

Drawing the Line: *Niswander's* Balance Between Employer Confidentiality Interests and Employee Title VII Anti- Retaliation Rights

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ABSTRACT: Employer confidentiality policies involve an employee's promise not to share information deemed confidential by an employer. Breaching these confidentiality promises involves serious consequences, including discharge. In certain circumstances, employees may breach the confidentiality policy for legitimate reasons. In Niswander v. Cincinnati Insurance Co., the Sixth Circuit developed a six-factor balancing test to assess when an employee's Title VII interests outweigh an employer's interest in maintaining the workplace. The test opens the door to inconsistent and sometimes unreasonable results. To provide for consistent and oftentimes more reasonable results, courts should use an objective test that focuses on the employee's need to breach an employer's confidentiality policy to preserve information related to employment-discrimination claims.

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I. INTRODUCTION

Recently, employers have confronted issues of employee loyalty by developing confidentiality policies.¹ The need to do so surged after the 1991 amendments to Title VII of the Civil Rights Act of 1964 (“Title VII”), which encouraged employees to bring employment-discrimination claims.² By 1994, the courts tended to withhold Title VII anti-retaliation protection from employees who opposed an employer’s discriminatory actions and, in doing so, breached employer confidentiality policies.³ During this time period, courts valued employers’ rights over those of employees. However, courts have since found it necessary to protect some employee breaches of confidentiality.⁴ This new trend created uncertainty in the law and caused difficulty in understanding what circumstances would justify an employee’s breach.

Some hypotheticals help demonstrate this uncertainty. In the first situation, an employer has a confidentiality policy to promote its interests and business plan. An employee joins the company and promises to uphold the employer’s confidentiality policy. Later, the employee discovers discriminatory policies and brings suit against the employer. Hoping to obtain a more-lucrative settlement, the employee takes confidential information. In this example, the employer could justifiably discharge the employee for violating the confidentiality policy.

While this first hypothetical appears black and white, the next example illustrates the uncertainty that the Sixth Circuit’s recent decision created.⁵ A supervisor, from an unrelated department, inadvertently copies an employee

1. Paul Salvatore, Allan Weitzman & Daniel Halem, *How the Law Changed HR: Five Decades of Social Upheaval and Lawmakers’ Response to It Have Stimulated Radical Change in the HR Profession*, HUM. RESOURCE MAG., Dec. 31, 2005, at 47, 56 (“Today’s employers . . . cope with a measurable lack of employee loyalty . . . causing [employers] to rely increasingly on noncompete, trade secret and confidentiality agreements.”).

2. *Id.* (“The 1991 amendments to Title VII stimulated a resurgence in litigation under 1960s employment laws—a trend that persists today.”).

3. See R. Bales, *A New Standard for Title VII Opposition Cases: Fitting the Personnel Manager Double Standard into a Cognizable Framework*, 35 S. TEX. L. REV. 95, 128–29 (1994) (analyzing the trends in Title VII case law). In 1994, Bales explained that “[c]ourts thus far are unanimous in holding that this activity is unprotected by [the Opposition Clause], no matter how related to the employee’s Title VII claim, and no matter whether the employee was a personnel manager or not.” *Id.* at 128.

4. See *Niswander v. Cincinnati Ins. Co.*, 529 F.3d 714, 725–26 (6th Cir. 2008) (developing a balancing test to determine when an employee’s appropriation and dissemination of confidential material will be a protected activity under the Title VII Opposition Clause); *Kempcke v. Monsanto Co.*, 132 F.3d 442, 446–47 (8th Cir. 1998) (reversing the district court’s grant of summary judgment for the employer because a reasonable jury could find that the employee who appropriated and disseminated confidential information engaged in a protected activity under the Title VII Opposition Clause).

5. See *Niswander*, 529 F.3d at 726 (applying a six-factor test to determine whether the delivery of confidential documents was reasonable).

on an e-mail intended only for supervisors. The e-mail clearly states that it contains confidential information related to the company's diversity policies and contains a disclaimer that it is for management personnel only. The employee then informs her supervisor that she mistakenly received the e-mail, that she read the e-mail, and that she thought some of the policies were discriminatory. Her supervisor then angrily tells her that she breached company policy by reading it and said, "It's best that she forget about it." While walking back to her office, the employee decides that she should keep a copy of the e-mail and send it to her attorney to preserve evidence in case her employer fires her for reading and opposing the e-mail.

In this hypothetical, both sides may suffer harm—the employee may suffer from retaliatory action and the employer may suffer from the breach of confidentiality. To fairly resolve the problem, courts attempt to strike a balance between these competing interests. In *Niswander v. Cincinnati Insurance Co.*, the Sixth Circuit developed a six-factor test to strike that balance.⁶ The court found these factors by briefly looking at various other cases and loosely stitching them together to create a totality-of-the-circumstances scenario.⁷ As such, the balancing test creates unpredictable and inconsistent results because it balances unlike terms to which judges give weight based on personal discretion rather than legal principles. To create more reliable and reasonable results, courts need to use an objective test to determine when an employee, who has breached an employer's confidentiality policy, deserves Title VII protection. The proposed reasonably-perceived-threat test would implicitly balance the competing interests by protecting an employee when a reasonable person in the same position as the employee would perceive a threat to his or her Title VII rights.

II. DEVELOPING *NISWANDER'S* TEST UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Title VII of the Civil Rights Act of 1964 protects applicants and employees from discrimination based on "race, color, religion, sex, or national origin" in the workplace.⁸ Title VII's Anti-Retaliation Clause further protects employees and applicants from retaliation by an employer where an employee opposes a discriminatory policy or participates in a discrimination suit.⁹ More specifically, the Opposition Clause within the Anti-Retaliation Clause protects applicants and employees from employer retaliation when the employees oppose an employer's discriminatory act or policy.¹⁰

6. *Id.*

7. *See id.* at 725–26 (explaining that the factors came from the court's discussion of other cases).

8. 42 U.S.C. § 2000e-2(a) (2006).

9. *Id.* § 2000e-3(a).

10. *Id.*

In *Niswander*, the Sixth Circuit analyzed the Opposition Clause and determined that it did not protect an employee who was fired for taking confidential information and giving it to her lawyers.¹¹ The majority developed a six-factor balancing test to determine whether the Opposition Clause protects an employee—who took and distributed confidential information in violation of an employer’s policy—from retaliation.¹²

A. TITLE VII’S OPPOSITION CLAUSE

The Opposition Clause makes it “an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter.”¹³ The Clause protects both employees and applicants for employment who have opposed an unlawful practice under Title VII from retaliatory actions taken by an employer, employment agency, joint labor-management committee, or labor organization.¹⁴ To avoid the chilling effect of retaliation, courts have held that where an employee shows that his or her activity was in opposition to a practice that the employee reasonably believed at the time to be unlawful under Title VII, the employee’s action may constitute an oppositional activity deserving of protection.¹⁵

Courts have interpreted this Clause as protecting a wide array of conduct,¹⁶ so long as the conduct is reasonable.¹⁷ Under the Opposition

11. *Niswander*, 529 F.3d at 727.

12. *Id.* at 726.

13. 42 U.S.C. § 2000e-3(a).

14. *Id.*

15. *See, e.g.*, *Wyatt v. City of Boston*, 35 F.3d 13, 15 (1st Cir. 1994) (“[A] claim concerning the opposition clause requires that the employee have a reasonable belief that the practice the employee is opposing violates Title VII.”); *Bigge v. Albertsons, Inc.*, 894 F.2d 1497, 1501 (11th Cir. 1990) (holding that under the Opposition Clause an employer would need to show a reasonable belief that an unlawful employment practice occurred); *Payne v. McLemore’s Wholesale & Retail Stores*, 654 F.2d 1130, 1140 (5th Cir. 1981) (“[P]laintiff can establish a prima facie case of retaliatory discharge under the opposition clause of section 704(a) if he shows that he had a reasonable belief that the employer was engaged in unlawful employment practices.”); *Berg v. La Crosse Cooler Co.*, 612 F.2d 1041, 1045 (7th Cir. 1980) (holding that an employee’s reasonable belief that the employer engaged in unlawful discrimination was sufficient to qualify for Opposition Clause protection); *Sias v. City Demonstration Agency*, 588 F.2d 692, 695 (9th Cir. 1978) (“When an employee reasonably believes that discrimination exists, opposition thereto is opposition to an employment practice made unlawful by Title VII even if the employee turns out to be mistaken as to the facts.”).

16. *See Matima v. Celli*, 228 F.3d 68, 78–79 (2d Cir. 2000) (describing the bounds of protected conduct). The Second Circuit stated that:

The law protects employees in the filing of formal charges of discrimination as well as in the making of informal protests of discrimination, “including making complaints to management, writing critical letters to customers, protesting against discrimination by industry or society in general, and expressing support of co-workers who have filed formal charges.” But not all forms of protest are protected by Title VII’s prohibition on retaliation. For instance, Title VII “does not constitute

Clause, conduct is reasonable when the need to protect the employee's action outweighs the employer's need for free reign in managing the company.¹⁸ To determine when one need outweighs the other, courts must make a factual determination.¹⁹ When an employee appropriates and uses confidential information in violation of an employer's confidentiality policy, balancing becomes complicated.²⁰ Further difficulties arise when an employee disseminates that information.²¹ Courts, in the latter situation, must also determine whether the dissemination of confidential information was reasonable under the circumstances.²² The Sixth Circuit recently developed a balancing test to determine whether the Opposition Clause protects an employee who takes and disseminates confidential information.²³

a license for employees to engage in physical violence in order to protest discrimination.”

Id. (citations omitted) (quoting *Sumner v. U.S. Postal Service*, 228 F.2d 203, 209 (2d Cir. 1990)). The Sixth Circuit also explained that:

[A]n employee is protected against employer retaliation for opposing any practice that the employee reasonably believes to be a violation of Title VII. The Equal Employment Opportunity Commission (“EEOC”) has identified a number of examples of “opposing” conduct which is protected by Title VII, including complaining to anyone (management, unions, other employees, or newspapers) about allegedly unlawful practices; refusing to obey an order because the worker thinks it is unlawful under Title VII; and opposing unlawful acts by persons other than the employer—e.g., former employers, union, and co-workers.

Johnson v. Univ. of Cincinnati, 215 F.3d 561, 579 (6th Cir. 2000).

17. See *Johnson*, 215 F.3d at 580 (stating that to invoke protection under Title VII's Opposition Clause, the employee's opposition must be reasonable); see also *Hochstadt v. Worcester Found. for Experimental Biology*, 545 F.2d 222, 231 (1st Cir. 1976) (“The standard can be little more definitive than the rule of reason applied by a judge or other tribunal to given facts. The requirements of the job and the tolerable limits of conduct in a particular setting must be explored.”). The court explained that the question to be determined is whether the plaintiff simply went “too far” in opposing the actions. *Id.* at 231.

18. *Niswander v. Cincinnati Ins. Co.*, 529 F.3d 714, 722 (6th Cir. 2008); *Hertz v. Luzenac Am., Inc.* 370 F.3d 1014, 1021–22 (10th Cir. 2004); *Rollins v. Fla. Dep't of Law Enforcement*, 868 F.2d 397, 401 (11th Cir. 1989).

19. *Hochstadt*, 545 F.2d at 231.

20. See *Niswander*, 529 F.3d at 722 (explaining that too much protection for disclosure of confidential information may provide incentives for stealing information to use as ammunition later). However, the court goes on to explain that not enough protection would provide employers with a “legally sanctioned reason to terminate an employee in retaliation for engaging in [protected] activity.” *Id.*

21. *Id.* at 725.

22. *Id.*

23. See *id.* at 727 (holding that it was unreasonable for an employee to deliver confidential documents to an attorney because her ability to preserve the information in other ways outweighed the need to take the information).

B. NISWANDER V. CINCINNATI INSURANCE CO.

In *Niswander v. Cincinnati Insurance Co.*, the Sixth Circuit developed a new six-factor balancing test to determine whether an employee, in violation of the employer's confidentiality policy, reasonably took information from an employer and, therefore, qualifies for protection under Title VII's Opposition Clause.²⁴ In this case, Niswander, a claims adjuster for Cincinnati Insurance Co., was sorting through documents to fulfill a discovery request in an Equal Pay Act claim.²⁵ While doing so, she collected unrelated insurance-claims files containing confidential policyholder information.²⁶ She did so despite the fact that these files contained no specific evidence of retaliation²⁷ because the files jogged her memory about instances of possible retaliation.²⁸ Applying its balancing test, the court held that her actions were not oppositional activities.²⁹

To determine what activities are reasonable, the court analyzed similar cases involving retaliation claims by employees who violated employer confidentiality policies.³⁰ Although the court found no similar Sixth Circuit cases under the Title VII Opposition Clause,³¹ it did find that both the Eighth and Ninth Circuits previously applied balancing tests to determine whether the Age Discrimination in Employment Act's ("ADEA") Opposition Clause protected employees who violated employer confidentiality policies.³²

In *Kempcke v. Monsanto Co.*, the Eighth Circuit balanced an employee's innocent acquisition of confidential documents relating to discrimination³³ with the employer's right to have an undisrupted work environment.³⁴ In this case, the employee inadvertently found the documents because they were left on a computer that the employer assigned to him.³⁵ Relying heavily on the employee's innocent conduct, the court determined that

24. *Id.* at 726.

25. *Niswander*, 529 F.3d at 717–18.

26. *Id.*

27. *Id.*

28. *Id.* at 718.

29. *Id.* at 727.

30. *Niswander*, 529 F.3d at 722.

31. *See id.* ("There is a paucity of caselaw addressing the production of confidential information in the context of a retaliation claim.")

32. *Id.* at 725. The court noted that section 4(d) of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(d) (2006), and the Title VII Opposition Clause are identical. *Niswander*, 529 F.3d at 723.

33. *Kempcke v. Monsanto Co.*, 132 F.3d 442, 446 (8th Cir. 1998).

34. *Id.* at 445 ("Even if Kempcke's conduct in delivering arguably incriminating documents to his attorney was generally consistent with opposing unlawful age discrimination, we must also consider whether that conduct was so disruptive, excessive, or 'generally inimical to [the] employer's interests . . . as to be beyond the protection' of § 623(d)." (quoting *Hochstadt v. Worcester Found. for Experimental Biology*, 545 F.2d 222, 230 (1st Cir. 1976))).

35. *Id.* at 446.

reasonableness depended on a question of fact as to whether the employee, after appropriating the information, misused it and thus would not be protected by the ADEA's Opposition Clause.³⁶

In *O'Day v. McDonnell Douglas Helicopter Co.*, the Ninth Circuit balanced "an employer's interest in maintaining a 'harmonious and efficient' workplace with the protections of the anti-discrimination laws."³⁷ The court held that the ADEA did not protect "stealing sensitive personnel documents," copying them, and showing them to a coworker, because the court did not want to turn the ADEA into an incentive for employees to rummage through confidential documents.³⁸ Both *Kempcke* and *O'Day* show that there was no hard-and-fast rule for determining whether an employee's appropriation of documents was reasonable. Instead, the courts utilized a "you'll-know-it-when-you-see-it" approach.

The Sixth Circuit also briefly examined a case involving an anti-retaliation claim arising under Ohio law.³⁹ In *Watkins v. Ford Motor Co.*, the United States District Court for the Southern District of Ohio held that the law did not protect an employee who procured a book left out in the open and then copied confidential information from it.⁴⁰ The court relied heavily on *O'Day* and reasoned that protecting this activity would create an umbrella protection for stealing confidential information.⁴¹

Recognizing that these cases provided factors for reasonableness, the Sixth Circuit decided to use a balancing test. The court stated that it must strike a balance "between the employer's recognized, legitimate need to maintain an orderly workplace and to protect confidential business and client information, and the equally compelling need of employees to be properly safeguarded against retaliatory actions."⁴² In balancing these

36. *Id.* (stating that the plaintiff's acquisition of the information was "akin to the employee who is inadvertently [sent] an internal memorandum, or who discovers a document mistakenly left in an office copier" and further discussing that innocent acquisition of confidential information related to an illegal topic under the ADEA without misuse would be a protected activity).

37. *O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 763-64 (9th Cir. 1996).

38. *Id.* at 762.

39. *Niswander v. Cincinnati Ins. Co.*, 529 F.3d 714, 723-24 (6th Cir. 2008).

40. *Watkins v. Ford Motor Co.*, No. C-1-03-033, 2005 WL 3448036, at *1, *8 (S.D. Ohio Dec. 15, 2005).

41. *Niswander*, 529 F.3d at 724 (stating that the court in *Watkins* relied heavily on *O'Day*); *Watkins*, 2005 WL 3448036, at *8 (explaining that similar to *O'Day*, the plaintiff "committed a serious breach of trust" by copying documents that "were not intended for general inspection"). In *Watkins*, the court further explained that removing the information, which had not been provided to him, from the defendant's property was not a legitimate means to preserve the evidence because it could have been obtained through proper channels of discovery in a lawsuit. *Id.* Therefore, the court held that such conduct was not protected as a matter of law. *Id.*

42. *Niswander*, 529 F.3d at 722. The court explained that:

Allowing too much protection to employees for disclosing confidential information may perversely incentivize behavior that ought not be tolerated in the workplace—

interests, the ultimate goal was to determine whether disseminating the confidential information was reasonable given the circumstances.⁴³

The court held that the following six factors were relevant to determine when acquiring or producing confidential information is reasonable:

(1) how the documents were obtained, (2) to whom the documents were produced, (3) the content of the documents, both in terms of the need to keep the information confidential and its relevance to the employee's claim of unlawful conduct, (4) why the documents were produced, including whether the production was in direct response to a discovery request, (5) the scope of the employer's privacy policy, and (6) the ability of the employee to preserve the evidence in a manner that does not violate the employer's privacy policy.⁴⁴

The court reasoned that these factors take into account the employer's legitimate interest in maintaining confidentiality, yet still protect the employee's need to access and disseminate the documents.⁴⁵

In applying this newly developed test, the court identified two factors that weighed in Niswander's favor: "(1) how the documents were obtained, [and] (2) to whom the documents were produced."⁴⁶ First, she legitimately accessed the information because, as a claims adjuster, her job required her to maintain those files.⁴⁷ Second, she gave the documents to her attorneys instead of other employees.⁴⁸

The court then distinguished the legitimate access in this case from the innocent acquisition in *Kempcke*, explaining that even with proper access, the employee did not innocently stumble across the documents; the employee sifted through and pulled them to serve her own purpose.⁴⁹ The court noted that the employee could have used other means to preserve the information that would jog her memory about possible incidents of retaliation without taking confidential documents.⁵⁰ The court suggested, as an example, that

namely, the surreptitious theft of confidential documents as potential future ammunition should the employee eventually feel wronged by her employer. On the other hand, inadequate protection to employees might provide employers with a legally sanctioned reason to terminate an employee in retaliation for engaging in activity that Title VII and related statutes are designed to protect.

Id.

43. *Id.* at 725.

44. *Id.* at 726.

45. *Id.* (quoting *Jefferies v. Harris County Cmty. Action Ass'n*, 615 F.2d 1025, 1036 (5th Cir. 1980)).

46. *Id.* at 726–27.

47. *Niswander*, 529 F.3d at 727.

48. *Id.*

49. *Id.*

50. *Id.*

the employee could have written notes about the incidents she believed were retaliatory.⁵¹ The court explained that the non-innocent taking and available alternatives weighed heavily in the employer's favor.⁵² Therefore, the court held that the Opposition Clause did not protect the employee's conduct.⁵³

In a concurring opinion, Judge McKeague expressed concern with the majority opinion.⁵⁴ He described two circumstances in which the majority's test may protect undeserving employees.⁵⁵ First, he explained that the sixth factor—the employee's ability to preserve the evidence without violating the employer's policy—may create a troubling circumstance. There may be instances where the Opposition Clause will protect an employee who gathers information by breaching an employer's privacy policy despite having non-breaching alternatives because other factors in the balancing test weigh in favor of the employee.⁵⁶ He then proposed a possible solution where an employee with other means to preserve the evidence is not protected by the Opposition Clause because the employee unreasonably acted in self-serving haste.⁵⁷

Second, Judge McKeague questioned the weight of the six factors.⁵⁸ He raised the question of whether pulling irrelevant information can ever be a reasonable activity.⁵⁹ He expressed concern that, conceptually, the test could afford Title VII protection to an employee who pulls information that is irrelevant to any Title VII claim.⁶⁰

51. *Id.*

52. *Niswander*, 529 F.3d at 727 (“Producing confidential documents for the sole purpose of jogging one’s memory, when there are readily available alternatives to accomplish the same goal, does not constitute the kind of reasonable opposition activity that justifies violating a company’s privacy policy.”).

53. *Id.*

54. *Id.* at 729 (McKeague, J., concurring).

55. *See id.* at 729–30 (discussing first that the six-factor test may protect employees who had other alternatives available to collect information, and second that the test may protect employees who took information irrelevant to discrimination or retaliation claims).

56. “[O]ne could read the majority opinion to permit an employee to breach her employer’s privacy policy even when there are nonbreaching alternatives within her reach if a particular tribunal believes that one or more of the other factors weigh heavily enough in her favor.” *Id.* at 729.

57. Judge McKeague explained:

An employee does not act reasonably when she favors her own expediency over employer and customer privacy and confidentiality. . . . It is only when an employee’s reasonable activities clash against an employer’s legitimate job requirements and workplace rules that a court must balance those two competing interests under Title VII.

Niswander, 529 F.3d at 729–30 (McKeague, J., concurring).

58. *Id.* at 730 (stating that the majority’s opinion is unclear as to whether each factor has equal weight).

59. *Id.*

60. *Id.*

In a separate concurrence, Judge Gilman wrote to disagree specifically with Judge McKeague.⁶¹ Judge Gilman expressed concern that Judge McKeague's proposed rule—that the presence of available alternatives is dispositive—was the same as the presumption against protecting misappropriation of confidential documents in the presence of alternatives previously rejected by the Fourth Circuit.⁶² Judge Gilman reasoned that under the totality of the circumstances, it may be reasonable for an employee to take confidential information to an attorney even when alternatives exist.⁶³ Citing *Kempcke*, he expressed his belief that an employee may take confidential documents to an attorney when the employee reasonably believes that he or she is the subject of discrimination.⁶⁴

In *Niswander*, the Sixth Circuit analyzed the techniques used to determine whether an employee deserves protection under the Opposition Clause for violating an employer's confidentiality policy. The court discussed balancing tests used in other circuits to develop its own six-factor analysis.⁶⁵ The court failed to discuss how much weight should be assigned to each factor and the analytical scheme courts should utilize when applying the six-factor test.⁶⁶ Ultimately, the application of the *Niswander* test left much to be desired. The court could have avoided this consequence if it had understood the employer's strong interest in confidentiality.⁶⁷

61. *Id.* (Gilman, J., concurring).

62. Judge Gilman explained his concern:

[G]iving controlling weight to the sixth factor to the exclusion of the other five would essentially be an adoption of the rebuttable-presumption test applied by the district court in *Laughlin* . . . , a test rejected on appeal by the Fourth Circuit in favor of the kind of balancing test that we have embraced herein.

Niswander, 529 F.3d at 730 (Gilman, J., concurring) (citations omitted). The district court in *Laughlin* created a presumption that "the misappropriation of an employer's documents is unprotected by Title VII" because the court could not imagine a situation where misappropriation of confidential information would ever outweigh the employer's interests in confidentiality and efficiency. *Laughlin v. Metro. Airports Auth.*, 952 F. Supp. 1129, 1138 (E.D. Va. 1997), *aff'd on other grounds*, 149 F.3d 253 (4th Cir. 1998). In affirming the district court's ruling, the Fourth Circuit explicitly rejected this presumption, stating that "[w]e believe that this Circuit's well-established balancing test provides an adequate, workable framework for assessing opposition clause claims and, thus, decline to adopt the district court's rationale." *Laughlin*, 149 F.3d at 260.

63. *Niswander*, 529 F.3d at 730 (Gilman, J., concurring).

64. *Id.*

65. *Id.* at 723–25 (majority opinion) (discussing the Sixth Circuit's analysis of the Eighth and Ninth Circuits' Opposition Clause cases).

66. *See id.* at 729–30 (McKeague, J., concurring; Gilman, J., concurring) (illustrating that the facts of the case leave the "wrinkles" in the majority analysis open for future courts to deal with as appropriate factual circumstances present themselves).

67. *See id.* (same).

III. THE EMPLOYER'S INTEREST IN CONFIDENTIALITY

Employers have a strong interest in confidentiality that suggests courts should limit confidentiality only in extreme circumstances. Understanding how important confidentiality is in our society is inimical to understanding when an employee's interest outweighs an employer's interest. When Congress enacted Title VII, it demonstrated its understanding that employment decisions are best left to employers. In employment-discrimination suits, courts allow discovery of confidential information where the employee would otherwise lose any opportunity to assert his or her Title VII rights to be free from discrimination and retaliation.⁶⁸ Thus, the employee's interest in asserting Title VII rights outweighs the employer's interest in confidentiality when the employee would otherwise have no opportunity to assert his or her Title VII rights.

A. CONFIDENTIALITY IS NECESSARY FOR BUSINESS

Confidentiality is an ancient concept.⁶⁹ It involves entrusting information to another.⁷⁰ The most important aspect of confidentiality is the "focus[] on relationships; it involves trusting others to refrain from revealing personal information to unauthorized individuals. Rather than protecting the information we hide away in secrecy, confidentiality protects the information we share with others based upon our expectations of trust and reliance in relationships."⁷¹ The age-old concept of protecting relationships and trust between people developed into modern-day fiduciary duties, such as the duty of confidentiality in a professional-client relationship.⁷² Likewise, in modern society, courts adapted confidentiality to protect aspects of the master-servant relationship.⁷³

Confidentiality is pivotal to employer success because it protects both trust-building with clients and sensitive information.⁷⁴ By keeping

68. See Donald P. Vandegrift, Jr., *The Privilege of Self-Critical Analysis: A Survey of the Law*, 60 ALB. L. REV. 171, 182-83 (1996) (explaining that courts have rejected privilege claims by employers because "private Title VII litigation is itself an important means of promoting equal employment opportunity and that if internally prepared company reports are suppressed in litigation, equal employment efforts may actually be harmed").

69. See Neil M. Richards & Daniel J. Solove, *Privacy's Other Path: Recovering the Law of Confidentiality*, 96 GEO. L.J. 123, 133 (2007) (discussing the Hippocratic Oath and a sixteenth-century English rhyme).

70. See *id.* at 134 (giving examples of entrusting information to attorneys and spouses).

71. *Id.* at 125 (citation omitted).

72. *Id.* at 135.

73. See *id.* at 136-38 (tracing the development of breach-of-confidence liability in English courts).

74. See Christine Moorman, Rohit Deshpandé & Gerald Zaltman, *Factors Affecting Trust in Market Research Relationships*, 57 J. MARKETING 81, 93 (1993) (describing a finding—from a study on factors that affect trust between a firm and an outside market researcher—that "[r]esearcher confidentiality is . . . very important to trust in research relationships" as "not surprising given

information confidential, employers have an incentive to spend money on risky innovations; an employer is more likely to capture future income from the innovation if information is not shared with outsiders.⁷⁵ Thus, without confidentiality, progress might slow. Confidentiality also improves the position of a business when negotiating.⁷⁶ Further, if the task of collecting and organizing information is almost prohibitively expensive but creates a competitive advantage for the employer, then dissemination of the information could bankrupt the employer while allowing competitors to free-ride.⁷⁷ Therefore, standing alone the interest in confidentiality is strong; it gets even stronger with Congress's mandate to let employers manage their workplace.⁷⁸

B. CONGRESS LEFT EMPLOYERS FREE TO MANAGE
THEIR OWN PRODUCTIVITY AND CULTURE

Congress clearly stated that it did not want to limit the employer's ability to manage its workplace.⁷⁹ The House Report states that it was

that information can be used to secure competitive advantage"); Peter P. Swire, *Efficient Confidentiality for Privacy, Security, and Confidential Business Information*, BROOKINGS-WHARTON PAPERS ON FIN. SERVS., 2003, at 273, 289 ("For confidential business information, the fear of disclosure may lead to more extreme measures to protect against disclosure by the financial institution or other company.").

75. See Robert Hauswald & Robert Marquez, *Loan-Portfolio Quality and the Diffusion of Technological Innovation* 12 (Fed. Deposit Ins. Corp., Working Paper No. 2004-02, 2004), available at http://www.fdic.gov/bank/analytical/working/wp2004_02/wp2004_02.pdf (explaining that a higher probability of technological diffusion results in a firm cutting back its investment in innovation); Julia Porter Liebeskind, *Knowledge, Strategy, and the Theory of the Firm*, 17 STRATEGIC MGMT. J. 93, 94 (1996) (explaining that protecting knowledge provides an incentive to innovate). Liebeskind explained:

By protecting knowledge, firms may serve to induce investment in strategic innovation, because incentives to innovate depend on the degree to which the innovator can appropriate future rent streams. In addition, if some firms are able to protect the value of their knowledge more effectively than other firms, these firms will have more high-powered incentives to innovate.

Id.

76. Swire, *supra* note 74, at 288 ("Many kinds of information improve the position of a company in a negotiating or other business setting. . . . Companies presenting a sealed bid do not wish the amount to be known to competitors, who can then underbid by \$1 and get the contract.").

77. See Andrew Jones, *Industrial Espionage in a Hi-Tech World*, COMPUTER FRAUD & SEC., Jan. 2008, at 7, 7 (discussing industrial espionage). Jones explains that "it is corporations spying on competitors to gain a market advantage, which probably entails the theft (or copying) of trade secrets and/or confidential or valuable information for use." *Id.* He further explains that "[t]he types of material that are most often targeted are companies' research and development, designs, formulas, manufacturing processes and future plans." *Id.*

78. See *Hochstadt v. Worcester Found. for Experimental Biology*, 545 F.2d 222, 230 (1st Cir. 1976) (discussing Congress's intent to allow employers to have extensive freedom in managing their businesses).

79. *Id.*

Congress's intent that "management prerogatives . . . be left undisturbed to the greatest extent possible."⁸⁰ The House Report further states that the "[i]nternal affairs of employers . . . must not be interfered with except to the limited extent that correction is required in discrimination practices."⁸¹ Congress's decision to allow managers freedom to control objective employment decisions is perhaps best understood as a matter of efficiency.

To obtain the most-efficient outcome, the decision maker must be the person in the best position to prevent waste.⁸² An employer is better situated than both Congress and the courts to prevent hiring disruptive employees because the employer has direct control over the hiring process. For example, Congress could find that employers have a natural tendency to discriminate based on race upon seeing an applicant in person. Suppose that, based on this finding, Congress decides to interfere in the hiring process. Congress passes a law that employers may not meet with applicants before hiring them. While such a law would have some basis for protecting Title VII rights,⁸³ it would be burdensome because employers would be forced to hire applicants without the use of their primary hiring tool—the interview.⁸⁴

Employers interview applicants to assess whether an applicant's values align with the organization's values. Employers determine whether the applicant would "fit" within the organizational culture.⁸⁵ That culture has significant effects on the organization's productivity.⁸⁶ Without the ability to interview, employers have a greater chance of hiring someone who might be

80. H.R. REP. NO. 88-914, pt.2, at 29 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2487, 2516.

81. *Id.*

82. *See* THE AMERICAN HERITAGE COLLEGE DICTIONARY 446 (4th ed. 2002) (defining "efficient" as "[a]cting or producing effectively with a minimum of waste, expense, or unnecessary effort").

83. 42 U.S.C. § 2000e-2 (2006) (prohibiting discrimination on the basis of race or color).

84. *See* Timothy A. Judge, Chad A. Higgins & Daniel M. Cable, *The Employment Interview: A Review of Recent Research and Recommendations for Future Research*, 10 HUM. RESOURCE MGMT. REV. 383, 383 (2000) ("There is perhaps no more widely used selection procedure than the employment interview.").

85. *Id.* at 392–93 ("The employment interview represents one important method that organizations can utilize to establish P–O fit because interviews enable organizations and applicants to interact through organizational representatives, allowing each party to determine if the other demonstrates congruent values.").

86. Michael S. Scott Morton, *The Interesting Organizations Project: Digitalization of the 21st Century Firm*, in *INVENTING THE ORGANIZATIONS OF THE 21ST CENTURY* 144 (Thomas W. Malone et al. eds., 2003) (explaining culture as "the shared values of the organization" and further explaining that "[p]eople in organizations build up a set of shared values that help determine how processes will operate and what the organization structure will mean in practice"); James H. Davis, F. David Schoorman, Roger C. Mayer & Hwee Hoon Tan, *The Trusted General Manager and Business Unit Performance: Empirical Evidence of a Competitive Advantage*, 21 STRATEGIC MGMT. J. 563, 573 (2000) (finding that, in the restaurant industry, trust in the General Manager is positively related to business-unit performance).

disruptive. Thus, employers have a strong interest in interviewing applicants to maintain their own organizational culture and productivity.⁸⁷

Continuing with the example, suppose an employer hires a Latina woman under the interview ban. Without meeting the applicant, the employer has no way to assess the applicant's reactions to various questions involving the organizational culture. When she arrives to work, she makes a mistake and three people tell her about it at different points throughout the day. She was not expecting such constant supervision and begins to become agitated. After a few days of being told about every little error, she stops working with other employees and hides her mistakes. These hidden mistakes pop up later causing shutdowns, which decrease the employer's productivity. In an interview, the employer could have caught this personality characteristic by assessing non-verbal cues such as body language in the applicant's responses to scenario-based questions.⁸⁸ The employer could have avoided hiring her altogether.

However, under the interview ban, the employer hired her and now has to trace mistakes back to their origin. Supervisors begin to scrutinize work more closely, especially hers, because she chooses to work alone. The employee views the close scrutiny through a racial lens and brings a claim that she is treated differently than other employees on the line, none of whom are Latino. Her discrimination suit would present a Title VII prima facie case for discrimination.⁸⁹ The employer would then have to put forth

87. See Colette Cuijpers, *ICT and Employer-Employee Power Dynamics: A Comparative Perspective of United States' and Netherlands' Workplace Privacy in Light of Information and Computer Technology Monitoring and Positioning of Employees*, 25 J. MARSHALL J. COMPUTER & INFO. L. 37, 39 n.5 (2007) (discussing employer interest in monitoring employee use of e-mail and the Internet as a legitimate concern and stating that "[m]onitoring can also be justified by an employer's interest in controlling business operations and measuring productivity, efficiency and quality"); Megan E. Hladilek, *Can I Go to Chemo?: Protecting Employee Rights to Intermittent and Reduced Leave Under the Family and Medical Leave Act*, 29 HAMLIN L. REV. 377, 394 (2006) (explaining that intermittent-leave options under the Family and Medical Leave Act focus on employer interest in maintaining optimal productivity, and that the options were designed to allow staffing flexibility "and not 'to force the employer to be directly involved in an employee's rehabilitation'" (quoting *Hatchett v. Philander Smith Coll.*, 251 F.3d 670, 677 (8th Cir. 2001))); Jill Yung, *Big Brother Is Watching: How Employee Monitoring in 2004 Brought Orwell's 1984 to Life and What the Law Should Do About It*, 36 SETON HALL L. REV. 163, 182 n.90 (2005) (explaining that the employer's interest extends even to activities outside the workplace and citing *Smith v. Zero Defects, Inc.*, 980 P.2d 545, 549-50 (Idaho 1999)). Yung also explains that "recognizing an employer's interest in off-duty alcohol consumption by employees, which allegedly threatened the employer's reputation, increased absenteeism, and hurt productivity." Yung, *supra*.

88. See Deborah Bowers & Brian H. Kleiner, *Behavioural Interviewing*, 28 MGMT. RES. NEWS 107, 107 (2005) (discussing the importance of hiring good employees and how the "Behavioural Interviewing process" ensures hiring the best-quality candidate).

89. For a prima facie case of discrimination in the employment application process, the plaintiff must initially show:

- (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his

legitimate reasons for passing over the employee.⁹⁰ Not only does this burden the employer, but it would also cost the courts time and money to sort out the facts, decreasing judicial efficiency. Thus, it is far more efficient to allow the employer discretion to use the interview to prevent hiring a potentially disruptive employee.

If Congress were to assume regulatory control over objective decision making in employment, the enforcement of workplace policies designed to create efficiencies becomes ineffective. However, if Congress leaves objective decision making to the employer, efficiency increases because the employer has direct access to and authority over applicants and employees.⁹¹

Employers must consider a variety of factors when creating a confidentiality policy that successfully fits their business model. Assuming a rational employer, goals will be set by complex analysis of the industry—including things such as supply costs, industry trends, consumer trends, and price.⁹² For example, one website that offers advice to small-business owners

qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). This standard has been modified for other adverse employment actions. For example, in a demotion case, the plaintiff must show that “[a]t the time of the plaintiff’s demotion, she was performing her job at a level that met the employer’s legitimate expectations; after the demotion, the employer replaced the plaintiff with someone of comparable or lesser qualifications.” ROBERT BELTON ET AL., *EMPLOYMENT DISCRIMINATION LAW: CASES AND MATERIALS ON EQUALITY IN THE WORKPLACE* 94 (7th ed. 2004). In a promotion case, the plaintiff must show that she “was qualified for the position, was rejected despite being qualified, and another applicant with equal or lesser qualifications was promoted.” *Id.* In a nondisciplinary or wrongful-discharge case, the plaintiff must show that she “was doing her job well enough to establish that she was performing adequately; after discharging her, the employer assigned someone else to do the same work.” *Id.* at 94–95. Finally, in a disciplinary-discharge case, the plaintiff must show that the employer retained other employees who engaged in acts of comparable seriousness. *Id.* at 95.

90. *McDonnell Douglas*, 411 U.S. at 802 (“The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee’s rejection.”).

91. Legal protections for an employer’s gathered knowledge are only available after the fact and require incontrovertible proof. See Liebeskind, *supra* note 75, at 99 (“[L]egal protections . . . can only be prosecuted once incontrovertible proof of expropriation is available.”). In comparison to legal protections, firms have “lower costs of monitoring and enforcing” employee-conduct rules because they have extensive rights to monitor the employee’s use of the firm’s technology, and supervisors can monitor groups of employees together in one location rather than tracking each one individually or at remote locations. *Id.* Firms also have preventable measures available, such as sanctions for activity that may lead to expropriation of important employer knowledge. *Id.*

92. THOMAS A. KOCHAN & MICHAEL USEEM, *TRANSFORMING ORGANIZATIONS* 392 (1992) (“[O]ver time an organizational culture, or set of shared assumptions and norms of behavior, tend to develop that protects organizations from the lure of passing fads, false market signals, or overly self-interested ‘outsiders.’”); Scott Morton, *supra* note 86, at 144 (“[C]ustomers are inevitably and inextricably part of the external environment in which firms live and work. Both the customers and the larger social, political, and economic environment set the context for the firm.”).

explains a few factors to consider when creating a confidentiality policy. It states:

In deciding what's secret about your business, look at:

- the extent to which the information is known outside the business
- the extent to which the information is known by employees and others involved in the business
- the value of the information to the business and its competitors
- the amount of effort or money expended by the business in developing the information
- the ease or difficulty with which the information could be properly acquired or duplicated by others

Another type of information that you may want to protect is sensitive customer information. In certain industries and professions, your employees may become privy to information that you and your customers would not want to be made public. If this is true for your business, you may want to consider a confidentiality policy to protect it.⁹³

It follows then that creating a practical confidentiality policy is a complex and significant managerial task. Managers consider numerous factors to create a practical policy that aims to protect important ends such as innovation, workplace peace, and the company. The employer must also create a culture that can adapt to new trends and constantly meet developing consumer requirements.⁹⁴

The employer performs this analysis more efficiently than Congress and the courts because it is immersed in the industry and more cognizant of issues within its own company. As discussed earlier, confidentiality policies play a major role in developing these efficiencies. Therefore, employers are in the best position to determine what information should be kept confidential to promote their companies' goals. The law should provide significant protection for employers who take action under confidentiality policies against employees who violate those policies. Indeed, Congress even sympathized with employers in their decision-making role and left

93. Business Owner's Tool Kit: Total Know-How for Small Business, What Information Is Secret?, http://www.toolkit.com/small_business_guide/sbg.aspx?nid=P05_5710 (last visited Feb. 26, 2010).

94. Robert F. Hurley, *Group Culture and Its Effect on Innovative Productivity*, 12 J. ENGINEERING & TECH. MGMT. 57, 71 (1995) ("[T]he innovativeness of a group's culture has a significant and positive effect on innovative productivity. When the group's culture is characterized by more receptivity to new ideas and innovation it is associated with higher levels of innovation.").

employers with a great deal of freedom in making various employment decisions.⁹⁵

However, this employer freedom is not without its legal limits. Although Congress intended to leave objective management decisions alone, some employment-discrimination cases that involved discovery indicate the line where courts intervene in the decision-making process and allow disclosure of confidential information.

C. LIMITS ON CONFIDENTIALITY

Courts frequently limit confidentiality through the discovery process in employment-discrimination suits. They draw a line where preserving confidentiality would shelter employers from Title VII discrimination claims, allowing them to freely discriminate—such as in the university-tenure and affirmative-action contexts.

First, in the university-tenure context, courts declined to create a privilege that would protect confidentiality.⁹⁶ In this instance, courts weighed the university's need for confidentiality when discussing a candidate up for tenure against the employee's need to access information when there may be discriminatory reasons for being denied tenure.⁹⁷ In the employment context, a privilege to protect the confidentiality of the tenure meeting would give universities *carte blanche* to discriminate because the employee would be unable to prove that the employer's proffered legitimate reasons for denying tenure were actually pretexts for discrimination.⁹⁸ Thus, the conclusion logically follows that confidentiality reaches its limit when upholding confidentiality would eviscerate the protections of Title VII.

The affirmative-action context both supports this conclusion and adds to the understanding of confidentiality's limit. In this situation, courts must balance an employer's need for self-evaluative information against an employee's need to obtain information for a full and fair determination of

95. H.R. REP. NO. 88-914, pt. 2, at 29 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2487, 2516.

96. See John G. Hill, Jr. & Ellen E. Hill, *Employment Discrimination: A Rollback of Confidentiality in University Tenure Procedures?*, 22 AM. BUS. L.J. 207, 213-14 (1984) (discussing two courts of appeals cases—*In re Dinnan*, 661 F.2d 426 (5th Cir. 1981) and *Gray v. Bd. of Educ.*, 692 F.2d 901 (2d Cir. 1982)—in which the courts refused to hold that tenure-meeting information is privileged).

97. See *id.* at 209 (stating that two values collide in a tenure discrimination case: “[T]he individual’s right to an employment decision free from discriminatory motives, and an educational institution’s interest in protecting the confidentiality and integrity of peer review”).

98. See *In re Dinnan*, 661 F.2d at 431 (“The public policy of the United States prohibits discrimination; [defendants] are not above that policy. To rule otherwise would mean that the concept of academic freedom would give any institution of higher learning a *carte blanche* to practice discrimination of all types.”); Hill & Hill, *supra* note 96, at 212-13 (discussing the burden of proof in a discrimination claim and the necessity of proving pretext).

the facts.⁹⁹ In balancing these needs, courts have vacillated on whether to implement a privilege protecting self-critical analysis.¹⁰⁰ When used, the privilege protects “an employer’s self-evaluation of its employment practices and policies.”¹⁰¹ However, courts are reluctant to apply this privilege because, among other reasons, it harms equal-employment efforts.¹⁰² Specifically, in *Martin v. Potomac Electric Power Co.*, the court held that there was no privilege of confidentiality because the employee’s need to obtain the evaluations and challenge them was more important to promoting equal-employment opportunity than a weakly worded and virtually useless self-evaluation.¹⁰³ Thus, confidentiality also reaches its limit when upholding it perpetuates inequality in employment by obstructing enforcement of Title VII.

From these examples, it is clear that confidentiality reaches its limits in the employment context only when upholding confidentiality obstructs the employee’s Title VII rights. While this interpretation is clear in discovery for civil suits, *Niswander* blurred this line for employee actions outside of discovery. *Niswander*’s six-factor balancing test clouded the law by allowing judges too much personal discretion.

IV. NISWANDER’S SIX-FACTOR BALANCING TEST PRODUCES INCONSISTENT AND UNREASONABLE RESULTS

The Sixth Circuit stated that its purpose for developing a factor-based test was to appropriately balance the employer’s need for confidentiality and the employee’s need to be properly safeguarded against retaliation.¹⁰⁴ The stated purpose is consistent with the principle developed in the discovery cases discussed above. However, the lack of legal analysis in *Niswander*’s six-factor test produces results that are unreasonable and inconsistent with the test’s purpose.

Within the test, the factors are divided into two types: (1) those that protect the employer’s need for confidentiality and (2) those that evaluate the employee’s subjective intent in breaching confidentiality. *Niswander* did

99. Richard F. Nelson, Note, *Employment Discrimination—In re Burlington Northern, Inc.: Self-Critical Subjective Analysis Privilege Under Title VII Discovery*, 16 CREIGHTON L. REV. 1090, 1091 (1983).

100. See Vandegrift, *supra* note 68, at 193 (“The privilege of self-critical analysis is an uncertain one; its application is determined not by a concrete set of rules, but on an *ad hoc* basis.”).

101. Nelson, *supra* note 99, at 1090.

102. Vandegrift, *supra* note 68, at 182–83. The author also discusses various other reasons courts have given in support of not applying the privilege. *Id.* at 180–84. For example, the privilege is not necessary because employers will continue to perform candid self-reports to remain in compliance with federal mandates. *Id.* at 181–82.

103. *Martin v. Potomac Elec. Power Co.*, 58 Fair Empl. Prac. Cas. (BNA) 355, 359 (D.D.C. 1990).

104. *Niswander v. Cincinnati Ins. Co.*, 529 F.3d 714, 722 (6th Cir. 2008).

not provide legal analysis on which judges could rely when determining which factor precludes protection of an employee's action. In addition, to determine the reasonableness of the employer's policy, judges must closely examine employer decisions about the policy's scope. After micro-managing employer decisions, a judge balances the factors using personal discretion because there is no guidance regarding how to weigh the factors. Finally, the test's flaws are compounded when judges try to balance the arbitrarily weighted and incommensurable factors—employer-need-based factors against employee-culpability-based factors. Thus, the Sixth Circuit developed a system that produces inconsistent and unreasonable results because it forces courts to substitute personal discretion for legal decision making and compounds this error by balancing unweighted and unlike terms.

A. *THE FIRST FLAW: SEARCHING FOR SUBJECTIVE INTENT*

The Sixth Circuit misdirects the analysis by focusing on subjective intent. Looking for the employee's subjective intent, the court developed four employee-centered factors: "[H]ow the documents were obtained, . . . to whom the documents were produced, . . . why the documents were produced, including whether the production was in direct response to a discovery request, . . . [and] the ability of the employee to preserve the evidence in a manner that does not violate the employer's privacy policy."¹⁰⁵ These four factors complicate the analysis and distract from the test's purpose—to determine whether the employee's need to preserve the information outweighed the employer's need for confidentiality.¹⁰⁶ In *Niswander*, the court relied on the employee's statement of her subjective intent—i.e., that she took documents to "jog her memory"¹⁰⁷—to determine that she was not protected in taking the documents. This focus on subjective intent eliminates the analysis of the circumstances that caused an employee to need to take the documents. Thus, the focus on subjective intent creates a complicated inquiry where the judge must enter the mind of the employee, and it therefore distracts from the purpose of the balancing test.

The Sixth Circuit reached its conclusion that *Niswander* was not protected by examining her intent when she took the confidential information.¹⁰⁸ The court held that "[p]roducing confidential documents for the sole purpose of jogging one's memory, when there are readily available alternatives to accomplish the same goal, does not constitute the kind of reasonable opposition activity that justifies violating a company's

105. *Id.* at 726.

106. *See id.* at 722 (stating that the court's purpose was to strike a balance "between the employer's recognized, legitimate need to maintain an orderly workplace and to protect confidential business and client information, and the equally compelling need of employees to be properly safeguarded against retaliatory actions").

107. *Id.* at 727.

108. *Id.* at 727–28.

privacy policy.”¹⁰⁹ The court distinguished the “innocence” in *Kempcke* from Niswander’s legitimate access to the documents because Niswander took documents with a wholly-self-serving motive.¹¹⁰ In doing so, the court actually made its determination that the employee did not deserve Title VII protection based on the employee’s intent. The court’s holding also implies that there would never be objective justifications for an employee’s actions because the employee could “take[] notes.”¹¹¹ This decision suggests that the balance depends on the employee’s subjective intent rather than the objective facts in the case that create a need to take the documents.

Such an inquiry ignores the court’s stated purpose for the balancing test and creates results that may be unreasonable. For example, an employee may take the documents while answering a discovery request for another suit—the same way the employee in *Niswander* did—and those documents may contain instances of actual retaliation. The employee may have had a need to take the documents because the employer was in the process of destroying old files to make space for incoming client files—i.e., destroying all files not sent for discovery. The destruction of old files may justify the employee’s action, but based on *Niswander*, the analysis ceases upon determination that the employee acted out of haste regardless of objective circumstances that justified the employee’s action. Thus, the court would find that the employee purposefully took the information and did not deserve protection.

Examining the employee’s subjective purpose also complicates the analysis because determining subjective intent is factually difficult. Following the analysis in *Niswander*, judges would use the four factors to get into the employee’s head. However, these four factors, without more, will not precisely prove an employee’s motive. In *Niswander*, the court was able to determine the employee’s subjective purpose because she stated exactly what she was thinking. However, in cases where that type of candid statement is not present, the judge will have to do some mind-reading through guess-work. This uncertainty makes it extremely difficult for employers and employees to predict results in court, which may lead to more employer-retaliation suits.

Absent proper guidance, it is difficult for other courts to follow the Sixth Circuit’s stated purpose and weigh the need for confidentiality against the need to safeguard anti-retaliation rights. To do so, the test requires an analysis that does not rely on subjective intent. However, even with a test that considers the objective circumstances on the employee’s side, the results may still be unreasonable when balanced against the employer’s interest.

109. *Niswander*, 529 F.3d at 727.

110. *Id.*

111. *Id.*

Unreasonable results would occur because of judicial micro-management of the decision-making role that Congress left to employers.¹¹²

B. *THE SECOND FLAW: MICRO-MANAGING AN EMPLOYER'S
NEED FOR CONFIDENTIALITY*

After examining the employer's interest, the court created only two factors to weigh the employer's need for confidentiality—"the content of the documents, both in terms of the need to keep the information confidential and its relevance to the employee's claim of unlawful conduct, . . . [and] the scope of the employer's privacy policy."¹¹³ In the first employer-need factor, the court determined that the need to maintain confidentiality must be measured by the information's relevance to the employee's retaliation claim.¹¹⁴ In the second, the court determined that the scope of the confidentiality policy is relevant to ensuring a proper balance between the employee and employer interests.¹¹⁵ These two factors focus on the employer's interest in maintaining confidentiality. In doing so, the factors eliminate the efficiencies created when Congress explicitly left internal decision-making authority to employers, of which, confidentiality is necessarily a managerial decision.¹¹⁶

In examining both factors, courts must determine whether the employer's confidentiality policy overreached and protected unnecessary information related to an employee's claim. Here, the courts step into the employer's position, but they do so without the knowledge that the employer had at the time it made the policy.¹¹⁷ Instead, the courts have an *ex post* view, tainted by knowledge of what information would be relevant to anti-retaliation claims. Thus, even if courts could ignore hindsight bias, they are still determining, in a vacuum, whether the internal confidentiality policy was valid. This vacuum creates substantial room for error, and courts may increase employers' information-protection costs by decreasing the scope of confidentiality without taking into account the organizational culture and goals.¹¹⁸ After substituting their judgment for that of Congress and that of the employer, courts are left to apply the balancing test using undetermined weights and weighing incommensurable factors.

112. See *supra* Part III.B (discussing that as a matter of efficiency Congress left objective employment decisions to employers).

113. *Niswander*, 529 F.3d at 726.

114. *Id.*

115. *Id.*

116. See *supra* Part III.B (discussing the efficiencies employers have in employment decision making).

117. Liebeskind, *supra* note 75, at 102 (concluding that knowledge protection is costly and "[t]hus, to economize, firms should only protect their unique, valuable knowledge which can repay the costs of protection"). Thus, it is unlikely that an employer's confidentiality policy would protect more information than that which actually requires protection.

118. *Id.*

C. COMPOUNDING THE FLAWS: USING UNDETERMINED WEIGHTS
AND WEIGHING INCOMMENSURABLE FACTORS

The six-factor balancing test is an inefficient and inconsistent way to determine whether the Opposition Clause protects an employee's action. First, with six individual factors, any one factor may be assigned controlling weight because the court did not provide guidance on the weight of each factor. No guidance allows for judges to attach inconsistent weights that might produce unreasonable results.¹¹⁹ Second, the test attempts to balance the need for confidentiality and the need to safeguard employee rights by measuring incommensurable factors that are not designed to be weighed against each other.¹²⁰ These two flaws create opportunities for unreasonable and inconsistent results.

In his concurrence, Judge McKeague expressed concern that the six-factor balancing test might produce unreasonable results because, if all factors are equal, a court could hold that the Opposition Clause protects an employee who takes confidential information that is irrelevant to his or her retaliation claim.¹²¹ This argument rings true for other factors as well. For example, the court expressed a desire not to encourage employees to fish for information related to discrimination or retaliation claims.¹²² Fishing occurs when an employee searches through confidential information intending to find and take information that appears to be discriminatory in the hopes of preserving evidence that might come in handy later.¹²³ Thus, fishing is essentially an employee flouting his or her employer's policies and performing his or her own discovery process without a pending case or court permission.¹²⁴ However, depending on the weight of the factors, such as the scope of the employer's policy and the relevance of the information, a court may find that the Opposition Clause protects an employee who fishes for information. Thus, weighing the factors in the six-part balancing test may protect undeserving employees.

Similarly unreasonable results arise from balancing incommensurable measurements. The Sixth Circuit's test attempts to balance the employer's

119. See *Niswander*, 529 F.3d at 730 (McKeague, J., concurring) (expressing concern about the weight of the factors); *infra* Part IV.C (discussing the unreasonable results produced by balancing unweighted and unrelated factors).

120. See *infra* Part IV.C (explaining the attempt in *Niswander* to balance incommensurable factors).

121. *Niswander*, 529 F.3d at 730 (McKeague, J., concurring).

122. *Id.* at 727 (majority opinion) (citing *O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 763–64 (9th Cir. 1996)).

123. *Id.*

124. See *id.* (“[W]e are loathe [sic] to provide employees an incentive to rifle through confidential files looking for evidence that might come in handy in later litigation.’ To hold in favor of *Niswander* would turn the opposition clause into ‘a license to flaunt [sic] company rules or an invitation to dishonest behavior.’” (alterations in original) (citation omitted) (quoting *O'Day*, 79 F.3d at 763–64)).

need for confidentiality and the employee's need to be safeguarded from employer retaliation by weighing the two factors measuring the employer's need against the four factors analyzing the employee's subjective intent.¹²⁵ This is similar to a scientist who is experimentally determining the difference in weight of two objects by measuring the kinetic energy of one and the mass of the other. The measurements and calculations would introduce inherent errors into the experiment.¹²⁶ It would be more efficient to simply place the objects on a scale beside each other. The same concept applies to the six-factor balancing test. Measuring common terms is the simplest and most efficient way to produce a valid result. Thus, by creating a test that measures incommensurable factors, the Sixth Circuit unnecessarily produced a mechanism for perpetuating inconsistent and unreasonable results through a messy and inefficient analysis.

The introductory example, which describes the uncertainty in the law, illuminates how the balancing process compounds the errors. In that example, an employee was inadvertently copied on an e-mail that was intended only for supervisors. She informed her supervisor that there was a mistake, that she read the e-mail, and that she opposed some of the statements because they seemed discriminatory. Her supervisor then angrily told her that she breached company policy by reading it and said, "It's best that she forget about it." She then decided to keep a copy of the e-mail and sent another one to her attorney for fear of possible retaliation for reading the e-mail.

Using the six factors, a judge could find the employee's action unreasonable because the employee had other methods available for preserving the information, such as saving the e-mail in a password-protected file on her desktop. That judge could also find that the employer's confidentiality policy protected information that is highly relevant to the employee's retaliation case. Thus, this judge would weigh the employer's unreasonable need to maintain a confidentiality policy that would allow it to have free reign to discriminate—as in the university-tenure and affirmative-action employer-self-evaluation cases¹²⁷—against the employee's seemingly reasonable intent. This judge has two incommensurable terms and no weights with which to work. Therefore, the judge has insubstantial grounds

125. *Id.* at 726.

126. *See generally* SEMYON G. RABINOVICH, MEASUREMENT ERRORS AND UNCERTAINTIES: THEORY AND PRACTICE 159–78 (3d ed. 2005), available at <http://www.springerlink.com/content/g75944/> (discussing the formula to calculate indirect measurement—using related measurements to calculate an unknown value—and the various techniques used to measure the uncertainty within those calculations).

127. *See supra* Part III.C (explaining that maintaining the employer's confidentiality in university-tenure decisions and affirmative-action employer self-evaluations prevented the employees from accessing relevant information necessary to their Title VII claims and that maintaining confidentiality would thus give employers free areas within which they could discriminate).

on which to base a decision, whereas a test that implicitly balanced the competing interests through an objective analysis would avert this problem.

The six-factor balancing test fails to balance an employer's interest in maintaining confidentiality and an employee's interest in Title VII protections. The test not only forces judges to read employees' minds, but also to micro-manage employer decision making. Additionally, as Judge McKeague points out, the undetermined weight of each factor could produce results that are inconsistent with the test's purpose, inconsistent across similar cases, and unreasonable.¹²⁸ Compounding these problems turns the test into a mechanism that measures incommensurable terms to perpetuate inconsistent and unreasonable outcomes.

V. A REASONABLY-PERCEIVED-THREAT TEST CORRECTS THE FLAWS IN THE SIX-FACTOR BALANCING TEST

The balancing test in *Niswander* complicates the analysis necessary to balance adequately the employee's and employer's competing interests. Using a clear-cut, simpler test would eliminate the uncertainty in balancing many factors, while adequately protecting the rights of employers and employees by implicit balancing through legal analysis. For example, a reasonably-perceived-threat test that inquired only into the reasons why the employee appropriated and disseminated confidential information, in violation of an employer's confidentiality policy, would sufficiently protect an employee from having his or her Title VII rights obstructed, while simultaneously protecting an employer's right to maintain a confidentiality policy.

It is important, as a cautionary note, that courts do not turn this objective test into the district court's presumption in *Laughlin v. Metropolitan Washington Airports Authority*.¹²⁹ In *Laughlin*, the district court held that "an employee who engages in misappropriation must overcome the presumption that such activity is not protected under Title VII's retaliation clause. This is to be done by a specific showing that there existed no alternative to the dishonest, disloyal conduct sought to be asserted as protected activity."¹³⁰ In essence, the trial court reasoned that the employee should not be protected because the employee committed a wrong.¹³¹

128. See *Niswander*, 529 F.3d at 729–30 (McKeague, J., concurring) (discussing problems with the majority's unweighted balancing test); *supra* Part IV.C (discussing the effect of compounding the flaws in the test).

129. *Laughlin v. Metro. Wash. Airports Auth.*, 952 F. Supp. 1129 (E.D. Va. 1997), *aff'd on other grounds*, 149 F.3d 253, 260 (4th Cir. 1998) (declining to adopt the presumption and instead applying a balancing test to affirm the trial court's decision).

130. *Id.* at 1139.

131. See *id.* at 1138 ("[T]his type of conduct, which on its face is dishonest and disloyal, should be presumed to fall outside of the protection afforded by Title VII . . .").

Not only did the Fourth Circuit decline to adopt the presumption,¹³² but this presumption is dangerous because it does not treat the interests of both sides equally. Instead, it treats the employee's wrong as the dispositive factor without assessing the importance of Title VII's protection for employees. If courts avoid the presumption in *Laughlin*, then applying the reasonably-perceived-threat test will adequately address the interests of both sides because it narrows the analysis to the purpose of balancing, which is to determine which party's need was greater.

The dispositive inquiry under the reasonably-perceived-threat test would be whether a reasonable person in the employee's position would perceive a threat to the ability to exercise his or her Title VII rights and act in the same way the employee did to preserve them. To ensure that the threat is great enough, it should be strong enough to create a good-faith and reasonable belief that if the employee does not preserve the information he or she will be unable to carry the burden of showing a violation of any rights under Title VII.¹³³ The reasonable belief is an objective standard that measures an employer's actions to determine whether a threat existed. Thus, the reasonably perceived threat in the test removes the obstacles to weighing factors and provides an objective basis for judges to analyze and decide the case based on law.

Furthermore, the test assumes the importance of the employer's interest in confidentiality by initially presuming that the employee was not reasonable. This simplifies the analysis and prevents judges from micro-managing objective employer decision making. In addition, it does not create the presumption Judge Gilman feared in *Niswander*—that the Opposition Clause does not protect an employee who breaches an employer's confidentiality policy even though alternative means existed to preserve the information¹³⁴—because the employee has the opportunity to show that he or she acted reasonably given the circumstances. Placing the burden on the employee would maintain the burden allocation already present in the Opposition Clause—that the employee must prove his or her actions qualify as oppositional.¹³⁵

Also, this test does not create an incentive for employees to fish for information. To qualify for protection, an employee must act solely out of

132. *Laughlin v. Metro. Wash. Airports Auth.*, 149 F.3d 253, 260 (4th Cir. 1998).

133. An employee has the right to be free from unlawful discrimination, which includes the following rights: the right to be free from disparate-treatment discrimination; the right to be free from disparate-impact discrimination; the right to be free from retaliation for participating in an "investigation, proceeding, or hearing" about unlawful discrimination; and the right to be free to oppose a discriminatory action. *See* 42 U.S.C. §§ 2000e-2(a), e-3(a) (2006) (proscribing certain employment practices).

134. *Niswander v. Cincinnati Ins. Co.*, 529 F.3d 714, 730 (6th Cir. 2008) (Gilman, J., concurring).

135. *See supra* note 15 and accompanying text (explaining that the employee has the burden of proving his or her actions qualify as oppositional).

the reasonable fear that confidential evidence regarding an employer's unlawful discrimination would disappear. The qualifier, "reasonable," means that there must be more than just a subjective belief that evidence will disappear. It requires that other facts exist that would objectively show that the belief is well-founded. Thus, an employee who has the authority to access confidential documents and who also abuses that authority by fishing for information would not be protected.

The test would also only protect employees who take information relevant to Title VII claims. The motivation for breaching the confidentiality policy comes from the employer's actions. Presumably, the employee knows when the employer discriminated against him or her and what information contains instances of that discrimination. Furthermore, if an employee takes information that a reasonable person could not have believed was relevant to a Title VII claim, this act would provide evidence that a reasonable person could not believe that any employer action with regard to that information—including destruction of it—would pose a threat to the employee's exercise of Title VII rights. Therefore, this test also quells Judge McKeague's concern that under the six-factor balancing test, an employee who takes information without any relevance to her specific claim might be protected.¹³⁶

What an employee does with the information to preserve it may also be considered as evidence of whether the employee had a legitimate purpose. A reasonable employee, who legitimately perceived a threat to Title VII rights, would distribute the information to individuals that could help the employee exercise his or her Title VII rights—such as an attorney, a supervisor in the company, or an employee named in the document as a subject of discrimination. However, an employee acting for his or her own selfish gain—including expedience in handling a Title VII matter—would disseminate the information to anyone, including individuals who cannot help. Thus, when an employee disseminates the information to individuals who would not be involved in the Title VII process—such as other non-affected employees rather than an attorney who would handle the potential claim—he or she shows a malicious purpose rather than an act in response to a perceived threat to Title VII rights.

An example helps illustrate this point. Suppose employee A found old documents on top of a shred pile that showed that female employees B and C earned significantly less than their male counterparts. Employee A saves these documents and gives them to B and C. This act would only constitute oppositional activity if a reasonable person in A's position would have

136. See *Niswander*, 529 F.3d at 730 (McKeague, J., concurring) (noting the concern that under the majority's reasoning a court could still deem an employee's breach of confidentiality pertaining to documents unrelated to a discrimination claim as reasonable if it finds that one of the other factors significantly favors the employee).

perceived a threat to her Title VII rights. In this scenario, A has the right to oppose discriminatory acts by the employer. Finding the documents on the shred pile created a reasonably perceived threat to her right to oppose the employer policy if A failed to preserve the information. To preserve the information, A disseminated it to the affected employees, B and C, who could exercise their Title VII rights to correct the employer's unlawful discrimination. The fact that A disseminated the information to affected employees would be evidence of A's legitimate purpose to exercise Title VII rights.

The reasonably-perceived-threat test is also consistent with the results of previously decided cases. Although the employee in *Niswander* only disseminated the documents to her attorney, she took the information to jog her memory about instances of possible retaliation.¹³⁷ Thus, her purpose was solely self-interest. On the facts of the case, she had no reason to believe that her Title VII rights would be obstructed if she did not preserve the evidence. Therefore, she could not have formed a good-faith, reasonable belief that such evidence would disappear and make it impossible for her to exercise any Title VII rights. This test not only creates consistent results with the court's holding in *Niswander*, it also would protect an employee's action in a case similar to *Kempcke v. Monsanto Co.*

Under the facts of *Kempcke*, the reasonably-perceived-threat test establishes the outer boundary of protection. In *Kempcke*, an employee was issued a company computer containing documents showing possible age discrimination.¹³⁸ The employee showed the documents to his supervisor and requested an explanation.¹³⁹ The court found that this was a protected activity.¹⁴⁰ The employer refused to answer and demanded that the employee return the documents by a specified date.¹⁴¹ The employee responded that the employer could deal with his attorney, to whom he also gave the documents.¹⁴² Here, the employee "has a legitimate interest in preserving evidence of [his employer's] unlawful employment practices."¹⁴³ The employee, in good faith, reasonably believed that returning the documents would jeopardize a potential claim because the employer previously engaged in suspicious activities that the employer vehemently refused to address.

137. *Id.* at 718 (majority opinion).

138. *Kempcke v. Monsanto Co.*, 132 F.3d 442, 446 (8th Cir. 1998).

139. *Id.* at 444.

140. *Id.* at 445.

141. *Id.* at 444.

142. *Id.*

143. *Kempcke*, 132 F.3d at 445 (quoting *O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 763 (9th Cir. 1996)).

Finally, where the *Niswander* test struggles to balance the competing interests,¹⁴⁴ the reasonably-perceived-threat test implicitly sets the employer's legitimate interest in its confidentiality policy against the employee's interest in Title VII protection. The premise of the test is that an employer's interest in confidentiality is illegitimate where it obstructs an employee's Title VII rights. When an employee has a reasonably perceived fear of losing any Title VII rights, the employer's interest should give way to Opposition Clause protection. The hypothetical in the Introduction provides an example of an instance where the reasonably-perceived-threat test creates a better result than the *Niswander* test.¹⁴⁵ The employee received a memo by mistake, told her supervisor about it, received a vaguely threatening reply, and then decided to save it and send it to her attorney—who is a person that would be involved in the Title VII process.¹⁴⁶ Objective facts indicate that the employee felt her Title VII rights might be threatened. The only unanswered question is whether that belief was reasonable—i.e., would a reasonable employee in her position have believed the information would disappear? The answer would most assuredly be yes. The implication of the supervisor's statement, "It's best that you forget about it," is either that management is trying to cover its tracks or that her supervisor is threatening her. Thus, the employee would be protected under the reasonably-perceived-threat test.

Inquiring into the purpose of an employee's action is the specific way to determine which party has the greater need. The inquiry protects both the strong interest in employer confidentiality and the equally strong interest in employee Title VII rights because the evidence used to determine an employee's reasonably perceived threat will inevitably show whether the employer discouraged employees from exercising Title VII rights. When the employee takes confidential information because of a good-faith, reasonable belief that taking the documents was necessary to preserve the evidence, the law should protect this activity, to preserve the employee's potential retaliation claim. However, when the employee acts in the absence of such a threat, the law should not protect this activity because to do so would harm the employer's interest. Finally, this test creates more-predictable results such that employers and employees both know whether the Opposition Clause protects a given activity.

144. See *supra* Part IV.C (explaining how the six-factor balancing test fails to balance competing interests).

145. See *supra* Part I (comparing the reasonably-perceived-threat test with the *Niswander* six-factor balancing test).

146. See *supra* Part I (describing an example which shows the benefits of the reasonably-perceived-threat test).

VI. CONCLUSION

The six-factor balancing test that *Niswander* established opened the gates to unpredictable and unreasonable results by mishandling the parties' interests.¹⁴⁷ A confidentiality policy is an important managerial decision because it helps build client relationships and protects the employer's strategic plan as well as incentives to innovate.¹⁴⁸ According to Congress, these managerial affairs should be left undisturbed to the greatest extent possible.¹⁴⁹ Keeping with this mandate, courts should only restrict managerial decisions that conceal information when the managerial decision obstructs Title VII's enforcement.¹⁵⁰ Therefore, courts should limit confidentiality only when it obstructs Title VII enforcement such that the employee would be unable to obtain relief.¹⁵¹ The balancing test in *Niswander* causes judges to overlook the test's purpose of balancing the employer's interest in confidentiality and the employee's interest in Title VII rights.¹⁵²

The court must revisit its balancing test to ensure that it more adequately protects both interests. To do so, it should use the reasonably-perceived-threat test, which simply asks whether a reasonable person in the employee's position would perceive a threat to any Title VII rights and act in the same way to preserve them. The reasonably-perceived-threat test is the most efficient way to balance employer and employee interests. The improvements inherent in the reasonable-person test would benefit all parties and, therefore, the courts should apply this test in cases involving confidentiality breaches under the Title VII Anti-Retaliation Clause.¹⁵³

147. See *supra* Part IV (establishing that the *Niswander* test produces inconsistent and unreasonable results).

148. See *supra* Part III.A (discussing the importance of confidentiality in the workplace).

149. See *supra* notes 78–79 and accompanying text (explaining Congress's intent to leave employers free to manage their businesses).

150. See *supra* Part III.C (explaining that, in the employment discrimination context, confidentiality is limited when upholding it would obstruct the employee's right to relief under Title VII).

151. See *supra* Part III.C (examining the employer's right to confidentiality and discussing when the courts should limit that right).

152. *Niswander v. Cincinnati Ins. Co.*, 529 F.3d 714, 722 (6th Cir. 2008); see *supra* Part IV (determining that the *Niswander* test is flawed and produces inconsistent and unreasonable results).

153. See *supra* Part V (advocating for the reasonably-perceived-threat test instead of the *Niswander* six-factor balancing test).