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# Relevance is Irrelevant: A Plain Meaning Approach to Title VII Retaliation Claims

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## RELEVANCE IS IRRELEVANT: A PLAIN MEANING APPROACH TO TITLE VII RETALIATION CLAIMS

*Eric Ledger\**

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### I. INTRODUCTION

Few courts have dealt directly with the issue of whether to protect an employee’s production of confidential documents in Title VII retaliation litigation.<sup>1</sup> Despite the lack of case law, the conflict is very

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1. *Niswander v. Cincinnati Ins. Co.*, 529 F.3d 714, 722 (6th Cir. 2008). At the Sixth Circuit, *Niswander* was argued before Judges Gilman, Rogers, and McKeague. *Id.* Title VII’s anti-

real.<sup>2</sup> On one hand, employers want to protect themselves from the improper or unnecessary dissemination of confidential documents in connection with a Title VII lawsuit. On the other hand, employees have a statutory right to participate in the charging process and to oppose unlawful employer conduct, which often involves confidential corporate documents.<sup>3</sup>

When an employer terminates an employee for disseminating confidential documents, Title VII's anti-retaliation provision provides the employee with protection for two types of activity: participation and opposition.<sup>4</sup> Generally, the provision grants more protection to a person who is participating in a lawsuit than to one who is merely opposing unlawful conduct.<sup>5</sup> But, courts have struggled to interpret the breadth of the participation clause.<sup>6</sup>

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retaliation provision forbids any employer from discriminating against any of its employees because the employee opposed any practice made unlawful under Title VII, or because the employee made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under Title VII. 42 U.S.C.A. § 2000e-3(a) (2008).

2. See *Niswander*, 529 F.3d 714. Besides *Niswander*, other examples include *O'Day v. McDonnell Douglas Helicopter Co.*, where an employee rummaged through files in his supervisor's office, copied several documents, and showed them to fellow employees. 79 F.3d 756 (9th Cir. 1996). In *Watkins v. Ford Motor Co.*, an employee copied information from a book that was left out in the open and disclosed that information to counsel. No. C-1-03-033, 2005 WL 3448036 (S.D. Ohio Dec.15, 2005). In *Kempcke v. Monsanto Co.*, an employee was fired for refusing to return confidential documents he provided to his attorney. 132 F.3d 442 (8th Cir. 1998). Finally, in *Shoaf v. Kimberly-Clark Corp.*, an employee provided a coworker who was participating in a Title VII action with safety violation reports, personnel information, and emails. 294 F. Supp. 2d 746, 752 (M.D.N.C. 2003).

3. *Niswander*, 529 F.3d at 726. In *Niswander*, the Sixth Circuit attempted to balance the employer's "legitimate and substantial interest in keeping its personnel records and agency documents confidential" while protecting the employee's need to produce documents in discovery. *Id.* (quoting *Jefferies v. Harris County Cmty. Action Ass'n*, 615 F.2d 1025, 1036 (5th Cir. 1980)).

4. 45A Am. Jur. 2d Job Discrimination § 215; see *infra* notes 72-88 and accompanying text describing the difference between participation and opposition.

5. *Niswander*, 529 F.3d at 726. Typically, opposition activity must be reasonable for the anti-retaliation provision to apply. *Id.* On the other hand, participation activity is generally not held to a standard of reasonableness. *Id.*

6. See Marilee L. Miller, Comment, *The Employer Strikes Back: The Case for a Broad Reading of Title VII's Bar on Retaliation*, 2006 UTAH L. REV. 505 (2006). Currently, there is a debate between three standards for determining whether employer conduct constitutes retaliation under the statute: (1) the Ultimate Employment Actions Standard; (2) the Materially Adverse Standard; and (3) the Deference Standard/EEOC Standard. *Id.* at 513-28. The Ultimate Employment Actions Standard is the strictest approach and limits retaliation protection only to actions affecting wages, hiring, firing, and demotion. *Id.* at 513-14. The Materially Adverse Standard expands protection to actions that materially change the terms, conditions, or privileges of employment. *Id.* at 515. The EEOC Standard is the most lenient. *Id.* at 520-22. It focuses on the effect of the alleged retaliation and expands protection to cover any employer action which deterred participation. *Id.*

In *Niswander v. Cincinnati Ins. Co.*, the Sixth Circuit recently ruled that confidential documents produced in response to a formal production request must be relevant to the production request in order for the production to constitute protected participation.<sup>7</sup> The Sixth Circuit analyzes irrelevant document production under the opposition clause using a six-part reasonableness test.<sup>8</sup>

This article is a case note on the Sixth Circuit's decision in *Niswander*. The position of this note is that for the purpose of establishing a retaliation claim under Title VII, 42 U.S.C.A. § 2000e-3(a), courts should consider the good-faith production of confidential documents in response to a formal request for discovery as participation activity, not opposition activity.<sup>9</sup> Whether the produced documents are relevant to a formal discovery request should not factor into the participation analysis.<sup>10</sup> The determining question should be whether the employee acted in good faith.<sup>11</sup>

This note will first describe the factual background of the *Niswander* decision and provide a background for Title VII retaliation litigation.<sup>12</sup> Second, it will discuss why Congress intended to allow irrelevant or provocative activity to be protected under the Title VII anti-retaliation statute.<sup>13</sup> Next, it will argue that a good-faith standard is better than a relevance standard.<sup>14</sup> Then, it will contrast the Sixth Circuit's decision in *Niswander* with that of other circuits and offer an alternative method for the Sixth Circuit's analysis.<sup>15</sup> Finally, it will examine the possible ramifications that *Niswander* may have on Title VII discovery.<sup>16</sup>

## II. STATEMENT OF THE CASE

### A. *Factual Background*

In December 2003, Kathy Niswander opted-in to a class action lawsuit claiming that Cincinnati Insurance Co. ("CIC") discriminated

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7. *Niswander*, 529 F.3d at 726-27.

8. *Id.*; see *infra* note 39 and accompanying text.

9. See *infra* notes 97-231 and accompanying text.

10. See *infra* notes 97-231 and accompanying text.

11. See *infra* notes 118-60 and accompanying text.

12. See *infra* notes 17-96 and accompanying text.

13. See *infra* notes 104-17 and accompanying text.

14. See *infra* notes 118-60 and accompanying text.

15. See *infra* notes 172-212 and accompanying text.

16. See *infra* notes 214-31 and accompanying text.

against women in violation of the Equal Pay Act (“EPA”), 29 U.S.C. § 206(d).<sup>17</sup> As part of discovery in the class action, both parties agreed to a Stipulated Protective Order, which allowed them to exchange confidential information.<sup>18</sup> After joining the class action, Niswander believed that her supervisor retaliated against her,<sup>19</sup> prompting her to file a retaliation claim with the Equal Employment Opportunity Commission (“EEOC”) in October 2005.<sup>20</sup>

As part of the ongoing equal pay litigation, CIC formally requested that Niswander produce documents related to her equal pay claim.<sup>21</sup> The requests for production were arguably vague and broadly worded.<sup>22</sup> One request stated: “Please produce any and all documents which reflect, refer or relate to Plaintiff’s claims against Cincinnati Insurance Company, including but not limited to, memoranda, correspondence, notes, e-mail and faxes to or from any supervisor, manager or employee of Cincinnati Insurance Company.”<sup>23</sup> Another request stated: “Please produce all documents which reflect, relate or concern the allegation of Plaintiff that Defendant has discriminated against her based on gender.”<sup>24</sup>

Niswander believed that the scope of the request included documents relating to her retaliation claim as well as her equal pay claim.<sup>25</sup> As a result, she subsequently produced confidential documents

17. Final Brief for the Appellant at 7, *Niswander v. Cincinnati Ins. Co.*, 529 F.3d 714 (6th Cir. 2008) (No. 07-3738), 2007 WL 5066236.

18. *Id.* at 8. The protective order provided that “[e]ither party, may at the time of production, designate such information as ‘confidential’ and the information so designated shall thereafter be subject to the provisions of this order.” *Id.*

19. *Niswander*, 529 F.3d at 717. The summary of the alleged retaliation is as follows: prior to Niswander joining in the equal pay lawsuit, her supervisor would call once per week and discuss her work. *Id.* After Niswander opted-in to the lawsuit, the supervisor stopped calling her. *Id.* He would only e-mail Niswander. *Id.* In September 2004, Niswander filed a complaint of retaliation with CIC’s Human Resources Department. *Id.* Niswander requested a new supervisor in August of 2005, but her request was denied. *Id.* Niswander was put on CIC’s Progressive Problem Resolution Program in September of 2005. *Id.* This was the first time Niswander had been placed in this program since she began working for CIC in March 1996. *Id.*

20. *Id.*

21. Final Brief for Appellant, *supra* note 17, at 15.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Niswander*, 529 F.3d at 718. [Niswander] admitted in her deposition that she had “no documents to support an equal pay [claim].” Instead, she sent documents that she believed were relevant to CIC’s alleged acts of retaliation against her. Some of the documents that Niswander sent were copies of e-mail correspondence with her supervisors related to her job performance. Other documents, however, were claim-file documents that allegedly would jog her memory regarding instances of retaliation, but that did not, in and of themselves, contain evidence of retaliation. In

to her lawyers that were wholly unrelated to the equal pay claim.<sup>26</sup> Niswander's lawyers turned the documents over to CIC's lawyers, who then turned the documents over to CIC.<sup>27</sup> CIC subsequently fired Niswander for violating the company's privacy policy.<sup>28</sup> Niswander filed suit in the District Court for the Northern District of Ohio, claiming that CIC unlawfully retaliated against Niswander by firing her in response to the production of documents.<sup>29</sup>

### B. Procedural History

At the district court level, both CIC and Niswander filed for summary judgment.<sup>30</sup> CIC claimed that it had a legitimate non-discriminatory reason for firing Niswander because she had violated

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sending the documents to her lawyers, some of which included information about CIC's policyholders, Niswander "thought everything was confidential" and that "anything [she] produced was all between the two attorneys, being Cincinnati Insurance[s attorney] and mine."

*Id.*

26. *Id.* Niswander never actually read the request for production, but instead was acting on instructions from her lawyers. *Id.* at 721. Niswander produced the documents at issue specifically in response to a letter from her lawyer, which stated:

Finally, if you have *any* documents related to your employment at CIC which you have not already sent in, please send them immediately. I will also be sending you a letter about some specific "holes" in our discovery responses which we need to address, but I also need you to look around your house and office for any documents you think might be even remotely helpful to our case and send them in right away. If we do not produce the documents to CIC and cooperate in discovery, we will not be able to use the documents at all.

Reply Brief for the Appellant at 5-6, *Niswander*, 529 F.3d 714 (No. 07-3738).

27. *Id.*

28. *Niswander*, 529 F.3d at 718. Niswander's termination letter stated that CIC had "learned that [Niswander] took confidential and proprietary documents, including documents from claim files, containing private and confidential information about insureds and claimants without permission for uses unrelated and unnecessary to the performance of your employment by CIC, in knowing violation of various company policies." *Id.* Niswander based her argument, that CIC's proffered non-discriminatory reason for firing her was pre-textual, partly on the fact that CIC did not treat the documents as confidential. Final Brief for Appellant, *supra* note 17, at \*28. Despite the fact that the stipulated protective order allowed for either party to mark documents as confidential, CIC never designated the documents as such. *Id.* This was evidence that the disclosure of the documents was not sufficient motivation for CIC to fire Niswander. *Id.*

29. See generally *Niswander v. Cincinnati Ins. Co.*, No. 5:06CV1086, 2007 WL 1189350 (N.D. Ohio Apr. 19, 2007).

30. *Id.* at \*1. CIC moved for summary judgment on the ground that Niswander could not establish a prima facie claim of retaliation. *Id.* at \*5. Niswander moved for summary judgment against CIC's claim of conversion of its documents. *Id.* at \*13. While both motions were granted, Niswander's grant of summary judgment was not appealed. Therefore, conversion of the documents is not an issue in the Sixth Circuit's analysis. *Niswander*, 529 F.3d at 717.

multiple company policies.<sup>31</sup> Niswander argued that CIC implicitly authorized her disclosure of documents by way of CIC's formal request for production of documents.<sup>32</sup> Niswander further argued that because she produced the documents within a formal discovery request, her activity was protected as participation under Title VII's anti-retaliation provision.<sup>33</sup> The district court granted summary judgment to CIC.<sup>34</sup>

The key to the district court's analysis was determining that Niswander's production of documents was not a protected activity.<sup>35</sup> Niswander had argued that the production of documents was protected under Title VII's participation clause.<sup>36</sup> However, after analyzing *Watkins v. Ford Motor Company*<sup>37</sup> and *O'Day v. McDonnell Douglas Helicopter Co.*,<sup>38</sup> the district court formed its opinion instead under the opposition clause balancing test formulated in *O'Day*.<sup>39</sup> The court likened Niswander's conduct to that of an employee stealing documents<sup>40</sup> and found that Niswander's production of documents was

31. *Niswander*, 2007 WL 1189350, at \*2. CIC specifically alleged that Niswander's actions violated CIC's Privacy Policy, Code of Conduct, and Conflict of Interest Policies. *Id.*

32. Final Brief for Appellant, *supra* note 17, at \*26. CIC's privacy policy had an exception for disclosures authorized by management. *Id.*

33. *Id.* at \*14-15. The participation clause inarguably provides for broader protection than the opposition clause. *Niswander*, 529 F.3d at 720-21.

34. *Niswander*, 2007 WL 1189350, at \*1.

35. *Id.* at \*7.

36. Final Brief for Appellant, *supra* note 17, at \*5-6.

37. No. C-1-03-033, 2005 WL 3448036, (S.D. Ohio Dec. 15, 2005).

38. 79 F.3d 756 (9th Cir. 1996).

39. *Niswander*, 2007 WL 1189350, at \*8-10. In the opposition clause analysis of its opinion, the Sixth Circuit refined the district court's test and established six factors to weigh in determining whether the dissemination of documents, in any context, may constitute reasonable opposition conduct:

- (1) how the documents were obtained, (2) to whom the documents were produced, (3) the content of the documents, both in terms of the need to keep the information confidential and its relevance to the employee's claim of unlawful conduct, (4) why the documents were produced, including whether the production was in direct response to a discovery request, (5) the scope of the employer's privacy policy, and (6) the ability of the employee to preserve the evidence in a manner that does not violate the employer's privacy policy.

*Niswander*, 529 F.3d at 726. See Nicholas Strohmayer, Note, *Drawing the Line: Niswander's Balance Between Employer Confidentiality Interests and Employee Title VII Anti-Retaliation Rights*, 95 IOWA L. REV. 1037 (2010) (critiquing the Sixth Circuit's six-factor opposition clause test).

40. *Niswander*, 2007 WL 1189350, at \*7-9. In *Watkins*, the employee copied confidential documents he found lying around the office and provided them to his attorney prior to initiating a lawsuit. *Id.* In *O'Day*, the employee obtained documents by rummaging through a drawer in his supervisor's office marked private. *Id.* Unlike *Watkins* and *O'Day*, Niswander worked at home and had possession of all the documents she ultimately turned over. *Id.* The District Court acknowledged this fact but determined that, "like the plaintiff in *Watkins*, [Niswander] began

unreasonable opposition.<sup>41</sup> The district court never analyzed whether Niswander's conduct was participation under Title VII.<sup>42</sup>

### C. *Competing Arguments*

On appeal to the Sixth Circuit, CIC successfully argued that confidential documents produced in discovery must be relevant to the production request in order to be considered participation under Title VII's anti-retaliation statute.<sup>43</sup> CIC argued that because Niswander produced confidential documents, which were not related to the equal Pay lawsuit, the documents were not actually in response to the discovery request.<sup>44</sup> Thus, Niswander was not participating in the Equal pay claim when she produced the documents.<sup>45</sup> CIC argued, in the alternative, that even if the court analyzed Niswander's conduct as participation, CIC had a legitimate non-discriminatory reason to fire her because she violated the company's confidentiality policy.<sup>46</sup>

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looking through those files for specific information relevant and helpful to her future claim of retaliation, not a business purpose, and provided these confidential documents to her attorney without Defendant's permission and clearly in violation of Defendant's confidentiality policies of which she was aware." *Id.* at \*9.

41. *Niswander*, 2007 WL 1189350, at \*10. ("In applying the balancing test of *O'Day* to the instant case, the Court finds that Defendant's interest in ensuring compliance with its policies of privacy and the law, and maintaining the confidentiality of its clients' personal information outweighs Plaintiff's interest in preserving what she considered to be evidence of unlawful retaliation on the part of Defendant. This is so especially in light of the fact that Plaintiff could have preserved this evidence without violating the law and her employer's policy and trust as she could have taken notes of the incidents that she felt spurned retaliation instead of taking pictures and claims file information that jogged her memory of these incidents and giving them to her attorney. Moreover, this "evidence" that Plaintiff handed over to her attorney does not prove retaliation in and of itself as Plaintiff herself admitted that the documents that she gave her attorney relating to claims file information only served to trigger her memory about incidents which she believed constituted retaliation.").

42. *Niswander*, 529 F.3d at 721. The Sixth Circuit even acknowledges that the lower court inexplicably failed to analyze Niswander's participation argument. *Id.*

43. Brief of Defendant-Appellee at \*24, *Niswander*, 529 F.3d 714 (No. 07-3738) 2007 WL 5066233. The Defendant characterizes Niswander's activity as collecting, removing, and disseminating confidential documents to a third-party for a non-business purpose. *Id.* at \*22. From the Defendant's view, Niswander was not responding to a request for production when she handed over the documents. *See generally, id.* She was merely preparing for a future retaliation claim that, if true, was properly analyzed under an opposition clause analysis. *Id.* at \*23. One flaw in this logic however, is that Niswander already had a retaliation claim pending with the EEOC. Final Brief for Appellant, *supra* note 17, at \*7.

44. Brief of Defendant-Appellee, *supra* note 43, at \*23-24.

45. *Id.*

46. *Id.* at \*30-31. The Defendant compared Niswander's disclosure of confidential documents with that of the Plaintiff in *Vaughn v. Epworth Villa*, No. CIV-04-1433-F, 2006 WL 2987728 (W.D. Okla. Oct. 17, 2006). However, in *Vaughn* the plaintiff's disclosure was not part of a formal discovery request. *Id.* at \*2. Like *O'Day* and *Watkins*, *Vaughn* involved disclosure prior



Niswander countered that her actions constituted participation, not opposition, and thus the district court erred in analyzing her claim under an opposition clause standard.<sup>47</sup> Niswander reasoned that she was participating in the discovery process of an equal pay lawsuit by producing documents in response to a formal request for production.<sup>48</sup> She just did not understand the scope of the discovery request given to her.<sup>49</sup>

Niswander's lawyer sent her two letters, one of which stated: "If you have any documents related to your employment at CIC which you have not already sent in, please send them to me immediately."<sup>50</sup> The letter continued: "I also need you to look around your house and office for any documents you think might be even remotely helpful to our case and send them in right away. If we do not produce the documents to CIC and cooperate in discovery, we will not be able to use the documents at all."<sup>51</sup>

Niswander acknowledged that the documents produced were irrelevant to her equal pay claim. However, she believed the produced documents were in response to an overly broad discovery request.<sup>52</sup> Niswander further argued that CIC's proffered reason for firing her was pretext because CIC took no steps to mitigate the damage that Niswander allegedly caused.<sup>53</sup> CIC's attorney in charge of protecting privacy conducted no investigation of the alleged breach, did not view the documents that were disclosed, and never informed customers of the supposed breach of confidentiality.<sup>54</sup>

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to filing a lawsuit. *Id.* The Defendant also suggested that the participation clause would not protect Niswander because a violation of company policy is per se bad faith conduct. Brief of Defendant-Appellee, *supra* note 43, at \*31. This logic is flawed because it implies that Niswander deliberately violated the company policy, but Niswander believed she was complying with CIC's request for production, thus she did not believe she was violating company policy. *Niswander*, 529 F.3d at 718.

47. Final Brief for Appellant, *supra* note 17, at \*23-24.

48. *Id.* at \*17.

49. *See Niswander*, 529 F.3d at 718.

50. *Id.* (emphasis in original). Niswander's attorney's alleged failure to properly instruct Niswander on the scope of discovery is the subject matter of a current malpractice suit. *See Niswander v. Price, Waicukauski & Riley, LLC*, No. 1-08-CV-1325 (S.D. Ind. filed Oct. 2, 2008).

51. *Niswander*, 529 F.3d at 718.

52. *See infra* notes 66-67 and accompanying text.

53. Final Brief for Appellant, *supra* note 17, at \*29-30. Niswander argued that CIC should have taken steps to protect the documents from further dissemination such as mark them as confidential and place them under the stipulated protective order. *Id.*

54. *Id.* at \*30.

#### D. *Sixth Circuit's Holding*

The Sixth Circuit analyzed Niswander's actions under both the opposition clause and the participation clause of Title VII.<sup>55</sup> The court affirmed the lower court's opposition clause analysis.<sup>56</sup> But, in analyzing the participation clause, the court held that the production of confidential documents within a formal request for discovery can be considered participation for the purposes of establishing a retaliation claim under Title VII only where the documents are relevant to the underlying action.<sup>57</sup> The court gave two primary reasons for refusing protection. First, the court was concerned about the employer's need to protect confidential information.<sup>58</sup> Second, the court did not want to immunize any future bad faith conduct of employees.<sup>59</sup> If Niswander's conduct was protected participation, then, employees would have "near-immunity" for their actions in connection with anti-discrimination lawsuits.<sup>60</sup>

Niswander neither appealed for rehearing en banc nor filed a Petition for Writ of Certiorari to the United States Supreme Court.

### III. STATUTORY BACKGROUND

The Civil Rights Act of 1964 ("the Act") is a legislative milestone of the Civil Rights Movement.<sup>61</sup> Its enactment prohibited discrimination based on race, color, sex, religion, or national origin<sup>62</sup> in many everyday

55. See *Niswander*, 529 F.3d 714.

56. See *supra* note 38 and accompanying text. Two concurring opinions discuss the weight of the factors in the *O'Day* opposition clause analysis. However, because the focus of this note is the Sixth Circuit's interpretation of the participation clause, a discussion of the opposition clause analysis or the concurring opinions is omitted. See *Niswander*, 529 F.3d at 729 (McKeague, J., Gilman, J., concurring).

57. *Niswander*, 529 F.3d at 722. The Sixth Circuit held that "[a]n individual's delivery of relevant documents during the discovery process or the giving of testimony at a deposition clearly falls within the ambit of participating . . . in a Title VII proceeding." *Id.* (citing *Hashimoto v. Dalton*, 118 F.3d 671, 680 (9th Cir. 1997)). The Court went on to analyze whether Niswander's conduct would constitute opposition activity. However, because this note argues that Niswander's production should have been deemed participation, the author will ignore the Court's analysis of the opposition clause. See *Niswander*, 529 F.3d 714.

58. *Id.* at 722.

59. *Id.*

60. *Id.*

61. Rebecca E. Zietlow, *To Secure These Rights: Congress, Courts, and the 1964 Civil Rights Act*, 57 RUTGERS L. REV. 945, 984 (2005). Indeed, Congress altered the structure of federalism by deciding that it could regulate private discrimination. *Id.*

62. 42 U.S.C. § 2000e-2. It is important to note that some forms of sex discrimination are not outlawed by Title VII. *Id.* Specifically, where sex is a bona fide occupational qualification for a job, discrimination in hiring and employing based on sex is still allowed. *Id.* However, courts

transactions.<sup>63</sup> Title VII of the Act was designed to eliminate discrimination in employment<sup>64</sup> and remains one of the most litigated provisions today.<sup>65</sup>

#### A. Retaliation Under Title VII

While Title VII grants considerable protection to an employee from discrimination, that protection is meaningless if the employer can retaliate against an employee for making a complaint.<sup>66</sup> Title VII's anti-

narrowly construe this exception and will not extend it to compensation or terms of employment. *See* EEOC v. Fremont Christian School, 781 F.2d 1362 (9th Cir. 1986) (finding a bona fide occupational qualification defense does not extend to discriminatory assignment of health insurance benefits). Oddly enough, the protection against sex discrimination was not originally part of Title VII, but added in an amendment from Representative Howard Smith, a Democrat from Virginia. Jo Freeman, *How 'Sex' Got Into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 LAW & INEQ. 163, 174-77 (1990-1991). Smith opposed granting federal civil rights protections, which led many to believe that the amendment was added as an attempt at killing the legislation. *Id.* When the amendment was introduced, many southern Democrats who spoke in favor of adding protection based on sex eventually voted against the Civil Rights Act. *Id.* Smith, however, disagreed with this suggestion and maintained his sincerity towards woman's rights. *Id.*

63. *See* JODY FEDER, CONG. RESEARCH SERV., RS22251, FEDERAL CIVIL RIGHTS STATUTES: A PRIMER (2005) at \*2. The Civil Rights Act of 1964 prohibited discrimination in regards to voter registration, public accommodations involved in interstate commerce (motels, restaurants, etc.), access to public facilities and public schools, agencies receiving federal funding, and employment. *Id.* It also expanded the power of the Civil Rights Commission, required reporting of voter registration data, and eased the requirements for removing civil rights cases to federal courts. *Id.*

64. *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006). "The antidiscrimination provision seeks a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status." *Id.* (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-01 (1973)).

65. Of the 93,277 charges filed with the EEOC in 2009, 68,710 were Title VII charges. EEOC Enforcement Statistics, <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> and <http://www.eeoc.gov/eeoc/statistics/enforcement/titlevii.cfm> (last visited March 6, 2010). Of the 281 merit suits filed by the EEOC in 2009, 188 were based on Title VII claims. EEOC Litigation Statistics, <http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm>, (last visited Mar. 6, 2010).

66. *Deravin v. Kerik*, 335 F.3d 195, 203-04 (2nd Cir. 2003). Courts have consistently recognized that the explicit language of § 704(a)'s participation clause is expansive and seemingly contains no limitations. *See, e.g., Clover v. Total Sys. Servs., Inc.*, 176 F.3d 1346, 1353 (11th Cir. 1999) ("The words 'participate in any manner' express Congress' intent to confer 'exceptionally broad protection' upon employees covered by Title VII."); *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 582 (6th Cir. 2000), *cert. denied*, 531 U.S. 1052 (2000); *Glover v. South Carolina Law Enforcement Div.*, 170 F.3d 411, 414 (4th Cir. 1999). The Supreme Court has noted that "[r]ead naturally, the word 'any' has an expansive meaning," and thus, as long as "Congress did not add any language limiting the breadth of that word," the term "any" must be given literal effect. *United States v. Gonzales*, 520 U.S. 1, 5 (1997). *Id.* *See also Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997). The overarching purpose of Title VII is to resolve discrimination issues at the local level by protecting employees who report discrimination to their employers. *See id.*

retaliation provision was drafted to address this issue.<sup>67</sup> The anti-retaliation provision is actually broader in scope than the anti-discrimination provision.<sup>68</sup> The anti-retaliation provision states:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.<sup>69</sup>

A prima facie case of retaliation requires the plaintiff to prove, among other things, that she engaged in a protected activity and suffered an adverse employment action as a result of engaging in the protected activity.<sup>70</sup> In analyzing whether an employee has engaged in a protected

67. See *supra* notes 62-63 and accompanying text. The “purpose of the anti-retaliation provision is to prevent Title VII claims from being deterred.” *Heuer v. Weil-McLain*, 203 F.3d 1021, 1023 (7th Cir. 2000).

68. The scope of the anti-retaliation provision extends protection beyond “workplace-related or employment-related retaliatory acts and harm.” *Colon-Perez v. Dep’t of Health of Puerto Rico*, 623 F. Supp. 2d 230, 241 (D. Puerto Rico 2009) (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006)).

The anti-discrimination provision seeks a workplace where individuals are not discriminated against because of their status, while the anti-retaliation provision seeks to prevent an employer from interfering with an employee's efforts to secure or advance enforcement of the Act's basic guarantees. To secure the first objective, Congress needed only to prohibit employment-related discrimination. But this would not achieve the second objective because it would not deter the many forms that effective retaliation can take, therefore failing to fully achieve the anti-retaliation provision's purpose of “[m]aintaining unfettered access to statutory remedial mechanisms.”

*Burlington*, 548 U.S. at 54 (quoting *Robinson*, 519 U.S. at 346).

69. 42 U.S.C.A. § 2000e-3(a).

70. George Chamberlin, *Cause of Action for Discharge from Employment in Retaliation for the Exercise of Rights Protected by Title VII*, 4 C.O.A. 2d 331 § 3 (2010) (1994). See also EEOC Compliance Manual, No. 915.003, Section 8-II(A), available at <http://www.eeoc.gov/policy/docs/retal.html> (last visited March 6, 2010). To establish a prima facie case of retaliation in the Sixth Circuit, an employee must prove that: (1) he or she engaged in protected activity, (2) the employer knew of the exercise of the protected right, (3) an adverse employment action was subsequently taken against the employee, and (4) there was a causal connection between the protected activity and the adverse employment action. *Niswander v. Cincinnati Ins. Co.*, 529 F.3d 714, 720 (6th Cir. 2008) (citing *Morris v. Oldham County Fiscal Ct.*, 201 F.3d 784, 792 (6th Cir. 2000)). This formulation is essentially the same as the EEOC description. EEOC Compliance Manual, *supra*. However, the formulation adds the requirement that the employer must know that the employee was exercising protected rights. *Id.* A requirement that an employer know of the employee's exercise of a protected right is part of the prima facie retaliation case in some circuits; in others, it is not. Chamberlin, *supra*. In circuits where employer knowledge is not a part of the prima facie case, this question is addressed under the causation element. *Id.* After the plaintiff has established a prima facie case of retaliation, the burden shifts to the employer to show a legitimate non-discriminatory reason for the adverse employment action.

activity, the anti-discrimination statute recognizes two categories of activity: participation and opposition.<sup>71</sup> This distinction is important due to the different levels of protection given to each activity.<sup>72</sup>

### 1. Participation

Courts broadly define participation to mean all activity surrounding the filing of a Title VII charge with the EEOC or the filing of a lawsuit under Title VII.<sup>73</sup> Once a person files a charge or initiates a lawsuit, the anti-retaliation statute protects their participation throughout the litigation.<sup>74</sup> The participant need not win on the merits of the underlying charge in order to have a retaliation claim against her employer.<sup>75</sup> For example, an employee who files a charge of harassment against her boss will still be deemed to have been participating in the charging process regardless of whether the charge of harassment is proven true.<sup>76</sup>

“Although the participation clause may be nearly absolute in theory, it may seldom be absolute in fact.”<sup>77</sup> Once a participant establishes a prima facie case of retaliation, the burden then shifts to the employer to articulate a legitimate non-discriminatory reason for taking

*Id.* § 15. After such a showing, the plaintiff must then show that the proffered reason either did not actually motivate the employer or was insufficient motivation to take the alleged retaliatory action. *Id.* If the employer did not know that the employee exercised a protected right, it would logically follow that the employer could not have retaliated against the employee. *Id.*

71. 42 U.S.C. § 2000e-3(a).

72. *Niswander*, 529 F.3d at 720. “The distinction between employee activities protected by the participation clause and those protected by the opposition clause is significant because federal courts have generally granted less protection for opposition than for participation in enforcement proceedings.” *Id.* (quoting *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1312 (6th Cir. 1989)).

73. *Id.* The protection provided under the participation clause is exceptionally broad and extends to persons who have participated in any manner in Title VII proceedings. *Id.* (citing *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 582 (6th Cir. 2000)). “[O]nce the activity in question is found to be within the scope of the participation clause, the employee is generally protected from retaliation.” *Id.* at 720-21 (quoting *Booker*, 879 F.2d at 1312 (6th Cir. 1989)).

74. 42 U.S.C. § 2000e-3(a).

75. *See Pasantino v. Johnson & Johnson Consumer Products Inc.*, 212 F.3d 493, 506 (9th Cir. 2000) (finding that the Participation Clause even protects charges made in bad faith). *See also Quinn v. Green Tree Credit Corp.*, 159 F.3d 759 (2d Cir. 1998). Even when it is determined that no sexual harassment has occurred, an employee is still protected from retaliation for alleging that it occurred. *Id.*

76. Chamberlin, *supra* note 70, § 5 (“Apart from evidence of actually filing a charge of discrimination, the plaintiff may be able to show sufficient participation in Title VII proceedings by evidence of attendance at an investigative hearing, providing testimony by deposition or affidavit, or by assisting a fellow employee in bringing a discrimination charge.”).

77. 5 Emp. Coord. Employment Practices § 10:18.

the adverse employment action.<sup>78</sup> If the employer meets this burden, the employee must then show that the proffered non-discriminatory reason was pre-textual.<sup>79</sup> The employee must show that the stated reason was not based in fact, did not actually motivate the employer to take the adverse employment action, or did not provide sufficient motivation for the employer.<sup>80</sup>

## 2. Opposition

The opposition clause covers a wide variety of behavior by employees not protected by the participation clause.<sup>81</sup> The goal of the opposition clause is to allow employees to express any concerns regarding discrimination, and allow employers to address those concerns without turning to litigation.<sup>82</sup> In contrast to participation, opposition activity must be reasonable in order to receive protection under the anti-retaliation statute.<sup>83</sup> Courts have employed a balancing test to determine whether the opposition conduct is reasonable.<sup>84</sup> The purpose of this test is to balance the employer's need to maintain an orderly workplace with the employee's rights under Title VII.<sup>85</sup> The employee must have a

78. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

79. *Id.*; see also *Lindsay v. Yates*, 578 F.3d 407 (6th Cir. 2009).

80. See *infra* notes 172-92 and accompanying text for an expanded discussion of pretext.

81. Chamberlin, *supra* note 70, § 6. Examples of opposition activity include: threatening to file a charge of discrimination, complaining about alleged discrimination on behalf of yourself or others, nonverbal protests against discrimination, or refusing to obey an order because one reasonably believes that it is discriminatory. EEOC Compliance Manual, *supra* note 70, Section 8-II(B)(2).

82. Chamberlin, *supra* note 70, § 6.

83. *Niswander v. Cincinnati Ins. Co.*, 529 F.3d 714, 721 (2008) (citing *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 580 (6th Cir. 2000)).

84. *Id.* at 725; see also EEOC Compliance Manual, *supra* note 70, Section 8-II(B)(3)(a) (“The manner in which an individual protests perceived employment discrimination must be reasonable in order for the anti-retaliation provisions to apply. In applying a “reasonableness” standard, courts and the Commission balance the right of individuals to oppose employment discrimination and the public's interest in enforcement of the EEO laws against an employer's need for a stable and productive work environment.”).

85. *Niswander*, 529 F.3d at 722. (“A balance must be achieved between the employer's recognized, legitimate need to maintain an orderly workplace and to protect confidential business and client information, and the equally compelling need of employees to be properly safeguarded against retaliatory actions. Allowing too much protection to employees for disclosing confidential information may perversely incentivize behavior that ought not be tolerated in the workplace—namely, the surreptitious theft of confidential documents as potential future ammunition should the employee eventually feel wronged by her employer. On the other hand, inadequate protection to employees might provide employers with a legally sanctioned reason to terminate an employee in retaliation for engaging in activity that Title VII and related statutes are designed to protect.”).

reasonable and good-faith belief that the opposed practice is unlawful.<sup>86</sup> The primary difference between participation and opposition is that participation activity typically involves a charge or a lawsuit being filed,<sup>87</sup> while opposition activity typically covers conduct prior to the filing of a charge or a lawsuit.<sup>88</sup> That seemingly trivial distinction matters greatly in the amount of protection each activity is afforded.<sup>89</sup>

### B. Administrative Law

Through Title VII, Congress created a regulatory body to oversee its implementation—the EEOC.<sup>90</sup> While the primary source of guidance in Title VII cases is the statutory text,<sup>91</sup> courts give deference to the EEOC compliance manual in cases where the statute is unclear.<sup>92</sup>

The EEOC manual states that participation “applies to individuals challenging employment discrimination under the statutes enforced by EEOC . . . and to individuals who testify or otherwise participate in such proceedings.”<sup>93</sup> The manual asks one question to determine whether a person is participating: “Did the [complaining party] or someone closely associated with [her] file a charge, or testify, assist, or participate in any

86. *Trent v. Valley Elec. Ass’n Inc.*, 41 F.3d 524, 526 (9th Cir. 1994) (finding that an employee need not prove that the opposed conduct is actually unlawful, but must have a reasonable good-faith belief that the conduct is unlawful).

87. EEOC Compliance Manual, *supra* note 70, Section 8-II(C)(2) (“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.”).

88. *Id.* at Section 8-II(B)(2).

89. *See supra* notes 72-73 and accompanying text.

90. 42 U.S.C. 2000e-4.

91. *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 110 (2002). “In the absence of an indication to the contrary, words in a statute are assumed to bear their ‘ordinary, contemporary, common meaning.’” *Id.* (quoting *Walters v. Metropolitan Ed. Enterprises, Inc.*, 519 U.S. 202, 207 (1997)).

92. *Federal Exp. Corp. v. Holowecki*, 552 U.S. 389, 397 (2008).

The Federal Government interacts with individual citizens through all but countless forms, schedules, manuals, and worksheets. Congress, in most cases, delegates the format and design of these instruments to the agencies that administer the relevant laws and processes. An assumption underlying the congressional decision to delegate rulemaking and enforcement authority to the agency, and the consequent judicial rule of deference to the agency’s determinations, is that the agency will take all efforts to ensure that affected parties will receive the full benefits and protections of the law.

*Id.* at 406-07.

93. EEOC Compliance Manual, *supra* note 70, Section 8-II(C)(1). The manual further defines the types of activities associated with participation: “Protection under the participation clause extends to those who file untimely charges. In the federal sector, once a federal employee initiates contact with an EEO counselor, (s)he is engaging in “participation.” *Id.*

manner in an investigation, proceeding, hearing, or lawsuit under the statutes enforced by the EEOC?”<sup>94</sup> If the answer to that question is yes, the employee is protected against retaliation by her employer.<sup>95</sup> Per the EEOC, “[t]he anti-discrimination statutes do not limit or condition in any way the protection against retaliation for participating in the charge process.”<sup>96</sup>

#### IV. ANALYSIS

The position that Niswander argued in her brief to the Sixth Circuit is the position taken in this note: in determining whether a Title VII litigant is participating in a protected activity, the relevance of any documents she produces is irrelevant when she is responding to a formal request for production.<sup>97</sup> What is important is whether she objectively responded to the formal production request in good faith.<sup>98</sup> The relevance of the documents provided should not matter to what is objectively an act of participation.<sup>99</sup> The question of whether Niswander acted in good faith should have been presented to a jury.<sup>100</sup>

This argument does not suggest that an employee should be immunized from adverse employment actions when disclosing confidential documents in discovery.<sup>101</sup> Instead, to balance the concern of protecting the employer’s maintenance of confidentiality with the employee’s right to participate in Title VII proceedings, the court should focus on the pretext analysis of the employer’s stated reason for terminating the employee.<sup>102</sup> Where an employer is legitimately and sufficiently motivated to take an adverse employment action against an employee for her disclosure of confidential documents, that employee can be legally terminated from her employment.<sup>103</sup>

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94. *Id.* at Section 8-I(B).

95. *Id.*

96. *Id.* at Section 8-II(C)(2).

97. Final Brief for Appellant, *supra* note 17, at 17.

98. *See infra* notes 118-60 and accompanying text. A good faith standard was not argued by Niswander, but instead is an argument proposed by this note. *See* Final Brief for Appellant, *supra* note 17.

99. *See infra* notes 118-60 and accompanying text.

100. *See infra* notes 118-60 and accompanying text.

101. *See infra* notes 172-92 and accompanying text.

102. *See infra* notes 172-92 and accompanying text.

103. *See infra* notes 172-92 and accompanying text.



### A. Congressional Intent

The Sixth Circuit held that production of confidential documents in response to a formal discovery request does not constitute participation in a protected activity unless the produced documents are relevant.<sup>104</sup> The holding unfairly requires a lay participant in a Title VII action to make a legal determination as to the relevance of any documents she turns over.<sup>105</sup> The decision makes no exception for the fact that Niswander reasonably believed she was responding in good faith to CIC's broad request for discovery.<sup>106</sup> The fact that Niswander did not believe the documents were directly related to the equal pay claim was fatal to her claim that she was participating in a protected activity.<sup>107</sup>

By interjecting a relevance test into the production of documents in discovery, the Sixth Circuit has provided employers with the discretion to fire an employee based on the quality of the employee's participation.<sup>108</sup> Congress did not intend for such a restriction when drafting the anti-retaliation provision.<sup>109</sup>

In drafting Title VII's anti-retaliation provision, Congress intended to provide exceptionally broad protection.<sup>110</sup> The statutory language

104. *Niswander v. Cincinnati Ins. Co.*, 529 F.3d 714, 722 (6th Cir. 2008). "An individual's delivery of relevant documents during the discovery process or the giving of testimony at a deposition clearly falls within the ambit of participating 'in any manner' in a Title VII proceeding." *Id.* (citing *Hashimoto v. Dalton*, 118 F.3d 671, 680 (9th Cir. 1997)).

105. *Id.*; see *infra* notes 121-28 and accompanying text. Although one may argue that Niswander's attorneys could have determined whether the documents were relevant, CIC's alleged reason for firing Niswander was that she produced the confidential documents to a third-party (Niswander's attorneys) for a non-business purpose. *Niswander*, 529 F.3d at 728. In CIC's view, it was up to Niswander to determine what documents were legally relevant to the request for production without assistance of counsel. *Id.*

106. Final Brief for Appellant, *supra* note 17, at 14.

107. *Niswander*, 529 F.3d at 721. Niswander admitted that she had no documents to support an equal pay claim. *Id.* "This admission is fatal to her argument that her conduct should be deemed participation(.)" *Id.*

108. *Id.* at 722. Justice McKeague suggests in his concurring opinion that an employee must always preserve evidence in a way that will not violate the employer's confidentiality policy. *Niswander*, 529 F.3d at 729 (McKeague, J., concurring).

109. See *infra* notes 110-17 and accompanying text.

110. *Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998, 1006 (5th Cir. 1969). ("The protective provisions of Title VII are substantially broader than even those included in the Fair Labor Standards Act and the National Labor Relations Act in that, in addition to protecting charges and testimony, Title VII also specifically protects assistance and participation. This indicates the exceptionally broad protection intended for protestors of discriminatory employment practices. The protection of assistance and participation in any manner would be illusory if employer could retaliate against employee for having assisted or participated in a Commission proceeding."); see also EEOC Compliance Manual, *supra* note 70, Section 8-II(D)(3) ("The anti-retaliation provisions are exceptionally broad.").

protects anyone who has testified or participated “in any manner.”<sup>111</sup> This wording has been broadly interpreted:<sup>112</sup>

The anti-retaliation provision is straightforward and expansively written. Congress chose the language “testified” and “participated in any manner” to express its intent about the activity to be protected against retaliation. The word “testified” is not preceded or followed by any restrictive language that limits its reach. As to “participated in any manner”, the adjective “any” is not ambiguous; it has a well-established meaning. Earlier this year, the Supreme Court explained, “Read naturally, the word ‘any’ has an expansive meaning, that is, ‘one or some indiscriminately of whatever kind.’ ” . . . “Congress did not add any language limiting the breadth of that word,” so “any” means all.<sup>113</sup>

Had Congress desired, it may have protected participation “in any relevant manner”; the fact that Congress chose not to evidences its desire for broad sweeping protection against employer retaliation.<sup>114</sup> Where statutory language is clear and the statutory scheme is coherent and consistent, the court typically does not need to conduct an in-depth analysis.<sup>115</sup>

Title VII’s anti-retaliation statute specifically protects participation “in any manner” and in no way limits participation on the basis of relevance.<sup>116</sup> The better standard to judge participation is not relevance, but good faith.<sup>117</sup>

### B. *Good Faith Analysis*

When it comes to the production of confidential documents in Title VII discovery, plaintiffs should receive protection from employer

111. 42 U.S.C. § 2000e-3(a).

112. *See Deravin v. Kerik*, 335 F.3d 195, 203 (2d Cir. 2003) (finding that the explicit language of the participation clause is expansive and seemingly contains no limitations); *see also Clover v. Total Sys. Servs., Inc.*, 176 F.3d 1346, 1353 (11th Cir. 1999) (holding that the words “participate in any manner” indicate broad Congressional intent).

113. *Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1186 (10th Cir. 1997) (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (internal citations omitted)).

114. *Glover v. South Carolina Law Enforcement Div.*, 170 F.3d 411, 414 (4th Cir. 1999). “Congress could not have carved out in clearer terms this safe harbor from employer retaliation.” *Id.* The Fourth Circuit found the statutory language so clear that it forecloses the improvisation of any further requirement. *Id.*

115. *U.S. v. Wildes*, 120 F.3d 468, 470 (4th Cir. 1997) (citing *U.S. v. Gonzales*, 520 U.S. 1 (1997)); *see also Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 254 (1992).

116. 42 U.S.C. § 2000e-3(a).

117. *See infra* notes 118-60 and accompanying text.

retaliation as long as they are responding to the production request in good faith.<sup>118</sup> First, a Title VII participant may not know the legal relevance of the documents she is producing; however, she knows whether she is acting in good faith.<sup>119</sup> Second, a good faith standard will alleviate one primary concern of the Sixth Circuit: the immunization of bad faith conduct. On the other hand, a relevance standard may actually uphold the future production of documents in bad faith.<sup>120</sup>

### 1. Good Faith v. Relevance

The purpose of Title VII's anti-retaliation provision is to give a lay person unfettered access to Title VII's remedial mechanisms.<sup>121</sup> A lay person cannot be expected to know whether a document is legally relevant,<sup>122</sup> thus, it is unfair to impose such a standard on a Title VII plaintiff.<sup>123</sup> For example, Niswander allegedly violated CIC's confidentiality policy because she turned irrelevant documents over to her attorneys.<sup>124</sup> Thus, CIC implicitly required that Niswander know what documents were legally relevant to the production request before she disclosed them to her attorneys.<sup>125</sup> The relevance of documents is a

118. *Id.*

119. Federal Rule of Civil Procedure 26(b)(1) provides that a party may obtain discovery regarding "any nonprivileged matter that is relevant to any party's claim or defense." Relevant information does not need to be admissible, as long as the discovery request is "reasonably calculated to lead to the discovery of admissible evidence." FED. R. CIV. P. 26(b)(1). Meanwhile, good faith is defined as "A state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage." BLACK'S LAW DICTIONARY (8th ed. 2004).

120. *See infra* notes 129-33 and accompanying text.

121. *EEOC v. Commercial Office Products Co.*, 486 U.S. 107, 124 (1988). The ADEA, like Title VII, sets up a "remedial scheme in which laypersons, rather than lawyers, are expected to initiate the process." *Id.* "The system must be accessible to individuals who have no detailed knowledge of the relevant statutory mechanisms and agency processes." *Federal Exp. Corp. v. Holowecki*, 552 U.S. 389, 403 (2008).

122. *Id.* It is important to note that Niswander was a claims adjuster with CIC. Thus, the argument could have been made in her case that she might have known the legal relevance of the documents. Brief of Defendant-Appellee, *supra* note 43, at \*5-6. Despite this fact, the goal of case law is to establish the law for the cases to come and not necessarily the cases at hand. *Glover*, 170 F.3d at 415. The vast majority of Title VII litigants are lay people, not lawyers. *Commercial Office Products Co.*, 486 U.S. at 124.

123. *Id.*; *see supra* note 121 and accompanying text.

124. *Niswander*, 529 F.3d at 728.

125. *Id.* One reason Niswander claimed that CIC's proffered non-discriminatory reason for terminating her was pretext is that CIC made no attempt to mitigate the alleged damage done by Niswander's disclosure. *Id.* One of CIC's arguments to counter that was that "the horse was out of

point that trained attorneys argue to a nuance in thousands of courtrooms every year.<sup>126</sup> The effect of requiring a lay Title VII participant to understand what is legally relevant to her case without the help of her attorney does not fit within the overarching goal of the anti-retaliation statute—to allow unfettered access to Title VII’s remedial mechanisms.<sup>127</sup> The better standard would be to allow the participant to produce the documents to her attorney so long as she is acting in good faith.<sup>128</sup>

The Sixth Circuit’s primary reason for adopting the relevance requirement was that to do otherwise would insulate employees who engage in bad faith conduct.<sup>129</sup> While this is certainly a valid concern, the Sixth Circuit’s remedy of adopting a relevance test on the production of confidential documents does not fully address that concern.<sup>130</sup> If the documents that Niswander produced had been relevant to the discovery request under the *Niswander* decision, Niswander would have been considered “participating.” Thus, the Sixth Circuit would have granted her “participant” status<sup>131</sup> despite the fact that the Sixth Circuit had described her conduct as “the surreptitious theft of confidential documents as potential future ammunition(.)”<sup>132</sup> The Sixth Circuit expressed disdain for Niswander’s conduct, while simultaneously establishing a rule that may, in future cases, immunize such conduct so long as the produced documents are relevant.<sup>133</sup>

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the barn.” *Id.* In essence, CIC was arguing that once Niswander turned the documents over to her attorneys, she violated CIC’s confidentiality policy and there was nothing they could have done to correct the disclosure. *Id.*

126. As of March 9, 2010, Westlaw’s Keycite reports that there were 8195 cases that have cited to Federal Rule of Evidence 401 within the past year alone.

127. See *supra* notes 121-22 and accompanying text.

128. See *infra* notes 129-60 and accompanying text.

129. *Niswander*, 529 F.3d at 722.

130. See *infra* notes 131-33 and accompanying text.

131. *Niswander*, 529 F.3d at 722. “An individual’s delivery of relevant documents during the discovery process or the giving of testimony at a deposition clearly falls within the ambit of participating ‘in any manner’ in a Title VII proceeding.” *Id.*

132. *Id.* Niswander lost the battle of characterization on this point given the fact that Niswander worked from home; she looked through the documents that she had in her home office. From the documents she had at home, Niswander produced several irrelevant and confidential documents that she believed supported a claim of retaliation. *Id.* at 717-19.

133. *Id.* at 722.

## 2. Good Faith Precedent

In order to rid bad faith conduct from Title VII litigation, the better standard to apply is good faith.<sup>134</sup> Title VII already imposes a good faith standard on opposition activity.<sup>135</sup> An employee who opposes conduct that is not actually prohibited by Title VII is still protected under the opposition clause if she has a good faith belief that the opposed conduct was prohibited.<sup>136</sup> Some courts have even imposed good faith requirements on participation activity.<sup>137</sup>

In *Mattson v. Caterpillar, Inc.*, an employee, Mattson, filed a sexual discrimination complaint against his supervisor, alleging that the supervisor had rubbed her breasts against his arm during a conversation.<sup>138</sup> Mattson had testified in a prior investigation that he did not believe the touch to be intentional and that he did not believe that his boss was sexually attracted to him.<sup>139</sup> Furthermore, a co-worker filed an affidavit concerning a conversation that occurred with Mattson in which Mattson stated that he had filed the complaint as a means to get his boss fired in “any way possible.”<sup>140</sup> The Seventh Circuit found, as a matter of law, that Mattson had filed the complaint in bad faith.<sup>141</sup> Despite the fact that the filing of a complaint is objectively an act of participation, the court held that an utterly baseless claim filed with malice cannot receive the protection afforded by the participation clause:<sup>142</sup>

We believe that the same threshold standard should apply to both opposition and participation clause cases. That is, the claims must not be utterly baseless. Were we to adopt a different standard, an employee

134. See *infra* notes 134-59 and accompanying text.

135. *Brannum v. Missouri Dept. of Corrections*, 518 F.3d 542, 547 (8th Cir 2008).

136. *Id.*

137. *Mattson v. Caterpillar, Inc.*, 359 F.3d 885, 891 (7th Cir. 2004); see also, *Belt v. Alabama Historical Com'n*, No. Civ.A. 04-0331-WSM, 2005 WL 1653728, at \*9 (S.D.Ala. July 12, 2005). In *Belt*, the District Court commented that a good faith standard should be applied to both opposition and participation conduct and that the Plaintiff met a good faith standard in her conduct during a deposition. However, the Plaintiff still could not establish a prima facie case of retaliation because she did not suffer an adverse employment action. *Id.* at \*9-11.

138. *Mattson*, 359 F.3d at 887-88.

139. *Id.* at 888.

140. *Id.* at 889.

141. *Id.* “[T]he sexual harassment charge Mattson filed with the IDHR and EEOC was both objectively and subjectively unreasonable, as well as made with the bad faith purpose of retaliating against his female supervisor.” *Id.*

142. *Id.* at 892. (“[T]he unique circumstances of this case present us with a complaint that is not only unreasonable and meritless, but also motivated by bad faith. Against this factual backdrop, we find that Mattson’s claim is not deserving of protection under the participation clause of Title VII. The paucity of case law on point illustrates the rarity of such claims as well as the limited nature of our holding.”).

could immunize his unreasonable and malicious internal complaints simply by filing a discrimination complaint with a government agency. Similarly, 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.<sup>143</sup>

While ruling that a good faith standard should apply to participation activity, the court noted that the scope of its ruling would affect few Title VII cases given the relatively small amount of cases in which bad faith claims are presented.<sup>144</sup>

In *Mattson*, the court examined what was objectively an act of participation, but articulated specific facts that showed that the participant was acting in bad faith.<sup>145</sup> Applying a good faith standard to *Niswander*, the Sixth Circuit could have examined what motive *Niswander* had in producing the confidential documents.<sup>146</sup> If the court could determine as a matter of law that *Niswander* acted in bad faith, the court could have declined to extend protection under the participation clause.<sup>147</sup> Applying such an analysis would have alleviated one of the court's primary concerns—immunizing future bad faith conduct of employees.<sup>148</sup>

An example of bad faith conduct is the case of *O'Day v. McDonnell Douglas Helicopter Co.*<sup>149</sup> Dealing with an act of opposition, *O'Day* is a quintessential example of bad faith conduct in Title VII.<sup>150</sup> In that case, *O'Day's* employer denied *O'Day* a promotion and *O'Day* believed that it was because of his age.<sup>151</sup> That same night, *O'Day* broke into his supervisor's office, rummaged through his supervisor's private files,

143. *Id.* at 891.

144. *Id.* at 892.

145. *Id.*

146. *Niswander v. Cincinnati Ins. Co.*, 529 F.3d 714, 727 (6th Cir. 2008). The court does briefly talk about *Niswander's* motive in searching for these documents: “*Niswander* specifically searched through the CIC documents that she had at her home office for the purpose of uncovering evidence of retaliation. Such behavior cannot be classified as truly innocent acquisition.” *Id.*

147. *Niswander* likely would have survived a good faith analysis because she testified at her deposition that she provided the documents in response to the request for production because she believed that CIC wanted documents related to retaliation as well as equal pay. Reply Brief of Appellant at 4, *Niswander*, 529 F.3d 714 (No. 07-3738). Although *Niswander* provided irrelevant confidential information, unlike *Mattson*, there were no facts from which the court could infer malice. *Niswander*, 529 F.3d at 722.

148. *Id.*

149. 79 F.3d 756 (9th Cir. 1996).

150. *Id.* *O'Day* is also the primary example that the Sixth Circuit compared *Niswander's* behavior to in its opposition clause analysis. *Niswander*, 529 F.3d at 723.

151. *O'Day*, 79 F.3d at 758.

copied certain documents, and showed them to fellow employees.<sup>152</sup> Even if O'Day had filed suit prior to searching his supervisor's office, the court should not protect this type of bad faith conduct because it is not inherently a part of litigation.<sup>153</sup>

One could argue that Congress's desire for broad sweeping protection under the participation clause should include bad faith conduct.<sup>154</sup> Indeed, there is case law supporting this proposition.<sup>155</sup> Examples of bad faith conduct that were deemed protected include filing a meritless charge,<sup>156</sup> an unfounded charge,<sup>157</sup> or even a malicious charge.<sup>158</sup> *Mattson* represents a break from this view.<sup>159</sup> However, for the same reasons that *Mattson* decided that an utterly baseless charge filed in bad faith was undeserving of participation clause protection, a court may decline protection to an employee's acquiring and disseminating of confidential documents in bad faith.<sup>160</sup>

152. *Id.*

153. The court may actually sanction parties in Title VII under its inherent power to sanction where "the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 US 240, 258-59 (1975). One bad faith sanction in Title VII is attorney's fees. 42 U.S.C. § 2000e-5 (k). That subsection states:

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

*Id.*

154. *See infra* notes 156-58 and accompanying text.

155. *See id.*

156. *EEOC v. Kallir, Philips, Ross, Inc.*, 401 F. Supp. 66 (S.D.N.Y. 1975), opinion supplemented, 420 F. Supp. 919 (S.D. N.Y. 1976), *aff'd*, 559 F.2d 1203 (2d Cir. 1977); *Hearth v. Metropolitan Transit Commission (M. T. C.)*, 436 F. Supp. 685 (D. Minn. 1977); *EEOC Decision No. 71-1115*, 3 Fair Empl. Prac. Cas. (BNA) 273 (E.E.O.C. 1971).

157. *Bradington v. Int'l Business Machines Corp.*, 360 F. Supp. 845 (D. Md. 1973), *aff'd*, 492 F.2d 1240 (4th Cir. 1974); *EEOC Decision No. 71-1545*, 3 Fair Empl. Prac. Cas. (BNA) 761 (E.E.O.C. 1971).

158. *Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998 (5th Cir. 1969).

159. *See supra* notes 145-60 and accompanying text.

160. *Compare Mattson v. Caterpillar, Inc.*, 359 F.3d 885, 891 (7th Cir. 2004) (finding that a good faith standard applies to both the opposition and participation clauses), *with O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 763 (9th Cir. 1996) (declining opposition clause protection to an employee's bad faith conduct). In *McKennon v. Nashville Banner Pub. Co.*, the United States Supreme Court left open the possibility of applying the bad-faith doctrine of unclean hands to Title VII claims. 513 U.S. 352, 360-61 (1995). Though procedurally distinct, *McKennon* is factually similar to *Niswander*. *Id.* at 354-55. *McKennon* dealt with an employee who suspected that her employer was planning to fire her due to her age. *Id.* She subsequently copied several confidential documents in preparation for potential litigation. *Id.* *McKennon's* bad faith conduct ultimately limited her recovery. *Id.* at 362-63. Procedurally, *McKennon* involved the after-acquired evidence doctrine. *Id.* at 360-61. The after-acquired evidence doctrine is used when an employer discovers evidence of employee wrongdoing that would have given the employer independent grounds to terminate the employee. *Id.* The doctrine is not a pure defense to an employee's claim

### C. *Protecting Employer Confidentiality*

Another concern of the Sixth Circuit was that the documents at issue were confidential, thus, higher standards were needed to protect against unauthorized dissemination.<sup>161</sup> However, unauthorized dissemination should not have been a significant issue in *Niswander* because the documents were produced as part of a formal discovery request.<sup>162</sup> The documents were given to officers of the court (Niswander's attorneys) who were bound by a protective order not to use any confidential documents exchanged in discovery for any improper purpose.<sup>163</sup>

One aspect of modern litigation is the advent of protective orders in guarding corporate confidentiality.<sup>164</sup> The Federal Rules of Civil Procedure specifically state that a court may require "that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way."<sup>165</sup> The Sixth Circuit held that Niswander could have preserved the documents without producing them to her attorneys.<sup>166</sup> However, the court scarcely commented on whether the production of the documents caused actual damage.<sup>167</sup> The court never commented on the fact that there was a

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of retaliation. However, once the employer discovers the independent grounds for termination the employee's damages for lost wages ceases to accumulate further. *Id.*

161. *Niswander v. Cincinnati Ins. Co.*, 529 F.3d 714, 722 (6th Cir. 2008). "Allowing too much protection to employees for disclosing confidential information may perversely incentivize behavior that ought not be tolerated in the workplace—namely, the surreptitious theft of confidential documents as potential future ammunition should the employee eventually feel wronged by her employer." *Id.*

162. One problem for Niswander is that she lost the battle of characterization on this argument. *Id.* at 726. The Sixth Circuit refused to examine Niswander's conduct as part of a formal discovery request because the documents produced were non-responsive. *Id.* The court analyzed Niswander's production as if it had occurred outside the formal discovery structure of the court. *Id.*

163. *Id.* at 727. In analyzing the opposition clause, the Sixth Circuit found that Niswander providing the documents to her attorneys was not as problematic as disclosing them to a co-worker. However, the court felt that there were better means available for Niswander to preserve the documents. Thus, her production was not reasonable. *Id.*

164. FED. R. CIV. P. 26(c)(1)(G).

165. *Id.*

166. *Niswander*, 529 F.3d at 727. "Niswander's providing the documents to her *Rochlin* attorneys is less problematic than giving them to a fellow employee. But in light of the fact that Niswander had alternative means to inform her *Rochlin* counsel of the alleged retaliation, her behavior cannot be condoned simply because she limited the dissemination of the documents in question to her attorneys." *Id.*

167. The court had already ruled that Niswander could not establish a prima facie claim of retaliation by the time it discussed Niswander's pretext argument, thus, the court did not significantly analyze this point. *Niswander*, 529 F.3d at 728. However, Niswander argued heavily



protective order, which allowed the parties to exchange confidential information.<sup>168</sup>

Protective orders are, obviously, an ever-expanding feature of modern litigation

. . . Protective orders recognize that parties engaged in litigation do not sacrifice all aspects of privacy or their proprietary information simply because of a lawsuit. But there remains a concomitant principle favoring full, fair, and open disclosure of the important matters occurring in the public's courts.<sup>169</sup>

If genuine damage had been done to CIC or its clients by Niswander's production of confidential documents, CIC could have placed the documents under the protective order of the court or otherwise availed itself of the protection that the court may afford to discovery under Fed. R. Civ. P. 26(c). CIC's failure to take steps to protect the confidential documents gives rise to Niswander's argument that CIC was not sufficiently motivated by the document disclosure to terminate Niswander.<sup>170</sup> In other words, CIC's stated reason was pretext.<sup>171</sup>

The protective order is just one way the court can protect an employer's interest in confidentiality.<sup>172</sup> Another way to balance the interests of the employer's confidentiality with the protection provided

in her brief that the alleged damage from the dissemination of documents was minimal. Final Brief for Appellant, *supra* note 17, at 28-30.

168. Final Brief for Appellant, *supra* note 17, at 8. The protective order stated that "[e]ither party, may at the time of production, designate such information as 'confidential' and the information so designated shall thereafter be subject to the provisions of this order." *Id.*

169. *In re Mirapex Products Liability Litigation*, 246 F.R.D. 668, 672-73 (D. Minn. 2007).

170. An interesting fact not briefed to the Sixth Circuit is that Niswander was not the first person to be terminated for producing confidential documents in the context of the equal pay case. Defendant's Memorandum in Support of Motion for Summary Judgment as to Claims Brought by Plaintiff Mary Slover, *Rochlin v. Cincinnati Ins. Co.*, No. IP001898C H/K, 2005 WL 1025776 (S.D. Ind. Apr. 7, 2005). Def's. Memorandum in Support of Mot. for Summ. J., *Rochlin v. Cincinnati Ins. Co.*, 2005 WL 1025776 (S.D. Ind. Apr. 7, 2005) (No. 01-01898). In September 2005, approximately three months before CIC terminated Niswander, another equal pay litigant was fired for producing confidential documents in response to a formal request for production. *Id.* "On September 26, 2005, [CIC] terminated Slover's employment because Slover was providing confidential and proprietary information directly to her counsel without CIC's knowledge or permission in violation of CIC's policies." *Id.* A third equal pay participant was also fired for the same reason as Niswander. See *Niswander v. Price, Waicukauski & Riley, LLC*, No. 1:2008cv01325 (S.D. Ind. filed Oct. 2, 2008).

171. See *infra* notes 172-92 and accompanying text.

172. *In re Mirapex*, 246 F.R.D. at 672.

by the anti-retaliation provision is for courts to evaluate the production of confidential documents under a pretext analysis.<sup>173</sup>

Since the United States Supreme Court's opinion in *McDonnell Douglas Corp. v. Green*, Title VII retaliation cases have employed a burden-shifting mechanism.<sup>174</sup> Once an employee establishes her prima facie case of retaliation, the burden is then shifted to the employer to articulate a legitimate nondiscriminatory reason for taking the adverse employment action.<sup>175</sup> To establish a legitimate nondiscriminatory reason, the employer must point to particular facts upon which it reasonably relied on in making its decision to terminate the employee.<sup>176</sup> The employer must also express why it was reasonable for the employer to rely on the stated facts.<sup>177</sup> After the employer articulates its reason, the burden shifts back to the plaintiff to establish that the defendant's stated reason was pretext.<sup>178</sup> An employee may show pretext in one of the following three ways: 1) the stated reason has no actual basis in fact; 2) the stated reason did not actually motivate the employer to take the adverse employment action; or 3) the stated reason did not sufficiently motivate the employer to take the adverse employment action.<sup>179</sup>

CIC's proffered reason for firing Niswander was that she violated the company's code of conduct by producing confidential documents to

173. See *infra* notes 174-92 and accompanying text.

174. 411 U.S. 792 (1973).

175. *Id.* at 802.

176. *Wright v. Murray Guard, Inc.*, 455 F.3d 702, 708 (6th Cir. 2006). Under the "honest belief" doctrine, adopted in some circuits, an employee cannot show pretext if the employer honestly believed that the legitimate nondiscriminatory reason was a basis for firing the employee. *Id.* The Sixth Circuit has adopted a modified doctrine that requires the employer to state the particular facts upon which it believed and why its belief was reasonable in taking the adverse employment action. *Id.* (citing *Smith v. Chrysler Corp.*, 155 F.3d 799, 806 (6th Cir. 1998)).

177. *Id.*

In determining whether an employer reasonably relied on the particularized facts then before it, we do not require that the decisional process used by the employer be optimal or that it left no stone unturned. Rather, the key inquiry is whether the employer made a reasonably informed and considered decision before taking an adverse employment action. Although we will not micro-manage the process used by employers in making their employment decisions, we also will not blindly assume that an employer's description of its reasons is honest. Therefore, when the employee is able to produce sufficient evidence to establish that the employer failed to make a reasonably informed and considered decision before taking its adverse employment action, thereby making its decisional process unworthy of credence, then any reliance placed by the employer in such a process cannot be said to be honestly held.

*Id.* at 708 (internal citations and quotations omitted).

178. *Smith v. Chrysler Corp.*, 155 F.3d 799, 807 (6th Cir. 1998).

179. *Wexler v. White's Fine Furniture, Inc.*, 317 F.3d 564, 592 (6th Cir. 2003) (citing *Dews v. A.B. Dick Co.*, 231 F.3d 1016, 1021 (6th Cir. 2000)).

a third-party for purposes other than company business.<sup>180</sup> Niswander responded to this argument by first alleging that CIC's proffered reason had no basis in fact because Niswander produced documents in response to CIC's request and, thus, CIC authorized the release.<sup>181</sup> Niswander also argued that CIC was not sufficiently motivated to terminate her based on the fact that CIC took no action to remedy the alleged violation.<sup>182</sup> CIC did not protect the documents by placing them under the court's protective order.<sup>183</sup> CIC's attorney in charge of privacy did not conduct an investigation concerning the alleged violation, did not contact any of the customers whose alleged privacy was violated, and did not even look at the documents which were produced.<sup>184</sup>

Having already declared Niswander's conduct insufficient to establish a prima facie case of retaliation, the Sixth Circuit briefly analyzed Niswander's pretext argument and determined that Niswander could not show that CIC's proffered nondiscriminatory reason was pretext.<sup>185</sup> What is important in their discussion of pretext is that the Sixth Circuit could have protected CIC's interest in maintaining the confidential documents by accepting CIC's proffered nondiscriminatory reason for terminating Niswander.<sup>186</sup> The court noted that CIC's proffered reason had a basis in fact because Niswander was not technically responding to the production request when she produced confidential documents.<sup>187</sup> The court went on to comment that CIC was actually motivated by Niswander's violation of company policy and that

180. Brief of Defendant-Appellee, *supra* note 43, at 34.

181. The provision in CIC's Code of Conduct which Niswander relied on states: "Associates, officers and directors may not transmit confidential information to any other person, internal or external, except when disclosure is legally mandated, authorized by the company or required for the proper conduct of business." Final Brief for Appellant, *supra* note 17, at 26.

182. *Id.* at 28-30. The insufficient motivation argument is best characterized in the following passage: "We have held that when an employer . . . waits for a legal, legitimate reason to fortuitously materialize, and then uses it to cover up his true, longstanding motivations for firing the employee, the employer's actions constitute the very definition of pretext." *Hamilton v. General Elec. Co.*, 556 F.3d 428, 436 (6th Cir. 2009) (citing *Jones v. Potter*, 488 F.3d 397, 408 (6th Cir. 2007) (internal quotations omitted)).

183. Final Brief for Appellant, *supra* note 17, at \*28.

184. *Id.* at \*31.

185. *Niswander*, 529 F.3d at 728. Whether the court properly analyzed Niswander's pretext claim is beyond the scope of this note. However, the Sixth Circuit failed to analyze the third prong of pretext. *Id.* The Court properly analyzed whether CIC's proffered nondiscriminatory reason had a basis in fact and whether the document production actually motivated CIC's decision to terminate Niswander. But, the Court never analyzed the primary argument Niswander made in regards to pretext—whether Niswander's conduct sufficiently motivated CIC. *Id.*; *see also*, Final Brief for Appellant, *supra* note 17, at \*28-30.

186. *Niswander*, 529 F.3d at 728.

187. *Id.*

Niswander failed to present evidence to the contrary.<sup>188</sup> By analyzing this case as an issue of pretext, the Sixth Circuit could have accepted Niswander's production as participation for the purposes of establishing a prima facie retaliation claim, while also accepting CIC's legitimate nondiscriminatory reason for terminating Niswander.<sup>189</sup>

An employer has a legitimate interest in protecting the confidentiality of its documents.<sup>190</sup> Focusing on whether that interest actually or sufficiently motivates the employer to fire an employee for disseminating such documents could sufficiently protect both the employer's interest in maintaining confidentiality as well as the employee's right to participate in Title VII proceedings.<sup>191</sup> The Sixth Circuit could have addressed its concern over protecting employer confidentiality by analyzing employee conduct within the framework of pretext.<sup>192</sup>

#### D. *Analysis of Other Circuits*

In *Glover v. South Carolina Law Enforcement Div.*, the Fourth Circuit extended protection under the participation clause to wholly irrelevant deposition testimony.<sup>193</sup> *Glover* dealt with a deponent who discussed matters concerning her boss outside the scope of the underlying Title VII claim upon which she was called to testify.<sup>194</sup> Although *Glover* discussed irrelevant matters during her deposition, the Fourth Circuit held that *Glover* was protected under the participation clause because the relevance of her statements did not change the fact that she was participating in a deposition. Participating in a deposition

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188. *Id.*

189. *Id.* at 727-28 (holding that summary judgment was proper even if Niswander could have established a prima facie case of retaliation).

190. *Id.* at 726 (quoting *Jefferies v. Harris County Cmty. Action Ass'n*, 615 F.2d 1025, 1036 (5th Cir. 1980)). An employer has a "legitimate and substantial interest in keeping its personnel records and agency documents confidential." *Id.*

191. *See supra* notes 173-90 and accompanying text.

192. *Niswander*, 529 F.3d at 728. The Sixth Circuit found that Niswander's conduct in violating CIC's confidentiality gave CIC a legitimate nondiscriminatory reason to terminate Niswander. *Id.* at 727-28.

193. 170 F.3d 411 (4th Cir. 1999), *cert. dismissed*, 528 U.S. 1146 (2000).

194. *Id.* at 412. ("Glover freely offered not only facts directly related to [her supervisor's] problems with the South Dakota marshals' office, but also her impressions of the operations of the South Carolina marshals' office. In particular, Glover perorated upon the perceived failings of her successor as the South Carolina U.S. Marshal, Israel Brooks. During the course of her testimony Glover accused Brooks of mismanagement, destruction of office documents, wasting funds, inappropriate behavior, dishonesty, and discrimination.").

was clearly an act of participation.<sup>195</sup> The application of Title VII's participation clause does not depend on the substance of the participation.<sup>196</sup> "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."<sup>197</sup>

Similar to CIC's argument in *Niswander*, the South Carolina Law Enforcement Division ("SLED") argued that because Glover's testimony was irrelevant to her Title VII claim, her behavior was unreasonable and thus should not constitute participation.<sup>198</sup> Even assuming that Glover's testimony was irrelevant, the Fourth Circuit still rejected SLED's argument by refusing to separate the relevance of a person's testimony at a deposition from the objective act of testifying.<sup>199</sup> In responding to SLED's proposed reasonableness standard, the court declared that:

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.<sup>200</sup> . . . Congress has determined that some irrelevant and even provocative testimony must be immunized so that Title VII proceedings will not be chilled.<sup>201</sup>

In *Niswander*, however, the Sixth Circuit suggested that a reasonableness test can be applied to participation.<sup>202</sup> The court held that "[t]he analysis of a participation claim does not generally require a finding of reasonableness . . . [b]ut when confidential information is at

195. *Id.* at 413.

196. *Id.* at 414.

197. *Id.*

198. *Id.* at 413. The arguments presented by CIC in *Niswander* and SLED in *Glover* are strikingly similar. Compare *Niswander v. Cincinnati Ins. Co.*, 529 F.3d 714 (6th Cir. 2008) (arguing that irrelevant document production should not constitute participation), with *Glover*, 170 F.3d 411 (arguing that irrelevant deposition testimony should not constitute participation). In both cases the Title VII claimant's participation was clearly irrelevant to the Title VII litigation. *Id.* In both cases the Defendants argued that irrelevant participation must meet a reasonableness test. *Id.*

199. *Id.* at 415.

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."

*Id.* at 414 (internal citations omitted).

200. *Id.* at 414.

201. *Id.*

202. *Niswander*, 529 F.3d at 726. Because the court had already declared that *Niswander*'s actions did not constitute participation, its holding that a reasonableness test could be applied to participation was in dicta. *Id.*

issue, a reasonableness requirement is appropriate.<sup>203</sup> The Sixth Circuit's holding in *Niswander* is similar to that of the dissent in *Glover*.<sup>204</sup> Like the Sixth Circuit, Judge Williams' dissent was primarily concerned with the negative effects of immunizing bad-faith conduct of employees. Thus, he felt a reasonableness test was appropriate.<sup>205</sup> In the majority opinion of *Glover*, Chief Judge Wilkinson responds to the dissent by stating:

Our good colleague in dissent fails to address the broad wording of the statute. Instead, the dissent subscribes to a nebulous rule of reason which, while it may seem clear in this case, will be anything but clear in the long line of cases to come. The statute permits an employee to be discharged for a wide variety of deficiencies in performance, but it does not subject an employee's testimony in a Title VII suit to the uncertain limbo of an employer's perception of its reasonableness.<sup>206</sup>

That same reasoning should apply to the Sixth Circuit's decision in *Niswander*— a broad request for production implicates broad relevance.

“The anti-discrimination statutes do not limit or condition in any way the protection against retaliation for participating in the charge process.”<sup>207</sup> The plain language of the anti-retaliation statute does not contain limiting words.<sup>208</sup> Interjecting a relevance requirement into the participation clause is contrary to the plain meaning of the statute and opens the door to uncertainty.<sup>209</sup> An employer should not have the right to discharge an employee who is objectively participating in a Title VII lawsuit based on the relevance of her participation.<sup>210</sup>

203. *Id.*

204. Compare *Niswander*, 529 F.3d at 726 (finding a reasonableness test appropriate), with *Glover*, 170 F.3d at 416 (Williams, J., dissenting) (arguing that irrelevant deposition testimony should be analyzed under a reasonableness standard).

205. In dissent, Judge Williams states: “Congress surely did not intend to give asylum to employees to gratuitously disparage and maliciously accuse their peers of professional misconduct having nothing whatsoever to do with the underlying charge of discrimination, simply because the comments were made during a deposition in a Title VII proceeding.” *Glover*, 170 F.3d at 416. Compare that with the Sixth Circuit's reasoning in *Niswander*: “[C]oncluding that *Niswander*'s conduct here is protected participation . . . would provide employees with near-immunity for their actions in connection with antidiscrimination lawsuits, protecting them from disciplinary action even when they knowingly provide irrelevant, confidential information . . .” *Niswander*, 529 F.3d at 722.

206. *Glover*, 170 F.3d at 415.

207. EEOC Compliance Manual, *supra* note 70, Section 8-II(C)(2).

208. *Deravin v. Kerik*, 335 F.3d 195, 203-04 (2d Cir. 2003).

209. *Glover*, 170 F.3d at 414.

210. *Id.* at 414-15.

In a case on point, the Middle District of North Carolina held in dicta that:

Disclosure of confidential information in response to a formal request for production would arguably receive extensive protection under Title VII because the court could take steps to protect the business interests of the employer by sealing documents, issuing protective orders, restricting the admissibility of evidence at trial, and conducting in camera proceedings where appropriate.<sup>211</sup>

Courts should not separate irrelevant documents from the objective act of producing those documents.<sup>212</sup> When you have a formal discovery request, there are sufficient safeguards in place within the court system to protect employers from an employee producing confidential documents.<sup>213</sup>

#### *E. Effect on Title VII Discovery*

One purpose of the anti-retaliation provision is to allow a person to have the freedom to communicate discrimination concerns with her employer.<sup>214</sup> “[E]ffective enforcement could thus only be expected if employees felt free to approach officials with their grievances.”<sup>215</sup> Placing conditions on discovery will not facilitate such communication and could impose hurdles on a plaintiff proving her case.<sup>216</sup> “[T]he imposition of unnecessary limitations on discovery is especially to be avoided in Title VII cases, because of the nature of the proofs required to demonstrate unlawful discrimination may often be indirect or circumstantial.”<sup>217</sup>

211. *Shoaf v. Kimberly-Clark Corp.*, 294 F. Supp. 2d 746, 757 (M.D.N.C. 2003). The court in *Shoaf* found against the plaintiff primarily because she produced the documents outside a formal production request. *See id.*

212. *Glover*, 170 F.3d at 415.

213. Indeed, one of Niswander’s arguments was that the protective order protected her disclosure from causing any harm to CIC and thus CIC lacked sufficient motivation to fire her. Final Brief for Appellant, *supra* note 17, at 28. “The parties had adopted a Stipulated Protective Order under which either party could mark documents confidential placing those documents under the protective order at the time of production. If CIC was truly concerned about confidentiality and privacy, it would have marked the documents confidential under the protective order, but it did not.” *Id.*

214. *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006).

215. *Id.* (citing *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960)).

216. *Miles v. Boeing Co.*, 154 F.R.D. 117, 119 (E.D. Pa. 1994).

217. *Id.* (internal quotation omitted).

Furthermore, the ruling in *Niswander* arguably creates perverse incentives.<sup>218</sup> The ruling encourages defendants to make overly broad requests for discovery in hopes that the plaintiff may violate the company's privacy policy.<sup>219</sup> At that point, the defendant will have a legitimate nondiscriminatory reason to terminate the plaintiff.<sup>220</sup> In fact, CIC terminated three of the equal pay litigants for allegedly violating its code of conduct.<sup>221</sup>

Alternatively, plaintiffs will be reluctant to freely produce a document where the document's relevance is questionable.<sup>222</sup> Plaintiffs will have to vigorously examine all documents turned over in discovery in order to ensure that anti-retaliation protection remains in place.<sup>223</sup> While a plaintiff is not free to flood a defendant with irrelevant discovery,<sup>224</sup> defendants should also not be able to hold plaintiffs under Damocles's sword, terminating a plaintiff upon production of a single irrelevant document.<sup>225</sup>

Ultimately, the Sixth Circuit's decision could impede the discovery process in EEOC actions.<sup>226</sup> The policy for allowing irrelevant deposition testimony is equally applicable to allowing irrelevant production of documents:

[T]o adopt a reasonableness restriction would lead the federal courts into a morass of collateral litigation in employment discrimination cases. With her immunity limited by a reasonableness requirement, a witness might be forced to evade or to refuse to answer deposition questions. And those questions can be wide-ranging . . . . The inevitable clashes between inquisitive deposing attorneys and recalcitrant witnesses will spawn discovery motions and appeals, all to be litigated in the courts. The resulting waste of individual and judicial resources would be far inferior to a system in which discovery

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218. See *supra* note 170 and accompanying text.

219. See *supra* notes 23-24 and accompanying text.

220. See *supra* notes 174-84 and accompanying text.

221. See *supra* note 170 and accompanying text.

222. *Glover v. South Carolina Law Enforcement Div.*, 170 F.3d 411, 415 (4th Cir. 1999).

223. *Id.*

224. Because a response to a formal request to produce documents must be signed by an attorney, flooding an opponent with irrelevant discovery can be sanctioned under Federal Rule of Civil Procedure 11(c). The rule explicitly prohibits the filing of any signed writing that is "presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation." FED. R. CIV. P. 11(b). Federal judges may also sanction improper conduct in discovery under FED. R. CIV. P. 37(b).

225. *Glover*, 170 F.3d at 415.

226. *Id.*



proceeds unfettered, with witnesses confident that they cannot be punished for telling their tales.<sup>227</sup>

The Sixth Circuit's decision could cause the rate of discovery to slow because plaintiffs will be forced to meticulously analyze every document passed to a defendant.<sup>228</sup> Likewise, defendants will be encouraged to request overly broad discovery.<sup>229</sup> More discovery battles will occur where a plaintiff refuses to turn over a document when its relevance is questionable.<sup>230</sup> The potential for wasting judicial resources is great.<sup>231</sup> The better policy is to allow broad, unimpeded discovery.<sup>232</sup>

## V. CONCLUSION

In light of the Sixth Circuit's decision in *Niswander* and its recent adoption in other districts,<sup>233</sup> the lawyer pursuing a Title VII claim for his client should be on guard.<sup>234</sup> Plaintiffs' lawyers should fully understand their client's employer's confidentiality policy before advising their client to take any action which may jeopardize her employment.<sup>235</sup> Lawyers should also thoroughly counsel their clients as

227. *Id.*

228. *Id.* One possibility to counteract such a result would be to adopt a rule akin to Federal Rule of Evidence 502(b), which was adopted in response to the concern that inadvertent disclosure of privileged documents would act as a waiver of attorney-client privilege. FED. R. EVID. 502 advisory committee's note. Rule 502(b) resolved the split over whether privilege could be restored after inadvertent disclosure. *Id.* One concern was that to do otherwise would grind document production to a halt while parties examined privilege, page by page. *Id.*

The rule does not require the producing party to engage in a post-production review to determine whether any protected communication or information has been produced by mistake. But the rule does require the producing party to follow up on any obvious indications that a protected communication or information has been produced inadvertently.

*Id.*

229. *Glover*, 170 F.3d at 415.

230. *Id.*

231. *Id.*

232. *Id.*

233. See *Harris v. Richland Community Health Care Ass'n, Inc.*, No. 3:07-0421-CMC-PJG, slip op. (D.S.C. Sept. 14, 2009) (finding *Niswander* instructive and adopting a reasonableness requirement when confidential documents are distributed outside of discovery); *Quinlan v. Curtiss-Wright Corp.*, 976 A.2d 429 (N.J. Super. 2009) (declining protection for an employee's copying of confidential documents pre-suit); *Johnson v. Portfolio Recovery Associates, LLC*, 682 F. Supp. 2d 560 (E.D. Va. 2009) (adopting *Niswander's* six-factor test in declining protection to an employee who disseminated documents to his attorney). Although these cases are factually distinct from *Niswander*, they evidence a trend toward greater protection of employer confidentiality and thus, less protection for the Title VII plaintiff.

234. See *supra* note 50 and accompanying text.

235. See *supra* notes 47-49 and accompanying text.

to how the client may search for, and subsequently produce documents they come across in their continued employment.<sup>236</sup> If confidential documents exist, the employee may provide the attorney with a synopsis of such documents so that the attorney may formally request their production.<sup>237</sup> Counseling should include a specific warning that clients are not to go through confidential employer files for the purpose of litigation unless specifically authorized to do so.<sup>238</sup>

Besides counseling the client, lawyers should request clarification when an employer's request for production is overly broad and may involve confidential documents.<sup>239</sup> When drafting a protective order in a Title VII case, lawyers for both sides should anticipate that confidential documents relating to the case may be in the hands of the employee and should draft language protecting the employee's dissemination accordingly.<sup>240</sup> Lawyers should also ensure that any confidential documents produced are marked as confidential.<sup>241</sup>

As courts either adopt or reject relevance standards in Title VII participation, judges should consider protective orders as an alternative method for protecting employer confidentiality.<sup>242</sup> When an employee is participating in good faith, the employee should be able to establish a prima facie case of retaliation.<sup>243</sup> If an employee's conduct shows cause for concern, the better analysis is not to deny that she was in fact participating, but instead to analyze whether her employer had a legitimate nondiscriminatory reason for terminating her employment.<sup>244</sup> Combining a good faith standard in participation with a pretext analysis will both protect an employee who is legitimately participating in a Title VII action and provide the employer with protection when it has a legitimate reason for terminating a Title VII participant.<sup>245</sup>

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236. *Niswander v. Cincinnati Ins. Co.*, 529 F.3d 714, 722 (6th Cir. 2008). *See supra* note 49 and accompanying text.

237. *Johnson*, 682 F.Supp.2d at 582.

238. *See supra* notes 25, 149-53 and accompanying text.

239. *See supra* notes 22-24, 49-51 and accompanying text.

240. *See supra* notes 18, 164-69 and accompanying text.

241. *See supra* notes 161-62, 182-84 and accompanying text.

242. *See supra* notes 164-69 and accompanying text.

243. *See supra* notes 118-60 and accompanying text.

244. *See supra* notes 172-92 and accompanying text.

245. *See supra* notes 118-60, 172-92 and accompanying text.

