No. 20-1334

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MAKINI JACKSON,
Plaintiff-Appellant,
v.

GENESEE COUNTY ROAD COMMISSION,
Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of Michigan

THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION'S NOTIFICATION OF JOINING OF BRIEF FOR UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT ON THE ISSUES ADDRESSED HEREIN

Pursuant to Federal Rule of Appellate Procedure 29(a), the Equal Employment Opportunity Commission (EEOC) notifies this Court that the EEOC joins the Brief for the United States as Amicus Curiae in Support of Plaintiff-Appellant on the Issues Addressed Herein, filed on July 15, 2020. The United States' amicus curiae brief sets out at pages 1-2 the EEOC's interest in this appeal. EEOC has coordinated with counsel for the United States concerning this notification.

Respectfully submitted,

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Dated: August 10, 2020

CERTIFICATE OF SERVICE

I, Anne Noel Occhialino, hereby certify that on August 10, 2020, I electronically filed the foregoing notification with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. I also certify that counsel of record, who have consented to electronic service, will be served the foregoing notice via the appellate CM/ECF system.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT ON THE ISSUES ADDRESSED HEREIN

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INTEREST OF THE UNITED STATES

The United States has a direct and substantial interest in this appeal, which presents an important question regarding the scope of protected oppositional activity under the anti-retaliation provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-3(a). The Attorney General and the Equal Employment Opportunity Commission (EEOC) share responsibility for enforcing Title VII. See 42 U.S.C. 2000e-5(a) and (f)(1). In addition, Title VII applies to the United States in its capacity as the Nation's largest employer. 42 U.S.C. 2000e-16. Because of

the federal government's interest in the proper interpretation of Title VII, the United States offers its views in this brief filed under Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE ISSUE

Whether the district court erred in requiring the plaintiff to show that her actions as the Human Resources Director "were beyond her regular job duties" to constitute protected activity under the opposition clause of Title VII's anti-retaliation provision, which prohibits discrimination against "any" employee "because he has opposed any practice made an unlawful employment practice by this subchapter," 42 U.S.C. 2000e-3(a).[1]

STATEMENT OF THE CASE

1. Factual Background

Plaintiff-appellant Makini Jackson was hired as the Human Resources (HR) Director and Equal Employment Opportunity (EEO) Officer for defendant-appellee Genesee County Road Commission in March 2016. (Opinion & Order, RE 21, PageID# 698). Her direct supervisor was John Daly, the County's Manager/Director. (Opinion & Order, RE 21, PageID# 698).

[1] The United States takes no position on any other issue presented in this case, including whether the other elements of a retaliation claim were satisfied.

As part of her job, Jackson investigated several discrimination complaints and revised the County's EEO policy. (Opinion & Order, RE 21, PageID# 698, 701). The complaints were filed by Anthony Branch, Joyce McClane, and Felicia Ivey against the same employee, John Bennett, before Jackson assumed her role as HR Director. (Opinion & Order, RE 21, PageID# 698-699). It is undisputed that, although they may have asked Jackson for EEOC "complaint" forms, none of the complainants filed a charge with the EEOC during Jackson's tenure. (See Opinion & Order, RE 21, PageID# 700). Jackson investigated each of these complaints internally. (Opinion & Order, RE 21, PageID# 698).

Jackson concluded that Branch's race discrimination complaint against Bennett had merit. (Opinion & Order, RE 21, PageID# 700-701). Jackson "advised * * * [her direct supervisor] Daly that [she] had reached this conclusion and that it needed to be affirmatively addressed with Bennett."[2] (Opinion & Order, RE 21, PageID# 701). She recommended, and Daly agreed, that Bennett be placed on administrative leave and be required to undergo a psychological evaluation. (Opinion & Order, RE 21, PageID# 699). After the psychological evaluation in May 2016, Jackson maintains that she did not want Bennett to return, whereas

[2] According to the district court, Jackson "never reached a conclusion" as to McClane's complaint against Bennett, and "'did not provide a conclusion' as to whether Bennett discriminated against Ivey based on race or gender." (Opinion & Order, RE 21, PageID# 700 (citation omitted)).

Daly did. (Opinion & Order, RE 21, PageID# 699). Daly provided Bennett with a letter specifying the terms of his return, but Bennett did not agree. (Opinion & Order, RE 21, PageID# 699). Ultimately, Jackson negotiated a severance agreement for Bennett that Daly and Bennett signed in August 2016. (Opinion & Order, RE 21, PageID# 699-700).

On October 17, 2016, Daly fired Jackson. (Opinion & Order, RE 21, PageID# 705). According to Daly, he terminated Jackson because she "had a communication style that was abrasive and offensive to people." (Opinion & Order, RE 21, PageID# 705 (citation omitted)). Jackson alleged that her termination was in retaliation for her investigation of employees' claims of discrimination, including Branch's complaint against Bennett, and for her handling of contractors' EEO plan submissions. (Opinion & Order, RE 21, PageID# 697). She filed a charge with the EEOC, which issued her a right-to-sue letter. (Opinion & Order, RE 21, PageID# 709-710).

2. Procedural History

Jackson filed a complaint against the County in the Eastern District of Michigan with two claims. (Complaint, RE 1, PageID# 1-9). In Count 1, Jackson asserted a retaliation claim under Title VII and Michigan's Elliott-Larsen Civil Rights Act. (Complaint, RE 1, PageID# 5-6). In Count 2, Jackson asserted a "wrongful termination/retaliation" claim in violation of Michigan's public policy.

(Complaint, RE 1, PageID# 6-7). The district court granted summary judgment in favor of the County on both counts. (Opinion & Order, RE 21, PageID# 697).

As relevant here, the district court held that Jackson's Title VII retaliation claim failed, in part, because she had not engaged in protected activity. (Opinion & Order, RE 21, PageID# 712-717). Jackson argued that she was protected because she (1) "investigated employee complaints of unlawful discrimination," (2) "concluded that Bennett racially discriminated against Branch," (3) "told Daly her conclusion about Bennett's conduct towards Branch," and (4) "supported Branch, McClane, and Ivey in their requests for EEOC complaint forms and when Branch and McClane 'each threatened further action.'" (Opinion & Order, RE 21, PageID# 712 (citation omitted)). The district court rejected these arguments under both the participation and opposition clauses of Title VII's anti-retaliation provision.[3]

On the opposition clause, the district court held that Jackson had not engaged in protected activity because she had not shown that her actions "were

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[3] The participation clause of Title VII's anti-retaliation provision prohibits an employer from "discriminat[ing] against any of his employees * * * because [the employee] has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]." 42 U.S.C. 2000e-3(a). The district court held that Jackson had not engaged in protected activity under this clause because "there is no indication that plaintiff's investigation 'occur[ed] pursuant to a pending EEOC charge,'" as required by this Court's precedent in *Abbott* v. *Crown Motor Co.*, 348 F.3d 537, 543 (6th Cir. 2003). (See Opinion & Order, RE 21, PageID# 712-713).

beyond her regular job duties." (Opinion & Order, RE 21, PageID# 716 (quoting *Lewis-Smith* v. *Western Ky. Univ.*, 85 F. Supp. 3d 885, 909 (W.D. Ky. 2015))). The district court acknowledged that Jackson had "inform[ed] Daly of her conclusion that Bennett had discriminated against Branch," but found this insufficient because it was part of her job as HR Director. (See Opinion & Order, RE 21, PageID# 716). The court stressed that Jackson "does not dispute that this investigation was part of her job duties, and she does not label her conclusion regarding Bennett's conduct towards Branch as her own personal belief." (Opinion & Order, RE 21, PageID# 716-717).[4]

The district court entered judgment in favor of the County on March 23, 2020. (Judgment, RE 22, PageID# 727). Jackson filed a timely notice of appeal on April 14, 2020. (Notice of Appeal, RE 23, PageID# 728).

SUMMARY OF ARGUMENT

The district court erred in concluding that Jackson did not engage in "opposition" within the meaning of Title VII's anti-retaliation provision. The

[4] Even if Jackson had established that she engaged in protected activity, the district court held that she failed to show a causal connection between that activity and her termination. (Opinion & Order, RE 21, PageID# 717-721). And, even if Jackson had established that she engaged in protected activity that was causally related to her termination, the court held that she failed to rebut the County's legitimate, non-discriminatory reason for her termination. (Opinion & Order, RE 21, PageID# 721-723). As noted, the United States takes no position on the appropriate resolution of these issues. See note 1, *supra*.

opposition clause of Title VII's anti-retaliation provision prohibits an employer from "discriminat[ing] against any of his employees * * * because [the employee] has opposed any practice made an unlawful employment practice by [Title VII]." 42 U.S.C. 2000e-3(a). An employee, like Jackson, can generally be said to have "opposed" an unlawful employment practice if she informs her employer that she believes unlawful discrimination occurred in the workplace.

Because the district court found that Jackson's opposition did not go "beyond her job duties" as HR Director, however, it held that she had not engaged in protected activity. In so holding, the district court erred by following the "manager rule" that some courts have adopted under the Fair Labor Standards Act (FLSA). Whatever its validity under the FLSA, the manager rule cannot be grafted onto Title VII's plain text or squared with precedent from this Court and the Supreme Court.

This is not to say that an HR or EEO employee's job duties are irrelevant to the larger analysis of a Title VII retaliation claim. Although there is no categorical requirement that an HR or EEO employee go beyond her job duties in order to engage in opposition, the plaintiff's job duties could be relevant to the analysis, including in determining whether the *manner* of the plaintiff's opposition was reasonable and whether the plaintiff held a reasonable, good-faith *belief* that the conduct being opposed was unlawful. Such limitations mitigate any concern that

HR or EEO employees, by virtue of their positions, could bring a retaliation claim every time they suffered a materially adverse action.

ARGUMENT

THE OPPOSITION CLAUSE OF TITLE VII'S ANTI-RETALIATION PROVISION DOES NOT REQUIRE EMPLOYEES IN HUMAN RESOURCE POSITIONS TO GO BEYOND THEIR JOB DUTIES TO ENGAGE IN PROTECTED ACTIVITY

A. Jackson Engaged In "Opposition" When She Communicated Her Belief That Unlawful Discrimination Had Occurred

The opposition clause of Title VII's anti-retaliation provision protects "any" employee who "opposed any practice made an unlawful employment practice by this subchapter." 42 U.S.C. 2000e-3(a). This appeal involves only the meaning of "oppose."[5] Based on the statutory text and the facts presented in the summary judgment opinion, Jackson engaged in "opposition" when she told Daly that she believed that Bennett had racially discriminated against Branch.

The Supreme Court has held that "[t]he term 'oppose,' being left undefined by the statute, carries its ordinary meaning * * * : '[t]o resist or antagonize . . .; to contend against; to confront; resist; withstand.'" *Crawford* v. *Metropolitan*

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[5] Neither the parties nor the district court addressed Title VII's requirement that the opposition be directed at a "practice made an unlawful employment practice by [Title VII]." 42 U.S.C. 2000e-3(a). This Court has held that "[a] person opposing an apparently discriminatory practice does not bear the entire risk that it is in fact lawful; he or she must only have a good faith belief that the practice is unlawful." *Booker* v. *Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1312-1313 (6th Cir. 1989).

Gov't of Nashville & Davidson Cty., 555 U.S. 271, 276 (2009) (internal citation omitted) (quoting Webster's New International Dictionary 1710 (2d ed. 1957)). This definition includes "the many ways in which an individual may communicate explicitly or implicitly opposition to perceived employment discrimination." EEOC Enforcement Guidance 915.004, § II-A-2 (Aug. 25, 2016), available at https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues.

This Court has held that "[t]he opposition clause protects * * * complaints to management and less formal protests of discriminatory employment practices." *Laster* v. *City of Kalamazoo*, 746 F.3d 714, 730 (6th Cir. 2014). For example, an employee engages in "opposition" by "complaining to anyone (management, unions, other employees, or newspapers) about allegedly unlawful practices." *Niswander* v. *Cincinnati Ins. Co.*, 529 F.3d 714, 721 (6th Cir. 2008) (citation omitted); see also *EEOC* v. *New Breed Logistics*, 783 F.3d 1057, 1067 (6th Cir. 2015). Similarly, an employee engages in "opposition" by "opposing unlawful acts by persons other than the employer—*e.g.*, former employers, union, and co-workers." *Niswander*, 529 F.3d at 721 (citation omitted).

This Court has qualified the broad scope of "opposition" with the requirement that "the manner of [the employee's] opposition must be reasonable." *Johnson* v. *University of Cincinnati*, 215 F.3d 561, 580 (6th Cir.), cert. denied, 531

U.S. 1052 (2000); see also *Jones* v. *St. Jude Med. S.C., Inc.*, 504 F. App'x 473, 480 (6th Cir. 2012). And while an employee's job duties may factor into a determination of whether her opposition was reasonable in a particular case, "there is no qualification on who the individual doing the complaining may be or on the party to whom the complaint is made known." See *Johnson*, 215 F.3d at 580.

Thus, in this case, the Court should ask whether Jackson implicitly or explicitly communicated her belief that unlawful discrimination had occurred, such that she can be said to have "opposed" the same. Under this standard, there can be no doubt that Jackson sufficiently "opposed" Bennett's alleged discrimination of Branch when she expressed her belief to Daly that it had occurred. As the Supreme Court recognized in *Crawford*, "'[w]hen an employee communicates to her employer a belief that the employer has engaged in . . . a form of employment discrimination, that communication' virtually always 'constitutes the employee's *opposition* to the activity.'" 555 U.S. at 276 (quoting U.S. Amicus Br. at 9, *Crawford*, *supra* (No. 06-1595)).

In contrast to Jackson's handling of the Branch complaint, Jackson's treatment of the other two complaints, when considered in isolation, likely do not rise to the same level based on the record as characterized by the district court. For McClane's complaint, the district court suggested that Jackson never formed a belief as to whether anything unlawful happened. (See Opinion & Order, RE 21,

PageID# 700). And for Ivey's complaint, the district court suggested that Jackson never implicitly or explicitly communicated her belief to anyone. (See Opinion & Order, RE 21, PageID# 700).

At the very least, however, Jackson engaged in opposition as required by the anti-retaliation provision when she told Daly her belief that Bennett had unlawfully discriminated against Branch. And as explained below, Title VII does not impose any additional requirement on Jackson to actionably "oppose" an unlawful employment practice because she is an HR Director.

B. The District Court Erred By Requiring Jackson To Prove That Her Opposition Went "Beyond Her Regular Job Duties"

Eschewing this straightforward textual analysis, the district court held that Jackson did not engage in protected activity under the opposition clause, because her opposition did not go "beyond her regular job duties" as HR Director. (Opinion & Order, RE 21, PageID# 716 (citation omitted)). In so holding, the district court implicitly and incorrectly followed the so-called "manager rule" that some courts have applied to retaliation claims under the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 *et seq.* Regardless of its place in FLSA jurisprudence, the "manager rule" cannot be reconciled with Title VII's text or the precedent construing it.

1. The District Court Implicitly Relied On The FLSA's Manager Rule

The FLSA "sets forth employment rules concerning minimum wages, maximum hours, and overtime pay," and prohibits retaliation against employees who attempt to enforce these rules. *Kasten* v. *Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 4 (2011) (citing 29 U.S.C. 201 *et seq.*). Unlike Title VII, however, the FLSA's anti-retaliation provision does not contain an opposition clause. Compare 42 U.S.C. 2000e-3(a), with 29 U.S.C. 215(a)(3). The FLSA makes it unlawful only "to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee." 29 U.S.C. 215(a)(3). Some courts have held that this provision of the FLSA does not protect certain employees in managerial or HR roles if the protected activity was part of their job duties.

This rule, which is known as the "manager rule," is a judicially created doctrine that first arose in an FLSA case in 1996, more than 30 years after Congress enacted Title VII. See *McKenzie* v. *Renberg's Inc.*, 94 F.3d 1478, 1486-1487 (10th Cir. 1996), cert. denied, 520 U.S. 1186 (1997). To avail himself or herself of the FLSA's anti-retaliation protections under the "manager rule," "the employee must step outside his or her role of representing the company" and take

action adverse to her employer. See *ibid.*; see also *Hagan* v. *Echostar Satellite, L.L.C.*, 529 F.3d 617, 627-628 (5th Cir. 2008); *Claudio-Gotay* v. *Becton Dickinson Caribe, Ltd.*, 375 F.3d 99, 102 (1st Cir. 2004), cert. denied, 543 U.S. 1120 (2005).

This Court has applied the manager rule in the FLSA, not Title VII, context in two unpublished cases. See *Pettit* v. *Steppingstone, Ctr. for the Potentially Gifted*, 429 F. App'x 524, 530 & n.2 (6th Cir. 2011); see also *McKinnon* v. *L-3 Commcn's Corp.*, No. 19-3699, 2020 WL 2499827, at *6-7 (6th Cir. May 14, 2020). In *McKinnon*, this Court explained that "courts generally require that an employee with [human resource] duties somehow 'step outside the role or otherwise make clear to the employer that [she] was taking a position adverse to the employer' in order for the employee's activity to be protected [under the FLSA]." 2020 WL 2499827, at *6 (second alteration in original; internal quotation marks and citation omitted). This Court thus affirmed the dismissal of the plaintiff's FLSA retaliation claim, because she "did not move beyond performance of her job duties," and because she advocated for changes that the legal department had approved. See *ibid.*

Despite the textual differences between the anti-retaliation provisions of the two statutes, some courts have imported the manager rule from the FLSA to Title VII. See, *e.g.*, *Brush* v. *Sears Holdings Corp.*, 466 F. App'x 781, 787 (11th Cir. 2012), cert. denied, 568 U.S. 1143 (2013). But see *Littlejohn* v. *City of N.Y.*, 795

F.3d 297, 317 n.16 (2d Cir. 2015) (noting that other courts have "imported" the so-called "manager rule" to claims under Title VII, but declining to do the same). The district court here, for example, relied on two cases applying the FLSA's manager rule to Title VII cases. (See Opinion & Order, RE 21, PageID# 714 (citing *Lewis-Smith* v. *Western Ky. Univ.*, 85 F. Supp. 3d 885 (W.D. Ky. 2015)); *Coleman* v. *G4S Secure Sols. (USA), Inc.*, No. 16-10250, 2016 WL 7439197 (E.D. Mich. Dec. 27, 2016)).

Although the cases the district court cited do not explicitly discuss the manager rule, they rely on key cases for the manager rule under the FLSA. See *Lewis-Smith*, 85 F. Supp. 3d at 909 (quoting *Correa* v. *Mana Prods., Inc.*, 550 F. Supp. 2d 319, 330-331 (E.D.N.Y. 2008) (citing *McKenzie*, 94 F.3d at 1486-1487)); *Coleman*, 2016 WL 7439197, at *6 (citing *McKenzie*, 94 F.3d at 1486-1487; *Pettit*, 429 F. App'x at 530 n.2). In the first case, *Lewis-Smith*, the district court rejected the plaintiff's Title VII retaliation claim, in part, because she "ha[d] not shown that she engaged in protected activities with regard to other persons' grievances beyond her regular job duties." 85 F. Supp. 3d at 909. In the second case, *Coleman*, the district court held that the plaintiff had not engaged in protected activity under Title VII because, "[i]n investigating, she did what she 'usually' does, and her investigation * * * came about from fulfilling her managerial duties." 2016 WL 7439197, at *7.

The district court in this case followed suit, concluding that Jackson had not engaged in "opposition" because she did not go "beyond her regular job duties" as HR Director. (Opinion & Order, RE 21, PageID# 716 (citing *Lewis-Smith*, 85 F. Supp. 3d at 909)). Specifically, Jackson "does not dispute that th[e] investigation was part of her job duties, and she does not label her conclusion regarding Bennett's conduct towards Branch as her own personal belief." (Opinion & Order, RE 21, PageID# 716-717). In addition, the district court noted, "Daly did not oppose plaintiff's investigation, her negotiations with Bennett, or her opinion that Bennett should not return to work." (Opinion & Order, RE 21, PageID# 714).

Although the district court did not explicitly invoke the manager rule, it applied its logic nonetheless. The district court's focus on whether Jackson acted within her job duties and with the ostensible support of her employer parallels this Court's analysis in *McKinnon* to determine if the plaintiff's actions were "adverse" to her employer under the FLSA's manager rule. Compare Opinion & Order, RE 21, PageID# 714-717, with *McKinnon*, 2020 WL 2499827, at *6-7. But it was error in this case for the district court to follow the FLSA's manager rule rather than Title VII's plain text.

2. The FLSA's Manager Rule Contravenes Title VII's Text And Relevant Precedent

The district court erred by imposing the requirements of the manager rule under the FLSA to Jackson's claim under Title VII. In the Title VII context, the

manager rule runs counter to the statutory text and contradicts precedent from the Supreme Court and this Court.

a. The manager rule contravenes Title VII's plain language. The "first step" in any statutory analysis is to "determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 340 (1997). "To do so, we orient ourselves to the time of the statute's adoption, here 1964, and begin by examining the key statutory terms." *Bostock* v. *Clayton Cty., Ga.*, 140 S. Ct. 1731, 1738-1739 (2020). An examination of the key statutory terms at issue in this case makes clear that Jackson engaged in protected activity under Title VII's anti-retaliation provision.

Title VII prohibits retaliation against an employee who has "opposed" discrimination. 42 U.S.C. 2000e-3(a). As described above, the Supreme Court has already confirmed that the "[t]he term 'oppose,' * * * carries its ordinary meaning," *i.e.*, "[t]o resist or antagonize . . .; to contend against; to confront; resist; withstand." *Crawford*, 555 U.S. at 276 (quoting Webster's New International Dictionary 1710 (2d ed. 1957)). "When an employee communicates to her employer a belief that the employer has engaged in . . . a form of employment discrimination, that communication' virtually always 'constitutes the employee's *opposition* to the activity." *Ibid*. (citation omitted). There is no requirement in

Title VII's text that the employee go "beyond her regular job duties" as HR Director. (Opinion & Order, RE 21, PageID# 716 (citation omitted)).

Nor is there a textual basis to exclude a subset of employees, namely those who work in HR, from protection if they meet the definition of oppositional activity. See *Littlejohn*, 795 F.3d at 318 (noting that the "plain language" of the opposition clause "does not distinguish among entry-level employees, managers, and any other type of employee"). The statute applies to "*any* of [the employer's] employees." 42 U.S.C. 2000e-3(a) (emphasis added). Title VII defines "employee" as "an individual employed by an employer" with an exception only for certain elected officials and their staff or appointees. 42 U.S.C. 2000e(f). And, as the Supreme Court has repeatedly explained, "the word 'any' has an expansive meaning." *Babb* v. *Wilkie*, 140 S. Ct. 1168, 1173 n.2 (2020) (citation omitted). As a result, "[n]othing in the language of Title VII indicates that * * * Congress intended to excise a large category of workers from its anti-retaliation protections." *DeMasters* v. *Carilion Clinic*, 796 F.3d 409, 422 (4th Cir. 2015).[6]

b. The Supreme Court's logic in *Crawford* counsels against adding judicial requirements to the statutory text. In that case, the plaintiff alleged that she was fired in retaliation for reporting sexual harassment during an internal investigation

[6] As explained below, however, this is not to say that an employee's job duties are irrelevant to the larger analysis of a retaliation claim. See Section B-3, *infra*.

initiated by an HR officer. See *Crawford*, 555 U.S. at 274. The district court granted summary judgment to the defendant, in part, because it found that the plaintiff had not sufficiently opposed unlawful conduct. *Id.* at 275. This Court affirmed, "taking the view that the [opposition] clause demands active, consistent 'opposing' activities to warrant protection against retaliation * * * and that an employee must instigate or initiate a complaint to be covered." *Id.* at 277 (internal quotation marks, citations, and alterations omitted).

Finding neither requirement supported by the text, the Supreme Court reversed. See *Crawford*, 555 U.S. at 277-280. The Court rejected the additional requirement that opposition be "active" or "consistent," because "'[o]ppose' goes beyond 'active, consistent' behavior in ordinary discourse, where we would naturally use the word to speak of someone who has taken no action at all to advance a position beyond disclosing it." *Id.* at 277. And the Court rejected the requirement that the opposition must originate with the plaintiff, noting that "a person can 'oppose' by responding to someone else's question just as surely as by provoking the discussion." *Id.* at 277-278.

Like the lower courts in *Crawford*, the district court in this case erred by ignoring Title VII's text when it held that an HR employee like Jackson must go "beyond her regular job duties" to qualify for protection. Such a requirement contravenes the plain meaning of "oppose" and "any" employee.

c. Indeed, this Court has already rejected the substance of the manager rule under Title VII. See *Johnson*, 215 F.3d at 579-580; accord *Warren* v. *Ohio Dep't of Pub. Safety*, 24 F. App'x 259, 265 (6th Cir. 2001). In *Johnson*, this Court considered the retaliation claim of the Vice President of Human Resources and Human Relations who had protested discrimination in the hiring process. See 215 F.3d at 566, 579. This Court held that "the fact that Plaintiff may have had a contractual duty to voice such concerns is of no consequence to his claim." *Id.* at 579. "[S]imply because it was Plaintiff's job to insure that Defendants did not engage in discriminatory hiring practices * * * does not thereby immunize Defendants from retaliating against Plaintiff for doing his job." *Id.* at 576 n.6.

Two other circuits have joined this Court in rejecting the manager rule in Title VII cases since the Supreme Court's decision in *Crawford*. See *DeMasters*, 796 F.3d at 421-424; *Littlejohn*, 795 F.3d at 317 n.16. In *Littlejohn*, the Second Circuit "decline[d] to adopt the manager rule," reasoning that "[t]he manager rule's focus on an employee's job duties, rather than the oppositional nature of the employee's complaints or criticisms, is inapposite in the context of Title VII retaliation claims." 795 F.3d at 317 n.16. In *DeMasters*, the Fourth Circuit similarly held that "the 'manager rule' has no place in Title VII jurisprudence." 796 F.3d at 413; see also *id.* at 424. In so holding, the Fourth Circuit explicitly agreed with this Court's decision in *Johnson* "that the 'manager rule' would 'run[]

counter to the broad approach used when considering a claim for retaliation under [the opposition] clause, as well [as] the spirit and purpose behind Title VII as a broad remedial measure.'" *Id.* at 424 (quoting *Johnson*, 215 F.3d at 580).

Other circuits have questioned, but not decided, the viability of the manager rule under Title VII. See *Collazo* v. *Bristol-Myers Squibb Mfg., Inc.*, 617 F.3d 39, 49 n.5 (1st Cir. 2010) (not deciding the issue, but "not[ing] that the language of the antiretaliation provision of the FLSA is different from that of Title VII"); *Weeks* v. *Kansas*, 503 F. App'x 640, 643 (10th Cir. 2012) (Gorsuch, J.) (noting that "one might perhaps argue that *McKenzie*'s rule itself has been superseded" by *Crawford*, but finding the issue waived).

Only one circuit has directly addressed and applied the manager rule since *Crawford*. See *Brush*, 466 F. App'x at 786-787. In an unpublished decision, the Eleventh Circuit cited the manager rule from *McKenzie*, summarily concluded that *Crawford* did not foreclose the application of the manager rule in Title VII, and declared "the 'manager rule' persuasive and a viable prohibition against certain individuals recovering under Title VII." *Id.* at 787. This scant analysis in a non-

precedential decision from out of circuit is uncompelling, especially given this Court's prior published decision in *Johnson*.[7]

3. Policy Arguments Cannot Displace Statutory Text And, In Any Event, Ignore That Job Duties Remain Relevant To Other Limitations On Title VII Retaliation Claims

Some courts have expressed a policy concern in FLSA cases that, without the manager rule, "nearly every activity in the normal course of a manager's job would potentially be protected activity," leading to a "litigation minefield." See *Hagan*, 529 F.3d at 628. The defendants in *Littlejohn* advanced this argument in the Title VII context, claiming that "allowing personnel officers to bring retaliation claims under the opposition clause based on complaints lodged in connection with their official duties would create an automatic prima facie case of retaliation for any terminated human resources or EEO employee." 795 F.3d at 318. Insofar as courts may be concerned that, because their job duties involve EEO-related matters, HR or EEO officers could claim retaliation in response to any discipline or termination, the atextual "manager rule" is not the appropriate means of addressing

[7] The Eleventh Circuit has granted rehearing en banc in a different case, in which the majority of the panel seemed to assume, without consideration of *Brush*, that an HR employee had engaged in opposition under Title VII. See *Gogel* v. *Kia Motors Mfg. of Ga., Inc.*, 904 F.3d 1226, 1235 (11th Cir. 2018), vacated and reh'g en banc granted, 926 F.3d 1290 (2019) (argued Oct. 22, 2019). That case presents other issues, including whether the manner of the HR employee's opposition was reasonable. The en banc decision is pending as of the filing of this brief.

that concern. Rather, an HR or EEO officer's job duties may be relevant to other elements of a Title VII retaliation claim.

As an initial matter, limits on liability derive from the statutory text enacted by Congress, not from "add[ing] words to the law to produce what is thought to be a desirable result." *EEOC* v. *Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2033 (2015); see also *Bostock*, 140 S. Ct. at 1737 ("When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest.").

Equally importantly, this policy concern is misplaced because it ignores the existing limitations on a Title VII retaliation claim under the opposition clause. Namely, if the plaintiff engages in opposition, the manner of such opposition must be reasonable and she must have a reasonable, good-faith belief that the conduct she opposed was unlawful.

As noted above, the employee's *manner* of opposition must be reasonable. See *Johnson*, 215 F.3d at 580. This is "a fact-intensive inquiry," *Wasek* v. *Arrow Energy Servs., Inc.*, 682 F.3d 463, 471 (6th Cir. 2012), which requires a "careful balancing * * * between the employer's recognized, legitimate need to maintain an orderly workplace * * * and the equally compelling need of employees to be properly safeguarded against retaliatory actions," *Niswander*, 529 F.3d at 722. See generally EEOC Enforcement Guidance 915.004, § II-A-2-b (noting that "[c]ourts

and the Commission balance the right to oppose employment discrimination against the employer's need to have a stable and productive work environment"). The manner of opposition could be deemed unreasonable—and thus not actionable opposition activity for retaliation purposes—if, for example, an employee "violates legitimate rules and orders of his employer, disrupts the employment environment, or interferes with the attainment of his employer's goals." See *Booker* v. *Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1312 (6th Cir. 1989); see also EEOC Enforcement Guidance 915.004, § II-A-2-b (providing examples of unreasonable opposition).

In the context of HR or EEO employees, the same reasonableness inquiry would apply, and the plaintiff's job duties may be relevant to this fact-specific analysis. "If an employee's protests render the employee ineffective in the job, the retaliation provisions do not immunize the employee from appropriate discipline or discharge." EEOC Enforcement Guidance 915.004, § II-A-2-b. For example, if an HR or EEO employee insisted on resolving complaints in a way contrary to her employer's reasonable Title VII policies, the trier of fact may find that the employee acted unreasonably and is not protected under the opposition clause.

In addition, the opposition clause would not protect a plaintiff who lacked a reasonable, good-faith belief that the conduct she opposed was unlawful. See note 5, *supra*. "This requirement includes objective and subjective components: the

employee complaining [about the employment practice] must 'actually believe[] that the conduct complained of constituted a violation of relevant law,' and 'a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee' would believe that the conduct complained of was unlawful." *Yazdian* v. *ConMed Endoscopic Techs., Inc.*, 793 F.3d 634, 646 (6th Cir. 2015) (second alteration in original; citation omitted). In other words, a plaintiff would not have an actionable retaliation claim if he or she did not subjectively believe that the conduct opposed was unlawful under Title VII or if such subjective belief was objectively unreasonable when measured by the appropriate legal standards. Of course, an HR employee's "training and experience" in HR-related matters may be relevant to whether he or she objectively and subjectively held a good-faith, reasonable belief that conduct was unlawful—an understanding might be objectively reasonable when held by an employee with no significant HR training, for example, but not objectively reasonable when held by an employee with more extensive training.

And finally, even if the plaintiff established that she engaged in "protected activity," this is only the first of four factors to establish a *prima facie* case of retaliation in the burden-shifting framework set up by *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). See *Laster*, 746 F.3d at 730. The knowledge, skill, and performance of any employee with reference to their job duties (whether an

EEO, HR, or other role) could be relevant to the analysis of other elements of the *prima facie* case or to the ultimate evaluation of the merits.[8]

In short, the FLSA's manager rule has no place in Title VII. But even without this limitation, plaintiffs must satisfy the remainder of the protected activity prong, the broader *prima facie* case, and the ultimate burden of persuasion to bring a successful retaliation claim, and the job duties of HR and EEO officials may well be relevant to the analysis.

[8] To establish a *prima facie* case of retaliation, the plaintiff must show that "(1) she engaged in a protected activity; (2) her exercise of such protected activity was known by the defendant; (3) thereafter, the defendant took an action that was materially adverse to the plaintiff; and (4) a causal connection existed between the protected activity and the materially adverse action." *Hubbell* v. *FedEx SmartPost, Inc.*, 933 F.3d 558, 568 (6th Cir. 2019) (citation omitted). If the plaintiff establishes a *prima facie* case, "the burden of production shifts to the defendant 'to proffer some legitimate, nonretaliatory reasons for its actions.'" *Ibid.* (citation omitted). If met, "the burden of persuasion then shifts back to the plaintiff 'to show that the proffered reasons * * * were a pretext for retaliation.'" *Ibid.* (citation omitted).

CONCLUSION

For the foregoing reasons, the district court erred in its interpretation of protected activity under the opposition clause of Title VII's anti-retaliation provision.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the length limitation of Federal Rule of Appellate Procedure 29(a)(5) because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), this brief contains 5820 words according to the word processing program used to prepare the brief.

This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2019 in Times New Roman 14-point font, a proportionally spaced typeface.

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Dated: July 15, 2020

CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2020, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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ADDENDUM

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