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## **CLOSING A DISCRIMINATION LOOPHOLE: USING TITLE VII'S ANTI-RETALIATION PROVISION TO PREVENT EMPLOYERS FROM REQUIRING UNLAWFUL ARBITRATION AGREEMENTS AS CONDITIONS OF CONTINUED EMPLOYMENT**

Sidney Charlotte Reynolds

*Abstract:* Courts have long viewed mandatory arbitration agreements (MAAs) as contract provisions that employees may accept or decline based on the common law doctrine of employment at-will. However, employees may see such MAAs as attempts to curtail Title VII rights and may refuse to sign them. Title VII prohibits employers from retaliating against employees who oppose discriminatory employment practices. A legal loophole has developed where some employers seek explicitly or implicitly to exempt themselves from Title VII's provisions by drafting MAAs that eliminate statutory rights and remedies from the arbitration process or deter employees from filing discrimination claims altogether. The U.S. Supreme Court has declared such MAAs to be contrary to the policies and purposes of Title VII. At the same time, courts have broadly construed Title VII's anti-retaliation provision to protect employees who might not be protected under the plain language of the provision. This Comment argues that Title VII's anti-retaliation provision should protect employees who have a reasonable belief that the MAAs they oppose are unlawful under Title VII and its policies and purposes.

Mary has worked at XYZ Inc. for five years.<sup>1</sup> XYZ, noting a recent employer trend of incorporating arbitration clauses in employment contracts, has decided to require all its employees to sign a mandatory arbitration agreement promising to submit any future discrimination claims to arbitration. However, the agreement contains a provision that the arbitrator may award no more than \$5000 in punitive damages if an employee proves intentional discrimination. Mary recognizes the agreement as unlawful and tells this to her employer.<sup>2</sup> She refuses to sign the agreement.<sup>3</sup> Because Mary's employment is at-will, XYZ may fire her for refusing to sign the agreement. XYZ fires Mary. This Comment addresses whether Mary should have any legal recourse in this situation.

A mandatory arbitration agreement (MAA) is a contract clause in which parties agree to submit any claim arising from the contract to

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1. Hypothetical created by the author.

2. In the case of intentional discrimination, the statutory cap for damages under Title VII of the Civil Rights Act of 1964 (Title VII) is \$300,000. 42 U.S.C. § 1981(b)(3) (2000).

3. At least one employee has filed a wrongful discharge claim after being fired for refusing to sign a mandatory arbitration agreement (MAA). See *Lagatree v. Luce, Forward, Hamilton & Scripps LLP*, 88 Cal. Rptr. 2d 664, 668 (Cal. Ct. App. 1999).

arbitration instead of filing the claim in court.<sup>4</sup> An MAA usually creates a specific arbitration scheme, including how to choose the arbitrators, what law will govern the dispute, and other guidelines, such as remedial limits.<sup>5</sup> Employers often condition the retention of an employee on the signing of an MAA.<sup>6</sup> However, MAAs in employment contracts sometimes contain provisions that violate the policies and purposes of Title VII of the Civil Rights Act of 1964 (Title VII).<sup>7</sup> The U.S. Supreme Court has declared such MAAs unlawful.<sup>8</sup> Sometimes employees dispute the validity of this kind of MAA once they have a Title VII claim they wish to file in federal court.<sup>9</sup> Federal courts have invalidated many such MAAs and have allowed employees to pursue their claims.<sup>10</sup> However, courts have observed that between the time an employee signs the MAA and the time it is invalidated, the MAA undermines Title VII by shielding employers from the full force of its provisions.<sup>11</sup>

This Comment argues that if an employer fires an employee who refuses to sign an MAA because it unlawfully mandates the waiver of Title VII rights and remedies, then the employee should have a viable retaliation claim against the employer. Part I explains private arbitration systems and employment at-will, and tracks the rise of arbitration in the employment context. Part II examines Title VII and its protections against employment discrimination. Part II continues by addressing Title VII's prohibition against retaliation against employees who complain of employer practices made unlawful by Title VII and the broad construction courts have afforded this anti-retaliation provision. Part III discusses how Title VII and other statutory schemes limit employers' ability to enforce MAAs that explicitly or implicitly shelter employers

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4. Sharona Hoffman, *Mandatory Arbitration: Alternative Dispute Resolution or Coercive Dispute Suppression?*, 17 BERKELEY J. EMP. & LAB. L. 131, 132 (1996).

5. *Id.*

6. Harry T. Edwards, *Where Are We Heading with Mandatory Arbitration of Statutory Claims in Employment?*, 16 GA. ST. U. L. REV. 293, 297 (1999).

7. Civil Rights Act of 1964, Title VII, Pub. L. No. 88-352, 78 Stat. 253 (codified at 42 U.S.C. §§ 2000e to 2000e-17 (2000)).

8. *See infra* Part III.B.

9. *See, e.g.*, *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 940 (4th Cir. 1999); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1485 (D.C. Cir. 1997); *Kinney v. United Healthcare Servs.*, 83 Cal. Rptr. 2d 348, 351 (Cal. Ct. App. 1999).

10. This Comment focuses exclusively upon individuals that are already employed. Whether or not job applicants would have a cause of action for retaliation in such circumstances is beyond its scope. For an example of a case addressing whether a job applicant has a cause of action for retaliation, *see Ruggles v. Cal. Polytechnic State Univ.*, 797 F.2d 782, 786 (9th Cir. 1986) (holding that job applicant does have a cause of action for retaliation in a failure-to-hire situation).

11. *See infra* Part III.B.

from the full force of Title VII. Finally, Part IV argues that Title VII's anti-retaliation provision should protect employees who oppose MAAs because those MAAs unlawfully require them to surrender rights or remedies under Title VII. Therefore, an employer who terminates an employee for refusing to sign an MAA made unlawful by Title VII should be liable for violating the statute's anti-retaliation provision.

## I. ARBITRATION, EMPLOYMENT AT-WILL, AND THE RISE OF MAAS

Arbitration is a process by which opposing parties resolve their disputes privately, outside the judicial system.<sup>12</sup> Parties forgo a judicial forum and present their evidence to an arbitrator who acts as decision maker in a less formal and less adversarial setting.<sup>13</sup> There are some distinct advantages to arbitration for both parties, such as efficiency, reduced cost, and quicker dispute resolution.<sup>14</sup>

The traditional employment at-will doctrine allows employers contractual freedom in creating MAAs. Employees who do not agree to submit all employment-related legal claims to arbitration instead of to courts may lose their jobs.<sup>15</sup> Within the past ten years, arbitration has become an increasingly popular method for resolving disputes, and employers have included MAAs in their employment contracts more frequently.<sup>16</sup> Although courts historically were reluctant to uphold such agreements, the 1925 Federal Arbitration Act (FAA),<sup>17</sup> compelled a change of judicial attitude.

### A. *The Employment At-Will Rule*

At-will employment represents the traditional common-law relationship between employer and employee.<sup>18</sup> "At-will" means either party may terminate the employment relationship at any time.<sup>19</sup> It also

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12. Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 1999 A.B.A. SEC. DISP. RESOL. 1, 3.

13. *See id.* at 5.

14. Hoffman, *supra* note 4, at 133.

15. Maltby, *supra* note 12, at 4.

16. *Id.* at 4.

17. 9 U.S.C. §§ 1-16 (2000).

18. Deborah A. Ballam, *Exploding the Original Myth Regarding Employment At-Will: The True Origins of the Doctrine*, BERKELEY J. EMP. & LAB. L. 91, 94 (1996).

19. *Id.*

means that employers may draft employment contracts tailored to their needs, and employees are free to sign the contracts or reject them in favor of other employment opportunities.<sup>20</sup> Absent an explicit contract requiring employers to dismiss only for just cause, or a state or federal statute prohibiting discrimination, a majority of states, including Ninth Circuit states such as Washington,<sup>21</sup> Hawaii,<sup>22</sup> Montana,<sup>23</sup> and California,<sup>24</sup> recognize employment at-will as the default doctrine.<sup>25</sup>

### *B. Employers' Increasing Use of MAAs in Employment Contracts*

The doctrine of employment at-will allows employers and employees to sign MAAs in which they agree to submit employment-related claims to arbitration rather than to the courts.<sup>26</sup> Because most states follow the at-will rule, employees may accept or decline to sign the MAA, although declining usually means losing their jobs.<sup>27</sup> As the courts and Congress have expanded the scope of protection against employment discrimination, large judgments, lengthy jury trials, and exorbitant legal costs have made arbitration more attractive to employers, and the use of MAAs in employment contracts has increased.<sup>28</sup> However, the private arbitration systems established in MAAs sometimes unfairly favor employers by deterring employees from filing claims or restricting the remedies the arbitrator may award to a prevailing employee.<sup>29</sup>

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20. Maltby, *supra* note 12, at 6.

21. *Roberts v. Atl. Richfield Co.*, 88 Wash. 2d 887, 891, 568 P.2d 764, 767 (1977).

22. *Shoppes v. Gucci Am., Inc.*, 14 P.3d 1049, 1064 (Haw. 2000).

23. *Prout v. Sears, Roebuck & Co.*, 772 P.2d 288, 290 (Mont. 1989).

24. *Foley v. Interactive Data Corp.*, 765 P.2d 373, 385 (Cal. 1988).

25. *Fadely v. Planned Parenthood Ass'n of Lubbock, Inc.*, 160 F.3d 1048, 1049 n.11 (5th Cir. 1998) (citing numerous cases utilizing the employment at-will doctrine).

26. *See* Maltby, *supra* note 12, at 9.

27. *See id.*

28. Ronald Turner, *Compulsory Arbitration of Employment Discrimination Claims with Special Reference to the Three A's—Access, Adjudication, and Acceptability*, 31 WAKE FOREST L. REV. 231, 264 (1996). Prior to 1991, very few employers considered MAAs to be necessary. *Id.* at 263. By 1997, about nineteen percent of employers were using them. Maltby, *supra* note 12 at 4.

29. *See, e.g., Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 940 (4th Cir. 1999); *Cole v. Burns Int'l. Sec. Servs.*, 105 F.3d 1465, 1485 (D.C. Cir. 1997); *Kinney v. United Healthcare Servs.*, 83 Cal. Rptr. 2d 348, 351 (Cal. Ct. App. 1999).

### C. *The FAA and the Evolving Judicial Attitude Toward MAAs*

The judicial attitude toward arbitration agreements has evolved from skepticism to endorsement.<sup>30</sup> Historically, judges did not trust arbitration because the arbitrator takes the judge's place in the legal proceedings.<sup>31</sup> In 1925, however, Congress passed the Federal Arbitration Act (FAA).<sup>32</sup> The FAA is a federal statute governing the enforcement of arbitration agreements in commercial contracts.<sup>33</sup> It requires judges to enforce pre-dispute arbitration agreements in commercial contracts unless there is a contract law basis (such as duress or unconscionability) for invalidating them.<sup>34</sup> However, courts have remained cautious about enforcing MAAs that encompass not just contract claims, but also claims that arise under federal statutes.<sup>35</sup>

The FAA provides in relevant part that a "contract evidencing a transaction involving commerce to settle by arbitration a controversy . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."<sup>36</sup> With this language, Congress mandated that courts uphold valid arbitration agreements despite judicial mistrust of arbitration.<sup>37</sup>

For decades after the passage of the FAA, the U.S. Supreme Court remained skeptical of arbitration, particularly when the claim involved statutorily created rights.<sup>38</sup> Beginning in the 1980s, the Court began to abandon its mistrust of arbitration and to enforce MAAs in the

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30. See *Wilko v. Swan*, 346 U.S. 427, 435 (1953) (noting that effectiveness of Securities Act protections is lessened in arbitration); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974) (finding that prior arbitral decision does not foreclose filing of Title VII claim in court); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626–27 (1985) (recognizing demise of "judicial suspicion of . . . desirability of arbitration"); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (holding commercial arbitration agreements enforceable unless invalid under traditional contract law).

31. Turner, *supra* note 28, at 231 n.3.

32. United States Arbitration Act of 1925, 43 Stat. 883 (current version at 9 U.S.C. §§ 1–16 (2000)).

33. 9 U.S.C. § 2.

34. *Id.*

35. See *infra* Part III.A.

36. 9 U.S.C. § 2.

37. Turner, *supra* note 28, at 231–32.

38. See, e.g., *Wilko v. Swan*, 346 U.S. 427, 435 (1953) (refusing to compel arbitration of claims arising under the Securities Act).

commercial context.<sup>39</sup> The Court's opinion in *Southland Corp. v. Keating*<sup>40</sup> strongly supports judicial enforcement of arbitration agreements in commercial contracts negotiated by parties of relatively equal bargaining strength.<sup>41</sup> In *Rodriguez de Quijas v. Shearson/American Express, Inc.*,<sup>42</sup> the Court removed any remaining doubts as to its view of MAAs in the commercial context.<sup>43</sup> The Court mandated that MAAs be enforced unless they contain provisions illegal under traditional contract law.<sup>44</sup>

Whether the FAA governs individual employment contracts was a long-disputed issue finally settled in March 2001.<sup>45</sup> Section One of the FAA exempts the contracts of workers "in interstate commerce" from the mandate of the FAA.<sup>46</sup> For years, courts debated about whether only transportation workers were included, or whether this was standard commerce clause language meant to reach any worker in the stream of commerce.<sup>47</sup> The Supreme Court, however, has recently held that Section One applies only to contracts of transportation workers, and therefore other employment contracts are governed by the FAA.<sup>48</sup>

## II. RIGHTS AND REMEDIES UNDER TITLE VII

Title VII, a major exception to the employment at-will rule, makes it unlawful for employers to discriminate against certain protected classes of employees, both in hiring and firing practices and in the terms and conditions of employment.<sup>49</sup> Title VII establishes complex enforcement mechanisms, including a federal agency to receive complaints and

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39. See, e.g., *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 480–81 (1989); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626–27 (1985); *Southland Corp. v. Keating*, 465 U.S. 1, 7 (1984).

40. 465 U.S. 1 (1984).

41. See *id.* at 7.

42. 490 U.S. 477 (1989).

43. *Id.* at 481.

44. *Id.* at 483. For example, the Court noted that an MAA would still be voidable if it inherently conflicted with the underlying purposes of a statute. *Id.*

45. *Circuit City Stores, Inc. v. Adams*, 121 S.Ct. 1302, 1311 (2001). This decision "likely will speed the already fast-growing use of arbitration clauses in employment contracts . . ." Robert S. Greenberger, *Justices Back Arbitration Use in Work Arena*, WALL ST. J., Mar. 22, 2001, at A3.

46. 9 U.S.C. § 1 (2000).

47. See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 36 (1991) (Stevens, J., dissenting).

48. *Adams*, 121 S.Ct. at 1306.

49. 42 U.S.C. § 2000e-2 (2000).

attempt conciliation, a cause of action for private individuals to sue employers, and extensive damage provisions.<sup>50</sup> It also provides employees with a cause of action to sue employers who fire them in retaliation for opposing employment practices made unlawful by Title VII.<sup>51</sup> Courts have construed this anti-retaliation provision broadly to effectuate the purposes of Title VII in ending employment discrimination.<sup>52</sup>

### A. Overview of Title VII Structure and Remedies

Title VII makes it unlawful for employers “to refuse to hire or to discharge any individual . . . because of such individual’s race, color, religion, sex, or national origin.”<sup>53</sup> This prohibition against discrimination covers intentionally discriminatory treatment, such as refusing to hire an applicant because of his or her race.<sup>54</sup> It also includes employer practices that have a “disparate impact” on employment conditions for protected groups.<sup>55</sup> Disparate impact refers to the discriminatory effect of a facially neutral employment practice.<sup>56</sup> For example, an employer might want to categorize employees by giving them an intelligence test. If the test does not screen for specific job qualifications and negatively affects a protected group’s terms or conditions of employment, it has a disparate impact.<sup>57</sup>

Congress charged the EEOC with responsibility for enforcing Title VII.<sup>58</sup> After an employee becomes aware of his or her employer’s alleged unlawful employment practice, the employee must file a complaint with the EEOC within 300 days.<sup>59</sup> The EEOC investigates employee complaints of discrimination and tries to resolve them by “conference, conciliation, and persuasion.”<sup>60</sup> If successful, an amicable agreement is made between the employee and employer.<sup>61</sup> If unsuccessful, the EEOC,

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50. *Id.* § 2000e-5.

51. *Id.* § 2000e-3.

52. See *infra* Part II.B.3.

53. 42 U.S.C. § 2000e-2(a)(1).

54. *Id.*

55. *Id.* § 2000e-2.

56. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971).

57. See *id.*

58. 42 U.S.C. § 2000e-4.

59. *Id.* § 2000e-5(e)(1).

60. *Id.* § 2000e-5(b).

61. *Id.*



the U.S. Attorney General, or the aggrieved employee has 180 days to file a civil suit in federal court.<sup>62</sup>

If an employee proves either intentional or disparate impact employment discrimination in court, remedies are extensive. They include back pay and other actual monetary damages the employee has incurred,<sup>63</sup> injunctions and other equitable relief to stop the unlawful employment practice in the future,<sup>64</sup> attorneys' fees,<sup>65</sup> and expert fees.<sup>66</sup> If the employee proves intentional discrimination, the employee may also receive compensatory damages such as money for "pain and suffering"<sup>67</sup> and punitive damages up to \$300,000 to punish the employer for the wrongful conduct.<sup>68</sup>

### *B. Title VII's Anti-Retaliation Provision as an Exception to At-Will Employment*

Prohibition of discrimination is not the only exception to the at-will rule.<sup>69</sup> Anti-retaliation provisions prohibit employers from dismissing employees who make complaints about potentially unlawful employment practices.<sup>70</sup> Title VII contains such an anti-retaliation provision.<sup>71</sup> Courts have construed the provision broadly to afford employees substantial protection from employers who fire them for complaining about potentially discriminatory practices under Title VII.<sup>72</sup>

#### *1. History of the Anti-Retaliation Doctrine*

Beginning with the rise of unions in the early part of the twentieth century, courts and legislatures developed anti-retaliation laws as an

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62. *Id.* § 2000e-5(f).

63. *Id.* § 2000e-5(g).

64. *Id.*

65. *Id.* § 2000e-5(k).

66. *Id.* § 1988(c).

67. *Id.* § 1981(b)(3). Compensatory damages include: "future pecuniary losses, emotional pain . . . and other nonpecuniary damages." *Id.*

68. *Id.* §1981a(b)(1).

69. Edward T. Ellis & Suzanne O. Rudder, *Current Developments in the Law of Retaliation*, SF03 ALI-ABA 241, 243 (2000).

70. *Id.*

71. 42 U.S.C. § 2000e-3(a).

72. *See infra* Part II.B.3.

exception to the at-will rule.<sup>73</sup> In 1935, Congress passed the National Labor Relations Act (NLRA),<sup>74</sup> which protects the right to unionize.<sup>75</sup> The NLRA includes a provision making it unlawful for an employer to fire or otherwise retaliate against an employee for complaining to a government agency or for giving testimony in proceedings about potential violations of the NLRA.<sup>76</sup> This language became known as an “anti-retaliation” provision.<sup>77</sup> Many federal statutes prohibiting employment discrimination, including Title VII,<sup>78</sup> the Americans with Disabilities Act,<sup>79</sup> and the Age Discrimination in Employment Act,<sup>80</sup> contain anti-retaliation provisions similar to the one in the NLRA.<sup>81</sup>

## 2. *Title VII’s Anti-Retaliation Provision*

The anti-retaliation provision of Title VII forbids discrimination against employees who protest allegedly discriminatory employment practices.<sup>82</sup> The provision states that an employer may not “discriminate against any [employee] . . . because he has opposed any practice made an unlawful employment practice by this subchapter.”<sup>83</sup> Title VII prohibits both intentional discrimination and disparate impact discrimination based on an individual’s “race, color, religion, sex, or national origin.”<sup>84</sup> The anti-retaliation provision enables employees to watch over their employers and report unlawful practices without risking their jobs.<sup>85</sup>

To establish a *prima facie* case of retaliation under Title VII, an employee must show that: (1) he or she was engaged in a “protected activity” (actions against which an employer may not retaliate); (2) he or she was a victim of “adverse employment action;” and (3) there is a

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73. Ellis & Rudder, *supra* note 69, at 253.

74. 49 Stat. 452 (codified at 29 U.S.C. §§ 101–197 (2000)).

75. 29 U.S.C. § 158(a)(2).

76. *Id.* § 158(a)(4).

77. Kurtis A. Kemper, Annotation, *Who Has “Participated” in Investigation, Proceeding, or Hearing and is Thereby Protected from Retaliation Under § 704(a) of Title VII of Civil Rights Act of 1964 (42 U.S.C.A. § 2000E-3(a))*, 149 A.L.R. FED. 431, §2 (1998).

78. 42 U.S.C. §§ 2000e–2000e-17 (2000).

79. *Id.* §§ 12,101–213.

80. 29 U.S.C. §§ 621–34 (2000).

81. 42 U.S.C. §§ 2000e-3(a), 12,203(a); 29 U.S.C. § 623(d).

82. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 796 (1973).

83. 42 U.S.C. § 2000e-3(a).

84. *Id.* § 2000e-2.

85. Ellis & Rudder, *supra* note 69, at 243.

causal link between the protected activity and the adverse action.<sup>86</sup> Under the second element, discharge is unquestionably an “adverse employment action,” an action that negatively affects terms or conditions of employment.<sup>87</sup> With respect to the first and third elements, courts have devoted considerable attention to what constitutes “protected activity” and whether a causal nexus exists.<sup>88</sup>

### 3. *Judicial Interpretations of the Scope of Title VII’s Anti-Retaliation Provision*

Retaliation liability is much broader than discrimination liability.<sup>89</sup> Courts have construed “protected activity” broadly.<sup>90</sup> Thus, most circuit courts have protected from retaliation white employees who complain about discrimination against black co-workers, employees who make informal complaints, and employees who have a reasonable but mistaken belief that an employment practice is unlawful.<sup>91</sup> Nevertheless, the judiciary has placed limits on the scope of retaliation claims it will entertain by requiring plaintiffs to prove a causal nexus between the activity and the employer’s alleged retaliatory action.<sup>92</sup>

#### a. *The Broad Interpretation of Protected Activity*

Courts have broadly construed “protected activity” not only in terms of the kind of activity protected from retaliation, but also *whom* the anti-retaliation provision protects.<sup>93</sup> Title VII’s anti-retaliation provision generally protects employees who make informal complaints about

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86. See *Folkerson v. Circus Circus Enter.*, 107 F.3d 754, 755 (9th Cir. 1997); *EEOC v. Avery Dennison Corp.*, 104 F.3d 858, 860 (6th Cir. 1997).

87. 42 U.S.C. § 2000e-3; see also *Ruggles v. Cal. Polytechnic State Univ.*, 797 F.2d 782, 786 (9th Cir. 1986) (holding that closing of job opening and loss of opportunity to compete for position is “adverse employment decision”).

88. See *infra* Part II.B.3.

89. See *infra* Part II.B.3.a.

90. See *NLRB v. Scrivener*, 405 U.S. 117, 122 (1972) (“[T]extual analysis [of the NLRA’s anti-retaliation provision] alone . . . reveals . . . an intent on the part of Congress to afford broad rather than narrow protection to the employee.”); *Payne v. McLemore’s Wholesale & Retail Stores*, 654 F.2d 1130, 1139 (5th Cir. 1981).

91. See *infra* Part III.B.3.a.

92. See *infra* Part III.B.2.

93. See, e.g., *Maynard v. City of San Jose*, 37 F.3d 1396, 1403 (9th Cir. 1994); *EEOC v. Crown Zellerbach Corp.*, 720 F.2d 1008, 1012 (9th Cir. 1983).

intentionally discriminatory actions.<sup>94</sup> It also protects third party employees who are not victims of discrimination, for example white employees who assist black employees with Title VII claims.<sup>95</sup> Interestingly, most circuits include complaints about activities that employees reasonably suspect are unlawful, but that turn out to be lawful.<sup>96</sup> Nevertheless, retaliation claims generally demand a fact-specific inquiry.<sup>97</sup>

A classic protected activity is filing a charge with the EEOC alleging employer discrimination barred by Title VII.<sup>98</sup> The statute explicitly protects this activity.<sup>99</sup> However, employees need not contact the EEOC before Title VII's anti-retaliation provision protects them.<sup>100</sup> Five circuits have defined "protected activity" to include informal complaints to the employer or to third parties.<sup>101</sup> For example, in *EEOC v. Crown Zellerbach Corp.*,<sup>102</sup> the Ninth Circuit held that a letter complaining of discriminatory activities sent to a customer of the employer was protected activity, even though it was not classic opposition to unlawful practices.<sup>103</sup> In a later case, the Ninth Circuit justified the *Crown Zellerbach* expansion of protected activity by explaining that a narrow interpretation of protected activity would chill the assertion of employees' right to be free from discrimination and frustrate the purposes of Title VII.<sup>104</sup>

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94. *Crown Zellerbach*, 720 F.2d at 1012.

95. *Maynard*, 37 F.3d at 1403.

96. See, e.g., *Rodriguez-Hernandez v. Miranda-Velez*, 132 F.3d 848, 855 (1st Cir. 1998); *Hunt-Golliday v. Metro. Water Reclamation Dist. of Greater Chicago*, 104 F.3d 1004, 1014 (7th Cir. 1997); *Reed v. A.W. Lawrence & Co.*, 95 F.3d 1170, 1178 (2d Cir. 1996); *Moyo v. Gomez*, 40 F.3d 982, 984 (9th Cir. 1994); *Meeks v. Computer Assocs. Int'l*, 15 F.3d 1013, 1021 (11th Cir. 1994); *Drinkwater v. Union Carbide Corp.*, 904 F.2d 853, 866 (3d Cir. 1990); *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1312 (6th Cir. 1989); *Love v. Re/Max of Am., Inc.*, 738 F.2d 383, 385 (10th Cir. 1984); *Sisco v. J.S. Alberici Const. Co.*, 655 F.2d 146, 150 (8th Cir. 1981); *Payne v. McLemore's Wholesale & Retail Stores, Inc.*, 654 F.2d 1130, 1138 (5th Cir. 1981).

97. See, e.g., *Rodriguez-Hernandez*, 132 F.3d at 855; *Hunt-Golliday*, 104 F.3d at 1014; *Reed*, 95 F.3d at 1178; *Moyo*, 40 F.3d at 984.

98. See, e.g., *Ruggles v. Cal. Polytechnic State Univ.*, 797 F.2d 782, 787 (9th Cir. 1986).

99. 42 U.S.C. 2000e-3(a) (2000).

100. *Sumner v. U.S. Postal Serv.*, 899 F.2d 203, 209 (2d Cir. 1990).

101. *Robbins v. Jefferson County Sch. Dist.*, 186 F.3d 1253, 1258 (10th Cir. 1999); *Barber v. CSX Distrib. Servs.* 68 F.3d 694, 702 (3d Cir. 1995); *Sumner*, 899 F.2d at 209; *Rollins v. Florida Dept. of Law Enforcement*, 868 F.2d 397, 400 (11th Cir. 1989); *EEOC v. Crown Zellerbach Corp.*, 720 F.2d 1008, 1014 (9th Cir. 1983).

102. 720 F.2d 1008 (9th Cir. 1983).

103. *Id.* at 1012-13.

104. *Trent v. Valley Elec. Ass'n*, 41 F.3d 524, 526 (9th Cir. 1994).

Furthermore, an employee may have a claim for retaliation without being a victim of discrimination.<sup>105</sup> In *Maynard v. City of San Jose*,<sup>106</sup> a white male employee assisted a black co-worker with a discrimination complaint.<sup>107</sup> The employer harassed the white employee and decreased his responsibilities.<sup>108</sup> The court held that Title VII's anti-retaliation provision protected him because allowing the retaliation to occur against the white employee would perpetuate the harmful effects of the unlawful discriminatory treatment of his black co-worker.<sup>109</sup>

Finally, the broad interpretation given to anti-retaliation laws has led many courts to find that an employee can sustain a retaliation claim even if no discrimination actually occurs but the employee has a reasonable belief that an employer's practice is unlawful under Title VII.<sup>110</sup> This expansive rule contravenes the express language of the statute, which protects those employees who oppose practices made unlawful by Title VII.<sup>111</sup> For example, in *Moyo v. Gomez*,<sup>112</sup> a prison fired a corrections officer for refusing to obey an order to deny showers to black inmates after work shifts.<sup>113</sup> The officer filed a retaliation claim under Title VII, alleging that the order denying showers constituted an unlawful employment practice under Title VII.<sup>114</sup> The EEOC had previously declared that inmates were not "employees" for the purposes of Title VII.<sup>115</sup> Therefore, the practice he opposed was actually a lawful practice under Title VII.<sup>116</sup> However, the Ninth Circuit held that the officer stated a cause of action because he demonstrated a reasonable belief that the

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105. See, e.g., *Lowrey v. Texas A & M Univ. Sys.*, 117 F.3d 242, 251 (5th Cir. 1997); *Maynard v. City of San Jose*, 37 F.3d 1396, 1403 (9th Cir. 1994); *Skinner v. Total Petroleum, Inc.*, 859 F.2d 1439, 1446-47 (10th Cir. 1988).

106. 37 F.3d 1396 (9th Cir. 1994).

107. *Id.* at 1400.

108. *Id.*

109. *Id.* at 1403 (citing *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1969)).

110. See, e.g., *Robbins v. Jefferson County Sch. Dist.*, 186 F.3d 1253, 1259 (10th Cir. 1999); *Rodriguez-Hernandez v. Miranda-Velez*, 132 F.3d 848, 855 (1st Cir. 1998); *Moyo v. Gomez*, 40 F.3d 982, 985 (9th Cir. 1994); *Drinkwater v. Union Carbide Corp.*, 904 F.2d 853, 865 (3d Cir. 1990).

111. 42 U.S.C. § 2000e-3 (2000).

112. 40 F.3d 982 (9th Cir. 1994).

113. *Id.* at 984.

114. *Id.*

115. *Id.*

116. See *id.* Such a practice would likely be vulnerable to challenge under another federal statute or the federal constitution.

practice was unlawful under Title VII.<sup>117</sup> The court found his belief to be reasonable, even though the law concerning the employment status of inmates was clear.<sup>118</sup>

The court construed “reasonable” broadly because Title VII requires employees neither to be familiar with all the factual and legal issues in a potential case, nor to be able to analyze the case law and come to the correct conclusion.<sup>119</sup> Therefore, the court interpreted “reasonable” to be a mixed standard of objective and subjective elements, where the court examines the facts and law from the average employee’s perspective to determine whether his or her belief was “reasonable.”<sup>120</sup> Eight other circuits have likewise held that a reasonable belief that a practice is unlawful is enough to sustain the plaintiff’s claim, even if the practice complained of turns out to be legal.<sup>121</sup>

*b. An Employee Must Establish a Nexus Between the Protected Activity and the Alleged Retaliatory Action*

Courts’ broad interpretation of “protected activity” does not imply that every employee challenge to an alleged discriminatory employment practice is a protected activity.<sup>122</sup> An employee must establish the third

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117. *Id.* at 985.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Rodriguez-Hernandez v. Miranda-Velez*, 132 F.3d 848, 855 (1st Cir. 1998); *Hunt-Golliday v. Metro. Water Reclamation Dist. of Greater Chicago*, 104 F.3d 1004, 1014 (7th Cir. 1997); *Reed v. A.W. Lawrence & Co.*, 95 F.3d 1170, 1178 (2d Cir. 1996); *Meeks v. Computer Assocs. Int’l*, 15 F.3d 1013, 1021 (11th Cir. 1994); *Drinkwater v. Union Carbide Corp.*, 904 F.2d 853, 866 (3d Cir. 1990); *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1312 (6th Cir. 1989); *Love v. Re/Max of Am., Inc.*, 738 F.2d 383, 385 (10th Cir. 1984); *Sisco v. J.S. Alberici Const. Co.*, 655 F.2d 146, 150 (8th Cir. 1981); *Payne v. McLemore’s Wholesale & Retail Stores, Inc.*, 654 F.2d 1130, 1138 (5th Cir. 1981). The Supreme Court recently reversed a Ninth Circuit holding that a female employee who claimed she was punished for complaining about an isolated sexual comment was entitled to anti-retaliation protection. *Clark County Sch. Dist. v. Breeden*, 121 S.Ct. 1508, 1509 (2001). The Court did not address the propriety of the “reasonable belief” rule, but it held that the employee’s belief that one isolated comment could constitute an violation of Title VII was not reasonable. *Id.* at 1510.

122. *See, e.g., Folkerson v. Circus Circus Enters.*, 107 F.3d 754, 756 (9th Cir. 1997) (holding that opposition must be to discriminatory practice of employer, not private individual); *Roth v. Lutheran Gen. Hosp.*, 57 F.3d 1446, 1460 (7th Cir. 1995) (holding that plaintiff’s baseless accusations of discrimination provided no grounds for retaliation claim); *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406, 1411 (9th Cir. 1987) (holding that disc jockey’s complaints about radio station programming change were not an “activity protected by Title VII” because they related to the desire to maintain the “value of his radio personality”).

prong of a retaliation claim: causation.<sup>123</sup> Causation means that the employer fired the employee as a result of the protected activity rather than for a legitimate reason.<sup>124</sup> Thus, if the employee is disruptive to the workplace—for example, by blocking access to the employer's place of business—courts will generally find that the dismissal was legitimate.<sup>125</sup> Also, Title VII's anti-retaliation provision does not protect employees who, in the guise of "protected activity," make defamatory statements against their employers.<sup>126</sup> For example, a court has held that Title VII's anti-retaliation provision did not protect an employee who sent a memorandum to her supervisor containing libelous statements about the employer's allegedly discriminatory employment practices.<sup>127</sup> Other legitimate reasons for dismissal include unsatisfactory job performance,<sup>128</sup> engaging in disruptive or excessively hostile behavior,<sup>129</sup> or refusing to accept additional work duties.<sup>130</sup> These defenses protect law-abiding employers who fire employees for legitimate reasons, even though circumstances may suggest that the employee has a retaliation claim.<sup>131</sup>

### III. MAAS MAY NOT LIMIT STATUTORY RIGHTS AND REMEDIES, PARTICULARLY THOSE UNDER TITLE VII

The U.S. Supreme Court has held that when employees agree to submit federal statutory claims to arbitration, they agree only to a change of forum, not a change of substantive rights and remedies under a statute.<sup>132</sup> The Court has been cautious in examining MAAs involving Title VII claims because federal courts play an important role in enforcing Title VII.<sup>133</sup> Nevertheless, employers sometimes unlawfully

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123. *Folkerson*, 107 F.3d at 755.

124. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

125. *Id.* at 803.

126. *Bartulica v. Paculdo*, 411 F. Supp. 392, 397 (D. Mo. 1976).

127. *Id.*

128. *See Sorensen v. City of Aurora*, 984 F.2d 349, 354 (10th Cir. 1993); *McNair v. Sullivan*, 929 F.2d 974, 980 (4th Cir. 1991); *Canitia v. Yellow Freight Sys., Inc.*, 903 F.2d 1064, 1067 (6th Cir. 1990).

129. *See Hochstadt v. Worcester Found. for Experimental Biology*, 545 F.2d 222, 234 (1st Cir. 1976).

130. *See Smith v. Tex. Dept. of Water Res.*, 818 F.2d 363, 367 (5th Cir. 1987).

131. *See Ellis & Rudder, supra* note 69, at 244.

132. *See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

133. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44-45 (1974).

use MAAs to limit, explicitly or implicitly, the substantive rights and remedies available to employees under Title VII.<sup>134</sup>

A. *The Supreme Court's Protection of Federal Statutory Rights and Remedies in FAA Cases*

Although the Supreme Court has become less skeptical of arbitration since the passage of the FAA, it has remained cautious about enforcing MAAs that govern federal statutory claims.<sup>135</sup> The Court has held that despite the FAA, statutory rights and remedies should be available in arbitration just as they would be in court.<sup>136</sup> For example, an MAA may not contain a provision that prohibits a plaintiff from filing a charge of discrimination with the EEOC, making a claim under a particular federal statute, or recovering monetary damages.<sup>137</sup>

In *Alexander v. Gardner-Denver Co.*,<sup>138</sup> an employee participated in an arbitration of his Title VII discrimination claims pursuant to a collective bargaining agreement.<sup>139</sup> After the arbitrator dismissed his claims, the employee filed a Title VII discrimination suit in federal court.<sup>140</sup> The Supreme Court held that an individual employee does not waive his or her right to file a civil suit under Title VII simply because his or her union has a collective bargaining agreement to arbitrate contract-based employment claims.<sup>141</sup> The Court emphasized the importance of Title VII's purpose and declared that "final responsibility for enforcement of Title VII is vested with federal courts."<sup>142</sup>

In the 1980s, the Court continued to enforce MAAs encompassing statutory claims as long as the MAA did not reduce statutory rights and remedies.<sup>143</sup> For example, in *Mitsubishi Motors Corp. v. Soler Chrysler-*

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134. See *infra* Part III.B.

135. See, e.g., *Gilmer v. Interstate/Johnson Corp.*, 500 U.S. 20, 26 (1991); *Mitsubishi*, 473 U.S. at 627; *Alexander*, 415 U.S. at 44.

136. *Gilmer*, 500 U.S. at 26; *Mitsubishi*, 473 U.S. at 628; *Alexander*, 415 U.S. at 44.

137. See *infra* Part III.B.

138. 415 U.S. 36 (1974).

139. *Id.* at 39. Because the arbitration clause was contained in a collective bargaining agreement, the Court has subsequently held *Alexander* to apply only in that context and not in the context of individual employment contracts. See *Gilmer*, 500 U.S. at 34–35.

140. *Alexander*, 415 U.S. at 42–43.

141. *Id.* at 43.

142. *Id.* at 44.

143. *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).



*Plymouth, Inc.*,<sup>144</sup> a consumer filed a claim in federal district court pursuant to a federal antitrust statute.<sup>145</sup> The defendant, an automobile manufacturer, sought to compel arbitration of the claim in accordance with the terms of an MAA previously signed by the consumer.<sup>146</sup> The Supreme Court held that the MAA was enforceable because it sufficiently protected the consumer's statutory rights and remedies in arbitration.<sup>147</sup> However, the Court emphasized that MAAs may not be a vehicle for the waiver of federal statutory rights and remedies because "a party does not forgo the substantive rights afforded by the statute [in an MAA]; it only submits to their resolution in an arbitral, rather than a judicial, forum."<sup>148</sup>

In *Gilmer v. Interstate/Johnson Lane Corp.*,<sup>149</sup> the Court re-emphasized the importance of preserving statutory rights in MAAs.<sup>150</sup> In that case, a securities broker signed a registration form containing an MAA.<sup>151</sup> His employer terminated his employment at age sixty-two, in possible violation of the Age Discrimination in Employment Act,<sup>152</sup> so he filed a claim in federal court.<sup>153</sup> The Court held the agreement enforceable and compelled arbitration.<sup>154</sup> However, the Court acknowledged the *Mitsubishi* line of cases and reaffirmed that arbitration agreements should constitute only a change of forum, not a reduction of statutory rights.<sup>155</sup>

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144. 473 U.S. 614 (1985).

145. *Id.* at 618.

146. *Id.*

147. *Id.* at 628.

148. *Id.*

149. 500 U.S. 20 (1991).

150. *Id.* at 26.

151. *Id.* at 23. The New York Stock Exchange rules require all brokers to sign this registration form if they are to do business with the exchange. *Id.*

152. 29 U.S.C. §§ 621-34 (2000).

153. *Gilmer*, 500 U.S. at 23.

154. *Id.* at 23.

155. *Id.* at 26.

*B. Employers Sometimes Seek To Have Employees Sign MAAs To Shelter Themselves from Employees' Title VII Rights and Remedies*

The EEOC has recognized that some employers draft MAAs that “flagrantly eviscerat[e] core rights and remedies” of Title VII.<sup>156</sup> Considering the extensive remedies available under Title VII, employers may desire to create arbitration schemes in employment contracts that limit the employer’s liability for future discrimination.<sup>157</sup> Employers might do this *explicitly* by restricting the damages available under Title VII to a level far below the statutory limits.<sup>158</sup> They might also do so *implicitly* by requiring employees to pay up-front arbitration costs so high as to deter employees from filing claims altogether.<sup>159</sup> Such MAAs are unlawful according to the rule reaffirmed by the Supreme Court in *Gilmer*: arbitration should be a change of forum, not a change of rights or remedies.<sup>160</sup> However, the FAA allows courts to invalidate commercial arbitration agreements only for reasons available under traditional contract law.<sup>161</sup> Therefore, many courts faced with MAAs that *do* restrict substantive rights and remedies under Title VII have either reformed the contract or invalidated it on breach of contract, public policy, or unconscionability grounds.<sup>162</sup>

*1. Cases Involving Explicit Shelters*

Employers sometimes use MAAs to restrict the damages available to employees who successfully show discrimination under Title VII.<sup>163</sup> In

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156. EEOC, POLICY STATEMENT ON MANDATORY BINDING ARBITRATION OF EMPLOYMENT DISCRIMINATION DISPUTES, No. 915.002, at 15 (July 10, 1997).

157. See Maltby, *supra* note 12, at 5–6.

158. See *infra* Part III.B.1 and accompanying text.

159. See *infra* Part III.B.2 and accompanying text.

160. *Gilmer*, 500 U.S. at 26. Although *Gilmer* dealt with a claim under the Age Discrimination in Employment Act, circuits addressing the question have agreed that *Gilmer* also applies to Title VII actions. See *EEOC v. Frank’s Nursery Crafts, Inc.*, 177 F.3d 448, 448 n.2 (6th Cir. 1999); *Koveleskie v. SBC Capital Mkts., Inc.*, 167 F.3d 361, 364 (7th Cir. 1999); *cf. Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1198 (9th Cir. 1998) (finding that 1991 Amendments to Civil Rights Act reflect Congress’s intent to codify and extend *Gardner-Denver* rule excluding enforcement of MAAs in Title VII cases).

161. 9 U.S.C. § 2 (2000).

162. See, e.g., *Hooters of Am., Inc. v. Phillips*, 39 F. Supp. 2d 582, 624 (D.S.C. 1998), *aff’d* 173 F.3d 933 (4th Cir. 1999); *Stirlen v. Supercuts*, 60 Cal. Rptr. 2d 138, 158–59 (Cal. Ct. App. 1997).

163. *Hooters*, 39 F. Supp. 2d at 599; *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1060 (11th Cir. 1998); *Stirlen*, 60 Cal. Rptr. 2d at 158–59.

*Hooters of America, Inc. v. Phillips*,<sup>164</sup> the MAA granted the employer complete discretion in designing the arbitration rules.<sup>165</sup> The rules the employer adopted limited virtually every remedial measure in Title VII to amounts far below what Title VII allows.<sup>166</sup> For example, the employer's rules capped punitive damages at \$13,000 while the Title VII statutory cap is \$300,000.<sup>167</sup> Also, the rules precluded the arbitration panel from ordering any injunctive relief, such as an order to stop Hooters from engaging in discriminatory policies or practices, where Title VII explicitly provides for such relief.<sup>168</sup> The district court held that these damage restrictions were inadequate to protect federal statutory rights as required by *Gilmer*.<sup>169</sup> Therefore, the subsequent rules were unconscionable and violated Title VII's public policies.<sup>170</sup> The Fourth Circuit Court of Appeals affirmed the district court decision.<sup>171</sup> Although the appeals court made no comment on the district court's findings of unconscionability and violation of public policy, it did hold that the employer had completely breached its contractual duty to arbitrate by "creating a sham system unworthy even of the name of arbitration."<sup>172</sup>

Other employers have also unsuccessfully attempted to include restrictions on Title VII damages in MAAs.<sup>173</sup> For example, in *Derrickson v. Circuit City Stores, Inc.*,<sup>174</sup> the MAA provided for only one year of back pay and capped punitive damages.<sup>175</sup> The district court refused to enforce the MAA and denied the employer's motion compelling arbitration because the arbitration agreement severely limited the employee's remedies under Title VII.<sup>176</sup> The court explained that

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164. 39 F. Supp. 2d 582 (D.S.C. 1998).

165. *Id.* at 599.

166. *Id.* at 599-60.

167. *Id.*

168. *Id.*

169. *Id.* at 622 (referring to *Gilmer* court's standards for cases involving arbitration of statutory rights as authority for invalidating MAA at preliminary injunction hearing rather than allowing arbitration to go forward).

170. *Id.* at 623.

171. *Hooters of Am., Inc., v. Phillips*, 173 F.3d 933, 941 (4th Cir. 1999).

172. *Id.* at 940.

173. See *Derrickson v. Circuit City Stores, Inc.*, 81 Fair Empl. Prac. Cas. (BNA) 1533, 1538 (D. Md. 1999), *aff'd sub nom.* *Johnson v. Circuit City Stores, Inc.*, 203 F.3d 821 (4th Cir. 1999); *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1060 (11th Cir. 1998).

174. 81 Fair Empl. Prac. Cas. (BNA) 1533, 1538 (D. Md. 1999), *aff'd sub nom.* *Johnson v. Circuit City Stores, Inc.*, 203 F.3d 821 (4th Cir. 1999).

175. *Id.*

176. *Id.*

such a provision sheltered the employer, stating, “[The MAA] shields Circuit City . . . and prevents Plaintiff from effectively vindicating her rights.”<sup>177</sup> Therefore, the court invalidated the provision based on the Supreme Court’s rule in *Gilmer* and the public policies of Title VII.<sup>178</sup> In *Paladino v. Avnet Technologies*,<sup>179</sup> the MAA at issue was even more restrictive, limiting damages to breach of contract only.<sup>180</sup> The Eleventh Circuit, also citing *Gilmer*, held that the district court properly denied enforcement of the provision because it was “fundamentally at odds with the purposes of Title VII.”<sup>181</sup>

## 2. *Cases Involving Implicit Shelters*

Some MAAs implicitly deter employees from filing Title VII discrimination claims by requiring the employees to pay arbitrator’s fees.<sup>182</sup> Although in federal court the services of a judge are free to the litigants,<sup>183</sup> arbitrator’s fees can run between \$500 and \$1,000 per day.<sup>184</sup> Paying some or all of these fees is beyond the means of many employees and may make arbitration prohibitively expensive, thereby discouraging employee claims.<sup>185</sup> The D.C. Circuit addressed this practice as a matter of first impression in *Cole v. Burns International Security Services*.<sup>186</sup> In that case, a former employee filed a federal court complaint for race discrimination under Title VII despite the fact that his employment

177. *Id.*

178. *Id.*

179. 134 F.3d 1054 (11th Cir. 1998).

180. *Id.* at 1056.

181. *Id.* at 1060. Restrictions on damages are not the only MAA provisions that have been held to violate Title VII’s public policies. Three circuits recently held that the employee may not waive the jurisdiction of the EEOC over discrimination claims by private agreement. *EEOC v. Waffle House, Inc.*, 193 F.3d 805, 812 (4th Cir. 1999), *cert. granted*, 68 U.S.L.W. 3726 (U.S. Mar. 26, 2001) (No. 99-1823) (holding that EEOC may litigate on issue of injunctive relief to stop discriminatory employment practice but may not litigate claim for damages on behalf of plaintiff who signed MAA); *EEOC v. Frank’s Nursery & Crafts, Inc.*, 177 F.3d 448, 468 (6th Cir. 1999) (holding that jurisdiction of EEOC is exclusive and may not be waived even over claim filed by EEOC on behalf of plaintiff who signed MAA); *EEOC v. Kidder, Peabody & Co.*, 156 F.3d 298, 302 (2d Cir. 1998) (holding that EEOC may litigate issue of injunction but not damages on behalf of plaintiff).

182. *Cole v. Burns Int’l Sec. Svcs.*, 105 F.3d 1465, 1484 (D.C. Cir. 1997).

183. *Id.* Of course, even in federal court the employee must bear the burden of other court-related costs such as filing fees, messenger services, and copy charges. *See infra* note 199 and accompanying text.

184. *Cole*, 105 F.3d at 1480.

185. *Id.* at 1484; *see also* *Shankle v. B-G Maint. Mgmt. of Colo., Inc.*, 163 F.3d 1230, 1235 (10th Cir. 1999).

186. 105 F.3d 1465 (D.C. Cir. 1997).

contract contained an MAA.<sup>187</sup> The D.C. Circuit court affirmed the district court's decision to compel arbitration but ruled that the employer could not compel the employee to pay some or all of the arbitrator's fees.<sup>188</sup> The court took particular notice of the *Gilmer* requirement that arbitration should constitute a change of forum, not a change of rights and remedies.<sup>189</sup> It then concluded that an MAA requiring the employee to pay some or all of the arbitrator's fees "would surely deter the bringing of arbitration and constitute a *de facto* forfeiture of the employee's statutory rights."<sup>190</sup> The court found that to enforce such an MAA would be to change the rights afforded employees by Title VII.<sup>191</sup> The Tenth and Eleventh Circuits have also invalidated MAAs that failed the *Cole* test because they required the employees to pay the arbitrator's fees.<sup>192</sup>

Recently, in *Green Tree Financial Corp.-Alabama v. Randolph*,<sup>193</sup> the Supreme Court addressed the arbitration cost issue in a consumer dispute over an arbitration clause.<sup>194</sup> The Court did not cite *Cole* directly but used similar reasoning to suggest that a party may seek to invalidate an MAA on the basis of prohibitive fees.<sup>195</sup> In *Green Tree*, the consumer argued that burdensome arbitrator's fees made the MAA void because deterring Title VII claims violates the public policies behind Title VII.<sup>196</sup> The Court agreed with this theory but found that the consumer failed to offer any evidence as to what type of arbitration system would be used or what the fee assessment procedure was likely to be.<sup>197</sup> Presumably, an employee who could present an MAA that explicitly required the arbitrator to assess fees to the employee, and who could prove that the fees would prevent him or her from filing a claim, would meet the burden that *Green Tree* established.<sup>198</sup>

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187. *Id.* at 1467.

188. *Id.* at 1484.

189. *Id.* at 1481.

190. *Id.* at 1468. The court upheld the agreement at issue in *Cole* because it construed the language relating to arbitrator's fees to require the employer to pay. *Id.* at 1486.

191. *Id.* at 1482.

192. *See, e.g.,* *Shankle v. B-G Maint. Mgmt. of Colo., Inc.*, 163 F.3d 1230, 1233 (10th Cir. 1999); *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1060 (11th Cir. 1998).

193. 531 U.S. 79 (2000).

194. *Id.* at 86.

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.* at 87 n.6.

However, an MAA that merely requires sharing arbitration costs may be lawful. Courts have distinguished *Cole* when plaintiffs could not produce evidence that paying one half of the arbitrator's fees would prevent them from filing a claim.<sup>199</sup> A requirement that the employee pay costs that he or she would have had to pay in court does not alter that employee's access to a forum.<sup>200</sup> Thus, these cases are consistent with *Cole*, which is premised on the Supreme Court's test articulated in *Gilmer*. If the fee burden does not constitute a waiver of forum, and therefore a waiver of rights and remedies, it is probably valid.<sup>201</sup>

#### IV. IF AN EMPLOYEE IS FIRED FOR REFUSING TO SIGN A POTENTIALLY UNLAWFUL MAA, THE EMPLOYEE SHOULD HAVE AN ANTI-RETALIATION CLAIM

After such cases as *Hooters of America, Inc. v. Phillips*,<sup>202</sup> in which the Fourth Circuit denounced the employer's arbitration rules as "so one-sided that their only possible purpose is to undermine the neutrality of the [arbitration],"<sup>203</sup> courts have begun to recognize the potential for abuse in employers' use of MAAs. The judiciary's ultimate conclusion is that MAAs seeking to limit Title VII rights or remedies are unlawful and will not be enforced.<sup>204</sup> Furthermore, courts have warned that if an employer succeeds in forcing an employee to sign an unlawful MAA, the employee may be deterred from filing a discrimination claim.<sup>205</sup> However, if the employee points out the unlawful nature of the MAA and refuses to sign it, the employer may discharge or discipline the employee in the name of employment at-will. This Comment argues that in order to resolve this "Catch-22," the employee should have a viable cause of action for retaliation against the employer under the anti-retaliation provision of Title VII, which protects employees who oppose employment practices made unlawful by Title VII.

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199. *McCaskill v. SCI Mgmt. Corp.*, No. 00-C-1543, 2000 WL 875396, at \*3 (N.D. Ill. June 22, 2000); *Howard v. Anderson*, 36 F. Supp. 2d 183, 185 (S.D.N.Y. 1999).

200. *See Cole v. Burns Int'l. Sec. Svcs.*, 105 F.3d 1465, 1484 (D.C. Cir. 1997).

201. *See id.* at 1482.

202. 173 F.3d 933 (4th Cir. 1999).

203. *Id.* at 938.

204. *See supra* Part III.B.

205. *See supra* notes 182–185 and accompanying text.

Admittedly, this solution may push Title VII's anti-retaliation provision into uncharted territory.<sup>206</sup> Traditional retaliation claims generally arise when employers discipline or fire employees for complaining about patently discriminatory behavior, such as refusing showers to black workers but not white workers.<sup>207</sup> Furthermore, the statutory language only refers to employees who complain of "practice[s] made unlawful" by Title VII, which Title VII defines as intentional or disparate impact discrimination.<sup>208</sup>

However novel the idea may seem, allowing a cause of action for retaliation for MAA opposition is not without legal support. Although some disputed MAAs may be neither intentionally discriminatory nor have a disparate impact, courts have found MAAs that reduce statutory rights and remedies unlawful due to the strong purposes and policies of Title VII.<sup>209</sup> At the same time, courts have broadly construed the language of the anti-retaliation provision to protect employees in situations outside the bounds of Title VII's plain language.<sup>210</sup> Therefore, employee opposition to an MAA that explicitly or implicitly shelters an employer from Title VII rights or remedies should give rise to a viable Title VII retaliation claim, even if the MAA in question does not constitute intentional or disparate impact discrimination. Without limiting legitimate employer defenses, recognizing such claims would both prevent employers from circumventing the protections and purpose of Title VII and encourage employers to draft lawful arbitration agreements.

*A. An Employee's Opposition to an MAA Made Unlawful by Title VII or Its Policies Could Give Rise to a Claim for Retaliation*

An analysis of the lawfulness of any MAA or the merits of any Title VII retaliation claim requires a highly fact-specific inquiry.<sup>211</sup> Thus, it is

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206. One employee has filed a wrongful termination claim after his employer fired him for refusing to sign an MAA. *Lagatree v. Luce, Forward, Hamilton & Scripps LLC*, 88 Cal. Rptr. 2d 664, 668 (Cal. Ct. App. 1999). The employee argued that requiring him to sign the MAA—which he believed to be unlawful—as a condition of employment, was contrary to California public policy. *Id.* The court declared that allowing a plaintiff to “strike gold” with such a wrongful termination suit was “absurd.” *Id.* at 681. However, in that case, the court found the MAA in question to be lawful and enforceable. *Id.*

207. *Cf. Moyo v. Gomez*, 40 F.3d 982, 984 (9th Cir. 1994).

208. 42 U.S.C. §§ 2000e-2 to e-3 (2000).

209. *See supra* Part III.B.

210. *See supra* Part II.B.3.a.

211. *See, e.g., Moyo v. Gomez*, 40 F.3d 982, 985 (9th Cir. 1994).

essential to distinguish the various situations in which an employee fired for opposing an unlawful MAA may have a viable retaliation claim. The four fact patterns below recall Mary (introduced at the outset of this Comment) and serve as useful illustrations of the analysis that follows. The first two situations represent more traditional retaliation claims, where the employee reasonably believes a practice is either intentionally discriminatory or has a disparate impact. The second two situations demonstrate why Title VII's anti-retaliation provisions should protect employees who oppose MAAs made unlawful by the policies behind Title VII, because these MAAs explicitly or implicitly shelter the employer from employees' rights and remedies.

First, consider a situation where XYZ presents Mary with an MAA that states, "By agreeing to arbitration, black employees agree not to file any claim of discrimination in federal court." She tells XYZ that this practice is discriminatory and refuses to sign. XYZ fires Mary for refusing to sign the agreement. This represents a traditional *prima facie* retaliation case.<sup>212</sup> Mary recognizes that the MAA itself is facially and intentionally discriminatory, has complained to that effect,<sup>213</sup> and has been fired as a result. While few employers would offer such a patently discriminatory MAA, this example illustrates that traditional retaliation claims limit MAAs despite employment at-will arguments.

Second, consider a situation where XYZ presents an MAA that states, "Employees waive their right to file Title VII discrimination claims in federal court and agree to submit such claims to arbitration." Mary tells XYZ that use of the MAA is a discriminatory employment practice because it will deter her female and minority co-workers from fully enforcing their legal rights and refuses to sign the agreement. XYZ fires Mary. This kind of agreement represents a more common MAA, waiving rights to file a lawsuit in federal court. Federal courts have found that such MAAs are not unlawful as long as they constitute only a change of forum. Nevertheless, Mary has opposed the MAA reasonably, believing it to be discriminatory because it may prevent black co-workers from bringing a claim. In this situation, the dispositive issue is whether Mary's belief that the MAA is unlawful on a theory of disparate impact is a reasonable belief.

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212. *See supra* note 86 and accompanying text.

213. The court's analysis will be the same regardless of whether Mary complains to her employer, the EEOC, or a third party about the alleged unlawful practice. *See supra* notes 98–101 and accompanying text.



Third, consider a situation where XYZ presents an MAA that states, "If the employee proves intentional employment discrimination on the part of the employer, the arbitrator may award no more than \$1000 in punitive damages." Mary tells XYZ that this is unlawful because she heard that in successful discrimination cases plaintiffs can get as much as \$300,000 in punitive damages. She refuses to sign the agreement. XYZ fires Mary. Such a provision is unlawful because it explicitly shelters XYZ from the remedies of Title VII and therefore contravenes Title VII's public policies.<sup>214</sup> Courts can avoid enforcing such provisions in MAAs using a variety of contract doctrines, including doctrines of construction, public policy, and unconscionability.<sup>215</sup> However, with respect to the first requirement of a prima facie claim.<sup>216</sup> Title VII's anti-retaliation provision protects employees who complain about a "practice made unlawful" by Title VII. In other words, "protected activity" includes complaints about a practice of intentional or disparate impact employment discrimination, but nothing in the statutory language refers to protection for employees who oppose practices made unlawful due to the policies *behind* Title VII.<sup>217</sup> Thus, the critical issue is whether Mary's opposition to a practice that is unlawful based on Title VII's policies is "protected activity" for retaliation purposes.

Finally, consider a fourth situation in which the MAA states, "The employee and employer must submit all legal claims arising from employment to arbitration. Any and all arbitrator's fees shall be paid by the party bringing a claim." Mary informs XYZ that she will not sign the MAA because the fees may be excessive and prohibit her or her co-workers from vindicating their rights. XYZ fires Mary for refusing to sign. Under the standard set forth in *Green Tree Financial Corp.-Alabama v. Randolph*<sup>218</sup>, there is nothing inherently unlawful about an MAA of this type, unless Mary could show a court that the fees would be unduly burdensome to her rights under Title VII.<sup>219</sup> Yet, Mary has a reasonable belief that the MAA's fee provision will preclude her ability to bring a discrimination claim. That is, she believes the MAA implicitly shields XYZ from the force of Title VII. Again, the critical issue is

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214. See *supra* notes 163–172 and accompanying text.

215. See *supra* Part III.B.

216. See *supra* note 86 and accompanying text.

217. See 42 U.S.C. § 2000e-3(a) (2000).

218. 531 U.S. 79 (2000).

219. *Id.* at 87 n.6.

whether Mary's opposition is "protected activity" for the purpose of Title VII's anti-retaliation provision.

*B. Title VII's Anti-Retaliation Provision Should Protect Employees Who Have a Reasonable Belief That an MAA Is an Unlawful Practice Under Title VII or Its Policies*

While the first factual scenario encompasses a traditional retaliation claim, where the discriminatory practice complained of is obvious, the other three present more challenging issues likely to arise in the context of an employee opposing an MAA. If an employee believes an MAA is intentionally discriminatory or has a disparate impact, as in the second scenario, Title VII's anti-retaliation provision should protect him or her if the belief is reasonable, even if the MAA is legal.<sup>220</sup> The issue raised in the third and fourth scenarios is whether the provision should protect employees who oppose employment practices made unlawful by the *policies* behind Title VII, rather than the plain language of Title VII itself. In other words, is an employee's opposition "protected activity" when the employee opposes a practice that contradicts the policies of Title VII? Retaliation liability is broader than discrimination liability.<sup>221</sup> Anti-retaliation provisions extend to a number of circumstances not expressly addressed by Title VII and effectuates Congress's purpose in protecting employees who report potentially unlawful practices.<sup>222</sup> Therefore, courts should extend this same protection to employees who reasonably oppose MAAs that explicitly or implicitly shelter employers from employee rights and remedies in violation of the policies and purposes of Title VII.

*I. Title VII's Anti-Retaliation Provision Should Protect an Employee Who Has a Reasonable Belief That an MAA Is an Unlawful Employment Practice Under Title VII*

Title VII's anti-retaliation provision should protect employees fired for opposing MAAs they reasonably believe are intentionally discriminatory or have a disparate impact on certain classes of employees. According to *Moyo v. Gomez*<sup>223</sup> the broad protection of Title

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220. See *supra* note 121 and accompanying text.

221. See *supra* Part II.B.3.a and accompanying text.

222. See *supra* Part II.B.3.a.

223. 40 F.3d 982 (9th Cir. 1994).

VII encompasses even those employees who mistakenly believe an employer's practice is discriminatory.<sup>224</sup> Title VII itself does not afford such protection, and a rule that protects employees who report practices that are actually lawful seems contrary to the plain language of the statute.<sup>225</sup> Yet anti-retaliation provision coverage extends to such employees.<sup>226</sup>

There is no reason that the same broad protection should not apply to employees who oppose MAAs. In an MAA opposition claim, the employee may have a reasonable belief that the MAA is unlawful under Title VII. For example, an employee, such as Mary in the second scenario, could contend that use of the MAA has a disparate impact on racial minorities. If members of this Title VII protected class are more likely to refuse to sign the MAA, these minority employees might be fired. Meanwhile, white employees who may not be as concerned about Title VII protections may sign the MAA and remain employed. Thus, the MAA may disparately impact minority employment.<sup>227</sup> This disparate impact is analogous to *Griggs v. Duke Power*,<sup>228</sup> where the Supreme Court found that a standardized test administered to all employees as a condition of employment operated to exclude blacks and was not related to job performance.<sup>229</sup>

An employee would not have to be correct about this legal theory to be protected from retaliation.<sup>230</sup> He or she would simply need a reasonable belief that the MAA constitutes an unlawful employment practice under Title VII.<sup>231</sup> In *Moyo*, the Ninth Circuit used a broad standard for "reasonable," basing it on the limited factual and legal knowledge available to most employees.<sup>232</sup> This means that an employee would not need statistical data or a sophisticated understanding of the disparate impact theory to sustain a claim of *retaliation*, even though he or she would need such data to win a claim of *discrimination*. Thus, if an

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224. See *supra* notes 110–121 and accompanying text.

225. 42 U.S.C. 2000e-3(a) (2000). The language of the statute refers only to practices made *unlawful* by Title VII.

226. See *supra* Part II.B.3.a.

227. 42 U.S.C. § 2000e-2(k)(1)(A).

228. 401 U.S. 424 (1971).

229. *Id.* at 431.

230. See *supra* notes 110–121 and accompanying text.

231. See *supra* notes 110–121 and accompanying text. Although it is not discussed in detail, some courts have also mentioned that the employee must have a "good faith" belief. See, e.g., *Moyo v. Gomez*, 40 F.3d 982, 984 (9th Cir. 1994).

232. *Moyo*, 40 F.3d at 985.

employee observed a number of black employees quit rather than sign an MAA while white employees signed the MAA, this could be the basis for the reasonable belief that the MAA is unlawful and could sustain a retaliation claim.<sup>233</sup>

2. *Title VII's Anti-Retaliation Provision Should Protect an Employee Opposing an MAA Because It Violates the Strong Public Policies Behind Title VII*

In Title VII retaliation claims, courts should interpret “protected activity” to include not only opposition to intentionally discriminatory employment practices or those with disparate impact, but also opposition to MAAs that explicitly or implicitly shelter employers from Title VII rights or remedies and are unlawful under the policies and purposes of Title VII. The use of MAAs that restrict substantive rights and remedies under any federal statute is unlawful according to the rule in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*<sup>234</sup> that arbitration constitutes only a change of forum.<sup>235</sup> *Gilmer v. Interstate/Johnson Lane Corp.*<sup>236</sup> and *Circuit City Stores, Inc. v. Adams*<sup>237</sup> recognized that only arbitration systems that fully protect an employee’s statutory rights and remedies are acceptable replacements for courts.<sup>238</sup> Thus, if an MAA allows an employee the same rights and remedies he or she would have in court, the employer may legally require the employee to waive the right to file a claim in federal court.<sup>239</sup>

However, courts routinely invalidate MAAs explicitly or implicitly sheltering employers from compliance with Title VII. Such sheltering includes capping damages at an artificially low amount, preventing employees from filing claims with the EEOC, establishing patently unfair arbitration systems, or requiring employees to pay burdensome

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233. Also, because the employee does not have to be a member of a protected class to be safe from retaliation, there is no requirement that the plaintiff show that the MAA restricts his or her own rights and remedies under Title VII. See *supra* notes 105–109 and accompanying text. Therefore, the employee need only demonstrate a reasonable belief that use of the MAA is an unlawful employment practice as applied to his or her co-workers who may otherwise be protected by Title VII.

234. 473 U.S. 614 (1985).

235. *Id.* at 628.

236. 500 U.S. 20 (1991).

237. 121 S.Ct. 1302 (2001).

238. *Id.* at 1313; *Gilmer*, 500 U.S. at 26.

239. *Gilmer*, 500 U.S. at 26.

arbitrator's fees.<sup>240</sup> Courts have used both contract theory and the policies behind Title VII to invalidate terms that cause employees to "forgo the substantive rights afforded by the statute."<sup>241</sup>

The FAA requires courts to enforce MAAs unless they are invalid under traditional contract law.<sup>242</sup> Therefore, federal courts have used various contract theories to invalidate MAAs that hinder Title VII. For example, the Supreme Court in *Alexander v. Gardner-Denver Co.*<sup>243</sup> construed the MAA narrowly to exclude Title VII claims from its scope,<sup>244</sup> while the *Cole v. Burns International Security Services*<sup>245</sup> court read the MAA to require the employer to pay all arbitrator's fees to avoid perpetuating an implicit Title VII shelter.<sup>246</sup> In *Hooters of America, Inc., v. Phillips*,<sup>247</sup> the court found the MAA itself to be lawful, but refused to compel arbitration because the employer had breached the MAA by promulgating patently unfair arbitration rules.<sup>248</sup> The *Derrickson v. Circuit City Stores, Inc.*<sup>249</sup> and *Paladino v. Avnet Technologies*<sup>250</sup> courts refused to compel arbitration because the MAAs in both cases contained damage restrictions that violated Title VII's public policies.<sup>251</sup> Although the legal means employed by courts have varied, the end has always been to invalidate MAAs that explicitly limit employees' rights and remedies under Title VII.

Concurrent with their invalidation of unlawful MAAs, courts have also construed "protected activity" beyond Title VII's plain language in order to effectuate Title VII's policies and purposes.<sup>252</sup> The Fifth Circuit observed that in order for Title VII's anti-retaliation provision to be effective, "appropriate informal opposition to perceived discrimination

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240. See *supra* Part III.B.

241. *Id.* at 26.

242. 9 U.S.C. § 2 (2000).

243. 415 U.S. 36 (1974).

244. *Id.* at 42.

245. 105 F.3d 1465 (D.C. Cir. 1997).

246. *Id.* at 1485.

247. 173 F.3d 933 (4th Cir. 1999).

248. *Hooters*, 173 F.3d at 940.

249. 81 Fair Empl. Prac. Cas. (BNA) 1533 (D. Md. 1999), *aff'd sub nom.* *Johnson v. Circuit City Stores, Inc.*, 203 F.3d 821 (4th Cir. 1999).

250. 134 F.3d 1054 (11th Cir. 1998).

251. *Derrickson*, 81 Fair Empl. Prac. Cas. (BNA) at 1538; *Paladino*, 134 F.3d at 1059-60.

252. See *supra* note 90 and accompanying text.

must not be chilled by the fear of retaliatory action.”<sup>253</sup> To avoid this chilling of opposition, the Ninth Circuit in *EEOC v. Crown Zellerbach Corp.*<sup>254</sup> extended the meaning of “protected activity” to include employee complaints about discrimination to customers of the employer.<sup>255</sup> In *Maynard v. City of San Jose*,<sup>256</sup> the court held that “protected activity” included a white employee’s assistance of a black co-worker because to deny the white employee’s retaliation claim would perpetuate the harmful effects of discriminatory behavior in contravention of Title VII’s purpose.<sup>257</sup> Finally, in *Moyo*, the court used the “reasonable belief” rule to extend “protected activity” to include opposition to practices that are *lawful* under Title VII.<sup>258</sup> The lesson of these cases is clear: courts should broadly construe “protected activity” beyond the plain language of the anti-retaliation provision when doing so will effectuate the purposes of Title VII.

Therefore, an employee who opposes an MAA that restricts Title VII rights and remedies does so with the Court’s support. Because courts have also sought to effectuate the purposes and prevent the circumvention of Title VII by extending anti-retaliation protection beyond the statute’s plain language, the provision should protect an employee fired for opposing an MAA made unlawful by the policies behind Title VII. Furthermore, because courts have invalidated explicit and implicit shelters alike, this protection should be extended to employees who oppose MAAs that contain implicitly unlawful fee-sharing provisions, such as the MAA in scenario four, as well as those who oppose more explicit violations such as the damage restrictions in scenario three. If the MAA’s end result is a potentially unlawful Title VII shelter, an employee should have the right to oppose the MAA.

This argument should be particularly cogent in the Ninth Circuit and the eight other federal circuits where the “reasonable belief” rule applies.<sup>259</sup> Employees are not expected to be familiar with all the factual and legal issues in a potential case.<sup>260</sup> The average employee may not have the legal sophistication required to discern between employment

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253. *Payne v. McLemore’s Wholesale & Retail Stores*, 654 F.2d 1130, 1138 (5th Cir. 1981) (quoting *Hearth v. Metro. Transit Comm’n*, 436 F. Supp. 685, 688–89 (D. Minn. 1977)).

254. 720 F.2d 1008 (9th Cir 1983).

255. *Id.* at 1012.

256. 37 F.3d 1396 (9th Cir. 1994).

257. *Id.* at 1403.

258. *Moyo v. Gomez*, 40 F.3d 982, 985 (9th Cir. 1994).

259. *See supra* notes 110–121 and accompanying text.

260. *Moyo*, 40 F.3d at 985.

practices made unlawful by Title VII's plain language and those that contravene Title VII's policies and purposes. The employee's reasonable belief should prevent outright dismissal of the claim. For example, if scenario four occurred in the Ninth Circuit and Mary filed a retaliation claim, the *Moyo* rule would apply and the burden would be whether or not she had a reasonable belief that the fee-splitting agreement contradicts the policies of Title VII. Whether a practice that contradicts Title VII's public policies is a "practice made unlawful" according to the anti-retaliation provision's plain language would then be subjected to the court's analysis of "reasonable" in *Moyo* and subsequent cases.<sup>261</sup> The court would have to determine whether an average employee would have believed that the MAA restricted his or her ability to bring a claim. While Mary may ultimately be mistaken about the provision's illegality, she can still sustain a retaliation claim with a reasonable belief. Accordingly, an employee's reasonable belief that an employment practice contradicts the policies of Title VII should trigger the protections of Title VII's anti-retaliation provision regardless of whether Title VII's plain language or policies are the source of the illegality, or whether the provision would be enforceable if signed.

### 3. *Protecting Employees Who Oppose MAAs That Contradict Title VII Will Prevent Employers from Gaining Leverage over Employees' Title VII Rights*

Courts should construe Title VII's anti-retaliation provision to protect employees who oppose MAAs that contradict the policies of Title VII because the current legal alternatives leave many employees with few legal options with regard to their Title VII rights. Without the provision's protection, an employee who believes an MAA subverts Title VII has two options: refusing to sign and finding another job or signing and then challenging the MAA if a discrimination claim arises. However, the choice of whether to sign may actually mean choosing between employment and rights, while signing and challenging may place a series of obstacles between an employee and his or her Title VII rights.

While the employment at-will doctrine legitimately compels an employee's choice between resigning and continuing employment under changed conditions, a closer look reveals that for a class of cases the choice may really be between continued employment and the employee's

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261. See *supra* notes 110–121 and accompanying text.

Title VII rights.<sup>262</sup> A cause of action for wrongful termination would only apply to current employees. Employers might present MAAs to employees who have complained of discrimination or who might be at a higher risk of filing a Title VII complaint.<sup>263</sup> Thus, requiring an employee to choose between keeping his or her job by signing an MAA that restricts access to Title VII's remedial scheme and quitting with his or her Title VII rights intact produces the same result: a diminishment of the employee's Title VII rights. Allowing a cause of action for wrongful termination would prevent employers from using the presumptions of employment at-will to restrict their employees' Title VII rights.

Alternatively, if the employee signs the MAA in order to continue working, the employer might gain unfair leverage with respect to the employee's Title VII rights. First, the employee may be deterred from filing a Title VII claim at all. Employees might believe that once they sign the agreement, it is binding regardless of the circumstances under which it was signed.<sup>264</sup> If an employee thinks that the employer's arbitration scheme is prohibitively expensive or unfair, he or she may decide that filing a claim is unfeasible or futile. This is what the *Cole* court identified as an MAA with a deterrent effect on the filing of Title VII claims.<sup>265</sup> Also, having to litigate the validity of the arbitration clause in addition to the discrimination claim might increase the time and expense parties must invest in a Title VII case. Such additional costs may ultimately favor employers, who may be better able to absorb additional litigation costs than employees.

Recognizing a cause of action for wrongful termination when a current employee refuses to sign an MAA that contradicts Title VII's policies could prevent employers from taking advantage of this Catch-22 with regard to an employee's Title VII rights. Ultimately, Title VII was designed as a limitation on employment at-will that protects employee rights.<sup>266</sup> Employers should not be able to use the presumption of

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262. See Hoffman, *supra* note 4, at 153.

263. A few courts have identified and condemned "preemptive retaliation," which is the practice of firing an employee who the employer fears may make a discrimination complaint in the future. See, e.g., Sauer v. Salt Lake County, 1 F.3d 1122, 1128 (10th Cir. 1993).

264. Basic principles of contract law dictate that parties who sign contracts are presumed to have read and understood the terms. See, e.g., Golenia v. Bob Baker Toyota, 915 F. Supp. 201, 204 (S.D. Cal. 1996). Furthermore, the argument that requiring an employee to sign an MAA to keep his or her job makes the MAAs an illegal contract of adhesion has been rejected by some courts. See *id.*; Lang v. Burlington Northern R.R., 835 F. Supp. 1104, 1106 (D. Minn. 1993).

265. Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1484 (D.C. Cir. 1997).

266. See *supra* notes 49–51 and accompanying text.



employment at-will to limit those rights, either by putting employees to a choice between continued employment and their Title VII rights, or by using an MAA as a disincentive on the exercise of those rights. The threat of suit for wrongful termination is one way to restrain the very imbalance in the employment relationship that Title VII seeks to eliminate.

C. *Including MAA Opposition in the Scope of "Protected Activity" Discourages Employers from Drafting MAAs Unfairly in Their Own Favor*

There is great temptation for employers to lessen their potential Title VII liability by drafting MAAs to their own advantage.<sup>267</sup> Courts' recognition of Title VII retaliation claims premised on MAA opposition would reduce an employer's ability both to draft MAAs thwarting Title VII's policies and to fire employees who question the practice. In turn, the adverse effects these agreements have on the enforcement of Title VII could diminish. Retaliation claims could motivate those employers who willfully or negligently draft unlawful agreements to redraft them. Recognizing this cause of action should ultimately decrease litigation by producing binding arbitration agreements that fully protect Title VII rights and remedies.

D. *An Employer May Defend Against an Employee's Retaliation Claim by Showing that No Causal Nexus Exists Between the Employee's Opposition to the MAA and His or Her Termination*

To defend against a claim of retaliation, the employer may offer evidence that breaks the causal link between the employee's protected activity and the dismissal. Were an employee to offer a prima facie case that he or she was dismissed for expressing opposition to a potentially unlawful MAA, the employer could establish legitimate reasons for the dismissal and defeat the claim.<sup>268</sup> For example, it would not matter if the employee engaged in "protected activity" if the employer fired him or her for habitual tardiness.<sup>269</sup> Also, if the employee opposed the agreement

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267. Maltby, *supra* note 12, at 5.

268. *See, e.g.,* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); Folkerson v. Circus Circus Enters., 107 F.3d 754, 755 (9th Cir. 1997); EEOC v. Avery Dennison Corp., 104 F.3d 858, 860 (6th Cir. 1997).

269. *See, e.g.,* Hochstadt v. Worcester Found. for Experimental Biology, 545 F.2d 222, 234 (1st Cir. 1976).

in an excessively disruptive or illegal way, and that behavior was the true reason for dismissal, then the retaliation claim should also fail.<sup>270</sup> In these situations, the employer would not be firing the employee for opposing an unlawful practice, but for legitimate, lawful reasons that would justify any employer's dismissal of any employee.

## V. CONCLUSION

With increasing numbers of employers turning to mandatory arbitration for conflict resolution, the number of opportunities for courts to adjudicate employment disputes is decreasing. Therefore, pursuant to Supreme Court mandate, courts must take every precaution to ensure that arbitration agreements provide the same Title VII rights and remedies that employees would have in a courtroom. Congress created Title VII's anti-retaliation provision to ensure that employers would not find ways to circumvent Title VII's mandate. Consistent with Congressional policy, courts have construed employers' retaliation liability more broadly than employers' discrimination liability. Accordingly, if an MAA undermines Title VII's discrimination protections, an employee should be able to reject that MAA. If he is discharged, he should have a viable claim under Title VII's anti-retaliation provision.

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270. *Bartulica v. Paculdo*, 411 F. Supp. 392, 397 (D. Mo. 1976).



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