

OPPOSITION AT THE WATER COOLER: THE TREATMENT OF NON- PURPOSIVE CONDUCT UNDER TITLE VII'S ANTI-RETALIATION CLAUSE

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I. INTRODUCTION

Imagine that you are an employee at a mid-sized company. While at work one day, you decide to take a quick coffee break. As you enter the break room, you run into your coworker, Carolyn. Carolyn is a good friend of yours and you decide to take some time to catch up with her. After making some small talk, the tone of the conversation changes, and although people are walking in and out of the room, Carolyn quietly tells you that she has heard that your manager has been making unwanted advances and derogatory sexual comments toward one of your coworkers. Carolyn tells you that the whole situation makes her a little uncomfortable and that she is interested to see how it plays out. Carolyn is subsequently fired after the conversation makes its way back to your manager through a bystander. Should Carolyn be protected for opposing her employer's discriminatory conduct or is this a situation where Carolyn did not properly oppose the discrimination, and thus is not protected from being fired?

In enacting Title VII, Congress sought to prevent discrimination based on sex, race, national origin and religion in the workplace.¹ To prevent discrimination claims from being deterred,² Congress included an anti-retaliation provision in Title VII.³ This provision prohibits employers from retaliating against an employee for opposing discrimination (the "opposition clause") or for participating in a Title VII investigation, proceeding or hearing (the "participation clause").⁴ While the opposition clause has been construed broadly,⁵ Justice Alito recently raised the issue of whether opposition needs to be made with the purpose of opposing discriminatory conduct for it to be

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1. 42 U.S.C. § 2000(e)-(2) (2009).

2. *Heuer v. Weil-McLain*, 203 F.3d 1021, 1023 (7th Cir. 2000).

3. 42 U.S.C. § 2000e-(3)(a) (2009).

4. *Id.*

5. Brief of the National Employment Lawyers Ass'n et al. as Amici Curiae in Support of Petitioner at 15–16, *Crawford v. Metropolitan Government of Nashville*, 129 S. Ct. 846 (2009) (No. 06-1595).

protected under the anti-retaliation provision.⁶ Alito was particularly concerned that if the opposition clause were read to protect non-purposive conduct, the trend of rapidly increasing retaliation claims would continue.⁷ Although Alito clearly indicated that he thought only purposive opposition should be protected under the opposition clause, he acknowledged that it remains undecided whether non-purposive conduct is protected as well.

So, in the previously discussed situation, should Carolyn's discussion of the harassment be protected under the opposition clause? Was Carolyn's conversation by the water cooler done with the purpose of opposing discriminatory conduct or was it simply workplace gossip? Would it matter if the conversation had taken place in Carolyn's office rather than in a common area? What if, rather than being a coworker, you were one of Carolyn's supervisors? Although the opposition clause has been construed broadly, it remains unclear if Carolyn would, or should, be protected from retaliation by her employer.

Alito suggests that unless opposition is active and purposive, it should not be protected under the anti-retaliation provision.⁸ To implement this standard, the Court would need to ascertain Carolyn's intent in opposing the conduct in order to determine whether her discussion was in fact purposive. Was Carolyn engaging in water-cooler gossip or was she opposing her manager's sexual harassment? This is a difficult question, and until it is answered, both employees and employers have little notice of what kind of opposition is protected.

While Alito may be correct in making purposive versus non-purposive conduct the dividing line, courts will need to be careful about how they choose to determine purpose. Because of the difficulties courts have faced in trying to ascertain intent, it is necessary to have an objective test that will ultimately show whether the opposition was purposive. A test that clearly sets out factors to be used in determining what opposition is protected would enable employers to know when they can and cannot take adverse action against an employee. Additionally, this test would allow employees who may be afraid to oppose discriminatory conduct to know what factors courts would consider in determining the scope of the opposition clause, thus allowing the employee to communicate his or her opposition in a way that will be protected. Although there are several ways that courts could try to determine purpose, this note proposes that courts should consider whether the communication was reasonably calculated to put the employer on notice of the discrimination. This test would not only offer guidance as to what conduct is protected, but would also protect the employer's interest by offering an opportunity to fix the problem.

6. Crawford v. Metropolitan Government of Nashville, 129 S. Ct. 846, 855 (2009) (Alito, J., concurring).

7. *Id.*

8. *Id.* at 854.

II. BACKGROUND

Congress enacted Title VII in response to the recognition that widespread discontent and discrimination were negatively affecting the country.⁹ Title VII intended to “eliminate all practices which operate to disadvantage the employment opportunities of any group protected by [it].”¹⁰ Although the statute did not originally include sex as a protected characteristic,¹¹ opponents of Title VII demanded inclusion of sex to prevent its enactment,¹² thus leading Title VII to protect discrimination based on sex, religion, race, or national origin.¹³ Yet even with the addition of sex, Title VII passed and has had a significant impact on employment in the United States ever since.¹⁴

A. Title VII and Sexual Harassment

Prior to Title VII’s passage, employment was almost always on an at-will basis, and employees could be fired at any time for any reason.¹⁵ Enacted as part of the Civil Rights Act of 1964, Title VII changed this traditional practice by restricting an employer’s ability to terminate an employee at-will if the termination was based on the employee’s status as a member of a protected class.¹⁶ Additionally, Title VII prohibits employers from discriminating against members of a protected class in hiring, compensation and the terms and conditions of employment.¹⁷

In its initial stages of development, Title VII was drafted to protect minority employees who had long suffered exclusion from job opportunities. However, by the time Title VII passed, it had expanded to protect individuals from being discriminated against because of their sex.¹⁸ This protection was interpreted to encompass more than just overt discrimination and to protect individuals from

9. Cheryl Krause Zemelman, *The After-Acquired Evidence Defense to Employment Discrimination Claims: The Privatization of Title VII and the Contours of Social Responsibility*, 46 STAN. L. REV. 175, 189 (1993).

10. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280 (1976).

11. Jeff Mitchell, *Title VII’s “Sex Life”*, 24 WOMEN’S RIGHTS L. R. 137, 137 (2003).

12. *Id.*

13. 42 U.S.C. § 2000e (2009).

14. *Id.*

15. Deborah A. Ballam, *Employment-at-Will: The Impending Death of a Doctrine*, 73 AM. BUS. L.J. 653, 653 (2000).

16. 42 U.S.C. § 2000e (2009).

17. *Id.* Title VII states that:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.

18. Brianne J. Gorod, *Rejecting “Reasonableness”: A New Look at Title VII’s Anti-Retaliation Provision*, 56 AM. U.L. REV. 1469, 1476 (2007).

sexual harassment in the workplace.¹⁹ Sexual harassment claims are generally analyzed as either quid pro quo claims or hostile work environment claims.²⁰ Quid pro quo harassment is that which “involves the conditioning of concrete employment benefits on sexual favors,”²¹ whereas hostile work environment harassment “[does] not affect[] economic benefits, [but] creates a hostile or offensive work environment.”²² Hostile work environment harassment was not recognized until 1986, when the Supreme Court held that although an employee had not suffered economic or tangible harm, her supervisor’s unwanted fondling, sexual demands and forcible rape were sufficient to constitute sexual harassment.²³ Because the prohibition against sex-based discrimination was added as a last minute attempt to defeat Title VII’s passage, there is little legislative history to guide courts on how to interpret the prohibition.²⁴ Therefore, case law guides the interpretation and treatment of sexual harassment.²⁵

B. Title VII’s Anti-Retaliation Provision

The anti-retaliation provision was added to Title VII as a means to secure the statute’s principle objective of a discrimination-free workplace by “preventing an employer from interfering (through retaliation) with an employee’s efforts to secure or advance enforcement of the Act’s basic guarantees.”²⁶ The provision states that:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by [Title VII], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII].²⁷

In order to successfully achieve the goal of preventing employers from retaliating against those employees seeking Title VII’s protections, the provision’s clauses (known as the “opposition clause” and the “participation clause”) have been interpreted to provide broad protection for protestors of discrimination,²⁸ although the participation clause’s protection is limited by the provision’s enumerations.²⁹ In order to be protected by the anti-retaliation provision, an employee’s conduct must be covered by the opposition clause or the participation clause. While the opposition clause has been interpreted

19. Amanda Helm Wright, *From the Factory to the Firm: Clarifying Standards for Blue-Collar and White Collar Sexual Harassment Claims Under Title VII of the Civil Rights Act of 1964*, 2001 U. ILL. L. REV. 1085, 1088 (2001).

20. *Id.*

21. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 62 (1986).

22. *Id.*

23. *Meritor Savings*, 477 U.S. at 60.

24. *Id.* at 63–64.

25. Mitchell, *supra* note 11, at 137.

26. *Burlington Northern v. White*, 548 U.S. 53, 63 (2006).

27. 42 U.S.C. § 2000e-3(a) (2009).

28. *See Burlington Northern*, 548 U.S. at 65.

29. *See* 42 U.S.C. § 2000e-3(a).

broadly, its scope is far from clear. Because neither the wording nor the legislative history of the provision make it clear how much the opposition clause is meant to protect, courts have been left to develop their own definition of protected opposition.³⁰

In order to make a retaliation claim, an employee must show that (1) the employee participated in a protected activity (either opposing discrimination or participating in a statutory complaint process); (2) the employer took adverse action against the employee; and (3) there is a causal connection between the employee's protected activity and the adverse action.³¹ To be considered a protected activity, the employee's opposition must be based on a reasonable good faith belief that the employer's conduct constitutes a Title VII violation, regardless of whether the opposed conduct actually violates Title VII.³² Furthermore, the opposition must be reasonable and not overly broad, ambiguous or disruptive.³³

Notwithstanding the above requirements, courts have generally interpreted the opposition clause fairly broadly, so as not to disincentivize employees from utilizing Title VII's protections.³⁴ Complaints to supervisors, whether they be formal or informal, have been protected,³⁵ as have complaints to coworkers as long as those complaints are communicated to the management.³⁶ Informal protests (as long as they are not disruptive) and voicing one's opinions in order to bring attention to the discriminatory conduct have also been protected.³⁷ Additionally, the opposition clause generally covers opposition to discrimination against a third party.³⁸

While case law guides us as to what specific cases of opposition might be covered, Justice Alito's concurrence in *Crawford v. Metropolitan Government of Nashville* raises the still unanswered issue of whether non-purposive conduct is covered by the opposition clause.³⁹ Although Alito may be correct in asserting that only purposive behavior should be covered, leaving courts to determine an individual's purpose in opposing discrimination may be problematic.

III. CLARIFYING THE PURPOSIVE VERSUS NON-PURPOSIVE DISTINCTION WITH A "REASONABLY CALCULATED COMMUNICATION TEST"

In his concurring opinion, Justice Alito suggests that in determining the scope of the opposition clause, the line should be drawn at whether the

30. *Hochstadt v. Worchester Found. for Experimental Biology*, 545 F.2d 222, 230 (1st Cir. 1976).

31. U.S. Equal Employment Opportunity Commission (EEOC), *Compliance Manual on Retaliation* § 8-II B (1998).

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

33. U.S. Equal Employment Opportunity Commission (EEOC), *Compliance Manual on Retaliation* § 8-II B (1998).

34. *See Burlington Northern v. White*, 548 U.S. 53, 63–64 (2006).

35. *See, e.g., Ray v. Henderson*, 217 F.3d 1234, 1240 n.3 (9th Cir. 2000).

36. *Niederlander v. Am. Video Glass Co.*, 80 F. App'x. 256, 261 (3rd Cir. 2003).

37. *Laughlin v. Metropolitan Washington Airports Authority*, 149 F.3d 253, 259 (4th Cir. 1996).

38. *Ray*, 217 F.3d at 1240 n.3.

39. 129 S. Ct. 846, 855 (2009).

opponent's conduct was purposive.⁴⁰ He wrote his concurrence in order "to emphasize [his] understanding that the Court's holding does not and should not extend beyond employees who . . . engage in analogous purposive conduct."⁴¹ Alito expressed concern that allowing non-purposive conduct to be protected by the opposition clause would increase the number of retaliation claims brought against employers and would further tie employers' hands.⁴² While further defining the scope of the anti-retaliation clause may help to slow this increase in claims, Justice Alito's purposive versus non-purposive dividing line may be problematic if courts are not provided with the proper mechanism to ascertain purpose. In deciding what opposition is protected, rather than simply determining intent without clear guidance, courts should look to whether the communication was reasonably calculated to put the employer on notice, thus giving an employer an opportunity to stop the discrimination.

A. The Need for an Objective Test

Unless courts are provided with an objective test offering guidance for determining purpose, using purposive conduct as the dividing line would be problematic for a number of reasons. First, asking courts to determine whether the conduct was purposive without providing a clear, objective test would leave courts trying to determine intent with little guidance, a task which is notoriously difficult. Second, because the opposition clause has been interpreted broadly,⁴³ retaliation claims are increasing rapidly.⁴⁴ Requiring plaintiffs to show that the communication was reasonably calculated to put the employer on notice in order to be considered purposive would tighten the parameters of the opposition clause and possibly slow down the rate at which retaliation claims are being brought. Third, courts have emphasized the desire that employers be put on notice of discrimination and given the opportunity to fix the problem before a claim is brought.⁴⁵ While requiring that a plaintiff's conduct be done with the purpose of opposing discrimination could result in an employer becoming aware of discrimination, this may not always be the case. Requiring that purposive opposition be done in a way that is meant to put an employer on notice would make it extremely likely that the employer is on notice and given

40. *Id.* at 853.

41. *Id.*

42. *See id.* at 854-55.

43. Brief for Petitioner at 15-16, *Crawford v. Metro. Gov't of Nashville*, 129 S. Ct. 846 (2009) (No. 06-1595).

44. *See* U.S. Equal Employment Opportunity Commission, Charge Statistics: FY 1992 Through FY 1996, <http://www.eeoc.gov/stats/charges-a.html> (last visited Mar. 5, 2009); *see* U.S. Equal Employment Opportunity Commission, Charge Statistics: FY 1997 Through FY 2007, <http://www.eeoc.gov/stats/charges.html> (last visited Mar. 5, 2009).

45. *See* Brief for Petitioner at 42, *Crawford v. Metro. Gov't of Nashville*, 129 S. Ct. 846 (2009) (No. 06-1595) (discussing that employees may forfeit damages if they fail to take advantage of preventative opportunities provided by an employer as well as the loss of an affirmative defense for employers who know about harassment but fail to prevent its recurrence); *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998) (discussing need to incentivize employers to prevent discrimination); *Burlington Indus. v. Ellerth*, 524 U.S. 742, 765 (1998) (holding that an employer is vicariously liable for a supervisor's harassment when the employer knew about the conduct but did not take steps to prevent recurrence of harassment).

an opportunity to remedy the situation. Finally, requiring that purposive conduct be communicated in a way that is reasonably calculated to put the employer on notice would further serve the desire to balance an employee's opposition against an employer's need to maintain a stable work environment.⁴⁶

Unless courts follow an objective test for determining purpose, drawing the line at purposive versus non-purposive opposition would leave plaintiffs with the difficult task of proving intent and employers with the undesirable task of determining intent with little direction. Generally, courts will determine intent, the "secret, silent operation of someone's mind," by considering all facts and circumstances surrounding the incident.⁴⁷ The lack of an objective test leaves courts with little guidance to figure out what was going on in an individual's mind. Additionally, trying to prove intent as a plaintiff is equally difficult, as the plaintiff is left to point to extrinsic factors to convince a court of his or her motivations.⁴⁸ Although a plaintiff will still need to use extrinsic factors to show purpose under the reasonably calculated communication test, having a test that clearly sets out the factors to be considered will allow plaintiffs to communicate opposition in a way that plainly indicates purpose and thus reduces the difficulty of showing intent.

Leaving courts to look at the totality of the circumstances to determine purpose leaves employers with little guidance as to what type of opposition is protected. While a court might find that an individual was acting with the purpose of opposing conduct in a certain situation, it is unlikely that this will help an employer determine whether his own employee's conduct is purposive. Instead, the employer is left to determine an employee's motivations before being able to take any action against an employee. This ties employers' hands and fails to give adequate weight to an employer's desire to maintain internal discipline and a stable work environment.⁴⁹ By requiring that an individual's opposition be communicated in a way that puts an employer on notice, courts would have guidance as to what objective manifestations of intent need to be considered in determining whether conduct is purposive and employers would be able to look to courts' treatment of these factors as guidance as to what type of employee conduct will be considered protected opposition.

Looking at whether the employee made the communication in a way that was calculated to put the employer on notice also serves to narrow the parameters of the opposition clause. While the opposition clause has been read broadly in order to incentivize employees to utilize Title VII's protections,⁵⁰ the increasing number of retaliation claims brought each year⁵¹ suggest that courts

46. *Gonzalez v. Bolger*, 486 F. Supp. 595, 601 (D.C. Cir. 1980).

47. *Nelson v. Scully*, 672 F.2d 266, 269 (2d Cir. 1982).

48. MICHAEL K. BROWN, ET AL., *WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY* 179 (Univ. Cal. Press 2003) (2003).

49. *Gonzalez*, 486 F. Supp. at 601.

50. *Burlington Northern*, 548 U.S. at 63–64.

51. See U.S. Equal Employment Opportunity Commission, *Charge Statistics: FY 1992 Through FY 1996*, <http://www.eeoc.gov/stats/charges-a.html> (last visited Mar. 5, 2009); see U.S. Equal Employment Opportunity Commission, *Charge Statistics: FY 1997 Through FY 2007*, <http://www.eeoc.gov/stats/charges.html> (last visited Mar. 5, 2009).

may have misinterpreted the clause too broadly on behalf of plaintiffs and at the expense of employers.

Some may argue that because the opposition clause is meant to be read broadly,⁵² construing it slightly more narrowly would place too much weight on the employer's interest and the employee will suffer because of it. While this is a valid concern, the Supreme Court's decision in *Faragher v City of Boca Raton*⁵³ emphasized the need to protect employers' interests as well as employees' interests, even if that may slightly narrow employees' protections. There, the Court stated that if a plaintiff fails to utilize an employer's preventative or remedial mechanisms, she may not recover damages that could have been avoided had she availed herself of the mechanisms.⁵⁴ If the employee could have avoided harm altogether by utilizing these mechanisms, the employer should not be liable.⁵⁵ This is just one example of the Court limiting an employee's protections to ensure that employers were given a reasonable opportunity to learn about the discrimination or harassment and remedy the situation.⁵⁶ While requiring that purposive opposition be reasonably calculated to put the employer on notice may tighten the scope of the opposition clause, this slight narrowing of the clause's parameters will incentivize employees to communicate conduct in a way that puts employers on notice of the improper conduct and gives employers an opportunity to remedy the situation. Because the primary purpose of Title VII is to avoid harm rather than to provide redress, it is far better that employers be given, and take, the opportunity to end harassment and remedy the situation, rather than have the issue brought to court.⁵⁷

Congress intended that when an employee opposes discriminatory conduct, it would be because the employee is seeking that the employer stops the conduct and prevent its recurrence.⁵⁸ Courts interpreting the scope of the opposition clause have tended to protect opposition that puts an employer on notice so that the employer has an opportunity to put an end to the discrimination. Formal and informal complaints made directly to a supervisor are a clear example of opposition communicated in a way that puts an employer on notice. Both of these types of opposition have been protected under the opposition clause.⁵⁹ By requiring that opposition be communicated to the employer, courts have consistently recognized the importance of putting an

52. See *Burlington Northern*, 548 U.S. at 63–64.

53. 524 U.S. 775, 807 (1998).

54. *Id.*

55. *Id.*

56. See also *Burlington Indus. v. Ellerth*, 524 U.S. 742, 765 (1998).

57. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998) (discussing need to incentivize employers to prevent discrimination); *Burlington Indus. v. Ellerth*, 524 U.S. 742, 765 (1998) (holding that an employer is vicariously liable for a supervisor's harassment when the employer knew about the conduct but didn't take steps to prevent recurrence of harassment).

58. Brief for Petitioner at 41, *Crawford v. Metro. Gov't of Nashville*, 129 S. Ct. 846 (2009) (No. 06-1595).

59. See, e.g., *Ray v. Henderson*, 217 F.3d 1234, 1240 n.3 (9th Cir. 2000).

employer on notice.⁶⁰ Other forms of opposition that might not initially appear to be protected at first glance may actually be protected because they were communicated directly to the employer. The court in *Hertz v. Luzenac Am. Inc.* held that an employee who lost his temper and shouted at his supervisor in front of other employees about discriminatory comments was protected by the opposition clause.⁶¹ In another context, an employee who asked a supervisor whether she had been prevented from acquiring seniority because of her race was protected under the opposition clause even though this conduct was not what one typically considers opposition, as on its face it is merely an inquiry.⁶² If the court had decided this case based on whether the opposition was purposive, it very well may have come out the other way. But, if the court used the reasonably calculated communication test as a way to ascertain purpose, the opposition likely would have been protected. These cases reflect a recognition of the importance of communicating opposition in a way that puts the employer on notice and gives the employer a chance to prevent the continuation of discrimination.

Ultimately, in interpreting the scope of the opposition clause, it is crucial that the interests of the employee be weighed against the interests of the employer.⁶³ In acknowledging that employers' interests necessarily shape the scope of an employee's protection, courts have embraced a balancing test in their analysis of the opposition clause.⁶⁴ Opposition may not be protected if it is damaging to an employer's business goals⁶⁵ or if it infringes on the employer's ability to maintain a harmonious and efficient operation.⁶⁶ This is not to say that an employer's interest in avoiding the cost and disruption that often accompany opposition should outweigh an employee's right to Title VII's protection,⁶⁷ but this interest must be acknowledged and taken into account in determining when opposition is protected.⁶⁸

By using a test that focuses on employer notice to determine the employee's purpose, courts will be giving adequate weight to the employer's interests, while leaving the scope of the opposition clause sufficiently broad to protect employees' interests. Additionally, looking at employer notification as the indicator of whether conduct is purposive advances the employee's interest of working in a discrimination-free environment. While acknowledging that

60. *Niederlander v. Am. Video Glass Co.*, 80 F. App'x. 256, 261 (2003) (holding that complaints to coworkers are protected but only if they are communicated to the employer).

61. 370 F.3d 1014, 1021-22 (10th Cir. 2004).

62. *Holsey v. Armour & Co.*, 743 F.2d 199, 210-11 (4th Cir. 1984).

63. See CHRISTOPHER A. ANZALONE, *SUPREME COURT CASES ON GENDER AND SEXUAL EQUALITY: 1787-2001*, 186 (2d ed. 2002) (discussing how the Supreme Court's emphasis on business necessity in disparate impact cases and legitimate, non-discriminatory reasons in disparate treatment cases results from the Court's acknowledgement that Title VII demands balance between an employee's rights and an employer's prerogative).

64. Brian J. Kreiswith, *Justifiable Limitations on Title VII Anti-Retaliation Provisions*, 107 YALE L.J. 2339, 2342 (1998).

65. See, e.g., *Mozee v. Jeffboat, Inc.*, 746 F.2d 365, 373-74 (7th Cir. 1984).

66. *Silver v. KCA, Inc.*, 586 F.2d 138, 141 (9th Cir. 1978).

67. Elizabeth Chambliss, *Title VII as a Displacement of Conflict*, 6 TEMP. POL. & CIV. RTS. L. REV. 1, 21 (1997).

68. *Hochstadt v. Worcester Found. for Experimental Biology*, 545 F.2d 222, 233 (1st Cir. 1978).

employees' rights must be protected, Congress has expressed a manifest desire that employers' hands not be tied in the selection and control of employees.⁶⁹ By employing a test that would leave employers with little guidance as to how to determine an employee's intent in opposing conduct, employers' hands would be unnecessarily bound, which clearly goes against Congress' intent.

If courts are left to ascertain plaintiffs' purpose without guidance, employees may be able to take advantage of this ambiguity in the rule by claiming to have opposed discriminatory conduct as a way to prevent an employer from taking action. The Supreme Court tried to avoid this problem in *Clark County School District v. Breeden*.⁷⁰ In *Breeden*, a group of employees, including the plaintiff, was assigned to review job applicants' psychological evaluation reports.⁷¹ One of the applicant's files contained a comment that the applicant had made to a co-worker ("I hear making love to you is like making love to the Grand Canyon"), which was read out loud.⁷² The plaintiff's supervisor stated that he did not know what that meant and another co-worker told him that he would tell him later, which led both men to start chuckling.⁷³ It took the plaintiff nearly two years and six months to file a complaint.⁷⁴ During that time, the employer had been considering transferring the plaintiff.⁷⁵ While the Court held that the plaintiff was not protected because the incident was not objectively offensive,⁷⁶ the timing of the incident and the filing suggested that the plaintiff was using the incident to try to prevent the employer from taking any action against her.⁷⁷ Leaving courts and employers without a clear and objective test to determine whether opposition is purposive and thus protected could lead to an increase in employees using the opposition clause to immunize themselves from employer action. If an employee is aware that an employer has been considering transferring or firing him and is aware that the employer will need to discern his intent before acting, he could choose to oppose discriminatory conduct (assuming there is some conduct to oppose) as a way to bind the employer's hands.

By using a test that looks at whether the opposition was reasonably calculated to put the employer on notice of the discriminatory conduct, many of these problems would likely be avoided. Rather than leaving an employer with little direction to determine if the opposition was purposive, the employer would be guided by specific factors that would indicate whether the communication was calculated to put the employer on notice.⁷⁸ Additionally, adopting a test which tightens the parameters of the opposition clause may help slow the rapidly increasing number of retaliation claims. Finally, requiring that

69. Chambliss, *supra* note 67, at 21–22.

70. 532 U.S. 268 (2001) (per curiam).

71. *Id.* at 269.

72. *Id.*

73. *Id.*

74. *Id.* at 271.

75. *Id.* at 272.

76. *Id.* at 271.

77. *Id.* at 271–72.

78. *See infra* Part III.B.

opposition be reasonably calculated to put the employer on notice will further courts' desire to balance employees' rights against employers' interests by putting employers on notice,⁷⁹ and giving the employers an opportunity to correct the situation and prevent its recurrence.

B. Proposed Test

In order to avoid the potential problems posed by trying to determine a plaintiff's purpose, it is crucial that the factors used to establish whether the opposition was reasonably calculated to put the employer on notice be clearly set forth so courts, employers, and employees have guidance as to what opposition is protected. First, there are several factors that courts have already identified as necessary for protection under the opposition clause.⁸⁰ These include having a good faith belief that the conduct being opposed violates Title VII⁸¹ and that the opposition is reasonable.⁸² In addition to those requirements, I am proposing that the court look at several other factors.⁸³ First, courts must consider to whom the opposition was made. Next, the way the opposition was communicated must be taken into account. Finally, courts should take into account the setting in which the opposition took place. As with any reasonableness standard, it is crucial to specify the reasonable person to whom it applies, which for the purposes of this test would be a reasonable employee. Using these factors will not always make it immediately clear whether opposition is protected, and courts will need to carefully weigh each factor. However, by considering these factors rather than the employee's motivation in communicating the opposition, many of the problems articulated above could be avoided.

1. Previously Necessary Components

There are several well-established components that are necessary for opposition to be protected. The first of these is that the employee must have a good faith belief that the conduct constitutes a Title VII violation.⁸⁴ There is a subjective and objective component to the employee's showing of good faith. An employee must show that he or she subjectively believed that the opposed conduct violated Title VII, but also that this belief was objectively reasonable.⁸⁵

79. See *Hochstadt v. Worchester Found. for Experimental Biology*, 545 F.2d 222, 233 (1st Cir. 1978).

80. See *supra* Part II.B (discussing necessary components of a protected activity).

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

82. U.S. Equal Employment Opportunity Commission (EEOC), *Compliance Manual on Retaliation* § 8-II.3.b (1998).

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

84. Every circuit has interpreted the opposition clause to require a good faith belief that the discriminatory conduct violates Title VII. See Brief for Petitioner at 35 n.45, *Crawford v. Metro. Gov't of Nashville*, 129 S. Ct. 846 (2009) (No. 06-1595) (citing cases from each of the 12 geographical circuits showing that all have interpreted the opposition clause in this manner).

85. See, e.g., *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1140 (5th Cir. 1981); *Bredeen*, 532 U.S. at 270.

For the purposes of a retaliation claim, it is irrelevant whether or not the conduct actually violates Title VII.⁸⁶

In addition to the good faith requirement, courts have consistently required that the opposition be reasonable and not overly broad, ambiguous or disruptive.⁸⁷ Although individuals should be able to enjoy the protections Title VII offers, courts are only willing to go so far in requiring employers to keep hostile and disruptive employees under employment.⁸⁸ In determining whether opposition is reasonable, courts once again apply a balancing test,⁸⁹ where the employee's interest in securing the protections of Title VII is balanced against the employer's interest in maintaining a stable, productive and harmonious workplace.⁹⁰

The employer's interest generally outweighs the employee's interest when the opposition is so disruptive that it interferes with the employer's legitimate business concerns.⁹¹ For example, courts have held that communicating opposition through a demonstration that interferes with the employer's legitimate business concerns is too disruptive to be considered reasonable and thus is not protected by the opposition clause.⁹² Additionally, opposition that is communicated in a way that violates workplace rules, such as dissemination of confidential information, may well be too disruptive to be reasonable.⁹³

Although an employer's interest in maintaining a workplace that is free of disruptions must be given weight, it is important to remember that opposition, by its very nature, has the potential to be disruptive.⁹⁴ Furthermore, if the ultimate goal is to put the employer on notice, a higher level of disruption might be considered reasonable when the opposition was clearly calculated to put the employer on notice. Consider, for example, an employee whose opposition took the form of yelling about the discriminatory conduct. When this conduct was a one-time occurrence and was directed at a supervisor, it was found to be reasonable opposition.⁹⁵ Yet, if this communication had been directed towards coworkers, one could argue that it was unreasonably disruptive, regardless of whether the opposition is later communicated to the employer, as that

86. *Bredeeen*, 532 U.S. at 270.

87. U.S. Equal Employment Opportunity Commission (EEOC), Compliance Manual on Retaliation, § 8-II B (1998).

88. *See Chambliss*, *supra* note 67, at 21 (discussing the lack of guidance in how far Congress meant to allow hostile and disruptive employee conduct).

89. Edward A. Marshall, *Excluding Participation in Internal Complaint Mechanisms from Absolute Retaliation Protection: Why Everyone, Including the Employer, Loses*, 5 EMP. RTS. & EMPLOY. POL'Y J. 549, 561 (2001).

90. *Id.*

91. U.S. Equal Employment Opportunity Commission (EEOC), Compliance Manual on Retaliation, § 8 iii (1998).

92. *See, e.g., Pendleton v. Rumsfield*, 628 F.2d 102, 107 (D.C. Cir. 1980) (holding that employees who held a demonstration in the food area of a military hospital were too disruptive to be protected because it could disrupt patients' feeding).

93. *See Jefferies v. Harris County Community Action Ass'n*, 615 F.2d 1025, 1036 (5th Cir. 1980) (holding that an employee who copied and disseminated a confidential personnel form in an effort to protest allegedly discriminatory conduct was not protected by the opposition clause).

94. *Chambliss*, *supra* note 67, at 21.

95. *Hertz v. Luzenac Am., Inc.*, 370 F.3d 1014, 1021-23 (10th Cir. 2004).

opposition takes a less direct form and does little to contribute to putting the employer on notice. While there may be a slightly higher threshold for disruptive opposition that clearly puts the employer on notice, that threshold can only go as high as is reasonable when it is weighed against the employer's interest.⁹⁶

2. Additional Components

In addition to the employee's good faith belief and the reasonableness of the opposition, courts should look at to whom it was communicated, how the opposition was communicated, and the setting in which the opposition took place in order to determine if the opposition was reasonably calculated to put the employer on notice of the discriminatory conduct. By taking these additional factors into account, employees will be encouraged to communicate their opposition in a way that allows the employer to remedy the situation. Thus, the employer's interest is advanced in a way that does not detract from the employee's interest because, although the employee may need to put a little more thought into how he communicates the opposition, he will still be receiving the anti-retaliation provision's protections.

In determining whether an employee's opposition was reasonably calculated to put the employer on notice, courts should consider to whom the opposition was communicated. Opposition that is directly communicated to a superior or supervisor will weigh heavily in favor of the opposition being protected. When the opposition is communicated only to a coworker it becomes less clear whether the communication should be protected. If the opposition is communicated to a coworker and subsequently communicated to the employer, this would indicate that the opposition was calculated to put the employer on notice. Still, in the case of opposition being communicated only to a coworker, courts should give more weight to the other factors of the test to determine if the opposition should be protected. If the opposition is made to someone outside the company, this will likely weigh against the opposition being protected. It is hard to imagine a situation in which opposition was communicated to an outsider yet still reasonably calculated to put the employer on notice, but if an employee was able to show through the other factors that this was in fact the case, the opposition would need to be protected.

In addition to considering to whom the communication was made, courts should also give weight to how the communication was made. The most compelling example of making a communication in a way that is calculated to put the employer on notice would be a verbal or written complaint that makes it clear that the discriminatory conduct is being opposed by the employee. Such a communication, so long as it is communicated to the employer or to coworkers and then to the employer, would very likely be found reasonably calculated to put the employer on notice. On the other end of the spectrum, a communication made by the employee to other employees that consists of a general complaint that is not subsequently communicated to an employer is unlikely to be found calculated to put the employer on notice. Other forms of opposition, such as a demonstration (as long as it is not disruptive), letters to supervisors or other

96. Rollins v. Florida Dep't of Law Enforcement, 868 F.2d 397, 401 (11th Cir. 1989).

superiors, and inquiries to superiors about possible discrimination⁹⁷ would likely be found forms of communication that are calculated to put the employer on notice. As opposition becomes less clear and more passive, the likelihood that it would be found calculated to put an employer on notice decreases. So, if an employee opposes discriminatory conduct by refusing to participate in activities or complete work assignments, the employee would likely not be protected, even if the communication is considered reasonable, because it would not appear to be reasonably calculated to put the employer on notice (unless the employee is able to point to other factors indicating otherwise).

Finally, the setting in which the opposition took place should be used to determine if the opposition should be protected. If the opposition was made in the workplace, it will weigh in favor of the opposition being protected as opposed to if it had been made outside the workplace. Whether or not opposition made in certain areas inside the workplace is protected may depend on the nature of the workplace. For example, if the office is small and informal, communicating opposition in a break area that is heavily frequented may weigh in favor of protection. On the other hand, if the workplace is large and formal, communicating opposition in a break area might be considered too informal to give weight to the notion that the communication was calculated to put the employer on notice.

By applying this new test, many of the problems that would arise without clear guidance can be avoided. Employers would be able to use the factors to determine if an employee's opposition is protected before taking action and thus reduce the risk of litigation. When litigation is unavoidable and a claim makes it way to court, there will be clear guidance as to what opposition should be protected. Finally, employees would benefit from this test, in that it would be clear what the employee would need to consider before opposing conduct, so as to be protected by the opposition clause.

IV. APPLICATION

What would the result be for Carolyn, the woman overheard talking to a coworker about sexual harassment,⁹⁸ if courts applied this new test? The conduct Carolyn is opposing, unwanted advances and derogatory sexual comments, could reasonably be perceived as a violation of Title VII. Although a court would probably need to look at more extrinsic factors to determine if Carolyn meets the good faith belief requirement, it appears that she did have a good faith belief that the conduct violated Title VII. Carolyn's opposition is not broad or ambiguous, but there may be an argument that it is disruptive. Although gossip can be insidious, it likely will not be so disruptive as to make the opposition unreasonable. So, although there may be an argument that office gossip is disruptive, that does not appear to be true in Carolyn's case.

97. As the court held in *Holsey v. Armour & Co.*, asking a supervisor if one was passed up for a promotion because of race is a protected objection. 743 F.2d 199, 211 (4th Cir. 1984). If the employee instead posed the question to a coworker, it would likely indicate that the opposition was not calculated to put the employer on notice.

98. See *supra* Part I.

After meeting these requirements, the court must consider how the communication was made. Here, Carolyn made a verbal statement to a coworker expressing her disapproval of the situation. This is a relatively clear expression of Carolyn's disapproval, but in order for Carolyn's opposition to be purposive, it is necessary to examine the additional factors. The opposition was communicated to a coworker, which in itself is not a problem, but Carolyn's employer was only put on notice because a bystander happened to overhear the conversation and then informed her manager. Here, the setting in which the opposition took place will likely be the deciding factor. Carolyn communicated her opposition in the company's break room. If this is a smaller, less formal workplace where work related discussions often take place in the break room, Carolyn might be able to show that this communication was in fact meant to put her employer on notice and thus protected. More likely than not, however, the informality of the setting and the fact the opposition was never directly communicated to her manager will outweigh the way in which the communication was made and indicate that this opposition was not protected.

Now consider another scenario: David, an employee at the same workplace as Carolyn, is working late one night on a team project. Although most people have gone home, David and his supervisor, Barry, are sharing a pizza and finalizing their report. David and Barry, who are friends outside of work, have been talking about their families and work, when David asks Barry if he has heard anything about another supervisor's harassment of an employee. Barry replies that he hasn't and asks David if he knows anything more about it. David says that all he knows is that it has been going on for a little while and some employees are really unhappy about it. The next day, Barry tells his superior that David informed him of this harassment and soon after David is demoted. Although he is told that the demotion is due to poor work performance, David is certain it is because of his conversation with Barry.

If a court were left trying to determine David's purposes from the totality of the circumstances, his opposition would likely not be protected. Although the communication was made to a supervisor, it appears that the communication was made with the purpose of informing rather than opposing. But, if a court were to apply a reasonably calculated communication test to determine purpose, David's conduct would be protected.

First, the communication was made directly to David's supervisor. There was no intermediary step between the opposition and the employer. The fact that the communication was not disruptive and was made directly to David's supervisor will weigh heavily in favor of the communication being protected. The communication was a verbal statement, and although David did not expressly state that he opposed the discriminatory conduct, he made clear that some of his coworkers did. Although this communication would weigh more heavily in David's favor if he had stated that he was opposed to the conduct, the fact that he was making the opposition for a coworker will not weigh against him. Finally, although it would have been better for David if the communication had been made in a more formal setting, this opposition should still be protected. He was at work with a supervisor in a private area when he made the opposition. Because the opposition was made directly to a supervisor, it is not necessary that the communication be made somewhere more public. If

it had in fact been made somewhere public, it arguably would have been far more disruptive.

V. CONCLUSION

Congress offered little guidance as to how broadly the scope of the opposition clause should be read. It is clear that, generally, the opposition clause is meant to be read broadly,⁹⁹ yet it is also clear that the opposition clause does not offer absolute protection and that an employer's legitimate business goals must be weighed against an employee's need to be protected against retaliation.¹⁰⁰ Courts have been left to determine on a case-by-case basis whether each individual instance of opposition is protected. Justice Alito suggested that a line should be drawn between purposive and non-purposive conduct.¹⁰¹ While he acknowledged that it is unclear whether non-purposive conduct is protected, he was insistent that it should not be.¹⁰²

Although Justice Alito suggests a possible standard to address this unresolved problem, leaving employers and courts to determine an employee's motivation without guidance raises a number of concerns. First, looking to the purpose behind opposition would be difficult for courts to determine and for plaintiffs to show.¹⁰³ Additionally, because determining purpose would be very fact-specific and thus would vary on a case-by-case basis, employers and employees would be left with little guidance as to what opposition is protected. Finally, while drawing this line would advance the employer's interest by keeping non-purposive opposition outside the scope of the opposition clause, it would do little to put employers on notice of the discriminatory conduct and thus may not give employers an opportunity to fix the discrimination which is being opposed.

By employing a test that requires that opposition be reasonably calculated to put the employer on notice, the type of conduct Justice Alito was concerned with will likely be kept out of the scope of protection while avoiding the problems addressed previously. Alito was concerned that the opposition clause may eventually be read to protect employees who "never expressed a word of opposition to their employers."¹⁰⁴ Because it is unlikely that a plaintiff could show that this kind of silent opposition was reasonably calculated to put an employer on notice, applying the factors test described above would address Justice Alito's concerns while avoiding the problems created by looking at the purpose of the opposition.

Adopting a test that considers how and to whom the communication was made, as well as the setting in which the opposition took place, will help to define the parameters of the opposition clause. Additionally, it will give adequate weight to the employer's interest by putting the employer on notice

99. See *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 65 (2006).

100. *Gonzalez v. Bolger*, 486 F. Supp. 595, 601 (D.C. Cir. 1980).

101. *Crawford v. Metropolitan Gov't of Nashville*, 129 S. Ct. 846, 854 (2009) (Alito, J., concurring).

102. *Id.* at 855.

103. See *BROWN ET AL.*, *supra* note 48, at 179 (discussing the difficulty in proving intent and the evidence necessary to prove intent).

104. *Crawford*, 129 S. Ct. at 854 (Alito, J., concurring).

and giving the employer an opportunity to put an end to discriminatory conduct. Finally, although one might argue that this test would harm plaintiffs by narrowing the scope of the opposition clause, employees will have clear guidance as to how opposition should be communicated so as to assure the communication is protected. For these reasons, in determining whether conduct is purposive, courts should implement the reasonably calculated communications test.