No. 22-10612

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JACQUELINE HUMPHREY,

Plaintiff-Appellant

v.

AUGUSTA, GEORGIA,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT AND URGING REVERSAL ON THE ISSUE ADDRESSED HEREIN

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In accordance with Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, the United States as amicus curiae certifies that, in addition to those identified in the certificates filed by plaintiff-appellant and defendant-appellee, the following persons may have an interest in the outcome of this case:

1. Calderon, Tovah R., U.S. Department of Justice, Civil Rights Division, counsel for the United States;
2. Clarke, Kristen, U.S. Department of Justice, Civil Rights Division, counsel for the United States;
3. Goldstein, Jennifer S., Equal Employment Opportunity Commission, counsel for the United States;
4. Horowitz, Jeremy D., Equal Employment Opportunity Commission, counsel for the United States;
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The United States is not aware of any publicly traded corporations or companies that have an interest in the outcome of this case or appeal.

s/ Alisa C. Philo
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Date: May 13, 2022

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INTEREST OF THE UNITED STATES

The United States has a direct and substantial interest in this appeal, which presents an important question regarding the scope of protected oppositional activity under the anti-retaliation provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-3(a). The Attorney General and the Equal Employment Opportunity Commission (EEOC) share responsibility for enforcing Title VII. See

42 U.S.C. 2000e-5(a) and (f)(1). The United States files this brief under Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE ISSUE

Whether the district court erred in applying the so-called "manager rule" to conclude that, because it found that Humphrey's opposition to unlawful employment practices occurred in the course of her job duties, Humphrey was not protected from retaliation under Title VII, 42 U.S.C. 2000e-3(a).[1]

STATEMENT OF THE CASE

1. Factual Background

Plaintiff Jacqueline Humphrey was hired to work in the Equal Employment Opportunity (EEO) Office for Defendant, the City of Augusta, Georgia. Doc. 52, at 1.[2] Her job duties included investigating EEO claims raised by City employees, making factual findings, and proposing corrective action. Doc. 52, at 1-2. At issue here is Humphrey's conduct with respect to four EEO investigations. See Doc. 52, at 2.

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

[2] "Doc. __, at __" refers to the district court record in this case with the first number corresponding to the number of the docket entry and the second number corresponding to the CM/ECF-assigned page number.

First, Humphrey investigated an internal complaint of gender discrimination filed by Evelyn Washington. Doc. 52, at 2. After Washington filed a charge of discrimination with the EEOC on the same basis, Humphrey communicated directly with the EEOC investigator. Doc. 52, at 2-3. In an email to the law department about this correspondence, Humphrey alleged that the law department's "continued interference * * * as it relates to this office appears to be retaliatory and harassing." Doc. 43-1, at 63; see also Doc. 52, at 3.

Second, Humphrey investigated an internal allegation of pay disparity filed by Roy Searles. Doc. 43-1, at 76; see also Doc. 52, at 3. In her case determination, which was sent to the City Commission, Humphrey concluded that the allegation was unfounded but explained that she had been unable to conduct an objective investigation because of the lack of information provided by the City. Doc. 43-1, at 78-80. Humphrey stated that she "perceive[d] the actions of [human resources (HR)], along with [Searles' supervisor] * * * as intentional interference with office operations" and "retaliatory for the purposes of Title VII." Doc. 43-1, at 79.

Third, Humphrey investigated and substantiated an internal allegation of pay disparity filed by James Henry. Doc. 49-1, at 1-2; see also Doc. 52, at 3-4. The Mayor informed Humphrey that Henry later "refused to settle his EEOC case

because the [EEOC] investigator substantiated Mr. Henry's claims . . . because of Plaintiff's findings." Doc. 52, at 3-4 (alterations in original).

Fourth, Humphrey investigated and substantiated an internal allegation filed by Lori Howard of race discrimination in a promotional process. Doc. 43-1, at 103-106; see also Doc. 52, at 4. Humphrey "sent that finding 'to all Defendant Commissioners.'" Doc. 52, at 4.

Five days after receiving a copy of Humphrey's findings regarding Howard's claim, the City Commissioners called a "special meeting" at which Humphrey was fired. Doc. 52, at 4. Humphrey alleges that she was retaliated against because "she substantiated Defendant's employees' claims, which assisted the employees before the EEOC and created a 'substantial cost' to Defendant." Doc. 52, at 4. The City maintains that she was fired for performance issues, which "had been building for years and reached a critical mass at this meeting." Doc. 43, at 8-9.

2. Procedural History

Humphrey filed a complaint against the City alleging retaliation in violation of Title VII. Doc. 12, at 5-6. At the summary judgment stage, Humphrey stipulated (Doc. 49, at 10 n.2) that she was proceeding only under the "opposition clause" of Title VII's anti-retaliation provision, which prohibits an employer from discriminating against "any" employee because she "has opposed any practice"

made unlawful by Title VII, 42 U.S.C. 2000e-3(a). Because the district court concluded that she had not engaged in protected activity under the opposition clause, it granted summary judgment to the City. Doc. 52, at 13.

In reaching this conclusion, the district court first held that it "must apply the manager rule" based on this Court's decision in *Brush* v. *Sears Holding Corp.*, 466 F. App'x 781 (11th Cir. 2012) (unpublished), cert. denied, 568 U.S. 1143 (2013). Doc. 52, at 11. The district court explained that the manager rule "holds that when a management employee, 'in the course of her normal job performance, disagrees with or opposes the actions of an employer,' that disagreement does not equate to protected activity." Doc. 52, at 11 (quoting *Brush*, 466 F. App'x at 787). "Instead, [for an employee's actions to] qualify as 'protected activity' an employee must cross the line from being an employee performing her job . . . to an employee lodging a personal complaint." Doc. 52, at 11 (alterations in original; internal quotation marks omitted) (quoting *Brush*, 466 F. App'x at 787).

Applying the manager rule, the district court concluded that "Plaintiff's actions do not amount to protected activity." Doc. 52, at 11. Like the plaintiff in *Brush*, Humphrey had "informed [Defendant] of [each claimant's] allegations, investigated those allegations, and reported the results of her investigation[s] to [Defendant]." Doc. 52, at 12 (alterations in original) (quoting *Brush*, 466 F. App'x at 787). The district court rejected Humphrey's arguments that her adverse

findings went beyond her job duties and, in the alternative, that she was not a manager to whom the rule should apply. See Doc. 52, at 12-13. The district court concluded that "Plaintiff's investigations, including the findings of those investigations (including results adverse to Defendant), do not constitute protected activity." Doc. 52, at 13.

The district court entered judgment against Humphrey on January 24, 2022. Doc. 53. Humphrey filed a timely notice of appeal. Doc. 55.

SUMMARY OF ARGUMENT

Based on its finding that Humphrey's opposition occurred in the course of her job duties as an EEO coordinator, the district court erroneously concluded that Humphrey had not engaged in protected activity under Title VII. The opposition clause of Title VII's anti-retaliation provision prohibits an employer from acting "against any of his employees" because the employee "has opposed any practice made an unlawful employment practice by [Title VII]." 42 U.S.C. 2000e-3(a). "Any" of a defendant's "employees" is defined broadly with enumerated exceptions inapplicable here. And the plain meaning of "oppose," as confirmed by the Supreme Court in *Crawford* v. *Metropolitan Government of Nashville & Davidson County*, 555 U.S. 271 (2009), includes when an employee communicates her belief to her employer that the employer has engaged in unlawful discrimination or retaliation. So long as an employee's manner of opposition was

reasonable and she had a good-faith, reasonable belief that the conduct that she opposed was unlawful, she is protected from retaliation under Title VII.

The district court nevertheless rejected Humphrey's retaliation claim based solely on its application of the so-called "manager rule." This doctrine, derived from cases decided under the Fair Labor Standards Act (FLSA), states that managers and other employees with EEO responsibilities have not engaged in protected activity under the FLSA's anti-retaliation provision unless they have gone beyond their job duties and have taken action adverse to their employer. Regardless of its validity for FLSA claims, the manager rule contravenes Title VII's text and precedent and is further undermined by important practical considerations. This Court's unpublished opinion in *Brush* v. *Sears Holding Corp.*, 466 F. App'x 781 (11th Cir. 2012), cert. denied, 568 U.S. 1143 (2013), upon which the district court relied, overlooked Title VII's text and these other considerations. Moreover, the *Brush* decision is not binding and is in at least some tension with this Court's more recent precedent. Thus, like every other court of appeals to directly address this issue in a published opinion, this Court should hold that the manager rule does not apply to claims brought under the opposition clause of Title VII's anti-retaliation provision.

ARGUMENT

THE DISTRICT COURT ERRED IN APPLYING THE MANAGER RULE TO HUMPHREY'S TITLE VII RETALIATION CLAIM

Title VII prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. See 42 U.S.C. 2000e-2(a). To "secure that primary objective," Title VII also prohibits employers from retaliating against employees who seek "to secure or advance enforcement of the Act's basic guarantees." *Burlington N. & Santa Fe Ry. Co.* v. *White*, 548 U.S. 53, 63 (2006). Specifically, the anti-retaliation provision prohibits discrimination against "any" employee "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). Here, the district court rejected Humphrey's claim under the opposition clause based on its erroneous application of the manager rule.

A. An Employee Engages In Protected Activity Under The Opposition Clause When She Communicates In A Reasonable Manner Her Good Faith Belief That Unlawful Discrimination Has Occurred

The opposition clause of Title VII's anti-retaliation provision protects "any * * * employee[]" who "oppose[s] any practice made an unlawful employment practice by this subchapter." 42 U.S.C. 2000e-3(a). Title VII defines an "employee" as "an individual employed by an employer," with an exception only

for certain elected officials and their staff or appointees. 42 U.S.C. 2000e(f). And, as the Supreme Court has explained, "the word 'any' has an expansive meaning." *Babb* v. *Wilkie*, 140 S. Ct. 1168, 1173 n.2 (2020) (citation omitted); see also *Merritt* v. *Dillard Paper Co.*, 120 F.3d 1181, 1186 (11th Cir. 1997) ("'[A]ny' means all.").

The Supreme Court also has explained that "[t]he term 'oppose,' being left undefined by the statute, carries its ordinary meaning * * * : '[t]o resist or antagonize . . .; to contend against; to confront; resist; withstand." *Crawford* v. *Metropolitan Gov't of Nashville & Davidson Cnty.*, 555 U.S. 271, 276 (2009) (internal citation omitted) (quoting Webster's New International Dictionary 1710 (2d ed. 1957)). "'When an employee communicates to her employer a belief that the employer has engaged in . . . a form of employment discrimination, that communication' virtually always 'constitutes the employee's *opposition* to the activity.'" *Ibid.* (quoting U.S. Amicus Br. at 9, *Crawford*, *supra* (No. 06-1595)); see also EEOC Enforcement Guidance on Retaliation and Related Issues, 2016 WL 4688886, at *7 (Aug. 25, 2016) ("Protected 'opposition' activity broadly includes the many ways in which an individual may communicate explicitly or implicitly opposition to perceived employment discrimination.").

Courts have recognized two limitations on when such opposition is protected from retaliation. First, "the manner in which an employee expresses her opposition

to an allegedly discriminatory employment practice must be reasonable." *Gogel* v. *Kia Motors Mfg. of Ga., Inc.*, 967 F.3d 1121, 1139 (11th Cir. 2020) (en banc) (citation omitted). Second, the employee must have a "good faith, reasonable belief" that the employment practice being opposed is unlawful. See *Dixon* v. *Hallmark Cos.*, 627 F.3d 849, 857 (11th Cir. 2010) (citation omitted).

Because the district court did not address either limitation, the question on appeal is only whether Humphrey can be said to have "opposed" an unlawful employment practice.[3] Under the proper standard, Humphrey, who indisputably was an employee at the time, opposed unlawful employment practices when she complained of perceived retaliation in conjunction with her internal investigations regarding Washington and Searles, and when she substantiated and reported her findings of discrimination with respect to the allegations of Henry and Howard. Humphrey did not "merely transmit[] or investigate[] a discrimination claim without expressing her own support for that claim." *Littlejohn* v. *City of New York*, 795 F.3d 297, 318 (2d Cir. 2015). Rather, she communicated her belief to her employer that it had engaged in unlawful discrimination and retaliation. In other

[3] As noted above, the United States takes no position on the distinct issues of whether Humphrey's opposition was done in a reasonable manner or whether she had a good faith, reasonable belief that the conduct she opposed was unlawful. See note 1, *supra*.

words, she opposed unlawful employment practices. See *Crawford*, 555 U.S. at 276.

B. The Manager Rule, Which Is Sometimes Applied To Claims Under The FLSA, Is Inappropriate In The Title VII Context

Applying the so-called "manager rule," the district court nevertheless held that Humphrey had not engaged in protected opposition. Doc. 52, at 10-13. However, the manager rule, which originated in the context of FLSA claims, contravenes Title VII's plain text and the Supreme Court's decision in *Crawford*. It is also undermined by important practical considerations specific to Title VII. Although this Court's unpublished decision in *Brush* v. *Sears Holding Corp.*, 466 F. App'x 781 (11th Cir. 2012), cert. denied, 568 U.S. 1143 (2013), applied the manager rule to a Title VII retaliation claim, that decision failed to consider Title VII's statutory language and context. The *Brush* decision is an outlier among the courts of appeals that have addressed the question and is in at least some tension with this Court's recent precedent. Accordingly, this Court should hold that the manager rule does not apply to claims brought under the opposition clause of Title VII's anti-retaliation provision.

1. The Manager Rule Contravenes Title VII's Text And Relevant Precedent And Is Further Undermined By Important Practical Considerations

The manager rule is a judicially-created doctrine that originated in an FLSA case. See *McKenzie* v. *Renberg's Inc.*, 94 F.3d 1478, 1486-1487 (10th Cir. 1996),

cert. denied, 520 U.S. 1186 (1997). Since then, some courts have held that managers and other employees with EEO responsibilities do not engage in protected activity under the FLSA if their actions were part of their job duties. See *McKenzie*, 94 F.3d at 1486-1487; see also *McKinnon* v. *L-3 Commc'ns Corp.*, 814 F. App'x 35, 42-43 (6th Cir. 2020) (unpublished); *Hagan* v. *Echostar Satellite, L.L.C.*, 529 F.3d 617, 627-628 (5th Cir. 2008); *Claudio-Gotay* v. *Becton Dickinson Caribe, Ltd.*, 375 F.3d 99, 102 (1st Cir. 2004), cert. denied, 543 U.S. 1120 (2005). But see *Rosenfield* v. *GlobalTranz Enters., Inc.*, 811 F.3d 282, 287-288 (9th Cir. 2015) (declining to fully embrace the manager rule in the FLSA context), cert. denied, 137 S. Ct. 85 (2016). This rule, which became known as the "manager rule," requires a manager or EEO employee to "step outside [her] role of representing the company" and take action adverse to her employer in order to be protected from retaliation under the FLSA. See *McKenzie*, 94 F.3d at 1486-1487; see also *Littlejohn*, 795 F.3d at 317 n.16 (explaining the evolution of the manager rule but declining to adopt it under Title VII).

Regardless of its place in FLSA jurisprudence, the manager rule cannot be reconciled with Title VII's text or relevant Supreme Court precedent. And important practical considerations counsel against, not in favor of, adopting the rule in the Title VII context.

a. The manager rule contravenes Title VII's plain language. The "first step" in any statutory analysis is to "determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 340 (1997). To do so, the Court must "begin by examining the key statutory terms." *Bostock* v. *Clayton Cnty.*, 140 S. Ct. 1731, 1738-1739 (2020).

Title VII prohibits retaliation against an employee who has "opposed" discrimination. 42 U.S.C. 2000e-3(a). As described above, the Supreme Court has already confirmed that "[t]he term 'oppose,' * * * carries its ordinary meaning," *i.e.*, "[t]o resist or antagonize . . .; to contend against; to confront; resist; withstand." *Crawford*, 555 U.S. at 276 (quoting Webster's New International Dictionary 1710 (2d ed. 1957)). "'When an employee communicates to her employer a belief that the employer has engaged in . . . a form of employment discrimination, that communication' virtually always 'constitutes the employee's *opposition* to the activity.'" *Ibid.* (quoting U.S. Amicus Br. at 9, *Crawford*, *supra* (No. 06-1595)). There is no requirement in Title VII's text that an employee go beyond her job duties to engage in actionable opposition.

Nor is there a textual basis to exclude a subset of employees, namely those in management or with EEO responsibilities, from protection if they meet the definition of oppositional activity. The statute applies to "*any* of [the employer's]

employees." 42 U.S.C. 2000e-3(a) (emphasis added). Given the ordinary meaning of "any" and the statutory definition of "employee," Congress could not have "intended to excise a large category of workers from its anti-retaliation protections." *DeMasters* v. *Carilion Clinic*, 796 F.3d 409, 422 (4th Cir. 2015); see also *Jackson* v. *Genesee Cnty. Rd. Comm'n*, 999 F.3d 333, 345 (6th Cir. 2021) (explaining that the use of "any" in Title VII's anti-retaliation provision "suggests that all employees are subject to the same standard"); *Littlejohn*, 795 F.3d at 318 (explaining that the "plain language" of the opposition clause "does not distinguish among entry-level employees, managers, and any other type of employee").

b. The Supreme Court in *Crawford* refused to add judicial requirements to the statutory text. In that case, the plaintiff alleged that she was fired in retaliation for reporting sexual harassment during an internal investigation initiated by an HR officer. See *Crawford*, 555 U.S. at 274. The district court granted summary judgment to the defendant, in part, because it found that the plaintiff had not sufficiently opposed the allegedly unlawful conduct. See *id.* at 275. The Sixth Circuit affirmed, "taking the view that the [opposition] clause demands active, consistent 'opposing' activities to warrant protection against retaliation * * * and that an employee must instigate or initiate a complaint to be covered." *Id.* at 277 (internal quotation marks, citations, and alterations omitted).

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

c. Important practical considerations also weigh in favor of recognizing that managers and EEO employees can "oppose" unlawful employment actions, even if such opposition falls within the bounds of their job descriptions. In particular, the manager rule does not make sense in light of two well-established aspects of Title VII law.

First, the manager rule could have a perverse interaction with Title VII's affirmative defense in hostile work environment cases. Under *Faragher* v. *City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742 (1998), in certain circumstances, employers have an affirmative defense to liability under Title VII if plaintiffs fail to take advantage of their internal investigation processes. See *Crawford*, 555 U.S. at 278 (summarizing the

Faragher/*Ellerth* defense). Yet, under the manager rule, "the categories of employees best able to assist employees with discrimination claims—the personnel that make up [employee assistance programs], HR, and legal departments—would receive no protection from Title VII if they oppose discrimination targeted at the employees they are duty-bound to protect." *DeMasters*, 796 F.3d at 423.

As a result, an employer could gain the benefit of the affirmative defense while retaliating against the officials who conduct the internal investigations for effectively doing their jobs. Cf. *Johnson* v. *University of Cincinnati*, 215 F.3d 561, 577 (6th Cir.) ("Said differently, an employer inclined to engage in invidious discrimination in the workplace could hire an affirmative action official in order to convey the false impression that the employer is interested in eliminating illegal discrimination from the workplace, and proceed to retaliate against the official secure in the knowledge that no legal claim could be lodged against the employer for its actions."), cert. denied, 531 U.S. 1052 (2000). And this could disincentivize employees from using the internal investigation processes to bring claims of discrimination and retaliation to light in the first place. *DeMasters*, 796 F.3d at 423.

Second, the manager rule runs counter to the requirement that the manner of an employee's opposition be reasonable. As the Fourth Circuit explained, applying the reasonable-manner rule "in tandem with the 'manager rule' * * * would

create a dilemma for employees who would have to step outside the scope of employment for their activity to be protected under Title VII's anti-retaliation provision, but would risk losing that protection if the deviation from their job responsibilities could be deemed sufficiently insubordinate or disruptive." *DeMasters*, 796 F.3d at 423. There is "no need to make plaintiffs walk a judicial tightrope when the statutory scheme created by Congress offers a clear path to relief." *Ibid.*

d. These considerations are not outweighed by a concern that some courts have expressed in the FLSA context that, without the manager rule, "nearly every activity in the normal course of a manager's job would potentially be protected activity," making it difficult to discipline or discharge groups of employees "without fear of a lawsuit." *Hagan*, 529 F.3d at 628; see also *Littlejohn*, 795 F.3d at 318 (rejecting same argument under Title VII). This is because a Title VII retaliation claim under the opposition clause already is subject to other, important limitations.

As set forth above, to constitute "protected activity," the plaintiff's *manner* of opposition must be reasonable *and* she must have had a *good faith, reasonable basis* for believing that the conduct she opposed was unlawful. Both limiting principles require fact-specific analyses for which an employee's job responsibilities could be relevant. For example, under the reasonable-manner

requirement, "an employee's oppositional conduct loses its protection when the manner chosen to voice that opposition so interferes with the employee's performance of her job that it renders her ineffective in the position for which she was employed." *Gogel*, 967 F.3d at 1141. In *Gogel*, this Court found that the plaintiff's opposition was unprotected because, by recruiting another employee to file a Title VII suit against the employer, the plaintiff "chose to act in a way that conflicted with the core objectives of her sensitive and highly important position," rendering her "entirely ineffective as manager of the Team Relations department." *Id.* at 1150. Similarly, in *Hamm* v. *Members of the Board of Regents*, 708 F.2d 647 (11th Cir. 1983), this Court held that a plaintiff who was responsible for investigating discrimination complaints had not engaged in protected conduct, because she had failed to follow the applicable procedures and instead "repeatedly chose to work outside the framework [her employer] was attempting to establish to deal with discrimination claims." *Id.* at 654; see also *Gogel*, 967 F.3d at 1139 (discussing *Hamm*).

In addition, even if a plaintiff establishes that she engaged in "protected activity," this is only one factor to establish a *prima facie* case of retaliation. See *Gogel*, 967 F.3d at 1134-1135 (explaining that the plaintiff must also show that she suffered an adverse action that was causally related to the protected activity). If a plaintiff establishes a *prima facie* case of retaliation, the burden of production

shifts to her employer to articulate a "legitimate, non-discriminatory reason for the employment action." *Id.* at 1135. If the employer meets that burden, the plaintiff "must then demonstrate that the proffered reason was merely a pretext to mask [retaliatory] actions." *Ibid.* (internal quotation marks and citation omitted; alteration in original).

For all these reasons, the FLSA's manager rule is incompatible with Title VII.

2. The District Court Relied On This Court's Unpublished Decision In Brush*, Which Overlooked The Different Statutory Context When Applying The FLSA-Derived Manager Rule To A Title VII Claim*

The district court nevertheless held that it "must apply the manager rule" in light of this Court's unpublished decision in *Brush*. Doc. 52, at 11. There, this Court "f[ound] the 'manager rule' persuasive and a viable prohibition against certain individuals recovering under Title VII." *Brush*, 466 F. App'x at 787. In importing the manager rule from the FLSA context, *Brush* ignored the textual differences between the FLSA and Title VII and minimized the importance of *Crawford*.

In *Brush*, this Court relied on FLSA cases from other circuits to apply the manager rule to a Title VII retaliation claim without recognizing the different statutory context. See 466 F. App'x at 787 (citing *McKenzie* v. *Renberg's, Inc.*,

supra; *Hagan* v. *Echostar Satellite, L.L.C.*, *supra*).[4] The FLSA "sets forth employment rules concerning minimum wages, maximum hours, and overtime pay," and prohibits retaliation against employees who attempt to enforce these rules. *Kasten* v. *Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 4 (2011). Unlike Title VII, the FLSA only prohibits retaliation against employees who file a complaint or participate in certain FLSA proceedings; it does not prohibit retaliation against employees who more broadly "oppose" an employer's unlawful employment practices.[5] Compare 42 U.S.C. 2000e-3(a), with 29 U.S.C. 215(a)(3); see also *DeMasters*, 796 F.3d at 422 (recognizing that "the conduct protected by the FLSA is far more constricted than the broad range of conduct protected by Title VII's anti-retaliation provision"). The breadth of Title VII's opposition clause, as confirmed by the Supreme Court's decision in *Crawford*, makes the manager rule particularly inapt.

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[4] It does not appear that this Court has itself adopted the manager rule in the FLSA context. See *Newhouse* v. *Lowndes Advoc. Res. Ctr., Inc.*, No. 7:19-cv-49, 2021 WL 5035031, at *7 n.3 (M.D. Ga. Mar. 31, 2021) (observing that "[t]he Eleventh Circuit has not recognized the manager rule in a published opinion").

[5] The FLSA makes it unlawful "to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee." 29 U.S.C. 215(a)(3).

The Court in *Brush*, however, failed to engage with *Crawford*'s conclusion concerning the plain meaning of Title VII's text. Instead, the Court characterized *Crawford* as pertaining "only to whether the reporting of a harassment claim was covered by Title VII where the reporting was solicited rather than volunteered." *Brush*, 466 F. App'x at 787. According to the Court, *Crawford* "did not address whether a disinterested party to a harassment claim could use that harassment claim as its own basis for a Title VII action." *Brush*, 466 F. App'x at 787. But, as explained above, *Crawford* cannot be read so narrowly. *Crawford* emphasized the expansive meaning of "opposition" and rejected judicially-created requirements that would improperly limit the statute's reach. See 555 U.S. at 276-278. Just as there is no basis to require opposition to originate with the plaintiff, there is no basis to require opposition to occur outside of certain plaintiffs' job duties.

3. This Court Should Join Other Circuits And Hold That The Manager Rule Does Not Apply To Title VII

Other than this Court's unpublished decision in *Brush*, no court of appeals has squarely held that the manager rule *does* apply to Title VII.[6] Instead, multiple

[6] The Eighth Circuit's decision in *EEOC* v. *HBE Corp.*, 135 F.3d 543 (8th Cir. 1998), and the Tenth Circuit's decision in *Weeks* v. *Kansas*, 503 F. App'x 640 (10th Cir. 2012) (Gorsuch, J.) (unpublished), are not to the contrary. In *HBE Corp.*, the Eighth Circuit simply acknowledged a defendant's argument regarding the manager rule but found it inapplicable on the facts. See 135 F.3d at 554. And in *Weeks*, the Tenth Circuit applied the manager rule because the appellant had waived any objection to it, but observed that, if preserved, "one might perhaps

(continued...)

courts of appeals have held or suggested that the manager rule is inapplicable to Title VII. And even this Court's more recent precedent is in at least some tension with *Brush*.

Three courts of appeals have explicitly rejected the manager rule under Title VII in published opinions. The Fourth Circuit unequivocally held that "the 'manager rule' has no place in Title VII enforcement." *DeMasters*, 796 F.3d at 424. Likewise, the Second Circuit, "decline[d] to adopt the manager rule," reasoning that "[t]he manager rule's focus on an employee's job duties, rather than the oppositional nature of the employee's complaints or criticisms, is inapposite in the context of Title VII retaliation claims." *Littlejohn*, 795 F.3d at 317 n.16. Most recently, the Sixth Circuit concluded that "[t]here are good reasons * * * not to extend the FLSA manager rule to Title VII claims." *Jackson*, 999 F.3d at 346.

Two more courts of appeals have cast doubt on the rule's applicability to Title VII. In an unpublished decision, the Tenth Circuit found "no support, in either the text of Title VII or related case law," for the manager rule. *Poff* v. *Oklahoma*, 683 F. App'x 691, 701 n.5 (10th Cir. 2017). And, although it declined to decide the issue, the First Circuit observed "that the language of the

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(...continued)
argue that *McKenzie*'s rule itself has been superseded" by *Crawford*. 503 F. App'x at 642-643.

antiretaliation provision of the FLSA is different from that of Title VII." *Collazo* v. *Bristol-Myers Squibb Mfg., Inc.*, 617 F.3d 39, 49 & n.5 (1st Cir. 2010).

Although this Court held that the manager rule applied to a Title VII retaliation claim in *Brush*, 466 F. App'x at 787, that decision is non-binding, see 11th Cir. R. 36-2, and in at least some tension with this Court's more recent precedent. In *Gogel*, an en banc decision, this Court rejected an HR manager's retaliation claim because the manner of her opposition was unreasonable. 967 F.3d at 1144-1150. In doing so, it did not mention the manager rule or cite *Brush*. Instead, the Court stated in dicta that the plaintiff's "internal advocacy before Kia management on behalf of other employees was clearly protected conduct." *Id.* at 1144. The Court did not, however, expressly reject (or endorse) the manager rule.[7]

This Court should not adopt the reasoning in *Brush*. Instead, like its sister circuits, this Court should hold that the FLSA's manager rule does not apply to claims brought under the opposition clause of Title VII's anti-retaliation provision.

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[7] This issue is also presented in two pending cases before this Court, *Patterson* v. *Georgia Pacific, LLC*, No. 20-12733 (11th Cir. docketed July 22, 2020), and *Nelson* v. *Health Services, Inc.*, No. 21-11319 (11th Cir. docketed Apr. 21, 2021). The EEOC filed amicus briefs in both cases arguing that the manager rule does not apply to retaliation claims under Title VII.

CONCLUSION

For the foregoing reasons, the district court erred when it applied the manager rule to Humphrey's retaliation claim under Title VII.

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CERTIFICATE OF COMPLIANCE

This brief complies with the length limitation of Federal Rule of Appellate Procedure 29(a)(5) because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), this brief contains 5,170 words according to the word processing program used to prepare the brief.

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

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Date: May 13, 2022

CERTIFICATE OF SERVICE

I hereby certify that on May 13, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

I further certify that four paper copies identical to the electronically filed brief will be mailed to the Clerk of the Court by Federal Express.

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