NO. 13-2278

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

J. NEIL DEMASTERS,

Plaintiff-Appellant,

v.

CARILION CLINIC, ET AL.,

Defendant-Appellee.

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

BRIEF OF *AMICUS CURIAE* THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PLAINTIFF-APPELLANT URGING REVERSAL

Michael L. Foreman
Counsel of Record
PENNSYLVANIA STATE UNIVERSITY
DICKINSON SCHOOL OF LAW
CIVIL RIGHTS APPELLATE CLINIC
329 Innovation Blvd., Suite 118
State College, PA 16803
(814) 865-3832
mlf25@psu.edu

Roberta L. Steele
NATIONAL EMPLOYMENT LAWYERS ASSOCIATION
417 Montgomery Street, 4th Fl.
San Francisco, CA 94104
(415) 296-7629
rsteele@nelahq.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Fed. R. App. P., *amicus curiae* herein states that it is neither a publicly held corporation nor has a parent corporation that is publicly held.

INTEREST OF *AMICUS CURIAE*

The National Employment Lawyers Association (NELA) advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. Founded in 1985, NELA is the country's largest professional organization comprised exclusively of lawyers who represent individual employees in cases involving labor, employment, and civil rights disputes. NELA and its 68 circuit, state, and local affiliates have more than 3,000 members nationwide committed to working for those who have been illegally mistreated in the workplace.[1]

Amicus curiae is committed to furthering the goals of Title VII of the Civil Rights Act of 1964 to eradicate employment discrimination and, consistent with

[1] Pursuant to Local Rule 29(a), all parties have consented to the filing of this brief. As required by Local Rule 29(c)(5), *amicus curiae* state that: (a) no party's counsel authored this brief in whole or in part; (b) no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and (c) no person—other than *amicus curiae*, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief.

the U.S. Supreme Court's vision of the law, to encourage employers to develop and implement policies prohibiting discrimination in employment, specifically policies aimed at protecting employees from harassment on the job.

Title VII's anti-retaliation provision ensures a workplace free from unlawful discrimination by "preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006). A Fourth Circuit decision clarifying "participation," "opposition," and when third-parties have a cause of action for retaliation under Title VII will help employers comply with the law and directly impact scores of employees.

SUMMARY OF ARGUMENT

The district court erred by applying an overly demanding pleading standard contrary to U.S. Supreme Court and Fourth Circuit precedent. *Iqbal* and *Twombly* simply require that a plaintiff plead a plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The district court also erred by requiring DeMasters to plead a *prima facie* case of discrimination. When viewed under the proper legal standard, DeMasters pled sufficient facts to support a claim under the participation

and opposition clauses[2] of Title VII's anti-retaliation provision. Additionally, DeMasters pled sufficient facts to support a claim of third-party retaliation under *Thompson v. North American Stainless, LP*, 131 S. Ct. 863 (2011).

The district court's holding that protection under the participation clause requires a pending charge of discrimination before the Equal Employment Opportunity Commission (EEOC) is wrong as a matter of law. In *Faragher* and *Ellerth*, the Supreme Court encouraged employers to adopt policies that would lead to internal resolution of alleged Title VII violations by providing them with an affirmative defense to liability. *See Faragher v. Boca Raton*, 524 U.S. 775, 806 (1998); *Burlington Indus. v. Ellerth*, 524 U.S. 742, 765 (1998). In creating this affirmative defense, the Supreme Court made employers' policies against discrimination an integral part of the Title VII framework. Thus, the participation clause must protect employees who, before the filing of an EEOC charge, utilize the employer's internal anti-harassment policies and procedures. This position is consistent with a plain reading of the statute and that taken by the United States in policy pronouncements and litigation.

The district court's interpretation of the scope of the participation clause would lead to absurd results, encouraging employees to prematurely file EEOC

[2] Appellant discusses the proper standard for proving opposition in detail, *see* Appellant's Br. 9-15, and those arguments will not be repeated.

charges to ensure protection from retaliation. This contravenes Supreme Court precedent, which makes clear that the most effective means to accomplish Title VII's goals is to encourage employers to develop internal processes to prevent and correct discrimination. *See Ellerth*, 524 U.S. at 764-65. Additionally, the district court erred by improperly shifting the focus of the inquiry from *what* an employee did to *when* the employee did it, despite Title VII's focus on the employee's conduct.

Even if this Court finds that DeMasters did not engage in protected activity under either the opposition or participation clauses of Title VII's anti-retaliation provision, he pled sufficient facts to raise a plausible claim of third-party reprisal under *Thompson*. The district court misapplied *Thompson*, incorrectly focusing on the employer's intent to punish Doe. This misinterprets the test established in *Thompson*, which asks: (1) whether a reasonable person would be dissuaded from making or supporting a charge of discrimination by Carilion's conduct, *Thompson*, 131 S. Ct. at 868; and (2) whether DeMasters fell within the "zone of interests" protected by Title VII. *Id.* at 870.

ARGUMENT

I. THE DISTRICT COURT APPLIED AN OVERLY DEMANDING PLEADING STANDARD TO DEMASTERS' COMPLAINT.

The district court dismissed DeMasters' complaint based on an overly demanding pleading standard that is unsupported by Supreme Court or Fourth Circuit precedent. The district court found that DeMasters failed to plead a *prima facie* case of retaliation in his complaint. Joint Appendix ("JA") 98; *see also id.* 95-96 n.5 ("[I]t is Demasters' burden to allege that he engaged in protected activity in order to state a prima facie claim for retaliation under Title VII. That he has failed to do.").[3] The Supreme Court in *Twombly* and *Iqbal* enunciated a pleading standard beyond the "no set of facts" standard in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).[4] Nonetheless, a plaintiff is still only required to show that his claim has facial plausibility by "plead[ing] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 556 (2007)). A complaint under this pleading standard "*does not* need detailed factual

[3] This quoted language from the district court could be interpreted as requiring DeMasters to plead the existence of a pending EEOC charge as part of his *prima facie* case for retaliation. Such an interpretation, however, as discussed *infra* part II, is an error of law.

[4] *Conley*, 355 U.S. at 45-46 (creating the pleading standard that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief").

allegations," *Twombly*, 550 U.S. at 555 (emphasis added), but only needs to allege facts that "state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678. While the district court properly set out the *Iqbal* standard in its opinion, it did not follow it and instead applied an inappropriately demanding pleading standard.

Fourth Circuit precedent also does not support the district court's high pleading standard. The Fourth Circuit "traditionally view[s] civil rights complaints . . . with 'special judicial solicitude.'" *Kramer v. Va. State Court Sys.*, 2013 WL 373573, at *2 (W.D. Va. Jan. 30, 2013) (quoting *Harrison v. U.S. Postal Serv.*, 840 F.2d 1149, 1152 (4th Cir. 1988)). Specifically, when assessing civil rights complaints on a motion to dismiss, district courts in the Fourth Circuit "must not dismiss the complaint unless it appears to a certainty that the plaintiff would not be entitled to relief under any legal theory which might plausibly be suggested by the facts alleged." *Morgan v. Town of Mineral*, 2012 WL 5464633, at *3 (W.D. Va. May 4, 2012) (quoting *Harrison*, 840 F.2d at 1152). The Fourth Circuit's "special judicial solicitude" standard is critical in retaliation cases where the right to "'unfettered access' to Title VII's remedial mechanisms," *Burlington N.*, 548 U.S. at 68, insures that the substantive right to be free from illegal discrimination has meaning. Accordingly, under Fourth Circuit precedent, the district court failed to meet its obligation to liberally assess DeMasters' Title VII retaliation claim.

A. DEMASTERS WAS NOT REQUIRED TO PLEAD A *PRIMA FACIE* CASE OF RETALIATION.

As a matter of law, the district court erred in dismissing DeMasters' complaint because he "failed to allege a *prima facie* case of retaliation." JA 98. The district court's conclusion that DeMasters was required to plead a *prima facie* case of retaliation is neither supported by Supreme Court nor Fourth Circuit precedent. The Supreme Court in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), held that a plaintiff is not required to plead a *prima facie* case of discrimination to overcome a motion to dismiss. *Id.* at 511. *Swierkiewicz* remains undisturbed in the wake of *Twombly* and *Iqbal*. *Twombly*, 550 U.S. at 569-70 (stating that *Swierkiewicz* did not change the law of pleading, but rather held that the Second Circuit's requirement that a plaintiff plead a *prima facie* case of discrimination was "contrary to the Federal Rules' structure of liberal pleading requirements").

Moreover, the Fourth Circuit, as well as numerous federal courts of appeals, has affirmed that a plaintiff is not required to plead a *prima facie* case of retaliation to overcome a motion to dismiss. *See Bala v. Va. Dep't of Conservation & Recreation*, 532 F. App'x 332, 334 (4th Cir. 2013) ("This Court has never indicated that the requirements for establishing a *prima facie* case under *McDonnell Douglas* also apply to the pleading standard that plaintiffs must satisfy in order to survive a motion to dismiss. Complaints in such cases therefore must

satisfy only the simple requirements of Rule 8(a)." (quoting *Swierkiewicz*, 534 U.S. at 513) (internal quotation marks omitted)); *see also Coleman v. Md. Ct. of App.*, 626 F.3d 187 (4th Cir. 2010); *Rodriguez-Reyes v. Molina-Rodriquez*, 711 F.3d 49 (1st Cir. 2013); *Khalik v. United Air Lines*, 671 F.3d 1188 (10th Cir. 2012); *Keys v. Humana, Inc.*, 684 F.3d 605 (6th Cir. 2012); *Arista Records LLC v. Doe 3*, 604 F.3d 110 (2d Cir. 2010); *al-Kidd v. Ashcroft*, 580 F.3d 949 (9th Cir. 2009). As such, the district court erred as a matter of law in dismissing DeMasters' complaint on the basis that he did not plead a *prima facie* case of retaliation.

II. THE PARTICIPATION CLAUSE PROTECTS AN EMPLOYEE PRIOR TO THE FILING OF AN EEOC CHARGE.

The district court erred as a matter of law by requiring an employee to file an EEOC charge before receiving protection under the participation clause of Title VII. The plain text of Title VII patently demonstrates the error in the district court's interpretation of the participation clause. Because the Appellant's Brief provides a detailed textual analysis of Title VII, it will not be repeated here. *See* Appellant Br. 27-32. There are, however, other important considerations that should compel this Court to conclude that DeMasters' conduct is protected by the participation clause.

A. THE UNITED STATES GOVERNMENT HAS TAKEN THE POSITION THAT THE PARTICIPATION CLAUSE PROTECTS EMPLOYEES PRIOR TO THE FILING OF AN EEOC CHARGE.

DeMasters is not alone in arguing that the protections under the participation clause do not require a pending EEOC charge. The EEOC, the governmental agency charged by Congress with enforcing Title VII, has consistently taken the view that the participation clause does not require a pending EEOC charge. Indeed, the Solicitor General of the United States argued this same position in its brief before the Supreme Court in *Crawford v. Metropolitan Government of Nashville & Davidson County, Tennessee*, 555 U.S. 271 (2009).[5]

The EEOC has recognized that a reading of the participation clause that leaves unprotected any conduct that relates to but precedes the filing of an EEOC charge would enable employers to retaliate against employees whose conduct is not otherwise protected under the opposition clause. *See* Paul M. Igasaki, *Retaliation*, Equal Emp't Opportunity Comm'n, at 45 (May 20, 1998), *available at* http://www.eeoc.gov/policy/docs/retal.html ("An interpretation of Title VII that permits some forms of retaliation to go unpunished would undermine the effectiveness of the EEO statutes and conflict with the language and purpose of the

[5] Because the Court found that Crawford's actions were protected under the opposition clause, the Court did not reach the issue of whether they were also protected under the participation clause. *Crawford*, 555 U.S. at 280.

anti-retaliation provisions."). This has been the EEOC's interpretation of the anti-retaliation provision of Title VII for over 12 years. *See* Brief of EEOC in *Townsend* at 19, *Townsend v. Benjamin Enterprises, Inc.*, 679 F.3d 41 (2d Cir. 2012) (No. 09-0197) (citing Brief of the EEOC as Appellant, *EEOC v. Total Sys. Services, Inc.*, 221 F.3d 1171 (11th Cir. 2000) (No. 99-13196); *Facts About Retaliation*, EEOC, http://www.eeoc.gov/laws/types/facts-retal.cfm).

Furthermore, the Solicitor General took this same position in *Crawford*. *See* Brief for the United States as Amicus Curiae Supporting Petitioner at 17, *Crawford*, 555 U.S. 271 (2009) (No. 06-1595) [hereinafter Brief for the United States] ("Nothing in the statute's text indicates that protection under the participation clause applies *only* if an EEOC charge has been filed. To the contrary, while the statute explicitly extends to employees who file a 'charge,' it goes on to state that it applies as well to employees who 'participated *in any manner* in an investigation, proceeding, or hearing under this subchapter.'" (quoting 42 U.S.C. 2000e-3(a) (1972)) (emphasis in original). Accordingly, the position advanced by the Appellant is not novel, but rather one that has been advocated consistently by the federal government. The views of the Solicitor General and EEOC constitute "a body of experience and informed judgment to which the courts and litigants may properly resort for guidance" and as such, should be "entitled to a 'measure of respect'" by this Court. *Fed. Express Corp. v.*

Holowecki, 552 U.S. 389, 399 (2008) (internal quotations and citations omitted); *see also Crawford*, 555 U.S. at 276.

B. THE SUPREME COURT IN *FARAGHER* AND *ELLERTH* BROUGHT INTERNAL ANTI-HARASSMENT POLICIES AND PROCEDURES INTO THE TITLE VII ENFORCEMENT MECHANISM.

The primary purpose of Title VII is "not to provide redress but to avoid harm." *Faragher*, 524 U.S. at 806 (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975)). Congress and the courts have determined that the best and most effective way to accomplish Title VII's goal is for employers to develop their own internal processes to prevent and correct discrimination. *See Ellerth*, 524 U.S. at 764 ("Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms. Were employer liability to depend in part on an employer's effort to create such procedures, it would effect Congress' intention to promote conciliation rather than litigation in the Title VII context.").

By creating an affirmative defense to liability under Title VII, the Supreme Court, in *Faragher* and *Ellerth*, turned employers' internal policies and procedures regarding harassment and discrimination into an enforcement mechanism under Title VII. *See Faragher*, 524 U.S. at 807-08; *Ellerth*, 524 U.S. at 765. The Supreme Court in *Faragher* and *Ellerth* effectively made employers' policies and procedures for addressing workplace harassment "an investigation, proceeding, or hearing under this subchapter." *See* 42 U.S.C. § 2000e-3(a) (1972). As discussed,

infra at pages 14-15, the Fourth Circuit has not hesitated to apply the *Faragher* and *Ellerth* affirmative defense as part of Title VII's enforcement mechanism. Recognizing that the participation clause protects employees who use or assist others in using an employer's anti-discrimination complaint procedure prior to formally filing a charge with the EEOC is entirely consistent with the purpose of Title VII's anti-retaliation provision.

C. THE FOURTH CIRCUIT'S DECISION IN *LAUGHLIN V. METROPOLITAN WASHINGTON AIRPORTS AUTHORITY* MUST BE INTERPRETED THROUGH THE LENS OF *FARAGHER* AND *ELLERTH*.

In *Laughlin*, the Fourth Circuit interpreted the participation clause to protect employees who are involved in an "ongoing 'investigation, proceeding or hearing.'" *Laughlin v. Metro. Wash. Airports Auth.*, 149 F.3d 253, 259 (4th Cir. 1998). As an initial matter, *Laughlin* is factually distinguishable from DeMasters' case. In *Laughlin*, the plaintiff's conduct was arguably criminal, as well as against company policy, as she improperly removed documents from a supervisor's desk after a co-worker complained of sexual harassment. *Id.* at 259 n.3. Title VII, however, does not protect an employee who engages in illegal conduct. *Id.* (citing, *e.g.*, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 803-04 (1973)) (citations omitted). In contrast, DeMasters was acting in full accordance with *Faragher* and *Ellerth*'s requirement for employees to address harassment through employers' established policies. *See Jordan v. Alternative Resources Corp.*, 458 F.3d 332, 354

(4th Cir. 2006) ("The *Ellerth*/*Faragher* defense, in essence, imposes a duty on an employee to report harassing and offensive conduct to his employer."). Moreover, in *Laughlin*, the plaintiff was not utilizing the employer's internal anti-harassment policy because the victim of harassment and the alleged harasser had resigned. *Laughlin*, 149 F.3d at 256. In addition, the victim of harassment had not yet filed an EEOC charge or lawsuit. *Id.* Accordingly, there was not only the absence of a pending investigation, proceeding, or hearing pursuant to a pending EEOC charge or Title VII lawsuit, there was also no ongoing *internal* process, proceeding, or hearing in which the plaintiff could participate. As a result, and contrary to the district court's analysis, *Laughlin* did not decide whether an EEOC charge was necessary for protection under the participation clause.

More significantly, when *Laughlin* is read in light of *Faragher* and *Ellerth*, *Laughlin* supports the proposition that the participation clause does not require a pending EEOC charge. *Faragher* and *Ellerth* were decided just six days before *Laughlin*. The *Laughlin* decision does not cite either case, and it is unlikely that the panel had an opportunity to consider their implications seriously, if at all. *Laughlin* did not address whether the enforcement mechanisms under Title VII included employers' internal discrimination, harassment, and complaint policies and procedures; however, its reasoning did not foreclose that possibility. This Court should interpret *Laughlin* consistent with *Faragher* and *Ellerth* and make

clear that employers' internal policies and procedures are "an investigation, proceeding, or hearing under this subchapter." *See* 42 U.S.C. § 2000e-3(a) (1972). Because the viability of a Title VII claim can rest on whether the plaintiff took advantage of internal procedures, distinguishing between EEOC investigations and employers' internal policies and procedures is inconsistent with the purpose of Title VII's anti-retaliation provision and unsupported post-*Faragher* and *Ellerth*.

The Fourth Circuit has consistently acknowledged that using employers' internal policies and procedures prior to the filing of an EEOC charge is important after *Faragher* and *Ellerth*. As noted in *Jordan*, the court framed this as an employee's duty. *Jordan*, 458 F.3d at 354. Indeed, courts in this circuit often resolve Title VII cases against employees because either the employees failed to utilize the employer's internal policies and investigation procedures, or, through those procedures, the employer promptly and effectively addressed the complained-of unlawful conduct. *See, e.g.*, *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262, 268 (4th Cir. 2001) (reasoning that "vitiating an employee's reporting requirement would completely undermine Title VII's basic policy of encouraging forethought by employers and saving action by objecting employees." (internal quotations omitted)); *Butler v. Md. Aviation Admin.*, 2012 WL 3541985, at *7 (D. Md. Aug. 14, 2012) (granting a motion to dismiss because plaintiff unreasonably failed to take advantage of the employer's complaint and

investigation opportunities as required by *Faragher* and *Ellerth*); *Bush v. Potter*, 2009 WL 5177286, at *6-7 (D. Md. Dec. 21, 2009) (holding that employer was not liable for sexual harassment because it had "a viable anti-harassment policy, widely communicated to [its] employees" that it used to promptly remove the unlawful work conditions, thereby satisfying the *Ellerth*/*Faragher* defense); *Cooper v. City of Roanoke, Va.*, 2003 WL 24117704 (W.D. Va. Jan. 10, 2003), *aff'd*, 75 F. App'x 128 (4th Cir. 2003) (same); *Brown v. Henderson*, 155 F. Supp. 2d 502, 513 (M.D.N.C. 2000) (same). Thus, it is essential that *Laughlin* be properly interpreted consistent with *Faragher* and *Ellerth*, so that employees who utilize employers' internal discrimination, harassment, and complaint policies and procedures will be protected under Title VII's participation clause.

D. THE DISTRICT COURT'S NARROW INTERPRETATION OF THE PARTICIPATION CLAUSE CREATES A GAP BETWEEN ACTIVITIES COVERED BY THE PARTICIPATION CLAUSE AND THOSE COVERED BY THE OPPOSITION CLAUSE, LEADING TO UNINTENDED CONSEQUENCES AND ABSURD RESULTS.

The Fourth Circuit has observed that the participation clause is broad. *See Laughlin*, 149 F.3d at 259 n.4 (citing *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1312 (6th Cir. 1989)) ("[T]he scope of protection for activity falling under the participation clause is broader than for activity falling under the opposition clause."). Contrary to Supreme Court and Fourth Circuit precedent, the district court interpreted the participation clause narrowly, leaving a gap of activity

unprotected under Title VII's anti-retaliation provision. This gap would arise when employees who, prior to the filing of an EEOC charge, avail themselves of the employers' internal policies and procedures as envisioned in *Faragher* and *Ellerth*, but whose conduct is not oppositional under the statute.

This gap between the participation and opposition clauses leads to results that neither Congress nor the Supreme Court contemplated. For example, the district court's view would encourage employees to rush to file an EEOC charge at the first hint of harassment or discrimination to ensure they are protected against retaliation under Title VII, thereby bypassing employers' internal policies aimed at addressing unlawful conduct in the workplace. Not only may the employee who avoids the internal process be providing the employer an affirmative defense, it would also lead to an increase in EEOC charges, resulting in unnecessary litigation and the underlying conduct going unremedied. This places employees in the untenable position of needing to file an EEOC charge to ensure protection from retaliation under the participation clause, jeopardizing their legal claim because they did not utilize the internal procedures provided by the employer to prevent and remedy discrimination as required by the *Faragher* and *Ellerth* affirmative defense. This is antithetical to Congress' intent that Title VII protect employees from discrimination.

As the United States explained in its brief in *Crawford*, "Title VII's enforcement depends on participation and truthful cooperation by employees during employer-sponsored investigations. If employees are afraid to report instances of harassment or to participate in employer investigations out of fear of retaliation, employers may not become fully aware of harassment, thereby preventing them from taking corrective action." *See* Brief for the United States at 7, *Crawford*, 555 U.S. 271 (No. 06-1595). Adopting the district court's narrow interpretation of the participation clause would stifle the utility of the internal discrimination, harassment, and complaint policies and procedures that the Supreme Court valued so highly in *Faragher* and *Ellerth*.

Finally, the district court's interpretation of the participation clause shifted the focus improperly from *what* an employee does to *when* he or she does it, despite the fact that the participation clause focuses on the employee's conduct. *See* 42 U.S.C. § 2000e-3(a) (1972) ("It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has *made a charge*, *testified*, *assisted*, or *participated in any manner* in an investigation, proceeding, or hearing under this subchapter." (emphasis added)). The district court ruled that DeMasters' conduct was not protected by the participation clause because "there was no ongoing Title VII investigation or proceeding at the time DeMasters was communicating with Doe." JA 88. Timing

would make a difference when it should not. For example, consider an employee, Bill, who utilizes the employer's internal policies and procedures by reporting workplace harassment of another employee, Sally, to human resources. Later that same day, Sally, the victim of the harassment, files an EEOC charge. Assuming Bill's conduct is not considered opposition, as the district court held here, Bill, who followed the employer's internal anti-harassment policy, is unprotected from retaliation. If Bill, however, had instead waited until moments after the victim filed an EEOC charge, then Bill would be protected under Title VII. This cannot be what Congress intended when it used the extremely broad language "made a charge, testified, assisted, or participated in any manner." 42 U.S.C. § 2000e-3(a) (1972). Nor is it what the Supreme Court intended when it encouraged employers to develop internal policies for addressing workplace discrimination and harassment.

Some circuit courts have incorrectly concluded that the participation clause protects an employee's participation in an employer's internal anti-discrimination policy only after an EEOC charge is filed. *See Bourne v. Sch. Bd. of Broward Cnty.*, 508 F. App'x 907, 911 (11th Cir. 2013); *Townsend v. Benjamin Enters., Inc.*, 679 F.3d 41, 48 (2d Cir. 2012); *Ellis v. Compass Grp. USA, Inc.*, 426 F. App'x 292, 297 (5th Cir. 2011); *Abbott v. Crown Motor Co.*, 348 F.3d 537, 543 (6th Cir. 2003); *Brower v. Runyon*, 178 F.3d 1002, 1006 (8th Cir. 1999);

Vasconcelos v. Meese, 907 F.2d 111, 113 (9th Cir. 1990). As discussed above, this narrow reading of the participation clause is inconsistent with the language of the statute, and undermines both Congress' intent and the Supreme Court's strong admonishment that employers should establish policies to prevent and address workplace harassment when it occurs—before it becomes an issue for the federal district courts. As the Solicitor General explained in *Crawford*, "the reality [is] that Title VII's anti-retaliation provision protects witnesses just as much as the direct victims of discrimination and that internal investigations are an integral part of Title VII—whether or not a charge has been filed with the EEOC." Brief for the United States at 24, *Crawford*, 555 U.S. 271 (No. 06-1595).

E. DEMASTERS PLED A PLAUSIBLE CLAIM OF RETALIATION UNDER THE PARTICIPATION CLAUSE.

When the proper test for determining participation is applied, DeMasters pled a plausible claim of retaliation under the participation clause to survive a motion to dismiss. By contacting Human Resources on Doe's behalf after seeking Doe's permission to do so, JA 29 at ¶¶ 13-14, and by speaking to Human Resources repeatedly regarding its investigation into the alleged harassment, JA 30-31 at ¶¶ 19-20, 23-24, DeMasters relied on Carilion's own anti-harassment policy. Consequently, DeMasters pled sufficient facts on which to base a claim that he was unlawfully subjected to retaliation and entitled to the protection of Title VII's participation clause.

III. DEMASTERS' COMPLAINT ASSERTED A PLAUSIBLE THIRD-PARTY RETALIATION CLAIM UNDER *THOMPSON V. NORTH AMERICAN STAINLESS*.

This Court should also reverse the lower court's dismissal of the complaint because DeMasters alleged facts sufficient to state a plausible claim of third-party retaliation under the standard set forth in *Thompson v. North American Stainless, LP*, 131 S. Ct. 863 (2011). Although the Fourth Circuit has not yet applied *Thompson* directly to a claim of third-party reprisal, the facts presented in this case fall within the scope of the holding of *Thompson*. The *Thompson* Court held that a plaintiff could bring a Title VII retaliation claim against his employer if: (1) the employer's actions "'well might have dissuaded a reasonable worker from making or supporting a charge of discrimination,'" *Thompson*, 131 S. Ct. at 868 (quoting *Burlington N.*, 548 U.S. at 68); and (2) the plaintiff falls within the "zone of interests" Congress sought to protect in enacting Title VII. *Id.* at 870. The district court misapplied this test.

The lower court erred in concluding that DeMasters did not state a plausible claim under *Thompson* because "there is no suggestion that DeMasters was terminated to punish Doe." JA 96. Contrary to the district court's reasoning, to state a viable claim of third-party retaliation, a plaintiff need not allege that the employer took the adverse employment action in order to punish the employee who engaged in the protected activity. Indeed, Justice Kennedy, at oral argument

in *Thompson*, anticipated facts similar to the facts presented here. Justice Kennedy asked, "so if an employer says, now, if anybody makes a discrimination claim, we're going to fire two other employees just to show you that we run an efficient corporation here, you say that that is proper or improper?" Transcript of Oral Argument at 32, *Thompson*, 131 S. Ct. 8623 (2011) (No. 09-291), *available at* http://1.usa.gov/1a14SIw. Counsel for respondent-employer conceded that the policy would be "improper." *Id.* While Justice Kennedy was testing the limits of counsel's argument, his question highlighted a significant issue and one that the unanimous *Thompson* Court answered in favor of the plaintiff. The *Thompson* Court's holding reiterated and expanded the scope of the Court's prior ruling in *Burlington Northern* that retaliation is actionable if the employer's adverse action could deter a reasonable employee from filing a charge of discrimination. *Thompson*, 131 S. Ct. at 868. Thus, on a motion to dismiss, this Court must accept as true the factual allegation that DeMasters was terminated because of his connection to Doe's protected activity, and under *Thompson*, focus on whether it is plausible that a reasonable employee, under similar circumstances, could be dissuaded from filing a charge of discrimination, or from "testif[ying], assist[ing], or participat[ing] in any manner in an investigation, proceeding, or hearing under this subchapter," 42 U.S.C. § 2000e-3(a) (1972). "By focusing on the materiality of the challenged action and the perspective of a reasonable person .

. . , [the Court] believe[d the] standard [would] . . . effectively captur[e] those acts that are likely to dissuade employees from complaining or assisting in complaints about discrimination." *Burlington N.*, 548 U.S. at 69-70.

A. CARILION'S TERMINATION OF DEMASTERS FOR HIS INVOLVEMENT IN DOE'S COMPLAINTS IS LIKELY TO DETER A REASONABLE PERSON FROM MAKING OR SUPPORTING A CHARGE OF DISCRIMINATION.

The question is whether terminating DeMasters "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Thompson*, 131 S. Ct. at 868 (quoting *Burlington N.*, 548 U.S. at 68); *see also Cooper v. City of N. Myrtle Beach*, 2012 WL 1283498, at *7 (D.S.C. Jan. 25, 2012) ("Reading *Burlington* in conjunction with *Thompson*, and applying them to the facts of this case, the question becomes whether placing plaintiff on probation might reasonably have dissuaded Johnson from supporting her charge of discrimination."). This Court should answer this question in the affirmative because a reasonable employee who repeatedly confided in a co-worker about sexual harassment in the workplace would be dissuaded from filing an EEOC charge knowing that doing so would result in the employer taking an adverse action against his confidant.

"[T]he significance of any given act of retaliation will often depend upon the particular circumstances." *Burlington N.*, U.S. at 69. Although the Supreme Court "decline[d] to identify a fixed class of relationships for which third-party reprisals

are unlawful," *Thompson*, 131 S. Ct. at 868, it "expect[ed] that firing a close family member will almost always meet the *Burlington* standard, and inflicting a *milder reprisal* on a *mere acquaintance* will almost never do so, but beyond that . . . [it was] reluctant to generalize." *Id.* (emphasis added).

Applying this standard to the facts of this case, Doe and DeMasters had a close relationship. They were co-workers and DeMasters was Doe's employee assistance counselor. As discussed in more detail below, DeMasters was the person who assisted Doe with understanding Carilion's policies regarding workplace harassment. In fact, DeMasters took Doe's concerns to Carilion's Human Resources Department. DeMasters was fired for these actions.

On or about October 17, 2008, Doe confided in DeMasters that Doe was suffering from severe sexual harassment perpetrated by Doe's supervisor. JA 28 at ¶ 12. DeMasters "reviewed the steps of Carilion's sexual harassment policy with Doe and suggested a plan to report the harassment and facilitate investigation of Doe's complaint." JA 28-29 at ¶ 13. Doe signed a release giving DeMasters permission to speak to Human Resources on Doe's behalf. JA 28-29 at ¶ 13. After Carilion fired the harasser, and Doe repeatedly experienced hostility from his co-workers for his complaints, Doe continued to confide in DeMasters with the hope that DeMasters could help Carilion more effectively protect Doe from the retaliation. *See* JA 29-30 at ¶¶ 15-17, 21.

Because Doe and DeMasters had a close and confidential relationship, firing DeMasters for helping Doe confront the sexual harassment he was experiencing was a materially adverse action that might dissuade a reasonable employee from filing a charge of discrimination, or assisting or participating in Title VII's enforcement mechanism. Therefore, it is plausible that firing DeMasters in this context constituted unlawful conduct under *Burlington Northern* and *Thompson*. Even if this Court doubts whether a reasonable employee would be dissuaded from filing an EEOC charge, this is a factual question properly left to a jury and, given the Fourth Circuit's "special judicial solicitude" standard, *Harrison v. U.S. Postal Serv.*, 840 F.2d 1149, 1152 (4th Cir. 1988), should not be dispositive at the motion to dismiss stage.

B. DEMASTERS FALLS WITHIN THE ZONE OF INTERESTS CONGRESS SOUGHT TO PROTECT IN ENACTING TITLE VII.

DeMasters is exactly the type of person Congress intended to protect when it enacted Title VII. In *Thompson*, the Court held that the term "aggrieved" in Title VII incorporated the "zone of interests" test, "enabling suit by any plaintiff with an interest 'arguably [sought] to be protected by the statute.'" *Thompson*, 131 S. Ct. at 870 (quoting *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 495 (1998)). The Court further concluded that "the purpose of Title VII is to protect employees from their employers' unlawful actions." *Thompson*, 131

S. Ct. at 870. Therefore, because the plaintiff in *Thompson* was an employee of the defendant, and because Congress enacted Title VII to protect employees from their employers' unlawful conduct, the Court held that the plaintiff was within Title VII's zone of interests. *Id.* Likewise, DeMasters, a Carilion employee, falls within the zone of interests Congress sought to protect in enacting Title VII.

It is undisputed that DeMasters was Carilion's intended victim and not "collateral damage." *See id.* Carilion fired DeMasters within days of settling Doe's Title VII lawsuit. JA 31 at ¶ 27. Specifically, DeMasters received letters from Carilion on August 10, 2012, and January 16, 2013, explicitly linking DeMasters' firing to his relationship with Doe. JA 32 at ¶¶ 31-32 (explaining how Carilion "'determined' that [DeMasters] had 'made statements that could reasonably have led John [Doe] to conclude that he should file suit against Carilion'"). Further, DeMasters' supervisor told him that Carilion fired him because Carilion wanted to "throw someone under the bus" in response to Doe's protected activity. JA 32 at ¶¶ 32-33. Thus, DeMasters plausibly pled that he was the intended victim of Carilion's retaliatory action. As such, DeMasters' complaint pled facts making it plausible that he is within the zone of interests Congress sought to protect in enacting Title VII.

CONCLUSION

For the foregoing reasons, this Court should conclude that DeMasters pled sufficient facts to establish a plausible claim for relief under Title VII's anti-retaliation provision. This Court should also conclude that the district court erred in holding that DeMasters did not plead a plausible third-party retaliation claim under *Thompson*. Consistent with Congressional intent and Supreme Court precedent, courts should broadly interpret Title VII's anti-retaliation provision. The decision of the district court must be reversed in order to ensure that those, like DeMasters, subjected to unlawful retaliation do not fall into an unintended gap of unprotected activity.

Respectfully submitted this 25th day of February, 2014.

/s/ Michael L. Foreman

Michael L. Foreman
Counsel of Record
PENNSYLVANIA STATE UNIVERSITY
DICKINSON SCHOOL OF LAW
CIVIL RIGHTS APPELLATE CLINIC
329 Innovation Blvd., Suite 118
State College, PA 16803
(814) 865-3832
mlf25@psu.edu

Roberta L. Steele
NATIONAL EMPLOYMENT LAWYERS ASSOCIATION
417 Montgomery Street, 4th Fl.
San Francisco, CA 94104
(415) 296-7629
rsteele@nelahq.org

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because:

   [X] this brief contains [5,869] words, excluding the part of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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

   [X] this brief has been prepared in a proportionally space typeface using [*Microsoft Word 2010*] in [*14pt Times New Roman*].

Dated: 2/25/2014

/s/ *Michael L. Foreman*
Michael L. Foreman

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 25th day of February, 2014 a true and accurate copy of the foregoing was electronically filed with the Clerk of the Court and served on counsel using the CM/ECF system.

I further certify on the 25th day of February, 2014, I caused the required copies of the Brief of *Amicus Curiae* to be hand filed with the Clerk of the Court, via Federal Express Next Day Delivery, and served upon counsel for the Appellant and Appellees, at the addresses below.

Terry N. Grimes, Esquire
GRIMES & WILLIAMS, PC
320 Elm Avenue,
Roanoke, Virginia 24016,

Agnis Chakravorty, Esquire
Frank K. Friedman, Esquire
WOODS ROGERS
10 South Jefferson Street, P.O. Box 14125
Roanoke, Virginia 24038

/s/ *Michael L. Foreman*
Michael L. Foreman