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I. INTRODUCTION

Human resource (HR) managers undertake important tasks at companies. For example, a company may employ a human resource manager to manage internal issues, such as those affecting lower-level employees. That HR manager may come to the conclusion that a lower-level employee, having faced some discrimination from the company, had their rights violated. In that situation, the HR manager may advocate for the employee against the company. Subsequently, the company terminates the HR manager for siding with the employee over the company. Can the HR manager successfully bring a retaliation suit against the company? It depends. More specifically, the answer depends on whether the court must follow the manager exception when hearing Title VII[1] retaliation claims.

The manager exception, also known as the manager rule, excludes employees who serve in a managerial role, usually in some HR or

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1. 42 U.S.C. §§ 2000e–3(a).

personnel capacity, from the protection of Title VII's anti-retaliation provision.[2] These managers are excluded when they oppose their employer in the normal course of their job responsibilities.[3] To answer the previously posited question, a court applying the manager exception will likely find the HR manager's retaliation claim unsuccessful because the manager's opposition to the company's discrimination against the lower-level employee was related to the normal course of the their job responsibilities. Most managers' daily responsibilities typically include overseeing the activities of other employees and being the conduit between those employees and the upper echelons of the business. When the manager exception is enforced, opposition to employers from managers conducting their natural work obligations could lead to workplace retaliation with no remedy.

The manager rule, originating in claims under the Fair Labor Standards Act (FLSA),[4] has slowly been adopted by circuit courts since 1998, when it was carried over from FLSA to Title VII retaliation cases.[5] The adoption of the rule to Title VII cases has since created a circuit split due to some circuits declining to extend the rule to Title VII cases.[6] In *Patterson v. Georgia Pacific*,[7] the United States Court of Appeals for the Eleventh Circuit addressed the following question: does the manager exception have any basis in the text of Tile VII?[8] Ten years prior, the court adopted the manager exception in an unpublished, non-binding opinion.[9] In *Patterson*, however, the court engaged in a lengthy textual analysis of Title VII to determine if there was any language signifying that Congress intended a manager exception in the law.[10] Further, the court examined the validity of carrying the exception from FLSA cases to Title VII cases.[11] Ultimately, the court rejected the application of the manager exception to Title VII cases because the exception is not consistent with the broad statutory text that Congress enacted.[12] As a matter of first impression, the court also held that an employee who opposes an unlawful employment practice of a former employer may file

2. Lisa J. Banks & Sam Kramer, Emerging Issues In Anti-Discrimination Law (ALI-ABA Course of Study, Mar. 17–18, 2016), SX021 ALI-ABA 275, 12 (2016).

3. *Id.*

4. 29 U.S.C. §§ 201–219.

5. E.E.O.C. v. HBE Corp., 135 F.3d 543, 554 (8th Cir. 1998); *see* 29 U.S.C. § 215(a)(3).

6. *See* Banks & Kramer, *supra* note 2.

7. 38 F.4th 1336 (11th Cir. 2022).

8. *Id.* at 1346.

9. Brush v. Sears Holdings Corp., 466 F. App'x. 781, 783 (11th Cir. 2012).

10. *Patterson*, 38 F.4th at 1348.

11. *Id.* at 1346.

12. *Id.* at 1348.

a Title VII claim against their current employer who retaliates against them due to their opposition against the previous employer.[13] The court's decision in *Patterson* clarified that all potential managerial plaintiffs may bring suit under Title VII without fear of their claims being barred by the manager exception. [14]

II. FACTUAL BACKGROUND

Marie Patterson worked at Memorial Hermann as a human resource manager—where she served as an advisor on employment law compliance—and during her time at Memorial Hermann, Patterson consulted with company management on the potential termination of three pregnant employees.[15] Patterson later left Memorial Hermann and began working for Georgia Pacific as a HR manager in 2015. At Georgia Pacific, Patterson worked at the company's Alabama River Cellulose mill under the HR director Jeffrey Hawkins. Hawkins was based out of an Atlanta office and occasionally visited the mill. As part of the job, Patterson worked in connection with Timothy McIlwain, the plant manager for the mill.[16]

Patterson began to experience discord with McIlwain in June of 2017.[17] Patterson met with McIlwain in order to discuss a possible race discrimination suit at the mill.[18] McIlwain dismissed these concerns by telling Patterson, "[b]ecause of who you are you are not going to tell me how to run this mill!"[19] Soon after, McIlwain told Hawkins that he was having difficulty reaching Patterson and was unable to determine how often Patterson was physically present at the mill.[20] During this conversation, McIlwain also informed Hawkins of rumors circulating around the mill that the employees wished to form a union.[21] Hawkins

13. *Id.*

14. *Id.* at 1349.

15. *Id.* at 1341–42. Patterson's bosses at Memorial Hermann expressed that they intended to fire the three pregnant employees. Patterson advised them to wait until she could confer with another human resource manager, as she was concerned about potential FMLA liability issues. *Id.*

16. *Id.* at 1341.

17. *Id.*

18. *Id.* Patterson believed a possible suit could arise out of two black employees being overlooked for job opportunities they had the qualifications for. *Id.*

19. *Id.*

20. *Id.* Hawkins stated that another HR manager complained to him concerning difficulty in reaching Patterson. *Id.*

21. *Id.* The necessity for a meeting was due to the fact that the formation of a union would have caused problems for the mill. *Id.*

instructed McIlwain to schedule an emergency meeting on June 29 to discuss the potential union.[22]

The central conflict in this case began when Hawkins misunderstood Patterson's reasoning for being unable to attend the meeting about the possible union at the mill. Patterson told Hawkins she would be unable to attend the meeting due to a deposition she was required to attend being scheduled for the same day.[23] Although Patterson was referring to a deposition for the Title VII pregnancy discrimination case that she previously worked on while being employed at Memorial Hermann, she did not mention it to Hawkins. Consequently, Hawkins incorrectly assumed Patterson would be attending a deposition on a Georgia Pacific case, and scheduled the meeting a day later so that Patterson could attend.[24] Hawkins was then confused when Georgia Pacific's legal department informed him there were no company depositions on June 29 and an administrator informed him that Patterson had an entry in her email calendar for a "deposition," but that there were no additional clarifying details listed as to the nature of the deposition.[25]

Further problems began to arise when McIlwain claimed that Patterson was underperforming her work duties.[26] On June 30, Patterson attended the emergency management meeting and was assigned with helping McIlwain draft a union avoidance plan.[27] Patterson then went on a week-long vacation while continuing to work on the plan and communicate with McIlwain about it via email. During the time Patterson was on vacation, McIlwain told Hawkins he had been unable to contact Patterson while she was away and that he completed the union avoidance plan with no assistance from Patterson.[28] Hawkins then obtained Patterson's security badge swipe records to the mill's entrance, and, upon reviewing three months of records, concluded that out of the past twenty-five work days, Patterson had taken off work thirteen full days and four half-days.[29]

Hawkins visited the mill to investigate Patterson's substantial absences from the mill; her lack of assistance to McIlwain in drafting the

22. *Id.*

23. *Id.* at 1341–42.

24. *Id.* at 1342.

25. *Id.*

26. *See id.*

27. *Id.* There was no specific deadline given to Patterson for the assignment, but she understood the matter to be urgent and necessitating completion in a timely manner. *Id.*

28. *Id.* Patterson contended that she had worked with McIlwain on the union avoidance plan from her hotel room during her vacation. *Id.*

29. *Id.*

union avoidance plan; and her whereabouts on June 29.[30] Hawkins went to Patterson's office and inquired about the details of the June 29 deposition. Patterson informed him that three female employees filed an EEOC case against her previous employer, Memorial Hermann, after being fired while on FMLA leave.[31] Hawkins then asked Patterson if, in her deposition for the Memorial Hermann case, she had supported or gone against the employer, and Patterson told him she had testified "on behalf of the ladies."[32] Hawkins responded, telling Patterson she had "went against" her previous employer and her doing so had "made things clear" to him.[33] One week later, Hawkins and McIlwain fired Patterson without giving a reason. They gave Patterson a termination letter which offered her a lump sum payment of $50,000 if she agreed not to bring any lawsuit, including one under Title VII, against Georgia Pacific. Patterson rejected the offer, filed an EEOC charge, and received a notice of right to sue from the EEOC.[34]

Patterson brought suit against Georgia Pacific for retaliation under Title VII's anti-retaliation provision in the United States District Court for the Southern District of Alabama.[35] The district court granted Georgia Pacific summary judgment on two grounds. First, the district court concluded that Patterson had not engaged in protected activity because she was an HR manager.[36] The district court relied on *Brush v. Sears Holdings Corp.*,[37] an unpublished case holding that management employees acting in the "normal course of [their] job performance" are prohibited from recovering under Title VII.[38] Second, the district court held that in order for Title VII to cover Patterson's opposition to discrimination — such opposition had to be against the discriminatory actions of Georgia Pacific —the company that retaliated via her

30. *Id.* at 1342–43.

31. *Id.* at 1343.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 1344. While Patterson's complaint mentioned factual details about the two black employees that were overlooked for job opportunities, the sole legal theory provided was that Patterson had been terminated from Georgia Pacific in retaliation for opposing Memorial Hermann in her deposition testimony for the pregnancy discrimination case. *Id.*

36. *Id.*

37. 466 F. App'x. 781, 783 (11th Cir. 2012).

38. *Patterson*, 38 F.4th at 1344.

termination.[39] Patterson appealed the district court's grant of summary judgment to the Eleventh Circuit.[40]

III. LEGAL BACKGROUND

A. Title VII Anti-Retaliation Claims Follow a Burden Shifting Framework

To establish a prima facie case for a claim of retaliation under Title VII, a plaintiff must first show (1) that "she engaged in statutorily protected activity," (2) "that she suffered an adverse action," and (3) "that the adverse action was casually related to the protected activity."[41] If the plaintiff establishes such a prima facie case, it creates a presumption that the adverse action from the employer derived from an intent to retaliate.[42] The burden is shifted to the defendant-employer who must "articulate a legitimate, non-discriminatory reason" for the retaliation.[43] If the defendant is able to produce a basis for the retaliation and overcome the presumption, the burden shifts once more back to the plaintiff to show that each reason is merely a pretext to mask retaliation.[44] Upon such a showing that each of the defendant's proposed reasons are simply a pretext for masking their retaliatory actions, a plaintiff is successful in their case.[45] The courts must follow this analysis when ruling on Title VII cases.

B. Title VII's Participation and Opposition Clauses Provide Retaliation Protection

Title VII's Anti-Retaliation provision was enacted with the purpose of protecting employees from discrimination and retaliation on the basis of

39. *Id.* The district court explained that because Patterson was opposing the pregnancy discrimination of Memorial Hermann, she was not opposing discriminatory actions or practices by Georgia Pacific, her current employer, and her opposition was not protected conduct. Patterson v. Ga. Pac., LLC, No. 18-cv-00492-JB-MU, 2020 U.S.Dist.LEXIS135434 at *12 (S.D. Ala. July 29, 2020).

40. *Patterson*, 38 F.4th at 1340.

41. *Id.* at 1344–45; *see* Jefferson v. Sewon Am., 891 F.3d 911, 924 (11th Cir. 2018). To establish the causation necessary in the third prong, the plaintiff must show that "the relevant decisionmaker was aware of the protected conduct, and that the protected activity and adverse actions were not wholly unrelated." Jones v. Gulf Coast Health Care of Del., LLC, 854 F.3d 1261, 1271 (11th Cir. 2017).

42. *Jones*, 854 F.3d at 1271.

43. *Id.*

44. *Id.*

45. *Id.*

certain protected statuses.[46] The pertinent section of Title VII states that it is:

> [A]n unlawful employment practice for an employer to discriminate against any of [its] employees . . . because he has opposed any practice made an unlawful employment practice by this [subchapter], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this [subchapter].[47]

Two distinguished clauses are included in this provision: the opposition clause and the participation clause.[48] The first part of the provision, the opposition clause, protects employees who have "opposed" any employer's discriminatory practices or policies outlined in Title VII.[49] The second part of the provision, the participation clause, protects employees who have "participated" in asserting their rights by filing an EEOC charge, aiding the EEOC in an investigation or engaging via active participation in a discrimination matter or lawsuit.[50] A court may find that an employer has violated either, or both, of these clauses when deciding a Title VII retaliation case.

C. The United States Supreme Court and Eleventh Circuit Have Provided Guidance on the Meaning of Title VII's Opposition and Participation Clauses

The United States Court of Appeals for the Eleventh Circuit and the Supreme Court of the United States have clarified language in Title VII, explaining that it is the court's responsibility to effectuate Congress's enacted text.[51] When conducting such textual analysis, it is fundamental to interpret words in a statute as their ordinary meaning at the time they were enacted by Congress.[52] In *United States v. Alabama*,[53] the Eleventh Circuit held that the indefinite article "an" means "any."[54] In *Merritt v.*

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46. Banks & Kramer, *supra* note 2, at § IIIA.

47. 42 U.S.C. § 2000e–3(a).

48. U.S. EQUAL EMP. OPPORTUNITY COMM'N, E.E.O.C. ENFORCEMENT GUIDANCE ON RETALIATION AND RELATED ISSUES § IIA (Aug. 25, 2016), 2016 WL 4688886 [hereinafter EEOC Guidelines].

49. *Id.*

50. *Id.*

51. Wiersum v. U.S. Bank, N.A., 785 F.3d 483, 488 (11th Cir. 2015).

52. CSX Corp. v. United States, 18 F.4th 672, 679 (11th Cir. 2021).

53. 778 F.3d 926 (11th Cir. 2015).

54. *Id.* at 933.

Dillard Paper Co.,[55] the Eleventh Circuit examined the use of the word "any" in the participation clause and held that because Congress did not include language to limit its well-defined meaning, the natural reading of the word means "all."[56] In *Crawford v. Metropolitan Government of Nashville & Davidson County*,[57] the Supreme Court stated that the word "opposed" in the opposition clause should be interpreted as its ordinary meaning of "resisting or contending against."[58] When engaging in a textual analysis of Title VII, these explanations are helpful to courts aiming to decipher the intent of Congress.

D. The Manager Rule Rationale Originated in FLSA Suits and Emerged in Title VII Cases Creating a Circuit Split

The manager rule was first applied in retaliation suits brought under the FLSA. In *McKenzie v. Renberg's Inc.*,[59] the United States Court of Appeals for the Tenth Circuit reasoned that in order to be protected under the FLSA, an "employee must step outside his or her role of representing the company and either file (or threaten to file) an action adverse to the employer, actively assist other employees in asserting their FLSA rights, or . . . engage in activities" that can be reasonably perceived as asserting FLSA rights.[60] Thus, the "hallmark of protected activity" under the FLSA is an employee advocating for the rights of themselves or others, *not* by merely performing their assigned tasks, but by taking some action adverse to the company that they would not normally take.[61] In the context of FLSA claims, the manager rule addresses an inherent conflict: if hearing and addressing employee complaints is part of a manager's tasks, then "nearly every activity in the normal course of a manager's job would potentially be protected activity."[62] Because the court in *McKenzie* established the manager rule

55. 120 F.3d 1181 (11th Cir. 1997).

56. *Id.* at 1186.

57. 555 U.S. 271 (2009).

58. *Id.* at 276.

59. 94 F.3d 1478 (10th Cir. 1996).

60. *Id.* at 1486–87. In *McKenzie*, the court held that an employee who, in her capacity as a personnel manager, informed company that it could be subject to litigation due to its FLSA violations, was acting consistent within her duties as a personnel director in assisting the company with compliance, and such activity was not FLSA protected activity. *Id.* at 1487.

61. *Id.*

62. Banks & Kramer, *supra* note 2, at § IIIA (quoting Hagan v. Echostar Satellite, L.L.C., 529 F.3d 617, 628 (5th Cir. 2008)).

in FLSA cases, it has emerged in Title VII cases in various circuits that have adopted the rule.[63]

The federal appellate courts are divided on the appropriateness of applying the manager rule to Title VII anti-retaliation claims.[64] In 1998, the United States Court of Appeals for the Eighth Circuit was the first to adopt the rule from FLSA cases to a Title VII case in *Equal Employment Opportunity Commission v. HBE Corp.*,[65] where a director of personnel for a hotel corporation brought a Title VII retaliation claim against his former company. The personnel director was terminated for refusing to fire another employee as instructed by his boss because he believed the request was racially motivated.[66] The court applied the manager rule and held that, in comparison to the employee in *McKenzie*, the employee in this case "stepped outside" his normal role, although the court did not address the fact that the manager role originated in a FLSA case as opposed to a Title VII case.[67] The United States Court of Appeals for the First Circuit and the Tenth Circuit adopted the manager rule to Title VII cases in 2010 and 2012, respectively.[68] Similarly to the Eighth Circuit, the First and Tenth Circuit courts did not analyze the different statutory texts of Title VII and the FLSA or give the manager rule's inception any examination.[69] Such an examination did not occur until 2015, when the United States Court of Appeals for the Second Circuit addressed the issue.[70]

A handful of circuits have declined to use the manager rule because its purpose in the FLSA context from which it originated is not appropriate for Title VII cases, as Title VII is distinct from the FLSA in text and

63. *McKenzie*, 94 F.3d at 1486–87.

64. Notably, the EEOC has stated in its enforcement guidance on retaliation and related issues that it rejects the manager rule in Title VII cases. According to the Commission, "all employees who engage in opposition activity are protected from retaliation, even if they are managers, human resources personnel, or other EEO advisors." The Commission further states, "[t]he statutory purpose of the opposition clause is promoted by protecting all communications about potential EEO violations by the very officials most likely to discover, investigate, and report them; otherwise, there would be a disincentive for them to do so." EEOC Guidelines, *supra* note 48, at § IIA2d.

65. 135 F.3d at 549–50.

66. *Id.* at 550.

67. *Id.* at 554; *McKenzie*, 94 F.3d at 1487.

68. Collazo v. Bristol-Myers Squibb Mfg. Inc., 617 F.3d 39, 49 (1st Cir. 2010); Weeks v. Kansas, 503 F. App'x 640, 642 (10th Cir. 2012).

69. *Collazo*, 617 F.3d at 49.

70. Littlejohn v. City of New York, 795 F.3d 297, n.16 (2nd Cir. 2015).

purpose.[71] In *Littlejohn v. City of New York*,[72] the Second Circuit ruled against application of the manager rule as its "focus on an employee's job duties, rather than the oppositional nature of the employee's complaints or criticisms," is not appropriate in the context of Title VII's purpose.[73] Likewise, the United States Court of Appeals for the Fourth Circuit, in the 2015 case *DeMasters v. Carilion Clinic*,[74] noted that the application of the manager rule to Title VII claims would deter its intended broad range of protection when examining the difference between the protection of employees in the FLSA and Title VII.[75] The Fourth Circuit differentiated the FLSA's more constrictive protection of employees who have "filed any complaint or instituted or caused to be instituted any proceeding . . . or ha[ve] testified or [are] about to testify in any such proceeding, or ha[ve] served or [are] about to serve on an industry committee," from Title VII's more inclusive protection of employees who *oppose* discriminatory practices of their employers or participate in an action against them.[76] More recently, in the 2021 case of *Jackson v. Genesee County Road Commission*,[77] the United States Court of Appeals for the Sixth Circuit also declined to follow the manager rule for three main reasons: Title VII's use of "any" in the opposition clause "suggests all employees are subject to the same standard," there is no language in the statute that states the employee's conduct must fall outside her regular job duties, and exclusion would contradict the spirit and purpose of the statute as a broad remedial measure.[78] These more recent cases have included this textual and congressional intent analysis, which has ultimately lead to the respective courts' rejection of the manager rule.

The Eleventh Circuit has not stated an official position on the manager rule, in spite of previously ruling in its favor in *Brush*, an unpublished, and thus non-binding case.[79] In *Brush*, the Eleventh Circuit ruled the manager exception applicable to Title VII claims.[80] The court in *Brush* examines *Crawford*, where the Supreme Court held that "when an employee communicates to her employer a belief that the employer has engaged in . . . a form of employment discrimination, that communication

71. *Id.*; DeMasters v. Carilion Clinic, 796 F.3d 409, 422 (4th Cir. 2015); Jackson v. Genesee County Road Commission, 999 F.3d 333, 346 (6th Cir. 2021).

72. 795 F.3d at 297.

73. *Id.* at n.16.

74. 796 F.3d at 409.

75. *Id.* at 422.

76. *Id.* (quoting 29 U.S.C. § 215(a)(3)).

77. 999 F.3d at 333.

78. *Id.* at 345.

79. *Brush*, 466 F. App'x. at 787.

80. *Id.*

virtually always constitutes the employee's *opposition* to the activity."[81] The Supreme Court in *Crawford* thus rejected the idea that Title VII's opposition clause requires active and consistent opposing activities to protect against retaliation.[82] The court in *Brush* held that the Supreme Court in *Crawford* did not foreclose the applicability of the manager rule, but rather, concerned only whether Title VII covered the reporting of a harassment claim where the reporting was solicited or volunteered.[83] The Eleventh Circuit's interpretation of *Crawford* allowed the adoption of the manager rule without the Eleventh Circuit's perceived possible contradiction to the Supreme Court. The Eleventh Circuit did not engage in a textual analysis of Title VII or examine the appropriateness of its origin.[84]

E. The Eleventh Circuit has Not Ruled on the "Current Employer Requirement" in Title VII Cases

The current employer requirement is the notion that, in order for a plaintiff to be a successful in a retaliation case against their employer, the employee must oppose the same employer that retaliates against them.[85] The Second Circuit has discussed the possibility of an employee being discriminated against by a future employer due to opposing a past employer's unlawful practices.[86] In *McMenemy v. City of Rochester*,[87] the Second Circuit held that an employee is protected from "*any* employer, present or future," who discriminates against her because of her "prior or ongoing opposition" against a separate employer's unlawful employment practice.[88] In contrast, the Eleventh Circuit has not previously addressed the question of whether an employee who opposes the unlawful employment practices of her former employer, and consequently faces retaliation from her current employer because of such opposition, may bring suit against her current employer under the opposition clause of Title VII's anti-retaliation provision.

81. *Crawford*, 555 U.S. at 276.
82. *Id.* at 276.
83. 466 Fed. Appx. at 787.
84. *Id.*
85. *Patterson*, 38 F.4th at 1348.
86. McMenemy v. City of Rochester, 241 F.3d 279, 284 (2001).
87. 241 F.3d 279, 279 (2001).
88. *Id.* at 284.

IV. COURT'S RATIONALE

In *Patterson*, the Eleventh Circuit considered the adoption of the manager rule to Title VII anti-retaliation cases.[89] The court applied a de novo standard of review to the district court's order granting summary judgment in favor of Georgia Pacific.[90] Summary judgment is appropriate only if the record shows that no genuine dispute as to any material facts exists, and Georgia Pacific is entitled to judgment as a matter of law.[91]

Georgia Pacific defended the district court's grant of summary judgment in their favor on four main grounds: (1) Patterson did not exhaust her EEOC remedies; (2) Patterson had not engaged in protected activity because she was acting in her role as an HR manager; (3) Patterson had not engaged in protected activity because she opposed her former employer's unlawful employment practices, not Georgia Pacific's; and (4) she has not established a genuine issue of material fact on causation or pretext.[92] The Eleventh Circuit evaluated the case by addressing each of these contentions.

A. Patterson Exhausted her EEOC Remedies

Georgia Pacific argued that Patterson's claim went beyond her EEOC charge because her charge is almost entirely about race discrimination and not about the alleged retaliation she faced for her actions at the Memorial Hermann deposition or pregnancy discrimination.[93] The court

89. *Patterson*, 38 F.4th at 1346.

90. *Id.* at 1345.

91. FED. R. CIV. P. 56(A). When determining whether a genuine issue of material fact exists, the court reviewed the evidence and all factual inferences therefrom in the light most favorable to Patterson, the non-movant. Feliciano v. City of Miami Beach, 707 F.3d 1244, 1247 (11th Cir. 2013).

92. *Patterson*, 38 F.4th at 1344. Before filing a Title VII suit against a defendant, a plaintiff must first exhaust her remedies by filing a charge of discrimination with the EEOC. The Eleventh Circuit has noted that a plaintiff's judicial complaint is limited by the scope of the EEOC investigation that can "reasonably be expected to grow out of the [EEOC] charge of discrimination." Gregory v. Ga. Dep't of Hum. Res., 355 F.3d 1277, 1280 (11th Cir. 2004). Bringing factual discrimination allegations in an EEOC charge that are absent from the charge's legal theory to a claim in court might be inappropriate. Ultimately, such allegations are usually allowable if they amplify the legal claim put forth as the court has a policy of not strictly interpreting EEOC charges. *Id.* at 1279 (holding that where a plaintiff had not listed retaliation on the EEOC charge, the EEOC investigation would have reasonably uncovered any evidence of retaliation, and thus, the plaintiff satisfactorily exhausted the complaint).

93. *Patterson*, 38 F.4th at 1345. The Eleventh Circuit explains that although Patterson's EEOC charge largely focuses on racial discrimination, the charge also provides factual information regarding her giving testimony in the Memorial Hermann Title VII

ruled that the factual allegations in Patterson's EEOC charge were enough for a reasonable EEOC investigator to possibly conclude that she had been complaining about Georgia Pacific retaliating against her for giving the Memorial Hermann deposition.[94] Thus, Patterson's complaint did not go beyond her EEOC charge and Patterson exhausted her EEOC remedies.[95]

B. Patterson engaged in Protected Activity Because the Manager Exception is Inapplicable to Title VII cases

The Eleventh Circuit rejected the manager exception.[96] The court held that the manager exception had no foundation in the opposition clause of Title VII and actually contradicted its text .[97] First, the court addresses its contradictory prior ruling in *Brush*, stating that the decision is not precedential due to its status as an unpublished opinion, and, thus, not binding on the court.[98] Further, none of the reasoning in *Brush* convinced the Eleventh Circuit that the manager exception is a "viable rule of law that should be applied to Title VII."[99] As the court had no prior precedent to rely on, it examined the origin of the rule and engaged in textual analysis of Title VII to determine if Congress intended managers to be excluded from the law's protection.[100]

The court discussed the exception's origin in FLSA claims.[101] The court noted that Title VII's text is different from the text of the FLSA.[102] Where the FLSA more narrowly protects employees "who have filed any complaint or instituted any proceeding," the Title VII opposition clause more broadly protects employees who "ha[ve] opposed any practice made an unlawful employment practice."[103] The court cited the Fourth Circuit's reasoning in *DeMasters* to hold that because the two statutes differ in language and purpose, the court must respect those differences and not

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pregnancy discrimination case, Hawkins questioning her about the deposition, and his response that her opposition to her previous employer "made things clear" to him. *Id.*

94. *Id.* at 1346.

95. *Id.*

96. *Id.* The Eleventh Circuit chooses to refer to the "manager rule" as the "manager exception." *Id.*

97. *Id.*

98. *Id.* The Eleventh Circuit relied on *United States v. Izurieta*, 710 F.3d 1176, 1179 (11th Cir. 2013), for the proposition that its unpublished opinions are not precedential.

99. *Patterson*, 38 F.4th at 1346.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* The Eleventh Circuit cites language from the FLSA and Title VII. 29 U.S.C. § 215(a)(3); 42 U.S.C. § 2000e–3(a).

"copy and paste" an exception from one to the other.[104] The court concluded that if the manager exception is to be applied to Title VII cases, it must come from the text of Title VII itself.[105]

The court also engaged in textual analysis of Title VII, beginning with the use of the word "any" in the text of the opposition clause where it provides protection to "*any* of [the employer's] employees."[106] The court relied on its previous ruling in *Merritt*, to hold that because Congress did not expand on the word with more statutory language, "any" takes its ordinary meaning of "all."[107] Further, the court cited the Sixth Circuit rule in *Jackson* reasoning that the use of the word "any" indicates that "all employees" are held to the same standard.[108] Thus, the category of "all employees" encompasses HR mangers.[109] Therefore, HR managers are afforded protection under Title VII's opposition clause.[110]

Lastly, the court examined whether the manager exception comes from the word "opposed" in the opposition clause.[111] The Eleventh Circuit relied on the Supreme Court in *Crawford* to hold the ordinary meaning of "opposed" includes "resist[ing] or antagoniz[ing], contend[ing] against, [] confront[ing], resist[ing], [and] withstand[ing]."[112] The court noted that the character of an employee's position is not encompassed in the ordinary meaning of "opposed" and is not related to the act of an employee opposing her employer.[113] Relying on the Second Circuit in *Littlejohn*, the Eleventh Circuit reasoned that an employee's job duties or titles are not implicated when examining the "oppositional nature of the employee's complaints or criticisms."[114] The court concludes that implying a managerial aspect to "opposed" would be contrary to how Title VII uses the word for its plain meaning.[115]

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104. *Patterson*, 38 F.4th at 1346; *DeMasters*, 796 F.3d at 422. The Eleventh Circuit cited the Supreme Court case *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718 (2017), which held that when a court is "in the business of interpreting statutes, [it] presume[s] differences in language like [between Title VII and the FLSA] convey differences in meaning." *Id* at 1723.

105. *Patterson*, 38 F.4th at 1346.

106. *Id.* 42 U.S.C. § 2000–e3(a) (emphasis supplied).

107. *Patterson*, 38 F.4th at 1347; *Merritt*, 120 F.3d at 1186.

108. *Patterson*, 38 F.4th at 1347; *Jackson*, 999 F.3d at 345.

109. *Patterson*, 38 F.4th at 1347.

110. *Id.*

111. *Id.*

112. *Id.* (quoting *Crawford*, 555 U.S. at 276 (punctuation excluded)).

113. *Patterson*, 38 F.4th at 1347.

114. *Patterson*, 38 F.4th at 1347; *Littlejohn*, 795 F.3d at n. 16.

115. *Patterson*, 38 F.4th at 1347.

The Eleventh Circuit decided that Congress did not "silently and implicitly" write into the text of Title VII an exception that would exclude an "entire category of employees."[116] Thus, the court held that the manager exception is not applicable to Title VII retaliation claims.[117]

C. Patterson Engaged in Protected Activity Because Title VII Applies to Past Employers

The court engaged in more statutory analysis to determine whether it is of consequence that the unlawful practices Patterson opposed were that of her former employer, Memorial Hermann, and not the retaliating employer, Georgia Pacific.[118] The court analyzed the opposition clause once more, stating it prohibits retaliation by "'an employer' against '*any* individual' for having 'opposed *any* practice made an unlawful employment practice'" by Title VII.[119] The court remarked that the statute does not specify the past, present, or future nature of the employer.[120] Additionally, the court noted that it has previously ruled the article "an" means "any."[121] As Georgia Pacific is *any* employer, it qualifies under the clause.[122] Therefore, Patterson qualified as *any* individual, pregnancy discrimination falls into the category of *any* unlawful employment practice, and Patterson was not barred from recovering due to a current employer requirement.[123] Analogous to the Second Circuit's holding in *McMenemy*, the Eleventh Circuit held that a current employer may not retaliate for opposition clause conduct even if it is directed at or only involves a former employer."[124] Thus, the court rejected the current employer requirement.[125]

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116. *Id.* at 1348.

117. *Id.* Notably, the Eleventh Circuit addressed the many "practical considerations" put forth by Georgia Pacific for the adaption of the manager exception, firmly stating that pronouncing policy considerations was not in the purview of judges. *Id.*

118. *Id.*

119. *Id.* at 1348–49.

120. *Id.* at 1349.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* Notably, despite the district court not ruling on Patterson's participation clause claim, the Eleventh Circuit held that she engaged in protected activity under the clause. *Id.* Title VII makes it unlawful "for an employer . . . to discriminate against any of his employees . . . because he has made a charge, testified, assisted, or participated in any investigation, proceeding, or hearing under" Title VII. 42 U.S.C. § 2000–e3(a). The court held that, for the same reasons as in its analysis of the opposition clause, neither the proposed manager exception or the proposed current employer requirement are applicable to the participation clause. *Patterson*, 38 F.4th at 1349–50.

D. A Genuine Issue of Material Fact on Causation and Pretext was Established

The court ruled that Patterson created a genuine issue of material fact as it relates to causation and pretext.[126] In a prima facie case for retaliation, a plaintiff must show the protected activity was casually related to an adverse action.[127] Patterson's statement to Hawkins about her attendance and behavior at the Memorial Hermann deposition, immediately followed by Hawkins retort to Patterson, and the close temporal proximity of one week between the interaction and Patterson's termination all demonstrated that a genuine issue of fact as to causation was established.[128]

The court also found the existence of a genuine issue of fact as to pretext by showing that Georgia Pacific's proffered reasons for her termination were merely a pretext to cover their retaliation.[129] Georgia Pacific asserted that its non-discriminatory purpose for firing Patterson was her poor performance and excessive absences.[130] Patterson responded by offering a long list of evidence that the circumstances leading up to and during her termination show a discriminatory purpose, thereby establishing a genuine issue of material fact on pretext.[131] Thus, a genuine issue of material fact on pretext had been established.[132] The Eleventh Circuit reversed the grant of summary judgment by the district court and remanded the case back to the lower court.[133]

V. IMPLICATIONS

Retaliation can happen at any level of employment in a workplace environment, whether it be directed at C-Suite employees or lower-level employees. The Eleventh Circuit's ruling in *Patterson* will protect the

126. *Patterson*, 38 F.4th at 1355.

127. *Id.* at 1351.

128. *Id.* at 1351–52.

129. *Id.* at 1353.

130. *Id.* at 1352.

131. *Id.* at 1353–55. Patterson's evidence included: the lack of deadline on the union avoidance plan, Patterson's assistance to McIlwain on the project; Hawkins deviated from normal Georgia Pacific procedure on reviewing attendance issues in getting her badge swipe records, the fact that the only attendance reviewed was three months' worth when she had been employed by the company much longer, Patterson not receiving a warning about her attendance issues or work pace, Patterson's positive work review from the previous year, the conversation between Patterson and Hawkins a week before her termination, the lack of a reason for her termination at the time it happened, and the lump sum payment offered in exchange for Patterson foregoing legal action. *Id.*

132. *Id.* at 1355.

133. *Id.*

rights of managerial employees, specifically those who have job duties related to handling discrimination claims and the hiring and firing of personnel, by enabling them to take action under Title VII's anti-retaliation provision in Georgia, Alabama, and Florida.[134]

This ruling will likely impact the rights of hundreds of thousands of employees in the state of Georgia alone.[135] Rejecting the manager exception will come with advantages and disadvantages for the parties concerned. It may benefit managers by allowing them to address the rights of other employees, but could disadvantage the employers who could potentially lose the ability to supervise job performance for HR workers effectively.[136] Without the exception, an emergence of many Title VII claims likely means a strain on the EEOC's review of allegations and issuance of charges, as well as courts trying to keep up with workplace retaliation litigation. Notably, another major holding in *Patterson*, the rejection of the current employer requirement could have a workplace impact as well.[137] This will likely empower HR managers to speak out about discriminatory conduct without fearing future retaliation from the industry.

The ruling court in *Patterson* is in line with the recent overall trend in how circuit courts have ruled on the side of managers. As an effect, the ruling in *Patterson* will likely encourage circuits that have enforced the manager rule to re-examine their prior holdings.[138] All circuits that currently enforce the manager rule adopted it without consideration of the different statutory language and purposes of Title VII and the FLSA.[139] Upon reconsideration, *Patterson* will probably be used as a persuasive precedent to abandon the exception. After all, the exception being neither implicit in the law of Title VII nor intended by Congress

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134. *Id.*

135. *See May 2021 State Occupational Employment Estimates*, U.S. BUREAU OF LABOR STATISTICS, https://www.bls.gov/oes/current/oes_ga.htm (last visited Aug. 11, 2022).

136. Deborah L. Brake, *Tortifying Retaliation: Protected Activity at the Intersection of Fault, Duty, and Causation*, 75 OHIO ST. L.J. 1375, 1401 (2014).

137. *Patterson*, 38 F.4th at 1349.

138. Patterson's attorney, Kurt Kastorf, stated that he believes the ruling "creates a compelling precedent for other courts to look at nationally, that there aren't classes of management of human resources or legal employees who are simply exempt from the scope of [Title VII's] retaliation provision." Mason Lawlor, *Creating 'a Compelling Precedent,' 11th Circuit Rules Title VII's Anti-Retaliation Provision Protects All Employees, Including Managers*, LAW.COM (July 8, 2022), https://www.law.com/dailyreportonline/2022/07/08/creating-a-compelling-precedent-11th-circ-rules-title-viis-anti-retaliation-provision-protects-all-employees-including-managers/?slreturn=20221018121641 [https://perma.cc/T228-6FF9].

139. *See Collazo*, 617 F.3d at 49; *Weeks*, 503 F. App'x at 642; *HBE Corp.*, 135 F.3d at 554.

means courts are unlikely to find other support for maintaining the exception outside of public policy reasons. At this point, courts will not partake in that debate.[140] Ultimately, the Eleventh Circuit's precedent in *Patterson* will have a broad range of impact, from welcoming retaliation litigation from an entire class of employees to inspiring other circuits to take a closer look at the origins of their Title VII law.

140. *Patterson*, 38 F.4th at 1348.