UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Andrea Gogel,

Plaintiff - Appellant

v.

Kia Motors Manufacturing Georgia, Inc.

Defendant - Appellee

No. 16-16850

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

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1. The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. It represents 300,000 direct members, and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community.

2. This is such a case. It concerns, in relevant part, the reach of Title VII's anti-retaliation provision, 42 U.S.C. §2000e-3(a), and its application to human resources professionals — individuals who are hired to assist their employer

comply with Title VII and to help resolve employee disputes. These employees are not only indispensable to employer efforts to ensure a productive workplace free of discrimination, but they are essential to "bring[ing] employment discrimination to an end," though Congress's "preferred means" — "[c]ooperation and voluntary compliance," rather than through litigation. *Ford Motor Co., v. EEOC*, 458 U.S. 219, 228 (1982) (quoting *Alexander v. Gardner–Denver Co.*, 415 U.S. 36, 44 (1974)).

3. Title VII prohibits employers from penalizing any employee "because [s]he [has] oppose[d] any practice made unlawful" by the Act. "[T]he protection afforded by the statute is not absolute," however. *Rollins v. State of Fla. Dep't of Law Enf't*, 868 F.2d 397, 400–01 (11th Cir. 1989). To determine whether particular "opposition" activities are covered by the statute, courts must perform a facts-and-circumstances analysis that "balanc[es] the purpose of the statute and the need to protect individuals asserting their rights thereunder against an employer's legitimate demands for loyalty, cooperation and a generally productive work environment." *Id.* at 401.

4. Plaintiff Andrea Gogel and the Equal Employment Opportunity Commission (EEOC or "the agency") urge the Court to adopt the unprecedented rule that the facts and circumstances the court must take into account exclude, as a matter of law, the work the plaintiff was paid to do. To adopt such a rule, this

Court would be required to abandon existing Circuit precedent directly on point and depart from the standard adopted by every other circuit to consider the question. *See, e.g.*, *Hamm v. Members of Bd. of Regents of State of Fla*., 708 F.2d 647, 653 (11th Cir. 1983) ("[a]n employer may remove an employee from a position similar to [Gogel's] without violating Title VII based on the manner in which the employee undertakes . . . her duties.").

5. The Chamber files this brief to defend this settled Circuit rule. Courts are rightly reluctant to upend settled rules of law that have functioned admirably for decades — in this case, more than 40 years — but here, the rule advanced by Gogel and the EEOC would not merely destabilize a well-understood and universally accepted principle of law, but would undermine the very goals for which Title VII was enacted.

6. The Chamber therefore seeks leave of Court to file the accompanying brief *amicus curiae* which addresses this effort by the EEOC and the Plaintiffs to abandon settled law in this Circuit and in its place impose on the Chamber's members a destabilizing construction of Title VII's anti-retaliation provision.

7. Counsel for the Chamber sought consent from counsel for Plaintiffs to file this brief, but consent was withheld.

Signature on following page

Dated: May 3, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Carson H. Sullivan, counsel for amicus curiae, certify that, on May 3, 2017, a copy of the foregoing was filed electronically through the appellate CM/ECF system with the Clerk of the Court. All counsel of record in this case are registered CM/ECF users.

s/ Carson H. Sullivan
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No. 16-16850

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ANDREA GOGEL,

Plaintiff-Appellant,

v.

KIA MOTORS MANUFACTURING OF GEORGIA, INC.

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, NEWNAN DIVISION
CASE NO. 3:14-CV-00153-TCB

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF APPELLEE

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to 11th Cir. R. 26.1-1, counsel for amicus curiae the Chamber of Commerce of the United States of America states that it is not a subsidiary of any corporation, and no publicly held corporation owns 10% or more of its stock. Counsel further states a belief that the certificates of interested persons filed by the parties and amicus in support of plaintiff-appellant are complete.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTERESTS OF AMICUS[1]

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. It represents 300,000 direct members, and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

This is such a case. It concerns, in relevant part, the reach of Title VII's anti-retaliation provision, 42 U.S.C. §2000e-3(a), and its application to human resources professionals — individuals who are hired to assist employers to comply with Title VII and to help resolve employee disputes. These employees are not only indispensable to employer efforts to ensure a productive workplace free of discrimination, but they are essential to "bring[ing] employment discrimination to an end," though Congress's "preferred means" — "[c]ooperation and voluntary compliance," rather than through litigation. *Ford Motor Co., v. EEOC*, 458 U.S.

[1] Pursuant to Fed. R. App. P. 29, the Chamber certifies that no party's counsel authored this brief in whole or in part or contributed money intended to fund the brief's preparation or submission, and no person other than the Chamber, its counsel, or its members contributed money to fund the brief's preparation or submission.

219, 228 (1982) (quoting *Alexander v. Gardner–Denver Co*., 415 U.S. 36, 44 (1974)).

Title VII prohibits employers from penalizing employees "because [they] [have] oppose[d] any practice made unlawful" by the Act. 42 U.S.C. §2000e-3(a). "[T]he protection afforded by the statute is not absolute," however. *Rollins v. State of Fla. Dep't of Law Enf't*, 868 F.2d 397, 400–01 (11th Cir. 1989).

Employees may lose protection in two circumstances. First, an employer may discipline an employee who engages in opposition conduct in a disruptive or otherwise unreasonable manner. *Rollins*, 868 F.2d at 401. Second, an employee may discipline an employee whose conduct "so interferes with the performance of [her] job that it renders [her] ineffective in the position for which [she] is employed." *Rosser v. Laborers' Int'l Union of N. Am. Local No. 438*, 616 F.2d 221, 223 (5th Cir. 1980).[2] To determine whether particular "opposition" activities are covered by the statute, courts must perform a facts-and-circumstances analysis that "balanc[es] the purpose of the statute and the need to protect individuals asserting their rights thereunder against an employer's legitimate demands for loyalty, cooperation and a generally productive work environment."[3]

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[2] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209-10 (11th Cir. 1981), this Court adopted as binding precedent all decisions of the former Fifth Circuit, including Unit A, handed down prior to October 1, 1981.

[3] *Rollins*, 868 F.2d at 401; *see also* EEOC Enforcement Guidance on Retaliation and Related Issues ("EEOC Enforcement Guidance"), No. 915.004 (August 25,

Plaintiff Andrea Gogel and the Equal Employment Opportunity Commission (EEOC or "the agency") urge the Court to adopt the unprecedented rule that when performing this balancing test, the facts and circumstances a court must take into account exclude, as a matter of law, the work the plaintiff was paid to do. To adopt such a rule, this Court would be required to abandon existing Circuit precedent directly on point and depart from the standard adopted by every other circuit to consider the question.

To support this unprecedented change to the fundamentals of anti-retaliation law, Gogel and the EEOC claim that a contrary rule would leave human resources professionals like Gogel unprotected by §2000e-3(a). So far as the record discloses, the defendant here has never argued that human resource professionals are categorically excluded from protection under the statute, and such a rule categorical exclusion would be antithetical to the balancing test adopted by this Court, and every other circuit to address the question. Rather, Gogel's job duties were but a factor the court below considered in performing the balancing of interests that this Court's cases require.

Gogel filed a charge of discrimination, consulted with counsel, and ultimately filed her own lawsuit, all of which is undoubtedly "opposition" conduct

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2016), https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm, (court must "balance the right to oppose employment discrimination against the employer's need to have a stable and productive work environment"; "opposition [must be] reasonable").

protected by §2000e-3(a), notwithstanding her professional responsibilities. It appears that Gogel no longer maintains that she was discharged for this conduct.

But Gogel was hired to resolve employee disputes short of litigation. When she began referring co-workers to her lawyer so that they could bring their own lawsuits, her employer concluded that her conduct had "so interfere[d] with the performance of [her] job that it render[ed] [her] ineffective in the position for which [she had been] employed." *Rosser*, 616 F.2d at 223. When it terminated her employment for that reason, it did not violate Title VII.

The Chamber files this brief to defend this settled Circuit rule. Courts are rightly reluctant to upend settled rules of law that have functioned admirably for decades — in this case, more than 40 years — but here, the rule advanced by Gogel and the EEOC would not merely destabilize a well-understood and universally accepted principle of law, but would undermine the very goals for which Title VII was enacted.

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiff Andrea Gogel was hired by Appellee Kia Motors Manufacturing Georgia, Inc. ("Kia") as Team Relations Manager. Among other tasks, Gogel was charged with identifying and proactively defusing conflicts in the workplace, including discrimination claims, "before th[ose disputes] got out to an outside party, such as an attorney" or the EEOC. Appendix, at 123. She was expected to

investigate complaints of discrimination, manage employee expectations, find workable solutions, and propose them to in-house counsel and her boss, and then implement those solutions to resolve employee disputes short of litigation. Appendix, at 122-24. Her role was thus to act as Kia's agent in its effort to do what Congress intended when it passed Title VII: to solve problems internally, through "[c]ooperation and voluntary compliance" — Congress's "preferred means" for "bring[ing] employment discrimination to an end." *Ford Motor Co.*, 458 U.S. at 228 (quoting *Alexander*, 415 U.S. at 44).

At some point, it became clear to Gogel's supervisors that Gogel was either unwilling to, or incapable of, serving in this role. For example, at her deposition, Gogel described a conversation she had with one of her colleagues — someone who had come to Gogel with a discrimination complaint of her own — in which she (Gogel) told the complaining employee that she "didn't feel like [she] could trust" Kia. Appendix, at 151. When this co-worker asked Gogel if she had retained a lawyer to bring a case against Kia, Gogel provided the co-worker with "the name of the attorney that [Gogel] had chosen" to represent her in litigation against the Company. *Id*. The lawyer to whom Gogel referred the co-worker ended up representing Gogel, the co-worker, and a third colleague of Gogel's with respect to their own claims against Kia. Appendix, at 145.

Given that Gogel was referring complaining co-workers to a plaintiff's lawyer who could assist in bringing a claim against the Company, it was clear to her superiors that she could no longer be expected to do her job — to "resolve employment conflict[s] . . . before they got out to an outside party, such as an attorney or the" EEOC. Appendix, at 123. At that point, the "possibility of [Kia achieving] voluntary compliance [with respect to the claims of those who came to Gogel was] reduced, and the result [was almost certain to] be more litigation, not less." *Alexander*, 415 U.S. at 59. Kia terminated her employment.

Gogel and the EEOC insist that the job duties Gogel was hired to perform, and her demonstrated inability to perform them, "do not matter" in determining whether she has a viable retaliation claim. Appellant's br. at 34; EEOC br. at 23. As explained *infra*, to embrace that position, the Court would have to turn its back not only on the established law of this Circuit, but would also have to reject an unbroken, decades-long line of circuit authority from around the country interpreting Title VII's anti-retaliation provision, 42 U.S.C. §2000e-3(a).

As this Court has held, determining the reach of §2000e-3(a) requires "balancing the purpose of the statute and the need to protect individuals asserting their rights thereunder against an employer's legitimate demands for loyalty, cooperation and a generally productive work environment." *Rollins*, 868 F.2d at 400–01. Necessarily, when a court performs the balancing test this Court requires

in §2000e-3(a) cases, "an understanding of the nature of plaintiff's job" is indispensable, and "[a]n employer may remove an employee from a position similar to [Gogel's] without violating Title VII based on the manner in which the employee undertakes . . . her duties." *Hamm v. Members of Bd. of Regents of State of Fla.*, 708 F.2d 647, 653-654 (11th Cir. 1983); *Rosser*, 616 F.2d at 223 ("There may arise instances where the employee's conduct in protest of an unlawful employment practice so interferes with the performance of his job that it renders him ineffective in the position for which he was employed. In such a case, his conduct, or form of opposition, is not covered by §704(a)"); *see also Pendleton v. Rumsfeld*, 628 F.2d 102, 106 (D.C. Cir. 1980) ("requirements of the job and the tolerable limits of conduct in [that] particular setting *must be* explored") (quoting *Hochstadt v. Worcester Found. for Experimental Biology*, 545 F.2d 222, 231 (1st Cir. 1976) (emphasis added)); *accord Melie v. EVCI/TCI Coll. Admin.*, 374 F. App'x 150, 153 (2d Cir. 2010) (plaintiff had been hired "to promote TCI and to persuade students to enroll" but in fact "repeatedly criticized TCI"; he was removed "for conduct inconsistent with [the employee's] duties," and not "because of" a retaliatory motive); *Matima v. Celli*, 228 F.3d 68, 79 (2d Cir. 2000) (same; quoting *Pendleton*). As this Court has held, conduct that might otherwise be covered by §2000e-3(a) is not protected when "it so interferes with the

performance of [the plaintiff's] job that it renders [her] ineffective in the position for which [she] was employed." *Rosser*, 616 F.2d at 223.

This analytical framework has worked effectively for decades, simultaneously protecting important employee rights and the employer's interests in "loyalty [and a] productive [work] environment." The dramatic changes to existing law sought here would do more than merely destabilize a functioning, uniformly accepted test for assessing retaliation claims. It would also undermine the important societal interests of cooperation and voluntary compliance, and resort to litigation only as a last resort, that are embodied in Title VII — interests that are of significant importance to American business.

ARGUMENT

I. AN EMPLOYER DOES NOT VIOLATE THE ANTI-RETALIATION PROVISIONS OF TITLE VII WHEN IT TERMINATES AN EMPLOYEE BECAUSE SHE FAILS OR REFUSES TO PERFORM HER JOB

Gogel insists that "Plaintiff's job title and duties do not matter" in determining whether her conduct is protected by 42 U.S.C. §2000e-3(a). Gogel br. 34. The EEOC goes further, arguing that "any" employee is protected for "any" opposition conduct, and the job duties of the employee will never "alter the retaliation analysis." EEOC br. 22-24. To the EEOC, there are no "unique considerations for any subset of employees," including those with significant EEO responsibilities. *Id*. at 24.

That is incorrect. As explained below, that position cannot be squared with the express language of Title VII, it is incompatible with this Circuit's law and with the uniform case law construing that statutory language, and it would undermine the critical legislative purposes that animated Congress in passing the Act.

A. The Plain Language Of §2000e-3(a) Requires That Courts Determining The Reach Of That Section Consider The Work The Plaintiff Was Employed To Perform

"[I]n any case of statutory construction, [the court's] analysis begins with the 'language of the statute.'" *Owens v. Samkle Auto. Inc.*, 425 F.3d 1318, 1321 (11th Cir. 2005). The relevant language of Title VII prohibits employers from taking materially adverse action against an individual "because [s]he has opposed [a] practice made an unlawful employment practice by" the Act. 42 U.S.C. §2000e-3(a).

The causation requirement built into the statute makes Gogel's position untenable. When an employer takes adverse action against an employee "for conduct inconsistent with [the employee's] duties,"[4] by definition, it acts to protect its business interests — its legitimate "demands for loyalty, cooperation and a

[4] *Melie*, 374 F. App'x at 153 (plaintiff had been hired "to promote TCI and to persuade students to enroll" but in fact "repeatedly criticized TCI"; no retaliatory motive).

generally productive work environment"[5] — and not "because" of a retaliatory motive.

That was the conclusion this Court reached in *Hamm v. Members of Board of Regents of State of Florida*. There, the plaintiff challenged her employer's decision to remove her from her position as equal employment specialist with the University of South Florida. She had been hired to "assist her superior . . . in resolving problems of discrimination," but instead, she became an advocate for the employees — helping them draft letters complaining about their mistreatment, copying their confidential personnel files for them, and, in one instance, searching through university records to find information a complaining employee could then use as evidence of prove pretext with respect to a promotion he had been denied. 708 F.2d at 653. She also prepared an investigative report on an employee termination, in which she concluded that he should not have been fired, and then released the report to a campus newspaper without authorization.

Although all of these actions were taken in "opposition" to conduct the plaintiff thought to be unlawful under Title VII, this Court rejected the assertion that she had been removed from her position "because" of a retaliatory motive. The Court explained:

> An understanding of the nature of plaintiff's job demonstrates why [her retaliation claim fails]. The

[5] *Rollins*, 868 F.2d at 400–01.

> university placed the plaintiff in a position which required loyalty to her supervisor and [he] expected her to perform her assigned duties within the framework established by the university. Despite her statements that she understood she was not to function as an advocate on behalf of aggrieved employees, she consistently did so . . . . Rather than supporting a claim of retaliation, the evidence shows that plaintiff repeatedly chose to work outside the framework USF was attempting to establish to deal with discrimination claims. *An employer may remove an employee from a position similar to that at issue here without violating Title VII based on the manner in which the employee undertakes his or her duties.*

Id. at 653-54; *accord Rosser*, 616 F.2d at 223 ("There may arise instances where the employee's conduct in protest of an unlawful employment practice so interferes with the performance of his job that it renders him ineffective in the position for which he was employed. In such a case, his conduct, or form of opposition, is not covered by §704(a)").

The Court's reasoning in *Hamm* and *Rosser* applies with equal force in this case. As in those cases, Gogel was hired to assist her employer in resolving employee grievances and complaints before they got to an "outside party." She was placed in a "position which required loyalty" and was expected to "perform her assigned duties within the framework established by [Kia]." *Hamm*, 708 F.2d at 653. Instead of trying to resolve her co-worker's complaints through internal channels, Gogel facilitated her efforts to file a charge of discrimination and, ultimately, a lawsuit, and then lied to Kia by denying that she had any significant

interaction with the co-worker. Appendix, at 152-53. In these circumstances, Kia was entitled to remove her from that position of trust without violating Title VII based on the inappropriate way in which she defaulted on her duties.

Although Gogel was broadly protected by §2000e-3(a) — and in fact was pursuing her own claim against the Company without apparent penalty, the statute did not excuse her from doing her job. She was not dismissed "because" she was protesting conduct made unlawful by Title VII, but because she had made clear that she was incapable of performing in the Title VII compliance role for which she had been hired and could no longer be trusted to work "to prevent lawsuits." By insisting that job "functions do[] not alter the retaliation analysis," the EEOC would effectively eliminate this causation requirement from the statute. EEOC br. 22. Even if the EEOC did not face *Hamm* and *Rosser*, and a 40-year headwind in other circuits (as explained below), the Court would not be able to make the statutory language demanding proof of causation disappear as the agency proposes.[6]

[6] Neither Gogel nor the EEOC cite any case that holds to the contrary, and so far as the Chamber has been able to determine, none exists. Moreover, the absolutist "any person in any job and any conduct" position advocated by the EEOC is contrary to the EEOC's own guidance on point, EEOC Enforcement Guidance (court must "balance the right to oppose employment discrimination against the employer's need to have a stable and productive work environment"; "opposition [must be] reasonable"). Furthermore, the EEOC's position would lead to absurd results, such as a corporate officer or in-house counsel working hand in hand with a plaintiff's lawyer to bring suit against the company to whom the individual owes

B. This Court And The Other Circuit Courts Have Uniformly Recognized That All Relevant Facts Must Be Assessed When Marking Out The Boundaries Of Title VII's Protections Against Retaliation, And That Includes The Plaintiff's Job Duties

Although Gogel and the EEOC insist that "any" conduct by "any" employee will be protected under §2000e-3(a),[7] as this Court has previously (and repeatedly) held, "the protection afforded by the statute is not absolute." *Rollins*, 868 F.2d at 400–01. Rather, the plaintiff's "opposition" conduct "must be reasonable" under all of the relevant circumstances. *Id.* The "determination of reasonableness [has to be] made on a case by case basis by balancing the purpose of the statute and the need to protect individuals asserting their rights thereunder against an employer's legitimate demands for loyalty, cooperation and a generally productive work environment." *Id.*; *see also* EEOC Enforcement Guidance (court must "balance the right to oppose employment discrimination against the employer's need to have a stable and productive work environment"; "opposition [must be] reasonable").

It is not possible to make a sensible "determination of reasonableness" on a "case by case basis," as this Court requires — to determine whether the employee's opposition activities would undermine their "productive work" — without taking account of the job the plaintiff was asked to perform. And for

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a fiduciary duty. As this Court has held, the court is obliged to reject a statutory construction that "would frustrate the congressional intent and lead to absurd results." *United States v. DBB, Inc.*, 180 F.3d 1277, 1283 (11th Cir. 1999).

[7] *See* EEOC br. 23-24 ('"any' is not ambiguous"; '"any' means 'all'").

decades, that is precisely how courts have approached the subject: "[t]he requirements of the job and the tolerable limits of conduct in a particular setting *must be explored*." *Hochstadt*, 545 F.2d at 231 (emphasis supplied).

Hamm, *supra*, is the clearest example of that rule in this Circuit, but the line of circuit authority elsewhere is forty years long and, so far as the Chamber has been able to determine, unbroken. *See, e.g.*, *Melie*, 374 F. App'x at 153 (plaintiff had been hired "to promote TCI and to persuade students to enroll" but in fact "repeatedly criticized TCI"; he was removed "for conduct inconsistent with [the employee's] duties," and not "because of" a retaliatory motive); *Matima*, 228 F.3d at 79 ("A question of retaliation is not raised by a removal for conduct inconsistent with [the employee's] duties, unless its use as a mere pretext is clear."); *Nelson v. Pima Cmty. Coll.*, 83 F.3d 1075, 1082 (9th Cir. 1996) ("§2000e-3(a) does not prevent an employer from dismissing an employee who handles discrimination complaints as part of his job when the employee handles these complaints contrary to the instructions of his employer"); *Jones v. Flagship Int'l*, 793 F.2d 714, 717, 728 (5th Cir. 1986) (employer's Manager of Equal Employment Opportunity Programs, among other things, "attempt[ed] to encourage others to file charges against Flagship" which made her "ineffective in the position for which she was employed."); *Holden v. Owens-Illinois, Inc.*, 793 F.2d 745, 751 (6th Cir. 1986) ("instances where the employee's conduct in protest of an unlawful employment

practice so interferes with the performance of his job that it renders him ineffective in the position for which he was employed. In such a case, his conduct, or form of opposition, is not covered by § 704(a)"); *Pendleton*, 628 F.2d at 106; *Whatley v. Metro. Atlanta Rapid Transit Auth.*, 632 F.2d 1325, 1328 (5th Cir. 1980) ("Title VII cannot be held to immunize an employee from all consequences of his behavior merely because part of his job happens to require the handling of discrimination complaints"); *see also Sampath v. Concurrent Techs. Corp.*, No. CIVA 3:03-CV-264, 2008 WL 868215, at *44 (W.D. Pa. Mar. 31, 2008), *aff'd*, 299 F. App'x 143 (3d Cir. 2008) ("requirements of the job and the tolerable limits of conduct in the particular setting" must be used to determine the "limits of the protected activity"); *Jones v. Washington Metro. Area Transit Auth.*, No. CIV. A. 89-0552, 1993 WL 835589, at *5 (D.D.C. Aug. 6, 1993) (same; "The employer is entitled to 'loyalty and cooperativeness.'"); *Garcia v. Am. Airlines, Inc.*, 673 F. Supp. 63, 66–67 (D.P.R. 1987) ("[w]hen a discharge is for conduct inconsistent with an employee's duties, no question of retaliation arises.")

The D.C. Circuit's discussion of the issue in *Pendleton* is particularly apt. There, the plaintiff was an EEO Counselor at Walter Reed Medical Center who had been "specially charged with improving Walter Reed's 'personnel practices and racial problems.'" 628 F.2d at 106. Pendleton and his co-plaintiff were "participants" in, or at least attendees at, a boisterous event at which grievances

held by food service workers were aired "and [they claimed that they] were discharged because of it." 628 F.2d at 106-07.

The magistrate judge before whom the case was tried rendered judgment in favor of the Hospital, but in its opinion affirming that judgment, the D.C. Circuit noted that the "magistrate [had] never refer[red] to a matter which, in our view, is quite rightly stressed by the parties, *the actual duties of the plaintiffs as EEO Counselors*." *Id*. at 107 (emphasis added). Quoting the First Circuit in *Hochstadt*, the D.C. Circuit emphasized that "[t]he requirements of [their] job and the tolerable limits of conduct [in that position] in a particular setting *must be explored*." *Id.* at 108 (emphasis added). The court explained:

> It seems fairly obvious that a reasonable person in [the employer's] position might, on learning of the plaintiffs' parts in the demonstration, have felt that [plaintiffs] had *fatally compromised their ability to gain the confidence of middle management . . . , and that they were lacking in ability to appreciate management's point of view or see the facts as management saw them*. [T]hese are the *requirements of the job*, as any person of common sense would perceive. Without the confidence of middle management, a Counselor [could not] get grievances settled early and at low levels of authority [and the] private settlement of grievances is a purpose of the Act.
>
> [T]he problem before us for resolution really *has the duties of an EEO Counselor as its most significant element*. The decision to remove any employee *must be made primarily in light of that employee's duties*. A question of retaliation is not raised by a removal *for conduct inconsistent with those duties*, unless its use as a mere pretext is clear.

Id. (emphasis added). That analysis has been cited with approval by this Court. *Rollins*, 868 F.2d at 400-01 ("our approach [to performing the retaliation 'balancing' test] is consistent with those of our sister circuits which have addressed the issue," citing *Pendleton*).

Gogel and the EEOC insist that Gogel's job duties "do not matter" (Gogel br. 34) and, as a matter of law, cannot "alter the retaliation analysis," (EEOC br. 22), but that simply is not the law. Gogel's "duties [with respect to EEO compliance are the] most significant element" in the analysis. *Pendleton*, 628 F.2d at 108; *Hamm*, 708 F.2d at 653 ("an understanding of the nature of plaintiff's job demonstrates why the district court must be affirmed").

C. If Courts Were Precluded From Considering The Employee's Job Duties, It Would Undermine The Most Fundamental Goals Of Title VII

Although the rule urged by Gogel and the EEOC is foreclosed by the language of the statute and this Court's decisions, including *Hamm* and *Rosser*, and would be incompatible with the analysis that every other court of appeals to consider the issue has adopted, it is also worth noting that adopting the rule would also undermine the very goals Title VII was designed to achieve.

As this Court and the Supreme Court have emphasized (often in response to overzealous action by the EEOC), voluntary employer compliance efforts lie at "the heart of Title VII." *E.E.O.C. v. Asplundh Tree Expert Co.*, 340 F.3d 1256,

1261 (11th Cir. 2003). Conversely, Congress intended to "reserve judicial action as a last resort." *Id.* at 1261; *Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 515 (1986) (goal of Title VII is to cause employers "to self-examine and self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history'") (citation omitted)).[8]

To effectuate this Congressional purpose, Chamber members employ human resources professionals like Gogel to act as their agents to ensure compliance. Among a great many other discrete and confidential tasks, these employees identify potential sources of friction or latent claims and resolve them before they become lawsuits; investigate claims of unlawful harassment or other disparate treatment and confidentially recommend appropriate dispositions; engage disabled employees in an interactive dialog to find reasonable accommodations; safeguard sensitive employee data; ensure that employees are properly classified as exempt or non-exempt from the overtime requirements of the Fair Labor Standards Act;

[8]Conference Report, S.Rep. No. 681, 92d Cong., 2d Sess., 17–18; Conference Report, H.R. Rep. No. 899, 92d Cong., 2d Sess. 17–18; *see also Alexander*, 415 U.S. at 44, 59 (Title VII was passed "to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin [and] [c]ooperation and voluntary compliance were selected as the preferred means for achieving this goal."; eschewing construction of Act that would reduce "voluntary compliance or settlement of Title VII claims [and] result [in] more litigation, not less."); *accord Ford Motor Co.*, 458 U.S. at 228 (quoting *Alexander*); *Mach Mining, LLC v. E.E.O.C.*, 135 S. Ct. 1645, 1651 (2015) (same).

and analyze the statistical results of various employment practices in a fashion appropriate under the Uniform Guidelines on Employee Selection in order to identify any potential adverse impact against protected groups.[9] They do all of these things as the employer's agent in order to ensure compliance and ward off litigation.

In order for these professionals to perform these tasks, the employer must have confidence in their judgment and discretion. Employers trust them with sensitive information about others — compensation, work history, medical information — and the employer must know that it can confide in these employees' discretion and know that they will treat that information with care. These employees often, if not uniformly, work directly with legal counsel to obtain advice about the extent of the employer's legal obligation and its potential exposure if matters cannot be resolved through the employer's voluntary efforts. In sum, employers must trust these professionals to work on the employer's behalf to *solve* problems and *avoid* litigation.

Where the employer determines that a professional entrusted with these critical responsibilities has become unwilling or unable to protect the employer's interests in dealing with the employees — indeed, has started working *against* these interests — it cannot retain them. If the rule urged by Gogel and the EEOC

[9] 29 C.F.R. § 1607.16(D).

were to be the law, employers would be forced to retain human resources professionals who are actively working to undermine Congress's goal of voluntary compliance and in whom the employer cannot place any trust. That would make it far more difficult, and would significantly reduce the incentives, for employers to resolve complaints internally, without litigation, as Congress plainly intended. If the statute's goals are to be achieved, the employer cannot be exposed to a retaliation claim when it concludes, as Kia did here, that a human resources professional in its employ is affirmatively *undermining* its interests rather than advocating on its behalf.

II. NO DECISION SUPPORTS THE EEOC'S VIEW THAT AN EMPLOYEE'S DUTIES ARE OFF-LIMITS WHEN DETERMINING WHETHER THE ANTI-RETALIATION PROVISION OF TITLE VII APPLIES

These principles are well-settled and time-honored; it is no great surprise that neither Gogel nor the EEOC have been able to find a single decision, in any court, that adopts their absolutist "any opposition means any opposition by any employee" position.

EEOC relies primarily on *DeMasters v. Carilion Clinic*, 796 F.3d 409 (4th Cir. 2015), *Johnson v. Univ. of Cincinnati*, 215 F.3d 561 (6th Cir. 2000), and *Littlejohn v. City of New York*, 795 F.3d 297 (2d Cir. 2015), but those three cases dealt with the entirely separate question whether managerial employees, and in particular, whether human resources or EEO managers, are *categorically excluded*

from retaliation protection under Title VII when the opposition conduct on which the rely was "part of [their] routine job duties." *Littlejohn*, 795 F.3d at 317. For example, in *Littlejohn*, the plaintiff alleged that she was demoted from her position as Director of the defendant's Office of Equal Employment Opportunity for doing her job — for advising her superiors that "racial discrimination [had occurred during a] reorganization process." *Id.* at 315. The Second Circuit held that she was not categorically prohibited from asserting retaliation because her job and her "opposition" activities were one and the same.

EEOC's reliance on these so called "manager rule" cases is misplaced for two reasons. First, the issue in *Littlejohn*, *Johnson*, and *DeMasters* is not presented here. Gogel was dismissed for engaging in what Kia understood to be conduct *outside of* — indeed, diametrically *opposed* to — her job functions. None of these courts discussed, much less disagreed with, the long-settled rule that the "requirements of the job and the tolerable limits of conduct in a particular setting must be explored"[10] when determining whether conduct is excluded from §2000e-3(a)'s coverage, much less concluded that a "[p]laintiff's job title and duties do not matter" when considering a retaliation claim. The district court here did not discuss, and certainly did not apply, any version of the "manager rule," and Kia did not urge the Court to apply it.

[10] *Hochstadt*, 545 F.2d at 231.

Second, as the Second Circuit acknowledged in *Littlejohn*, the rule adopted in those cases is not good law in the Eleventh Circuit. The "manager rule," though inapplicable here, remains good law in this Circuit. *Littlejohn*, 795 F.3d at 317 n.16, (disagreeing with *Brush v. Sears Holdings Corp.*, 466 F. App'x 781, 787 (11th Cir. 2012) ("a management employee that, in the course of her normal job performance, disagrees with or opposes the actions of an employer does not engage in 'protected activity'")); *cf. Whatley*, 632 F.2d at 1329 ("Title VII cannot be held to immunize an employee from all consequences of his behavior merely because part of his job happens to require the handling of discrimination complaints").

The EEOC also relies on *Merritt v. Dillard Paper Co.*, 120 F.3d 1181 (11th Cir. 1997), but there, the question was whether §2000e-3(a) extended to adverse action taken against an employee who involuntarily and unwillingly participated in a Title VII proceeding as a reluctant witness. That issue is not presented here, and the court never discussed, much less disagreed with, the settled case law establishing the "case by case" balancing test, nor did it question the holding in *Hamm* that "[a]n employer may remove an employee from a position similar to [Gogel's] without violating Title VII based on the manner in which the employee undertakes . . . her duties." 708 F.2d at 654.

The question posed in this case has been settled, in this Circuit and elsewhere, for more than 40 years. The existing rule sensibly "balanc[es] the

purpose of the statute and the need to protect individuals asserting their rights thereunder against an employer's legitimate demands for loyalty, cooperation and a generally productive work environment," and requires the reviewing court to consider all the relevant facts and circumstances, including the job the plaintiff had been asked to perform. *Rollins*, 868 F.2d at 401. The Chamber is aware of no case, in any jurisdiction, questioning that rule, much less adopting the absolutist rule urged by Gogel and the EEOC. The correct response would be to reject their invitation to revolutionize the law of retaliation.

CONCLUSION

For the foregoing reasons, the judgment of district court should be affirmed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Carson H. Sullivan, counsel for amicus curiae, certify, pursuant to Federal Rules of Appellate Procedure 29(d), 32(a)(5)-(7), that the foregoing Brief of Amicus Curiae the Chamber of Commerce of the United States in Support of Appellee is proportionately spaced and has a typeface of 14 point Times New Roman, contains 5,486 words, and that the text of the electronic brief is identical to the text of the paper copies.

s/ Carson H. Sullivan
Carson H. Sullivan

May 3, 2017

CERTIFICATE OF SERVICE

I, Carson H. Sullivan, counsel for amicus curiae, certify that, on May 3, 2017, a copy of the foregoing was filed electronically through the appellate CM/ECF system with the Clerk of the Court. All counsel of record in this case are registered CM/ECF users.

I also certify that I deposited in an overnight delivery service the original and six copies of the brief to the Clerk of this Court.

s/ Carson H. Sullivan
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