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## Reading Too Much into What the Court *Doesn't* Write: How Some Federal Courts Have Limited Title VII's Participation Clause's Protections after *Clark County School District v. Breeden*

Lawrence D. Rosenthal

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## READING TOO MUCH INTO WHAT THE COURT DOESN'T WRITE: HOW SOME FEDERAL COURTS HAVE LIMITED TITLE VII'S PARTICIPATION CLAUSE'S PROTECTIONS AFTER *CLARK COUNTY SCHOOL DISTRICT V. BREEDEN*

Lawrence D. Rosenthal\*

*Abstract:* In 2001, the Supreme Court issued its opinion in *Clark County School District v. Breedon*, in which it refused to determine what a plaintiff must prove to demonstrate that she engaged in "protected activity" under Title VII's anti-retaliation provision's opposition clause. Although the Court declined to answer this question, courts have interpreted *Breedon* as requiring an opposition-clause plaintiff to prove a good-faith, objectively reasonable belief of an unlawful employment practice. Although *Breedon* involved Title VII's opposition clause, some courts are now applying *Breedon* to cases involving Title VII's participation clause. This is baffling for two reasons. First, *Breedon* involved the opposition clause, not the participation clause, and prior to *Breedon*, federal courts had concluded that the participation clause provided more protection than the opposition clause provided. Second, *Breedon* never definitively established the standard for opposition-clause cases. Despite this, some courts are now applying *Breedon*'s objectively reasonable standard to participation-clause cases. This Article argues that courts should not apply *Breedon* in participation-clause cases and should protect participation-clause plaintiffs even if the plaintiffs' beliefs about unlawful employment practices are unreasonable. Courts should do this because of (1) the participation clause's plain language; (2) the Equal Employment Opportunity Commission's (EEOC) position on this issue; (3) the canon of statutory construction that requires remedial statutes such as Title VII to be interpreted broadly; and (4) the fact that *Breedon* neither addressed the participation clause nor provided a definitive standard for opposition-clause cases.

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INTRODUCTION

In addition to prohibiting employers from discriminating against employees based upon “race, color, religion, sex, or national origin,”<sup>1</sup> Title VII of the Civil Rights Act of 1964 (Title VII) prohibits employers from discriminating against employees who “participate[]” in proceedings brought under Title VII or against individuals who

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1. 42 U.S.C. § 2000e-2(a) (2000).

“oppose[]” practices made unlawful by Title VII.<sup>2</sup> These prohibitions, found in Title VII’s anti-retaliation provision, protect two types of activities. The anti-retaliation provision’s participation clause protects employees who file charges with the Equal Employment Opportunity Commission (EEOC), testify regarding claims brought under Title VII, assist in proceedings brought under Title VII, or participate “in any manner” in Title VII proceedings.<sup>3</sup> The anti-retaliation provision’s opposition clause protects employees who oppose or protest an employer’s unlawful employment practices or who engage in other “opposition” activities without resorting to the EEOC.<sup>4</sup>

The Supreme Court has indicated that Title VII’s anti-retaliation provision is critical to Title VII’s effectiveness, and that without an effective anti-retaliation provision, Title VII’s substantive prohibitions would suffer.<sup>5</sup> As a result, prior to its opinion in *Clark County School*

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2. 42 U.S.C. § 2000e-3(a). Plaintiffs bringing suit under either clause of Title VII’s anti-retaliation provision do not have to prevail on the underlying discrimination claim in order to prevail on their retaliation claims. See HAROLD S. LEWIS, JR. & ELIZABETH J. NORMAN, *EMPLOYMENT DISCRIMINATION LAW AND PRACTICE* 97–98 (2001). For an example of a case in which a court determined that claims brought pursuant to the *opposition* clause require only a reasonable, good-faith belief that the employer’s conduct is unlawful, see *Jordan v. Alternative Resources Corp.*, 458 F.3d 332, 340 (4th Cir.), *reh’g en banc denied*, 467 F.3d 378 (4th Cir. 2006), *cert. denied*, \_\_\_ U.S. \_\_\_, 127 S. Ct. 2036 (2007). For a case in which a court determined that conduct is protected under the *participation* clause regardless of whether the plaintiff wins the underlying claim, see *Johnson v. University of Cincinnati*, 215 F.3d 561, 582 (6th Cir. 2000).

3. § 2000e-3(a).

4. See EEOC COMPLIANCE MANUAL § 8-II (1998), available at <http://www.eeoc.gov/policy/docs/retal.html> [hereinafter *Compliance Manual*]. According to the Compliance Manual, specific examples of protected opposition include: (1) threatening to file a charge or other formal complaint alleging discrimination; (2) threatening to file a complaint with the EEOC, an equivalent state agency, union, court, or any other entity that receives complaints relating to discrimination; (3) complaining about alleged discrimination against oneself or against others; (4) refusing to obey an order because of a reasonable belief that it is discriminatory; and (5) requesting a reasonable accommodation or religious accommodation. *Id.* The Compliance Manual does not provide as many examples of protected participation, but it does provide that the participation clause applies to “individuals challenging employment discrimination under the statutes enforced by EEOC in EEOC proceedings, in state administrative or court proceedings, as well as in federal court proceedings.” *Id.* The Compliance Manual also echoes the statutory language that indicates that activities such as (1) filing a charge; (2) testifying; (3) assisting; or (4) “participat[ing] in any manner in an investigation, proceeding, hearing, or litigation under Title VII, the ADEA, the EPA, or the ADA” are protected activities. *Id.*

5. See, e.g., *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63–64 (2006). The Court noted that a narrow construction of Title VII’s anti-retaliation provision would “fail to fully achieve the anti-retaliation provision’s ‘primary purpose,’ namely, ‘maintaining unfettered access to statutory remedial mechanisms.’” *Id.* (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997)). The Court further noted that “[i]nterpreting the anti-retaliation provision to provide broad protection from retaliation helps assure the cooperation upon which accomplishment of the Act’s primary objective depends.” *Id.* at 67; see also *Robinson*, 519 U.S. at 346 (holding that Title VII’s

*District v. Breeden*,<sup>6</sup> the Supreme Court and all federal courts had usually granted broad protection to employees seeking protection under Title VII's anti-retaliation provision.<sup>7</sup> One way in which courts had given this broad protection was by allowing plaintiffs to succeed in retaliation claims even if they lost their substantive discrimination claims.<sup>8</sup> Thus, even if plaintiffs' discrimination claims failed, the plaintiffs could still prevail on their retaliation claims.<sup>9</sup> This protection, however, has not been unlimited, as federal courts have concluded that the anti-retaliation provision's protections are not absolute.<sup>10</sup>

The Supreme Court had the opportunity to address the scope of the *opposition* clause's protection when it decided *Breeden*. In *Breeden*, the Court addressed whether the plaintiff established a *prima facie* case of retaliation under Title VII's *opposition* clause.<sup>11</sup> The Court concluded that the plaintiff did not establish a *prima facie* case, because she was unable to prove that her complaint to her supervisors constituted "protected activity," the first element of a *prima facie* case under the anti-retaliation provision.<sup>12</sup> In reaching this conclusion, the Court

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anti-retaliation provision applies to former employees as well as to current employees in part because a narrower interpretation would undermine Title VII's effectiveness).

6. 532 U.S. 268 (2001).

7. See, e.g., *Burlington Northern*, 548 U.S. at 65 (relying on the EEOC's position that Title VII's anti-retaliation provision should provide "exceptionally broad protection."). See also *Robinson*, 519 U.S. at 346, where the Court extended anti-retaliation protection to former employees, despite the fact that the anti-retaliation provision's language did not explicitly include former employees within the scope of its protection. See 42 U.S.C. § 2000e-3(a).

8. See LEWIS & NORMAN, *supra* note 2, at 97-98 (citing cases). This interpretation is in conflict with the statute's plain language, which protects employees from retaliation based on an employee's opposition to "any practice made an unlawful employment practice by this subchapter." 42 U.S.C. § 2000e-3(a) (emphasis added). However, courts have given a broader interpretation to that clause than its plain language would suggest. See *supra* text accompanying note 2.

9. LEWIS & NORMAN, *supra* note 2, at 97-98.

10. See, e.g., *Breeden*, 532 U.S. at 270 (suggesting, but not deciding, that only objectively reasonable beliefs that employment practices are unlawful are protected under the *opposition* clause of Title VII's anti-retaliation provision); *Jordan v. Alternative Res. Corp.*, 458 F.3d 332, 343 (4th Cir.), *reh'g en banc denied*, 467 F.3d 378 (4th Cir. 2006), *cert. denied*, \_\_\_ U.S. \_\_\_, 127 S. Ct. 2036 (2007) (rejecting an employee's *opposition*-clause claim because it was not based on an objectively reasonable belief that the employer's conduct violated Title VII); *Mattson v. Caterpillar, Inc.*, 359 F.3d 885, 892 (7th Cir. 2004) (concluding that *Breeden*'s objectively reasonable standard applies to claims brought under the anti-retaliation provision's participation clause).

11. See *Breeden*, 532 U.S. at 269. When addressing the issue of whether the plaintiff established this *prima facie* case, the Court had the opportunity to decide what standard applied when determining whether a plaintiff engaged in protected activity under the *opposition* clause; however, as will be discussed in Part IV of this Article, the Court specifically declined to decide that issue. *Id.* at 270.

12. *Id.* at 271. As will be discussed *infra* Part I, a plaintiff in a retaliation case must prove that (1)

determined that no reasonable person could have concluded that the comment in question violated Title VII, and that the plaintiff's complaints about that remark were, therefore, not protected activity.<sup>13</sup> Importantly, the Court did not decide the standard for determining what constitutes protected activity under the opposition clause;<sup>14</sup> however, federal courts that have addressed this issue since *Breeden* have come to require a showing that the plaintiff's belief that he was opposing an unlawful employment practice was objectively reasonable.<sup>15</sup> A plaintiff's good-faith, but *unreasonable*, belief of an unlawful employment practice is no longer protected,<sup>16</sup> as it had been in some jurisdictions prior to *Breeden*.<sup>17</sup>

Another result of *Breeden* is that some federal courts now apply this objectively reasonable standard to cases involving Title VII's *participation* clause.<sup>18</sup> This development is somewhat unexpected because before *Breeden*, courts held that the participation clause's protections were more broad than those afforded by the opposition clause.<sup>19</sup> However, since *Breeden*, some courts do not distinguish between the two clauses, and they apply *Breeden*'s objectively reasonable standard to opposition-clause cases *and* to participation-clause cases.<sup>20</sup> This development is baffling for two reasons. First, the

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he engaged in a protected activity; (2) his employer was aware of the protected activity; (3) he suffered an adverse employment action; and (4) there was a causal connection between the protected activity and the adverse employment action. See Brian A. Riddell & Richard A. Bales, *Adverse Employment Actions in Retaliation Cases*, 34 U. BALT. L. REV. 313, 315 (2005).

13. See *Breeden*, 532 U.S. at 271.

14. *Id.* at 270.

15. For a thorough discussion of this issue, see generally Lawrence D. Rosenthal, *To Report or Not To Report: The Case for Eliminating the Objectively Reasonable Requirement for Opposition Activities Under Title VII's Anti-Retaliation Provision*, 39 ARIZ. ST. L.J. 1127 (2007).

16. See *Breeden*, 532 U.S. 268.

17. See, e.g., *Love v. RE/MAX of Am., Inc.*, 738 F.2d 383, 385 (10th Cir. 1984) (citing cases holding that a plaintiff's activity is protected so long as it is based on a his or her good-faith belief that Title VII has been violated).

18. See, e.g., *Moore v. City of Philadelphia*, 461 F.3d 331, 341 (3d Cir. 2006); *Gilooly v. Mo. Dep't of Health & Senior Servs.*, 421 F.3d 734, 744 (8th Cir. 2005) (Colloton, J., concurring in part and dissenting in part); *Mattson v. Caterpillar, Inc.*, 359 F.3d 885, 892 (7th Cir. 2004); *Neely v. City of Broken Arrow*, No 4:07CV00018, 2007 WL 1574762, at \*2 (N.D. Okla. May 29, 2007).

19. See, e.g., *Wyatt v. City of Boston*, 35 F.3d 13, 15 (1st Cir. 1994); *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1312 (6th Cir. 1989); *Sias v. City Demonstration Agency*, 588 F.2d 692, 695 (9th Cir. 1978).

20. See *infra* Parts V.A and V.B. Some courts have not yet decided whether a reasonable, good-faith belief of an unlawful employment practice is required in order to gain protection under Title VII's participation clause. See, e.g., *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1455 (11th Cir. 1998) (stating that because the facts viewed in a light most favorable to the plaintiff

Court in *Breeden* was not even confronted with which standard applied under the participation clause.<sup>21</sup> Second, the Court in *Breeden* never definitively stated that an objectively reasonable standard was required under the opposition clause.<sup>22</sup> Despite this, some courts have begun to limit the participation clause's protection and to require that before participation-clause plaintiffs receive protection, they must prove that their participation was reasonable.<sup>23</sup>

These courts now make it more difficult for plaintiffs to prevail in participation-clause cases; however, there are many reasons why courts should not impose this objectively reasonable requirement on participation-clause plaintiffs. First, Title VII's language supports a broad interpretation of the participation clause, an interpretation that would not require an objectively reasonable standard.<sup>24</sup> Second, the EEOC has expressed its opinion that the participation clause should provide extremely broad protection to employees, and that it should provide protection even in cases in which a plaintiff's participation is unreasonable.<sup>25</sup> Third, a narrow interpretation conflicts with the canon of statutory construction that remedial statutes should be interpreted

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demonstrated that the plaintiff did have a good-faith, reasonable basis for filing her charge, the court "need not decide whether protection from retaliation under the participation clause is conditioned by a good faith, reasonable basis requirement."). Despite this lack of a clear answer from the Eleventh Circuit, at least one United States district court from within the Eleventh Circuit has suggested that a good-faith requirement applies to participation-clause activities. In *Belt v. Alabama Historical Commission*, No. Civ.A. 04-0331-WSM, 2005 WL 1653728, at \*9 (S.D. Ala. July 12, 2005), *aff'd*, 181 F. App'x 763 (11th Cir. 2006), the court noted that "all that matters is whether [the] plaintiff testified in good faith at her deposition in February 2003 because it is that deposition that [the] plaintiff characterizes as a statutorily protected act." Because testifying at a deposition would fall under the participation clause rather than the opposition clause, it appears that the court applied a good-faith requirement to participation-clause activities.

21. See *Breeden*, 532 U.S. at 270. The second part of the *Breeden* opinion did, in fact, address the participation clause; however, that part of the opinion did not focus on the issue of which standard should be used to determine whether a plaintiff engaged in protected activity under either clause of Title VII's anti-retaliation provision. See *id.* at 271-74.

22. *Id.* at 270. One possible reading of the Court's opinion is that if it did answer the question, the Court would have applied a strict interpretation of the statute and would have required that there be an actual unlawful employment practice before a retaliation plaintiff could prevail. This, of course, would have conflicted with most other precedent because, at the time the Court decided *Breeden*, no courts required an actual unlawful employment practice as a prerequisite for a retaliation plaintiff to prevail. But see *EEOC v. C & D Sportswear Corp.*, 398 F. Supp. 300, 306 (M.D. Ga. 1975), for an early case in which the court did require an actual violation.

23. See discussion *infra* Parts V.A-B.

24. See 42 U.S.C. § 2000e-3(a) (2000). Specifically, the statute provides protection for individuals who participate "in any manner" in a Title VII investigation, proceeding, or hearing.

25. See *Compliance Manual*, *supra* note 4, at § 8-II.

broadly.<sup>26</sup> Finally, courts should not apply *Breeden* to participation-clause cases because, as was previously noted, *Breeden* did not address the participation clause and never definitively determined the proper standard for opposition-clause cases.<sup>27</sup>

This Article will first examine, in Part I, Title VII's anti-retaliation provision, including the opposition clause and the participation clause.<sup>28</sup> Part II will address opposition-clause cases and *Breeden*'s effect on them,<sup>29</sup> while Part III of this Article will describe how the courts analyzed participation-clause cases pre-*Breeden*.<sup>30</sup> Part IV of this Article will briefly analyze the *Breeden* opinion.<sup>31</sup> Part V will address post-*Breeden* cases and how courts have applied *Breeden* to participation-clause cases.<sup>32</sup> Finally, Part VI of this Article will argue that using the objectively reasonable standard for both types of cases is inappropriate, and that the courts that have rejected *Breeden* in the participation-clause context have correctly analyzed this issue.<sup>33</sup> At the very least, if courts are going to treat these cases similarly, they should not require the objectively reasonable standard, but rather they should require only that anti-retaliation-clause plaintiffs oppose or participate in good faith.<sup>34</sup> However, before explaining why that option is preferable to an across-the-board reasonableness requirement in all retaliation cases, this Article will explain Title VII's anti-retaliation provision.

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26. See, e.g., *Bd. of County Comm'rs v. EEOC*, 405 F.3d 840, 847 n.6 (10th Cir. 2005) (noting that Title VII is a broad remedial statute and should be construed liberally); *Charlton v. Paramus Bd. of Educ.*, 25 F.3d 194, 199–200 (3d Cir. 1994) (acknowledging that the anti-retaliation provision of Title VII should be broadly construed to further the goal of preventing employer retaliation).

27. 532 U.S. at 270–72. There are other reasons why courts should not apply *Breeden* to participation-clause cases, many of which are discussed in the context of the opposition clause in Rosenthal, *supra* note 15, at 1149–76. Some of these reasons include (1) the fact that most employees are not familiar with the intricacies of employment discrimination law, and they should not be held to a high, reasonableness standard; (2) applying *Breeden* to the participation clause would discourage employees from coming forward with discrimination complaints and would also cause employees to be hesitant to support other employees' discrimination complaints; and (3) using a reasonableness standard will result in inconsistent outcomes for cases with similar facts. See *id.*

28. See discussion *infra* Part I.

29. See discussion *infra* Part II.

30. See discussion *infra* Part III.

31. See discussion *infra* Part IV.

32. See discussion *infra* Part V.

33. See discussion *infra* Part VI.

34. I made this argument regarding the *opposition* clause in Rosenthal, *supra* note 15, at 1149–77.



I. TITLE VII'S ANTI-RETALIATION PROVISION AND HOW  
THE FEDERAL COURTS ANALYZE CLAIMS BROUGHT  
UNDER THIS PROVISION

Like most state anti-discrimination statutes and other federal anti-discrimination statutes, Title VII prohibits employers from discriminating against employees because the employees opposed what they reasonably believed to be unlawful employment practices or because they participated in proceedings brought under the statute.<sup>35</sup> Title VII's anti-retaliation provision provides as follows:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeships or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.<sup>36</sup>

According to the statute's language, two types of activities are protected—opposition and participation.<sup>37</sup> The participation clause, which is the focus of this Article, protects employees who file EEOC charges or who testify or assist in EEOC investigations, proceedings, and hearings.<sup>38</sup> This clause also protects employees who “participate[] *in any manner*” in investigations, hearings, or proceedings brought

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35. 42 U.S.C. § 2000e-3(a) (2000). For example, the Americans with Disabilities Act of 1990 also has an anti-retaliation provision. 42 U.S.C. § 12203(a) (2000). The Age Discrimination in Employment Act also has an anti-retaliation provision. 29 U.S.C. § 623(d) (2000). For an example of a state anti-discrimination statute's anti-retaliation provision, see MASS. GEN. LAWS ch. 151B, § 4(4) (1999). Although similar to Title VII's anti-retaliation provision, the Massachusetts statute's language does have some differences. *See Morris v. Boston Edison Co.*, 942 F. Supp. 65, 70 (D. Mass. 1996). *See also* FLA. STAT. § 760.10(7) (1992) (the Florida Civil Rights Act), which provides protection to individuals who either oppose unlawful employment practices or participate “in any manner” in state anti-discrimination proceedings. Because the language of this provision is nearly identical to Title VII's anti-retaliation provision, Florida courts interpret the provisions similarly. *See Hinton v. Supervision Int'l., Inc.*, 942 So. 2d 986, 989 (Fla. Dist. Ct. App. 2006).

36. 42 U.S.C. § 2000e-3(a).

37. *See id.*

38. *See id.*

pursuant to Title VII.<sup>39</sup> As will be addressed later, this “in any manner” language is one reason why courts should grant broad protection to participation-clause plaintiffs.<sup>40</sup> However, there are additional reasons why courts should provide extremely broad protection to these individuals.<sup>41</sup>

The opposition clause is a bit more general, as it provides protection to employees who “oppose[]” what they reasonably believe to be unlawful employment practices under Title VII.<sup>42</sup> Under this clause, employees are protected from retaliation if they complained about, opposed, or questioned an employer’s employment practice.<sup>43</sup> There are also several other types of protected “opposition” conduct covered by this provision.<sup>44</sup>

To establish a prima facie case under either clause, the plaintiff is required to prove four elements.<sup>45</sup> He must prove: first, that he engaged in a “protected activity;” second, that the employer was aware of the protected activity;<sup>46</sup> third, that he suffered an “adverse employment action;”<sup>47</sup> and finally, that there was a causal connection between the protected activity and the adverse employment action.<sup>48</sup> If the plaintiff establishes a prima facie case, the *McDonnell Douglas*<sup>49</sup> burden-shifting framework will be applied. Under this framework, if the employer

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39. See *id.* (emphasis added).

40. See discussion *infra* Part VI.A.

41. See discussion *infra* Part VI.

42. See 42 U.S.C. § 2000e-3(a). Although the statute does not include any language that would indicate that a reasonable belief that the employer has committed an unlawful employment practice is sufficient, courts both before and after *Breeden* have interpreted the statute in that manner. See Rosenthal, *supra* note 15, at 1129 n.7, 1133 n.28.

43. See LEWIS & NORMAN, *supra* note 2, at 99–101.

44. See *supra* note 4.

45. See Riddell & Bales, *supra* note 12, at 315.

46. *Id.* This is the element of the prima facie case where the dispute about the level of protection afforded by the opposition clause and/or the participation clause becomes relevant.

47. *Id.* Prior to the Supreme Court’s opinion in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), the United States courts of appeals had established different standards for determining what constitutes an “adverse employment action.” For a complete discussion of the various approaches the courts took with respect to what constituted an “adverse employment action” prior to *Burlington Northern*, see Riddell & Bales, *supra* note 12, at 315–30. In *Burlington Northern*, the Court ultimately adopted a somewhat employee-friendly approach, concluding that to establish an “adverse employment action,” a plaintiff must “show that a reasonable employee would have found the challenged action materially adverse, which . . . means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.” 548 U.S. at 68 (citation omitted) (internal quotation marks omitted).

48. Riddell & Bales, *supra* note 12, at 315.

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

articulates a legitimate reason for the adverse employment action, the employee then has the burden of proving that the employer's articulated reason was pretextual, and that the real reason for the adverse employment action was retaliation.<sup>50</sup>

With respect to the first element, engaging in protected activity, courts have typically provided more protection to plaintiffs suing under the participation clause. Specifically, while many courts protected almost all participation-clause activity pre-*Breedon*,<sup>51</sup> courts analyzing opposition-clause cases tried to balance the employee's right to oppose what he reasonably believed was an unlawful employment practice with the employer's right to control its employees and employment policies.<sup>52</sup> When addressing opposition-clause claims, courts often had to decide whether the employee's belief that the employer engaged in an unlawful employment practice was reasonable and whether the employee's form of opposition was reasonable.<sup>53</sup>

Regardless of under which clause the plaintiff seeks protection, the courts are unanimous that a plaintiff need not win his discrimination claim in order to win his retaliation claim;<sup>54</sup> the standard needed to prevail now depends on whether the retaliation claim was based on participation or opposition and upon the jurisdiction in which the plaintiff files suit.<sup>55</sup> One caveat is that the employment practice about which the plaintiff complains must be a practice covered by Title VII.<sup>56</sup>

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50. For a thorough explanation of the burden-shifting approach taken by courts when confronted with employment discrimination claims, see *McDonnell Douglas*, 411 U.S. at 802-07. See also *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506-12 (1993); *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-60 (1981).

51. See, e.g., *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 582 (6th Cir. 2000); *Wyatt v. City of Boston*, 35 F.3d 13, 15 (1st Cir. 1994) (citing cases); *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1312 (6th Cir. 1989).

52. See, e.g., *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1142 (5th Cir. 1981) (determining that an employee's picketing and boycotting were protected activities).

53. See *id.* at 1140-41.

54. See *LEWIS & NORMAN*, *supra* note 2, at 97-99. But see *EEOC v. C & D Sportswear Corp.*, 398 F. Supp. 300, 306 (M.D. Ga. 1975) (requiring an actual Title VII violation for the plaintiff to be protected under the anti-retaliation provision).

55. See *LEWIS & NORMAN*, *supra* note 2, at 100-03. Courts have determined that the plaintiff need not win the claim despite the fact that Title VII's anti-retaliation provision limits protection to individuals who oppose a practice "made an unlawful employment practice" under Title VII. 42 U.S.C. § 2000e-3(a) (2000). For a thorough discussion of this issue, see generally Rosenthal, *supra* note 15.

56. See *Slagle v. County of Clarion*, 435 F.3d 262, 268 (3d Cir.), *cert. denied*, 547 U.S. 1207 (2006) (deciding that a plaintiff's "vague allegations" of "'civil rights' violations" were not protected activity). See also *infra* note 58.

Specifically, the plaintiff would fail in a Title VII retaliation claim if he filed an EEOC charge and failed to identify a protected characteristic as the motivating factor behind the adverse employment action.<sup>57</sup> For example, an employee would fail in a Title VII retaliation claim if his complaint alleged violations of the Fair Labor Standards Act rather than of Title VII.<sup>58</sup>

As previously indicated, pre-*Breeden*, most federal courts protected almost all participation activities.<sup>59</sup> However, regarding opposition activities, courts were split with respect to whether an employee's belief of an employer's unlawful employment practice had to be reasonable, or whether the employee's opposition was protected as long as he had a good-faith belief that the employer's practice was unlawful.<sup>60</sup> Although that issue was not before the *Breeden* Court, the *Breeden* dicta ended that debate, with courts now requiring that the employee's belief of an unlawful employment practice be objectively reasonable.<sup>61</sup>

Despite the facts that *Breeden* did not conclude that the objectively reasonable requirement was a part of the plaintiff's prima facie case,<sup>62</sup> and that *Breeden* involved the opposition clause,<sup>63</sup> some federal courts are now using *Breeden* to make it more difficult for participation-clause plaintiffs to prevail in their retaliation claims.<sup>64</sup> Specifically, these courts

57. See *Slagle*, 435 F.3d at 267–68.

58. See *Learned v. City of Bellevue*, 860 F.2d 928, 932–33 (9th Cir. 1988) (affirming summary judgment against an employee who alleged a Title VII retaliation claim because the plaintiff did not allege discrimination involving race, color, national origin, sex, or religion); *Williams v. Gonzales*, No. 1:04CV00342, 2005 WL 3447885, at \*14 (E.D. Tex. Dec. 14, 2005) (deciding that a plaintiff's Title VII retaliation claim was not meritorious because the underlying conduct about which he complained (an issue involving overtime pay) was not within Title VII's purview).

59. See *LEWIS & NORMAN*, *supra* note 2, at 97.

60. For example, prior to *Breeden*, the Tenth Circuit required that the plaintiff have only a subjective, good-faith belief that the employer engaged in an unlawful employment practice. See *Love v. RE/MAX of Am., Inc.*, 738 F.2d 383, 385 (10th Cir. 1984). Other courts, however, required that the plaintiff's belief not only be a good-faith belief, but that it must also be objectively reasonable. See *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701, 707 (7th Cir. 2000); *Little v. United Techs.*, 103 F.3d 956, 960 (11th Cir. 1997).

61. See *Rosenthal*, *supra* note 15, at 1129 n.7.

62. See *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 270 (2001).

63. See *id.* As indicated earlier, the second part of the *Breeden* opinion included a discussion of Title VII's participation clause; however, because the discussion did not address the "protected activity" aspect of a plaintiff's prima facie case, that section of the opinion is not directly applicable to the topic of this Article. See *id.* at 271–73.

64. See, e.g., *Moore v. City of Philadelphia*, 461 F.3d 331, 341 (3d Cir. 2006); *Gilooly v. Mo. Dep't of Health & Senior Servs.*, 421 F.3d 734, 742 (8th Cir. 2005) (Colloton, J., concurring in part and dissenting in part); *Mattson v. Caterpillar, Inc.*, 359 F.3d 885, 891–92 (7th Cir. 2004); *Neely v. City of Broken Arrow*, No. 4:0700018, 2007 WL 1574762, at \*2 (N.D. Okla. May 29, 2007); *Disilverio v. Serv. Master Prof'l*, No. 2:05CV01368, 2007 U.S. Dist. LEXIS 24732 (W.D. Pa. Mar.

are applying the same reasonable-belief standard from *Breeden* to participation-clause cases.<sup>65</sup> As a result, participation-clause plaintiffs now have a more difficult burden when attempting to establish their prima facie case. However, before addressing the pre-*Breeden* and post-*Breeden* participation-clause cases, it is important to see how the courts handled opposition-clause cases prior to *Breeden*.

## II. *BREEDEN'S* EFFECT ON HOW TO TREAT OPPOSITION-CLAUSE CASES

Although *Breeden* never specifically held that an opposition-clause plaintiff's good-faith belief that an employer was engaging in an unlawful employment practice must also be objectively reasonable, courts since *Breeden* have followed that approach.<sup>66</sup> However, pre-*Breeden*, there was a split on this issue, with some courts requiring only a subjective, good-faith belief that the employer's conduct was unlawful.<sup>67</sup> Although many courts required the plaintiff's belief to be objectively reasonable, the Tenth Circuit was one court that required only the subjective, good-faith belief of unlawful employment practices.<sup>68</sup>

Prior to *Breeden*, the Tenth Circuit required only a subjective, good-faith belief of an unlawful employment practice.<sup>69</sup> In *Love v. RE/MAX of America*, the court affirmed a judgment in favor of the plaintiff on her retaliation claim.<sup>70</sup> Even though the plaintiff's discrimination claim

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31, 2007); Moore v. Principi, No. 1:00CV02975, 2003 WL 21281765, at \*3 (N.D. Ill. June 4, 2003). See also discussion *infra* Parts V.A and V.B.

65. See discussion *infra* Parts V.A and V.B.

66. See Rosenthal, *supra* note 15, at 1129 n.7.

67. Two cases in which the court required only the plaintiff's subjective, good-faith belief that the conduct was unlawful are *Love v. RE/MAX of America, Inc.*, 738 F.2d 383, 385 (10th Cir. 1984), and *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1312–13 (6th Cir. 1989). In early cases involving the interpretation of Title VII's anti-retaliation provision, some courts applied a standard stricter than the objective/subjective standard, holding that the opposition clause only protects employees who oppose *actual* unlawful employment practices. See, e.g., *EEOC v. C & D Sportswear Corp.*, 398 F. Supp. 300, 305–06 (M.D. Ga. 1975).

68. See *Love*, 738 F.2d at 385. In addition to the Tenth Circuit, the Sixth Circuit also decided that only a subjective, good-faith belief that the activity was unlawful was required. See *Booker*, 879 F.2d at 1312–13. Other courts, such as the First Circuit, Seventh Circuit, and Eleventh Circuit required both the subjective, good-faith belief of an unlawful employment practice and that the belief be objectively reasonable. See *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701, 706–07 (7th Cir. 2000); *Little v. United Techs.*, 103 F.3d 956, 960 (11th Cir. 1997); *Wyatt v. City of Boston*, 35 F.3d 13, 15 (1st Cir. 1994).

69. See *Love*, 738 F.2d at 385.

70. *Id.* at 387.

failed, the Tenth Circuit noted that her retaliation claim could survive as long as it was “based on a mistaken good faith belief that Title VII ha[d] been violated.”<sup>71</sup> The court “agree[d] that a good faith belief is sufficient” for a plaintiff who loses her substantive claim to prevail on his retaliation claim.<sup>72</sup> Even after *Breeden*, the Tenth Circuit and one district court within that circuit utilized only the subjective, good-faith-belief test when determining whether activity was protected under Title VII’s opposition clause.<sup>73</sup> Specifically, in *Petersen v. Utah Department of Corrections*, the court cited *Love* for the proposition that a subjective, good-faith belief was enough to establish protected activity.<sup>74</sup> Additionally, the United States District Court for the District of Kansas applied the subjective, good-faith-belief test in *Kennedy v. General Motors Corp.*, which it decided one year after *Breeden*.<sup>75</sup> In *Kennedy*, the plaintiff brought several claims, including a retaliation claim.<sup>76</sup> In its motion for summary judgment, the employer claimed that the plaintiff did not engage in protected activity.<sup>77</sup> Rejecting the employer’s position and its reliance on *Breeden*, the court noted:

The *Breeden* decision, then, is somewhat curious in that the Court seems to have held the plaintiff to the more stringent “reasonable belief” test, concluded that the plaintiff’s claim failed under the more stringent test, but declined to determine whether that test was the appropriate standard. The court, then, cannot say with any degree of certainty what the import of the *Breeden* decision is, including whether the Supreme Court really meant to imply that as a matter of law the plaintiff could not have actually believed that her supervisor’s conduct violated Title VII. The point, however, is largely irrelevant as the Tenth

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71. *Id.* at 385. In *Love*, the Tenth Circuit cited the following opinions for the proposition that all that was required was a good-faith belief: *Rucker v. Higher Education Aids Board*, 669 F.2d 1179, 1182 (7th Cir. 1982); *Sisco v. J.S. Alberici Construction Co.*, 655 F.2d 146, 150 (8th Cir. 1981); *Payne v. McLemore’s Wholesale & Retail Stores*, 654 F.2d 1130, 1137–40 (5th Cir. 1981); *Parker v. Baltimore & Ohio Railroad Co.*, 652 F.2d 1012, 1019 (D.C. Cir. 1981); *Monteiro v. Poole Silver Co.*, 615 F.2d 4, 8 (1st Cir. 1980); *Sias v. City Demonstration Agency*, 588 F.2d 692, 695 (9th Cir. 1978); *Mitchell v. Visser*, 529 F. Supp. 1034, 1043 (D. Kan. 1981).

72. *Love*, 738 F.2d at 385.

73. See *Petersen v. Utah Dep’t of Corr.*, 301 F.3d 1182, 1188 (10th Cir. 2002); *Kennedy v. Gen. Motors Corp.*, 226 F. Supp. 2d 1257, 1264 (D. Kan. 2002).

74. 301 F.3d at 1188.

75. *Kennedy*, 226 F. Supp. 2d at 1258–59.

76. *Id.* The other claims the plaintiff brought against the defendant included additional Title VII claims and a claim under the Age Discrimination in Employment Act. *Id.*

77. *Id.* at 1263.

Circuit—in a decision that was issued after the Supreme Court’s *Breedon* decision—recently restated its adherence to the subjective standard without mention of the *Breedon* decision. To the extent that there is any discrepancy between *Breedon* [sic] and *Petersen*, that is a matter to be clarified by the Circuit and not this court in light of the Circuit’s unequivocal statement of the standard in *Petersen*.<sup>78</sup>

Thus, the court refused to adopt the objectively reasonable standard as part of the plaintiff’s prima facie case.<sup>79</sup>

Although the court in *Kennedy* was hesitant to use *Breedon* and adopt the objectively reasonable standard, the Tenth Circuit eventually adopted *Breedon*’s objectively reasonable standard when it decided *Crumpacker v. Kansas*.<sup>80</sup> In *Crumpacker*, the plaintiff brought suit, alleging sex discrimination and retaliation.<sup>81</sup> The court eventually confronted the issue of whether a subjective, good-faith belief that the practice at issue was unlawful was sufficient to constitute protected activity.<sup>82</sup> After acknowledging that recent precedent would allow for the plaintiff’s suggested good-faith-only interpretation,<sup>83</sup> the court held that it was going to follow *Breedon*’s objectively reasonable standard:

While the [*Breedon*] Court did not address the propriety of the Ninth Circuit’s interpretation of the Title VII retaliation provision, the Court did implicitly reject any interpretation of Title VII which would permit a plaintiff to maintain a retaliation claim based on an *unreasonable* good-faith belief that the underlying conduct violated Title VII. Accordingly, the Supreme Court’s decision in [*Breedon*] supercedes [sic] and overrules this court’s prior decisions, to the extent they interpreted Title VII as permitting retaliation claims based on an *unreasonable* good-faith belief that the underlying conduct violated Title VII.<sup>84</sup>

Therefore, the Tenth Circuit adopted the objectively reasonable requirement under the first prong of a plaintiff’s prima facie case under the opposition clause.<sup>85</sup> And, as was noted earlier, after *Breedon*, courts

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78. *Id.* at 1264 (citation omitted).

79. *Id.*

80. 338 F.3d 1163 (10th Cir. 2003).

81. *Id.* at 1165.

82. *Id.* at 1171.

83. *Id.*

84. *Id.* (emphasis in original) (citation omitted).

85. *Id.* The Tenth Circuit was then consistent with the other United States courts of appeals that

from all jurisdictions have come to apply the objectively reasonable standard to opposition-clause cases.<sup>86</sup> This was a departure from the jurisdictions that required only a subjective, good-faith belief of an unlawful employment practice, and this change made it much more difficult for plaintiffs to prevail in these opposition-clause cases.

### III. THE PRE-*BREEDEN* ANALYSIS FOR PARTICIPATION- CLAUSE CASES

Pre-*Breeden*, most courts agreed that regardless of the content of an EEOC charge or the extent or nature of an employee's participation in an EEOC proceeding, an employee was protected from retaliation under Title VII's participation clause.<sup>87</sup> Most courts distinguished between opposition-clause cases and participation-clause cases, providing unqualified protection for participation-clause plaintiffs and slightly limited protection to opposition-clause plaintiffs.<sup>88</sup> This section of the Article will examine how the majority of courts analyzed participation-clause cases prior to *Breeden*.

Prior to *Breeden*, most federal courts provided almost unlimited protection to individuals suing under the participation clause.<sup>89</sup> Unlike opposition-clause cases, many of which involved an inquiry into whether the plaintiff's belief of unlawful employment practices and the plaintiff's form of opposition were reasonable, most participation-clause cases simply asked whether the plaintiff participated in the EEOC process.<sup>90</sup> If the plaintiff did participate in a Title VII action, that activity was protected, regardless of whether the conduct was reasonable, and regardless of the plaintiff's motives.<sup>91</sup> Three pre-*Breeden* cases that stand for this proposition come from the First Circuit, the Sixth Circuit,

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have addressed this issue.

86. See Rosenthal, *supra* note 15, at 1128 n.7.

87. See LEWIS & NORMAN, *supra* note 2, at § 2.40.

88. *Id.*

89. *Id.*; see also Wyatt v. City of Boston, 35 F.3d 13, 15 (1st Cir. 1994); Booker v. Brown & Williamson Tobacco Co., Inc., 879 F.2d 1305, 1312 (6th Cir. 1989); Sias v. City Demonstration Agency, 588 F.2d 692, 695 (9th Cir. 1978); Pettway v. Am. Cast Iron Pipe Co., 411 F.2d 998, 1007 (5th Cir. 1969).

90. Butts v. McCullough, 237 F. App'x 1, 5 (6th Cir. 2007); Slagle v. County of Clarion, 435 F.3d 262, 266 (3d Cir.), *cert. denied*, 547 U.S. 1207 (2006). Although the two previously cited cases were decided after *Breeden*, several pre-*Breeden* cases made the same observation. See, e.g., Booker, 879 F.2d at 1312.

91. See LEWIS & NORMAN, *supra* note 2, at § 2.40; Butts, 237 F. App'x at 5; Booker, 879 F.2d at 1312.



and the Fifth Circuit.<sup>92</sup> In all three cases, the courts indicated that the plaintiff receives almost unqualified protection for participation-clause activities.<sup>93</sup>

The First Circuit addressed this issue in *Wyatt v. City of Boston*.<sup>94</sup> In *Wyatt*, the plaintiff was a teacher who brought multiple claims against the Boston Public School System.<sup>95</sup> In one claim, the plaintiff alleged that his former employer retaliated against him as a result of his filing of a charge with the Massachusetts Commission Against Discrimination and as a result of his opposition to what he perceived to be sexual harassment.<sup>96</sup> The trial court dismissed the plaintiff's complaint, and the plaintiff appealed.<sup>97</sup> In reversing the dismissal, the First Circuit addressed the need for determining whether the plaintiff's actions fell under the opposition clause or the participation clause.<sup>98</sup> The court noted that while a plaintiff pursuing a claim under the opposition clause must have a reasonable belief that the employer's conduct violated Title VII, "there is nothing in [the participation clause's] wording requiring that the charges be valid, *nor even an implied requirement that they be reasonable.*"<sup>99</sup> The court then observed that it was "well settled" that the participation clause protects plaintiffs regardless of the merits of their claims, and that the protection extends to statements that are false and malicious.<sup>100</sup>

The Sixth Circuit also took a broad approach to the participation clause's protection prior to *Breeden*. In *Booker v. Brown & Williamson Tobacco Co.*,<sup>101</sup> although the court was analyzing a claim brought under

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92. *Wyatt*, 35 F.3d at 15; *Booker*, 879 F.2d at 1312; *Pettway*, 411 F.2d at 1007. The Fourth Circuit had also given a broad interpretation to the participation clause prior to *Breeden*. See *Glover v. S.C. Law Enforcement Div.*, 170 F.3d 411, 414 (4th Cir. 1999). In fact, the Fourth Circuit still provides a high level of protection for employees pursuing claims under that clause of Title VII's anti-retaliation provision. See *Martin v. Mecklenburg County*, 151 F. App'x 275, 279 (4th Cir. 2005) (acknowledging the broad protection afforded by the participation clause, but expressing concern regarding whether lies should be protected).

93. *Wyatt*, 35 F.3d at 15; *Booker*, 879 F.2d at 1312; *Pettway*, 411 F.2d at 1007.

94. 35 F.3d at 13.

95. *Id.* at 14.

96. *Id.*

97. *Id.*

98. *Id.* at 15.

99. *Id.* (quoting 3 ARTHUR LARSON & LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 87.12(b), at 17-95 (1994)) (emphasis added).

100. *Id.* (citing *Sias v. City Demonstration Agency*, 588 F.2d 692, 695 (9th Cir. 1978); *Pettway v. Am. Cast Iron Pipe Co.*, 411 F.2d 998, 1007 (5th Cir. 1969)).

101. 879 F.2d 1304 (6th Cir. 1989).

Michigan’s anti-discrimination statute, the court made clear that Title VII provided greater protection to participation-clause plaintiffs than to opposition-clause plaintiffs.<sup>102</sup> In *Booker*, the Sixth Circuit applied Title VII case law to determine the extent of protection afforded by the state statute.<sup>103</sup> When addressing the participation clause’s protections, the court noted:

The distinction between employee activities protected by the participation clause and those protected by the opposition clause is significant because federal courts have generally granted less protection for opposition than for participation in enforcement proceedings. The “exceptionally broad protection” of the participation clause extends to persons who have “participated in any manner” in Title VII proceedings. Protection is not lost if the employee is wrong on the merits of the charge, *nor is protection lost if the contents of the charge are malicious and defamatory as well as wrong*. Thus, once the activity in question is found to be within the scope of the participation clause, the employee is generally protected from retaliation.<sup>104</sup>

After describing this “exceptionally broad protection” for participation-clause plaintiffs, the court noted that the opposition clause does not afford such broad protection.<sup>105</sup> Therefore, it was clear that prior to *Breeden*, the Sixth Circuit provided “exceptionally broad protection” to participation-clause plaintiffs.<sup>106</sup>

One final example of how, prior to *Breeden*, courts provided very broad protection to participation-clause plaintiffs comes from the Fifth Circuit.<sup>107</sup> In fact, both *Wyatt* and *Booker* relied on *Pettway v. American Cast Iron Pipe Co.*, despite the fact that *Pettway* was decided twenty years prior to *Booker* and twenty-five years prior to *Wyatt*.<sup>108</sup> In *Pettway*, the Fifth Circuit addressed the scope of protection afforded by Title VII’s anti-retaliation provision.<sup>109</sup> The employer argued that the plaintiff made false and malicious accusations in an EEOC correspondence, and that such communications could form the basis for a lawful

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102. *Id.* at 1312. The plaintiff was pursuing a claim under the Michigan Civil Rights Act. The plaintiff also brought suit under 42 U.S.C. § 1981 (2000). *Id.*

103. *Id.*

104. *Id.* (emphasis added) (citations omitted).

105. *Id.*

106. *Id.*

107. *Pettway v. Am. Cast Iron Pipe Co.*, 411 F.2d 998, 1006 (5th Cir. 1969).

108. *Wyatt v. City of Boston*, 35 F.3d 15 (1st Cir. 1994); *Booker*, 879 F.2d at 1312.

109. 411 F.2d at 999–1000.

termination.<sup>110</sup> The plaintiff, however, argued that the participation clause protected all statements, regardless of their truth and of the plaintiff's motive.<sup>111</sup>

The trial court determined that an employer could lawfully terminate an employee under such circumstances, but the Fifth Circuit reversed.<sup>112</sup> The Fifth Circuit noted that

Title VII also specifically protects assistance and participation. This indicates the exceptionally broad protection intended for protestors of discriminatory employment practices. The protection of assistance and participation *in any manner* would be illusory if [an] employer could retaliate against [an] employee for having assisted or participated in a Commission proceeding.<sup>113</sup>

The court then continued:

We hold that where, disregarding the malicious material contained in a charge (or petition for reconsideration, or other communication with EEOC sufficient for EEOC purposes, or in a proceeding before EEOC) the charge otherwise satisfies the liberal requirements of a charge, the charging party is exercising a protected right under the Act. He may not be discharged for such writing. The employer may not take it upon itself to determine the correctness or consequences of it. Nor may the court either sustain any employer disciplinary action or deny relief because of the presence of such malicious material . . . . An employer, consistent with the language and the intent of Title VII, simply cannot avail himself of the retributive discharge as a means of stifling minority group complaints to the EEOC.<sup>114</sup>

Therefore, the court gave the participation clause a very broad interpretation. However, in a footnote, the court noted that an employer could pursue a civil claim for defamation against the individual who made the allegedly defamatory comments.<sup>115</sup>

As this section of the Article has demonstrated, prior to *Breedon*, several United States courts of appeals determined that Title VII's

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110. *Id.* at 1003.

111. *Id.* at 1003–04.

112. *Id.* at 1004, 1008.

113. *Id.* at 1006 n.18 (emphasis added).

114. *Id.* at 1007 & n.22.

115. *Id.* at 1007 n.22.

participation clause provided more protection to plaintiffs than did Title VII's opposition clause, and that this protection was extremely broad.<sup>116</sup> However, as will be demonstrated later in this Article, after the Court issued its *Breeden* opinion, some courts started to give a more limited interpretation to that clause.<sup>117</sup> As a result, participation-clause plaintiffs in some jurisdictions now face a more difficult burden when trying to pursue a claim under that provision. However, before this Article addresses the ramifications of *Breeden*, it will address the *Breeden* opinion itself.

#### IV. THE *BREEDEN* OPINION

Although the Supreme Court in *Breeden* did not hold that plaintiffs in opposition-clause cases must prove that they had an objectively reasonable belief that their employer was engaged in an unlawful employment practice, courts have come to interpret *Breeden* as standing for that proposition.<sup>118</sup> In *Breeden*, the plaintiff alleged that while she and two male employees were reviewing job applicants, the plaintiff's supervisor repeated a sexually explicit comment that was contained in one of the evaluations.<sup>119</sup> He then turned to the plaintiff and said that he did not understand the comment.<sup>120</sup> Next, the other male employee indicated that he would explain the comment later, and both men laughed.<sup>121</sup> The plaintiff complained to the supervisor who made the statement, as well as to other individuals.<sup>122</sup> However, the plaintiff acknowledged that she was not offended by the comment when she read it; so it appears that it was the supervisor's reading of the comment, his statement that he did not understand it, and the subsequent discussion between the two male co-workers that formed the basis of the plaintiff's complaint.<sup>123</sup>

The district court granted the employer's motion for summary

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116. As was noted *supra* note 92, the Fourth Circuit had also granted broad protection to participation-clause plaintiffs prior to *Breeden*.

117. See discussion *infra* Parts V.A and V.B.

118. See Rosenthal, *supra* note 15, at 1139–42.

119. Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 269 (2001).

120. *Id.* Specifically, the comment was that “making love to [her] was like making love to the Grand Canyon.” *Id.*

121. *Id.*

122. *Id.* at 269–70.

123. *Id.* at 271.

judgment, but the Ninth Circuit reversed.<sup>124</sup> The Ninth Circuit noted that the opposition clause extends not only to conduct that is unlawful, but also to complaints about conduct that the employee could reasonably believe was unlawful.<sup>125</sup> Reasoning that the plaintiff's opposition would have been protected if she had a reasonable, good-faith belief that the incident constituted sexual harassment, the Ninth Circuit reversed the grant of summary judgment.<sup>126</sup>

On certiorari, the Court declined to decide whether the Ninth Circuit's interpretation of the opposition clause was correct, believing that even if the Ninth Circuit's standard was correct, "no one could reasonably believe that the incident [involved in this case] violated Title VII."<sup>127</sup> Explaining that no reasonable person could have concluded that the incident could have reached the level of actionable sexual harassment, the Court rejected the Ninth Circuit's conclusion that summary judgment was inappropriate.<sup>128</sup> According to the Court, "[the plaintiff's] supervisor's comment, made at a meeting to review the application, that he did not know what the statement meant; [the plaintiff's] co-worker's responding comment; and the chuckling of both are at worst an 'isolated incident[t]' that cannot remotely be considered 'extremely serious,' as our cases require."<sup>129</sup>

Although the Court did not hold that plaintiffs suing under Title VII's anti-retaliation provision's opposition clause must prove that they had a reasonable and good-faith belief of an unlawful employment practice,<sup>130</sup> all courts since *Breedon* have come to read *Breedon* as imposing this requirement.<sup>131</sup> As the next section illustrates, some courts are now applying that standard to participation-clause cases, despite the facts that *Breedon* did not involve the participation clause and that *Breedon* did not even definitively establish that standard for opposition-clause cases.

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124. *Id.* at 269. The unpublished opinion from the United States Court of Appeals for the Ninth Circuit can be found at *Breedon v. Clark County School District*, No. 99-15522, 2000 WL 991821 (9th Cir. July 19, 2000).

125. *Breedon*, 2000 WL 991821, at \*1.

126. *Id.* at \*1-2.

127. *Breedon*, 532 U.S. at 270.

128. *Id.* at 270-71.

129. *Id.* at 271 (citing *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998)).

130. *Id.* at 270.

131. See Rosenthal, *supra* note 15, at 1129 n.7.

## V. BREEDEN'S EFFECT ON PARTICIPATION-CLAUSE CASES

Since *Breeden*, some federal courts have read too much into the opinion and have applied it to participation-clause cases.<sup>132</sup> This has happened even though *Breeden* did not address participation-clause cases and the Court did not even specifically adopt the good-faith, objectively reasonable standard in opposition-clause cases.<sup>133</sup> However, believing that there is no reason to treat these types of claims differently, these courts have made it more difficult for participation-clause plaintiffs to bring successful actions, and in the process, they have most likely chilled employees' participation activities.

### A. United States Courts of Appeals That Have Applied *Breeden* to Participation-Clause Cases

The United States Court of Appeals for the Seventh Circuit is one court that has interpreted *Breeden* to apply to participation-clause cases, and several courts have followed its pro-employer decision in *Mattson v. Caterpillar, Inc.*<sup>134</sup> In *Mattson*, the court determined that the plaintiff's discrimination charge was without merit, unreasonable, and made in bad faith; as a result, the court determined the participation clause did not protect the plaintiff.<sup>135</sup> In reaching this conclusion, the court rejected or distinguished other courts' opinions that had held that all participation activities are protected.<sup>136</sup> The court also relied on *Breeden* for this

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132. See discussion *infra* Parts V.A and V.B. These cases include *Moore v. City of Philadelphia*, 461 F.3d 331, 341 (3d Cir. 2006); *Gilooly v. Missouri Department of Health & Senior Services*, 421 F.3d 734, 742 (8th Cir. 2005) (Colloton, J., concurring in part and dissenting in part); *Mattson v. Caterpillar, Inc.*, 359 F.3d 885, 892 (7th Cir. 2004); *Neely v. City of Broken Arrow*, No. 4:07CV00018, 2007 WL 1574762 at \*6 (N.D. Okla. May 29, 2007); *Disilviero v. Service Master Professional*, No. 2:05CV01368, 2007 U.S. Dist. LEXIS 24732 at \*12 (W.D. Pa. March 31, 2007); and *Moore v. Principi*, No. 1:00CV02975, 2003 WL 21281765, at \*3 (N.D. Ill. June 4, 2003).

133. *Breeden*, 532 U.S. at 270. Later in the *Breeden* opinion, the Court did address a participation-clause issue, *id.* at 271–74; however, that part of the opinion is not relevant to the specific issue involved in this Article.

134. 359 F.3d at 885 (7th Cir. 2004). Some courts have also cited *Mattson* for the proposition that the objectively reasonable standard applies to opposition-clause cases. See *Rabago v. Univ. of Tex. Med. Branch*, No. G-04-141, 2005 WL 3078653, at \*2 (S.D. Tex. Nov. 15, 2005). Of course, most courts that apply the objectively reasonable standard to opposition-clause cases cite *Breeden* for that proposition.

135. 359 F.3d at 890–91.

136. *Id.* at 889–90 (rejecting the plaintiff's attempt to use *Johnson v. University of Cincinnati*, 215 F.3d 561, 582 (6th Cir. 2000); *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1312 (6th Cir. 1989); *Womack v. Munson*, 619 F.2d 1292, 1298 (8th Cir. 1980); and *Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998, 1007 (5th Cir. 1969)).

conclusion.<sup>137</sup>

In *Mattson*, the plaintiff complained to a supervisor when a female employee touched him on two occasions.<sup>138</sup> After concluding that the complaint lacked merit, the employer warned the plaintiff that making false accusations of harassment could lead to disciplinary action.<sup>139</sup> Three months later, the plaintiff filed formal charges based upon the same allegations of inappropriate touching.<sup>140</sup> After this, the employer discovered that the plaintiff's purpose for filing these charges was to have his supervisor terminated.<sup>141</sup> As a result, the employer terminated the plaintiff.<sup>142</sup> The plaintiff then brought a retaliation lawsuit, and the trial court granted summary judgment in favor of the employer.<sup>143</sup>

On appeal, the plaintiff argued that despite the possibility that his charge was filed in bad faith, his actions, while not protected under the opposition clause, were still protected under the participation clause.<sup>144</sup> The plaintiff argued that he did not lose Title VII protection simply because his allegations were either unreasonable or made in bad faith.<sup>145</sup> Rejecting or distinguishing the cases upon which the plaintiff relied, the Seventh Circuit noted that "this Court has consistently stated that utterly baseless claims do not receive protection under Title VII."<sup>146</sup> Believing that allowing such claims would "arm employees with a tactical coercive weapon"<sup>147</sup> to maintain job security, the court decided that protection should not be afforded to those who file baseless claims:

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137. *Id.*

138. *Id.* at 888.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at 889–90.

145. *Id.* The plaintiff in *Mattson* relied on *Johnson v. University of Cincinnati*, 215 F.3d 561, 582 (6th Cir. 2000); *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1312 (6th Cir. 1989); *Womack v. Munson*, 619 F.2d 1292, 1298 (8th Cir. 1980); and *Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998, 1007 (5th Cir. 1969).

146. *Mattson*, 359 F.3d at 890 (citing *Fine v. Ryan Int'l Airlines*, 305 F.3d 746, 752 (7th Cir. 2002); *McDonnell v. Cisneros*, 84 F.3d 256, 259 (7th Cir. 1996); *Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1458 (7th Cir. 1994)). Although these cases do stand for this proposition, *Fine* and *Dey* both involved Title VII's opposition clause, not its participation clause. *Fine*, 305 F.3d at 751–52; *Dey*, 28 F.3d at 1458. The *Cisneros* case, which relied on *Dey* for this "utterly baseless" proposition, involved both formal and informal complaints, and it was unclear under which clause of Title VII's anti-retaliation provision the plaintiffs were proceeding. 84 F.3d at 258–59.

147. *Mattson*, 359 F.3d at 890–91 (quoting *Spadola v. New York City Transit Auth.*, 242 F. Supp. 2d 284, 292 (S.D.N.Y. 2003)).

We believe that the same threshold standard should apply to both opposition and participation clause cases. That is, the claims must not be utterly baseless. Were we to adopt a different standard, an employee could immunize his unreasonable and malicious internal complaints simply by filing a discrimination complaint with a government agency. Similarly, an employee could assure himself unlimited tenure by filing continuous complaints with the government agency if he fears that his employer will discover his duplicitous behavior at the workplace.<sup>148</sup>

The court then claimed that its position was consistent with cases from the Sixth and Eleventh Circuits, yet it also acknowledged that neither of those circuits answered the question regarding which standard applied to participation-clause cases.<sup>149</sup>

The Seventh Circuit then addressed *Breeden*.<sup>150</sup> After describing *Breeden*, the court addressed the plaintiff's argument that *Breeden* was inapplicable to participation-clause cases.<sup>151</sup> In response to the plaintiff's argument, the Seventh Circuit curiously noted:

While we acknowledge that the Supreme Court did not apply the reasonableness requirement in a participation clause context, *the Supreme Court also did not hold that the reasonableness requirement only applies to the opposition clause*. Because the Supreme Court did not distinguish between opposition and participation claims, we also decline to do so and hold that the good faith, reasonableness requirement applies to all Title VII claims.<sup>152</sup>

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

149. *Id.* The two cases with which the Seventh Circuit claimed its opinion was consistent were *Johnson v. University of Cincinnati*, 215 F.3d 561, 582 (6th Cir. 2000), and *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1455 (11th Cir. 1998). Interestingly, however, although the Eleventh Circuit in *Wideman* did note that it had not answered the specific question (nor was it going to do so in that opinion), the Sixth Circuit in *Johnson* seemed to suggest that it had adopted a more liberal reading of Title VII's participation clause than the Seventh Circuit was claiming; in fact, many courts have relied on *Johnson* for the idea that the participation clause provides more protection than the opposition clause. *See, e.g., Slagle v. County of Clarion*, 435 F.3d 262, 268 (3d Cir.), *cert. denied*, 547 U.S. 1207 (2006).

150. *Mattson*, 359 F.3d at 891–92.

151. *Id.* at 892.

152. *Id.* (emphasis added). The Seventh Circuit's reasoning that because the Supreme Court did not limit its *Breeden* holding to opposition-clause cases, it must have meant that it applied to *all* retaliation cases, is flawed. As was mentioned previously, prior to *Breeden*, most courts treated the two provisions differently; the language of the two provisions is different, and simply because the Court did not limit its opinion to cases brought pursuant to the opposition clause does not mean the Court intended to treat them similarly—the Court was faced with only the opposition clause, and it



Therefore, the Seventh Circuit became one court to extend *Breeden* to participation-clause cases, even though that particular issue was not before the Court in *Breeden*. Since *Mattson*, other United States courts of appeals have applied *Breeden* to participation-clause cases, despite the fact that most courts did not impose the objectively reasonable requirement on participation-clause plaintiffs prior to *Breeden*.<sup>153</sup>

In addition to the Seventh Circuit, the Third Circuit has also concluded that *Breeden*'s objectively reasonable standard applies to participation-clause plaintiffs.<sup>154</sup> The Third Circuit reached this conclusion even though (1) *Breeden* was an opposition-clause case,<sup>155</sup> (2) *Breeden* never established the test for determining what constitutes protected activity under the opposition clause or the participation clause,<sup>156</sup> and (3) prior to *Breeden*, the majority of courts had consistently provided more protection to participation-clause plaintiffs than to opposition-clause plaintiffs.<sup>157</sup> Nonetheless, plaintiffs in this circuit now face a much more difficult burden when bringing suit under Title VII's anti-retaliation provision's participation clause.

In *Moore v. City of Philadelphia*, several plaintiffs brought retaliation claims against the City of Philadelphia, alleging that the city retaliated against them for opposing the way some of their African-American co-workers were treated.<sup>158</sup> Although the plaintiffs were able to reverse the district court's grant of summary judgment, the Third Circuit addressed the standard required for both opposition-clause plaintiffs and participation-clause plaintiffs to establish that they engaged in protected activity.<sup>159</sup> When the court addressed the rules for analyzing retaliation claims, it indicated that Title VII's anti-retaliation provision did have

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had no reason to even address the participation clause. This issue is addressed more thoroughly *infra* Part VI.D.

153. Since *Mattson*, the following opinions have applied *Breeden* to participation-clause cases: *Moore v. City of Philadelphia*, 461 F.3d 331, 341 (3d Cir. 2006); *Gilooly v. Missouri Department of Health & Senior Services*, 421 F.3d 734, 744 (8th Cir. 2005) (Colloton, J., concurring in part and dissenting in part); *Neely v. City of Broken Arrow*, Case No. 4:07CV00018, 2007 WL 1574762, at \*2 (N.D. Okla. May 29, 2007); *Disilviero v. Service Master Professional*, No. 2:05CV01368, 2007 U.S. Dist. LEXIS 24732, at \*12 (W.D. Pa. March 31, 2007).

154. *Moore*, 461 F.3d at 341. As will be discussed later in this Article, a different panel of the Third Circuit maintained the distinction between opposition-clause cases and participation-clause cases. See *infra* Part V.C; *Slagle*, 435 F.3d at 266.

155. *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 270 (2001).

156. *Id.*

157. See LEWIS & NORMAN, *supra* note 2, at § 2.40.

158. *Moore*, 461 F.3d at 334.

159. *Id.* at 341.

two separate clauses, but it then relied on *Breeden* and observed that “[w]hether the employee opposes, or participates in a proceeding against, the employer’s activity, the employee must hold an objectively reasonable belief, in good faith, that the activity they [sic] oppose is unlawful under Title VII.”<sup>160</sup> Although *Moore* relied on *Breeden* for this proposition, there is no such language in *Breeden*, as *Breeden* involved the opposition clause and the Court declined to determine what standard was appropriate in opposition-clause cases.<sup>161</sup> Nonetheless, the Third Circuit did impose this higher standard for participation-clause plaintiffs.<sup>162</sup>

Another opinion that referenced both *Breeden* and *Mattson* and argued for a lower level of protection for participation-clause plaintiffs was a concurring opinion from the Eighth Circuit.<sup>163</sup> In *Gilooly v. Missouri Department of Health & Senior Services*, the plaintiff alleged several causes of action, including a retaliation claim based on his participation and allegedly false statements he made during the investigation of his sexual harassment claim.<sup>164</sup> The majority reversed the lower court’s grant of summary judgment with regard to the retaliation claim, believing there was an unresolved issue of material fact.<sup>165</sup> Without citing *Breeden*, the majority opined that employees cannot gain protection under Title VII after filing false charges, lying to investigators, or making defamatory statements.<sup>166</sup> Nonetheless, the court found that an issue of fact existed regarding the cause of the plaintiff’s adverse action.<sup>167</sup>

Judge Colloton wrote an opinion concurring in part and dissenting in part, in which he addressed the scope of the participation clause’s protection post-*Breeden*.<sup>168</sup> He agreed that false statements made during an investigation can form the basis of a lawful termination,<sup>169</sup> and he

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160. *Id.* (citing *Breeden*, 532 U.S. at 271) (emphasis added).

161. 532 U.S. at 270.

162. *Moore*, 461 F.3d at 341.

163. *Gilooly v. Mo. Dep’t of Health & Senior Servs.*, 421 F.3d 734, 742 (8th Cir. 2005) (Colloton, J., concurring in part and dissenting in part).

164. *Id.* at 737.

165. *Id.* at 741.

166. *Id.* at 740.

167. *Id.* at 740–41.

168. In his opinion, Judge Colloton opined that the court should have affirmed the lower court’s grant of summary judgment on all of the plaintiff’s claims, including his retaliation claim. *Id.* at 741.

169. *Id.*

then addressed the protection afforded by the opposition clause and the participation clause.<sup>170</sup> After acknowledging that the “plain language of the [participation] clause sweeps more broadly than the opposition clause”<sup>171</sup> and that some courts have extended participation-clause protection to false, malicious, or even frivolous complaints,<sup>172</sup> Judge Colloton argued that *Mattson* was the correct standard, and that the same level of protection should apply under both the participation clause and the opposition clause.<sup>173</sup> Interestingly, while Judge Colloton relied on Title VII’s plain language earlier in his opinion, he ultimately rejected the “respectable textual argument” that the participation clause provides broader protection than the opposition clause.<sup>174</sup> He agreed with *Mattson* that the level of protection should be the same under the participation clause and the opposition clause.<sup>175</sup>

As this section of the Article demonstrated, some United States courts of appeals are applying *Breedon* to participation-clause cases. As a result, many plaintiffs are facing a steeper climb when attempting to vindicate their rights under Title VII’s participation clause. Additionally, as the next section of the Article will address, several United States district courts are also using *Breedon* to limit the protection afforded by the participation clause.

#### B. *United States District Courts That Have Applied Breedon to Participation-Clause Cases*

In addition to some United States courts of appeals, some United States district courts have also begun to apply *Breedon* to participation-clause cases. However, not only have district courts from within the circuits that applied *Breedon* to participation-clause cases begun to limit the scope of the participation clause, but district courts within circuits that have not applied *Breedon* to participation-clause cases have also started to erode the participation clause’s protections. This makes it more difficult for participation-clause plaintiffs to prevail in their

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170. *Id.* at 741–42.

171. *Id.* at 742.

172. *Id.* (citing *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 582 (5th Cir. 2000); *Womack v. Munson*, 619 F.2d 1292, 1298 & n.10 (8th Cir. 1980); *Pettway v. Am. Cast Iron Pipe Co.*, 411 F.2d 998, 1007 (5th Cir. 1969); *Proulx v. Citibank, N.A.*, 659 F. Supp. 972, 977–78 (S.D.N.Y. 1987)).

173. *Id.* at 742–43.

174. *Id.* at 742. Although not directly mentioned in the opinion, the textual argument to which Judge Colloton was referring was most likely based on the “participated in any manner” language in Title VII’s anti-retaliation provision’s participation clause. *See* 42 U.S.C. § 2000e-3(a) (2000).

175. *Id.* at 742–43.

lawsuits against their employers.

The United States District Court for the Northern District of Illinois applied the *Breeden* standard to a participation-clause case in *Moore v. Principi*.<sup>176</sup> In *Moore*, although the court expressed its displeasure about imposing a higher standard on participation-clause plaintiffs, it felt bound to do so because of Seventh Circuit precedent.<sup>177</sup> The plaintiff in *Moore* filed suit, alleging discrimination based on race and retaliation.<sup>178</sup> After a jury found in favor of his employer, the plaintiff moved for a new trial.<sup>179</sup> One basis for the motion was that the trial judge gave inaccurate instructions regarding the standard for protected activity under the participation clause.<sup>180</sup> After initially agreeing that the reasonable, good-faith-belief standard was appropriate in his participation-clause claim, the plaintiff in *Principi* eventually objected to that instruction and asked the judge to remove the reasonable, good-faith-belief requirement from the jury instructions.<sup>181</sup> The court ultimately denied the plaintiff's request, reasoning that the Seventh Circuit had already determined that the reasonable, good-faith requirement did apply.<sup>182</sup> The court relied on dicta from earlier Seventh Circuit opinions and concluded that it was bound to utilize the

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176. No. 1:00CV02975, 2003 WL 21281765 (N.D. Ill. June 9, 2003).

177. *Id.* at \*38. Specifically, the court felt bound to follow the Seventh Circuit's opinion in *McDonnell v. Cisneros*, 84 F.3d 256, 259 (7th Cir. 1996), in which that court noted that there was a reasonableness and good-faith threshold in participation-clause cases. The district court also noted several other opinions in which the Seventh Circuit had suggested (but did not hold) that there was a reasonableness and good-faith requirement. These cases were the following: *Fine v. Ryan International Airlines*, 305 F.3d 746, 752 (7th Cir. 2002); *Hunt-Golliday v. Metropolitan Water Reclamation District*, 104 F.3d 1004, 1014 (7th Cir. 1997); *Roth v. Lutheran General Hospital*, 57 F.3d 1446, 1459–60 (7th Cir. 1995); *Dey v. Colt Construction & Development Co.*, 28 F.3d 1446, 1458 (7th Cir. 1994); *Holland v. Jefferson National Life Insurance Co.*, 883 F.2d 1307, 1314 (7th Cir. 1989); *Collins v. Illinois*, 830 F.2d 692, 702 (7th Cir. 1987); and *Jennings v. Tinley Park Community Consolidated School District*, 796 F.2d 962, 967 (7th Cir. 1986). Some of these cases, however, involved the opposition clause rather than the participation clause. *See supra* note 146. The *Moore* court did, however, acknowledge that there was authority for the proposition that the participation clause granted more protection than the opposition clause. Specifically, the court noted that *Glover v. South Carolina Law Enforcement Division*, 170 F.3d 411, 415–16 (4th Cir. 1999), *Wyatt v. City of Boston*, 35 F.3d 13, 15 (1st Cir. 1994), and *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1312 (6th Cir. 1989), all provided support for the proposition that there was no requirement that the underlying charge be made reasonably or in good faith.

178. *Moore*, 2003 WL 21281765, at \*1.

179. *Id.*

180. *Id.* at \*2. The plaintiff in *Moore* filed an internal complaint of discrimination, which usually triggers Title VII's opposition clause. *Id.* Nonetheless, the court in *Moore* treated the plaintiff's actions as falling under the participation clause. *Id.* at \*3.

181. *Id.* at \*2.

182. *Id.*

reasonable, good-faith standard in participation-clause cases.<sup>183</sup>

The court did not cite *Breeden*, and it also suggested that it was not entirely comfortable applying this higher standard:

Were this Court dealing with the issue as an original matter, we would be inclined to follow those Circuits that have confronted the point directly and have concluded that under the statute's participation clause (unlike the opposition clause), there is no threshold requirement that the underlying discrimination charge be made reasonably or in good faith and that the protection against retaliation is absolute.<sup>184</sup>

Despite its concern, the court eventually saw some merit in the higher standard.<sup>185</sup> The court noted that there were "valid reasons why there ought to be some threshold that an employee making a charge of discrimination must clear before becoming entitled to protection against retaliation."<sup>186</sup> Additionally, the court noted that an employee should not be able to "acquire indefinite tenure by peppering his employer with frivolous complaints . . . ."<sup>187</sup> The court concluded that as long as the threshold was low, employees would not be dissuaded from filing charges, which is what the anti-retaliation provision was enacted to ensure.<sup>188</sup>

The United States District Court for the Western District of Pennsylvania has also applied the same standard to both opposition-clause cases and participation-clause cases.<sup>189</sup> In *Disilverio v. Service Master Professional*, the court granted the employer's motion for summary judgment after the plaintiff alleged that his employer retaliated against him for not providing information relevant to another employee's discrimination charge and for refusing to provide false

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183. *Id.* at \*3 (relying on *Fine v. Ryan Int'l Airlines*, 305 F.3d 746, 752 (7th Cir. 2002); *Hunt-Golliday v. Metro. Water Reclamation Dist.*, 104 F.3d 1004, 1014 (7th Cir. 1997); *Roth v. Lutheran Gen. Hosp.*, 57 F.3d 1446, 1459–60 (7th Cir. 1995); *Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1458 (7th Cir. 1994); *Holland v. Jefferson Nat'l Life Ins. Co.*, 883 F.2d 1307, 1314 (7th Cir. 1989); *Collins v. Illinois*, 830 F.2d 692, 702 (7th Cir. 1987); *Jennings v. Tinley Park Cmty. Consol. Sch. Dist.*, 796 F.2d 962, 967 (7th Cir. 1986)). As was noted earlier, however, at least some of these cases involved the opposition clause rather than the participation clause. *See supra* notes 146 and 177 and accompanying text.

184. *Moore*, 2003 WL 21281765, at \*3.

185. *Id.* at \*4.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Disilverio v. Serv. Master Prof'l*, No. 2:05CV01368, 2007 U.S. Dist. LEXIS 24732, at \*1–2 (W.D. Pa. Mar. 31, 2007).

information regarding that charge.<sup>190</sup> The employer conceded that the plaintiff had engaged in protected activity and that he suffered an adverse employment action; therefore, the only remaining issues were whether there was a causal connection between the two events and whether the plaintiff created an issue of fact regarding the employer's reason for the adverse action.<sup>191</sup> Despite the employer's concession regarding the plaintiff's protected activity, the court elaborated on this element of the prima facie case.<sup>192</sup> While acknowledging that there are two clauses in Title VII's anti-retaliation provision, the court echoed the arguments made in *Moore v. City of Philadelphia*, stating that a plaintiff must have a reasonable, good-faith belief that the conduct he is opposing (or participating against) was unlawful, regardless of the specific clause under which the plaintiff was pursuing a claim.<sup>193</sup> The court also cited *Breeden* for this proposition.<sup>194</sup>

Finally, the United States District Court for the Northern District of Oklahoma has also concluded that *Breeden*'s reasonable, good-faith-belief standard applies to participation-clause cases.<sup>195</sup> In *Neely v. City of Broken Arrow*, the district court responded to an employer's motion to dismiss by allowing the plaintiff to amend his complaint; however, it was clear from the court's opinion that it interpreted *Breeden* to apply to participation-clause cases.<sup>196</sup> The plaintiff, a firefighter, was asked to investigate possible sexual harassment in his department and, according to the complaint, he ultimately believed that the firefighters had sexually harassed members of the public.<sup>197</sup> The plaintiff alleged that as a result of his conclusions, he suffered an adverse action, and he later filed a charge alleging he was retaliated against for participating in the investigation.<sup>198</sup> The plaintiff first argued that different standards applied to cases brought under the participation clause and the opposition

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190. *Id.*

191. *Id.* at \*11.

192. *Id.* at \*11–12.

193. *Id.* at \*12 (citing *Moore v. City of Philadelphia*, 461 F.3d 331, 341 (3d Cir. 2006)).

194. *Id.* (citing *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 271 (2001)).

195. *Neely v. City of Broken Arrow*, No. 4:07CV00018, 2007 WL 1574762, at \*2 (N.D. Okla., May 29, 2007).

196. *Id.* at \*2.

197. *Id.* Although Title VII prohibits employees from harassing other employees in the workplace, the statute does not prohibit individuals from harassing members of the public. *See* 42 U.S.C. § 2000e-2(a) (2000).

198. *Neely*, 2007 WL 1574762, at \*2.

clause.<sup>199</sup> The plaintiff argued that there was no requirement that his belief of unlawful discrimination be objectively reasonable.<sup>200</sup> Relying on *Jeffries v. Kansas*,<sup>201</sup> a case decided prior to *Breeden* that rejected the objectively reasonable requirement in participation-clause cases, the plaintiff argued that his actions were protected.<sup>202</sup> The plaintiff in *Neely* also argued that because *Breeden* involved the opposition clause, that opinion was applicable only to opposition-clause cases.<sup>203</sup> Despite these persuasive arguments, the court disagreed.<sup>204</sup>

In rejecting the plaintiff's argument that *Breeden* applied only to opposition-clause cases, the court relied on the Tenth Circuit's opinion in *Crumpacker v. Kansas Department of Human Resources*.<sup>205</sup> *Crumpacker* was an opposition-clause case that determined that after *Breeden*, an employee's good-faith belief of an unlawful employment practice was not enough to immunize him from retaliation if that belief was not reasonable.<sup>206</sup> As was noted earlier, pre-*Breeden*, the Tenth Circuit had required only a good-faith belief of an unlawful employment practice, but that court ultimately changed its position post-*Breeden*.<sup>207</sup> Interestingly, although *Breeden* was an opposition-clause case, the court in *Neely* extended it to the participation clause:

The Supreme Court, however, recently rejected by implication any interpretation of Title VII that would permit plaintiffs to maintain retaliation claims based on an unreasonable good-faith belief that the underlying conduct violated Title VII . . . [T]he Supreme Court's decision in [*Breeden*] supercedes [sic] and overrules this court's prior decisions, to the extent they interpreted Title VII as permitting retaliation claims based on an unreasonable good-faith belief that the underlying conduct violation [sic] Title VII . . . Notably, the Tenth Circuit did not state that "retaliation opposition claims" must be based on

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199. *Id.* Specifically, the plaintiff argued that the Tenth Circuit's opinion in *Jeffries v. Kansas*, 147 F.3d 1220 (10th Cir. 1998), controlled participation-clause cases, and that its grant of broader protection to participation-clause plaintiffs was still good law after *Breeden*. *Neely*, 2007 WL 1574762, at \*2.

200. *Id.*

201. 147 F.3d 1220 (10th Cir. 1998).

202. *Neely*, 2007 WL 1574762, at \*2.

203. *Id.*

204. *Id.*

205. *Id.* (citing *Crumpacker v. Kan. Dept. of Human Res.*, 338 F.3d 1163, 1172 n.5 (10th Cir. 2003)).

206. *Crumpacker*, 338 F.3d at 1172.

207. *Id.* at 1171.

reasonable, good-faith belief; it stated that “retaliation claims” in general are governed by *Breeden*.<sup>208</sup>

Although *Crumpacker* and *Breeden* were opposition-clause cases, the *Neely* court observed that “notably, the Tenth Circuit did not state that ‘retaliation opposition claims’ must be based on reasonable, good-faith belief; it stated that retaliation claims in general are governed by *Breeden*. This court reads *Crumpacker* to hold that *Breeden* added an objective, reasonableness inquiry into both opposition and participation cases.”<sup>209</sup> Thus, *Neely* is another example of an opinion where a court applied *Breeden* to a participation-clause case.<sup>210</sup>

As this section of the Article demonstrates, some United States district courts are applying *Breeden* to participation-clause cases and are limiting the protection afforded by that clause. However, as the next two sections of the Article will demonstrate, not all courts agree with this approach. Some courts still provide participation-clause plaintiffs with the protections they received from most courts prior to *Breeden*.

### C. *United States Courts of Appeals That Have Not Applied Breeden to Participation-Clause Cases*

Although some United States courts of appeals have decided that *Breeden* applies to both opposition-clause cases and participation-clause cases, not all of these courts have agreed. In fact, several courts of appeals have continued to grant broader protection to plaintiffs pursuing claims under the participation clause without even mentioning *Breeden* in their opinions. This section of the Article will analyze some of those cases.

The Sixth Circuit Court of Appeals issued one such opinion in *Butts*

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208. *Neely*, 2007 WL 1574762, at \*2 (quoting *Crumpacker*, 338 F.3d at 1171).

209. *Id.* at \*2. Similar to how *Mattson* interpreted *Breeden*, this is another example of a court reading too much into what a court does *not* write. The reason the court in *Crumpacker* did not refer to participation-clause cases was because that case did not involve participation-clause retaliation. See *Crumpacker*, 338 F.3d at 1166. The *Neely* court’s decision to infer the objectively reasonable requirement from *Breeden* and *Crumpacker* is yet another example of reading too much into an opinion that does not even address the same topic before the court.

210. Although not specifically referencing *Breeden*, the United States District Court for the District of Hawaii also adopted the *Mattson* standard and applied the same level of protection to both opposition-clause cases and participation-clause cases. Specifically, in *Funai v. Brownlee*, the court relied on *Mattson* and concluded “that in order to constitute ‘protected activity,’ such participation must still be ‘reasonable,’ just as is required under the ‘opposition clause.’” 369 F. Supp. 2d 1222, 1230–31 (D. Haw. 2004) (citing *Mattson v. Caterpillar, Inc.*, 359 F.3d 885, 891 (7th Cir. 2004)).



*v. McCullough*.<sup>211</sup> In *Butts*, the plaintiff filed suit under the Age Discrimination in Employment Act<sup>212</sup> and the Tennessee Human Rights Act,<sup>213</sup> alleging age discrimination and retaliation.<sup>214</sup> After the jury ruled in the plaintiff's favor, the defendants appealed.<sup>215</sup> The court used Title VII case law to analyze the plaintiff's retaliation claim,<sup>216</sup> noted the distinction between the opposition and participation clauses, and then noted that the level of protection differs depending upon which clause the plaintiff based his claim.<sup>217</sup> While first acknowledging that opposition conduct must be based on a "reasonable and good faith belief," the court then observed that the protection afforded by the participation clause is much broader.<sup>218</sup> The court noted that "with respect to the participation clause, this Court has stated that [t]he 'exceptionally broad protections' of the participation clause extend[ ] to persons who have 'participated in any manner' in Title VII proceedings."<sup>219</sup> The court continued: "Protection is not lost if the employee is wrong on the merits of the charge, nor is protection lost if the contents of the charge are malicious or defamatory as well as wrong."<sup>220</sup> In conclusion, the court noted that "once [the] activity in question is found to be within the scope of the participation clause, the employee is generally protected from retaliation."<sup>221</sup> Therefore, the Sixth Circuit is one court that has not applied *Breedon* to participation-clause cases.<sup>222</sup>

The Third Circuit also maintained the distinction between opposition-

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211. 237 F. App'x 1 (6th Cir. 2007). The Sixth Circuit is one court with a history of applying different standards to cases brought under the opposition clause and the participation clause. *See, e.g., Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 579–82 (6th Cir. 2000).

212. 29 U.S.C. §§ 621–34. (2000).

213. TENN. CODE ANN. § 4-21-101 (2005).

214. *Butts*, 237 F. App'x at 1.

215. *Id.* at 1–2.

216. *Id.* at 5 (citing *Johnson*, 215 F.3d at 579). The ADEA's anti-retaliation provision is very similar to Title VII's anti-retaliation provision. *See* 29 U.S.C. § 623(d); *Wathen v. Gen. Elec. Co.*, 115 F.3d 400, 404 n.6 (6th Cir. 1997).

217. *Butts*, 237 F. App'x at 5–6.

218. *Id.*

219. *Id.* at 6.

220. *Id.* (quoting *Johnson*, 215 F.3d at 582).

221. *Id.*

222. Despite this conclusion that the participation clause provides greater protection than the opposition clause, the plaintiff in *Butts* still lost on appeal; however, that result was not related to the issue of the participation clause's scope of protection in a post-*Breedon* world, but rather it happened because the plaintiff could not produce sufficient evidence of pretext. *Id.* at 8.

clause claims and participation-clause claims in *Slagle v. County of Clarion*;<sup>223</sup> however, as previously discussed, the Third Circuit adopted a narrower interpretation of the participation clause seven months after *Slagle* in *Moore v. City of Philadelphia*.<sup>224</sup> Although *Moore* was decided after *Slagle*, both opinions were issued post-*Breeden*, and while *Moore* relied on *Breeden*, the same court (but a different panel) in *Slagle* indicated that there were two different standards for the two different types of cases.<sup>225</sup> In *Slagle*, the plaintiff filed a retaliation complaint, alleging that his employer retaliated against him on two separate occasions.<sup>226</sup> The district court granted the employer's motion for summary judgment, and the plaintiff appealed.<sup>227</sup> Although the Third Circuit affirmed the judgment, it did so because the plaintiff's EEOC charge did not allege any type of Title VII violation; as such, the plaintiff did not engage in protected activity.<sup>228</sup> Ultimately, the Third Circuit determined that the participation clause does not protect facially invalid claims.<sup>229</sup>

Despite this holding, the court suggested it was not adopting *Breeden* for participation-clause cases. Specifically, the court acknowledged that the distinction between the opposition clause and the participation clause is "significant" because "the levels of statutory protection differ."<sup>230</sup> The court then noted that "[c]ourts that have interpreted the 'participation clause' have held that it offers much broader protection to Title VII employees than does the 'opposition clause.'"<sup>231</sup> Continuing to explain

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223. 435 F.3d 262 (3d Cir.), *cert. denied*, 547 U.S. 1207 (2006).

224. 461 F.3d 331, 341 (3d Cir. 2006); *see also supra* Part V.A.

225. *Moore*, 461 F.3d at 341; *Slagle*, 435 F.3d at 266. Two district court cases from within the Third Circuit appear to take the more rigorous approach and apply the objectively reasonable standard to participation-clause cases. In both *Lloyd v. Washington & Jefferson College*, No. 2:05CV00802, 2007 WL 1575448, at \*17 (W.D. Pa. May 30, 2007), and *Kress v. Birchwood Landscaping*, No. 3:05CV00566, 2007 WL 800996, at \*17 (M.D. Pa. Mar. 14, 2007), the courts cited *Breeden* and noted in dicta that the same standard applies to both opposition activities and participation activities.

226. *Slagle*, 435 F.3d at 263–64.

227. *Id.* at 264.

228. *Id.* at 266–67.

229. *Id.* at 268. Despite this conclusion from the Third Circuit, I argue that as long as plaintiffs filed their charges in good faith (regardless of whether it was reasonable or unreasonable), their actions should be protected. *See Rosenthal, supra* note 15, at 1149–76.

230. *Slagle*, 435 F.3d at 268 (quoting BARBARA L. SCHLEI & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 533 (2d ed. 1983)). The court also relied on *Proulx v. Citibank, N.A.*, 659 F. Supp. 972 (S.D.N.Y. 1987), and *Robinson v. Southeastern Pennsylvania Transportation Authority*, 982 F.2d 892 (3d Cir. 1993).

231. *Id.* (citing *Deravin v. Kerik*, 335 F.3d 195, 203 (2d Cir. 2003); *Booker v. Brown &*

the participation clause's broad protections, the court noted that the bar is set low in order to receive protection, and that "[o]nce a plaintiff files a facially valid complaint, the plaintiff will be entitled to the broad protections of § 704(a), as interpreted by the EEOC and by numerous courts."<sup>232</sup> Relying on the EEOC Compliance Manual, the court then noted that a participation-clause plaintiff is protected "regardless of whether the allegations in the original charge were valid or reasonable."<sup>233</sup> The court also relied on pre-*Breeden* cases from the First and Sixth Circuits.<sup>234</sup> In conclusion, the court noted that "[a]ll that is required is that [a] plaintiff allege in the charge that his or her employer violated Title VII by discriminating against him or her on the basis of race, color, religion, sex, or national origin, in any manner."<sup>235</sup> Because the plaintiff failed to do so, he was not protected.<sup>236</sup>

As this section of the Article has demonstrated, not all United States courts of appeals have applied the more restrictive *Breeden* standard to participation-clause cases. Although the Third Circuit has since issued an opinion that seems to adopt the more rigorous standard, the Sixth Circuit has consistently applied different levels of protection under the different clauses of the anti-retaliation provision.<sup>237</sup> As the next section of the Article will demonstrate, some United States district courts also refuse to apply *Breeden* to cases outside of the context in which the *Breeden* opinion was written.

#### D. *United States District Courts That Have Not Applied Breeden to Participation-Clause Cases*

In addition to the previously mentioned United States courts of

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Williamson Tobacco Co., 879 F.2d 1304, 1312 (6th Cir. 1989); *Sias v. City Demonstration Agency*, 588 F.2d 692, 695 (9th Cir. 1978); *Pettway v. Am. Cast Iron Pipe Co.*, 411 F.2d 998, 1006 (5th Cir. 1969)).

232. *Id.* at 268.

233. *Id.* (citing *Compliance Manual*, *supra* note 4, at § 8-II.).

234. *Id.* (citing *Wyatt v. City of Boston*, 35 F.3d 13, 15 (1st Cir. 1994); *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 582 (6th Cir. 2000)).

235. *Id.*

236. *Id.* Post-*Breeden*, two other United States courts of appeals have also acknowledged that the participation clause provides more protection than the opposition clause does. See *Deravin*, 335 F.3d at 203; *Martin v. Mecklenburg County*, 151 F. App'x 275, 279 (4th Cir. 2005). In *Martin*, however, the court was careful to note that it felt reluctant to protect an employee who lied during a Title VII investigation, proceeding, or hearing, despite acknowledging that the phrase "in any manner" could be read to include "unreasonable and irrelevant" activity. 151 F. App'x at 279.

237. See, e.g., *Johnson*, 215 F.3d at 582; *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1312 (6th Cir. 1989).

appeals that still apply different levels of protection to the different clauses in Title VII's anti-retaliation provision, several United States district courts have also continued to do so post-*Breeden*. Although many of these cases did not squarely address the issue, many of them did note that the participation clause provides more protection than the opposition clause. This approach is consistent with how the majority of courts addressed this issue prior to the Court's *Breeden* opinion.

The United States District Court for the District of South Carolina issued one such opinion.<sup>238</sup> In *Whatley v. South Carolina Department of Public Safety*, although the plaintiff's claim ultimately failed, the court addressed the different levels of protection afforded by the two clauses in Title VII's anti-retaliation provision.<sup>239</sup> While first noting that the opposition clause requires a reasonableness test, the court then observed that "[t]he reasonableness test of the opposition clause analysis is inapplicable to the consideration of a claim under the participation clause."<sup>240</sup> The court reached this conclusion based on the broader language found in the participation clause.<sup>241</sup> Specifically, the court noted that the distinction in the level of protection "is based on the broad statutory language . . . with respect to the participation clause."<sup>242</sup>

The United States District Court for the Middle District of North Carolina also followed pre-*Breeden* precedent for the proposition that the participation clause provides more protection than the opposition clause.<sup>243</sup> After determining that the plaintiff's conduct was not protected by the opposition clause, the court addressed the plaintiff's argument that his conduct was protected by the participation clause.<sup>244</sup> Although the court ultimately decided against the plaintiff, the court concluded that the plaintiff had engaged in protected activity.<sup>245</sup> The court noted that the participation clause provided more protection than the opposition clause, and that "the participation clause prohibits an

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238. *Whatley v. S.C. Dep't of Pub. Safety*, No. 3:05CV00042, 2006 WL 3918239 (D.S.C. Sept. 1, 2006). As was noted earlier, the Fourth Circuit is another court that has given broad protection to individuals seeking protection under the participation clause. *See supra* note 92.

239. *Whatley*, 2006 WL 3918239, at \*9–10.

240. *Id.* at \*10.

241. *Id.*

242. *Id.* As was mentioned *supra* note 24, while the opposition clause does not have a "catch-all phrase," the participation clause does indicate that plaintiffs are protected as long as they make a charge, testify, assist, or participate "in any manner." 42 U.S.C. § 2000e-3(a) (2000).

243. *Shoaf v. Kimberly-Clark Corp.*, 294 F. Supp. 2d 746, 756 (M.D.N.C. 2003).

244. *Id.* at 755–56.

245. *Id.* at 756.

employer from discharging an employee in retaliation for giving testimony in a Title VII proceeding because “the participation clause shields even allegedly unreasonable testimony from employer retaliation.”<sup>246</sup> The court noted that the Fourth Circuit reached this conclusion based on the statute’s language, which “leads inexorably to the conclusion that all testimony in a Title VII proceeding is protected against punitive employer action.”<sup>247</sup>

The United States District Court for the Southern District of Texas also noted that the objectively reasonable standard does not apply to participation-clause cases.<sup>248</sup> In *Eugene v. Rumsfeld*, the court identified the two separate clauses in the anti-retaliation provision and noted that while the opposition clause “requires the employee to demonstrate that she had at least a ‘reasonable belief’ that the practices she opposed were unlawful,”<sup>249</sup> the “participation clause, however, does not include the ‘reasonable belief’ requirement and provides broad protection to an employee who has participated in a Title VII proceeding.”<sup>250</sup> Thus, even though this opinion was issued six months after *Breeden*, it acknowledged a difference in the levels of protection between the opposition clause and the participation clause.<sup>251</sup>

While many courts are expanding *Breeden* to cases not involving the opposition clause, this section and the preceding section of this Article demonstrate that some courts are still providing a greater level of protection to participation-clause plaintiffs.<sup>252</sup> As the courts continue to take different approaches on this issue, and as they continue to debate

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246. *Id.* (quoting *Glover v. S.C. Law Enforcement Div.*, 170 F.3d 411, 412 (4th Cir. 1999)).

247. *Id.* (quoting *Glover*, 170 F.3d at 414). As noted earlier, the language in the participation clause protects individuals who make a charge, testify, assist, or participate “in any manner.” 42 U.S.C. § 2000e-3(a).

248. *Eugene v. Rumsfeld*, 168 F. Supp. 2d 655, 680 (S.D. Tex. 2001).

249. *Id.* (quoting *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1312 (6th Cir. 1989)).

250. *Id.* (citing *Hashimoto v. Dalton*, 118 F.3d 671, 680 (9th Cir. 1997)).

251. *Id.*

252. For another opinion from a United States district court where the court acknowledged a greater level of protection for participation-clause claims, see *Williams v. Gonzales*, No. 1:04CV00342, 2005 WL 3447885, at \*13 (E.D. Tex. Dec. 14, 2005), which noted that the participation clause does not include the “reasonable belief” requirement. *See also* *Tolbert v. Follett Higher Educ. Group, Inc.*, No. 3:05CV00159, 2006 WL 559462, at \*6 (M.D. Ala. Mar. 7, 2006) (noting that the participation clause affords “exceptionally broad protection to those who take part in any sort of activity related to the development or prosecution of a Title VII case,” but that the opposition clause “requires the plaintiff . . . to have a good faith, reasonable belief that the practice opposed is unlawful”); *Thompson v. Exxon Mobil Corp.*, 344 F. Supp. 2d 971, 984 (E.D. Tex. 2004) (noting that the participation clause does not incorporate the reasonable belief standard).

the scope of the *Breeden* opinion, it is clear that the Supreme Court will have to answer two questions. First, must plaintiffs pursuing claims under the opposition clause demonstrate an objectively reasonable belief that the behavior they were opposing violated Title VII?<sup>253</sup> Second, if opposition-clause plaintiffs must meet that standard, does that standard also apply to participation-clause plaintiffs? The remainder of the Article will address the second question and argue that even if an objectively reasonable requirement exists under the opposition clause, the same requirement should not exist under the participation clause.<sup>254</sup>

## VI. WHY *BREEDEN* SHOULD NOT APPLY TO PARTICIPATION-CLAUSE CASES

There are several reasons why courts should not apply *Breeden*'s dicta to participation-clause cases. First, as is the case with any issue involving statutory interpretation, the initial inquiry begins with the statute's language, and Title VII's language grants very broad protection under the participation clause.<sup>255</sup> Second, the agency charged with enforcing Title VII, the EEOC, has clearly articulated its belief that the objectively reasonable standard should not apply to the participation clause.<sup>256</sup> Although the EEOC Compliance Manual does not have the force of regulation, courts should defer to its position on this issue because (1) the EEOC's position is persuasive; (2) it is entirely consistent with the statutory text; and (3) it certainly furthers, rather than frustrates, Title VII's purposes. Third, as a remedial statute, Title VII should be interpreted broadly, and applying *Breeden* to the participation clause narrows, rather than broadens, Title VII's protections.<sup>257</sup> Finally,

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253. This was the specific question the Court refused to answer in *Breeden*. Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 270 (2001). The Court also declined an opportunity to address this issue when it denied certiorari in *Jordan v. Alternative Resources Corp.*, 458 F.3d 332 (4th Cir.), *reh'g en banc denied*, 467 F.3d 378 (4th Cir. 2006), *cert. denied*, \_\_\_ U.S. \_\_\_, 127 S. Ct. 2036 (2007).

254. See Rosenthal *supra* note 15, at 1149–76 (arguing that the objectively reasonable standard should not apply to opposition-clause cases). There are, however, additional reasons why the objectively reasonable standard should not apply to cases brought pursuant to the participation clause. These reasons will be addressed in Part VI.

255. 42 U.S.C. § 2000e-3(a) (2000).

256. See *Compliance Manual*, *supra* note 4, at § 8-II. This belief is in contrast to the EEOC's position with respect to opposition-clause cases, where the agency adopted the objectively reasonable standard. *Id.*

257. See Bd. of County Comm'rs v. EEOC, 405 F.3d 840, 847 n.6 (10th Cir. 2005) (noting that Title VII is a remedial statute and should be construed broadly); Charlton v. Paramus Bd. of Educ., 25 F.3d 194, 199–200 (3d Cir. 1994) (acknowledging that the anti-retaliation provision of Title VII

and most importantly, relying on *Breeden* for the idea that the objectively reasonable standard applies to participation-clause cases is inappropriate because *Breeden* never addressed the participation clause, and because *Breeden* never definitively decided the correct standard for opposition-clause cases.<sup>258</sup> Therefore, courts should reject the approach currently followed by the Seventh Circuit, the Third Circuit,<sup>259</sup> and all other courts that apply *Breeden* to participation-clause cases, and they should instead continue to provide broad protection for participation-clause plaintiffs.

A. *The Participation Clause's Plain Language Supports an Expansive Interpretation*

Pre-*Breeden*, almost all courts provided extremely broad protection to participation-clause plaintiffs, and they applied a lower level of protection to opposition-clause plaintiffs.<sup>260</sup> Even in a post-*Breeden* world, some courts still provide greater protection to participation-clause plaintiffs than they do to opposition-clause plaintiffs.<sup>261</sup> One of the reasons for this distinction is the plain language of Title VII's anti-retaliation provision:

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

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should be broadly construed to further the goal of preventing employer retaliation).

258. *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 270–72 (2001).

259. As was noted earlier, the Third Circuit has not definitively answered this question. In one opinion, the court noted in dicta that the same standard applies to both opposition-clause cases and participation-clause cases. *See Moore v. City of Philadelphia*, 461 F.3d 331, 341 (3d Cir. 2006). In another opinion from the Third Circuit, the court noted in dicta that different standards apply to the different types of cases. *See Slagle v. County of Clarion*, 435 F.3d 262, 266 (3d Cir.), *cert. denied*, 547 U.S. 1207 (2006). *See also supra* note 154.

260. LEWIS & NORMAN, *supra* note 2, at § 2.40.

261. *See discussion supra* Parts V.C and V.D.

subchapter.<sup>262</sup>

Unlike the opposition clause, the participation clause includes the catch-all phrase, “participated in any manner.”<sup>263</sup> Based upon this difference between the two clauses, and based upon the first canon of statutory construction—that the statute’s plain language should govern a statute’s interpretation—many courts have granted (and still grant) more protection to plaintiffs filing suit under the participation clause.<sup>264</sup>

One court that has relied on this plain language argument is the United States Court of Appeals for the Fourth Circuit.<sup>265</sup> In *Glover v. South Carolina Law Enforcement Division*, the court addressed whether the plaintiff’s deposition testimony (given as part of another pending lawsuit not involving the plaintiff) constituted protected activity.<sup>266</sup> The question arose because the plaintiff made negative comments about other individuals involved in the initial litigation, and she suffered an adverse action as a result of her “performance” at her deposition.<sup>267</sup> She then filed a retaliation claim against her former employer.<sup>268</sup> When addressing whether the plaintiff’s deposition testimony was protected under the participation clause, the former employer argued that the testimony was not protected because it was unreasonable.<sup>269</sup> Rejecting the employer’s contention that the testimony had to be reasonable, the court noted that “[r]eading a reasonableness test into section 704(a)’s

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262. 42 U.S.C. § 2000e-3(a) (2000) (emphasis added). I acknowledge the possibility that the “in any manner” language could refer to other possible *activities* in which a potential employee could participate, and not necessarily to the *state of mind* the employee has when engaging in those activities. This interpretation would therefore limit the “in any manner” language to *activities* such as serving as a witness, testifying, assisting in an investigation, providing evidence, etc., and would not immunize employees who engage in those activities unreasonably or in bad faith.

263. *Id.*

264. The typical starting point for interpreting a statute is its plain language. *See* *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). Courts can ignore the plain language only if applying it would frustrate Congress’s goals behind the legislation or if applying the plain language would yield bizarre results. *See* *Kaplan v. City of N. Las Vegas*, 323 F.3d 1226, 1232 (9th Cir. 2003) (citing *Royal Foods Co. v. RJR Holdings, Inc.*, 252 F.3d 1102, 1108 (9th Cir. 2001)) (noting that courts can ignore a statute’s language if following the language would yield “bizarre results”); *see also* *Nat’l. Pub. Radio v. FCC*, 254 F.3d 226, 230 (D.C. Cir. 2001) (noting that courts can ignore a statute’s language if applying the language would frustrate the statute’s purpose) (relying on *Env’tl. Def. Fund, Inc. v. EPA*, 82 F.3d 451, 469 (D.C. Cir. 1996)). In this case, however, applying the participation clause’s plain language furthers, rather than frustrates, congressional intent and does not yield bizarre results.

265. *See* *Glover v. S.C. Law Enforcement Div.*, 170 F.3d 411, 414 (4th Cir. 1999).

266. *Id.* at 412–13.

267. *Id.*

268. *Id.* at 413.

269. *Id.* at 413–14.



participation clause *would do violence to the text of that provision* and would undermine the objectives of Title VII.<sup>270</sup> The Fourth Circuit elaborated:

*The plain language of the participation clause itself forecloses us from improvising such a reasonableness test.* The clause forbids retaliation against an employee who “has made a charge, testified, assisted, or participated in any manner” in a protected proceeding. [The plaintiff] was fired because she “testified” in a Title VII deposition. The term “testify” has a plain meaning: “[t]o bear witness” or “to give evidence as a witness.” Moreover, those who testify in Title VII proceedings are endowed with exceptionally broad protection. The word “testified” is not preceded or followed by any restrictive language that limits its reach. In fact, it is followed by the phrase “in any manner”—a clear signal that the provision is meant to sweep broadly. Congress could not have carved out in clearer terms this safe harbor from employer retaliation. A straightforward reading of the statute’s unrestrictive language leads inexorably to the conclusion that all testimony in a Title VII proceeding is protected against punitive employer action.<sup>271</sup>

The Fourth Circuit continued:

But the scope of protection for activity falling under the participation clause is broader than for activity falling under the opposition clause. This is because of the opposition clause’s different text—the ambiguous term “oppose” has the potential to include a wide range of informal activity ranging from petitions to militant self-help. . . . But as we have noted, *the text of the participation clause is unambiguous and specific.* Testifying in a Title VII proceeding is plainly protected participation—the clause neither requires nor allows further balancing.<sup>272</sup>

Therefore, the Fourth Circuit made it clear that with respect to this form of participation, it was not going to apply the opposition clause’s reasonableness standard.<sup>273</sup>

Several other courts have also recognized that the participation clause’s unqualified language supports granting more protection to participation-clause plaintiffs. For example, a United States district court

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270. *Id.* at 414 (emphasis added).

271. *Id.* (quoting 42 U.S.C. § 2000e-3(a) and BLACK’S LAW DICTIONARY 1476 (6th ed. 1990)) (emphasis added) (citations omitted) (internal quotation marks omitted).

272. *Id.* at 415 (emphasis added) (citations omitted) (internal quotation marks omitted).

273. *Id.*

from within the Fourth Circuit recognized that Title VII's language supports a broader level of protection for participation-clause plaintiffs.<sup>274</sup> In *Whatley*, the court observed the following: "The reasonableness test of the opposition clause analysis is inapplicable to the consideration of a claim under the participation clause. *This distinction is based on the broad statutory language . . . with respect to the participation clause.*"<sup>275</sup> Another district court echoed this sentiment when it stated that a "straightforward reading of the participation clause's unrestrictive language 'leads inexorably to the conclusion that all testimony in a Title VII proceeding is protected against punitive employer action.'"<sup>276</sup> Even Judge Colloton acknowledged in *Gilooly* that there is a "respectable textual argument" that supports the position that the participation clause provides greater protection than the opposition clause.<sup>277</sup>

Although there might be some policy reasons not to protect all participation activities,<sup>278</sup> especially those undertaken in bad faith,<sup>279</sup> the participation clause's plain language indicates that courts should protect all activities. Because providing unlimited protection to individuals seeking protection under this provision will not yield "bizarre results," nor will doing so conflict with Title VII's purposes, courts should follow the provision's language and provide unlimited protection to these plaintiffs.<sup>280</sup> This plain-language argument is not, however, the only

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274. *Whatley v. S.C. Dep't. of Public Safety*, No. 3:05CV00042, 2006 WL 3918239, at \*10 (D.S.C. Sept. 1, 2006).

275. *Id.* (emphasis added).

276. *Shoaf v. Kimberly-Clark Corp.*, 294 F. Supp. 2d 746, 756 (M.D.N.C. 2003) (quoting *Glover*, 170 F.3d at 414).

277. *Gilooly v. Mo. Dep't of Health & Senior Servs.*, 421 F.3d 734, 742 (8th Cir. 2005) (Colloton, J., concurring in part and dissenting in part).

278. The most common justification for not providing such broad protection is that courts do not want employees to obtain permanent job security simply by filing multiple charges of discrimination. See *Mattson v. Caterpillar, Inc.*, 359 F.3d 885, 890–91 (7th Cir. 2004). This was addressed more thoroughly in the discussion of *Mattson* earlier in this Article, *supra* Part V.A. Also, the court in *Moore v. Principi*, No. 1:00CV02975, 2003 WL 21281765, (N.D. Ill. June 4, 2003), echoed the *Mattson* concerns when it noted that "an employee should not be able to acquire indefinite tenure by peppering his employer with frivolous complaints." *Id.* at \*4.

279. See *Mattson*, 359 F.3d at 890–91; *Moore*, 2003 WL 21281765, at \*4.

280. See *supra* text accompanying note 264. Such a rule could result in an employee's abuse of the EEOC process; however, limiting the participation clause's protection would undermine Congress's goal of providing "unfettered access to [Title VII's] remedial mechanisms." *Robinson v. Shell Oil Inc.*, 519 U.S. 337, 346 (1997). If forced to choose between giving greater protection to those who legitimately need it (and risk providing a sword to employees who would use Title VII illegitimately) and limiting the protection afforded by the statute, the courts should choose the former. As was mentioned *supra* note 229, one possible alternative is to provide protection under

reason courts should grant broad protection to plaintiffs pursuing claims under the participation clause. As the next section of this Article will demonstrate, there is no reason why the courts should not defer to the EEOC's position on this issue—that all participation-clause activity is protected, even if it is unreasonable.

*B. The Equal Employment Opportunity Commission's Persuasive Position Is Consistent with the Participation Clause's Plain Language and Furthers, Rather than Frustrates, Title VII's Purposes*

The agency responsible for enforcing Title VII is the EEOC.<sup>281</sup> The EEOC has drafted a Compliance Manual, which, although not entitled to the deference owed to administrative regulations,<sup>282</sup> deserves attention. In the Compliance Manual, the EEOC agrees with the Court's dicta in *Breeden* that only complaints based on a reasonable, good-faith belief of unlawful employer practices are protected under the opposition clause;<sup>283</sup> however, the EEOC disagrees with those courts that have decided that the same standard applies to the participation clause.<sup>284</sup>

With respect to the anti-retaliation provision's participation clause, the Compliance Manual indicates that "participation is protected regardless of whether the allegations in the original charge were valid or reasonable."<sup>285</sup> The Compliance Manual also indicates that the statute does not "limit or condition in any way the protection against retaliation

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the participation clause as long as employees act in good faith, regardless of whether they act reasonably.

281. 42 U.S.C. §§ 2000e-4, 2000e-5, 2000e-8, 2000e-9 & 2000e-12 (2000).

282. Most courts acknowledge that the Compliance Manual is not entitled to the same level of deference as administrative regulations. *See* *Noviello v. City of Boston*, 398 F.3d 76, 90 n.3 (1st Cir. 2005) (noting that the Compliance Manual is entitled to deference "only to the extent [it has] the power to persuade"); *Ebbert v. DaimlerChrysler Corp.*, 319 F.3d 103, 115 (3d Cir. 2003) (noting that the Compliance Manual is not subject to "the kind of deliberateness or thoroughness that gives rise to significant deference," and stating that the Compliance Manual is "automatically at the lower end of the *Skidmore* scale of deference"); *Singh v. Green Thumb Landscaping, Inc.*, 390 F. Supp. 2d 1129, 1137 (M.D. Fla. 2005) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (noting that the EEOC's position is entitled to deference depending on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control," and rejecting the EEOC's position because it was "entirely lacking in the extensive analysis and thoroughness necessary to be entitled to substantial deference by the Court" and because the EEOC's position conflicted with the "plain and unambiguous" language of Title VII).

283. *Compliance Manual*, *supra* note 4, at § 8-II, 8-3-8-21.

284. *Id.* at 8-9-8-11.

285. *Id.* at 8-10.

for participating in the charge process.”<sup>286</sup> In distinguishing the participation clause from the opposition clause, the Compliance Manual provides that “[w]hile the opposition clause applies only to those who protest practices that they reasonably and in good faith believe are unlawful, the participation clause applies to *all* individuals who participate in the statutory complaint process.”<sup>287</sup> Finally, and apparently not foreseeing that courts would begin to use *Breeden* in participation-clause cases, the Compliance Manual indicates that “courts have consistently held that [an employer] is liable for retaliating against an individual for filing an EEOC charge *regardless of the validity or reasonableness of the charge.*”<sup>288</sup>

Although the Compliance Manual is not entitled to *Chevron* deference,<sup>289</sup> the Supreme Court has indicated that the EEOC guidelines “do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.”<sup>290</sup> With respect to the EEOC’s positions articulated in its Compliance Manual, some courts have agreed with the EEOC’s positions and accepted them with respect to the issue of this Article and with respect to other issues involving Title VII and other anti-discrimination statutes.<sup>291</sup> One opinion that specifically cited to the EEOC Compliance Manual when confronted with the issue discussed in this Article was the previously discussed *Slagle v. County of Clarion*.<sup>292</sup> In *Slagle*, although the plaintiff was ultimately unsuccessful in his claim, the court looked to the EEOC Compliance Manual regarding the level of protection afforded by the participation clause.<sup>293</sup> Specifically, the court in *Slagle* noted that once the plaintiff files a facially valid claim, the participation clause’s protections provide him with “broad protections.”<sup>294</sup> The court noted that several courts and the EEOC have taken this position, and it then

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286. *Id.*

287. *Id.* (emphasis added).

288. *Id.* (emphasis added).

289. See *supra* note 282 regarding the level of deference owed to the positions taken by the EEOC in its Compliance Manual.

290. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986) (quoting *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 141–42 (1976)). Admittedly, the EEOC’s position on the issue involved in this Article is found in its Compliance Manual, not in its guidelines.

291. See discussion *supra* Parts V.C and V.D; *Deravin v. Kerik*, 335 F.3d 195, 204 (2d Cir. 2003) (following the Compliance Manual’s position with respect to whether involuntary participation in a Title VII proceeding constitutes protected activity).

292. 435 F.3d 262 (3d Cir.), *cert. denied*, 547 U.S. 1207 (2006).

293. *Id.* at 268.

294. *Id.*

specifically cited to section 8–II of the Compliance Manual for the proposition that a plaintiff is protected under the participation clause “regardless of whether the allegations in the charge were valid or reasonable.”<sup>295</sup>

The Supreme Court also adopted an EEOC position regarding Title VII’s anti-retaliation provision in *Robinson v. Shell Oil Co.*<sup>296</sup> In *Robinson*, when deciding whether former employees were covered by Title VII’s anti-retaliation provision, the Court relied on the EEOC’s amicus brief and the position taken by the EEOC in its Compliance Manual.<sup>297</sup> According to the EEOC, excluding former employees from Title VII’s protections would undermine Title VII’s purposes and would allow employers to terminate employees who might bring discrimination claims.<sup>298</sup> Agreeing with the EEOC, the Court noted that the EEOC’s arguments “carry persuasive force given their coherence and their consistency with a primary purpose of antiretaliation provisions: Maintaining unfettered access to statutory remedial mechanisms.”<sup>299</sup>

The Supreme Court has also adopted other positions from the EEOC Compliance Manual, although not necessarily in the context of Title VII’s anti-retaliation provision. For example, although the Court in *Clackamas Gastroenterology Associates, P.C. v. Wells*<sup>300</sup> acknowledged that the Compliance Manual is not controlling,<sup>301</sup> it agreed with the Compliance Manual with respect to how to determine which workers are considered “employees” under the Americans with Disabilities Act.<sup>302</sup> The Court specifically noted that agency interpretations contained in compliance manuals do not warrant *Chevron* deference,<sup>303</sup> but believed that in that particular case, the EEOC’s position in the Compliance Manual was correct.<sup>304</sup>

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295. *Id.* (quoting *Compliance Manual*, *supra* note 4, at § 8-II, and relying on *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 582 (6th Cir. 2000); *Wyatt v. City of Boston*, 35 F.3d 13, 15 (1st Cir. 1994); *Proulx v. Citibank, N.A.*, 659 F. Supp. 972, 977 (S.D.N.Y. 1987)).

296. 519 U.S. 337, 346 (1997).

297. *Id.* at 345–46.

298. *Id.* at 346.

299. *Id.*

300. 538 U.S. 440 (2003).

301. *Id.* at 449 n.9.

302. *Id.* at 449–51.

303. *Id.* at 449 n.9, 451; *see also supra* note 282 and accompanying text. *But see Nilsson v. City of Mesa*, 503 F.3d 947, 953 n.3 (9th Cir. 2007) (noting that the EEOC Compliance Manual is entitled to *Chevron* deference).

304. *See Clackamas*, 538 U.S. at 448–51. Admittedly, the Supreme Court has not always agreed with the EEOC’s position. For example, in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482–87

The Supreme Court has noted that the EEOC constitutes “a body of experience and informed judgment to which courts and litigants may properly resort for guidance.”<sup>305</sup> Although the Court has not directly addressed the EEOC’s position with respect to the specific issue of this Article, the EEOC’s position on this issue is persuasive, consistent with the anti-retaliation provision’s plain language,<sup>306</sup> and furthers the goals of that provision.<sup>307</sup> Furthermore, if individuals are not protected when they make what turn out to be incorrect statements or take unreasonable actions, the likelihood that they will be willing to participate in any Title VII proceedings will be diminished.

Several courts, in addition to the Supreme Court in *Robinson* and *Burlington Northern*, have noted that giving a broad interpretation to Title VII’s anti-retaliation provision, as the EEOC suggests, is essential to the statute’s effectiveness.<sup>308</sup> For example, in *Glover*, the Fourth Circuit indicated that it was critical to provide individuals with broad protection under the participation clause.<sup>309</sup> The court noted that limiting the broad protection and implementing the *Breeden* reasonableness standard to participation activities would frustrate Title VII’s purposes and lead to other problems.<sup>310</sup> Specifically, the court noted:

In fact, to adopt a reasonableness restriction would lead the federal courts into a morass of collateral litigation in employment discrimination cases. With [the witness’s] immunity limited by a reasonableness requirement, a witness might be forced to evade or refuse to answer deposition questions . . . . The inevitable clashes between inquisitive deposing attorneys and recalcitrant witnesses will spawn discovery motions and appeals, all to be litigated in the courts. The resulting waste of individual and judicial resources would

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(1999), the Court rejected the EEOC’s position; however, in that case, the Court concluded that the EEOC’s position conflicted with the plain language of the ADA.

305. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986) (relying on *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 141–42 (1976)). The Court in *Meritor* was referring to the EEOC’s guidelines and not its Compliance Manual; nonetheless, the Court did acknowledge that the EEOC is experienced in matters involving employment discrimination. To see how other courts have treated the issue of how much deference to give to the Compliance Manual, see *supra* note 282.

306. See discussion *supra* Part VI.A.

307. In cases where the Court rejected the EEOC’s position, it was usually because the Court determined that the EEOC’s position conflicted with the plain language of the statute. See, e.g., *Sutton*, 527 U.S. at 482–87.

308. See cases cited *supra* note 257.

309. *Glover v. S.C. Law Enforcement Div.*, 170 F.3d 411, 414–15 (4th Cir. 1999).

310. *Id.* at 415.

be far inferior to a system in which discovery proceeds unfettered, with witnesses confident that they cannot be punished for telling their tales.<sup>311</sup>

The court in *Glover* further explained its concern with imposing a reasonableness requirement under the participation clause when it noted that “[i]f a witness in a Title VII proceeding were secure from retaliation only when her testimony met some slippery reasonableness standard, she would surely be less than forth-coming.”<sup>312</sup> Thus, the Fourth Circuit clearly articulated its belief that the reasonableness requirement should not apply to the participation clause.<sup>313</sup> This is consistent with the EEOC’s position on this issue, and it certainly furthers, rather than frustrates, Title VII’s goals. As such, courts should resist the trend of applying the *Breeden* dicta to participation-clause cases, and they should continue to give the broad protection Congress intended the participation clause to provide.

Several United States district courts have also concluded that a broad interpretation for the participation clause is essential to fulfilling the anti-retaliation provision’s goals. For example, the court in *Whatley* relied on *Laughlin v. Metro Washington Airports Authority*<sup>314</sup> and observed that “activities under the participation clause are *essential* to the machinery set up by Title VII.”<sup>315</sup> Also relying on *Laughlin*, the District Court of South Carolina repeated the same statement when deciding that the participation clause’s protection is broader than that of the opposition clause.<sup>316</sup> Finally, the court in *Shoaf v. Kimberly-Clark Corp.*<sup>317</sup> relied on *Laughlin* for the proposition that activities protected under the participation clause “are essential ‘to the machinery set up by Title VII.’”<sup>318</sup>

Not applying the *Breeden* dicta to participation-clause cases is entirely consistent with the EEOC’s position. However, the EEOC’s

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311. *Id.*

312. *Id.* at 414.

313. *Id.* at 414–15.

314. *Laughlin v. Metro Wash. Airports Auth.*, 149 F.3d 253 (4th Cir. 1998).

315. *Whatley v. S.C. Dep’t of Pub. Safety*, No. 3:05CV00042, 2006 WL 3918239, at \*10 (D.S.C. Sept. 1, 2006) (quoting *Laughlin v. Metro Wash. Airports Auth.*, 149 F.3d 253, 259 n.4 (4th Cir. 1998)) (emphasis added).

316. *Walters v. Benedict Coll.*, No. 3:04CV00952, 2006 WL 644442, at \*7 (D.S.C. Mar. 10, 2006).

317. 294 F. Supp. 2d 746 (M.D.N.C. 2003).

318. *Id.* at 755–56 (quoting *Laughlin*, 149 F.3d at 259 n. 4); *Hashimoto v. Dalton*, 118 F.3d 671, 679–80 (9th Cir. 1997) (noting that the plaintiff’s visit with an EEOC counselor was protected activity, and that it was “in the machinery set up by Title VII”).

persuasive position and that position's consistency with Title VII's language and goals are only two of several reasons why courts should refuse to apply the reasonableness standard to participation-clause claims. Courts should also hesitate before imposing a more restrictive standard to these cases because, as the next section of the Article will demonstrate, remedial statutes such as Title VII should be given broad, rather than narrow, interpretations. Applying this canon of statutory construction will help further the purposes of Title VII and its anti-retaliation provision, and is more likely lead to work environments free from impermissible discrimination.

*C. Because Title VII Is a Remedial Statute, Courts Should Give the Anti-Retaliation Provision a Broad, Rather than a Narrow, Interpretation*<sup>319</sup>

Although the Supreme Court has not directly addressed whether the objectively reasonable test is the correct test to apply in retaliation cases, it has had the opportunity to hear some cases involving Title VII's anti-retaliation provision.<sup>320</sup> In its anti-retaliation jurisprudence prior to *Breeden*, and in some cases post-*Breeden*, the Court has typically given a broad interpretation to the anti-retaliation provision.<sup>321</sup> This is entirely consistent with the canon of statutory construction that remedial statutes should be interpreted broadly.<sup>322</sup>

One of the first cases in which the Court addressed Title VII's anti-retaliation provision was *Robinson v. Shell Oil Co.*<sup>323</sup> In *Robinson*, the Court addressed whether the anti-retaliation provision covered former employees as well as current employees and job applicants.<sup>324</sup> Title VII's language limited the class of individuals protected by the anti-retaliation provision to "employees" and "applicants for employment,"<sup>325</sup> and as a

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319. Because this argument applies to both the opposition clause and the participation clause, it appears here and in my previous Article regarding Title VII's opposition clause. See Rosenthal, *supra* note 15, at 1150–57.

320. These cases include *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), and *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997).

321. *Burlington N.*, 548 U.S. at 63–65; *Robinson*, 519 U.S. at 346.

322. See, e.g., *Bd. of County Comm'rs v. EEOC*, 405 F.3d 840, 846–47 (10th Cir. 2005) (noting that Title VII is a remedial statute and should be construed broadly); *Charlton v. Paramus Bd. of Educ.*, 25 F.3d 195, 199–200 (3d Cir. 1994) (acknowledging that the anti-retaliation provision of Title VII should be broadly construed to further the goal of preventing employer retaliation).

323. 519 U.S. 337 (1997).

324. *Id.* at 339.

325. 42 U.S.C. § 2000e-3(a) (2000).



result, the Fourth Circuit concluded that former employees were not covered.<sup>326</sup> The Supreme Court reversed.<sup>327</sup>

In *Robinson*, the plaintiff had been fired, and he subsequently filed a charge of racial discrimination.<sup>328</sup> While the EEOC was investigating that charge, the plaintiff applied for a position with another company, and during the hiring process, his former employer provided a negative job reference.<sup>329</sup> Believing that the negative job reference was retaliation for filing an EEOC charge, the former employee sued his former employer.<sup>330</sup> The district court and the circuit court both ruled in favor of the former employer, believing that the anti-retaliation provision did not apply to former employees; however, because of the circuit split on the issue, the Supreme Court granted certiorari.<sup>331</sup>

Relying on the fact that a narrow construction would not cover discharged employees, and relying on the EEOC's position on this issue, the Court ultimately decided that former employees were covered under the anti-retaliation provision.<sup>332</sup> The Court noted that a narrow interpretation of the term "employee" would run counter to the anti-retaliation provision's purpose and would deter discrimination victims from coming forward with their complaints.<sup>333</sup> According to the EEOC, such a narrow interpretation would "provide a perverse incentive for employers to fire employees who might bring Title VII claims."<sup>334</sup> The Court acknowledged the strength of the EEOC's position, commenting that it was consistent with the anti-retaliation provision's "primary purpose," which is to maintain "unfettered access to statutory remedial mechanisms."<sup>335</sup> The Court concluded as follows:

The 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—for example, complaints regarding discriminatory termination. We agree with these contentions and

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326. *Robinson v. Shell Oil Co.*, 70 F.3d 325, 332 (4th Cir. 1995) (en banc), *rev'd*, 519 U.S. 337 (1997).

327. *Robinson*, 519 U.S. at 339.

328. *Id.*

329. *Id.*

330. *Id.* at 340.

331. *Id.*

332. *Id.* at 345–46.

333. *Id.*

334. *Id.* at 346 (citing EEOC Amicus Brief at 18–21).

335. *Id.*

find they support the inclusive interpretation of “employees” in § 704(a) that is already suggested by the broader context of Title VII.<sup>336</sup>

The Court therefore ended up giving a broad interpretation to Title VII’s anti-retaliation provision, believing that such a reading was consistent with the Act’s goal of providing victims of discrimination “unfettered access” to statutory remedies.<sup>337</sup>

More recently, the Court expressed its view on the importance of Title VII’s anti-retaliation provision in *Burlington Northern & Santa Fe Railway Co. v. White*.<sup>338</sup> Although that case primarily answered the question of what constitutes an “adverse employment action” under the anti-retaliation provision, the Court emphasized throughout its opinion the importance of Title VII’s anti-retaliation provision and how a narrow interpretation of that provision would have a chilling effect on an employee’s willingness to oppose or participate against a potentially unlawful employment practice.<sup>339</sup> In *Burlington Northern*, the plaintiff claimed her employer retaliated against her after she complained about sexist comments.<sup>340</sup> The plaintiff alleged that as a result of these complaints, her job responsibilities were changed, and that she was suspended.<sup>341</sup> After a jury ruled in the plaintiff’s favor, the defendant appealed to the Sixth Circuit.<sup>342</sup> The Sixth Circuit eventually heard the matter en banc and affirmed the judgment on the retaliation count.<sup>343</sup> On certiorari, the Court was asked to decide whether the plaintiff suffered an employment action sufficiently severe to constitute an “adverse employment action.”<sup>344</sup>

Although the Court focused on the particular issue of what constitutes an “adverse employment action,” there were several parts of the Court’s opinion that demonstrated its belief that the anti-retaliation provision should be interpreted broadly rather than narrowly. First, the Court noted that the anti-retaliation provision seeks to secure the elimination of discrimination by “preventing an employer from interfering (through

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336. *Id.*

337. *Id.*

338. 548 U.S. 53 (2006), *aff’g* White v. Burlington N. & Santa Fe Ry. Co., 364 F.3d 789 (6th Cir. 2004).

339. *See id.* at 63–65.

340. *Id.* at 58.

341. *Id.*

342. *Id.* at 59.

343. *Id.*

344. *Id.* at 60–61.

retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees."<sup>345</sup> The Court then stated that a limited construction of the anti-retaliation provision would "fail to fully achieve the anti-retaliation provision's 'primary purpose,' namely, '[m]aintaining unfettered access to statutory remedial mechanisms.'"<sup>346</sup> The Court noted that the EEOC had consistently maintained that the anti-retaliation provision should provide "exceptionally broad protection" to those who protest discriminatory employment practices.<sup>347</sup> Finally, the Court noted the following:

Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses. "Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances." Interpreting the anti-retaliation provision to provide broad protection from retaliation helps assure the cooperation upon which accomplishment of the Act's primary objective depends.<sup>348</sup>

Therefore, although not directly addressing the issue involved in this Article, the Court in *Burlington Northern* did express the view that Title VII's anti-retaliation provision should be interpreted broadly.<sup>349</sup>

Lower federal courts have also recognized the broad remedial purposes of Title VII, both in the anti-retaliation context and in cases involving the substantive prohibition against discrimination.<sup>350</sup> This is consistent with the canon of statutory construction that remedial statutes should be interpreted broadly.<sup>351</sup> In the context of Title VII's anti-retaliation provision, courts have already interpreted the statute broadly to a certain extent; although they recognize that the provision's language requires that an employee's opposition be to a practice that is, in fact, unlawful, courts have interpreted that provision to include complaints made about conduct that the employee reasonably, and in good faith,

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345. *Id.* at 63.

346. *Id.* at 64 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997)).

347. *Id.* at 65 (quoting *Compliance Manual*, *supra* note 4, at § 8-II, at 8-13 (1998)).

348. *Id.* at 67 (quoting *Mitchell v. Robert DeMaria Jewelry, Inc.*, 361 U.S. 288, 292 (1960)) (citations omitted).

349. *See id.* at 63–65.

350. *See, e.g.*, *Hammer v. St. Vincent Hosp. & Health Care Ctr.*, 224 F.3d 701, 706–07 (7th Cir. 2000); *Little v. United Tech., Carrier Transicold Div.*, 103 F.3d 956, 960 (11th Cir. 1997); *Moyo v. Gomez*, 32 F.3d 1382, 1386 (9th Cir.), *amended by* 40 F.3d 982 (9th Cir. 1994); *cf. Steger v. Franco, Inc.*, 228 F.3d 889, 894 (8th Cir. 2000) (noting that the ADA is a remedial statute and should be interpreted broadly).

351. *See supra* note 257 and accompanying text.

believes is unlawful.<sup>352</sup> However, if more courts start taking the *Mattson* approach and start limiting the protections afforded by the participation clause (and continue to interpret this remedial legislation narrowly, rather than broadly), employees will be less likely to file charges, and they will also be less likely to cooperate with the EEOC. This, of course, would frustrate Title VII's goal of eliminating workplace discrimination.

In addition to the previously discussed reasons why courts should not apply *Breeden* to participation-clause cases, there are two more reasons why courts should not do so. First, the Court in *Breeden* was not asked to address the standard for participation-clause cases; and second, the Court in *Breeden* failed to definitively state that the objectively reasonable standard was appropriate for opposition-clause cases.<sup>353</sup> As a result, courts such as the Seventh Circuit in *Mattson* should reconsider their positions on this issue and provide more protection to participation-clause plaintiffs.

*D. The Breeden Court Never Addressed Title VII's Participation Clause, nor Did It Conclusively Establish a Reasonableness Requirement for Any Retaliation Claims*

Had the Supreme Court actually addressed the issue of what standard applies to Title VII participation-clause cases, subsequent courts' decisions to apply that standard to participation-clause cases would have been understandable—and required. However, as this next section will illustrate, not only did the Court in *Breeden* fail to address that specific issue, it also failed to affirmatively articulate the proper standard for opposition-clause cases.<sup>354</sup> Therefore, the fact that some courts are now using *Breeden* as authority for the proposition that the objectively reasonable standard applies to participation-clause cases is troubling, especially to plaintiffs suing their employers under that provision.

*1. The Breeden Court Was Confronted with an Opposition-Clause Case, not a Participation-Clause Case*

As previously mentioned, Title VII's anti-retaliation provision protects two types of activities—opposition and participation.<sup>355</sup> Pre-*Breeden*, most courts distinguished between the two clauses and their

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352. See LEWIS & NORMAN, *supra* note 2, at 97.

353. Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 270 (2001).

354. *Id.*

355. 42 U.S.C. § 2000e-3(a) (2000).

respective scopes of protection to determine whether the plaintiff had engaged in protected activity.<sup>356</sup> “Participation” plaintiffs received more protection than “opposition” plaintiffs,<sup>357</sup> and the lines were fairly clear with respect to which actions constituted “participation” and which actions constituted “opposition.”

In *Breeden*, the plaintiff brought an “opposition” case, as her lawsuit was based on how her employer reacted to her internal complaint about co-worker conduct.<sup>358</sup> Post-*Breeden*, several participation-clause plaintiffs have attempted to point out this distinction, but many courts have rejected the argument that *Breeden* does not apply to participation-clause cases.<sup>359</sup> The most relevant comment on this specific issue came from *Mattson*, where the court stated the following:

While we acknowledge that the Supreme Court did *not* apply the reasonableness requirement in a *participation clause context*, the Supreme Court did also not hold that the reasonableness requirement only applies to the opposition clause. *Because the Supreme Court did not distinguish between opposition and participation claims, we also decline to do so* and hold that the good faith, reasonableness requirement applies to all Title VII claims.<sup>360</sup>

This statement from *Mattson* is peculiar in two respects. First, *Mattson* clearly acknowledged that the *Breeden* Court did *not* apply the objectively reasonable standard to a participation-clause case,<sup>361</sup> thus making *Breeden* distinguishable from *Mattson*. Second, and more peculiar, is the fact that *Mattson* read an objectively reasonable requirement into participation-clause cases despite the fact that the *Breeden* Court did not even have to address participation-clause cases *because it was not confronted with one*.<sup>362</sup> The most likely reason the

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356. See cases cited *supra* note 19.

357. LEWIS & NORMAN, *supra* note 2, at 100–02.

358. *Breeden*, 532 U.S. at 269–70. The plaintiff also alleged that she suffered an adverse employment action because she filed a formal discrimination charge and a subsequent lawsuit. *Id.* at 271. While these actions clearly fall within Title VII’s participation clause, the Court did not address whether the reasonable-belief standard applies to participation-clause cases. *Id.* at 271–73.

359. For an example of one case in which the plaintiff tried to argue that *Breeden* was an opposition-clause case and should therefore not apply to a claim brought under the participation clause, see *Mattson v. Caterpillar, Inc.*, 359 F.3d 885, 891–92 (7th Cir. 2004).

360. *Mattson*, 359 F.3d at 892 (emphasis added).

361. *Id.*

362. *Breeden*, 532 U.S. at 270. The second part of the *Breeden* opinion did, in fact, address the participation clause; however, that part of the opinion focused on an issue unrelated to the issue of

*Breeden* Court did not distinguish between opposition-clause claims and participation-clause claims is because it did not have to do so; it was confronted only with an opposition-clause claim.<sup>363</sup>

The Seventh Circuit in *Mattson* therefore relied on what the Court did *not* write in *Breeden* rather than what it did write. Although it certainly would have been more understandable had the *Mattson* court read *Breeden* as incorporating an objectively reasonable standard only into opposition-clause cases, to do so in the participation-clause context is an example of a court stretching the Supreme Court's *Breeden* opinion to reach its desired result. By interpreting *Breeden* to require an objectively reasonable standard in a participation-clause case, *Mattson* stretched *Breeden* past what its words suggested. *Breeden* did not address the participation clause; therefore, applying that opinion to participation-clause cases expands *Breeden* beyond its intended scope.

Similarly, and just as peculiarly, the court in *Neely* also used the fact that the *Breeden* Court did *not* address participation-clause claims to come to the conclusion that *Breeden* *did* apply to them.<sup>364</sup> Specifically, the *Neely* court, when addressing the Tenth Circuit's post-*Breeden* *Crumpacker* decision, indicated that:

Notably, the Tenth Circuit did not state that “retaliation opposition claims” must be based on reasonable, good-faith belief; it stated that “retaliation claims” in general are governed by *Breeden*. This court reads *Crumpacker* to hold that *Breeden* added an objective, reasonableness inquiry into both opposition and participation retaliation cases.<sup>365</sup>

Thus, despite the fact that the participation clause was not at issue in the first part of the *Breeden* opinion,<sup>366</sup> this is an example of another court using the Court's *Breeden* opinion to conclude that the objectively reasonable standard applied to participation-clause cases. However, as was the case in *Mattson*, relying on *Breeden* for the proposition that the objectively reasonable standard applies to participation-clause cases is inappropriate, as both courts relied on what the *Breeden* Court did *not* write rather than on what it did write.

*Mattson* and *Neely* used verbal gymnastics to justify the result they

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which standard should be used to determine whether a plaintiff engages in protected activity under either clause of Title VII's anti-retaliation provision. 532 U.S. at 271–74.

363. See *supra* note 21 and accompanying text.

364. *Neely v. City of Broken Arrow*, No. 4:07CV00018, 2007 WL 1574762, at \*2 (N.D. Okla. May 29, 2007).

365. *Id.*

366. See *supra* note 21 and accompanying text.

apparently wanted to achieve. By looking at what the Court did *not* write (because the Court was not confronted with the issue), rather than what it *did* write (which standard *possibly* applies to opposition-clause claims), *Mattson* and *Neely* were successful in limiting the scope of Title VII's participation clause. This will frustrate, rather than further, the purpose behind Title VII's anti-retaliation provision. However, as the next section of this Article will demonstrate, courts that limit the participation clause have done so not only by looking at what the *Breeden* Court did not even address, but also by applying *Breeden*'s dicta regarding the opposition clause's objectively reasonable standard to participation-clause cases even though the Court never definitively determined that the objectively reasonable test applies to opposition-clause cases.<sup>367</sup>

## 2. *The Breeden Court Never Determined That the Objectively Reasonable Standard Applies to Opposition-Clause Cases*

The second reason that it is inappropriate for courts to apply *Breeden*'s dicta regarding the opposition clause's objectively reasonable standard to participation-clause cases is that the Court in *Breeden* never even definitively adopted such a standard for opposition-clause cases.<sup>368</sup> Specifically, when determining whether the Ninth Circuit should have reversed the summary judgment in favor of the employer, the Court noted:

The Court of Appeals for the Ninth Circuit has applied § 2000e-3(a) to protect employee "oppos[ition]" not just to practices that are actually "made . . . unlawful" by Title VII, but also to practices that the employee could reasonably believe were unlawful. *We have no occasion to rule on the propriety of this interpretation, because even assuming it is correct, no one could reasonably believe that the incident recounted above violated Title VII.*<sup>369</sup>

The Court was clear that it *specifically refused to decide* which standard applied to opposition-clause cases.<sup>370</sup> Although some courts have read this language to incorporate a reasonableness standard into opposition-clause and participation-clause cases,<sup>371</sup> *Kennedy v. General Motors*

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367. *Breeden*, 532 U.S. at 270.

368. *Id.*

369. *Id.* (emphasis added) (citation omitted).

370. *Id.*

371. *See supra* Parts V.A and V.B.

*Corp.*,<sup>372</sup> a post-*Breeden* case, acknowledged the Court’s “non-decision” when it stated that the *Breeden* decision was “somewhat curious in that the Court seems to have held the plaintiff to the more stringent ‘reasonable belief’ test, concluded that the plaintiff’s claim failed under the more stringent test, *but declined to determine whether the test was the appropriate standard.*”<sup>373</sup> Therefore, the *Kennedy* court recognized that *Breeden* did not even decide which test was appropriate for opposition-clause cases.<sup>374</sup>

Thus, as *Kennedy* realized, the Court in *Breeden* did not definitively establish the proper standard to use when analyzing opposition-clause cases. Despite this lack of a conclusive answer, and despite a failure to address whether such a standard applies to participation-clause cases, some courts have used *Breeden* in the participation-clause context.<sup>375</sup> As this Article has pointed out, courts should not continue to pursue this path. Instead, they should keep the participation clause’s extremely broad protection intact.

As this section has demonstrated, courts relying on *Breeden* for the proposition that the objectively reasonable requirement applies to participation-clause cases have read *Breeden* too broadly. First, *Breeden* never addressed the scope of the participation clause’s protection.<sup>376</sup> Second, the *Breeden* Court failed to conclusively establish that the objectively reasonable standard applied to opposition-clause cases.<sup>377</sup> Despite these two glaring distinctions between *Breeden* and participation-clause cases, the trend of applying *Breeden* to participation-clause cases appears to be gaining momentum. As long as this trend continues, courts will continue to chill participation-type activities, and the congressional intent underlying the participation clause will continue to be frustrated.

## CONCLUSION

Since the Supreme Court’s decision in *Breeden*, several courts have interpreted *Breeden* too broadly and have applied it to cases involving Title VII’s participation clause. Ignoring years of precedent indicating

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372. *Kennedy v. Gen. Motors Corp.*, 226 F. Supp. 2d 1257 (D. Kan. 2002).

373. 226 F. Supp. 2d at 1264 (emphasis added).

374. *Id.* However, since *Kennedy*, all courts have come to interpret *Breeden* as requiring an objectively reasonable test in opposition-clause cases. See Rosenthal, *supra* note 15, at 1129 n.7.

375. See discussion *supra* Parts V.A and V.B.

376. See *supra* note 21 and accompanying text.

377. *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 270 (2001).



that the participation clause provides more protection than the opposition clause, these courts have limited the protection afforded by Title VII's participation clause, and as a result, have made it less likely for individuals to either pursue their own claims under Title VII or to help other individuals pursue their claims against their common employer. Although there might be some justification for not extending protections to individuals who act in bad faith, taking away protection from people who in good faith, but unreasonably, "participate" in any manner in a Title VII proceeding will serve only to stifle employee complaints, and it will provide employers with more protection when they take adverse employment actions against employees whom they feel harm the company by participating in EEOC activities.

Fortunately, not all courts are giving *Breedon* such a broad reading. The reasons supporting a narrower interpretation of *Breedon* certainly outweigh any reason for expanding *Breedon* beyond its intended scope. First, the plain language of Title VII's participation clause provides broad protection to participation-clause plaintiffs by protecting individuals who file a charge, assist, testify, or participate "in any manner" in an EEOC proceeding.<sup>378</sup> If Congress wanted to limit the scope of participation-clause protection, it certainly could have chosen to limit the participation clause's language rather than drafting the provision in such a way that allows for an expansive interpretation. Second, the EEOC's position, which is persuasive and entirely consistent with the statute's language, supports limiting *Breedon* to opposition-clause cases and providing greater protection to individuals seeking relief under the participation clause. Additionally, the EEOC's position furthers, rather than frustrates, Title VII's purpose. Third, as a remedial statute, Title VII should be interpreted broadly, and expanding *Breedon* to apply to participation-clause cases does just the opposite—it narrows the level of protection afforded by the statute. Finally, the Court in *Breedon* was addressing an *opposition*-clause case, and it never even addressed the appropriate standard that should govern *participation*-clause cases. Further, the Court never definitively answered which was the proper standard to apply to opposition-clause cases. Despite the numerous reasons that counsel against applying *Breedon* to participation-clause cases, several courts have done just that.

Therefore, although the current trend appears to be to expand *Breedon* and limit Title VII's protections, courts should resist this urge and rely on years of prior case law that provided a greater level of protection for

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378. 42 U.S.C. § 2000e-3(a) (2000).

participation-clause plaintiffs than for opposition-clause plaintiffs.<sup>379</sup> This will help further the remedial purposes of Title VII, and it will encourage, rather than discourage, individuals to pursue their own claims of discrimination and help co-workers pursue their claims of discrimination. This will be a step in the right direction toward eliminating all impermissible discrimination from the workplace.

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379. Ideally, this broad protection would also extend to opposition-clause plaintiffs; however, as was explained in my previous Article, that is unlikely to happen. *See* Rosenthal, *supra* note 15, at 1130.