DOES THE OPPOSITION CLAUSE HAVE ONLY SELECTIVE APPLICATION? THE USE OF THE MANAGER RULE BY DEFENDANTS TO LIMIT RETALIATION CLAIMS

SURVEY OF ELEVENTH CIRCUIT CASE LAW

by

Janet E. Wise, Esquire

National Employment Lawyers Association
Empower | Educate | Excel
2019 Annual Convention
June 28, 2019

Available Courtesy of:
SASS LAW FIRM
601 West Dr. Martin Luther King Jr. Boulevard
Tampa, Florida 33603
(813) 251-5599
www.EmploymentLawTampa.com

DOES THE OPPOSITION CLAUSE HAVE ONLY SELECTIVE APPLICATION?[1]

THE USE OF THE MANAGER RULE BY DEFENDANTS TO LIMIT RETALIATION CLAIMS

SURVEY OF ELEVENTH CIRCUIT CASE LAW

Janet E. Wise, Esquire
SASS LAW FIRM
601 West Dr. Martin Luther King Jr. Boulevard
Tampa, Florida 33603
813.251.5599
www.EmploymentLawTampa.com

I. ELEVENTH CIRCUIT CASES

A. *Brush v. Sears Holdings Corp.*, 466 Fed. Appx. 781 (11th Cir. 2012) (unpublished).

Plaintiff Janet Brush investigated another employee's sexual harassment claim as a part of her work duties for her employer, Sears. The specific position Brush held was Loss Prevention District Coach. During the investigation, the employee informed Brush that her manager had raped her multiple times. Brush reported these allegations to Sears, and Sears terminated the manager's employment.

On more than one occasion, Brush urged Sears to report the manager's conduct to the police department. Sears declined to do so. Further, the employee had also asked for this information not to be shared with the police or her spouse.

Thereafter, Sears terminated Brush's employment, stating that she violated Sears' company policy regarding the investigation of sexual harassment claims. The EEOC issued a reasonable cause finding related to Brush's EEOC Charge, and Brush subsequently filed a retaliation lawsuit against Sears. Brush alleged that Sears terminated her employment because she opposed "the nature and performance of the [sexual harassment] investigation," "she uncovered that [Sears] had negligently allowed three forcible rapes to occur on its premises and did nothing about it," "she raised rape issues that would have been kept hidden if she had allowed [her co-worker] to conduct the interviews," and "because of her participation in the investigation and her opposition to the way [Sears] was conducting the investigation." *Brush*, 466 Fed. Appx. at 784.

---

[1] These materials are distributed by the Sass Law Firm for informational purposes only. These materials should not be considered legal advice and should not be used as such.

Sears maintained that Brush had not engaged in protected activity in support of a retaliation claim, arguing that she did not oppose "a practice made unlawful by Title VII." In other words, Sears argued that Brush opposed the fact that Sears refused to report the manager's conduct to the authorities, which was a complaint about Sears' internal investigation process as opposed to any discrimination or retaliation against a particular employee that is unlawful under Title VII.

Brush argued that "an investigative manager's role in reporting a Title VII violation necessarily qualifies as a 'protected activity' relating to a discriminatory practice." In response, the Eleventh Circuit referenced the manager rule that had earlier been examined in other circuits, stating that "the 'manager rule' holds that 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.' Instead, to qualify as 'protected activity' an employee must cross the line from being an employee 'performing her job ... to an employee lodging a personal complaint.'" (Citations omitted).

The Eleventh Circuit concluded that Brush acted only as a manager investigating a sexual harassment claim for her employer, and that she had not sought redress under Title VII or taken any steps contrary to Sears during the investigation. Therefore, the Eleventh Circuit affirmed the District Court's summary judgment order.

B. *Gogel v. Kia Motors Mfg. of Ga.*, 904 F. 3d 1226 (11th Cir. 2018).

Plaintiff Andrea Gogel was employed with Kia Motors as Team Relations Manager. Gogel reported to the Director of Human Resources, Randy Jackson. While Gogel believed that Kia Motors discriminated against her on the basis of her gender, race and national origin, and she filed an EEOC charge about it, the focus of this case is primarily on Gogel's interactions with another employee named Diana Ledbetter.

Ledbetter filed an internal complaint with Kia Motors that Gogel received related to a relationship between Ledbetter's supervisor and the president of Kia Motors. Gogel asked Jackson how to handle the complaint, and Jackson told Gogel not to investigate it. Ledbetter raised additional gender discrimination allegations regarding the manner in which Kia Motors treated her as well.

During approximately November 2010, Gogel and Ledbetter met. During their meeting, Gogel provided Ledbetter with the name of the attorney Gogel planned to contact regarding her own discrimination claims.

During December 2010, Ledbetter filed an EEOC charge against Kia Motors alleging gender, race, and national origin discrimination. Ledbetter filed the charge without any input from Gogel about doing so.

On January 19, 2011, Kia Motors terminated Gogel's employment, stating that Gogel had encouraged or solicited Ledbetter to file an EEOC charge and that there was at a minimum an appearance of conflict of interest. Jackson was the decision maker, and he believed that Gogel's

encouraging Ledbetter to file an EEOC charge (which she did not do) contravened Gogel's job duties as Team Relations Manager.

Kia Motors did not dispute that Gogel established a *prima facie* case of retaliation, and it maintained that its legitimate, non-retaliatory reason for terminating Gogel's employment was that she encouraged Ledbetter to file an EEOC charge rather than handling the discrimination claim internally. Kia Motors also claimed that "the manner in which [] Gogel encouraged [] Ledbetter to file an EEOC charge was unreasonable." *Gogel*, 904 F.3d at 1234. Kia Motors urged the Eleventh Circuit to institute a *per se* rule that a human resources manager's actions in assisting an employee to file an EEOC charge cannot be found to be reasonable, and, therefore, cannot be protected activity under Title VII.

The Eleventh Circuit discussed the balancing test to be employed on a case-by-case basis to determine whether or not an employee's conduct is reasonable, and it examined prior precedent in which the employee's manner was found to be unreasonable.[2] The Eleventh Circuit then cited cases from other circuits finding that a human resources employee can engage in protected activity under Title VII when she "supports other employees in asserting their Title VII rights." *Littlejohn v. City of New York*, 795 F.3d 297, 318 (2nd Cir. 2015). The Eleventh Circuit also stated as follows:

> For this reason, in deciding whether a human resources employee's opposition is reasonable, our precedent does not look to the fact that a human resources employee opposes a policy, but rather looks to the manner in which she does it.

Gogel, 904 F.3d at 1235.

The Court then went on to discuss at length the standard to apply when a human resources employee brings a retaliation claim based on her opposition to discrimination against another employee:

> The difficulty in this case arises from the idea that human resource employees cannot perform their job duties while supporting their coworkers' oppositional conduct. But this conflict is overstated. An employer's desire for a loyal, cooperative, and productive human resource employee can be entirely consistent with the "purpose of the statute and the need to protect individuals asserting their rights." [Citation omitted] That's because Title VII emphasizes employers' voluntary compliance, as well as the role human resource employees play in achieving and maintaining compliance….
>
> That said, if human resource employees consistently worked outside their employer's internal procedures for addressing discrimination complaints, that employer's ability to achieve voluntary compliance with Title VII would be diminished or eliminated. There would be no one to implement its program . . . Because of the importance of voluntary compliance, a human resource employee

[2] *Whatley v. Metropolitan Atlanta Rapid Transit Auth.*, 632 F.2d 1325 (5th Cir. 1980 Unit B); *Hamm v. Members of Bd. of Regents of State of Fla.*, 708 F.2d 647 (11th Cir. 1983).

> usually furthers the purpose of the statute and the need to protect people asserting their rights by following her employer's procedures. And when a human resource employee handling another employee's complaint deviates from an internal reporting procedure, the manner of the HR employee's actions may be unreasonable….
>
> But not always. There are times when an employer's internal procedures are not effective for certain classes of complaints or the complaints of particular people . . . A human resource employee who tries to resolve complaints internally but fails due to the inadequacy of her employer's procedures furthers the "purpose of the statute and the need to protect individuals asserting their rights" by going outside the employer's internal procedures. [Citation omitted]
>
> The extent of the deviation from procedure is also a relevant consideration. For instance, in *Hamm* and *Whatley*, the employees went beyond assisting one other employee with a discrimination charge, by making various public statements and engaging in other insubordinate conduct. And in each case, these violations occurred multiple times. [Citations omitted]
>
> We recognize that deviating from an employer's internal procedures to support another employee's opposition can be a violation of job duties. This Court has acknowledged that when the manner of an employee's opposition "interferes with the performance of his job," it is often unreasonable. [Citation omitted] But an employer cannot defeat the requirements of Title VII by establishing job duties that are inconsistent with the statute's protections. See *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...."). Thus, while their actions opposing discriminatory practices must be reasonable, human resource employees are not compelled to "take the pro-employer side" when another employee complains of discrimination. [Citation omitted] Instead, Title VII protects human resource employees when they "support[] other employees in asserting their Title VII rights," *Littlejohn*, 795 F.3d at 318 (quotation omitted), and the manner of their support is reasonable, *Rollins*, 868 F.2d at 401. This Circuit's test has always sought to balance achieving the purposes of Title VII with avoiding workplace disruption. See *Rollins*, 868 F.2d at 401. In the case of human resource employees, sometimes striking that balance will require accepting an employee's opposition to discrimination as protected activity where the employee has stepped outside the bounds of work rules to do so.

Gogel, 904 F.3d at 1235-1236.

Applying the above standard to the instant case, the Court determined that the manner in which Gogel opposed Kia Motors' discrimination was reasonable. The Court noted that Gogel and others reported discrimination complaints to Jackson, and Jackson declined to investigate those complaints and did not allow others to do so, either. Moreover, Jackson instructed Gogel

not to investigate Ledbetter's complaints about Kia Motors' president or the gender discrimination Ledbetter was experiencing. Therefore, Jackson did not allow Gogel or others to investigate in accordance with Kia Motors' policies, and those policies became completely ineffective. Consequently, "[b]ecause [] Gogel tried to use Kia's internal framework, her deviation from it furthered the purposes of Title VII, without impacting Kia's illusory efforts at voluntary compliance." *Gogel*, 904 F.3d at 1237. The Court applied the balancing test and found that the manner in which Gogel opposed Kia Motors' conduct was reasonable and that she therefore engaged in protected activity under Title VII, reversing summary judgment on Gogel's retaliation claim.

II. SELECTED DISTRICT COURT CASES

A. *Dunn v. Wal-Mart Stores East, L.P.*, 2013 WL 1455326 (S.D. Fla. 2013).

Daisy Berrios was employed with Wal-Mart as an Assistant Store Manager. (Berrios filed for bankruptcy and the plaintiff in the case became the Bankruptcy Trustee, Marcia Dunn.) During 2010, three Wal-Mart employees communicated discrimination complaints to Berrios, and Berrios in turn informed the Wal-Mart Labor Relations Department about these complaints. Labor Relations required Berrios to hold a meeting with store management about the complaints, which she did. The meeting Berrios held included the Store Manager, Claudine Elvin.

According to Berrios, shortly after the meeting about the discrimination complaints, Elvin met with Berrios and threatened Berrios' job because Berrios had gone over Elvin's head in reporting the discrimination complaints. Then, again according to Berrios, Wal-Mart scrutinized her work and terminated her employment. Berrios filed a retaliation complaint against Wal-Mart, and Wal-Mart moved for summary judgment, claiming that Berrios could not establish that she engaged in protected activity in support of a *prima facie* case of retaliation.

The Southern District of Florida applied the manager rule to determine whether or not Berrios had engaged in protected activity under the opposition clause. The Court looked at Wal-Mart's policies to see what Berrios was required to do as an Assistant Store Manager. An open door policy required Berrios to receive discrimination complaints, and a discrimination and harassment prevention policy required Berrios to "immediately report such conduct to the *appropriate level of management* for investigation," and "*[a]ppropriate level of management* includes, but is not limited to, the Field Logistics Human Resources Manager, Employment Advisor, Market Human Resources Manager, Regional Human Resources Manager, or People Director." *Dunn*, 2013 WL at *1-*2. (Emphasis in original). Because Wal-Mart has a Labor Relations Department and the employees mentioned the union to Berrios, Berrios was required to report the complaints to the Labor Relations Department. *Dunn*, 2013 WL at *2.

The Court determined that Berrios had not engaged in protected activity under the opposition clause to support a *prima facie* case of retaliation since Berrios had performed her required job duties and had not stepped outside of that role to articulate a personal complaint. Therefore, the Court granted summary judgment in favor of Wal-Mart.

B. *McMullen v. Tuskegee Univ.*, 184 F. Supp. 3d 1316 (M.D. Ala. 2016).

Ruby McMullen was employed with Tuskegee University as Director of Human Resources. Employee Tracy Boleware complained that a Tuskegee vice president harassed her, violating Title VII. Thereafter, Tuskegee terminated Boleware's employment. Before doing so, McMullen advised Tuskegee that it should not terminate Boleware's employment, as this would appear to be retaliatory or that this would be retaliatory. Against McMullen's advice, Tuskegee proceeded with terminating Boleware's employment. Tuskegee then terminated McMullen's employment, and she filed a retaliation lawsuit against Tuskegee.

Tuskegee argued that McMullen could not establish a *prima facie* case of retaliation as she had not engaged in protected activity. More specifically, Tuskegee argued that McMullen had not opposed a practice made unlawful by Title VII since the actions she had taken were in accordance with her job duties as Director of Human Resources.

The Middle District of Alabama cited to the Eleventh Circuit's unpublished *Brush* opinion (see above) in support of its decision:

> The "manager rule" was described by the Eleventh Circuit in *Brush*, as follows: "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.'" *Brush*, 466 Fed. Appx. at 787. Instead, the employee engages in a protected activity if she crosses the line from being an employee performing her job, to an employee lodging a personal complaint. *Id.*
> . . .
>
> The Eleventh Circuit reasoned that disagreement with internal procedures is not the same as opposing a discriminatory practice. *Id.* at 787. The court found no evidence that the plaintiff was asserting any rights or that she took any action adverse to the company during the investigation. *Id.* The court stated that because the plaintiff's complaint involved the adequacy of the employer's internal procedure for receiving complaints rather than an unlawful employment practice, she did not satisfy the first element of a prima facie case. *Id.* at 788.

McMullen, 184 F. Supp. 3d at 1322.

The Middle District of Alabama also compared cases from other circuits to analyze whether McMullen had engaged in protected activity and opposed a practice made unlawful by Title VII:

> In a case cited in *Brush*, the Tenth Circuit has addressed a similar retaliation theory. *See McKenzie v. Renberg's Inc.*, 94 F.3d 1478 (4th Cir.1996). In that case, the plaintiff, a Personnel Director, reported what she thought were possible wage and hour violations to her employer. Although she had no warnings about her job performance, and despite her testimony that there was a company policy that required progressive discipline, she was discharged. In finding that her termination did not constitute retaliation, the court reasoned that it is the assertion of statutory rights by taking an action adverse to the company that is a protected activity.

> *McKenzie*, 94 F.3d at 1486. The court explained that because the plaintiff merely informed the company that it was at risk of claims that might be instituted by others as a result of alleged statutory violations, which was included in her job responsibilities, she did not engage in a protected activity. *Id.* at 1486–87; *see also E.E.O.C. v. HBE Corp.*, 135 F.3d 543, 554 (8th Cir.1998) (finding protected activity where plaintiff refused to implement a discriminatory company policy as contrasted with the facts of *McKenzie* where the personnel director "merely alerted management of potential violations of the law in order to avoid liability for the company."). In this case, the evidence that McMullen told others at Tuskegee that they should delay terminating Boleware's employment because it might appear to be retaliatory was not a personal complaint, but was instead advice that termination could appear to be retaliatory, and therefore expose Tuskegee to liability, was not protected activity. *McKenzie* at 1486–87.
>
> . . .
>
> In *McKenzie* the defendant argued that the act of reporting good faith concerns about statutory violations was not protected activity, and the court agreed that because the personnel director in that case never crossed the line from performing her job to an employee lodging a personal complaint or actively assisting others in asserting their rights and asserting a right adverse to the company, there was no protected activity. *McKenzie*, 94 F.3d at 1486. The *McKenzie* court also reasoned that a plaintiff's actions were consistent with her duties as personnel director to evaluate wage and hour issues and "assist the company in complying with its obligations." *Id.* at 1487.
>
> This application of the "manager rule" also applies under the Eleventh Circuit's view of the rule. In its unpublished opinion, the Eleventh Circuit relied on the characterization of the "manager rule" in *McKenzie*, stating that a management employee who in the course of her normal job performance disagrees with or opposes the actions of the employer does not engage in protected activity. *Brush*, 466 Fed.Appx. at 787. "A requirement of 'stepping outside' a normal role is satisfied by a showing that the employee took some action against a discriminatory policy." *E.E.O.C.*, 135 F.3d 543 at 554.

McMullen, 184 F. Supp. 3d at 1323-1324.

Finally, the Middle District of Alabama noted that McMullen did not refuse to terminate Boleware's employment or otherwise object to Tuskegee's decision to terminate Boleware's employment. Rather, McMullen notified Boleware that Tuskegee had terminated Boleware's employment. For these reasons, the Court granted summary judgment in this matter.

C. *Jones v. City of Heflin, Ala.*, 207 F. Supp. 3d 1255 (N.D. Ala. 2016).

Heath Jones was a Lieutenant with the City of Heflin police department. Officer Susan Young reported to Jones and claimed that the City discriminated against her on the basis of gender.

After Young complained about gender discrimination, Captain Benefield (who was the highest-ranking officer in the police department) instructed Jones to inform Young's husband that she was cheating on him. Jones refused to comply with Benefield's directive.

Thereafter, the City terminated Jones' employment, and Jones filed a retaliation claim against the City. The City argued that the manager rule applied in this case, citing *Brush v. Sears Holdings Corp.* The Northern District of Alabama rejected this argument, stating as follows:

> To the extent that the Eleventh Circuit decides to apply the "manager rule" in a binding decision, the facts of this case are significantly distinguishable. In particular, *Brush* involved a plaintiff claiming retaliatory discharge on the basis that she had "disagree[d] with the way in which Sears conducted its internal investigation into [another employee's] allegations [about sexual harassment and rape]." 466 Fed.Appx. at 786. Thus, "Ms. Brush was neither the aggrieved nor the accused party in the underlying allegations. Instead, she was one of the Sears employees tasked with conducting the internal investigation." *Id.*
>
> Unlike the *Brush* plaintiff, what Captain Benefield asked Mr. Jones to do—anonymously reporting an affair to Officer Young's husband—was not part of an investigation into Officer Young's claims or within the scope of any other ordinary managerial action. Instead, Captain Benefield's instruction to Mr. Jones was purely driven by a desire to give Officer Young some painful payback for filing her Title VII lawsuit. Further, Mr. Jones was far from a disinterested party to the retaliatory scenario proposed by Captain Benefield. Thus the manager rule, if ever formally adopted by the Eleventh Circuit, would not apply to the facts of this case and, Mr. Jones has satisfied the first *prima facie* element of his opposition-based retaliation claim.

Jones, 207 F. Supp. 3d at 1269-1270.

DISCLAIMER

The laws and cases referenced in these materials may have changed since the date of publication.

These materials are being made available for informational purposes only and are not to be relied upon as legal advice.

If you have an employment law question,
we urge you to seek legal counsel.