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WHY TITLE VII'S PARTICIPATION CLAUSE NEEDS TO BE BROADLY INTERPRETED TO PROTECT THOSE INVOLVED IN INTERNAL INVESTIGATIONS

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INTRODUCTION

Imagine being the Human Resources Director of a company when a fellow coworker comes to you alleging that she has been sexually harassed by the Vice President of the company, who, by the way, also happens to be the husband of the President and part owner of the company. You do what you think it is your job to do, namely, begin to conduct an internal investigation of the allegations.¹ However, before the investigation is completed, you are terminated by none other than the company's President. It seems like you have a perfect claim against your employer under the anti-retaliation clause of Title VII of the Civil Rights Act of 1964, right?² After all, you were fired because you were participating in an investigation of alleged discrimination against your employer. Wrong—at least this is what the Second Circuit recently held³ following a disturbing line of cases that ban employee claims of retaliation that are *merely* linked to internal investigations.⁴

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¹ In its analysis, this Note makes no distinction between a human resources director and other employees.

² Civil Rights Act of 1964, Pub. L. No. 88-352, tit. II, § 704(a), 78 Stat. 253 (codified as amended at 42 U.S.C. § 2000e-3(a) (2012)).

³ See *Townsend v. Benjamin Enters., Inc.*, 679 F.3d 41, 44–46 (2d Cir. 2012). For a full discussion of this case, see *infra* Part II.E.

⁴ See, e.g., *Hatmaker v. Mem'l Med. Ctr.*, 619 F.3d 741, 746–47 (7th Cir. 2010) (holding that the “investigation” referred to in Title VII does not include internal employer investigations (internal quotation marks omitted)); *Correa v. Mana Prods., Inc.*, 550 F. Supp. 2d 319, 329 (E.D.N.Y. 2008) (holding that a human resources manager who participated in an internal investigation was not protected by the

Out of a total of 99,947 individual charge filings of discrimination with the Equal Employment Opportunity Commission ("EEOC") in 2011, over thirty percent were claims of retaliation under Title VII.⁵ There has been an eleven percent increase in the number of retaliation claims since 1997.⁶ This significant increase highlights the importance of having legislation that ensures the protection of employees from their employers' unjustified retaliation. One of these laws, which has been largely successful in providing such protection, is Title VII of the Civil Rights Act of 1964.⁷

Title VII "created the first effective federal prohibition against employment discrimination," and gave employees an avenue by which to protect themselves and seek redress for such discrimination.⁸ Title VII's protections fall under two main

participation clause of Title VII); *Byers v. Dall. Morning News, Inc.*, 209 F.3d 419, 428 (5th Cir. 2000) ("In the instant case, the 'participation clause' is irrelevant because Byers's [sic] did not file a charge with the EEOC until *after* the alleged retaliatory discharge took place."); *EEOC v. Total Sys. Servs., Inc.*, 221 F.3d 1171, 1174 (11th Cir. 2000) (concluding that the participation clause of Title VII does not protect an employee who participated in an employer's internal investigation); *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 581 (6th Cir. 2000) ("To establish a claim of retaliation under the participation clause, [a] [p]laintiff must make a *prima facie* case by showing that [the] [d]efendants discharged him because he filed a claim with the EEOC."); *Vasconcelos v. Meese*, 907 F.2d 111, 113 (9th Cir. 1990) (holding that an employee who makes accusations against an employer during an internal investigation does so at the employee's own "peril"); *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1313 (6th Cir. 1989) (holding that the protection of the participation clause is triggered only after the initiation of a statutory proceeding); *Bick v. City of N.Y.*, No. 95CIV.8781(KMW)(MHD), 1997 WL 381801, at *3 (S.D.N.Y. July 10, 1997) (dismissing an employee's retaliation claim because she did not engage in "protected activity" under Title VII when she made statements during an internal investigation (internal quotation marks omitted)).

⁵ U.S. EQUAL EMPL'T OPPORTUNITY COMM'N, Charge Statistics FY 1997 Through FY 2013, <http://www1.eeoc.gov/eeoc/statistics/enforcement/charges.cfm?renderforprint=1>. In 2011, the EEOC reported 31,429 claims of retaliation under Title VII; this made up 31.4% of all claims reported to the EEOC, which is the highest amount of reported claims made under this statute since 1997. *Id.* This number obviously does not include those employees who were retaliated against for their involvement in an employer's internal investigation, but did not file a claim with the EEOC. One can only imagine the actual number of people affected by this type of discrimination.

⁶ *See id.* In 1997, a total of 80,680 claims were filed with the EEOC, 16,394 of which were retaliation claims under Title VII. *Id.*

⁷ Civil Rights Act of 1964, Pub. L. No. 88-352, tit. II, § 704(a), 78 Stat. 253 (codified as amended at 42 U.S.C. § 2000e-3(a) (2012)).

⁸ GEORGE A. RUTHERGLEN & JOHN J. DONOHUE III, *EMPLOYMENT DISCRIMINATION: LAW AND THEORY* 2 (3d ed. 2012).

sections: section 703(a)(1)–(2)⁹ and section 704(a).¹⁰ While section 703(a)(1)–(2) protects employees from being discriminated against based on their “race, color, religion, sex, or national origin,”¹¹ section 704(a) protects employees from being retaliated against by their employers.¹² In other words, section 704(a), which is also known as the anti-retaliation provision, was Congress’s attempt to provide protection for employees who were not discriminated against on the basis of who they were or how they looked, but because of the actions that they decided to take against their employers.¹³

The anti-retaliation provision reads in pertinent part:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.¹⁴

The anti-retaliation provision can be further broken down into two parts: (1) the “opposition” clause¹⁵ and (2) the “participation” clause.¹⁶ This Note is primarily concerned with the participation clause, though it will make reference to the opposition clause as well as some of the courts’ interpretations of the opposition clause to support its assertion. Even though the participation clause affords employees necessary protection against their employers, courts have consistently limited its

⁹ Civil Rights Act of 1964 § 703(a)(1)–(2).

¹⁰ *Id.* § 704(a).

¹¹ *Id.* § 703(a)(1)–(2).

¹² *Id.* § 704(a).

¹³ *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006).

¹⁴ Civil Rights Act of 1964 § 704(a) (codified as amended at 42 U.S.C. § 2000e-3(a) (2012)).

¹⁵ *Id.*

¹⁶ *Id.* The section of the statute that reads that it is “an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter,” is the opposition clause. *Id.* The section of the statute that reads that it is “an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter,” is the participation clause. *Id.*

scope by interpreting “investigation . . . under this subchapter”¹⁷ as applying only to those employees who are participating in an investigation, proceeding, or hearing that is connected to a *formal* EEOC charge.¹⁸ This Note argues that this narrow interpretation of the statute is contrary to the intention and aim of Title VII and, in turn, should be interpreted more broadly. Part I of this Note gives a brief explanation of the meaning and purpose of Title VII’s anti-retaliation provision. Part II focuses on some of the cases that have limited the application of the participation clause to employees who are involved in formal EEOC proceedings. In particular, it focuses on the most recent Second Circuit case, *Townsend v. Benjamin Enterprises, Inc.*,¹⁹ to examine the dangers presented by such a limited interpretation. Part III of this Note discusses several reasons why such a narrow interpretation should be avoided. Finally, the Note concludes in Part IV by arguing that courts should interpret the participation clause more broadly, urging them to take into consideration cases which have interpreted Title VII’s anti-retaliation provision broadly and to give deference to the EEOC, which also interprets the provision broadly.

I. THE ANTI-RETALIATION PROVISION

The anti-retaliation provision of Title VII of the Civil Rights Act of 1964 prohibits retaliation by an employer against an employee who has been involved in protected activity.²⁰ Protected activity consists of (1) opposing a practice that the various discrimination statutes have made illegal, or (2) “filing a charge, testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing under the applicable statute.”²¹

¹⁷ *Id.*

¹⁸ See *infra* Part II for cases illustrating this interpretation. Courts have held that this phrase refers to Subchapter VI of Chapter 21 of Title 42, which, among other things, explains the procedures and enforcement powers of the EEOC. See generally 42 U.S.C. §§ 2000e–2000e–17 (2012). Therefore, courts have concluded that Congress’s intention was to restrict the participation clause, applying it only to investigations followed by a formal EEOC charge. See *Townsend v. Benjamin Enters., Inc.*, 679 F.3d 41, 49 (2d Cir. 2012); *EEOC v. Total Sys. Servs., Inc.*, 221 F.3d 1171, 1174 (11th Cir. 2000).

¹⁹ 679 F.3d 41 (2d Cir. 2012).

²⁰ U.S. EEOC COMPLIANCE MANUAL § 8-I(A) (1998) [hereinafter EEOC Manual], available at <http://eeoc.gov/policy/docs/retal.pdf>.

²¹ *Id.*

A. *The “Opposition” Clause*

An employee who opposes an employer's action that is made illegal by the various discrimination statutes is engaged in protected activity.²² The statute's protection applies to an employee who has made an explicit or an implicit communication to his employer that he believes its actions are discriminatory and in violation of the discrimination statutes.²³ The statute's enforcing agency, the EEOC, has provided examples of what constitutes opposition: (1) a threat to file a charge that alleges discrimination; (2) a complaint, formal or otherwise, about discrimination; and (3) a refusal to obey orders for the belief that they are discriminatory.²⁴

The opposition clause has two key limitations, which narrow its coverage. The first limitation applies to the manner by which an employee may oppose alleged discrimination, allowing only for “reasonable” opposition.²⁵ The second limitation of this clause is that employees must base their opposition on a “reasonable and good faith belief” that the employer's practices were unlawful.²⁶ These limitations become significant in advocating for a broader interpretation of the participation clause, since employees may find themselves without redress for an employer's retaliatory actions if they are unable to bring a claim under the opposition clause.²⁷

B. *The “Participation” Clause*

The participation clause does not have the same limitations of reasonableness and good faith that are included in the opposition clause. Therefore, even if the original allegations were not valid or reasonable, an employee may still be protected by the

²² *Id.*

²³ *Id.* § 8-II(B)(1).

²⁴ *Id.* § 8-II(B)(2).

²⁵ *Id.* § 8-II(B)(3)(a). While courts have cited public criticism of an employer and peaceful picketing as reasonable methods of opposition, they have refused to recognize excessive actions—such as the searching and copying of confidential materials, the badgering of co-employees to get them to testify in support, or any illegal activity—as reasonable. See *O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 763 (9th Cir. 1996); *Sumner v. U.S. Postal Serv.*, 899 F.2d 203, 209 (2d Cir. 1990); *Jackson v. St. Joseph State Hosp.*, 840 F.2d 1387, 1389–90 (8th Cir. 1988).

²⁶ EEOC Manual, *supra* note 20, § 8-II(B)(3)(b)(8–8).

²⁷ See *infra* Part III.

participation clause.²⁸ As it reads in pertinent part, this clause protects an employee from discriminatory retaliation if “he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.”²⁹ Despite the broader reach of this clause as compared to the opposition clause, courts have interpreted “under this subchapter” narrowly to apply only to those employees who have filed a claim with the EEOC.³⁰ The unfair effect of such an interpretation is that employees who have participated in internal investigations, which are not otherwise linked to formal EEOC charges, are left without redress under the participation clause.³¹ Not only does this narrow interpretation unnecessarily limit an employee’s options for redress, it also runs afoul of the intent of the statute.³²

While there is not much evidence of Congress’s intent as it relates specifically to the anti-retaliation provision, courts have consistently held that the goal of this legislation is to prevent employers from interfering with employees who are seeking to oppose or remedy discrimination.³³ From these cases, it becomes clear that Congress’s main concern was to ensure an “increased

²⁸ See EEOC Manual, *supra* note 20, § 8-II(C)(2)(8–9). This distinction is important because an employer that retaliates against an employee will usually not be saved under the participation clause by claiming that the employee lied or otherwise acted unreasonably or in bad faith. See, e.g., *Wyatt v. City of Boston*, 35 F.3d 13, 15 (1st Cir. 1994).

²⁹ Civil Rights Act of 1964 § 704(a).

³⁰ See *supra* note 4.

³¹ See, e.g., *Townsend v. Benjamin Enters. Inc.*, 679 F.3d 41, 49 (2d Cir. 2012).

³² In her dissent in *Clover v. Total System Services, Inc.*, Justice Henderson stated:

To hold . . . that an employee is protected if she makes a statement to an investigator for the government agency but is not protected if she makes the identical statement, concerning the same allegation of discrimination, to her employer’s representative unduly weakens the assurances afforded by the anti-retaliation provision.

Clover v. Total Sys. Servs., Inc., 157 F.3d 824, 832 (11th Cir. 1998) (Henderson, J., dissenting), *vacated*, 172 F.3d 795 (11th Cir. 1999.), *superseded on reh’g*, 176 F.3d 1346 (11th Cir. 1999).

³³ *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 54 (2006) (emphasizing that the anti-retaliation provision seeks to prevent employers from “interfering with an employee’s efforts to secure or advance enforcement of the Act’s basic guarantees”); see also *Robinson v. Shell Oil Co.*, 519 U.S. 337, 338 (1997) (highlighting that § 704(a)’s main purpose is to “maintain[] unfettered access to Title VII’s remedial mechanisms”).

statutory protection for employees”³⁴ and to prevent harm to those employees who wish to take advantage of the protections guaranteed to them under the various anti-discrimination statutes.³⁵ Therefore, there can be little question that Title VII’s primary objective is the prevention and deterrence of harm.³⁶ Nevertheless, despite the courts’ acknowledgment of the statute’s intent, some courts seem to have disregarded it when deciding to limit the application of Title VII’s participation clause to only those employees who are involved in a formal EEOC claim.

II. COURTS: INTERNAL INVESTIGATIONS ARE NOT “UNDER THIS SUBCHAPTER”

Relying on a narrow interpretation of Title VII, the following line of cases illustrate the unwillingness of the courts to grant plaintiffs redress under the participation clause when they have participated in an employer’s internal investigation of alleged discrimination.

A. Vasconcelos v. Meese

In *Vasconcelos v. Meese*,³⁷ the plaintiff, Priscilla Vasconcelos, worked with the U.S. Marshal’s Service.³⁸ She filed a complaint with both the EEOC and the Marshal’s Service’s Internal Affairs Office against her employer for sexual harassment.³⁹ However, her EEOC complaint did not get resolved within the requisite time, leaving her with only her employer’s internal investigation.⁴⁰ Accused of lying during the investigation, Vasconcelos was fired, and her discharge was upheld on an internal appeal to the Merit Systems Protection Board.⁴¹ Vasconcelos resorted to the courts, alleging, among other things,

³⁴ Patricia A. Moore, *Parting Is Such Sweet Sorrow: The Application of Title VII to Post-Employment Retaliation*, 62 FORDHAM L. REV. 205, 214 (1993).

³⁵ Oren R. Griffin, *Avoiding Retaliation in the Higher Education Workplace in the Aftermath of Burlington N. & Santa Fe Ry. Co. v. White*, 227 EDUC. L. REP. 525, 526 (2008).

³⁶ Brief for the U.S. EEOC as Amicus Curiae Supporting Appellant Grey-Allen at 18, *Townsend v. Benjamin Enters. Inc.*, 679 F.3d 41 (2d Cir. 2012) (No. 09-0197-cv(L)) [hereinafter EEOC Amicus Brief].

³⁷ 907 F.2d 111 (9th Cir. 1990).

³⁸ *Id.* at 112.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

that she had been fired in retaliation for the charges she made against her employer but found no remedy in the district or circuit courts.⁴²

While she argued that she should be protected under Title VII's participation clause regardless of whether or not she lied during the internal investigation, the court held that the statute did not even apply to her.⁴³ Looking at the statute's language, the court rationalized that the protection of the participation clause was limited to employees involved in a formal EEOC proceeding and that any "charges made outside of that context are made at the accuser's peril."⁴⁴ It is hard to believe that such a holding can be in line with the statute's intent to prevent or deter harm, as it puts employees in quite a predicament—should they endure the discrimination or risk reporting it at their own "peril," knowing that if they choose the latter, they may have no other recourse?⁴⁵ This case is a classic example of the danger of courts limiting the participation clause's application.

B. EEOC v. Total System Services Inc.

In *EEOC v. Total System Services Inc.*,⁴⁶ the plaintiff, Lindy Warren, was fired from her job for allegedly lying during an internal investigation of sexual harassment.⁴⁷ After complaining to the EEOC about her termination, the EEOC filed suit on her behalf, alleging that she was unlawfully terminated in retaliation for complaining about her supervisor's sexual harassment during an internal investigation, which constituted participating in protected activity under Title VII's participation clause.⁴⁸ The district court granted the defendant's motion for summary judgment, holding that the EEOC did not prove that the plaintiff had engaged in protected activity; the circuit court affirmed.⁴⁹

⁴² *Id.*

⁴³ *Id.* at 113.

⁴⁴ *Id.* The court did not express any opinion as to whether an employee who lies during an EEOC proceeding would be protected by the participation clause.

⁴⁵ See *supra* Part I.B for a discussion on the legislative intent behind the anti-retaliation provision of Title VII.

⁴⁶ 221 F.3d 1171 (11th Cir. 2000).

⁴⁷ *Id.* at 1173.

⁴⁸ *Id.*

⁴⁹ *Id.* at 1173–74.

Despite the EEOC itself arguing that the participation clause “must encompass taking part in an employer’s internal investigation,” the court refused to recognize its argument.⁵⁰ Instead, the court concluded that the participation clause only protects those involved in activities that occur after a claim has been filed with the EEOC and that it does not protect those employees who are involved in internal investigations.⁵¹ In fact, the court disturbingly noted that it did not believe that Congress intended to “protect absolutely every sexual harassment complaint made to an employer—no matter how informal or knowingly false—as a protected activity under the participation clause.”⁵² It is hard to imagine that Congress did not intend to protect employees who complain of discrimination during an internal investigation when the ultimate effect is perpetuation of discriminatory actions and unavailability of redress.⁵³

C. *Correa v. Mana Products, Inc.*

In *Correa v. Mana Products, Inc.*,⁵⁴ the plaintiff was the Human Resources/Payroll Administrator at Mana Products.⁵⁵ During her time there, two Mana employees filed complaints against the company with the New York Human Rights Division, alleging discrimination on the basis of national origin.⁵⁶ According to the plaintiff, after she investigated and documented the incidents, Mana’s Executive Vice President told her that it was the first time that Mana was the subject of such a complaint⁵⁷ and that she was not satisfied with how the plaintiff

⁵⁰ *Id.* at 1174 & n.3.

⁵¹ *Id.*

⁵² *Id.*

⁵³ This Note takes no position as to whether an employer should have to accommodate employees who make false accusations or lie during an internal investigation. However, an employer should not, as this court essentially holds, be able to use this as a pretext to circumvent the clear protections of the statute by making blanket restrictions against employees merely because they are not involved in formal EEOC proceedings. It is worth noting, however, that the EEOC has said that permitting an employer “to retaliate against a charging party based on its unilateral determination that the charge was unreasonable or otherwise unjustified would chill the rights of all individuals protected by the anti-discrimination statutes.” EEOC Manual, *supra* note 20, § 8-II(C)(2).

⁵⁴ 550 F. Supp. 2d 319 (E.D.N.Y. 2008).

⁵⁵ *Id.* at 322–23.

⁵⁶ *Id.* at 323

⁵⁷ Mana later admitted that there had been several employees who had previously filed charges against the corporation with the National Labor Relations

handled the situation.⁵⁸ The plaintiff was told that her write-ups were “too editorial” and that they would cause a problem “if they fell into the wrong hands.”⁵⁹ The plaintiff was subsequently fired.⁶⁰ She sued alleging that she had been retaliated against in violation of Title VII.⁶¹ In granting summary judgment for the defendants, despite acknowledging that the Second Circuit had previously “recognized the explicit language of § 704(a)’s participation clause as being expansive and containing seemingly no limitations,”⁶² the district court held that the language of section 704(a) only protected participation under a proceeding that was connected to a formal investigation.⁶³

D. Hatmaker v. Memorial Medical Center

In *Hatmaker v. Memorial Medical Center*,⁶⁴ the plaintiff, Janet Hatmaker, was a part-time Chaplain at Memorial Medical Center Hospital.⁶⁵ When the director of the hospital died, one of the reverends, Greg Stafford, was appointed as acting director while the hospital searched for a permanent replacement.⁶⁶ In searching for a replacement, the Chief Human Resources Officer, Forrest Hester, asked staff members for their opinions about Stafford.⁶⁷ In response to Hester’s solicitation, Hatmaker sent an e-mail voicing concern about Stafford’s presentation of himself in public and his discriminatory treatment of women, expressing her belief that he would not be qualified for the position.⁶⁸

After receiving this email, Hester started an internal investigation to rule out discrimination.⁶⁹ At the end of the investigation, Hester concluded that there was no discrimination and informed Hatmaker that she should resign if she was

Board, claiming that they had been discriminated against in retaliation for their unionizing efforts. *Id.* at 323 n.2. Mana also admitted that the corporation had been previously sued by employees. *Id.*

⁵⁸ *Id.* at 323.

⁵⁹ *Id.* at 326 (internal quotation marks omitted).

⁶⁰ *Id.*

⁶¹ *Id.* at 322.

⁶² *Id.* at 328 (citing *Deravin v. Kerik*, 335 F.3d 195, 203 (2d Cir. 2003)).

⁶³ *Id.* at 329.

⁶⁴ 619 F.3d 741 (7th Cir. 2010).

⁶⁵ *Id.* at 742.

⁶⁶ *Id.* at 743.

⁶⁷ *Id.*

⁶⁸ *Id.* at 743–44.

⁶⁹ *Id.* at 744.

uncomfortable working with Stafford; she was subsequently suspended for thirty days.⁷⁰ At the end of her suspension, Hatmaker was fired “for the comfort of all concerned.”⁷¹ She sued the hospital alleging that she was fired in retaliation for participating in an internal investigation.⁷² The district court granted summary judgment for the hospital, and the circuit court affirmed.⁷³

In its decision, the circuit court emphasized that Hatmaker’s communications were connected to a “purely internal investigation of possible sex discrimination,”⁷⁴ and that an employer’s investigation was “distinct from one by an official body authorized to enforce Title VII.”⁷⁵ In its rationale, the court incorrectly emphasized the validity of the plaintiff’s claim, concluding that her claim did not even have a “valid core.”⁷⁶ Just as in *EEOC v. Total System Services Inc.*, the court misplaced its analysis on the validity of the claim.⁷⁷

This is a dangerous precedent, which blurs the distinction between two separate arguments. Whether an employee should be penalized for making a false claim is a separate issue from whether an employee involved in an internal investigation is protected under Title VII from an employer’s retaliation.⁷⁸ Employees with valid claims of discrimination should be able to seek a remedy when they are unjustly terminated from their positions or otherwise suffer adverse consequences due to their involvement with an internal investigation. It is unfair to deny these employees the protection of the statute merely because there are others who may make false claims. Using this logic, should *all* employees involved in *formal* EEOC proceedings be left without the protection of Title VII’s participation clause because there are some who may file false claims? No court would be able to hold such because it would be a clear

⁷⁰ *Id.* at 745.

⁷¹ *Id.* (internal quotation marks omitted).

⁷² *Id.* at 743.

⁷³ *Id.*

⁷⁴ *Id.* at 745.

⁷⁵ *Id.* at 747.

⁷⁶ *See id.* at 746.

⁷⁷ 221 F.3d 1171, 1175 (11th Cir. 2000) (holding that the protection of the participation clause did not extend to an employee who has lied during internal investigations); *see also supra* notes 46–53 and accompanying text.

⁷⁸ *See supra* note 53 and accompanying text.

contradiction of the statute itself and its legislative intent. Why then are courts so willing to merge these two distinct issues for internal investigations?

E. Townsend v. Benjamin Enterprises, Inc.

The most recent, and perhaps the most disturbing case that follows this flawed line of reasoning, is *Townsend v. Benjamin Enterprises, Inc.*⁷⁹ In ruling on an issue of first impression, the Second Circuit upheld the district court's dismissal of the plaintiff's claim, holding that she did not engage in protected activity under Title VII's participation clause when she participated in an employer's internal investigation that was not connected to a formal charge with the EEOC.⁸⁰

Co-plaintiff Martha Townsend approached co-plaintiff Karlean Grey-Allen, who was serving as the Human Resources Director of Benjamin Enterprises Incorporated ("BEI").⁸¹ Townsend alleged that Hugh Benjamin, the Vice President and husband of the President of BEI, had sexually harassed her on numerous occasions.⁸² In response, Grey-Allen called the New York State Division of Human Rights, which suggested that she separate Hugh Benjamin from Townsend and interview him to see what happened.⁸³ Operating under this advice, Grey-Allen asked Hugh Benjamin to work from home.⁸⁴ During her efforts to investigate the matter, Grey-Allen also sought the advice of Dennis Barnett, a management consultant retained by BEI, who she considered a mentor.⁸⁵ When BEI's president, Michelle Benjamin, found out about this conversation, she fired Grey-Allen the same day, alleging that Grey-Allen had breached confidentiality when she spoke with Barnett.⁸⁶ Subsequently, Michelle Benjamin took over the investigation, allowed Hugh Benjamin to return back to work, and concluded that the claims were unfounded.⁸⁷

⁷⁹ 679 F.3d 41 (2d Cir. 2012).

⁸⁰ *Id.* at 44–45.

⁸¹ *Id.* at 46.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

Focusing on the language of the statute in making its decision, the Second Circuit held that the participation clause only referred to proceedings “under this subchapter,” which meant specifically under Subchapter VI of Chapter 21 of Title 42.⁸⁸ The court explained that this Subchapter was primarily devoted to describing the EEOC’s procedures and enforcement powers, ultimately concluding that the statute refers only to the investigations that are connected to a formal EEOC charge and not to informal internal investigations.⁸⁹

In making its decision, the court refused to give deference to the EEOC’s interpretation of the statute as submitted in an amicus brief, which urged the court to include internal investigations under its reading of the statute.⁹⁰ The court also dismissed Grey-Allen’s argument that internal investigations should be considered protected activity because they are essential to the aim and effectiveness of Title VII.⁹¹ Instead, the court was concerned only with what it interpreted to be the “plain language of the participation clause,” dismissing an analysis that took the legislative intent of the statute into consideration.⁹² In so doing, the court’s decision ultimately ran afoul of the intent of Title VII, leaving a plaintiff who was fired under the pretext of a breach of confidentiality without a remedy for her employer’s retaliation.⁹³

III. WHY PARTICIPATION IN AN INTERNAL INVESTIGATION SHOULD BE PROTECTED ACTIVITY

A. *Granting Employees Protection Under the Participation Clause Encourages Cooperation in Internal Investigations, Furthering the Goals of Title VII*

As demonstrated by the preceding cases, plaintiffs who are retaliated against for participating in internal investigations are

⁸⁸ *Id.* at 49 (internal quotation marks omitted).

⁸⁹ *Id.*

⁹⁰ *Id.* at 50 n.10. The EEOC itself includes “[c]ooperating with an internal investigation of alleged discriminatory practices” as part of the list of protected activity under the participation clause. See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, *Facts About Retaliation*, <http://www.eeoc.gov/laws/types/facts-retal.cfm> (last visited Apr. 16, 2015).

⁹¹ *Townsend*, 679 F.3d at 50–51.

⁹² *Id.*

⁹³ See *supra* Part I.B for a discussion on the legislative intent behind the anti-retaliation provision of Title VII.

often left without a remedy, while employers continue retaliating against their employees without even as much as a reprimand. Aware of the possibility that their employment may be negatively impacted—or even terminated—for participating in their employer's investigation, employees may be hesitant, and rightfully so, to come forward and speak out against discrimination.⁹⁴

Employees, aware that they will not be protected under the participation clause for being involved in an internal investigation that is not connected with a formal EEOC claim, will be reluctant to cooperate.⁹⁵ This “[f]ear of retaliation is the leading reason why people stay silent instead of voicing their concerns about bias and discrimination.”⁹⁶ Allowing anti-retaliatory protection under the participation clause for internal investigations, as is allowed under the opposition clause, would not only alleviate these fears but would also “promote employees’ cooperation when their employers investigate discrimination allegations.”⁹⁷

When employees are reluctant to come forward with allegations of discrimination or to cooperate in internal investigations due to fear of retaliation, this runs afoul of the purpose of Title VII to prevent and remedy discrimination.⁹⁸ The purpose of Title VII is furthered mostly through the willingness of employees to speak up against discriminatory practices.⁹⁹ Therefore, voluntary participation is key to the effective enforcement of Title VII.¹⁰⁰ Leaving an employee without remedy

⁹⁴ See Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 20 (2005).

⁹⁵ The EEOC has noted that those charged with investigating claims will not investigate them if they believe they may be retaliated against, and that victims of discrimination will likely not complain when they in turn realize that their complaints will go uninvestigated. See EEOC Amicus Brief, *supra* note 36, at 13.

⁹⁶ Brake, *supra* note 94.

⁹⁷ Megan E. Mowrey, *Discriminatory Retaliation: Title VII Protection for the Cooperating Employee*, 29 PACE L. REV. 689, 691 (2009).

⁹⁸ See *supra* Part I.B for a discussion of Congress's intent. See also Alex B. Long, *The Troublemaker's Friend: Retaliation Against Third Parties and the Right of Association in the Workplace*, 59 FLA. L. REV. 931, 935 (2007) (arguing that limiting the protection of the participation clause “diminishes the ability of Title VII to carry out its mission of combating workplace discrimination”).

⁹⁹ See EEOC Manual, *supra* note 20.

¹⁰⁰ See *id.*; see also Brake, *supra* note 94 (“To a large extent, the effectiveness and very legitimacy of discrimination law turns on people's ability to raise concerns about discrimination without fear of retaliation.”); Long, *supra* note 98, at 936 (Title VII's “protection from retaliation would be an empty promise without the ability and

for an employer's discriminatory retaliation "would have a chilling effect upon the willingness of individuals to speak out against employment discrimination or to participate in the EEOC's administrative process or other employment discrimination proceedings."¹⁰¹ Many acts of discrimination would be left unreported, and those discriminated against would have a hard time finding witnesses that would be willing to help them in purely internal investigations.

Not only does participation in internal investigations ultimately promote Title VII's purpose of preventing and remedying discrimination, it also promotes Congress's "intention to promote conciliation rather than litigation in the Title VII context."¹⁰² When employers establish their own internal grievance procedures and investigations, they can potentially "limit liability, provide more informal, efficient means of conciliation, and eliminate costly and time-consuming litigation,"¹⁰³ in effect, furthering Congress's intention.

A. *The Alternative Is Too Narrow, Providing Limited Protection*

Not only does a lack of protection under the participation clause for employees involved in internal investigations result in some instances of discrimination to go unreported and, ultimately, unremedied, but it also leaves some employees with limited recourse. Despite its recent expansive interpretation,¹⁰⁴ the opposition clause is nevertheless limited in scope and "does not protect employees sufficiently."¹⁰⁵ In order to utilize the protection of the opposition clause, employees must meet two requirements: (1) the manner used to oppose the alleged

willingness of coworkers to assist . . . without fear of employer reprisal"); Mowrey, *supra* note 97, at 693 ("Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses." (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006))).

¹⁰¹ See EEOC Manual, *supra* note 20.

¹⁰² *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764 (1998).

¹⁰³ Dorothy E. Larkin, *Participation Anxiety: Should Title VII's Participation Clause Protect Employees Participating in Internal Investigations*, 33 GA. L. REV. 1181, 1181 n.2 (1999).

¹⁰⁴ See *Crawford v. Metro. Gov't of Nashville & Davidson Cnty., Tenn.*, 555 U.S. 271, 271 (2009) (holding that the opposition clause protected an employee who did not *actively* oppose her employer's discriminatory action, but rather merely answered questions during her employer's investigation).

¹⁰⁵ Larkin, *supra* note 103, at 1217; see also *supra* notes 25–27 and accompanying text.

discrimination must be “reasonable”¹⁰⁶ and (2) the employee must have a “reasonable and good faith belief that the opposed practices were unlawful.”¹⁰⁷ In other words, the courts must weigh the public’s interest and the employee’s right to oppose discrimination against the employer’s need for work productivity and stability to decide whether or not the employee’s manner of opposition was reasonable and whether the employee reasonably and truthfully believed that the employer’s actions were illegal.¹⁰⁸

These two requirements will often preclude plaintiffs from successfully asserting the protection of the opposition clause.¹⁰⁹ With some employees unable to find a remedy under the opposition clause and unable to turn to the participation clause, they find themselves in an uncomfortable situation; do they refuse to speak out against discrimination by refusing to participate in internal investigations in whatever capacity, or do they speak out and possibly run the risk of losing their job?

What courts seemingly fail to realize is that by taking away the availability of the participation clause in cases involving only internal investigations, they are inadvertently rewarding those employers who are quick to fire employees. Many courts seem to acknowledge that if only employees had first filed a claim with the EEOC before participating in an internal investigation, they would have been protected under the participation clause.¹¹⁰ In essence, these courts are rewarding employers for their quick termination of employees, while punishing the employee who decides to seek an internal remedy prior to going to the EEOC.¹¹¹

¹⁰⁶ EEOC Manual, *supra* note 20, § 8-II(B)(3)(a).

¹⁰⁷ *Id.* § 8-II(B)(3)(b).

¹⁰⁸ *Id.* § 8-II(B)(3)(a); *see also* *Hatmaker v. Mem’l Med. Ctr.*, 619 F.3d 741, 747 (7th Cir. 2010) (“[O]pposition, to be protected by the statute, must be based on a good-faith (that is, honest) and reasonable belief that it is opposition to a statutory violation.”).

¹⁰⁹ *See, e.g.,* *Townsend v. Benjamin Enters., Inc.*, 679 F.3d 41, 47–48 & n.4 (2d Cir. 2012) (finding that the plaintiff did not have a good faith belief that the employee was sexually harassed, and that she was just doing her job by conducting an internal investigation); *Hatmaker*, 619 F.3d at 747–48 (holding that the plaintiff failed to meet the good faith requirement); *EEOC v. Total Sys. Servs., Inc.*, 221 F.3d 1171, 1175 (11th Cir. 2000) (denying the plaintiff relief under the opposition clause); *Correa v. Mana Prods., Inc.*, 550 F. Supp. 2d 319, 328 (E.D.N.Y. 2008) (stating that the plaintiff failed to show evidence of specific acts opposing the employer’s actions).

¹¹⁰ *See supra* note 4.

¹¹¹ *See Long, supra* note 98, at 957 (arguing that even though an employer can foresee that a formal EEOC charge will follow soon after an internal complaint is

Courts should take into consideration that the participation clause does not have the same strict requirements of the opposition clause¹¹² and that it may be the employee's only alternative in opposing an employer's retaliatory actions; therefore, courts should not deny employees access to its protection merely because they have not filed formal EEOC charges.

IV. INTERPRETING THE CLAUSE BROADLY TO EXTEND PROTECTION

To ensure that employees receive proper protection under Title VII and that courts stay true to the purpose of the statute, courts should interpret the participation clause broadly. Courts can accomplish this broad interpretation regardless of whether they apply the "plain meaning" or "purposive" approach to statutory interpretation.

A. Plain Meaning Approach

Courts that use the plain meaning approach base their interpretations on the literal meaning of a statute's text.¹¹³ Under this approach, the court is able to analyze the statute as a whole, as well as "consider[] . . . dictionaries and grammar books . . . analogous provisions in other statutes, canons of construction, and the common sense God gave us."¹¹⁴ The Second Circuit in *Townsend v. Benjamin Enterprises, Inc.* claimed that it used this approach in reaching its decision that an "investigation . . . under this subchapter" banned employees from recovering under the participation clause when they were *merely* involved in internal investigations.¹¹⁵ However, in reaching its decision, the court relied only on the fact that other parts of the subchapter described the EEOC and its procedures.¹¹⁶ The Court

filed, it "would theoretically be immune from a future retaliation claim" if it takes action against the employee before such formal charges).

¹¹² See *supra* note 28 and accompanying text.

¹¹³ Larkin, *supra* note 103, at 1207.

¹¹⁴ Natasha Dasani, *Class Actions and the Interpretation of Monetary Damages Under Federal Rule of Civil Procedure 23(b)(2)*, 75 *FORDHAM L. REV.* 165, 177–78 (2006) (alteration in original) (footnotes omitted) (internal quotation marks omitted).

¹¹⁵ 679 F.3d at 49 ("[T]he plain language of the participation clause does not include participation in an internal employer investigation unrelated to a formal EEOC charge.").

¹¹⁶ *Id.*

relied on precedent and persuasive authority, which similarly held that the plain meaning approach did not support the plaintiff's claim.¹¹⁷ The Court failed to consider the other tools available to it for its analysis. For example, the EEOC provided the Court with dictionary meanings of the word "under" that could have changed its analysis.¹¹⁸ Substituting the word "under" for one of those definitions, the statute in pertinent part would have read: "It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has . . . participated in any manner in an investigation, proceeding, or hearing [subject to the authority, control, direction, or guidance of¹¹⁹] this subchapter."¹²⁰ Reading the statute in this way, courts using the plain meaning approach would be able to conclude that Congress intended employee participation in internal investigations to be protected regardless of whether they were connected to a formal EEOC charge.

Courts using the plain meaning approach can also use similar provisions from other statutes to help them interpret the plain meaning of the statute in question.¹²¹ In the case *Hechinger Investment Company of Delaware, Inc. v. Hechinger Liquidation Trust*,¹²² looking at the plain meaning of the word "under" as it related to a federal tax provision, then-Judge Alito stated that "[w]hen an action is said to be taken 'under' a provision of law or a document having legal effect, what is generally meant is that the action is 'authorized' by the provision of law or legal document."¹²³ A similar conclusion was reached by the Supreme Court in *Ardestani v. INS*.¹²⁴ There, after referring to several dictionaries and six other cases from the United States

¹¹⁷ *Id.* at 49 & n.8.

¹¹⁸ EEOC Amicus Brief, *supra* note 36, at 15 ("required by: in accordance with: bound by" (internal quotation marks omitted) (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2487 (Merriam Webster Inc., 1986)); *see also infra* note 119 and accompanying text.

¹¹⁹ *Id.* (citing LESLEY BROWN, NEW SHORTER OXFORD ENGLISH DICTIONARY 3469 (Oxford University Press et al., 1993)).

¹²⁰ Pub. L. No. 88-352, § 704 (codified as amended at 42 U.S.C. § 2000e-3(a) (2012)).

¹²¹ *See supra* note 114 and accompanying text.

¹²² 335 F.3d 243 (3d Cir. 2003).

¹²³ *Id.* at 252 ("Thus, if a claim is asserted 'under' 42 U.S.C. § 1983, Section 1983 provides the authority for the claim. If a motion is made 'under' Fed. R. Civ. P. 12(b)(6), that rule provides the authority for the motion. If benefits are paid 'under' a pension or welfare plan, the payments are authorized by the plan.").

¹²⁴ 502 U.S. 129 (1991).

Courts of Appeal, the Supreme Court reasoned that the plain meaning of “under” was “subject to” or “governed by.”¹²⁵ Therefore, drawing upon these cases in the context of Title VII, courts could easily interpret “investigation under this subchapter” to mean investigations authorized by Title VII, which would include internal employer investigations that try to remedy and avoid discrimination made illegal by the statute.¹²⁶

Looking at the statute as a whole to further understand the plain meaning of “investigation under this subchapter,”¹²⁷ courts will see that when it wanted to, Congress has clearly stated its intention that the EEOC conduct investigations.¹²⁸ If Congress intended to limit the participation clause to only investigations conducted by the EEOC, it could have expressly done so, as it has in other parts of Title VII.¹²⁹ In a statute that elsewhere specifically makes reference to EEOC investigations, the lack of this specific reference in other parts is likely intentional, leaving room for courts to interpret it broadly to include internal employer investigations. Therefore, courts using the plain meaning approach to statutory interpretation should have no problem extending the protection of the participation clause to employees who have faced retaliatory action in response to their participation in an employer’s internal investigation.

B. *Purposive Approach*

While some courts may still be hesitant to conclude that the plain meaning approach can support an interpretation of Title VII that protects employees involved in internal investigations, there can be no doubt that a purposive approach, which takes

¹²⁵ *Id.* at 135 (internal quotation marks omitted).

¹²⁶ *See* *Clover v. Total Sys. Servs., Inc.*, 157 F.3d 824, 832 (11th Cir. 1998) (Henderson, J., dissenting), *vacated*, 172 F.3d 795 (11th Cir. 1999.), *superseded on reh’g*, 176 F.3d 1346 (11th Cir. 1999).

In my view, it is equally reasonable to read the statutory language to mean any investigation into an employment practice rendered illegal by Title VII. Thus, an employee would be protected by the participation clause once an investigation was begun into conduct which allegedly violated the statute even if a formal EEOC complaint was not in existence at that time.

Id.

¹²⁷ Looking at the statute in its totality is another tool available to a court when using the plain meaning approach. *See* Dasani, *supra* note 114.

¹²⁸ EEOC Amicus Brief, *supra* note 36, at 14–15 (making reference to various instances when Congress has specifically authorized investigations by the EEOC).

¹²⁹ *Id.*

into consideration the purpose and intent of Title VII, would lead to a broader interpretation of the anti-retaliation provision that would comfortably lead to this conclusion.

Rather than being solely concerned with the exact wording of the statute, the purposive approach to statutory interpretation also takes into consideration the legislative intent of the statute.¹³⁰ In applying this approach, courts are able to "remain faithful to the purpose and intent of the statute."¹³¹ This approach is especially important in the context of Title VII's anti-retaliation provision to ensure the adequate protection of employees who speak out against discrimination and participate in investigations that help uncover and remedy illegal acts of discrimination in the workplace.

C. *Courts Have Interpreted the Anti-Retaliation Provision of Title VII Broadly*

Even though the legislative history of Title VII's retaliatory provision is limited, it is likely that Congress intended the provision to be ambiguous, leaving room for the courts to interpret it liberally.¹³² Referring to the legislative intent of Title VII as a whole,¹³³ courts have consistently acknowledged that a broad interpretation is necessary to remain true to the statute's purpose; some have even expressly rejected a strict reading of the statute.¹³⁴ Following this reasoning, courts should interpret the

¹³⁰ See Dasani, *supra* note 114, at 180.

¹³¹ *Id.* at 181.

¹³² See RICHARD H. POFF & WILLIAM C. CRAMER, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, LEGISLATIVE HISTORY OF TITLES VII AND XI OF THE CIVIL RIGHTS ACT OF 1964, 2112-13. Though clearly hostile to Congress's ambiguous drafting of the anti-retaliation provision of Title VII, the report nevertheless acknowledges that the language is ambiguous and that courts will likely interpret it broadly:

While we are unprepared to say that the ambiguity is deliberate and calculated, it is difficult to believe that it is altogether accidental. Statutory ambiguities require judicial interpretation. In light of the trend court decisions have taken in recent years, it is not unrealistic to predict that the interpretations the courts would make would be of the broadest possible scope.

Id. at 2112.

¹³³ For a discussion on Title VII's statutory intent, see *supra* Part I.B.

¹³⁴ See *Culpepper v. Reynolds Metals Co.*, 421 F.2d 888, 891 (5th Cir. 1970) ("It is . . . the duty of the courts to make sure that [Title VII] works, and the intent of Congress is not hampered by a combination of a strict construction of the statute and a battle with semantics."); see also *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 64 (2006) (extending the protection of Title VII by refusing to limit the

participation clause broadly to include employees who suffer retaliation in response to their participation in internal investigations. In fact, the purpose of Title VII—to prevent employers from interfering with employees who are seeking to oppose or remedy discrimination—demands this interpretation.¹³⁵

The Supreme Court's holdings in several recent cases also lend support to a broad reading of the participation clause. In *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*,¹³⁶ the Supreme Court had no problem holding that the opposition clause of Title VII protected an employee fired in retaliation for answering questions during an employer's internal investigation.¹³⁷ The Court reversed the Sixth Circuit's ruling that the opposition clause did not protect an employee who did not herself initiate a complaint against an employer, holding that to find otherwise would be inconsistent with the statute's purpose.¹³⁸

The Supreme Court again expanded the protection of Title VII in *Thompson v. North American Stainless, LP*.¹³⁹ Delivering the opinion of the Court, Justice Scalia acknowledged that the plain meaning of the anti-retaliation provision and the provision's purpose support a broad interpretation.¹⁴⁰ In so acknowledging, the Court held that a third party could bring a retaliation claim under Title VII.¹⁴¹ The plaintiff in this case was fired from his job after his fiancée, who worked at the same

harm that the statute forbids to only those actions that are related to employment or occur at the workplace, reasoning that “such a limited construction” would not be consistent with the statute’s purpose); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997) (holding that although Title VII clearly only refers to “employees,” in order to uphold the purpose of Title VII—“[m]aintaining unfettered access to statutory remedial mechanisms”—it must be read to include former employees); *Deravin v. Kerik*, 335 F.3d 195, 203 (2d Cir. 2003) (recognizing that the “the explicit language of § 704(a)’s participation clause is expansive and seemingly contains no limitations”); *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.”) (quoting *Pettway v. Am. Cast Iron Pipe Co.*, 411 F.2d 998, 1006 n.18 (5th Cir. 1969)).

¹³⁵ See *supra* notes 33–36 and accompanying text (discussing Title VII’s purpose).

¹³⁶ 555 U.S. 271 (2009).

¹³⁷ *Id.* at 277–78.

¹³⁸ See *id.* at 279.

¹³⁹ 131 S. Ct. 863 (2011).

¹⁴⁰ See *id.* at 868.

¹⁴¹ See *id.*

company, filed a charge of sex discrimination against their employer.¹⁴² The Court had little difficulty reaching its decision that the plaintiff was retaliated against for his fiancée's actions and was therefore protected by the anti-retaliation provision of Title VII, despite his status as a third party.¹⁴³

Courts presented with cases under Title VII's participation clause should follow the Supreme Court's example of interpreting the statute broadly and promoting the legislative purpose and intent of the statute. Courts should break free from the disturbing line of cases that has continued to deny employees relief when they have been *merely* cooperating in their employers' internal investigations. It is crucial to Title VII's success in avoiding and remedying workplace discrimination that the participation clause be interpreted broadly.

D. The EEOC Supports a Broad Interpretation of the Anti-Retaliation Provision of Title VII

The EEOC, the agency that has been given the task by Congress to interpret, administer, and enforce Title VII, is supportive of a broad interpretation.¹⁴⁴ While courts are not bound by the interpretations of the EEOC, they have consistently looked to it for guidance in the Title VII context.¹⁴⁵ In reaching its decision in *Burlington Northern & Santa Fe Railway Co.*,¹⁴⁶ the Supreme Court referred to the EEOC's Manual for guidance in broadly interpreting the anti-retaliation provision.¹⁴⁷ In

¹⁴² *Id.* at 867.

¹⁴³ *See id.* at 870.

¹⁴⁴ EEOC Amicus Brief, *supra* note 36, at 1.

¹⁴⁵ Though not binding, EEOC interpretations should nevertheless be given deference when possible. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) ("We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts, . . . do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."); *see also* *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971) ("The administrative interpretation of the [Civil Rights] Act by the enforcing agency is entitled to great deference."); EEOC Amicus Brief, *supra* note 36, at 22 ("Although the EEOC's interpretation is not controlling, it does reflect a body of experience and informed judgment to which courts and litigants may properly resort for guidance and, as such, is at least entitled to a measure of respect by the Court.") (internal quotation marks omitted) (citing *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 399 (2008)).

¹⁴⁶ 548 U.S. 53 (2006).

¹⁴⁷ *Id.* at 65-66.

Robinson v. Shell Oil Co.,¹⁴⁸ the Supreme Court again agreed with the EEOC's interpretation of the statute, acknowledging that "[t]he EEOC quite persuasively maintains that it would be destructive of this purpose of the antiretaliation provision for an employer to be able to retaliate with impunity against an entire class of acts under Title VII."¹⁴⁹

In the participation clause context, the EEOC expressly includes the involvement in internal investigations of alleged discrimination as a protected activity under the participation clause.¹⁵⁰ Furthermore, in its amicus brief submitted to the Court of Appeals in *Townsend v. Benjamin Enterprises, Inc.*, the EEOC makes clear that in an effort to further the remedial purpose of Title VII, "[f]or more than ten years . . . [it] has interpreted the participation clause to cover internal investigations."¹⁵¹ The court in *Townsend* erred in not giving deference to the EEOC's interpretation of the participation clause. Courts confronted with a similar case should construe the language of the participation clause broadly and give deference to the EEOC's interpretation of the anti-retaliation provision; the purpose of Title VII would be better served if they do.

CONCLUSION

With more and more employees filing claims of employer retaliation with the EEOC, courts should be careful not to narrowly interpret the participation clause of Title VII so as to deny these employees its protections. Courts have acknowledged time and again that Title VII was broadly written and should be interpreted accordingly. Title VII was passed by Congress to ban an employer from taking discriminatory actions against its employees. Congress intended for the statute to prevent and, if necessary, to remedy discrimination.

Specifically, under its anti-retaliation provision, Title VII bans an employer from retaliating against its employees when they oppose its discriminatory actions. This provision is crucial to promoting the protections of Title VII. Without the safeguards

¹⁴⁸ 519 U.S. 337 (1997).

¹⁴⁹ *Id.* at 346.

¹⁵⁰ See *supra* note 90 and accompanying text.

¹⁵¹ EEOC Amicus Brief, *supra* note 36, at 22.

of this provision, employees will hesitate to speak out against discrimination for fear of the consequences, leaving discrimination unremedied and employers unpunished.

Despite its importance, however, courts have limited the protection of the anti-retaliation provision, namely by limiting the scope of the participation clause to apply only to those employees who are involved in formal EEOC proceedings. Courts should understand that this is a dangerous precedent. By narrowly interpreting the participation clause, not only are courts deviating from the purpose of Title VII, they are leaving employees who are already faced with a restrictive opposition clause with limited recourse.

There is no reason why the participation clause should not be interpreted liberally to protect employees who are involved in internal investigations. Both the plain meaning and purposive approaches to statutory interpretation support such an interpretation. Furthermore, the Supreme Court itself has acknowledged that the anti-retaliation provision should be construed liberally and has in fact done just that in its decisions. Courts presented with cases under Title VII's participation clause should follow the Supreme Court's example and interpret the clause broadly, thereby promoting the legislative purpose and intent of the statute and affording employees necessary protections against their employers. Courts need to break free from the disturbing precedent of limiting the scope of the participation clause, which is stifling employee protections and inadvertently rewarding employers for their discriminatory behavior. Only then will the aim of the anti-retaliation provision be promoted.