A NEW STANDARD FOR TITLE VII OPPOSITION CASES: FITTING THE PERSONNEL MANAGER DOUBLE STANDARD INTO A COGNIZABLE FRAMEWORK

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Title VII[1] prohibits an employer from retaliating against an employee who opposes discriminatory employment practices.[2] Protection extends both to employees who have themselves been discriminated against,[3] and to employees who oppose discrimination against other employees[4] or who

1. 42 U.S.C. § 2000e-2 (1990).

2. 42 U.S.C. § 2000e-3(a) (1990).

3. *See, e.g.*, Jalil v. Avdel Corp., 873 F.2d 701, 709 (3d Cir. 1989) (reversing summary judgment for the employer when the plaintiff alleged he was discharged in retaliation for union activities and for filing charges of national origin discrimination), *cert. denied*, 493 U.S. 1023 (1990); Donnellon v. Fruehauf Corp., 794 F.2d 598, 601–2 (11th Cir. 1986) (affirming judgment for an employee when the employer retaliated by firing the employee a month after she filed an EEOC complaint; the court dismissed as pretext the employer's proffered reason for the discharge—that the employee threatened to leave the company and work for a competitor); Curl v. Reavis, 740 F.2d 1323, 1331 (4th Cir. 1984) (affirming retaliation judgment for plaintiff when the employer told the plaintiff that plaintiff would be given a promotion if the plaintiff dropped her EEOC charge); Gifford v. Atchison, Topeka & Santa Fe Ry. Co., 685 F.2d 1149, 1155–56 (9th Cir. 1982) (holding that § 704(a) protects an employee who only threatens to file an EEOC charge); East v. Romine, Inc., 518 F.2d 332, 341–42 (5th Cir. 1975) (reversing summary judgment for the employer when the employer discharged the plaintiff because the plaintiff was a litigious person), *overruled by* Burdine v. Texas Dept. of Community Affairs, 647 F.2d 513 (5th Cir. 1981); Proulx v. Citibank, N.A., 659 F. Supp. 972, 979 (S.D.N.Y. 1987) (holding that a plaintiff who files a "false and malicious" EEOC claim is protected from retaliatory discharge); Kellner v. General Refractories Co., 631 F. Supp. 939, 946–47 (N.D. Ind. 1986) (holding that Title VII protects a plaintiff who was constructively discharged after she filed a sex discrimination claim with her local Human Relations Commission).

4. *See, e.g.*, Eichman v. Indiana State Univ. Bd. of Trustees, 597 F.2d 1104, 1107 (7th Cir. 1979) (protecting a man who protested discrimination against women employees); Novotny v. Great Am. Savs. & Loan Ass'n, 584 F.2d 1235, 1262 (3d Cir. 1978) (same), *vacated on other grounds*, 442 U.S. 366 (1979); EEOC v. Beaver Gasoline Co., 584 F.2d 1263, 1263 (3d Cir. 1978) (same); Stevens v. Stubbs, 576 F. Supp. 1409, 1415 (N.D. Ga. 1983) (same); EEOC decision No. 71-1804, 3 Fair Empl. Prac. Cas. (BNA) 955 (Apr. 19, 1971) (protecting a white person who protested discrimination against African-Americans).

assist other employees in enforcing their Title VII rights.[5]

Although no jobs are exempt from Title VII's antiretaliation provisions,[6] courts give far less protection to personnel managers[7] than to other employee classifications. It is, for example, black letter law that an employee is protected against retaliatory discharge when the employee encourages a co-worker to enforce the co-worker's Title VII rights.[8] If the employee is a personnel manager, however, courts will find that same action to constitute a legitimate, nondiscriminatory reason for discharge, and will find the antiretaliation provision inapplicable.[9]

When courts articulate a cogent reason for this double standard, they justify it by arguing that the nature of the job distinguishes the personnel manager from other employee classifications.[10] An employer is entitled to a greater degree of loyalty from personnel managers because the personnel manager is hired specifically to represent the company *against* employees who have or might file discrimination claims. The Ninth Circuit, for example, explained that a plaintiff's position of director of industrial relations "was unique in that it required the occupant to act *on behalf of* his employer in an area where normally action against the employer and on behalf of the employees is protected activity."[11]

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5. *See, e.g.*, Skinner v. Total Petroleum, Inc., 859 F.2d 1439, 1446–47 (10th Cir. 1988) (holding that the plaintiff stated a Title VII claim when he alleged that he was fired for supporting a subordinate in filing an EEOC claim); Johnston v. Harris County Flood Dist., 51 Fair Empl. Prac. Cas. (BNA) 458 (S.D. Tex. 1987) (stating that Title VII protects an employee who testifies at another employee's EEOC hearing), *aff'd in part, rev'd and remanded in part*, 869 F.2d 1565 (5th Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990); Federoff v. Walden, 17 Fair Empl. Prac. Cas. (BNA) 91, 94 (S.D. Ohio 1978) (holding that supervisor unlawfully retaliated against an employee who supported another employer's EEOC complaint).

6. *See infra* notes 208–12 and accompanying text.

7. The author includes within the "personnel management" job classification other similar classifications such as EEOC officers, industrial relations directors, human resources directors, and employee relations directors.

8. EEOC v. Kallir, Philips, Ross, Inc., 401 F. Supp. 66, 70–71 (S.D.N.Y. 1975) (Title VII protects an employee who filed charges of sex discrimination against her employer and advised co-workers to do the same), *aff'd*, 559 F.2d 1203 (2d Cir.), *cert. denied*, 434 U.S. 920 (1977); *see generally supra* notes 4 and 5.

9. Jones v. Flagship Int'l, 793 F.2d 714, 727–28 (5th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987) (discussed *infra* at notes 230–39 and accompanying text); Smith v. Singer Co., 650 F.2d 214, 217 (9th Cir. 1981) (discussed *infra* at notes 196–97 and 223–29 and accompanying text); Herrera v. Mobil Oil, 53 Fair Empl. Prac. Cas. (BNA) 1406 (W.D. Tex. 1990) (discussed *infra* at notes 240–42 and accompanying text); *cf.* Berg v. La Crosse Cooler Co., 612 F.2d 1041 (7th Cir. 1980) (discussed *infra* at note 284).

10. *See, e.g.*, Holden v. Owens-Illinois, Inc., 793 F.2d 745, 751 (6th Cir.), *cert. denied*, 479 U.S. 1008 (1986) (discussed *infra* notes 106–07, 244–46 and accompanying text); Pendleton v. Rumsfeld, 628 F.2d 102, 108 (D.C. Cir. 1980) (discussed *infra* notes 269–73 and accompanying text); Herrera v. Mobil Oil, 53 Fair Empl. Prac. Cas. (BNA) 1406 (W.D. Tex. 1990) (discussed *infra* notes 240–42 and accompanying text).

11. *Smith*, 650 F.2d at 217 (discussed *infra* notes 196–97, 223–29 and accompanying text).

The Ninth Circuit is correct; personnel managers are different, and the antiretaliation law should treat them differently. The law as it stands today, however, is not equipped to deal with the unique responsibilities of personnel managers. There is an inherent contradiction in trying to apply a nondeferential black letter standard to cases in which courts want to give employers an extraordinary amount of deference. The result is a mangling of the antiretaliation doctrine to fit personnel manager cases, making the black letter law difficult to ascertain and often perverting Congress' intent.

This Article proposes a new standard for evaluating all cases in which employers retaliate against employees for opposing discriminatory employment practices. Part I presents an overview of Title VII black letter antiretaliation law. Part I concludes that the law is unnecessarily indeterminate and that the law frequently is used to withhold protection from the very plaintiffs Title VII is designed to protect. Part II proposes a new standard for evaluating opposition cases. The new standard provides an unambiguous doctrinal framework for maintaining the restrictive antiretaliation protection given to personnel managers, while simultaneously protecting nonpersonnel managers by ensuring that personnel manager cases are not used to restrict the antiretaliation protection of other employees. Part III analyzes the personnel manager position and examines the difficulties traditional black letter law has in integrating personnel manager cases into the traditional doctrinal framework of antiretaliation law. Part III then describes how the proposed standard will cure the doctrinal confusion over personnel manager cases, while allowing courts to maintain the restrictive antiretaliation protection given to personnel managers.

I. THE TITLE VII RETALIATION ACTION

A. *Plaintiff's Prima Facie Case*

A plaintiff establishes a prima facie case of retaliation by showing (1) that the plaintiff engaged in activity protected by Title VII; (2) that an adverse employment action occurred; and (3) that there was a causal connection between the participation in the protected activity and the adverse employment action.[12] These requirements are discussed in greater detail in Part I, sections C–E.

12. Anderson v. Phillips Petroleum Co., 861 F.2d 631, 634 (10th Cir. 1988); McCluney v. Schlitz Brewing Co., 728 F.2d 924, 927 (7th Cir. 1984); Wrighten v. Metropolitan Hosps., Inc., 726 F.2d 1346, 1354 (9th Cir. 1984); Hamm v. Members of the Bd. of Regents of the State of Fla., 708 F.2d 647, 654 (11th Cir. 1983); McMillan v. Rust College, Inc., 710 F.2d 1112, 1116 (5th Cir. 1983); Burrus v. United Tel. Co. of Kan., Inc., 683 F.2d 339, 343 (10th Cir.), *cert. denied*, 459 U.S. 1071 (1982); Grant v. Bethlehem Steel Corp., 622 F.2d 43, 46 (2d Cir. 1980); Whatley v. Metropolitan Atlanta Transit Auth., 632 F.2d 1325, 1328 (5th Cir. 1980); Womack v. Munson, 619 F.2d 1292, 1296 (8th Cir. 1980), *cert. denied*, 450 U.S. 979 (1981); Coleman v.

B. *Plaintiff's Burden of Proof*

After the plaintiff establishes a prima facie case of retaliatory discharge, the burdens of proof are allocated in the same manner as in other Title VII actions[13]—*i.e.*, the burdens follow the general pattern created by *McDonnell Douglas Corp. v. Green.*[14] As in *McDonnell Douglas*, the plaintiff's showing of a prima facie case creates a presumption that discrimination occurred.[15] After the plaintiff makes a prima facie showing, the burden shifts to the defendant to rebut the presumption of discrimination by producing evidence that the adverse employment action was taken for a legitimate, nondiscriminatory reason.[16] The defendant need not persuade the court that it was actually motivated by the proffered reasons, but must

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Wayne State Univ., 664 F. Supp. 1082, 1091 (E.D. Mich. 1987); Rogers v. McCall, 488 F. Supp. 689, 697–98 (D.D.C. 1980).

Other courts articulate the test somewhat differently. For example, the district court in *Hochstadt v. Worcester Found. for Experimental Biology*, 425 F. Supp. 318 (D. Mass.), *aff'd*, 545 F.2d 222 (1st Cir. 1976), stated that a plaintiff establishes a prima facie case of retaliation by showing that (1) the plaintiff engaged in protected activity; (2) the employer was aware of the protected activities; (3) an adverse employment action occurred; and (4) the plaintiff's discharge followed the protected activities within such period of time that the court can infer retaliatory motivation. *Id.* at 324. *Accord* Mitchell v. Baldridge, 759 F.2d 80, 86 (D.C. Cir. 1985) (articulating a three-part test, but stating that a causal connection could be inferred from the close temporal proximity of the participation and the adverse employment action); Aguirre v. Chula Vista Sanitary Serv. & Sani-Tainer, Inc., 542 F.2d 779, 781 (9th Cir. 1976) ("A showing by plaintiff that he was discharged following protected activities of which the employer was aware establishes a prima facie case of retaliatory dismissal."); Croushorn v. Board of Trustees of Univ. of Tenn., 518 F. Supp. 9, 19 (M.D. Tenn. 1980) (articulating a seven-part test).

This different articulation of the requirements of plaintiff's prima facie case permits the plaintiff to prove the causal link between protected activity and employer action by showing the employer's awareness of the protected activity coupled with temporal proximity. 3 LARSON, EMPLOYMENT DISCRIMINATION § 87.31, at 17-116–7 (1984). For this reason, these cases will be treated as creating a different standard for proving causation. *See infra* Part I-C.

13. EEOC v. J.M. Huber Corp., 927 F.2d 1322, 1326 (5th Cir. 1991); Jones v. Flagship Int'l, 793 F.2d 714, 725 n.11 (5th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987); Canino v. EEOC, 707 F.2d 468, 471 (11th Cir. 1983); Kauffman v. Sidereal Corp., 695 F.2d 343, 344 (9th Cir. 1982); Grant v. Bethlehem Steel Corp., 622 F.2d 43, 46 (2d Cir. 1980); Romero v. Union Pac. R.R., 615 F.2d 1303, 1326 (10th Cir. 1980); Williams v. Boorstin, 663 F.2d 109, 113 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 985 (1981); Womack v. Munson, 619 F.2d 1292, 1296 (8th Cir. 1980), *cert. denied*, 450 U.S. 979 (1981); Czarnowski v. Desoto, Inc., 518 F. Supp. 1252, 1257–58 (N.D. Ill. 1981); Giulday v. Department of Justice, 485 F. Supp. 324, 325–26 (D. Del. 1980); Croushorn v. Board of Trustees of Univ. of Tenn., 518 F. Supp. 9, 19 (M.D. Tenn. 1980); Hochstadt v. Worcester Found. for Experimental Biology, 425 F. Supp. 318, 324 (D. Mass.), *aff'd*, 545 F.2d 222 (1st Cir. 1976); Kornbluh v. Stearns & Foster Co., 73 F.R.D. 307, 312 (S.D. Ohio 1976).

14. 411 U.S. 792 (1973).

15. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253–54 (1981) (concerning Title VII cases generally); Jones v. Flagship Int'l, 793 F.2d 714, 719 (5th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987) (concerning retaliation actions specifically).

16. *Burdine*, 450 U.S. at 254 (concerning Title VII cases generally); Jones v. Flagship, 793 F.2d at 725 n.11 (concerning retaliation actions specifically).

merely raise a genuine issue of fact concerning whether the defendant discriminated against the plaintiff.[17]

If the defendant produces admissible evidence showing there could be a legitimate non-discriminatory reason for the adverse employment action, the factfinder then proceeds to the "ultimate question:" Did the defendant intentionally discriminate against the plaintiff?[18] While the factfinder's rejection of the defendants proffered reasons for the employment action allows the factfinder to infer that intentional discrimination occured, such a rejection does not compel judgment for the plaintiff as a matter of law.[19] The Supreme Court has frequently stated that the Title VII plaintiff bears the burden of persuasion at all times.[20]

C. Causal Connection

Two issues commonly arise in the context of the plaintiff's burden of proving that the plaintiff's protected activity caused the adverse employment action. The first is the method by which the plaintiff is to prove causation. The second is the quantum of proof necessary for the plaintiff to prove a prima facie case and to meet the ultimate burden of persuasion.

1. How Causation Is Shown

A plaintiff may demonstrate that the protected activity caused the adverse employment action in one of two ways. First, the plaintiff may present direct evidence of the employer's retaliatory motivation.[21] The most reliable[22] evidence of retaliatory motivation is a showing that, although the employer articulated a seemingly legitimate reason for the adverse employment action, other nonprotesting employees guilty of similar misconduct were treated less severely.[23] Conversely, an employer can strengthen its

17. *Burdine,* 450 U.S. at 254–55 (concerning Title VII cases generally); Jones v. Flagship, 793 F.2d at 725 n.11 (concerning retaliation actions specifically).

18. St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742, 2749 (1993).

19. *Id.*

20. *Id.*

21. 3 LARSON, EMPLOYMENT DISCRIMINATION § 87.31, at 17-120 (1984).

22. *Id.* at 17-122.

23. DeCintio v. Westchester County Med. Ctr., 821 F.2d 111, 115 (2d Cir.), *cert. denied,* 484 U.S. 965 (1987) (reversing summary judgment when plaintiff introduced evidence that other employees who engaged in similar misconduct, but did not join plaintiff's Title VII action, were not fired); Armstrong v. Index Journal Co., 647 F.2d 441, 448–49 (4th Cir. 1981) (defendant discharged female plaintiff for refusing to service an account because of its low return; a male employee previously refused to handle the same account for the same reason, but was not disciplined); Acosta v. University of the Dist. of Columbia, 528 F. Supp. 1215, 1224 (D.D.C. 1981) (plaintiff failed to prove that employer awarded grants to other faculty members with similar qualifications); Powe v. Georgia-Pac. Co., 488 F. Supp. 467, 475 (W.D. Mich. 1980) (plaintiff

case in rebuttal[24] by showing either that any person guilty of similar misconduct received identical or harsher disciplinary treatment,[25] or that, although other employees engaged in similar protected activity, there was no pattern of retaliation against the other employees.[26]

The second way a plaintiff may show causation is by raising the inference of retaliatory motivation by showing the temporal proximity between the protected activity and the employer's action.[27] If proceeding in this fashion, the plaintiff is additionally required to show that the employer was aware of the employee's protected activities;[28] an employer cannot be motivated by facts of which it is unaware.[29] Courts are not consistent concerning the degree of temporal proximity required to establish a causal connection.[30]

2. *Quantum of Proof*

The second issue that commonly arises in the context of the causation

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failed to prove that employer treated differently other workers "of his caliber" when they failed, as did plaintiff, to show up to work for two days).

24. *See generally* 3 LARSON, EMPLOYMENT DISCRIMINATION § 87.32, at 123 (1984).

25. EEOC v. Union Camp Corp., 27 Fair Empl. Prac. Cas. (BNA) 1393, 1400 (W.D. Mich. 1981).

26. *Id.*

27. Waddell v. Small Tube Prods., Inc., 799 F.2d 69, 73 (3rd Cir. 1986); Ayon v. Sampson, 547 F.2d 446, 448 (9th Cir. 1976); Burrows v. Chemed Corp., 567 F. Supp. 978, 986 (E.D. Mo. 1983), *aff'd*, 743 F.2d 612 (8th Cir. 1984); Roach v. Teledyne Monarch Rubber Co., 31 Fair Empl. Prac. Cas. (BNA) 1393, 1399 (N.D. Ohio 1982); Harris v. Richards Mfg. Co., 511 F. Supp. 1193, 1203 (W.D. Tenn. 1981), *aff'd in part*, 675 F.2d 811 (6th Cir. 1982); Kralowec v. Prince George's County, 503 F. Supp. 985, 1010 (D. Md. 1980), *aff'd*, 679 F.2d 883 (4th Cir.), *cert. denied*, 459 U.S. 872 (1982).

28. Cohen v. Fred Meyer, Inc., 686 F.2d 793, 796 (9th Cir. 1982); Smith v. Georgia, 684 F.2d 729, 733 (11th Cir. 1982); Mandia v. Arco Chem. Co., 618 F. Supp. 1248, 1253 (W.D. Pa. 1985); Wilson v. Willowbrook, Inc., 433 F. Supp. 321, 322–23 (N.D. Tex. 1977), *aff'd*, 569 F.2d 1154 (5th Cir.), *cert. denied*, 439 U.S. 845 (1978); *see* Neale v. Dillon, 534 F. Supp. 1381, 1389–90 (E.D.N.Y.), *aff'd*, 714 F.2d 116 (2d Cir. 1982).

29. Featherson v. Montgomery County Pub. Schs., 739 F. Supp. 1021, 1025–26 (D. Md. 1990) (plaintiff must demonstrate that a protected activity caused the adverse employment action); Castillo Morales v. Best Fin. Corp., 652 F. Supp. 412, 415 (D.P.R.) (same), *aff'd*, 831 F.2d 280 (1st Cir. 1987); Wright v. Udell Dental Lab, 35 Fair Empl. Prac. Cas. (BNA) 668, 670 (E.D. Minn. 1984) (same); McNeil v. Greyhound Lines, Inc., 31 Fair Empl. Prac. Cas. (BNA) 1068, 1072 (S.D. Fla. 1983) (the employer was not notified of the charge until after it discharged the plaintiff).

30. *Compare* Reeves v. Digital Equip. Corp., 710 F. Supp. 675, 677 (N.D. Ohio 1989) (three months was too long) *with* Racich v. National R.R. Passenger Corp., 47 Fair Empl. Prac. Cas. (BNA) 146, 151–52 (N.D. Ill. 1988) (three months was not too long); *compare* Juarez v. Ameritech Mobile Communications, Inc., 746 F. Supp. 798, 804 (N.D. Ill. 1990) (six months was too long), *aff'd*, 957 F.2d 317 (1992) *with* Moss v. Southern Ry. Co., 41 Fair Empl. Prac. Cas. (BNA) 553 (N.D. Ga. 1986) (one year was not too long); *compare* Cooper v. City of N. Olmstead, 795 F.2d 1265, 1272 (6th Cir. 1986) (four months was too long) *with* Greenwood v. Ross, 778 F.2d 448, 456 (8th Cir. 1985) (nine months was not too long).

requirement is the quantum of proof necessary for a plaintiff to prove a prima facie case and to meet the ultimate burden of persuasion. Courts generally articulate five distinct degrees of causation.[31] The tests are, in order of ascending difficulty for the plaintiff: (a) the burden of proof is placed on the employer to show that the adverse employment action would have occurred absent any discriminatory motivation;[32] (b) the plaintiff must prove that the plaintiff's participation in protected activity *played any part* in the employer's decision to take adverse action;[33] (c) the plaintiff must prove that participation in protected activity *was a significant factor* in the employer's decision to take adverse action;[34] (d) the plaintiff must prove that participation in protected activity *was the principal factor* in the employer's decision to take adverse action;[35] and (e) the plaintiff must prove that the employer would not have taken adverse action "but-for" the plaintiff's protected activity.[36]

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31. *See generally* Edward C. Walterscheid, *A Question of Retaliation: Opposition Conduct as Protected Expression Under Title VII of the Civil Rights Act of 1964*, 29 B.C. L. REV. 391, 409–11 (1988); 3 LARSON, EMPLOYMENT DISCRIMINATION § 87.32, at 17-123 to 17-133 (1984); BARBARA LINDEMANN SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 560–61 (2d ed. 1983); Sutton v. National Distillers Prods., 445 F. Supp. 1319, 1327–28 (S.D. Ohio 1978), *aff'd*, 628 F.2d 936 (6th Cir. 1980).

32. Fields v. Clark Univ., 817 F.2d 931, 936 (1st Cir. 1987) (allocating the burden in this way because "[t]he employer is in the best position to prove which of its motives were determinative."). *See also* 3 LARSON, EMPLOYMENT DISCRIMINATION § 87.32, at 17-123 to 17-133 (1984).

33. Davis v. State Univ. of N.Y., 802 F.2d 638, 643 (2d Cir. 1986) (plaintiff must show that the employer's retaliatory motive "play[ed] a part"); Hochstadt v. Worcester Found. for Experimental Biology, 425 F. Supp. 318, 324 (D. Mass.) (plaintiff need only show that retaliatory motives "contributed among other reasons"), *aff'd*, 545 F.2d 222 (1st Cir. 1976); *see* Brunetti v. Wal-Mart Stores, Inc., 525 F. Supp. 1363, 1376 (E.D. Ark. 1981) ("Retaliation need not be the sole or even the primary reason for a discharge . . . "); Goodwin v. City of Pittsburgh, 480 F. Supp. 627, 633 (W.D. Pa. 1979) ("If retaliation played a part in the adverse action, even though not the sole reason, the employer's action is a violation . . . "), *aff'd*, 624 F.2d 1090 (3rd Cir. 1980); EEOC v. Kallir, Philips, Ross, Inc., 401 F. Supp. 66, 74 n.17 (S.D.N.Y. 1975) ("[e]ven if the defendant was in part motivated by this [nonretaliatory] incident, the court's finding that its decision was also motivated by unlawful factors makes the suspension illegal."), *aff'd*, 559 F.2d 1203 (2d Cir.), *cert. denied*, 434 U.S. 920 (1977).

34. *See* Jeffries v. Harris County Community Ass'n, 425 F. Supp. 1208, 1216 (S.D. Tex. 1977), *aff'd in part*, 615 F.2d 1025 (5th Cir. 1980); Barnes v. Lerner Shops of Tex., 323 F. Supp. 617, 620 (S.D. Tex. 1971).

35. Tidwell v. American Oil Co., 332 F. Supp. 424, 430 (D. Utah 1971); *see also* Mitchell v. Keith, 752 F.2d 385, 391 (9th Cir.) ("Either the 'determining factor' or the 'but for' language is sufficient . . . "), *cert. denied*, 472 U.S. 1028 (1985).

36. Klein v. Trustees of Ind. Univ., 766 F.2d 275, 280 (7th Cir. 1985); McDaniel v. Temple Indep. Sch. Dist., 770 F.2d 1340, 1346 (5th Cir. 1985); Ross v. Communication Satellite Corp., 759 F.2d 355, 365–66 (4th Cir. 1985); Jack v. Texaco Research Ctr., 743 F.2d 1129, 1131 (5th Cir. 1984); McCluney v. Schlitz Brewing Co., 728 F.2d 924, 928 (7th Cir. 1984); McMillan v. Rust College, Inc., 710 F.2d 1112, 1116 (5th Cir. 1982); DeAnda v. St. Joseph Hosp., 671 F.2d 850, 857 n.12 (5th Cir. 1982); Kauffman v. Sidereal Corp., 695 F.2d 343, 345 (9th Cir. 1982); Sherkow v. Wisconsin Dep't of Pub. Instruction, 630 F.2d 498, 502 (7th Cir. 1980); Williams v. Boorstin, 663 F.2d 109, 117 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 985 (1981); Sutton v. Na-

D. Adverse Employment Action

"Adverse employment action" is sufficiently broad so as to encompass anything an employer might do to detrimentally affect the status, terms, or conditions of its employee's employment.[37] This includes discharge,[38] constructive discharge,[39] or suspension;[40] demotion[41] or refusal to promote;[42] disadvantageous transfer;[43] refusal to hire[44] or rehire,[45] or delay in reinstatement;[46] disadvantageous manipulation of vacation time or other benefits;[47] harassment such as interrogation,[48] reprimands,[49] surveillance,[50] or unfavorable job evaluations;[51] informing a former employee's prospective employer that the employee left employment because the employee felt the employee was discriminated against[52] or that the employee filed an EEOC charge against the former employer;[53] refusing to issue a letter of recommendation;[54] or suing the employee for defamation.[55]

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tional Distillers Prods., 445 F. Supp. 1319, 1328 (S.D. Ohio 1978), *aff'd*, 628 F.2d 936 (6th Cir. 1980).

37. *See generally* 3 LARSON, EMPLOYMENT DISCRIMINATION § 87.20, at 17-101 to 17-112 (1984); WARREN GORHAM LAMONT, EMPLOYMENT DISCRIMINATION COORDINATOR ¶¶ 20,925–32 (1992).

38. Rucker v. Higher Educ. Aids Bd., 669 F.2d 1179, 1182 (7th Cir. 1982).

39. United States v. City of Socorro, 25 Fair Empl. Prac. Cas. (BNA) 815 (D.N.M. 1976).

40. EEOC v. Kallir, Philips, Ross, Inc., 401 F. Supp. 66, 72 (S.D.N.Y. 1975), *aff'd*, 559 F.2d 1203 (2d Cir.), *cert. denied*, 434 U.S. 920 (1977).

41. Smith v. Columbus Metro. Hous. Auth., 443 F. Supp. 61, 62–63 (S.D. Ohio 1977).

42. Kirkland v. Buffalo Bd. of Educ., 487 F. Supp. 760, 770 (W.D.N.Y. 1979), *aff'd*, 622 F.2d 1066 (2d Cir. 1980).

43. Collins v. Illinois, 830 F.2d 692, 770–71 (7th Cir. 1987).

44. Barela v. United Nuclear Corp., 317 F. Supp. 1217, 1218–19 (D. N.M. 1970), *aff'd*, 462 F.2d 149 (10th Cir. 1972).

45. O'Brien v. Sky Chefs, Inc., 670 F.2d 864, 869 (9th Cir. 1982), *overruled by* Atonio v. Wards Cove Packing Co., Inc., 810 F.2d 1477 (9th Cir. 1987), *cert. denied*, 487 U.S. 1264 (1988).

46. Romero v. Union Pac. R.R., 615 F.2d 1303, 1304 (10th Cir. 1980).

47. Grove v. Frostberg Nat'l Bank, 549 F. Supp. 922, 940, 944 (D. Md. 1982) (vacation time); EEOC Decision No. 71-2040, 3 Fair Empl. Prac. Cas. (BNA) 1101 (May 12, 1971) (overtime); Commonwealth of Pa. v. Thorp, Reed, & Armstrong, 361 A.2d 497, 502 (1975) (access to clients).

48. Paxton v. United Nat'l Bank, 688 F.2d 552, 572 (8th Cir. 1982), *cert. denied*, 460 U.S. 1083 (1983); Gallegos v. Thornburgh, 52 Fair Empl. Prac. Cas. (BNA) 343 (D.D.C. 1989).

49. Griffin v. Michigan Dep't of Corrections, 654 F. Supp. 690, 694–95 (E.D. Mich. 1982).

50. Francis v. American Tel. & Tel. Co., 55 F.R.D. 202, 207 (D.C. Cir. 1972).

51. Smith v. Secretary of the Navy, 659 F.2d 1113, 1114 (D.C. Cir. 1981).

52. Curl v. Reavis, 740 F.2d 1323, 1326 (4th Cir. 1984).

53. Rutherford v. American Bank of Commerce, 565 F.2d 1162, 1164 (10th Cir. 1977).

54. *Id.*; Sparrow v. Piedmont Health Sys. Agency, Inc., 593 F. Supp. 1107, 1118 (M.D.N.C. 1984).

55. EEOC v. Virginia Carolina Veneer Corp., 495 F. Supp. 775, 778 (W.D. Va. 1980), *appeal dism'd*, 652 F.2d 380 (4th Cir. 1981); *see generally* Gary Phelan, *Employee Opposition Under Title VII: Immunity to Aggrieved Persons Filing Discrimination Claims*, 59 N.Y. ST. B. J. 42 (1987).

E. Protected Activity

Title VII generally prohibits an employer from retaliating against an employee who opposes discriminatory employment practices. Section 704(a) of the Civil Rights Act of 1964 provides, in pertinent part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because [the employee] 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.[56]

Title VII thus protects from retaliation both employees who *participate* in Title VII actions and employees who *oppose* discrimination.[57]

1. Participation

An employee who files charges with the EEOC[58] or with a similar state agency[59] is protected by § 704(a) from employer retaliation. The charges need not be formal; a letter to the EEOC complaining of race discrimination[60] or a threat by an employee to an employer to file an EEOC charge[61] both can trigger § 704(a) protection.[62]

In addition to protecting an employee who files charges, § 704(a) also protects employees who participate in a Title VII investigation, proceeding, or hearing on their own behalf or on behalf of another.[63] An employee is protected if the employee encourages co-workers to enforce their Title VII

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56. 42 U.S.C. § 2000e-3(a) (1990) (emphasis added).

57. Holden v. Owens-Illinois, Inc., 793 F.2d 745, 748 (6th Cir.), *cert. denied*, 479 U.S. 1008 (1986).

58. *See, e.g.*, Brady v. Thurston Motor Lines, 726 F.2d 136, 141 (4th Cir.), *cert. denied*, 469 U.S. 827 (1984); Sherkow v. Wisconsin Dep't of Pub. Instruction, 17 Fair Empl. Prac. Cas. (BNA) 1527 (W.D. Wis. 1978), *aff'd in part*, 630 F.2d 498 (7th Cir. 1980).

59. *See, e.g.*, Jalil v. Avdel Corp., 873 F.2d 701, 703 (3d Cir. 1989), *cert. denied*, 493 U.S. 1023 (1990); Kellner v. General Refractories Co., 631 F. Supp. 939 (N.D. Ind. 1986); Sellers v. Garnsey & Wheeler Co., 25 Fair Empl. Prac. Cas. (BNA) 1361 (D. Colo. 1980); EEOC v. Kallir, Philips, Ross, Inc., 401 F. Supp. 66, 70 (S.D.N.Y. 1975), *aff'd*, 559 F.2d 1203 (2d Cir.), *cert. denied*, 434 U.S. 920 (1977).

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

61. Gifford v. Atchison, Topeka & Santa Fe Ry., 549 F. Supp. 1 (C.D. Cal. 1980), *aff'd in part*, 685 F.2d 1149 (9th Cir. 1982); *see* Croushorn v. Board of Trustees of Univ. of Tenn., 518 F. Supp. 9 (M.D. Tenn. 1980).

62. A person whose charges fail to comply with the pleading requirements may also be protected from retaliation. *See* Grimes v. Louisville & Nashville R. R. Co., 583 F. Supp. 642, 648 (S.D. Ind. 1984), *aff'd*, 767 F.2d 925 (7th Cir. 1985), *cert. denied*, 476 U.S. 1160 (1986); *see also* Joseph Kattan, *Employee Opposition to Discriminatory Employment Practices: Protection From Reprisal Under Title VII*, 19 WM. & MARY L. REV. 217, 227–28 n.43 (1977).

63. 42 U.S.C. § 2000e-3(a) (1990).

rights,[64] refuses to sign an inaccurate affidavit on behalf of an employer,[65] testifies on behalf of a co-worker,[66] aids the state or federal investigating authority,[67] participates in a conciliation meeting on behalf of a co-worker,[68] submits affidavits on behalf of a co-worker to the EEOC,[69] or submits nonconfidential documentary evidence to an agency investigating a discrimination complaint.[70] An employer is liable for retaliation if the employer promulgates a rule prohibiting employees from cooperating in Title VII investigations without prior supervisory approval,[71] coercively interviews employees under circumstances that could render their testimony involuntary,[72] or fails to prevent harassment of an employee by co-workers who give the employer notice that they intend to engage in harassment of the employee.[73]

2. *Opposition*

Section 704(a) also protects employees who *oppose* practices made unlawful by Title VII.[74] The meaning of the "opposition" clause of § 704(a), as compared to the "participation" clause, is not clear from the text of the statute.[75] The committee reports on the Civil Rights Act of 1964 and the Equal Employment Opportunity Act of 1963, which together later became Title VII of the Civil Rights Act, merely repeat the statutory language without providing further information.[76] The proceedings,[77] floor debates,[78]

64. *Kallir*, 401 F. Supp. at 71–72; *cf.* Jones v. Flagship Int'l, 793 F.2d 714 (5th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987) (discussed *infra* notes 228–37 and accompanying text).

65. Thomas v. Jack Marshall Foods, 37 Fair Empl. Prac. Cas. (BNA) 1607 (N.D. Ala. 1983); Smith v. Columbus Metro. Hous. Auth., 443 F. Supp. 61, 63 (S.D. Ohio 1977).

66. Smith v. Georgia, 684 F.2d 729, 730 (11th Cir. 1982); Nash v. City of Houston Civic Ctr., 39 Fair Empl. Prac. Cas. (BNA) 1503 (S.D. Tex. 1984), *remedies determined by* 39 Fair Empl. Prac. Cas. (BNA) 1512 (S.D. Tex. 1985), *aff'd in part* , 800 F.2d 491 (5th Cir. 1986); EEOC v. International Union of Operating Eng'rs, 438 F. Supp. 876 (S.D.N.Y. 1977).

67. Kralowec v. Prince George's County, 503 F. Supp. 985 (D.C. Md. 1980), *aff'd*, 679 F.2d 883 (4th Cir.), *cert. denied*, 459 U.S. 872 (1982); Mead v. United States Fidelity & Guar. Co., 442 F. Supp. 102 (D. Minn. 1977).

68. Aquino v. Sommer Maid Creamery, Inc., 657 F. Supp. 208, 210 (E.D. Pa. 1987).

69. EEOC v. United Assoc. of Journeymen, 311 F. Supp. 464, 465 (D.C. Ohio 1970).

70. Alston v. Blue Cross & Blue Shield, 37 Fair Empl. Prac. Cas. (BNA) 1792 (E.D.N.Y. 1985).

71. United States v. City of Milwaukee, 390 F. Supp. 1126, 1129 (E.D. Wis. 1975) (voiding the work rule).

72. EEOC v. United Assoc. of Journeymen, 311 F. Supp. 464 (S.D. Ohio 1970) (granting a motion to suppress the evidence obtained under such circumstances).

73. EEOC Dec. No. 79-59, 26 Fair Empl. Prac. Cas. (BNA) 1774 (1979).

74. 42 U.S.C. § 2000e-3(a) (1990).

75. Hochstadt v. Worcester Found. for Experimental Biology, 545 F.2d 222, 230 (1st Cir. 1976); *see also* 3 LARSON, EMPLOYMENT DISCRIMINATION § 87.12 (1992).

76. H.R. REP. NO. 914, 88th Cong., 2d Sess., pt. 7, at 27–28, 1964 U.S.C.C.A.N. 2391, 2401–03; H.R. Rep. No. 570, 88th Cong., 1st Sess. 5 (1963); S. REP. NO. 867, 88th Cong., 1st Sess. 17 (1964).

and interpretive memoranda[79] are similarly unrevealing. The task of interpreting the meaning of protected opposition thus falls to the courts.[80]

Courts generally treat the opposition clause as broader than the participation clause.[81] For example, in *Owens v. Rush*,[82] the plaintiff sent a letter to the Board of County Commissioners complaining that her employer was paying, in violation of the Equal Pay Act, less qualified and less experienced men more than it was paying her.[83] The employer then fired the plaintiff; the plaintiff responded by bringing a retaliation action.[84] Though the court held that the letter, because it was only sent to the board and because it failed even to mention Title VII, was insufficient to bring plaintiff within the participation clause,[85] the court stated that the letter constituted a form of opposition to a discriminatory act, and therefore brought the plaintiff within the protection of § 704(a).[86]

The breadth of the opposition clause is not, however, infinite. To fall within its protection, employee conduct must meet three criteria. First, the conduct must be lawful. Second, the conduct must be taken in response to "an unlawful employment practice" under Title VII. Third, the conduct must be nondisruptive.

(a) Lawfulness

In *McDonnell Douglas v. Green*,[87] the plaintiff participated in a "stall-

77. *See Hochstadt*, 545 F.2d at 230.
78. *Id.*
79. Interpretive Memorandum on H.R. 7152, 110 CONG. REC. 7213 (1964).
80. *Hochstadt*, 545 F.2d at 230.
81. This is not to deny the breadth of judicial interpretation of the participation clause. The Sixth Circuit noted that the "exceptionally broad protection" of the participation clause extends to persons who have "participated in any manner" in Title VII proceedings, whereas the opposition clause "does not protect all 'opposition' activity." Booker v. Brown & Williamson Tobacco Co., Inc., 879 F.2d 1304, 1312 (6th Cir. 1989), *citing* Pettway v. American Cast Iron Pipe Co., 411 F.2d 998, 1006 (5th Cir. 1969) *and* Holden v. Owens-Illinois, Inc., 793 F.2d 745, 751 (6th Cir.), *cert. denied*, 479 U.S. 1008 (1986). While it is true that courts often strain to find employee participation, but often strain to avoid finding employee opposition (*see infra* notes 134–88 and accompanying text), the opposition clause nevertheless can be said to be "broader" because participation clause cases can be expressed as a subset of opposition clause cases, and the opposition clause reaches cases unreached by the participation clause. *See infra* notes 106–07; *see also* Novotny v. Great Am. Fed. Savs. & Loan Ass'n, 584 F.2d 1235, 1259 (3rd Cir. 1978) (stating that restricting the scope of the opposition clause to involvement with formal charges or litigation under Title VII would render the opposition clause mere surplusage), *vacated on other grounds*, 442 U.S. 366 (1979).
82. 24 Fair Empl. Prac. Cas. (BNA) 1543 (D. Kan. 1979).
83. *Id.* at 1547.
84. *Id.*
85. *Id.* at 1552.
86. *Id.* at 1553.
87. 411 U.S. 792 (1973).

in" to block access to and egress from the employer's plant at a peak traffic hour.[88] The stall-in violated state laws prohibiting the obstruction of traffic.[89] Although the employee acted to protest his employer's civil rights record, the Court held that his action was unprotected by § 704(a): "Nothing in Title VII compels an employer to absolve and rehire one who has engaged in such deliberate, unlawful activity against it."[90]

McDonnell Douglas does not necessarily compel the conclusion that unlawful conduct per se precludes a finding of retaliation under § 704(a). As one commentator noted,[91] the Court in *McDonnell Douglas* nevertheless found that the plaintiff presented a prima facie case of discrimination.[92] The Court held that the employer's refusal to hire the plaintiff because of his illegal conduct constituted a legitimate, nondiscriminatory reason to take adverse action, and thus was sufficient to overcome the plaintiff's prima facie case.[93] Nonetheless, the Court stated that the employee must have the opportunity to rebut by showing pretext,[94] and thus concluded that an employer "may justifiably refuse to rehire one who was engaged in unlawful, disruptive acts against it, but only if this criterion is applied alike to members of all races."

Despite this reading of *McDonnell Douglas*, all federal courts that faced the issue concluded that illegal activity of any sort is unprotected by § 704(a).[95]

(b) Taken in response to an "unlawful employment practice"

Section 704(a) states that an employee is only protected from retaliation if the employee opposed "any practice made an unlawful employment practice by this subchapter."[96] There are four possible standards for determining whether this condition is satisfied. First, a court might require the employee to present a valid claim of a Title VII violation. Second, a court might require the employee to present evidence that the employee's actions were taken in the good faith, subjective belief that the employer was violating Title VII. Third, a court might require the employee to show that the

88. *Id.* at 803.
89. *Id.*
90. *Id.*
91. Walterscheid, *supra* note 31, at 403–04.
92. *McDonnell Douglas*, 411 U.S. at 802.
93. *Id.* at 803.
94. *Id.* at 804.
95. Mozee v. Jeffboat, Inc., 746 F.2d 365, 374 (7th Cir. 1984); Silver v. KCA, Inc., 586 F.2d 138, 141 (9th Cir. 1978); Croushorn v. Board of Trustees of Univ. of Tenn., 518 F. Supp. 9, 25 (M.D. Tenn. 1980); *see also* 3 LARSON, EMPLOYMENT DISCRIMINATION § 87.12, at 17–79; Martin K. Denis, *Title VII Retaliation Claims*, 9 EMP. REL. L.J. 642, 649–50 (1984).
96. 42 U.S.C. § 2000e-3 (1990).

employee's belief that the employer was violating Title VII was objectively reasonable. Fourth, a court might require the employee to show that the employee's belief that the employer was violating Title VII was both objectively *and* subjectively reasonable.

(i) Validity A few courts require employees to present a valid claim of a Title VII violation as a prerequisite for obtaining the protection of § 704(a). This requirement arises in two contexts. One is when an employee charging discrimination makes a mistake of fact—*i.e.*, the employee mistakenly believes the employer committed an act, the commission of which—if it occurred—would violate Title VII. The employee opposes the employer's commission of this purported act by public protest, or by protesting up the employer's hierarchical ladder. In retaliation for this opposition, the employer takes adverse action against the employee.

An example of this type of case is *EEOC v. C & D Sportswear Corp.*,[97] in which a company suspended an African-American employee from work, pending an internal investigation of an altercation between the employee and the company president.[98] The next day, when the president's son questioned the employee about the altercation, the employee told the president's son that it was her opinion that she was suspended because the president was a racist.[99] The employee was fired immediately; she responded by suing for retaliatory discharge under § 704(a).[100] The EEOC found that her suspension was not motivated by racism, but declared nonetheless that her complaint was protected by § 704(a).[101] The district court agreed that the charge of racism was unfounded, but held that, in the context of informal charges of discrimination:

> [W]here accusations are made outside the procedures set forth by Congress that accusation is made at the accuser's peril. In order to be protected, it must be established that the accusation is well-founded. If it is, there is, in fact, an unlawful employment practice and he has the right, protected by Section 704(a), to oppose it. However, where there is no underlying unlawful employment practice the employee has no right to make that accusation in derogation of the procedures provided by the statute.[102]

Commentators criticize this approach as frustrating the purpose of Title VII, which was to permit employees to pursue the vindication of their

97. 398 F. Supp. 300 (M.D. Ga. 1975). For discussion and criticism of the holding of this case, *see* Kattan, *supra* note 62, at 236–38.

98. *C & D Sportswear*, 398 F. Supp. at 301.

99. *Id.*

100. *Id.*

101. *Id.* at 305.

102. *Id.* at 306.

statutory rights without fear of retaliation.[103] One, for example, noted that:

> However inelegant or bereft of social niceties his accusations might be, the employee's actions . . . give the employer an opportunity to rebut the assertions or to resolve the problem informally. Absent some protection for this opposition employees either would take their grievances directly to the EEOC, thus creating additional burdens for the agency, or would decide not to assert their rights at all, thus depriving the Commission of the employee participation fundamental to the success of Title VII's enforcement system.[104]

Perhaps for this reason, the *C & D Sportswear* approach is rejected by every circuit court that has considered the issue. These courts have held that an employer may not retaliate against an employee who erroneously charged discrimination due to a mistake of fact.[105]

The second context in which courts might require an employee to present a valid claim of a Title VII violation to secure the protection of § 704(a) is when an employee charging discrimination makes a mistake of law—*i.e.*, the employee is mistaken in the belief that an act committed by an employer violates Title VII. The employee opposes the employer's commission of this purported act. In retaliation for this opposition, the employer takes adverse action against the employee.

An example of this type of case is *Holden v. Owens-Illinois, Inc.*,[106] in which the Sixth Circuit held that "[s]ince Title VII does not require the adoption of affirmative action programs, to the extent that plaintiff sought to implement an affirmative action plan which would comply with Executive Order 11,246, plaintiff was not opposing a practice that violated Title VII."[107] Likewise, the court in *Abel v. Bonfanti*[108] considered the case of a

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103. *See, e.g.*, Bernard D.. Meltzer, *The National Labor Relations Act and Racial Discrimination: The More Remedies, the Better?*, 42 U. CHI. L. REV. 1 (1974) ("[I]t is likely that reasonable, but erroneous, perceptions of racial discrimination will continue to exist in numerous employment situations. Misperceptions of this kind are to be expected so long as any racial group is less successful than others and so long as pervasive suspicion of employer 'racism' persists."); *see also* 3 LARSON, EMPLOYMENT DISCRIMINATION § 87.12(b) at 17-95 ("To permit a statutory remedy for retaliation only to those who are convinced, not only of the righteousness of their actions, but of the likelihood that they will prevail, is to eviscerate that [opposition] clause altogether.").

104. Kattan, *supra* note 62, at 237.

105. Love v. RE/MAX of Am., 738 F.2d 383, 385 (10th Cir. 1984), *citing as examples* Rucker v. Higher Educ. Aids Bd., 669 F.2d 1179, 1182 (7th Cir. 1982); Sisco v. J.S. Alberici Constr. Co., 655 F.2d 146, 150 (8th Cir. 1981), *cert. denied*, 455 U.S. 976 (1982); Payne v. McLemore's Wholesale & Retail Stores, 654 F.2d 1130, 1137–40 (5th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982); Parker v. Baltimore & Ohio R.R. 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).

106. 793 F.2d 745 (6th Cir.), *cert. denied*, 479 U.S. 1008 (1986).

107. *Id.* at 749; *see also* Phillips v. Pepsi-Cola Gen. Bottlers, Inc., 927 F.2d 605 (6th Cir. 1991) (unpublished disposition, text in Westlaw).

plaintiff who brought a retaliation claim under § 1981.[109] The plaintiff alleged that he was fired for opposing his employer's practice of refusing to hire people with unshaven faces, which the plaintiff believed discriminated against Sikhs.[110] The court, ostensibly applying a good faith standard, held that the plaintiff could not have held a good faith belief that the shaving requirement violated § 1981 because that criterion was racially neutral;[111] for this reason, the plaintiff's opposition to the requirement could not support a retaliation action.[112]

As with the cases voiding retaliation actions when plaintiffs make mistakes of fact, commentary regarding "mistake of law" cases is highly critical.[113] The holdings of *Holden* and *Abel* are in the minority; most courts hold that a good faith mistake of law will not defeat an employee's retaliation action.[114]

(ii) Subjective good faith Instead of requiring an employee to prove a valid Title VII violation, a court might require only that the employee

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108. 625 F. Supp. 263 (S.D.N.Y. 1985).

109. *Id.* at 265.

110. *Id.* at 267.

111. *Id.*

112. *Id.* at 268.

113. Meltzer, *supra* note 103, at 33 ("[T]he protean . . . nature of anti discrimination law is likely to contribute to reasonable but erroneous perceptions of racial discrimination."); *see* Kattan, *supra* note 62, at 237 ("[E]mployees rarely possess sufficient factual or legal information, prior to a formal investigation, to know with certainty that their employer engages in discriminatory practices.").

114. *See, e.g.*, Gifford v. Atchison, Topeka, & Santa Fe Ry. Co., 685 F.2d 1149, 1157 (9th Cir. 1982) (concluding that an employee need not be aware that the practice is "*unlawful under Title VII* at the time of the opposition in order for opposition to be protected."); Parker v. Baltimore & Ohio R.R. Co., 652 F.2d 1012, 1020 (D.C. Cir. 1981) (good faith opposition to an affirmative action plan in the belief that it discriminated against white males is protected by § 704(a); "the fact that a nonfrivolous claim is ultimately resolved in favor of management does not justify an attempt to suppress the claim by penalizing the employee who raised it."); Dimaranan v. Pomona Valley Hosp. Medical Ctr., 775 F. Supp. 338, 346 (C.D. Cal. 1991) (holding that plaintiff's mistaken belief that her employer's rule against nurses speaking Tagalog, the native language of the Philippines, violates Title VII did not vitiate the employee's retaliation action); Goluszek v. H.P. Smith, 48 Fair Empl. Prac. Cas. (BNA) 317, 321 (N.D. Ill. 1988) ("Section 2000e-3 does not require that the challenged employment practice actually violate Title VII; it is sufficient if the plaintiff has a reasonable belief that there is a Title VII violation."), *quoting* Jennings v. Tinley Park Community Consol. Sch. Dist. No. 146, 796 F.2d 962, 967 (7th Cir. 1986), *cert. denied*, 481 U.S. 1017 (1987). An issue which has not yet arisen concerns mistakes of law regarding the scope of Title VII's protection. For example, Title VII only protects employees of employers who employ fifteen or more people. Plaintiffs might easily, by counting as employees people whom a court later determines to be independent contractors, conclude erroneously that they are protected by Title VII. What happens if an employer retaliates against a plaintiff who opposes a discriminatory act in the mistaken belief that the plaintiff is protected by Title VII? Because the fifteen-employee requirement appears jurisdictional, the plaintiff likely would not be protected.

show that the employee's actions were taken in the good faith, subjective belief that the employer was violating Title VII. For example, in *Monteiro v. Poole Silver Co.*,[115] an employee's refusal to do his work precipitated a thirty-minute altercation with his supervisor.[116] Toward the end of this altercation, Monteiro, the employee, accused his supervisor of racism.[117] The supervisor then fired Monteiro for refusing to work.[118] The district court found that Monteiro's discrimination charge was unfounded.[119] The court also rejected his retaliation claim, concluding that his charge of racism was raised merely as a smoke screen to challenge his supervisor's legitimate criticism.[120] The First Circuit affirmed.[121] Noting that Monteiro did not establish that "in raising accusations of discrimination he was opposing conduct honestly perceived as unlawful,"[122] the court held that "Title VII does not shield disruptive conduct taken in bad faith simply because some other worker might have been properly motivated in acting similarly."[123]

(iii) Objective reasonableness Alternatively, a court might only require the employee to present evidence of an objectively reasonable belief that the employer was violating Title VII. For example, in *EEOC v. Johnson*,[124] Johnson was fired for inadequate job performance.[125] As in *Monteiro*, the district court found that Johnson saw the writing on the wall and "invoked the protection of the sex discrimination laws to protect her from problems caused by personal difficulties and inadequate performances at work."[126] Instead of relying, as did *Monteiro*, on the employee's subjective bad faith, the district court in *Johnson* rejected the employee's retaliation charge because her claim of discrimination was not objectively reasonable.[127] Noting that Johnson received better pay and more privileges than many of her male co-workers,[128] and citing the employer's ample evidence of inadequate job performance,[129] the court found that a reasonable person in the plaintiff's position could not conclude, as plaintiff apparently

115. 615 F.2d 4 (1st Cir. 1980).
116. *Id.* at 6–7.
117. *Id.*
118. *Id.* at 7 and n.4.
119. *Id.* at 7.
120. *Id.* at 7 and 8.
121. *Id.* at 10.
122. *Id.* at 8.
123. *Id.* at 9 n.6.
124. 18 Fair Empl. Prac. Cas. (BNA) 896 (D. Minn. 1978).
125. *Id.* at 900.
126. *Id.* at 903.
127. *Id.*
128. *Id.*
129. *Id.* at 900.

did, that her employer discriminated against her at all, "let alone on the basis of sex."[130] *Abel v. Bonfanti*[131] might also be categorized as this type of case.

(iv) Subjective good faith and objective reasonableness The vast majority of cases, however, require the plaintiff to show both subjective good faith and objective reasonableness,[132] and hold that the satisfaction of these criterion will enable plaintiffs to claim protection of § 704(a) despite mistake of either fact or law.[133]

(c) Non-disruptive: The *Hochstadt* balancing test

Courts are exceedingly loath to extend § 704(a) protection to employees whose reasonable, good faith belief that their employer is engaging in discrimination prompts them to oppose that discrimination in a way that significantly disrupts the work environment.[134] To deal with disruptive opposition, all courts that faced the issue adopted a balancing test to determine whether employee conduct is protected.[135] The most frequently cited opin-

130. *Id.* at 903.

131. 625 F. Supp. at 263; *see supra* notes 108–112 and accompanying text.

132. *Parker*, 652 F.2d at 1020 (requiring both good faith and reasonableness); *see* Manoharan v. Columbia Univ. College of Physicians & Surgeons, 842 F.2d 590, 593 (2d Cir. 1988) (affirming summary judgment because the plaintiff did not have a "good faith, reasonable belief" that the employer was violating the law); Payne v. McLemore's Wholesale & Retail Stores, 654 F.2d 1130, 1137–40 (5th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982) (plaintiff acted both reasonably and in good faith); *see also* Rucker v. Higher Educ. Aids Bd., 669 F.2d 1179, 1182 (7th Cir. 1982) (the mistake must be sincere as well as reasonable); Sisco v. J.S. Alberici Constr. Co., 655 F.2d 146, 150 (8th Cir. 1981), *cert. denied*, 455 U.S. 976 (1982) (plaintiff stated a valid retaliation claim because his complaints about his employer's affirmative action plan were neither unreasonable nor held in bad faith); Croushorn v. Board of Trustees of Univ. of Tenn., 518 F. Supp. 9, 25 (M.D. Tenn. 1980) (despite finding that plaintiff "[u]ndisputably . . . actually and in good faith believed" his employer was discriminating against him, the court nonetheless examined the reasonableness of that belief).

133. *See supra* notes 97–114 and accompanying text.

134. In addition to the cases discussed below, *see* Pendleton v. Rumsfeld, 628 F.2d 102, 108 (D.C. Cir. 1980) (participation in a disruptive, noisy demonstration during work hours rendered EEOC officers unfit to perform their duties); Gonzalez v. Bolger, 486 F. Supp. 595, 602 (D.D.C. 1980) (employee's militant demands for paid time to prepare EEO complaints on behalf of himself and two others, and other disruptive behavior, exceeded tolerable limits of protected conduct); Women Employed v. Rinella & Rinella, 468 F. Supp. 1123, 1126 (N.D. Ill. 1979) (employee did not act in good faith in her opposition and engaged in loud and insubordinate conduct in the company's working area).

135. Rollins v. State of Fla. Dep't of Law Enforcement, 868 F.2d 397, 401 (11th Cir. 1989); Holden v. Owens-Illinois, Inc., 793 F.2d 745, 751 (6th Cir. 1986); Jones v. Flagship Int'l, 793 F.2d 714, 728 (5th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987); McKenna v. Weinberger, 729 F.2d 783, 790–91 n.54 (D.C. Cir. 1984); Mozee v. Jeffboat, Inc., 746 F.2d 365, 374 (7th Cir. 1984); Armstrong v. Index Journal Co., 647 F.2d 441, 448 (4th Cir. 1981); Jefferies v. Harris County Community Action Ass'n, 615 F.2d 1025, 1036 (5th Cir. 1980); Pendleton v. Rumsfeld, 628 F.2d 102, 108 (D.C. Cir. 1980); Novotny v. Great Am. Fed. Sav. & Loan Ass'n, 584 F.2d

ion[136] on this issue is *Hochstadt v. Worcester Foundation for Experimental Biology,*[137] which concerned an employee whose constant complaints to her colleagues about alleged sex discrimination damaged relationships among employees and interfered with their work.[138] Stating that an employer is entitled to loyalty and cooperativeness from its employees,[139] the First Circuit limited § 704(a) by declaring that the statute "does not afford an employee unlimited license to complain at any and all times and places."[140] The court adopted a balancing test to determine whether particular conduct is protected[141] under the opposition clause of section 704(a): "[T]he employer's right to run his business must be balanced against the rights of the employee to express his grievances and promote his own welfare."[142] This balancing test is used to determine whether plaintiffs have gone "too far,"[143] and each case turns on its own facts.[144] Concluding that employees may not use excessive means to accomplish protected ends,[145] the First Circuit held that the plaintiff's actions went beyond the scope of protected opposition because they damaged the basic goals of her employer.[146] The *Hochstadt* court thus concluded that the plaintiff's "serious acts of disloyalty" provided the employer with a legitimate, nondiscriminatory basis for discharging the plaintiff.[147]

This balancing test is a poor approach to dealing with employees' disruptive activity in opposing an employer's discriminatory employment

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1235, 1261 (3d Cir. 1978), *vacated on other grounds*, 442 U.S. 366 (1979); Baker v. Georgia Power Co., 27 Fair Empl. Prac. Cas. (BNA) 1301 (N.D. Ga. 1981); Gonzalez v. Bolger, 486 F. Supp. 595, 602 (D.D.C. 1980), *aff'd*, 656 F.2d 899 (1981).

136. Walterscheid, *supra* note 31, at 412.

137. 545 F.2d 222 (1st Cir. 1976).

138. *Id.* at 233.

139. *Id.* at 230.

140. *Id.* at 233.

141. If an employee's conduct is found to be unprotected under § 704(a), this conduct will constitute a legitimate, nondiscriminatory reason for the employer's adverse employment action. *See, e.g.*, Rosser v. Laborers' Int'l Union of N. Am., 616 F.2d 221, 224 (5th Cir.), *cert. denied*, 449 U.S. 886 (1980). The burden of proof will then shift back to the employee to show that this reason was mere pretext. *See supra* notes 13–17 and accompanying text. Because an employee's action must be fairly egregious to divest it of the protection of § 704(a), *see infra* discussion at notes 292–305, an employee will have extraordinary difficulty proving that the employer's reasons were a pretext. Thus, if an employee's conduct is found to be unprotected by § 704(a), the employee's claim of retaliatory discharge is almost certainly doomed to failure.

142. *Hochstadt*, 545 F.2d at 233.

143. *Id.* at 231.

144. *Id.* "The standard can be little more definitive than the rule of reason applied by a judge or other tribunal to given facts." *Id.*; *see also* Rollins v. State of Fla. Dep't of Law Enforcement, 868 F.2d 397, 401 (11th Cir. 1989).

145. *See generally Hochstadt*, 545 F.2d at 233–34.

146. *Id.*

147. *Id.* at 234.

practices for three reasons. First, it is over-inclusive insofar as *all* challenges to employer practices will create *some* disruption in the management of the company.[148] In arguing for a motive based rather than a degree-of-disruption based test for determining whether oppositional activity should be protected, one commentator noted:

> An employee validly might cause some disruption in bypassing his supervisor to discuss a discrimination grievance with management, in soliciting the aid of his fellow workers in gathering evidence to substantiate his claim, or simply in presenting his claim to management. Similarly, an outburst of anger by the employee during his presentation of a sensitive discrimination grievance should not defeat his entitlement to protection. Surely these forms of non-coercive conduct merit protection if the employee's aim was to secure a fair settlement of his good faith grievance without exerting undue pressure on the employer.[149]

The second failure of the balancing approach is that it fails to articulate clear standards for determining which employee activities are protected. What factors, for example, should courts consider when conducting the balancing test? Is it relevant that the employee's actions *could potentially have been* extraordinarily disruptive, but fortuitously were not? Is the degree to which the employee either might have or did in fact disrupt the workplace relevant at all? Is the degree of the employer's alleged infraction relevant? What about the employer's response? If the employer's response is relevant, should courts look only at the employer's retaliatory response, or can the courts also examine whether the employer took any action to correct the employment practices that the employee alleged were discriminatory? Should it matter that the employee's belief in the employer's discrimination was both objectively reasonable and held in good faith?

These potential factors are seldom mentioned in judicial opinions, and, with the exception of cases in which the court concluded that the employee's oppositional activity directly conflicted with the job duties for which the employee was hired, the opinions appear to be ad hoc and grounded only on the whims of the judges.[150] As noted elsewhere,[151] in the

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148. Kattan, *supra* note 62, at 241.

149. *Id.* at 242.

150. *See, e.g., Hochstadt*, 545 F.2d at 231 (plaintiff's disruptive activity went "too far"); *see* Rollins v. State of Fla. Dep't of Law Enforcement, 868 F.2d 397, 401 (11th Cir. 1989) (same); Jefferies v. Harris County Community Action Ass'n, 615 F.2d 1025, 1036–37 (5th Cir. 1980) ("Under these circumstances, we hold that [the defendant's] interest in protecting the confidentiality of its records outweighs [the plaintiff's] right to protect her interests by opposing perceived employment discrimination."); Baker v. Georgia Power Co., 27 Fair Empl. Prac. Cas. (BNA) 1301, 1303 (N.D. Ga. 1981).

151. R. Bales, Student Article *Title I of the Americans with Disabilities Act: Conflicts Between Reasonable Accommodation and Collective Bargaining*, 2 CORNELL J. LAW & PUB. POL'Y, 161, 200 n.219 (1992).

context of the Americans with Disabilities Act,[152] an approach telling judges to examine facts[153] and balance them, avoids formulating a rule of decision. People are entitled to know the legal rules before they act, yet under the *Hochstadt* test, no one can know the law until litigation is completed and the last appeal rejected. Such indeterminacy breeds litigation that a bright line test would avoid. Litigation imposes stiff costs and high risks on both parties in a potential lawsuit, costs and risks which employees are disproportionately unable to bear.[154] Indeterminacy may be good business for employment litigators, but it is bad law.[155]

The *Hochstadt* balancing test is a poor approach to dealing with employees' disruptive activity for a third reason: It can be used to withhold § 704(a) protection from the very class of plaintiffs—employees who have been victims of Title VII discrimination—that Congress sought to protect. In *EEOC v. Kendon of Dallas, Inc.*,[156] Becky Clark and her husband Michael were hired at the same time by the same employer to do identical work.[157] Although their employer had an express company policy prohibiting employees from discussing their salary levels amongst themselves, Becky learned from her husband that he earned more than she did.[158] A few days later, after having agreed at the beginning of her shift to work overtime, Becky protested to her supervisor regarding the unequal salaries that she believed females were receiving.[159] Becky "loudly and in the presence of other employees" threatened to call the "labor board" about equal pay violations.[160] Her supervisor "got hot" and told her to go ahead and call them, whereupon Becky left the workplace.[161] When she returned the following morning, her employer informed her that she was fired for her insubordinate attitude.[162]

The EEOC brought a class action suit against Becky's employer alleging unequal pay in violation of Title VII and the Equal Pay Act,[163] and retaliatory discharge in violation of § 704(a). Although the court agreed with the EEOC on the unequal pay charge[164] and awarded back pay,[165] the

152. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990).
153. Particularly when, as here, the relevant facts are unspecified.
154. Bales, *supra* note 151, at 200 n.219.
155. *Id.*
156. 34 Empl. Prac. Dec. (CCH) ¶ 34,393 (E.D. Tex. Mar. 8, 1984).
157. *Id.* at 33,589.
158. *Id.*
159. *Id.* at 33,590.
160. *Id.* at 33,591.
161. *Id.*
162. *Id.*
163. *Id.* at 33,588.
164. *Id.* at 33,596.
165. *Id.* at 33,600–01.

court rejected the retaliation claim. The court reasoned that Becky's failure to perform the overtime work that she previously agreed to do justified her discharge,[166] despite the fact that Becky's refusal followed directly—and indeed was premised on—her employer's pay discrimination.[167] Second, the court concluded that the employer "had a right to expect [Becky] to express her grievances in private instead of making loud threats on the factory floor in front of other employees to call the Labor Board about Kendon's . . . practices."[168]

In *Garrett v. Mobil Oil Corp.*,[169] the plaintiff complained to no avail of racial discrimination to her supervisors.[170] The plaintiff then complained of the discrimination to her supervisors' superiors,[171] but was then fired for her "repeated violation of bypassing [her] supervis[or] in presenting complaints to management and disrupting work."[172] The plaintiff sued on a § 704(a) charge, contending that her attempts to gain the ear of top management were justified because her supervisors ignored her complaints of racial discrimination.[173] She also pointed to an employee handbook that stated: "While your immediate supervisor should be the first person you contact to resolve a problem, you may take it to higher levels . . . if your Supervisor's decision does not satisfy you."[174] Without examining whether the plaintiff's original claim of discrimination was meritorious,[175] the court concluded that the disruptive nature of the plaintiff's protests vitiated the protection of § 704(a).[176]

The Fifth Circuit ruled similarly in *Jefferies v. Harris County Community Action Ass'n.*[177] Believing she was the victim of a wrongful failure to promote, the plaintiff photocopied a personnel action form and sent it to the chairman of her employer's personnel committee.[178] The employer then discharged the plaintiff for photocopying and disseminating, within the

166. *Id.* at 33,592.
167. *Id.* at 33,591.
168. *Id.* at 33,592.
169. 531 F.2d 892 (8th Cir. 1976).
170. *Id.* at 893–94.
171. *Id.* at 894.
172. *Id.* at 895.
173. *Id.*
174. *Id.* (citations omitted)
175. The court did note in passing that the plaintiff's employment probably was not terminated because of race. *Id.* at 895 n.1. This is different, however, from examining whether the plaintiff's original claim of discrimination while employed possessed merit; the latter, but not the former, is relevant to determining whether the plaintiff was justified when she sought upper management's attention to her discrimination claim.
176. *Id.* at 895–96.
177. 615 F.2d 1025 (5th Cir. 1980).
178. *Id.* at 1029.

company, confidential company records.[179] The plaintiff countered by asserting that her activity was related to her wrongful failure to promote charge, and therefore was protected under § 704(a).[180] The Fifth Circuit disagreed. Stating that "not all [oppositional] activity is protected under 704(a)"[181] and that "employee conduct must be reasonable in light of the circumstances,"[182] the court employed the *Hochstadt* court's balancing test for determining whether particular conduct is protected under the opposition clause.[183] Without considering either the accuracy of the plaintiff's original charge of discrimination[184] or the actual disruptive effect of the plaintiff's oppositional activity,[185] the Fifth Circuit concluded that the plaintiff's dissemination of her employer's confidential information, even if in furtherance of an action protected under Title VII, was not protected activity.[186]

Thus, under the *Hochstadt* balancing test as it is currently articulated and applied, a plaintiff may lose § 704(a) protection even if the charge of discrimination is accurate[187] and the disruption caused is minimal.[188] To remedy these shortcomings and to reduce the indeterminacy of disruption cases, this Article proposes a new test for evaluating whether oppositional activity is protected by § 704(a).

II. A NEW & IMPROVED STANDARD FOR EVALUATING OPPOSITIONAL ACTIVITY

A. The Proposed Standard

1. If the employee's claim is valid, i.e., if the employer did in fact violate Title VII, then § 704(a) should protect any employee activity taken to exhort the employer to comply with the requirements of Title VII. The

179. *Id.*
180. *Id.* at 1036.
181. *Id.*
182. *Id.*
183. *Id.*
184. After the trial, the district court dismissed the plaintiff's claim that her employer discriminated on the basis of race and sex in failing to promote her. *Id.* at 1028. The Fifth Circuit reversed the dismissal, and remanded for further findings of fact. *Id.* at 1032, 1035.
185. *Id.* at 1036–37.
186. *Id.* at 1029, 1036–37 (the plaintiff only distributed the confidential information within the company and the court did not consider whether the distribution caused any actual disruption).
187. *Jefferies*, 615 F.2d at 1028–37; *Garrett*, 531 F.2d at 893–96; *Kendon*, 34 Empl. Prac. Dec. (CCH) at 33,588–601; *see also* EEOC v. Kallir, Philips, Ross, Inc., 401 F. Supp. 66, 71 (S.D.N.Y. 1975) (dicta) ("[A]n employee's conduct in gathering or attempting to gather evidence to support his charge may be so excessive and so deliberately calculated to inflict needless economic hardship on the employer" as to lose its protected status.), *aff'd*, 559 F.2d 1203 (2d Cir.), *cert. denied*, 434 U.S. 920 (1977).
188. *Jefferies*, 615 F.2d at 1028–37.

law should recognize two exceptions to this rule: § 704(a) should not protect either (a) illegal activity, or (b) activity on behalf of others which directly conflicts with the job duties for which the employee was hired.

2. If the employee's claim that the employer violated Title VII was both subjectively and objectively reasonable, but is nevertheless invalid, courts should employ a balancing test similar to that articulated by the First Circuit in *Hochstadt*. Courts should consider three factors: (a) the degree to which the employee's action actually disrupted the work environment; (b) the degree to which the employee's belief was both objectively and subjectively reasonable; and (c) the degree to which the employee's action was proportionate to the Title VII violation the employee believed was occurring.

3. If the employee's activity was illegal, motivated by bad faith, or directly in conflict with the job duties for which the employee was hired, protection should be unavailable under § 704(a).

B. Explanatory Notes

1. This standard provides a strong incentive for employers to comply with Title VII without unduly hindering the employers' basic right to control the work place. It should not matter that an employee's tactics are disproportionately harsh in comparison to the Title VII violation sought to be remedied; the employer may avoid the disruption simply by complying with the mandates of Title VII. A discriminatory employer therefore should not be heard to complain that an employee's tactics in pursuing a legitimate claim are too disruptive.

Kendon is the type of case upon which application of this rule will have the most effect. In that case, the court concluded that the disruptive effect of the plaintiff's public expression of her discrimination charge justified withholding § 704(a) protection from her, despite finding that the employer did discriminate against the plaintiff.[189] The proposed rule would preclude the application of a balancing test, and instead would mandate a finding for the plaintiff on the retaliation charge. In cases such as *Garrett* and *Jefferies*, in which the courts did not consider the merit of the plaintiffs' original charges, the proposed rule would force courts to determine the merit of the charges before ruling on the retaliation claim. If the original charges were determined to be valid, then plaintiffs would be protected from retaliatory discharge regardless of how disruptive their oppositional activity was, so long as the activity was not illegal and did not directly conflict with the job duties for which the employee was hired.

189. *Kendon*, 34 Empl. Prac. Dec. (CCH) at 33,592.

Courts should continue to withhold § 704(a) protection from employees who resort to illegal tactics in opposing discrimination.[190] This should be tempered, however, by the *McDonnell Douglas* conclusion that although an employee's illegal conduct may justify discharge, an employer may not treat employees engaging in identical conduct differently based on race or sex.[191]

Under the second exception to the proposed rule, § 704(a) would not protect oppositional activity which directly conflicts with the job duties for which the employee was hired. In *Doe v. AFL-CIO,*[192] for example, the court held that the discharge of an African-American union organizer was justified because he communicated his views to potential members that union policies were anti-African-American.[193] The court held that, although an employee cannot be fired for possessing beliefs concerning race and sex related matters contrary to those held by the employer, an employee can be fired if his protected beliefs impair his ability to do his job.[194] The court held that because the plaintiff's anti-union communications to potential union members directly contradicted the plaintiff's job of recruiting new members, the employer's decision to fire the employee was justified and the employee was unprotected by § 704(a).[195]

Doe would be decided identically under the proposed rule. Because the employee's oppositional activity was directly antithetical to the job for which the employee was hired, the activity would be unprotected.

The proposed rule would significantly affect cases in which personnel managers allege that they were retaliated against for their oppositional activities. In *Smith v. Singer,*[196] for example, Singer fired Smith because Smith, Singer's director of industrial relations, filed complaints on behalf of others with the EEOC, and then denied knowledge of the identity of the charging parties. In upholding the discharge, the Ninth Circuit explained the importance of allowing employers to discharge personnel managers who make personnel decisions against the wishes of their employer:

> The question is whether, under [§ 704(a)], it is protected activity for this executive employee, occupying this position of responsibility, to take such action against the company he represents in support not of his own rights but of the perceived rights of those with whom it is his

190. *See supra* notes 87–90 and accompanying text.

191. *See supra* notes 91–94 and accompanying text.

192. 405 F. Supp. 389 (N.D. Ga. 1975), *aff'd,* 537 F.2d 1141 (5th Cir. 1976), *cert. denied,* 429 U.S. 1102 (1977).

193. *Id.* at 394.

194. *Id.*

195. *Id.*

196. 650 F.2d 214 (9th Cir. 1981) (discussed in greater detail *infra* notes 223–29 and accompanying text).

> duty to deal on behalf of his company. If [§ 704(a)] gives him the right to make himself an adversary of the company, then so long as he does not give nonprivileged cause for dismissal he is forever immune from discharge. Section [704(a)] so construed renders wholly unworkable the program of voluntary compliance which appellant was employed to conduct.[197]

In other words, § 704(a) would give a renegade personnel manager carte blanche to construct whatever personnel policies the manager might choose, and the company would be powerless to stop the manager. If the person to whom the company delegates responsibility for making hiring decisions and policies is insulated from retaliation by the company, then the company loses all influence over those decisions and policies, and is in no position to negotiate directly with aggrieved parties. This frustrates the congressional goal of private resolution of discrimination claims by employers and employees.[198]

There are two caveats to the direct conflict exception. The first is that it only applies to actions taken on behalf of others. An employer should not be allowed to hire or fire personnel managers on the basis of proscribed criteria.[199]

The second caveat is that the direct conflict exception must be interpreted very narrowly. In *Doe*, for example, the court cited as evidence of a direct conflict the plaintiff's statement that his "first loyalty was to the black movement,"[200] and implied that such general disloyalty would be sufficient to justify withholding § 704(a) protection.[201] This interpretation should be rejected; courts should require employers seeking to avail themselves of the exception to prove that the oppositional conduct created an actual, direct conflict with the employee's primary job duty. If employers are allowed to discharge employees for general disloyalty, the direct con-

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197. *Id.* at 217.

198. *See* St. John v. Employment Dev. Dep't, 642 F.2d 273 (9th Cir. 1981) (refusing to find a business necessity defense for transferring an employee out of its EEO unit because that employee filed an EEOC charge on her own behalf). The court further stated:

> Even though not establishing a business necessity defense, the conflict of interest may tend to undermine policies central to Title VII. Voluntary compliance is Title VII's preferred method for promoting the goal of nondiscrimination; it is also the reason for the EEOC's existence . . . . It may be that the fundamental policies of Title VII require that voluntary compliance be encouraged by allowing an employer's transfer of a complaining employee to a position without EEOC contact, but otherwise equivalent. Because the Department has not made this argument either at trial or on appeal, we decline to consider the argument as a ground for reversal.

Id. at 275 (citations omitted).

199. *See infra* notes 206–10 and accompanying text (discussing cases which hold that a personnel manager is not per se excluded from the protection of § 704(a)).

200. *Doe*, 405 F. Supp. at 393.

201. *Id.*

flict exception will swallow the general rule that an employee presenting a valid claim of discrimination should be protected from retaliation.[202]

2. An employee's tactics in pursuing an invalid but reasonable claim should be commensurate with the merits of that claim and the egregiousness of the employer's purported violation. The proposed rule provides three factors which courts must consider when determining whether the employee's oppositional activities were reasonable under the circumstances. First, courts must consider the degree to which the employee's action actually disrupted the work environment. In *Jefferies*,[203] for example, the court would be forced to consider whether the plaintiff's distribution of a confidential personnel action form to the chairman of her employer's personnel committee actually disrupted the work environment to such a significant degree that it justified the employee's discharge. It is very doubtful that the plaintiff's actions did disrupt the work environment. Second, courts must consider the degree to which the employee's belief that the employer was violating Title VII was both objectively and subjectively reasonable. Neither a mistake of fact nor a mistake of law should per se obviate a plaintiff's retaliation suit; however, a plaintiff uncertain of the merits of a discrimination charge should not be given free reign to terrorize the employer into acquiescing to the plaintiff's demands. Third, courts must consider the degree to which the employee's action was proportionate to the Title VII violation the employee believed was occurring. For example, organizing a multi–employee protest might be justified if an employee believes the employer is discriminating against a class of persons, but might not be reasonable if an employee believes the employer committed only a minor offense against a single individual.

While the balancing test proposed under the new rule does not eliminate entirely the indeterminacy created by the application of the *Hochstadt* balancing test, the new balancing test reduces that indeterminacy in two ways. First, it restricts the class of cases in which the balancing test is to be employed. The *Hochstadt* balancing test currently applies to all oppositional activity which the employer asserts is disruptive; the proposed rule does not apply a balancing test to cases in which the employee asserts a valid claim of discrimination. For these cases, the proposed rule substitutes a bright line rule declaring that the employee is protected from retaliation no matter the extent of disruption caused.[204] Second, the proposed rule articulates for the first time the precise factors which courts are to consider

202. *See infra* notes 293–307 and accompanying text.

203. 615 F.2d 1025 (5th Cir. 1980) (discussed *supra* notes 177–86 and accompanying text).

204. *See supra* Part II-A-1.

when conducting the balancing test.[205]

3. Section 704(a) should not be construed to protect an employee's oppositional activity that is illegal, motivated by bad faith, or directly in conflict with the job duties for which the employee was hired. The illegality and the direct conflict exceptions have already been discussed.[206] An example of activity taken in bad faith is attempting to harass the employer into submitting to demands clearly not required—and known to the plaintiff not to be required—by Title VII.[207]

III. TREATMENT OF PERSONNEL MANAGERS BY CURRENT LAW

A. *Doctrinal Confusion*

All courts that considered the issue conclude that no particular job is per se exempt from the Title VII prohibition of retaliatory discharge. For example, in *Francoeur v. Corroon & Black Co.*,[208] a personnel manager, after discovering an apparent sex–based pay disparity, approached her immediate supervisor for an explanation.[209] Finding the response inadequate, she filed an EEOC charge, whereupon she was fired.[210] The court, noting that the plaintiff's conduct was wholly reasonable and in good faith, and that her actions were taken with regard for her employer's need to maintain smooth operations, concluded that "there exists no position for which an EEOC filing in itself may constitute unprotected activity."[211] Other courts encountering similar fact patterns reach the same conclusion.[212]

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205. *See supra* Part II-A-2.

206. *See supra* Part II-B-1.

207. *See* Kattan, *supra* note 62, at 239. Kattan notes that when discrimination charges are brought in bad faith, the charges "may be no more than a subterfuge for the disruptive conduct itself or a pretext for voicing general dissatisfaction with the workplace," matters which are not and should not be protected by § 704(a). *Id.*; *see also* Rollins v. State of Fla. Dep't of Law Enforcement, 868 F.2d 397, 399–400 (11th Cir. 1989) (the insubordinate and disruptive manner in which the plaintiff lodged her complaints indicated that the plaintiff was looking more for personal attention than for relief from actual discrimination).

208. 552 F. Supp. 403 (S.D.N.Y. 1982).

209. *Id.* at 408.

210. *Id.* at 409.

211. *Id.* at 412.

212. *See, e.g.*, Jones v. Flagship Int'l, 793 F.2d 714, 726 (5th Cir. 1986) ("In assuming her position as Flagship's Manager of EEO Programs, Jones neither abandoned her right to be free from discriminatory practices nor excluded herself from the protections of § 704(a)."), *cert. denied*, 479 U.S. 1065 (1987); Roesel v. Joliet Wrought Washer Co., 596 F.2d 183 (7th Cir. 1979) (affirming judgment against an employer for paying a female personnel director less than it paid to male management employees, and less than it would have paid to a male for the same job); Schuster v. Beloit Corp., No. 86-C-309-C, 1987 WL 109922 (W.D. Wis. Oct. 30, 1987) (denying summary judgment to an employer, when the plaintiff alleged he was fired in retaliation for filing an age discrimination claim); *see* Harris v. First Nat'l Bank of Hutchinson, Kan., 680 F. Supp. 1489 (D. Kan. 1987) (denying summary judgment to an employer where the employee, a person-

Despite judicial recitations affirming § 704(a) protection of personnel managers, courts give personnel managers significantly less protection than they give other employees. As a general rule, activity which courts will consider protected if performed by nonpersonnel managers will be considered unprotected when performed by a personnel manager if that activity conflicts with the job duties for which the personnel manager was hired.[213]

B. Valid Reasons for Differential Treatment

1. Significant Management Responsibility

Only one case directly addresses the degree to which an employee's management responsibility affects the employee's protection under § 704(a).[214] The plaintiff in *Novotny v. Great American Federal Savings & Loan Association*[215] was a secretary of the company, a member of its board of directors, and the "number two man" in management.[216] Novotny alleged that his employer fired him in retaliation for opposing the employer's sex discrimination against other employees.[217] The court found that Novotny was fired for showing poor judgment in siding with the employees in a public confrontation with the "number one man" in management, without attempting first to resolve the matter privately.[218] Granting judgment for the employer, the court stated that:

> [I]t is axiomatic that the higher an employee is on the management ladder, the more circumspect that employee should be in expressing opposition to employment practices of which he disapproves. . . . [W]e find that Novotny was not discharged because he opposed what he may have thought, incorrectly, was an unlawful employment practice, but because he conducted his "opposition" in a manner . . . which would be unacceptable to even the fairest of managements.[219]

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nel officer, alleged she was constructively discharged in retaliation for protesting disparate pay); *see also* Mitchell v. Keith, 752 F.2d 385 (9th Cir.), *cert. denied,* 472 U.S. 1028 (1985) (affirming a § 1981 retaliation judgment in favor of plaintiff, who was discriminated against by white supervisors because of his work as the plant's first EEO Coordinator); Harris v. Board of Pub. Util., 757 F. Supp. 1185 (D. Kan. 1991) (denying summary judgment to an employer when the employee, a Director of Human Resources, alleged he was discharged in retaliation for voicing opposition to his employer's discriminatory hiring practices); Gallegos v. Thornburgh, 52 Fair Empl. Prac. Cas. (BNA) 343 (D.D.C. 1989) (entering judgment for plaintiff, an ex-EEO Officer, against whom the employer retaliated for the plaintiff's EEO activities on behalf of Hispanic workers); *cf.* Smith v. Secretary of the Navy, 659 F.2d 1113 (D.C. Cir. 1981) (reversing summary judgment for the employer and holding the plaintiff, an EEO Counselor, was entitled to have any discriminatory records purged from his personnel files).

213. *See infra* Part III-C.
214. Walterscheid, *supra* note 31, at 419–426.
215. 539 F. Supp. 437 (W.D. Pa. 1982).
216. *Id.* at 439, 451.
217. *Id.* at 449.
218. *Id.* at 451.
219. *Id.*

The district court thus held that an employee's protection by § 704(a) varies inversely with an employee's height on the management ladder. Other courts, while not adopting this approach explicitly, mention the employee's management status as a factor in upholding the discharge of personnel managers.[220] The policy of treating management employees differently from other employees is consistent with the exclusion of supervisory and managerial employees from coverage by the National Labor Relations Act.[221]

2. *Job Description Includes Representing the Company*

The nature of the personnel manager's job is different from that of other employees; the personnel manager is hired specifically to represent the company *against* employees who have or might file discrimination claims. Employers frequently argue that they are entitled to demand a greater degree of loyalty from their personnel managers than they are from other employees. Courts generally agree, and consequently afford less § 704(a) protection to personnel managers than to other employees. This conclusion accords with the analysis in Part II-B-1 that personnel managers should be treated differently. To reach this conclusion, however, courts are forced to distort the doctrinal framework of traditional Title VII antiretaliation law.

C. *Judicial Justifications for Differential Treatment*

This distortion arises from judicial attempts to apply black letter retaliation law to personnel manager cases. Judicial attempts fail because of the inherent contradiction in trying to apply a liberal black letter standard to

220. Jones v. Flagship Int'l, 793 F.2d 714, 728 (5th Cir. 1986) (EEO officer "played a crucial role in equal employment matters involving the company."), *cert. denied*, 479 U.S. 1065 (1987); Smith v. Singer Co., 650 F.2d 214, 217 (9th Cir. 1981) (EEO officer had a "unique" position in that it required him to act on behalf of his employer; plaintiff's job was held by him "not as a private attorney general but as a company executive."); Pendleton v. Rumsfeld, 628 F.2d 102, 108 (D.C. Cir. 1980) (EEO counselors had "the responsibilities of at least a quasi-member of the management team.").

221. Employees may be excluded from NLRA (29 U.S.C. §§ 151–166 (1982)) protection either under the congressionally created supervisory exception or the judicially implied exclusion for managerial employees. NLRB v. Yeshiva Univ., 444 U.S. 672, 681–82 (1980); Sutter v. Community Hosps. of Sacramento, 94 Lab. Rel. Rep. (BNA) 1450 (Dec. 10, 1976). Supervisory and managerial employees are defined principally by their authority to hire, fire, discipline, or to effectively recommend such actions. NLRB v. Bell Aerospace Co., 416 U.S. 267, 279–84 (1974). "These [managerial] employees are 'much higher in the managerial structure' than those explicitly mentioned by Congress [in the supervisory exclusion], which 'regarded [managerial employees] as so clearly outside the Act that no specific exclusionary provision was thought necessary.' *Yeshiva*, 444 U.S. at 682 (citations omitted). For criticism of the managerial exclusion, *see* PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 211–18 (1990).

cases in which courts want to give employers an extraordinary amount of deference. The result is a mangling of the antiretaliation doctrine to fit personnel manager cases. Rather than enunciating a clear standard and rationale for treating personnel managers differently from other employees, courts employ several less well-reasoned justifications to explain the double standard. Courts typically find five categories of conduct to constitute legitimate, nondiscriminatory reasons for an employer to fire personnel managers: (1) solicitation of adverse suits, (2) inefficacy as a worker, (3) disobeying superiors or company policy, (4) general disloyalty, and (5) disruption.

1. Solicitation of Adverse Suits

While § 704(a) protects ordinary employees who encourage co-workers to enforce their Title VII rights,[222] the same is not true for personnel managers. Personnel managers generally are hired to avoid employee suits and, where necessary, to help defend the employer against them. A personnel manager who encourages other employees to sue the company does exactly the opposite of what the manager was hired to do. Not surprisingly, courts are sympathetic toward employers who, feeling betrayed, fire such a personnel manager. For example, in *Smith v. Singer*,[223] Smith brought an action against his employer Singer alleging that Singer had violated § 704(a) by terminating his employment as director of industrial relations because he engaged in protected activities. Smith asserted that his discharge was retaliatory because "he encountered [a] lack of cooperation and commitment from the company in his efforts to accomplish needed reforms in the affirmative action program. . . ."[224] The district court, however, found that Singer discharged Smith "for failure to perform tasks fundamental to his position" because Smith filed, on behalf of other employees, complaints against Singer with the contracts compliance division of the Defense Contracts Administration Service ("DCAS") and the EEOC, and then denied knowledge of the identity of the charging parties.[225] The Ninth Circuit observed that:

> It was the very purpose of appellant's job to assist Singer in achieving [voluntary] compliance; the job was held by him not as a private attorney general but as a company executive. The position was unique in that it required the occupant to act *on behalf of* his employer in an area where normally action against the employer and on behalf of the employees is protected activity.[226]

222. *See supra* notes 2–5 and accompanying text.
223. 650 F.2d 214 (9th Cir. 1981).
224. *Id.* at 215.
225. *Id.* at 216.
226. *Id.* at 217.

The court thus acknowledged explicitly that the plaintiff, as a personnel manager, would be treated differently from other employees because of the nature of his job. The court then stated:

> By filing complaints against Singer because he disagreed with their choice of policies, appellant placed himself in a position squarely adversary to his company. In so doing he wholly disabled himself from continuing to represent the company's interest as its liaison with the enforcement agencies, and from continuing to work with Singer executives in the voluntary development of nondiscriminatory hiring programs.[227]

Since Smith "rendered himself unable to fulfill the functions of his office,"[228] the Ninth Circuit held that Singer neither discriminated nor retaliated against Smith in terminating his employment. Accordingly, the court affirmed the district court order dismissing Smith's complaint.[229]

The Fifth Circuit dealt squarely with the same issue in *Jones v. Flagship International.*[230] Jones, the equal opportunity manager and EEO officer for her employer Flagship, filed a charge on her own behalf with the EEOC alleging discrimination in pay and sexual harassment.[231] Jones then invited at least one other employee to join her in a class action suit against Flagship.[232] Flagship first suspended, and then fired Jones,[233] stating that such action was justified because: (1) Jones, an EEO employee, created a conflict of interest by filing charges with the EEOC; (2) Jones breached company policy by taking personnel files home; and (3) Jones encouraged others to file charges against Flagship.[234]

The district court found, and the Fifth Circuit agreed, that Flagship's second justification (breach of company policy) was groundless.[235] The circuit court declined to pass on Flagship's first justification (conflict of interest).[236] Thus, the Fifth Circuit opinion rests entirely on whether Jones' conduct in inviting others to join in her discrimination claim, coupled with her expressed intent to serve at the vanguard of a class action suit, was protected under § 704(a).

The court held it was not. Noting that the need to settle discrimination claims through the process of cooperation and conciliation necessarily re-

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227. *Id.*
228. *Id.*
229. *Id.*
230. 793 F.2d 714 (5th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987).
231. *Id.* at 717.
232. *Id.*
233. *Id.*
234. *Id.* at 717, 725.
235. *Id.* at 724 n.10.
236. *Id.* at 726. "We need not address ourselves to the extent to which an employer may act in relieving an employee of her EEO duties without running afoul of § 704(a) . . . ." *Id.*

quired Flagship to repose great confidence in Jones,[237] the court concluded that:

> Jones' action in (1) filing a discrimination suit against Flagship, (2) suggesting that a class action suit would follow, and (3) soliciting or inviting others to sue or join in a suit against the company not only rendered Jones ineffective in the position for which she was employed, but critically harmed Flagship's posture in the defense of discrimination suits brought against the company.[238]

The court, therefore, held that Jones' action was not protected under § 704(a), and that her action provided Flagship with a nondiscriminatory basis upon which to discharge her.[239]

Likewise, in *Herrera v. Mobil Oil, Inc.*,[240] Mobil Oil fired Herrera for breach of his responsibilities as an employee relations advisor. Herrera counseled a disgruntled employee to file a charge of discrimination with the EEOC, and provided that employee with confidential management guides.[241] The district court, upholding the discharge, concluded that "[p]laintiff's action placed him in a squarely adversarial position with Defendant which rendered him unable to fulfill the functions and responsibilities of his position. Defendant had no option but to terminate him."[242]

Courts thus are unanimous in concluding that an employer may discharge a personnel manager who encourages employees to sue the company.

2. *Inefficacy as a Worker*

An employer neither discriminates nor retaliates when the employer fires an employee who is unable to perform the employee's job.[243] Courts often use "inefficacy as a worker" as a catch-all phrase to encompass precisely the same considerations that they use to justify the discharge of personnel managers who solicit adverse suits; the conduct of the personnel manager is directly contrary to the job for which the manager was hired. In *Holden v. Owens-Illinois, Inc.*,[244] for example, an affirmative action manager was fired after she attempted to implement a stronger affirmative action plan than her employer wanted.[245] The Sixth Circuit, reversing the

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237. *Id.* at 728.
238. *Id.*
239. *Id.*
240. 53 Fair Empl. Prac. Cas. (BNA) 1406 (W.D. Tex. 1990).
241. *Id.* at 1407.
242. *Id.* at 1409.
243. Doe v. AFL-CIO, 405 F. Supp. 389 (N.D. Ga. 1975), *aff'd*, 537 F.2d 1141 (5th Cir. 1976), *cert. denied*, 429 U.S. 1102 (1977).
244. 793 F.2d 745 (6th Cir.), *cert. denied*, 479 U.S. 1008 (1986).
245. *Id.* at 748.

decision of the district court, held her discharge justified, stating that "[i]n acting like a 'compliance officer,' plaintiff disabled herself from continuing to work with company executives. . . ."[246] Other courts, too, cite "inefficacy as a worker" to justify the discharge of personnel managers whose otherwise protected activity conflicted with their job duties.[247] Because personnel managers tend to be both relatively high on the management ladder, and because of the nature of their position as an advocate for the employer in employment matters, it is easy for courts to find a relatively small degree of opposition to constitute a significant interference with a personnel director's job performance.[248]

3. Disobeying Superiors or Company Policy

Cases involving employees who disobey superiors or company policy fall into two general categories. The first includes employees who disseminate confidential information. Courts thus far are unanimous in holding that this activity is unprotected by § 704(a), no matter how related to the employee's Title VII claim, and no matter whether the employee was a personnel manager or not. The second includes employees who refuse to obey an order or a policy that they believe violates Title VII. Predicting the outcome of these cases is easy: if the employee is a personnel manager, the employee loses; if the employee has another job description, the employee wins.

(a) Disseminating confidential information

Disseminating confidential information, even if in furtherance of an antidiscrimination suit, is not protected by § 704(a). In *Jefferies v. Harris County Community Action Association.*,[249] the Fifth Circuit upheld an employer's dismissal of an employee who photocopied a "personnel action" form, and sent it to a co-employee who was the chairman of the employer's

246. *Id.* at 753.

247. *See* Rosser v. Laborers' Int'l Union of N. Am., 616 F.2d 221, 223–24 (5th Cir.) (plaintiff's running in a union election for the job of her supervisor so interfered with the performance of her job that it rendered her ineffective in the position for which she was employed), *cert. denied*, 449 U.S. 886 (1980); *Herrera*, 53 Fair Empl. Prac. Cas. (BNA) at 1409 (Plaintiff's actions in counseling a disgruntled employee to file an EEOC charge and providing that employee with a confidential management guide "placed him in a squarely adversarial position with Defendant which rendered him unable to fulfill the functions and responsibilities of his position" leaving the employer with "no option but to terminate him."); *see also* Smith v. Singer, 650 F.2d at 217 (Employee who filed a DCAS complaint and an EEOC charge without revealing to his employer that he was the charging party "wholly disabled himself from continuing to represent the company's interests," thereby rendering him "unable to fulfill the functions of his office . . . ").

248. *See infra* Part III-B; *see also* Walterscheid, *supra* note 31, at 419–26.

249. 615 F.2d 1025 (5th Cir. 1980).

personnel committee.[250]

In *O'Day v. McDonnell Douglas Helicopter Co.*,[251] an employee surreptitiously entered his supervisor's office, photocopied his confidential personnel file, and showed the file to a friend and co-worker to warn him of his low performance rating.[252] Although the employee claimed he gathered the information to support an EEOC charge of age discrimination,[253] the court held that his conduct justified discharge.[254] In *Baker v. Georgia Power Co.*,[255] an employee copied the names, salaries, and starting dates of employment for several employees and sent the information to an attorney with the Justice Department.[256] The court held that the company's interest in protecting the confidentiality of its records outweighed the employee's right to protect her interests by opposing perceived employment discrimination.[257] Similarly, in *Herrera v. Mobil Oil, Inc.*,[258] the district court held unprotected a plaintiff (an employee relations advisor) who gave a confidential management guide to a disgruntled co-employee who the plaintiff counseled to file EEOC charges against their employer.[259]

(b) Refusing to obey discriminatory orders or policies

Courts almost always interpret § 704(a) to protect nonpersonnel managers who refuse to obey an order or a policy they believe to violates Title VII. For example, in *EEOC v. Sandia Savings & Loan Association*,[260] a Hispanic employee who, because of his past experience was uniquely qualified for a supervisory position,[261] was offered the position for over $200 per month less than his predecessor earned.[262] After he refused the job because the pay was inadequate,[263] the company hired a less-qualified, nonemployee Anglo for the position for $150 per month more than it offered its Hispanic employee.[264] When the Anglo employee arrived, the company ordered the Hispanic employee to give his new supervisor a tour of the

250. *Id.* at 1036–37.
251. 784 F. Supp. 1466 (D. Ariz. 1992).
252. *Id.* at 1467.
253. *Id.*
254. *Id.* at 1470.
255. 27 Fair Empl. Prac. Cas. (BNA) 1301 (N.D. Ga. 1980).
256. *Id.* at 1302.
257. *Id.*
258. 53 Fair Empl. Prac. Cas. (BNA) 1406 (W.D. Tex. 1990).
259. *Id.* at 1409.
260. 27 Fair Empl. Prac. Cas. (BNA) 580 (D. N.M. 1980).
261. *Id.* at 583.
262. *Id.* at 582.
263. *Id.*
264. *Id.*

building.[265] The employee refused, and was fired on the spot.[266] The court found that the Hispanic employee's refusal to give the tour constituted a protest of the company's disparate pay policy, and thus was protected by § 704(a).[267] Other courts similarly protect nonpersonnel managers who refuse to obey an order or a policy they believe is discriminatory.[268]

When the protesting employee is a personnel manager, however, virtually any type of insubordinate behavior, regardless of the motivation, provides a legitimate, nondiscriminatory reason for discharge. Courts usually justify this differential treatment because the protest directly contradicts the job for which the employee was hired. For example, in *Pendleton v. Rumsfeld,*[269] EEO counselors who disobeyed their commanding general's order not to participate in a demonstration (organized by a civil rights group they once led) were found to have failed to have given the employer the undivided loyalty it had a right to expect.[270] Asserting that their supervisor was justified in his belief that the EEO counselors' participation in the demonstration "fatally compromised their ability to gain the confidence of middle management,"[271] and that their participation in the demonstration indicated that the employees "were lacking in ability to appreciate management's point of view or to see the facts as management saw them,"[272] the court concluded:

> The problem before us for resolution really has the duties of an EEO Counselor as its most significant element. The decision to remove any employee must be made primarily in the light of that employee's duties. A question of retaliation is not raised by a removal for conduct inconsistent with those duties . . . .[273]

In *Whatley v. Metropolitan Atlantic Rapid Transit Authority,*[274] the plaintiff, an assistant general manager for EEO matters, argued that he was

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265. *Id.*

266. *Id.*

267. *Id.* at 585.

268. *See, e.g.,* De Anda v. St. Joseph Hosp., 671 F.2d 850 (5th Cir. 1982) (reversing and remanding a judgment for the employer where the plaintiff, a hospital pharmacist, alleged that her supervisor instructed her to pay lower wages to a potential black employee than to a potential white employee); Goos v. National Ass'n of Realtors, 715 F. Supp. 2 (D.D.C. 1989) (denying an employer's motion for summary judgment when the plaintiff, a supervisor, refused to fire a minority subordinate rather than a less-senior nonminority subordinate, because she believed the order was racially motivated); Tidwell v. American Oil Co., 332 F. Supp. 424 (D. Utah 1971) (granting judgment to plaintiff, a supervisor of key punch operators, who the company fired for approving an African-American's employment application against the direction of her superiors).

269. 628 F.2d 102 (D.C. Cir. 1980).

270. *Id.* at 108.

271. *Id.*

272. *Id.*

273. *Id.*

274. 632 F.2d 1325 (5th Cir. 1980).

fired for filing a complaint with a federal agency charging the company with discriminating against a co-worker.[275] The Fifth Circuit, however, characterized the issue as whether § 704(a) prevented an employer from dismissing an employee whose job was handling discrimination complaints, when the employee handled those complaints in a manner contrary to the instructions of the employer.[276] The court, in holding that the plaintiff's failure to follow the company's internal administrative procedures justified his discharge,[277] solidified employers' control over the conduct of personnel managers.[278] Other courts follow suit.[279]

4. General Disloyalty

In *Jefferson Standard Broadcasting Co.*,[280] the Supreme Court, in the context of limiting the right of union employees to engage in "concerted activity" against their employer, stated that "There is no more elemental cause for discharge of an employee than disloyalty to his employer."[281] If anything, an employer is entitled to even greater loyalty from its management employees[282] than from the rank-and–file employees at issue in *Jefferson Standard*.[283]

No doubt taking their cue from such Supreme Court pronouncements, many courts imported the concept of disloyalty into § 704(a) law, and used it to justify the discharge of personnel managers.[284] For example, in *Hamm*

275. *Id.* at 1326–27.

276. *Id.* at 1326.

277. *Id.* at 1329.

278. Walterscheid, *supra* note 31, at 423.

279. *See* Baranek v. Kelly, 44 Fair Empl. Prac. Cas. (BNA) 1400, 1404 (D. Mass. 1987) (granting judgment for the employer, when an affirmative action officer refused to disclose the names of employees who complained about an employer's hiring practices, and scheduled a meeting with disgruntled employees contrary to the specific instructions of her supervisors); *see also* Smith v. Singer Co., 650 F.2d 214, 215 (upholding summary judgment for the employer, when a director of industrial relations concealed from his employer for more than three months that he was the charging party in employment complaints with the DCAS and the EEOC).

280. NLRB v. Local 1229, IBEW (Jefferson Standard Broadcasting Co.), 346 U.S. 464 (1953).

281. *Id.* at 472.

282. *See* NLRB v. Bell Aerospace, Co., 416 U.S. 267, 274–89 (1974) (distinguishing managerial and supervisory employees from rank-and-file employees and denying the supervisory employees the protection of the NLRA because an employer is entitled to the undivided loyalty of the former, but not necessarily the latter); *see also* NLRB v. Yeshiva Univ., 444 U.S. 672, 679–83 (1980) (affirming the trial court's classification of faculty as holding managerial status.).

283. The employees in *Jefferson Standard* who acted disloyally were technicians. *Jefferson Standard*, 346 U.S. at 467–68.

284. Courts seldom use disloyalty in § 704(a) cases to justify the discharge of nonpersonnel manager employees. *See, e.g.*, Jennings v. Tinley Park Community Consol. Sch. Dist. No. 146, 48 Fair Empl. Prac. Cas. (BNA) 1317 (7th Cir. 1988) (affirming the discharge of an employee, but rejecting disloyalty as a legitimate reason for doing so); Payne v. McLemore's Wholesale & Retail Stores, 654 F.2d 1130 (5th Cir. 1981) (holding retaliatory an employer's refusal to rehire a

v. Members of the Board of Regents of the State of Florida,[285] Hamm, an equal opportunity specialist and an advisor to the vice president of the university which employed her, distributed an internal investigatory report to the student newspaper before giving it to her supervisor.[286] Shortly thereafter, Hamm was transferred to a less desirable job;[287] she responded by filing a Title VII suit alleging retaliation.[288] Hamm, the court noted, functioned as an advocate on behalf of a disgruntled employee,[289] a function inconsistent with her job description and the duty of loyalty owed to her employer.[290] Citing her employer's testimony that this incident caused him to lose confidence in Hamm's ability to satisfactorily perform her job, the court concluded that such a rationale provided a sufficient basis for finding that Hamm failed to establish a connection between her activity and the adverse employment action.[291] The court thus upheld the transfer.[292]

Other cases likewise cite disloyalty to justify withholding § 704(a) protection from protesting personnel managers.[293] In otherwise similar

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former employee who joined a civil rights organization which was boycotting and picketing a chain of stores owned by the employer), *cert. denied*, 455 U.S. 1800 (1982); Berg v. La Crosse Cooler Co., 612 F.2d 1041 (9th Cir. 1980) (permitting a personnel clerk who informed an employee that the law entitled her to disability payments for pregnancy to side with the employee even after the personnel manager told the clerk that maternity benefits need not be given under the law as he saw it); Kornbluh v. Stearns & Foster Co., 73 F.R.D. 307 (S.D. Ohio 1976) (denying summary judgment for employer when plaintiff alleged he was fired in retaliation for his wife's picketing of the employer's plant); EEOC Decision No. 71-1804, 3 Fair Empl. Prac. Cas. (BNA) 955 (Apr. 19, 1971) (finding retaliatory an employer's discharge of an employee who picketed the employer's plant to protest discriminatory hiring practices). *Cf.* Rosser v. Laborers' Int'l Union of N. Am., 616 F.2d 221, 224 (5th Cir.), *cert. denied*, 449 U.S. 886 (1980). In *Rosser*, the Fifth Circuit held that an African-American clerk who ran for the job of her immediate (white) supervisor's office in order to oppose discrimination could be discharged because her campaign cast into doubt the clerk's loyalty to her supervisor. The court explained that:

> Even though opposition to an unlawful employment practice is protected, such protection is not absolute. There may arise instances where the employee's conduct in protest of an unlawful employment practice so interferes with the performance of his job that it renders him ineffective in the position for which he was employed. In such a case, his conduct, or form of opposition, is not covered by § 704(a).
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> . . . [S]ince her loyalty and cooperation were in doubt as a result of her active political opposition to [her supervisor's] candidacy, he had a valid non-discriminatory reason for discharging her.

Id. at 223–24.

285. 708 F.2d 647 (11th Cir. 1983).
286. *Id.* at 652.
287. *Id.* at 652–53.
288. *Id.* at 653.
289. *Id.* at 654.
290. *Id.* at 653.
291. *Id.*
292. *Id.* at 654.
293. *See, e.g., Smith*, 650 F.2d at 217 (plaintiff "placed himself in a position squarely adver-

cases not involving personnel managers, however, the disloyalty defense is criticized as overbroad, allowing employers to dismiss employees who Title VII was intended to protect. In *EEOC v. Crown Zellerbach Corp.*,[294] seven African-American employees were fired for disloyalty in retaliation for sending a letter to a customer condemning the company's personnel director as "the Standard Bearer of the bigoted position of racism at Zellerbach . . . ."[295] The district court agreed with the employer that sending the letter was disloyal and thus not protected by § 704(a).[296] The Ninth Circuit reversed, stating:

> Almost every form of "opposition to an unlawful employment practice" is in some sense "disloyal" to the employer, since it entails a disagreement with the employer's views and a challenge to the employer's policies. Otherwise the conduct would not be "opposition." If discharge or other disciplinary sanctions may be imposed based simply on "disloyal" conduct, it is difficult to see what opposition would remain protected under section 704(a).[297]

The Seventh Circuit also criticized the disloyalty defense. In *Jennings v. Tinley Park Community Consolidated School District Number 146*,[298] Jennings, a school superintendent's secretary, prepared a report without telling the superintendent on the school district's disparate pay policies and delivered it to the school board.[299] The school superintendent then fired her, asserting that he felt he could no longer trust her and count on her loyalty.[300] Citing *Crown Zellerbach*'s conclusion that almost every form of opposition to an employment practice is in some sense disloyal,[301] and stating that allowing a disloyalty defense would virtually eviscerate § 704(a),[302] the Seventh Circuit vacated and remanded.[303] On remand, the district court held that the superintendent fired Jennings for legitimate business reasons,[304] and the Seventh Circuit affirmed.[305] The circuit court once again rejected the disloyalty defense. Rather, the court noted, Jennings was fired because she bypassed her boss with her protest, thus inter-

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sary to his company."); *Pendleton*, 628 F.2d at 108 (plaintiffs failed to give their employer the undivided loyalty it had the right to expect); *Herrera*, 53 Fair Empl. Prac. Cas. (BNA) at 1409 (same).

294. 720 F.2d 1008.
295. *Id.* at 1011.
296. *Id.*
297. *Id.* at 1014.
298. *Jennings*, 864 F.2d 1368 (7th Cir. 1988).
299. *Jennings*, 796 F.2d 962, 967 (7th Cir. 1986), *cert. denied*, 481 U.S. 1017 (1987).
300. *Id.*
301. *Id.* at 968.
302. *Id.*
303. *Id.*
304. 864 F.2d at 1370.
305. *Id.* at 1374.

fering with the superintendent's rapport with the school board, and disrupting the work environment.[306] The court stated:

> Today's decision is not an affirmation of the "loyalty" defense that was questioned in *Jennings I*. It is doubtful whether loyalty alone can be a legitimate, nondiscriminatory reason for disciplining an employee engaged in opposition to an unlawful employment practice. The issue here is not simply loyalty; it is whether a supervisor can discipline an employee who deliberately interferes with the supervisor's efficacy in relationship to his superiors . . . . An employer may in such circumstances discipline the employee, not because of her opposition, not because of a sense of disloyalty, but rather because of the employee's deliberate decision to disrupt the work environment . . . .[307]

5. Disruption

The Ninth Circuit, by rejecting the disloyalty defense, but embracing the disruption defense, scored a touchdown and took a safety on the same play. As discussed in Part I-E-2-c, the balancing test used to withhold § 704(a) protection from disruptive plaintiffs is over inclusive on its face (*all* opposition is in some sense disruptive), indeterminate (courts fail to articulate clear standards for applying the test), and is used to withhold protection from plaintiffs with valid Title VII claims. The rule proposed herein provides a superior method of evaluating § 704(a) opposition cases.

D. Application of the Proposed New Standard for Evaluating Oppositional Activity

The proposed rule cures the doctrinal confusion surrounding personnel manager cases. By enunciating an explicit exception for activities that directly contradict the position for which the protesting employee was hired, the rule allows courts to treat personnel managers differently from other employees without distorting the traditional doctrinal framework of Title VII antiretaliation law. It also protects nonpersonnel managers by ensuring that the standards enunciated in personnel manager cases will not be applied more generally.

Most of the cases discussed in Part III would be decided identically under the proposed rule. Cases involving personnel managers who solicit adverse suits would continue to be decided in favor of employers, because such solicitation is almost always contrary to a personnel manager's job description. Likewise, the cases citing "inefficacy as a worker" would likely be decided the same way because that phrase is generally used as a

306. *Id.*
307. *Id.*

synonym for "contrary to the employee's job description."[308]

Some of the cases involving personnel managers who disobey superiors or company policy might be decided differently. When a personnel manager refuses to obey a directive concerning personnel policies, such a refusal would directly contradict the personnel manager's job duties. Disseminating confidential information, however, may not always be directly contradictory to the personnel manager's duties, unless that information relates to personnel matters.[309] If a personnel manager's oppositional activity does not directly conflict with her job duties, that activity should be evaluated using the same standards that apply to all employees.[310]

Many of the cases citing disloyalty and disruption to justify differential treatment would no doubt be decided differently under the proposed rule. The point of inquiry would shift from "how disloyal or disruptive was the oppositional activity," to "was the oppositional activity directly contrary to the personnel manager's job duties?" Often, however, the degree of disruption will be relevant to determining whether the oppositional activity contradicted the personnel manager's job duties.[311]

IV. CONCLUSION

The proposed rule for evaluating whether oppositional activity is protected by § 704(a) boasts several advantages over the current standard. First, it strengthens the protection of employees who oppose employer discrimination, while maintaining the current level of protection for employees who oppose employment practices that they reasonably and in good faith believe to be discriminatory. Second, it reduces the indeterminacy inherent in the balancing test approach by removing a class of cases to which a balancing test will apply, and by articulating definite criteria to be used in cases in which a balancing test still will be employed. Third, it eliminates the doctrinal confusion caused by the application of traditional black letter antiretaliation law to personnel manager cases. Fourth, it provides an unambiguous doctrinal framework for maintaining the restrictive antiretaliation protection given to personnel managers. This ensures that employers retain control over personnel policies and decisions, and helps foster the congressional policy of encouraging voluntary compliance with Title VII strictures. Finally, it protects nonpersonnel managers by ensuring that cases

308. *See* Part III-C-2.

309. E.g., if a personnel manager were to photocopy and distribute to union negotiators the company's bargaining strategy in negotiations over a collective bargaining agreement.

310. *See* Part II.

311. E.g., if a personnel manager, hired to maintain a smooth employer-employee relationship, organized an employee demonstration.

giving employers wide latitude to control personnel manager opposition are not used to justify giving employers such latitude over employees generally.