IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-9229

D. LISA CLOVER,

Plaintiff-Appellee,

v.

TOTAL SYSTEMS SERVICES, INC.,

Defendant-Appellant.

On Appeal from the United States District Court
for the Middle District of Georgia

BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE IN SUPPORT OF SUGGESTION FOR REHEARING EN BANC

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U.S. COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

Clover v. Total System Services, Inc., Dkt No. 97-9229

Pursuant to 11th Cir. R. 26.1-1, I hereby certify that the following persons have an interest in the outcome of this case:

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Pursuant to Fed. R. App. P. 26.1, the Equal Employment Opportunity Commission, as a government agency, is not required to file a corporate disclosure statement.

Dori K. Bernstein, Esq.

CERTIFICATE OF TYPE SIZE AND STYLE

Pursuant to 11th Cir. R. 28-2(d), I hereby certify that the type size and style used in this brief is 12 point Courier.

_____

Dori K. Bernstein, Esq.

STATEMENT OF COUNSEL IN SUPPORT OF REHEARING EN BANC

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the Supreme Court of the United States:

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975)

Faragher v. City of Boca Raton, 118 S.Ct. 2275 (1998)

NLRB v. Scrivener, 405 U.S. 117 (1972)

Robinson v. Shell Oil Co., 117 S. Ct. 843 (1997)

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance:

Whether Title VII prohibits an employer from retaliating against an employee because she has assisted her employer's effort to investigate allegations of sexual harassment contained in a charge pending before the EEOC?

Dori K. Bernstein, Esq.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

Cases

Statutes

Rules and Regulations

Other Authorities

STATEMENT OF INTEREST

The Equal Employment Opportunity Commission (EEOC or Commission) is charged by Congress with the interpretation, administration, and enforcement of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq. The panel majority in this case overturned a jury verdict for plaintiff-appellee D. Lisa Clover on her Title VII claim that defendant-appellant Total Systems Services, Inc. (TSYS) fired her in retaliation for cooperating with an internal investigation of sexual harassment alleged in a charge then pending before the EEOC. The panel held that neither the "opposition clause" nor the "participation clause" of § 704(a), 42 U.S.C. § 2000e-3(a), protects from retaliatory adverse action an employee who has assisted her employer's effort to discover whether charged discrimination has occurred. In so holding, the panel majority construed the statutory prohibition against retaliation in a manner that conflicts with the text, administrative scheme, and congressional purpose of Title VII. Because the panel majority's restrictive interpretation of § 704(a) threatens to compromise the integrity of the EEOC's investigative process and to impede effective enforcement of Title VII, the Commission offers its views in support of en banc review.

STATEMENT OF THE ISSUE

Whether Title VII prohibits an employer from retaliating against an employee because she has assisted her employer's effort to investigate allegations of sexual harassment contained in a

charge pending before the EEOC?

STATEMENT OF THE CASE

1. Course of Proceedings

Clover sued TSYS for unlawful discharge in violation of Title VII, 42 U.S.C. § 2000e-3(a), claiming that she was fired in retaliation for her participation in an internal investigation of sexual harassment alleged in a charge then pending with the EEOC.[1] A jury found for Clover and awarded her $25,000 in compensatory damages and $160,000 in punitive damages. The district court denied TSYS's post-trial motion for judgment as a matter of law, and TSYS appealed. See Clover v. Total System Services Inc., 1998 WL 689700, *2 (11th Cir. Oct. 6, 1998). On October 6, 1998, a panel of this Court reversed the judgment and award of damages for Clover, over a dissent by Judge Henderson. Clover filed a timely petition for rehearing and suggestion for rehearing en banc on October 27, 1998.

2. Statement of Facts

Lisa Clover worked as a microfiche clerk in the Support

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[1] Section 704(a) of Title VII makes it an "unlawful employment practice for an employer to discriminate against any of his employees or applicants . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a).

Services Division of TSYS. Clover was directly supervised by Annette Jones who, in turn, was supervised by Allen Pettis. Courtney Waters, a 17-year-old high school student who had worked with Clover, filed an EEOC charge against TSYS, alleging that Pettis had subjected her to sexual harassment in violation of Title VII. After receiving notice of Waters's administrative charge, TSYS initiated an internal investigation of her allegations of sexual harassment. The investigation was conducted by Audrey Hollingsworth, a manager in TSYS's Human Resources office, and Marcus Calhoun, the company's legal counsel. See Clover, 1998 WL 689700, *1.

On March 22, 1995, Hollingsworth asked Jones to have Clover report to the Human Resources office for a meeting the next morning. Clover arrived for the meeting "a few minutes after 9:15."[2] Id. During the meeting, Hollingsworth and Calhoun told Clover they were conducting an internal investigation of allegations of sexual harassment made by Waters against Pettis.

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[2] There was "some confusion" about when the meeting was scheduled to begin. Hollingsworth believed it was set for 9:00 am, while Clover understood it would start at 9:15. Clover, at *1. Clover told Hollingsworth she was tardy because she had run a school errand for her nephew, but later that day explained to her supervisor that she had arrived late "because she was up late the night before preparing a resume." Id. at *2.

Id. Although "Clover was initially reluctant to answer questions about the matter," she agreed to assist "after being assured that she would suffer no reprisals for her cooperation." Id. at *10 (Henderson, J., dissenting). "For thirty to forty minutes," Hollingsworth and Calhoun questioned Clover about "the office interaction between Waters and Pettis." Id. at *1. In response to their inquiry, Clover described conduct by Pettis that she considered "inappropriate or unusual behavior for a member of senior management."[3] Id. at *3. The following day, TSYS fired Clover, purportedly because she had given "conflicting explanations for her tardiness" in arriving at the meeting with Hollingsworth and Calhoun. Id.

Clover sued under Title VII, claiming that TSYS unlawfully fired her because of her participation in the internal inquiry into the allegations of sexual harassment in Waters's EEOC charge. A

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[3] Specifically, Clover told Hollingsworth and Calhoun that she had observed Pettis often visit Waters's work area "without any `business purpose'"; call Waters on her personal pager during work hours; knock on the department door to get Waters's attention and call her out into the hall to talk, but hide behind the door if Clover or another worker looked up; hang up if someone other than Waters answered the phone during the day; and that Waters responded to Pettis "in a flirting kind of style." Clover, at *3.

jury found for Clover and awarded her compensatory and punitive damages. The district court entered judgment on the verdict, and TSYS appealed. Id. at *2.

3. Panel Decision

In a split decision, the panel majority reversed the judgment for Clover and held that because "the evidence presented at trial does not support the conclusion that Clover engaged in statutorily protected conduct," TSYS was entitled to judgment as a matter of law. Id. at *2. The majority first concluded that Clover's cooperation with TSYS's internal investigation of sexual harassment was not protected under the "opposition clause" of § 704(a). In the majority's view, "[n]one of the conduct Clover described comes anywhere near constituting sexual harassment," and Clover therefore lacked an "objectively reasonable" belief that TSYS had engaged in unlawful discrimination, as required to invoke the protection of the opposition clause. Id. at *4.

The panel majority further ruled, as a matter of law, that the "participation clause" of § 704(a) did not prohibit TSYS from firing Clover because she had assisted the company's internal investigation of Waters's EEOC charge. The participation clause, the majority held, "protects against retaliation for cooperation with an investigation of allegedly unlawful employment practices only when the EEOC or its designated representative conducts the investigation." Id. at *7. The majority based its interpretation on an "examination of the context in which the word `investigation'

appears" elsewhere in Title VII. Id. at *5. In every other section in which the words "investigate" or "investigation" appear, the majority observed, the term "refers to an investigation of a charge of discrimination by the EEOC or its representative." Id. at *7. "The complete absence of any mention" in Title VII "of in-house or internal investigations," the majority concluded, "indicates that only EEOC investigations are investigations `under this subchapter.'" Id. Having determined that "[t]he statute and regulations do not require, authorize, or even mention an investigation by the employer," the majority reasoned that "an employer's internal investigation is not `an investigation . . . under this subchapter' as that term is used in § 2000e-3(a), and therefore participation in internal investigations is not an activity protected by the participation clause." Id. at *8.

Judge Henderson, in a dissenting opinion, expressed "concerns about the majority's holding" that Clover's conduct was unprotected by the opposition clause because she lacked an "objectively reasonable" belief that TSYS could be liable for sexual harassment. Id. at *9 (Henderson, J., dissenting). Judge Henderson found it "entirely possible . . . that many reasonable young women would have found the conduct" Clover described "to be offensive and objectionable." Id. The dissent's primary focus, however, was on the majority's holding that the participation clause protects an employee "only when participating in an investigation conducted by the EEOC or its designated representative." Id. The majority's

"narrow" construction, Judge Henderson concluded, "is not required by the language of the statute, prior decisions of this court, or persuasive authority from other courts," and "unduly weakens the assurances afforded by the anti-retaliation provision." Id.

Unlike the panel majority, Judge Henderson found it significant that TSYS was prompted to investigate alleged sexual harassment when it received notice of Waters's EEOC charge. In Judge Henderson's view, the pending EEOC charge meant that "an investigation under `this subchapter' had clearly commenced by the time of the Clover interview." Id. at *8. The majority's holding, Judge Henderson warned, "would discourage employees with grievances concerning discriminatory treatment from pursuing informal resolution of those matters with management before filing a formal EEOC charge and would certainly discourage other employees from participating in such informal investigations." Id. Given that TSYS likely "could have compelled Clover to participate in its internal investigation," Judge Henderson found it "unfair to deny to her and other similarly situated employees the freedom from retaliation for such cooperation." Id.

ARGUMENT

THE PARTICIPATION AND OPPOSITION CLAUSES OF TITLE VII § 704(a) PROHIBIT AN EMPLOYER FROM RETALIATING AGAINST AN EMPLOYEE BECAUSE SHE HAS COOPERATED IN AN INTERNAL INVESTIGATION OF WORKPLACE DISCRIMINATION ALLEGED IN A PENDING ADMINISTRATIVE CHARGE.

1. An Employee Who in Good Faith Provides Information Relevant to

an Internal Investigation of Alleged Discrimination Has Opposed an Employment Practice Unlawful Under Title VII.

The "opposition clause" of § 704(a) prohibits retaliation against an employee "because he has opposed any practice made an unlawful employment practice by this subchapter." 42 U.S.C. § 2000e-3(a). The courts of appeals, including this Court, have universally held that "opposition is protected if the employee had a reasonable and good faith belief that the practice opposed constituted a violation of Title VII." See B. Lindemann and P. Grossman, Employment Law at 656 (3d Ed. 1996) (citing, inter alia, EEOC v. White & Son Enters., 881 F.2d 1006, 1012 n.5 (11th Cir. 1989)). When an employer initiates an internal investigation of alleged discrimination in the workplace, an employee who is invited (or required) to cooperate with the inquiry has an objectively reasonable belief that, by providing relevant information to the designated investigators, she is opposing a practice made unlawful by Title VII.

The "primary objective" of Congress in enacting Title VII "was a prophylactic one" intended "to achieve equality of employment opportunities and remove barriers" to attaining that goal. Albemarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975) (internal quotation omitted). To this end, Congress sought to induce employers "to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible," the lingering effects of past discrimination. Id. at 418 (internal

quotiation omitted). The Supreme Court recently reaffirmed this "clear statutory policy" when it interpreted Title VII to hold an employer vicariously liable for a supervisor's discriminatory harassment, subject to an affirmative defense designed "to recognize the employer's affirmative obligation to prevent violations and give credit . . . to employers who make reasonable efforts to discharge their duty." Faragher v. City of Boca Raton, 118 S.Ct. 2275, 2292 (1998) ("primary objective" of Title VII, "like that of any statute meant to influence primary conduct," is "to avoid harm"). Because encouraging employers to discover and prevent discriminatory practices in the workplace is the primary objective of Title VII, an employee who assists her employer in this endeavor is, by definition, opposing practices made unlawful by Title VII. The very fact that the employer has initiated an investigation of alleged discrimination is sufficient to demonstrate the "objective reasonableness" of the employee's belief that, by providing information relevant to the inquiry, she is opposing an employment practice made unlawful by Title VII.

The panel majority in this case held that the opposition clause does not protect from retaliation an employee who, in good faith, cooperates with her employer's internal investigation of alleged sexual harassment, unless she has an objectively reasonable belief that the information she provided is alone sufficient to demonstrate a violation of Title VII. The majority's analysis, however, ignores the reality that most evidence of discrimination

is circumstantial and must be assembled in bits and pieces. This Court has recognized "the unique proof problems that accompany discrimination cases":

> Frequently, acts of discrimination may be hidden or subtle; an employer who intentionally discriminates is unlikely to leave a written record of his illegal motive, and may not tell anyone about it. . . . Because of those realities, plaintiffs are often obliged to build their cases entirely around circumstantial evidence.

Combs v. Plantation Patterns, 106 F.3d 1519, 1537 (11th Cir. 1997). In the context of sexual harassment, moreover, the determination whether particular conduct supports a reasonable belief that Title VII has been violated can be particularly difficult. See Reed v. A.W. Lawrence & Co., Inc., 95 F.3d 1170, 1178-80 (2d Cir. 1996) (upholding jury's finding that plaintiff had reasonable good faith belief that coworker's vulgar remark was unlawful employment practice, for purposes of deciding whether her internal complaint was protected under opposition clause).

If an employee who cooperates in an internal investigation of harassment is not protected from retaliation unless the information she provides, standing alone, supports a reasonable belief that Title VII was violated, the critical process of self-examination and self-correction that was Congress's central goal will be seriously impeded. An employee who fears reprisal is unlikely to disclose her knowledge of inappropriate or questionable conduct that, by itself, might not support a reasonable belief that unlawful discrimination occurred. Such information, however, could

corroborate or support the observations or recollections of other employees, and thus greatly assist the effort to discover and remedy unlawful discrimination. Unless each employee who holds a different piece of the "discrimination puzzle" is encouraged to come forward, rather than deterred from disclosure, the primary prophylactic objective of Title VII will be defeated.

Clover's conduct in this case easily meets the standard for protection under the opposition clause. TSYS required Clover to meet with Hollingsworth and Calhoun, who informed her that they were investigating Waters's allegations of sexual harassment by Pettis and questioned Clover about the "office interactions" between the two. Clover, at *1. TSYS concedes that Clover acted in "good faith" when she recounted "inappropriate or unusual behavior" by Pettis, id. at *3, and there is no suggestion that Clover "lied or misrepresented the facts" during the interview. Id. at *10 (Henderson, J., dissenting). By responding in good faith to the questions of TSYS officials investigating alleged sexual harassment, Clover "opposed [a] practice made an unlawful employment practice by [Title VII]," regardless of whether the conduct she described would, by itself, support an objectively reasonable belief that Waters suffered unlawful discrimination.

2. An Employee Who Takes Part in Her Employer's Efforts to Investigate a Pending Charge of Employment Discrimination has Assisted or Participated in an Investigation or Proceeding Under Title VII.

The "participation clause" of Title VII's anti-retaliation provision prohibits discrimination against an employee "because he has made a charge, testfied, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a). The panel majority in this case construed the participation clause to prohibit "retaliation for cooperation with an investigation of allegedly unlawful employment practices" in a pending administrative charge "only when the EEOC or its designated representative conducts the investigation." Clover, 1998 WL 689700, *7. In so holding, the majority adopted an overly restrictive interpretation of the term "investigation," and ignored entirely the broader term "proceeding."

It is clear from the plain statutory text of Title VII's charge-filing provisions that an administrative "proceeding" under Title VII commences at the time a charge is filed with the EEOC, or with the appropriate state or local authority. Section 706(c) provides that "no charge may be filed" with EEOC "before the expiration of sixty days after proceedings have been commenced" with the authorized state or local enforcement agency, and that a "proceeding" under state or local law "shall be deemed to have been commenced" when a signed written statement of facts "on which such proceeding is based" is sent by registered mail to the state or local authority. 42 U.S.C. § 2000e-5(c) (emphases added). Under § 706(e)(1), when an individual "has initially instituted

proceedings" with a state or local agency to challenge employment discrimination, a "charge shall be filed" with the EEOC within 300 days after the alleged unlawful practice occurred. 42 U.S.C. § 2000e-5(e)(1). The Supreme Court reads these charge-filing provisions to require that "no charge may be filed with the EEOC until 60 days have elapsed from initial filing of the charge with an authorized state or local agency, unless that agency's proceedings `have been earlier terminated.' . . . In light of the 60-day deferral period, a complainant must file a charge with the appropriate state or local agency, or have the EEOC refer the charge to that agency, within 240 days of the alleged discriminatory event in order to ensure that it may be filed with the EEOC within the 300-day limit." EEOC v. Commercial Office Products Co., 486 U.S. 107, 111-12 (1988) (emphases added). The plain language of the statute thus establishes that from the time a charge is filed with the EEOC (or designated state agency) until that charge is dismissed or otherwise finally resolved, a "proceeding . . . under this subchapter" remains pending, and Title VII broadly protects from retaliation any individual who has "assisted, or participated in any manner" in that "proceeding." 42 U.S.C. § 2000e-3(a). See Smith v. Columbus Metropolitan Housing Authority, 443 F. Supp. 61, 64 (S.D. Ohio 1977) ("Once a charge is filed, the charging party is no longer simply an employee, and the respondent is no longer simply an employer. Both are parties to a Title VII agency proceeding, and both have lawful avenues provided

by statute, rule, or regulation by which to discover information pertinent to the pending proceeding.").

Title VII provides that within ten days after a charge is filed, the EEOC "shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice)" on the respondent employer, "and shall make an investigation thereof." 42 U.S.C. § 2000e-5(b); see also 29 C.F.R. § 1601.14 (requiring notice of charge to be served on respondent within ten days after filing). "As part of each investigation, the Commission will accept any statement of position or evidence with respect to the allegations of the charge which" the charging party or the respondent employer "wishes to submit." 29 C.F.R. § 1601.15. See also EEOC's standard form - Notice of Charge of Discrimination (requesting respondent employer to submit "a statement of your position with respect to the allegations contained in this charge, with copies of any supporting documentation," and informing that "[t]his material will be made part of the file and will be considered" during EEOC's investigation). The EEOC "may require a fact-finding conference with the parties" to provide an "investigative forum intended to define the issues, to determine which elements are undisputed, to resolve those issues that can be resolved and to ascertain whether there is a basis for negotiated settlement of the charge." 29 C.F.R. § 1601.15(c). If the EEOC determines, after its investigation, that there is reasonable cause to believe the charge

is true, Title VII requires the EEOC to endeavor to eliminate the alleged unlawful practice through "informal methods of conference, conciliation, and persuasion." 42 U.S.C. § 2000e-5(b).

The panel majority in this case failed to recognize that the administrative process established to implement Title VII, consistent with the primary legislative purpose, anticipates an internal inquiry by the employer into the discrimination alleged in the charge. While neither the statute nor the regulations explicitly require an employer to conduct its own investigation of the allegations in an administrative charge, the entire statutory and regulatory scheme is designed to encourage the employer to "self-examine" and voluntarily correct discriminatory practices, furthering the "primary objective" of Congress in enacting Title VII. See Albemarle Paper, 422 U.S. at 417-18. By requiring prompt notice of the charge, inviting the employer's response and participation in the investigation, and mandating conciliation efforts, the procedures established in the statute and regulations clearly contemplate an internal examination by the employer into the discriminatory practices alleged in the charge. Virtually every respondent employer will need to make some type of inquiry into the charged allegations in order to submit a response to the EEOC, or to participate meaningfully in a fact-finding conference or conciliation efforts. See Clover, 1998 WL 689700, *9 (Henderson, J., dissenting). Each step in this process -- whether performed by the the EEOC, the charging party, the employer, or

other employees -- is an integral part of an administrative "proceeding" under Title VII.

The filing of an administrative charge of employment discrimination thus serves "to set the EEOC machinery in operation," and triggers the "exceptionally broad protection intended" for those who assist or participate "in any manner" in the administrative "proceeding" that remains pending until the charge is dismissed or otherwise finally resolved. See Pettway v. American Cast Iron Pipe Co., 411 F.2d 998, 1006 n.18 & 1007 (5th Cir. 1969). "The protection of assistance and participation in any manner would be illusory if employer could retaliate against employee for having assisted or participated in a Commission proceeding." Id. at 1106 n.18. An employee who "has assisted, or participated in any way" in her employer's effort to respond to the allegations contained in the charge, or to engage otherwise in the pending administrative "proceeding" under Title VII, is therefore protected from retaliation by § 2000e-3(a).

The Supreme Court's interpretation of the anti-retaliation provision of the National Labor Relations Act ("NLRA"), is highly instructive. See NLRB v. Scrivener, 405 U.S. 117 (1972). Section 8(a)(4) of the NLRA makes it an unfair labor practice for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act." 29 U.S.C. § 158(a)(4). At issue in Scrivener was whether that provision protects from retaliation an employee who gave a

sworn written statement to an NLRB field examiner investigating a charge, but who had neither filed the charge nor testified at a hearing. 405 U.S. at 118. The Eighth Circuit was "reluctant to hold that § 8(a)(4) can be extended to cover preliminary preparations for giving testimony," and construed the provision "to protect an employee against an employer's reprisal only for filing an unfair labor practice charge or for giving testimony at a formal hearing, and that it affords him no protection for otherwise participating in the investigative stage." Id. at 121.

In a unanimous opinion, the Supreme Court rejected the Eighth Circuit's view. The Court began by observing that interpreting § 8(a)(4) "to protect the employee during the investigative stages . . . comports with the objective of that section" to ensure for individuals with information about unlawful practices "complete freedom" from "employer intimidation." Id. at 121-22 (internal quotations omitted). While acknowledging that the statutory reference "to an employee who `has filed charges or given testimony,' could be read strictly and confined in its reach to formal charges and formal testimony," the Court divined from "the preceding words `to discharge or otherwise discriminate,'" and "particularly . . . the word `otherwise,'" Congress's intent "to afford broad rather than narrow protection to the employee." Id. at 122. This "textual analysis alone," the Court concluded, supported "a broad and not a narrow construction." Id.

The Court further determined that a broad interpretation of §

8(a)(4) "squares with the practicalities of appropriate agency action." Id. at 123. "An employee who participates in a Board investigation," the Court observed, "may not be called formally to testify or may be discharged before any hearing at which he could testify . . . or the case may be settled or dismissed before hearing." Id. In the Court's view, "[i]t would make less than complete sense to protect the employee because he participates in the formal inception of the process (by filing a charge) or in the final, formal presentation, but not to protect his participation in the important developmental stages that fall between these two points in time." Id. at 124. Such a limited construction, the Court stated, would provide "unequal and inconsistent protection" inadequate "to preserve the integrity of the Board process in its entirety." Id. The Court found additional support for a broad interpretation in the Board's subpoena power. An employee who has been subpoenaed, the Court reasoned, "should be protected from retaliatory action regardless of whether he has filed a charge or has actually testified," and "[t]here is no basis for denying similar protection to the voluntary participant." Id.

The panel majority's restrictive interpretation of Title VII's anti-retaliation provision cannot be reconciled with the Supreme Court's interpretive approach and reasoning in Scrivener. A "textual analysis" of § 704(a) demonstrates that "[t]he protection provisions of Title VII are substantially broader than even those included in the . . . NLRA in that, in addition to protecting

charges and testimony, Title VII also specifically protects assistance and participation." Pettway, 411 F.2d at 1006 n.18. Title VII's anti-retaliation provision "is straightforward and expansively written." Merritt v. Dillard Paper Co., 120 F.3d 1181, 1186 (11th Cir. 1997). The panel majority in this case acknowledged that Title VII does not "define precisely what constitutes an `investigation . . . under this subchapter.'" Slip op. at 5. Nor does the statute expressly define the even broader term "proceeding," a term the majority totally disregarded in its analysis. Similarly, the verb "assisted" "is not preceded or followed by any restrictive language that limits its reach." See Merritt, 120 F.3d at 1186 (internal quotations omitted). The use of "any" in the phrase "participated in any way," moreover, "is not ambiguous" and "has a well-established . . . expansive meaning" -- "`any' means all." Id. The expansive language chosen by Congress demonstrates an intent to afford to employees the broadest possible protection against retaliation for conduct that relates in any way to the administrative charge process under Title VII. Because an employer's internal inquiry into a discrimination charge is part of the administrative "proceeding" contemplated by the statutory scheme, an employee who assists or participates in any way in that inquiry is within the protective scope of the participation clause.

Construing the participation clause to prohibit retaliation against employees who cooperate with an employer's internal investigation of allegations in a Title VII charge will best serve

"a primary purpose of antiretaliation provisions: Maintaining unfettered access to statutory remedial mechanisms." See Robinson v. Shell Oil Co., 117 S. Ct. 843, 848 (1997) (citing, inter alia, Scrivener, 405 U.S. at 121-22). Protection against retaliation during an internal investigation of a charge is essential "to prevent the [Commission's] channels of information from being dried up by employer intimidation of prospective complainants and witnesses," see Scrivener, 405 U.S. at 122, and thereby "to preserve the integrity of the [Commission] process in its entirety." Id. at 124. If an employer is free to discharge or otherwise retaliate against an employee who can provide damaging information relevant to a charge, as the panel majority held, the EEOC's ability to investigate the alleged discriminatory practices will be seriously compromised, if not entirely destroyed.

A broad interpretation of the participation clause to encompass cooperation in an employer's own inquiry into a charge "squares with the practicalities of appropriate agency action." See Scrivener, 405 U.S. at 123. An employer who receives the requisite prompt notice of a charge will be able to preempt or corrupt any subsequent administrative investigation simply by questioning its employees before the EEOC has had an opportunity to do so. Because any information an employee relates to an employer in an internal investigation of a charge "is potentially impeachment material should he later change his version of events, the employee's decision whether to cooperate is one which affects

his participation in the pending [administrative] proceeding. . . . To permit employers to accumulate exculpatory evidence during the prehearing phase by wielding the control they exercise over employees' job security certainly violates the spirit of Title VII, which contemplates that allegations of discriminatory employment practices will be litigated before the appropriate agencies and courts, not before the supervisory staff of the respondent employer." Smith, 443 F. Supp. at 64.

CONCLUSION

Because the panel majority's narrow interpretation of § 704(a) is inconsistent with the expansive language and protective purpose of the provision, and would seriously impede the effective enforcement of Title VII, we urge this Court to grant rehearing en banc and affirm the judgment on the jury verdict for Clover.

Respectfully submitted,

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