EMPLOYMENT LAW — TITLE VII — ANTIRETALIATION — ELEVENTH CIRCUIT HOLDS THAT HUMAN RESOURCE EMPLOYEE'S ENCOURAGEMENT OF COWORKER TO FILE EEOC CHARGE WAS NOT PROTECTED ACTIVITY. — *Gogel v. Kia Motors Manufacturing of Georgia, Inc.*, 967 F.3d 1121 (11th Cir. 2020) (en banc).

Title VII of the Civil Rights Act of 1964[1] makes it unlawful for an employer to retaliate against any employee because she "has opposed any practice made an unlawful employment practice" by the statute.[2] The "primary purpose" of the antiretaliation protection in Title VII, according to the Supreme Court, is to "[m]aintain[] unfettered access to statutory remedial mechanisms,"[3] and the Court has interpreted this "opposition clause" broadly.[4] Recognizing that Title VII "depends for its enforcement upon the cooperation of employees,"[5] lower courts have held that an employee engages in "protected activity" by helping a coworker file a Title VII lawsuit.[6] Recently, however, in *Gogel v. Kia Motors Manufacturing of Georgia, Inc.*,[7] the Eleventh Circuit held that a human resource employee's encouragement of a coworker to file a charge with the Equal Employment Opportunity Commission (EEOC) was not protected activity when the employee's duties included resolving complaints internally.[8] By adopting a per se rule that unconditionally defers to employers' demands for loyalty, the *Gogel* decision allows employers to terminate human resource employees whenever their oppositional activities deviate from their job duties. This rule misunderstands the unique role of human resource employees in the workplace and threatens to undermine Title VII's protections for employees more broadly.

Andrea Gogel worked as a team relations manager for Kia's plant in West Point, Georgia, where she was tasked with developing workplace

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[1] 42 U.S.C. § 2000e.

[2] *Id.* § 2000e-3(a). In addition to this "opposition clause," Title VII also includes a "participation clause" that prohibits employers from retaliating against any employee because she "has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" under the statute. *Id.* Similar antiretaliation provisions appear in other federal antidiscrimination statutes, such as the Age Discrimination in Employment Act, 29 U.S.C. § 623(d), and the Americans with Disabilities Act, 42 U.S.C. § 12203(a)–(b). *See* Melissa A. Essary & Terence D. Friedman, *Retaliation Claims Under Title VII, the ADEA, and the ADA: Untouchable Employees, Uncertain Employers, Unresolved Courts*, 63 MO. L. REV. 115, 118 & n.3 (1998) (comparing the three antiretaliation provisions).

[3] Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 64 (2006) (first alteration in original) (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997)).

[4] *See, e.g.*, Crawford v. Metro. Gov't, 555 U.S. 271, 276–77 (2009) (holding that the opposition clause protects an employee when she testifies during an internal investigation of reported harassment by her coworker).

[5] *Burlington N.*, 548 U.S. at 67.

[6] *See, e.g.*, Hobgood v. Ill. Gaming Bd., 731 F.3d 635, 642–43 (7th Cir. 2013) (holding that such action could constitute "protected activity" under both Title VII and the First Amendment).

[7] 967 F.3d 1121 (11th Cir. 2020) (en banc).

[8] *Id.* at 1150.

policies and investigating allegations of harassment or discrimination.[9] During her time there, she received numerous complaints about sexism and gender discrimination, but her supervisors refused to act on them.[10] In 2008, for example, Kia employee Diana Ledbetter complained to Gogel about an inappropriate relationship between Ledbetter's supervisor and Kia's president.[11] When Gogel sought to investigate the potential Title VII violation, her supervisor ordered her not to.[12] Ledbetter also complained about sexism at Kia: during company executives' visits, she was ordered to serve wine to the executives, was called a "geisha," and was asked to pretend to be a receptionist because she was "pretty."[13] Gogel herself similarly experienced sexist behavior firsthand. When Gogel was included in meetings, she was instructed not to "speak at all," while her male subordinates were permitted to speak.[14] In 2009, Kia made every manager without a superior in their department a department head except for Gogel, the only woman to hold such a position.[15] When Gogel notified her supervisor about these complaints, they were dismissed as mere "opinion" without an investigation.[16]

In November 2010, Gogel filed her first charge with the EEOC, alleging gender and national origin discrimination.[17] One month later, Kia asked Gogel to sign an agreement not to discuss her EEOC charge with other employees and not to influence other employees to file charges against the company; Gogel signed the agreement a few days later.[18] Ledbetter filed her own EEOC charge in December 2010.[19] After realizing that Gogel and Ledbetter had used the same law firm in filing their charges, Kia fired Gogel, allegedly because it believed her to have "encouraged or even solicited [Ms. Ledbetter's] filing of the charge" and the company "lost total confidence and trust in her to perform . . . [her] job duties."[20]

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[9] Gogel v. Kia Motors Mfg. of Ga., Inc., 904 F.3d 1226, 1229 (11th Cir. 2018).

[10] *See Gogel*, 967 F.3d at 1168–72 (Rosenbaum, J., dissenting). Indeed, Gogel was told she "had a 'responsibility' to support the '[p]atriarchal culture'" at Kia. *Id.* at 1172 (alteration in original).

[11] *Id.* at 1169.

[12] *Id.* at 1170. Another supervisor told Gogel to secretly investigate the subordinate (but not the president), only to tell her later to destroy all the information she had gathered. *Id.*

[13] *Id.* at 1173–74.

[14] *Id.* at 1169.

[15] *Id.* at 1170.

[16] Gogel v. Kia Motors Mfg. of Ga., Inc., 904 F.3d 1226, 1237 (11th Cir. 2018).

[17] *Id.* at 1231. Gogel's national origin discrimination claim was based on allegations that American managers at Kia were not properly given decisionmaking authority by the Korean management. *Id.* at 1230.

[18] *Id.* at 1231.

[19] *Id.*

[20] *Id.* at 1232 (first alteration in original). Weeks before Kia terminated Gogel, one of Gogel's subordinates informed Kia's management that Gogel and Ledbetter met "a number of times around the date [Ledbetter] filed her charge," and he claimed that "Ledbetter had told him . . . that she,

Gogel filed a second EEOC charge and then sued Kia for discriminatory and retaliatory termination under Title VII.[21] The U.S. District Court for the Northern District of Georgia granted Kia's motion for summary judgment on all claims, concluding that Kia lawfully fired Gogel "for failing to perform her job duties because she allegedly helped or solicited Ms. Ledbetter in filing her EEOC charge."[22] Gogel appealed.[23]

The Eleventh Circuit affirmed in part and reversed in part. Writing for the panel, Judge Martin[24] affirmed the grant of summary judgment on the discrimination claim but reversed on the retaliation claim on the ground that Gogel had plausibly alleged that her cooperation with Ledbetter was protected activity under Title VII's opposition clause.[25] The panel's opinion began by setting out the three-step *McDonnell Douglas Corp. v. Green*[26] framework in the retaliation context: the plaintiff must first establish a prima facie case of retaliation;[27] the burden of production then shifts to the defendant to rebut the prima facie case by providing "a legitimate, non-discriminatory reason" for termination;[28] and the plaintiff finally has an opportunity to demonstrate that the defendant's proffered reason was a "pretext."[29] After conceding that Gogel had made a prima facie case, Kia proffered Gogel's encouragement or solicitation of Ledbetter to file an EEOC charge as a legitimate, nondiscriminatory reason.[30]

Kia conceded that assisting a coworker with filing an EEOC charge is ordinarily protected activity but asserted that "when a human resource employee like Ms. Gogel helps another employee file a discrimination charge, that conduct is unreasonable and not protected

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[another employee], and Ms. Gogel were all filing charges against Kia and all had the same attorney." *Id.* While both Gogel and Ledbetter denied that Gogel "encouraged" Ledbetter to file the EEOC charge, Gogel admitted that she provided Ledbetter with the name of an attorney whom she intended to meet. *Id.* at 1234.

[21] *Id.* at 1232–33; *Gogel*, 967 F.3d at 1133. Gogel also filed discrimination and retaliation claims under 42 U.S.C. § 1981, which are analyzed under the same framework as are Title VII claims. *Gogel*, 904 F.3d at 1232–33, 1239. Gogel also argued that Kia discriminated against her by failing to promote her; the district court found that her failure-to-promote claim was barred by the statute of limitations, and she did not appeal that conclusion. *Id.* at 1233 n.3.

[22] *Gogel*, 904 F.3d at 1233.

[23] *Id.*

[24] Judge Martin was joined by Judge O'Scannlain, sitting by designation from the Ninth Circuit.

[25] *Gogel*, 904 F.3d at 1238–39. The panel briefly discussed and affirmed the dismissal of Gogel's discrimination claims on the basis of gender and national origin because the record "strongly indicate[d]" that Gogel's alleged assistance to Ledbetter, rather than discrimination, formed the basis for her termination. *Id.* at 1239.

[26] 411 U.S. 792 (1973).

[27] *Gogel*, 904 F.3d at 1233 (citing Thomas v. Cooper Lighting, Inc., 506 F.3d 1361, 1363 (11th Cir. 2007) (per curiam)).

[28] *Id.* (quoting Bryant v. Jones, 575 F.3d 1281, 1308 (11th Cir. 2009)).

[29] *Id.* (quoting *Bryant*, 575 F.3d at 1308).

[30] *Id.*

activity."[31] However, after applying the test set forth in *Rollins v. Florida Department of Law Enforcement*[32] — which requires the balancing of "the purpose of the statute and the need to protect individuals asserting their rights . . . against an employer's legitimate demands for loyalty, cooperation and a generally productive work environment"[33] — the panel concluded that a jury could find Gogel's opposition was carried out in a reasonable manner, and her conduct was therefore protected.[34] The panel highlighted that when an employer's internal procedure is ineffective, the human resource employee needs to deviate from it to "further[] the purpose of the statute," reasoning that "an employer cannot defeat the requirements of Title VII by establishing job duties that are inconsistent with the statute's protections."[35]

Judge Julie Carnes dissented in part and concurred in part.[36] Judge Carnes would have affirmed the grant of summary judgment on the retaliation claim because she believed that Gogel's conduct was unprotected oppositional activity.[37] Judge Carnes faulted the panel majority for ignoring the rule set out in *Rosser v. Laborers' International Union, Local No. 438*[38] that an employee's oppositional activity is unprotected when it "'so interferes with the performance' of her job duties 'that it renders [her] ineffective in the position for which [she] was employed.'"[39] Under this test, when an employee's responsibility includes resolving complaints internally, her solicitation of a coworker to file a claim is "per se unreasonable."[40]

The Eleventh Circuit granted the petition for rehearing en banc and vacated the panel's decision.[41] Writing for the en banc majority, Judge Branch[42] affirmed the district court's grant of summary judgment to Kia.[43] The majority explained that *Rosser*'s "rendered-ineffective-in-the-job" test provided "a ready answer" to the question whether Gogel's alleged solicitation of a coworker was protected activity: because her

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[31] *Id.* at 1234.

[32] 868 F.2d 397 (11th Cir. 1989) (per curiam).

[33] *Id.* at 401.

[34] *Gogel*, 904 F.3d at 1237–38.

[35] *Id.* at 1236.

[36] *Id.* at 1239 (J. Carnes, J., dissenting in part and concurring in part). Judge Carnes agreed with the panel in affirming the dismissal of Gogel's discrimination claims. *Id.* at 1240 n.3.

[37] *Id.* at 1240.

[38] 616 F.2d 221 (5th Cir. 1980).

[39] *Gogel*, 904 F.3d at 1243 (J. Carnes, J., dissenting in part and concurring in part) (alterations in original) (quoting *Rosser*, 616 F.2d at 223).

[40] *Id.* at 1247.

[41] Gogel v. Kia Motors Mfg. of Ga., Inc., 926 F.3d 1290, 1291 (11th Cir. 2019).

[42] Judge Branch was joined by Chief Judge William Pryor and Judges Grant, Tjoflat, Ed Carnes, Marcus, and Julie Carnes.

[43] *Gogel*, 967 F.3d at 1150. The majority agreed with the panel's decision to affirm the grant of summary judgment on Gogel's discrimination claims. *Id.* at 1126 n.1.

efforts to recruit an employee to sue the company "so clearly conflicted with the performance of her job duties . . . that it rendered her ineffective in that position," her oppositional activity was unprotected.[44] While acknowledging that the *Rollins* balancing test expanded on the *Rosser* test, the majority held that the *Rollins* test is relevant only when the employee's oppositional conduct does not interfere with her job duties and thus did not apply to Gogel.[45]

Having found that Kia put forth a legitimate, nondiscriminatory reason for firing Gogel, the majority held that Gogel failed to establish a triable issue of fact on whether that reason was pretextual and affirmed the district court's grant of summary judgment on her retaliation claim.[46] The majority rejected Gogel's argument that Kia fired her not because she had solicited Ledbetter but because she had filed her own EEOC charge, noting that Kia retained Gogel after she filed her EEOC charge and provided her with more favorable compensation.[47]

Judge Martin dissented.[48] She criticized the majority for misapplying the *McDonnell Douglas* framework[49] and for "improperly accept[ing]" Kia's version of the facts.[50] While she accepted that an employee's oppositional conduct could sometimes "'so interfere[] with the performance' of her job duties" as to be unreasonable, and thus that Kia successfully offered a legitimate, nondiscriminatory reason for Gogel's termination,[51] she believed that there were multiple triable issues of fact on whether Kia's proffered reason was pretextual.[52] In particular, she pointed out that the majority "overlook[ed] the fact that Ms. Gogel's

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[44] *Id.* at 1139–40.

[45] *Id.* at 1140–41. The majority rejected as unworkable any exception to *Rosser*'s bright-line rule for human resource employees dissatisfied with their employer's response to complaints of discrimination. *Id.* at 1142–43. The majority also clarified that under the circuit's precedent, what matters in analyzing the employer's reason for termination is not what the employee actually did, but what the employer reasonably believed the employee to have done. *Id.* at 1148 (citing Alvarez v. Royal Atl. Devs., Inc., 610 F.3d 1253, 1266 (11th Cir. 2010)). According to the majority, Gogel had not presented evidence to rebut her supervisor's testimony showing that Kia reasonably believed Gogel to have solicited a coworker to sue the company. *Id.* at 1149.

[46] *Id.* at 1135–36.

[47] *Id.* at 1135, 1137–38. Three judges filed brief concurring opinions. Chief Judge Pryor wrote mainly to criticize the word choice in Judge Martin's dissent. *Id.* at 1150–51 (W. Pryor, C.J., concurring). Judge Jordan concurred in the judgment because, despite agreeing with much of the dissent's legal analysis, he found that Gogel did not present a triable issue of fact on whether Kia's proffered reason was pretextual. *Id.* at 1151–52 (Jordan, J., concurring in the judgment). Judge Wilson concurred in part and dissented in part, agreeing with the majority's analysis of Gogel's oppositional conduct but arguing that Gogel established a triable issue of fact on whether Kia had fired her for filing her own EEOC charge. *Id.* at 1155–56 (Wilson, J., concurring in part and dissenting in part).

[48] Judges Rosenbaum and Jill Pryor joined Judge Martin's dissent.

[49] *Gogel*, 967 F.3d at 1157 (Martin, J., dissenting).

[50] *Id.* at 1161.

[51] *Id.* at 1160 (alteration in original) (quoting *id.* at 1139 (majority opinion)).

[52] *Id.*

conduct, the nature of her job, and Kia's motivations for terminating her were all in dispute."[53] Finally, Judge Martin voiced concern with the disparaging tone that the majority used in depicting Gogel.[54]

Judge Rosenbaum also dissented.[55] She also would have reversed the grant of summary judgment on the retaliation claim because, in her view, there was a triable issue of fact on whether Gogel's alleged solicitation of Ledbetter qualified as protected activity.[56] She sharply disagreed with the majority's reliance on the "rendered-ineffective-in-the-job" test in *Rosser* as a standalone test for evaluating Gogel's oppositional activity.[57] Noting the majority's reference to the *Rollins* balancing test,[58] she criticized the majority for failing to give weight to the test's first two factors — Title VII's purpose and the opposing employee's rights.[59] Judge Rosenbaum argued that the majority also ignored *Rollins*'s requirement that the employer's demands for loyalty be "legitimate" in order to carry weight in the balancing test.[60] In her view, an employer's "bad-faith efforts to frustrate Title VII"[61] could make its demands illegitimate and unworthy of the court's deference in the *Rollins* balancing.[62] Under this standard, Gogel had raised a triable issue on whether Kia's refusal to seriously address internal complaints rendered her oppositional conduct reasonable.[63] Finally, Judge Rosenbaum argued that even assuming Gogel's alleged solicitation of Ledbetter was unprotected, the grant of summary judgment was inappropriate because Gogel had sufficiently alleged that Kia's proffered reason was pretextual.[64]

By adopting a per se rule that unconditionally defers to employers' demands for loyalty, the *Gogel* decision allows employers to terminate human resource employees whenever their oppositional activities deviate from their job duties. This rule misunderstands the unique role of human resource employees in the workplace, and its harm may be com-

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[53] *Id.* at 1158.

[54] *Id.* at 1164–65.

[55] Judges Martin and Jill Pryor joined Judge Rosenbaum's dissent.

[56] *Gogel*, 967 F.3d at 1175 (Rosenbaum, J., dissenting).

[57] *Id.* at 1176.

[58] *Id.*

[59] *Id.* (citing Rollins v. Fla. Dep't of L. Enf't, 868 F.2d 397, 401 (11th Cir. 1989) (per curiam)).

[60] *Id.* at 1178–79.

[61] *Id.* at 1178.

[62] *Id.* at 1180–81.

[63] *Id.* at 1181.

[64] *Id.* at 1168. Judge Rosenbaum explained that the majority failed to consider the full scope of Gogel's protected activities against which Kia allegedly retaliated, *see id.* at 1184–85, and argued that a jury could conclude that Kia's "investigation" into Gogel's alleged solicitation was mere pretense, designed to "cover for [its] real reason for firing Gogel: her [other] Title VII opposition and participation conduct," *id.* at 1188.

pounded by the emerging "manager rule" in the antiretaliation jurisprudence. With internal complaint procedures becoming the dominant enforcement mechanism for Title VII, this decision threatens to undermine Title VII's protections for employees more broadly by emboldening employers to use internal procedures in bad faith to obstruct employees' access to Title VII remedies.

Due to the lack of a limiting principle, the rendered-ineffective-in-the-job test adopted by the *Gogel* majority enables an employer to fire human resource employees for encouraging their coworkers to file EEOC charges even when the employer's internal complaint procedures are completely ineffective or the employer acted in bad faith. Under the majority's rule, all that mattered was that Gogel's conduct conflicted with her responsibility "to internalize the resolution of any complaint."[65] The majority apparently was not concerned with what Kia had done with those complaints after Gogel "internalize[d]" them, nor did it even consider the possibility that Kia's internal procedures might be designed to thwart, rather than redress, allegations of discrimination.[66] By contrast, under the more nuanced balancing test applied by Judge Rosenbaum in her dissent, an employer would not have such an ability to exploit internal complaint procedures because a court would credit only "legitimate" demands of an employer, which would also be balanced against the countervailing interests of Title VII enforcement and the opposing employee's rights.[67] If the majority had applied the balancing test, Gogel's claims would have survived summary judgment, giving a jury "an opportunity . . . to balance the competing considerations, and to reach a conclusion as to the reasonableness of [her] conduct."[68] Particularly, Gogel might have shown that Kia's demands for loyalty were illegitimate after taking into account Kia's pervasive sexist culture and its consistent effort to frustrate investigations of discrimination complaints.[69]

The *Gogel* majority's attempt to narrow Title VII protection for human resource employees revealed its misunderstanding of their unique role in the workplace. To the majority, Gogel's "appearance of a conflict of interest" constituted a valid ground for discharge.[70] To avoid discharge, she had to always act "in the best interests of the company,"[71] even at the cost of sacrificing her fellow employees' Title VII rights and

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[65] *Id.* at 1145 (majority opinion).

[66] *See id.* at 1145–47.

[67] *Id.* at 1167, 1176 (Rosenbaum, J., dissenting).

[68] *Id.* at 1179 (quoting Payne v. McLemore's Wholesale & Retail Stores, 654 F.2d 1130, 1146 (5th Cir. Unit A Sept. 1981)).

[69] *See id.* at 1169–70, 1181.

[70] *Id.* at 1133 (majority opinion).

[71] *Id.* at 1145.

her own commitments to opposing discrimination.[72] But what the majority neglected to account for was these human resource employees' inherent conflicts of interest: their very responsibilities "create divided loyalties to management and to their fellow employees, and to the antidiscrimination directives of their employers' policies and the law itself."[73] A human resource employee who robustly performs her role can be on a "collision course" with the employer, whose interest is not necessarily best served by "vigorous implementation" of its antidiscrimination policies.[74] Critically, human resource employees who are women or racial minorities are particularly susceptible to accusations of disloyalty, especially when they are handling complaints by members of the same minority groups.[75] Indeed, Gogel herself was accused of disloyalty for cooperating with another female employee in opposition to sex discrimination at Kia.[76] At the same time, those most vulnerable to discrimination and retaliation at work are in dire need of human resource employees as potential allies providing legal and moral support.[77] Faced with these acute conflicts of interest coupled with the threat of discharge implicit in any at-will employment,[78] human resource employees like Gogel need more, not less, protection from antidiscrimination laws in order to effectively fulfill their role of ensuring workplace equality.

Furthermore, the rendered-ineffective-in-the-job test endorsed by the *Gogel* majority could prove even more damaging when applied together with the emerging "manager rule" in the antiretaliation jurisprudence. Under this rule, a human resource employee's oppositional activity is unprotected when she acts "solely as a manager" and stays

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[72] *See id.* at 1146.

[73] Deborah L. Brake, *Retaliation in the EEO Office*, 50 TULSA L. REV. 1, 8 (2014).

[74] *Id.*

[75] *Id.* at 9.

[76] *See Gogel*, 967 F.3d at 1133.

[77] *See* Alex B. Long, *The Troublemaker's Friend: Retaliation Against Third Parties and the Right of Association in the Workplace*, 59 FLA. L. REV. 931, 967 (2007) (arguing that a narrow construction of the Title VII antiretaliation provision "turn[s] would-be allies into potential targets" and "discourage[s] coworkers from assisting those who are most vulnerable to discrimination and retaliation"). Professor Alex Long also argues that courts should interpret antiretaliation provisions to encourage employees to associate with and assist one another because a "deeply embedded" federal employment law principle is that employees have the right to provide "mutual aid or protection" in the workplace without fear of retaliation. *Id.* at 936.

[78] Employment at will, under which employment is a purely private contractual relationship terminable by either party for any reason at any time, is the background rule of the American employment relationship. *See, e.g.*, 10 N. PETER LAREAU, LABOR AND EMPLOYMENT LAW § 259.02 (2020); Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 951 (1984) (premising the at-will rule on freedom of contract). Title VII and other wrongful discharge protections have intervened to put limits on employers' right to discharge for certain socially undesirable reasons. *See* Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 TEX. L. REV. 1655, 1658–59 (1996).

within the bounds of her normal duties.[79] The manager rule first emerged in the context of the Fair Labor Standards Act[80] and has been adopted by a number of circuits.[81] To qualify for statutory protection, the human resource employee must "cross[] the line from being an employee merely performing her [managerial duties] to an employee lodging a personal complaint . . . and asserting a right adverse to the company."[82] The Eleventh Circuit has already applied the manager rule to Title VII in an unpublished opinion.[83] If it formally adopts the doctrine, the consequences will be destructive in light of the rendered-ineffective-in-the-job test applied by the *Gogel* majority.[84] Under the manager rule, a human resource employee must deviate from her normal job duties and assert an interest adverse to the company in order to qualify as engaging in protected activity.[85] Under *Gogel*, on the other hand, such a deviation by a human resource employee would "render her ineffective in her position," making her activity unreasonable and unprotected by the statute.[86] *Gogel* thus means that, if the Eleventh Circuit formally adopts the manager rule in the Title VII context, human resource employees in the circuit would effectively be unable to engage in protected activities under the opposition clause at all.[87]

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[79] *See* Brush v. Sears Holdings Corp., 466 F. App'x 781, 787 (11th Cir. 2012); *see also* Brake, *Retaliation in the EEO Office*, *supra* note 73, at 16–17.

[80] 29 U.S.C. §§ 201–219.

[81] *See, e.g.*, Hagan v. Echostar Satellite, L.L.C., 529 F.3d 617, 627–28 (5th Cir. 2008); Claudio-Gotay v. Becton Dickinson Caribe, Ltd., 375 F.3d 99, 102 (1st Cir. 2004); McKenzie v. Renberg's Inc., 94 F.3d 1478, 1486–87 (10th Cir. 1996).

[82] *McKenzie*, 94 F.3d at 1486 (emphasis omitted); *cf.* Garcetti v. Ceballos, 547 U.S. 410, 424 (2006) (holding that a public employee's speech falling within the scope of the employee's job duties is unprotected by the First Amendment). Proponents of the manager rule claim that without it, certain segments of employees would have a basis for a retaliation claim simply by doing their job, making it more difficult for employers to supervise and discipline. *See, e.g.*, *Hagan*, 529 F.3d at 628.

[83] *See Brush*, 466 F. App'x at 787 (holding that an employee tasked with investigating a sexual harassment complaint did not engage in protected activity under Title VII because she opposed the actions of an employer "in the course of her normal job performance"); *accord* Weeks v. Kansas, 503 F. App'x 640, 642 (10th Cir. 2012) (Gorsuch, J.) (applying the manager rule to Title VII). Meanwhile, the Second, Fourth, and Sixth Circuits have rejected the application of the manager rule to Title VII cases. *See* Littlejohn v. City of New York, 795 F.3d 297, 318 (2d Cir. 2015) (noting that Title VII's text "does not distinguish among entry-level employees, managers, and any other type of employee"); DeMasters v. Carilion Clinic, 796 F.3d 409, 422–23 (4th Cir. 2015) (finding the manager rule "problematic" when viewed in conjunction with the requirement that employee conduct not be too "insubordinate, disruptive, or nonproductive," *id.* at 423 (quoting Armstrong v. Index J. Co., 647 F.2d 441, 448 (4th Cir. 1981))); Johnson v. Univ. of Cincinnati, 215 F.3d 561, 580 (6th Cir. 2000) (requiring only that the manner of the manager's opposition be "reasonable").

[84] *Cf.* Brake, *Retaliation in the EEO Office*, *supra* note 73, at 33–34 (discussing the tension between the manager rule and the requirement that an employee's oppositional activity be reasonable).

[85] *See Brush*, 466 F. App'x at 787 (citing *McKenzie*, 94 F.3d at 1486).

[86] *See Gogel*, 967 F.3d at 1140.

[87] Although the majority stated in dictum that "Gogel's internal advocacy before Kia management on behalf of other employees was clearly protected conduct," *id.* at 1144, it did not discuss

Because internal complaint procedures have become the dominant enforcement mechanism for Title VII, the majority's decision threatens to undermine Title VII's protections for employees more broadly. The majority's application of the rendered-ineffective-on-the-job test to human resource employees creates grave risks that they "will never speak one word about the law's 'statutory remedial mechanisms' to other employees, under even the most sustained discriminatory circumstances."[88] It incentivizes employers to use internal procedures as liability shields rather than enforcement mechanisms. The Supreme Court has provided enormous legal incentives for employers to establish internal complaint procedures for addressing workplace harassment and discrimination on the premise that the purpose of Title VII will be better achieved through "voluntary compliance."[89] These internal procedures proliferated in the last few decades and have become the dominant enforcement apparatus for employment antidiscrimination statutes.[90] With employees increasingly resorting to these procedures rather than filing formal legal actions for their grievances, human resource employees are the ones who operationalize the antidiscrimination laws and shape the norms and behavior of the workplace, thereby becoming the last line of defense for their coworkers' statutory rights.[91] By insisting that these human resource employees unconditionally stay within the bounds of their duty to resolve complaints internally, the *Gogel* majority overlooked whether the ideal of voluntary compliance was actually fulfilled.[92] As a result of the majority's decision, employers will be further emboldened to use internal procedures to obstruct access to Title VII remedies rather than to meaningfully improve workplace equality.

Brush v. Sears Holdings Corp., 466 F. App'x 781, or address the applicability of the manager rule to Title VII.

88 *Gogel*, 967 F.3d at 1166 (Rosenbaum, J., dissenting).

89 *See, e.g.*, Ricci v. DeStefano, 557 U.S. 557, 581 (2009) ("[W]e have recognized . . . Congress' intent that 'voluntary compliance' be 'the preferred means of achieving the objectives of Title VII.'" (quoting Loc. No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 515 (1986))); *see also* Deborah L. Brake, *Retaliation in an EEO World*, 89 IND. L.J. 115, 133 (2014). Legal incentives for employers to have internal procedures come, in part, from two Supreme Court cases decided in 1998 — *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) — that provided employers who have internal complaint procedures with an affirmative defense to avoid liability under Title VII. *See* Brake, *Retaliation in an EEO World*, *supra*, at 128–29. The EEOC is also less likely to find "cause" for discrimination in charges filed against employers that have internal antidiscrimination procedures than in charges against employers that do not. *Id.* at 130.

90 Brake, *Retaliation in an EEO World*, *supra* note 89, at 133.

91 *See id.* at 133–34; Margo Schlanger & Pauline Kim, *The Equal Employment Opportunity Commission and Structural Reform of the American Workplace*, 91 WASH. U. L. REV. 1519, 1523 (2014).

92 *See Gogel*, 967 F.3d at 1145.