Employee Opposition to Discriminatory Employment Practices: Protection From Reprisal Under Title VII

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In its effort to enforce the anti-discrimination provisions of Title VII of the Civil Rights Act of 1964, the Equal Employment Opportunity Commission (EEOC) relies primarily on individual complaints to bring to its attention discriminatory employment practices that violate the Act. The major burden of enforcing the Act, therefore, rests on employees who file charges of discrimination with the Commission. One drawback of the Commission's reliance on the complaint mechanism is that a variety of pressures on aggrieved individuals may deter them from challenging an employer's policies. Another is the inability of many employees or appli-

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2. The EEOC has only limited powers to initiate law suits under the Civil Rights Act. The Act separates public prevention from private remedies and places more emphasis on the latter. Comment, Enforcement of Fair Employment Under the Civil Rights Act of 1964, 32 U. CHI. L. REV. 430, 432 (1965). If charges are not filed by aggrieved individuals the EEOC may initiate civil actions in the district courts when a person subject to the Act engages in a "pattern or practice of resistance to the full enjoyment" of rights secured by Title VII. 42 U.S.C. 2000e-6(a) & (c) (Supp. III 1973). The EEOC brought only 39 such suits in fiscal year 1975. 10 EEOC ANN. REP. 8 (1976). In addition, the EEOC may take internal action on pattern or practice charges filed by its own members. 42 U.S.C. § 2000e-5(b) (Supp. III 1973). This device, however, has limited use, and the Commission has given it low priority. U.S. COMM’N ON CIVIL RIGHTS, FEDERAL CIVIL RIGHTS ENFORCEMENT Effort 296 (1970) [hereinafter cited as ENFORCEMENT EFFORT]. Consequently, the Commission relies on aggrieved individuals to notify it of most of the discriminatory practices it considers. See Pettway v. American Cast Iron Pipe Co., 411 F.2d 998 (5th Cir. 1969); EEOC Dec. No. 74-77, 2 EMPL. PRAC. GUIDE (CCH) ¶ 6417 (1974); G. GINSBURG, CASES AND MATERIALS ON EQUAL EMPLOYMENT 232 (2d ed. 1974).

3. See ENFORCEMENT EFFORT, supra note 2, at 297.

4. See H. R. REP. No. 92-238, 92d Cong., 2d Sess. (1972). This report argues that when Title VII was enacted congressional understanding of discrimination was inadequate. Although in 1964 “employment discrimination tended to be
cants for employment to produce evidence beyond their own sus-
picions that discrimination is being practiced. A third major impedi-
ment is fear of employer reprisal, which primarily deters incumbent
employees from questioning employment conditions in the first in-
stance.

To protect the integrity of the Act's enforcement machinery, Con-
gress has prohibited employers, employment agencies, or labor-
management committees covered by the Act from retaliating against
employees or applicants for employment who invoke their rights
under Title VII. Section 704(a) of the Act provides:

It shall be an unlawful employment practice for an employer
to discriminate against any of his employees or applicants
for employment, for an employment agency or joint labor-
management committee . . . to discriminate against any
individual; or for a labor organization to discriminate
against any member thereof or applicant for membership,
because he has opposed any practice made an unlawful em-
ployment 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.

Section 704(a) clearly covers employees who participate in the
EEOC's proceedings: all are protected from employer reprisal if
they file charges in good faith, no matter how implausible their
charges may be. The statute is silent, however, as to other types of
protected "opposition" activities. The Act's legislative history indi-
cates only that Congress gave scant attention to this provision. Al-
though the history suggests that Congress possibly intended little

5. EEOC News Release No. 70-3, at 1 (Jan. 29, 1970), quoted in Enforcement
Effort, supra note 2, at 297.
(1969). One writer has suggested that an incumbent employee unhappy with
conditions of his employment is more likely to complain of discrimination than
the applicant for employment who is rejected discriminatorily. Blumrosen, The Duty
of Fair Recruitment Under the Civil Rights Act of 1964, 22 Rutgers L. Rev. 465,
466-69 (1968). Given that the strong deterrent effect of potential employer
retaliation primarily restrains the incumbent employee, Blumrosen's hypothesis is
difficult to accept. See also Note, Title VII, Seniority Discrimination, and the
Incumbent Negro, 80 Harv. L. Rev. 1260 (1967).
more than to safeguard the employee's access to the statutory machinery,\(^9\) as in other labor relations statutes,\(^{10}\) the evidence is inconclusive. Moreover, the broad language of section 704(a), which explicitly protects anyone who has opposed unlawful employment practices, militates against such an interpretation.

9. See notes 26-36 infra & accompanying text.


Vigorous exercise of this right "to persuade other employees to join" must not be stifled by the threat of liability for the overenthusiastic use of rhetoric or the innocent mistake of fact. Thus, the [NLRB] has concluded that statements of fact or opinion relevant to a union organizing campaign are protected by § 7, even if they are defamatory and prove to be erroneous, unless made with knowledge of their falsity. Id. at 277-78. See also NLRB v. Cement Transp., Inc., 490 F.2d 1024 (6th Cir.), cert. denied, 419 U.S. 828 (1974). Similarly, the Labor-Management Reporting and Disclosure Act guarantees union members the right to express "any views, arguments, or opinion" free from union reprisal. 29 U.S.C. § 411(a)(2) (1970). See Salzhandler v. Caputo, 316 F.2d 445, 451 (2d Cir.), cert. denied, 375 U.S. 946 (1963). California's Labor Code, which prohibits employers from engaging in activities that interfere with the free political activities or affiliations of employees, may offer the most extensive statutory protection of employee speech. CAL. LAB. CODE § 1101 (West 1972). See Lockheed Aircraft Co. v. Superior Court, 28 Cal. 2d 481, 171 P.2d 21 (1946).

This uncertainty has resulted in inconsistent applications of the opposition clause of section 704(a). Some courts protect opposition only when the opposed practice is actually unlawful; other regard the legality of the opposed practice as irrelevant. Some authorities protect only nondisruptive opposition, but the EEOC considers even picketing or work stoppages legitimate opposition activities. The Supreme Court has indicated only that section 704(a) protects "legitimate civil rights activities"; it has not decided whether the statute "extends only to the right of access [to the EEOC] or well beyond it." Section 704(a)'s broad command would render unreasonable a limitation of its protection to employees who file complaints with the EEOC or who otherwise participate in its proceedings. A liberal protection of opposition activities without regard to their impact on the employment relationship, however, would controvert Congress's intent in enacting Title VII to leave management prerogatives and union freedoms "undisturbed to the greatest extent possible." Section 704(a) clearly was designed to augment the enforcement provisions of Title VII in promoting nondiscrimination. Its proper scope may be determined by considering the manner in which it best serves the efficient operation of that enforcement while maintaining industrial peace—a central theme of United States labor laws.

This Article evaluates the degree of protection afforded employees who oppose employer conduct that they perceive to be discriminatory. Its basic premise is that section 704(a) protects all non-coercive employee activities that reasonably are related to obtaining access to Title VII's enforcement machinery or that are designed to secure arms-length private settlements of discrimination disputes. Protection should not extend to coercive actions, however, because they manifest avoidance of the elaborate mechanisms provided by the law for ascertaining and resolving claims of discrimination in favor of unilateral resolution of a dispute by the employee. Furthermore, in

11. See notes 68-73 infra & accompanying text.
16. See notes 42-50 infra & accompanying text.
contrast to the EEOC's position that section 704 (a) relief should be granted if an employee's participation in opposition activities provided one of the reasons for an employer's alleged misconduct, this Article suggests that relief should be predicated on a showing that those activities actually were the motivating cause for the employer's reprisals.

Section 704 (a)'s guarantee of protection for certain opposition activities occasionally may place it in conflict with the exclusivity principle of the National Labor Relations Act (NLRA), which designates the union as the exclusive bargaining agent for employees covered by a collective bargaining agreement. This Article suggests a means of accommodating a guarantee of opposition activities with that principle.

**The Background of Section 704 (a)**

The legislative history of Title VII is an inconclusive guide to the protection Congress intended to provide persons protesting discrimination in employment. Congress's chief concern in 1964 was to solve the societal problem of racial discrimination expeditiously. A rising incidence of civil rights activities, evidencing a new awareness by racial minorities that the time to end discrimination had come, brought turmoil to the South. Militance replaced passivity toward racial inequality, and confrontations between law enforcement agencies and civil rights demonstrators became increasingly commonplace. In a special message to Congress in June, 1963, President Kennedy emphasized the "rising tide of discontent that threatens

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public safety" and warned that legislative inaction on civil rights would result in "continued, if not increased, racial strife—causing the leadership on both sides to pass from the hands of reasonable and responsible men to the purveyors of hate and violence." 19 The first congressional report on the bill that later became Title VII spoke of a "growing impatience by the victims of discrimination with its continuance." 20 The events in the South awakened the nation's conscience to the injustice of racial inequality a century after the abolition of slavery. 21 This new recognition of the moral imperative of enhancing black Americans' social and economic standing, 22 together with the fear of growing racial tension and violence, 23 motivated Congress to enact the comprehensive Civil Rights Act of 1964.

In its haste to enact a civil rights bill that would quell the nation's restlessness, Congress gave insufficient consideration to the particulars and nuances of many forms of discrimination. House and Senate debates principally centered on whether civil rights legislation should be enacted at all. The inclusion of sex discrimination among the prohibited practices, for example, was wholly fortuitous. It was offered as an amendment to the bill by a southern Congressman who hoped to "clutter up" the bill and thereby make it objectionable to more legislators. 24 The prohibition of sex discrimination thus passed "without even a minimum of congressional investigation." 25 Another provision enacted with similar cursory consideration or appreciation of its impact was section 704(a).

The House and the Senate passed the anti-retaliation provision of section 704(a) in the form recommended by the House Judiciary


21. See B. SCHWARTZ, supra note 18, at 1017.


23. President Kennedy's fears that black discontent threatened the public safety were exaggerated. As Professor Kalven noted, most civil rights activity in the early sixties was peaceful, and was conducted in a manner calculated not to violate the law. He called this "one of the extraordinary achievements of the [civil rights] movement." H. KALVEN, THE NEGRO AND THE FIRST AMENDMENT 184 (1965). The danger of racial violence nevertheless was real, much of it attributable to official lawlessness in those states where significant opposition to civil rights activity existed. See generally United States v. Price, 383 U.S. 787 (1966).

24. See Developments: Title VII, supra note 22, at 1167.

25. Id.
Committee.\textsuperscript{26} From its inception, section 704(a) contained the "opposition" clause prohibiting employer or union discrimination against one who had "opposed any practice" that the Act made unlawful.\textsuperscript{27} The Committee Report summarized section 704(a) as prohibiting an employer from discriminating "against any of his employees or applicants for employment . . . because he has made a charge, testified, assisted, or participated in any manner in the enforcement of this title." \textsuperscript{28} The Report offered no specific explanation of the opposition clause, however, and section 704(a) received virtually no further congressional consideration.\textsuperscript{29}

In the absence of definitive congressional statements, the purposes of section 704(a) may be deduced from the overall aim of the Civil Rights Act of 1964.\textsuperscript{30} Although some members of the House Judiciary Committee questioned whether the bill would end racial turmoil or "relax the tensions of our troubled times," \textsuperscript{31} the majority viewed the legislation as a measure to end discrimination "before racial unrest

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\item 26. During the congressional debates the only change in the provision, which was numbered § 705(a) in the original bill, was to renumber it § 704(a). See 110 Cong. Rec. 12813 (1964). See generally Smith, Economic Pressure in Support of Unlawful Employment Discrimination Claims, 61 Cornell L. Rev. 368, 387-88 (1976).
\item 29. A comparative analysis of the House and Senate bills inserted into the record interpreted § 704(a)'s protection to extend to individuals who either participate in proceedings or investigations under the Act or otherwise support the Act's policies. Legislative History, supra note 15, at 3070. A later comparative analysis, however, made no reference to the provision. See Comparative Analysis of the Civil Rights Bill, H. R. 7152, as Passed by the House of Representatives and the Senate, 110 Cong. Rec. 15999, 16001-04 (1964).
\item 30. One writer has argued that the scant discussion of 704(a) in the legislative history "shows that the section's framers were only interested in assuring a free flow of information and access to law enforcement tribunals." Smith, supra note 26, at 387 (footnote omitted). The paucity of material evincing congressional intent with respect to the provision, however, counsels that it be construed in the overall historical context of the legislation. The few statements in the legislative history regarding § 704(a) provide no conclusive evidence that Congress was concerned strictly with the enforcement mechanisms; at most they demonstrate that this interpretation is not foreclosed. Moreover, the few scattered references in the legislative history to the opposition clause indicate at least some congressional awareness of its potentially expansive scope. See Lopatka, Protection Under the National Labor Relations Act and Title VII of the Civil Rights Act for Employees Who Protest Discrimination in Private Employment, 50 N.Y.U.L. Rev. 1179, 1191 n.61 (1975).
\item 31. Additional Views on H. R. 7152, reprinted in Legislative History, supra note 15, at 2113.
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Thus, the Act attempted to provide an effective means of enforcing the civil rights of Americans. To this end, Congress created an elaborate statutory framework, administered by the EEOC, that was designed to eliminate employment discrimination.

Taken as a whole, the legislative history suggests that Congress intended to shift the racial battleground from the streets to the EEOC. Minority grievances were to be resolved not by pressures and counter-pressures, but through the offices of a commission created to eradicate discrimination in employment. The necessity for protest activities such as sit-ins and picketing in support of civil rights grew out of the absence of any effective legal remedies to combat discrimination. Although the absence of effective legal mechanisms for vindicating individuals' civil rights may have justified protest prior to the Civil Rights Act, such conduct now may detract unnecessarily from the effect of the broad range of legal remedies available under the Act. Congress could not have intended to accord special protection to such activities when its purpose was to rechannel civil rights efforts to the offices of equal employment agencies. Needless disruption of industrial peace cannot be countenanced when an enforcement scheme provides an orderly means of

32. LEGISLATIVE HISTORY, supra note 15, at 2150.
34. One commentator noted that the Act attempted "to channel discrimination claims away from friction and contentiousness." Smith, supra note 26, at 389 (footnote omitted).
resolving disputes; rather, the resolution of complaints through legal channels should be encouraged.36

This does not suggest that aggrieved persons should be prohibited from engaging in all activities that might create disharmony between labor and management. The Constitution guarantees the right to protest,37 subject to limitations on the forum that may be used for expression;38 however, it does not restrict private interference with such dissent.39 To construe section 704(a) as providing employees with protection for all opposition activities would imply that Congress attempted to impose first amendment constraints on private employers. No evidence suggests that Congress intended such a far-

36. One writer argues that, because protests provided some of the impetus for Title VII's enactment, they should be protected even when they violate local laws. Spurlock, Proscribing Retaliation Under Title VII, 8 Ind. L. J. 453, 473 (1975). This argument misinterprets congressional intent, which was not to enshrine protest activities as the principal method of combatting discrimination but rather to render them unnecessary by providing a legal mechanism to eliminate the practice.

37. The law has developed significantly since Hughes v. Superior Court, 339 U.S. 460 (1950), which upheld an injunction against the picketing of a store by blacks who demanded that the business hire black employees in proportion to its black customers. The Court accepted the finding of the state courts below that the purpose of the picketing was unlawful, id. at 462, and suggested further that states may forbid picketing "under the belief that otherwise community tensions and conflicts would be exacerbated." Id. at 464. Several commentators have criticized this rationale as insensitive to first amendment protections. See, e.g., T. Emerson, The System of Freedom of Expression 446-47 (1970); Gould, supra note 35, at 77-84; Frank, The United States Supreme Court: 1949-50, 18 U. Chi. L. Rev. 1, 9 (1950). More current decisions by the Court, however, demonstrate a greater solicitude for picketers' first amendment rights. See, e.g., NLRB v. Fruit and Vegetable Packers Local 760, 377 U.S. 58 (1964). Recently, the Court noted that, if picketing was conducted in a protected forum, the first amendment "would not permit control of speech . . . to depend upon the speech's content." Hudgens v. NLRB, 424 U.S. 507, 520 (1976) (footnote omitted).

38. For example, private property owners may prevent picketing on their premises. See Hudgens v. NLRB, 424 U.S. 507 (1976); Central Hardware Co. v. NLRB, 407 U.S. 539 (1972).

39. See, e.g., Hudgens v. NLRB, 424 U.S. 507 (1976); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974); Black v. Cutter Laboratories, 351 U.S. 292 (1956). One commentator has argued that employee opposition activities are constitutionally protected from employer reprisal unless the employees' conduct inflicts "an unwarranted degree of harm" on the employer. See Note, Title VII and N.L.R.A.: Protection of Extra-Union Opposition to Employment Discrimination, 72 Mich. L. Rev. 318, 331 (1973) [hereinafter cited as Extra-Union Opposition]. This analysis is based on a misinterpretation of Gould, supra note 35, who suggests only that employee picketing should be protected from injunctive interference by the state. See id. at 84 n.162.
reaching result. The inquiry into activities to be protected from employer reprisal should be narrow, focusing on whether particular opposition activities are necessary or desirable in the context of Title VII’s remedial framework and Congress’s concern for resolving racial disputes peacefully. These activities may be identified by reference to the scheme of enforcement under Title VII.

PROTECTION OF EMPLOYEE PARTICIPATION IN PROCEEDINGS UNDER TITLE VII

As noted above, the principal purpose of section 704(a) is to protect persons who use the Act’s statutory machinery to assert discrimination grievances or who otherwise participate in or cooperate with the enforcement process. Access to this machinery is indispensable to realization of the goals of the Act. Because the EEOC, with certain exceptions, investigates allegations of discriminatory employment practices only upon the filing of a charge with the EEOC by or on behalf of an aggrieved party, the agency relies on individual

40. Although other labor statutes offer broad protection for specific employee speech activities, both the statutory language and the need for protection expressed by those laws are more explicit than they are under § 704(a). Section 7 of the National Labor Relations Act (NLRA), 29 U.S.C. § 157 (1970), guarantees employees “the right to self-organization, to form, join, or assist labor organizations, . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” Employer interference with those rights is an unfair labor practice under § 8(a) (1) of the NLRA. Id. § 158(a) (1) (1970). The protection of the right to engage in concerted activities is explicit; it has been held to extend to picketing their employer during off-duty hours. See Edir, Inc., 159 N.L.R.B. 686 (1966). The right to organize entails a right to persuade other employees to join the union, without which self-organization is impossible. Employee speeches and pamphletering are necessary components of the right to organize, as self-organization is based on voluntarism, not on the requirements of the law. Similar activities are not indispensable to eradicating discrimination. The victim of discrimination must persuade only the agencies charged with enforcing Title VII of the justness of his cause. The union organizer cannot achieve his goal so easily. “Employee pressure plays a far more essential role” under the NLRA than it does under Title VII. Lopatka, supra note 30, at 1216.

The Labor-Management Reporting and Disclosure Act of 1959, which protects from union infringement an employee’s right “to express any views, arguments, or opinions,” 29 U.S.C. § 411(a) (2) (1970), is more explicit in its coverage than is 704(a). This protection is essential to enable an employee, who may or may not have joined the union voluntarily, from becoming a political captive of his union. Some argue, nonetheless, that speech seriously weakening the union as a collective bargaining agent should be unprotected. See Atleson, A Union Member’s Right of Free Speech and Assembly: Institutional Interests and Individual Rights, 51 MINN. L. REV. 403, 458-59 (1967).
initiative as a significant aid to enforcement. When the EEOC acts independently, it understandably selects large employers or labor organizations as subjects for its investigations.41

An employee's charge of discrimination against his employer inevitably strains the relationship between the two. Although this risk undoubtedly deters some employees from filing discrimination charges, it cannot be eradicated by legislation. Overt employer retaliation, however, is a more serious threat to employees' economic security and thus to the efficient operation of the enforcement process. Clearly, an employee is unlikely to file a discrimination complaint if by doing so he subjects himself to discharge or other serious reprisal. The risk far outweighs the potential gain.

The importance of the charge in the EEOC's enforcement process requires that the potential complainant be insulated from employer reprisal to the maximum extent possible. When a writing satisfies the liberal procedural requirements of a charge under Title VII, the complainant clearly is exercising a right protected by section 704(a).42 Similar considerations suggest that a person whose charge fails to comply with the pleading requirements also should be protected from employer retaliation.43 In both instances, the complainants' charges

41. In fiscal year 1975 the EEOC issued 39 "pattern or practice" charges. According to the EEOC: "Virtually all of these charges covered employees or unions with more than 1,000 employees or members, and many covered employees with multiple facilities and work forces of up to 25,000 employees." 10 EEOC ANN. REP. 8 (1976).


43. Almost any charge that reasonably identifies the parties and generally describes the grounds for the employee's belief that the respondent is engaging in discriminatory employment practices satisfies the EEOC's requirements. Charges of discrimination may be filed "by or on behalf of a person claiming to be aggrieved, or by a member of the Commission." 42 U.S.C. § 2000e-5(b) (Supp. III 1973). The charge must be filed within 180 days of the occurrence of the alleged discriminatory act, 42 U.S.C. § 2000e-5(e) (Supp. III 1973), and must contain the names of the parties, a clear and concise statement of the facts, the number of employees of the respondent union (if known), and a statement of whether charges have been filed with a state or local fair employment practices agency. 29 C.F.R. § 1601.11(a) (1976).

For a description of EEOC procedures, see Sape & Hart, Title VII Reconsidered: The Equal Employment Opportunity Act of 1972, 40 GEO. WASH. L. REV. 824, 862-74 (1972); Note, Limitations Periods for Filing a Charge with the Equal Employment Opportunity Commission Under Title VII of the Civil Rights Act of 1964, 56 B.U.L. REV. 760, 761-64 (1976). Despite this liberal pleading requirement, inarticulately drawn charges nevertheless may be filed with the
provide evidence of their intent to gain access to Title VII's enforcement process, and complete support for these endeavors mandates that technically inadequate complaints be protected. If an employee's defective charge is dismissed, he consequently suffers the continuance of the employer's allegedly discriminatory practice; no purpose would be served by requiring the complainant to bear the additional burden of employer retaliation. Although the filing of a defective charge will cause the employer some inconvenience, it will not affect him in a manner materially different from the effect of a correctly written complaint; in both situations the employer will be accused of discrimination before an official body. Thus, when the employee's action is consonant with the enforcement scheme of Title VII, as is the filing in good faith of a charge of discrimination, denying protection to the inartful pleader creates a barrier to the utilization of the process without advancing any countervailing interests of the employer.

Substantively, section 704(a) has been construed to protect any employee or applicant making a bona fide charge, regardless of the validity of the allegations. The complexity of the law and of various factual situations surrounding discrimination make an employee's correct assessment of the merits of his claim difficult in all but the most egregious instances of discrimination: that task is reserved to the EEOC. To condition the complainant's protection on the accuracy of his claim would emasculate the section's safeguard. This principle was recognized by the Court of Appeals for the Fifth Circuit in *Pettway v. American Cast Iron Pipe Co.*\(^4\) In *Pettway* a longtime black employee of the defendant filed charges of discrimination on his own behalf and assisted other employees in filing similar charges. While the complainant's charge was pending he was suspended from work for two weeks, allegedly because of an altercation with a white employee. He then filed another charge, contending that he was suspended because of his race. Although the EEOC dismissed both charges, it advised the employee that he could submit additional information and seek reconsideration of the Commission's decision. The employee thereafter wrote a letter to the EEOC's chairman stating his objections to the decision and requesting further investi-

\(^4\) 411 F.2d 998 (5th Cir. 1969).
The letter suggested that the employer bribed the EEOC employee who had investigated his case. The Commission treated the letter as a valid petition for reconsideration. Once informed of this allegation the employer discharged the complainant, maintaining that the statements were false and malicious. The court of appeals accepted the trial court's finding that, although no evidence supported the bribery charge, no proof had demonstrated that the employee's allegation was motivated by malice. The court concluded that the complainant was protected by section 704(a):

There can be no doubt about the purpose of § 704(a). In unmistakable language it is to protect the employee who utilizes the tools provided by Congress to protect his rights. The Act will be frustrated if the employer may unilaterally determine the truth or falsity of the charges and take independent action.

The court indicated that this result was warranted by the nature of Title VII's enforcement machinery: the EEOC was "an administra-

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45. The letter stated: "[W]e believe somebody, some how got to Mr. Holliday, who investigated the case. We don't know what was done or offered him, but we do know it had to have been something, otherwise, your decision would not have been so far off base." Id. at 1002 n.5.

46. Id. at 1004. Assessing the degree of protection the court would have extended to malicious charges is difficult. Analogous precedent indicated that § 8(a)(4) of the NLRA, 29 U.S.C. § 158(a)(4) (1970), did not protect from employer retaliation employees who filed maliciously false charges before the NLRB. 411 F.2d at 1006 n.19. See, e.g., Socony Mobil Oil Co. v. NLRB, 357 F.2d 662 (2d Cir. 1966) (per curiam); NLRB v. Coca-Cola Bottling Co., 333 F.2d 181 (7th Cir. 1964). The court in Pettway rejected the applicability of these cases, noting that Title VII's language is broader than the NLRA's and that the differences between the two acts probably outnumbered their similarities. 411 F.2d at 1006. The language of both statutes, however, speaks of protecting employees who have made charges, without making reference to the petitions' contents. Moreover, the Supreme Court frequently has relied on NLRA precedent when fashioning remedies under Title VII. See, e.g., International Bhd. of Teamsters v. United States, 431 U.S. 324, 366 (1977); Franks Transp. Co. v. Bowman, 424 U.S. 747, 769 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405, 419 (1975). General differences between the two statutes, therefore, do not mandate different results in cases of malicious charges. No valid purpose is served in protecting malicious charges, and a denial of protection to such accusations should not discourage the filing of charges by employees who genuinely feel themselves to be aggrieved.

47. 411 F.2d at 1004-05. The Fifth Circuit recognized that invalid charges may damage important interests of the employer, including his reputation. Id. at 1007. It determined, however, that several procedural safeguards provide sufficient protection for the employer. Id. For example, the Act and regulations impose sanctions against disclosure by EEOC of personnel information revealed in Commission proceedings, 42 U.S.C. § 2000e-8(e) (1970); 29 C.F.R. §§ 1601.20,
tive agency without the power of enforcement." 48 Thus, it noted that the EEOC had no authority to issue orders, compel enforcement, or enter the litigation between the parties. 49 The suit, said the court, was between private parties, and the filing of charges by an aggrieved party was essential to the EEOC's administration of the Act. 50

1601.24 (1976), and reported EEOC decisions do not identify the parties by name. Id. Moreover, although the extensive protection provided for a person filing charges under § 704(a) may create some inconvenience for employers, Congress determined that effectuation of the goals of Title VII might necessitate imposition of some burdens on businesses. Thus, the Act requires all persons or organizations subject to it to maintain and preserve records of their employment practices and to file them with the EEOC. See 42 U.S.C. § 2000e-8(c) (Supp. III 1973).

48. 411 F.2d at 1005.

49. Id. The EEOC's enforcement powers are more substantial now than when Pettway was decided. If a charge is properly filed, the EEOC must investigate to determine whether the allegation is supported by "reasonable cause." If no such support exists the Commission must dismiss the petition. 42 U.S.C. § 2000e-5(b) (Supp. III 1973). The complainant may file an action in his own name in the district court after the EEOC either dismisses his complaint or has had jurisdiction over the charge for 180 days. Id. at § 2000e-5(f) (1). If the Commission determines that reasonable cause exists to believe that discrimination occurred, it must "endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." Id. at § 2000e-5(b).

If this process fails, the EEOC may bring an action against the respondent in district court, in which the complainant may intervene. Id. at § 2000e-5(f) (1).

The EEOC believes that the conciliation process "receives leverage" from the reasonable cause requirement by providing "support to the conciliator in his negotiations with the respondent." ENFORCEMENT EFFORT, supra note 2, at 326. Despite this belief, in fiscal year 1975 the Commission achieved successful conciliation in only 5,983 of 11,992 attempts. 10 EEOC ANN. REP. 34, Table 4 (1976). Moreover, the EEOC's regulations encourage settlement attempts after preliminary investigations but before the issuance of a reasonable cause determination. See 29 C.F.R. § 1601.19(a) (1976). Apparently, the threat of a suit by the Commission in the event of unsuccessful conciliation efforts is too minimal to affect ordinary settlement discussions. In fiscal year 1975 the Commission filed only 180 such suits. 10 EEOC ANN. REP. 8 (1976). Thus, for most petitioners the EEOC provides little more than an effort at mediating the dispute before the complainant can bring an individual suit in a district court.

A final impediment to the Commission's ability to pursue petitioners' complaints effectively is the backlog of cases on the EEOC's docket. From 1970 to 1975, the number of cases pending before the EEOC increased from 20,352 to 106,700. 10 EEOC ANN. REP. 33, at Chart III (1976). Parties consequently suffer two- or three-year delays before conciliation can be attempted. H.R. REP. No. 238, 92d Cong., 2d Sess. 12 (1972). These delays make opposition activities appear attractive because they may promote a speedier termination of an employer's discriminatory conduct.

50. 411 F.2d at 1005.
Although the 1972 amendments to the Act have increased the Commission's powers to issue and enforce orders in the course of its investigations, to seek temporary or preliminary relief in the district courts pending its disposition of charges, and to file suit, the considerations underlying the Fifth Circuit's decision in *Pettway* remain valid. As the EEOC noted in 1974, "the main burden of enforcing the Act continues to rest with aggrieved individuals who file charges." The court enjoined


54. See id. § 2000e-5(f) (1), 6(c).

55. EEOC Dec. No. 74-77, 2 EMPL. PRAC. GUIDE (CCH) ¶ 6417, at 4417 (1974). See also East v. Romine, Inc., 518 F.2d 332, 341 n.8 (5th Cir. 1975); G. GINSBURG, supra note 2, at 232.


57. Id. at 1127. See also EEOC Dec. No. 74-121, 2 EMPL. PRAC. GUIDE (CCH) ¶ 6435 (1974). In that decision an employer under investigation by the EEOC held a meeting with his workers and instructed them to provide management with a statement both of the information EEOC investigators sought during interviews and of the employees' answers. In addition, the employees were told "not to worry about losing their jobs if they cooperated with the Commission's investigation." Id. at 4161. The Commission found reasonable cause to believe that the employer violated § 704(a), holding that "the mere mention of discharge by [the employer] in the context of its employees cooperating with the investigation amounts to a violation of Sec. 704(a)." Id. at 4262 (footnote omitted). In EEOC Dec. No. 71-2312, [1973] EEOC DEC. (CCH) ¶ 6248 (1973), an employee was discharged for disobeying her supervisor's directions to assure the EEOC that her employer did not engage in race discrimination. The Commission determined that the discharge violated § 704(a). A similar construction has been accorded to § 8(a)(4) of the NLRA. 29 U.S.C. § 158(a)(4) (1970). Although § 8(a)(4) by its terms protects employees who have "filed charges or given testimony" in proceedings under the Act, the Supreme Court has held that it covers an employee who has made statements to NLRB representatives, but who
the police department from enforcing the rule, reasoning that the statutory enforcement process, to function effectively, had to be insulated from interference in all its phases. The right to file a charge is meaningless unless accompanied by safeguards assuring that the complaint will receive due consideration and a complete investigation. If employers under investigation for their employment practices can order their employees either not to cooperate with that investigation or to respond to investigators' inquiries by reciting the management's official position, the strain placed on the integrity of the enforcement process is no less severe than in a situation involving reprisal for filing a charge. 58

EMPLOYEE OPPOSITION UNDER SECTION 704(a)

The opposition clause of section 704(a) protects various employee activities beyond the scope of the enforcement machinery established by Title VII. Employee opposition to unlawful employment activities can take many forms, ranging from the mere questioning of an employer regarding his employment practices to concerted activity designed to pressure the employer into altering his practices. Subsequent to Pettway, the EEOC's efforts have been directed toward expanding the scope of the opposition clause to include a wide variety of employee activities, including economic pressures. Viewing section 704(a) enforcement as one of its highest priorities, the Commission provides preferential treatment in the administrative process to claims of reprisal. 59

According to the EEOC, section 704(a) pro-

has neither filed charges nor testified at a formal hearing. See NLRB v. Scriver, 405 U.S. 117 (1972).

58. Protection of charges and participation in enforcement proceedings is provided not only when the EEOC is involved but also when the charge is filed with or the investigation is conducted by a state or local fair employment practices agency. See EEOC v. Kallir, Phillips, Ross, Inc., 401 F. Supp. 66 (S.D.N.Y. 1975). When the discriminatory practice occurs in a state or locality that has its own fair employment laws, employees seeking relief must file charges with the appropriate administering agency responsible. See 42 U.S.C. § 2000e-5(b) (1970). The EEOC may not investigate the complaint until the state agency has had at least 60 days to act thereon. Id. § 2000e-5(c). Moreover, if a charge nevertheless is filed first with the EEOC, the Commission must refer it to the appropriate state agency. Id. This scheme reflects a strong congressional preference for local or state action. See 110 Cong. Rec. 12725 (1964) (remarks of Sen. Humphrey); 110 Cong. Rec. 13087 (1964) (remarks of Sen. Dirksen). When a charge initially is filed with the state or local agency, it must be filed with the EEOC either no later than 300 days after the occurrence of the discriminatory act or within 30 days after the Commission receives notice that the state or local agency has terminated its proceedings, whichever is later. Id. § 2000e-5(e) (Supp. III 1973).

scribes employer or union actions that tend to chill employees’ willingness to oppose discrimination. Thus, if the form of an employee’s opposition “is not so destructive of important social or business interests as to outweigh the objectives of Section 704(a) which are served by protecting it . . . the opposition will normally be held to be protected.”

In applying this test, the EEOC rarely finds opposition to be destructive of social or business interests. The Commission’s inquiry, moreover, may focus on the wrong issues. See, e.g., EEOC Dec. No. 71-2328, [1973] EEOC DEC. (CCH) ¶ 6279 (1971). The Commission’s Compliance Manual states: “Every instance of unremedied retaliation against persons who engage in Section 704(a) opposition . . . has a long term chilling effect upon the willingness of those persons and others to actively oppose Title VII discrimination.” EEOC COMPL. MAN. (CCH) § 491.2, at 5201, ¶ 6902 (1975). This view is endorsed by Spurlock, supra note 36, at 481-82, who maintains that the possibility of a “chilling effect” should promote an expansive reading of § 704(a) opposition.

61. EEOC COMPL. MAN. (CCH) § 491.5, at 5203, ¶ 6905 (1975).

62. In EEOC Dec. No. 71-1804, [1973] EEOC DEC. (CCH) ¶ 6264 (1971), the EEOC upheld a § 704(a) complaint by an employee who picketed his employer’s plant to protest allegedly discriminatory practices. In EEOC Dec. No. 74-56, 2 EMPL. PRAC. GUIDE (CCH) ¶ 6438 (1973), the EEOC determined that an employee walk-out was a protected opposition activity, concluding that “it was not so destructive of [the employer’s] interest as to exceed the bounds of permissible protest.” Id. at 4168. Similarly, in EEOC Dec. No. 72-1114, [1973] EEOC DEC. (CCH) ¶ 6347 (1972), the EEOC held that an employee who, “whether erroneously or not, believed that his job security could be affected” by his supervisor’s religion-oriented statements, engaged in a protected activity when he attempted to organize an employee walk-out. Id. at 4629. These decisions demonstrate that the Commission’s application of the business interests test deprives it of any meaning. Apparently, very few activities are so destructive of the employer’s legitimate business interests as to be rendered unprotected. Compare EEOC Dec. No. 71-1850, [1973] EEOC DEC. (CCH) ¶ 6245 (1971), with Doe v. AFL-CIO, Dep’t of Organization, 405 F. Supp. 389 (N.D. Ga. 1975), aff’d mem., 537 F.2d 1141 (5th Cir. 1976), cert. denied, 429 U.S. 1102 (1977).

63. Similar tests have been proposed by others. Spurlock, supra note 36, would protect all opposition conduct except that which the employer proves to have been “deliberately destructive of the employment relationship and [to have] significantly compromised the rights of others.” Id. at 491. Similarly, in Extra-Union Opposition, supra note 39, the author argues that opposition always should be protected except when the employer can “demonstrate actual or imminent serious harm to himself, to the collective bargaining relationship, or to labor peace.” Id. at 330. Both commentators proceed from the premise that opposition activity is important or “fundamental” to the elimination of discrimination. The best available means for achieving that goal, however, is the legal process. Moreover, the perniciousness of discrimination does not justify protecting from employer reaction virtually every activity purporting to oppose it. Thus, the establishment of a picket line in front of a business that the picketers erroneously have accused of engaging in discrimination does not further the goals of Title VII. If the
may be detrimental to the employer's interests, especially if it results in the massive restructuring of his business or a large back-pay award; yet, the employee who files the suit clearly is protected. A picket line or a demonstration against a business's alleged discrimination may not result in measureable or identifiable monetary harm to the employer, particularly if the public's response is apathetic, but the coercion implicit in such agitation does threaten the employer's control of his business and may cause other intangible harm to the business. The EEOC position appears to deprive the actions of protection only if they cause an actual business loss. The protection afforded to opposition, however, should not be contingent on the success or failure of activities with the same underlying motives. Moreover, the employer should not be deprived of his ordinary prerogatives if picketing employees avoid the statutory process, which offers the best means of determining whether discrimination has occurred, and opt instead to pursue a form of economic coercion. Such employee opposition does not advance Title VII's goal of peacefully resolving discrimination claims. Instead, it represents a possibly erroneous unilateral determination by employees that their discrimination charges are valid, similar to the employer's unilateral determination of the invalidity of his employee's charges that was condemned by the court in Pettway. Although both parties should be encouraged to resolve disagreements to their mutual satisfaction, neither should be permitted to substitute its judgment for that of a qualified tribunal created for the purpose of resolving discrimination claims.

Given that one of section 704(a)'s major purposes was to guarantee the integrity of the statutory machinery, activities incompatible with its effective operation merit no protection. The policies underlying Title VII, however, are promoted through the authorization and protection of a wide variety of noncoercive opposition activities. Initially, section 704(a) shelters those actions promoting private resolution of employment discrimination complaints. Employers thus should be prevented from retaliating against employees who question their company's employment practices. Informal settlement is a prominent theme of Title VII. The EEOC's enormous backlog of

employer was precluded from discharging the picketing employees unless he could prove that the activity deliberately was destructive of the employment relationship, he would be deprived of a freedom for no apparent purpose. Any curtailment of employer freedoms should be reasonably calculated to further the goals of Title VII.

64. See 42 U.S.C. § 2000e-5(b) (Supp. III 1973). See also H.R. REP. No. 914, 88th Cong., 1st Sess. (1963), reprinted in LEGISLATIVE HISTORY, supra note 15, which states that Title VII's purpose is to "eliminate, through the utilization of
cases often compels the agency to treat expeditiously only the more serious complaints and to leave others on its docket for two or three years.\(^6^5\) Consequently, the EEOC generally seeks to resolve most disputes through informal conciliation of the parties, frequently even before it determines whether a complaint is supported by reasonable cause.\(^6^6\) Because informal preinvestigation conciliation has become a principal function of the EEOC, parties should be encouraged to resolve their disputes through private, noncoerced negotiations. Such efforts will produce satisfactory settlements in at least a moderate number of situations, relieving both employer and employee of the burdens associated with litigation. Private negotiation thus complements the statutory enforcement mechanism without infringing on its integrity.\(^6^7\) In contrast, if an employee may confront his employer only at the risk of reprisal, complainants will tend to bring grievances directly to the EEOC, thus further increasing the Commission's Title VII administrative burdens.

Other opposition activities that complement and promote access to Title VII's enforcement process include the investigatory efforts of employees who contemplate filing discrimination charges against their employer. Although a discharged employee or rejected applicant may file charges on the basis of little more than suspicion of discrimination, an incumbent employee usually will need additional information before presenting a complaint to either his employer or the EEOC. An incumbent employee ordinarily desires to maintain a cordial employment relationship and to avoid a reputation as a troublemaker; therefore, he will not want to file frivolous charges. A generalized suspicion that his employer is committing an unlawful employment practice usually will be insufficient to advance the employee's purposes, regardless of whether it supports a valid charge. A complaint not supported by concrete evidence undoubtedly will receive less thorough consideration than one supported by factual

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formal and informal remedial procedures, discrimination in employment.” Id. at 2026.

65. See note 49 supra.

66. 29 C.F.R. § 1601.19(a) (1976).

67. See Hearth v. Metropolitan Transit Comm’n, 436 F. Supp. 685 (D. Minn. 1977), in which the court stated: “The resolution of [Title VII] charges without government prodding should be encouraged.” Id. at 689. This position is analogous to that expressed in recent labor relations decisions, which have emphasized that a peaceful resolution of disputes through an arbitral or a legal forum must be sought prior to a resort to self-help. See, e.g., United Steelworkers v. NLRB, 550 F.2d 266 (3d Cir.), cert. denied, 429 U.S. 834 (1976). See generally Note, Dow Chemical: Restricting the Availability of Self-Help Measures in Labor Disputes, 77 COLUM. L. REV. 105 (1977).```


detail or documentation. The employee may need evidence indicating, for example, that he was passed over for promotion in favor of another or that a comparable employee enjoys higher wages or better employment conditions. To obtain such information, the would-be complainant may need to consult other employees and to divulge his suspicions to them. He also may require their support in compiling the factual basis for making a reasonable presentation of a grievance to the employer or to the Commission. Such activities are examples of employee opposition that, unless carried out in an unnecessarily disruptive manner, should be protected by section 704(a). Their purpose is to facilitate either a fruitful discussion with the employer or a closely focused investigation by the EEOC.

Protected Opposition Activities

Although the EEOC has construed broadly the scope of opposition activities protected by section 704(a), the federal courts have tended toward a more restrictive view and have relied on more objective criteria for determining whether particular activities warrant protection under the statute. One judicial test has conditioned protection on a finding that the accusation of discrimination actually is valid. In *EEOC v. C & D Sportswear Corp.*, a black employee was suspended from work pending an investigation of an altercation between the employee and the company’s president. When the employee complained during the company’s subsequent investigation of the incident that her suspension had been motivated by racism, she was discharged. The EEOC found this allegation to be unsubstantiated but held that her conduct nonetheless was protected by section 704(a).69 The district court agreed that her claim was “unfounded,” but held that “where accusations are made outside the procedures set forth by Congress [they are] made at the accuser’s peril. In order to be protected, it must be established that the accusation is well founded.”70 The court reasoned that unfounded accusations should not be protected because they were likely to result in “racial discord, disruption, and disharmony.”71

69. Id. at 305.
71. 398 F. Supp. at 305.
Although this "validity of the claim" test provides an objective criterion for determining whether a particular activity should be protected, its application discourages both valid and invalid employee discrimination complaints, a result at variance with the purpose of section 704(a)'s opposition clause. No evidence has indicated that more racial discord results from unfounded complaints than from those that are substantiated. The mode of opposition probably will determine the degree of discord. More significantly, employees rarely possess sufficient factual or legal information, prior to a formal investigation, to know with certainty that their employer engages in discriminatory practices. As Professor Meltzer has stated:

[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. In addition, the protean nature of antidiscrimination law is likely to contribute to reasonable but erroneous perceptions of racial discrimination.72

Because of this difficulty in determining the validity of discrimination grievances, an employee who reasonably and in good faith believes that he is the subject of discriminatory treatment should be able to present his accusations to his employer without risking reprisal. Protecting opposition of this nature is consonant with the purposes of the Act. However inelegant or bereft of social niceties his accusations might be, the employee's actions under such circumstances 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.73

A second test applied by the courts withholds protection from opposition activities that have a "disruptive" effect on the employer's business.74 In Green v. McDonnell Douglas Corp.,75 the defendant

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72. Discrimination Remedies, supra note 17, at 33 (footnote omitted).
73. Other courts have held that employees are protected by section 704(a) when they complain to management of discrimination. See, e.g., Sherrill v. J.P. Stevens Co., 410 F. Supp. 770, 784 (W.D.N.C. 1975), aff'd, 551 F.2d 308 (4th Cir. 1977). See also EEOC Dec. No. YCH9-140, [1973] EEOC DEC. (CCH) ¶ 6075 (1969).
74. See, e.g., Garrett v. Mobil Oil Corp., 531 F.2d 892 (8th Cir. 1976).
75. 463 F.2d 337 (8th Cir. 1972), vacated on other grounds, 411 U.S. 792 (1973).
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corporation discharged a black employee for participating in an illegal “stall-in” of automobiles on an access road to its plant. The Court of Appeals for the Eighth Circuit held that the employee’s activity was not protected by section 704(a). On appeal of the court’s rejection of a companion claim of racial discrimination the Supreme Court noted its agreement with the Eighth Circuit’s holding, stating that “[n]othing in Title VII compels an employer to absolve and rehire one who has engaged in such deliberate, unlawful activity against it.” The employer could be ordered to rehire the plaintiff only if the corporation had used his actions as a pretext for a dismissal that actually was motivated by the employee’s opposition to discriminatory practices.

Disruptiveness need not be illegal to justify reprisal, but in such situations the employee’s actions generally are inconsistent with the orderly conciliation process provided by Title VII. In Ammons v. Zia Co., the Court of Appeals for the Tenth Circuit upheld the discharge of an employee who had made thirty-two complaints to management, fourteen within a fifteen month period, alleging sex discrimination in pay. The employer admitted that he had discharged the employee because of her complaints, but insisted that the complaints themselves, not their substantive allegations of sex discrimination, had motivated the employee’s discharge. Although the employee was entitled to present complaints to management, she should have sought legal remedies rather than continue informal pressures once her initial activity failed to resolve the dispute. Further complaints based on the original grievance may indicate that the employee’s motive

76. 463 F.2d at 341.
78. Id. at 804. According to Professor Meltzer, Green “makes it clear that the broad provisions of section 704(a) . . . must be narrowed by taking account of the nature of the ‘opposed’ practices and their impact on legitimate competing interests—including, presumably, orderly bargaining and dispute settlement.” Discrimination Remedies, supra note 17, at 30-31 n.148. The Court stressed the illegality of the plaintiff’s conduct and carefully distinguished between illegal activities and “legitimate civil rights activities,” thus intimating that the latter would be protected. 411 U.S. at 797, 804. The Eighth Circuit also suggested that lawful protest would be protected. 463 F.2d at 341. The legality of the protest, however, should not necessarily insulate it from employer reprisal. Conduct that is lawful under the first amendment nevertheless may contravene the goals and procedures of Title VII. For example, although the establishment of a picket line charging the employer with racism may be protected constitutionally from interference by the state, it does not merit protection from employer reprisal.
79. 448 F.2d 117 (10th Cir. 1971).
80. Id. at 120.
is merely harassment of management rather than a search for a good faith settlement of his grievance.

These cases indicate that if the employee's activity is illegal or is motivated by bad faith, such as a desire to harass the employer into submission to the employee's demands, protection should be unavailable under section 704(a). In such instances, discrimination charges may be no more than a subterfuge for the disruptive conduct itself or a pretext for voicing general dissatisfaction with the workplace, matters not covered specifically by Title VII. These activities should be unprotected, not because of the actions' disruptive effect in and of itself but because of the employee's improper motive.

Although unnecessary disruptiveness, which betrays an intent to coerce the employer, is not worthy of protection, mere disruptiveness should not be determinative of the propriety of the employee's conduct because it often may be the by-product of activities entirely consistent with the purposes and procedures of Title VII. In EEOC v. Kallir, Phillips, Ross, Inc., 81 after discovering that a male counterpart in the firm annually earned $7000 more than she, a female employee complained to the defendant firm and also advised a co-worker to register a similar grievance. Dissatisfied with the employer's delays in responding to her claim, the employee filed charges against the firm with the local fair employment practices agency. The agency thereafter requested that she provide an objective description of her position at the firm. Believing that this information could not be obtained from her employer, the complainant secured a letter from one of the firm's clients on whose account she had worked. When the firm learned that she had involved a client in her action, it suspended the employee. The court, however, noting that the complainant had asked the client to keep the matter confidential, rejected the employer's justification for the suspension. The employee's actions were regarded as assistance to a Title VII investigation, and hence protected. Also protected was the employee's advice that her co-worker file charges against the firm: section 704(a) "necessarily protects an employee from retaliation for merely advising fellow employees of their rights under the law." 82

Similar reasoning justifies protecting certain employee activities prior to the filing of a formal complaint, despite their collaterally disruptive effect. Thus, an employee should be protected from retaliation when he attempts to gather evidence in support of his allegations be-

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82. Id. at 71. See also EEOC Dec. No. 71-1544, [1973] EEOC DEC. (CCH) ¶ 6229 (1971).
fore approaching his employer with his complaint or when he seeks the assistance of outside parties because he lacks either the confidence or the necessary understanding of the law to proceed unassisted. As indicated in Kallir, however, "an 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. In such instances, however, the basis for the denial of protection should be the employee's improper motive and not the resulting hardships. The disruption caused by an activity is evidence of the employee's improper motive but it cannot be determinative.

Protection also has been extended to various activities that, although related only indirectly to Title VII's enforcement procedures, advance the statutory goals, even when such activities may disrupt the employer's ordinary business practices. For example, section 704(a) properly protects employees who are not the subjects of discrimination but who nevertheless attempt to discuss with management perceived discriminatory practices. Employees engaging in such activities attempt to correct Title VII violations through private negotiation and settlement. Similar considerations have led the EEOC to prohibit retaliation against employees who advise blacks to apply for a job with the employer or against applicants who question the

83. See, e.g., Johnson v. Lillie Rubin Affiliates, Inc., 5 Empl. Prac. Dec. ¶ 8542 (M.D. Tenn. 1973). The limits of this protection are suggested by Hochstadt v. Worcester Foundation for Experimental Biology, 545 F.2d 222 (1st Cir. 1976). The plaintiff in Hochstadt invited a newspaper reporter to examine her employer's confidential salary records and suggested that an officer of the Association of Women in Science conduct a covert affirmative action survey while ostensibly attending a scientific seminar at her laboratory. She also engaged in numerous activities that prevented others from working with her. The court upheld her discharge against a § 704(a) attack. Id. at 234.


85. 401 F. Supp. at 71.

86. But see Novotny v. Great Am. Fed. Sav. & Loan Ass'n, 430 F. Supp. 227 (W.D. Pa. 1977), in which the court held that employees are protected only if they "made a charge, testified, assisted, or participated" in Title VII proceedings. Id. at 230. The court's holding would reduce § 704(a)'s opposition clause to a nullity.

employer about the company’s employment practices. The decisive factor in these cases is that the employee’s action is designed to exhort the employer to comply with the legal requirements of Title VII, and therefore is consistent with its purposes.

An employee’s disregard of a supervisor’s order may be a protected activity even though the noncompliance interferes with the employer’s business. In such situations, the nature of the instruction will determine whether the employee may disregard it. An employee generally should not be permitted to determine unilaterally that he is the object of employment discrimination; therefore, the worker’s refusal to obey an order to perform assigned tasks should not be protected. If the instruction was designed to frustrate an employee’s attempts to present a charge of discrimination to management or to third parties, then the complainant’s noncompliance should be protected. Thus, the court’s denial of section 704(a) protection in Garret v. Mobil Oil Corp. was ill-reasoned. In that case an employee was discharged for disobeying her supervisor’s order not to present her discrimination complaint directly to management. The plaintiff contended that her supervisor previously had displayed insensitivity to her grievance, which necessitated meeting with other management officials to discuss the problem. The court upheld the discharge, reasoning that the plaintiff’s pursuit of her complaint, in contravention of her supervisor’s order, was a disruptive act not entitled to section 704(a) protection. Clearly, the court disregarded the need of employees to present their complaints to management to assess both the merits of the grievances and the necessity of invoking the enforcement machinery of Title VII.

Most challenges to an employer’s practices will create some disruption in the management of his business. In determining whether an employee’s actions are entitled to protection under section 704(a), however, their disruptive effect is relevant only insofar as it discloses the employee’s motive in pursuing a particular course of action. The disruptive effect may disclose whether an employee’s aim was to secure compliance with Title VII through the orderly means of persuasion or to coerce the employer into acceding to the employee’s unsubstantiated demands. If the principal purpose of the activity is to coerce the employer’s acquiescence through the threat of economic injury to his business, through harassment, or through other forms

90. 531 F.2d 892 (8th Cir. 1976).
91. Id. at 895-96.
of obstruction, the activity merits no protection. If, on the other hand, the disruptive effect is merely incidental to the employee's good faith attempt to present a complaint in an orderly manner to his employer or the appropriate agency, the activity should be protected.

A motive test obviously is more cumbersome than one focusing solely on the conduct's disruptive effects. Even if protection ultimately is predicated on some other criterion, however, an initial determination always must disclose that the employee's actual motive was to oppose some employment practice that he believed to be discriminatory, rather than to use a specious claim of discrimination as a pretext for unruly behavior. A picketer or a striker would have difficulty proving that he intended to reach a noncoerced agreement with his employer. In contrast, the incidental disruptive effects of employee conduct that are wholly compatible with Title VII's enforcement scheme would not be determinative of the employee's improper motive. 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 noncoercive 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.

The Scope of Protection Under Section 704(a)

A determination that an employee engaged in protected conduct is not a guarantee of job security; rather, it prohibits the employer from discriminating against that person merely for participating in those activities. Consequently, an employee who hopes to make a successful charge under section 704(a) must demonstrate that his participation in protected activities prompted the employer's retaliation. If the employer acted for legally permissible reasons, independent of the employee's opposition activities, his conduct does not violate section 704(a). Similarly, unlawful retaliation cannot be proved when the employer was unaware of an employee's participation in protected activities.


The employer usually will attempt to justify reprisal against an employee by proving either that the employee's conduct was disruptive or that the alleged retaliation was prompted by factors that were independent of the employee's opposition. An employer may introduce an employee's work record as evidence, contending that the performance did not meet the objective qualifications for the position. Title VII, however, prohibits employers from making "distinctions or differences in the treatment of employees" in any manner. Thus, the employee may counter the employer's defense by proving that employees with similar records did not suffer the same consequences for their actions. The worker also could demonstrate that he was subjected to an unusual degree of scrutiny because of his opposition activities. An attempted justification by the company that the employee had absented himself from work without excuse, for example, would be invalid if absence records were maintained in his file but not in those of other employees. In addition, subjecting to surveillance an employee who participated in protected activities would violate the Act unless other, nonparticipating employees were treated

Terrell v. Feldstein Co., 5 Empl. Prac. Dec. ¶ 8039 (M.D. Ala. 1972), aff'd per curiam, 468 F.2d 910 (5th Cir. 1972). Spurlock, supra note 36, argues that "an employer who pinions his defense in such situations upon lack of notice should beware. His claim is predicated upon the most tenuous of circumstances. He must be able to demonstrate that it was reasonable for him to lack notice of his employee's opposition . . . ." Id. at 486. Lack of notice, however, should not be a tenuous justification. Section 704(a) prohibits discrimination against an employee because he engaged in protected activities. When the company lacks notice of the employee's conduct the required causal connection is absent, and to charge the employer with knowledge of the employee's activities would serve no purpose of Title VII. In such circumstances the company's actions are prompted by purposes valid under Title VII. The reasonableness of the employer's assertion that he lacked notice is relevant only in determining the credibility of his contention. In addition, the case law places on the plaintiff the burden of proving that the employer's actions were motivated by the employee's participation in protected activities, a requirement comporting with the statutory language. See, e.g., Jeffreys v. Harris County Community Action Ass'n, 425 F. Supp. 1208 (S.D. Tex. 1977); Tidwell v. American Oil Co., 332 F. Supp. 424 (C.D. Utah 1971). The employer, therefore, need offer no defense for his actions unless the employee first proves that the company was aware of his involvement in protected conduct.


95. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973). Cf. East v. Romine, Inc., 518 F.2d 332, 339-40 (5th Cir. 1975) (suggesting that the employer must prove that the employee was not treated differently from workers with similar records).

similarly. Consequently, any employer response that singles out the employee engaged in opposition activities for unfavorable treatment could be vulnerable to a claim of unlawful retaliation.

The prevailing interpretation of section 704(a) protects an employee whose participation in opposition activities provided only one of the reasons for the employer's alleged retaliation. The apparent rationale for this construction is that there is "no acceptable place in the law for partial racial discrimination." Similarly, some courts have interpreted section 8(a)(3) of the NLRA to protect employees if their participation in union activities was one of the reasons for their discharge by an employer. The adoption of this construction for section 704(a), however, ignores the essential element of causation; section 704(a) provides relief to employees who

100. Smith v. Sol D. Adler Realty Co., 436 F.2d 344, 350 (7th Cir. 1971) (housing discrimination). See also Burris v. Wilkins, 544 F.2d 891 (5th Cir. 1977) (housing discrimination); Riley v. Adirondack S. School for Girls, 541 F.2d 1124 (5th Cir. 1976) (en banc) (discrimination in private school admissions).
101. 29 U.S.C. § 158(a)(3) (1970). Section 8(a)(3) provides in pertinent part: "It shall be an unfair labor practice for an employer ... by discrimination in regard to hire or tenure of employment of any term or condition of employment to encourage or discourage membership in any labor organization ... ."
were the objects of discrimination because they engaged in protected activities. If the employer would have taken the same actions for legitimate reasons, relief should be unavailable, regardless of the employee's participation in protected activities. The critical question is not whether the employer derived satisfaction from discharging or demoting an employee but whether the employee would have been accorded identical treatment in the absence of his involvement in protected activities.103

The Supreme Court enunciated a similar test in Mt. Healthy City School District v. Doyle,104 a case involving retaliation against a teacher who engaged in constitutionally protected activities. In Doyle the school board refused to renew the contract of the plaintiff-teacher following his involvement in a series of altercations with school employees and students. The board cited two reasons for its action: the plaintiff had made an obscene gesture to two girls in the school cafeteria and had conveyed the contents of a memorandum on teacher dress and appearance to a local radio station. In a decision affirmed by the Sixth Circuit without opinion,105 the district court ordered that the teacher be reinstated because his communication to the radio station, which was protected by the first amendment, had played "a substantial part" in the board's decision.106 The Supreme Court agreed that the communication was constitutionally protected107 but vacated the order and remanded the case to the lower courts, holding that the board should have had the opportunity to prove that it would have taken the same actions in the absence of the teacher's protected conduct.108 The employee otherwise could be placed "in a better position as a result of his exercise of constitutionally protected conduct than he would have occupied had he done nothing." 109 The teacher's first amendment rights would have been

103. Cf. NLRB v. Whitfield Pickle Co., 374 F.2d 576 (5th Cir. 1967), in which the court, for similar reasons, criticized the NLRB's practice of finding a violation of the NLRA's § 8(a) (3) whenever an employee's participation in union activities was one of multiple reasons for his discharge:

To invoke § 8(a) (3), the anti-union motive need not be dominant (i.e., larger in size than other motives); in some cases it may be so small as the last straw which breaks the camel's back. . . . [A]ll that need be shown . . . is that the employee would not have been fired but for the anti-union animus of his employer.

Id. at 582.


106. 429 U.S. at 283.

107. Id. at 284.

108. Id. at 287.

109. Id. at 285-86.
protected sufficiently if he were placed in no worse a position than if he had not engaged in the conduct.

Similar reasoning applies to section 704(a): its purpose is to ensure that employees are not penalized for engaging in protected activities. The statute, however, does not reward participation in such activities by guaranteeing employment to workers who engage in them. An unorthodox rule of causation that focuses on whether the employee's participation in protected activities was one of several reasons for the employer's actions may reward the employee with guaranteed employment when he could have been discharged or otherwise penalized in the absence of his opposition. As Doyle makes clear, the employee's right to voice opposition to the conditions of his employment is vindicated sufficiently by guaranteeing that he be accorded the treatment he would have enjoyed in the absence of this expression.

**Opposition and the Union**

*Emporium Capwell Co. v. Western Addition Community Organization* \(^{110}\) illustrates the difficulties in protecting self-help opposition by disgruntled employees. The Emporium Capwell Company, which operated a department store, was a party to a collective bargaining agreement that recognized the union as the sole collective bargaining agent for the store's employees. The agreement contained an anti-discrimination clause and a clause prohibiting strikes and lockouts; it also established grievance and arbitration procedures for processing contract violations. In 1968 a group of employees presented the union with a list of grievances, which included a claim of racial discrimination by the company. After investigating the allegations, the union concluded that the company was guilty of discrimination and filed a charge in accordance with the agreement's grievance procedures. Dissatisfied with the contract's procedures for processing racial discrimination claims, however, the complaining employees unsuccessfully sought a meeting with the company's president. Thereafter, they picketed the store and urged customers to boycott it. The employees were fired after warnings by the company failed to dissuade them from pursuing their activities.

The employees then filed a charge with the National Labor Relations Board, claiming that the company had violated their right to engage in concerted activities \(^{111}\) and had committed an unfair labor practice under section 8(a)(1) of the NLRA. \(^{112}\) Rejecting the em-

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\(^{110}\) 420 U.S. 50 (1975).


ployees' claim, the Board concluded that an extension of protection to their activities would undermine the NLRA's exclusivity principle,\footnote{113} which designates the union as the employees' exclusive bargaining agent.\footnote{114} The Court of Appeals for the District of Columbia Circuit reversed, holding that self-help activity was protected unless "the union was actually remedying the discrimination to the fullest extent possible, by the most expedient and efficacious means."\footnote{115} The court apparently thought that this result was necessary to harmonize

\footnote{113} Section 9(a) of the NLRA, 29 U.S.C. § 159(a) (1970), provides in pertinent part:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . .

Section 8(a)(5) of the Act, 29 U.S.C. § 158(a)(5) (1970), provides that an employer who refuses to bargain collectively with his employees' representatives commits an unfair labor practice. Together, § 9(a) and § 8(a)(5) direct the employer to bargain with the majority representatives with respect to all matters concerning "rates of pay, wages, hours of employment, or other conditions of employment." An employer who bargains on such matters with any person other than the majority representative, including individual employees who seek to deal directly with the company, commits an unfair labor practice. See Medo Photo Supply Corp. v. NLRB, 321 U.S. 678 (1944); J.L. Case Co. v. NLRB, 321 U.S. 332 (1944).

\footnote{114} Emporium & Western Addition Community Organization v. NLRB, 192 N.L.R.B. 173, 185 (1971).

\footnote{115} Western Addition Community Organization v. NLRB, 485 F.2d 917, 931 (D.C. Cir. 1973) (emphasis omitted). The imposition of this requirement was questionable because an independent remedy was available to the employees if their union failed to present their grievances fairly. See Miranda Fuel Co., 140 N.L.R.B. 181 (1962), enforcement denied, 326 F.2d 172 (2d Cir. 1963). A breach of duty occurs when the union's conduct toward the employee is "arbitrary, discriminatory, or in bad faith," Vaca v. Sipes, 386 U.S. 171, 190 (1967); in that situation, the employee may seek damages from both the employer and the union. Id. at 196-97. See generally Lewis, Fair Representation in Grievance Arbitration: Vaca v. Sipes, 1967 Sup. Ct. Rev. 81. A union's breach of its duty of fair representation, at least in race discrimination cases, also has been held to violate Title VII. See Macklin v. Spector Freight Sys., Inc., 478 F.2d 979 (D.C. Cir. 1973). The "most efficacious" standard established by the District of Columbia Circuit in Western Addition also has been criticized for its potentially emasculating effect on the exclusivity principle in cases of race discrimination, on the NLRA's objective of insulating lawful and established bargaining relationships from the pressure of recognitional picketing by rival labor organizations, and on the national policy promoting arbitration, rather than economic pressure, as the most appropriate means of resolving disputes that arise under collective bargaining agreements. See Discrimination Remedies, supra note 17, at 33-36.
the NLRA with Title VII, which it regarded as protecting peaceful picketing by employees.\footnote{116}{485 F.2d at 927-30.}

The Supreme Court reversed and reiterated the Board’s position that protecting the employees’ activities in this situation would subvert the labor laws’ goal of majority rule. The decision emphasized the union’s “legitimate interest in presenting a united front on this as [well as] on other issues and in not seeing its strength dissipated and its stature denigrated by subgroups within the unit separately pursuing what they see as separate interests.”\footnote{118}{Id. at 70.} The Court added that, if the employer and the union did not comply with their legal obligations, the employees could seek legal remedies, “whether by means of conciliation through the offices of the EEOC, or by means of federal-court enforcement at the instance of either that agency or the party claiming to be aggrieved.”\footnote{119}{Id. at 72.} The Court thereby rejected the contention that the self-help conduct should have been protected under the NLRA to accommodate that Act with Title VII, and particularly with section 704(a). If the employees’ conduct was protected by section 704(a), Title VII provided the means through which the employees could vindicate their rights.\footnote{120}{Id. at 72.} More importantly, the Court disagreed that the employees’ conduct necessarily was protected by section 704(a), noting that “[w]hether the protection afforded by § 704(a) extends only to the right of access [to enforcement agencies] or well beyond it” was not a question properly presented in the case.\footnote{121}{Id. at 71 n.25.} This statement signaled the Court’s retreat from its previous broad pronouncement that section 704(a) protected employees “attempting to protest or correct allegedly discriminatory conditions of employment.”\footnote{122}{McDonnell Douglas Corp. v. Green, 411 U.S. at 796 (1973).}

The concern voiced by the Supreme Court in \textit{Emporium Capwell} that self-help activities not be permitted to interfere with the central goals of the labor laws is equally applicable to section 704(a). An extension of protection to such actions, either under section 8(a)(1) of the NLRA or under section 704(a) of Title VII, would undermine both the principle of exclusivity that promotes effective collective bargaining and the goal that arbitration, rather than coercion, be used to resolve grievances.\footnote{123}{See Smith, supra note 26, at 390. Smith argues persuasively that a limitation of the Court’s comments to § 8(a)(1) trivializes \textit{Emporium} to a finding that}
competing claims to the employer would threaten industrial peace, regardless of how the employer treated the claims. If the employer was required to deny the claims of one group to satisfy another, the attendant disharmony would produce strife not only between employees and their employer but also among the employees themselves. In contrast, no important interests would be served by protecting the conduct. The picketing employees in Emporium Capwell had two separate but compatible remedies: arbitration and the filing of charges under Title VII. If they had pursued both, an adverse arbitral finding would not have barred their Title VII action. Both methods of resolving the dispute would have enjoyed the finality and respect absent in a coerced concession, and both would have provided an effective procedure for determining whether discrimination actually had occurred. In Emporium Capwell the picketers unilaterally made this determination, a conclusion that the Labor Board later rejected. The employees avoided the process available to them for obtaining an impartial determination of the issue and instead resorted to tactics of economic coercion. The significant fact is not that the NLRB differed with the employees in assessing the situation, but rather that the Board (or some other appropriate agency) was not given the opportunity to determine whether the grievances were valid. The employees in effect acted as judges of their own claim and enforcers of their own remedy.

In 1975, seventy-four percent of all collective bargaining agreements contained prohibitions of various forms of discrimination. These contractual guarantees, combined with the legal guarantee of full union representation, provided many employees with the two separate remedies recognized by the Supreme Court in Emporium Capwell. Both remedies, arbitration and Title VII charges, relieve redress was sought in the wrong forum. See also Lopatka, supra note 30, at 1216-18.

125. 192 N.L.R.B. at 184. The Board also found that the employees had a good faith belief that they were the objects of the company's discrimination. Id.
128. A number of impediments prevent arbitration from being an effective remedy in every situation. For example, unions traditionally have been insensitive
the employee from the burden of independently investigating his claim. The complexity of Title VII laws suggests that employee and employer alike rarely are qualified to assess accurately the merits of a discrimination claim or to determine the appropriate relief or remedy if discrimination exists. Unilateral action, therefore should be discouraged on both sides of the dispute. Doubtful claims may be resolved through informal discussion or through the available processes for adjudicating such claims.

The exclusivity principle arguably could preclude informal discussion between employee and employer relating to the existence of discrimination. Section 9(a) of the NLRA, however, grants employees the right to present grievances to their employer without the intervention of the bargaining representative. The employer and employee may resolve the grievance individually in a manner consistent with the terms of the collective bargaining agreement if the bargaining representative is given the opportunity to be present at the adjustment. The right conferred by section 9(a) is unenforceable against the employer, and merely allows the employer to adjust the grievance with the individual employee. The employer need not entertain the grievance and may require the worker to use the procedures established under the collective bargaining agreement. Permitting the employee to discuss a discrimination-related grievance would not violate the exclusivity principle. Informal employee discussions with an employer concerning suspected discrimination, moreover, provides the parties with an opportunity to reach a private, uncoerced resolution of the grievance, a result consistent with the goals of Title VII. If they fail to resolve their differences, the employee may invoke

to affirmative action against discrimination and have attached a low priority to enforcement of such clauses in their contracts. See Gould, supra note 35, at 48; Gould, Racial Equality in Jobs and Unions, Collective Bargaining, and the Burger Court, 68 Mich. L. Rev. 237, 244 (1969). In addition, arbitrators usually are reluctant to rely on public law concepts in their decisions, and they generally regard their function as enforcing the parties' intent rather than advancing salutary notions of public policy. See Meltzer, Labor Arbitration and Overlapping and Conflicting Remedies for Employment Discrimination, 39 U. Chi. L. Rev. 30, 32-33 (1971); Feller, supra note 126. Arbitration can be an effective remedy, however, when the particular claim advanced is individual in scope and one that can be resolved without modifying the collective bargaining agreement with respect to the "rules of the shop." See Robinson & Neal, Arbitration of Employment Discrimination Cases: A Prospectus for the Future, in ARBITRATION—1976, supra note 126, at 20, 28.

130. Id.
131. See Black-Clawson Co. v. Machinists Lodge 355, 313 F.2d 179 (2d Cir. 1962).
arbitration or Title VII remedies. Thus, an informal employee-employer discussion harms no cognizable interest under the labor laws or Title VII.

CONCLUSION

Participation by individual employees or applicants for employment in Title VII's enforcement machinery remains indispensable to accomplishing the congressional mandate that employment discrimination be eliminated. Individuals invoking their statutory rights serve not only their personal interests but also the public interest in securing equal employment opportunities for all. Without their participation, the EEOC cannot adequately fulfill its responsibilities. To encourage individual participation in the enforcement process, potential complainants must be protected from employer reprisal when they file a charge with the EEOC, regardless of the charge's validity. The possible victim of discrimination should be required neither to relinquish his rights nor to gamble on the correctness of his grievance at the risk of employer retaliation.

These considerations also apply to employees engaging in activities opposed to perceived discriminatory employment practices; private resolution of discrimination disputes should be encouraged if it can be achieved without coercion. Practically, an employee may want to seek such a settlement before filing a charge, either as a means for seeking clarification or additional evidence or as a courtesy to his employer. An employer correspondingly experiences less inconvenience from a direct approach by an employee than he does from the filing of a discrimination charge. Opposition need not be protected, however, when an employee seeks to substitute self-help for enforcement through statutory procedures established to eliminate the need for such actions.

Although the employee who engages in opposition activities or who resorts to Title VII's formal legal processes should be protected from retaliation, Congress did not intend to provide the complainant with more security than he otherwise would have enjoyed in the absence of his participation in protected activities. The purpose of section 704(a) is to protect employees who oppose discrimination from retaliation prompted by their opposition activities but not to insulate the incompetent or unruly employee from discharge, irrespective of the employer's attitude toward the worker's participation in opposition activities. Such an extended protection would lead to the proliferation of frivolous complaints without advancing any of the objectives of Title VII.