13-2278

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

J. NEIL DEMASTERS,
Plaintiff Appellant,

v.

CARILION CLINIC, CARILION MEDICAL CENTER and CARILION BEHAVIORAL HEALTH, INC.,
Defendant-Appellee.

On Appeal from the U.S. District Court
for the Western District of Virginia

BRIEF OF THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE IN SUPPORT OF APPELLANT DEMASTERS AND IN FAVOR OF REVERSAL

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STATEMENT OF INTEREST

The Equal Employment Opportunity Commission ("EEOC") is charged by Congress with interpreting, administering, and enforcing Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.. The issue in this case is whether Title VII's retaliation provision protects an employee assistance counselor from being fired for urging an employee to use the employer's established mechanisms to complain about sexual harassment and for opposing the employer's failure to eradicate the hostile work environment growing out of that complaint. Given the chilling effect of the termination in this case and the importance of unfettered access to Title VII's remedial mechanisms to effective enforcement of the statute, the EEOC offers its views to the Court. The EEOC files this brief pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure.

STATEMENT OF THE ISSUE

1. Does an employer violate the opposition clause of Title VII's anti-retaliation provision when it fires an Employee Assistance Program (EAP) consultant because he counsels a co-worker to complain to his employer about sexual harassment and then objects to the employer's failure to eradicate the hostile work environment growing out of that complaint during the employer's internal investigation?

2. Does an employer violate the participation clause of Title VII's anti-retaliation provision when it fires an EAP consultant because of his participation in an employer's internal mechanism designed to address and root out discrimination prior to the filing of an EEOC charge?

STATEMENT OF THE CASE

A. Statement of Facts

Defendants, Carilion Clinic, Carilion Medical Center, and Carilion Behavioral Health Inc. (collectively, "Defendants" or "Carilion") are related corporations that provide healthcare and employ more than 10,000 individuals. District court docket number ("R") 21, (First Amended Complaint at 2). DeMasters was hired as an EAP consultant on July 24, 2006, and worked in that position until he was fired on August 10, 2011. Id. at 3. On October 17, 2008, "John Doe" (pseudonym) was referred to the EAP and told DeMasters he had been sexually harassed and assaulted by his male supervisor for several months. Id. Doe said his supervisor asked Doe to display his genitals and to provide his supervisor with oral sex, and that his supervisor masturbated in front of him on two separate occasions. Id. Doe told DeMasters that the supervisor ignored Doe's requests to stop. Id. Doe also told DeMasters that he "feared that Carilion would retaliate against him." Id. During this October 17th meeting, DeMasters "told Doe that it

appeared that Doe was a victim of sexual harassment in violation of Carilion's sexual harassment policy." Id. Doe signed a release to permit DeMasters to go to Human Resources (HR) "on Doe's behalf" to lodge a complaint for Doe. Id. at 4. DeMasters "relayed the substance of Doe's harassment complaint" the same day to an HR employee who said she would forward the complaint to HR manager Joe Baer. Id.

On October 24, 2008, Doe met with DeMasters and stated that Doe "continued to feel uncomfortable with the unit director and was facing increasing hostility from coworkers who were sympathetic with or friends of the harasser." Id. On October 28, 2008, after conferring with EAP colleagues, DeMasters spoke with Baer and offered "to coach[] the department director as to how human resources might better respond to Doe's complaints." Id. at 5. Baer told DeMasters that he would speak to the director directly. Id. On October 31, 2008, Doe spoke again with DeMasters, stating that the hostility was worsening and that Doe felt "insulted, frustrated, disappointed, and discounted by management's response to his complaint." Id. "At some point," DeMasters told Doe that DeMasters thought Carilion's management and HR "mishandled" Doe's complaints. Id. at 6. DeMasters "also told Baer at some point that he felt that Carilion was not handling the case properly." Id.

More than two years later, on December 14, 2010, DeMasters was notified by a Carilion manager that Doe had filed an EEOC charge and was filing suit for sexual harassment against Carilion. Id. On August 8, 2011, about three weeks "after Carilion settled Doe's claim," Carilion called a meeting with DeMasters, DeMasters's department director, an HR official, and Carilion's corporate counsel, "question[ing] [DeMasters] about Doe's harassment complaint and other matters." Id. When asked if he told Doe "that what happened to him was sexual harassment," DeMasters said "he did make such a statement." Id. DeMasters was then asked "why he had not taken the 'pro-employer side,' . . . [and] had not protected Carilion's interests." Id. at 6-7. DeMasters was also told that his "conduct had left Carilion 'in a compromised position'" and was asked if he "understood what liability a company could face if a company supervisor engaged in harassment as defined by law." Id. at 7. The department director stated that DeMasters "had failed to protect Carilion and had placed the entire operation at risk." Id.

On August 10, 2011, DeMasters was terminated by letter stating that he "fail[ed] to perform or act in a manner that is consistent with the best interests of Carilion Clinic." Id. at 7. In a January 16, 2012, letter, Carilion stated it had "'determined' that [DeMasters] had 'made statements that could

reasonably have led John [Doe] to conclude that he should file suit against Carilion;' that [DeMasters] had 'failed to perform or act in a manner that is consistent with the best interests of Carilion Clinic;' that '[w]ithout question . . . [DeMasters had] made multiple statements that were contrary to his employer's best interests and that required disciplinary action;' and that [DeMasters] had 'failed to protect Carilion's EAP's client company, in this case also the employing organization, Carilion.'" Id. DeMasters was also told that "Carilion was angry at having lost the discrimination lawsuit and was looking to 'throw somebody under the bus.'" Id.

DeMasters sued Carilion for retaliatory discharge, alleging that Carilion fired him in retaliation for opposing Carilion's response to Doe's harassment and retaliation complaints when DeMasters told Carilion that it was mishandling Doe's complaints and for participating in the complaint process by initiating the internal investigation and by encouraging Doe to participate in the process. Carilion moved to dismiss DeMasters's first amended complaint under Fed.R.Civ.P. 12(b)(6), on the ground that DeMasters did not engage in protected activity. R23 (Defendant's Motion to Dismiss).

B. District Court's Decision

The district court agreed with Carilion and granted Carilion's motion

to dismiss. R38 (Order). The court held that DeMasters's activity was not protected under the participation clause because it was "unrelated to an EEOC filing or Title VII action" in that "DeMasters did not even know Doe had filed an EEOC complaint until 2010, two years after he last communicated with Doe." R37 (Memorandum Opinion (Op.) at 7-8). In so holding, the court relied primarily on Laughlin v. Metro Washington Airports Auth., 149 F.3d 253, 259 (4th Cir. 1998), for the proposition that one cannot be covered under the participation clause if there is no "ongoing investigation under Title VII." Op. at 8.

After acknowledging that the opposition clause "covers a broader range of conduct" than the participation clause, id. at 9, the court held that DeMasters's conversations with Doe were not oppositional because they were "in the context of EAP counseling" and "not an attempt to bring attention to Carilion's discriminatory activities." Id. at 12-13. The court also held that "DeMasters intended only to relay Doe's complaints to Carilion, not voice his own opposition to any unlawful employment practice, such as the sexual harassment or hostile work environment alleged by Doe." Id. at 14. The court went on to hold that to the extent that DeMasters did object to Carilion about its response to Doe's complaints, he was merely "voicing criticism of Carilion's investigation and handling of Doe's

complaint" and that "criticisms of Carilion's investigative process is not oppositional activity subject to Title VII protection." Id. at 14 (citing Brush v. Sears Holding Corp., 466 F.App'x 781 (11th Cir. 2012) (a co-worker fired for objecting to the handling of a fellow employee's sexual harassment complaint did not state a Title VII claim because she only objected to the internal investigation and not the underlying harassment)).

SUMMARY OF ARGUMENT

DeMasters, an EAP counselor, was fired because he encouraged a co-worker to take advantage of his employer's policies and procedures to complain about sexual harassment. Effective enforcement of Title VII depends on robust protections against retaliation. Only when employees are free from fear of retaliation will they avail themselves of the remedial mechanisms provided by their employers, by the EEOC, and by the courts. The anti-retaliation provision prohibits discrimination against any employee who has opposed unlawful practices or who has participated in any manner in proceedings under Title VII. The district court dismissed DeMasters's complaint for failure to state a claim because it read both provisions too narrowly.

DeMasters's assistance to Doe in complaining about sexual harassment and his criticisms of Carilion's handling of Doe's complaint

constituted protected opposition. When DeMasters conveyed Doe's complaint to Carilion's HR department, there is no dispute that he reasonably believed the conduct he described was unlawful under Title VII. When DeMasters further told Carilion's HR personnel that they were mishandling Doe's case, he was expressing his opposition to their failure to prevent ongoing retaliatory harassment arising from the original complaint. Under controlling Supreme Court precedent, DeMasters's statements to HR constituted protected opposition to unlawful discrimination. The district court held that DeMasters's handling of Doe's complaint did not constitute opposition conduct under a judicially-created "manager rule" exception because he was merely doing his job as an EAP counselor. That rule requires employees to "step outside" their normal job role and take an action adverse to the company to be protected from retaliation. That rule has no application here, first because DeMasters's conduct was viewed by his employer as adverse to the company's interests, and second because the manager rule, developed in FLSA cases, cannot be squared with the logic or policy rationale animating recent Supreme Court Title VII retaliation cases. Thus, the district court erred in holding that DeMasters had not stated a claim under the opposition clause.

DeMasters's assistance to Doe and criticisms of Carilion's handling

of his case also constituted participation in proceedings under Title VII. Proceedings under Title VII include employers' internal investigations and DeMasters's efforts to help Doe instigate an investigation are properly viewed as participation conduct. The plain language of the statute states that employees are protected when they participate in any proceeding under the statute and internal investigations are necessarily "under" the statute given the strong incentives for employers to create internal procedures for dealing with harassment complaints to limit their liability for supervisory harassment. Thus, the district court erred in holding that DeMasters's assistance to Doe did not constitute participation under Title VII because Doe had not yet filed a charge or lawsuit.

STANDARD OF REVIEW

The district court dismissed this claim pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim. On appeal, the Court reviews the facts alleged in the complaint de novo, assuming all well-plead factual allegations true, and draws reasonable inferences therefrom. See Aziz v. Alcolac Inc., 658 F.3d 388, 391 (4th Cir. 2011); DIRECTTV, Inc. v. Tolson, 513 F.3d 119, 123 (4th Cir. 2008). The court below dismissed this case on the grounds that DeMasters did not engage in protected activity under Title VII when he objected to management's failure to eliminate a co-worker's hostile work

environment stemming from the co-worker's complaint of sexual harassment. Dismissal is not warranted if DeMasters asserts factual allegations "above the speculative level," and states a claim for relief that is "plausible on its face." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007).

ARGUMENT

TO EFFECTUATE THE REMEDIAL PURPOSES OF TITLE VII AND THE ANTI-DETERRENCE PURPOSES OF THE RETALIATION PROVISION, BOTH THE OPPOSITION AND THE PARTICIPATION CLAUSES SHOULD BE CONSTRUED TO PROTECT DEMASTERS FROM TERMINATION BASED ON HIS ROLE IN CHALLENGING HARASSMENT ALLEGED BY A CO-WORKER.

Title VII expressly prohibits employers from retaliating against employees who report or complain about unlawful discrimination in the workplace. Title VII's anti-retaliation provision states: "It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment ... or to discriminate against any individual … because he has opposed any practice made an unlawful employment practice by this subchapter [the "opposition clause"], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter [the "participation clause"]." 42 U.S.C. § 2000e-3(a). Because of the

importance of "unfettered access" to Title VII's remedial mechanisms, Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997), the Supreme Court construed the scope of the statute's protections broadly by prohibiting any adverse actions likely to deter employees' exercise of their rights, Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53, 68 (2006), and, of most significance here, by reading the range of protected employee conduct broadly, see, e.g., Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee, 555 U.S. 271, 276 (2009). Both the opposition and participation clauses protect an employee's disclosure of discriminatory acts through use of the internal mechanisms specifically created by the employer to address complaints of sexual harassment and an ongoing hostile work environment and other violations of federal employment laws.

The district court held that Title VII's opposition and participation clauses do not protect a company's EAP consultant who objects to the employer's failure to eliminate discriminatory practices he reasonably believed to be in violation of Title VII and who initiates an investigation by notifying his employer of the harassment complaint of another employee. In so doing, the court created an inexplicable gap in Title VII's protection against retaliation that conflicts with the text and purposes of section 704(a).

In part as a response to a series of Supreme Court decisions, internal investigations are increasingly a vital part of Title VII's enforcement mechanisms. Using a combination of common law principles and Title VII policy and precedent, the Supreme Court held that Title VII imposes an affirmative duty on employers to investigate allegations of sexual harassment to avoid liability under the statute, and a parallel obligation on employees to avail themselves of their employers' internal complaint processes or otherwise mitigate their harm. Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998); Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 765 (1998). Likewise, in Kolstad v. American Dental Ass'n, 527 U.S. 526, 545-46 (1999), the Supreme Court held that an employer could avoid punitive damages under Title VII by showing that the supervisor was acting contrary to the employer's good faith efforts to comply with Title VII. The principles undergirding the decisions in Faragher, Ellerth, and Kolstad, to prevent and deter harm from discriminatory employment practices, highlight the importance of the internal investigatory process to Title VII liability. See Faragher, 524 U.S. at 806 (Title VII's "'primary objective,' like that of any statute meant to influence primary conduct, is not to provide redress but to avoid harm.") (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975)); Ellerth, 524 U.S. at 764 ("Title VII is designed to encourage the

[employer's] creation of anti-harassment policies and effective grievance mechanisms."); Kolstad, 527 U.S. at 546 (recognizing "Title VII's objective of motivat[ing] employers to detect and deter Title VII violations"); accord McKennon v. Nashville Banner Pub'g Co., 513 U.S. 352, 358 (1995).

By allowing employers to obviate liability if they prove that plaintiffs "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer," the Supreme Court has made clear that Title VII considers employers to act reasonably when they implement effective internal dispute mechanisms and considers employees to act reasonably when they take advantage of them. See Faragher, 524 U.S. at 807. Thus, employer procedures designed to root out discrimination are fundamental and indispensable components of good faith efforts to comply with Title VII. To permit those persons charged with assuring compliance with the anti-harassment policies and complaint procedures to be fired merely for doing their job and conveying the complaints through the employer's established channels to report such harm runs directly counter to the principles and logic of the Court's approach to harm prevention in Ellerth and Faragher. Vigorous internal investigations necessary to effectuate Title VII policies would be significantly chilled if an employer was free to retaliate against an EAP consultant or HR employee for

effectively responding to and counseling employees who lodge discrimination complaints about how to protect their right to work free from such unlawful conduct.

I. The Opposition Clause of Title VII's Anti-Retaliation Provision Prohibits Retaliation Against an Employment Assistance Program Consultant for Relaying a Co-Worker's Harassment Complaint And for Objecting to a Company's Failure to Eliminate a Hostile Work Environment Growing Out of That Underlying Complaint.

The opposition clause of Title VII's anti-retaliation provision bars retaliation against an employee for objecting to an employer's ineffective response to an allegation of an ongoing hostile work environment growing out of a complaint of sexual harassment. The provision broadly protects "any employee" from retaliation "because he opposes any practice[] made an unlawful employment practice by this title," i.e., Title VII. See 42 U.S.C. § 2000e-3(a). Properly construed, that clause protects an employee who, through the employer's anti-discrimination enforcement machinery, communicates to his employer a reasonable belief that a fellow employee has been subjected to sexual harassment and an on-going hostile work environment. Thus, contrary to the district court's holding, the allegations in DeMasters's complaint – that DeMasters advised Doe on his sexual harassment complaint, that DeMasters relayed Doe's complaint to HR, and

that DeMasters criticized Carilion's handling of Doe's complaints of on-going harassment – are sufficient to articulate a plausible claim of opposition conduct protected by Title VII from retaliation.

a. An Employee Who Reports Sexual Harassment and a Hostile Work Environment Through the Employer's Accepted Channels Has Engaged in Protected Opposition Under Title VII.

To establish protected opposition conduct, the plaintiff must demonstrate that he had a good faith, reasonable belief that the underlying challenged actions were unlawful. See EEOC v. Navy Fed. Credit Union, 424 F.3d 397, 406-07 (4th Cir. 2005) (evidence must be assessed "as a whole" to determine whether the complainant reasonably believed the at-issue conduct was unlawful). The test for determining whether an employee reasonably believes a practice violates Title VII is an objective one. Cf. Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 270 (2001) (per curiam) (determining that plaintiff's belief that exposure to one sexist remark was unlawful sexual harassment was not reasonable).

The allegations in DeMasters's complaint setting forth Doe's communication to him of supervisory sexual harassment and DeMasters's own observations regarding Carilion's failure to correct Doe's ongoing hostile work environment, are sufficient at the complaint stage, to demonstrate that it is plausible that DeMasters had a good faith belief that

the underlying sexual harassment and hostile work environment were unlawful. In accordance with Carilion's internal policies, once DeMasters reported to HR Doe's descriptions of graphic sexual harassment by his supervisor, which included telling HR that Doe was asked "to display his genitals and provide oral sex to the manager" and "the manager had masturbated in front of him on hospital grounds," Carilion investigated. R.21 at 3. Particularly in light of Carilion's decision immediately to fire the allegedly harassing manager for his inappropriate behavior, it is plausible, based on these allegations, that DeMasters had a reasonable belief that the conduct Doe described and that DeMasters reported to HR was unwelcomed and unlawful.

The real question in the case is whether DeMasters's statements to HR expressed opposition to the conduct he described. The ordinary meaning of the word "oppose" is "to be hostile or adverse to." Crawford, 555 U.S. at (2009) (quoting, Random House Dictionary of the English Language 1359 (2d ed. 1987)). When an employee communicates to his employer a belief that the employer has engaged in activity that constitutes a form of discrimination, that communication constitutes the employee's opposition to that activity. See 2 EEOC Compl. Man. (BNA) § 8-II(B)(1), at 614.0003 (Mar. 2003) (opposition clause "applies if an individual explicitly or

implicitly communicates to his or her employer or other covered entity a belief that its activity constitutes a form of employment discrimination"); id. § 8-II(B)(2), at 614.0003 (protected opposition occurs when a "complaint would reasonably [be] interpreted as opposition to employment discrimination"). An employee's disclosure, through the approved complaint apparatus constructed by the employer to identify and eliminate discrimination, that an unlawful activity has taken place, is properly viewed as opposition activity. Indeed, this Court has made clear that protected opposition activity includes "informal expressions of one's views . . . or alternative forms of protest" so long as they are not unduly disruptive. Armstrong v. Index Journal Co., 647 F.2d 441, 448 (4th Cir. 1981). And, as the Supreme Court noted in Crawford, an employee's communication of a belief that the employer has engaged in a form of discrimination or retaliation "virtually always 'constitutes the employee's *opposition* to the activity." 555 U.S. at 851 (citations omitted). Thus, when an employee uses the employer's mechanism to inform the employer that a supervisor engaged in, for example, sexual harassment, the employee has opposed the activity within the meaning of the statute.

The Supreme Court in Crawford thought Crawford's ostensibly disapproving account of sexually obnoxious behavior was opposition

conduct, particularly where her answer to the harassed investigator's question "antagonized her employer to the point of sacking her on a false pretense." Id. at 850-51. Similarly, in this case, DeMasters was perceived by his employer as harming the company by pursuing another employee's claims of egregious sexual harassment and retaliation. Carilion fired DeMasters because of that perception. Carilion did not even offer a false pretense for "sacking" DeMasters. It openly stated that it was terminating him because he did not protect the employer's interests when he advised Doe that he should pursue remedies for his harassment complaint. Based on these allegations, DeMasters is reasonably viewed as having opposed an employer's discriminatory conduct.

b. An Employee Who Tells Management It Is Mishandling a Hostile Work Environment Complaint Has Engaged in Participation in Proceedings Under Title VII.

In rejecting DeMasters's claim, the district court relied on a court-made "manager rule" exception developed under the anti-retaliation provisions of the Fair Labor Standards Act (FLSA). Under that rule, the FLSA requires an employee to "step outside his or her role representing the company" and take some action adverse to the company to be protected under the Act. See McKenzie v. Renberg's Inc., 94 F.3d 1478, 1486-87 (10th Cir. 1996). The purpose of the rule is to deny management officials whose duties include

assuring compliance with Title VII any protection from retaliation when they assist employees in their claims under the statute. Although this Court has not applied this rule in a Title VII case, the district court held that DeMasters was not engaged in statutorily protected activity because he was merely doing his job as an EAP consultant, advising Doe and informing Carilion about potentially discriminatory practices.

This holding is at odds with the facts recited in DeMasters's complaint, which make clear that Carilion thought DeMasters had stepped outside his role and taken actions adverse to the company's interests. DeMasters alleged in his complaint that he disclosed to Carilion's HR manager, Baer, that Carilion was not handling Doe's complaints about retaliation and on-going hostility properly. The nature of the underlying harassment he described and his criticism of the ensuing internal investigation sufficed to register DeMasters's opposition to the conduct. Certainly Baer could have reasonably perceived it as such. Indeed, according to the complaint, DeMasters told Baer that Carilion mishandled Doe's complaint. And Carilion management told DeMasters at the time of his termination that he failed to take a "pro-employer side" in response to Doe's complaints and that he left Carilion in a "compromised position" by potentially exposing Carilion to liability for sexual harassment. Finally, Carilion stated in its

letter terminating DeMasters that he was being fired because "he made statements that could reasonably have led John [Doe] to conclude that he should file suit against Carilion," thereby failing "to protect" Carilion. Taken together, these allegations in the complaint plausibly allege that DeMasters was acting outside his normal role as an EAP consultant when he opposed Carilion's conduct.

In any event, the "manager rule" exception should not be imported from FLSA jurisprudence into Title VII. Title VII contains an express opposition clause. The ordinary meaning of the word "oppose," as noted above, is not limited to activity outside an employee's normal job duties. For that reason, to create a rule requiring managers to act outside of their normal duties in a Title VII case is contrary to the Court's rationale in Crawford.

Title VII unambiguously protects "any employee" who opposes unlawful discrimination. 42 U.S.C. § 2000e-3(a). The Supreme Court in Crawford, interpreting Title VII's opposition clause broadly, explained that a person can "oppose" something by responding to someone's question just as surely as by provoking the discussion in the first place. Crawford, 555 U.S. at 277-78. Nowhere did the Court 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. See Schanfield v. Sojitz Corp., 663 F. Supp. 2d 305, 342 (S.D.N.Y. 2009) (Crawford did not suggest that activity is not "oppositional" if it is part of one's job to complain about it, and it would be "utterly inconsistent" with the sweeping language of the decision to conclude that statements made or actions taken in the context of the employee's job are not "oppositional").

Title VII's plain language and the breadth with which the retaliation provisions should be applied are incompatible with carving out a "step outside" requirement for those employees who work as part of the employer's compliance machinery. In Johnson v. University of Cincinatti, 215 F.3d 561, 580-81 (6th Cir. 2000), the Sixth Circuit held that the plaintiff's contractual duty to advocate on behalf of minorities was immaterial to his claim of retaliation for protesting discrimination in hiring minorities. As the Court said, "the only qualification that is placed upon an employee's invocation of protection from retaliation under Title VII's opposition clause is that the manner of his opposition be reasonable." Id. at 581. Moreover, section 704(a) cannot function as intended, to protect efforts to end Title VII violations, if the employees best situated to call attention to and oppose an employer's discriminatory practices are outside its protective ambit. By depriving these employees protections under the statute, courts

create a disincentive for these employees to carry out their duty to ensure compliance with anti-discrimination laws. Thus, the plain language of the opposition clause, which the Supreme Court held should be read broadly, and the principles emanating from it, make clear that Title VII's protective ambit covers all employees, particularly those who are part of the employer's Title VII compliance machinery.

II. The Participation Clause of Title VII's Anti-Retaliation Provision Prohibits Retaliation Against an Employment Assistance Program Consultant for Participating In an Employer's Internal Investigation Because That Investigation is a Proceeding Under Title VII.

Title VII protects from retaliation persons participating in Title VII investigations, both internal and external. Title VII prohibits an employer from retaliating against "any of his employees . . . because he has . . . participated in any manner in an investigation . . . under [Title VII]." 42 U.S.C. § 2000e-3(a). Nothing in this prohibition limits the term "investigation" to one conducted by EEOC. Nonetheless, the district court read the statute to so limit the term, thereby leaving an employer free to retaliate against employees for participating in the employer's internal investigations into Title VII violations. In so doing, the lower court, in essence, re-wrote the statute to add terms to the statute which do not exist. The court erred.

When Congress meant to limit investigations to those conducted by EEOC, it did so expressly. Elsewhere in Title VII, Congress made clear its intent to address only investigations conducted by EEOC. See 42 U.S.C. § 2000e-5(b) ("the Commission . . . shall make an investigation" of a charge); § 2000e-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 should be viewed as investigations under that section. See Burlington N., 548 U.S at 63 ("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)).

Moreover, to arrive at the conclusion that internal investigations are outside Title VII's protections, the district court necessarily read the term "under" in a manner more constrained than its everyday meaning. The ordinary connotation of the word "under" in the context of a statute is "subject to" or "governed by" the statute in question. Ardestani v. INS, 502 U.S. 129, 135 (1991); see The New Shorter Oxford English Dictionary 3469 (1993) ("Subject to the authority, control, direction, or guidance of.");

Webster's Third New International Dictionary 2487 (1986) ("required by: in accordance with: bound by"); In re Hechinger Inv. Co. of Del., 335 F.3d 243, 252 (3d Cir. 2003) (Alito, J.) ("When an action is said to be taken 'under' a provision of law . . ., what is generally meant is that the action is 'authorized' by the provision of law."). The Supreme Court's precedents interpreting Title VII make clear that an employer's internal investigations occur "under" Title VII because such investigations are subject to or governed by Title VII. See Ardestani, 502 U.S. at 135. But see Hatmaker v. Memorial Med. Ctr., 619 F.3d 741, 746-47 (7th Cir. 2010) (participation clause does not cover internal investigations before the filing of a charge with the EEOC; not addressing Supreme Court precedents).

The district court rejected this analysis in reliance on Laughlin v. Metro Washington Airports Auth., 149 F.3d 253, 258 (4th Cir. 1998), which it understood to hold that "under this subchapter" refers only to conduct occurring after a Title VII charge is filed. However, this Court ruled that the conduct in that case could not be considered to be "under this subchapter" because there was no ongoing internal investigation or external proceeding at the time of the protected activity. At the time of the alleged conduct, the internal processing of Laughlin's claim had ended and she had not yet filed suit, so there were no proceedings of any sort under Title VII. Id. at 259.

By contrast, in this case, the internal proceedings were ongoing at the time of DeMasters's conduct. DeMasters was actually involved in advancing the internal processing of Doe's complaint through Carilion's accepted channels. Thus, contrary to the district court's conclusion, Laughlin does not foreclose the argument that "investigations under this subchapter" can include internal investigations into sexual harassment and an ongoing hostile work environment. DeMasters's claim is cognizable as protected participation. But see McNair v. Computer Data Sys. Inc., 172 F.3d 863 (table), 1999 WL 30959 at *5 (4th Cir. 1999) (unpublished) (citing Laughlin and reading it broadly to preclude a participation claim where McNair alleged retaliation for actions taken "before she filed her first EEOC charge").

The D.C. Circuit has held that, in federal sector employment, an employer-initiated investigation to detect or root out discrimination prohibited by Title VII is an investigation "under" the statute. See Smith v. Secretary of the Navy, 659 F.2d 1113, 1122 (D.C. Cir. 1981). In Smith, the court held Title VII protects an employee who suffered an adverse action because of his work as a federal EEO counselor. According to the court, participation in an employer's EEO activities is "participation in protected activities." 659 F.2d at 1121, n.63. It is true that taking advantage of the

federal sector's EEO processes constitutes a mandatory pre-condition to a Title VII lawsuit and, by contrast, taking advantage of a private employer's internal processes is voluntary, however the difference is not as stark as it first appears. Although a private sector employee can state a cognizable claim without first using the employer's internal machinery, if he does not use the internal processes, he may not be able to state a cognizable claim for relief. See Barrett v. Applied Radiant Energy Corp., 240 F.3d 262, 267 (4th Cir.2001) ("evidence that the plaintiff failed to utilize the company's complaint procedure will normally suffice to satisfy [the company's] burden under the second element of the defense") (internal quotation marks omitted). Moreover, the federal and private sector pre-suit processes share a common purpose. As the D.C. Circuit held in the federal sector context, early reporting requirements fully support Title VII's overarching purposes by "encourag[ing] private efforts to enforce the law." Smith, 659 F.2d at 1121-22.

As in Smith, DeMasters is entitled to protection from retaliation for participating in the company's internal processes. DeMasters lodged Doe's complaint with HR, triggering an internal investigation into the sexual harassment allegations and he encouraged Doe to participate in the investigation. This is protected participation. As the Supreme court noted,

Title VII's anti-retaliation provision is intended "to prevent employer interference with 'unfettered access' to Title VII's remedial mechanisms . . . by prohibiting employer actions that are likely 'to deter victims of discrimination from complaining to the EEOC,' the courts, and their employers." Burlington N., 548 U.S. at 68 (citations omitted). If an EAP employee like DeMasters knows that he will be fired for initiating an employer's internal processes and encouraging an employee to take advantage of those processes in response to his complaint that he was being sexually harassed and working in a hostile environment, he would think twice about giving such advice. If a victim knows that seeking counseling from EAP would be useless because the individual charged with assisting him is unwilling to act, he will be less likely to avail himself of internal complaint procedures, and, in so doing, jeopardizes his legal rights.

This chilling effect would thwart a victim's "'unfettered access' to Title VII's remedial mechanisms," id., and undermine the Supreme Court's oft-repeated edict that employers should be allowed to self-correct, see, e.g., Faragher, 524 U.S. at 805-06. The internal compliance mechanisms on which Title VII depends could not function effectively if employees responsible for receiving and detecting violations of the statute can be fired without recourse when the employer does not like the advice he gave to a

harassment victim, or worse, as here, because he failed to dissuade effectively the victim from filing a Title VII suit. The district court erred in holding that the Title VII's retaliation provision does not apply in this case. Because internal investigations are an integral part of Title VII's remedial scheme, participation in such an investigation is a protected activity.

CONCLUSION

For the foregoing reasons, the EEOC urges the Court to reverse the dismissal for failure to state a claim and remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume requirements set forth in Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B), and Fourth Circuit Rule 32(b)(1). This brief contains 5,849 words, from the Statement of Interest through the Conclusion, as determined by the Microsoft Word 2007 word processing program, with 14-point proportionally spaced type.

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CERTIFICATE OF SERVICE

I hereby certify that on February 25, 2013, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the Court's CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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