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Petition for a Writ of Certiorari. Brush v. Sears Holding Corp., 568 U.S. 1143 (2013) (No. 12-268), 2013 U.S. LEXIS 925

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No. 12-268

IN THE

Supreme Court of the United States

JANET BRUSH,

Petitioner,

v.

SEARS HOLDING CORPORATION,
d/b/a SEARS, ROEBUCK & CO.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 704(a) of Title VII prohibits an employer from retaliating against an employee because he or she opposed discrimination forbidden by Title VII. The lower courts are divided as to how such anti-retaliation provisions apply to management officials, such as personnel or EEO officials, whose duties include assuring compliance with Title VII or implementing an employer's anti-discrimination policy.

The question presented is:

Are management officials:

(1) subject to exclusion from protection under section 704(a) if their actions are within the scope of their official duties (the rule in the Fifth, Eighth, Tenth and Eleventh Circuits),

(2) protected under section 704(a) regardless of whether their actions are within the scope of their official duties (the rule in the Sixth and District of Columbia Circuits), or

(3) subject to exclusion from protection under section 704(a) if their actions are *not* within the scope of their official duties (the rule in the Ninth Circuit)?

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Petitioner Janet Brush respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered on March 26, 2012.

OPINIONS BELOW

The March 26, 2012 opinion of the Court of Appeals, which is reported at 466 Fed.Appx. 781 (11th Cir. 2012), is set out at pp. 1a-16a of the Appendix. The May 31, 2012 order of the Court of Appeals denying rehearing and rehearing en banc, which is not reported, is set out at pp. 42a-43a of the Appendix. The January 14, 2011 Order of the District Court for the Southern District of Florida, which is not reported, is set out at pp. 17a-41a of the Appendix.

JURISDICTION

The decision of the Court of Appeals was entered on March 26, 2012. A timely petition for rehearing and rehearing en banc was denied on May 31, 2012. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 704(a) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-3(a), provides in pertinent part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice, made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in

any manner in an investigation, proceeding, or hearing under this subchapter.

STATEMENT OF THE CASE

The courts of appeals are divided regarding whether the anti-retaliation provisions of federal employment laws protect personnel and other management officials whose job responsibilities include assuring compliance with those statutes. In the instant case a Sears employee complained to her employer that she had been sexually harassed; there is no dispute that section 704(a) of Title VII protected the harassment victim herself from retaliation. The Eleventh Circuit, however, held that section 704(a) did not protect petitioner--the key Sears official who notified others of the complaint, unearthed the nature of the harassment, and pressed the company to take speedier and more aggressive action in response. The Court of Appeals applied to petitioner's section 704(a) retaliation claim a court-made "manager rule" exception to federal anti-retaliation laws. The Sixth and District of Columbia Circuits have expressly rejected that limitation on the protections of section 704(a).

(1) *The Events Giving Rise to This Action*

At the time of the events giving rise to this action, Brush worked for Sears as a Loss Prevention District Coach. Her job was to reduce a variety of risks to the company, particularly losses due to theft. In mid-September 2007, Brush received a call late one evening on her cell phone from Mrs. Doe[1], whom she had known

1. Because of the seriousness of the conduct alleged, we refer to the victim and harasser respectively as "Mrs. Doe" and the "Store Coach," rather than using their actual names.

for many years.[2] Mrs. Doe reported to Brush that she was being sexually harassed by her Store Coach (Sears' title for a store manager), but provided few details. Brush gave this information to higher ranking Sears officials, who decided to suspend the Store Coach, and directed that Scott Reuter (a District Manager) interview Mrs. Doe and other possible witnesses. (App. 5a, 20a-21a). Brush accompanied Reuter, although her responsibility was largely limited to taking notes and serving as a witness to whatever was said in response to Reuter's questions.[3]

Mrs. Doe, when interviewed by Reuter (accompanied by Brush), provided some information about the sexual harassment, but Brush concluded that Mrs. Doe was not revealing the full extent of the harassment because she was uncomfortable speaking with Reuter, a man whom Doe did not know. After Reuter's questioning had ended and Mrs. Doe had left the room, Brush told Reuter that she intended to speak with Doe alone, and Reuter acquiesced.[4] (App. 5a). When questioned by Brush outside Reuter's presence, Mrs. Doe disclosed the gravity of what had occurred.

> I said, "[Mrs. Doe], did you tell Scott the whole story?' That's all I said. [Mrs. Doe] looked down to the ground and just started crying hysterically. And said, "No, Janet, I didn't tell Scott the whole story. [The Store Coach] raped me three times in the loft."[5]

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2. Complaint ¶ 43.

3. Brush Dep., 9.

4. Brush Dep., 72, 98; Complaint, ¶¶ 35, 42.

5. Brush Dep., 73.

Mrs. Doe indicated she did not want her husband to find out about the attacks (App. 5a); there was conflicting evidence regarding what if anything Mrs. Doe said about not telling others.[6]

Brush reported Doe's statement to Reuter, and together they called their supervisor, Bob Church. Brush pressed Church to take action, suggesting that Sears contact the police, contending that she was not competent to investigate charges of such criminal acts. Church, however, declined to do so, explaining he wanted to talk to "Legal." In a conversation the next day, Brush again pressed Church in vain to take some further action.[7] Brush concluded that Church had "brushed [the rape report] under the rug."[8] Brush later explained that she wanted Sears to do more because "we were not taking care of our associates."[9]

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6. Brush testified that Mrs. Doe asked only that Brush not tell Doe's husband. According to Brush, Doe did not object when Brush indicated she would have to notify her superiors. (Brush Dep. 73). On Brush's account the issue of contacting the police or any others never arose during her interview with Doe. (Brush Dep., 73-75). Doe described the exchange differently, stating that she "asked [Brush] not to say nothing because I didn't want the police involved." (Doe Dep., 15). The District Court noted that "[e]xactly what occurred during this interview is in dispute." (App. 12a n. 3). The Court of Appeals, on the other hand, concluded that there was an express discussion about the police (not merely a general request that no one be told about the rapes), and that Doe had specifically asked that the police not be notified. (App. 5a).

7. Brush Dep., 76-77.

8. Brush Dep., 6, 85.

9. Brush Dept., 85.

In early October, after interviewing both Mrs. Doe and the Store Coach, Church met with Brush. When Church suggested that the Store Coach had merely engaged in a consensual sexual relationship with Mrs. Doe, Brush vehemently disagreed, insisting that Doe was "visibly frightened of this man." Brush rejected on the same ground Church's suggestion that Mrs. Doe had been trying to cover up a consensual relationship with the Store Coach because of his race. Shortly after this meeting, the Store Coach was fired. (App. 5a). There were no further discussions about the matter between Brush and other Sears officials, until after Brush was dismissed.[10]

On November 20, 2007, Sears fired Brush. (*Id.*). She was told at the time that the reason for the dismissal was that she had violated Sears policy when she unearthed the rapes, because at the time Brush re-interviewed Mrs. Doe she was not accompanied by Mr. Reuter. (App.6a and n. 4).[11] Brush filed a Title VII charge with the EEOC, alleging that she had been dismissed because of the actions she had taken in unearthing and seeking to correct the harassment of Mrs. Doe. The EEOC made a cause finding (App. 6a), concluding that Brush had indeed been "terminated in retaliation for engaging in protected activity." The Commission found that Sears "was unhappy with the way [Brush] asked the questions and embarrassed at the way she handled the matter. . . .

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10. Brush Dep., 92-94.

11. Sears' printed "Guide on How To Investigate" states "[h]aving a witness (another coach) present during the interview is helpful (*but not necessary*) to prevent conflicting statements and avoid issues with uncooperative parties." (Doc. 32-24, p. 30; Doc. 38-11, p. 3 (Emphasis added)).

[Sears] negatively viewed her participation in the sexual harassment investigation and terminated her employment under pretextual reasons."[12]

(2) *The Proceedings Below*

Brush filed suit in district court, asserting that she had been fired "because she uncovered that Defendant had negligently allowed three forcible rapes to occur on its premises," and "because she raised rape issues that would have been kept hidden if she had allowed Mr. Reuter to conduct the interviews." (Complaint, ¶¶ 59, 60; App. 6a). That retaliation, the complaint asserted, violated section 704(a) of Title VII. 42 U.S.C. § 2000e-3(a).

Sears moved for summary judgment, arguing inter alia that section 704(a) did not forbid retaliation against Brush because of the so-called "manager rule."[13] The District Court agreed. Brush's retaliation claim was barred, the District Court held, by the manager rule applied in several circuits, because Brush was acting within the scope of her employment when she opposed the sexual harassment of Mrs. Doe. (App. 28a-31a).[14]

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12. Doc. 38-4, p. 2.

13. Defendant's Memorandum of Law in Support of Its Motion for Summary Final Judgment, p. 9("plaintiff cannot establish protected activity because the alleged activity occurred in the course of performing her job duties.")(capitalization omitted); see Defendant's Reply to Plaintiff's Opposition to Defendant's Motion for Summary Final Judgment, pp. 4-5.

14. The District Court also granted summary judgment on other grounds. The Court of Appeals did not reach those other issues, which thus are not relevant at this stage in the proceedings.

"[T]he rule . . . forecloses oppositional activity claims by managers who are simply performing their duties." (App. 31a; see 30a("the long line of cases that preclude a finding of protected activity when the activity occurs in the course of performing one's job duties")). Plaintiff's actions were unprotected since they "occurred during the course of the performance of her job." (App. 28a). In light of the manager rule, the District Judge insisted, Brush's assertion that "she 'disapproved' of the store manager's alleged rape is meaningless." (App. 30a).

The Eleventh Circuit affirmed on the same ground, adopting and applying a version of the "manager rule" utilized in the Fifth and Tenth Circuits. Under that rule, the Court of Appeals explained, an official who opposes discrimination against someone else is not protected from retaliation by section 704(a) if that opposition was within "the scope of [the official's] employment." (App. 14 n. 8). "[W]e find the 'manager rule' persuasive and a viable prohibition against certain individuals recovering under Title VII." (App. 13a). "[T]he '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.'" (App. 12a). Regardless of whether Brush personally opposed sexual harassment or wanted to correct or prevent such abuse, the Eleventh Circuit held, under the manager rule the actions that Brush took were not "protected activity" under section 704(a) because her "job responsibilities involved exactly the type of actions that Brush took on Mrs. Doe's behalf." (App.13a).

The Court of Appeals acknowledged that

> [t]hrough discovery, Brush produced evidence that showed she "opposed the alleged sexual battery [experienced by Mrs. Doe], explained [to her employer, Sears] that the seriousness of those allegations required police intervention, and that she wanted to call the Orange County Police."

(App. 6a)(additions in opinion)(quoting appellate brief).

> Brush also provided some circumstantial evidence that her termination may have been related to her involvement in the internal investigation conducted by Sears. In particular, she cited a declaration by her former boss, . . . who stated that he "believe[d] Ms. Brush was terminated because of her involvement in uncovering and opposing rapes that took place on [Sears'] property."

(App. 7a). But because of the manager rule, the Eleventh Circuit concluded that this evidence was legally irrelevant.

Brush filed a timely petition for rehearing and rehearing en banc. The petition was denied on May 31, 2012. (App. 42a-43a).

REASONS FOR GRANTING THE PETITION

I. THE CIRCUITS ARE DEEPLY DIVIDED OVER THE EXISTENCE AND SCOPE OF A "MANAGER RULE" EXCEPTION TO SECTION 704(a) AND OTHER FEDERAL ANTI-RETALIATION LAWS

This case presents a complex circuit conflict regarding whether the anti-retaliation provisions in federal employment statutes apply to management officials whose responsibilities include reporting, investigating, or preventing violations of those laws. The question has arisen most often, as here, with regard to section 704(a) of Title VII, which prohibits retaliation against any employee who opposes discrimination forbidden by Title VII. 42 U.S.C. § 2000e-3(a). "[C]ourts have long acknowledged the difficult situation of reconciling the language of Title VII with the dismissal of an employee whose job it is to handle discrimination complaints." *Schanfield v. Sojitz Corp. of America,* 663 F.Supp. 2d 305, 342 (S.D.N.Y. 2009) (footnote omitted).

The Fifth, Eighth, Tenth and Eleventh Circuits have adopted a "manager rule," under which an official may be denied the protections of a statutory anti-retaliation provision if his or her actions are within the scope of the official's duties. The Sixth and District of Columbia Circuits have rejected the manager rule, holding that anti-retaliation provisions such as section 704(a) accord the same protection to managers, supervisors and personnel officials that they provide to other workers. The courts of appeals that do utilize the manager rule disagree among themselves about whether the rule applies to an official who—although acting within the scope of his or her

responsibilities—is attempting to assist a particular employee or group of employees. The Ninth Circuit applies a standard that is essentially the opposite of the manager rule, holding that a manager can be denied the protection of an anti-retaliation provision because his or her conduct was outside the scope of his or her employment and adverse to the interest of the employer.

In the lower courts, the manager rule is not tied to the text of the statute involved, but is treated as a federal common law of retaliation. In addition to Title VII, the rule has been applied to a wide variety of other federal statutes, including the Fair Labor Standards Act[15], the Americans with Disabilities Act[16], the Uniformed Services

15. *Hagan v. Echostar Satellite, L.L.C.*, 529 F. 3d 617 (5th Cir. 2008); *McKenzie v. Renberg's Inc.*, 94 F. 3d 1478 (10th Cir. 1996).

16. In *Clemons v. Nike, Inc.*, 2007 WL 2890972 (D.Or. Sept. 28), the plaintiff, an employee relations specialist, was assigned the task of finding a reasonable accommodation under the ADA for an employee who was losing his sight. When initial efforts to find another position were unsuccessful, the plaintiff was directed to dismiss the disabled worker. The plaintiff responded that the disabled worker and the company "needed more time to engage in the [legally required] interactive process [under the ADA]," 2007 WL 2890972 at *3, and that "to terminate the employee, in the middle of the interactive process to find a reasonable accommodation, violated the ADA." *Id.* at *9. The employer agreed to allow another week and a half to find another job for the disabled worker, but then fired the plaintiff. The district court dismissed the plaintiff's ADA retaliation claim on the ground that, in seeking to assure compliance with the ADA, "Clemons was performing her job." *Id.*at *10. In the court below Sears relied on the decision in *Clemons* as an example of the manager rule. Defendant's Memorandum of Law In Support of Its Motion For Summary Final Judgment, p. 9.

Employment and Reemployment Rights Act[17], the Family and Medical Leave Act[18], the Sarbanes Oxley Act[19], and Title IX.[20] These decisions most often rely on opinions construing other federal statutes, and are not based on the purpose or text of the particular provision at issue. Federal courts have also applied the manager rule to claims under state anti-retaliation statutes, relying on the federal court-fashioned manager-rule doctrine rather than on the text or purpose of, or state court decisions regarding, the state statute at issue.[21] Thus, while the instant appeal concerns whether a "manager rule" limits the protections of section 704(a) of Title VII, this case has important implications for a broad range of federal anti-retaliation statutes.

A. The Fifth, Eighth, Tenth and Eleventh Circuits Have Adopted A Court-Created "Manager Rule" Exception to Section 704(a) and Other Federal Anti-Retaliation Statutes

The essence of the manager rule is to deny to certain officials protections that would be accorded to the direct

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17. *Cook v. CTC Communications Corp.*, 2007 WL 3284337 at *9-*10 (D.N.H. Oct. 30).

18. *Trapani v. Greatwide Logistics Services, LLC*, 2011 WL 3803789 at *12 (E.D.Pa. Aug. 29).

19. *Riddle v. First Tennessee Bank*, 2011 WL 4348298 (M.D.Tenn. Sept. 16).

20. *Atkinson v. Lafayette College*, 635 F.Supp. 2d 581 (E.D.Pa. 2009).

21. See *Hill v. Belk Stores Services, Inc.*, 2007 WL 2997556 (W.D.N.C. Oct. 12).

victim of an unlawful employment practice. There is no dispute that in the instant case section 704(a) would have protected Mrs. Doe if she herself had taken the actions in which Brush engaged—reporting sexual harassment to Brush's supervisor, insisting that Doe be interviewed by Brush alone, pressing Sears to act with greater dispatch, urging that the police be contacted, and maintaining that Doe's sexual contacts with the Store Coach were not consensual. The question presented is whether section 704(a) protected Brush when she did so.

(1) Under the Eleventh Circuit's version of the manager rule, actions that would be protected if engaged in by a discrimination victim are not protected if taken by an official who was "neither directly interested in the underlying discrimination nor acting beyond the scope of her employment in opposing an employer's action." (App. 14a n. 8). Under the manager rule an official who opposes harassment of or discrimination against other employees can be retaliated against for having done so if that opposition occurs "in the course of her normal job performance." (App. 12a). Thus, under the Eleventh Circuit decision, the "actions that Brush took on Mrs. Doe's behalf" (App. 13a)—actions that would have been protected if engaged in by Doe herself (or by a mere co-worker)—were not protected by section 704(a) because Brush had acted "as a manager." (*Id.*).

The Court of Appeals based the manager rule on its view that the protection created by section 704(a) was intended, at least primarily, for opposition activity engaged in by the specific victim of the harassment or other discriminatory practice. *Crawford v. Metropolitan Gov't of Nashville and Davidson Cty., Tenn.*, 555 U.S.

271 (2009), sets out the definitive account of what types of actions and statements are protected by section 704(a). But, the Eleventh Circuit insisted, *Crawford* only applies to acts of and statements by discrimination victims themselves. "*Crawford* . . . does not address whether a disinterested party to a harassment claim could use that claim [of discrimination against the victim] as its own basis for a Title VII [retaliation] action." (App. 13a). "[T]he breadth of *Crawford*'s application to individuals who suffered workplace discrimination is not transferrable to the entirety of the management string that might review any such allegation." (*Id.*).

> Brush would have us extend *Crawford*'s reasoning not just to those directly impacted by workplace discrimination but to all individuals involved in the investigation, no matter how far distant. Although we have not yet passed on the transitive property of a Title VII claim, other circuits have by creating what is known as the "manager rule."

(App. 11a-12a).

Under the Eleventh Circuit's manager rule, a manager is not protected if, while acting within the scope of her employment, she opposes discrimination against another employee. Such a manager would be covered by section 704(a) only insofar as she was opposing discrimination in the procedure for handling a discrimination complaint. Thus, although Brush could not base a retaliation claim on her opposition to sexual harassment of Mrs. Doe, she would have been protected for opposing an unlawful response to Doe's complaint—e.g., if Sears had refused to investigate the complaint because of Doe's religion.

> Although she seeks to predicate her claim for retaliation upon Mrs. Doe's claims of sexual harassment and rape, 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. *As such* her claims relate not to Mrs. Doe's allegations, but instead to the procedures of the internal investigation conducted by Sears.

(App. 10a) (emphasis added). The only viable manager retaliation claim is one that "relates to" the manner in which a discrimination claim is handled. In this case, however, Sears' handling of Doe's harassment complaint (as opposed to the treatment of Doe herself) was not itself unlawful. "Brush . . . has cited no . . . federal law that would have mandated Sears take some action other tha[n] what it took. . . . [I]t is impossible for Brush to have had a reasonable belief that Sears' actions [in handling Doe's complaint] were unlawful." (App. 14a).

(2) Three other circuits have adopted a version of the manager rule. The Eighth Circuit endorses the manager rule as a limitation on Title VII retaliation claims. *EEOC v. HBE Corp.*, 135 F. 3d 543, 554 (8th Cir. 1998). *HBE* held that in a section 704(a) case there is "[a] requirement of 'stepping outside' a normal role," e.g. "outside the normal managerial role which is to further company policy." That requirement is not met by "merely alert[ing] management of potential violations of the law in order to avoid liability for the company." *Id.* In *HBE* the company's director of personnel, after being told to dismiss an African-American employee, double checked (and found

groundless) the criticism of that worker, expressed a belief that the dismissal decision was racially motivated, and ultimately refused to terminate that employee. The Eighth Circuit held that the director of personnel was protected only because he had refused to fire the worker, since that refusal of a direct order "placed him outside the normal managerial role which is to further company policy." 135 F. 3d at 554.

The Fifth Circuit adopted a manager rule in *Hagan v. Echostar Satellite, L.L.C.*, 529 F. 3d 617,627-30 (5th Cir. 2008). "[W]e agree that an employee must do something outside his or her job role" to be protected by an anti-retaliation provision." 529 F. 3d at 628.

> If we did not require an employee to "step outside the role" or otherwise make clear to the employer that the employee was taking a position adverse to the employer, nearly every activity in the normal course of a manager's job would potentially be protected activity ....

519 F. 3d at 628. "[O]therwise . . . whole groups of employees—management employees, human resources employees, and legal employees, to name a few—[would] be[] difficult to discharge ...." 529 F. 3d at 628.

The Tenth Circuit originated the manager rule in *McKenzie v. Renberg's Inc.*, 94 F. 3d 1478, 1486 (10th Cir. 1996). *McKenzie* concluded that an Assistant Personnel Director did not engage in protected activity under the FLSA when she expressed "concern" to higher officials that the company might be in violation of the Fair Labor Standards Act. The Tenth Circuit held that bringing

such information to the attention of the employer does not constitute protected activity, so long as the official does not go further and actually object to the practice in question or disagree with the employer's actions.

> McKenzie was not asserting any rights under the FLSA, but rather was merely performing her everyday duties as personnel director . . . . McKenzie never crossed the line from being an employee merely performing her job as personnel director . . . . [S]he [only] informed the company that it was at risk of claims that might be instituted by others . . . . In order to engage in protected activity . . . , the employee must step outside his or her role of representing the company . . . .

94 F. 3d at 1486-87.

Although *McKenzie* and *Hagan* involved retaliation claims under the Fair Labor Standards Act, the manager rule is treated as a matter of general federal law, rather than a construction of any particular federal statute. Thus, *McKenzie* and *Hagan* are the authorities on which the lower courts have generally relied in applying the manager rule in Title VII cases. In the instant case both the Eleventh Circuit and the District Court (as well as the defendant itself[22]) relied on *McKenzie* and *Hagan* as the basis for the manager rule. (App. 12a, 28a).

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22. Defendant's Memorandum of law in Support of Its Motion for Summary Final Judgment, p. 9.

B. The Sixth and District of Columbia Circuits Have Rejected The Manager Rule

Two circuits have squarely rejected the manager rule, reasoning that this limitation on section 704(a) both violates the rights of the officials involved and undermines compliance with Title VII.

In *Johnson v. University of Cincinnati*, 215 F. 3d 561 (6th Cir. 2000), the Sixth Circuit refused to adopt the manager rule limitation. The plaintiff in *Johnson* was a Vice President for Human Resources and Human Relations, and one of his primary responsibilities was to manage the employer's affirmative action program. He was dismissed in retaliation for his advocacy on behalf of minorities.

> Plaintiff protested discrimination that occurred in the hiring process . . . . [T]he fact that Plaintiff may have had a contractual duty to voice such concerns is of no consequence to his claim. Under Title VII . . . there is no qualification on who the individual doing the complaining may be . . . . [T]he district court's conclusion, that as a high-level affirmative action official Plaintiff could not claim protected advocacy under the opposition clause . . . runs counter to the broad approach used when considering a claim for retaliation under this clause . . . . [T]he district court allows for an employer to retaliate against the person best able to oppose the employer's discriminatory practices—the "high-level affirmative action official"—without fear of reprisal under Title

> VII. . . . [T]he individual who has contracted to advocate on behalf of women and minorities has not thereby contracted to be retaliated against for his advocacy.

215 F. 3d at 579-80 (emphasis omitted). One member of the Sixth Circuit panel dissented, unsuccessfully urging the adoption of the very scope-of-employment based manager rule applied by the Eleventh Circuit in the instant case.

> The plaintiff contends that he was terminated for his active advocacy on behalf of minorities, yet, this was his job. If he was not performing his job to the satisfaction of his employers, the University is entitled to dismiss him. The plaintiff has presented no evidence that his advocacy went beyond *the scope of his employment*, and I believe this is significant. I do think that the plaintiff's employment as a high level affirmative action officer does and should make a difference in the analysis of his claims. Because it was his job to advocate on behalf of minorities I do not think he is entitled to protected status for his general advocacy on behalf of minorities.

215 F. 3d at 587-88 (Kennedy,J. concurring and dissenting) (emphasis added); see *Nemeth v. Citizens Financial Group, Inc.*, 2011 WL 2531200 at *6 (E.D.Mich. June 24) (rejecting manager rule defense in light of *Johnson*).

In *Smith v. Secretary of the Navy*, 659 F. 2d 1113 (D.C.Cir. 1981), the plaintiff was a federal EEO Counselor; the district court found that Smith had been retaliated

against because of his EEO activities. On appeal, one member of the appellate court argued that the court should adopt a version of the manager rule, and should hold that section 704(a) does not protect EEO officials from retaliation for conduct that is part of their job assignment.

> This provision of the Act was not designed to protect those, such as EEO counselors, whose own employer . . . has assigned them to work on civil rights matters . . . . Mere participation in EEO is insufficient.

659 F. 2d at 1124 (MacKinnon, J., dissenting). The District of Columbia Circuit, however, emphatically rejected that proposed limitation on the scope of section 704(a).

> [T]he plain language of Title VII prohibits reprisals against employees for their participation in EEO activities . . . . Smith's EEO work, performed pursuant to a designation by the Department of the Navy, plainly falls within the protective ambit of the statutory language. It is the explicit function of EEO officers to "assist" in "investigation(s)" and "proceeding(s)" under Title VII, and it is for work of this kind that Smith was penalized. . . . . Smith was found to be the victim of an "improper consideration of his EEO duties"; he was . . . wrongly criticized for performing functions given protected status under Title VII.

659 F. 2d at 1121-22. The District of Columbia Circuit opinion specifically noted that Title VII protects officials

who conduct internal investigations—one of the key actions in which Brush had engaged—even when conducting such investigations is an "explicit function" of the position in question.

C. The Circuits That Have Adopted The Manager Rule Disagree About When That Rule Applies

The circuits that have adopted the manager rule are divided about when it applies. The Tenth and Fifth Circuits hold that the rule does not bar protection of a manager—even if acting within the scope of his or her employment—if he or she assists or advocates for an employee whose rights may have been violated, or complains to other officials about the manner in which the employer has dealt with the asserted violation of that employee's rights. The Eighth and Eleventh Circuits, on the other hand, recognize no such limitation on the manager rule.

In the seminal decision in *McKenzie v. Renberg's, Inc.*, the Tenth Circuit held that the manager rule does not apply—and a management official is protected from retaliation—if he or she goes beyond merely informing the employer of a risk of liability and "actively assist[s] other employees in asserting . . . rights." 94 F. 3d at 1486. A manager's actions would thus constitute protected activity, the Tenth Circuit holds, if the manager assisted the employee in some way, such as by engaging in "*advocacy* of rights [of the employee]," being "supportive of adverse rights [of that worker]," or "complain[ing] to superiors." *Id.*(emphasis added). The manager rule did apply in *McKenzie* because the plaintiff there had merely expressed "concerns" about whether company practices were legal and "informed the company that it was at risk of claims that might be instituted by others." *Id.*

The Fifth Circuit recognized the same limitation on the manager rule in *Hagan v. Echo Satellite, L.L.C.*, 529 F. 3d 617 (5th Cir. 2008). The supervisor in that case had merely passed on to other officials a question that subordinates had raised regarding possible entitlement to additional overtime pay. The Fifth Circuit held that this action was subject to the manager rule because the supervisor had no intent to assist the workers in obtaining more money and did not in fact believe that they were entitled to the additional compensation they sought. 529 F. 3d at 630. The plaintiff was simply repeating to his superiors the question asked by his subordinates, not "assisting [those] employees in asserting rights." 529 F. 3d at 628 (*quoting McKenzie,* 94 F. 3d at 1486-87). The plaintiff would have been protected from retaliation if he had "complain[ed] to his employer on behalf of [the workers]," was acting "as an advocate for [the subordinates]," or was "personally advocating on behalf of his [subordinate's] statutory rights." 529 F. 3d at 629-30.

But neither the Eighth Circuit in *HBE* nor the Eleventh Circuit in the instant case recognizes such a limitation on the manager rule. The difference between the Fifth and Tenth Circuit version of the manager rule, on the one hand, and the version in the Eighth and Eleventh Circuits, is of controlling importance in the instant case. The Eleventh Circuit correctly recognized that Brush had "acted on Doe's behalf." (App. 13a). Brush repeatedly complained about the manner in which Sears' was responding to Doe's complaint, pressing for quicker action and for the selection of an investigator with criminal investigation expertise. When higher officials suggested that Doe might be lying to cover up a consensual sexual relationship with the Store Coach, Brush spoke up on Doe's behalf, insisting

the sexual relationship could not have been consensual because Doe—when being interviewed by Brush—was "visibly frightened of this man."[23] In the Fifth and Tenth Circuit those actions by Brush would have placed her outside the manager rule, and would have constituted protected activity. But in the Eleventh Circuit all that mattered was that Brush's actions—regardless of whether they involved assistance, advocacy and complaining to superiors—were within Brush's scope of employment.

D. The Ninth Circuit Applies A Rule That Is The Opposite of The Plurality Manager Rule

The four circuits applying the manager rule do agree that the rule would not apply to an official who stepped outside of his or her official role and took some action that was adverse to the interests of the employer. (See App. 13a). Several of those decisions cite as the quintessential example of that type of protected activity the filing with government officials of a charge that the employer had engaged in an unlawful employment action. E.g., *McKenzie*, 94 F. 3d at 1486 (manager protected if she "initiate[s] a . . . claim against the company on her own behalf or on behalf of anyone else").

In *Smith v. Singer Co.*, 650 F. 2d 214 (9th Cir. 1981), however, the Ninth Circuit applied the opposite rule, holding that filing such charges was not protected precisely because it was outside the official's scope of employment and adverse to the interests of the employer. In *Smith* the plaintiff, a director of industrial relations, filed complaints with EEOC and another federal agency

23. Brush Dep., 92-93.

alleging widespread discriminatory practices at a particular facility. The Ninth Circuit held that Smith could be dismissed for that action precisely because it was adverse to the interests of the company.

> [I]f . . . . he was fired simply for having filed [the complaints], we conclude that firing him . . . would have been justified. . . . [Plaintiff's] position . . . required the occupant to act on behalf of his employer in an area where normally action against the employer and on behalf of the employees is protected activity. . . . If § 2000e-3(a) give [plaintiff] the right to make himself an *adversary* of the company, then . . . he is forever immune from discharge. . . . By filing complaints against Singer . . . . , appellant placed himself in a position squarely *adversary* to his company. In doing so he wholly disabled himself from continuing to represent the company's interest . . . and from continuing to work with Singer executives . . . .

650 F.3d at 216-17 (emphasis added); see *id.* at 216 (section 704(a) does not protect opposition that is "inconsistent with the requirements of the employee's position.").

II. THE MANAGER RULE CREATES A MAJOR OBSTACLE TO IMPLEMENTATION OF TITLE VII AND OTHER FEDERAL EMPLOYMENT STATUTES

The manager rule strikes at the very heart of the voluntary compliance mechanisms on which Title VII depends and which section 704(a) was enacted to protect.

In the four circuits which have adopted the manager rule as a major restriction on the scope of section 704(a), employers today are often permitted to retaliate against anti-discrimination efforts by the very personnel and other management officials who are in the best position to prevent and correct violations of Title VII. District court decisions applying the manager rule have repeatedly sanctioned reprisals against officials who were attempting to assure compliance with Title VII and other important federal employment laws. The serious obstacle to implementation of federal law that has been created by the manager rule poses an important problem that warrants review by this Court.

In enacting Title VII and other federal employment statutes, Congress did not provide that those laws would be enforced by an army of federal agents constantly visiting and monitoring every private and public employer in the nation. *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960). Rather, compliance with these statutes rests largely on the voluntary actions of employers, which necessarily requires effective internal mechanisms for "prevent[ing] and promptly correct[ing]" violations of the statute. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765 (1998). The efficacy of those internal mechanisms turns to a substantial degree on the skill and commitment of the officials who administer them.

The internal compliance mechanisms on which Title VII depends could not possibly function effectively if the management officials responsible for detecting and correcting violations of the statute could lawfully be retaliated against when—indeed *because*—they were carrying out those very duties. The types of retaliatory

acts that "well might . . . 'dissuade[] a reasonable worker from making . . . a charge of discrimination,'" *Burlington Northern & Santa Fe Rwy. Co. v. White,* 548 U.S. 53, 68 (2006), would be equally effective in deterring a reasonable official from reporting allegations of discrimination, from conducting a thorough investigation of such charges, and from reaching conclusions that might be disfavored by higher officials. Risk of retaliation that chills the operation of an employer's internal machinery can be an even greater threat to voluntary compliance than the danger of reprisal that deters a single individual victim.

> [E]xtending the [manager] rule [to section 704(a)] would strip Title VII protection from "whole groups of employees—management employees, human resources employees, and legal employees, to name a few"—employees who are in the best position to advise employers about compliance.

Rangel v. Omni Hotel Mgmt. Corp., 2010 WL 3927744 at *5 (W.D.Tex. Oct. 4)(*quoting Hagan*, 529 F. 3d at 528). The manager rule has been applied to retaliation claims of precisely those individuals who it is most important be able to oppose discrimination "without apprehension of personal consequences to [themselves,]" *Stump v. Sparkman,* 435 U.S. 349, 355 (1978): a Director of Personnel[24], a Human Resources Director[25], a human

24. *EEOC v. HBE Corp.,* 135 F. 3d at 549; *McKenzie,* 94 F. 3d at 1481.

25. *Vidal v. Ramallo Bros. Printing, Inc.,* 380 F.Supp. 2d 60, 61 (D.P.R. 2005); *Adams v. Northstar Location Services, Inc.,* 2010 WL 3911415 at *1 (W.D.N.Y. Oct. 1).

resources manager[26], an "HR professional"[27], a Senior Employee Relations Specialist[28], and a Director of an Office of Diversity.[29]

The efforts of such officials to oppose violations of federal employment laws—like the complaints of the victims themselves—can trigger retaliation. In some instances that may occur because the individual being investigated outranks the personnel official conducting the investigation. In *Vidal v. Ramallo Bros. Printing, Inc.*, 380 F.Supp. 2d 60 (D.P.R. 2005), relied on by the District Court below (App. 28a), a company's Human Resources Director informed the company president and vice-president that "in accordance with his duties, he was initiating an investigation concerning complaints of sexual harassment against them." 380 F.Supp. 2d at 61. The plaintiff "was terminated that afternoon." *Id.* Applying the manager rule, the district court dismissed the plaintiff's section 704(a) claim, holding that the plaintiff's actions were not "protected activities" under Title VII because those actions "were part of his job responsibilities." 380 F. Supp. 2d at 62. "Vidal was working in his capacity as a Human Resources Director, for the benefit of the company, and in accordance with its policies forbidding sexual harassment, when he notified [his

26. *Cook v. CTC Communications Corp.*, 2007 WL 3284337 at *1 (D.N.H. Oct. 30).

27. *Bradford v. UPMC*, 2008 WL 191706 at *3 (W.D.Pa. Jan. 18).

28. *Clemons v. Nike, Inc.*, 2007 WL 2890972 (D.Or. 2007).

29. *Johnson v. County of Nassau*, 480 F.Supp. 2d 481, 588 (E.D.N.Y. 2007).

superiors] of the claims against them and of his intention to start an investigation on the matter." *Id.* Personnel officials may run a similar risk if the individual alleged to have engaged in discrimination is a valuable employee whom management would prefer not to fire or embarrass; in sexual harassment cases the harasser ordinarily holds a higher, more important position than the victim, and is using that elevated position to intimidate his victim. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 802-03 (1998).

Upper management may also object to internal efforts to comply with federal employment law because they could cost the firm money. In *Stein v. Rousseau*, 2006 WL 2263340 (E.D.Wa. Aug. 8), a manager pointed out that the employer's existing overtime-compensation policy was unlawful under the FLSA; the firm's owner agreed to change the policy. A disagreement arose about what to say to workers about the firm's earlier policy, which ended with one of the owners shouting at the manager, "I am not kidding, if they come in here and it costs me tens of thousands of dollars, we will take you out behind the building and shoot you." *Id.* at *1. The manager was fired the next day. The district court held that the retaliation suit of the dismissed official was barred by the manager rule. *Id.* at *4. Any internal investigation that unearths evidence of a Title VII violation also has the potential to result in unwanted financial exposure for the employer and thus anger higher officials.

The manager rule is not limited in its application to personnel officials; it has been applied to any supervisor who—as is true of most supervisors—has a duty to report problems to higher officials. For example, in

Cyrus v. Hyundai Motor Mfg. Alabama, LLC, 2008 WL 1848796 (M.D.Ala. April 24), the retaliation victim was an automobile plant official responsible for purchasing parts. *Id.* at *2. The district court held that he could be dismissed for reporting several incidents of sexual harassment because the official's job responsibilities broadly included "report[ing] alleged unlawful conduct." *Id.* at *11.

> Plaintiff admits that his job constantly required him to bring to the management . . . areas of concern in the workplace. . . . Plaintiff . . . on a weekly basis . . . participated in meetings convened between [a Deputy President] and the directors for the specific purpose of addressing "concerns for the benefit of the company" and flagging problems that needed to be "rectif[ied]."

Id. at *11. In *Rice v. Spinx Co.,* 2012 WL 684019 (D.S.C. March 2), the court applied the manager rule to dismiss the Title VII claim of a store manager who was retaliated against because, when an employee from another store told him she had been sexually harassed, that manager reported that harassment to higher officials, helped the victim fill out the firm's sexual harassment form, and delivered that form to the company's human resources department. 2012 WL 684019 at *1-*5. Although Rice was not a personnel official, his assistance for the harassment victim was held unprotected because he was "following Defendant's harassment policy" and "acting within the scope of his duties." 2012 WL 684019 at *4 n. 4 and *5 n. 5. In *Atkinson v. Lafayette College,* 653 F.Supp. 2d 581 (E.D.Pa. 2009), the college's Director of Athletics, in order to bring about compliance with Title IX, had

> repeatedly and consistently advocated for both female employees and female students in the athletic program. She worked on increasing scholarships to female athletes, ensuring equitable funding of sports programs, hiring full-time coaches for women's sports, and assuring equal pay for female coaching staff.

653 F.Supp. 2d at 596. The college ultimately terminated the plaintiff, who filed suit claiming that she had been fired in retaliation for her efforts to implement Title IX. Applying the manager rule, the district court dismissed her claim because her "Title IX activities fail to fall within the realm of 'protected activity' because she never engaged in activity that was either adverse to the College or outside the scope of her position as Athletic Director." *Id.*

The manager rule has also been applied to retaliation claims by an office manager[30], a field service manager[31], a sales and marketing director[32], an Assistant Director of Ambulance Services[33], a Corporate Security Investigator[34],

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30. *Mousavi v. Parkside Obstetrics, Gynecology & Infertility, S.C.*, 2001 WL 3610080 at *1 (N.D.Ill., Aug. 26).

31. *Hagan*, 529 F. 3d at 620.

32. *Stewart v. Master Builders Association of King and Snohomish Counties*, 736 F.Supp. 1291, 1293 (W.D.Wa. 2010).

33. *George v. Board of Cnty. Comm'rs of Franklin County, Kan.*, 2007 WL 950270 at *1 (D.Kan. March 26).

34. *Riddle v. First Tennessee Bank*, 2011 WL 4348298 (M.D.Tenn. Sept. 16).

a safety official[35] and the chairman of a college Department of Economics and Finance.[36]

These cases illustrate the importance of removing the manager rule as a deterrent to vigorous efforts by individual officials to bring about compliance with Title VII and other important federal employment laws.

III. THE MANAGER RULE IS INCONSISTENT WITH THE TEXT AND PURPOSE OF SECTION 704(a)

The manager rule is inconsistent with the plain language of section 704(a). The core principle of the manager rule limitation is that the protections of section 704(a) do *not* apply to every employee who opposes sexual harassment or other forms of discrimination. The Eleventh Circuit emphatically insisted that section 704(a) does not protect "all individuals involved" in internal efforts to detect or correct discrimination (App. 11a). Rather, the Court of Appeals reasoned, the protections created by section 704(a) exist primarily for the discrimination victim herself, and thus are "not transferable to the entirety of . . . management." (App. 13a). The manager rule is a "prohibition against certain individuals" invoking the protections of section 704(a). (*Id.*).

Any such restriction on which employees are protected by section 704(a) is incompatible with the terms of the statute, which forbid an employer "to discriminate against *any* of his employees . . . . because he has opposed any

35. *Hill v. Belk Stores Services, Inc.*, 2007 WL 2997556 at *1.

36. *Ezuma v. City University of New York*, 665 F.Supp. 116, 118 (E.D.N.Y. 2009).

practice, made an unlawful practice by this subchapter." 42 U.S.C. § 2000e-3(a) (emphasis added). The adjective "any" precludes construing the statute, as have the Eleventh Circuit and other lower courts, to forbid retaliation only against *some* employees who oppose unlawful discrimination, and to actually permit retaliation against "certain" types of employees. The use of "any" is inconsistent with reading into section 704(a) a limitation that places a group of employees outside the protection of the provision. "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately *of whatever kind.*'" *United States v. Gonzales*, 520 U.S. 1, 5 (1997)(*quoting Webster's Third New International Dictionary* 97 (1976))(emphasis added). "[T]he normal meaning of the term 'any' [allows of] no limitation." *Shea v. Vialpando*, 416 U.S. 251, 260 (1974). "'[A]ny . . .' suggest a broad interpretation." *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S.Ct. 1325, 1332 (2011).

When Congress wanted to exclude some category of individuals from the protections of Title VII, it did so expressly. For example, section 701(f) defines "employee" to exclude elected officials and certain of their appointees. 42 U.S.C. § 2000e(f). Section 702(a) provides that Title VII does not apply to the employment of an alien outside the United States. 42 U.S.C. § 2000e-1(a). Section 703(f) provides that the prohibitions in Title VII (including section 704(a)) do not include action taken by an employer "with respect to an individual who is a member of the communist Party" or certain related organizations. See 42 U.S.C. §§ 2000e-2(g) (individuals who cannot fulfill applicable national security based requirement not protected from certain adverse actions), 2000e-2(k)(3) (disparate impact provision does not apply to certain

users of controlled substances). This Court has repeatedly refused to read into one provision of a statute a type of exception that Congress expressly imposed only in other provisions. *Astrue v. Capato ex rel. B.N.C.*, 132 S.Ct. 2021, 2029 (2012); *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S.Ct. 2296, 2304 (2011).

This Court's decision in *Burlington Northern & Santa Fe Rwy. Co. v. White*, 548 U.S. 53 (2006), made clear that the protections of section 704(a) are not limited to the victims of unlawful discrimination. Section 704(a), the Court explained, forbids retaliatory acts that "well might have 'dissuaded a reasonable worker from . . . *supporting* a charge of discrimination,'" 548 U.S. at 68 (*quoting Rochon v. Gonzales*, 438 F. 3d 1211, 1219 (D.C.Cir. 2006))(emphasis added) or "are likely to dissuade employees from . . . *assisting* in complaints about discrimination." 548 U.S. at 70 (emphasis added). Manifestly a personnel official or other manager could "support[]" a discrimination charge or "assist" the victim of sexual harassment. *Burlington Northern*'s interpretation of section 704(a) clearly encompasses the instant case, which the Eleventh Circuit correctly described as involving "actions that Brush took on Mrs. Doe's behalf." (App. 13a).

In *Crawford* this Court held that under section 704(a) a sexual harassment victim could not be fired because, in response to questions by "a Metro human resources officer," the victim "described several instances of sexually harassing behavior." 555 U.S. at 274. Under the manager rule applied by the Eleventh Circuit, however, the very human resources officer in *Crawford*, who was attempting to prevent or correct violations of Title VII by "looking into rumors of sexual harassment," could have been fired

for asking those questions, for reporting Ms. Crawford's answers to other officials, or for indicating that she believed Crawford's statements. Section 704(a) cannot function as intended, protecting efforts to end violations of Title VII, if only one party to such an investigatory interview is protected from retaliation.

The decision below—and the manager rule—rest on the mistaken assumption that conduct which is within the scope of employment of a manager cannot also be opposition to unlawful discrimination. But carrying out one's official duties and opposing violations of the law are not mutually exclusive. For example, the employees of the EEOC and of the Civil Rights Division of the Department of Justice in their daily work are both opposing discrimination and acting within the scope of their employment. So were the attorneys from the Office of the Solicitor General who represented the United States before this Court in cases such as *Crawford*, *Staub v. Proctor Hospital*, 131 S.Ct. 1186 (2011), and *Thompson v. North American Stainless, LP*, 131 S.Ct. 863 (2011). The fact that Brush was acting within the scope of her employment when she reported Doe's allegations of sexual harassment, insisted on re-interviewing Doe to find out the true nature of that harassment, pressed her superiors for a speedier and more aggressive response, and defended the veracity of Doe's claims is simply irrelevant to whether those actions constituted opposition protected by section 704(a).

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, DATED MARCH 26, 2012

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 11–10657

D.C. Docket No. 9:09-cv-81290-KLR

JANET BRUSH,

Plaintiff–Appellant,

v.

SEARS HOLDINGS CORPORATION,
d.b.a. Sears, Roebuck & Co.,

Defendant–Appellee.

Appeal for the United States District Court
For the Southern District of Florida

(March 26, 2012)

Before DUBINA, Chief Judge, FAY, and KLEINFELD,* Circuit Judges.

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* Honorable Andrew J. Kleinfeld, United States Circuit Judge, Ninth Circuit, sitting by designation.

Appendix A

FAY, Circuit Judge:

Long considered a formidable weapon against an employer's unlawful practices in the workplace, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et seq.*, has historically been used by plaintiffs to recover for discrimination on such bases as race, color, sex or national origin.[1] None of those recognized bases for recovery are implicated here. At issue instead is an employee's termination following a company's internal investigation into an allegation of workplace sexual harassment.[2] The plaintiff here, though, was neither the employee that complained of the sexual harassment nor the employee allegedly responsible for that harassment. Rather, Plaintiff–Appellant Janet Brush ("Brush") was one of the employees tasked with conducting the internal

1. 42 U.S.C. § 2000e–2; *see also McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 800, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) ("The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens.") (internal citations omitted); *Meritor Savings Bank v. Vinson,* 477 U.S. 57, 66, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986) (recognizing discrimination based on sex is actionable under Title VII).

2. The Complaint at issue here alleges causes of action under both Title VII and the Florida Civil Rights Act of 1992 ("FCRA"), Fla. Stat. § 760.10 *et seq.* However, we need not distinguish between the two, since Plaintiff–Appellant concedes that both causes of action are interpreted under similar standards. *See also Harper v. Blockbuster Entm't Corp.,* 139 F.3d 1385, 1389 (11th Cir.1998).

investigation. Defendant–Appellee Sears Holding Corporation ("Sears") terminated her soon after.[3] Brush subsequently filed suit against Sears, alleging she was terminated in retaliation for certain actions she took as an investigator of the sexual harassment claim.

Upon consideration of Sears' motion for summary judgment, the district court found Brush could not support a Title VII retaliation claim. Among the deficiencies the district court identified in Brush's claim was the fact that she was not engaged in "protected activity" as defined by Title VII and therefore her subsequent termination could not be actionable as retaliation. We affirm.

I.

"This court reviews a district court's grant of summary judgment de novo, applying the same legal standards used by the district court." *Galvez v. Bruce,* 552 F.3d 1238, 1241 (11th Cir.2008). Summary judgment is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a); *see also Swisher Int'l., Inc. v. Schafer,* 550 F.3d 1046, 1050 (11th Cir.2008). "In making this determination, we ... draw[ ] all reasonable inferences in the light most favorable to the nonmoving party." *Damon v. Fleming Supermarkets of Fla., Inc.,* 196 F.3d 1354, 1358 (11th Cir.1999). Of course, the nonmoving

3. Brush was employed by Kmart, which is a subsidiary of Sears Holding Corporation. However, for the sake of clarity with respect to the named defendant here, we refer to Defendant–Appellee as "Sears."

party must go beyond the pleadings to present affirmative evidence demonstrating that there is a genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). However, a plaintiff's failure to support an essential element of her case necessarily renders all other facts immaterial and requires the district court to grant summary judgment for the defendant. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

II.

Janet Brush worked for Sears or its affiliates, off and on, for over fifteen years. In her most recent stint, Brush was employed from approximately 2000 to November 20, 2007. Beginning in 2006, Brush accepted a position as a Loss Prevention District Coach. The district she oversaw contained 20 stores. Her job was to minimize varieties of risk to the company, including losses arising from theft, as well as to protect Sears' assets, including its employees. In that capacity, she interacted with numerous Sears employees during the course of her employment. Her immediate boss was David Pearson, who served as Sears' Regional Loss Prevention Coach.

During Brush's employment with Sears, Sears had noted several deficiencies relating to Brush's work performance. These deficiencies first became apparent at the end of 2006. Early the next year, Sears placed Brush on a Performance Improvement Plan ("PIP") to address these deficiencies. Although Brush's PIP plan was extended several months to enable her to meet the

relevant criteria, by all accounts Brush completed her PIP on or around September 20, 2007.

Only a few days before her completion of the PIP plan, on or around September 15, 2007, Brush received a telephone call from an Assistant Store Coach. The Assistant Store Coach, whom we refer to simply as "Mrs. Doe," informed Brush that she was being sexually harassed by her Store Coach. Brush notified Sears of the allegation. Sears suspended the Store Coach accused of harassment and directed Brush and another Sears employee, Scott Reuter, to meet with Mrs. Doe to investigate further. They did so, but both Brush and Reuter felt that she was not entirely forthcoming during their interview. Reuter and Brush then determined that Brush should meet with Mrs. Doe alone "to see if she wanted to add anything to her prior interview." Compl. ¶ 40. Brush did so, at which time Mrs. Doe informed her that she had been raped multiple times by the Store Coach. However, Mrs. Doe asked that neither her husband nor the police be informed of the rape. Brush notified Reuter of what Mrs. Doe told her, and they subsequently reported the same to Sears. Brush "stated that [Sears] need [ed] to contact the Orange County Police." Compl. ¶ 48. Sears declined, citing the investigation's incomplete status and Mrs. Doe's own desire not to involve law enforcement. Sears, however, terminated the employment of the Store Coach, the man who Mrs. Doe said harassed and raped her. Brush nonetheless continued to urge the reporting of the alleged rape.

On November 20, 2007, Sears terminated Brush's employment, citing her violation of Sears' policy relating

to the investigation of sexual harassment claims.[4] One week later, Brush filed a charge with the EEOC, alleging sex discrimination and retaliation. The EEOC issued a finding that there was reasonable cause to support Brush's retaliation claim.

Nearly two years later, Brush filed suit against Sears, alleging that she was dismissed in retaliation for "her opposition to the nature and performance of the [sexual harassment] investigation." Compl. ¶ 5. Specifically, her Complaint alleges that she was terminated because "she uncovered that [Sears] had negligently allowed three forcible rapes to occur on its premises and did nothing about it," Compl. ¶ 59; because "she raised rape issues that would have been kept hidden if she had allowed Mr. Reuter to conduct the interviews," Compl. ¶ 60; "because of her participation in the investigation and her opposition to the way [Sears] was conducting the investigation," Compl. ¶ 61; and because "she was considered a trouble-maker and whistleblower," Compl. ¶ 62.

Through discovery, Brush produced evidence that showed she "opposed the alleged sexual battery [experienced by Mrs. Doe], explained [to her employer, Sears] that the seriousness of these allegations required police intervention, and that she wanted to call the Orange County Police." Appellant Br. at 8. Furthermore,

4. Specifically, Sears alleges Brush violated the sexual harassment policy in meeting with the complainant alone, in suggesting to the employee that she had been raped without asking an open-ended question to see what the employee said, and in failing to properly investigate the claim by obtaining video evidence.

deposition testimony demonstrated that Brush was "very adamant ... that the authorities should be involved because Sears was not capable of investigating this type of criminal activity." *Id.* (internal quotations and citations omitted). Finally, Brush also provided some circumstantial evidence that her termination may have been related to her involvement in the internal investigation conducted by Sears. In particular, she cited a declaration by her former boss, Pearson, who stated that he "believe[d] Ms. Brush was terminated because of her involvement in uncovering and opposing rapes that took place on [Sears'] property." *Id.* at 11.

Nonetheless, subsequently Sears moved for summary judgment, contending that Brush could not establish a *prima facie* case of retaliation and that there was no genuine issue of material fact showing that Sears' decision to terminate Brush was pretextual. The district court agreed. Brush now appeals.

III.

Title VII's anti-retaliation provision makes it unlawful for an employer to discriminate against an employee "because [s]he has opposed any practice made an unlawful employment practice ..., or because [s]he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." *McCann v. Tillman*, 526 F.3d 1370, 1375 (11th Cir.2008) (alterations in original) (citing 42 U.S.C. § 2000e–3(a)). As noted by the Supreme Court in *Crawford v. Metropolitan Government of Nashville*

& Davidson County, Tenn., 555 U.S. 271, 274, 129 S.Ct. 846, 172 L.Ed.2d 650 (2009), the two clauses of the anti-retaliation provision are known as the "participation clause" and the "opposition clause." Although Brush's allegations encompassed both means of retaliation, she conceded before the district court that she may only recover under the opposition clause in this instance. *See EEOC v. Total Sys. Svcs., Inc.*, 221 F.3d 1171, 1174 (11th Cir.2000) (prohibiting recovery under participation clause where no EEOC complaint was filed prior to termination).[5] Therefore, we need only address her claim insomuch as it pertains to Brush's opposition to an allegedly unlawful employment practice by Sears. *See also Little v. United Techs. Carrier Transicold Div.*, 103 F.3d 956, 960 (11th Cir.1997) (noting also that plaintiff must have an objectively reasonable belief that the employer engaged in an unlawful employment practice).

Brush's case rests upon her belief that her opposition to rape and Sears' handling of Mrs. Doe's allegations are actionable under Title VII. Under the framework provided

5. Nonetheless, Brush urges on appeal that *Total Sys.* is no longer good law because of such subsequent decisions as *Thompson v. North American Stainless, LP*, ---U.S. ----, 131 S.Ct. 863, 178 L.Ed.2d 694 (2011); *Kasten v. Saint-Gobain Performance Plastics Corp.*, ---U.S. ----, 131 S.Ct. 1325, 179 L.Ed.2d 379 (2011); and *Crawford v. Metropolitan Government of Nashville & Davidson County, Tennessee*, 555 U.S. 271, 129 S.Ct. 846, 172 L.Ed.2d 650 (2009). We need not address that argument at this time because, "[u]nder the prior panel precedent rule, we are bound by earlier panel holdings ... unless and until they are overruled en banc or by the Supreme Court." *United States v. Smith*, 122 F.3d 1355, 1359 (11th Cir.1997).

by *McDonnell Douglas Corp.*,[6] Brush must "carry the initial burden under the statute of establishing a prima facie case." *McDonnell Douglas Corp.*, 411 U.S. at 802, 93 S.Ct. 1817. We need only turn to the remaining stages of the burden-shifting inquiry under *McDonnell Douglas*—articulation of "some legitimate, nondiscriminatory reason" by the defendant for the employment action, *id.* at 802, 93 S.Ct. 1817, and showing of pretext by the plaintiff regarding defendant's stated reasons for the employment action, *id.* at 804, 93 S.Ct. 1817—if a *prima facie* case is established.

To make a *prima facie* showing of a retaliation claim, a plaintiff must demonstrate that (1) she engaged in statutorily protected activity; (2) she suffered a materially adverse employment action; and (3) there was a causal link between the protected activity and the subsequent materially adverse employment action. *Butler v. Ala. Dep't of Transp.*, 536 F.3d 1209, 1212 (11th Cir.2008). It is the first prong, protected activity, which we now address.

Quite simply, Brush's disagreement with the way in which Sears conducted its internal investigation into

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6. While Brush disputes the applicability of *McDonnell Douglas* under these circumstances, claiming that Pearson's declaration provides direct evidence of retaliation by Sears, we cannot agree. Pearson's declaration merely states his belief that Brush's termination was in retaliation for Brush's opposition of rape; nowhere does the declaration or any other evidence provided by Brush detail specific conversations, communications or other direct evidence of retaliatory intent on the part of Sears. Accordingly, Brush can only prove her case through circumstantial evidence, which necessitates the *McDonnell Douglas* framework.

Mrs. Doe's allegations does not constitute protected activity. As required by the explicit language of 42 U.S.C. § 2000e–3(a), to qualify as "protected activity," a plaintiff's opposition must be to a "practice made unlawful by [Title VII.]" Since there is no evidence of Brush's opposition to any unlawful practice here, it follows that Brush can support no claim under Title VII.

Although she seeks to predicate her claim for retaliation upon Mrs. Doe's claims of sexual harassment and rape, 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. As such, her claims relate not to Mrs. Doe's allegations, but instead to the procedures of the internal investigation conducted by Sears. Although we have found no published Eleventh Circuit cases regarding whether such a basis is a viable foundation for a Title VII retaliation claim, *cf. Entrekin v. City of Panama City, Fla.*, 376 Fed.Appx. 987, 994 (11th Cir.2010) (per curiam) (unpublished case disallowing recovery under similar circumstances), certainly internal investigations alone do not constitute discriminatory practices. *See, e.g., Baldwin v. Blue Cross/Blue Shield of Ala.*, 480 F.3d 1287, 1304 (11th Cir.2007) (detailing type of investigative procedures acceptable under Title VII). Nor do federal courts mandate the procedures that are required under such circumstances. *See Adams v. O'Reilly Automotive, Inc.*, 538 F.3d 926, 930 (8th Cir.2008) ("Federal courts, however, are not in the business of micromanaging or second-guessing companies' internal investigations."); *see also Entrekin*, 376 Fed.Appx. at 994 ("Title VII does

not ... establish requirements for an employer's internal procedures for receiving sexual harassment complaints, or even require that employers must have an internal procedure for receiving such complaints.").

Nonetheless, Brush argues that an investigative manager's role in reporting a Title VII violation necessarily qualifies as a "protected activity" relating to a discriminatory practice. Reply Br. at 5 ("[W]hen an employee communicates a belief that her employer has engaged in employment discrimination, that communication virtually always constitutes protected activity."). In support, Brush cites *Crawford*. In *Crawford*, the Supreme Court held that an employee that responded to an inquiry about whether she had ever witnessed "inappropriate behavior" from a specific employee was protected by Title VII. *Crawford*, 555 U.S. at 280, 129 S.Ct. 846. In so finding, the Court rejected the Sixth Circuit's reasoning that the opposition clause of Title VII "demands active, consistent 'opposing' activities to warrant ... protection against retaliation." *Id.* at 275, 129 S.Ct. 846 (citing *Crawford v. Metropolitan Government of Nashville & Davidson County, Tenn.*, 211 Fed.Appx. 373, 373 (6th Cir.2006)). Instead, the Court stated that the *Crawford* plaintiff's opposition was no less actionable because she had been asked about sexual harassment rather than having volunteered similar allegations. *Crawford*, 555 U.S. at 277–78, 129 S.Ct. 846.

Brush would have us extend *Crawford*'s reasoning not just to those directly impacted by workplace discrimination but to all individuals involved in the investigation of that

discrimination, no matter how far distant. Although we have not yet passed on the transitive property of a Title VII claim, other circuits have by creating what is known as the "manager rule." In essence, 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." *See McKenzie v. Renberg's Inc.*, 94 F.3d 1478 (10th Cir.1996); *Hagan v. Echostar Satellite, L.L.C.*, 529 F.3d 617 (5th Cir.2008) (same). 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." *McKenzie*, 94 F.3d at 1486. While Brush argues that *Crawford* has foreclosed the "manager rule," [7] we cannot agree. *Crawford* pertained only to whether the reporting of a harassment claim was

7. Indeed, Brush cites several district court cases she claims support this position: *Schanfield v. Sojitz Corp. of America*, 663 F.Supp.2d 305 (S.D.N.Y.2009), and *Rangel v. Omni Hotel Management Corp.*, No. SA–09–CV–0811 OG, 2010 WL 3927744 (W.D.Tex. Oct. 4, 2010). However, it should go without saying that we are not bound by the decisions of other circuits, let alone the decisions of district courts from other circuits. *See, e.g., United States v. McGarity*, 669 F.3d 1218, 1266 n. 66 (11th Cir.2012) ("It is axiomatic that this Circuit is bound only by its own precedents and those of the Supreme Court ... and certainly this is even more true in the context of a district court determination from another circuit.") (citing *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981)). This is even more obvious when considering an opinion like *Rangel*, which is actually a magistrate judge's Report and Recommendation. *See Rangel*, 2010 WL 3927744, *1. Nonetheless, both *Rangel* and *Schanfield* are easily distinguishable from the facts at issue here.

covered by Title VII where the reporting was solicited rather than volunteered. *Crawford,* 555 U.S. at 277–78, 129 S.Ct. 846. It did not address whether a disinterested party to a harassment claim could use that harassment claim as its own basis for a Title VII action. Accordingly, we find the "manager rule" persuasive and a viable prohibition against certain individuals recovering under Title VII.

Considering the facts adduced by the parties in light of the "manager rule," there can be no dispute that Brush acted solely as a manager here. In her capacity as an investigator of Mrs. Doe's sexual harassment claim, Brush informed Sears of Mrs. Doe's allegations, investigated those allegations, and reported the results of her investigation to Sears. Brush's job responsibilities involved exactly the type of actions that Brush took on Mrs. Doe's behalf. There is simply no evidence in the record that Brush was asserting any rights under Title VII or that she took any action adverse to the company during the investigation. *Cf. id.* at 1486–87, 129 S.Ct. 846. Disagreement with internal procedures does not equate with "protected activity" opposing discriminatory practices. Under such circumstances, the breadth of *Crawford*'s application to individuals who suffered workplace discrimination is not transferable to the entirety of the management string that might review any such allegation.[8]

8. Of course, we do not foreclose the ability of one employee to "oppose" discrimination on another employee's behalf. *Cf. Sumner v. United States Postal Serv.,* 899 F.2d 203, 209 (2d Cir.1990) (recognizing right of third party to recover for retaliation under such a basis). However, where, as here, a third

The evidence in this record shows that Brush's opposition was to Sears' failure to immediately summon law enforcement and a more general "opposi[tion] to the grave forcible sex [alleged by Mrs. Doe]." Brush, however, has not demonstrated how these actions were criminally unlawful on the part of Sears. She has cited no state or federal law that would have mandated Sears take some action other that what it took. Sears fired the accused offender. Nor has Brush demonstrated that Mrs. Doe in this instance wanted her claims reported to the police. In fact, it is undisputed that Mrs. Doe informed Brush and Sears that she did not want either the police or her husband informed of what happened to her. Under these circumstances, then, it is impossible for Brush to have had a reasonable belief that Sears' actions were unlawful. *Cf. Little*, 103 F.3d 956 at 960. Therefore, Brush's deposition testimony that she was "opposed [to] the way that Sears Holding took care of our associates, took care of the investigation" simply refutes any claim that she was engaged in protected activity.

As a final matter, to the extent that Brush predicates her argument of unlawful employment practices upon the alleged rapes by the Store Coach, her argument necessarily fails. She conceded both before the district court and at oral argument that Sears is not tolerant of rape and, in fact, did not tolerate it in this instance. Nonetheless, she seeks to found her opposition upon her principled stance against rape generally, and rape in

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party is neither directly interested in the underlying discrimination nor acting beyond the scope of her employment in opposing an employer's action, no Title VII claim will lie.

the workplace particularly. However, opposition against a general type of criminal behavior does not, without some connection to the employer, constitute the type of opposition to an unlawful employment practice that was contemplated by Congress in passing Title VII.

Therefore, we echo the words of *Entrekin*: "because [Brush's] complaint involved the adequacy of [Sears'] internal procedure for receiving sexual harassment complaints, rather than an employment practice that Title VII declares to be unlawful," *Entrekin,* 376 Fed.Appx. at 994, her criticisms do not relate to unlawful activity. And, since unlawful activity is the *sine qua non* of "protected activity" as defined by Title VII, Brush cannot satisfy the first requirement of a *prima facie* case for retaliation.[9]

Given our holding that Brush cannot satisfy the first factor of the three-part *prima facie* case for retaliation, we need not address the district court's other bases for granting summary judgment to Sears. In particular, we decline to address the evidence of Brush's PIP; Sears' proffered legitimate, non-discriminatory basis for Brush's termination; or Brush's subsequent argument of pretext under the burden-shifting inquiry under *McDonnell Douglas.*

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9. Brush urges us that the EEOC letter of determination should have some evidentiary weight. While we agree that an EEOC reasonable cause finding may be admissible as evidence, *Goldsmith v. Bagby Elevator Co.,* 513 F.3d 1261, 1288 (11th Cir.2008), it alone does not create a genuine dispute of material fact preventing the granting of summary judgment.

IV.

Having studied the record along with the parties' briefs, and entertained oral argument, we find that Brush did not engage in statutorily protected activity and therefore cannot support a claim for retaliation under Title VII. Accordingly, we affirm the district court's order granting summary judgment to Defendant–Appellee Sears Holding Corporation.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA, DATED JANUARY 14, 2011

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case #09-81290-CIV-RYSKAMP/VITUNAC

Janet Brush,

Plaintiff,

vs.

Sears Holdings Corporation
d/b/a Sears, Roebuck & Co.,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION TO STRIKE

THIS CAUSE comes before the Court pursuant to Defendant Sears Holdings Corporation d/b/a Sears, Roebuck & Co.'s ("Defendant" or "Kmart"[1]) motion for summary judgment, filed October 1, 2010 [DE 33]. Plaintiff Janet Brush ("Plaintiff") responded on October 21, 2010 [DE 39]. Kmart replied on November 8, 2010 [DE 45]. This cause is also before the Court pursuant to Plaintiff's

1. K mart is a subsidiary of Sears Holdings Corporation.

motion to strike, filed October 22, 2010 [DE 40]. Kmart responded on November 8, 2010 [DE 46]. Plaintiff replied on November 18, 2010 [DE 48]. The Court held a hearing on these motions on December 8, 2010. This motion is ripe for adjudication.

I. BACKGROUND

A. General Information Regarding Plaintiff's Employment

Plaintiff worked at Kmart as a Loss Prevention District Coach ("LPDC").[2] Plaintiff was responsible for minimizing risk to the company. Among other duties, Plaintiff was responsible for controlling shrink (e.g., external and internal theft) and protecting Kmart's assets (e.g., people, facilities, and merchandise). Between the years 2000 and 2006, Plaintiff was responsible for loss prevention in approximately 10 stores in Florida. Plaintiff aspired to become a Regional Loss Prevention Manager. Toward that end, in 2006, Plaintiff accepted a position as the LPDC over a 20-store district, which she held until her employment was terminated. Plaintiff reported to Regional Loss Prevention Coach ("RLPC"), David Pearson ("Pearson"), who, in turn, reported to Regional Loss Prevention Director, Robert Church ("Church").

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2. Plaintiff maintains she worked for K mart since 1992 and began working as a LP D C in 20 00. K mart maintains that Plaintiff began working for K mart in 2000. This factual dispute is immaterial; Plaintiff worked as an LPD C during the relevant time period.

Appendix B

In 2006, Plaintiff had a number of performance deficiencies which were documented in her year-end performance review. Plaintiff's performance deficiencies included poor shrink results for her district, poor inventory preparation, poor market control, poor staffing, poor follow- up and poor time management. In early 2007, Plaintiff was placed on a Performance Improvement Plan (PIP) because of these deficiencies. Plaintiff's PIP was extended to 120 days to ensure that she was meeting all of the criteria for her position. Plaintiff completed her PIP on approximately September 20, 2007.

Plaintiff failed to sustain sufficient performance improvement, and her supervisors determined that her termination was warranted. In early November 2007, Pearson sent a memorandum to Church and Shelly Arnold ("Arnold"), the Human Resources Manager for Kmart Loss Prevention, in which he outlined Plaintiff's ongoing performance deficiencies and recommended termination. On November 10, 2007, Pearson submitted his revised memorandum to Arnold for review. The performance issues identified by Pearson included: 1) unacceptable levels of shrink in Plaintiff's district; 2) sloppy and unprofessional handling and follow up on the placement of a loss prevention employee whose background check included disqualifying information, which was met with sharp criticism from the company's Human Resources Compliance Team; 3) failure to perform adequate store visits; 4) failure to train store Loss Prevention Coaches (LPCs) and ensure timely completion of corporate initiatives; 5) poor communication with her supervisor; 6) failure to timely complete a children's toy recall; and

7) Plaintiff's poor judgment and failure to follow-up regarding an internal sexual harassment investigation. Kmart determined that Plaintiff's ongoing performance problems and the unwanted risks associated with them warranted termination. Plaintiff's employment was terminated on November 20, 2007.

Plaintiff claims she was terminated in retaliation for her participation in the sexual harassment investigation and for her opposition to alleged violations of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e, et seq. and the Florida Civil Rights Act ("FCRA"), Fla. Stat. § 760.01, et seq.

B. The Sexual Harassment Investigation

Kmart evidently has its loss prevention department play a role in internal sexual harassment investigations. On September 15, 2007, Plaintiff received a call on her cell phone from an assistant store manager ("complainant") who alleged that she had been sexually harassed by her store manager. The complainant stated that the manager had been sending inappropriate text messages to her cell phone. The complainant also disclosed to Plaintiff that complainant's husband found her cell phone and saw the text messages from the manager. The complainant made no mention of any sexual encounter with the manager, consensual or otherwise.

Plaintiff communicated the complaint to Regional Manager Dave Rodney ("Rodney") and to Pearson. Keith Johnson ("Johnson"), the Divisional Loss Prevention

Director, emailed to Plaintiff and District Coach Scott Reuter ("Reuter"), Plaintiff's operations counterpart, the company's sexual harassment investigation packet, which contained forms and instructions on how to conduct investigations.

On September 16, 2007, Plaintiff and Reuter were instructed to travel to the store at issue and to suspend the alleged harasser. Plaintiff and Reuter were next instructed to meet with the complainant's husband. During that meeting, Plaintiff did not inquire as to the circumstances under which he either came upon the text messages or possessed his wife's cell phone. After meeting the complainant's husband, Church and Johnson instructed Plaintiff and Reuter to return to the store and further investigate the allegations. Reuter interviewed witnesses from the forms provided in the investigative packet. Plaintiff acted as note-taker during the interviews.

Reuter and Plaintiff interviewed the complainant first. Plaintiff later interviewed the complainant in private, after which she informed Church that the complainant had been raped and that law enforcement should be contacted.[3] Plaintiff made that recommendation without having reviewed the store's surveillance video, having spoken with the manager or other fact witnesses, or having

3. Exactly what occurred during this interview is in dispute. Plaintiff maintains that the complainant volunteered that she had been raped. K mart maintains that Plaintiff suggested to the complainant that the complainant had been raped. What did or did not occur during this interview was not the exclusive basis for the decision to terminate Plaintiff's employment, however

made any effort to obtain details from the complainant regarding the alleged rapes or otherwise test the veracity of those new allegations. Church asked Plaintiff to refrain from contacting the police until he sought guidance from the company's legal department.

Plaintiff was instructed to obtain copies of relevant surveillance footage from the store. Plaintiff delegated this task to Lisa Murphy, the store's LPC, who was not only the store manager's subordinate but also a fact witness in the investigation. Additionally, Plaintiff failed to ensure that the video was properly annotated and never reviewed the footage before it was sent to the corporate office for analysis.

The store manager eventually admitted to a consensual affair with complainant. His employment was terminated, and the complainant was transferred to another store.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 56(c) requires entry of summary judgment when the pleadings, depositions, and affidavits show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Summary judgment should be granted when the record, taken as a whole, could not lead a rational trier of fact to find for the non-moving party. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2513 (1986). The non-moving party must go beyond the pleadings and present affirmative evidence showing that there is a genuine issue of material fact for

trial. *Id.* at 252, 106 S.Ct. at 2512. It is not sufficient for the non-moving party to show a mere "scintilla" of evidence, or evidence that is merely colorable or not significantly probative, in support of its position. *Id.* Additionally, conclusory allegations and conjecture are not sufficient to overcome a motion for summary judgment. *See Mayfield v. Patterson Pump Co.*, 101 F.3d 1371, 1376 (11th Cir. 1996).

Plaintiff's claims are subject to the three-part allocation of proof established by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04, 93 S.Ct. 1817, 1824-25 (1973). If Plaintiff can establish a *prima facie* case of unlawful retaliation, the burden shifts to Kmart to articulate a legitimate, non-retaliatory reason for the challenged employment actions. *See Hanley v. Sports Auth.*, 143 F.Supp.2d 1351, 1356 (S.D. Fla. 2000). If Kmart does so, Plaintiff must show that Kmart's proffered reasons are a mere pretext for discrimination by pointing to concrete evidence in the form of specific facts discrediting Kmart's proffered reason for the challenged employment action. *See Mayfield*, 101 F.3d at 1376.

To establish a prima facie claim of retaliation under Title VII and the FCRA, Plaintiff must prove that: (1) she engaged in "protected activity"; (2) she suffered an adverse employment action; and (3) there is a causal connection between the protected activity and the adverse employment action. *Brown v. Snow*, 440 F. 3d 1259, 1266 (11th Cir. 2006); *Harper v. Blockbuster Entertainment Corp.*, 139 F.3d 1385, 1389 (11th Cir. 1998)("decisions construing Title VII guide the analysis of claims under the [FCRA]").

Appendix B

III. ANALYSIS

A. Protected Activity

Title VII provides that:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a). Statutorily protected activity is limited to where an employee: a) has made a charge, testified, assisted or participated in any manner in an investigation, commonly known as the "participation clause"; or b) has opposed any practice made unlawful by Title VII, commonly known as the "opposition clause." *Id.*

Plaintiff originally attempted to invoke protection under both the participation and the opposition clauses. Plaintiff alleges that her "participation" in the internal investigation affords her protection under Title VII's "participation clause." Plaintiff also invokes protection under the "opposition clause" by claiming that she "opposed" the manner in which Kmart conducted its internal investigation. More specifically, Plaintiff claims that her termination was motivated by her disagreement with Kmart's decision not to immediately summon

local law enforcement to independently investigate the allegations. Plaintiff's claims, even if true, do not constitute statutorily-protected activity under either clause of the anti-retaliation statutes.

Plaintiff concedes in her response that she cannot rely on the participation clause. The participation clause applies only to "proceedings and activities which occur in conjunction with or after the filing of a formal charge with the EEOC; [and] does not include participating in an employer's internal, in-house investigation, conducted apart from a formal charge with the EEOC." *EEOC v. Total Syst. Svcs., Inc.*, 221 F.3d 1171, 1174 (11th Cir. 2000), *reh'g en banc denied* 240 F.3d 899 (11th Cir. 2001). As Plaintiff's participation was in connection with Kmart's internal investigation, the participation clause does not apply.

Plaintiff's disagreement with Kmart's decision not to immediately summon local law enforcement does not constitute protected activity under the opposition clause. To constitute protected activity under this clause, the conduct being opposed must be a "practice made unlawful by [Title VII]." 42 U.S.C. § 2000e-3(a); *see also* Fla. Stat. § 760.10(7) ("it is an unlawful employment practice for an employer... to discriminate against any person because that person has opposed any practice which is an unlawful employment practice under this section"). While a plaintiff need not prove that the employer's conduct was actually unlawful, the allegations and record must also indicate that the belief, though perhaps mistaken, was objectively reasonable. *Little v. United Techs. Carrier Transicold*

Div., 103 F. 3d 956, 960 (11th Cir. 1997) (holding that a plaintiff must show both a subjective belief that the employer engaged in an unlawful employment practice and that the belief was objectively reasonable) . Whether the belief is objectively reasonable is measured against existing substantive law. *Clark County School District v. Breeden*, 532 U.S. 268, 269, 271, 121 S.Ct. 1508, 1509-10 (2001) (holding that exposure to one sexist remark is insufficient to constitute sexual harassment).

Plaintiff cannot establish that she engaged in activity protected by the opposition clause. Kmart's decision to conduct additional investigation and to consult with its legal department before acting on Plaintiff's recommendation to call law enforcement is not an employment practice "made unlawful" under either Title VII or the FCRA. These statutes do not dictate how an employer must conduct internal investigations of discrimination claims. "Title VII does not...establish requirements for an employer's internal procedures for receiving sexual harassment complaints, or even require that employers must have an internal procedure for receiving such complaints." *Entrekin v. City of Panama City*, 376 Fed.Appx. 987, 994 (11th Cir. 2010) (holding that plaintiff did not engage in protected activity because plaintiff's complaint involved adequacy of defendant's internal procedure for receiving sexual harassment complaints, rather than an employment practice that Title VII declares to be unlawful). *See also Baldwin v. Blue Cross/Blue Shield of Alabama*, 480 F.3d 1287, 1304 (11th Cir. 2007) (noting that a company need not "conduct a full-blown due process, trial-type proceeding in response to complaints of sexual harassment. All that is required of an investigation is reasonableness in all of the

circumstances, and the permissible circumstances may include conducting the inquiry informally in a manner that will not unnecessarily disrupt the company's business, and in an effort to arrive at a reasonably fair estimate of truth").

Not only was there no legal requirement for Kmart to contact law enforcement under the facts of this case, but the undisputed evidence demonstrates that it would have been inappropriate to do so. The complainant specifically told Plaintiff that she did not want law enforcement or her husband involved in the matter. When Plaintiff urged Kmart to call the police she had done nothing to test the rape allegations. Plaintiff had not obtained any details from the complainant regarding the allegations, had not reviewed surveillance video that might have shed light on the veracity of complainant's allegations, had not yet questioned the accused store manager and had not explored whether the sexual encounter was consensual.

Plaintiff's disagreement with Kmart's decision to investigate further before contacting law enforcement is not "opposition to conduct made unlawful" under Title VII and, to the extent Plaintiff subjectively believed it was, her belief was not objectively reasonable as measured against existing substantive law. *See Little*, 103 F.3d at 960 (affirming summary judgment for employer where Plaintiff did not have an objectively reasonable belief that his complaint constituted opposition to an unlawful employment practice). Thus, Plaintiff cannot establish that she engaged in statutorily protected activity under Title VII or the FCRA.

Even if the recommendation to contact law enforcement constituted protected activity, Plaintiff's claims would still fail because her recommendation occurred during the course of the performance of her job as LPDC investigating an internal complaint. Although the Eleventh Circuit has yet to address this issue, other courts have held that a management employee who disagrees with or opposes his employer's decisions is not engaging in protected activity if the employee is merely performing her job. *McKenzie v. Renberg's Inc.*, 94 F.3d 1478, 1486 (10th Cir. 1996) (judgment against personnel director who claimed termination was in retaliation for reporting overtime violations and informing her employer she thought it was at risk for claims by others because she was performing her job because she "never crossed the line from being an employee merely performing her job as personnel director to an employee lodging a complaint about the wage and hour practices of her employer and asserting a right adverse to the company"); *Hagan v. Echostar Satellite, L.L.C.*, 529 F.3d 617, 630-31 (5th Cir. 2008)(affirming judgment for employer where manager was not personally advocating on behalf of his technicians' statutory rights under the FLSA but merely relayed their concerns about their schedules; he did not "step outside the role" of manager so as to engage in a protected activity under the FLSA); *Vidal v. Ramallo Bros. Printing, Inc.*, 380 F.Supp.2d 60, 62 (D. P.R. 2005) (rejecting Title VII retaliatory discharge claim of human resources director who advised the company president and vice-president that he was investigating sexual harassment claims against them as plaintiff's actions were part of his job responsibilities).

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As the LPDC for the store in question, Plaintiff received the complaint and thereafter was assigned to investigate same. Plaintiff and Reuter traveled to the store, suspended the store manager, and conducted interviews of the parties and all fact witnesses. Plaintiff's recommendation to summon law enforcement was consistent with her investigative authority. The packet Johnson emailed to Plaintiff and Reuter specifically instructed investigators to consider whether interim actions should be taken during an investigation, such as "Should the Law Department be involved?" and "Should law enforcement be alerted?" (Pl. Dep., Exh 2, p. 5.) Thus, Plaintiff's recommendation that Kmart contact law enforcement was consistent with both her role as an investigator in the investigation and Kmart's written investigative guidelines. Because Plaintiff stayed within her role of representing Kmart, she was not taking action adverse to Kmart.

Plaintiff also claims that Kmart terminated her because she "challenged" Kmart's decision to hide the complainant from view of the alleged harasser when he arrived at the store to meet with corporate officials. Plaintiff cites no record evidence to support this claim, and her deposition testimony actually contradicts it. Plaintiff testified that she complied with the request to move the complainant from the store manager's view. Additionally, Plaintiff has offered no legal authority to establish that secluding a complainant from an alleged harasser under these circumstances is an unlawful employment action under Title VII.

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Plaintiff's allegation that she "disapproved" of the store manager's alleged rape is meaningless. Plaintiff was not reporting something she personally observed at Kmart, and she rushed to conclude that the complainant had been "raped." Plaintiff's implication that those involved in the investigation (including the complainant) who did not endorse her recommendation to summon law enforcement must, therefore, "approve" rape, is nonsensical.[4]

Plaintiff cites *Crawford v. Metropolitan Government of Nashville and Davidson Division*, 129 S.Ct. 846 (2009) for the proposition that the "opposition clause," unlike the participation clause, can be triggered even when no EEOC claim is pending. Defendant has not argued otherwise. In any event, *Crawford* is factually distinguishable. At issue in *Crawford* was whether a fact witness engaged in protected activity when she provided information adverse to the employer when questioned during an internal harassment investigation. *Id.* at 850-51. The fact witness in *Crawford* alleged that she herself was subjected to harassment by the alleged harasser. *Id.* Here, Plaintiff was not a fact witness reporting facts that she personally observed. Rather, Plaintiff was an investigator who merely relayed to her superiors secondhand information obtained during the investigation. Contrary to Plaintiff's suggestion, *Crawford* did not address, let alone modify, the long line of cases that preclude a finding of protected activity when the activity occurs in the course of performing one's job duties.

4. Indeed, Plaintiff's counsel stipulated at oral argument that K mart disapproves of rape in the workplace. The Court never doubted that such was the case.

Plaintiff also cites *Collazo v. Bristol-Myers Squibb Mfg.*, 617 F.3d 39 (1st Cir. 2010), a post-*Crawford* decision in which the court applied the "manager's role" standard to a plaintiff/scientist's opposition-based retaliation claim. The court concluded that the plaintiff/scientist stepped out of his role because he assisted a subordinate with filing and pursuing an internal discrimination complaint. *Id.* at 49. The plaintiff/scientist also reported his own observations of harassing conduct by the alleged wrongdoer. *Id.* at 43-44. *Collazo* acknowledged *Crawford* for its clarification as to the types of communication that could constitute oppositional activity, but it did not interpret *Crawford* as altering the rule that forecloses oppositional activity claims by managers who are simply performing their duties. *Id.* at 42, 49.

Schanfield v. Sojitz Corp of Am., 663 F.Supp.2d 305 (S.D.N.Y. 2009), another case Plaintiff cites, is also inapposite. In *Schanfield*, the court found that the plaintiff/auditor stepped outside his role after he continued to raise perceived discriminatory aspects of a rotational system after being told not to do so. *Id.* at 317. As in *Collazo*, the auditor was relaying first-hand information. *Id.* at 315-16.

Plaintiff was not reporting discriminatory conduct that she personally observed. Instead, Plaintiff was simply relaying to her superiors the allegations and facts obtained from others during the course of her investigation. Application of the "manager rule" in this case is consistent with applicable precedent.

Appendix B

B. Causal Connection

Even if Plaintiff could establish that she engaged in statutorily protected activity, her claims would still fail because she cannot establish that there was a causal connection between her protected activity and her termination.

Plaintiff maintains that Pearson told her that she was terminated for violation of the policy for conducting internal sexual harassment investigations. There is no merit to Plaintiff's 14 contention that the necessary causal connection is satisfied because Pearson suggested to her that she was terminated for violating investigative policy. Although there were numerous performance deficiencies supporting the decision to terminate, Kmart's concerns about Plaintiff's role in the investigation were unrelated to her request to summon law enforcement. The termination memorandum, as well as Plaintiff's sworn testimony, makes clear that Kmart was dissatisfied with the manner in which the rape allegation surfaced and Plaintiff's apparent indifference to her superiors' request that she provide them with relevant and adequately labeled store surveillance footage. These issues relate to Plaintiff's judgment and failure to follow proper investigative procedures, which are legitimate business concerns that have nothing to do with statutorily protected activity. As such, Plaintiff cannot establish a "causal connection" between statutorily protected activity and her termination.

Plaintiff's reliance on her tenure with the Company and her removal from her PIP do not establish the

necessary causal connection. The record reveals that, after she was removed from the PIP, Plaintiff reverted to the same performance level that led to her PIP in the first place. In either event, many of the performance deficiencies that led to her termination occurred after her role in the investigation ended. These deficiencies, therefore, were intervening events that would have broken any causal chain between her alleged "protected activity" and her termination.

C. Legitimate, Non-Discriminatory Basis for Employment Decision

Assuming Plaintiff could establish a *prima facie* case of retaliation, Kmart has satisfied its burden of articulating legitimate, non-retaliatory reasons for its decision to terminate Plaintiff's employment. Kmart's termination memorandum identified several performance deficiencies, all of which contributed to Plaintiff's termination of employment. Plaintiff admits that time management was a challenge for her, which affected her ability to meet Kmart's expectations. Plaintiff ranked among the lowest loss prevention coaches in terms of shrink percentages, and her inattention to detail and failure to follow up on job assignments exposed Kmart to significant exposure. Not only did she exhibit questionable judgment in the investigation at issue, but she: 1) had unacceptable levels of shrink; 2) demonstrated sloppy and unprofessional handling and follow up on the placement of a loss prevention employee whose background check included disqualifying information (for which she was sharply criticized by the company's Human Resources Compliance

Team); 3) failed to perform adequate store visits; 4) failed to train Store LPCs and ensure timely completion of corporate initiatives; 5) had poor communication with her supervisor; and 6) failed to timely complete a children's toy recall that posed safety risks to children.

D. Pretext

Because Kmart has met its burden of articulating legitimate reasons for its decision to terminate, Plaintiff is required to establish that Kmart's stated reasons are pretextual. *Combs v. Plantation Patterns*, 106 F.3d 1519, 1543 (11th Cir. 1997) ("a plaintiff may not establish that an employer's proffered reason is pretextual merely by questioning the wisdom of the employer's reason, at least not where, as here, the reason is one that might motivate a reasonable employer").

Plaintiff cannot establish that Kmart's reasons are pretextual. The performance problems that contributed to Plaintiff's termination arose long before the sexual harassment investigation, and those problems were of such concern that Kmart placed her on a PIP. Unfortunately, Plaintiff failed to maintain an acceptable level of performance after she was removed from the PIP. Kmart determined that termination was in order because of her persistent inattention to detail, "sloppiness," and time management problems.

Further, Kmart's concerns were not unique to Plaintiff. The evidence establishes that Kmart terminated at least one other LPDC for similar reasons and had

been critical of others in the past who did not follow proper investigative protocol. Thus, the decisions at issue were consistent with Kmart's past practice. Because Plaintiff cannot establish that the reasons supporting Kmart's decision were pretextual, she cannot establish an actionable retaliation claim as a matter of law.

Plaintiff maintains that Kmart never discussed her performance deficiencies with her. The record does not support this contention. Plaintiff does not deny the numerous performance problems identified in the termination memo, and the record reflects that many, if not all, of those issues were communicated to her during her employment. Plaintiff, for example, testified that she was aware that Kmart officials were very upset with her handling of the hiring of an employee who had disqualifying information on his record, that Pearson was frustrated with her untimely completion of projects and that Pearson may likely have spoken with her about other concerns, including her failure to ensure her stores had removed out-of-date merchandise and the haphazard way she conducted her store visits. Many of these issues had previously been brought to her attention and were documented in her PIP.

Though there are several examples of performance deficiencies identified in the record, Plaintiff only defends her decision to meet privately with the complainant during the investigation. Plaintiff claims that Kmart's investigative policies allowed for private meetings with fact witnesses. A more complete examination of the record, however, establishes that her decision to meet alone with

the complainant exhibited poor judgment. Plaintiff, who claims that her role was "note-taker" and that she and Reuter were taking instruction from Kmart officials during the investigation, initiated a private meeting with the complainant despite Plaintiff's acknowledgment that she had no experience with sexual harassment investigations. Plaintiff's conduct in the investigation contributed to her termination not because of any alleged "protected activity," but because of legitimate concerns regarding her failure to follow proper investigative technique and poor decision-making. Plaintiff herself has terminated Kmart employees for similar reasons.

Plaintiff next attempts to "excuse" herself from Kmart's performance standards because she worked a dual territory. Others at Kmart worked dual territories, however, and Plaintiff voluntarily accepted the dual market because she perceived it as a stepping stone to promotion. Moreover, the record establishes that Kmart has consistently enforced its performance standards and terminated at least one other LPDC for failure to adhere to the performance standards.

Plaintiff's citation to a few favorable comments contained in her 2006 performance evaluation does not change the result. That Plaintiff's older evaluations included both positive and negative feedback does not establish "inconsistency" in Kmart's position. The inclusion of positive and negative feedback shows that her performance evaluations were balanced.

Appendix B

Plaintiff's reference to an unrelated case against Kmart in Pennsylvania is baffling because she does not explain how it is relevant to this case.

Plaintiff's claim that Kmart was "angry" with her uncovering of the alleged rapes also is contradicted by her own testimony. Plaintiff testified that, throughout the investigative process, those who coordinated and monitored the investigation dealt with her in a professional manner and did or said nothing Plaintiff found offensive. Plaintiff concedes that she probably should have had a witness present when she met privately with the complainant and was not educated enough to know whether there was enough evidence to contact law enforcement. Plaintiff also acknowledged that perhaps she failed to appreciate that her superiors were doing their jobs and were working with a sense of urgency.

Plaintiff's alleged confusion about Kmart's position on the identity of "the decision- maker" is disingenuous. The process for terminating the employment of someone at Plaintiff's level extends across different hierarchal levels. Church testified that the termination process for someone at Plaintiff's level incorporates safeguards and multiple levels of review. Church explained that Pearson's decision to recommend termination would be reviewed by Arnold, who, if she agreed, would approve the termination and submit it for review to the corporate team, including Tom Arigi and the V.P. of Loss Prevention, Bill Titus. Plaintiff fails to explain how this so-called conflict is relevant to this case. Kmart does not defend on the ground that the "decision-maker" was unaware fo the alleged protected activity.

As noted, Plaintiff maintains that Pearson told her that she was terminated for violation of the policy for conducting internal sexual harassment investigations. When Pearson spoke with the EEOC and when he subsequently gave his declaration to Plaintiff, he acknowledged that Kmart had concerns about his performance and already had terminated his employment. Pearson's declaration and statements to the EEOC do not constitute party-admissions and are therefore not binding on Kmart. *See* F.R.E. 801(d)(2).

Though Pearson now claims that he did not recommend Plaintiff's termination and believes her termination was unwarranted, his input and the documents he authored formed part of the basis for the decision to terminate Plaintiff's employment. Though Plaintiff claims that some of the documents appear "suspect and seemingly altered," or are "bizarre" because written in different tenses, it is significant that, in his declaration dated October 21, 2010, Pearson did not: 1) disavow his authorship of these documents; 2) distance himself from the statements and representations he made in those documents; or 3) support Plaintiff's unfounded allegations that Kmart "doctored" or altered documents – even though the documents were in Plaintiff's hands long before Pearson signed his declaration.

Finally, Plaintiff seeks to exclude some of the documentary evidence that she otherwise cannot overcome. Plaintiff's claim that she was "blind-sided" by certain documents not only lacks substantive merit, but she has not explained why she made no issue of these

documents from the time they were served on August 24, 2010, to the filing of her Opposition on October 21, 2010. If Plaintiff truly believed she was unduly prejudiced by these documents, then she should have either filed a timely motion to strike and/or sought Kmart's agreement or, alternatively, leave of court, to re-open discovery for the limited purposes of conducting any necessary follow-up.

The documents at issue either were duplicative of documents previously produced to Plaintiff, not responsive to Plaintiff's discovery and/or add nothing substantive to the case. Plaintiff takes issue with Exhibit D to Arnold's declaration, Pearson's termination memo, but that document was previously produced to Plaintiff on January 25, 2010. Exhibit C to Arnold's declaration is an email from Pearson to Arnold attaching his first draft of the termination memo. The draft is not only is less-inclusive than the final version of the memo, but Kmart voluntarily produced the draft after Church's deposition because it tended to dispel Plaintiff's suggestion that Kmart had created the termination memo after her termination on November 20, 2007 – an issue Plaintiff had not previously raised in discovery. This document merely details Plaintiff's myriad performance issues. Exhibit E to Arnold's declaration establishes that these performance issues were identified prior to Plaintiff's termination.

Plaintiff's attempt to exclude comparative data identified in Exhibit A to Human Resources Director Chris Jemo's declaration is equally without merit. This document summarizes disciplinary action taken against Reuter for failure to perform an appropriate investigation,

merely underscoring that Kmart takes seriously failure to follow investigative procedure.

Exhibits A-C to Church's declaration add nothing substantively to the case and were voluntarily produced after Church's deposition simply to clarify issues that had arisen during his deposition. These documents detail Plaintiff's performance deficiencies, including her failure to follow proper hiring procedure. In either event, Church's attestations in the declaration and the record as a whole are more than sufficient to support the entry of summary judgment.

The undisputed record evidence establishes that Kmart is entitled to summary judgment in this action. Plaintiff cannot establish "protected activity" or that Kmart's reasons for its decision to terminate Plaintiff's employment are pretextual. Rather, the facts show that Plaintiff was terminated because of performance deficiencies that surfaced prior to her alleged protected activity and that other associates have been terminated for similar reasons.

IV. CONCLUSION

THE COURT, being fully advised and having considered the pertinent portions of the record, hereby

ORDERS AND ADJUDGES that Defendant's motion for summary judgment, filed October 1, 2010 [DE 33], is GRANTED. It is further

Appendix B

ORDERED AND ADJUDGED that Plaintiff's motion to strike, filed October 22, 2010 [DE 40], is DENIED. Final judgment shall be entered by separate order.

DONE AND ORDERED at Chambers in West Palm Beach, Florida, this 14th day of January, 2011.

/s/_____
KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER DENYING PETITION FOR REHEARING AND FOR REHEARING EN BANC OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, DATED MAY 31, 2012

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 11-10657-DD

JANET BRUSH,

Plaintiff-Appellant,

versus

SEARS HOLDING CORPORATION,
d.b.a. Sears, Roebuck & Co.,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

May 31, 2012

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

BEFORE: DUBINA, Chief Judge, FAY and KLEINFELD* Circuit Judges.

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*Honorable Andrew J. Kleinfeld, United States Circuit Judge, Ninth Circuit, sitting by designation.

Appendix C

PER CURIAM:

The petition for Rehearing is DENIED and no Judge in regular active service on the Court having requested the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/_____
UNITED STATES CIRCUIT JUDGE