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Retaliation in the EEO Office

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RETALIATION IN THE EEO OFFICE

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INTRODUCTION

The growth of employer policies and procedures governing equal employment opportunity ("EEO") in the workplace, replete with an expanding cohort of employees overseeing them, has set the stage for a crisis in retaliation law. One of the more significant yet under-explored developments in the law of employment discrimination is the no-man's

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land in which employees who handle EEO matters find themselves when they experience retaliation. In recent years, importing doctrines from other areas of employment law, courts have denied employees protection from retaliation for handling internal complaints challenging discrimination under employer policies. Employees charged with responsibility for EEO compliance increasingly find themselves unprotected from retaliation for acting, within their prescribed roles, in opposition to discrimination instead of towing the company line. This development not only undermines the effectiveness of retaliation law by creating a virtual exemption for a class of employees based on their job description, but it also threatens the integrity of discrimination law more broadly.

This article explains why the current framework for addressing retaliation against EEO personnel is untenable. It also exposes the complicated questions that arise in thinking about how retaliation law should be reconfigured to protect these employees. The core dilemma is that handling internal discrimination complaints and overseeing EEO compliance—essentially, actions "opposing" discrimination—are part of the employee's job duties. And yet, reviewing employee job performance is well within the realm of discretionary conduct by employers left unchecked by the limited intrusion of discrimination statutes into the pre-existing employment-at-will regime. When an employee's job duties include EEO compliance, a negative evaluation of how the employee performs that responsibility is both, simultaneously, legitimate oversight of job performance and adverse action for opposing discrimination. As employers continue to internalize Title VII compliance responsibilities and assign them to their own employees, retaliation law is called upon to distinguish between employers' permissible oversight of job performance and unlawful retaliation for opposition to discrimination. So far, retaliation law has done a miserable job. The underlying difficulty is that when an employee's job responsibilities encompass EEO compliance, job performance and protected activity are one and the same.

By exploring this emergent gap in retaliation law, this article calls attention to the vulnerability of employees who, in the course of performing EEO responsibilities, are punished for their actions taken in opposition to discrimination. Part I sketches the developments in the law that have contributed to the prominence of the EEO office in the modern workplace and lays the groundwork for critiquing retaliation law's failure to keep pace with these developments. It begins by describing the shift to internal governance of the workplace—that is, the proliferation of internal policies and procedures for addressing discrimination and the legal incentives for having such policies. It then describes the role-conflicts experienced by the employees charged with implementing these policies. Finally, it provides a summary of how retaliation law distinguishes internal and external complaints, with different levels of legal protections depending on the path of the complaint. Since employer EEO processes involve internal complaints, they are governed by Title VII's opposition clause, which offers a lower level of protection from retaliation than the participation clause, which governs complaints made to external enforcement agencies.

Part II describes the developments in retaliation law that result in denying even the lower tier protection of the opposition clause to the employees who perform EEO responsibilities. First, these employees face a distinctive problem under the generally applicable reasonable belief doctrine, since retaliation that occurs early in the complaint process can halt an investigation before any foundation for forming a reasonable belief exists. Second, for the EEO employee who can clear the reasonable belief requirement, an even more

substantial obstacle awaits. A newly-developing doctrine, labeled by some courts as the "manager rule," denies protection from retaliation to employees whose job duties involve overseeing internal discrimination complaints. The remainder of this section traces the evolution of this doctrine and its expanding roots in discrimination law.

Part III explores the incoherence of the retaliation doctrines that are ensnaring EEO employees. It first delves deeper into the cases in which EEO employees have prevailed, in search of a limiting principle that ultimately proves elusive. It then discusses the dilemmas the doctrine poses for EEO employees seeking to retain protection from retaliation. Courts' insistence that these employees step outside their EEO roles in order to secure protection risks subjecting them to punishment for insubordination and disloyalty. The principles articulated in these cases provide no safe way out of the dilemma. The section concludes by explaining this doctrinal incoherence as a product of the clash between discrimination law's incorporation of internal policies and procedures, which necessitates the employment of persons whose job responsibilities include overseeing EEO compliance, and the retention of an employment-at-will regime that ensures employer discretion in supervising job performance. In this complicated stew, it is impossible to separate a retaliatory motive from the employer's legitimate oversight of job performance. The employee's job duties are inseparable from opposition to discrimination.

Part IV evaluates these developments in retaliation law against the backdrop of discrimination law's acceleration of internal grievance procedures and anti-discrimination policies. Over the past two decades, legal standards have incorporated internal policies and procedures for handling discrimination into substantive determinations about compliance with the law. And yet, the lack of safeguards for the employees implementing these internal policies and governance procedures should call into question the integrity of such policies and procedures. Without strong protection from retaliation, employers gain the benefit of having EEO internal policies and procedures without any assurance that they actually serve the preventive and remedial functions the law attributes to them. The result is a sharp incongruity between retaliation law and the legal framework that has developed to address discrimination claims. This section concludes by arguing that, given the unlikelihood of reversing the law's embrace of internal governance, the doctrines that have developed to withhold retaliation protection from EEO employees should be replaced with a more transparent balancing of the employer's and employee's interests in such cases. A forthright evaluation of the reasonableness of the employee's actions opposing discrimination, as judged from the perspective of a reasonable EEO professional following the employer's antidiscrimination policy, would offer a better measure of protection for EEO employees than existing law, while still permitting employers to punish poor job performance that exceeds the boundaries of reasonableness. While far from perfect, such a balancing test would be preferable to the current virtual exclusion of EEO employees from retaliation law's protections.

I. MAPPING THE EEO OFFICE AND ITS PLACE IN RETALIATION LAW

One of the most important developments in workplace law in the past two decades is the proliferation of internal employer policies and procedures for managing conflicts in

the workplace.[1] In particular, questions, concerns, and disputes about perceived discrimination are now governed by comprehensive employer policies on the subject, with detailed processes for channeling complaints. Discrimination law, under the guise of encouraging voluntary compliance and preventing discrimination, has warmly embraced and encouraged this trend. Retaliation law, however, marks a sharp divide in the protections afforded complaints about discrimination depending on whether they are pursued through an official statutory enforcement mechanism—the EEOC, a state fair employment agency, or a court—or voiced internally to the employer. While the former set of complaints trigger the full scope of the law's protection, the latter group triggers a different set of rules. The bifurcation of retaliation law into separate tiers of protection for internal and external complaints laid the groundwork for the development of the distinctive doctrinal rules governing EEO employees.

A. The Normalization of Employer Nondiscrimination Policies

The judicial embrace of legal incentives encouraging employers to promulgate policies and procedures for handling discrimination complaints began in earnest in the late 1990s. A pair of cases decided in 1998 made employer liability for supervisory sexual harassment turn largely on the existence and use of internal harassment policies and grievance procedures. In *Burlington Industries, Inc. v. Ellerth*[2] and *Faragher v. City of Boca Raton*,[3] the Supreme Court adopted an affirmative defense to employer liability for a supervisor's sexual harassment, not involving a tangible employment action, where the employer shows: 1) that it acted reasonably to prevent and correct harassment; and 2) that the plaintiff acted unreasonably in failing to prevent or mitigate harm. While the Court did not spell out the precise contours of these two prongs, it clearly made anti-harassment policies and complaint processes a cornerstone of the defense. As applied by lower courts, the existence of internal policies and complaint procedures for addressing sexual harassment, coupled with the plaintiff's failure to use them in a reasonably prompt fashion, is generally sufficient to establish the affirmative defense.[4]

In the wake of *Ellerth* and *Faragher*, employer anti-harassment policies and procedures have become enshrined in the legal framework for determining employer liability for harassment. Although adopted in cases involving sexual harassment, the same liability framework applies to other forms of harassment covered by Title VII—harassment based on race, color, religion, or national origin, so that these broader harassment policies are incorporated into the substantive legal standards for these kinds of harassment as well.[5] Since these cases were decided, writing anti-harassment policies, consulting on and designing complaint channels, and conducting trainings for employees on these policies have

1. *See generally* Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319 (2005).

2. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998).

3. Faragher v. City of Boca Raton, 524 U.S. 775 (1998).

4. See, e.g., Susan Bisom-Rapp, *An Ounce of Prevention Is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law*, 22 BERKELEY J. EMP. & LAB. L. 1, 5–6 (2001) [hereinafter Bisom-Rapp, *An Ounce of Prevention*].

5. *See* Deborah L. Brake, *Retaliation in an EEO World*, 89 IND. L.J. 115, 129, 132 (2014) [hereinafter Brake, *Retaliation in an EEO World*].

become a cottage industry.[6] It is the rare employer today that lacks a policy prohibiting unlawful harassment and a process for complaining about it.[7]

Harassment law is not the only area of Title VII law that incorporates an employer's internal policies and grievance procedures into the legal framework of employer liability for discrimination. Employer liability for constructive discharge, in cases where the discriminatory action precipitating the "quit" falls short of a tangible employment action, also turns on the same affirmative defense.[8] In such cases, the employee's unreasonable failure to report the precipitating discriminatory acts through the employer's nondiscrimination policy will exonerate the employer of liability for constructive discharge. Regardless of the type of discrimination alleged, the existence of an employer antidiscrimination policy is also relevant to the plaintiff's ability to seek punitive damages for proven discrimination. One year after the *Faragher* and *Ellerth* decisions, in *Kolstad v. American Dental Association*,[9] the Supreme Court limited the availability of punitive damages under Title VII to cases where the plaintiff shows that the employer acted in bad faith or with a reckless disregard toward employee rights. Employers may avoid such a finding, the Court instructed, if they "adopt anti-discrimination policies and . . . educate their personnel on Title VII's prohibitions."[10] By tying immunity from punitive damages to employer policies, the ruling encourages employers to have broad anti-discrimination policies and procedures.

A recent Supreme Court decision suggests that employer nondiscrimination policies may eventually become even more tied into the doctrinal rules regulating employer liability. In *Staub v. Proctor Hospital, Inc.*,[11] the Court pointedly left open the possibility that the existence of an internal anti-discrimination policy and complaint procedure, combined with the plaintiff's failure to use it, could potentially break the chain of causation in cases where a biased subordinate influences a manager to take discriminatory action against the plaintiff. In *Staub*, the Court resolved the so-called "cat's paw" issue that had perplexed the lower courts by ruling that the employer is liable when a supervisory employee acts with discriminatory intent to cause a higher-up employee to take adverse action against the plaintiff.[12] While upholding employer liability in such cases, the Court raised the possibility that the existence of an employer policy and process for challenging discrimination, coupled with the employee's failure to take advantage of it, might break the chain of causation and exonerate the employer from liability.[13] If that contingency, which the Court raised in *dicta*, were to materialize into a new rule limiting employer liability, the presence of internal discrimination policies and complaint channels would play an even bigger role

6. Susan Bisom-Rapp, *Fixing Watches with Sledgehammers: The Questionable Embrace of Employee Sexual Harassment Training by the Legal Profession*, 24 U. ARK. LITTLE ROCK L. REV. 147, 147–55 (2001).

7. FRANK DOBBIN, INVENTING EQUAL OPPORTUNITY 93–97, 201, 213 (2009).

8. *See* Pa. State Police v. Suders, 542 U.S. 129 (2004).

9. Kolstad v. American Dental Association, 527 U.S. 526 (1999).

10. *Id*. at 545.

11. Staub v. Proctor Hospital, Inc., 131 S. Ct. 1186 (2011). Although *Staub* involved a claim brought under the Uniformed Service Employees Rights and Responsibilities Act (USERRA), it is widely understood to govern Title VII actions as well. *See* Charles A. Sullivan, *Tortifying Employment Discrimination*, 92 B.U. L. REV. 1431, 1433–36 (2012).

12. *Staub*, 131 S. Ct. at 1192. The "cat's paw" label derives from an Aesop's fairy tale about a cat who manipulated a monkey to do its bidding, making the monkey the "cat's paw;" once used to describe this class of cases, the metaphor has stuck. *Id.* at 1190 n.1.

13. *Id.* at 1194 n.4 ("We also observe that Staub took advantage of Proctor's grievance process, and we express no view as to whether Proctor would have an affirmative defense if he did not.").

in establishing employer compliance in an even wider class of cases.

The prevalence of employer anti-discrimination policies and the legal rules incentivizing them are now so entangled that it is hard to tell which came first. Some law and society scholars have made a persuasive case that the law's embrace of employer policies was, in fact, endogenous; that is, the widespread adoption of anti-discrimination policies by employers predated and precipitated courts' integration of them into the substantive law of discrimination.[14] By this account, personnel professionals and EEO specialists succeeded in filling a regulatory void with policies, complaint procedures and training programs that came to define judicial understandings of employer compliance with the external law.[15] In support of this narrative, Frank Dobbin makes the point that the vast majority of employers already had sexual harassment policies and complaint procedures in place before the Court decided the *Faragher* and *Ellerth* cases.[16] When the Court accepted the significance of employer anti-harassment policies as evidence of compliance with the law, it reflected, rather than initiated, the trend towards employer adoption of internal policies and procedures for addressing discrimination.[17]

In addition to the doctrinal rules that formally incentivize employer policies, employer anti-discrimination policies, and complaint procedures are also incorporated into the substantive law through less formal mechanisms. Because the legal standard for disparate treatment, the most common employment discrimination claim, requires proof of discriminatory intent, employer anti-discrimination policies play an important role in evidencing substantive compliance with the law.[18] Such policies are viewed as symbolic manifestations of good faith efforts to prevent discrimination, so much so that judges often equate the existence of employer anti-discrimination policies and complaint procedures with substantive legal compliance itself.[19] The EEOC, which encourages employers to adopt nondiscrimination policies and grievance procedures, also looks favorably on such measures.[20] Research investigating the resolution of charges filed with the EEOC has found that the EEOC is significantly less likely to find "cause" for discrimination when the employer has an anti-discrimination policy and grievance procedure.[21] This presump-

14. *See* DOBBIN, *supra* note 7.

15. *Id*. at 1–21.

16. *Id*. at 191, 213. *See also* Elizabeth Chambliss, *Title VII as a Displacement of Conflict*, 6 TEMPLE POL. & CIV. RTS. L. REV. 1, 9–10 (1997) (discussing the shift by employers to adopt internal policies and procedures addressing discrimination that was in full swing by the mid-1990s).

17. DOBBIN, *supra* note 7, at 4, 191.

18. *See* Lauren B. Edelman, Linda H. Krieger, Scott R. Eliason, Catherine R. Albiston & Virginia Mellema, *When Organizations Rule: Judicial Deference to Institutionalized Employment Structures*, 117 AM. J. SOC. 888, 929–30 (2011).

19. *See* Lauren B. Edelman, *Law at Work: The Endogenous Construction of Civil Rights*, *in* HANDBOOK OF EMPLOYMENT DISCRIMINATION RESEARCH 337 (Laura Beth Nielson & Robert L. Nelson eds., 2005); Lauren B. Edelman, Christopher Uggen & Howard S. Erlanger, *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, 105 AM. J. SOC. 406, 407 (1999) [hereinafter Edelman et al., *The Endogeneity of Legal Regulation*].

20. *EEOC Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors*, 8 FAIR EMPL. PRAC. MANUAL (BNA) No. 966, at 405, 7651, 7661 (July 1999); *EEOC Compliance Manual*, No. 915.003, Section 15; Race & Color Discrimination 1104-21 (Apr. 19, 2006), *available at* www.eeoc.gov/policy/docs/race-color.html.

21. C. Elizabeth Hirsh & Sabino Kornrich, *The Context of Discrimination: Workplace Conditions, Institutional Environments, and Sex and Race Discrimination Charges*, 113 AM. J. SOC. 1394, 1424–25 (2008).

tion of compliance redounds to the benefit of employers in all kinds of cases alleging intentional discrimination, not just harassment cases.[22]

The Supreme Court viewed an employer anti-discrimination policy in a similar light in its landmark decision overturning class certification in *Wal-Mart Stores, Inc. v. Dukes*.[23] The Court cited Wal-Mart's establishment of a company-wide policy prohibiting discrimination to help defeat the inference, urged by the plaintiffs, of a common policy of discrimination through the exercise of delegated discretion.[24] The existence of the company anti-discrimination policy had more explanatory force to the Court in accounting for the decisions of individual supervisors than the social framework testimony offered by the plaintiffs to show the existence of an unwritten policy of biased decision-making.

Whether because of the law, or as a precursor to it and a driving force behind the development of the law, employer anti-discrimination policies and internal grievance processes have become the norm in the modern workplace.[25] Keeping this machinery running requires a legion of employees whose job responsibilities, in full or in part, consist of overseeing these policies and complaint processes.[26]

B. The Dual Role of the EEO Employee

The deluge of employer anti-discrimination policies and procedures requires a throng of employees to oversee and implement them. Job titles vary, as does the precise structuring of these jobs.[27] Large employers may have one or more dedicated employees whose full-time responsibilities involve EEO compliance.[28] Smaller employers may lump these responsibilities in with other human resources matters, placing them in the hands of a human resources department or personnel office.[29] Other employers may allocate these responsibilities more diffusely, making many or even all supervisors responsible for EEO matters arising within their departments, instructing them to report discrimination complaints through a chain of command, and handle them according to company policy. Typ-

22. *See* Lauren B. Edelman, *Rivers of Law and Contested Terrain: A Law and Society Approach to Economic Rationality*, 38 LAW & SOC'Y REV. 181, 190 (2004); C. Elizabeth Hirsh, *Settling for Less? Organizational Determinants of Discrimination-Charge Outcomes*, 42 LAW & SOC'Y REV. 239 (2008); *see also* Edelman et al., *The Endogeneity of Legal Regulation*, *supra* note 19, at 407 ("grievance procedures have emerged over the past few decades as the primary symbol of nondiscrimination and as the most rational way for employers to insulate themselves from legal liability").

23. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011).

24. *Id*. at 2554 ("To the contrary, left to their own devices, most managers in any corporation—and surely most managers in a corporation that forbids sex discrimination—would select sex-neutral, performance-based criteria for hiring and promotion that produce no actionable disparity at all.").

25. *See, e.g.*, Bisom-Rapp, *Fixing Watches with Sledgehammers*, *supra* note 6, at 147–55; DOBBIN, *supra* note 7, at 213; Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 334–36 (2005); Crawford v. Metro. Gov't of Nashville and Davidson Cnty., Tenn., 555 U.S. 271, 278–79 (2009) (noting citation of studies by Petitioner "demonstrating that Ellerth and Faragher have prompted many employers to adopt or strengthen procedures for investigating, preventing, and correcting discriminatory conduct").

26. *See* DOBBIN, *supra* note 7, at 86–88, 93–97, 130–31.

27. *See* Floyd D. Weatherspoon, *Don't Kill the Messenger: Reprisal Discrimination in the Enforcement of Civil Rights Laws*, 2000 L. REV. M.S.U.-D.C.L. 367 n.1 (listing various titles, including: EEO officer, counselor, affirmative action officer, diversity manager, compliance officer, and EEO investigator; and noting that EEO duties are sometimes given to persons with other responsibilities and broader titles, such as general counsel).

28. *See* DOBBIN, *supra* note 7, at 86–88, 95–97, 130–31 (describing range of EEO personnel assignments).

29. *Id.*

ical EEO responsibilities include investigating and responding to discrimination complaints brought by other employees.[30] EEO personnel are also called upon to flag potential compliance problems, bringing them to the attention of the employer and making recommendations to resolve them. In short, employees in these roles, whatever their title, conduct the work of "opposing discrimination."

However EEO responsibilities are packaged and parceled out, the employees performing these functions face structural conflicts and challenges. They are tasked with duties that create divided loyalties to management and to their fellow employees, and to the anti-discrimination directives of their employers' policies and the law itself.[31] In the course of performing these responsibilities, conflicts may arise over the substance of, and appropriate response to, employee discrimination complaints.[32] In straddling these intersecting and potentially conflicting loyalties, the EEO employee may be viewed simultaneously as a "company man" by fellow employees and as a troublemaker by management. The conflicts inherent in EEO responsibilities leave these employees vulnerable to charges of disloyalty from both of these constituencies.

In the event of a conflict, the EEO employee has the most to lose from a rift with management. The nature of EEO responsibilities makes such conflicts endemic to the job. As Floyd Weatherspoon has explained, the employee "who raises an issue of discrimination and opposes such conduct may be viewed as being disloyal to the organization."[33] The robust performance of EEO functions can set the EEO employee on a collision course with the employer. The employer's interest is best served by having anti-discrimination policies and procedures, but not necessarily by their vigorous implementation.[34] For example, the EEO employee who questions or seeks to block a personnel action which she believes would jeopardize the employer's compliance with Title VII may find herself in conflict with higher-up employees. Likewise, in counseling employees on their EEO rights, she walks a fine line in performing this function with integrity without being viewed as overly pro-employee and antagonistic to management.[35] The potential for conflict is especially great if the person accused of bias is high in the power structure. In the event of such conflict, the mere existence of an anti-discrimination policy is no guarantee that the employer will support the actual work of the EEO employee seeking to implement that policy. The presence of EEO personnel in the workplace does not necessarily reflect management's agreement with the vigorous performance of these responsibilities. Displaying the EEO banner may be more of a reflection of the legal incentives described earlier, augmented by a public relations boost, than a philosophical alignment with the mission of EEO work.[36]

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30. *See* Chambliss, *supra* note 16, at 10 n.44 (discussing the various responsibilities of EEO personnel).

31. *See* Jeffrey A. Mello, *The Dual Loyalty Dilemma for HR Managers Under Title VII Compliance*, 65 SAM ADVANCED MANAGEMENT J. 10, 11–12 (2000) (discussing the dual role and role conflicts facing the HR manager charged with Title VII compliance).

32. *See* Weatherspoon, *supra* note 27, at 367. In addition, particular disagreements may arise over the scope of any duty of confidentiality, since employees may have an expectation of confidentiality when they confide EEO matters, while employers may demand to be informed about any and all complaints. *Id.* at 390.

33. *Id.* at 401–02.

34. *Id.* at 394.

35. Floyd Weatherspoon makes each of these points, discussing the precarious role of EEO employees and their vulnerabilities to reprisal. Weatherspoon, *supra* note 27, at 404.

36. For further discussion of the "pivotal role" of EEO employees, and an argument that they function as "lightning rods" for displacing conflict over discrimination in the workplace. *See* Chambliss, *supra* note 16, at

Other factors particular to the employer may exacerbate the vulnerability of the EEO employee. For example, employees who handle complaints about an allegedly discriminatory action taken by the personnel office are sometimes supervised by the director of the personnel office, creating an additional layer of conflict.[37] Another variable is the level of support and resources provided to the employees responsible for EEO matters. It is a frequent complaint of such employees that they are not given sufficient resources and organizational power to do their jobs effectively.[38] With more companies outsourcing human resources functions, employees in these roles must continually prove their worth to management, making them especially vulnerable to charges of disloyalty in internal conflicts.[39]

Race and gender relations within the organization may further complicate the work of the EEO employee. Many women and persons of color work in jobs with EEO responsibilities.[40] While their gender and racial identities do not necessarily translate into low organizational power, being a minority and/or female can exacerbate the vulnerability of the EEO employee to charges of being "biased" toward employees, especially in dealing with discrimination complaints by other women and people of color.

While there are no official statistics quantifying the frequency with which EEO employees experience retaliation, the evidence that exists suggests that this is a real concern. A survey of EEO/affirmative action employees conducted in 1998 by Floyd Weatherspoon found that 67% of them believed that they had experienced reprisal for their efforts to further EEO goals, although only 4% actually filed an EEO complaint against their employer in response.[41] Literature from the field of human resources management confirms that human resources professionals who take a strong stance against discrimination in their workplace risk jeopardizing their careers.[42] Given the structural and institutional position of the EEO employee, such findings are not surprising.

C. A Primer on Retaliation Law: "Opposition" versus "Participation"

Section 704(a) of Title VII makes it unlawful for an employer to discriminate against any employee "because he has opposed any practice, made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title."[43] Courts have interpreted this language to set forth two distinct clauses with varying levels of protection. The first, the "opposition clause," applies to employees who oppose discrimination internally, without invoking the formal enforcement machinery of Title VII.[44] The second, the "par-

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1–3, 33.

37. Weatherspoon, *supra* note 27, at 397–98.

38. *Id.* at 393–97.

39. *See* Lynne Bennington, *HRM Role in EEO: Sheep in Shepherd's Clothing?*, 65 J. BUS. ETHICS 13, 16 (2006).

40. Weatherspoon, *supra* note 27, at 397.

41. *Id.* at 383 n.88; *see also* Chambliss, *supra* note 16, at 36–41 (discussing a case study and examples of the "personalization" and "displacement" of workplace conflict onto the employer's EEO compliance officer).

42. *See* Bennington, *supra* note 39, at 16 (summarizing research findings).

43. 42 U.S.C. § 2000e-3(a) [§ 704(a)].

44. *See, e.g.*, Correa v. Mana Prods., Inc., 550 F. Supp. 2d 319, 327-28 (E.D.N.Y. Mar. 17, 2008) (citing authorities). The only judicially recognized exception to this rule is for EEO complaints made by federal employees through the complaint channels within their internal agency, which some courts have treated as triggering the protections of the participation clause since federal government has special statutory requirements for internal

ticipation clause," applies once Title VII's formal enforcement machinery has been invoked through the filing of a charge with the EEOC or state enforcement agency.[45] The dividing line between the two clauses turns on whether or not a formal charge was filed with appropriate government agency; if not, any claim for retaliation is governed by the opposition clause.[46]

Title VII has played an out-sized role in the development of retaliation law under other discrimination statutes. To date, all federal statutes that prohibit employment discrimination either have explicit language prohibiting retaliation or have been judicially interpreted to implicitly prohibit retaliation.[47] Courts add content to retaliation bans under these statutes by generally adhering to the standards that have developed under Title VII.[48] Even in the absence of statutory language separating internal opposition from formal enforcement, courts have imported Title VII's legal standards separating internal opposition from external participation and applied them to retaliation claims brought under other employment discrimination statutes.[49]

For any retaliation claim, the plaintiff must prove three core elements: (1) protected activity; (2) adverse action; and (3) causation; that is, that the protected activity caused the adverse action.[50] The difference between opposition clause claims and participation clause claims lies in the legal standards governing the first element, protected activity. By far the broader protection is found under the participation clause. Participating in formal enforcement proceedings is fully protected, regardless of the merits of the underlying discrimination charge and regardless of the form that the participation takes.[51] Some cases go so far as to protect employees under the participation clause even when their participation is adjudged to be in bad faith.[52] In more recent years, courts have drawn the line at bad faith

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EEO processes. *See* Hashimoto v. Dalton, 118 F.3d 671 (9th Cir. 1997); Kurtz v. McHugh, 423 F. App'x. 572 (6th Cir. 2011).

45. *See, e.g.*, EEOC v. Total Sys. Servs., Inc., 221 F.3d 1171, 1174 n.3 (11th Cir. 2000) (participation clause does not apply where no EEOC charge had yet been filed); Vasconcelos v. Meese, 907 F.2d 111, 113 (9th Cir. 1990) (same); Byers v. Dallas Morning News, Inc., 209 F.3d 419 (5th Cir. 2000) (same). Courts are divided on the question of whether participating in an employer's internal investigation that occurs in response to the filing of a formal EEOC charge falls under the participation clause. *See* Abbott v. Crown Motor Co., 348 F.3d 537, 543 (6th Cir. 2003) (yes); Clover v. Total Sys. Services, Inc., 176 F.3d 1346, 1353 (11th Cir. 1999) (same); *but cf.* Hatmaker v. Memorial Medical Ctr., 619 F.3d 741, 746–47 (7th Cir. 2010) (reserving judgment on that question).

46. *See, e.g.*, Van Portfliet v. H&R Block Mortgage Corp., 290 Fed. App'x 301 (11th Cir. 2008) ("the participation clause has no application where an employee participates only in an internal, in-house investigation conducted apart from a formal EEOC charge"). Indeed, filing an internal complaint pursuant to company policy is on the same footing as informally expressing a concern about discrimination to anyone in the workplace, with both actions falling under the opposition clause and governed by the same standards. *See, e.g.*, Muhammad v. Audio Visual Servs. Grp., 380 Fed. App'x. 864, 872 (11th Cir. 2010).

47. Statutes with specific provisions banning retaliation include the Age Discrimination in Employment Act ("ADEA"), the Americans with Disabilities Act ("ADA"), the Family and Medical Leave Act ("FMLA"), and the Equal Pay Act. Other statutes have been construed to implicitly encompass retaliation. *See* Jackson v. Birmingham Bd. of Educ., 544 U.S. 167 (2005) (Title IX); CBOCS West, Inc. v. Humphries, 553 U.S. 442 (2008) (42 U.S.C. § 1981); Gomez-Perez v. Potter, 553 U.S. 474 (2008) (the federal employees provisions of the ADEA).

48. *See, e.g.*, Preston v. Va. *ex rel.* New River Cmty. Coll., 31 F.3d 203 (4th Cir. 1994) (Title IX); Sarno v. Douglas Elliman-Gibbons & Ives, Inc., 183 F.3d 155 (2d Cir. 1999) (ADA); Peters v. Jenney, 327 F.3d 307 (4th Cir. 2003) (Title VI).

49. *See, e.g.*, Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 83–84 (2005) [hereinafter Brake, *Retaliation*].

50. *See, e.g.*, MICHAEL J. ZIMMER, CHARLES A. SULLIVAN, REBECCA HANNER WHITE, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 485 (8th ed. 2013) (summarizing elements).

51. *Id*. at 468–70, 474.

52. *See, e.g.*, Pettway v. Am. Cast Iron Pipe Co., 411 F.2d 998 (5th Cir. 1969); Glover v. S.C. Law Enf. 170

and have imposed a minimal good faith requirement even for participation clause claims.[53] Nonetheless, good faith participation in formal statutory enforcement mechanisms suffices to establish protected activity under the participation clause, and is protected from retaliatory adverse action.[54]

Internal opposition to discrimination triggers a different set of standards governing the retaliation claim. First, the person who opposed discrimination must have acted on an objectively reasonable belief that the conduct she opposed actually violated the law.[55] Courts apply the reasonable belief requirement harshly, using judicial precedents to strictly define the outer boundaries of reasonableness.[56] Second, the manner of the employee's opposition must be reasonable in form and not unduly burdensome or disruptive.[57] This standard too has been criticized for circumscribing employee responses to discrimination and prioritizing workplace stability over employee interests in a fair and equitable workplace.[58]

On top of these well-established and generally applicable limitations on protected activity for internal opposition to discrimination, the employees charged with implementing and overseeing internal EEO compliance now face additional restrictions on the scope of protected activity. Increasingly, these employees confront distinctive hurdles in demonstrating that they engaged in protected activity in opposing discrimination.

II. THE NO-MAN'S LAND OF THE EEO EMPLOYEE

Against this background, the discussion below turns the spotlight on how retaliation law applies to the employees charged with carrying out the duties of the EEO office. Two recent developments threaten to undermine retaliation protection for this class of employees, with implications for the integrity of discrimination law more broadly. The first marks a particular iteration of the generally applicable reasonable belief requirement for opposition to discrimination. The second is a distinctive limitation that singles out the employees who implement and oversee anti-discrimination policies. Both of these developments, separately and together, leave EEO employees without adequate protection from retaliation for opposing discrimination in the course of their job duties.

A. The Reasonable Belief Doctrine Meets the EEO Employee

One gap in retaliation protection for EEO compliance personnel stems from the rea-

F.3d 411 (4th Cir. 1999).

53. *See, e.g.*, Hatmaker v. Mem'l Med. Ctr., 619 F.3d 741 (7th Cir. 2010); Niswander v. Cincinnati Ins. Co., 529 F.3d 714 (6th Cir. 2008).

54. *See* Lawrence D. Rosenthal, *Reading Too Much into What the Court Doesn't Write: How Some Federal Courts Have Limited Title VII's Participation Clause's Protections After* Clark County School District v. Breeden, 83 WASH. L. REV. 345 (2008).

55. *See* Clark Cnty. Sch. Dist. v. Breeden, 532 U.S. 268 (2001).

56. *See, e.g.*, Brake, *Retaliation*, *supra* note 49, at 86–103; Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859, 913-29 (2008); Brake, *Retaliation in an EEO World*, *supra* note 5, at 136–57.

57. *See, e.g.*, Laughlin v. Metro. Wash. Airports Auth., 149 F.3d 253 (4th Cir. 1998); Argyropoulos v. City of Alton, 539 F.3d 724 (7th Cir. 2008); O'Day v. McDonnell-Douglas Helicopter Co., 79 F.3d 756 (9th Cir. 1996).

58. *See* Terry Smith, *Everyday Indignities: Race, Retaliation and the Promise of Title VII*, 34 COLUM. HUM. RTS. L. REV. 529 (2003).

sonable belief requirement for retaliation claims brought under the opposition clause. Legal scholars have resoundingly criticized this doctrine.[59] By measuring reasonableness against courts' own understanding of discrimination, as reflected in existing case law, the doctrine holds laypersons to an impossibly strict standard of legal knowledge and sets a ceiling on the ability of employees to press for a conception of equal opportunity that exceeds the bare minimum set by law.[60] However, two features of this doctrine make it distinctively problematic for the employees charged with EEO compliance.

First, the employees who investigate discrimination complaints are in a uniquely difficult position with respect to their ability to form a reasonable belief in discrimination before retaliatory action can occur. Until a thorough and independent investigation is completed, an employee charged with investigating a report about discrimination can have no objectively reasonable belief that discrimination has actually occurred. If retaliation interferes with that process before the investigation is completed, the employee who undertakes to perform the investigation is left without recourse under Title VII.

A recent decision from the Second Circuit Court of Appeals illustrates the problem. In *Townsend v. Benjamin Enterprises*,[61] the company receptionist, Martha Diane Townsend, made an internal complaint alleging that she was sexually harassed by the company's Vice-President, Hugh Benjamin. Benjamin was a shareholder of the firm and the husband of the company President and co-owner, Michelle Benjamin. The allegations were serious: Townsend claimed that Benjamin sexually harassed her over a period of nearly two years and that his behavior included making sexual comments and propositions, sexual touching, and sexual assault. Because of the nature of the allegations and the high-level position of the accused employee, the complaint was rife with company politics.

Townsend reported the harassment to the company's Human Resources director, Karlean Victoria Grey-Allen. Grey-Allen took a written and oral statement from Townsend and then contacted the state fair employment agency for guidance on how to proceed. At this point in the proceedings, Townsend had not yet filed a formal charge with either the state agency or the EEOC. In response to Grey-Allen's inquiry about how best to proceed with the internal complaint, the state agency advised her to separate Benjamin and Townsend pending a full investigation. Grey-Allen followed this advice and instructed Benjamin to work from home until the investigation was complete. She also sought advice on how to handle the investigation from a management consultant retained by the firm. Shortly thereafter, Michelle Benjamin fired Grey-Allen. As is often the case in retaliation litigation, the parties disputed the real reason for the termination.[62] This factual dispute was never resolved, however, because the retaliation claim was dismissed.[63]

After firing Grey-Allen, Michelle Benjamin took over the investigation herself. She

59. Brake, *Retaliation in an EEO World*, *supra* note 5, at 126-27 (citing critiques by other scholars).

60. *See, e.g.*, Brake & Grossman, *supra* note 56, at 913–29.

61. Townsend v. Benjamin Enters., 679 F.3d 41 (2d Cir. 2012).

62. The firm claimed that Grey-Allen breached confidentiality by discussing sensitive employee matters with the management consultant, while Grey-Allen claimed that she was fired for undertaking a meaningful investigation of the sexual harassment allegations. *Cf. id.* at 61 (Lohier, J., concurring) ("[t]here was strong evidence that [the company] fired Grey-Allen for no reason other than that she conducted an effective internal investigation of a sexual harassment claim against a corporate vice-president").

63. The district court did, however, find sufficient evidence to rule that the plaintiff had created a genuine issue of material fact on the issue of causation. Townsend v. Benjamin Enters., 2008 U.S. Dist. LEXIS 19445, at *2 (S.D.N.Y. March 13, 2008).

immediately reversed Grey-Allen's separation order and allowed Hugh Benjamin to return to work, prompting Townsend to resign the next day. According to Grey-Allen, the substituted investigation was bogus and tightly controlled by Michelle Benjamin. Benjamin's investigation of her husband concluded that "nothing happened" and that it was merely a "he said versus she said" situation.[64] Both Townsend and Grey-Allen subsequently filed charges with the EEOC and then brought a consolidated lawsuit against the company.

Townsend tried her case to a jury and obtained a verdict in her favor on her sexual harassment claim.[65] Grey-Allen was not so successful; the district court dismissed her retaliation claim, granting the employer's motion for judgment as a matter of law, and the Second Circuit affirmed. The Second Circuit's starting point was to decide which of the two clauses in § 704(a) applied. Analyzing the claim under the opposition clause presented a distinct problem. Like other courts that have ruled on this issue, the Second Circuit understood the Supreme Court's decision in *Clark County School District v. Breeden*[66] to require complaining employees, at a minimum, to possess both a subjective good faith belief and an objectively reasonable belief that unlawful discrimination had occurred in order to support a retaliation claim brought under the opposition clause.[67] However, at the time of her actions, Grey-Allen could not have formed an objectively reasonable belief that discrimination had occurred because she had not yet completed the investigation into the allegations. Indeed, the whole purpose of the investigation was to determine whether sexual harassment had occurred. For this reason, Grey-Allen put all of her eggs in the participation clause basket.[68]

However, the participation clause presented an insurmountable problem as well. At the time that Grey-Allen separated Hugh Benjamin from the firm and undertook the investigation, Townsend's complaint was an internal one. As is the case with most employees who file discrimination complaints,[69] Townsend first complained internally under the company's policy, instead of going directly to the EEOC or state enforcement agency. Indeed, had she not proceeded this way, she would have risked losing her sexual harassment claim under the affirmative defense for failing to invoke the company's policy for reporting sexual harassment.[70] Although Townsend later filed a charge with the EEOC after Grey-Allen was fired, the timing of Townsend's EEOC charge was too late for Grey-Allen to bring her retaliation claim under the participation clause. The Second Circuit acknowledged that the case presented an issue of first impression in the circuit, but ultimately followed the other circuit courts that have held that participating in an internal employer investigation, absent a prior charge filed with the federal or state enforcement agency, does not amount to "participation under this subchapter" as the participation

64. *Townsend*, 679 F.3d at 46.

65. She received a jury award of $30,400.00 in damages and the court awarded $141,308.80 in attorney's fees and costs. The jury rejected her constructive discharge claim, however.

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

67. *Townsend*, 679 F.3d at 41.

68. Townsend v. Benjamin Enters., 2012 U.S. App. LEXIS 9441, at *13–14 (noting that Grey-Allen "conceded that she was not covered by the opposition clause, because she did not know whether Townsend's allegations of harassment were true and thus lacked a good-faith belief that the discriminatory action had occurred, which is required for protection under the opposition clause"); *see also* Townsend v. Benjamin Enters., 2008 U.S. Dist. LEXIS 31582, at *5 (S.D.N.Y. Apr. 17, 2008) ("Grey-Allen concedes that she cannot claim protection under the opposition clause because she lacked a good faith belief that Townsend was sexually harassed.").

69. Brake, *Retaliation in an EEO World*, *supra* note 5, at 133.

70. *See supra* text accompanying notes 2–4 for an explanation of the affirmative defense.

clause requires.[71] With no fit under either clause, Grey-Allen's retaliation claim failed to survive the employer's motion for judgment as a matter of law. The case illustrates how the reasonable belief doctrine ensnares the employees charged with handling discrimination complaints and investigations if they suffer retaliation for implementing and enforcing employer anti-discrimination policies.

While the Supreme Court has shown some sensitivity to the vulnerability of employees who participate in their employers' internal investigations of alleged discrimination, it has not (yet, at least) extended protection from retaliation in such circumstances in a way that would help employees like Grey-Allen. In *Crawford v. Metropolitan Government of Nashville & Davidson County*,[72] the Court considered the scope of the opposition clause as it applies to an employee who acts as a supporting witness for the complainant in an employer's sexual harassment investigation. In that case, the plaintiff was not the complainant, but an employee who was interviewed in the course of the employer's internal investigation into sexual harassment allegations. In response to the investigator's questioning, the plaintiff provided information about the alleged harasser that corroborated the complaint. The Court ruled that the plaintiff's statements in the investigation were a form of opposition to discrimination and fell within the protections of the opposition clause.[73]

While the Court's decision was essential to protect the rights of employee-witnesses in internal investigations, it does nothing for the employees charged with responsibility for handling the investigation. The role of the employee who processes the complaint and conducts the investigation does not fit within the model of opposition embraced by the Court in *Crawford*—at least, not for retaliatory acts taken before the investigation has concluded. Nor does the Court's reasoning help employees like Grey-Allen to find protection under the opposition clause in such situations. The Court decided *Crawford* under the opposition clause and declined to address the plaintiff's claim under the participation clause. The Court thus left in place the circuit court precedent declining to apply the participation clause to employers' internal complaint processes.[74] And, although the Court found that the plaintiff in *Crawford* was protected under the opposition clause, it did so without ameliorating the strictness of the reasonable belief doctrine as applied to non-complainants who participate in internal investigations. Accordingly, the *Crawford* decision unfortunately does not preclude the result in *Townsend*. Indeed, the Second Circuit decided *Townsend* after the Supreme Court's decision *Crawford*, and did not discern any tension between the two decisions.

There is one window of opportunity left open by the court in *Townsend* for an EEO investigator such as Grey-Allen to prevail in a retaliation claim, and that is if she had proceeded far enough into the investigation before being fired to have formed an objectively reasonable belief that the reported discrimination had in fact occurred.[75] This offers little by way of reassurance, however, since it creates the bizarre incentive for an employer

71. *Townsend*, 679 F.3d at 49.

72. Crawford v. Metro. Gov't. of Nashville & Davidson Cnty., 555 U.S. 271 (2009).

73. *Id.* at 284.

74. *Id.* at 282.

75. For a contrary case where the plaintiff, a union officer, challenged retaliation for investigating a sexual harassment complaint and was able to satisfy the reasonable belief doctrine, *see McMenemy v. City of Rochester*, 241 F.3d 279 (2d Cir. 2001). However, this case was decided before the Supreme Court's decision in *Breeden* applying the reasonable belief doctrine. Lower court decisions post-*Breeden* have taken an increasingly strict approach to the reasonable belief requirement. *See* Brake & Grossman, *supra* note 56, at 919–29.

seeking to whitewash an investigation to fire its EEO investigators sooner rather than later.

There is yet another problem with the reasonable belief doctrine as it applies to the employees who perform EEO responsibilities. Even without early interference into an investigation, an EEO employee can trip over the reasonable belief doctrine due to a mismatch between the broad scope of employer anti-discrimination policies and the much narrower scope of anti-discrimination law. Many employer policies go well beyond the strict requirements of anti-discrimination law, without clear lines delineating which obligations are required by anti-discrimination law and which are not. For example, EEO responsibilities often include affirmative action obligations within employer non-discrimination policies. However, retaliation law enforces a bright-line distinction between the two. The case of *Holden v. Owens-Illinois, Inc*.[76] is an example of how finely the reasonable belief doctrine parses anti-discrimination and affirmative action responsibilities, and the potential fall-out for the EEO employee who works on both fronts. The plaintiff in that case, an African American woman, had among her job duties responsibility for managing the employer's affirmative action plan. As a federal contractor, the employer was required to have an affirmative plan by Executive Order 11,246. She was fired after just six weeks in the job, the district court ruled, in retaliation for too aggressively enforcing the obligations in the plan.[77] The sixth circuit reversed, ruling that such actions were not protected under Title VII since there could be no objectively reasonable belief that a failure to implement an affirmative action plan amounted to unlawful discrimination under Title VII.[78]

There is a whole run of cases on this theme of denying protection from retaliation to a plaintiff who challenges adverse action taken in retaliation for her efforts to promote affirmative action.[79] Because of the scope of their responsibilities, EEO employees are especially likely to trip over this line.[80] The distinction made by the reasonable belief doctrine in these cases draws an artificial and overly formalistic line between affirmative action and nondiscrimination and ignores the overlap in systemic discrimination claims, including disparate treatment and disparate impact, blurring any such a line. The retaliation plaintiffs in these cases could just as easily be characterized as opposing what they understand to be systemic discrimination as pursuing affirmative action. Indeed, the Executive Order itself, in mandating that employers adopt plans for setting goals and timetables to promote affirmative action, simultaneously bans discrimination, including the systemic varieties that Title VII reaches.

The job responsibilities of employees charged with EEO functions are particularly ill-suited to the confines of the reasonable belief doctrine. Because their actions commence before an objectively reasonable belief in discrimination can be formed, and because they enforce employer anti-discrimination policies that do not dovetail with the scope of discrimination law, their efforts to implement employer policies and complaint procedures leave them particularly vulnerable to the stringency of the reasonable belief doctrine.

The reasonable belief doctrine is just one sticking point in retaliation law for the

76. Holden v. Owens-Illinois, Inc., 793 F.2d 745 (6th Cir. 1986).
77. *Id.* at 746.
78. *Id.* at 752.
79. *See* Brake, *Retaliation in an EEO World*, *supra* note 5, at 146–47 (summarizing and critiquing cases).
80. *Id.* at 132–33, 147 (describing the blurred lines in EEO policies between anti-discrimination and affirmative action).

employees responsible for EEO matters. A second and potentially more significant roadblock is a newly developing doctrine specific to this class of employees.

B. The Manager Rule and the Step-Outside-of-Role Requirement

The reasonable belief doctrine is just one piece of the legal puzzle confronting EEO personnel. Increasingly, courts have deployed a separate rule that bars certain employees from protection from retaliation for actions that fall within the scope of their job responsibilities. Under this emerging doctrine, courts have refused to treat employees with EEO responsibilities as opposing discrimination when they act in their employer's interest to enforce and implement anti-discrimination policies. These kinds of retaliation claims typically arise under the opposition clause, since the participation clause does not apply to internal complaint processes. The rule courts have applied to exclude these employees varies in its articulation and reasoning, but is most often phrased as a requirement that managers acting in the course of their job responsibilities must do something extra to step outside their role in order to secure protection from retaliation. It is not clear what that "something" is. However, lack of clarity is not the only problem. Stepping outside an employee's assigned role presents problems of its own. The result is a vastly diminished level of protection for the affected employees.

A recent example of this doctrine, described by the court as "the manager rule," comes from an Eleventh Circuit decision, *Brush v. Sears Holdings Corp*.[81] The plaintiff in that case, Janet Brush, was tasked with conducting an internal investigation into a sexual harassment complaint. As the investigation unfolded, the allegations turned out to be more serious than they first appeared, involving multiple instances of rape by a supervisor on company premises. Brush soon came to loggerheads with company officials over whether to report the rape allegations to the police; Brush advocated informing the police, while company officials refused, citing the complainant's desire for confidentiality and the incomplete status of the investigation. Sears terminated Brush, allegedly in retaliation for taking a strong stance on how Sears should respond to the sexual harassment investigation.[82] After she was fired, invoking the opposition clause, Brush filed a retaliation charge with the EEOC, which issued a reasonable cause determination in her favor. The lower court granted summary judgment to the employer, and the Eleventh Circuit affirmed on the grounds that Brush acted in her role as a manager with responsibility for investigating the harassment charges, and therefore did not engage in protected activity under the opposition clause.[83]

In reaching this conclusion, the Eleventh Circuit proceeded in several steps. First, the court described Brush's dispute with Sears as "a disagreement with the way in which Sears conducted its internal investigation" into the sexual harassment allegations.[84] This characterization treated their dispute as a minor, procedural matter rather than a substantive disagreement over how an employer should respond to rape allegations.[85] A more

81. Brush v. Sears Holdings Corp., 466 Fed. App'x. 781 (11th Cir. 2012).

82. The complaint alleged that "she uncovered that [Sears] had negligently allowed three forcible rapes to occur on its premises and did nothing about it," and that Brush and Sears had a dispute over how to handle the investigation, most prominently, about whether to report the rapes to the police. *Id.* at 784.

83. *Id.* at 789.

84. *Id.* at 786.

85. In this respect, the case differs significantly from a case relied on by the court, *Entrekin v. Panama City,*

favorable spin for Brush would have emphasized that she opposed Sears' decision to downplay several instances of alleged workplace rape. Seen in this light, Brush's position could just as easily be characterized as opposing discrimination, since Title VII requires employers to take prompt, appropriate action in response to workplace harassment, and the sufficiency of the response depends on the seriousness of the harassment.

The next step in the court's reasoning has broader implications. The court expressed its agreement with other courts that have adopted the manager rule, holding that an employee does not engage in protected activity when she disagrees with or opposes the employer's actions in the course of her normal job responsibilities.[86] To engage in protected activity, such an employee must "cross the line" from performing her job to "'lodging a personal complaint.'"[87] Having endorsed the manager rule, the court placed Brush's actions firmly within this doctrine, noting that she acted "solely as a manager here" in investigating the complaint and stayed within her job duties.[88]

While relatively new to Title VII, this doctrine does not come entirely out of the blue. It has roots in other areas of employment law. A brief look at its development in other areas of law sheds light on its entry into Title VII.

1. Digging up the Doctrine's Employment Law Roots

The leading case cited in *Brush* and other Title VII courts applying the manager rule is a Tenth Circuit case decided in 1996 under the Fair Labor Standards Act (FLSA), *McKenzie v. Renberg's, Inc*.[89] The plaintiff in *McKenzie* was a personnel director who urged her employer to correct what she believed were FLSA violations in the recording and payment of employee overtime. Like Title VII, but in somewhat different language, the FLSA bars retaliation against employees acting to enforce the statute.[90] The Tenth Circuit rejected the retaliation claim because the plaintiff's actions fell within her job duties as personnel director. To be protected from retaliation, the court explained, an employee must step outside her role representing the company and cross the line to take action adverse to her employer, such as by lodging a FLSA complaint herself.[91] Since the plaintiff's job responsibilities included overseeing wage and hour compliance, her actions—reporting wage and hour violations to management and making efforts to bring the company into compliance—were not protected under the statute.

Another Tenth Circuit case decided the following year elaborated on the contours of the rule. That case distinguished *McKenzie* to hold that a food clerk's actions reporting

Fla., 376 Fed. App'x. 987 (11th Cir. 2010), in which that court ruled that the plaintiff's disagreement with the employer about the proper policy for reporting a sexual harassment complaint (to a superior officer or directly to the human resources department) did not amount to protected activity. In *Entrekin*, the dispute was more clearly procedural, with no connection to a particular stance on the merits of the underlying harassment complaint or the appropriateness of the employer's response to it.

86. *Brush*, 466 Fed. App'x. at 787.

87. *Id.*

88. *Id.*

89. McKenzie v. Renberg's, Inc., 94 F.3d 1478 (10th Cir. 1996).

90. 29 U.S.C. § 215(a)(3) (2006) (forbidding a covered employer to "discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding" under the statute). In 2011, the Supreme Court interpreted this language to encompass oral as well as written complaints, taking a broad reading of the language, "filed any complaint." Kasten v. Saint-Gobain Perf. Plastics Corp., 131 S. Ct. 1325 (2011).

91. *McKenzie*, 94 F.3d at 1486-87.

wage and hour violations were protected because his job responsibilities did not include oversight of wage and hour compliance.[92] Rather, the court considered his actions to be a "personal complaint about the wage and hour practices" of the employer, and the "unofficial assertion of rights through complaints at work."[93] The *McKenzie* rule, as applied, draws a sharp line between actions taken in the course of official oversight duties, which are not protected, and out-of-role opposition, which is protected. The scope of the plaintiff's job duties, as defined by the employer, determines which side of the line the conduct touches.[94]

Numerous FLSA cases have since followed suit, using the plaintiff's job description as the decisive factor in determining whether the activities are protected from retaliation under the statute.[95] In one case representative of this trend, the plaintiff, a human resources employee for Wal-Mart, complained that the store was fudging employee time records to save overtime pay in violation of the FLSA.[96] According to the plaintiff, her complaints were met with deaf ears. She expressed frustration to her supervisor, going so far as to say that she would not be comfortable testifying in support of Wal-Mart in a pending wage and hour case involving a former employee. The plaintiff was not asked to testify, but she was demoted and then fired.[97] The key paragraph in the court's reasoning captures the wide berth this rule gives to employers in dealing with the employees charged with FLSA compliance responsibilities:

> [P]laintiff's expressions of concern or discomfort or frustration over her employer's wage and work hour reporting practices . . . do not amount to the requisite adversarial assertion of statutory rights. Plaintiff's expressions of concern, even if characterized as "complaints," were made in her capacity as Personnel Training Coordinator. She appears to have been appropriately cautioning her superiors about improprieties with an eye toward correcting them and minimizing the risk of liability. Even her expressed apprehensions about the possibility of testifying were a matter of frank and honest disclosure, for her employer's benefit as well as her own.[98]

92. Conner v. Schnuck Mkts., 121 F.3d 1390 (10th Cir. 1997). *See also* Samons v. Cardington Yutaka Techs., 2009 WL 961168 (S.D. Ohio April 7, 2009) (finding no FLSA protected activity by a human resources employee and distinguishing *EEOC v. Romeo Community Schools*, 976 F.2d 985 (6th Cir. 1992), which found protected activity where a custodian, not responsible for HR matters, reported alleged FLSA/Equal Pay Act violations).

93. *Id.* at 1394.

94. *See, e.g.*, Haynes v. Crescent Real Estate Equities, LLC, 2012 U.S. Dist. LEXIS 91381 (S.D. Texas July 2, 2012) (examining scope of plaintiff's job duties to determine whether her complaints about FLSA compliance were protected activity under the statute); Lasater v. Tex. A&M Univ. Commerce, 495 Fed. App'x. 458 (5th Cir. 2012) ("voicing concerns" about FLSA compliance did not step outside manager's role for purposes of establishing protected activity under FLSA).

95. *See, e.g.*, Hagan v. Echostar Satellite, LLC, 529 F.3d 617, 628 (5th Cir. 2008) (ruling that the plaintiff/manager did not step outside his role in bringing forward possible wage/hour violations, and stating "[v]oicing each side's concerns is not only *not adverse* to the company's interests, it is exactly what the company expects of a manager"); Claudio-Gotay v. Becton Dickinson Caribe, Ltd., 375 F.3d 99 (1st Cir. 2004) (engineer with responsibility for approving pay invoices of contractor-employed guards did not step outside his role in refusing to sign timesheets he believed wrongly excluded overtime pay; in alerting employer to the potential FLSA violation, he acted out of concern for protecting the company from liability).

96. Robinson v. Wal-Mart Stores, Inc., 341 F. Supp. 2d 759 (W.D. Mich. 2004).

97. As is typical in these cases, the parties disputed the issue of causation, with the plaintiff alleging a retaliatory reason for her dismissal and the employer claiming it acted on a legitimate reason. *Id.*

98. *Id.* at 763.

This amounts to a sweeping exclusion of compliance personnel, broadly defined, from the retaliation protection of the FLSA. Like the other courts that have proceeded down this path, the court relied on *McKenzie*.[99]

A parallel development has occurred in constitutional free speech protections for public employees and is contributing to an acceleration of similar manager exemptions from retaliation protections in other areas of law. In a case that has been extensively criticized for chipping away at public employee free speech protections, *Garcetti v. Ceballos*,[100] the Supreme Court ruled that a public employee's speech falling within the scope of the employee's job duties is not protected by the First Amendment.[101] In that case, the plaintiff was an assistant district attorney who complained about misconduct within the district attorney's office. The Court reasoned that, to support a public employee's free speech claim, the speech must be adverse to the employer and exceed the employee's normal employment role. Nancy Modesit has termed this development "the *Garcetti* virus" for its subsequent contagious flight into other areas of employment law, although she did not single out Title VII law as a grounding point in that journey.[102] Decided a decade after *McKenzie* applied essentially the same rule to retaliation claims under the FLSA, *Garcetti* has further propelled the influx of the manager rule into retaliation protections under anti-discrimination statutes.[103]

From *McKenzie* and *Garcetti*, and the cases following them, it was a short leap to statutory protections for opposing discrimination.

2. The Manager Rule's Migration to Discrimination Law

Tracking these trends, the manager rule has now stepped into Title VII retaliation law full bore. As in *Brush*, the plaintiff in such cases is typically in the human resources field, charged with EEO oversight and compliance. A representative example is *Correa v. Mana Products, Inc.*,[104] in which the plaintiff, a human resources manager, alleged that

99. *See, e.g.*, Stewart v. Masters Builders Ass'n of Kin and Snohomish Cntys., 736 F. Supp. 2d 1291 (W.D. Wash. 2010) (employee with supervisory responsibilities did not step outside his role so as to act adverse to employer when he contacted state fair labor agency on behalf of subordinate employees to question the employer's conferral of FLSA-exempt status to certain employees; he acted within his job responsibilities and his communication to management emphasized that he was acting in the best interests of the company to protect it from FLSA liability); George v. Bd. of Cnty. Comm'rs of Franklin Cnty., Kan., 2007 WL 950270 (D. Kan. Mar. 26, 2007) (plaintiff, assistant director of ambulance services for the county, did not step outside his role when he raised FLSA violations that forced the county to change its policy and respond to a lawsuit brought by others in which it had to pay backpay; plaintiff did not bring an individual complaint of his own and did not step outside his role of representing the company); Samons v. Cardington Yutaka Techs., 2009 WL 961168 (S.D. Ohio April 7, 2009) (plaintiff, senior manager of administration with human resources responsibilities, did not step outside her role so as to engage in protected activity by merely bringing potential FLSA violations to the company's attention).

100. Garcetti v. Ceballos, 547 U.S. 410 (2006).

101. For critiques of *Garcetti*, *see* Richard Moberly, *The Supreme Court's Antiretaliation Principle*, 61 CASE W. RES. 375, 428-29 (2010); Richard R. Carlson, *Citizen Employees*, 70 LA. L. REV. 237, 244-45 (2009); Orly Lobel, *Citizenship, Organizational Citizenship, and the Laws of Overlapping Organizations*, 97 CALIF. L. REV. 433, 453–55 (2009); Nancy M. Modesit, *The* Garcetti *Virus*, 80 U. CIN. L. REV. 137 (2011).

102. Modesit, *supra* note 101.

103. *See, e.g.*, Cook v. CTC Communications, Inc., 2007 WL 3284337 (D.N.H. Oct. 20, 2007) (using *Garcetti* to support applying a requirement that a manager step outside of her role in order to support a retaliation claim under USERRA and the FMLA, although acknowledging a lack of precedent applying the rule to those statutes); *id.* (discerning in *Garcetti* the broad principle that "complaints made within an employee's job cannot form the basis of a retaliation claim").

104. Correa v. Mana Products, Inc., 550 F. Supp. 2d 319 (E.D.N.Y. 2008).

she was fired for handling employee grievances that led to the filing of discrimination charges against the company. The plaintiff alleged that the company's vice president told her that she was being fired because the company president believed that she had sided with the employees who filed the discrimination charges. However, the court noted that she did not actively encourage the employees to file the charges, nor did she even believe that the employees in question had actually experienced discrimination.[105] The court's reasoning, however, is much broader, explaining that the plaintiff did not engage in protected opposition because she acted within her job duties in writing up and shepherding employee EEO grievances through the complaint process, and did not step outside her role sufficiently so as to come within the protections of the opposition clause.[106] In dismissing the retaliation claim, the court characterized her actions as supportive of the company's anti-discrimination policy, and therefore not in opposition to the interests of the employer. Like the court in *Townsend*, the court made short order of the plaintiff's participation clause claim, since the employees' complaints were made internally.[107] The *Correa* court's reasoning gives employers a wide berth to pressure the employees in charge of EEO compliance into discouraging and minimizing complaints, rewarding them when complaints go away and punishing them when they do not.

Other courts have used similar reasoning to deny retaliation protection. In *Vidal v. Ramallo Brothers Printing, Inc.*,[108] the plaintiff, a human resources director, was fired after informing the president and vice-president of the company that he was investigating sexual harassment complaints that other employees had made against them. The plaintiff alleged that after notifying the president and vice-president of the complaints, they ordered him not to investigate, saying that they would handle the matter themselves. They fired him later that afternoon. The court granted the employer's motion to dismiss on the grounds that the plaintiff had not engaged in protected activity because he did not step outside his role, which included responsibility for handling and investigating sexual harassment complaints under the company's anti-harassment policy.[109] The court's opinion is short but sweeping: as human resources director, working for the benefit of the company and pursuant to its sexual harassment policy, the plaintiff's actions were within his job responsibilities and not adverse to the company. The court distinguished the actions of an employee in the plaintiff's position who filed a discrimination complaint on his own behalf, which would be protected, from merely reporting or investigating the discrimination complaints of others, which was not protected under Title VII.

105. *Id.* at 327-28.

106. *Id.* at 330. For support, the court cited an earlier Title VII precedent with hints of a manager rule. *See* Nelson v. Pima Community College, 83 F.3d 1075 (9th Cir. 1996). That court ultimately ruled against the plaintiff for lack of causation, but added, in *dicta*, that an employee whose job involves handling discrimination complaints does not engage in protected activity under Title VII and may be fired for handling such complaints in a manner contrary to the employer's instructions. The court distinguished actions made on behalf of the employer in the course of performing job duties from the protected activity of an employee whose job does not include such duties but who pursues such matters anyway.

107. Even if the plaintiff had written her internal reports in anticipation that they would be discoverable in a later formal enforcement proceeding, the court explained, "passively" writing up reports on discrimination charges would still be unprotected.

108. Vidal v. Ramallo Bros. Printing, Inc., 380 F. Supp. 2d 60 (D. P.R. 2005).

109. *Id.* at 62.

An Employee Assistance Program Consultant faced a similar predicament in *Demasters v. Carillion Clinic*.[110] After advising a fellow employee that what he had experienced was sexual harassment and expressing criticism of the employer's handling of the complaint, the plaintiff was terminated for "fail[ing] to perform or act in a manner that was consistent with the best interest of [the employer]," since his advice may have prompted the employee's filing of a sexual harassment lawsuit against the employer.[111] The court followed *Brush*, holding that the employee did not engage in protected activity under Title VII.

This kind of reasoning is cropping up increasingly in Title VII cases. A recent decision from the Western District of Pennsylvania placed another human resources professional outside of Title VII's retaliation protections for handling discrimination complaints and enforcing EEO policies. In *Bradford v. UPMC*,[112] the plaintiff's job responsibilities included investigating discrimination complaints. The employer moved to exclude evidence of these activities on the ground that her investigations and recommendations related to such matters could not qualify as protected activity because they fell within her job responsibilities. Because of the procedural posture of the case—the motion was before a new judge, after a prior judge assigned to the case had denied the employer's motion for summary judgment—the court's actual holding was contingent on whether the prior judge had already foreclosed the employer's motion under the "law of the case." If not, the court indicated it would grant the employer's motion, since it agreed that the plaintiff's investigations of other employees' discrimination complaints and her resulting recommendations could not amount to protected activity. The court repeated the mantra that, as a professional in charge of EEO matters, the plaintiff must "'step outside' her normal role in order to be considered as opposing unlawful activity."[113]

Having taken hold in Title VII retaliation cases, this doctrine is now spreading to other anti-discrimination statutes, including Title IX of the Education Amendments of 1972, prohibiting sex discrimination in federally funded education institutions. In 2005, when the Supreme Court recognized the availability of retaliation claims under Title IX, it did not set out the elements of a claim under Title IX or the principles for discerning them. Lower courts have filled this gap by analogizing to Title VII retaliation law. That course has led to the importation of the manager rule into Title IX retaliation law.

For example, in one such case, *Atkinson v. Lafayette College*,[114] a former college athletic director brought a retaliation claim alleging that she was fired for her efforts to strengthen the athletic department's compliance with Title IX. Like other lower courts deciding retaliation claims under Title IX, the court looked to Title VII principles for guidance. The court found no protected activity on the part of the plaintiff "because she never

110. Demasters v. Carillion Clinic, 2013 U.S. Dist. LEXIS 133660 (W.D. Va. Sept. 17, 2013).

111. *Id.* at *9.

112. Bradford v. UPMC, 2008 U.S. Dist. LEXIS 5790 (W.D. Pa. Jan. 18, 2008).

113. *Id.* at *10. *See also* Samons, v. Cardington Yutaka Techs., 2009 WL 961168 (S.D. Ohio April 7, 2009) (dismissing Title VII retaliation claim for failure to exhaust administrative remedies, but noting in *dicta* that it would also likely fail for lack of protected activity where the plaintiff, a senior manager of administration with human resources duties, did not step outside her role in acting to address possible gender discrimination, and specifically noting that the step-outside-role rule from FLSA cases has been applied to Title VII retaliation claims); Weeks v. Kansas, 503 Fed. App'x. 640 (10th Cir. 2012) (applying the manager rule to reject a Title VII retaliation claim brought by a general counsel alleging that she was fired because her employer did not like the advice she provided regarding unlawful discrimination against an employee).

114. Atkinson v. Lafayette Coll., 653 F. Supp. 2d 581 (E.D. Pa. 2009).

engaged in activity that was either adverse to the College or outside the scope of her position as Athletic Director."[115] As precedent for this principle, the court threaded together *Garcetti*'s limitation on public employee first amendment protections with the ruling from *McKenzie* and its progeny curbing statutory retaliation protections for employees who act within their job responsibilities.[116] The result, once again, is a wholesale exemption from retaliation protections for employees whose actions opposing discrimination fall within their job descriptions. Under the court's reasoning, filing a personal complaint or lawsuit would fall outside of such an employee's job duties, but other compliance efforts would not.[117] Since the plaintiff "never stepped outside of her role as Athletic Director to put the College on reasonable notice of potential legal action relating to any Title IX issues," she did not engage in protected activity.[118]

In addition to Title IX, the manager rule, coupled with the requirement that such persons step outside their role in order to engage in protected activity, has been applied to retaliation claims for actions opposing other discrimination statutes, such as the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Family and Medical Leave Act (FMLA).[119] It is quickly on its way to becoming a fixture in discrimination law's treatment of retaliation.

3. The Logical Expansion to Managers Beyond Specialized EEO Personnel

The logic of the manager rule is not limited to an employer's official EEO or human resources staff; any managerial employee with responsibility over the work environment and personnel issues is vulnerable. It was only a matter of time before the rule extended beyond officially-designated human resources or EEO personnel to reach a broader class of managers. In *Cyrus v. Hyundai Motor Manufacturing, Alabama, LLC*,[120] the court applied the rule to an employee who directed the purchasing and parts operation of an auto plant. The plaintiff, a white male supervisor at the Korean-owned company, had brought forward a variety of discrimination complaints from the workers he supervised, including allegations of preferential treatment of Korean workers over non-Korean workers and allegations of sexual harassment and bias toward female employees. He claimed that he experienced adverse action as a result of these actions. The court rejected his retaliation claim, viewing his actions as part of his managerial responsibility to alert the company to any allegedly unlawful conduct that could potentially hurt it. The court noted the absence of evidence that the plaintiff "stepped outside of his role as a director and asserted a right adverse" to the company.[121] Rather, it was his job "to bring to the management roundtable

115. *Id.* at 596.

116. *Id.*

117. *Id.* at 596–97 ("this would include the filing of a complaint, but not reporting suspected discrimination to a supervisor").

118. Because Title IX compliance was part of the plaintiff's job, the court required the plaintiff to meet a "'heightened' burden of showing that her actions put the College on notice that litigation against it, due to Title IX violations, was a 'reasonable possibility.'" *Id.* at 599. The Court did not specify what kind of actions in connection with litigation would meet this heightened standard.

119. *See, e.g.*, Cook v. CTC Commc'ns Corp., 2007 WL 3284337 (D.N.H. Oct. 20, 2007) (dismissing retaliation claim under the FMLA because the plaintiff did not step outside her role as a human resources professional in her enforcement efforts, but allowing her to proceed on her USERRA retaliation claim because she did step outside her role in refusing to terminate a worker for taking military service leave).

120. Cyrus v. Hyundai Motor Mfg. Ala., LLC, 2008 U.S. Dist. LEXIS 33826 (M.D. Ala. Apr. 24, 2008).

121. *Id.* at *37.

areas of concern in the workplace."[122] The scope of the company's anti-discrimination policy reinforced the court's conclusion that the manager did not act out of personal opposition to discrimination, but rather in the company's own interest.[123] The court noted that the plaintiff's actions bringing forward a female assistant manager's complaint of sex bias merely complied with his obligation under the company's harassment policy, which required him to report such complaints up the chain of command.

Another court applied the rule to a general manager, not specializing in EEO matters, whose job responsibilities included reporting any complaints about unfair treatment, including discrimination, pursuant to company policy. In *Dunn v. Wal-Mart Stores East, L.P.*,[124] the plaintiff, an assistant store manager, contacted the company's labor relations department to report subordinate employees' complaints about discrimination, instead of simply directing the complaining employees to read and follow the store's anti-discrimination and harassment policy. She was later criticized by a store manager for going "over her head" and reporting the complaints to another department, and was subsequently terminated. The court ruled that she did not engage in protected activity since the company's policy required allegations of discrimination to be reported to persons outside of the immediate store hierarchy. Consequently, the plaintiff "did not step 'outside of her assigned responsibility,' or cross the line from performing her job to lodging a personal complaint."[125]

As these cases suggest, the logic of the manager rule applies to all supervisors with responsibility for reporting and addressing their subordinates' concerns about discrimination, not just to managers specializing in human resources and EEO fields. Depending on the scope of the employer's anti-discrimination policy, this could include employees in any management-level position.[126] While some courts have resisted applying the doctrine so sweepingly,[127] its logic is not easily confined to official EEO personnel, especially if company policies place obligations broadly on managerial employees to report alleged discrimination and to monitor the work environment for violations of company policy.

III. DOCTRINAL INCOHERENCE AND THE SEARCH FOR A LIMITING PRINCIPLE

If the manager rule applied to all supervisory employees, as its logic would suggest, it would decimate the law's protection from retaliation. However, courts have not followed the doctrine's logic to that extreme and have instead flailed about for a limiting principle. So far, no coherent limiting principle has emerged. This section argues that the search for a limiting principle to this doctrine is futile. The fundamental difficulty is that discrimination statutes are set against the backdrop of the common law regime of at-will employment.

122. *Id.* at *34.

123. *Id.* at *52-53.

124. Dunn v. Wal-Mart Stores E., L.P., 2013 U.S. Dist. LEXIS 50974 (S.D. Fla. Apr. 9, 2013).

125. *Id.* at *25.

126. *Cf.* Hagan v. Echostar Satellite, LLC, 529 F.3d 617, 628 (5th Cir. 2008) ("[A] part of any management position often is acting as an intermediary between the manager's subordinates and the manager's own superiors," such that voicing the concerns of other employees is "not only *not* adverse to the company's interests, it is exactly what the company expects of a manager.").

127. *See, e.g.*, Collazo v. Bristol-Myers, 617 F.3d 39 (1st Cir. 2010) (declining to apply the manager rule where plaintiff was not a personnel manager, but a scientist, helping a subordinate fill out a complaint to human resources); Howe v. Sears, Roebuck & Co., 2014 U.S. Dist. LEXIS 355 (W.D. Wisc. Jan. 3, 2014) (declining to apply the manager rule to an assistant store manager and noting that courts generally have only applied the rule to managers in human resources and personnel, and not to managers in other fields).

In that system, employers can terminate or otherwise take adverse action against an employee for any reason, with the exception of those reasons which would violate the specific limits set by statute. Retaliation law bars adverse action taken for a retaliatory reason, while leaving employers free to act on other reasons. Adverse action that is motivated by employee job performance is the paradigm of a legitimate nondiscriminatory reason. A typical retaliation case, if it goes to a jury, requires the fact-finder to sort out whether the adverse action was taken because of the plaintiff's protected activity in opposing discrimination or because of the plaintiff's job performance. The problem with applying the manager rule is that, in this class of cases, job performance cannot be meaningfully separated from opposition to discrimination. This section explores these difficulties.

A. Clearing the Bar, but Without Principled Limits

In some cases, employees with EEO responsibilities have succeeded in securing protection from retaliation for their opposition to discrimination. In these cases, courts have either applied the manager rule but found that the plaintiff stepped far enough outside her role to secure protection, or they have found protected activity without mentioning the manager rule at all. In none do they settle on an adequate solution to the difficulties raised by the manager rule.

Cases decided prior to the 1990s do not mention the manager rule, nor do they acknowledge any special rules that would require EEO employees to depart from their job duties in order to secure protection from retaliation. In these cases, courts do not purport to treat the employees responsible for employer anti-discrimination policies any differently than other employees. For example, in *Coleman v. Wayne State University*,[128] a personnel director was protected from retaliation for voicing his concerns about the university's discriminatory hiring practices and noncompliance with its affirmative action policy. This court did not mention the overlap between the alleged protected activity and the plaintiff's job description as a problem.

As the manager rule has taken shape, however, some courts have managed to rule in favor of employees with EEO responsibilities by more finely parsing the step-outside-of-role requirement with factual distinctions. While some plaintiffs have managed to clear the bar in this way, these pro-plaintiff cases provide little guidance for employees whose duties include overseeing compliance with employer nondiscrimination policies. Instead of offering principled limits, these cases reveal unresolved tensions and dilemmas.

One path taken by courts is to manipulate the employer "policy" in order to find that the plaintiff acted adversely to it and therefore in "opposition" to the employer. Under this approach, the result turns on whether the plaintiff's actions are described as falling within, or going against, the employer's policy. This, in turn, depends on how the employer "policy" is defined—as the official policy of non-discrimination or the managerial policy that the plaintiff is opposing. Rather than forthrightly acknowledge the threshold issue of how to classify and describe the employer's policy, and that the classification drives the result, the courts engage in an opaque process of manipulation.

128. Coleman v. Wayne State Univ., 664 F. Supp. 1082 (E.D. Mich. 1987).

For example, in one case decided in favor of the plaintiff, *EEOC v. HBE Corporation*,[129] the court found that the plaintiff, a personnel manager, engaged in protected activity when he disobeyed an order to fire an African American manager for reasons he believed were discriminatory. The court distinguished the seminal *McKenzie* case on the grounds that *McKenzie* was a case in which the plaintiff "merely alerted management of potential violations of the law in order to avoid liability for the company."[130] Since the normal managerial role is to further company policy, the court reasoned, a refusal to implement company policy meets the step-outside-of-role requirement. However, the court did not acknowledge that its analysis turned on what it credited as the company "policy"—the written nondiscrimination policy, which the plaintiff acted to further, or the allegedly discriminatory actions taken by high-level employees (and in violation of the official nondiscrimination policy) which the plaintiff opposed. Only by treating the relevant policy as the directive to fire the subordinate could the court say that the plaintiff engaged in a refusal to implement company policy, thereby affording him protection from retaliation.[131] But the employer's "policy" could just as easily have been the company's official nondiscrimination policy, which the plaintiff acted to further within the scope of his job duties.

Not surprisingly, *HBE* has been a difficult case to distinguish for courts applying the manager rule to find plaintiffs outside the scope of protection. These courts have distinguished *HBE* by foregrounding the employer's nondiscrimination policy, and the plaintiff's responsibilities under it, to place plaintiffs on the losing side of the line. In the *Cyrus* case discussed above, for example, the court distinguished *HBE* by explaining that the plaintiff here followed company policy when he acted within his job duties as a supervisor to report possible discrimination.[132] Likewise, in *Vidal*, also discussed above, where the plaintiff disobeyed direct orders from the company's principals not to proceed with a sexual harassment investigation, the court emphasized that he did so consistently with the employer's sexual harassment policy.[133] In cases like these, the employer's adoption of broad internal anti-discrimination policies operates to relieve the employer from accountability for retaliating against the employees who enforce and apply those policies. However, no principle emerges from the case law for explaining why, in determining whether the plaintiff acted in opposition to the employer's policy, the relevant policy is sometimes the allegedly discriminatory practice and sometimes the official anti-discrimination policy.

A different—but no more satisfying—approach is to base the plaintiff's success in meeting the manager rule on whether the court classifies the plaintiff's efforts as "active" or "passive" in opposing discrimination. This distinction, too, is elusive, with similar ac-

129. EEOC v. HBE Corp., 135 F.3d 543 (8th Cir. 1998).

130. *Id.* at 554.

131. For another case taking this approach, *see* Foster v. Time Warner Entm't Co., 250 F.3d 1189, 1195 (8th Cir. 2001) (upholding retaliation verdict for the plaintiff under the Americans with Disabilities Act where the plaintiff, a customer service supervisor, "stepp[ed] outside the normal role of a manager" when she refused to enforce a new sick leave policy, and instead followed the employer's anti-discrimination policy, which encouraged the type of accommodation she offered to an employee with epilepsy).

132. That court also distinguished *Conner*, a case in which the plaintiff engaged in protected activity by reporting FLSA violations, a task that did not fall within his job duties, for the same reason—that the plaintiff here acted pursuant to company policy in reporting it. Cyrus v. Hyundai Motor Mfg. Ala., LLC, 2008 U.S. Dist. LEXIS, at *38 (M.D. Ala. April 24, 2008).

133. Vidal v. Ramallo Bros. Printing, Inc., 380 F. Supp. 2d 60, 62 (D. P.R. 2005).

tions falling on both sides of the line. A representative case is *Cook v. CTC Communications Corporation*,[134] which involved one plaintiff bringing three retaliation claims under three different statutes. As the starting point, the court explained that the plaintiff, a human relations manager, had to show that she stepped outside of her role when she took various compliance-related actions under each of these statutes. The court proceeded to finely parse her actions, finding that she satisfied this obligation under two of the statutes, but not under the third. One of the successful claims was for actions taken to comply with the Uniformed Services Employment Reemployment Rights Act (USERRA). The plaintiff had blocked a colleague's attempt to terminate an employee for missing work due to military leave and refused her superior's instruction to "dig up" performance problems for this employee so as to sidestep a potential USERRA violation. She also questioned a manager's effort to classify certain employees as exempt from the requirements of the Fair Labor Standards Act (FLSA), and contacted the Department of Labor about her suspicions, which confirmed the employees' coverage under the statute. The court found that these actions taken pursuant to these two statutes veered far enough outside the plaintiff's role of supporting the company's mission to qualify as protected activity.[135] On the other hand, the court ruled that a third set of activities did not qualify as protected activity because the plaintiff did not do enough to step outside her role. The unprotected actions entailed refusing to falsify records to terminate an employee who took leave authorized by the Family and Medical Leave Act (FMLA), challenging the legality of plans to fire another employee who took FMLA leave, and reporting her concerns about FMLA violations internally to a superior. The court characterized these actions as merely "rais[ing] a concern" about actions she believed were unlawful, but not "actively refus[ing] to follow" the employer's instructions.[136] The distinction is elusive.

The court applied the same rule to the retaliation protections under all three statutes. And yet, the plaintiffs' compliance efforts were very similar under all three statutes, consisting of challenging managerial actions that she perceived to violate each statute. The court faltered in explaining why the plaintiff's compliance efforts in the first two instances were any more "active" than her efforts with respect to FMLA compliance. The courts efforts to do so only showcase the implausibility of separating "active" refusals to countenance discrimination from more "passive" compliance with the employer's nondiscrimination policy.

Other courts have found their way around the manager rule by finding that the plaintiff ventured far enough beyond her job responsibilities, as defined by the employer, to succeed in stepping outside her role, and thereby engaged in protected activity under the statute. Courts taking this path require the employee to do more than what is needed to oversee compliance with anti-discrimination policies, or to do it in a way that departs from the ordinary course of the job. In one case where the plaintiff met this standard, *Johnson v. County of Nassau*,[137] the plaintiff was the director of the county hospital's "Office of Diversity." The job required him to serve as a liaison between upper-management and

134. Cook v. CTC Commc'ns Corp., 2007 WL 3284337 (D.N.H. Oct. 20, 2007).
135. *Id.* at *9.
136. *Id.* at *11.
137. Johnson v. County of Nassau, 480 F. Supp. 2d 581 (E.D.N.Y. 2007).

employees in their complaints about discrimination. He brought a retaliation claim alleging that he was transferred and demoted for repeatedly raising his fellow employees' complaints about race discrimination, including, in one instance, at a public meeting of the hospital's board of directors. The court found that he engaged in protected activity based on his act of speaking up at the public meeting, relying on the fact that the meeting occurred outside of his professional responsibilities as head of the Diversity Office.[138] The court took pains to note that the plaintiff expressed his concerns during the public portion of the meeting, which suggested that he did so outside his official role. The court added that, in the course of criticizing the hospital for not investigating black employees' complaints of race discrimination, "he did not make a presentation about his work activities."[139]

This way of parsing the manager rule, however, creates a grave dilemma for the EEO employee. Handling discrimination complaints and/or enforcing employer anti-discrimination policies in a manner that exceeds the employee's job duties, or veers from the ordinary course of performing them, clashes with another doctrinal limit on protected activity under the opposition clause, that the employee not cross the line into disloyalty or disruption, but express opposition in a form that is reasonable and proportionate.[140] This tension is discussed in greater detail in part III.B., below.

More than any principled limit, what is driving the plaintiff-friendly cases decided under the manager rule is the concern that there has to be a stopping point somewhere, lest the rule swallow up protection from retaliation for supervisory employees acting in opposition to discrimination pursuant to employer anti-discrimination policies. The pro-plaintiff cases are driven more by a determination to draw the line somewhere than by the logic of where to draw it.

An example of a court caught in the throes of this dilemma, and floundering in explaining why it hoists the plaintiff over the line, is *Johnson v. University of Cincinnati*.[141] In this case, the plaintiff was Vice President of Human Resources, with responsibility for promoting diversity and ensuring compliance with the university's affirmative action and anti-discrimination policies. Although the Sixth Circuit did not refer to the manager rule by name, it overturned the district court's ruling that a university affirmative action director does not engage in protected conduct by acting within his job responsibilities, which included advocating for minority rights.[142] The appellate court was clearly troubled by the implications of such a holding for cutting back on retaliation protection.[143] However, the

138. *Id.* at 602.

139. *Id.*

140. *See, e.g.*, Hochstadt v. Worcester Foundation for Experimental Biology, 545 F.2d 222 (1st Cir. 1976); Velez v. Janssen Ortho LLC, 389 F. Supp. 2d 253 (D. PR 2005); Jones v. Flagship Int'l, 793 F.2d 714 (5th Cir. 1986); Burns v. Blackhart Mgt. Corp., 494 F. Supp. 2d 427 (S.D. Miss. 2007).

141. Johnson v. Univ. of Cincinnati, 215 F.3d 561 (6th Cir. 2000).

142. *Id.* at 586.

143. *Id.* at 577.

> . . . an employer inclined to engage in invidious discrimination in the workplace could hire an affirmative action official in order to convey the false impression that the employer is interested in eliminating illegal discrimination from the workplace, and proceed to retaliate against the official secure in the knowledge that no legal claim could be lodged against the employer for its actions. Thus, to hold that a high-level affirmative action official cannot bring a Title VII claim for discrimination based upon his or her advocacy of women and minorities would be to invite stratagems designed to circumvent, and indeed, to violate law which was designed to serve . . .

Id.

court's reasoning merged its analysis of protected activity on the retaliation claim with its analysis of the plaintiff's claim of race and sex discrimination based on his association with, and furtherance of the rights of, minorities and women. Instead of directly engaging the lower court's ruling on the implications of the plaintiff's job responsibilities for the retaliation claim, the Sixth Circuit invoked third-party associational standing precedents to conclude that Title VII's coverage of status-based discrimination encompassed penalizing an employee for his "association with a member of a recognized protected class."[144]

While understandable, given the court's concern for preserving statutory retaliation protection for employees like Johnson, this is an over-reading of the associational standing cases, all of which involved a white employee penalized for have a close relationship with a person of color, based on the courts' implicit assumption that the employee was penalized for associating with persons of a different race.[145] The application of that reasoning to Johnson, an African American affirmative action officer who advocated for women and minorities, is a stretch, since the plaintiff's theory of harm did not rest on any causal link to his own race. With its attention absorbed in the fancy footwork required to support associational standing, the court's treatment of the retaliation claim was submerged in its analysis of the discrimination claim.[146] This move enabled the court to side-step the issue of how the plaintiff's job duties affected the retaliation claim. Unlike the majority, the dissenting judge highlighted the plaintiff's job responsibilities, pointing out the absence of any evidence that the plaintiff's advocacy "went beyond the scope of his employment."[147] On that point, the majority responded cursorily, stating, "simply because it was Plaintiff's job to insure that Defendants did not engage in discriminatory hiring practices the likes of which Defendants had previously been found to employ, does not thereby immunize Defendants from retaliating against Plaintiff for doing his job."[148]

The *Johnson* decision is best understood—albeit not explained by the court in these terms—as a wholesale rejection of the manager rule rather than a roadmap for discerning

144. *Id.* at 574.

145. *See, e.g.*, Zielonka v. Temple Univ., 2001 U.S. Dist. LEXIS 16732, at *15–19 (E.D. Pa. Oct. 15, 2001) (disagreeing with the *Johnson* court's treatment of third-party standing in interracial association cases, and explaining that a discrimination claim based on an employee's interracial relationship must nevertheless be tethered to the plaintiff 's race, and citing supporting authorities). *Cf.* Andrew M. Carlon, *Racial Adjudication*, 2007 B.Y.U. L. REV. 1151, 1194 (2007) (in defense of the author's statutory interpretation argument, which the author describes as not "a knockout" but also not "wholly ridiculous," citing *Johnson* and noting that the reasoning in that case is "a greater departure from the text than my reading").

146. *Johnson*, 215 F.3d at 575.

> Indeed, . . . the fact that Plaintiff has not alleged discrimination because of his race is of no moment inasmuch as it was a racial situation in which Plaintiff became involved—Plaintiff's advocacy on behalf of women and minorities in relation to Defendant's alleged discriminatory hiring practices—that resulted in Plaintiff's discharge from employment.

Id. The court ventured further down the rabbit hole in explaining why a white affirmative action officer also would have a discrimination claim if penalized for the same actions, since "the race of the minorities for which he was advocating would be 'imputed' if you will to the Caucasian high-level affirmative action official." *Id.* In support of its reasoning, the court cited a 42 U.S.S. §1981 case decided in 1977, a time long before the Supreme Court recognized the availability of retaliation claims under that statute, in which the Court held that a white employee fired for opposing the discriminatory treatment of an African American colleague had standing to sue for race discrimination. Today, courts would likely treat such a situation as a retaliation claim, rather than using third-party standing to frame it as a claim for status-based discrimination.

147. *Id.* at 587 (Kennedy, Circuit Justice, dissenting).

148. *Id.* at 576 n.6. *See also id.* at 579 ("the fact that Plaintiff may have had a contractual duty to voice such concerns is of no consequence to his claim"); *id.* at 580 ("the individual who has contracted to advocate on behalf of women and minorities has not thereby contracted to be retaliated against for his advocacy").

principles for limiting or distinguishing it. The result in *Johnson* ultimately boiled down to the majority's concern about the implications for retaliation law, and by extension discrimination law, if the plaintiff were exempted from protection from retaliation because of his job duties in overseeing the employer's anti-discrimination policy. In that event, the court cautioned, employers could "retaliate against the person best able to oppose the employer's discriminatory practices—the high-level affirmative action official—without fear of reprisal under Title VII."[149]

Rather than setting forth a principled basis for limiting and distinguishing the manager rule, the cases where plaintiffs prevail reflect the judgment, made explicit by the court in *Johnson*, that unless the doctrine is cabined, it creates a substantial loophole in retaliation protections, whereby employers can benefit from having antidiscrimination policies while retaliating against the persons who implement them.

While some courts have seen their way clear to lift plaintiffs over this hurdle, others have not. Rather than provide EEO employees a way out of the manager rule, the lines courts have drawn to rule in favor of plaintiffs create additional dilemmas for employees and reveal deeper tensions within in the doctrine. These issues are explored below.

B. Tracing the Fault Lines in the Doctrine

Without clear lines for discerning when an EEO employee steps outside her role so as to side-step the manager rule, courts have cited a host of reasons for finding the plaintiff on the wrong side of the line. These lines reveal the dilemmas confronting employees who experience retaliation because of their job-related efforts to address discrimination in the workplace.

One factor courts turn to in explaining the scope of protection, or lack thereof, is the employee's motivation for opposing discrimination and whether it is characterized as personally motivated or not. The relevance of the employee's motivation, however, is far from clear. Certainly, using the plaintiff's motivation to determine whether opposition to discrimination qualifies as protected activity is without basis in the statutory language. Such a distinction is also at odds with the purpose of retaliation law to encourage enforcement of anti-discrimination law. Unless the action is taken in bad faith, the precise motivation for opposing discrimination should not matter. While the employer's motivation is paramount—whether the employer acted for a retaliatory motive or a legitimate motive is a core element in proving the claim—the employee's motive for opposing discrimination has never been an element of the retaliation claim. As long as the employee acts intentionally and not by accident (which is only likely to become an issue in artfully constructed classroom hypotheticals), the reason for an employee's good-faith opposition to discrimination should not matter.

Nevertheless, some courts applying the manager rule have used the employee's motivation to support a finding that the employee failed to step far enough outside her role to evade the strictures of the manager rule. These cases purport to distinguish opposition to discrimination that is undertaken for personal reasons from that which is motivated by a desire to serve the employer's interests. As a mediating principle, this distinction circles back to the intractable problem of identifying the relevant employer "policy" to use as the

149. *Id.* at 580.

benchmark for deciding whether the employee acted in furtherance of, or opposition to, the employer's policy. It is neither workable nor desirable to separate personal interest from an interest in serving the employer as distinct motivations for opposing discrimination. In an era when anti-discrimination policies are the norm, employees' efforts to secure compliance with these policies could always be explained as motivated by the welfare of the company. If that were enough to discredit protected activity, the law's protection against retaliation would wither.

The cases in which courts attempt to parse the plaintiff's reasons for opposing discrimination demonstrate the folly of this enterprise. In *Stein v. Rousseau*,[150] for example, the court denied the plaintiff, a general manager, protection from retaliation for raising FLSA compliance issues because he acted out of concern for the company's potential liability and not out of his own separate interests. The court discerned in his statement, "we've got a big problem here," a motivation to act on behalf of, and not adverse to, the company.[151] Another court attempted to parse a line separating self-interested motives from the interest of the employer in *Van Portfliet v. H&R Block Mortgage, Inc*.,[152] with equally poor reasoning. The employer there argued that the plaintiff, a sales supervisor, acted within his job responsibilities under the company sexual harassment policy when he reported sexually harassing behavior that targeted an employee he supervised. The court ultimately avoided having to decide the case on the manager rule by relying on the reasonable belief requirement to overturn the jury's verdict for the plaintiff. But the court nevertheless opined that the plaintiff's self-oriented motivation might have saved him from the manager rule by allowing him to argue that he stepped outside his supervisory role. The court explained, in *dicta*, "[m]oreover, it is unclear that such a rule would be applicable in this case because, while the plaintiff testified that he was obligated by company policy to report misconduct, he also said that he reported [the district manager's] conduct because it personally upset him."[153] The court's distinction supposes a non-existent line separating "personal opposition to unlawful harassment" and implementing the employer's anti-harassment policy.[154] If this reasoning carries the day, woe to the employee who forgets to describe his efforts to enforce a company sexual harassment policy in terms of his "personal" feelings against harassment.

Applying the manager rule to favor employees who act out of personal motivation is not only incoherent, it also creates additional dilemmas for employees. A different retaliation doctrine, requiring employees to clearly identify discrimination as the source of their opposition, has used employee motivation in the opposite direction. Using this doctrine, plaintiffs have occasionally been penalized for acting out of self-interest, which is used to undermine their claim of engaging in protected activity. The court in *Hill v. IGA Food Depot*[155] penalized the plaintiff for purportedly acting out of a self-interested motive,

150. Stein v. Rousseau, 2006 U.S. Dist. LEXIS 54939 (E.D. WA. Aug. 8, 2006).

151. *Id.* at *5. *See also id.* (stating that the plaintiff "did not offer his opinion for the benefit of any specific employee. Rather, he offered it for the benefit of the company as a whole in his capacity as one of the company's managers").

152. Van Portfliet v. H&R Block Mortg., Inc., 2007 WL 2773995 (M.D. Fla. Sept. 21, 2007).

153. *Id.* at *8.

154. *Id.* In the end, however, given its disposition of the case, the court found "no reason for wrestling with a problematic issue." *Id.*

155. Hill v. IGA Food Depot, 2006 U.S. Dist. LEXIS 80455 (M.D. Ala. Nov. 2, 2006).

which undercut his expression of opposition to discrimination. That court listed the plaintiff's personal motivation for opposing the allegedly discriminatory hiring of cashiers, since his daughter had applied for such a position, among its reasons for ruling against him. The court flagged his impure motivation in a messy analysis of why he did not do enough to clearly identify discrimination as the subject of his complaint, which therefore fell outside the opposition clause.[156] Characterizing the plaintiff's inquiry about the lack of African American cashiers as a vague and overly general grievance, the court suggested that he was motivated by his daughter's application and not a more principled stance against discrimination. The decision, while unsupported by the text and purpose of the retaliation claim, shows the risks to plaintiffs of expressing a personal interest in opposing discrimination.

A different doctrine poses an even greater threat to employees seeking to bridge the gap by stepping outside their roles and responsibilities over EEO matters—and this one has a firmer footing in established law. An employee who acts out of personal motives, or who in other respects goes beyond what is required by her job description, risks charges of acting disloyally to the employer. Indeed, as the earlier discussion of EEO role conflicts reveals, it is a very fine line separating the performance of EEO responsibilities from disloyal actions. Acting disloyally to the employer is itself a basis for denying employees protection from retaliation, and EEO employees have been especially vulnerable to charges of disloyalty. The retaliation doctrine in which this concern is couched requires the form of the opposition to be reasonable and proportionate under the circumstances. Courts have recognized this as an independent limit under the opposition clause, insisting that the manner of opposition must be reasonable in nature and not disproportionate or unduly disruptive.[157]

This requirement, limiting the form of the opposition from straying too far into disruption and disloyalty, is in tension with the entire project of the manager rule. By requiring employees with EEO responsibilities to step outside their role to find cover in protected activity, the rule butts right up against the limit on the form of opposition. And indeed, the EEO employee who steps outside the role set by her job description risks losing the retaliation claim on the grounds of insubordination and disloyalty.

An early case brought by EEO employees, *Pendleton v. Rumsfeld*,[158] foreshadows the problem. Decided in 1980, at a time before employer nondiscrimination policies were quite so common, the plaintiffs brought a retaliation claim against the federal government, which did have extensive EEO policies and procedures. The plaintiffs were EEO counselors who had participated in a demonstration highlighting the unequal employment opportunities available to minority employees in the Department. The court ruled that their actions were not protected from retaliation by Title VII, emphasizing the fine line that EEO

156. *Id.* at *17.

157. *See* Unt v. Aerospace Corp., 765 F.2d 1440, 1446 (9th Cir. 1985) (Title VII does not protect plaintiffs who violate legitimate company rules, disobey orders, or otherwise disrupt the work environment). For a sampling of cases applying this limit, that the form of the opposition be reasonable, *see* Booker v. Brown & Williamson Tobacco Co., 879 F.2d 1304, 1312 (6th Cir. 1989) (plaintiffs are not protected when the opposition violates legitimate employer rules, disrupts the work environment, or interferes with the employer's goals); Shoaf v. Kimberly-Clark Corp., 294 F. Supp. 2d 746, 754–55 (M.D. N.C. 2003) (plaintiff's action of releasing confidential information to another employee who had charged the employer with discrimination was not protected opposition since it breached the employer's trust). For a critique of this doctrine, *see* Smith, *supra* note 58.

158. Pendleton v. Rumsfeld, 628 F.2d 102 (D.C. Cir. 1980).

personnel must straddle, remaining responsive to their fellow employees while still retaining the trust of management.[159] While acknowledging the difficulty of this "dual" role, the court explained that EEO employees must not become so "militant" that they stray from their "quasi-management" role. The court accepted the employer's judgment that the plaintiffs' participation in the demonstration compromised their ability to retain the confidence of management. While the court did not articulate the later-framed manager rule, the court's ruling nevertheless functions to effectively preserve the same space for employers to react to employee job performance and deny protection to EEO employees, albeit coming at the issue from the opposite direction.[160] Instead of faulting the employees for not stepping outside their roles as EEO counselors, the court allowed the employer to penalize them *for* stepping outside their roles as EEO counselors. The court drew the line where it did out of a desire to keep retaliation law from insulating insubordinate employees from legitimate employer actions when they go too far in siding with employees on EEO matters. The more modern cases applying the manager rule reflect this same concern, although they pursue a path from the opposite direction to get to the same destination.[161]

The tension in the doctrine is pronounced: under the manager rule, EEO personnel must depart from their roles to have protection from retaliation, such as by acting out of personal motivation and not company-interest; but under the requirement that the form of opposition be reasonable, an employee who veers too far from her delegated role and acts against her employer's interest risks losing protection on the grounds of insubordination and disloyalty.[162] At best, the line separating an adversarial stance in EEO compliance efforts from unreasonable disloyalty is an elusive one. There is slim, if any, distance between stepping outside the employee's EEO role and crossing into the territory of insubordination. The cases applying the manager rule demonstrate the futility of the endeavor.

In one example of such a case, *Samons v. Cardington Yutaka Technologies*,[163]decided under the FLSA, the plaintiff was a senior manager of administration with human resources duties. She alleged retaliation for bringing several potential FLSA violations to the attention of the company, but lost her retaliation claim because she never stepped outside her role as a human resources manager. The court acknowledged that she went so far as to write a report concluding that the employer had engaged in FLSA violations, which prompted a hostile reaction from the employer. However, the court emphasized that she never filed a FLSA claim herself, on behalf of herself or others, and fell short of acting in an adversarial capacity against the employer. This kind of fact pattern illustrates the predicament facing employees charged with compliance responsibilities under discrimination statutes. An employee who takes stronger measures than the plaintiff in *Samons* to oppose discrimination pursuant to an employer policy might succeed in meeting the requirements of the manager rule, which Title VII has imported from the FLSA. But in the process she

159. *Id.* at 158.

160. Although the doctrinal underpinnings of the court's ruling were somewhat cryptic, the court decided the case under the requirement, mentioned above, that opposition be undertaken in a form that is not unreasonable. Judge Wald dissented.

161. *See, e.g.*, Claudio-Gotay v. Becton Dickinson Caribe Ltd., 375 F.3d 99 (1st Cir. 2005) (applying manager rule to protect employer's prerogative to discipline employee who continued to refuse to sign employee timesheets even after reporting his concern that employees were being denied overtime pay in violation of the FLSA).

162. *See, e.g.*, Hochstadt v. Worcester Found. for Experimental Biology, 545 F.2d 222 (1st Cir. 1976). *See also* Smith, *supra* note 58 (critiquing this doctrine and the cases applying it).

163. Samons v. Cardington Yutaka Technologies, 2009 WL 961168 (S.D. Ohio April 7, 2009).

will likely run afoul of the competing injunction to act reasonably and within the proper boundaries of employer loyalty.[164]

The sweet spot for stepping outside the employee's role without crossing over into disloyalty is not easy to discern. One of the cases cited with approval in *Atkinson*, the Title IX retaliation case applying this doctrine, discussed above, illustrates the difficulty. The *Atkinson* court found guidance from *Hill v. Belk Store Services, Inc.*,[165] which placed an onerous burden on an employee to go beyond his normal compliance job duties to gain protection from retaliation in a wrongful discharge claim brought under state tort law. The court in *Hill* ruled that the store's safety expert acted within his scope of employment when he investigated and reported safety hazards at the worksite, and therefore ruled against him on the wrongful discharge claim. In formulating the rule for the wrongful discharge claim, the court looked to Title VII precedent, explaining that "actions within the scope of an employees [sic] duties are not protected for the purpose of Title VII."[166] The court found that the plaintiff did not step outside his normal compliance role despite allegations that his employer knew that he was assisting the state OSHA office in investigating the worksite and that he had complained to that office. It is hard to imagine what more a Title VII plaintiff could do in a similar situation without raising charges of disloyalty and insubordination.

The underlying problem is not just that the room for employees to navigate is slim, but that there is no distance separating the EEO employee who steps outside her role from the landmine of insubordination. In a case decided before the manager rule took shape, *Jones v. Flagship International*,[167] a court denied retaliation protection to an EEO manager because she "gave aid and comfort, if not outright encouragement, to [another employee] to pursue her grievances against the company, at a time when Jones' duty was to discourage and defend such claims . . . ."[168] Rather than finding that these actions cut in favor of protecting the plaintiff, the court found them to support a legitimate, non-retaliatory reason for the adverse action, that the plaintiff had been insubordinate and disloyal.

The tension between the manager rule, which requires EEO employees to depart from their normal roles, and the withdrawal of protection from retaliation for disloyal and insubordinate actions, traces back to an intractable incoherence: the impossibility of separating a retaliatory motive from a legitimate motive where the plaintiff's job duties include opposing discrimination.

C. What Lies Beneath: The Causation Conundrum and the Clash with Employment-at-Will

The doctrine's incoherence is not simply a matter of courts being lax or unprincipled

164. *See, e.g.*, Smith v. Singer Co., 650 F.2d 214 (9th Cir. 1981) (affirming dismissal of retaliation complaint where plaintiff, director of industrial relations with responsibilities over company's affirmative action and EEO programs, himself filed complaints with the EEOC and OCCD (under the Executive Order); the plaintiff's job was to ensure voluntary compliance, not external enforcement, and in pursuing the latter, he crossed the line into an adversarial role against the company); Garrett v. Mobil Oil Corp., 531 F.2d 892 (8th Cir. 1976) (plaintiff's actions repeatedly bypassing supervisor in reporting complaints to management was unreasonably disruptive and not protected under Title VII's opposition clause).

165. Hill v. Belk Store Servs., Inc., 2007 U.S. Dist. LEXIS 79239 (W.D.N.C. Oct. 12, 2007).

166. *Id.* at *3–4.

167. Jones v. Flagship Int'l, 793 F.3d 714 (5th Cir. 1986).

168. *Id.* at 724; *see also* Baranek v. Kelly, 1987 WL 17546 (D. Mass. Sept. 9, 1987).

in articulating the limits of the manager rule. Rather, it stems from the underlying problem that employers' delegation of EEO compliance responsibilities to employees makes it impossible to separate legitimate concerns about job performance from retaliatory motives. The retaliation claim in these cases butts up against the overarching legal framework of employment-at-will, in which statutory law purports to impose discrete limits on employer conduct. In this muddle, the manager rule functions to preserve at least some room for the employment-at-will rule to govern the employees charged with EEO responsibilities. However, it does so by imposing a blanket exclusion from retaliation protection on an ever-growing class of employees. The result is a crisis in the integrity of the internal EEO policies and complaint procedures that discrimination law so heavily incentivizes.

When it is part of an employee's job to ensure compliance with the law and with the employer's own policies against discrimination, the task of parsing causation in a retaliation claim becomes incoherent. The protected activity—opposing discrimination—merges seamlessly into the employee's job performance. Although the retaliation claim purports to treat the issue of whether the employee engaged in protected activity separately from the question of causation, judicial anxiety about causation pervades these cases, driving the courts to short-circuit a determination on causation by finding, as a threshold matter, an absence of protected activity.

The court's opinion in *Atkinson*, the Title IX retaliation case discussed above, in which the court denied protection from retaliation to a college athletic director who pressed the college to do more to comply with Title IX, provides a good example of how the intractability of causation drives the doctrine on the manager rule.[169] In support of its finding that the athletic director did not engage in protected activity under Title IX, the court characterized her dispute with the college as a disagreement over how—not whether—to comply with Title IX.[170] The court viewed the college's hostility toward her efforts—especially her actions mobilizing student support—as an appropriate response to insubordination rather than a retaliatory response to protected activity.[171] Although the court did not say so explicitly, the very impossibility of distinguishing opposition to discrimination from job performance fueled the court's determination to stop retaliation law from cutting too deeply into the ability of employers to supervise the persons charged with anti-discrimination compliance. As the court observed, "[t]o now suggest that [the plaintiffs'] actions constituted protected activity would open the College to a lawsuit any time it terminated someone hired in such a compliance role."[172]

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169. Atkinson v. Lafayette Coll., 653 F. Supp. 2d 581 (E.D. Pa. 2009).

170. *Id.* at 602. In the course of explaining why she did not step outside her role and therefore did not engage in protected activity, the court observed, "[p]laintiff never suggested that the College opposed her Title IX efforts." *Id.* at 599. But that statement does not square with the plaintiff's actual claim, which was that she was fired for advocating for increased funds to expand women's sports, or alternatively, to cut certain men's sports to bring the program into compliance.

171. The court's discussion of the issue of whether the plaintiff engaged in protected activity, which turned on whether she stepped outside her role, is infused with its skepticism about her proof of causation:

> Undoubtedly, Plaintiff repeatedly and aggressively raised issues regarding the College's noncompliance with Title IX in the athletic department. She fails to recognize, however, that this advocacy was, in part, precisely what the College hired her to do. Although the changes she sought required substantial effort on her part, nothing in the evidence before the Court suggests that the College ever opposed her efforts or sought to avoid Title IX compliance.

Id. at 600.

172. *Id. Cf.* Smith v. Secretary of the Navy, 659 F.2d 1113, 1121 (D.C. Cir. 1981) (protecting plaintiff from

Without some gate-keeper for retaliation claims by EEO employees, opposition to discrimination would be indistinguishable from the performance of job duties. It is not just a question of where to draw the line, but that there is no coherent line between an impermissible reason for taking adverse action (retaliation for opposing discrimination) and a legitimate one (disapproval of the employee's job performance in handling EEO responsibilities). For employees whose job responsibilities include EEO oversight, one slides unstoppably into the other. By making a threshold determination of no protected activity, the court in a case like *Atkinson* can side-step the incoherent question of whether the reason for the adverse action was the plaintiff's opposition to discrimination or how she performed her job duties. The drive to preserve the umbrella of at-will-employment over employees charged with anti-discrimination duties ultimately lies beneath the courts' turn to the manager rule.[173]

While it would be tempting to argue that the manager rule should be abandoned in favor of a forthright focus on causation, the very incoherence of the causation inquiry in these cases makes that unworkable. And indeed, the facts of *Matta v. Snow*,[174] applying the manager rule to a Title VII retaliation claim, demonstrate the validity of employers' legitimate interests in retaining control over how employees perform EEO job duties. The plaintiff there was an EEO specialist at the U.S. Department of Treasury, and the court's description of the facts suggests that the employer may well have had legitimate job-related reasons for terminating him. Some of the plaintiff's communications appeared overly emotional and unnecessarily combative, and the agency had concerns about his impartiality, neutrality, and reliability in performing his duties. But instead of probing causation and considering whether a legitimate reason motivated the employer's adverse action, the court fell back on the sweeping rationale that is typical for these cases, stating that actions taken within the scope of an employee's job duties do not qualify as "opposition" to discrimination under Title VII.[175] As another court explained, if such employees were protected, the human resources manager, or other employees with EEO responsibilities, would become virtually untouchable, a result that would intrude too deeply into the employment at-will common law baseline.[176]

Illuminating the causation problem underlying the doctrine places these cases in a different light. To the extent judges are failing to articulate principled lines, it is because they are engaged in an impossible task. Reconsider *Johnson*, the case discussed above in which the plaintiff, an affirmative action officer, managed to prevail in his retaliation claim, despite the court's convoluted reasoning and lack of engagement with the manager rule. The majority and dissent found themselves on opposing sides of an intractable di-

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retaliation for performing his EEO functions, but noting that "[t]his is not a case in which evidence suggests [that he] devoted excessive time to his EEO duties").

173. *See, e.g.*, Hagan v. Echostar Satellite, LLC, 529 F.3d 617, 628 (5th Cir. 2008) (warning of the "litigation minefield" if employees with FLSA oversight responsibilities could engage in "protected activity" under the statute).

174. Matta v. Snow, 2005 U.S. Dist. LEXIS 36194 (D. D.C. Dec. 16, 2005).

175. *Id.* at *75–76.

176. Correa v. Mana Prods., Inc., 550 F. Supp. 2d 319, 330 (E.D.N.Y. Mar. 17, 2008). *Cf.* Whatley v. Metro. Atlanta Rapid Transit Auth., 632 F.2d 1325 (5th Cir. 1980) (holding that Title VII does not prevent an employer from firing an employee whose job it is to handle discrimination complaints when the employee does this contrary to the employer's instructions).

lemma. For the majority, exempting employees in these cases from the protections of retaliation law would mean that employers could gain the benefit of anti-discrimination policies while punishing the employees who implement and oversee them. But at the same time, as the dissent in *Johnson* explained, "it was [the plaintiff's] job to advocate on behalf of minorities," and the employer had every right to fire him for not doing his job to its liking. Both sides are right.

Given that the underlying difficulty in these cases is the impossibility of parsing causation, we might ask why the manager rule emerged as the vehicle for mediating the clash between retaliation law and employment-at-will. Why haven't the courts acknowledged the intractability of causation in these cases, instead of developing an amorphous requirement that managers with EEO responsibilities must step outside their role as a prerequisite to obtaining protection from retaliation? The answer traces back to just how entrenched internal EEO policies and processes have become, both in practice and in discrimination law. Acknowledging the incoherence of causation in these cases would expose the crisis in retaliation law created by the privatization of policies and processes for addressing discrimination. As internal employer antidiscrimination policies have become fixtures in the workplace, and discrimination law increasingly incentivizes and defers to them, more employees are involved in the work of implementing these policies. When they do so more vigorously than their employers would like, they are vulnerable to retaliation; and yet, their claims do not fit the model of retaliation law, which proscribes retaliatory motives but leaves free reign over employee job performance. For courts to openly recognize the incoherence of applying retaliation law to these employees would call into question the soundness and integrity of the internal governance model for handling discrimination. And that train left the station long ago.

Despite the incoherence of the doctrine—the impossibility of separating job performance from opposition to discrimination when one's job is to oppose discrimination—there is a real function that the doctrine is serving, despite the inconsistencies and gaps it creates in retaliation law. Courts are engaged in a surreptitious balancing act that weighs employers' interests in retaining control over EEO personnel against employees' interests in carrying out EEO policies free from retribution. While the weighing of employers' and employees' interests is inherently part of the balancing act that animates retaliation law, the manager rule hides that it is even occurring. And the sweepingly pro-employer balance that the rule strikes does not adequately account for the benefits employers reap from having such policies in place. Nor does it accord with the widely-shared perception, thanks to a stream of largely pro-employee Supreme Court retaliation cases, that there is a pro-employee tilt in retaliation law.

The biggest problem with retaliation law's failure to protect EEO employees is that it magnifies the risk that employers will co-opt internal compliance regimes for their own benefit, retaining the veneer of legitimacy but undermining their independence. Between the manager rule and the distinctive problems with the reasonable belief doctrine in this setting, current trends in the law leave EEO employees highly vulnerable to retaliation. Retaliation law fails employees like Grey-Allen in the *Townsend* case, who undertake a serious, independent investigation into a discrimination complaint but encounter retaliation before they can complete it. And for the EEO employee who escapes the *Townsend* trap, a more difficult hurdle awaits: an employee whose job duties require her to report,

investigate, or remedy discrimination must step outside her role to gain protection under the opposition clause. But the cases leave little or no space between stepping outside that role and crossing into insubordination, disloyalty and unsatisfactory job performance. The result is an expanding no-man's land for employees who experience retaliation in the course of performing EEO responsibilities.

To date, the case law has done a dismal job of responding to the tensions underlying this doctrine. There is indeed a legitimate concern that applying retaliation protections to persons who job involves enforcing nondiscrimination guarantees could overly constrain employers in their ability to monitor and control how these employees perform their jobs. However, excluding employees with EEO responsibilities from retaliation protection strikes a massive blow to the scope of retaliation law, especially in light of how broadly employer policies delegate reporting and oversight responsibilities to employees. The resulting gap in retaliation protection raises important questions about the role internal governance has come to play in supplanting formal legal enforcement and shielding employers from liability. It also raises renewed questions about the relationship between legal protection from discrimination and the law's protection against retaliation.

IV. TWO PATHS DIVERGE: RETALIATION AND DISCRIMINATION LAW AT CROSS-PURPOSES

Until recently, the core teaching from the Supreme Court's retaliation cases has been that strong protection from retaliation is an integral and necessary part of a legal regime prohibiting discrimination. In a trilogy of cases beginning in 2005, the Court has interpreted general statutory bans on discrimination to implicitly encompass protection from retaliation, going so far as to equate the two conceptually. In the first of these cases, *Jackson v. Birmingham Board of Education*,[177] the Court interpreted Title IX, which prohibits discrimination based on sex in federally-funded education programs but omits any specific mention of retaliation, to implicitly include a ban on retaliation. The Court reasoned that punishing someone for complaining about sex discrimination is itself a form of sex-based discrimination.[178] Two later cases followed this line of reasoning to find protection from retaliation to be an inherent part of a general statutory ban on discrimination.[179]

In several cases decided since *Jackson*, the Court broadly interpreted statutory bans on retaliation within discrimination statutes, overcoming significant textual hurdles to do so.[180] The Court emphasized in these cases the instrumental connection between discrimination and retaliation, explaining that broad protection against retaliation is necessary for the effective enforcement of discrimination law.[181] Altogether, within the past decade, the Court has decided seven retaliation cases in which it has embraced broad protection from retaliation as an essential, core component of the anti-discrimination project.[182]

177. Jackson v. Birmingham Bd. of Educ., 544 U.S. 167 (2005).

178. *Id*.

179. *See* CBOCS West, Inc. v. Humphries, 553 U.S. 442 (2008) (§ 1981); Gomez-Perez v. Potter, 553 U.S. 474 (2008) (the federal sector provision of the ADEA, 29 U.S.C. § 633(a).

180. Kasten v. Saint-Gobain Perf. Plastics Corp., 131 S. Ct. 1325 (2011); Thompson v. N. Am. Stainless, LP, 131 S. Ct. 863 (2011); Crawford v. Metro. Govt. of Nashville and Davidson Cnty., Tenn., 555 U.S. 271 (2009); Burlington N. & Sante Fe Ry. Co. v. White, 548 U.S. 53 (2006).

181. *See* Brake, *Retaliation in an EEO World*, *supra* note 5, at 122–25.

182. *Id.*

The Court's most recent retaliation case, however, de-couples the two sets of protections and sets retaliation law on a separate track. Instead of a convergence, this case warns of cross-purposes in the two bans. In *Nassar v. University of Texas Medical Center*,[183] the Court decided that Title VII's more plaintiff-friendly causation framework for discrimination claims does not apply to retaliation claims. Rather than adopt the motivating factor standard that applies to mixed-motive cases alleging status-based discrimination under Title VII, the Court ruled that retaliation claims require proof of but-for causation, a more difficult standard for plaintiffs to meet.[184] Part of the Court's reasoning warned that aligning the proof requirements for the two claims would encourage frivolous retaliation claims and detract from the enforcement of discrimination law.[185] The Court's reasoning struck a very different tone from its previous retaliation cases. For the first time, the Court viewed the two claims as in competition with one another, instead of seeing them as essential parts of an integrated whole. The decision marks a significant departure from the Court's conceptualization of retaliation as a form of status-based discrimination in *Jackson*.[186] The different proof structures the Court adopted in *Nassar* for retaliation and discrimination would not make sense if the Court still viewed the two prohibitions as part and parcel of the same anti-discrimination project.

The developments in retaliation law discussed in this article are part of this shift away from the unification of retaliation and discrimination, and toward a widening gulf between the two sets of protections. The dismantling of retaliation coverage for the employees overseeing EEO compliance has taken place against the backdrop of expanding internal anti-discrimination policies and their integration into the external law of employment discrimination. As discussed previously, over the past two decades, discrimination law has firmly committed itself to incorporating employer policies and procedures into the substantive determination of employer liability.[187] This incorporation of internal policies is consistent with the law's conceptualization of discrimination as intentional, invidious, and discrete.[188] But the shift to internal oversight of discrimination complaints is in tension with retaliation law, which restricts employer autonomy in carrying out internal governance. The overlay of retaliation law on top of the EEO workplace reveals the disconnect between the internal governance model of discrimination law, which equates internal anti-discrimination policies with substantive compliance, and retaliation law, which regulates employer responses to discrimination complaints. In this tension, discrimination law's embrace of internal governance has won out, closely tracking the common law's employment-at-will default of maintaining employer control over employee job performance.

In the doctrinal snare of retaliation law as applied to EEO employees, the tensions created by the internal governance model and its incompatibility with retaliation law have come home to roost. The difficulty sorting out retaliation law in this setting reveals the underlying fragility of the union between retaliation and discrimination as intertwined, mutually reinforcing concepts. The Court's teachings from *Jackson*, which were never

183. Nassar v. Univ. of Tex. Sw. Med. Ctr., 133 S. Ct. 2517 (2013).
184. *Id.* at 2522, 2532–33.
185. *Id.* at 2531–32.
186. Justice Kennedy, who dissented in *Jackson*, wrote the majority opinion in *Nassar*.
187. *See supra* text accompanying notes 1–11.
188. *See, e.g.*, Tristin K. Green, *Insular Individualism: Employment Discrimination Law After* Ledbetter v. Goodyear, 43 HARV. C.R.-C.L. L. REV. 353 (2008).

fully elaborated, have been cut short. The core insight from *Jackson* and its progeny remains powerful: legal protections from retaliation and discrimination serve the same purposes, and protection against the former is essential to securing the law's protection from the latter. But that lesson never disrupted discrimination law's embrace of internal policies and complaint processes as indicators of substantive compliance with the external law, nor the expectation of employer autonomy in overseeing internal policies and complaint processes.

Short of walking back discrimination law's embrace of internal governance, the best hope for getting retaliation law back on track—and at least curbing somewhat the opportunities for employer interference with internal EEO compliance—is to replace the current law's virtual exclusion of EEO employees from retaliation protection with a more forthright, transparent balancing of employer and employee interests. Such a balancing should factor in the central role now played by internal anti-discrimination policies in the external law. As Justice Souter recognized in *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*,[189] without meaningful protection from retaliation, internal antidiscrimination policies would become a mere sham, undermining the integrity of the legal framework that incentivizes them.[190] Absent protection from retaliation, the employees who administer these processes are vulnerable to pressures to implement them in a way that accords with an employer's self-serving desire to whitewash claims and silence potential complainants.[191]

Instead of an inscrutable rule requiring managers with EEO responsibilities to step outside their role in order to gain protection from retaliation, these employees should be protected when they act reasonably within their job responsibilities to address discrimination complaints under employer anti-discrimination policies. Despite its flaws, reasonableness—which would effectively function as a just-cause rule in this area of job responsibilities—would at least be a fairer gate-keeper than the current retaliation doctrines policing these claims. It would still preserve some space for employer oversight of employee job performance, while protecting the integrity of internal anti-discrimination policies by allowing the employees who implement them reasonable room to do so. Reasonableness in this setting should be calibrated by the professional norms of EEO employees and the scope of the particular employer's anti-discrimination policies. Both the employee's understanding of discrimination and the manner of responding to complaints should be reasonable, in light of professional norms and the scope of the employer's anti-discrimination policies. Because the responsible EEO employee does not pre-judge a discrimination complaint, the reasonableness standard advocated here should not permit employers to intervene with retaliatory action to cut short an investigation. In a case like

189. Crawford v. Metro. Gov't of Nashville and Davidson Cnty., Tenn., 555 U.S. 271 (2009).

190. *Id*. at 273–76. However, *Crawford* has not been viewed by lower courts as foreclosing application of the manager rule to employees implementing and overseeing EEO policies. *See, e.g.*, Brush v. Sears Holdings Corp., 466 Fed. App'x. 781 (11th Cir. 2012); Dunn v. Wal-Mart Stores, E., L.P., 2013 U.S. Dist. LEXIS 50974 (S.D. Fla. Apr. 9, 2013).

191. *Cf.* Sonia Goltz, *Women's Appeals for Equity at American Universities*, 58(6) HUM. REL. 763, 784 (2005) (discussing the experiences of two complainants whose universities' affirmative action officers were initially strongly supportive of their complaints, but then made an abrupt about-face and became much less supportive).

Grey-Allen's in *Townsend v. Benjamin Enterprises*,[192] an employee undertaking a reasonable investigation into allegations of discrimination should be protected from retaliation that cuts off the investigation before the facts can be ascertained.

Of course, a legal standard purporting to measure the reasonableness of employee opposition is no panacea. The existing reasonable belief standard, which courts apply to retaliation claims brought under Title VII's opposition clause, is emblematic of the dangers. Courts currently apply the reasonable belief standard—to all employees alleging retaliation for their involvement in internal complaints, not just EEO employees—in a way that sets reasonableness far beyond the sights of the typical employee. Courts applying the reasonable belief doctrine measure reasonableness strictly, benchmarked against the substantive law of discrimination as interpreted by the courts. The standard advocated here for retaliation cases brought by EEO employees would take a very different tact in gauging the reasonableness of employee opposition, measuring it not by the external law but from the perspective of a reasonable EEO employee operating under the employer's anti-discrimination policies. The critical move in the standard advocated here is to measure reasonableness from the perspective of persons with the employee's job responsibilities and operating under the employer's anti-discrimination policies. Under this version of a reasonableness standard, employers would still have a role in supervising the job performance of EEO employees, and could take action against those who unreasonably construe discrimination requirements and/or respond unreasonably to discrimination complaints, as measured against professional norms. While the shift to such a reasonableness standard is far from ideal, and is accompanied by the risk of courts following their own norms rather than those of the EEO profession, the dilemmas created by the overlay of retaliation law onto a legal regime that incentivizes and defers to internal compliance while leaving intact employer autonomy over job performance defy an easy resolution through doctrinal rules. The approach advocated here would at least bring greater harmony between retaliation and discrimination law, in-keeping with the Court's prior recognition that the two cannot be productively separated.

The current void in retaliation coverage for EEO employees undermines whatever benefits internal governance has to offer.[193] Instead of incentivizing employers to act as voluntary agents of change in furthering the anti-discrimination project, the lack of protection for the employees doing this work makes these processes mere window dressing.[194] By granting free rein to employers to fire or otherwise penalize EEO employees for taking seriously discrimination complaints, retaliation law adds fuel to the fire of the critics who denounce employer self-monitoring.[195] The doctrinal gap exposed here also undermines

192. Townsend v. Benjamin Enters., 2012 U.S. App. LEXIS 9441 (2d Cir. May 9, 2012); *see supra* text accompanying notes 58–64.

193. For a defense of an internal governance model that incentivizes voluntary employer policies and processes addressing discrimination, *see* Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001).

194. *Cf.* Bennington, *supra* note 39, at 16, 18–19 (discussing the conflicts facing HR managers that inhibit them from standing up to discrimination, and discussing study findings suggesting that HR managers in fact do no better than line managers in implementing nondiscriminatory selection systems).

195. *See, e.g.*, Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form Over Substance in Sexual Harassment Law*, 26 HARV. WOMEN'S L.J. 3 (2003); Bisom-Rapp, *An Ounce of Prevention*, *supra* note 4; Bisom-Rapp, *Fixing Watches with Sledgehammers*, *supra* note 6.

one of the strengths of retaliation law: properly applied, it creates space for building coalitions within the workplace whereby employees work together to fulfill the goal of equal opportunity. But without protection from retaliation, the employees overseeing internal anti-discrimination policies would be better off keeping their noses to the ground and looking out for themselves. Instead of facilitating EEO employees in protecting the rights of their fellow workers, the gaps in the law set up the incentive to be a "company man" and convey whatever message the employer wants to hear.

CONCLUSION

In his classic work, *Exit, Voice, and Loyalty*, A.O. Hirschman extolled voice as a productive force in response to organizational decline and stagnation.[196] He argued that loyalty mediates between exit and voice, and that greater loyalty makes people more likely to voice their dissent rather than exit the organization. Subsequent literature has expounded on the benefits of voice—to the organization and to society—and on the desirability of incentivizing voice over exit.[197] Perversely, retaliation doctrine now privileges exit over voice—first, by reserving the highest level of protection for complaints made to external authorities (courts and the EEOC), and second, by removing the personnel who oversee internal complaint channels from even the lower level of protection in the law. The effect is to stifle not only the voice of the employees who oversee EEO compliance, but also the employees who use these channels to bring their own internal discrimination complaints.[198] Maintaining the integrity of internal complaint channels is essential if employees are to have the fortitude it takes to use them. Denying protection from retaliation to the employees who oversee EEO compliance hurts both those employees and any others who might use these processes to voice their concerns about discrimination.

Rather than helping to stabilize and fulfill the mission of discrimination law, retaliation doctrine is now developing in a way that works against that mission. The doctrinal gaps discussed in this article expose a foundational crack in the edifice. Despite the flowery rhetoric in many of the Court's recent retaliation cases, retaliation law is out of synch with the promise of discrimination law.

196. A.O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970).

197. *See generally* VOICE AND WHISTLEBLOWING IN ORGANIZATIONS: OVERCOMING FEAR, FOSTERING COURAGE AND UNLEASHING CANDOR (Ronald J. Burke & Cary L. Cooper, eds. 2013).

198. *Cf.* Chambliss, *supra* note 16, at 53 (noting that "most employees who complain about discrimination do so through internal workplace procedures, where they are represented by internal EEO personnel").