No. 16-16850

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ANDREA GOGEL,

Plaintiff-Appellant,

v.

KIA MOTORS MANUFACTURING GEORGIA, INC.,

Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of Georgia, Newnan Division
Hon. Timothy C. Batten, Sr., District Judge

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

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, I hereby certify that the following is, to the best of the Commission's knowledge, a complete list of persons and entities having an interest in this case.

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Pursuant to Federal Rule of Appellate Procedure 26.1, Amicus Curiae the Equal Employment Opportunity Commission, as a government entity, is not required to file a corporate disclosure statement.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Page(s)

STATUTES

STATEMENT OF INTEREST

The U.S. Equal Employment Opportunity Commission ("EEOC") is charged by Congress with interpreting, administering, and enforcing various federal laws against employment discrimination, including Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. This appeal presents important issues regarding protected activity under Title VII's antiretaliation provision, this Court's "honest belief" precedent, and whether an employee's job duties and position affect the retaliation analysis. The Commission has a strong interest in ensuring that the statute is construed consistent with its plain language and purpose. Accordingly, the Commission offers its views to the Court pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure.

STATEMENT OF ISSUES[1]

I. Whether a reasonable factfinder could conclude that Kia would not have fired Gogel but for protected activity, where the evidence reflects that she filed an EEOC charge, she was twice placed on disciplinary leave leading up to her termination, and the decisionmaker testified he fired her for assisting another employee with filing an EEOC charge.

II. Whether the district court misapplied this Court's precedent regarding an

[1] The Commission expresses no opinion on any other issues presented in this appeal.

employer's honest belief, where the "misconduct" for which the decisionmaker fired Gogel was itself protected activity—her alleged assistance to another employee with filing an EEOC charge.

III. As the antiretaliation provision prohibits an employer's discrimination against "any of his employees" for protected activity, whether the district court erred in its analysis of facts relating to Gogel's managerial position and equal employment functions to excuse Kia's otherwise retaliatory and unlawful conduct.

STATEMENT OF THE CASE

A. Statement of the Facts

Andrea Gogel began working at Kia Motors Manufacturing Georgia, Inc. ("Kia") in 2008 (D117, P68[2]), as Team Relations Manager. D117, P82-83. Randy Jackson, Kia's Director of Human Resources and Administration (D117, P103), was her supervisor. D117, P96-97.

The Team Relations department is responsible for developing policies and standards that promote a positive work culture. D117, P87-88. Most Team Relations investigations addressed issues such as "attendance problems, falsification of documents, and leaves of absences." D101-1, P3 ¶7. Though Team

[2] "D" refers to the document number and "P" refers to page number(s) in the consecutively paginated original record, pursuant to 11th Cir. R. 28-5 and Federal Rule of Appellate Procedure 28(e).

Relations worked with the legal department on allegations of discrimination, investigations were conducted at the legal department's direction. D117, P101. The legal department investigated and handled all EEOC charges. D115, P156.

In March 2009, Kia announced organizational changes (D117, P113-14) and introduced the title of Head of Department (HOD). D85, P2 ¶4. Consequently, a number of managers became HODs for their departments. *Id*. Jackson had told Gogel HOD designations were automatic for senior managers. D117, P126-27. In Team Relations, Gogel "was the senior person of that group," D120, P256, and managed several direct reports—Assistant Managers Arthur Williams, Bryan Rathert, and Paul Grimes. D117, P83-84.

Rather than designating Gogel the HOD for Team Relations in 2009, however, Kia designated Bob Tyler, Kia's Human Resources Manager (D117, P97), as HOD for both the Human Resources and Team Relations departments. D121, P62; D117, P115. Gogel observed that she was the only senior manager who had not been designated as HOD, and that all the male senior managers had been made HODs. D117, P125. When these designations were announced, Gogel immediately went to Jackson, and asked why she had not been designated HOD. D117, P116-17. He told her, "it's purely timing. Just be patient." D117, P117.

In October 2009, Gogel again complained about her non-promotion, and told Jackson and Tyler that she believed she was being treated differently because of

her gender. D117, P185.

Around April 2010, Kia again did not designate Gogel the HOD of Team Relations. D117, P179. According to Tyler, no women were promoted to HOD positions. D112, P74. Gogel complained about this non-promotion to Jackson. D117, P248. When asked whether Gogel, in 2010, was "basically running her own department but just not having the designation," Tyler testified, "Yes." D122, P75.

In October 2010, Gogel met with Jackson, Tyler, and Charles Webb. D101-1, P8. Webb was Kia's in-house counsel at the time. D115, P48. Gogel explained her belief that she was not promoted "because of my gender." D101-1, P9. On November 10, 2010, Gogel filed an EEOC charge alleging that she was discriminatorily denied the HOD position in 2009 and 2010, based on sex and national origin (United States). D117, Ex.15.

Kia received a copy of the charge around November 22, 2010. D115, P156. Around November 23, 2010, two employees, Williams and Diana Ledbetter, told Gogel that Jackson was "talking about [Gogel's] EEOC charge in a very loud way in the open office environment." D117, P198-99. After Ledbetter learned that Gogel had filed an EEOC charge, she asked Gogel about her charge and whether she had chosen an attorney. D101-1, P14 ¶ 47. Gogel gave her the name of the attorney. D117, P208-09. As Ledbetter and Gogel were work colleagues and friends, Ledbetter had previously told Gogel that she was concerned her pregnancy

would affect her promotion opportunities at Kia. D117, P203-04.

On Friday, December 3, 2010, Kia presented Gogel with a document to sign (D117, P209-10), that sought her agreement to not discuss her EEOC charge or similar claims against Kia with team members and not to use her position to solicit or influence team members to make claims against Kia. D118, Ex. 27. The document also sought Gogel's agreement not to seek assistance from her team members in "any fact finding or any information gathering related to my claim" and not to make any statements to team members that "malign[ed] the company." *Id*. She did not sign it at that time, explaining that she did not feel comfortable doing so until her attorney reviewed it. D117, P210. She was then asked to go home. *Id*. Being sent home on December 3, 2010, was a disciplinary action, and marked the first time Gogel ever received formal discipline. D115, P151. The following Monday, December 6, 2010, Gogel signed the document. D117, P209-10.

On January 4, 2011, Jackson met with Arthur Williams, Gogel's subordinate. D120, P248. In the meeting, Williams claimed that Ledbetter had told him that she was talking with Gogel and Tyler, and that "they were all filing." D123, P130-31.[3] Jackson became "concerned about [Gogel] meeting with Diana."

[3] According to Ledbetter, however, she "never told Arthur [Williams] that all three of us were going to sue the company and had the same attorney." D101-2, P4 ¶ 10. Nor did Ledbetter tell Gogel she was filing an EEOC charge before filing it. *Id*. at

D120, P258. It was specifically Ledbetter's EEOC charge that prompted Jackson's concerns about Gogel's interactions with Ledbetter. *Id*. ("[W]hen I saw the charge with Diana, and I saw your firm representing them, I don't want my manager of my team relations group out soliciting and encouraging other people to file lawsuits; so I had a concern with that."). Jackson also asked Grimes, another of Gogel's direct reports, whether he knew anything about Gogel's EEOC charge (D119, P209), and requested that Grimes meet with Webb in January 2011 to discuss the matter. D119, P211.

On January 7, 2011, Jackson and Webb called Gogel into a meeting and told her she had been accused of collusion with Ledbetter and that she had thereby violated the December 6, 2010, agreement. D117, P261; D118, Ex. 29 (reflecting that discussion occurred on January 7th). They referred to a specific meeting between Gogel and Ledbetter. D117, P262. Gogel testified that in that meeting, she had talked with Ledbetter about two issues: cafeteria coverage during Kia's holiday closure, and a meal for Korean workers during that holiday closure. *Id.* She explained that to Jackson and Webb. *Id*. Webb turned to Jackson and asked him what he wanted to do. D117, P263. Jackson replied, "Well, just to be safe, why don't we go ahead as planned." *Id*. They then told Gogel they were placing

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¶ 11. Gogel first learned of Ledbetter's EEOC charge through Williams around December 2010. D101-1, P54-55 ¶ 54.

her on administrative leave until they "could sort things out." *Id*.

On January 19, 2011, Jackson fired Gogel by letter. D115, P159. Jackson made the decision to fire Gogel because he was "totally convinced" that Gogel had "encouraged and solicited other team members to file a lawsuit." D120, P272-73. As there was no lawsuit at the time, Jackson clarified that he considered the EEOC charge a lawsuit. D120, P274. The termination letter stated that Gogel had previously agreed not to solicit or influence team members to make claims against the company, and cited and attached the December 6, 2010, agreement. D118, Ex. 29. The letter then informed Gogel that Ledbetter had filed an EEOC charge against Kia on December 10, 2010. D118, Ex 29. It further stated that Kia "received credible reports" that Ledbetter had discussed her intention to file a charge with Gogel, that Gogel had not encouraged Ledbetter to complain internally instead of "externaliz[ing] the complaint," and had not notified Kia that Ledbetter was planning to file a charge. *Id*. The letter also said that Kia had learned, since her administrative leave began, that employees feared retaliation from her, and viewed her as having a "combative win-lose approach which often escalates issues unnecessarily." *Id*.

Nonetheless, Jackson testified that Gogel "was always very professional." D120, P299. When asked whether he had ever received a complaint about Gogel before January 2011, he answered, "I mean, no." D120, P290. Nor had anyone

ever expressed that Gogel had retaliated against them before January 2011. D120, P291.

On February 8, 2011, Gogel filed a second EEOC charge alleging that Kia's termination of her employment on January 19, 2011, was retaliatory. D118, Ex.30.

B. Magistrate Report and District Court Decision

In granting summary judgment to Kia on Gogel's retaliation claim, the district court adopted the magistrate's report and recommendation as its order. D130, P25. In analyzing Gogel's retaliation claim, the magistrate judge noted that Kia had "concede[d] that Gogel can satisfy the elements of a prima facie case of retaliation" (D125, P61 & n.76), and instead argued that Gogel could not show its reason for firing her —its loss of "confidence in her abilities to perform her job duties after an investigation showed that she had solicited Ledbetter to file a charge"—was a pretext for retaliation. *Id*. at 62. The magistrate judge declined to address whether Gogel, in fact, had solicited Ledbetter, as it viewed the central legal issue to be whether Kia, "at the time it terminated her, honestly believed that she had solicited Ledbetter to pursue legal action" against the company. *Id*. at 65-67. The magistrate judge pointed to Gogel's testimony reflecting that she had told Ledbetter she was seeking outside assistance and gave her the name of the attorney she planned to meet as "suppl[ying] some validation" to Kia's concern. *Id*. at 68. Because Gogel had "failed to create any genuine issue with regard to pretext," the

magistrate judge recommended that Kia's motion for summary judgment be granted on Gogel's Title VII and § 1981 retaliation claims. *Id*. at 74.

Upon review of the magistrate judge's report and recommendation, the district court found that the judge's "conclusions were correct and Gogel's objections lack merit." D130, P4. The district court framed the plaintiff's objections to the magistrate's report as raising several contentions: 1) that Kia's stated reason for firing Gogel—supporting a co-worker in asserting her rights—constituted direct evidence of retaliation; 2) that her claim should be analyzed under the "circumstantial evidence paradigm"; and 3) that Kia had not provided a non-discriminatory reason for her termination, and the evidence, in any event, demonstrated that its stated reason was pretextual and motivated by unlawful intent. *Id*. at 7.

Rejecting the argument that Kia's stated reason for firing Gogel was direct evidence of retaliation, the court relied on *Jones v. Flagship International*, 793 F.2d 714, 728 (5th Cir. 1986), to conclude that "Kia did not terminate Gogel for engaging in protected activity." *Id*. at 10-11. Rather, in the court's view, Kia fired Gogel for no longer being fit for her position in the Team Relations department, as Kia "maintained a good-faith belief that Gogel's solicitation of Ledbetter critically 'harm[ed] [Kia's] posture in the defense of discrimination suits brought against the company.'" *Id*. at 11 (quoting *Jones*, 793 F.2d at 728). "Because Kia did not

terminate Gogel for engaging in protected activity, there is no direct evidence of discrimination or retaliation." *Id*. at 11.

The court also agreed with the magistrate judge's view of the legal issue in the case: "whether Kia, at the time it terminated her, honestly believed that Gogel had solicited Ledbetter to pursue legal action against Kia." *Id*. at 12. Distinguishing this case from others in which an employer fires an employee on the mistaken belief that the employee had engaged in protected activity, the court stated, "Here, Kia believed it was terminating Gogel for an activity that was not considered protected (conduct conflicting with her job duties)." *Id*. at 13. The district court added that Gogel had failed to present "any evidence demonstrating that Kia did not honestly believe she violated the December 6 agreement by soliciting Ledbetter." *Id*. at 13. The court also reiterated, "[a]s previously mentioned, the activity Gogel took part in was not protected activity. Therefore, Kia's decision to terminate Gogel for this activity was legitimate, not retaliatory." *Id*. at 15.

In holding that there was no evidence of pretext, the court again emphasized that the relevant legal question is "'whether [Kia], in good faith, believed the reports of misconduct.'" *Id*. at 18 (quoting *Clark v. S. Broward Hosp. Dist.*, 601 F. App'x 886, 896 (11th Cir. 2015)). Gogel, the court stated, failed to offer "any evidence" disputing the magistrate's finding that Kia had a "good-faith" belief that

Gogel had solicited Ledbetter. *Id*. at 19. Nor was the court able to find "any additional evidence" from which a jury could infer that her termination was discriminatory or retaliatory. *Id*. at 20-21. Observing the close temporal proximity between Gogel's filing of her EEOC charge and her termination, but noting that on its own temporal proximity is insufficient to create a triable issue of causation, the court concluded that there was no additional evidence that would permit a reasonable juror to find Kia's reason for firing Gogel was unlawful. *Id*. at 21-22.

ARGUMENT

The record evidence in this case demonstrates that Gogel engaged in protected activity and creates a triable issue as to Gogel's retaliation claim, particularly in light of testimony from decisionmaker Randy Jackson that he fired Gogel for encouraging and assisting another employee in filing an EEOC charge. That Gogel's job responsibilities involved managerial and/or equal employment functions does not alter this conclusion. Indeed, the district court's narrow focus on this aspect of the record led it to err in analyzing the central issue in this (and any) Title VII case—whether the plaintiff was discriminated against in violation of the statute. *See U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 714 (1983) ("The 'factual inquiry' in a Title VII case is 'whether the defendant intentionally discriminated against the plaintiff.'"). Applying a *de novo* standard of review, this Court should reverse the district court's grant of summary judgment

on Gogel's retaliation claim.

I. The record evidence in this case creates a triable issue with respect to Gogel's retaliation claim.

To establish a prima facie case of retaliation, "a plaintiff must prove that he engaged in statutorily protected activity, he suffered a materially adverse action, and there was some causal relation between the two events." *Goldsmith v. Bagby Elevator Co., Inc.*, 513 F.3d 1261, 1277 (11th Cir. 2008). Ultimately, the plaintiff must show that "his or her protected activity was a but-for cause of the alleged adverse action by the employer." *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2534 (2013). Here, Kia's termination of Gogel's employment on January 19, 2011, plainly constitutes an adverse action. *See, e.g.*, *Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1190 (11th Cir. 1997) (undisputed that termination was adverse employment action).

A. Gogel engaged in statutorily protected activity under Title VII.

Under this Court's precedent, Gogel's filing of an EEOC charge on November 10, 2010, and her repeated complaints to her managers about her non-promotion based on sex preceding that charge, constitute statutorily protected activity. *See, e.g.*, *Shannon v. Bellsouth Telecomms., Inc.*, 292 F.3d 712, 715 n. 2 (2002) ("[Plaintiff] engaged in protected activity well before filing the EEOC charge in September of 1997, by voicing complaints of discrimination to his supervisors"); *Johnson v. Booker T. Washington Broad. Serv., Inc.*, 234 F.3d 501,

507 (11th Cir. 2000) ("[Plaintiff] engaged in statutorily protected expressions by filing a charge with the EEOC" and complaining about discriminatory conduct to his superiors). In summarily stating that "the activity Gogel took part in was not protected activity," D130, P15, the district court plainly erred.

Though the parties dispute whether Gogel—in fact—assisted Ledbetter in filing her EEOC charge, Kia stated that it believed she had encouraged Ledbetter to file an EEOC charge or to pursue Title VII litigation against it, and fired her on that basis. Had Gogel in fact done so, such activity is also protected under the statute. *See* 42 U.S.C. § 2000e-3(a) (protected conduct includes "mak[ing] a charge, testif[ying], assist[ing], or participat[ing] in any manner in an investigation, proceeding, or hearing under this subchapter"). As this Court explained in *EEOC v. Total System Services, Inc.*, 221 F.3d 1171, 1174 (11th Cir. 2000), the statutory language "protects proceedings and activities which occur in conjunction with or after the filing of a formal charge with the EEOC." *See also Robinson v. Shell Oil Co.*, 519 U.S. 337, 339 (1997) (stating the antiretaliation provision makes it unlawful to discriminate against employees "who have either availed themselves of Title VII's protections or assisted others in so doing"). Surely, then, the act of assisting another with the filing of an EEOC charge falls within conduct protected under the statute. *See Rosser v. Laborers' Int'l Union of N. Am., Local No. 438*, 616 F.2d 221, 223-24 n.3 (5th Cir. 1980) (contrasting plaintiff's unreasonable and

unprotected form of opposition—her "attempted political ouster" of her supervisor—with protected activity under the statute such as "assist[ing] union members in filing charges with the EEOC").

Indeed, as a general matter, supporting another employee in reporting discrimination constitutes protected activity. *See Crawford v. Metro. Gov't of Nashville & Davidson Cty.*, 555 U.S. 271, 276, 279 n.3 (2009) (explaining that when an employee reports the belief that the employer has engaged in a form of employment discrimination, that communication "virtually always" constitutes protected conduct; noting that "employees will often face retaliation not for opposing discrimination they themselves face, but for reporting discrimination suffered by others"); *see also Mulkey v. Bd. of Comm'rs of Gordon Cty.*, 488 F. App'x 384, 385, 389-90 (11th Cir. 2012) (where plaintiff accompanied female co-worker to report sexual harassment against co-worker to human resources director, holding that evidence created triable issue as to whether he engaged in protected opposition).

Assisting another employee with his or her Title VII litigation constitutes statutorily protected conduct as well. *See, e.g., Hobgood v. Ill. Gaming Bd.*, 731 F.3d 635, 642-43(7th Cir. 2013) (analyzing Title VII and First Amendment retaliation claims, where protected conduct was plaintiff's assistance to another employee with organizing and filing that employee's Title VII retaliation suit);

Ellerbrook v. City of Lubbock, 465 F. App'x 324, 332-33 (5th Cir. 2012) (discussing plaintiff's protected activity in the form of assisting in another's litigation against the same employer).

Finally, even if Kia mistakenly believed that Gogel had facilitated Ledbetter's charge-filing, that factual mistake would present no bar to Gogel's retaliation claim, as an employer's action motivated by retaliatory animus is the basis for liability. As the Supreme Court recently held in *Heffernan v. City of Paterson*, 136 S.Ct. 1412, 1418 (2016), a First Amendment retaliation case, an employer's termination of an employee based on its mistaken belief that he engaged in protected conduct constitutes a valid basis for retaliation claim. *Id*. In *Heffernan*, the employer had demoted the plaintiff based on its belief that he had supported a particular political candidate, which in fact, he had not. *Id*. at 1416. Because that political conduct would have been protected under the First Amendment, the Supreme Court explained, even if the employer made a factual mistake about the employee's behavior, the employee "is entitled to challenge that unlawful action," as the employer's retaliatory motive is "what counts" in a retaliation analysis. *Id*. at 1418.

Similarly, the Third Circuit has held that where there is evidence that an employer took an adverse action based on its belief that the plaintiff engaged in protected activity, this constitutes actionable retaliation. *Fogleman v. Mercy*

Hosp., Inc., 283 F.3d 561, 565, 571-72 (3d Cir. 2002) (holding that plaintiff's ADEA and ADA claims alleging retaliatory termination based on employer's mistaken belief were valid). "Because the statutes forbid an employer's taking adverse action against an employee for discriminatory reasons," the court in *Fogleman* explained, "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." *Id*. at 565. Accordingly, even if Kia acted on a mistaken belief that Gogel assisted Ledbetter in filing her EEOC charge, her termination for that reason would nonetheless constitute actionable retaliation.

As the record evidence demonstrates that Gogel engaged in protected activity, and was subjected to an adverse action, the only outstanding question is whether the evidence would also permit a reasonable factfinder to conclude that this protected activity caused her to be fired.

B. The evidence would allow a reasonable juror to conclude that but for Kia's belief that Gogel had assisted another employee in filing an EEOC charge, and the filing of her own EEOC charge, Gogel would not have been fired.

Jackson's uncontested testimony that he fired Gogel for assisting Ledbetter in filing an EEOC charge or lawsuit, and Kia's termination letter, are sufficient to create a triable issue as to whether Kia fired Gogel based on the belief that she had engaged in protected activity—here in the form of assisting or encouraging

Ledbetter to file an EEOC charge—and for filing her own EEOC charge.

Jackson testified that he fired Gogel because he believed that she had "encouraged and solicited other team members" to file EEOC charges. In explaining his decision, Jackson further testified, "I need 100 percent trust in that particular job, Manager of Team Relations. I had lost that trust. I was convinced that was going on. I made a decision to terminate her employment." D120, P273. In his termination letter to Gogel, Jackson expressly referenced Ledbetter's EEOC charge, his belief that Ledbetter had discussed her intention to file an EEOC charge with Gogel, and that Gogel had been seen talking with Ledbetter on numerous occasions, to explain the basis for why Kia had lost "confidence in the loyalty and trust that is required by your position." D118, Ex. 29. Under this Court's precedent, this evidence creates a triable issue on Gogel's retaliation claim. *See Taylor v. Runyon*, 175 F.3d 861, 869 (11th Cir. 1999) (where manager told plaintiff that she was "no longer worthy of his trust because she filed a discrimination claim against him"; explaining that this statement "readily come[s] within our examples of direct evidence" of retaliation).

The agreement that Kia presented to Gogel on December 3, 2010, about two weeks after it learned of Gogel's EEOC charge on November 22, would also permit a reasonable juror to conclude that Kia reacted to Gogel's filing of her EEOC charge with retaliatory animus. That is because the "agreement" prohibited

Gogel, and by extension her team members, from conduct that could constitute statutorily protected opposition, including but not limited to making negative statements about the company, influencing other employees to "make claims against" Kia, and seeking information from her team members that relate to her claim against Kia. *Cf.* Doc. 118, Ex. 27 and *supra* pp. 12-16 (discussing forms of protected activity). Indeed, Kia attached that agreement to Gogel's termination letter, expressly referred to it in the termination letter (D118, Ex. 29), and contended that it fired her because it had lost confidence in Gogel given her "violation" of that agreement. *See* D130, P18.

Kia not only presented her with this agreement on December 3, 2010, but also placed her on disciplinary administrative leave that same day for the first time in her employment, and again on January 7, 2011, before firing her on January 19, 2011. That succession of events, all occurring within an approximate two-month span following her EEOC charge, would permit a reasonable factfinder to conclude that but for Gogel's filing of her own EEOC charge, Kia would not have fired her. *See, e.g.*, *Chapter 7 Trustee v. Gate Gourmet, Inc.*, 683 F.3d 1249, 1259-60 (11th Cir. 2012) (grant of summary judgment on plaintiff's retaliation claim was error, where sequence of events following plaintiff's EEOC charge supported showing of causation between EEOC charge and adverse action).

II. The district court erred in relying on this Court's precedent discussing an employer's "honest belief."

In holding that the evidence did not create a triable issue that Kia had retaliated against Gogel, the district court erred by relying on this Court's precedent discussing an employer's "honest belief." *See, e.g.*, D130, P13 (stating that from the evidence, "one could conclude that Kia honestly believed that Gogel acted in a manner sufficient to cause the company to lose confidence in the loyalty and trust of someone in her position."). The so-called "honest belief" doctrine, however, is not applicable to this case, and by framing the issue in these terms, the court "unnecessarily evaded the ultimate question of discrimination *vel non.*" *See Aikens*, 460 U.S. at 714.

Discussion of an employer's "honest belief" typically arises when an employer claims that it took an adverse action against an employee based on its "honest belief" that the employee engaged in misconduct warranting that adverse action. For example, in *Flowers v. Troup*, 803 F.3d 1327 (11th Cir. 2015), a Title VII race discrimination case, the employer asserted that it fired the plaintiff because an investigation had revealed that the plaintiff had committed football recruiting violations. *Id*. at 1337-38. This Court stated that the defendant "could have honestly believed that Flowers had committed recruiting violations" and fired him on that or another non-discriminatory basis, particularly in the absence of any evidence from which race discrimination could be inferred. *Id*.; *see also Clark v.*

S. Broward Hosp. Dist., 601 F. App'x 886, 896 (11th Cir. 2015) (affirming grant of summary judgment on plaintiff's discriminatory termination claim, where defendant received multiple reports of plaintiff's racist and anti-Semitic remarks, investigated them, and asserted it fired plaintiff on that basis; explaining that the plaintiff had produced no evidence that the hospital did not honestly believe the allegations and "the serious misconduct alleged by co-workers easily constitute[d] a non-discriminatory reason for terminating Plaintiff's employment").

Here, the "honest belief" doctrine is inapplicable because the basis for Kia's determination that Gogel was no longer trustworthy or fit for her position was its belief that she had engaged in protected activity—assisting a co-worker with filing an EEOC charge. In other words, Kia's stated reason for firing Gogel was not based on legitimately sanctionable misconduct independent from her protected activity, but rather precisely because of—and for no other reason than—her protected activity. Accordingly, the district court's reliance on an "honest belief" rationale to grant summary judgment to the defendant was error.

Finally, although this Court has acknowledged that there may be occasions in which an employer may be justified in firing an employee in relation to protected activity, this Court has strongly indicated that such action would be permitted in only very narrow circumstances not present here, such as where there is evidence of an imminent safety concern. *See Alvarez v. Royal Atl. Developers,*

Inc., 610 F.3d 1253, 1269-70 (11th Cir. 2010). In *Alvarez*, the employer claimed it fired the plaintiff out of concern that given her discrimination complaint, and her access to the company's computers and bank accounts, she might sabotage the company. *Id*. at 1269. This Court rejected the defendant's asserted reason, as the plaintiff's complaint "contain[ed] no threats against the company or anyone else," and thereby provided no justification for its otherwise retaliatory termination of the plaintiff. *Id*. at 1270 (observing that the company also failed to "show that there was no means short of firing Alvarez that it could have used to protect itself from the sabotage it feared"). This Court also added that it is not a legitimate, non-discriminatory reason to fire an employee who has complained of discrimination because the company thinks the employee is "unhappy working for the company" given the complaint, or that it would be "awkward and counterproductive" to retain her. *Id*. at 1269. ("Anyone who complains about unlawful discrimination is not likely to be a happy camper. . . . And it will always be 'awkward,' and perhaps 'counterproductive' in the business sense, to work with people who complain that you have discriminated against them. But recognizing those concerns as legitimate, non-retaliatory reasons to fire someone who complains about unlawful discrimination would do away with retaliation claims and the protection they provide to victims of discrimination. That, in turn, would be 'counterproductive' to the purpose of the statutory provisions prohibiting discrimination.").

Here, of course, there is no evidence that Gogel threatened the company with sabotage, or that continuing to employ her would pose any physical danger or safety hazard. Under *Alvarez*, Kia had no compelling justification that could legally excuse its retaliatory conduct.

III. That Gogel's position involved managerial or equal employment functions does not alter the retaliation analysis.

The district court also erred in treating Kia's reason for firing Gogel—assisting another employee in filing an EEOC charge—as a non-retaliatory basis for that action because of Gogel's position in the company. The district court highlighted not only her job duties, but also her high level position, in discussing the legitimacy of Kia's action. The court agreed, for example, with the magistrate judge's finding that the evidence supported the conclusion that Gogel's actions were "sufficient to cause the company to lose confidence in the loyalty and trust of *someone in her position*." D130, P13 (emphasis added). Reflected in the court's analysis is the flawed view that because Gogel held a managerial position, Kia could require that she not engage in protected (*i.e.*, not "loyal") conduct and could fire her for doing so. The district court's analysis, in essence, excused Kia's otherwise retaliatory conduct. This was error. Given the plain language of the statute, and its broad remedial purpose, retaliation claims brought by employees with managerial or equal employment functions are to be analyzed in the same manner as any other retaliation claim brought under Title VII.

Title VII's antiretaliation provision makes it unlawful for "an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a).

As this Court observed in *Merritt*, "[t]he anti-retaliation provision is straightforward and expansively written." 120 F.3d at 1186. In analyzing the phrase "participated in any manner" in this provision, this Court in *Merritt* highlighted the significance of the adjective "any," observing that it is "not ambiguous" and has "a well-established meaning." 120 F.3d at 1186. Pointing to the Supreme Court's discussion of the term "any" in *United States v. Gonzales*, 520 U.S. 1, 5 (1997), this Court quoted the *Gonzales* decision to inform and support its Title VII analysis: "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *Id*. (quoting *Gonzales*, 520 U.S. at 5). "Here, as in *Gonzales*," this Court reasoned, "'Congress did not add any language limiting the breadth of that word,' so 'any' means all." *Id*.

Similarly, the plain text of the statute defining coverage to include "any of his employees" contains no limiting language that mentions, let alone excludes any category of employee from protection. *See* 42 U.S.C. § 2000e-3(a). Under this

Court's reasoning in *Merritt*, then, "all" employees are protected from retaliation, with no exemptions or unique considerations for any subset of employees. 120 F.3d at 1186. *See also DeMasters v. Carilion Clinic*, 796 F.3d 409, 422 (4th Cir. 2015) ("Nothing in the language of Title VII indicates that the statutory protection accorded an employee's oppositional conduct turns on the employee's job description or that Congress intended to excise a large category of workers from its anti-retaliation protections."); *Littlejohn v. City of New York*, 795 F.3d 297, 318 (2d Cir. 2015) ("The plain language of § 704(a)'s opposition clause . . . does not distinguish among entry-level employees, managers, and any other type of employee.").

Though statutory interpretation "begin[s], and often should end as well, with the language of the statute itself," *Merritt*, 120 F.3d at 1185, the Supreme Court's analysis in *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997), also counsels for a broad interpretation of the statutory term "employees" in Title VII's antiretaliation provision. *See id*. at 346 (holding that the term "employees" includes former employees and noting "that it would be destructive of th[e] 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."). Because "the cooperation of employees who are willing to file complaints and act as witnesses" is critical to Title VII's

enforcement, interpretation of the antiretaliation provision "to provide broad protection" helps ensure such reporting. *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006).

That same rationale applies here. An interpretation or application of the statute to exclude from protection employees with "job duties" and a "position" like Gogel's would impede employees "from voicing concerns about workplace discrimination and put in motion a downward spiral of Title VII enforcement." *DeMasters*, 796 F.3d at 423. In light of that deterrent effect, as well as the statute's plain text and Supreme Court precedent, the Fourth Circuit in *DeMasters* rejected the contention that if counseling and communicating complaints are part of an employee's regular duties, such an employee does not qualify for protection under Title VII, often referred to as the "manager rule." 796 F.3d at 422-24. The adoption of such a rule, the Fourth Circuit observed, would in effect sanction retaliation against "the categories of employees best able to assist employees with discrimination claims—the personnel that make up EAP, HR, and legal departments." *Id*. at 423.

The Sixth Circuit, in *Johnson v. University of Cincinnati*, 215 F.3d 561 (6th Cir. 2000), also rejected the argument that a high level affirmative action official was excluded from Title VII's antiretaliation protection based on his job duties, stating that to hold so would "run[] counter to the broad approach used when

considering a claim for retaliation under this clause, as well the spirit and purpose behind Title VII as a broad remedial measure." *Id*. at 580. Allowing such an exclusion, the court in *Johnson* stated, would essentially "immunize the employer from being held liable for illegally discriminating against that individual for such advocacy" and "invite stratagems designed to circumvent, and indeed, to violate law." 215 F.3d 561 at 577.

While this Court, in an unpublished decision, has stated that it "find[s] the 'manager rule' persuasive and a viable prohibition against certain individuals recovering under Title VII," *Brush v. Sears Holding Corp*., 466 F. App'x. 781, 787 (11th Cir. 2012), as discussed above, the statute's plain text and purpose counsel this Court to analyze retaliation claims brought by employees with managerial or equal employment functions in the same manner as any other retaliation claim. Significantly, this Court in *Brush* did not analyze the statutory text or contemplate a per se exclusion of managerial or EEO employees when addressing the "manager rule."

In any event, Gogel's retaliation claim is distinguishable from *Brush*. In *Brush*, this Court addressed whether the plaintiff had engaged in protected opposition, where her job duties involved conducting internal investigations and the plaintiff asserted that her objections to how the defendant handled an investigation constituted protected activity. *Id*. at 785-87. Because she

investigated matters as part of her job, her asserted protected activity involved "exactly the type of actions" she would have normally undertaken in her position. *Id*. at 787. On that basis, this Court held that the plaintiff had not engaged in protected opposition, but was simply fulfilling her work duties. *Id*. Here, the conduct for which Gogel was terminated—filing an EEOC charge and purportedly assisting another in doing so—was not a duty of her position and clearly constituted protected activity. Further, the district court relied on its discussion of Gogel's work duties, not primarily to address the issue of protected activity, but rather to support its view that Kia was not motivated by retaliatory intent.

The district court's reliance on *Jones v. Flagship International*, 793 F.2d 714, 728 (5th Cir. 1986), constituted error as well. In *Jones*, the Fifth Circuit held that while the plaintiff had established a prima facie case of retaliation, the defendant fired her for a legitimate reason—because her conduct, which included initiating a class action lawsuit against the company, also created a conflict with her job duties, where the plaintiff was the Manager of Equal Employment Opportunity Programs, and her "principal duties" were to investigate EEOC charges and defend the employer before administrative agencies. *Jones*, 793 F.2d at 716, 727-29. The facts supporting Gogel's claims are distinguishable: she was not in charge of equal employment opportunity programming, and Kia's legal department—not team relations—directed investigations of discrimination

complaints, and handled EEOC charges and litigation. This evidence would allow a reasonable juror to reject the contention that Kia fired her because she would not be able to function in her role.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's grant of summary judgment on Gogel's Title VII retaliation claim.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume requirements set forth in Federal Rules of Appellate Procedure Rules 29(a)(5) and 32(a)(7)(B). This brief contains 6,303 words, from the Statement of Interest through the Conclusion, as determined by the Microsoft Word 2010 word processing program, with 14-point proportionally spaced type for text and 14-point proportionally spaced type for footnotes.

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CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2017, 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. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by e-mail sent by the appellate CM/ECF system.

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