No. 21-11319

In the
United States Court of Appeals
for the Eleventh Circuit

LISA NELSON,
Plaintiff-Appellant,

v.

HEALTH SERVICES, INC.,
Defendant-Appellee.

On Appeal from the United States District Court
for the Middle District of Alabama

BRIEF OF AMICUS CURIAE ALABAMA DEFENSE LAWYERS ASSOCIATION IN SUPPORT OF AFFIRMANCE FOR DEFENDANT-APPELLEE

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CERTIFICATE OF INTERESTED PERSONS AND DISCLOSURE STATEMENT

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INTRODUCTION

Ms. Nelson and the EEOC overstate the reach of the "manager rule." The manager rule does not provide managers with special protection. It does the opposite: it ensures that managers do not get special treatment under Title VII by holding them to the same requirements under the opposition-retaliation clause that every other employee faces.

Unlike other employees, it is the duty of managers to relay complaints of employees through the appropriate channels that their employers have implemented. The reason a manager would relay a complaint, therefore, is because they are required to do so—not because they express their own support for that complaint. This distinction would be erased without the manager rule, however, as managers reporting a complaint up the ladder would be able to establish a prima facie case of opposition retaliation any time they face discipline. But Title VII does not enlarge managers' scope of protected conduct to include, without regard to whether the manager's conduct constitutes opposition, actions committed solely because their job requires them to do so. Nor should this Court. Instead, this Court should join the majority of courts that have recognized limitations on a manager's ability to assert an opposition-retaliation claim when that manager is merely relaying or transmitting another employee's complaint.

STATEMENT OF INTEREST

The Alabama Defense Lawyers Association is a non-profit association of nearly 1,000 Alabama lawyers involved in the defense of civil lawsuits. ADLA aims to improve the administration and quality of justice, often as amicus curiae in cases involving important questions of law related to the defense of civil lawsuits.

ADLA feels compelled to contribute to this case because the case concerns the scope of protected activity under Title VII's antiretaliation provision as to management employees, and every employer subject to Title VII has such management employees. Recognizing that Title VII does not provide special treatment to managers, the District Court refused to stretch the opposition clause to include conduct in which a manager merely performing his or her job duties served as a "pass through" when reporting another employee's complaint. ADLA respectfully requests the opportunity to demonstrate to the Court why the District Court's decision to analyze the oppositional nature of Ms. Nelson's actions despite her managerial status promotes sound, easy-to-follow policy for employers that is consistent with Title VII's text and purpose.[1]

[1] This brief is submitted with a motion for leave to file. ADLA affirms that no counsel for a party authored this brief in whole or in part and that no person other than ADLA, its members, or its counsel has made any monetary contributions intended to fund this brief's preparation or submission. Fed. R. App. P. 29(a)(4)(E).

STATEMENT OF THE ISSUE

Whether the District Court was correct in concluding that the reporting of another employee's complaint by a management employee "in the normal course of her job performance" does not in and of itself amount to opposition under Title VII's antiretaliation provision.

SUMMARY OF THE ARGUMENT

Managers are uniquely required to report the complaints of others, and the manager rule clarifies that such conduct is not in and of itself protected under Title VII. Ignoring the manager rule would provide managers with extra rights, harm employers throughout the Eleventh Circuit, and go against Title VII's text and policy goals.

ARGUMENT

I. This Court should join the majority of courts and uphold the manager rule because the rule promotes sound and predictable policy for employers that is consistent with Title VII's text and purpose.

A. The manager rule recognizes that managers are uniquely required to report the complaints of others and clarifies that such conduct is not in and of itself protected conduct.

The manager rule recognizes that managers are uniquely required to report the complaints of others and clarifies that such conduct is not in and of itself protected conduct. Under the manager rule, a management employee that opposes the actions of an employer "in the course of her normal job performance" does not engage in protected conduct unless she "cross[es] the line from being an employee performing

her job to an employee lodging a personal complaint." *Brush v. Sears Holdings Corp.*, 466 Fed. Appx. 781, 787 (11th Cir. 2012). A manager can satisfy this "requirement" of crossing the line or "stepping outside a normal role" by showing that she "took some action against a discriminatory policy." *McMullen v. Tuskegee Univ.*, 184 F. Supp. 3d 1316, 1324 (M.D. Ala. 2016). Otherwise, a disinterested manager typically cannot use another employee's harassment complaint as her own basis for a Title VII action. *Brush*, 466 Fed. Appx. at 787.

The manager rule does not hold that a manager's opposition to the actions of an employer can "never" qualify as protected activity when it occurs "in the course of her normal job performance." (EEOC amicus brief, p. 11). Nor does it render unprotected conduct by a manager that otherwise meets the requirements of Title VII. (EEOC amicus brief, p. 19). And it certainly does not "graft an additional requirement onto the opposition clause applicable only to management and human resources officials." (EEOC amicus brief, pp. 15, 19).

Instead, the manager rule ensures that managers do not receive special treatment under Title VII by virtue of their job duties, namely when they serve as a "pass-through" for complaints. Although that "pass-through" *can* constitute protected conduct under Title VII, the manager rule makes clear that that conduct in and of itself is not conduct that Title VII makes unlawful. The manager must still prove that her conduct amounted to opposition.

The manager rule is thus not so much a "rule" as it is an articulation of what constitutes opposition in a certain factual scenario, namely when a management employee reports a complaint "in the course of her normal job performance." The rule developed because managers are uniquely required to serve as "pass throughs" for the complaints of other employees. There is no analogous "non-manager rule" because non-managers are not required to relay the complaints of other employees and thus do not pose the same risks regarding blending of roles that managers pose when relaying the complaints of other employees. So, it has not been necessary to define what constitutes opposition in this factual context for non-managers. In any event, however, a non-management employee that faces retaliation for delivering a hand-written complaint as part of his job duties would also still need to demonstrate that his delivery amounts to opposition. Retaliation for the delivery in and of itself is not conduct that Title VII makes unlawful, and the manager rule merely highlights this distinction.

B. Rejecting the manager rule would have harmful consequences to Title VII employers in the Eleventh Circuit.

Rejecting the manager rule would have harmful consequences to Title VII employers in the Eleventh Circuit. Without the manager rule, Title VII's opposition clause would cover all internal complaints reported up the ladder by managers, even those where the job requirement is a but-for cause of the reporting, and without regard to whether the manager has "communicate[d] to her employer a belief that

the employer has engaged in . . . a form of employment discrimination." *Crawford v. Metro. Govt. of Nashville & Davidson Cty., Tenn.*, 555 U.S. 271, 276 (2009). That approach is unsustainable to Title VII employers in the Eleventh Circuit.

First, Title VII employers perpetually would be subject to litigation by the mere employment of a manager. An employer would not be able to terminate a manager for any reason—even if the employer were justified—because management employees, by the very nature of their job duties and performance, would always be in a protected category. As a result, managers would be able to establish a prima facie case anytime they report an internal complaint up the ladder. Rejecting the manager rule would thus create a permanent class of potential plaintiffs. But a manager doing nothing more than her job should not arm her with a handy weapon to use anytime she encounters anything that could be perceived as retaliation.

Additionally, if every internal complaint by a manager was deemed protected conduct, every investigation into reported unlawful employment practice would become an admission on the part of the employer. Employers would be discouraged from complying with Title VII if they are at risk of having each investigation being construed as an admission of unlawful employment practices. Instead, employers would be incentivized to avoid investigating claims and protect themselves from litigation, in contrast to Title VII's purpose of encouraging employers to investigate reports and prevent discrimination from ever happening. Thomas J. Hook, Jr.,

Defining Employer Liability in Sexual Harassment and Title VII Retaliation Claims: The Supreme Court Creates the Same Problem Twice, 13 Suffolk J. Trial & App. Advoc. 121, 122 (2008).

Rejecting the manager rule would also create substantial unpredictability for employers. Employers would be unable to conduct valuable risk assessment reviews before terminating an employee and thus would be unable to predict when the termination of an employee could lead to litigation. The line between opposition and doing something "in the course of [one's] normal job performance" would be blurred permanently for employers, leaving them unable to distinguish between administrative "pass-throughs" of complaints and managers' own complaints.

Finally, as explained above, *supra* p. 4, the application of the manager rule does not strip management employees of their rights. Indeed, management employees are just as protected under Title VII as any other employee. And the manager rule would maintain that equal treatment, by ensuring that managers, like every other employee, demonstrate that their opposition was protected conduct. If a management employee is personally harassed or discriminated against, however, then she remains as protected under Title VII as any other employee is. The manager rule does not change this calculus. Allowing for anything otherwise defeats the goals of Title VII and cannot have been what Congress intended when enacting Title VII.

C. The manager rule comports with the text of Title VII's opposition clause.

Contrary to the position of Ms. Nelson and the EEOC, the manager rule comports with the text of Title VII's opposition clause. Title VII prohibits an employer from retaliating against "any" "employee 'because [s]he has opposed any practice made an unlawful employment practice . . . or because [s]he has . . . participated in any manner in an investigation, proceeding, or hearing under this subchapter.'" *McCann v. Tillman*, 526 F.3d 1370, 1375 (11th Cir. 2008) (quoting 42 U.S.C. § 2000e-3(a)). Title VII does not carve out exceptions for managers or grant them special privileges; like every other employee pursuing a retaliation claim under the opposition clause, a manager must prove that the opposition that forms the basis of their retaliation claim was a "practice made an unlawful employment practice" by Title VII. Otherwise, the opposition is not protected conduct. Title VII does not state or otherwise suggest that managers are exempt from this rule or that a different standard of opposition applies to managers. Amicus thus agrees with the EEOC when it states that Title VII "lacks any textual basis for treating managerial and human resources officials differently from other employees." (EEOC amicus brief, p. 21).

The EEOC conflates the manager rule with the requirement that opposition conduct be premised on "a good faith, reasonable belief that the employer was engaged in unlawful employment practices." *Dixon v. Hallmark Cos.*, 627 F.3d 849,

857 (11th Cir. 2010). A good faith, reasonable belief requires a plaintiff to show "not only [] that he *subjectively* (that is, in good faith) believed that his employer was engaged in unlawful employment practices, but also that his belief was *objectively* reasonable in light of the facts and record presented." *Dixon*, 627 F.3d at 857 (emphasis in original). The manager rule is concerned with the nature of the conduct and whether that conduct crosses the line from job performance to opposition. While both address what constitutes protected conduct under Title VII, they do so in different ways. Whether a manager's belief was reasonable has no bearing on whether her actions cross the line from job performance to opposition.

Indeed, even courts that purportedly have rejected the manager rule have interpreted Title VII consistent with the manager rule. *See e.g., Littlejohn v. City of New York*, 795 F.3d 297, 318 (2d Cir. 2015) ("rejecting" the manager rule but limiting a manager's ability to assert an opposition-retaliation claim when that manager is "merely transmit[ting] or investigat[ing] a discrimination claim without expressing [one's] own support for that claim."); *Poff v. Oklahoma ex rel. Oklahoma Dept. of Mental Health & Substance Abuse Servs.*, 683 Fed. Appx. 691, 703 (10th Cir. 2017) ("[A]lthough [plaintiff] need not allege that her opposition was outside the scope of her employment, she must allege that her opposition was to activity made an unlawful employment practice by Title VII.").

In *Littlejohn*, despite "rejecting" the manager rule, the court explained that "the mere passing on of a complainant's statements by a supervisor or human resources manager is not inherently oppositional in the same way as the victim's own report of that misconduct" because "[t]here is a significant distinction between merely reporting or investigating other employees' complaints of discrimination" and "communicating to the employer the manager's own 'belief that the employer has engaged in . . . a form of employment discrimination.'" 795 F.3d at 318. Courts have interpreted this as a greenlight for applying the manager rule in Title VII opposition-retaliation claims. *See Cooper v. New York Dept. of Lab.*, 2015 WL 5918263, at *7 (N.D.N.Y. Oct. 9, 2015) ("[A]lerting [one's] supervisors to federal regulation mandates in the course of performing her job so as to bring the proposed procedures into compliance. . . in and of itself, is insufficient to plausibly suggest that Plaintiff was opposing a protected activity under Title VII."), *affd.*, 819 F.3d 678 (2d Cir. 2016) ("[T]he amendment of internal procedures in a manner that [plaintiff] believed[] would permit political considerations to influence the evaluation of discrimination claims [] is not a "practice made an unlawful employment practice" by Title VII."); *Antoine v. State Univ. of New York Downstate Med. Ctr.*, 2021 WL 135720, at *3 (E.D.N.Y. Jan. 13, 2021) ("[The plaintiff] incorrectly assumes that he engaged in a protected activity by virtue of filing an EEOC charge and state court complaint.").

CONCLUSION

The manager rule is but a way to ensure that managers do not get special protection under Title VII by virtue of their employment duties. Managers—like every other employee under Title VII—must demonstrate that they opposed conduct made unlawful under Title VII. In granting Health Services's motion for summary judgment, the District Court recognized that to the extent a manager is required to report or investigate other employees' complaints of discrimination, merely conveying others' complaints does not amount to opposition of practices made unlawful by Title VII. For the reasons discussed above, ADLA respectfully asks this Court to uphold this principle and to affirm the District Court's judgment in favor of Health Services.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 2,491 words. Fed. R. App. P. 29(a)(4)(G), 32(g)(1).

/s/ Marc James Ayers

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CERTIFICATE OF SERVICE

I certify that on July 21, 2021, I filed the foregoing brief with the Clerk of the Court via CM/ECF, which will serve all participants in this case.

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