RECORD NO. 13-2278

In The

United States Court Of Appeals

For The Fourth Circuit

J. NEIL DEMASTERS,

Plaintiff – Appellant,

v.

CARILION CLINIC; CARILION MEDICAL CENTER; CARILION BEHAVIORAL HEALTH, INC,

Defendants – Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA AT ROANOKE

BRIEF OF APPELLANT

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 13-2278 Caption: J. Neil DeMasters v. Carilion Clinic, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

J. Neil DeMasters
(name of party/amicus)

who is appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Terry N. Grimes Date: 10/29/2013

Counsel for: J. Neil DeMasters/appellant

CERTIFICATE OF SERVICE

****

I certify that on 10/29/2013 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Terry N. Grimes 10/29/2013
(signature) (date)

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JURISDICTIONAL STATEMENT

J. Neil DeMasters ("DeMasters") filed suit in the United States District Court for the Western District of Virginia alleging that defendants Carilion Clinic, Carilion Medical Center, and Carilion Behavioral Health, Inc. ("defendants" or "Carilion") violated the anti-retaliation provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et. seq*. (JA 6-11, 26-34). DeMasters appeals the district court's September 17, 2013 order granting defendants' Rule 12(b)(6) motion to dismiss and dismissing DeMasters' amended complaint with prejudice (JA 99). This Court has jurisdiction pursuant to 28 U.S.C. § 1291, which provides that "[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States." Further, DeMasters timely filed his notice of appeal on October 17, 2013 — thirty days from September 17, 2013. *See* Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF THE ISSUES

I. Whether the district court erred by holding that DeMasters' complaints to Carilion were not protected oppositional activity under Title VII.

II. Whether the district court erred by holding that DeMasters' complaints to Carilion concerning the mishandled investigation were not complaints regarding an activity made unlawful under Title VII.

III. Whether the district court erred by holding that DeMasters' complaints to Carilion were not protected participatory activity under Title VII.

STATEMENT OF THE CASE

DeMasters was employed by Carilion as an Employee Assistance Program (EAP) consultant in Carilion's Behavioral Health Unit from on or about July 24, 2006 until his employment was terminated on or about August 10, 2011 (JA 28). DeMasters' EAP position came under the Department of Behavioral Health and Psychiatry and focused on the stabilization and emotional recovery of Carilion employees experiencing crises. In October 2008, Carilion referred an employee (John "Doe") to DeMasters for help (JA 28 at 12). Doe had been a victim of homosexual sexual harassment and assault by a supervisor and department manager (Id.).

DeMasters first met with Doe on or about October 17, 2008 (Id.). Doe told DeMasters that the manager had been harassing him for several months (Id.). Among other requests, the manager asked Doe to display his genitals and provide oral sex to the manager (Id.). Doe also stated that on two occasions the manager had masturbated in front of Doe on hospital grounds (Id.). Doe asked the manager to stop but feared that Carilion would retaliate against him (Id.).

After the initial consultation with Doe, DeMasters told Doe that he believed Doe had been a victim of sexual harassment (JA 28-29 at 13). DeMasters

developed a plan to report the harassment to Carilion and to facilitate the investigation of Doe's complaint (Id.). As DeMasters' position required confidentiality, DeMasters sought and received a release from Doe in order for DeMasters to speak directly with Carilion's human resources to address the harassment (Id.). That same day, DeMasters contacted Carilion's HR compliance department and reported the harassment (JA 29 at 14). Carilion's HR representative told DeMasters that she would "follow up" with HR manager Joe Baer and get back with Doe as soon as possible (Id.).

Doe later contacted DeMasters and told him that Carilion had also taken a statement from him (JA 29 at 15). Again Doe expressed concern regarding retaliation by Carilion (Id.). Thereafter, on or about October 23, 2008, DeMasters received a telephone call from Doe reporting that over the weekend the department director had permitted the perpetrator to come back into the hospital to retrieve his personal belongings (JA 29 at 16). Doe also reported that the department director told him that Doe "should have been fired a long time ago," thus validating Doe's concerns about retaliation by Carilion (Id.).

The next day, October 24, 2008, Doe again consulted with DeMasters concerning his emotional state and reported that he continued to feel uncomfortable with the unit director and was facing increasing hostility from coworkers who were sympathetic to the harasser (JA 29 at 17). In fact, after

DeMasters reported Doe's harassment, the hostile work environment for Doe worsened (Id.). Thus, three days later on October 27, 2008, DeMasters again contacted Carilion's HR department to report that the hostile work environment was worsening and needed to stop (JA 29-30 at 18 and 19).

The next day, October 28, 2008, DeMasters received a call from Carilion's HR manager, Joe Baer (JA 30 at 20). Baer stated that he had spoken with Doe concerning the harassment (Id.). DeMasters offered Baer the services of EAP in an effort to teach human resources how better to respond to Doe's sexual harassment complaint (Id.). Baer declined the offer (Id.). Three days later on October 31, 2008, Doe again met with DeMasters (JA 30 at 21). Doe's emotional state was declining because he felt insulted, frustrated, disappointed, and discounted by management's response to his complaint, and the hostile work environment was continuing to degrade (Id.). Later that same day, Doe spoke with DeMasters' colleague in EAP (JA 30 at 22). The colleague assured Doe that EAP — *i.e.*, DeMasters — was doing all it could to try to persuade Carilion to address Doe's harassment and hostile work environment complaints (Id.).

Nearly two weeks passed (JA 30 at 23). On or about November 12, 2008, Baer finally contacted DeMasters and told him he was working with Doe's director in an effort to do something about Doe's complaints (Id.). At some point,

DeMasters told Doe that Doe's complaints had not been handled properly by Carilion's management and human resources (JA 31 at 24).

On or about December 14, 2010, one of Carilion's managers called DeMasters and asked him about Doe's case because Doe filed a complaint with the Equal Employment Opportunity Commission and was pursuing a civil suit for sexual harassment against Carilion (JA 31 at 25). DeMasters acknowledged that Doe had been seen in EAP but did not reveal any specifics (Id.). Carilion's manager told DeMasters that he might expect to hear further from Carilion (Id.).

Carilion resolved Doe's civil suit, which was dismissed by stipulation and order of dismissal entered July 14, 2011 (JA 31 at 26). Within days of settling Doe's claim, Carilion turned its attention to DeMasters (JA 31 at 27). On or about August 8, 2011, Carilion called DeMasters to a meeting with department director Mark Derbyshire, vice president of human resources Jeanne Armatrout, and Carilion's corporate counsel. DeMasters asked if he could also have counsel present (Id.). Carilion's attorney told DeMasters that if he persisted, he would be considered insubordinate and fired (Id.). Carilion then interrogated DeMasters concerning Doe's harassment complaint and other matters (Id.).

Carilion's representatives also asked DeMasters if he told Doe that what had happened to him was sexual harassment (JA 31 at 28) (Carilion already knew the answer was yes as they had a transcript of a recorded conversation between Doe

and DeMasters). When DeMasters admitted that he had done so, Carilion asked DeMasters why he had not taken the "pro-employer side" (Id.) (Carilion's view of the EAP program is that, with respect to employee issues that involve Carilion, it exists not to provide counseling to employees but instead to discourage and avoid lawsuits). During the meeting one or more of Carilion's managers asked DeMasters if he understood what liability a company could face if a supervisor engaged in sexual harassment (JA 32 at 30). Carilion told DeMasters bluntly that he had not carried out his job duties — that is to "protect" Carilion's interests — and thus, his conduct had left Carilion "in a compromised position" (JA 32 at 29). DeMasters' department director also stated that DeMasters had failed to protect Carilion and had placed the entire operation at risk (JA 32 at 30). Just two days later, on October 10, 2011, Carilion sent a letter to DeMasters stating that he had "fail[ed] to perform or act in a manner that is consistent with the best interests of Carilion Clinic" (JA 32 at 31). Carilion fired DeMasters that day (Id.).

In a letter dated January 16, 2012, Derbyshire also stated that DeMasters had "made statements that could reasonably have led John [Doe] to conclude that he should file suit against Carilion;" "failed to perform or act in a manner that is consistent with the best interests of Carilion Clinic;" "[w]ithout question . . . made multiple statements that were contrary to his employer's best interests and that required disciplinary action;" and had "failed to protect Carilion EAP's client

company, in this case also the employing organization, Carilion" (JA 32 at 32). In conclusion, Derbyshire stated fulminously that "the EAP contractor was very fortunate to be able to maintain this company as the entire operation was at risk for the actions of one consultant," *i.e.*, DeMasters (Id.). DeMasters' supervisor also reported that Carilion was angry at having lost Doe's suit and was looking to "throw somebody under the bus" (JA 32 at 33).

Thereafter, DeMasters filed a complaint on November 21, 2012 in the United States District Court for the Western District of Virginia asserting that Carilion violated Title VII's anti-retaliation provision when it terminated his employment for reporting and addressing the sexual harassment and hostile work environment Doe was experiencing (JA 6-11). Defendants filed a motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(6) and a supporting memorandum on April 5, 2013 (JA 2-3, 12-14). Subsequently, DeMasters filed a motion for leave to file an amended complaint on April 16, 2013, which was granted on April 25, 2013 (JA 3, 15-34). Thus, defendants' first motion to dismiss was denied as moot on April 26, 2013 (JA 3). Thereafter, defendants filed a second motion to dismiss and supporting memorandum on May 15, 2013 (JA 35). The district court granted defendants' motion to dismiss on September 17, 2013 and dismissed DeMasters' amended complaint with prejudice (JA 99). DeMasters appealed this decision on October 17, 2013 (JA 100).

SUMMARY OF ARGUMENT

DeMasters' complaints to Carilion are protected activity under both the participation and opposition clauses of Title VII. The antiretaliation provision of Title VII is a crucial component of Congress' goal to protect a plaintiff's substantive right to challenge discrimination and thus has been construed broadly.

In furtherance of Title VII's objective to prohibit retaliation for protected activity, the opposition clause has likewise been construed broadly to include, for example, informal protests of discriminatory employment practices, passive resistance, and third party reprisals. Under Title VII, DeMasters opposed the sexual harassment of Doe when, after Doe's psychiatric counseling, DeMasters told Doe that Doe had been subjected to sexual harassment; asked for Doe's consent to report the abuse to Carilion; reported the abuse; thereafter reported the hostile work environment that resulted; and then stayed intimately involved to ensure that Doe's complaints were being adequately handled by Carilion.

The participation clause also confers exceptionally broad protection upon employees covered by Title VII. DeMasters' complaints to Carilion are thus protected activity under the participation clause as DeMasters initiated and involved himself in an internal investigation under Carilion's anti-discrimination policy and was later discharged because the investigation led to an EEOC charge.

ARGUMENT

I. Standard of Review

An appellate court "reviews the district court's grant of a motion to dismiss pursuant to . . . Fed. R. Civ. P. 12(b)(6) under a *de novo* standard of review." Smith v. McCarthy, 349 Fed. Appx. 851, 856 (4th Cir. 2009) (citations omitted). Thus, when reviewing a district's courts grant of a motion to dismiss, the appellate court must test the legal sufficiency of the "complaint to determine whether the plaintiff has properly stated a claim[.]" Townsend v. Fannie Mae, 923 F. Supp. 2d 828, 832 (W.D. Va. 2013). The appellate court "'does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses.'" Id. (citing Republican Party of N.C. v. Martin, 980 F.2d 943, 952 (4th Cir. 1992)). The appellate "court must accept all factual allegations in the complaint as true and must draw all reasonable inferences in favor of the plaintiff." Id. (citing Erickson v. Pardus, 551 U.S. 89, 94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007)).

II. DeMasters' Complaints to Carilion are Protected Activity Under the Opposition Clause of Title VII.

a. The antiretaliation provision of Title VII is a crucial component of Congress' goal to protect a plaintiff's substantive right to challenge discrimination and thus has been construed broadly.

The Supreme Court has vigorously protected an employee's right to be free from retaliation. Specifically, the Court has consistently construed the antiretaliation provision broadly, explaining that it must extend beyond the

discrimination provision to ensure employees the full protection of Title VII. *See, e.g.*, Crawford v. Metro. Gov't of Nashville & Davidson Cnty., Tenn., 555 U.S. 271 (2009); Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 67 (2006) ("Interpreting the antiretaliation provision to provide broad protection from retaliation helps ensure the cooperation upon which accomplishment of the Act's primary objective depends."). The antiretaliation provision's primary purpose is to secure compliance with the other provisions of Title VII, and it must be interpreted in the context of Title VII's broader statutory scheme. Thus, although the prohibition on discrimination and antiretaliation provisions differ in purpose, they complement each other and should be read together. *See* Burlington N., 548 U.S. at 63, 75 (Alito, J., concurring).

To that end, the Court has interpreted the protections of the antiretaliation provision to cover "a broad range of employer conduct." Thompson v. N. Am. Stainless, LP, 131 S. Ct. 863, 868, 870 (2011) (citing Burlington N., 548 U.S. at 62, 64, 68) (applying the protections of the antiretaliation provision to third parties who are in the zone of interests that Title VII seeks to protect)). "[T]he majority of courts, including the Supreme Court, have been willing to construe Title VII and companion provisions under the Fair Labor Standards Act, 29 U.S.C. § 215(a)(3), and the Age Discrimination Employment Act (ADEA), 29 U.S.C. § 623(d), broadly in order not to frustrate the purpose of these Acts, which is to prevent fear

of economic retaliation from inducing employees 'quietly to accept [unlawful] conditions.'" EEOC v. Ohio Edison Co., 7 F.3d 541, 543 (6th Cir. 1993) (citing Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 292, 4 L. Ed. 2d 323, 80 S. Ct. 332 (1960)). Thus, the Supreme Court has recognized that retaliation is actionable even under statutes that do not expressly provide such protection. *See* Gomez-Perez v. Potter, 553 U.S. 474, 481 (2008) (holding that the ADEA proscribes retaliation); CBOCS W., Inc. v. Humphries, 553 U.S. 442, 457 (2008) (holding that 42 U.S.C. § 1981 proscribes retaliation); Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 173 (2005) (finding that Title IX's private cause of action for sex discrimination encompasses retaliation); N.L.R.B. v. Scrivener, 405 U.S. 117, 121-22 (1972) (recognizing that retaliation is protected under the National Labor Relations Act); Mitchell v. Robert De Mario Jewelry, Inc., 361 U.S. 288, 292 (1960) ("By the proscription of retaliatory acts set forth in [the Fair Labor Standards Act], . . . Congress sought to foster a climate in which compliance with the substantive provisions of the Act would be enhanced."); *see also* Minor v. Bostwick Laboratories, Inc., 669 F.3d 428, 437 (2012) ("[I]ntracompany complaints qualify as protected activity within the meaning of the FLSA's antiretaliation provision.").

b. Opposition Has Likewise Been Construed Broadly.

With respect to the scope of the opposition clause, "the term 'oppose,' left undefined by the statute, carries its ordinary meaning, which includes 'to resist or antagonize . . .; to contend against; to confront; resist; withstand,' or 'to be hostile or adverse to, as in opinion.'" Collazo v. Bristol-Myers Squibb Mfg., 617 F.3d 39, 46 (1st Cir. 2010) (citing Crawford, 129 S. Ct. at 850 (quoting Webster's New International Dictionary 1710 (2d ed. 1958) and Random House Dictionary of English Language 1359 (2d ed. 1987))). Further, "the 'plain-meaning rule should not be applied to produce a result which is actually inconsistent with the policies underlying the statute.'" Ohio Edison, 7 F.3d at 544 (citing Bailey v. USX Corp., 850 F.2d 1506 (11th Cir. 1988); Pantchenko v. C.B. Dolge Co., 581 F.2d 1052, 1055 (2d Cir. 1978); Rutherford v. American Bank of Commerce, 565 F.2d 1162, 1165-66 (10th Cir. 1977)). Therefore, the opposition clause has been held to protect not only formal charges of discrimination, but also "informal protests of discriminatory employment practices, including making complaints to management, writing critical letters to customers, protesting against discrimination by industry or by society in general, and expressing support of co-workers who have filed formal charges." Sumner v. United States Postal Service, 899 F.2d 203, 209 (2d Cir. 1990) (citing Grant v. Hazelett Strip-Casting Corp., 880 F.2d 1564, 1569 (2d Cir. 1989), and Schlei & Grossman, Employment Discrimination Law,

548-549 (1983)). Thus, "an employee may also 'oppose' unlawful practices by tacit conduct . . . ." Fisher v. Town of Orange, 885 F. Supp. 2d 468, 478 (D. Mass. 2012) (citing Collazo., 617 F.3d at 47). As the Supreme Court noted in Crawford,

> "[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. Countless people were known to "oppose" slavery before Emancipation, or are said to "oppose" capital punishment today, without writing public letters, taking to the streets, or resisting the government. And we would call it "opposition" if an employee took a stand against an employer's discriminatory practices not by "instigating" action, but by standing pat, say, by refusing to follow a supervisor's order to fire a junior worker for discriminatory reasons.

Crawford, 555 U.S. at 277 (citing cf. McDonnell v. Cisneros, 84 F.3d 256, 262 (7th Cir. 1996) (finding employee covered by Title VII of the Civil Rights Act of 1964 where his employer retaliated against him for failing to prevent his subordinate from filing an EEOC charge)).

c. Under Title VII, DeMasters Opposed the Sexual Harassment of Doe.

DeMasters opposed the sexual harassment of Doe when, after Doe's psychiatric counseling, DeMasters told Doe that Doe had been subjected to sexual harassment; asked for Doe's consent to report the abuse to Carilion as the information he obtained was confidential; then reported the abuse (JA 28-29). Further revealing is the fact that DeMasters stayed intimately involved in this process, making sure that Doe's complaints were being adequately handled by Carilion (JA 29-31).

Collazo v. Bristol-Myers Squibb Mfg. is instructive. There, a supervisor was informed by one of his subordinates that she felt sexually harassed by another employee. Collazo, 617 F.3d at 43. Upon the harassed employee's request, the supervisor arranged a meeting with HR and accompanied her to it. Id. at 47. After HR took no action, the supervisor accompanied the employee to another meeting. Again no action was taken; thus, the supervisor set up a third meeting, but was terminated before it could occur. The First Circuit held that "[a] jury could reasonably view [the supervisor's][] persistent efforts to help [the harassed employee] initiate her sexual harassment complaint and urge Human Resources to act upon that complaint as resistant or antagonistic to the complained-of conduct." Id. The court continued that "nothing in Crawford or Title VII's antiretaliation provision suggests that employees engage in protected conduct only when they verbally communicate their opposition to unlawful employment practices. On the contrary, Crawford recognized that an employee can oppose unlawful employment practices by his or her conduct." Id. (citing Crawford, 129 S. Ct at 851). Thus, as Justice Alito emphasized in his concurring opinion, "employees may communicate their views to their employers through 'purposive conduct.'" Id. (citing Crawford, 129 S. Ct. at 853, 855 (Alito, J., concurring)).

This Court should continue protecting an employee's right to be free from workplace retaliation in the instant case. Here, as in Collazo, by doing everything

he could to help Doe pursue his sexual harassment complaint, *see supra* pages 2-5, DeMasters "effectively and purposefully communicated his opposition to" Doe's treatment. Id. at 47-48.

d. A Third Party Reprisal Is Also Protected Under Title VII.

Carilion was also motivated, in part, by its desire to "throw somebody under the bus" for Doe's lawsuit (JA 32). Even to the extent DeMasters' termination was also a third party reprisal, DeMasters is still protected by the opposition clause.

EEOC v. Ohio Edison Co., 7 F.3d 541 (6th Cir. 1993) is instructive. There, "a former employee alleged he was discriminated against by the withdrawal of an offer of reinstatement because a co-employee engaged in protected activity and protested his discriminatory discharge on his behalf and threatened that a claim would be filed for the discriminatory discharge." Ohio Edison, 7 F.3d at 546. The Sixth Circuit held that the opposition clause should be interpreted broadly to include claims of retaliatory discrimination against an employee for the protected activity of another employee. Id. In holding so, the court noted that

> [i]n enacting section 2000e-3, Congress unmistakably intended to ensure that no person would be deterred from exercising his rights under Title VII by the threat of discriminatory retaliation. Since tolerance of third-party reprisals would, no less than the tolerance of direct reprisals, deter persons from exercising their protected rights under Title VII, the Court must conclude, as has the only other court to consider the issue, Kornbluh v. Stearns & Foster Co., 73 F.R.D. 307, 312 (S.D. Ohio 1976), that section 2000e-3 proscribes the alleged retaliation of which plaintiff complains.

Ohio Edison, 7 F.3d at 543. The court went on to explain that any other "construction of Title VII would produce absurd and unjust results," as no one other than the employee terminated is "in a position to seek back pay and/or retroactive promotion . . . ." Id. at 544. "Thus, unless plaintiff h[imself][] is permitted to seek relief . . . , the 'make whole' purpose of Title VII would be frustrated. Such a result would contravene the express legislative history of Title VII, [citation omitted], and would be unacceptable . . . ." Id. (citing Albemarle Paper Co. v. Moody, 422 U.S. 405, 419-22, 45 L. Ed. 2d 280, 95 S. Ct. 2362 (1975)). The court continued, noting that "the Supreme Court in N.L.R.B. v. Scrivener . . . held that the language of a statute should not be read strictly, but should 'be read more broadly' if such a reading was also consistent with the 'purpose and objective' of the prohibition made illegal by the statute." Id. at 545 (citing Scrivener, 405 U.S. at 122). Accordingly, the opposition clause "should be construed broadly to mean 'he or his representative has opposed any practice,' because it is consistent with the objective of the Act which is to prohibit retaliation against protected activity." Id. Consequently, when there is a causal link between the person engaging in the protected activity and the person retaliated against, Title VII protects the employee retaliated against. Id.; *see also* Thompson, 131 S. Ct. at 871 (approving third-party retaliation claims under Title VII and adopting a test

that a plaintiff may sue if he or she falls within the "zone of interest" arguably sought to be protected by the statutory provisions of Title VII).

Here, on October 17, 2008 Carilion referred Doe to DeMasters for counseling (JA 28). After Doe described the harassment, DeMasters concluded that Doe had been a victim of sexual harassment in violation of Carilion's sexual harassment policy and suggested a plan to report the harassment to Carilion (Id.). Doe also sent a release to permit DeMasters "to speak directly with Carilion's human resources department so that [DeMasters] could advance a complaint on Doe's behalf and communicate directly with Carilion concerning the matter" (JA 28-29). DeMasters contacted Carilion's HR on several occasions to report the harassment and increasingly hostile work environment Doe was experiencing (JA 29-30). After Doe's civil suit was settled, Carilion "dealt" with DeMasters for not protecting their financial interests, and in part sought retaliation for Doe's suit, by terminating DeMasters' employment (JA 31-32).

In the January 16, 2012 letter, DeMasters was informed that he had "made statements that could reasonably have led John [Doe] to conclude that he should file suit against Carilion;" that "[w]ithout question . . . [DeMasters had] made multiple statements [to Doe] that were contrary to his employer's best interests and that required disciplinary action;" and that DeMasters had "failed to protect Carilion EAP's client company, in this case also the employing organization,

Carilion" (JA 32). Thus, Carilion made the causal link between Doe and DeMasters quite clear.

Consequently, the district court erred as a matter of law in not applying Thompson as DeMasters was in the "zone of interest" protected by Title VII and there is no question that he was fired because of his association with Doe and with Doe's claim. For the same reasons set forth in the aforementioned cases, this Court must conclude that the allegations in the complaint are sufficient to allege discrimination by Carilion against DeMasters and are more than sufficient to overcome a motion to dismiss.

e. Passive Resistance Is Also A Time-Honored Form of Opposition.

DeMasters has stated a claim for retaliation as he assisted "another employee with his . . . discrimination claim, as well as [engaged in] other endeavors to obtain the employer's compliance with Title VII[.]" Id.

McDonnell v. Cisneros, 84 F.3d 256 (7th Cir. 1996) is instructive. There, the plaintiff alleged retaliation for the plaintiff's failure to prevent another employee from filing a complaint. McDonnell, 84 F.3d at 261-62. The Seventh Circuit noted that "[s]uch a claim does not come within the scope of the retaliation provision of Title VII if interpreted literally." Id. at 262. However, the court went on to explain that "there are two situations, apparently not foreseen by Congress, in which a literal interpretation of the provision would leave a gaping hole in the

protection of complainants and witnesses." Id. Applicable here is "[t]he second situation, which . . . is where the employer retaliates against an employee for having failed to prevent the filing of a complaint." Id. The court explained that this "second situation" represents a case

> of genuine retaliation, and we cannot think of any reason (and the government has suggested none), other than pure oversight, why Congress should have excluded them from the protection of section 2000e-3(a). It does no great violence to the statutory language to construe "he has made a charge" to include . . . "he allowed a charge to be made."

Id. Pertinently, the court continued,

> Several courts, including our own, hold that assisting another employee with his . . . discrimination claim, as well as other endeavors to obtain the employer's compliance with Title VII, is protected "opposition conduct." We said in Rucker v. Higher Educational Aids Bd., 669 F.2d 1179, 1182 (7th Cir. 1982) that "an *a fortiori* violation of section 2000e-3(a) is committed when an employee opposes an attempt to discriminate against a fellow employee so successfully that the employer desists from the attempt and then fires the 'whistle-blower' for what he has done."

Id. (citing EEOC v. Ohio Edison Co., 7 F.3d 541 (6th Cir. 1993); Parker v. Baltimore & Ohio R.R., 209 U.S. App. D.C. 215, 652 F.2d 1012, 1019 (D.C. Cir. 1981); Novotny v. Great American Fed. Savings & Loan Ass'n, 584 F.2d 1235, 1260-61 (3d Cir. 1978)).

In McDonnell the opposition was *completely passive* as "[i]t consisted only of failing to carry out his employer's desire that he prevent his subordinates from

filing discrimination complaints." Id. The court *nevertheless* found the plaintiff's actions as "opposition." Id. The First Circuit explained,

> Passive resistance is a time-honored form of opposition, however, and it would be very odd to suppose that Congress meant a form of behavior that straddles what the cases, characterizing the dual structure of the retaliation provision, call "opposition" and "participation" conduct to fall between the stools. The result would be that employers could obtain immunity from the retaliation statute by directing their subordinates to take steps to prevent other workers (as by threat of dismissal or other discipline) from complaining about discrimination.

Id.

Here, DeMasters participated in passive resistance by not taking the "pro-employer side," (JA 31-32), and went further by actively opposing Doe's harassment. DeMasters, after being informed of the harassment and receiving a release from Doe, contacted Carilion's HR and reported the harassment (JA 28-29). A little over a week later, DeMasters again contacted Carilion's HR to report that the hostile work environment was worsening and demanded that it stop (JA 29-30). DeMasters further demonstrated to Carilion his opposition to the continuing harassment and hostile work environment by offering Carilion's HR the services of EAP in an effort to teach HR how better to respond to Doe's complaints (JA 30). Throughout this process, DeMasters did all he could to try to persuade Carilion to address Doe's harassment and hostile work environment complaints (*see* Id.). Thus, DeMasters plainly assisted "another employee with his . . .

discrimination claim, as well as other endeavors to obtain the employer's compliance with Title VII[.]" McDonnell, 84 F.3d at 262 (citations omitted).

f. *McKenzie* is Inapplicable Here — And Even If It Were Applicable, Defendants' Own Words Demonstrate That DeMasters Satisfied This Standard.

In McKenzie v. Renberg's Inc., the Tenth Circuit found that in order to survive a motion for judgment as a matter of law with respect to a retaliation claim *under the FLSA*, a plaintiff/lawyer had to have stepped outside "her role of representing the company and either file (or threaten to file) an action adverse to the employer, actively assist other employees in asserting [Title VII] rights, or otherwise engage in activities that reasonably could be perceived as directed towards the assertion of rights protected by [Title VII]." Weeks v. Kan., 503 Fed. Appx. 640, 642 (10th Cir. 2012) (citing McKenzie v. Renberg's Inc., 94 F.3d 1478, 1486-87 & n.8 (10th Cir. 1996)).

First, McKenzie is a FLSA case, not a Title VII case. As the Washington Court of Appeals noted in Lodis v. Corbis Holdings, Inc., 292 P.3d 779, 787 (Wash. Ct. App. 2013), the FLSA does not have an opposition clause. The court continued, "The ordinary meaning of 'oppose' is not limited to activity outside the normal job duties of the employee." Lodis, 292 P.3d at 787. Since Title VII includes an opposition clause, those limiting words would have to be read into the statute. Id. The court also pointed out that, like Title VII, the Washington statute

at issue in that case "unambiguously protects any person who opposes unlawful discrimination in the workplace." Id. (citing RCW 49.60.210(1)). "As such, it is untenable to carve out a step outside requirement for a limited class of employees who work in human resources or some other position that requires advising their employer on discriminatory practices." Id. Second, Crawford superseded *McKenzie's* rule. As the Tenth Circuit has noted,

> [a] few years ago, and well after McKenzie, the Supreme Court suggested [in Crawford] that all one has to do to oppose an unlawful employment practice in Title VII cases is to 'antagonize . . . ; contend against; . . . confront; resist; [or] withstand' it . . . . Whether and how this general standard meshes with *McKenzie's* preexisting and more particular rule for retaliation claims by in-house attorneys is not clear.

Weeks, 503 Fed. Appx. at 643. The Lodis court acknowledged this same conflict,

> [T]he U.S. Supreme Court recently interpreted the opposition clause in Title VII very broadly. Crawford v. Metro. Gov't of Nashville & Davidson Cnty., Tenn., 555 U.S. 271, 276, 129 S. Ct. 846, 172 L. Ed. 2d 650 (2009). . . . Nowhere did the [C]ourt find it necessary to discuss whether the employee stepped outside her normal employment duties or whether on remand the trial court should consider such a limitation on the opposition clause.

Lodis, 292 P.3d at 788. Further, for the same reasons that "an employer cannot be permitted to avoid liability for retaliation under Title VII simply by crafting equal employment policies that require its employees to report unlawful employment practices[,]" Collazo, 617 F.3d at 49, the intent of Congress is contravened when an employer establishes departments that are designed to cut down on lawsuits, and

then when an employee of that department stands up for a harassed employee, discharges the employee leaving the employee without recourse for the retaliation.

Further, DeMasters nevertheless did step outside the "scope of his role" here. DeMasters' job was to counsel Carilion employees experiencing crises. DeMasters provided counseling to Doe concerning the issues that resulted from the sexual harassment. DeMasters *also* was intimately involved in assisting Doe in advancing his sexual harassment complaint and making sure that Doe's complaints were being adequately handled by Carilion. Thus, Carilion plainly conceded in its letters on August 10, 2011 and January 16, 2012 that by advancing Doe's harassment claim, DeMasters stepped outside his role.

g. DeMasters' Statements to Doe were Intended to Reach Carilion — And They In Fact Reached Carilion.

DeMasters told Doe that in his view Doe was a victim of sexual harassment (JA 28). DeMasters did not request that Doe keep this to himself. Instead, DeMasters obtained Doe's consent to report the harassment *to Carilion* (Id. at 28-29). Further, not only did DeMasters' views reach Carilion, these statements themselves actually reached Carilion (Doe recorded a conversation with DeMasters and played it for Carilion). Thus, the statements were intended to reach Carilion and did reach Carilion.

Contrary to the district court's holding, Pitrolo v. County of Buncombe does not change this result. This was not a daughter reporting to her father something

"that was going on in [her] life at the time." 2009 WL 1010634, at *3 (4th Cir. Mar. 11, 2009). This was DeMasters reporting to Doe, a Carilion employee not related to him, that Doe had been subjected to sexual harassment. Thus, unlike Pitrolo's "private complaint to a close family member[,]" it would be more than reasonable "to 'characterize' [this] . . . as an 'informal grievance procedure' under Laughlin." Id.

Likewise, Harris-Rogers v. Ferguson Enterprises does not change the result as the district court suggested. DeMasters did not accidentally inform Doe that he was being subjected to harassment. 2011 WL 4460574, at *4 (E.D.N.C. Sept. 26, 2011). DeMasters purposively informed Doe he was being sexually harassed and obtained Doe's consent in order to do something about it — *i.e.*, report the harassment *to Carilion*.

III. DeMasters' Complaints that "Carilion Mishandled Doe's Harassment Complaints" are Protected Activity.

At some point, sympathizers of Doe's harasser started harassing Doe. The harassment increased in severity as time went on. When this occurred, DeMasters contacted Carilion's HR to report it (JA 29-30). At this point, DeMasters offered Carilion's HR the services of EAP (JA 30). By doing this, DeMasters was not only criticizing Carilion's "investigative process" up to that point, he was also opposing Carilion's allowance of this hostile work environment to persist. As the First Circuit explained in Noviello v. City of Boston, this is protected activity.

In Noviello, the court explained that Title VII's anti-retaliation

> provision directs an employer not to discriminate against any employee "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). Here, the term "discriminate" appears without the qualifier. A familiar canon of construction teaches that "[a] term appearing in several places in a statutory text is generally read the same way each time it appears." Ratzlaf v. United States, 510 U.S. 135, 143, 126 L. Ed. 2d 615, 114 S. Ct. 655 (1994). We apply that canon here. The result: the verb "discriminate" in the anti-retaliation clause includes subjecting a person to a hostile work environment. *See* Morris v. Oldham County Fiscal Court, 201 F.3d 784, 792 (6th Cir. 2000); *see also* Knox v. Indiana, 93 F.3d 1327, 1334 (7th Cir. 1996) ("Nothing indicates why . . . retaliating against a complainant by permitting her fellow employees to punish her for invoking her rights under Title VII . . . does not fall within the statute.").

398 F.3d 76, 90 (1st Cir. 2005). The court went on to note that their interpretation was shared by the EEOC and that

> this capacious reading of section 2000e-3(a) is consonant with its purpose of "maintaining unfettered access to statutory remedial mechanisms." Robinson v. Shell Oil Co., 519 U.S. 337, 346, 136 L. Ed. 2d 808, 117 S. Ct. 843 (1997). Harassment by coworkers as a punishment for undertaking protected activity is a paradigmatic example of adverse treatment spurred by retaliatory motives and, as such, is likely to deter the complaining party (or others) from engaging in protected activity. Ray v. Henderson, 217 F.3d 1234, 1245 (9th Cir. 2000); Wideman v. Wal-Mart Stores, Inc., 141 F.3d 1453, 1456 (11th Cir. 1998). Reading the statute to provide a remedy for retaliatory harassment that expresses itself in the form of a hostile work environment thus furthers the goal of ensuring access to the statute's remedial mechanisms.

Id. Therefore, DeMasters' criticism of Carilion's "investigative process" was effectively opposition to Carilion's allowance of the hostile work environment to

persist — thus constituting protected activity. *See* Collazo, 617 F.3d at 43 (finding that where a supervisor arranged and accompanied an employee to meetings to address sexual harassment, a jury could reasonable view the supervisor's efforts to assist the harassed employee as opposition to the harassed employee's complained-of conduct, because "nothing in Crawford or Title VII's antiretaliation provision suggests that employees engage in protected conduct only when they verbally communicate their opposition to unlawful employment practices"); *see also* Thompson, 131 S. Ct. at 871 (approving third-party retaliation claims under Title VII and adopting a test that a plaintiff may sue if he or she falls within the "zone of interest" arguably sought to be protected by the statutory provisions of Title VII).

Brush v. Sears Holdings Corp. does not change this result. In Brush, the plaintiff was actually "tasked with conducting the internal investigation." 466 Fed. Appx. 781, 783 (11th Cir. 2012). Here, Doe was referred to DeMasters for *counseling*. Further, unlike Brush, by Carilion's own words, DeMasters went outside of his "job responsibilities . . . [and] took action adverse to the company during the investigation." Id. at 787. Carilion terminated DeMasters because DeMasters conduct left Carilion "in a compromised position" as he had not carried out his job duties — that is, when handling complaints concerning employment related issue, to "protect" Carilion's interests (JA 32). DeMasters was just an EAP counselor — nothing more. In a very real sense, Carilion's suggestion that

DeMasters was discharged for failing to "protect" Carilion's interests is not a defense to DeMasters' retaliation claim, it is instead a confession of liability.

Moreover, in Brush, there was no allegation that the harassment was ongoing. Brush reported the harassment and then the harasser was terminated. Id. at 784. Although Brush continued to push the employer to disclose the allegation to the police, she was not complaining of additional harassment at the workplace. Id. Brush only opposed harassment that had ceased. Here, DeMasters was complaining that Carilion was not properly handling the investigation *and* was permitting harassment to continue. Thus, DeMasters was plainly opposing a "practice made unlawful by [Title VII.]" Brush, 466 Fed. Appx. at 786.

IV. DeMasters' Complaints to Carilion are Protected Activity Under the Participation Clause of Title VII.

a. The Participation Clause Protects DeMasters As He Intimately Involved Himself In Carilion's Internal Investigation.

"Title VII's participation clause prohibits employers from retaliating against employees who 'participate[] in any manner in an investigation, proceeding, or hearing under [Title VII].'" Martin v. Mecklenburg County, 151 Fed. Appx. 275, 278-79 (4th Cir. 2005) (citing 42 U.S.C. § 2000e-3(a) (2000)). "[T]he provision is meant to sweep broadly' to include even unreasonable and irrelevant activity." Id. at 279 (citing Glover v. S.C. Law Enforcement Div., 170 F.3d 411, 414 (4th Cir. 1999); Deravin v. Kerik, 335 F.3d 195, 203 (2d Cir. 2003) ("The explicit language

of [the] participation clause is expansive and seemingly contains no limitations."); Clover v. Total Systems Servs., Inc., 176 F.3d 1346, 1353 (11th Cir. 1999) ("The words 'participate in any manner' express Congress' intent to confer exceptionally broad protection upon employees covered by Title VII." (internal quotation marks omitted))).

DeMasters initiation of and repeated attempts to assist in Carilion's internal investigation are plainly protected activity under the participation clause.

First, "an employer-initiated investigation designed to detect or root out discrimination prohibited by Title VII is an investigation 'under' the statute . . . [because] [t]here is no basis for limiting the phrase 'investigation . . . under this subchapter' to investigations conducted by the EEOC, and no court of appeals . . . has limited the statute in that fashion." Brief for the United States as Amicus Curiae Supporting Petitioner, Crawford v. Metro. Gov't, 555 U.S. 271 (2009) (No. 06-1595), at *16. Further, "Congress elsewhere in Title VII used language making clear its intent to address only investigations conducted by the Commission." Id. (citing 42 U.S.C. 2000e-5(b) ("the Commission * * * shall make an investigation" of a charge); 42 U.S.C. 2000e-8(a) (the Commission shall have access to evidence relating to unlawful employment practices "[i]n connection with any investigation of a charge"); 42 U.S.C. 20002-9 (referring to "hearings and investigations conducted by the Commission or its duly authorized agents or agencies")). "The

fact that Congress did not use such Commission-specific language in Section 704(a) suggests that employer-initiated investigations into conduct proscribed by Title VII would be covered." Id. at *16-17 (citing Burlington N., 126 S. Ct. at 2412 ("We normally presume that, where words differ as they differ here, 'Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" (quoting Russello v. United States, 464 U.S. 16, 23 (1983))).

Second, "[n]othing in the statute's text indicates that protection under the participation clause applies only if an EEOC charge has been filed. To the contrary, while the statute explicitly extends to employees who file a 'charge,' it goes on to state that it applies as well to employees who 'participated in any manner in an investigation, proceeding, or hearing under this subchapter.'" Id. (citing 42 U.S.C. 2000e-3(a)).

Finally, as depicted by the Faragher/Ellerth affirmative defense, "Title VII is designed to encourage the [employer's] creation of antiharassment policies and effective grievance mechanisms." Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764 (1998); *see also* Faragher v. City of Boca Raton, 524 U.S. 775, 806 (1998) ("It would therefore implement clear statutory policy and complement the Government's Title VII enforcement efforts to recognize the employer's affirmative obligation to prevent violations and give credit here to employers who make reasonable efforts to discharge their duty."). Therefore, Title VII

"[e]mployers should not be permitted to use . . . [internal] investigation[s] [through the Faragher/Ellerth affirmative defense] as a shield to liability under Title VII while at the same insisting that the absence of an EEOC charge precludes any liability to retaliation for participation in the very same investigation." Id. at *21.

Thus, DeMasters' reports to Carilion concerning the sexual harassment and hostile work environment, and his continued involvement in the internal investigation in an attempt to ensure that it was properly investigated and handled, are protected participation activity.

b. The Participation Clause Protects DeMasters As He Was Terminated Because The Investigation Led to An EEOC Charge.

Participation includes "(1) making a charge; (2) testifying; (3) assisting; or (4) participating in any manner in an investigation, proceeding, or hearing under Title VII." Laughlin v. Metropolitan Wash. Airports Auth., 149 F.3d 253, 259 (4th Cir. 1998) (citing 42 U.S.C.A. § 2000e-3(a)). "Participatory activities are vigorously protected to ensure employees' continuing access to the EEOC and the enforcement process." Id. (citing Vasconcelos v. Meese, 907 F.2d 111, 113 (9th Cir. 1990) ("The purpose of section 2000e-3's participation clause is to protect the employee who utilizes the tools provided by Congress to protect his rights." (internal quotation marks omitted))). The Supreme Court has frequently considered the common usage of a term in a situation like this. *See, e.g.*, Crawford, 129 S. Ct. at 850. "Assist's" common usage includes "to give support

or help; to make it easier for someone to do something or for something to happen[,]" MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/assist (last visited Feb. 3, 2014), and "[t]o contribute effort in the complete accomplishment of an ultimate purpose intended to be effected by those engaged[,]" BLACK'S LAW DICTIONARY 111 (5th ed. 1979).

As stated previously, DeMasters actively *assisted* in the process of *reporting and resolving Doe's sexual harassment and hostile work environment complaints* when he met with Doe in October 2008; told Doe that he was a victim of sexual harassment; obtained a release to allow him to speak directly with Carilion; submitted a harassment complaint; and spoke thereafter with Doe and Carilion's HR on several occasions concerning the complaint in an effort to stop the hostile work environment (JA 28-31). In direct response to Doe furthering his and DeMasters' efforts by filing an EEOC charge, DeMasters' was terminated (JA 31-32). Carilion determined that DeMasters had "made statements that could reasonably have led John [Doe] to conclude that he should file suit against Carilion[;]" emphasizing that DeMasters had "made multiple statements that were contrary to his employer's best interests[,]" which led to Doe filing a lawsuit against Carilion (JA 32 at 32). Thus, DeMasters was terminated for his actions leading to the filing of an EEOC charge of discrimination as his actions contributed to the effort to complete accomplishment of the ultimate purpose — to adjudicate

Doe's sexual harassment. Therefore, DeMasters' activities also are protected by the participation clause.

CONCLUSION

For the foregoing reasons, DeMasters requests that this Court reverse the judgment of the District Court and remand this case for further proceedings.

REQUEST FOR ORAL ARGUMENT

DeMasters requests oral argument.

Respectfully Submitted,

J. NEIL DeMASTERS

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Dated: February 18, 2014

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I hereby certify that on February 18, 2014, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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