clause are "'not preceded or followed by any restrictive language that limits its reach.' In fact, it is followed by the phrase 'in any manner'—a clear signal that the provision is meant to sweep broadly."[292] In wrapping up this point, the court stated "Congress could not have carved out in clearer terms this safe harbor from employer retaliation. *A straightforward reading of the statute's unrestrictive language* leads inexorably to the conclusion that all testimony in a Title VII proceeding is protected against punitive employer action."[293]

Other courts have also relied on the statutory language when interpreting the participation clause. The First Circuit in *Wyatt* stated that under the participation clause, "there is nothing in its wording requiring that the charges be valid, nor even an implied requirement that they be reasonable."[294] Although some of these appellate-court cases might not have specifically involved knowingly false and

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290. *Id.* at 414 (alteration in original) (emphasis added) (citations omitted). The court also described the participation clause as "unambiguous and specific." *Id.* at 415.

291. *Id.* at 414. The cases upon which the court relied were *Pettway*, 411 F.2d at 1006 n.18 and *Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1186 (11th Cir. 1997). *Id.*

292. *Glover*, 170 F.3d at 414 (citing *Merritt*, 120 F.3d at 1186). The court in *Merritt* stated the following regarding the participation clause: "the adjective 'any' is not ambiguous . . . . '[It] has an expansive meaning, that is, "one or some indiscriminately of whatever kind."' . . . '[A]ny' means all." *Merritt*, 120 F.3d at 1186 (citation omitted) (quoting States v. Gonzales, 520 U.S. 1, 5 (1997)).

293. *Glover*, 170 F.3d at 414 (emphasis added).

294. Wyatt v. City of Boston, 35 F.3d 13, 15 (1st Cir. 1994). The Eleventh Circuit has also observed that the statutory language requires different levels of protection for opposition claims and participation claims. Equal Emp. Opportunity Comm'n v. Total Sys. Servs., Inc., 221 F.3d 1171, 1175 (11th Cir. 2000), *reh'g denied*, 240 F.3d 899 (11th Cir. 2001) ("The statutory retaliation provision has two distinct components. Both offer employees some protection, but that these two components should offer two different levels of protection is consistent with the plain reading and purposes of the statute.").

malicious actions, the courts were clear that participation-clause protection is extremely broad.

United States district courts have also relied on the statutory language to conclude protection under the participation clause is very broad. For example, the United States District Court for the District of Columbia relied on *Glover* when addressing the participation clause's language and stated the following:

> The Fourth Circuit reasoned that "[t]he plain language of the participation clause itself foreclose[d]" a limited interpretation of its scope. As the court explained, "[t]he word 'testified' is not proceeded [sic] or followed by any restrictive language that limits its reach"; indeed, "it is followed by the phrase 'in any manner'—a clear signal that the provision is meant to sweep broadly."[295]

The court also stated the following regarding the participation clause's language:

> Second, the text of the participation clause itself militates in favor of protection for the substance of statements made in the course of EEO proceedings, even if false or malicious. As then-Chief Judge Wilkinson observed, the participation clause forbids retaliation against an employee who "has made a charge, testified, assisted, or participated *in any manner*" in a protected proceeding. "A straightforward reading of the statute's unrestrictive language leads inexorably to the conclusion that all testimony in a Title VII proceeding"—or at least the *substance* of such testimony—"is protected against punitive employer action."[296]

Thus, this was another case in which the court acknowledged the participation clause's broad language and its protection for almost all participation activities.

Even cases that ultimately ruled in favor of employers have acknowledged the participation clause is extremely broad. For example, the Tenth Circuit in *Vaughn v. Epworth Villa*[297]

295. Egei v. Johnson, 192 F. Supp. 3d 81, 87 (D.D.C. 2016) (first, second, and third alterations in original) (citation omitted) (quoting *Glover*, 170 F.3d at 414).

296. *Id.* at 89 (citations omitted) (quoting *Glover*, 170 F.3d at 414). The court also observed that the Seventh Circuit's position was "not premised on the language of the statute, but on a disbelief that Congress could possibly have intended to protect" lying. *Id.*

297. 537 F.3d 1147 (10th Cir. 2008).

acknowledged the participation clause's broad language when concluding the plaintiff engaged in protected activity.[298] Although the court ultimately ruled the employer had a legitimate, non-retaliatory reason for the adverse employment action, the court decided the plaintiff had engaged in protected activity.[299] The court reviewed how other courts had applied broad protection under the participation clause and had relied on that clause's language.[300] The court noted the following:

> "When interpreting the language of a statute, the starting point is always the language of the statute itself." . . . In this case, the participation clause plainly provides that individuals may not be retaliated against when they "participate[ ] in *any manner* in an investigation, proceeding, or hearing under" Title VII. We fail to see how this language places the kind of obligation on the employee that the district court here imposed—the obligation to resort only to honest and loyal conduct in advancing a claim unless the employee proves that it is necessary to resort to other means. . . . "'[R]ead naturally, the word "any" has an expansive meaning,' and thus, so long as 'Congress did not add any language limiting the breadth of that word,' the term 'any' must be given literal effect." Accordingly, given the plain language of the participation clause, we must conclude that [the plaintiff] engaged in a "protected activity" when she submitted the unredacted medical records to the EEOC.[301]

Although the court ultimately ruled that terminating the plaintiff for providing unredacted records to the EEOC was a legitimate, non-retaliatory reason for the adverse action, the court determined that, based on the participation clause's language, the conduct was

298. *Id.* at 1151–52.

299. *Id.* at 1152–55.

300. *Id.* at 1152. The court relied on the following cases when addressing the participation clause's broad protection: *Deravin v. Kerik*, 335 F.3d 195, 203 (2d Cir. 2003); *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1312 (6th Cir. 1989); *Sias v. City Demonstration Agency*, 588 F.2d 692, 695 (9th Cir. 1978); *Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998, 1006 n.18 (5th Cir. 1969); and *Slagle v. County of Clarion*, 435 F.3d 262, 266 (3d Cir. 2006). *Vaughn*, 537 F.3d at 1152. After reviewing those cases, the court noted: "Based on the participation clause's plain language, we believe the broad coverage afforded to the clause by these courts is well founded." *Id.*

301. *Id.* (first alteration in original) (citations omitted). The court was careful to note it was not addressing whether such broad protection should be afforded to fraudulent claims. *Id.* at 1152 n.2.

protected for the purpose of establishing a prima facie case.[302] Of course, this was of little consolation to the plaintiff, as the court affirmed the district court's summary judgment in favor of the employer.[303]

Other courts that reached pro-employer outcomes have also concluded the statute's language provides broad protection for participation activity. For example, the Fourth Circuit in *Villa v. CavaMezze Grill, LLC*,[304] acknowledged the participation clause's language was "unambiguous and specific," and that its broad protection leads to the conclusion that "firing someone for testifying in a Title VII deposition is plainly prohibited, regardless of whether the testimony is unreasonable."[305] Even though that court ultimately ruled against the plaintiff, it did acknowledge the participation clause's breadth.[306]

Despite numerous courts' broad interpretations of the participation clause's language, there are some arguments *against* such a broad interpretation of that language, which courts *could* try to use if they want to avoid protecting employees who knowingly engage in false participation activities. One argument against such a broad interpretation of the "in any manner" language is that this phrase follows specific *actions* such as making a charge, testifying, or assisting, and as a result, the "participated in any manner" language refers only to other, similar *actions*, and not to particular motives the person has while engaging in the activity.[307]

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302. *Id.* at 1152–55. The court ruled against the plaintiff because it decided the plaintiff's activity was also a legitimate, non-retaliatory reason for the discharge. *Id.* at 1154.

303. *Id.* at 1155. By allowing the employer to prevail at the legitimate, non-retaliatory reason/pretext stage, the court minimized the relevance of the prima facie case. *See* Hatmaker v. Mem'l Med. Ctr., 619 F.3d 741, 745 (7th Cir. 2010) ("[P]articipation doesn't insulate an employee from being discharged for conduct that, if it occurred outside an investigation, would warrant termination. This includes making frivolous accusations, or accusations grounded in prejudice." (citations omitted)).

304. 858 F.3d 896 (4th Cir. 2017).

305. *Id.* at 902 (citing Glover v. S.C. L. Enf't Div., 170 F.3d 411, 414–15 (4th Cir. 1999)). The court also noted that in the *opposition* context, prohibiting employers from disciplining employees who fabricate allegations was not appropriate. *Id.* at 901–02.

306. *Id.* at 902 ("[T]he text of the participation clause is unambiguous and specific." (quoting *Glover*, 170 F.3d at 415)); *see also* Equal Emp. Opportunity Comm'n v. Total Sys. Servs., Inc., 221 F.3d 1171, 1174–76 (11th Cir. 2000), *reh'g denied*, 240 F.3d 899 (11th Cir. 2001) (acknowledging the breadth of the participation clause's language).

307. 42 U.S.C. § 2000e-3(a) (2018).

The Seventh Circuit in *Hatmaker v. Memorial Medical Center*[308] made a similar point and rejected the idea that the participation clause's language requires such an expansive interpretation.[309] The court criticized pro-plaintiff courts' broad interpretations of the participation clause by stating the following:

> To these courts[,] "participated in any manner" in an investigation seems to mean "participated by any and all means" rather than participated in any *capacity*, whether formally or informally, whether as complainant or as a witness, and at whatever stage of the investigation. But these courts can't actually *believe* that forging documents and coercing witnesses to give false testimony are protected conduct. And if they don't believe that, why do they think lying is protected?[310]

Thus, the *Hatmaker* court appears to believe that the "in any manner" refers to particular acts of participation, not to the motivation behind those acts.[311] This interpretation seems to utilize the canon of statutory construction, *ejusdem generis,* which provides as follows: "[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words."[312] Using this canon of construction is one way courts can avoid protecting individuals who knowingly engage in false participation activities, while still adhering to the statutory language. Specifically, courts can interpret "in any manner" as referring only to actions like making a charge, testifying, and taking other actions associated with the EEO process.

Another argument against such a broad reading of the participation clause is the rule that courts can ignore a statute's language if applying that language would yield an absurd result.[313] At

308. 619 F.3d 741 (7th Cir. 2010).

309. *Id.* at 746. This case involved an internal complaint, not one that occurred either as a result of, or simultaneously with, the filing of an EEOC charge. *Id.* at 745.

310. *Id.* at 746.

311. *See id.*

312. Wash. State Dep't of Soc. & Health Servs. v. Guardianship Est. of Keffeler, 537 U.S. 371, 384 (2003) (alteration in original) (quoting Cir. City Stores, Inc. v. Adams, 532 U.S. 105, 114–15 (2001)).

313. *See, e.g.*, Colón-Marrero v. Vélez, 813 F.3d 1, 11 (1st Cir. 2016) ("Our starting point in discerning the meaning of a statute is the provision itself, and '[t]he plain meaning of a statute's text must be given effect "unless it would produce an *absurd result* or one manifestly at odds with

least one court has referenced this rule when addressing the participation clause.[314] The court in *Glover*, when deciding to protect the plaintiff's participation activity, stated that providing such protection "would *not* lead . . . to an absurd result."[315] Specifically, the court stated:

> This interpretation would not lead, as SLED contends, to an absurd result. Our holding does not permit employees to immunize improper behavior simply by filing an EEOC complaint. "[A]n EEOC complaint creates no right on the part of an employee to miss work, fail to perform assigned work, or leave work without notice." Employers retain, as they always have, the right to discipline or terminate employees for any legitimate, nondiscriminatory reason.[316]

Thus, the court was willing to adhere to what it believed the statute's language required—protection for the plaintiff's participation activity—and the court believed that applying the statutory language did *not* yield an absurd result.[317] Of course, if a court did not wish to protect employees who knowingly engage in false participation activity, the court could conclude that protecting such behavior *would* yield the absurd result that an employee would be protected for engaging in malicious and deceptive behavior.

As has been addressed, courts that adopt a broad interpretation of the participation clause do so, in part, because of the clause's language. As was also pointed out, however, if courts do not want to reward false and malicious actions, there are possible avenues to pursue without ignoring the statutory language. The statutory language is not, however, the only reason courts might have to protect these employees. As will be addressed next, some courts do so to be consistent with the EEOC, which has expressed its position that the participation clause does provide protection in these circumstances.[318]

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the statute's intended effect."'" (alteration in original) (emphasis added) (quoting Arnold v. United Parcel Serv., Inc., 136 F.3d 854, 858 (1st Cir. 1998), *abrogated by* Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999))).

314. Glover v. S.C. L. Enf't Div., 170 F.3d 411, 414 (4th Cir. 1999).

315. *Id.* at 414–15 (emphasis added).

316. *Id.* at 414 (alteration in original) (citation omitted) (quoting Brown v. Ralston Purina Co., 557 F.2d 570, 572 (6th Cir. 1977)).

317. *Id.* at 414–15.

318. *See Enforcement Guidance on Retaliation and Related Issues*, *supra* note 14.

B. The EEOC Supports a Broad Interpretation of the Participation Clause

Another reason courts protect knowingly false participation activities is that the EEOC, the agency charged with administering Title VII, has expressed its position that such protection is warranted.[319] Although the EEOC's position is not always binding on the courts,[320] several courts have deferred to the EEOC on this issue.[321] The EEOC has stated the following:

> Participation in the EEO process is protected *whether or not the EEO allegation is based on a reasonable, good faith belief that a violation occurred*. This does not mean that falsehoods or bad faith are without consequence. An employer is free to bring these to light in the EEO matter, where it may rightly affect the outcome. But it is unlawful retaliation for an employer to take matters into its own hands and impose consequences for participating in an EEO matter.[322]

The EEOC has also stated the following regarding Title VII's anti-retaliation provision's opposition clause and participation clause:

> An individual is protected from retaliation for opposition to discrimination as long as s/he had a reasonable and good faith

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319. *Id.*

320. The EEOC's position is "'not entitled to full *Chevron* deference,' but it is entitled to a 'measure of respect under the less deferential . . . standard' because it 'reflect[s] a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'" Calhoun v. EPS Corp., 36 F. Supp. 3d 1344, 1357 n.4 (N.D. Ga. 2014) (alteration in original) (citations omitted), *vacated in part*, No. 13-cv-2954, 2014 WL 12799080 (N.D. Ga. Sept. 15, 2014). The Supreme Court has, at times, ignored the EEOC's position on other issues regarding federal EEO statutes. *See, e.g.*, Gen. Dynamics Land Sys., Inc., v. Cline, 540 U.S. 581, 600 (2004) (rejecting the EEOC's position regarding the scope of the ADEA because the EEOC's position was "clearly wrong"); Sutton v. United Air Lines, Inc., 527 U.S. 471, 482 (1999) (rejecting the EEOC's position regarding how to decide whether an individual has a disability under the ADA because the EEOC's position was "an impermissible interpretation of the ADA"), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553, 3553–59.

321. *See, e.g.*, *Calhoun*, 36 F. Supp. 3d at 1356–57; *see also* Wesolowski v. Napolitano, No. CV 211-163, 2013 WL 1286207, at *7 (S.D. Ga. Mar. 25, 2013) ("Additionally, the EEOC Compliance Manual makes a clear distinction between opposition and participation, requiring a reasonable good faith belief for the former and explicitly not requiring that for the latter."); Mezu v. Morgan State Univ., No. WMN-09-2855, 2013 WL 3934013, at *10–11 (D. Md. July 29, 2013) (citing to *Wesolowski* and to the EEOC Compliance Manual, concluding "that the Fourth Circuit would follow the clear majority rule and not require participation clause plaintiffs to establish reasonable belief in the merits of their underlying charge or complaint").

322. *Questions and Answers: Enforcement Guidance on Retaliation and Related Issues*, *supra* note 29 (emphasis added).

> belief that s/he was opposing an unlawful discriminatory practice, and the manner of opposition was reasonable. *An individual is protected against retaliation for participation in the charge process, however, regardless of the validity or reasonableness of the original allegation of discrimination*.[323]

As stated earlier, courts have relied on the EEOC's position when deciding to protect false participation activities. For example, the United States District Court for the Northern District of Georgia relied on the EEOC's position when discussing the breadth of the participation clause's protection.[324] In acknowledging a broad level of protection, the court relied on the EEOC Compliance Manual when it noted a plaintiff is protected under the participation clause regardless of whether the allegations in the original charge were valid or reasonable.[325] Other courts have also relied on the EEOC's position, providing broader protection under the participation clause than under the opposition clause.[326]

Therefore, in addition to the participation clause's plain language, the EEOC's position provides another reason it might be necessary to protect employees who knowingly engage in false participation activities. If, however, courts do not feel comfortable granting such protection, they can deny protection by ignoring the EEOC's position,

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323. *Section 2 Threshold Issues*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (May 12, 2000), https://www.eeoc.gov/laws/guidance/section-2-threshold-issues#2-II-A-5 (emphasis added).

324. *Calhoun*, 36 F. Supp. 3d at 1356–57; *see also* Slagle v. County of Clarion, 435 F.3d 262, 268 (3d Cir. 2006) (relying on the EEOC Compliance Manual for the proposition that "a plaintiff is protected under the participation clause 'regardless of whether the allegations in the original charge were valid or reasonable'").

325. *Calhoun*, 36 F. Supp. 3d at 1356–57 (relying on the EEOC's Compliance Manual for the proposition that "courts have consistently held that a respondent is liable for retaliating against an individual for filing an EEOC charge regardless of the validity or reasonableness of the charge"). As noted earlier, the court in *Calhoun* reversed its decision to grant summary judgment in favor of the plaintiff, but it did once again note the participation clause's "near-absolute" protection. Calhoun v. EPS Corp., No. 13-cv-2954, 2014 WL 12799080, at *4 (N.D. Ga. Sept. 15, 2014). Also see *Booth v. Pasco County*, 829 F. Supp. 2d 1180, 1201 (M.D. Fla. 2011), where the court cited to *Slagle*, 435 F.3d at 268, for relying on the EEOC's position that "a plaintiff is protected under the participation clause 'regardless of whether the allegations in the original charge were valid or reasonable.'"

326. *See Wesolowski*, 2013 WL 1286207, at *7 ("Additionally, the EEOC Compliance Manual makes a clear distinction between opposition and participation, requiring a reasonable good faith belief for the former and explicitly not requiring that for the latter."); *Mezu*, 2013 WL 3934013, at *10–11 (citing to *Wesolowski* and to the EEOC Compliance Manual and concluding "that the Fourth Circuit would follow the clear majority rule and not require participation clause plaintiffs to establish reasonable belief in the merits of their underlying charge or complaint").

saying it is an unreasonable interpretation of Title VII.[327] In addition to the statutory language and the EEOC's position, however, there is another reason courts might have to protect this type of activity; specifically, the popular, pro-employer argument that protecting these employees would guarantee them workplace tenure is not true.

C. Providing Protection Will Not Provide "Tenure" for Bad Employees.

One reason employers give for trying to limit the participation clause is that bad employees will be able to achieve workplace tenure simply by filing EEOC charges.[328] Despite the appeal of this argument to employers, this is not true. As some courts and the EEOC have recognized, employers are still free to discipline employees for poor performance or for other legitimate reasons.[329] Employers are prohibited only from disciplining an employee *because* of his EEO activities.[330]

One court that addressed this issue was the United States District Court for the Middle District of Florida.[331] In *Booth*, the court noted that adopting a broad interpretation of the participation clause "does not render employers hostage to vindictive employees. Employers may still discipline, and/or terminate employees who filed EEOC charges, they simply cannot do so *because* they filed such a charge."[332]

The Fourth Circuit also recognized protecting this type of participation would not allow employees to gain tenure by filing EEOC charges.[333] In *Glover*, the court determined that even though

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327. *See supra* note 325.

328. *See, e.g.*, Hatmaker v. Mem'l Med. Ctr., 619 F.3d 741, 745 (7th Cir. 2010); Mattson v. Caterpillar, Inc., 359 F.3d 885, 891 (7th Cir. 2004).

329. *See, e.g.*, *Booth*, 829 F. Supp. 2d at 1201 n.20; *see also Enforcement Guidance on Retaliation and Related Issues*, *supra* note 14 ("The breadth of these anti-retaliation protections does not mean that employees can immunize themselves from consequences for poor performance or improper behavior by raising an internal EEO allegation or filing a discrimination claim with an enforcement agency.").

330. *Booth*, 829 F. Supp. 2d at 1201 n.20.

331. *Id.*

332. *Id.*; *see also* Booker v. Brown & Williamson Tobacco Co., 879 F.2d 1304, 1312 (6th Cir. 1989) ("However, the fact an employee files a complaint or a charge does not create any right on the part of the employee 'to miss work, fail to perform assigned work, or leave work without notice,' unless absence from work is necessitated by proceedings that occur subsequent to the filing of a complaint or charge." (citation omitted)). Although *Booker* involved a state-law retaliation claim, it is another example of a court noting that filing EEOC charges does not, as employers have contended, provide job security for bad employees. *See id.*

333. Glover v. S.C. L. Enf't Div., 170 F.3d 411, 414 (4th Cir. 1999).

Title VII protects unreasonable testimony, that determination "does not permit employees to immunize improper behavior simply by filing an EEOC complaint."[334] The court continued, noting that such a complaint "creates no right on the part of an employee to miss work, fail to perform assigned work, or leave work without notice[,]"[335] and "[e]mployers retain, as they always have, the right to discipline or terminate employees for any legitimate, nondiscriminatory reason."[336]

The EEOC has also recognized that filing an EEOC charge does not immunize a worker from an adverse employment action.[337] Specifically, the EEOC has stated the following:

> Neither participation nor opposition give permission to an employee to neglect job duties, violate employer rules, or do anything else that would otherwise result in consequences for poor performance evaluations or misconduct. Even though the anti-retaliation laws are very broad, employers remain free to discipline or terminate employees for poor performance or improper behavior, even if the employee made an EEO complaint.[338]

Some courts, on the other hand, have agreed with employers that, despite the EEOC's position on this issue, and despite several courts' statements that employers can still terminate employees who engage in participation activities, bad employees will be allowed to gain job security by filing EEOC charges.[339] One such court was the Seventh Circuit, which stated the following: "[s]imilarly, an employee could assure himself unlimited tenure by filing continuous complaints with the government agency if he fears that his employer will discover his duplicitous behavior at the workplace."[340] Although some employers

334. *Id.*

335. *Id.* (quoting Brown v. Ralston Purina Co., 557 F.2d 570, 572 (6th Cir. 1977)).

336. *Id.*

337. *Small Business Fact Sheet: Retaliation and Related Issues*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Aug. 26, 2016), https://www.eeoc.gov/laws/guidance/small-business-fact-sheet-retaliation-and-related-issues ("Engaging in EEO activity does not shield an employee from discipline or discharge. Employers are free to discipline or terminate workers if motivated by *non-retaliatory and non-discriminatory* reasons that would otherwise result in such consequences.").

338. *Questions and Answers: Enforcement Guidance on Retaliation and Related Issues*, *supra* note 29.

339. *See, e.g.*, Hatmaker v. Mem'l Med. Ctr., 619 F.3d 741, 745 (7th Cir. 2010); Mattson v. Caterpillar, Inc., 359 F.3d 885, 891 (7th Cir. 2004).

340. *Mattson*, 359 F.3d at 891; *see also Hatmaker*, 619 F.3d at 745–46 (citing *Mattson* for this proposition and rejecting unlimited protection under the participation clause).

have convinced courts of this possibility, other courts and the EEOC have argued this is not true, as employers are still free to terminate bad employees.[341] The only limitation is the employer cannot do so *because* an employee engaged in participation activities.[342]

So, while a broad interpretation of the participation clause might have to protect employees if they knowingly file false charges or provide false testimony in an EEO proceeding, employers are still free to take adverse actions against those employees if, notwithstanding their participation activities, their job performance warrants discipline. As a result, the employers' argument that employees can achieve workplace tenure by filing malicious EEOC charges is incorrect and is another reason courts might have to protect these activities. The final reason for this pro-employee outcome, Title VII's purpose and process (including the EEOC's role in that process), will now be addressed.

D. Providing Broad Protection Is Consistent with Title VII's Remedial Scheme, and Not Providing Protection Will Deter Employees with Legitimate Claims from Coming Forward[343]

In addition to the previously discussed reasons why courts might have to protect individuals who knowingly engage in false participation activity, there is yet another reason for doing so. Specifically, several courts have noted that Title VII's goal of eliminating workplace discrimination, and the EEOC's role in that process, are critical, and therefore, filing EEOC charges (or participating in another person's EEO proceeding) requires the utmost protection.[344] Cases that have addressed this issue will now be addressed.

One court to rely on this argument was the court in the seminal case of *Pettway*.[345] In *Pettway*, the court relied heavily on Title VII's

341. *See, e.g.*, *Glover*, 170 F.3d at 414.

342. *Id.* at 414–15.

343. In addition to the cases that will be discussed in this Section, the EEOC, in an earlier version of its Compliance Manual, also expressed concern that limiting the participation clause would frustrate Congress's intent by deterring employees from asserting claims. *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC COMPLIANCE MANUAL § 8-II(C)(2) (1998) ("[P]ermit[ting] an employer to retaliate against a charging party based on its unilateral determination that the charge was unreasonable or otherwise unjustified would chill the rights of all individuals protected by the anti-discrimination statutes.").

344. *See infra* remaining discussion in Section IV.D.

345. Pettway v. Am. Cast Iron Pipe Co., 411 F.2d 998, 1005 (5th Cir. 1969).

function and structure when deciding the plaintiff's false and defamatory statements were protected.[346] The court stated:

> This is particularly required under the machinery set up by Title VII. Unlike so many Governmental structures in administrative law, EEOC is an administrative agency without the power of enforcement. . . . The burden of enforcement rests on the individual through his suit in Federal District Court. But charges must first have been filed with EEOC. Consequently, the filing of charges and the giving of information by employees is essential to the Commission's administration of Title VII, the carrying out of the congressional policy embodied in the Act and the invocation of the sole sanction of Court compulsion through employee instituted suit. . . . This is often the only way that such issues can be raised—by an individual drafting his charge as best he can without expert legal advice. This activity, essential as it is, must be protected.[347]

The court then noted a protected activity would acquire a "precarious status" if employees filing EEOC charges could be fired for doing so.[348] The court emphasized the broad protection needed for "those who seek the benefit of statutes designed by Congress to equalize employer and employee in matters of employment."[349] In wrapping up this point, the court concluded the balance weighs in favor of protecting these charges:

> Congress . . . sought to evaluate and balance the competing interests. On the one hand is the protection of the employer from damage caused by maliciously libelous statements and on the other is protection of the employee from racial and other discrimination. In Title VII Congress sought to protect the employer's interest by directing that EEOC proceedings be confidential and by imposing severe sanctions against unauthorized disclosure. The balance is therefore struck in

346. *Id.*

347. *Id.* (footnote omitted). The court in *Pettway* also stated the following regarding the anti-retaliation provision's purpose: "[I]t is to protect the employee who utilizes the tools provided by Congress to protect his rights. The Act will be frustrated if the employer may unilaterally determine the truth or falsity of charges and take independent action." *Id.*

348. *Id.* The court did refer to "innocent" employees, perhaps suggesting employees who knowingly engage in false participation activity deserve less protection. *Id.*

349. *Id.* at 1006.

> favor of the employee in order to afford him the enunciated protection from invidious discrimination, by protecting his right to file charges.[350]

As a result, the court provided protection to the employee in *Pettway*.[351] And, as has been discussed, many courts have relied on *Pettway* when defending an employee's right to file EEOC charges (or engage in other participation activity) regardless of the substance of the employee's allegations.[352]

Other courts have also addressed how protecting even unreasonable participation is consistent with Title VII and the procedure Congress established for enforcing it. For example, the Fourth Circuit in *Glover* stated that adopting a broad interpretation of the participation clause would be consistent with the goal of "[m]aintaining unfettered access to statutory remedial mechanisms."[353] The court noted broad protections for participation are warranted because they "ensure not only that employers cannot intimidate their employees into foregoing the Title VII grievance process, but also that [EEOC] investigators will have access to the unchilled testimony of witness."[354] The court also noted participation was "essential to the machinery set up by Title VII,"[355] and that a witness would "surely be less than forth-coming"[356] "[i]f a witness in a Title VII proceeding were secure from retaliation only when her testimony met some slippery reasonableness standard."[357] Finally, the court recognized that to further Congress's intent, "some irrelevant

350. *Id.* at 1007 (citation omitted).

351. *Id.*

352. *See, e.g.*, Equal Emp. Opportunity Comm'n v. Total Sys. Servs., Inc., 221 F.3d 1171, 1175 (11th Cir. 2000) (agreeing with *Pettway* regarding the broad scope of the participation clause and noting that providing broader protection to participation activity is consistent with the congressional purpose behind Title VII), *reh'g denied*, 240 F.3d 899 (11th Cir. 2001).

353. Glover v. S.C. L. Enf't Div., 170 F.3d 411, 414 (4th Cir. 1999) (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997)).

354. *Id.*

355. *Id.* (quoting Laughlin v. Metro. Wash. Airports Auth., 149 F.3d 253, 259 n.4 (4th Cir. 1998)).

356. *Id.*

357. *Id.* This case involved a plaintiff who alleged retaliation based on testimony she gave in another employee's EEO proceeding; nonetheless, this activity and filing EEOC charges both fall under the participation clause. *See id.* at 412–13; 42 U.S.C. § 2000e-3(a) (2018).

and even provocative testimony must be immunized so that Title VII proceedings will not be chilled."[358]

A United States District Court, relying on dicta from the D.C. Circuit, also noted that protecting the substance of EEOC charges was important to further the purpose for which Congress established the EEOC.[359] The court in *Egei* noted the following:

> The obvious concern of Congress, in both the opposition and participation clauses, was to protect the employee who dares to speak out against his employer's hiring practices. The enforcement scheme Congress chose for Title VII relies heavily on the initiative of aggrieved employees, whose efforts in the public interest would be severely chilled if they bore the risk of discharge whenever they were unable to establish conclusively the merits of their claims.[360]

Later, the court expressed concern over how a strict interpretation of the participation clause would chill employee complaints and frustrate Title VII's remedial scheme.[361] First noting that broad protection is "consistent with the remedial purpose"[362] behind Title VII, the court then stated, "[a]ctivities under the participation clause are essential to the machinery set up by Title VII."[363] The court wrapped up its discussion regarding this issue by noting that participation activities "would be chilled, and Title VII's scheme frustrated, if employees' bore the risk of discharge whenever they were unable to establish conclusively the merits of their claims.'"[364]

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358. *Glover*, 170 F.3d at 414. As noted earlier, the court rejected a reasonableness standard also because it would lead to a "morass of collateral litigation" and a waste of judicial resources. *Id.* at 415.

359. Egei v. Johnson, 192 F. Supp. 3d 81, 89 (D.D.C. 2016). The District of Columbia Circuit's opinion to which the district court referred was *Parker v. Baltimore & Ohio Railroad Co.*, 652 F.2d 1012 (D.C. Cir. 1981).

360. *Egei*, 192 F. Supp. 3d at 89.

361. *Id.* at 89–90.

362. *Id.* at 89.

363. *Id.* (quoting Laughlin v. Metro. Wash. Airports Auth., 149 F.3d 253, 259 n.4 (4th Cir. 1998)); *see also* Vaughn v. Epworth Villa, 537 F.3d 1147, 1151 (10th Cir. 2008) ("Activities under the participation clause are essential to the machinery set up by Title VII. As such, the scope of protection for activity falling under the participation clause is broader than for activity falling under the opposition clause." (quoting *Laughlin*, 149 F.3d at 259 n.4)).

364. *Egei*, 192 F. Supp. 3d at 89–90 (quoting *Parker*, 652 F.2d at 1019). The court distinguished between good-faith but mistaken claims and false claims, but it noted that absent an employee's admission that he filed a knowingly false claim, the risk of chilling employee testimony existed. *Id.* at 90. The court stated: "It would be cold comfort for claimants if they were nominally protected from adverse action on the basis of their testimony, but only to the extent that a judge, an ALJ, or

Thus, the court in *Egei* was concerned about the chilling effect not protecting all statements made to the EEOC would have, and therefore, the participation clause should provide very broad protection.[365] The court, like the courts described earlier, believed Title VII's purpose of eliminating workplace discrimination (and the structure it created to enforce Title VII) would be frustrated if the court adopted a more narrow interpretation of the participation clause.[366]

Not all courts agree that Title VII's purpose and/or structure supports protecting employees who knowingly engage in false participation activities, and courts could rely on those arguments should they feel uncomfortable protecting false and malicious participation activity. The Seventh Circuit in *Mattson*, in concluding false and malicious claims are not protected, noted the following regarding Title VII:

> Title VII was designed to protect the rights of employees who in good faith protest the discrimination they believe they have suffered and to ensure that such employees remain free from reprisals or retaliatory conduct. Title VII was not designed to "arm employees with a tactical coercive weapon" under which employees can make baseless claims simply to "advance their own retaliatory motives and strategies."[367]

As a result of this reasoning, the court adopted an "utterly baseless" standard for determining whether an employee engages in protected participation conduct, which is the same approach the court used when evaluating opposition conduct.[368] Thus, the court ignored

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even an employer concludes in 'good faith' that such testimony was false or malicious." *Id.* The court later stated it was not condoning lying or minimizing the effect such activity has on the administrative process, but it concluded the risk of chilling participation would be too great if it adopted a restrictive view of the participation clause. *Id.* Toward the end of the opinion, the court again addressed this when it stated that the case did not address an employee who admitted to making false or malicious statements, and that its holding was limited to situations where an employee asserts the truth of the issue and the employer disbelieves him. *Id.* at 90–91.

365. *Id.* at 90.

366. *Id.* at 89–90; *see also* Calhoun v. EPS Corp., No. 13-cv-2954, 2014 WL 12799080, at *4 (N.D. Ga. Sept. 15, 2014) ("If this were an opposition case, the result might be different. But because the anti-discrimination laws grant near-absolute protection to participation activity, the Court cannot abide this result. *Doing so would discourage employees from filing legitimate discrimination complaints and undermine the anti-discrimination regime*." (emphasis added)).

367. Mattson v. Caterpillar, Inc., 359 F.3d 885, 890 (7th Cir. 2004) (quoting Spadola v. N.Y.C. Transit Auth., 242 F. Supp. 2d 284, 292 (S.D.N.Y. 2003)); *see also* Hatmaker v. Mem'l Med. Ctr., 619 F.3d 741, 745 (7th Cir. 2010) (relying on *Mattson* to conclude that the participation clause does not provide absolute protection).

368. *Mattson*, 359 F.3d at 891.

the distinction most courts make, which is that the participation clause provides more protection than the opposition clause.[369] In fact, the court noted providing more protection under the participation clause would simply lead to employees filing more EEOC charges (rather than filing only internal complaints), which the court viewed as an abuse of Title VII and its procedures.[370] Thus, if a court does not want to protect employees who knowingly engage in false participation activities, it could utilize the *Mattson* argument that doing so would frustrate, rather than further, Congressional intent.

As this Section has demonstrated, some courts believe providing very broad protection for participation activities is consistent with Title VII and with the process Congress established for enforcing it, while other courts have decided such broad protection would frustrate Congress's goals. This dispute is similar to the other disputes regarding the reasons courts might/do not have to protect false charges or false testimony, in that some courts have decided one way while other courts have decided the other.[371] Unless Congress acts to clarify the participation clause's scope, or unless the Supreme Court decides to address this issue, there will continue to be confusion regarding the scope of the participation clause's protection.

V. CONCLUSION

For Title VII to effectively eradicate workplace discrimination, employees must feel free to raise Title VII concerns with their employers and with the EEOC. This is why Congress included an anti-

369. *See id.*; *see also Hatmaker*, 619 F.3d at 746 (relying on *Mattson* to note that providing such broad protection would "encourage the abuse of Title VII and the proceedings that it established").

370. *Mattson*, 359 F.3d at 891; s*ee also* Proulx v. Citibank, N.A., 659 F. Supp. 972, 977 (S.D.N.Y. 1987) (deciding false and malicious statements *are* protected, the court acknowledged the following: "To extend the statute's protection to malicious claims runs the obvious risk of licensing, if not encouraging, bad faith discrimination claims by trouble-making, obstructionist employees bent upon harassment. Could Congress, one wonders, really have had this in mind?").

371. One other reason some courts have used when granting broad protection is that the target of the false statements might be able to pursue other remedies. For example, *Pettway* addressed this possibility of alternative remedies for employers. Pettway v. Am. Cast Iron Pipe Co., 411 F.2d 998, 1007 n.22 (5th Cir. 1969). Specifically, the court stated that it "in no way impl[ied] that an employer is preempted . . . from vindicating his reputation through resort to a civil action for malicious defamation." *Id.* The court in *Booth* also acknowledged potential remedies for targets of defamatory charges. Booth v. Pasco Cnty., 829 F. Supp. 2d 1180, 1201 n.20 (M.D. Fla. 2011). The court stated: "[f]or example, the filing of a defamatory charge may enable an employer to sue that employee for defamation. In addition, a defendant may be awarded attorney's fees and other costs for successfully defending a frivolous action." *Id.*

retaliation provision that protects employees who oppose unlawful employment practices and who participate in the process Congress established for vindicating Title VII's substantive rights. While both activities are protected, it remains unclear how broad that protection is under the participation clause. Specifically, courts disagree whether knowingly engaging in false participation activities is protected conduct.

Although it might seem distasteful to protect employees who knowingly engage in false participation activities,[372] there are reasons why protecting these activities might be necessary. First, the participation clause's language contains no qualifiers, but rather it protects individuals who participate "in any manner" in an EEO proceeding. Second, the EEOC, which is responsible for administering Title VII, has determined participation activities must be protected, regardless of whether they are reasonable or true. Third, despite what some employers argue, providing protection will not allow bad employees to gain workplace tenure; if they are not good employees, employers can still terminate them. Finally, placing limits on participation activities is inconsistent with Congressional intent because a heightened standard for protection would dissuade employees from bringing legitimate Title VII claims and/or testifying in others' EEO proceedings. As a result of these reasons, when deciding whether to protect deceptive employees, several courts have tipped the scales in favor of doing so.

Although Congress has not amended Title VII in many years, if it wants to deny protection for employees who knowingly engage in false participation activity, it should amend Title VII's anti-retaliation provision and limit its protection to employees who either oppose or participate only if those actions are based on a reasonable, good-faith belief the employer has engaged in unlawful conduct. Of course, the Supreme Court could also decide whether its *Breeden* opinion, which utilized a reasonable, good-faith-belief test in an *opposition* case, should apply to *participation* cases as well. Until then, however, it seems the scope of Title VII's participation clause will continue to be another unresolved issue regarding this very important anti-discrimination legislation.

372. *See supra* note 9.