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,

NATIONAL EMPLOYMENT LAWYERS ASSOCIATION; EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Amici Supporting Appellant.

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

REPLY BRIEF OF APPELLANT

Terry N. Grimes
TERRY N. GRIMES, ESQ., P.C.
320 Elm Avenue, S.W.
Roanoke, VA 24016
(540) 982-3711

Counsel for Appellant

*Gibson*Moore Appellate Services, LLC
421 East Franklin Street ♦ Suite 230 ♦ Richmond, VA 23219
804-249-7770 ♦ www.gibsonmoore.net

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

ARGUMENT AND AUTHORITIES 1

I. DeMasters' Complaints to Carilion are Protected Activity Under the Opposition Clause of Title VII 3

a. DeMasters Used Purposive Conduct to Bring Doe's Harassment to Carilion's Attention 3

1. DeMasters' Report to Doe that He Had Been Subjected to Sexual Harassment was Oppositional As it Was Intended Specifically to Reach Carilion, and DeMasters Did Far More than Simply Report His Objection to Doe 5

2. DeMasters Also Did More than Merely Disagree with Carilion's Internal Procedures; DeMasters Objected to the Hostile Environment and Retaliation that Doe Continued to Experience 6

b. Even Though DeMasters is Not Required to Demonstrate that He Stepped Outside His Normal Employment Role, He Nevertheless Did So 9

II. DeMasters' Complaints to Carilion are Protected Activity Under the Participation Clause of Title VII 11

a. DeMasters is Protected Under the Participation Clause As An Employer's Internal Investigation is a Proceeding Under Title VII 11

b. DeMasters is Likewise Protected by the Participation Clause as He Was Terminated for His Involvement Leading to An EEOC Charge of Discrimination 13

III. The District Court Erred as a Matter of Law in Not Applying Thompson as There is No Question that He was Fired Because Of His Association with Doe and with Doe's Claim 18

a. Cases Decided Prior to Thompson Are Not Controlling Authority 18

b. It is Irrelevant that Doe's Suit was Settled Prior to DeMasters Being Terminated 19

IV. Maintaining Unfettered Access to Statutory Remedial Measures is a Primary Purpose of the Antiretaliation Provision 21

CONCLUSION 22

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF FILING AND SERVICE

TABLE OF AUTHORITIES

Page(s)

Cases

Brock v. Richardson,
812 F.2d 121 (3d Cir. 1987) 17

Brush v. Sears Holdings Corp.,
466 Fed. Appx. 781 (11th Cir. 2012) 7, 8

Burlington Indus., Inc. v. Ellerth,
524 U.S. 742 (1998).....12, 13

Burlington Northern & Santa Fe (BNSF) Railway Co. v. White,
548 U.S. 53, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (2006) 11, 18, 19, 20

Clover v. Total Systems Servs., Inc.,
176 F.3d 1346 (11th Cir. 1999) 14

Collazo v. Bristol-Myers Squibb Mfg.,
617 F.3d 39 (1st Cir. 2010).....3, 4, 9

Crawford v. Metro. Gov't of Nashville & Davidson Cnty., Tenn.,
555 U.S. 271, 129 S. Ct. 846 (2009) 4, 9, 11, 12

Croushorn v. Board of Trustees of University of Tennessee,
518 F. Supp. 9 (M.D. Tenn. 1980) 17

Deravin v. Kerik,
335 F.3d 195 (2d Cir. 2003) 12, 14

EEOC v. Navy Fed. Credit Union,
424 F.3d 397 (4th Cir. 2005) 6

Entrekin v. City of Panama City Florida,
376 Fed. Appx. 987 (11th Cir. 2010) 7

Erickson v. Pardus,
551 U.S. 89, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007) 10

Faragher v. City of Boca Raton,
524 U.S. 775 (1998).....12, 13

Fogarty v. Boles,
121 F.3d 886 (3d Cir. 1997) 17

Fogleman v. Mercy Hosp.,
283 F.3d 561 (3d Cir. 2002) 8, 10, 16, 17

Garnett v. Holder,
2013 WL 453086 (N.D. Ala. 2013).....7

Glover v. S.C. Law Enforcement Div.,
170 F.3d 411 (4th Cir. 1999) 14

Harris-Rogers v. Ferguson Enterprises,
2011 WL 4460574 (E.D.N.C. Sept. 26, 2011) 6

Hightower v. Easton Area Sch. Dist.,
818 F. Supp. 2d 860 (E.D. Pa. 2011).....4

Jordan v. Alternative Res. Corp.,
458 F.3d 322 (4th Cir. 2006) 1, 7

Laughlin v. Metro Washington Airports Auth.,
149 F.3d 253 (4th Cir. 1998) 11

Lodis v. Corbis Holdings, Inc.,
292 P.3d 779 (Wash. Ct. App. 2013) 9

Martin v. Mecklenburg County,
151 Fed. Appx. 275 (4th Cir. 2005) 14

McDonnell v. Cisneros,
84 F.3d 256 (7th Cir. 1996) 9

McGuire v. City of Springfield,
280 F.3d 794 (7th Cir. 2002) 18

McNair v. Computer Data Sys., Inc.,
1999 WL 30959 (4th Cir. 1999) 15

Merritt v. Dillard Paper Company,
120 F.3d 1181 (11th Cir. 1997) 14

Owens v. Rush,
654 F.2d 1370 (10th Cir. 1981) 14

Pitrolo v. County of Buncombe,
2009 WL 1010634 (4th Cir. Mar. 11, 2009) 6

Porter v. California Dep't of Corrections,
383 F.3d 1018 (9th Cir. 2004) 18

Price v. Thompson,
380 F.3d 209 (4th Cir. 2004) 18

Robinson v. Shell Oil Co.,
519 U.S. 337 (1997) 14, 21, 22

Russello v. United States,
464 U.S. 16 (1983) 11

Sauers v. Salt Lake County,
1 F.3d 1122 (10th Cir. 1993) 17

Sproull v. Golden Gate Nat'l Senior Care, LLC,
2010 U.S. Dist. LEXIS 32055 (W.D. Pa. Apr. 1, 2010) 5

Summers v. Altarum Inst., Corp.,
740 F.3d 325 (4th Cir. 2014) 1

Thomas v. Goodyear Tire & Rubber Co.,
2001 WL 34790222 (W.D. Va. 2001), aff'd,
31 Fed. Appx. 101 (4th Cir. 2002) 15

Thompson v. N. Am. Stainless, LP,
567 F.3d 804 (6th Cir. 2009), rev'd and remanded,
131 S. Ct. 863 (2011).....18, 19, 20

Townsend v. Fannie Mae,
923 F. Supp. 2d 828 (W.D. Va. 2013).....10

United States EEOC v. Bojangles Rests., Inc.,
284 F. Supp. 2d 320 (M.D.N.C. 2003).....passim

Univ. Texas Sw. Med. Ctr. V. Nassar,
133 S. Ct. 2517 (2013).....11

Von Gunten v. Maryland,
243 F.3d 858 (4th Cir. 2001).....2

Statutes

42 U.S.C. §§ 2000e, *et. seq*. (Title VII of the Civil Rights Act of 1964).....passim

42 U.S.C. § 2000e-1 (sec. 704(a)).....14, 21

42 U.S.C. § 2000e-3(a) (78 Stat. 257, as amended).....14, 15

42 U.S.C. § 2000e-5(b).....11

42 U.S.C. § 2000e-9.....11

42 U.S.C. § 12203(a).....16

Rule

Fed. R. Civ. P. 12(b)(6).....1

Other Authorities

BLACK'S LAW DICTIONARY 111 (5th ed. 1979).....14

MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/assist
(last visited Mar. 26, 2014).....14

ARGUMENT AND AUTHORITIES

When a manager at Carilion Clinic, Carilion Medical Center, and Carilion Behavioral Health, Inc. ("defendants" or "Carilion") asked a subordinate, John Doe, to display his genitals, to provide oral sex to the manager, and masturbated in front of the subordinate on hospital grounds (JA 28 at ¶ 12), then the subordinate was harassed and retaliated against by co-workers for complaining, Carilion responded by terminating the employee who helped Doe report the harassment and seek relief, DeMasters, asserting that DeMasters "fail[ed] to perform or act in a manner that is consistent with the best interests of Carilion Clinic" (JA 32 at ¶ 31).[1] Carilion's actions violated the anti-retaliation provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et. seq*. Thus, contrary to defendants' assertion, DeMasters has alleged sufficient facts to state all of the elements of a claim for retaliatory discharge (Defs. Br. 13, n. 5 (citing Jordan v. Alternative Res. Corp., 458 F.3d 322, 344-47 (4th Cir. 2006))).[2]

---

[1] As defendants correctly point out, "[a]n appellate court 'review[s] *de novo* an appeal from a Rule 12(b)(6) dismissal, *accepting the complaint as true and drawing reasonable inferences in the plaintiff's favor*'" (Defs. Br. 12 (quoting Summers v. Altarum Inst., Corp., 740 F.3d 325, 328 (4th Cir. 2014))) [emphasis added]. Thus, even though defendants state 106 times on brief that the events involved in this case are "alleged," the Court must accept all of these allegations as true.

[2] "In an ordinary retaliation case, a plaintiff must show that (1) []he engaged in a protected activity, (2) []he suffered an adverse employment action, and (3) the adverse action was taken because of h[is][] protected activity." United States EEOC v. Bojangles Rests., Inc., 284 F. Supp. 2d 320, 325 (M.D.N.C. 2003) (citing

As an initial matter, Doe's sexual harassment concerns were not resolved with the harasser's firing (*contra* Defs. Br. 4). Doe in fact contacted or met with DeMasters or his colleagues on at least five occasions concerning the ongoing harassment and retaliation he was experiencing at work (JA 29-30 at ¶¶ 15, 16, 17, 21). Indeed, Doe thereafter filed an EEOC charge and then a civil suit (JA 31 at ¶ 25). DeMasters continued to object and complain to Carilion about the ongoing harassment and retaliation (JA 29-30 at ¶¶ 18, 19, 20, 23) — complaints related to activities prohibited by Title VII, that being discrimination on the basis of sex and retaliation (*contra* Defs. Br. 4-5).

Further, when DeMasters contacted Carilion's human resources yet again, this time "to address the ongoing hostile working environment in Doe's workplace because instead of reducing the hostile work environment following plaintiff's complaint to human resources, Carilion was making matters worse[,]" (JA 29 at ¶ 18), DeMasters was in fact "complaining or commenting on an[] alleged discriminatory treatment of Doe by either Doe's Director or his co-workers" (*contra* Defs. Br. 5). As is clear from DeMasters' amended complaint, DeMasters agreed with his co-workers that he would "contact Carilion's human resources department again to offer insight into how Carilion might intervene with the

---

Von Gunten v. Maryland, 243 F.3d 858, 863 (4th Cir. 2001)). Carilion does not dispute that DeMasters suffered an adverse employment action or that, if he engaged in protected activity, he was terminated because of it.

department director in an effort to stop the hostile work environment" (JA 29-30 at ¶ 18). And, thus, DeMasters "called Carilion's human resources department to discuss the matter and left a message with the representative that day" (JA 30 at ¶ 19). And, as DeMasters continued to complain to Carilion, he *was* in fact complaining about a practice made unlawful under Title VII — his complaints were that Carilion was not properly handling the investigation *and* was permitting harassment and retaliation to continue (*contra* Defs. Br. 6).

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

a. DeMasters Used Purposive Conduct to Bring Doe's Harassment to Carilion's Attention.

DeMasters openly, by verbal communication, opposed that Doe was being asked to display his genitals, provide homosexual oral sex to his manager, and being masturbated in front of on hospital grounds. After Doe's psychiatric counseling, DeMasters *reported the abuse* (JA 28-29). DeMasters then continuously "purposefully communicated" his opposition to the initial harassment, the continuing hostile work environment, and the retaliation Doe was experiencing as DeMasters persistently contacted Carilion and demanded that Doe's complaints be adequately handled by Carilion (JA 29-31).[3] As recognized

[3] Carilion attempts, without success, to distinguish Collazo v. Bristol-Myers Squibb Mfg., 617 F.3d 39, 46 (1st Cir. 2010), by stating that unlike DeMasters, the plaintiff in Collazo "expressed *actual* oppositional views and engaged in

in Crawford, both DeMasters' verbal opposition and his continued oppositional conduct "effectively and purposefully communicated his opposition to" Doe's treatment. Collazo, 617 F.3d at 47-48 (citing Crawford v. Metro. Gov't of Nashville & Davidson Cnty., Tenn., 555 U.S. 271, 129 S. Ct. 846, 851 (2009)). It is evident that DeMasters' complaints were anything but "equivocal" (*contra* Defs. Br. 19).[4] To the contrary, DeMasters opposition could not have been clearer. DeMasters either called or received a return phone call from Carilion at least four times, each time directly reporting the harassment and/or the retaliation that Doe was experiencing, and even attempting to coach the department director as to how to handle these complaints to prevent further harassment and retaliation (JA 29-30 at ¶¶ 14, 19, 20, 23). These facts are quite different than cases that have held a

---

"*persistent efforts*" to help the claimant initiate her complaint of sexual harassment" (Defs. Br. 46 (citing Collazo, 617 F.3d at 47)). Beyond the fact that DeMasters made his complaints by telephone, rather than in person, Collazo is indistinguishable from the case at bar. And, "[t]o determine if retaliation plaintiffs sufficiently opposed discrimination, we look to the message being conveyed rather than the means of conveyance." Hightower v. Easton Area Sch. Dist., 818 F. Supp. 2d 860, 885 (E.D. Pa. 2011). Thus, DeMasters "persistent efforts to help [the harassed employee] initiate h[is] sexual harassment complaint and urge Human Resources to act upon that complaint [could be viewed by the trier of fact] as resistant or antagonistic to the complained-of conduct." Collazo, 617 F.3d at 47.

[4] Whether or not DeMasters actually opposed employment practices made unlawful by Title VII has no bearing on whether DeMasters purposively directed opposition to his employer's attention (*contra* Defs. Br. 20). Furthermore, it is clear that a manager asking his subordinate to display his genitals, provide homosexual oral sex to his manager, masturbating in front of him, and the employer then permitting co-workers to continue the harassment and retaliate against the victim are not practices "that employees simply think are unfair" (*contra* Defs. Br. 20 (citing JA 89-90)).

plaintiff's reports to be vague. *See, e.g.*, Sproull v. Golden Gate Nat'l Senior Care, LLC, 2010 U.S. Dist. LEXIS 32055, at *29-31 (W.D. Pa. Apr. 1, 2010) (finding that plaintiff's report was equivocal when she stated that she *was not sure* that her co-worker had been subjected to discrimination, but thought that it needed to be looked at). Thus, contrary to Carilion's assertion, DeMasters has provided specific instances of when, how, and to whom he complained of discrimination (JA 28-29; *contra* Defs. Br. 25, n. 9).

1. DeMasters' Report to Doe that He Had Been Subjected to Sexual Harassment was Oppositional As it Was Intended Specifically to Reach Carilion, and DeMasters Did Far More than Simply Report His Objection to Doe.

After he met with Doe, the first action that DeMasters took was to inform Doe that he had been subjected to sexual harassment and request consent to report the abuse to Carilion as the information he obtained was confidential (JA 28-29). As DeMasters thereafter reported the harassment and then continued to complain to Carilion concerning Doe's harassment, DeMasters clearly does not rely solely on his statement to Doe to support his claim. In addition it is worth noting that while the district court and Carilion claim this conversation cannot qualify as oppositional conduct (Defs. Br. 21), DeMasters plainly intended his objection, as relayed to Doe, to reach Carilion — as is clear by the fact that DeMasters specifically requested consent to report the harassment himself, *and* then continued to report the hostile environment and retaliation that followed — and DeMasters'

complaints did in fact reach Carillion (JA 31 at ¶ 28).[5] In response, Carilion terminated DeMasters for not taking "the "pro-employer side" (JA 31-32 at ¶ 28-33).

2. DeMasters Also Did More than Merely Disagree with Carilion's Internal Procedures; DeMasters Objected to the Hostile Environment and Retaliation that Doe Continued to Experience.

Carilion's attempt to disaggregate DeMasters' objections is error (Defs. Br. 23, 29-32). *See, e.g.*, EEOC v. Navy Fed. Credit Union, 424 F.3d 397, 406-07 (4th Cir. 2005) (noting that evidence must be assessed "as a whole" in Title VII retaliation determinations, here being whether the complainant reasonably believed the at-issue conduct was unlawful). As an initial matter, even after the harasser was terminated, the harassment of Doe did not cease. Rather, the harasser's co-workers picked up right where the harasser had left off, and they also began to retaliate against Doe (*see* JA 29-31 at ¶¶ 17-24). DeMasters objected to this treatment as strongly as he did the initial harassment (Id.). Under these facts, it is irrelevant when the harasser was terminated as Doe was subjected to harassment and retaliation just as frequently after the harasser was terminated.

[5] Again, as explained previously, Pitrolo v. County of Buncombe, 2009 WL 1010634 (4th Cir. Mar. 11, 2009) and Harris-Rogers v. Ferguson Enterprises, 2011 WL 4460574 (E.D.N.C. Sept. 26, 2011) are not instructive as DeMasters purposefully informed Doe, a Carilion employee not related to him, that Doe was being subjected to harassment. *See* Pitrolo, 2009 WL 1010634, at *3; Harris-Rogers, 2011 WL 4460574, at *4. This therefore was plainly oppositional activity.

Furthermore, it is evident that Doe was subjected to unlawful treatment under Title VII — sexual harassment, a hostile work environment based on his sex, and retaliation. Thus, all of DeMasters' complaints were objections to a practice made unlawful by Title VII. It is patently absurd to suggest, as Carilion does on brief, that a manager asking his subordinate to display his genitals, provide homosexual oral sex to his manager, masturbating in front of him, then permitting co-workers to continue the harassment and retaliate against the victim is a "'complain[t] about conduct that no reasonable person would believe amounts to unlawful employment practice'" (Defs. Br. 26 (citing Jordan v. Alternative Res. Corp., 458 F.3d 332, 341-42 (4th Cir. 2006))).

DeMasters was not merely complaining about the internal procedures of Carilion. Rather, he was complaining about the continuing hostile work environment and the retaliation Doe was experiencing by his co-workers (*see* JA 29-31 at ¶¶ 17-24). Thus, the cases cited on brief by Carilion, Entrekin v. City of Panama City Florida, 376 Fed. Appx. 987, 994 (11th Cir. 2010) and Garnett v. Holder, 2013 WL 453086, at *5 (N.D. Ala. 2013), are not instructive here (*contra* Defs. Br. 26-27).

And again, Brush v. Sears Holdings Corp. does not change this result (*contra* Defs. Br. 28, 31). 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. Moreover, Brush only opposed harassment that had ceased. Here, DeMasters was complaining that Carilion was not properly handling the investigation *and* was permitting harassment, and now retaliation, to continue. Thus, DeMasters was plainly opposing a "practice made unlawful by [Title VII.]" Brush, 466 Fed. Appx. at 786.

Additionally, there is a difference in DeMasters asking that this Court assume his conduct be interpreted as oppositional and Carilion conceding that it was — the latter being the case here (*contra* Defs. Br. 29, n. 11). Furthermore, Carilion plainly fired DeMasters for engaging in oppositional conduct — whether or not it actually was is thus irrelevant. Fogleman v. Mercy Hosp., 283 F.3d 561, 565 (3d Cir. 2002) ("Because the statutes forbid an employer's taking adverse action against an employee for discriminatory reasons, it does not matter whether the factual basis for the employer's discriminatory animus was correct and that, so long as the employer's specific intent was discriminatory, the retaliation is actionable.").

b. Even Though DeMasters is Not Required to Demonstrate that He Stepped Outside His Normal Employment Role, He Nevertheless Did So.

This Court has not addressed whether the plaintiff may rely on conduct that falls within the normal scope of his job duties to allege protected activities. It is clear, however, 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. Thus, the intent of Congress is contravened if Carilion is permitted to avoid liability by establishing a department designed to cut down on lawsuits, and then discharge employees who object to harassment, leaving the objector with no recourse (*see* Defs. Br. 47 (citing McDonnell v. Cisneros, 84 F.3d 256 (7th Cir. 1996))). Thus, "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." Lodis v. Corbis Holdings, Inc., 292 P.3d 779, 787 (Wash. Ct. App. 2013). As such, the Supreme Court, in its broad interpretation of the opposition clause, has not found it necessary to discuss whether the employee stepped outside her normal employment duties[.]" Id. at 788 (citing Crawford, 555 U.S. at 276).

Furthermore, DeMasters did step outside of his normal employment role — Carilion has in fact conceded this point. *Carilion told DeMasters it was*

terminating him for stepping outside his normal employment role of protecting Carilion's interests (JA 32 at ¶ 29). And contrary to Carilion's assertion, DeMasters is not required to plead an exact description of his job duties. And, Carilion cannot ignore its letters of August 10, 2011 and January 16, 2012, terminating DeMasters for acting in nonconformance with his normal employment role, as it wishes. *See* Bojangles Rests., Inc., 284 F. Supp. 2d at 328 ("Title VII focuses on the employer's subjective reasons for taking an action, not the correctness of the reasoning as a factual matter" (citing Fogleman, 283 F.3d at 572)). Especially since this Court is required to draw reasonable inferences in DeMasters' favor, Townsend v. Fannie Mae, 923 F. Supp. 2d 828, 832 (W.D. Va. 2013) (citing Erickson v. Pardus, 551 U.S. 89, 94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007)), DeMasters has established by Carilion's own letters that, at the very least, DeMasters' conduct here was not part of his "normal employment role."

In sum, Carilion has admitted through its statements to DeMasters that DeMasters was fired for standing in opposition to the unlawful treatment of Doe — this makes Carilion liable. *See, e.g.*, Bojangles Rests., Inc., 284 F. Supp. 2d at 328 ("[A]n employer's perception or even misperception can lead to potential liability[.]").

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

a. DeMasters is Protected Under the Participation Clause As An Employer's Internal Investigation is a Proceeding Under Title VII.

As Carilion aptly points out, "[t]he 'purpose of [the] participation clause is to protect the employee who utilizes the tools provided . . . to protect his rights'" (Defs. Br. 14 (citing Laughlin v. Metro Washington Airports Auth., 149 F.3d 253, 259 (4th Cir. 1998))). While the statutory language of Title VII is clear and its precision "makes it incorrect to infer that Congress meant anything other than what the text [says] on the subject of relation[,]" Univ. Texas Sw. Med. Ctr. V. Nassar, 133 S. Ct. 2517, 2539, 2532 (2013), it is evident that Congress did not use Commission-specific limiting language in the participation clause for a reason — as it has elsewhere in Title VII. Brief for the United States as *Amicus Curiae* Supporting Petitioner, Crawford v. Metro. Gov't, 555 U.S. 271 (2009) (No. 06-1595), at *16-17 [hereinafter "United States' Crawford *Amicus* Brief"] (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)))); *see also* 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"). And,

through the Faragher/Ellerth affirmative defense created by the Supreme Court, employers are incentivized to offer employees like DeMasters another "tool" to utilize — that being an internal complaint and investigation procedure. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 806 (1998). Again, if an internal procedure is offered, it becomes part of the broad sweeping protected activity under the participation prong. *See* 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.").[6] If this were not the case, employees would be hurt by utilizing the very tool the Supreme Court has incentivized employers to provide in order to *prevent and remedy* Title VII violations. Faragher, 524 U.S. at 806. The Faragher/Ellerth affirmative defense cannot be a shield to liability *and* permit employers to insist that the absence of an EEOC charge precludes any liability to retaliation for participation. United States' Crawford *Amicus* Brief at *21. As NELA explained in its *amicus* brief, "[t]his places employees in the untenable position of needing to file an EEOC charge to ensure protection from retaliation under the participation clause, jeopardizing their legal claim because they did not utilize the internal procedures

[6] Cases to the contrary cited by Carillion are not binding authority as they are circuit court opinions from other circuits. *See, e.g.*, Bojangles Rests., Inc., 284 F. Supp. 2d at 326 ("[N]one of the previous decisions addressing the issue are binding authority in this Court [as] [n]either the Fourth Circuit Court of Appeals nor the United States Supreme Court have ever addressed this particular issue.").

provided by the employer to prevent and remedy discrimination as required by the Faragher and Ellerth affirmative defense. This is antithetical to Congress' intent that Title VII protect employees from discrimination" (NELA Br. at 16).

b. DeMasters is Likewise Protected by the Participation Clause as He Was Terminated for His Involvement Leading to An EEOC Charge of Discrimination.

Contrary to Carilion's suggestion, DeMasters does not rest his participation claim solely on his statement to Carilion in December 2010 that Doe had been seen in EAP (*contra* Defs. Br. 16, n. 7). DeMasters counseled Doe that he had been subjected to sexual harassment, and that after complaining of the harassment, he was experiencing a hostile work environment and retaliation (JA 28 at ¶ 13; JA 31 at ¶ 24). And thus when Carilion continued to permit a hostile work environment and retaliation to persist, Doe filed an EEOC Charge of Discrimination (JA 31 at ¶ 26). It is reasonable to infer therefore that DeMasters' assistance consequently led Doe to file an EEOC Charge of Discrimination. In fact, Carilion's termination letter to Doe asserts as such, and Carilion plainly blamed DeMasters for Doe filing a charge of discrimination and lawsuit against it. Carilion expressly "'determined'" that DeMasters "'made statements that could reasonably have led John [Doe] to conclude that he should file suit against Carilion'" (JA 32 ¶ 32).

As the participation prong protects an employee who assists *in any manner*, 42 U.S.C. § 2000e-3(a), this is plainly protected participatory activity.[7] As explained previously, Title VII's participation clause "is meant to sweep broadly' to include even unreasonable and irrelevant activity." Martin v. Mecklenburg County, 151 Fed. Appx. 275, 279 (4th Cir. 2005) (citing Glover v. S.C. Law Enforcement Div., 170 F.3d 411, 414 (4th Cir. 1999); Deravin v. Kerik, 335 F.3d at 203 ("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 "assisted" Doe as

> [t]he word "assisted" has been interpreted to include both voluntary and involuntary assistance. Merritt v. Dillard Paper Company, 120 F.3d 1181, 1186-87 (11th Cir. 1997). It can even be interpreted to include accompanying another person or providing undefined help. Owens v. Rush, 654 F.2d 1370, 1379 (10th Cir. 1981) (not Title VII case, but court defined "assisted" to include accompanying a spouse

[7] "Section 704(a) of Title VII of the Civil Rights Act of 1964 makes it unlawful 'for an employer to discriminate against any of his employees or applicants for employment' who have either availed themselves of Title VII's protections or assisted others in so doing." Robinson v. Shell Oil Co., 519 U.S. 337, 339 (1997) (citing 78 Stat. 257, as amended, 42 U.S.C. § 2000e-3(a)). "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 Mar. 26, 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).

> to an attorney's office and helping in some undefined manner in drafting a charge of discrimination).
>
> Therefore, the word "assisted" means providing voluntary or involuntary support in any manner to a person the employer believes to have engaged, or fears will be engaging, in protected activity. The assistance may, but need not, be actual assistance so long as it is proven that the employer perceives that assistance was or will be given, and the facts are such that it is reasonable to believe that adverse action was taken against a plaintiff for providing aid and support to a person who was believed to be engaging in protected activity or about to so engage.

Bojangles Rests., Inc., 284 F. Supp. 2d at 329.

Additionally, Carilion's reliance on McNair v. Computer Data Sys., Inc., 1999 WL 30959, at *5 (4th Cir. 1999) and Thomas v. Goodyear Tire & Rubber Co., 2001 WL 34790222, at *3 (W.D. Va. 2001), aff'd, 31 Fed. Appx. 101 (4th Cir. 2002) for the proposition that DeMasters' claim cannot be analyzed under the participation prong because DeMasters took action prior to the filing of Doe's EEOC charge is misplaced. Both McNair and Thomas involve a plaintiff inquiring into discrimination being taken *against them* prior to filing their EEOC Charge. Thus, these decisions do not consider whether the plaintiffs "assisted" in any manner in an investigation, proceeding, or hearing under Title VII, as it is impossible to assist oneself in this way. Here, however, as explained previously DeMasters did "assist" Doe within the meaning of 42 U.S.C. § 2000e-3(a).

Moreover, it is irrelevant whether DeMasters' assistance actually led to Doe filing an EEOC Charge of Discrimination as he was fired because Carilion thought

that it did (JA 32 at ¶ 32 ("In a letter dated January 16, 2012, Derbyshire also stated that he had 'determined' that plaintiff had 'made statements that could reasonably have led John [Doe] to conclude that he should file suit against Carilion[.]'")).

Fogleman v. Mercy Hosp., 283 F.3d 561 (3d Cir. 2002) is instructive. There the court explained,

> As a final means of showing illegal retaliation under the anti-discrimination statutes, Greg argues that even if he was not engaged in primary protected activity, Mercy perceived him to be so engaged. Greg contends that Mercy fired him with the subjective intent of retaliating against him for engaging in protected activity, thereby violating the anti-retaliation provisions. The District Court disposed of this claim as a matter of law, concluding that the statutory language did not support a perception theory of retaliation. We disagree.
>
> Unlike the interpretation of "such individual" to allow for third party claims advocated by Greg that we rejected in Section II.A, we do not believe that the perception theory contradicts the plain text of the anti-discrimination statutes. Rather, we read the statutes as directly supporting a perception theory of discrimination due to the fact that they make it illegal for an employer to "discriminate against any individual because such individual has [engaged in protected activity.]" 42 U.S.C. § 12203(a) (emphases added). "Discrimination" refers to the practice of making a decision based on a certain criterion, and therefore focuses on the decisionmaker's subjective intent. What follows, the word "because," specifies the criterion that the employer is prohibited from using as a basis for decisionmaking. The laws, therefore, focus on the employer's subjective reasons for taking adverse action against an employee, so it matters not whether the reasons behind the employer's discriminatory animus are actually correct as a factual matter.
>
> As an illustration by analogy, imagine a Title VII discrimination case in which an employer refuses to hire a prospective employee because he thinks that the applicant is a Muslim. The employer is still discriminating on the basis of religion even if the applicant he refuses

> to hire is not in fact a Muslim. What is relevant is that the applicant, whether Muslim or not, was treated worse than he otherwise would have been for reasons prohibited by the statute. We have adopted this same approach in the labor law context, where we have consistently held that an employer's discharge of an employee for discriminatory reasons amounts to illegal retaliation even if it is based on the employer's mistaken belief that the employee engaged in protected activity. *See* Fogarty v. Boles, 121 F.3d 886, 891 (3d Cir. 1997); Brock v. Richardson, 812 F.2d 121, 125 (3d Cir. 1987). Accordingly, we hold that if Greg can show, as he claims, that adverse action was taken against him because Mercy thought that he was assisting his father and thereby engaging in protected activity, it does not matter whether Mercy's perception was factually correct.

Fogleman, 283 F.3d at 571-72.

Thus, the District Court's holding that the "lack of temporal proximity between DeMasters' interactions with Doe and Doe's institution of a Title VII proceeding proves fatal to DeMasters' participation clause claim[,]" (JA 89), was error. As is clear, there does not have to be a pending EEOC Charge for a plaintiff's assistance to be considered under the participation clause. *See, e.g.*, Bojangles Rests., Inc., 284 F. Supp. 2d at 328 ("An employer may not discriminate against an employee who it fears will later file a charge, testify, assist, or participate in an investigation or hearing" (citing Sauers v. Salt Lake County, 1 F.3d 1122, 1128 (10th Cir. 1993) (action taken in fear that person would soon file a claim falls within scope of retaliation clause); Croushorn v. Board of Trustees of University of Tennessee, 518 F. Supp. 9, 19 (M.D. Tenn. 1980) (failure to retain teacher after teacher stated he would file a charge could qualify as retaliation)).

Furthermore, Carilion plainly admitted that DeMasters was fired for his opposition to the unlawful treatment of Doe which led to an EEOC Charge of Discrimination — Carilion's decision to postpone action against DeMasters until after Doe's suit does not change this.[8]

III. The District Court Erred as a Matter of Law in Not Applying Thompson as There is No Question that He was Fired Because Of His Association with Doe and with Doe's Claim.

a. Cases Decided Prior to *Thompson* Are Not Controlling Authority.

Carilion cites four circuit court cases for support of a categorical rule prohibiting recovery for third party retaliation — all decided prior to 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)) (Defs. Br. 34, n.12). However, as is evident, circuit court cases decided prior to controlling Supreme Court precedent are irrelevant — especially a circuit court case that was specifically reversed by the Supreme Court (Defs. Br. 34, n. 12 (citing Thompson

[8] Indeed, given the fact that Carilion had a pending lawsuit against it by Doe, this was likely the first opportunity Carilion had to retaliate. *See, e.g.*, McGuire v. City of Springfield, 280 F.3d 794, 796 (7th Cir. 2002) (adverse action could be retaliatory even though it followed protected activity by ten years because it was the employer's first opportunity to retaliate); Porter v. California Dep't of Corrections, 383 F.3d 1018 (9th Cir. 2004) (first chance to retaliate occurred two years later when plaintiff was put under supervision of person who retaliated); Price v. Thompson, 380 F.3d 209, 213 (4th Cir. 2004) (assuming, without deciding, that adverse action taken at the first opportunity satisfies the causal connection element of the prima facie case).

v. N. Am. Stainless, LP, 567 F.3d 804, 811 (6th Cir. 2009), rev'd and remanded, 131 S. Ct. 863 (2011))). It is clearly the more recent Supreme Court precedent that controls: "Although we acknowledge the force of this point, we do not think it justifies a categorical rule that third-party reprisals do not violate Title VII. As explained above, we adopted a broad standard in Burlington because Title VII's antiretaliation provision is worded broadly. We think there is no textual basis for making an exception to it for third-party reprisals, and a preference for clear rules cannot justify departing from statutory text." Thompson, 131 S. Ct. at 868; *see also, e.g.*, Bojangles Rests., Inc., 284 F. Supp. 2d at 326 (noting that binding authority would be a Supreme Court decision, not cases from other circuits).

b. It is Irrelevant that Doe's Suit was Settled Prior to DeMasters Being Terminated.

It is irrelevant that Carilion waited until after Doe's suit was settled to fire DeMasters — because had Doe known prior to filing his EEOC Charge and civil lawsuit, he, as a reasonable worker, might have well been dissuaded from engaging in these protected activities if he knew that his counselor who had assisted him in handling the harassment would be fired. *See, e.g.*, Thompson, 131 S. Ct. at 868 ("We think it obvious that a reasonable worker might be dissuaded from engaging

in protected activity if she knew that her fiance would be fired.").[9] As NELA explained,

> Contrary to the district court's reasoning, to state a viable claim of third-party retaliation, a plaintiff need not allege that the employer took the adverse employment action in order to punish the employee who engaged in the protected activity. Justice Kennedy, at oral argument in Thompson, anticipated facts similar to the facts presented here. Justice Kennedy asked, "so if an employer says, now, if anybody makes a discrimination claim, we're going to fire two other employees just to show you that we run an efficient corporation here, you say that that is proper or improper?" Transcript of Oral Argument at 32, Thompson, 131 S. Ct. 863 (2011) (No. 09-291), *available at* http://1.usa.gov/1a14SIw. Counsel for respondent-employer conceded that the policy would be "improper." Id. While Justice Kennedy was testing the limits of counsel's argument, his question highlighted a significant issue and one that the unanimous Thompson Court answered in favor of the plaintiff. The Thompson Court's holding reiterated and expanded the scope of the Court's prior ruling in Burlington Northern that retaliation is actionable if the employer's adverse action could deter a reasonable employee from filling a charge of discrimination. Thompson, 131 S. Ct. at 868.

---

[9] As the Supreme Court explained in Thompson,

> We must also decline to identify a fixed class of relationships for which third-party reprisals are unlawful. We expect that firing a close family member will almost always meet the Burlington standard, and inflicting a milder reprisal on a mere acquaintance will almost never do so, but beyond that we are reluctant to generalize. As we explained in Burlington, 548 U.S., at 69, 126 S. Ct. 2405, 165 L. Ed. 2d 345, "the significance of any given act of retaliation will often depend upon the particular circumstances." Given the broad statutory text and the variety of workplace contexts in which retaliation may occur, Title VII's antiretaliation provision is simply not reducible to a comprehensive set of clear rules.

Thompson, 131 S. Ct. at 868-69.

(NELA Br. at 20-21).

Furthermore, to the extent this Court finds it necessary that Carilion's actions be in an effort to punish Doe, this too is a question of fact. Contrary to Carilion's assertion, it is not impossible that Carilion terminated DeMasters to punish Doe even though Doe's suit had been settled (*contra* Defs. Br. 11) — in fact, since the case had been settled, this is likely the only way it could punish Doe at that point.

IV. Maintaining Unfettered Access to Statutory Remedial Measures is a Primary Purpose of the Antiretaliation Provision.

As Carilion points out, Robinson v. Shell Oil Co., 519 U.S. 337 (1997) explains that a *primary purpose of the antiretaliation provision* is "[m]aintaining unfettered access to statutory remedial mechanisms." Robinson, 519 U.S. at 346 (citations omitted) ("The EEOC quite persuasively maintains that it would be destructive of this purpose of the antiretaliation provision for an employer to be able to retaliate with impunity against an entire class of acts under Title VII--for example, complaints regarding discriminatory termination. We agree with these contentions and find that they support the inclusive interpretation of 'employees' in § 704(a) that is already suggested by the *broader context of Title VII*" [emphasis added]) (Defs. Br. 56-58). Robinson is instructive here, as each element of the antiretaliation provision is to be applied in accordance with the purpose of the entire antiretaliation provision. Thus, the participation and opposition prongs of

the protected activity element of the antiretaliation provision must be applied in accordance with the primary purpose to maintain "unfettered access to statutory remedial mechanisms." Robinson, 519 U.S. at 346 (citations omitted). DeMasters has done this. Carilion's argument that DeMasters did not engage in protected activity does not change the purpose of the antiretaliation provision of Title VII (*contra* Defs. Br. 57). Furthermore, as demonstrated above, DeMasters has engaged in protected activity under both the participation and the opposition prongs, and was terminated for this protected activity. Here, DeMasters and the *amici* have simply applied the law to these facts — not expanded the law (*contra* Defs. Br. 39).[10] And, under the law, it is evident that DeMasters has stated a claim for retaliation.

CONCLUSION

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

[10] It is amusing that defendants allege that the EEOC is trying to expand retaliation beyond the limits embraced by the EEOC (Defs. Br. 38).

Respectfully Submitted,

J. NEIL DeMASTERS

By /s/ *Terry N. Grimes*
Of Counsel

Terry N. Grimes, Esquire (VSB #24127)
TERRY N. GRIMES, ESQ., P.C.
320 Elm Avenue, S.W.
Roanoke, Virginia 24016
TELEPHONE: (540) 982-3711
FACSIMILE: (540) 345-6572
tgrimes@terryngrimes.com

Counsel for Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)
Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

   this brief contains 5,836 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

   this brief has been prepared in a proportional spaced typeface using Microsoft Word in 14 point Times New Roman.

/s/ Terry N. Grimes
Terry N. Grimes

Counsel for Appellant

Dated: March 28, 2014

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on March 28, 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:

Agnis C. Chakravorty
Frank K. Friedman
Joshua R. Treece
WOODS ROGERS, PLC
Wells Fargo Tower
10 South Jefferson Street
P. O. Box 14125
Roanoke, VA 24038
(540) 983-7727

Counsel for Appellees

Michael L. Foreman
PENNSYLVANIA STATE UNIVERSITY
DICKINSON SCHOOL OF LAW
329 Innovation Boulevard
Suite 118
State College, PA 16803
(814) 865-3832

Counsel for Amicus National Employment Lawyers Association

Susan L.P. Starr
U.S. Equal Employment
Opportunity Commission
Office of General Counsel
131 M. Street, N.E.
Washington, DC 20507
(202) 663-4727

Counsel for Amicus Supporting Appellant Equal Employment Opportunity Commission

The necessary filing and service were performed in accordance with the instructions given to me by counsel in this case.

/s/ Adrienne R. Acra-Passehl

Adrienne R. Acra-Passehl
GIBSON MOORE APPELLATE SERVICES, LLC
421 East Franklin Street
Suite 230
Richmond, VA 23219