IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

LESLIE A. TONEY and	)
WENDELL E. ORR,	)
	)
PLAINTIFFS,	) CIVIL ACTION NO. 2:17-CV-01285-DSC
	)
v.	)
	)
NEW KENSINGTON-ARNOLD	)
SCHOOL DISTRICT,	) JURY TRIAL DEMANDED
	)
DEFENDANT.	)
	)

BRIEF OF THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE

STATEMENT OF INTEREST

The U.S. Equal Employment Opportunity Commission ("EEOC" or "Commission") is charged by Congress with administering, interpreting, and enforcing the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 *et seq.* ("ADEA"); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* ("Title VII"); Title I of the Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.* ("ADA"); and the Equal Pay Act of 1963, 29 U.S.C. § 206(d) ("EPA"). Each of these statutes contains a provision that prohibits retaliation. 29 U.S.C. § 623(d) (ADEA); 42 U.S.C. § 2000e-3(a) (Title VII); 42 U.S.C. § 12203(a) (ADA); 29 U.S.C. § 215(a)(3) (EPA).

The facts giving rise to this third-party retaliation case began when plaintiff Leslie Toney filed an EEOC administrative charge alleging the New Kensington-Arnold School District ("District") discharged her because of her age. Shortly after the EEOC informed the District of Toney's charge, the District acted against her husband, Wendell Orr, who also worked for the

District, by suspending and then discharging him. Toney is suing the District under the ADEA for age discrimination and retaliation based in part on the suspension and discharge of her husband. Orr is suing for retaliatory suspension and discharge. The District has moved to dismiss Toney's and Orr's retaliation claims, ignoring or misconstruing the Supreme Court precedent that makes these claims plausible. Because the court's ruling could implicate the interpretation and effective enforcement of the ADEA and the other statutes the EEOC enforces, the Commission offers its views for the Court's consideration.

STATEMENT OF FACTS[1]

Until 2016, both plaintiffs Leslie Toney and Wendell Orr were employees of the District. R.19, ¶¶ 6, 8, 16-17, 25-29.[2] Toney, aged 57 at the time of her termination, was a secretary in the human resources department, and Orr was facilities director of buildings and grounds. *Id.* at ¶¶ 7-8. After the District terminated Toney at the end of June 2016, she filed a signed intake questionnaire with the EEOC on August 5, 2016. *Id.* at ¶ 19. She alleged that the District's superintendent, John Pallone, harassed her, discharged her, and retaliated against her because of her age. *Id.* The EEOC sent the District an EEOC Form 131, which gives an employer notice that a comprehensive EEOC charge will follow and advises the employer not to destroy evidence or retaliate against the charging party. *Id.* at ¶ 20. Pallone received the EEOC Form 131 on September 10, 2016. *Id.* at ¶ 21. Over the next few weeks, Pallone compiled a list of detailed charges against Orr, a thirteen-year veteran of the District. *Id.* at ¶¶ 23-24. Prior to the fall of 2016, Orr had never received a negative performance review nor received any written warnings or reprimands. *Id.* at ¶ 23.

Toney filed a verified charge with the EEOC on October 3, 2016. R.19-1. Also on

[1] This recitation of the facts is based on the allegations set out in the amended complaint, which the district court takes as true in considering a motion to dismiss.
[2] "R.#" refers to this court's docket entry number.

October 3, 2016, Pallone suspended Orr with pay and informed him that he would be fired if he did not resign. R.19 at ¶ 25. Pallone told Orr he was being fired for poor work performance. R.19-3. Pallone suspended Orr without pay beginning December 7, 2016, and ended his benefits on January 1, 2017. R.19 at ¶ 27.

Orr filed an EEOC charge against the District on December 12, 2016, alleging that Pallone suspended him in retaliation for his wife's age discrimination charge. *Id.* at ¶ 28. The District terminated Orr on January 26, 2017. *Id.* at ¶ 29. Toney subsequently asserted a retaliation claim based on Orr's termination and exhausted her administrative remedies with the EEOC. *Id.* at ¶ 30. Orr also amended his retaliation charge to include the termination. *Id.* at 31.

Toney sued the District for age-based harassment and wrongful discharge under the ADEA and state law. R.19 at 7-9. She also claimed that the District retaliated against her by suspending and firing Orr. *Id.* at 9-11. Orr sued the District for retaliatory harassment and wrongful discharge in violation of the ADEA and state law. *Id.* at 12-14. The District has moved for partial dismissal of the plaintiffs' amended complaint. R.20. The District argues that Toney cannot bring a retaliation claim based on Orr's termination and that Orr cannot bring a retaliation claim because his wife was not a current employee at the time the District suspended and fired him. R.21.

ARGUMENT

Both Toney and Orr state plausible claims for retaliation in the amended complaint.

Under Federal Rule of Civil Procedure 8(a)(2), a civil complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The Supreme Court in *Bell Atlantic Corp. v. Twombly* explained that to survive a motion to dismiss for failure to state a claim, a complaint must "give the defendant fair notice of what

the . . . claim is and the grounds upon which it rests . . . ." 550 U.S. 544, 555 (2007) (alteration in original; internal quotation marks omitted). In *Ashcroft v. Iqbal*, the Court elaborated that the complaint must "contain sufficient factual material, accepted as true, to 'state a claim to relief that is plausible on its face.'" 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570); *see Fowler v. UPMC Shadyside*, 578 F.3d 203, 211 (3d Cir. 2009) ("Under *Twombly* and *Iqbal*, we start with the question of whether [the plaintiff] has made factual allegations that state a plausible ground for relief."). A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678; *see also Phillips v. Cty. of Allegheny*, 515 F.3d 224, 232 (3d Cir. 2008) ("[I]n light of *Twombly*, Rule 8(a)(2) requires a 'showing' rather than a blanket assertion of an entitlement to relief.")

The amended complaint states plausible retaliation claims for both Toney and Orr. The ADEA makes it an unlawful employment practice to "discriminate" against an employee for filing a charge with the EEOC or engaging in other protected activity. 29 U.S.C. § 623(d). The ADEA further provides that "[a]ny person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter." *Id.* § 626(c)(1). The purpose of the ADEA's antiretaliation provision, which uses the same language as in Title VII, is to ensure that employees have "unfettered access to statutory remedial mechanisms" by deterring "the many forms that effective retaliation can take." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 64 (2006) (Title VII case) (internal quotation marks and citations omitted). The Supreme Court has broadly interpreted the antiretaliation provision to cover any action that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.* at 68 (internal quotations marks and

citations omitted).

The Supreme Court held in *Thompson v. North American Stainless* that "the term 'aggrieved' in Title VII" permits anyone with an interest arguably sought to be protected by the statute to sue and that this included the plaintiff, who was fired in retaliation for his fiancée having filed a charge. 562 U.S. 170, 178 (2011); *see also* EEOC *Enforcement Guidance on Retaliation and Related Issues*, at II.B.4, No. 915.004 (August 25, 2016), available at https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm ("Where there is actionable third party retaliation, both the employee who engaged in the protected activity and the third party who is subjected to the materially adverse action may state a claim.").[3]

A. Toney's allegations in the amended complaint state a retaliation claim that is plausible.

Toney stated a plausible claim of retaliation. It is undisputed that she engaged in protected activity by filing a charge. Soon after the District received notice of the charge, it suspended and ultimately fired her husband, Wendell Orr.

The District argues that Toney's claim "fails as a matter of law because third-party retaliation claims can only be brought by the third party. Mr. Orr, not Ms. Toney, is the third party." R.21 (Def. Br. at 8). The District is incorrect. Firing an employee's spouse because of the employee's EEOC charge constitutes unlawful retaliation against the complaining employee—

[3] Although *Burlington Northern* and *Thompson* are Title VII cases, the Third Circuit has recognized that because the antiretaliation provisions of the ADEA, ADA, and Title VII are nearly identical, "precedent interpreting any one of these statutes is equally relevant to interpretation of the others." *Fogleman v. Mercy Hosp.*, 283 F.3d 561, 567 (3d Cir. 2002); *see also Daniels v. Sch. Dist. of Phila.*, 776 F.3d 181, 192-93 (3d Cir. 2015) ("'Because the prohibition against age discrimination contained in the ADEA is similar in text, tone, and purpose to the prohibition against discrimination contained in Title VII, courts routinely look to law developed under Title VII to guide an inquiry under the ADEA.'") (quoting *Barber v. CSX Distribution Servs.*, 68 F.3d 694, 698 (3d Cir.1995)).

here, Toney. Thus, Toney's retaliation claim is not a third-party claim; rather, her claim is that the District unlawfully retaliated against *her* by firing her husband. Her plausible claim therefore depends on a straightforward application of *Burlington Northern*'s test for whether an action is materially adverse—whether the employer's action well might have dissuaded a reasonable worker from making or supporting a charge of discrimination—and not, as the District contends, on "an overly expansive reading of our Supreme Court's decision in *Thompson*." *See* R.21 (Def. Br. at 7). The District, however, omits *Burlington Northern* from its brief.

A reasonable employee would be less likely to file an EEOC charge if she knew that doing so would lead her former employer to fire her husband, satisfying the *Burlington Northern* objective standard for a retaliation claim. *Thompson*, 562 U.S. at 174 ("We think it obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiance would be fired."); *Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 568-69 (3d Cir. 2002) ("There can be no doubt that an employer who retaliates against the friends and relatives of employees who initiate antidiscrimination proceedings will deter employees from exercising their protected rights."). As *Thompson* and *Fogleman* make clear, the harm to Toney need not be connected to her own employment. "An employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm *outside* the workplace." *See Burlington Northern*, 548 U.S. at 63.

And although economic harm is not required to satisfy the *Burlington Northern* standard, Toney experienced economic injury directly traceable to Orr's suspension and termination because Toney's and Orr's economic fates are linked as a married couple—Orr losing his job caused direct economic harm to both himself and Toney. Their relationship allowed the District to harm her by firing him. Consequently, Toney's amended complaint states a claim for unlawful

retaliation under the ADEA.

Toney has a plausible retaliation claim even though she is no longer an employee of the District. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997). In *Robinson*, the Supreme Court interpreted the term "employee" in Title VII to include former employees because that interpretation is "more consistent with the broader context of Title VII and the primary purpose of [the antiretaliation provision]." *Id.* This purpose— "[m]aintaining unfettered access to statutory remedial mechanisms"— would be undermined were an employer "able to retaliate with impunity against an entire class of acts under Title VII—for example, complaints regarding discriminatory termination." *Id.*

The District seems to allow that former employees can sue for retaliation but maintains that the "limited circumstances" where former employees can pursue retaliation claims "are not present here" because it made no "effort to harm [Toney's] pursuit of employment opportunities." R.21 (Def. Br. at 8). In making this argument, the District relies on a district court case requiring that the retaliation result in harm to the plaintiff's future employment opportunities to be actionable. *See id.* (citing *Downs v. Schwarz*, No. 14-630, 2015 WL 4770711, at *11 (W.D. Pa. Aug. 12, 2015)). *Downs*, and several other district court opinions, rely on outdated Third Circuit precedent to hold that post-employment adverse actions in ADEA or Title VII retaliation claims must affect the plaintiff's future employment opportunities to be actionable. *See Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1300-01 & n.15 (3d Cir. 1997) ("*City of Pittsburgh*"), and *Boandl v. Geithner*, 752 F. Supp. 2d 540, 567 (E.D. Pa. 2010), (both citing *Nelson v. Upsala Coll.*, 51 F.3d 383, 388 (3d Cir. 1995), and *Charlton v. Paramus Bd. of Educ.*, 25 F.3d 194, 200-01 (3d Cir. 1994)).

City of Pittsburgh, *Nelson*, *Charlton*, and this line of more recent district court cases have

all been abrogated by *Burlington Northern*, which held that Title VII's antiretaliation provision must be construed to cover a broad range of employer conduct. "[T]he antiretaliation provision, unlike the substantive provision, is not limited to discriminatory actions that affect the terms and conditions of employment." *Burlington Northern*, 548 U.S. at 64. Because "[a] provision limited to employment-related actions would not deter the many forms that effective retaliation can take," the Supreme Court concluded in *Burlington Northern*, "Title VII's substantive provision and its antiretaliation provision are not coterminous." *Id.* at 64, 67. The Third Circuit has acknowledged the abrogation of the "employment-related" test. *See Moore v. City of Philadelphia*, 461 F.3d 331, 341 (3d Cir. 2006) (recognizing under *Burlington Northern* that the Supreme Court disagreed with the formulation adopted in *City of Pittsburgh*, and holding that retaliation extends beyond workplace-related conduct or employment-related retaliatory acts and harm).

Because former employees can pursue retaliation claims, and because "firing a close family member will almost always meet the *Burlington* standard [for adverse action]," *Thompson*, 562 U.S. at 868, Toney's amended complaint states a retaliation claim that is plausible.

B. Orr's retaliation claim as articulated in the amended complaint is also plausible.

Orr also states a plausible claim of retaliation in the amended complaint. The ADEA, like Title VII, provides a cause of action for a "person aggrieved" by an employer's unlawful employment practice. 29 U.S.C. § 626(c)(1). The Supreme Court held in *Thompson* that a plaintiff may sue under Title VII if he falls within a "zone of interests" arguably sought to be protected by the statute. 562 U.S. at 177. In alleging that the District suspended and fired Orr from his job shortly after the District received Toney's charge of discrimination, Orr has alleged

he was aggrieved by the District's unlawful practice, thus articulating a plausible third-party retaliation claim. Orr may pursue his own retaliation claim, as did the plaintiff in *Thompson*, because he falls within the "zone of interests" sought to be protected by the ADEA. *Thompson*, 562 U.S. at 177. Orr was an employee of the District, and "the purpose of [the ADEA] is to protect employees from their employers' unlawful actions." *Id.* at 178. Orr "is not an accidental victim of the retaliation. . . . To the contrary, injuring him was the employer's intended means of harming [Toney]. Hurting him was the unlawful act by which the employer punished her. In those circumstances, [Orr] was well within the zone of interests sought to be protected by [the ADEA]." *Id.*

The District does not appear to dispute this but argues that Orr's retaliation claim must be dismissed because "retaliation was not possible: Ms. Toney was no longer employed when actions were taken against Mr. Orr." R.21 (Def. Br. at 9). As discussed, *Robinson* permits former employees to sue for retaliation. And *Thompson* imposes no restriction that an adverse action need occur during the employment relationship of the party who engaged in the protected conduct. The interest in protecting employees from acts that may deter charge filing, testimony, and cooperation in EEOC investigative proceedings, or other statutorily protected activity applies equally after the person is no longer employed.

Under *Burlington Northern*, *Thompson*, and *Robinson*, if the facts alleged by Toney and Orr are true, the District's suspension and firing of Orr constituted unlawful retaliation and both plaintiffs may recover for the resulting harm.

CONCLUSION

For the reasons stated above, the EEOC urges this Court to deny the District's motion to dismiss.

Respectfully submitted,

JAMES L. LEE
Deputy General Counsel

JENNIFER S. GOLDSTEIN
Associate General Counsel

ANNE NOEL OCCHIALINO
Acting Assistant General Counsel

JULIE L. GANTZ
Attorney

U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Office of General Counsel
131 M St. N.E., 5th Floor
Washington, D.C. 20507

DEBRA M. LAWRENCE
Regional Attorney

RONALD L. PHILLIPS
Supervisory Trial Attorney

/s/ Catherine N. Sellers

CATHERINE N. SELLERS
Senior Trial Attorney
WA Bar No. 44563
EEOC – Baltimore Field Office
George H. Fallon Federal Building
31 Hopkins Plaza, Suite 1432
Baltimore, MD 21201
Phone: (410) 209-2233
Fax: (410) 209-2221
catherine.sellers@eeoc.gov

February 20, 2018

CERTIFICATE OF SERVICE

I, Catherine Sellers, hereby certify that I filed the foregoing brief using the court's CM/ECF filing system this 20th day of February 2018, and notice was sent to the parties registered as counsel in this case through the CM/ECF system.

/s/ Catherine N. Sellers

CATHERINE N. SELLERS
Senior Trial Attorney
EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
WA Bar No. 44563
EEOC – Baltimore Field Office
George H. Fallon Federal Building
31 Hopkins Plaza, Suite 1432
Baltimore, MD 21201
Phone: (410) 209-2233
Fax: (410) 209-2221
catherine.sellers@eeoc.gov