

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

3
4 August Term 2006

5
6 (Argued: February 9, 2007

Decided: July 7, 2008)

7
8 Docket No. 06-0474-cv

9 -----x
10 LEONYER M. RICHARDSON,

11
12 Plaintiff-Appellant,

13
14 -- v. --

15
16 COMMISSION ON HUMAN RIGHTS & OPPORTUNITIES, OFFICE OF
17 POLICY AND MANAGEMENT, CYNTHIA WATTS ELDER, LEANNE
18 APPLETON, LINDA YELMINI, DONALD BARDOT and
19 ADMINISTRATIVE AND RESIDUAL EMPLOYEES UNION,

20
21 Defendants-Appellees.

22
23 -----x
24
25 B e f o r e : WALKER, SACK, and WESLEY, Circuit Judges.

26 Appeal by Plaintiff-Appellant Leonyer M. Richardson from an
27 amended judgment of the United States District Court for the
28 District of Connecticut (Alfred V. Covello, Judge) granting
29 Defendants-Appellees' motions for summary judgment and dismissing
30 Richardson's suit in its entirety.

31 AFFIRMED.

32 JOSEPHINE S. MILLER, Danbury,
33 CT, for Plaintiff-Appellant.

34
35 JOSEPH A. JORDANO, Assistant
36 Attorney General of the State
37 of Connecticut, (Richard
38 Blumenthal, Attorney General,
39 David M. Teed, Assistant
40 Attorney General, on the

1 brief), Hartford, CT, for
2 Defendants-Appellees CHRO,
3 OPM, Watts Elder, Appleton,
4 Yelmini, and Bardot.

5
6 JAMES M. SCONZO, Jordan Burt
7 LLP, Simsbury, CT, for
8 Defendant-Appellee Residual
9 Employees Union Local 4200.

10 JOHN M. WALKER, JR., Circuit Judge:

11 We are asked to decide whether Title VII of the Civil Rights
12 Act of 1964 forbids the inclusion of an election-of-remedies
13 provision in a collective bargaining agreement, cf. EEOC v.
14 SunDance Rehab. Corp., 466 F.3d 490, 497 (6th Cir. 2006), or, in
15 the alternative, whether adherence to that provision constitutes
16 discrimination. The Equal Employment Opportunity Commission
17 ("EEOC") says that it does. The Connecticut Commission on Human
18 Rights and Opportunities ("CHRO"), not incidentally also a
19 defendant in this action, assures us that the EEOC is wrong.

20 We conclude that the law governing contracts that purport to
21 release or waive Title VII rights is independent of the law
22 governing employer actions taken in retaliation for, and intended
23 to deter, employee opposition to unlawful employment practices,
24 including the filing of charges with the EEOC or its state
25 analogues. In analyzing the former, we apply Alexander v.
26 Gardner-Denver Co., 415 U.S. 36, 45 (1974), and its progeny. In
27 analyzing the latter, we apply the anti-retaliation provision of
28 Title VII, 42 U.S.C. § 2000e-3(a), and cases interpreting its

1 scope, see, e.g., Burlington N. & Santa Fe Ry. Co. v. White, 548
2 U.S. 53 (2006).

3 While there are limits on what a union may agree to in
4 collective bargaining, Plaintiff's union has not transgressed
5 them by contracting to limit an employee's legal recourse under
6 certain circumstances. The collective bargaining agreement about
7 which Plaintiff complains simply stipulates that an aggrieved
8 employee may either arbitrate her grievance or file a charge with
9 the CHRO describing that grievance.

10 Nor did the union discriminate against Plaintiff by adhering
11 to the election-of-remedies provision after Plaintiff chose to
12 file a charge with the CHRO. The union's choice to adhere to its
13 collective bargaining agreement in this case was indubitably non-
14 discriminatory: the collective bargaining agreement does not
15 constitute a waiver of any statutory rights under Gardner-Denver,
16 and the defendants' withdrawal from arbitration did not
17 constitute retaliation because the forum-selection clause was a
18 reasonable defensive measure to avoid duplicative proceedings in
19 the two fora Richardson's employer maintained for addressing
20 discrimination complaints. See United States v. N.Y. City
21 Transit Auth., 97 F.3d 672 (2d Cir. 1996).

22 For these reasons, and because Plaintiff's remaining Title
23 VII claims are groundless, we affirm the judgment of the district
24 court.

1 **BACKGROUND**

2 Plaintiff-Appellant Leonyer M. Richardson, an African-
3 American woman, was employed by the state of Connecticut for more
4 than fifteen years. This appeal concerns the circumstances of
5 her termination and subsequent efforts to arbitrate its
6 legitimacy.

7 In 2000, Richardson transferred from the Connecticut Office
8 of Policy and Management ("OPM") to the CHRO, joining the CHRO as
9 a fiscal administrative officer. Shortly thereafter, she had a
10 series of vituperative interactions with Leanne Appleton, her
11 immediate supervisor at the CHRO, the most notable of which was a
12 dispute concerning the proper method of making bank deposits.
13 Richardson complained that Appleton's demand that Richardson
14 adhere to what Appleton claimed were proper procedures was
15 "retaliation on Leanne Appleton's part."

16 After airing her grievances internally on several occasions,
17 on July 30, 2001, Richardson filed a charge with the CHRO, which
18 was not only Richardson's employer but also the state analogue to
19 the EEOC. In her charge, Richardson alleged both disparate
20 treatment and retaliation by Appleton. Between July 30 and
21 October 16, 2001, the conflict between Richardson and Appleton
22 escalated both in intensity and breadth: On October 3, 2001,
23 Richardson amended her CHRO charge to further allege that a
24 second CHRO employee, Cynthia Watts Elder, who supervised

1 Appleton and Richardson, had retaliated against her for
2 complaining about Appleton. Finally, on October 16, 2001, Watts
3 Elder terminated Richardson's employment with the CHRO.

4 Richardson thereupon sought the assistance of her union,
5 Administrative and Residual Employees Union Local 4200 ("Local
6 4200"), in grieving her termination. In the interim, however,
7 Richardson again amended her CHRO charge, adding an allegation
8 that Watts Elder had only terminated her "for the purpose of
9 [further] retaliating against [her]."

10 As the district court explained, "[u]pon discovering that
11 Richardson had amended her . . . complaint against CHRO to
12 include an allegation of race discrimination regarding her
13 termination, Richardson's union . . . withdrew its appeal of her
14 grievance, as complaints of unlawful discrimination filed with
15 CHRO are not subject to arbitration under the union contract."
16 And, indeed, Article 15, Section 10(a)(2), a provision of the
17 collective bargaining agreement (CBA) that governs the
18 relationship between Local 4200 and the CHRO and the one that is
19 at the center of this dispute, stipulates that

20 disputes over claimed unlawful discrimination shall be
21 subject to the grievance procedure but shall not be
22 arbitrable if a complaint is filed with the Commission
23 on Human Rights and Opportunities arising from the same
24 common nucleus of operative fact.¹

1 ¹ Plaintiff-Appellant has submitted two copies of this
2 collective bargaining agreement. The second copy ostensibly
3 provides that "disputes over claimed unlawful discrimination" are

1 Richardson filed yet another charge with the CHRO on April 9,
2 2002, alleging this time that Local 4200's refusal to seek
3 arbitration of her grievance constituted an independent act of
4 retaliation.²

5 In a state like Connecticut that has an analogue to the
6 EEOC, an aggrieved employee must first file with the state agency
7 any charge she wishes to pursue in federal court. See 42 U.S.C.
8 § 2000e-5(c). However, in many of these states, including
9 Connecticut, any such charge is automatically cross-filed with
10 the EEOC. Lewis v. Conn. Dep't of Corr., 355 F. Supp. 2d 607,
11 615 n.4 (D. Conn. 2005) (discussing Connecticut); App. 1037
12 (charge against Local 4200 shared by CHRO with EEOC); see, e.g.,
13 Ford v. Bernard Fineson Dev. Ctr., 81 F.3d 304, 307 (2d Cir.
14 1996) (discussing New York).

15 Thus, both the CHRO and the EEOC responded to Richardson's
16 various charges. On March 15, 2002, the CHRO found that
17 Richardson had not been "subjected to any adverse treatment on

1 arbitrable until the "CHRO has held a formal hearing on the
2 issue." While this difference is quite possibly material, as it
3 is not clear on the record before us whether the union withdrew
4 its appeal of Richardson's grievance before or after the CHRO
5 held a formal hearing on her complaint, we credit the first copy
6 of the collective bargaining agreement, as it is the only copy
7 bearing a date stamp or a title page, and it is the copy upon
8 which the district court relied.

1 ² She also filed a similar charge on April 9, 2002 against
2 OPM. OPM negotiated the collective bargaining agreement with
3 Local 4200.

1 the basis of [her] membership in a protected class." On
2 September 4, 2002, the CHRO found that Local 4200 had not
3 retaliated against Richardson. Finally, on April 1, 2003, the
4 EEOC determined, to the contrary, that "Article 15, Section 10 of
5 the collective bargaining agreement violate[d] Title VII."

6 After thus exhausting her administrative remedies,
7 Richardson filed this suit in federal district court against the
8 CHRO, Appleton, Watts Elder, OPM, Linda Yelmini and Donald Bardot
9 (both of whom were at all relevant times labor specialists in
10 OPM), and Local 4200, claiming violations of Title VII, as well
11 as 42 U.S.C. §§ 1981 and 1983, the Connecticut Fair Employment
12 Practices Act, and the Connecticut Constitution. In a thorough
13 opinion dated March 31, 2005, the United States District Court
14 for the District of Connecticut (Alfred V. Covello, Judge)
15 granted the motions for summary judgment of defendants CHRO,
16 Appleton, Watts Elder, OPM, Yelmini and Bardot. The district
17 court dismissed Richardson's Title VII disparate treatment claim
18 against the CHRO because the CHRO had "sufficiently rebutted the
19 inference of discrimination raised by the plaintiff's prima facie
20 case," and Richardson had not adduced evidence that the CHRO's
21 reasons for disciplining her were merely pretextual. The
22 district court dismissed her Title VII retaliation claim against
23 the CHRO for similar reasons, finding that the CHRO had "a
24 legitimate non-discriminatory reason for the alleged retaliation,

1 'namely insubordination, poor performance, and violence in the
2 workplace.'" "

3 The district court also dismissed Richardson's Title VII
4 retaliation claim against OPM. The district court held that the
5 collective bargaining agreement "does not violate the [Federal
6 Arbitration Act], and it cannot give rise to an inference that
7 OPM, by enforcing the terms of the [agreement], was motivated by
8 a discriminatory animus."³ The district court did not address
9 Richardson's Title VII retaliation claim against Local 4200.

10 On November 23, 2005, the district court granted
11 Richardson's motion for a corrected judgment in order to address
12 that claim. The district court noted that "[t]he Union proceeded
13 according to [the collective bargaining agreement] . . . and the
14 record is void of any evidence of discrimination." It thereupon
15 granted Local 4200's motion for summary judgment.

16 On appeal, Richardson argues principally that the provision
17 of the collective bargaining agreement invoked by Local 4200 to
18 justify its refusal to seek arbitration of her grievance violates

1 ³ Finally, the district court dismissed Richardson's various
2 state law and constitutional claims against individual defendants
3 Appleton, Watts Elder, Yelmini, and Bardot. Richardson does not
4 meaningfully contest the district court's dismissal of her claims
5 against Appleton and Watts Elder, and we therefore affirm the
6 district court's judgment in that respect. See United States v.
7 Restrepo, 986 F.2d 1462, 1463 (2d Cir. 1993). Moreover,
8 Richardson's claims against Yelmini and Bardot were not
9 adequately briefed below, and we decline to consider them here.
10 See Gwozdzinsky v. Magten Asset Mgmt. Corp., 106 F.3d 469, 472
11 (2d Cir. 1997).

1 Title VII. She also briefly contests the district court's
2 summary judgment in the CHRO's favor with respect to her
3 disparate treatment and retaliation claims. It is, however, to
4 her first, and more substantial, argument that we initially turn.

5 ANALYSIS

6 I. A Brief History of the Enforcement Mechanisms of Title VII

7
8 Title VII of the Civil Rights Act of 1964 ("Title VII" or
9 "the Act"), 42 U.S.C. § 2000e et seq., forbids employment
10 discrimination on the basis of "race, color, religion, sex, or
11 national origin," see 42 U.S.C. § 2000e-2(a). The Act authorizes
12 the EEOC "to prevent any person from engaging in any unlawful
13 employment practice" forbidden by Title VII. See 42 U.S.C. §
14 2000e-5(a). It also permits an "alternative enforcement
15 procedure," Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 361
16 (1977): the filing of a lawsuit in federal court by an aggrieved
17 employee, 42 U.S.C. § 2000e-5(f)(1). See generally Gen. Tel. Co.
18 of the Nw., Inc. v. EEOC, 446 U.S. 318, 326 (1980).

19 As the Supreme Court has explained, "Title VII sets forth an
20 integrated, multistep enforcement procedure [designed] . . . to
21 detect and remedy instances of discrimination." EEOC v. Shell
22 Oil Co., 466 U.S. 54, 62 (1984) (internal quotation marks
23 omitted). The EEOC strives to conciliate employers and aggrieved
24 employees, cf. Occidental Life, 432 U.S. at 368 (describing EEOC
25 enforcement as "informal [and] noncoercive"), and acts primarily

1 to vindicate the public interest, see Gen. Tel. Co., 446 U.S. at
2 326 (noting that in vesting the EEOC with its powers "Congress
3 sought to implement the public interest"). While the EEOC may
4 bring actions in federal court if it is unable to secure an
5 acceptable conciliation agreement, see 42 U.S.C. § 2000e-5(f)(1),
6 an aggrieved employee may also bring such a lawsuit himself,
7 which "redresses his own injury [and] vindicates the important
8 congressional policy against discriminatory employment
9 practices," Gardner-Denver, 415 U.S. at 45.⁴

10 Thus, Title VII contemplates two distinct enforcement
11 mechanisms, but the trigger for each is the same: the filing of a
12 charge with the EEOC by an aggrieved employee.⁵ Indeed, in
13 structuring Title VII, Congress counted "on employee initiative."
14 Jute v. Hamilton Sundstrand Corp., 420 F.3d 166, 174-75 (2d Cir.
15 2005).

16 Because a crafty employer might seek to dissuade aggrieved

1 ⁴ See also EEOC v. Cosmair, Inc., L'Oreal Hair Care Div., 821
2 F.2d 1085, 1089 (5th Cir. 1987); cf. EEOC v. Waffle House, Inc.,
3 534 U.S. 279, 296 (2002); Gilmer v. Interstate/Johnson Lane
4 Corp., 500 U.S. 20, 28 (1991).

1 ⁵ Compare EEOC v. Superior Temp. Servs., Inc., 56 F.3d 441,
2 444 (2d Cir. 1995) (noting that under 42 U.S.C. § 2005e-6(e) the
3 EEOC may only investigate an employer on its motion in cases
4 concerning "a pattern or practice of discrimination"), with
5 Williams v. N.Y. City Hous. Auth., 458 F.3d 67, 69 (2d Cir. 2006)
6 (per curiam) ("Before an individual may bring a Title VII suit in
7 federal court, the claims forming the basis of such a suit must
8 first be presented in a complaint to the EEOC or the equivalent
9 state agency.").

1 employees from filing charges with the EEOC -- and thereby
2 shortcircuit both enforcement mechanisms -- employees potentially
3 aggrieved under Title VII are protected from interference in two
4 principal (and perhaps distinct) ways.⁶ First, in the "anti-
5 retaliation provision," Congress explicitly forbade
6 "discrimination" against an employee (1) who "has opposed any
7 practice made an unlawful employment practice by [Title VII]" or
8 (2) who "has made a charge, testified, assisted, or participated
9 in any manner in an investigation, proceeding, or hearing under
10 [Title VII]," 42 U.S.C. § 2000e-3(a). See, e.g., Kessler v.
11 Westchester County Dep't of Soc. Servs., 461 F.3d 199, 205-06 (2d
12 Cir. 2006). Second, courts have inferred from the purpose and
13 structure of Title VII a requirement -- what we will call the
14 "Gardner-Denver doctrine" -- that any release or waiver of Title
15 VII meet certain requirements, including that "a collective
16 bargaining agreement[, as opposed to an individually bargained
17 employment contract] not waive covered workers' rights to a
18 judicial forum for causes of action created by Congress." Pyett

1 ⁶ Courts have also sought to protect potentially aggrieved
2 employees in other ways. For instance, while an employee must
3 usually file a charge with the EEOC before filing suit in federal
4 court, we have waived this administrative exhaustion requirement
5 with respect to retaliation claims. As we have explained, "[t]he
6 more effective an employer was at using retaliatory means to
7 scare an employee into not filing future EEO complaints, the less
8 likely the employee would be able to hold the employer liable for
9 that retaliation because the less likely the employee would risk
10 filing an EEO complaint as to the retaliation." Terry v.
11 Ashcroft, 336 F.3d 128, 151 (2d Cir. 2003).

1 v. Penn. Bldg. Co., 498 F.3d 88, 91 n.3 (2d Cir. 2007); cf.
2 Rogers v. N.Y. Univ., 220 F.3d 73, 75 (2d Cir. 2000) (per
3 curiam). Moreover, even with respect to individually bargained
4 agreements, courts require that any such release or waiver be
5 knowing and voluntary, see, e.g., Bormann v. AT&T Commc'ns, Inc.,
6 875 F.2d 399, 402-03 (2d Cir. 1989), and some circuits have
7 outright forbidden any release or waiver of the right to file a
8 charge with the EEOC, see, e.g., SunDance, 466 F.3d at 498
9 (collecting cases).

10 Both the anti-retaliation provision and the Gardner-
11 Denver doctrine are meant to prevent discrimination; and
12 contribute to doing so by ensuring "unfettered access to
13 statutory remedial mechanisms," Robinson v. Shell Oil Co., 519
14 U.S. 337, 346 (1997). For this reason, the Second Circuit has
15 construed them both quite broadly.⁷ Compare Bormann, 875 F.2d at
16 403 (applying an "apparently more stringent" standard to waiver
17 or release), and Pyett, 498 F.3d at 93-94 (union may not waive
18 right to sue on behalf of members), with Runyan v. Nat'l Cash
19 Register Corp., 787 F.2d 1039, 1044 n.10 (6th Cir. 1986) (en
20 banc) (applying "ordinary contract principles" to waiver or
21 release), and Austin v. Owens-Brockway Glass Container, Inc., 78

1 ⁷ For instance, we have held that an employee is protected
2 from retaliation even if he opposes a lawful employment practice,
3 so long he reasonably believed that the practice was unlawful.
4 Manoharan v. Columbia Univ. Coll. of Physicians & Surgeons, 842
5 F.2d 590, 593 (2d Cir. 1988).

1 F.3d 875, 880-86 (4th Cir. 1996) (union waiver of right to sue
2 valid).

3 **II. Richardson's Collective Bargaining Agreement**

4 **A. The Difference Between the Gardner-Denver Doctrine and** 5 **the Anti-Retaliation Provision in This Case**

6 Richardson argues that Article 15, Section 10 of the
7
8 collective bargaining agreement violates the anti-retaliation
9 provision of Title VII. Appellant's Br. at 5 ("[T]he contract
10 clause at issue in this case constitute[s] a prima facie case of
11 forbidden retaliation."); id. at 16 (arguing that the collective
12 bargaining agreement reflects "a retaliatory policy"). Because
13 Richardson has misperceived the relationship between the Gardner-
14 Denver doctrine and the anti-retaliation provision, we pause to
15 explain the ways in which they may overlap, and the substantial
16 ways in which they do not.

17
18 While both the anti-retaliation provision and the Gardner-
19 Denver doctrine assure "the EEOC's ability to investigate and
20 select cases from a broad sample of claims," see Waffle House,
21 534 U.S. at 296 n.11; supra (discussing how ensuring access to
22 statutory mechanisms prevents discrimination), each works in a
23 different way. Broadly speaking, the anti-retaliation provision
24 protects employees from particular acts of discrimination that
25 are retaliatory. Indeed, the anti-retaliation provision forbids
26 only "discrimination." See United States v. N.Y. City Transit
27 Auth. (NYC Transit), 97 F.3d 672, 677 (2d Cir. 1996) ("[I]t is

1 important to remember that what the statute actually prohibits is
2 discrimination."). And discrimination claims require courts to
3 consider in detail such variables as the intent of the employer⁸
4 and how the employer's actions have affected the employee.⁹ The
5 Gardner-Denver doctrine, by contrast, protects employees from
6 certain kinds of company policies that violate Title VII. See,
7 e.g., Cosmair, 821 F.2d at 1089-90 (holding that waiver of right
8 to file charge with EEOC is void as against public policy). As
9 the following analysis demonstrates, the election-of-remedies
10 provision in this case violates neither the Gardner-Denver
11 doctrine nor the anti-retaliation provision of Title VII.

12 **B. Article 15, Section 10 of Richardson's collective-**
13 **bargaining agreement does not violate the Gardner-**
14 **Denver doctrine.**
15

16 The Gardner-Denver doctrine does not preclude a union and an

1 ⁸ See Jute, 420 F.3d at 173 (noting that employee must
2 ultimately show retaliatory motive); cf. James v. N.Y. Racing
3 Ass'n, 233 F.3d 149, 153-54 (2d Cir. 2000) (noting under Title
4 VII's substantive provisions that "[t]he ultimate burden of
5 persuading the trier of fact that the defendant intentionally
6 discriminated . . . remains at all times with the plaintiff")
7 (emphasis added) (alteration in original).

1 ⁹ See Burlington, 548 U.S. at 69 (holding that "the
2 significance of any given act of retaliation will often depend
3 upon the particular circumstances") (emphasis added); see, e.g.,
4 id. (noting that "[a] schedule change . . . may make little
5 difference to many workers, but may matter enormously to a young
6 mother with school age children"); see also Oncale v. Sundowner
7 Offshore Servs., 523 U.S. 75, 81-82 (1998) ("The real social
8 impact of workplace behavior often depends on a constellation of
9 surrounding circumstances, expectations, and relationships . . .
10 ."); Joseph v. Leavitt, 465 F.3d 87, 95 (2d Cir. 2006) (Jacobs,
11 J., concurring).

1 employer from agreeing that employees must forego their right to
2 arbitrate a grievance if they bring a lawsuit in federal court
3 arising out of the same facts. In Gardner-Denver, the Supreme
4 Court said in dicta that "there can be no prospective waiver of
5 an employee's rights under Title VII." 415 U.S. at 51.¹⁰ While
6 we have acknowledged the uncertain descriptive power of this
7 dicta, see Fayer v. Town of Middlebury, 258 F.3d 117, 122 (2d
8 Cir. 2001) (noting the tension "between the cases denying
9 preclusive effect to collective bargaining arbitrations, on the
10 one hand, and the cases holding individual arbitration agreements
11 enforceable as against federal statutory and constitutional
12 claims, on the other"), Article 15, Section 10 passes muster even
13 under this formulation of the Gardner-Denver doctrine.

14 Richardson remained free to file a charge with the EEOC, as she
15 did, and to pursue a Title VII action in federal court, as she
16 has. She did not prospectively waive any of her Title VII
17 rights, nor did her union do so on her behalf.

18 In fact, Article 15, Section 10 is a rather sensible outcome
19 of the collective bargaining process. It makes sense that an
20 employer might not wish to "retain legal counsel to deal with
21 discrimination claims and take other steps reasonably designed to

1 ¹⁰ We consider this statement dicta because Gardner-Denver
2 concerned only whether "arbitration of contract-based claims
3 precluded subsequent judicial resolution of statutory claims."
4 See Gilmer, 500 U.S. at 35.

1 prepare for and assist in the defense” of a lawsuit while
2 simultaneously preparing for an arbitration hearing on the same
3 issue. Cf. NYC Transit, 97 F.3d at 677. And it also makes sense
4 that a union might want to deploy its scarce resources
5 selectively.

6 **C. Article 15, Section 10 of Richardson’s collective-**
7 **bargaining agreement does not violate the anti-**
8 **retaliation provision.**

9
10 Richardson argues that whether or not the election-of-
11 remedies provision violates Gardner-Denver, her union’s decision
12 to adhere to that provision after she filed a charge with the
13 CHRO constituted discrimination. As we have explained, “[t]o
14 establish a prima facie case of retaliation, an employee must
15 show [1] participation in a protected activity known to the
16 defendant; [2] an employment action disadvantaging the plaintiff;
17 and [3] a causal connection between the protected activity and
18 the adverse employment action.” Quinn v. Green Tree Credit
19 Corp., 159 F.3d 759, 769 (2d Cir. 1998) (internal quotation marks
20 omitted). Richardson’s claim fails because she has not made a
21 prima facie showing that either agreeing to or adhering to the
22 election-of-remedies provision constitutes an adverse employment
23 action by either her employer or her union.

24 NYC Transit discusses the “adverse employment action”
25 element of a retaliation claim in a context very similar to the
26 one presented here. In that case, defendant-employer New York

1 City Transit Authority ("Transit Authority") established an Equal
2 Employment Opportunity Division to "handle[] employee
3 discrimination complaints through informal settlement and
4 mediation proceedings." 97 F.3d at 674. As a matter of formal
5 policy, however, that forum would refuse to consider a complaint
6 once it became the subject of a lawsuit against the Transit
7 Authority or a "charge filed with a city, state, or federal anti-
8 discrimination agency;" such claims would be handled by the
9 Transit Authority's Law Department. Id. Plaintiffs alleged that
10 this policy constituted "an 'adverse employment action' within
11 the meaning of Title VII," and the court opined that this was
12 "the only question" in the case. Id. at 677.

13 At the outset, the court noted its reluctance to interpret
14 the term "adverse" broadly in the context of an employer's
15 litigation of discrimination claims, observing that, "[a]t some
16 level of generality, any action taken by an employer for the
17 purpose of defending against the employee's charge can be
18 characterized as adverse to the employee." Id. It ultimately
19 upheld the policy, holding that "[r]easonable defensive measures
20 do not violate the anti-retaliation provision of Title VII, even
21 though such steps are adverse to the charging employee and result
22 in differential treatment." Id. The court found that the
23 Transit Authority's policy constituted such a reasonable measure
24 because, inter alia, it "avoid[ed] parallel and duplicative

1 proceedings," in the Equal Employment Opportunity and the Law
2 Department, thus allowing the employer's counsel to render
3 effective advice through centralized administration of its
4 litigation. Id. The court also noted that the Transit
5 Authority's defensive measures "d[id] not affect the
6 complainant's work, working conditions, or compensation," and
7 that its "control over the handling of claims against it serve[d]
8 several essential purposes that have nothing to do with
9 retaliation, malice, or discrimination." Id.

10 The policy embodied by the CBA's election-of-remedies
11 provision also avoids duplicative proceedings in the two fora
12 maintained by the employer for adjudicating claims of
13 discrimination without affecting a complainant's work, working
14 conditions, or compensation. It does not foreclose other avenues
15 of relief, such as the right to pursue claims in federal court
16 which was at issue in Gardner-Denver, or the right to pursue
17 claims with non-CHRO bodies such as the EEOC. Indeed, the CBA
18 does not appear even to foreclose subsequent filing of claims
19 with the CHRO. CBA art. 15, § 10 ("[D]isputes over claimed
20 unlawful discrimination shall be subject to the grievance
21 procedure but shall not be arbitrable if a complaint is filed
22 with the [CHRO] arising from the same common nucleus of operative
23 fact." (emphasis added)). It only requires that the employee
24 make a concrete choice, at a specific time, between filing a

1 state claim with the CHRO and having the union pursue his or her
2 grievance in arbitration.

3 Accordingly, the election-of-remedies provision seems to
4 qualify as a "reasonable defensive measure" utilized by
5 Richardson's employer to litigate discrimination claims brought
6 against it effectively and efficiently, and plaintiff fails to
7 persuade us otherwise. Richardson only attempts to distinguish
8 NYC Transit on the ground that complainants here "have a
9 contractual or other entitlement to 'internal claims-handling
10 procedures.'" Appellant's Br. at 7. This entitlement, however,
11 is subject to the employer's permissible, non-discriminatory
12 defensive measures by virtue of the same contract that creates
13 the entitlement: Richardson has no contractual right to internal
14 arbitration if she has filed a charge with the CHRO. Because
15 Richardson has failed to distinguish NYC Transit, she has failed
16 to establish that her employer committed an adverse employment
17 action, an indispensable element of a prima facie case of
18 retaliation under Title VII.

19 It follows from this conclusion that the union's withdrawal
20 from arbitration once Richardson filed her CHRO charge does not
21 constitute an adverse employment action on the union's part. The
22 union had no contractual obligation to continue pursuing
23 arbitration in those circumstances; indeed, it was contractually
24 obligated to desist. In addition, it would have been futile for

1 the union to continue to arbitrate because the employer was
2 relieved of its contractual obligation to arbitrate once
3 Richardson filed her claim, and it refused to arbitrate under
4 such circumstances as a matter of policy. We cannot conclude
5 that the union's refusal to persist in a futile act, where the
6 futility is attributable entirely to an employer's reasonable
7 defensive measures, constituted an adverse employment action.
8 Accordingly, Richardson has failed to establish a prima facie
9 case of retaliation as to the union.

10 Johnson v. Palma, 931 F.2d 203 (2d Cir. 1991), is not to the
11 contrary. We did decide, in that case, that a union's "refusal
12 to proceed with the grievance process" constituted an adverse
13 employment action, even though the employer in Johnson also had a
14 policy of discontinuing internal grievance proceedings once an
15 employee filed a charge with the state anti-discrimination
16 agency. Id. at 206-7. The decision in Johnson, however, was
17 premised on the assumption that the employer, by implementing the
18 policy in question, also violated Title VII's retaliatory
19 provision. Id. at 208 ("We think a plaintiff establishes
20 retaliation by showing that the union acquiesces in a company
21 policy that abridges the statutory rights of the plaintiff.").
22 In light of NYC Transit, decided several years after Johnson,
23 such an assumption is not tenable in this case where the
24 employer—the State of Connecticut—employed a reasonable defensive

1 measure to avoid duplicative litigation in the two fora it
2 maintained for addressing claims. Furthermore, we have
3 interpreted Johnson as “hold[ing] that a union’s abandonment of a
4 grievance that the union has a contractual responsibility to
5 pursue on the employee’s behalf amounts to an adverse employment
6 action.” NYC Transit, 97 F.3d at 678. As discussed above, the
7 union had no such obligation here.

8 Richardson also relies on EEOC v. Board of Governors, 957
9 F.2d 424 (7th Cir. 1992). In that case, an employer refused to
10 continue with internal grievance proceedings after its employee
11 filed a charge with the EEOC. The grievance proceedings were
12 established by a collective bargaining agreement, which also
13 provided that the employer “ha[d] no obligation to entertain or
14 proceed further with . . . [a] grievance procedure” if the
15 aggrieved employee filed a charge with any non-arbitral body,
16 such as the EEOC. Id. at 426. In finding that the employer’s
17 action violated the ADEA, the Seventh Circuit held that “[a]
18 collective bargaining agreement may not provide that grievances
19 will proceed to arbitration only if the employee refrains from
20 participating in protected activity under the ADEA.” Id. at 431.

21 Our case law does not permit us to follow this holding on
22 the facts of this case. In reaching its conclusion, the Board of
23 Governors court assumes, without explanation, that an employer’s
24 decision to withdraw from arbitration constitutes an adverse

1 employment action, even though the language of the CBA explicitly
2 authorizes such action. See id. at 427-28 (“When charged with
3 unlawful retaliation . . ., an employer may offer a legitimate
4 non-discriminatory reason for taking an adverse action against an
5 employee who has engaged in protected activity.”). As discussed
6 above, NYC Transit does not permit us to make a similar
7 assumption here. Accordingly, Richardson’s reliance on Board of
8 Governors is misplaced.

9 **III. The District Court’s Summary Judgment for the CHRO**

10 We turn now to Richardson’s other argument on appeal: that
11 the district court improperly entered summary judgment in the
12 CHRO’s favor on her disparate treatment and retaliation claims.
13 Richardson contends that several issues of material fact remain
14 in dispute; in particular, she says that she has produced
15 sufficient evidence to justify a trial on the question of whether
16 the CHRO’s asserted justification for the various disciplinary
17 measures it took, and for its ultimate decision to terminate her
18 employment, was legitimate or but a pretext for discrimination
19 and retaliation. Appellant’s Br. at 24.¹¹ In conducting this
20 review, we are required to consider the record in the light most
21

1 ¹¹ We assume without deciding, as did the district court, that
2 Richardson has presented a prima facie case of disparate
3 treatment and retaliation; we inquire only whether the plaintiff
4 can “prove by a preponderance of the evidence that the legitimate
5 reasons offered by the defendant were not its true reasons, but
6 were a pretext for discrimination.” See Reeves v. Sanderson
7 Plumbing Prods., 530 U.S. 133, 143 (2000).

1 favorable to Richardson. Kessler, 461 F.3d at 201.

2 On a disparate treatment claim, the “employer [is] entitled
3 to judgment as a matter of law if the record conclusively
4 reveal[s] some . . . nondiscriminatory reason for the employer’s
5 decision.” Reeves v. Sanderson Plumbing Prods., 530 U.S. 133,
6 148 (2000); Getschmann v. James River Paper Co., 822 F. Supp. 75,
7 78 (D. Conn. 1993), aff’d, 7 F.3d 221 (2d Cir. 1993) (where there
8 is overwhelming evidence that the employer had a legitimate
9 reason to dismiss an employee, the employee must present more
10 than few isolated pieces of contrary evidence to survive summary
11 judgment). Here, as the district court explained after
12 thoroughly canvassing the record, “there is overwhelming evidence
13 [that the CHRO terminated Richardson’s employment due to her]
14 insubordination and hostile behavior.”

15 On her retaliation claim against Appleton and Watts Elder,
16 as with her retaliation claim against the union and the CHRO,
17 Richardson can survive summary judgment if she can show that an
18 issue of fact exists as to whether “a retaliatory motive played a
19 part in the adverse employment actions even if it was not the
20 sole cause.” Sumner v. U.S. Postal Serv., 899 F.2d 203, 209 (2d
21 Cir. 1990) (emphasis added). But Richardson’s broad allegations
22 of retaliation are unsubstantiated by any corroborative evidence.
23 See Cifra v. Gen. Elec. Co., 252 F.3d 205, 216 (2d Cir. 2001)
24 (stating that when the plaintiff has adduced evidence sufficient

1 to constitute a prima facie case, and the employer has
2 articulated a legitimate nonretaliatory reason for the adverse
3 action, the plaintiff must point to evidence that would be
4 sufficient to permit a rational factfinder to conclude that the
5 employer's explanation is a pretext for impermissible
6 retaliation).

7 Thus, the district court's entry of summary judgment in the
8 CHRO's favor on both claims was proper.

9 **CONCLUSION**

10 For the foregoing reasons, the judgment of the district
11 court is AFFIRMED.

12