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# THE FAILURE OF TITLE VII AS A RIGHTS-CLAIMING SYSTEM\*

DEBORAH L. BRAKE\*\* AND JOANNA L. GROSSMAN\*\*\*

*This Article takes a comprehensive look at the failure of Title VII as a system for claiming nondiscrimination rights. The Supreme Court's recent decision in Ledbetter v. Goodyear Tire & Rubber Co., requiring an employee to assert a Title VII pay discrimination claim within 180/300 days of when the discriminatory pay decision was first made, marks the tip of the iceberg in this flawed system. In the past decade, Title VII doctrines at both ends of the rights-claiming process have become increasingly hostile to employees. At the front end, Title VII imposes strict requirements on employees to promptly report and assert claims of discrimination. These requirements leave little room for gaps in knowledge, hesitation in responding, or fears of retaliation to delay rights-claiming. The model of rights-claiming behavior at the heart of this doctrine contrasts starkly with extensive social science research on how people perceive and respond to discrimination in the real world. The juxtaposition of Title VII doctrine with this social science literature reveals a fundamentally flawed framework for asserting discrimination rights. Employees make out poorly at the other end of the rights-claiming process, too. Those employees who do step forward to complain of discrimination are left with grossly inadequate protection from retaliation. Recent developments in retaliation law have weakened protections for employees, reinforcing the very reasons employees are unlikely to assert nondiscrimination rights in the first place. Together, Title VII's prompt complaint and retaliation doctrines create an untenable framework for employees deserving of the law's substantive protections. Rather than salvaging this system, the*

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*recent trend toward employer-sponsored internal processes for resolving discrimination complaints exacerbates these flaws in ways that have yet to be acknowledged. This Article marks an important contribution to the literature on Title VII and discrimination law, as the first major examination of how Title VII functions as a rights-claiming system.*

INTRODUCTION .....	861
I. TITLE VII'S PROMPT COMPLAINT DOCTRINES .....	866
A. <i>The Limitations Period</i> .....	866
B. <i>Triggering the Statute of Limitations: The Discrete Act Rule</i> .....	870
C. <i>The Inadequacy of Tolling Doctrines and Discovery Rules</i> ....	874
D. <i>Requirements for Reporting Harassment</i> .....	879
E. <i>Employer Internal Dispute Resolution Processes and Their Effect on Formal Rights-Claiming</i> .....	884
II. THE REALITIES OF PERCEIVING AND CLAIMING DISCRIMINATION .....	887
A. <i>Difficulties Perceiving Discrimination</i> .....	887
1. <i>The Influence of Ideology</i> .....	889
2. <i>Limited Information and Information-Processing Deficits</i> .....	891
3. <i>Within-Group Comparisons and Sense of Entitlement</i> .....	892
B. <i>Difficulties Challenging Discrimination</i> .....	894
1. <i>Actual Versus Predicted Responses to Bias</i> .....	894
2. <i>Employee Responses to Harassment</i> .....	896
3. <i>Reasons for the Reluctance To Challenge Discrimination</i> .....	900
a. <i>The Social Costs of Complaining</i> .....	900
b. <i>Retaliation</i> .....	902
III. TITLE VII'S FAILURE TO PROTECT EMPLOYEES WHO ASSERT THEIR RIGHTS .....	905
A. <i>The Materially Adverse Requirement</i> .....	906
B. <i>The Reasonable Belief Doctrine</i> .....	913
1. <i>The Factual Basis for Complaining</i> .....	916
2. <i>Reasonable Beliefs About the Reach of Title VII Law</i> ....	919
3. <i>The Expansion of the Reasonable Belief Doctrine: The Shrinking Protection of the Participation Clause and the Increasing Privatization of Discrimination Complaints</i> .....	929
CONCLUSION .....	933

## INTRODUCTION

In a recent controversial ruling, *Ledbetter v. Goodyear Tire & Rubber Co.*,<sup>1</sup> a divided Supreme Court severely undercut the ability of pay discrimination claimants to enforce their rights under Title VII, the main federal employment discrimination statute.<sup>2</sup> In its decision, the Court applied the statute of limitations in a way that ignored the realities of both pay discrimination claims specifically and workplace bias claims more generally.<sup>3</sup> While particularly devastating for pay discrimination claimants, *Ledbetter* is only the tip of the iceberg. As a result of many intersecting doctrines, and the realities of how employees experience and respond to discrimination, Title VII has become a failure as a rights-claiming system.

This Article explores the conflicts for employees created by the gap between Title VII's regime for invoking its protections and the workplace realities of perceiving and claiming discrimination. Most discrimination scholarship focuses on the substantive reach of discrimination law. Over the years, that body of work has developed a rich critique of the shortcomings of law's conception of discrimination and the deeper, more subtle forms of bias that it fails to reach, including a well-documented critique of the gap between law's aspirations and the realities of workplace bias. Our focus here is different: we scrutinize Title VII's regime for *claiming* antidiscrimination rights—a purportedly neutral set of procedures that govern access to the law's substantive protections—and conclude that it falls far short of what is necessary to provide meaningful access to the law's substantive rights.

The effectiveness of Title VII depends on the law's success in providing employees with access to its substantive guarantees of nondiscrimination and protecting them from retaliation when they seek to enforce them. Title VII's enforcement framework depends on employees' willingness to step forward and act, in effect, as "private attorneys general"

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1. 550 U.S. \_\_\_, 127 S. Ct. 2162 (2007). Soon after *Ledbetter* was decided, a bill to undo the ruling was introduced in Congress. See Lilly Ledbetter Fair Pay Act of 2007, H.R. 2831, 110th Cong. (2007) (introduced June 22, 2007). The bill was passed by the House of Representatives and is currently pending in the Senate. See Bill Summary for H.R. 2831, <http://thomas.loc.gov/> (last visited Mar. 22, 2008). President Bush, however, issued a formal statement of opposition to the Act. See Executive Office of the President, Statement of Administration Policy: H.R. 2831—Lilly Ledbetter Fair Pay Act of 2007 (July 27, 2007), available at <http://www.whitehouse.gov/omb/legislative/sap/110-1/hr2831sap-r.pdf>.

2. 42 U.S.C. §§ 2000e to 2000e-17 (2000 & Supp. 2004). Though not an exclusive remedy for employees, Title VII is the broadest-ranging federal antidiscrimination law and entitles employees to seek both equitable relief and money damages for violations.

3. For a focused critique of *Ledbetter*, see Joanna Grossman & Deborah Brake, *The Supreme Court Slams the Door on Pay Discrimination Claims: The Ruling in Ledbetter v. Goodyear Tire & Rubber Co.*, FINDLAW'S WRIT, June 4, 2007, [http://writ.news.findlaw.com/commentary/20070604\\_brake.html](http://writ.news.findlaw.com/commentary/20070604_brake.html).

to enforce the law.<sup>4</sup> As the Second Circuit recently observed, "Title VII combats unlawful employment practices . . . principally through reliance on employee initiative."<sup>5</sup> Yet, at many different junctures, employees are stymied and deterred in their efforts to take this initiative.

We explore, here, the intersection between rights-claiming rules and employee behavior—the ability of injured individuals to avail themselves of rights and remedies provided by law. The path from injury to internal dispute resolution or lawsuit is not self-executing; instead, there is a complex social process that must occur between those two points. In a pathbreaking article published more than two decades ago, Felstiner, Abel, and Sarat focused on this social process and "the way in which experiences become grievances, grievances become disputes, and disputes take various shapes."<sup>6</sup> The authors set forth three stages in the emergence of disputes: naming ("saying to oneself that a particular experience has been injurious"); blaming ("when a person attributes an injury to the fault of another individual or social entity"); and claiming ("when someone with a grievance voices it to the person or entity believed to be responsible and asks for some remedy").<sup>7</sup> All three transformations must occur in order for an aggrieved individual to gain access to justice.<sup>8</sup> Predictably, the smallest category of the "dispute pyramid" is at the top—those injurious experiences that end up in court.<sup>9</sup> Discrimination injuries are no exception. An analysis by Laura Beth Nielson and Robert Nelson, which puts "data on formal complaints together with data on the reported prevalence of

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4. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415 (1975).

5. *Jute v. Hamilton Sundstrand Corp.*, 420 F.3d 166, 174–75 (2d Cir. 2005).

6. William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631, 632 (1980).

7. *Id.* at 635–36. On this social process, see also Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 11–26 (1983); Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y REV. 525, 536–42 (1980); Austin Sarat, *Exploring the Hidden Domains of Civil Justice: "Naming, Blaming, and Claiming" in Popular Culture*, 50 DEPAUL L. REV. 425, 426–29 (2000).

8. As Beth Quinn has observed in the sexual harassment context,

a victim must identify the behavior as harassment, recognize the availability of a legal remedy, and report her victimization to some forum in some manner. Sexual harassment is a civil complaint; the victim must come to and stand before the law—whether informally through her employer's legally derived policies or directly to the state.

Beth A. Quinn, *The Paradox of Complaining: Law, Humor, and Harassment in the Everyday Work World*, 25 LAW & SOC. INQUIRY 1151, 1155 (2000).

9. See Laura Beth Nielsen & Robert L. Nelson, *Rights Realized? An Empirical Analysis of Employment Discrimination Litigation as a Claiming System*, 2005 WIS. L. REV. 663, 681.

discrimination,”<sup>10</sup> confirmed the existence of a rights-claiming regime that produces a “dramatic amount of underclaiming.”<sup>11</sup>

Our analysis of rights-claiming in the employment discrimination context directly implicates the problems of naming, blaming, and claiming. The doctrines and social processes we analyze relate to the perception of workplace harm (naming), attribution of a discriminatory motive to the employer (blaming), and the myriad obstacles to challenging discrimination (claiming). Against the backdrop of this useful taxonomy, we consider *why* employment discrimination injuries do not translate easily into legal claims.

A successful rights-claiming system must respond to employees’ needs at both ends of the rights-claiming process, enabling and encouraging employees whose rights are violated to come forward and protecting them from possible retaliation when they do. The soundness of a rights-claiming system is best evaluated holistically because the dynamics of rights-claiming at every stage are interactive. The failure to adequately encourage and enable rights-claiming contributes to an environment where rights-claiming is aberrational, increasing the likelihood that employees who do complain will be viewed as troublemakers and provoke retaliation. Perhaps even more significantly, inadequate protection from retaliation reinforces the obstacles that suppress rights-claiming in the first place. Title VII thus fails employees at each point in the rights-claiming process.

Title VII’s requirements for reporting and challenging discrimination reveal a view of “employee initiative”—how employees perceive and respond to discrimination—that is contrary to the way these processes actually take place. The law’s timely filing and reporting doctrines take as their worthy claimant a person who quickly and accurately perceives discrimination and responds by promptly challenging it, undeterred by the social costs of complaining or the prospect of retaliation. Many employees do not measure up to these expectations—they consistently “name,” “blame,” and “claim” less well than courts expect—and are thus unable to invoke the law’s substantive protections.

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10. *Id.* at 703.

11. *Id.* at 665 (“The present system may police against egregious forms of discrimination, but for many who perceive themselves to be victims of discrimination, their rights remain unrealized.”). Analyzing all available data on race discrimination, the authors concluded that “of 3.4 million potential race claimants, only 28,912 file an EEOC complaint, and only about 7,500 file a federal lawsuit. . . . After looking at these numbers, we are inclined to ask not why there are so many discrimination claims, but why there are so few.” *Id.* at 706; *see also* Felstiner, Abel & Sarat, *supra* note 6, at 651 (“The transformation perspective suggests that there may be too little conflict in our society. . . . It encourages inquiry into why so few such individuals even get some redress.”).

The law fails employees at the other end of the rights-claiming process as well. Employees who overcome these obstacles and manage to assert their rights are left without adequate protection from retaliation for doing so. Contrary to judicial rhetoric promising generous protection from retaliation,<sup>12</sup> Title VII leaves employees unprotected from significant retaliatory harms, adding to the very vulnerabilities that make employees circumspect about challenging discrimination in the first place. The increasingly strict approach federal judges have taken to interpreting Title VII's timely filing and reporting doctrines and their increasing dilution of the law's protection from retaliation combine to create a double-bind for employees who experience discrimination.<sup>13</sup> The result is a rights-claiming system that is extremely difficult for employees to navigate safely.

The increasing privatization of employment disputes—a recent trend noted by many scholars—adds to the severity and nature of the problems we identify.<sup>14</sup> By channeling bias claims into internal dispute resolution processes, in lieu of or as a prerequisite to the pursuit of formal statutory remedies, employers have effectively added another layer of obstacles to the enforcement of employees' statutory rights. Although employers increasingly direct or require employees to exhaust internal grievance procedures before filing lawsuits, Title VII's timely filing requirements are not tolled in the interim. The clock may run out on an employee who delays filing formal charges in the hopes of resolving the dispute internally. Internal dispute resolution processes also further jeopardize employee protections against retaliation, which are watered down for participation in extra-statutory processes, even if the employee had little choice about whether to pursue them.

Part I of this Article chronicles the various doctrines that obligate employees to promptly challenge and report violations of Title VII rights. These doctrines include the statute of limitations, the definition of the acts that trigger the limitations period, equitable tolling and discovery rules, the special rules for reporting and challenging sexual harassment, and the role of internal employer procedures in the timing requirements for formally

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12. See *infra* note 238 and accompanying text.

13. Others have examined the judicial doctrines and tendencies that undercut Title VII's substantive protections. See, e.g., Nielsen & Nelson, *supra* note 9, at 673–80 (examining the pattern of legislative expansion and judicial retrenchment in antidiscrimination law); Tristin K. Green, *Insular Individualism: Employment Discrimination Law After Ledbetter v. Goodyear*, HARV. C.R.-C.L. L. REV. (forthcoming Spring 2008) (manuscript at 3), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1026054](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1026054) (describing the tendency of federal courts toward “insular individualism”—“the belief that discrimination can be reduced to the action of an individual decisionmaker (or decisionmakers) isolated from the work environment and the employer”—that undercuts employees’ protection from workplace discrimination).

14. See *infra* notes 125–33 and accompanying text.

asserting Title VII rights. Each of these doctrines presupposes an ideal claimant who is fully aware of her rights, quickly perceives discrimination, and does not falter or hesitate to challenge discrimination through the prescribed channels. Together, they function to close off substantive protections from employees who do not match the law's ideal.

Part II turns to the extensive social science literature on how people actually perceive and respond to discrimination to contrast the law's ideal claimant with the realities of workers' lives. This Part parses two distinct bodies of literature: research on the processes of perceiving discrimination and the study of how people respond when they do perceive discrimination. Contrary to the law's implicit assumption that employees immediately know when they have experienced discrimination, knowledge of discrimination is obscured and suppressed by several psychological processes. As a result, most social psychologists believe that underperception of discrimination, rather than hypervigilance, is the norm. The law also falls wide of the mark in its assumptions about how people respond to discrimination. Far from the assertive complainant the law requires, people rarely respond to perceived discrimination with prompt complaints and challenges. Indeed, the reality of how people respond contrasts sharply not only with how judges envision employees will act, but also with how employees themselves expect they would respond to discrimination. People share a widespread belief that, if confronted with discrimination, they would challenge it immediately. In fact, when faced with such circumstances, they do the opposite. This gap between expectation and reality is deeply embedded in Title VII doctrine, with devastating consequences.

Finally, Part III examines Title VII's effectiveness at the end of the rights-claiming process, identifying major gaps in the law's protection from retaliation. This Part examines recent developments in two major doctrines—the materially adverse standard and the reasonable belief requirement—which together leave gaping holes in the law's protection from retaliation. Although the Supreme Court's 2006 decision in *Burlington Northern & Santa Fe Railway Co. v. White*<sup>15</sup> purported to expand retaliation protections to prohibit employer actions that “well might have ‘dissuaded a *reasonable* worker from making or supporting a charge of discrimination,’ ”<sup>16</sup> lower courts have undermined protection for employees with cramped interpretations of this standard. As a result, many employer actions that are likely to deter *actual* employees from

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15. 548 U.S. \_\_\_, 126 S. Ct. 2405 (2006).

16. *Id.* at \_\_\_, 126 S. Ct. at 2415 (emphasis added) (quoting *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2006)).



complaining are left undisturbed and unregulated, reinforcing the very concerns that deter discrimination complaints in the first place. Perhaps even more critically, another doctrine, the requirement that an employee have a *reasonable* belief that the challenged conduct is unlawful before complaining of discrimination, creates enormous risks for employees considering whether to challenge perceived discrimination. Recent lower court decisions have made this underexamined doctrine one of the biggest threats to rights-claiming under the statute. This Part brings our look at Title VII's rights-claiming process full circle, demonstrating the predicament created by a structure that imposes a rigid set of requirements for quickly asserting nondiscrimination rights but provides insufficient protection from retaliation for claimants.

Ultimately, we conclude that even apart from critiques of the law's substantive reach in defining discrimination, Title VII is fundamentally flawed as a rights-claiming system.

## I. TITLE VII'S PROMPT COMPLAINT DOCTRINES

At many different junctures, Title VII law makes assumptions about discrimination victims: what they know, when they know it, and how they respond to the information they are assumed to have. The law then takes these assumptions and translates them into requirements: employees *must* quickly perceive and promptly report discrimination in order to invoke the substantive protections of antidiscrimination law.

Numerous doctrines under Title VII place pressure on employees to recognize and challenge discrimination quickly when they experience it. They include the short statute of limitations, strict rules defining the acts that trigger it, inadequate tolling and discovery rules, a special set of requirements for reporting harassment, and an all-but-mandatory extra layer of internal dispute resolution that does not extend the time for formally asserting rights. As a whole, this body of doctrine leaves little room for uncertainty or hesitation and requires a high degree of employee awareness and vigilance in the assertion of Title VII rights.

### A. *The Limitations Period*

At the root of the problem for rights-claiming under Title VII is the statute's unusually short statute of limitations. Under current law, an employee must file a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") within "[180] days after the alleged unlawful employment practice occurred" or within 300 days if the claim

goes directly to a state work-sharing agency.<sup>17</sup> As enacted in 1964, the original statute had a charge-filing period of only ninety days.<sup>18</sup> Subsequent amendments to the Equal Employment Opportunity Act of 1972 extended this period to the current limit, over opponents' claims that the extension would lead to "stale charges" and "indefinite liabilities."<sup>19</sup>

The 180/300-day limitations period was patterned after the National Labor Relations Act ("NLRA").<sup>20</sup> Though reconciling Title VII's statute of limitations with that under the NLRA was an express goal of the 1972 Act, there are significant differences in the ease of identifying unlawful practices under each statute. Employers who commit unfair labor practices under the NLRA (by, say, firing union sympathizers) often do so in the context of a union organizing drive or in situations where there is already an incumbent union. In either of those situations, there is a relatively savvy institutional player—the union—with a familiarity with the law and an institutional structure designed to channel an employee's vague feelings of unfairness into an unfair labor practice charge with the appropriate regional office of the National Labor Relations Board.<sup>21</sup> For Title VII claimants,

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17. See 42 U.S.C. § 2000e-5(e)(1) (2000). The EEOC has delegated to state fair employment agencies the power to "grant or seek relief" from discriminatory practices made unlawful by Title VII. *Id.* As the Court explained in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002),

[i]n a State that has an entity with the authority to grant or seek relief with respect to the alleged unlawful practice, an employee who initially files a grievance with that agency must file the charge with the EEOC within 300 days of the employment practice; in all other States, the charge must be filed within 180 days.

*Id.* at 109. Claims that are first filed with a so-called "deferral agency" are governed by a longer EEOC deadline so that the state agency has time to investigate. The vast majority of claimants have access to a state deferral agency and, thus, to the longer 300-day limitations period. See MACK A. PLAYER, EMPLOYMENT DISCRIMINATION LAW 471 (1988) (noting that only a "few jurisdictions, primarily in the Southeast . . . do not have agencies which enforce fair employment practice laws"). Both the Americans with Disabilities Act ("ADA") and the Age Discrimination in Employment Act ("ADEA") employ the same limitations period as Title VII. See 29 U.S.C. § 626(d)(1) (2000) (adopting 180/300-day limitations period for ADEA claims); 42 U.S.C. § 12117(a) (2000) (stating that employment discrimination claims under the ADA are governed by Title VII's procedural requirements, including the 180/300-day limitations period).

18. Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(d), 78 Stat. 241, 260 (codified as amended at 42 U.S.C. § 2000e-5 (2000)).

19. H.R. REP. NO. 92-238, at 65–66 (1971), reprinted in 1971 U.S.C.C.A.N. 2137, 2174–75; see also Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 706(e), 86 Stat. 103, 105 (codified as amended at 42 U.S.C. § 2000e-5(e)(1) (2000)).

20. See 29 U.S.C. § 160(b) (2000) (charge must be filed with National Labor Relations Board within six months of the alleged unfair labor practice); H.R. REP. NO. 92-238, at 65 (minority views on H.R. 1746) (explaining desire to match the NLRA limitations period).

21. See, e.g., Michael Z. Green, *Finding Lawyers for Employees in Discrimination Disputes as a Critical Prescription for Unions to Embrace Racial Justice*, 7 U. PA. J. LAB. & EMP. L. 55,

however, there is no such institutional intermediary to help them navigate the rights-claiming process.<sup>22</sup> Instead, they must act individually to file necessary internal and administrative complaints in order to preserve judicial remedies and obtain counsel to pursue them.<sup>23</sup> Given these differences, the unusually short NLRA limitations period is a poor fit for Title VII. Title VII plaintiffs are much more in the shoes of personal injury tort plaintiffs than employees protected by the NLRA and should be regulated by the much longer statute of limitations that typically applies to tort claims.<sup>24</sup>

Congress revisited the limitations period in 1990. The Civil Rights Act of 1990, a bill that Congress passed but the first President Bush vetoed, was designed to override a number of Supreme Court rulings that had narrowed the scope of Title VII's substantive protections against discrimination.<sup>25</sup> It also included a provision extending the limitations period to two years in order to more closely match other federal laws, including those federal antidiscrimination laws that give employees a longer limitations period.<sup>26</sup> The Equal Pay Act of 1963, for example, applies a two-year limitations period, extended to three years if the violation is willful.<sup>27</sup> Section 1981, a Reconstruction-era federal law prohibiting race discrimination in the making and enforcement of contracts, including those between employer and employee, contains no express

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61–62 (2004) (arguing that unions should obtain legal counsel and provide other assistance needed so that employees can pursue discrimination claims effectively).

22. See Terry Smith, *Everyday Indignities: Race, Retaliation, and the Promise of Title VII*, 34 COLUM. HUM. RTS. L. REV. 529, 534 (2002) (“Title VII’s anti-retaliation provision should be especially solicitous of the self-help employee who opposes subtle discrimination, an often nuanced, sophisticated and covert means of differentiating based on race.”); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 465 (2001) (examining “the . . . role played by intermediaries in brokering the relationship between judicial elaboration and workplace innovation”); cf. Alex B. Long, *The Troublemaker’s Friend: Retaliation Against Third Parties and the Right of Association in the Workplace*, 59 FLA. L. REV. 931, 936 (2007) (“[I]n addition to the goal of permitting unfettered access to remedial mechanisms, another goal of anti-retaliation provisions in employment discrimination statutes should be to encourage workers to meet and discuss management-employee relations.”).

23. Sometimes, the EEOC decides to file a lawsuit on behalf of an employee or class of employees, but in the vast majority of cases, it issues a right-to-sue letter and the employee is left to pursue the claim without assistance.

24. See generally Martha Chamallas, *Discrimination and Outrage: The Migration from Civil Rights to Tort Law*, 48 WM. & MARY L. REV. 2115 (2007) (considering the relationship between federal antidiscrimination law and tort law).

25. See S. 2104, 101st Cong. § 2 (1990).

26. See *id.* § 7.

27. See 29 U.S.C. § 255(a) (2000); see also Fair Labor Standards Act, 29 U.S.C. § 255(a) (providing a two-year limitations period, extended to three years for willful violations); Fair Housing Amendments Act, 42 U.S.C. § 3613(a)(1)(A) (2000) (providing a two-year statute of limitations).

statute of limitations.<sup>28</sup> In the absence of such a provision, the Supreme Court has held that § 1981 race discrimination claims should be governed by an analogous period under state law,<sup>29</sup> and that the most analogous limitations period is the one that governs residual or general personal injury claims.<sup>30</sup> Claims asserting personal rights, such as tort claims, typically allow a two- to three-year limitations period.<sup>31</sup>

The effort to expand Title VII's statute of limitations period in the proposed Civil Rights Act of 1990 was highly contested, with opponents raising familiar concerns about "stale claims," expanding employer liability, and displacing Title VII's ostensible goal of conciliation with a more tort-like adversarial model.<sup>32</sup> Supporters of the extension countered that the statute's unusually short limitations period failed to account for the "substantial time" it takes for an individual to realize discrimination has occurred, learn about the available remedies, and obtain the assistance of counsel.<sup>33</sup>

After the 1990 bill was vetoed, its successor, the Civil Rights Act of 1991, was introduced almost immediately in the House.<sup>34</sup> The bill also included a two-year limitations period, again intended to bring Title VII into alignment with a variety of federal civil rights laws with longer limitations periods.<sup>35</sup> As it had been in 1990, however, this provision was contested, and the proposed extension was not included in the Senate bill that ultimately was enacted into law.<sup>36</sup>

The failure of congressional efforts to expand the limitations period in the 1991 Act closed the door on further reform efforts. Title VII's

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28. See 42 U.S.C. § 1981 (2000).

29. See *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 660 (1987) (holding that § 1981 claims, for which there is no express statute of limitations, should be governed by an analogous period under state law).

30. See *Owens v. Okure*, 488 U.S. 235, 249–51 (1989) (holding that § 1983 claims should be governed by New York's three-year residual statute of limitations for personal injury claims rather than the one-year limitations period reserved for intentional torts).

31. See, e.g., *Holt v. KMI-Continental, Inc.*, 95 F.3d 123, 131 (2d Cir. 1996) (applying Connecticut's three-year personal injury statute of limitations to § 1981 claim); Joanna L. Grossman, *Making a Federal Case Out of It: Section 1981 and At-Will Employment*, 67 BROOK. L. REV. 329, 370 (2001) ("In many states . . . the statute of limitations under § 1981 is considerably longer than that under Title VII.").

32. S. REP. NO. 101-315, at 63–64 (1990) (minority views of Sens. Hatch, Thurmond, and Coats on S. 2104); H.R. REP. NO. 101-644(I), at 129–30 (1990) (minority views on H.R. 4000).

33. H.R. REP. NO. 101-644(I), at 36–38, 45–46.

34. H.R. 1, 102d Cong. (1991) (introduced Jan. 3, 1991).

35. H.R. REP. NO. 102-40(I), at 63–64 (1991), as reprinted in 1991 U.S.C.C.A.N. 549, 601–02.

36. See S. 1745, 102d Cong., 105 Stat. 1071 (1991); see, e.g., 137 CONG. REC. 13,168, 13,230 (1991) (warning that "[p]assage of this legislation will mean an unending supply of discrimination cases for trial lawyers throughout the country").

limitations period remains unusually short when compared to the vast majority of other laws seeking to vindicate personal rights, and Congress has not made any meaningful effort to expand it in the intervening seventeen years.

*B. Triggering the Statute of Limitations: The Discrete Act Rule*

Title VII's short statute of limitations is exacerbated by strict rules about how to define the "unlawful employment practice" that triggers the limitations period. In 2002, the Supreme Court decided *National Railroad Passenger Corp. v. Morgan*,<sup>37</sup> in which it rejected the "continuing violations" doctrine.<sup>38</sup> Abner Morgan, a black electrician, sued his employer, alleging a series of discriminatory acts—that he was paid differently, punished unfairly, denied union representation in disciplinary meetings, and harassed because of his race—between when he was hired in 1990 and fired in 1995.<sup>39</sup> Amtrak won summary judgment on some claims because they occurred more than 300 days before Morgan filed a complaint with the EEOC and were therefore time-barred.<sup>40</sup> The Ninth Circuit reversed, holding that under the continuing violations doctrine, which permits a pattern of discrimination to form the basis for a lawsuit as long as at least one act occurred within the limitations period, the time-barred claims were "sufficiently related" to the timely ones.<sup>41</sup> The continuing violations doctrine, which was widely accepted by lower courts at the time, reflected the recognition that discrimination develops and burdens its victim over time and that it is often difficult to discern until an extended pattern emerges.

The Supreme Court in *Morgan* rejected the continuing violations doctrine, ruling instead that for discrimination that occurs in "discrete" acts, such as hiring, firing, promotion, demotion, and transfer decisions, the limitations period begins anew with the occurrence of each act of discrimination.<sup>42</sup> For such discrete acts of discrimination, and excepting hostile environment harassment, which the Court treated specially,<sup>43</sup>

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37. 536 U.S. 101 (2002).

38. *Id.* at 114.

39. *Id.* at 105 n.1, 115 n.8. For a detailed description of the underlying facts, see Nat'l R.R. Passenger Corp. v. Morgan, 232 F.3d 1008, 1010–13 (9th Cir. 2000), *aff'd in part and rev'd in part*, 536 U.S. 101 (2002).

40. *Morgan*, 536 U.S. at 106.

41. *Morgan*, 232 F.3d at 1015.

42. *Morgan*, 536 U.S. at 115.

43. *Id.* The Court treated hostile environment harassment differently because, by its very nature, it involves multiple incidents that occur over time. *Id.* at 104. The special rules for challenging hostile environment harassment are discussed *infra* Part I.D. Notwithstanding these special rules, however, some courts have held that discrete acts are still subject to the rule in

employees must challenge each act within 180/300 days.<sup>44</sup> Under this framework, prior acts of discrimination are relevant only as background evidence and are not themselves actionable.<sup>45</sup>

*Morgan's* list of discrete discriminatory acts did not include pay discrimination. However, federal appellate court rulings after *Morgan* almost universally continued to apply the rule enunciated in *Bazemore v. Friday*<sup>46</sup> that each discriminatory paycheck issued within the limitations period is actionable even if the pay discrimination first began long ago.<sup>47</sup> In 2007, in *Ledbetter v. Goodyear Tire & Rubber Co.*,<sup>48</sup> however, the Supreme Court departed from this consensus and extended *Morgan's* discrete act rule to pay discrimination claims. In an opinion written by Justice Samuel Alito, the *Ledbetter* majority held that an employee must challenge pay discrimination within 180/300 days of the *decision* to pay her a discriminatory wage, rejecting the longstanding position of the EEOC, the agency charged with enforcing Title VII, that pay discrimination could be challenged within 180/300 days of any *paycheck* containing a discriminatory wage.<sup>49</sup> The majority reasoned that a paycheck containing a discriminatory amount of money is not a present violation, but merely the present *effect* of a prior act of discrimination. “[C]urrent effects alone cannot breathe life into prior, uncharged discrimination,” the Court reasoned, and “such effects in themselves have ‘no present legal consequences.’”<sup>50</sup>

Even after *Ledbetter*, the full scope of *Morgan* is still uncertain. Open questions include whether the discrete act rule applies to pattern-and-practice cases (alleging systemic rather than individualized disparate

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*Morgan* even if they are mixed in with allegations of a hostile environment. See, e.g., *Pruitt v. City of Chicago*, 472 F.3d 925, 927 (7th Cir. 2006); *Sassé v. U.S. Dep’t of Labor*, 2005 FED. App. 0234P, ¶ 17 (6th Cir.), 409 F.3d 773, 783.

44. *Morgan*, 536 U.S. at 122.

45. Cf. *Ramirez Rodriguez v. Boehringer Ingelheim Pharm., Inc.*, 425 F.3d 67, 78 n.14 (2005) (permitting an ADEA plaintiff to introduce prior acts as background evidence).

46. 478 U.S. 385 (1986). For federal appellate decisions continuing to rely on *Bazemore* after *Morgan*, see, for example, *Forsyth v. Federation Employment & Guidance Service*, 409 F.3d 565, 573 (2d Cir. 2005), and *Shea v. Rice*, 409 F.3d 448, 452–53 (D.C. Cir. 2005). See also *Inglis v. Buena Vista Univ.*, 235 F. Supp. 2d 1009, 1020–22 (N.D. Iowa 2002) (describing the pre-*Morgan* consensus applying the continuing violations doctrine to pay claims).

47. *Bazemore*, 478 U.S. at 395 (Brennan, J., joined by all other Members of the Court, concurring in part) (“Each week’s paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII . . .”).

48. 550 U.S. \_\_\_, 127 S. Ct. 2162 (2007).

49. *Id.* at \_\_\_, 127 S. Ct. at 2177 n.11 (refusing to extend *Chevron* deference to the EEOC’s *Compliance Manual* or its adjudicatory decisions).

50. *Id.* at \_\_\_, 127 S. Ct. at 2169 (quoting *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977)).

treatment),<sup>51</sup> to acts of discrimination that occur *after* a timely filed EEOC charge,<sup>52</sup> to discrimination cases brought under § 1983,<sup>53</sup> and to claims brought under analogous state antidiscrimination laws.<sup>54</sup>

*Morgan* and *Ledbetter* together add to a body of law that erects substantial roadblocks for plaintiffs attempting to claim antidiscrimination rights. These decisions exacerbate the time pressures imposed on plaintiffs by the Court's prior rulings defining the acts that trigger the limitations period to occur at the earliest possible moment. In a series of earlier decisions, the Court established that the limitations period begins to run when the decision to discriminate has been made and communicated to the employee,<sup>55</sup> even if the decision is implemented or its effects are felt at a later date.<sup>56</sup> A discriminatory decision denying tenure, for example,

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51. Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 115 n.9 (2002).

52. In *Morgan*'s wake, some courts have concluded that its reasoning requires application of the discrete act rule to subsequent acts of discrimination. See, e.g., *Wedow v. City of Kansas City, Mo.*, 442 F.3d 661, 673–74 (8th Cir. 2006); *Martinez v. Potter*, 347 F.3d 1208, 1210–11 (10th Cir. 2003); *Romero-Ostolaza v. Ridge*, 370 F. Supp. 2d 139, 148–49 (D.D.C. 2005).

53. Several federal appellate courts have applied *Morgan*'s discrete act rule to § 1983 cases. See *O'Connor v. City of Newark*, 440 F.3d 125, 128 (3d Cir. 2006); *Hildebrandt v. Ill. Dep't of Natural Res.*, 347 F.3d 1014, 1036 n.18 (7th Cir. 2003); *Sharpe v. Cureton*, 2003 FED App. 0050P, ¶ 33 (6th Cir.), 319 F.3d 259, 267–68; *RK Ventures, Inc. v. City of Seattle*, 307 F.3d 1045, 1061 (9th Cir. 2002).

54. Compare *Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Comm'n*, 453 N.W.2d 512, 527 (Iowa 1990) (permitting recovery for the entire period an employee's rights have been violated if at least one act of illegal discrimination occurred within the 180-day statutory period), with *Rowe v. Hussmann Corp.*, 381 F.3d 775, 780–81 (8th Cir. 2004) (applying *Morgan* to claims brought under the Missouri Human Rights Act).

55. Some courts have construed the *Ricks* standard even more broadly in favor of employers, requiring only that the employee knew or should have known about the adverse action. See, e.g., *Cornwell v. Robinson*, 23 F.3d 694, 705 (2d Cir. 1994); *Cocke v. Merrill Lynch & Co.*, 817 F.2d 1559, 1561 (11th Cir. 1987).

56. See, e.g., *Lorance v. AT&T Techs., Inc.*, 490 U.S. 900, 905–07 (1989) (finding plaintiffs time-barred from challenging the discriminatory adoption of a facially neutral seniority system where the decision to adopt the system was made outside the limitations period, even though the system was first applied to plaintiffs, causing their demotion, within the limitations period); *Del. State Coll. v. Ricks*, 449 U.S. 250, 258 (1980) (running statute of limitations from the initial decision to deny tenure rather than from the expiration of the plaintiff's teaching contract or the employer's refusal to change the decision in its review processes); *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 557 (1977) (ruling that airline's failure to credit employee with seniority when she was rehired following her prior dismissal under a discriminatory policy was merely a "present effect to [its] past illegal act" for limitations purposes). Congress overturned the *Lorance* decision with respect to seniority systems in the Civil Rights Act of 1991. See 42 U.S.C. § 2000e-5(e)(2) (2000) (defining an "unlawful employment practice" to occur "when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system"). Although the legislative history of the 1991 Act strongly suggests that the intent behind this provision was much broader, the *Ledbetter* majority limited this provision to seniority systems, citing *Lorance* as good law for the principle that discriminatory decisions, not their effects, trigger Title VII's statute of limitations. Compare 137 CONG. REC. 28,999, 29,047 (1991) (interpretive memo of Sen. Danforth) ("This

triggers the statute of limitations, even if the employee continues teaching and does not feel the effect of that decision until he is terminated much later.<sup>57</sup> By rejecting the continuing violations doctrine for discrete acts of discrimination and defining discrete acts to include all individual disparate treatment cases except hostile environment harassment, the *Morgan* and *Ledbetter* decisions add to this time pressure. Together, this body of cases sets the critical point in time as the original discriminatory decision, rather than the timing of the discriminatory effects or the accumulation of discriminatory harm.

Most importantly, neither *Morgan* nor *Ledbetter* accounts for the fact that an employee may not realize that she has experienced discrimination in time to protect her rights under these rulings. An employee may be unable to recognize discrimination, and insufficiently motivated to act to challenge it, until the effects of discrimination are felt and accumulated. For example, if a female employee is denied a raise that her male colleagues receive, she may not realize that a discrete adverse act has occurred at all. Even if she is aware of an adverse employment decision, she may not realize that it is attributable to discrimination. And even if she recognizes that a discrete act occurred and was discriminatory, she may decide not to complain until the pay disparity becomes significant for fear of adverse consequences. Yet the Court's doctrine assumes that employees possess immediate and certain knowledge of the moment in time at which discrimination occurs and are willing and able to take immediate action to challenge it.

The realities of perceiving and reporting discrimination depart dramatically from this idealized vision, however, such that the discrete act rule has the effect of validating and perpetuating longstanding discrimination. Under the *Ledbetter* ruling, for example, a woman could be paid a discriminatory wage for her entire career as long as the initial discriminatory decision went unchallenged for 180/300 days.<sup>58</sup> As Justice

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legislation should be interpreted as disapproving the extension of this decision rule [in *Lorance* to contexts outside of seniority systems."], with *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. \_\_\_, 127 S. Ct. 2162, 2172–73, 2183 (2007) (relying in part on *Lorance* to bar pay discrimination claim where discriminatory decision occurred outside the limitations period and limiting the 1991 provision to seniority systems).

57. See *Ricks*, 449 U.S. at 250–51; see also *Ruiz-Sulsona v. Univ. of P.R.*, 334 F.3d 157, 160 (1st Cir. 2003) (applying same rule post-*Morgan*); *Cooper v. St. Cloud State Univ.*, 226 F.3d 964, 965 (8th Cir. 2000) (the initial denial of tenure triggered the limitations period, not the plaintiff's termination four years later).

58. The longstanding effects of pay discrimination are especially important given evidence that gender often plays a role in the initial setting of an employee's wage. See, e.g., Hannah Riley Bowles et al., *Social Incentives for Gender Differences in the Propensity To Initiate Negotiations: Sometimes It Does Hurt to Ask*, 103 ORG. BEHAV. & HUM. DECISION PROCESSES 84, 95 (2007)



Ginsburg lamented in her *Ledbetter* dissent, “[a]ny annual pay decision not contested immediately . . . becomes grandfathered, a *fait accompli* beyond the province of Title VII ever to repair.”<sup>59</sup> The Court’s strict timely filing rules are thus skewed to protect employers rather than to facilitate employees’ asserting their rights.

### C. *The Inadequacy of Tolling Doctrines and Discovery Rules*

Together, *Morgan* and *Ledbetter* apply Title VII’s short statute of limitations period strictly for most discrimination claimants, a hardship that might be lessened in some cases by application of a robust tolling doctrine and discovery rule. The Supreme Court, however, has been circumspect about, and lower courts have divided over, the applicability of such doctrines to the extent that they benefit plaintiffs.<sup>60</sup>

Because the limitations period under Title VII is not a jurisdictional prerequisite to suit in federal court, courts have the power to extend or shorten it based on equitable considerations.<sup>61</sup> Both employers and employees are theoretically protected by such equitable considerations. For employers, the doctrine of laches has been applied to place a limit on the filing of claims to shorten an existing limitations period or to preclude undue delay in filing a suit after the EEOC has evaluated the charge.<sup>62</sup> This doctrine protects the employer from any unfair prejudice caused by a plaintiff (or the EEOC) sitting on her rights.<sup>63</sup>

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(concluding, among other things, that women pay a “higher social cost for initiating compensation negotiations than men”).

59. 550 U.S. at \_\_\_, 127 S. Ct. at 2178 (Ginsburg, J., dissenting).

60. See *infra* notes 65–86 and accompanying text.

61. See *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) (noting the power of courts to apply doctrines such as waiver, estoppel, and equitable tolling to Title VII’s timely filing requirements).

62. See, e.g., *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 121 (2002) (“[A]n employer may raise a laches defense, which bars a plaintiff from maintaining a suit if he unreasonably delays in filing a suit and as a result harms the defendant.”). The defense of laches is available upon proof of “(1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.” *Id.* at 122 (citations omitted) (internal quotation marks omitted).

63. See *Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 355, 373 (1977) (applying laches to protect an employer who “might still be significantly handicapped in making his defense because of an inordinate EEOC delay in filing the action after exhausting its conciliation efforts”); *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 424 (1975) (applying laches based on delay of an individual party in pursuing her claim). For a more recent case applying laches to bar the plaintiff’s claim, even though the statute of limitations had not yet run, see *Smith v. Caterpillar, Inc.*, 338 F.3d 730, 733–34 (7th Cir. 2003) (applying defense of laches to bar plaintiff’s Title VII claim where plaintiff unreasonably delayed in terminating state agency’s claims process, which had lasted over eight years, to file with the EEOC).

Statutory limitations periods can also be extended for the benefit of employees by the doctrines of equitable estoppel or equitable tolling. The Supreme Court has said that equitable tolling principles apply under Title VII, although it has cautioned that they should be “applied sparingly.”<sup>64</sup> This admonition is itself telling, revealing a presumption that imperfect knowledge of discrimination and justifiable delay in filing a charge are aberrational and not the norm.

Lower courts have indeed followed the Court’s admonition to be sparing in their application of these principles. Equitable estoppel can only be raised when an employer actively prevents an employee from filing a timely claim.<sup>65</sup> Equitable tolling is a broader concept, which can be used to toll the statute of limitations when the plaintiff knows he has been injured but “cannot obtain information necessary to decide whether the injury is due to wrongdoing and, if so, wrongdoing by the defendant.”<sup>66</sup> An employer’s failure to post required EEOC notices, for example, can form the basis for a claim of equitable tolling if the plaintiff did not otherwise know he needed to file a claim with the EEOC.<sup>67</sup> Courts tend to confuse these two concepts and, in some cases, require evidence of employer wrongdoing for either of them to apply.<sup>68</sup> Courts generally refuse to toll the limitations period based on the employee’s lack of information unless the employer actively concealed relevant facts or actively misled the employee into believing she did not have a claim.<sup>69</sup> Even some kinds of clear

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64. *Morgan*, 536 U.S. at 113; see also *Baldwin City Welcome Ctr. v. Brown*, 466 U.S. 147, 152 (1984) (“Although absence of prejudice is a factor to be considered in determining whether the doctrine of equitable tolling should apply once a factor that might justify such tolling is identified, it is not an independent basis for invoking the doctrine and sanctioning deviations from established procedures.”).

65. See, e.g., *Santa Maria v. Pac. Bell*, 202 F.3d 1170, 1176 (9th Cir. 2000) (“Equitable estoppel focuses primarily on the actions taken by the defendant in preventing a plaintiff from filing suit . . . .”); *Currier v. Radio Free Eur./Radio Liberty, Inc.*, 159 F.3d 1363, 1368 (D.C. Cir. 1998) (“[A]n employer’s affirmatively misleading statements that a grievance will be resolved *in the employee’s favor* can establish an equitable estoppel.”); *Thelen v. Marc’s Big Boy Corp.*, 64 F.3d 264, 267 (7th Cir. 1995) (stating that equitable estoppel will operate as a bar to a statute of limitations defense if “‘the defendant takes active steps to prevent the plaintiff from suing in time,’ such as by hiding evidence or promising not to plead the statute of limitations” (quoting *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450 (7th Cir. 1990))).

66. *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 451 (7th Cir. 1990).

67. See *Earnhardt v. Puerto Rico*, 691 F.2d 69, 72 (1st Cir. 1982) (permitting the plaintiff to invoke the doctrine of equitable tolling where the employer violated the EEOC posting requirement and “the employee had no other actual or constructive knowledge of ADEA complaint procedures”).

68. See, e.g., *Pearl v. City of Long Beach*, 296 F.3d 76, 80 n.3 (2d Cir. 2002) (applying equitable “tolling” to case in which the defendant concealed the plaintiff’s cause of action).

69. See, e.g., *Bishop v. Gainer*, 272 F.3d 1009, 1014–16 (7th Cir. 2001) (refusing to toll the limitations period where employer did not actively conceal information or mislead plaintiffs); *Bennett v. Quark, Inc.*, 258 F.3d 1220, 1225–26 (10th Cir. 2001) (same); *Jackson v. Rockford*

wrongdoing by employers for the purpose of forestalling Title VII claims do not toll the limitations period, such that a direct threat of retaliation has been ruled not to toll the limitations period.<sup>70</sup> And with respect to the difficulties employees face in discerning discrimination, tolling doctrines do very little to ease these problems.

Active concealment by employers, even if sufficient grounds for tolling the limitations period, accounts for little of the problem in perceiving discrimination,<sup>71</sup> and employees who lack knowledge of their injury or its discriminatory origin for other reasons are unprotected by equitable tolling doctrines. To deal with the more common situation, employees who have insufficient knowledge to recognize when they have experienced discrimination, a more specific equitable rule—a discovery rule—is necessary. Under the traditional formulation of the discovery rule, a statute of limitations does not begin to run (because the cause of action does not accrue) until the plaintiff discovers or reasonably should have discovered she has been injured. The Supreme Court, however, has never expressly declared that Title VII permits the application of a discovery rule; in fact, it expressly declined to consider the question in both *Morgan* and *Ledbetter*.<sup>72</sup> Lower federal courts have split over the existence and scope of a discovery rule under Title VII and related federal antidiscrimination laws. The Fourth Circuit, for example, refused to apply a discovery rule to toll the statute of limitations in *Hamilton v. 1st Source Bank*,<sup>73</sup> a case alleging an unlawful discharge under the Age Discrimination in Employment Act (“ADEA”). The plaintiff learned only during the discovery process on another claim that he was paid less than younger employees in the same position.<sup>74</sup> He then filed a pay discrimination claim,

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Hous. Auth., 213 F.3d 389, 396–97 (7th Cir. 2000) (same); *Smith v. Am. President Lines, Ltd.*, 571 F.2d 102, 109 (2d Cir. 1978) (same).

70. See *Beckel v. Wal-Mart Assocs.*, 301 F.3d 621, 624 (7th Cir. 2002) (rejecting a threat of retaliation as a basis for tolling the limitations period, and stating that, “[r]ather than deterring a reasonable person from suing, it would increase her incentive to sue by giving her a second claim”).

71. See *infra* Parts II.A.1–II.A.3.

72. See *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. \_\_\_, \_\_\_, 127 S. Ct. 2162, 2177 n.10 (2007) (“We have previously declined to address whether Title VII suits are amenable to a discovery rule. Because *Ledbetter* does not argue that such a rule would change the outcome in her case, we have no occasion to address this issue.” (citation omitted)); *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114 n.7 (2002) (“One issue that may arise in such circumstances is whether the time begins to run when the injury occurs as opposed to when the injury reasonably should have been discovered. But this case presents no occasion to resolve that issue.”).

73. 928 F.2d 86 (4th Cir. 1990); see also *Amini v. Oberlin Coll.*, 2001 FED App. 0253P, ¶¶ 12–27 (6th Cir.), 259 F.3d 493, 498–502 (rejecting applicability of discovery rule to Title VII claims).

74. *Hamilton*, 928 F.2d at 87.

seventeen months after he had been discharged. The court upheld the dismissal of the pay claim as time-barred because "the 180-day period for filing claims begins to run from the time of the alleged discriminatory act" regardless of when it was discovered by the plaintiff.<sup>75</sup>

Other federal appellate courts have acknowledged the existence of a discovery rule in the context of federal antidiscrimination laws but have construed it so narrowly that it rarely applies. The Seventh Circuit's ruling in *Cada v. Baxter Healthcare Corp.*<sup>76</sup> is a good example. The plaintiff in that case brought an age discrimination suit against his employer when, after telling a manager at the company that he would not be retiring, he was told he would be terminated.<sup>77</sup> The plaintiff did not believe the manager had the authority to fire him, but the termination was reaffirmed by his direct supervisor in a meeting a few weeks later.<sup>78</sup> His suit was filed within the limitations period of the meeting with his actual supervisor but not of the conversation with the manager who first promised to fire him.<sup>79</sup> The Seventh Circuit recognized the existence of a discovery rule but applied it only to the time the "injury" was discovered—the original notice of termination—rather than the later reaffirmation or the discovery of evidence suggesting "discrimination."<sup>80</sup> The plaintiff's injury was discovered when the decision to fire him was communicated by the manager, not when it later became clear that the decision was final or when sufficient facts came to light to suggest discrimination.<sup>81</sup>

Likewise, in *Oshiver v. Levin, Fishbein, Sedran & Berman*,<sup>82</sup> the Third Circuit extended the limitations period only to include discovery of the adverse employment action, not the discovery of facts suggesting the employer's discriminatory motive.<sup>83</sup> In that case, a law firm fired a female associate in April 1990 saying that it did not have enough work to sustain

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75. *Id.* at 86.

76. 920 F.2d 446 (7th Cir. 1990).

77. *Id.* at 448–49.

78. *Id.* at 449.

79. Because of a state work-sharing agreement, the applicable limitations period was 300 days in this case instead of 180. See 42 U.S.C. § 2000e-5(e) (2000).

80. *Cada*, 920 F.2d at 450. Although the Supreme Court has not acknowledged the existence of a discovery rule, many courts find support for one in the Supreme Court's decision in *Delaware State College v. Ricks*, 449 U.S. 250 (1980), which held that the limitations period for an allegedly discriminatory tenure denial began "at the time the tenure decision was made and communicated" rather than from the date when the plaintiff's employment contract actually expired, *id.* at 258. According to the Seventh Circuit, the "discovery rule is implicit in the holding of *Ricks*." *Cada*, 920 F.2d at 450. Importantly, however, the Court's phrasing in *Ricks* suggests that it is the communication of the adverse decision, and not the discovery of facts suggesting discrimination, that triggers the limitations period.

81. *Cada*, 920 F.2d at 452–53.

82. 38 F.3d 1380 (3d Cir. 1994).

83. See *id.* at 1390–91.

her position; she learned during an unemployment benefits hearing the following year that the firm had hired a male attorney to replace her almost immediately.<sup>84</sup> The court held that the discovery rule delays the statute of limitations only until plaintiff "has discovered, or by exercising reasonable diligence, should have discovered (1) that he or she has been injured, and (2) that this injury has been caused by another party's conduct."<sup>85</sup> In this case, the notice of injury occurred on the day the plaintiff was discharged; her later discovery of facts suggesting a discriminatory motive was "irrelevant for the purposes of the discovery rule."<sup>86</sup> If courts continue to set the critical time for purposes of the discovery as the date the employee learned of the adverse action, and not when she learned sufficient facts to suggest discrimination, a more widespread adoption of the discovery rule will do very little to ease the burdens facing employees under Title VII's timely filing doctrines.

The minimalist discovery rules and tolling doctrines applied by lower courts to date make the harshness of the Court's timely filing precedents all the more palpable for employees who fail to immediately recognize when they experience discrimination. Moreover, even a more generous discovery rule would not help employees who are reluctant to immediately challenge each discriminatory act when they first learn of it and are only motivated to do so when they feel its accumulated effects. As a result, the discovery rule and other equitable tolling rules will not solve the problems plaintiffs confront in complying with Title VII's short limitations period.

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84. *Id.* at 1384.

85. *Id.* at 1386.

86. *Id.* at 1391; *see also* Ferrill v. City of Milwaukee, 295 F. Supp. 2d 920, 924 (E.D. Wis. 2003) (refusing to begin the limitations period for a black former police officer when he learned that white officers had received less severe punishments for similar infractions: "[W]hen the adverse employment action (i.e., the injury) was the termination of employment, the action accrues when the plaintiff was advised of the termination, not later when he discovers facts leading him to believe that he was the victim of discrimination."). In the pay discrimination context, the discovery rule has been held to toll the statute of limitations only until the employee learns that a comparator earns a higher salary, regardless of whether she has reason to believe the disparity is based on sex. *See, e.g.,* Adams v. CBS Broad., Inc., 61 F. App'x 285, 287-88 (7th Cir. 2003) (applying discovery rule when black female employee learned from coworkers a year after starting employment that white male technicians were being paid more); Inglis v. Buena Vista Univ., 235 F. Supp. 2d 1009, 1025-26 (N.D. Iowa 2002). However, simply knowing of a pay disparity with other workers is not enough to place an employee on notice that the disparity is discriminatory. *See, e.g.,* Leonard Bierman & Rafael Gely, "Love, Sex and Politics? Sure. Salary? No Way": *Workplace Social Norms and the Law*, 25 BERKELEY J. EMP. & LAB. L. 167, 178 (2004) ("Employees observe wage differentials without the full information necessary to evaluate the justifications for the differing wages.").

#### D. Requirements for Reporting Harassment

Although *Morgan* carves out hostile environment claims from its strict rule for challenging discrete discriminatory acts,<sup>87</sup> even this more lenient treatment is undermined by a judicially created affirmative defense to employer liability for hostile environment harassment. In *Faragher v. City of Boca Raton*<sup>88</sup> and *Burlington Industries, Inc. v. Ellerth*,<sup>89</sup> the Supreme Court established an affirmative defense to employer liability for sexual harassment by a supervisor that does not inflict tangible harm. The affirmative defense indirectly imposes a prompt complaint requirement on harassed employees as a condition of preserving their right to enforce Title VII's substantive guarantees. Employers may avoid liability or damages if they demonstrate both "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."<sup>90</sup>

The prompt complaint requirement comes from the second prong, which focuses on how the employee responds to the harassment. Lower courts interpreting the affirmative defense have taken a particularly anti-plaintiff view of the second prong for determining whether a delay in filing a complaint was excessive or whether the failure to file a complaint was reasonable.<sup>91</sup>

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87. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115 (2002) ("Hostile environment claims are different in kind from discrete acts. Their very nature involves repeated conduct.").

88. 524 U.S. 775 (1998).

89. 524 U.S. 742 (1998).

90. *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765. Despite the clarity of this test in requiring proof of both prongs, some lower courts have effectively waived the second prong where the first prong has been established. Under such rulings, an employer can establish the affirmative defense to liability based solely on the reasonableness of its own actions, even if the employee also behaved reasonably. See, e.g., *McCurdy v. Ark. State Police*, 375 F.3d 762, 771 (8th Cir. 2004); *Indest v. Freeman Decorating, Inc.*, 164 F.3d 258, 265 (5th Cir. 1999); *Watkins v. Prof'l Sec. Bureau, Ltd.*, No. 98-2555, 1999 U.S. App. LEXIS 29841, at \*18-19 (4th Cir. Nov. 15, 1999). But see *Harrison v. Eddy Potash, Inc.*, 248 F.3d 1014, 1026 (10th Cir. 2001) (describing *Indest* as "highly suspect" and refusing to read out the second prong of the affirmative defense). This development illustrates the extent to which lower courts have become hostile to harassment plaintiffs, even to the point of ignoring clear Supreme Court language.

91. For an analysis of the pro-employer way in which the affirmative defense has been applied in lower courts, see Joanna L. Grossman, *The First Bite Is Free: Employer Liability for Sexual Harassment*, 61 U. PITT. L. REV. 671, 722-29 (2000) (arguing that because reporting harassment was "the least likely victim response," the requirement of reporting to prove "reasonableness" unfairly benefits defendants); L. Camille Hébert, *Why Don't "Reasonable Women" Complain About Sexual Harassment?*, 82 IND. L.J. 711, 715 (2007) ("[L]ower courts have applied [*Faragher* and *Ellerth*] in ways quite hostile to the interests of women who have been sexually harassed and quite favorable to the interests of employers whose supervisory employees have been accused of sexual harassment.").

According to lower federal courts, a “reasonable” employee who has experienced workplace harassment must, at a minimum, file an internal complaint that complies with the employer’s policies.<sup>92</sup> If an employer’s antiharassment policy has been made available to employees,<sup>93</sup> courts have found it *unreasonable* for employees to complain to the wrong person under company policy,<sup>94</sup> to go directly to the EEOC or a union representative,<sup>95</sup> to provide insufficient information for the employer to conduct an investigation of the allegations,<sup>96</sup> or to fail to cooperate with the investigation.<sup>97</sup>

Only prompt complaints are deemed “reasonable,” a term courts tend to construe strictly, effectively imposing a phantom deadline even shorter than the statute of limitations. In one extreme case, a week’s delay was too long,<sup>98</sup> but even in more typical cases, courts expect almost immediate action from harassment victims, especially for incidents of severe harassment. The court in *Conatzer v. Medical Professional Building Services*,<sup>99</sup> for example, in a section of the opinion entitled “Employee’s Unreasonableness,” found it unreasonable as a matter of law for the plaintiff to wait seventeen days from the “first significant incident” to complain.<sup>100</sup>

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92. Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form Over Substance in Sexual Harassment Law*, 26 HARV. WOMEN’S L.J. 3, 21–23 (2003) (noting that courts have enforced a strict “duty to complain”).

93. *Cf. Faragher*, 524 U.S. at 808 (depriving the employer of the opportunity to prove the affirmative defense in part because it “had entirely failed to disseminate its policy against sexual harassment among [its] . . . employees”). See generally Grossman, *supra* note 92 (discussing the legal ramifications for employers of failing to disseminate antiharassment policies).

94. See *Madray v. Publix Supermarkets, Inc.*, 208 F.3d 1290, 1300–02 (11th Cir. 2000) (finding that complaining to managers not designated by the policy is unreasonable for purposes of the affirmative defense); *Green v. Wills Group, Inc.*, 161 F. Supp. 2d 618, 626 (D. Md. 2001) (holding that complaining to the wrong person rendered victim’s behavior unreasonable).

95. See, e.g., *Jackson v. Ark. Dep’t of Educ.*, 272 F.3d 1020, 1025 (8th Cir. 2001) (finding that electing to file a grievance with the EEOC rather than the employer constitutes an unreasonable failure to take advantage of corrective opportunities).

96. See, e.g., *Mernik v. Classic Cars, Inc.*, No. 3:99-CV-1327-P, 2000 U.S. Dist. LEXIS 9373, at \*34–35 (N.D. Tex. June 28, 2000) (finding plaintiff’s mention to employer of “crude and vulgar” behavior was insufficient to constitute availment of the employer’s sexual harassment procedures).

97. See, e.g., *Hill v. Am. Gen. Fin., Inc.*, 218 F.3d 639, 643 (7th Cir. 2000) (holding that failing to give honest answers to employer during investigation is unreasonable); *McCluney v. Cuomo*, No. 3:99-CV-0668-BC, 2000 U.S. Dist. LEXIS 9300, at \*22–23 (N.D. Tex. July 5, 2000) (finding that employee’s denial that harassment occurred in conversation with investigator was unreasonable).

98. See *Marsicano v. Am. Soc’y of Safety Eng’rs*, No. 97-C7819, 1998 WL 603128, at \*7 (N.D. Ill. Sept. 4, 1998) (finding seven-day delay unreasonable).

99. 255 F. Supp. 2d 1259 (N.D. Okla. 2003).

100. *Id.* at 1270; see also *Walton v. Johnson & Johnson*, 347 F.3d 1272, 1289–91 (11th Cir. 2003) (concluding that a three-month delay was unreasonable as a matter of law).

Employees who experience harassment and then wait to see if harassing behavior continues or to gather more evidence before complaining are often deemed unreasonable,<sup>101</sup> even though the EEOC's *Compliance Manual* states that an "employee might reasonably ignore a small number of incidents, hoping that the harassment will stop without resort to the complaint process."<sup>102</sup> The strictness of courts' approach here is particularly notable because, as explained later, employees might not be protected from retaliation if they complain before marshalling sufficient facts and ensuring a sufficient legal basis for their complaints.<sup>103</sup>

The failure to complain is almost always fatal to the plaintiff's case, since courts have been relatively unwilling to accept excuses and tend, instead, to assume that such a failure is always "unreasonable."<sup>104</sup> A "generalized fear of retaliation," for example, is an insufficient justification for not using an employer's internal grievance procedure (despite the frequency with which employees who complain actually experience retaliation),<sup>105</sup> and most fears are therefore rejected out of hand.<sup>106</sup> In dismissing such fears, courts tend to equate an employer's formal policy

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101. See *Matvia v. Bald Head Island Mgmt., Inc.*, 259 F.3d 261, 269–70 (4th Cir. 2001) (finding that the "gravity and numerosity of the incidents" made it unreasonable for victim to have waited to complain); *Phillips v. Taco Bell Corp.*, 83 F. Supp. 2d 1029, 1034 (E.D. Mo. 2000) (finding failure to report for three months unreasonable even though there was a three-month gap between the first incident and the next four, which happened in rapid succession).

102. See EEOC, *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors*, EEOC Comp. Man. (BNA) No. 915.002, at 17 (June 18, 1999), available at <http://www.eeoc.gov/policy/docs/harassment.html> ("An employee should not necessarily be expected to complain to management immediately after the first or second incident of relatively minor harassment.").

103. See *infra* Part III.B.1.

104. As Camille Hébert points out, courts sometime read the reasonableness requirement out of the second prong altogether, construing it instead to require complaints in all cases. See Hébert, *supra* note 91, at 720. Other courts recite the unreasonableness requirement, but give little, if any, consideration to whether a particular victim's failure to report was, in fact, unreasonable under the circumstances. See *id.*

105. See *infra* Part II.B.3.b.

106. *Harrison v. Eddy Potash, Inc.*, 248 F.3d 1014, 1026 (10th Cir. 2001) (holding that "[a] generalized fear of retaliation does not excuse a failure to report sexual harassment" (citation omitted)); *Leopold v. Baccarat, Inc.*, 239 F.3d 243, 246 (2d Cir. 2001) (holding that being "too scared" is not a justification for failing to complain without evidence to substantiate such fears); *Hill v. Am. Gen. Fin., Inc.*, 218 F.3d 639, 644 (7th Cir. 2000) (holding that "apprehension does not eliminate the requirement that the employee report harassment").



against retaliation with the actual absence of retaliation,<sup>107</sup> despite strong evidence that the two bear little correlation.<sup>108</sup>

To justify failing to complain, employees must show specific credible threats of retaliation or tangible evidence of the employer's prior unresponsiveness to harassment complaints.<sup>109</sup> The court in *Walton v. Johnson & Johnson*<sup>110</sup> refused to excuse a three-month delay because the harasser never told the plaintiff "her job was in jeopardy" or "threaten[ed] her with physical harm."<sup>111</sup> The court failed to credit her fear of complaining even though the supervisor's alleged harassment had included multiple episodes of "particularly traumatic" forcible rape and several occasions on which he showed her his gun.<sup>112</sup> Despite the rapes and the gun-brandishing, the lack of a direct threat of retaliation reduced her proffered excuse for failing to complain to "an unsupported subjective fear that the employee would suffer physical harm at the hands of her alleged harasser."<sup>113</sup> Even a harasser's active efforts to deter a complaint are not necessarily sufficient to excuse a victim's failure to complain. In *Wyatt v. Hunt Plywood Co.*,<sup>114</sup> the plaintiff complained to her direct supervisor, one of the individuals designated in the policy to receive complaints.<sup>115</sup> After

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107. See, e.g., *Taylor v. CSX Transp.*, 418 F. Supp. 2d 1284, 1309 (M.D. Ala. 2006) ("Ms. Taylor has failed to explain how she legitimately feared retaliation, particularly given that CSXT's antiharassment policy specifically forbid retaliation against employees who lodged sexual harassment complaints."); see also *infra* Part II.B.3.b (discussing the actual role of retaliation in employees' experiences).

108. See *infra* notes 228–31 and accompanying text (citing data on retaliation); see also Grossman, *supra* note 92, at 19–21 (citing data on antiharassment policies).

109. For cases requiring specific retaliation threats, see *Leopold*, 239 F.3d at 246 ("A credible fear [of retaliation] must be based on more than the employee's subjective belief. Evidence must be produced to the effect that the employer has ignored or resisted similar complaints or has taken adverse action against employees in response to such complaints."); *Anderson v. Deluxe Homes*, 131 F. Supp. 2d 637, 651 (M.D. Pa. 2001) (holding that warnings from other employees that complaint would result in retaliatory firing might make plaintiff's failure to complain reasonable). For cases considering employers' prior unresponsiveness, see *Young v. R.R. Morrison & Son, Inc.*, 159 F. Supp. 2d 921, 927 (N.D. Miss. 2000) (noting that "a plaintiff may bring forward evidence of prior unresponsive action by the company or management to actual complaints" as a reason for not complaining); *Childress v. PetsMart, Inc.*, 104 F. Supp. 2d 705, 709 (W.D. Tex. 2000) (finding employee's failure to complain unreasonable despite her testimony that she had been told by coworkers "that complaining would be futile"). But see *Burrell v. Crown Cent. Petroleum, Inc.*, 121 F. Supp. 2d 1076, 1083–84 (E.D. Tex. 2000) (finding plaintiff's failure to complain due to supervisors' participation in the harassment and their lack of appropriate response to harassment committed by others was unreasonable when complaint procedures provided for alternative means of reporting harassment).

110. 347 F.3d 1272 (11th Cir. 2003).

111. *Id.* at 1291.

112. *Id.*

113. *Id.* at 1291 n.17.

114. 297 F.3d 405 (5th Cir. 2002).

115. *Id.* at 407.

she complained, that supervisor joined in the harassment of the plaintiff—“continually propositioning [her] for sex and making lewd comments”—and warned her not to “go over his head.”<sup>116</sup> The Fifth Circuit ruled that the plaintiff behaved unreasonably by failing to complain to another designee in the policy, and the supervisor’s admonitions did “not excuse her failure to disclose harassment to a higher authority.”<sup>117</sup>

In general, these cases reflect a widespread refusal by courts to consider context when making determinations about the reasonableness of the plaintiff’s behavior. New employees are assumed to be as free to complain as longstanding ones,<sup>118</sup> employees are presumed to have hindsight knowledge about a pattern of harassment that has only just begun,<sup>119</sup> and the fear employees report about retaliation is dismissed as overly general and subjective. This acontextual approach essentially makes the failure to complain immediately through employer-specified channels per se “unreasonable,” effectively barring employees access to the law’s substantive protections against harassment.

The emphasis in the affirmative defense on prompt complaints by employees has spilled over into coworker harassment cases as well, even though the Supreme Court has never extended the defense to these claims. Unlike supervisory harassment, where the affirmative defense tempers the baseline rule of vicarious liability, coworker harassment claims require proof of a negligence-based justification for employer liability.<sup>120</sup> Plaintiffs challenging coworker harassment must show that the employer knew or should have known of the harassment but failed to respond with prompt and appropriate corrective action.<sup>121</sup> Prior to the Court’s adoption of the affirmative defense for supervisor harassment cases not involving tangible harm, proof that the employer knew or should have known of coworker harassment sufficed to establish employer liability, regardless of how the employer learned of the harassment.<sup>122</sup> In recent years, however, lower courts have applied the affirmative defense to coworker harassment as well. Plaintiffs have been penalized, for example, for not reporting coworker

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116. *Id.* at 412–13.

117. *Id.* at 413; *see also* *Reed v. MBNA Mktg. Sys., Inc.*, 231 F. Supp. 2d 363, 367 (D. Me. 2002) (refusing to excuse plaintiff’s failure to complain even though her harassing supervisor told her not to tell anyone and warned her that his father was “good friends with the owner” of her company).

118. *See, e.g.*, *Dennis v. Nevada*, 282 F. Supp. 2d 1177, 1180 (D. Nev. 2003) (concluding that plaintiff behaved unreasonably for failing to complain because she “did not want to jeopardize completing the probationary period successfully”).

119. *See, e.g.*, *Phillips v. Taco Bell Corp.*, 83 F. Supp. 2d 1029, 1034 (E.D. Mo. 2000) (expecting plaintiff to complain even before realizing the misconduct would recur and escalate).

120. Grossman, *supra* note 91, at 689–90.

121. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 799 (1998) (collecting cases).

122. *Id.*; Grossman, *supra* note 91, at 690 & n.94.

harassment through employer channels, even when employer knowledge of the harassment can be established in some other way.<sup>123</sup> Thus, all hostile environment claims effectively share a strict time limit on reporting harassment, even shorter, in many cases, than the one imposed by the statute of limitations.<sup>124</sup>

*E. Employer Internal Dispute Resolution Processes and Their Effect on Formal Rights-Claiming*

One of the most important developments in employment law in recent years is the trend toward channeling employee complaints about discrimination into internal dispute resolution ("IDR") processes set up by employers for addressing such concerns.<sup>125</sup> Although the statute's only explicit administrative exhaustion requirement is to file with the EEOC or state administrative agency before suing in court, the prevalence of employer IDR processes effectively adds another layer of complaint processing to Title VII's formal rights-claiming regime. Increasingly, courts and/or employers obligate, or at least strongly encourage, employees to attempt to resolve their discrimination complaints internally before taking official legal action.<sup>126</sup>

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123. See, e.g., *Zimmerman v. Cook County Sheriff's Dep't*, 96 F.3d 1017, 1018–19 (7th Cir. 1996); *Derringe v. Old Nat'l Bank*, No. 3:04-cv-217-RLY-WGH, 2006 U.S. Dist. LEXIS 78669, at \*16–18 (D. Ind. Oct. 27, 2006). Reporting requirements are enforced indirectly, as well, through the substantive elements of sexual harassment doctrine. For example, plaintiffs must prove that the conduct they experienced was "unwelcome," and the failure to promptly resist or complain has been used as evidence of welcomeness. See, e.g., *Reed v. Shepherd*, 939 F.2d 484, 492 (7th Cir. 1991) (female police officer's initial receptiveness to coworkers' sexual remarks/activities was fatal to her harassment claim).

124. Although the affirmative defense for supervisor harassment claims does not apply where the plaintiff has experienced tangible harm, discrimination that results in tangible harm falls under *Morgan's* rule for challenging discrete acts. Thus, the doctrines coalesce to impose very short time limits for challenging all forms of discrimination.

125. See, e.g., Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 29 (2006) ("[M]anagement lawyers and consultants have frequently urged employers to adopt internal dispute resolution procedures, zero-tolerance policies, and diversity and sexual harassment training programs."); Susan Sturm, *Equality and the Forms of Justice*, 58 U. MIAMI L. REV. 51, 76–77 (2003) ("Judicial doctrine has encouraged employers to develop internal dispute resolution and problem solving mechanisms. . . . Employers have instituted a wide range of dispute resolution processes, including ombuds officers, mediation, peer review, open door policies, and arbitration.").

126. See, e.g., *Abbott v. Crown Motor Co.*, 2003 FED App. 0388P, ¶ 5 (6th Cir.), 348 F.3d 537, 540 (after an employee filed an EEOC charge for racial harassment and discrimination, the supervisor called a meeting "at which he threatened that it was inappropriate for employees to take complaints outside of Crown Motors," and stated that "all complaints regarding employment should be made internally" (internal quotation marks omitted)); *Lowry v. Regis Salons Corp.*, No. 1:05-cv-1970-WSD, 2006 WL 2583224, at \*4 (N.D. Ga. Sept. 6, 2006) (plaintiff was required to sign an acknowledgement form when she was hired stating "that she understood her obligation as an employee to promptly report to the appropriate persons activities and/or conduct which may

This kind of “privatization” of employment discrimination disputes is driven by recent legal developments that make IDR policies and procedures all but mandatory and integrally tied to Title VII’s liability scheme. One important catalyst for this trend is the Supreme Court’s recent precedent, discussed above, constructing an affirmative defense to supervisor sexual harassment claims.<sup>127</sup> The first part of the defense requires an employer to show that it took reasonable preventive measures, generally construed to require the development and distribution of policies and procedures for resolving harassment complaints.<sup>128</sup> The other part of the affirmative defense, discussed in detail above, requires employees to act reasonably to prevent and correct harassment, which courts generally interpret to require employees to use such procedures.<sup>129</sup> Partly in response to these incentives, the privatization of harassment claims has become an entrenched part of workplace culture.<sup>130</sup>

The trend does not stop with sexual harassment. Because racial harassment is governed by the same liability framework, company harassment policies generally encompass racial harassment as well.<sup>131</sup> In addition, other legal pressures create incentives for employers to develop policies and procedures addressing all types of discrimination. For example, even though there is no employer defense to liability for discrimination involving tangible harm, employers can avoid punitive damages by proof of good faith efforts to comply with the law.<sup>132</sup> Thus, there are strong incentives for employers to create policies and procedures for addressing workplace discrimination generally. Any analysis of rights-claiming under Title VII must take into account these developments.

Far from solving the problems created by Title VII’s prompt complaint requirements, the added layer of internal processes creates additional risks for employees. Employers broadly encourage employees to use their IDR processes, and employer policies promising fair treatment and zero tolerance for discrimination encourage employees to trust these processes and hold high hopes for a positive outcome. If, however, the

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constitute harassment’ ” (quoting Defendant’s Statement of Material Facts as to Which There Is No Genuine Issue To Be Tried ¶ 7, *Lowry*, 2006 WL 2583224 (No. 1:05-cv-1970-WSD))).

127. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 807–08 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998).

128. *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

129. See *supra* notes 87–124 and accompanying text.

130. See Grossman, *supra* note 92, at 3.

131. See, e.g., *Harris v. Forklift Sys.*, 510 U.S. 17, 25–26 (1993) (Ginsburg, J., concurring) (noting that Title VII standards for sexual harassment are the same as those for racial harassment).

132. See *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526, 544 (1999).

results of IDR processes do not provide a satisfactory resolution, employees may be worse off in their efforts to enforce Title VII rights.<sup>133</sup>

An employee who waits to file an EEOC charge while pursuing an internal complaint process, for example, is likely to be out of luck. In an early Title VII decision, the Supreme Court ruled that an employee's pursuit of an internal grievance process does not toll the limitations period for filing a claim with the EEOC. In that case, *International Union of Electrical Workers v. Robbins & Myers, Inc.*,<sup>134</sup> an employee initially sought to resolve a discrimination concern internally, through the dispute resolution processes established in a collective bargaining agreement.<sup>135</sup> In reasoning that is not limited to collective bargaining agreements and applies to all IDR processes for investigating and resolving discrimination complaints, the Court ruled that an employee's participation in an internal grievance process does not toll the limitations period for filing a Title VII charge.<sup>136</sup> The Court was concerned that tolling the formal limitations period would discourage employers from attempting to voluntarily resolve such disputes, and it viewed such processes as wholly distinct from Title VII's formal enforcement mechanisms.<sup>137</sup>

The Court's reasoning cannot be squared with the past decade's proliferation of IDR processes for resolving discrimination complaints as an integral part of Title VII's legal framework. Courts' continuing refusal to toll Title VII's limitations period for time spent trying to resolve discrimination complaints internally seriously jeopardizes employees' formal assertion of rights.<sup>138</sup> Employers have a great deal of control over the length of time such processes take, whether employees use them, and the extent of employees' reliance on and hopes for such processes. In this environment, it is all too easy for such internal processes to run out the clock on asserting rights through the formal statutory mechanisms.

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133. Cf. Bagenstos, *supra* note 125, at 28–31 (explaining and further developing critique of employers' internal dispute resolution process for discrimination complaints as skewed to serve the needs of employers).

134. 429 U.S. 229 (1976).

135. *Id.* at 232–33.

136. *Id.* at 236–40.

137. *Id.* at 236–37.

138. See, e.g., *Campbell v. BankBoston, N.A.*, 327 F.3d 1, 10–11 (1st Cir. 2003) (holding that the limitations period began to run “not when the grievance procedure to correct that decision was terminated,” but when the initial decision to convert the pension system “was made and communicated”); *Jackson v. Carolinas Healthcare Sys.*, No. 3:06-CV-279-DCK, 2007 U.S. Dist. LEXIS 89526, at \*17 (W.D.N.C. Dec. 5, 2007) (“Use of a company’s formal internal grievance procedure does not toll the statute of limitations.”).

Taken together, the body of doctrine discussed above places tough requirements on employees to quickly ascertain and challenge any discrimination they encounter in the workplace if they are to preserve their Title VII rights. The law leaves very little allowance for difficulties perceiving and recognizing discrimination, hesitation in reporting and challenging it, and delay for the sake of pursuing other avenues first. The law effectively reserves Title VII's substantive rights to those employees who are hypervigilant about noticing, comprehending, and challenging violations of their rights. As the next section demonstrates, such an employee is far from the norm.

## II. THE REALITIES OF PERCEIVING AND CLAIMING DISCRIMINATION

The procedural framework for securing Title VII rights is strict by any definition, but especially so when considered against the backdrop of research about how people actually perceive and respond to workplace discrimination. Unlike the worthy claimant the law assumes, real targets of bias often do not immediately "know" when they have been discriminated against, and even when they do perceive bias, they rarely challenge it promptly, if at all. Legal doctrine predicated upon a false picture of employee behavior undermines Title VII's rights-claiming regime and eviscerates the law's substantive protections.

### A. *Difficulties Perceiving Discrimination*

Title VII's short statute of limitations and strict timely filing doctrines presume a legal subject who quickly perceives and recognizes unlawful discrimination when it strikes her. At a deeper level, the strictness of Title VII doctrine in weeding out potential claimants reflects judicial skepticism of rights-claiming in this area and a fear of hypervigilant employees who are too quick to infer discrimination. Such skepticism is shared widely in popular culture, which has developed negative terms such as "feminazi" and "playing the race card" to disparage women and people of color who place too much emphasis on discrimination.

In reality, however, perceiving discrimination is more complicated.<sup>139</sup> Evidence from the field of social psychology suggests that the underperception of discrimination is more the norm than hypervigilance.<sup>140</sup>

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139. This section summarizes social psychology research on perceiving discrimination described in greater detail in Deborah L. Brake, *Perceiving Subtle Sexism: Mapping the Social-Psychological Forces and Legal Narratives That Obscure Gender Bias*, 16 COLUM. J. GENDER & L. 679 (2007).

140. See, e.g., Elizabeth H. Dodd et al., *Respected or Rejected: Perceptions of Women Who Confront Sexist Remarks*, 45 SEX ROLES 567, 568-69 (2001) (summarizing research showing that women tend to explain away sexism, despite evidence that it has occurred); Cheryl R. Kaiser &

For example, even when women experience behavior that objectively qualifies as sexual harassment, many do not perceive that they have been sexually harassed.<sup>141</sup> This example is part of a broader and widely documented phenomenon whereby members of stigmatized groups acknowledge that their group experiences discrimination but deny that they have experienced it individually.<sup>142</sup>

As this phenomenon suggests, perceiving discrimination involves complex social and psychological processes. Rather than encouraging people to recognize discrimination quickly when they experience it, numerous psychological processes interfere with the perception of discrimination, especially when it occurs subtly rather than overtly.<sup>143</sup>

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Brenda Major, *A Social Psychological Perspective on Perceiving and Reporting Discrimination*, 31 LAW & SOC. INQUIRY 801, 803–06 (2006) (describing as “sparse,” the “empirical evidence that members of historically disadvantaged groups claim discrimination when none exists, or even that they are especially sensitive to and vigilant for discrimination,” and summarizing studies supporting the view that people err on the side of denying discrimination); Brenda Major & Cheryl R. Kaiser, *Perceiving and Claiming Discrimination*, in HANDBOOK OF EMPLOYMENT DISCRIMINATION RESEARCH: RIGHTS AND REALITIES 285, 286–87 (Laura Beth Nielsen & Robert L. Nelson eds., 2005) (“[M]embers of disadvantaged groups typically miss, underestimate, or deny the extent to which they are personally targets of prejudice.”); Charles Stangor et al., *Reporting Discrimination in Public and Private Contexts*, 82 J. PERSONALITY & SOC. PSYCHOL. 69, 69 (2002) (“[P]rior research has shown that members of stigmatized groups are in many cases unlikely to report that negative events that occur to them are due to discrimination, even when this is a valid attribution for the event.”).

141. See, e.g., Vicki J. Magley et al., *Outcomes of Self-Labeling Sexual Harassment*, 84 J. APPLIED PSYCHOL. 390, 390 (1999); see also Quinn, *supra* note 8, at 1156 (rejecting lack of legal understanding as a sufficient explanation for women’s resistance to label their experiences sexual harassment).

142. See John T. Jost, *Negative Illusions: Conceptual Clarification and Psychological Evidence Concerning False Consciousness*, 16 POL. PSYCHOL. 397, 404–05 (1995); Donald M. Taylor et al., *The Personal/Group Discrimination Discrepancy: Perceiving My Group, but Not Myself, To Be a Target for Discrimination*, 16 PERSONALITY & SOC. PSYCHOL. BULL. 254, 254–55 (1990); see also Faye Crosby, *The Denial of Personal Discrimination*, AM. BEHAV. SCI., Jan.–Feb. 1984, at 371, 372–73 (1984) (describing bedrock study in this literature from 1978 in which 400 male and female workers rated their personal job satisfaction and grievances similarly, despite objective evidence that the women in the study were discriminated against); James M. Olson & Carolyn L. Hafer, *Tolerance of Personal Deprivation*, in THE PSYCHOLOGY OF LEGITIMACY: EMERGING PERSPECTIVES ON IDEOLOGY, JUSTICE, AND INTERGROUP RELATIONS 157, 163–64 (John T. Jost & Brenda Major eds., 2001) (explaining that the discrepancy holds true for stigmatized groups generally and “crosses racial, gender, and economic boundaries,” and noting that “it is a statistical impossibility for all members of a group to experience less discrimination than other members”).

143. See, e.g., Brenda Major et al., *Attributions to Discrimination and Self-Esteem: Impact of Group Identification and Situational Ambiguity*, 39 J. EXPERIMENTAL SOC. PSYCHOL. 220, 230 (2002) [hereinafter Major et al., *Attributions to Discrimination*] (“[A]mbiguous situations appear to be especially difficult for members of stigmatized groups. Because they disguise prejudice, they create uncertainty and interfere with the target’s ability to discount their own role in producing negative outcomes.”); Brenda Major et al., *Prejudice and Self-Esteem: A Transactional Model*, 14 EUR. REV. SOC. PSYCHOL. 77, 81–82 (2003) [hereinafter Major et al.,

### 1. The Influence of Ideology

People have a widely shared desire to believe that the world is fundamentally just in the sense that individual merit determines individual outcomes, or in other words, people that “reap what they sow.”<sup>144</sup> Perceiving oneself as a victim of discrimination conflicts with this world view. In mainstream U.S. culture, beliefs in a just world are pervasive and strongly influence perceptions of discrimination.<sup>145</sup> This ideology is especially influential in shaping perceptions of discrimination under circumstances where discrimination is subtle and ambiguous, rather than overt and clear cut, as is often the case.<sup>146</sup>

Women and persons of color who adhere to a belief in a “just world” are less likely to attribute negative outcomes in their lives to discrimination and more likely to internalize the reasons for disappointing outcomes instead.<sup>147</sup> For example, research on stigmatized social groups has found that members of these groups who “endorsed the ideology of individual mobility,” i.e., agreed with such statements as “[a]dvancement in American society is possible for individuals of all ethnic groups,” were less likely to interpret negative events as discriminatory than their cohorts who did not adhere to these beliefs.<sup>148</sup>

The inhibiting effect of just world ideology on perceptions of discrimination is particularly pronounced for members of disadvantaged groups because it rationalizes and internalizes broader patterns of disadvantage for members of these groups.<sup>149</sup> In contrast, the belief in a

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*Prejudice and Self-Esteem*] (stating that people are much less likely to perceive bias when prejudice cues are subtle and not overt).

144. See, e.g., Olson & Hafer, *supra* note 142, at 159–63. Just world theory was originally used to explain how people react to the suffering of others, but subsequent work has demonstrated the theory’s force in explaining how people make sense of their own suffering. *Id.* at 159–60.

145. See Carolyn L. Hafer & James M. Olson, *Beliefs in a Just World, Discontent, and Assertive Actions by Working Women*, 19 PERSONALITY & SOC. PSYCHOL. BULL. 30, 34–35 (1993) (explaining that people who hold strong beliefs in a just world tend to minimize discrimination and blame themselves for poor outcomes); Kaiser & Major, *supra* note 140, at 806–08 (describing “the meritocratic worldview” and its prevalence in mainstream U.S. culture). Particular workplaces in which the belief in meritocracy is especially strong may be especially likely to discourage perceptions of bias against persons who do not rise to the top of the organization. See *id.* at 810–12.

146. Olson & Hafer, *supra* note 142, at 163.

147. *Id.* at 161; Kaiser & Major, *supra* note 140, at 810–12 (discussing research finding that low-status groups’ attributions to discrimination decrease when targets are first primed with messages promoting a meritocratic worldview).

148. Major et al., *Prejudice and Self-Esteem*, *supra* note 143, at 82 (discussing research on women and Latino/a Americans). The authors add: “They were also less likely to blame discrimination when a higher-status confederate (European-American; man) rejected them for a desirable role.” *Id.*

149. See Kaiser & Major, *supra* note 140, at 808 (“Because endorsing this meritocratic worldview results in seeing low-status group members as deserving of their poor outcomes, the



just world may have the opposite effect on members of privileged groups by setting up an expectation of continued privilege that causes members of these groups to suspect extrinsic and unfair considerations when they experience negative outcomes.<sup>150</sup>

Blaming oneself, rather than discrimination, for disappointing life events has the appeal of bolstering an individual's sense of control and avoiding the label of "victim."<sup>151</sup> For adherents to just world ideology, victimhood is a stigmatized identity.<sup>152</sup> The desire to see oneself as being in control of one's life helps explain the paradoxical finding that many more people acknowledge widespread discrimination against their social group than perceive discrimination against themselves individually.<sup>153</sup>

Blaming oneself rather than discrimination also enables people to avoid assessing blame on others. People are reluctant to perceive discrimination when doing so requires them to identify an individual discriminator.<sup>154</sup> The reluctance to blame others also helps explain why so many people who recognize widespread discrimination against their social group nevertheless deny that they have experienced it personally. Perceiving discrimination directed at an individual requires an identifiable villain, while recognizing systematic but anonymous discrimination does not.

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more low-status group members endorse these beliefs, the more they will minimize the extent to which they face discrimination.").

150. *Id.* at 808–09 ("[B]ecause endorsing the meritocratic worldview leaves members of high-status groups feeling entitled to their privileged position, the more they endorse the worldview, the more sensitive they will be toward perceiving signs of reverse discrimination."); *see also* Major et al., *Prejudice and Self-Esteem*, *supra* note 143, at 82 (suggesting that members of high-status groups, such as white males, are more likely to attribute negative outcomes to discrimination when they hold a belief in a just world).

151. Kaiser & Major, *supra* note 140, at 808 (discussing the psychological benefits of a meritocratic worldview, including a sense of control over one's destiny); *see also* KRISTIN BUMILLER, *THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS* 109 (1988) ("Injured persons reluctantly employ the label of discrimination because they shun the role of the victim.").

152. *See* Magley et al., *supra* note 141, at 392–93 (explaining that the ideology of individual responsibility "turn[s] the word *victim* into a synonym for *failure* or *irresponsibility*"); *see also* Quinn, *supra* note 8, at 1173 (explaining that complaining of sexual harassment saddles the complainant with a "stigmatized" identity, and quoting one manager as stating that "making a claim of sexual harassment is sort of like rape, it tends to reflect as badly on the person filing the report as it does the person being accused" (internal quotation marks omitted)).

153. Olson & Hafer, *supra* note 142, at 164.

154. *See* Crosby, *supra* note 142, at 380–81; *see also* Jacquie D. Vorauer & Sandra M. Kumhyr, *Is This About You or Me? Self-Versus Other-Directed Judgments and Feelings in Response to Intergroup Interaction*, 27 PERSONALITY & SOC. PSYCHOL. BULL. 706, 715–16 (2001) (reporting results of a study in which a member of a racial minority who interacted with a prejudiced white person felt badly after the interaction but attributed the negative feelings to internal reasons rather than the other person's prejudice).

While these widely shared ideologies discourage the perception of discrimination directed against individuals, other ideologies may encourage attributions to discrimination. For example, a strong identification with one's social group tends to encourage the perception of discrimination under conditions where prejudice cues are subtle or ambiguous.<sup>155</sup> People who strongly identify with members of their social group are more likely to suspect discrimination in situations where bias takes a subtle form.<sup>156</sup>

As this research suggests, knowledge of discrimination is far more complicated than Title VII's timely filing regime assumes. Far from being fixed and stable, it is mediated and filtered by an individual's belief system. Certain widely held belief systems encourage the denial of individualized discrimination, particularly the belief in a just world, the ideology of individual responsibility, and the reluctance to blame others.

## 2. Limited Information and Information-Processing Deficits

The likelihood of perceiving discrimination is highly dependent on the information available. Under ordinary circumstances, information suggestive of discrimination trickles in piecemeal, in anecdotal fashion, through the sharing of experiences with colleagues. Short of litigation and the judicially supervised discovery process, employees very rarely have access to aggregate data showing across-the-board treatment of employees by race, gender, and other protected characteristics. With respect to employee compensation, for example, organization-wide data broken down by gender or race is generally unavailable.<sup>157</sup> Although proposed legislation, in the form of the Paycheck Fairness Act, would require employers to make salary information more widely available, such proposals have failed to become law.<sup>158</sup>

Aggregate data is extremely important in enabling people to recognize individual instances of discrimination. Without data showing across-the-board disparities, people are more likely to hypothesize nondiscriminatory

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155. See Brenda Major, *From Social Inequality to Personal Entitlement: The Role of Social Comparisons, Legitimacy Appraisals, and Group Membership*, 26 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 293, 331 (1994); Major et al., *Prejudice and Self-Esteem*, *supra* note 143, at 95.

156. Interestingly, identification with one's social group had no effect on perception of individually directed discrimination when conditions suggestive of prejudice were either blatant or nonexistent. See Major et al., *Attributions to Discrimination*, *supra* note 143, at 228.

157. See Bierman & Gely, *supra* note 86, at 168, 171 (stating that social norms discourage discussion of salaries in the workplace and observing that one-third of U.S. private-sector employers have policies which, although illegal, bar employees from discussing their salaries, while many others communicate an expectation of salary confidentiality).

158. See Kay Steiger, *Less Money, Mo' Problems*, AM. PROSPECT, Apr. 25, 2007, [http://www.prospect.org/cs/articles?article=less\\_money\\_mo\\_problems](http://www.prospect.org/cs/articles?article=less_money_mo_problems). For the latest proposals of the Paycheck Fairness Act, see Bill Summaries for H.R. 1338 and S. 766, <http://thomas.loc.gov/> (last visited Mar. 22, 2008).

reasons for individual disparities and less likely to perceive discrimination.<sup>159</sup> With respect to pay disparities, for example, slight variations in any of the criteria used for setting pay are likely to be perceived as excusing gender gaps in pay, while data documenting organization-wide disparities greatly increases the likelihood of perceiving pay discrimination.<sup>160</sup>

The way information is presented and formatted also strongly influences people's ability to perceive discrimination. Presenting information on disparities in an aggregate, across-the-board format makes it much more likely that people will perceive discrimination than showing them the same information in case-by-case format.<sup>161</sup> Apparently, the case-by-case formatting leads people to hypothesize neutral, nondiscriminatory justifications, while the all-at-once, aggregate format makes such speculation less likely.<sup>162</sup>

Both in terms of the information available and the way the available information is likely to be presented, real-life conditions are much more likely to obscure rather than encourage employees' perceptions of discrimination.

### 3. Within-Group Comparisons and Sense of Entitlement

A third influence on the likelihood of perceiving discrimination is an individual sense of entitlement. In order to perceive that they have experienced unfair discrimination, people must believe that they are entitled to better treatment.<sup>163</sup> A person's sense of entitlement, in turn, is shaped by the process of social comparison and consideration of the treatment others receive, which provides information about what outcomes are possible and deserved.<sup>164</sup> Accordingly, the selection of comparators in this process is critical in shaping perceptions of fairness.

In the process of developing a sense of entitlement through comparison to others, the generalized tendency to draw comparisons within

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159. See Crosby, *supra* note 142, at 377-78; Major, *supra* note 155, at 332 ("It is easier to see discrimination on the collective level than on the individual level.").

160. Crosby, *supra* note 142, at 377-78.

161. See Faye Crosby et al., *Cognitive Biases in the Perception of Discrimination: The Importance of Format*, 14 SEX ROLES 637, 644-46 (1986); Major et al., *Prejudice and Self-Esteem*, *supra* note 143, at 81.

162. Crosby et al., *supra* note 161, at 645.

163. See Major, *supra* note 155, at 293-94 ("[B]eliefs about *entitlement* are a critical determinant of how members of social groups react affectively, evaluatively, and behaviorally to their socially distributed outcomes . . .").

164. See *id.* at 298-300 (explaining that feelings of entitlement shape expectations and perceptions of social justice, and that the process of social comparison is critical in shaping people's sense of entitlement).

one's social group has the effect of suppressing the likelihood that women and people of color will perceive bias. For example, working women are likely to compare their treatment with that of other working women due to structural features of the workplace that highlight women's similarity and proximity to one another.<sup>165</sup> Yet the very features of women's lives that create sufficient similarity to encourage within-gender comparisons—the undervaluation of women's work, vertical and horizontal job segregation, and the disproportionate responsibility for caretaking and family responsibilities—are likely to promote a lowered expectation of entitlement by virtue of the comparison to other women.<sup>166</sup> The use of same-gender comparisons to evaluate the fairness of one's pay, for example, leads women to expect lower pay because women overall receive lower pay.<sup>167</sup> Conversely, men compare their pay with that of other men, which leads them to expect higher pay.<sup>168</sup> In this way, the very existence of widespread discrimination against one's social group has the potential to suppress the perception of discrimination against individuals within that social group.<sup>169</sup>

In a similar dynamic, a person's current sense of entitlement is also shaped by his or her past treatment. A person who is used to being paid less is less likely to perceive lower pay as unfair or problematic.<sup>170</sup> Consequently, prior discrimination can become self-reinforcing by disguising the unfairness of present treatment through the lowered expectations set by past treatment.<sup>171</sup>

Data on gender differences in pay expectations illustrates how such processes suppress the likelihood that women will perceive pay discrimination. In studies asking men and women to determine the amount of compensation they would receive for performing specified tasks, women paid themselves sixty-one percent of what men did.<sup>172</sup> Similarly, when the compensation was set first and subjects were told to work as long as they

165. See Olson & Hafer, *supra* note 142, at 166–67; Major, *supra* note 155, at 302–03, 314–15.

166. Major, *supra* note 155, at 314–16. Vertical job segregation refers to the relative representation of women and men in high-ranking positions within any job type. Horizontal job segregation refers to the concentration of men or women in a particular job or category.

167. See *id.* at 320–21 (explaining that women's default within-group comparison reference point leads to lower expectations for pay than men have).

168. See *id.* at 321–22 (“Women and men estimate their personal deserving against a (same) sex-stereotyped judgment standard. . . . Because women and people doing ‘women’s jobs’ are typically paid less than men and people doing ‘men’s jobs,’ women estimate their personal deserving and evaluate their outcomes against a lower reference standard for pay than do men.”).

169. See *id.* at 294.

170. See *id.* at 307–08, 321–22.

171. See *id.* at 303 (“[P]eople typically feel they deserve the same treatment or outcomes that they have received in the past or that others like themselves receive.” (emphasis omitted)).

172. See Jost, *supra* note 142, at 404; see also Major, *supra* note 155, at 313–17.

thought appropriate for that level of pay, the women worked one-third longer than the men.<sup>173</sup> Women's suppressed sense of entitlement, strongly influenced by the process of social comparison, plays an important role in explaining the gap between the general recognition of discrimination against women as a group and the tendency to deny individual experience with discrimination.<sup>174</sup>

All of these processes greatly complicate the ability of employees to quickly recognize when they have experienced discrimination. The failure of Title VII law to engage these issues—most recently in the *Ledbetter* decision—leaves employees greatly impaired in their ability to enforce their substantive rights. With respect to pay discrimination in particular—the subject of the *Ledbetter* ruling—this research suggests that employees are highly unlikely to perceive pay discrimination in time to assert their Title VII rights.<sup>175</sup> More broadly, the difficulties identified in this literature with respect to perceiving discrimination bode poorly for rights-claiming with respect to discrimination claims generally.

### *B. Difficulties Challenging Discrimination*

In addition to the obstacles to *perceiving* discrimination, social scientists have documented a host of barriers to *challenging* it. These barriers are multifaceted, but we focus here on the well-established reluctance of victims to file formal complaints in the harassment context and the specific fear of retaliation that inhibits complaining about all forms of discriminatory conduct.

#### 1. Actual Versus Predicted Responses to Bias

Even individuals who accurately perceive that they have experienced discrimination face additional obstacles to publicly confronting the experience and reporting it. Social psychologists have observed a significant gap between the ability to privately recognize an experience as discriminatory and the ability or willingness to publicly label it as such.<sup>176</sup> This gap defies expectations of most individuals about how they believe they would react to discrimination in the workplace. In one study, for

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173. See Jost, *supra* note 142, at 404–05.

174. See Major, *supra* note 155, at 295–96.

175. See *id.* at 325–26 (noting that even when people are aware that women receive less pay than men, they tend to believe that differences in marketability, commitment to the workforce, job responsibilities, job performance, and job qualifications, rather than discrimination, explain the disparity, even when they do not).

176. See, e.g., Cheryl R. Kaiser & Carol T. Miller, *A Stress and Coping Perspective on Confronting Sexism*, 28 PSYCHOL. WOMEN Q. 168, 168 (2004); see also Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 26–31 (2005) (summarizing research on victims' ability to label discrimination).

example, the vast majority of the female subjects predicted that when confronted with three blatantly sexist comments by a male colleague, they would challenge the colleague directly.<sup>177</sup> Subjects in the same study, however, did not in fact challenge the very same remarks when actually subjected to them.<sup>178</sup> Researchers concluded that women's silence relative to their anticipated responses reflected both the influence of social constraints and the fear of negative judgments if they failed to acquiesce in the harasser's behavior.<sup>179</sup> That women's actual responses to bias are significantly less confrontational than most of them predict has been confirmed in other studies, including those designed to replicate employment settings.<sup>180</sup> In those studies, too, researchers found that women's nonconfrontational responses reflected an awareness of the anticipated costs of complaining rather than an acceptance or approval of the conduct.<sup>181</sup> These studies depict a reality in which people fail to confront discrimination publicly, and instead make strategic decisions about when to confront, challenge, or ignore prejudice based primarily on the anticipated consequences of their actions.<sup>182</sup>

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177. Janet K. Swim & Lauri L. Hyers, *Excuse Me—What Did You Just Say?!*: Women's Public and Private Responses to Sexist Remarks, 35 J. EXPERIMENTAL SOC. PSYCHOL. 68, 68–88 (1999).

178. *Id.* at 79. Although most women predicted they would confront the comments, *id.* at 81–83, only forty-five percent confronted them at all and most of those did so using indirect strategies such as asking the commentator to repeat himself or asking a rhetorical question, *id.* at 75–76. Only sixteen percent of the women directly challenged any of the remarks. *Id.* at 79.

179. *Id.* (reporting that, among the women who did not engage in confrontation, three-quarters judged the commentator as prejudiced and ninety-one percent held negative views toward him); see also Dodd et al., *supra* note 140, at 567, 569 (discussing women's fears of how others would perceive them if they confronted sexism).

180. See Julie A. Woodzicka & Marianne LaFrance, *Real Versus Imagined Gender Harassment*, 57 J. SOC. ISSUES 15, 15 (2001). In this study, college-age women were asked to predict how they would respond to three sexist questions in a job interview. *Id.* at 20–21. A different group of subjects, also college-age women, were then placed in a simulated job interview, allegedly to qualify for a research assistant position, and were asked the same three sexist questions. *Id.* at 21–22.

181. While most women predicted they would feel angry if sexist remarks were made, in fact they experienced fear as the predominant emotion. See *id.* at 25; cf. *id.* at 18 (explaining that “targets of sexual harassment fear retaliation, reprisals, and even physical harm” and citing literature interpreting sexual harassment as a manifestation of intimidation rather than sexuality).

182. Cf. Mindy E. Bergman et al., *The (Un)reasonableness of Reporting: Antecedents and Consequences of Reporting Sexual Harassment*, 87 J. APPLIED PSYCHOL. 230, 237 (2002) (“[O]ur results and others also show that reporting can harm the victim in terms of lowered job satisfaction and greater psychological distress. Such results suggest that, at least in certain work environments, the most ‘reasonable’ course of action for the victim is to avoid reporting.” (citations omitted)).

## 2. Employee Responses to Harassment

The best data about how employees actually respond to discrimination comes in the sexual harassment context because only there does the law officially require internal grievances as a prerequisite to vindicating rights.<sup>183</sup> Despite the law's insistence on using employer grievance procedures, however, sexual harassment victims tend not to utilize internal complaint procedures or otherwise formally report incidents of harassing behavior. Contrary to the law's expectation that reasonable employees report discrimination promptly and assertively,<sup>184</sup> studies and surveys reveal, quite to the contrary, that filing a complaint with an employer is the *least* likely response to harassment.<sup>185</sup> According to a 1995 study of federal employees, only six percent of employees who had experienced sexual harassment filed a formal complaint, while forty-four percent took no action at all.<sup>186</sup> The low reporting rate was striking given that the employer-agencies all maintained written antiharassment policies,<sup>187</sup> and seventy-eight percent of survey respondents knew about the formal complaint channels.<sup>188</sup> A study of sexual harassment cases decided in the two years following *Faragher/Ellerth*<sup>189</sup> found that among women who ultimately sued their employers for sexual harassment, only fifteen percent reported the harassment to their employers in a timely manner.<sup>190</sup> Other surveys also reveal that employees who have experienced harassing behavior report the incidents at strikingly low rates, from as low as three percent in one study to no higher than twenty-four percent in others.<sup>191</sup>

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183. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); see also Grossman, *supra* note 91, at 722–23 (arguing that the *Faragher/Ellerth* affirmative defense, which conditions an employee's right to recover on her prompt filing of a complaint, unfairly punishes employees who respond perfectly rationally to sexual harassment).

184. See *supra* notes 98–124 and accompanying text (describing cases that assume “reasonable” victims file complaints of discrimination promptly and assertively).

185. See Quinn, *supra* note 8, at 1154 (“Faced with harassing behavior, the least common tactic appears to be direct confrontation.”).

186. See U.S. MERIT SYS. PROT. BD., *SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: TRENDS, PROGRESS, AND CONTINUING CHALLENGES* 30 (1995) [hereinafter USMSPB 1995].

187. See *id.* at 40.

188. See *id.* at 33.

189. See *supra* notes 88–90 and accompanying text.

190. See David Sherwyn et al., *Don't Train Your Employees and Cancel Your “1-800” Harassment Hotline: An Empirical Examination and Correction of the Flaws in the Affirmative Defense to Sexual Harassment Charges*, 69 *FORDHAM L. REV.* 1265, 1280 (2001).

191. See Louise F. Fitzgerald et al., *The Incidence and Dimensions of Sexual Harassment in Academia and the Workplace*, 32 *J. VOCATIONAL BEHAV.* 152, 162 (1988) (finding that only three percent of their sample had attempted to report a sexual harassment experience); see also AMY L. CULBERTSON ET AL., *ASSESSMENT OF SEXUAL HARASSMENT IN THE NAVY: RESULTS OF THE 1989 NAVY-WIDE SURVEY* 17 (1992) (showing victim reporting rates of twenty-four percent for enlisted women and twelve percent for female officers); DEP'T OF DEF., 1995 *SEXUAL*

Employer surveys about the number of complaints they process confirm the patterns of low reporting. Large employers, for example, receive an average of six complaints per year, about two-tenths of one percent per 100 employees.<sup>192</sup> Yet, harassment surveys covering the same time period routinely find that four in ten women report having experienced harassing behaviors in the previous two years.<sup>193</sup> These numbers suggest a vast gap between the occurrence of harassment and the willingness to report it. The reporting rates do not vary dramatically across lines of race, culture, or professional background.<sup>194</sup> These rates have increased relatively little over the past twenty-five years,<sup>195</sup> despite the well-documented proliferation of antiharassment policies and internal grievance procedures.<sup>196</sup>

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HARASSMENT STUDY 19 (1996), available at [http://www.defenselink.mil/prhome/docs/r96\\_014.pdf](http://www.defenselink.mil/prhome/docs/r96_014.pdf) (finding that twenty-four percent of active-duty military personnel who experienced harassment reported it); BARBARA A. GUTK, SEX AND THE WORKPLACE: THE IMPACT OF SEXUAL BEHAVIOR AND HARASSMENT ON WOMEN, MEN, AND ORGANIZATIONS 71 (1985) (describing a survey of workers in Los Angeles in which eighteen percent of women harassed reported it to someone in authority); Jean W. Adams et al., *Sexual Harassment of University Students*, 24 J.C. STUDENT PERSONNEL 484, 488–89 (1983) (finding that no student experiencing sexual advances, propositions, or extortion reported the incident to university officials); James E. Gruber & Lars Bjorn, *Blue-Collar Blues: The Sexual Harassment of Women Autoworkers*, 9 WORK & OCCUPATIONS 271, 286–87 (1982) (showing a victim reporting rate of only seven percent for harassed female automobile workers).

192. See SOC'Y FOR HUM. RES. MGMT., SEXUAL HARASSMENT SURVEY 5 (1999).

193. USMSPB 1995, *supra* note 186, at 13.

194. See, e.g., Deborah Erdos Knapp et al., *Determinants of Target Responses to Sexual Harassment: A Conceptual Framework*, 22 ACAD. MGMT. REV. 687, 693–94 (1997) (citing research showing no relationship between women's race and their responses to sexual harassment); S. Arzu Wasti & Lilia M. Cortina, *Coping in Context: Sociocultural Determinants of Responses to Sexual Harassment*, 83 J. PERSONALITY & SOC. PSYCHOL. 394, 402 (2002) (reporting the results of a study comparing responses to sexual harassment by professional women in Turkey, professional and working-class Anglo-American women in the United States, and professional and working-class Hispanic women in the United States, and finding that "advocacy-seeking," such as reporting, complaining, or speaking with management, was an infrequent response by women to sexual harassment). Even women attorneys, a group one might expect to be especially confident in asserting their rights, exhibit a reluctance to claim bias publicly. See Lilia M. Cortina et al., *What's Gender Got To Do with It? Incivility in the Federal Courts*, 27 LAW & SOC. INQUIRY 235, 259–60 (2002) (describing a study of female attorneys' responses to incivility in legal practice, a phenomenon with a gender-based dimension); Cheryl R. Kaiser & Carol T. Miller, *Stop Complaining! The Social Costs of Making Attributions to Discrimination*, 27 PERSONALITY & SOC. PSYCHOL. BULL. 254, 255 (2001) (describing a study of female attorneys' responses to sex discrimination in the workplace).

195. Compare U.S. MERIT SYS. PROT. BD., SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: IS IT A PROBLEM? 71 (1981) [hereinafter USMSPB 1981] (documenting that three percent of federally employed women victims reported harassment), with U.S. MERIT SYS. PROT. BD., SEXUAL HARASSMENT IN THE FEDERAL GOVERNMENT: AN UPDATE 27 (1988) (showing a five percent reporting rate), and USMSPB 1995, *supra* note 186, at 33 (documenting a six percent reporting rate).

196. See Grossman, *supra* note 92, at 19–20 (describing nearly universal adoption of antiharassment policies by employers in the last decade).



Social scientists have shown that employees do respond to harassing behavior, but not in the formal, assertive way that Title VII doctrine requires. Most responses, particularly by women targeted for harassment, tend to be informal and nonconfrontational.<sup>197</sup> As with studies of broader forms of discrimination, study participants considering hypothetical forms of harassment tend to vastly overestimate the assertiveness with which they would respond to real incidents of harassment. Laboratory studies examining participants' responses to various hypothetical scenarios show that many participants believe they would be able to handle the situation themselves. Fifty-three percent of respondents in one study indicated they would "have a talk" with the harasser.<sup>198</sup> Seventy-nine percent of respondents in another study who had "received at least one sexual overture from a man at work reported that they were confident they could handle future overtures."<sup>199</sup> "[A]ctual victims," researchers have found, "have been shown to behave quite differently than research participants or the general public say they would behave."<sup>200</sup>

Early studies of how people respond to harassment rated participant responses according to their degree of assertiveness and found, in general, that actual victims of harassment tend to respond in relatively nonassertive ways.<sup>201</sup> They tend, for example, initially to ignore harassing behavior and, if it continues, to respond with only mild retributions or deflections like "I'm not your type."<sup>202</sup> They also rationalize harassment by blaming it on

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197. See Theresa M. Beiner, *Using Evidence of Women's Stories in Sexual Harassment Cases*, 24 U. ARK. LITTLE ROCK L. REV. 117, 136-41 (2001) (comparing Anita Hill's response to the responses of other women in sexual harassment studies); Linda Hamilton Krieger, *Employer Liability for Sexual Harassment—Normative, Descriptive, and Doctrinal Interactions: A Reply to Professors Beiner and Bisom-Rapp*, 24 U. ARK. LITTLE ROCK L. REV. 169, 175-84 (2001) (reviewing literature on victim response patterns). See generally Grossman, *supra* note 91, at 723-28 (reviewing literature on victim response).

198. Barbara A. Gutek & Mary P. Koss, *Changed Women and Changed Organizations: Consequences of and Coping with Sexual Harassment*, 42 J. VOCATIONAL BEHAV. 28, 37 (1993) (reviewing studies). For other studies examining hypothetical responses to harassment, see David E. Terpstra & Douglas D. Baker, *The Identification and Classification of Reactions to Sexual Harassment*, 10 J. ORGANIZATIONAL BEHAV. 1, 12 (1989).

199. Gutek & Koss, *supra* note 198, at 37.

200. Louise F. Fitzgerald, Suzanne Swan & Karla Fischer, *Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment*, J. SOC. ISSUES, Spring 1995, at 117, 119; see also Adams et al., *supra* note 191, at 489 (noting the "marked contrast between what students think they would do and what students actually do when confronted with [sexually harassing] behaviors").

201. See, e.g., James E. Gruber, *How Women Handle Sexual Harassment: A Literature Review*, 74 SOC. & SOC. RES. 3, 3-4 (1989); James E. Gruber & Lars Bjorn, *Women's Responses to Sexual Harassment: An Analysis of Sociocultural, Organizational, and Personal Resource Models*, 67 SOC. SCI. Q. 814, 822-24 (1986); Gutek & Koss, *supra* note 198, at 37-38; Terpstra & Baker, *supra* note 198, at 2.

202. Gutek & Koss, *supra* note 198, at 37.

nonrecurring circumstances, such as a particular outfit, or treat it as a joke.<sup>203</sup> Women who experience harassment also elect to take quiet, but personally costly actions to avoid the harasser, the job, or the situation, over more confrontational steps.<sup>204</sup>

Other studies have methodically cataloged the many varied types of responses to harassment, showing formal rights-claiming to be a least-favored strategy. Fitzgerald, Swan, and Fischer developed a system for classifying responses as either internally or externally focused.<sup>205</sup> Common internally focused responses include endurance (ignoring the harassment), denial (pretending it is not happening), reattribution (“reinterpreting the situation in such a way that it [is] not defined as harassment”), illusory control (blaming oneself), and detachment (separation from harasser or situation).<sup>206</sup> Common externally focused responses include avoidance of the harasser or situation, appeasement (putting off the harasser without direct confrontation), and social support (talking to friends or coworkers about the harassment), as well as more assertive responses like direct confrontations with the harasser or formal complaints.<sup>207</sup> Among the myriad responses identified, the single most infrequent one, the authors concluded, was “to seek institutional/organizational relief.”<sup>208</sup> Victims turn to formal rights-claiming only “when all other efforts have failed.”<sup>209</sup>

Finally, this literature suggests that men and women tend to respond differently to harassing behavior, a difference that introduces a gender gap into the gulf between the law’s “reasonable” harassment victims and real ones. Women tend to engage in more passive responses to harassment than men, and men are more likely to file formal reports or to seek the assistance of lawyers in pursuing a claim.<sup>210</sup> As Camille Hébert concluded in a recent article, there is “substantial evidence that . . . women, because of their differences from men in the manner in which they generally respond to sexual harassment, are being disadvantaged by the courts’ definitions of ‘reasonableness’ with respect to those responses.”<sup>211</sup> This finding suggests that the burdens imposed by Title VII’s prompt complaint doctrines may be especially onerous for women.

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203. *Id.* at 37–38.

204. *Id.* at 38. These steps include quitting, seeking a transfer, and absenteeism—actions that might alleviate the immediate problem of harassment but result in other costs to the victim.

205. Fitzgerald, Swan & Fischer, *supra* note 200, at 119.

206. *Id.* at 119–20.

207. *Id.* at 120–21.

208. *Id.* at 121 (emphasis omitted).

209. *Id.*

210. Hébert, *supra* note 91, at 730–31.

211. *Id.* at 730.

### 3. Reasons for the Reluctance To Challenge Discrimination

The widespread failure to confront discrimination publicly—by confronting the perpetrator, lodging an internal complaint, or filing an EEOC charge—is driven largely by an accurate perception that the costs of such responses will likely outweigh the benefits. At the outset, an employee is unlikely to challenge discrimination if she believes that such a challenge would be futile.<sup>212</sup> Employee perceptions that challenging discrimination is unlikely to yield any benefits are largely accurate.<sup>213</sup> Even if an employee believes that there is some benefit to be gained from challenging discrimination, she must still evaluate whether such a challenge is worth the costs. As the following discussion shows, the costs of pursuing discrimination claims are substantial.

#### a. The Social Costs of Complaining

Social psychologists have documented a disturbing phenomenon in which women and people of color who challenge discrimination are disliked for doing so, even when their challenge is clearly meritorious.<sup>214</sup> Such challengers tend to be perceived as hypersensitive and/or troublemakers when they confront discrimination.<sup>215</sup> A 2001 study found that African Americans who blamed discrimination for a poor performance rating on a test were viewed more negatively than African Americans who blamed themselves.<sup>216</sup> Regardless of the objective likelihood that the student actually experienced discrimination, the predominantly white

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212. See *Childress v. PetsMart, Inc.*, 104 F. Supp. 2d 705, 709 (W.D. Tex. 2000) (employee testified that she failed to complain about harassment because she had been told by coworkers “that complaining would be futile”); cf. Quinn, *supra* note 8, at 1172 (“To use the law instrumentally requires two acts of faith, so to speak. First, one must believe that change is possible. Second, one must judge that the power for this change rests (at least partially) with the law.”).

213. See Nielsen & Nelson, *supra* note 9, at 668 (“Those who do complain seldom succeed within their own organization, before the EEOC, or in the courts.”); *id.* at 701 (“Most [discrimination] plaintiffs who file federal suit never reach trial. If they do go to trial, they lose more than 60% of the time. If they win, they get relatively modest awards.”).

214. See Brake, *supra* note 176, at 32–36 (summarizing research).

215. See Stangor et al., *supra* note 140, at 70 (summarizing research demonstrating the social costs of reporting discrimination). See generally Faye J. Crosby, *Why Complain?*, J. SOC. ISSUES, Spring 1993, at 169, 170–71 (discussing social norms that depict people who complain as unattractive “whiners and malingerers,” while promoting the ideal of suffering uncomplainingly as noble); DEP’T OF DEF., *supra* note 191, at 21 (finding that, among active-duty military personnel who complained about harassment, twelve percent of women experienced hostility from their supervisors and nine percent of women experienced hostility from their coworkers); Kaiser & Miller, *supra* note 176, at 168, 175 (explaining their own work and citing other studies about responses to discrimination, specifically confrontation).

216. Kaiser & Miller, *supra* note 194, at 261; see also Brake, *supra* note 139, at 699–704 (discussing this and related studies in greater detail).

evaluators consistently rated an African American student more negatively—as a complainer, a troublemaker, hypersensitive, emotional, argumentative, and irritating—when he cited discrimination rather than his own failings as the reason for the poor performance.<sup>217</sup> A follow-up study showed that other external attributions—blaming the test methodology, for example—did not elicit the same negative reaction as the attribution to discrimination.<sup>218</sup> This study adds to a substantial body of work establishing the significant social costs incurred by members of lower-status social groups who challenge discrimination.<sup>219</sup> Such social penalties are exacted even when there is persuasive evidence of actual discrimination, such as direct evidence of an interviewer's prejudice.<sup>220</sup>

Women also experience negative social reactions when they confront sexism. As one recent study showed, the reaction to a woman who challenges sexism is more likely to be hostility or amusement than guilt or remorse.<sup>221</sup> Another study revealed that women who confronted sexist remarks were less well-liked by men than women who ignored the remarks.<sup>222</sup> These social penalties are part of a social dynamic of punishing role transgressions that occur when a member of a stigmatized group challenges the social hierarchy.<sup>223</sup>

Social penalties vary inversely with the complainant's position of privilege with respect to the discrimination in question. For example, in the study just described of men's and women's reactions to a woman's response to sexism, researchers found that men had a greater inclination to punish the woman's transgression from prescribed gender roles, while

217. Kaiser & Miller, *supra* note 194, at 261.

218. *Id.* at 259, 261.

219. *Id.* at 255–56 (describing research documenting the high costs imposed on members of stigmatized groups when they report discrimination); Knapp et al., *supra* note 194, at 711 (“[A] very common negative reaction experienced by women who officially complain is public humiliation.”).

220. Cheryl R. Kaiser & Carol T. Miller, *Derogating the Victim: The Interpersonal Consequences of Blaming Events on Discrimination*, 6 GROUP PROCESSES & INTERGROUP REL. 227, 235 (2003); *see also id.* at 228–29 (describing the implications of their own work and citing other research demonstrating that African Americans anticipate social backlash if they confront discrimination).

221. Alexander M. Czopp & Margo J. Monteith, *Confronting Prejudice (Literally): Reactions to Confrontations of Racial and Gender Bias*, 29 PERSONALITY & SOC. PSYCHOL. BULL. 532, 541 (2003) (“[T]he predominant evaluative sentiment resulting from confrontations about gender-biased behavior was amusement.”).

222. Dodd et al., *supra* note 140, at 574–75.

223. *Id.* at 568–69 (explaining that when women challenge sexism, the “confrontation goes against the more passive, ‘proper’ female gender role prescribed by society”); *cf.* Swim & Hyers, *supra* note 177, at 69 (explaining that the dynamic of punishment in response to transgressing gender roles contributes to the social constraints that suppress women’s confrontations of sexism).

other women tended to respond more favorably.<sup>224</sup> Other research confirms that social group membership has a marked influence on the way in which individuals react to persons who claim discrimination. Women and African Americans, for example, are more likely to claim discrimination privately, anonymously, or in the presence of a member of their same social group, and less likely to do so publicly or in the presence of men or white persons—a reflection of their understanding that members of privileged social groups are more likely to react hostilely to such claims.<sup>225</sup> Finally, members of low-power or stigmatized social groups suffer greater social costs when they publicly challenge discrimination than do white persons or men because their claims pose greater threats to the social order.<sup>226</sup>

The negative reactions to women and persons of color who complain about discrimination go a long way toward explaining why so many discrimination victims decline to confront or challenge discrimination.<sup>227</sup> The widespread dislike of people who challenge discrimination also sets the stage for understanding why retaliation frequently follows complaints about discrimination and how fears of retaliation influence employees' responses to discrimination.

#### b. Retaliation

In addition to the social costs discrimination victims both fear and face, employer retaliation occurs with enough regularity and severity to support perceptions of the high costs of reporting discrimination and the

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224. Dodd et. al, *supra* note 140, at 575.

225. See Stangor et al., *supra* note 140, at 73; see also Kaiser & Miller, *supra* note 176, at 168 (explaining research finding that women are reluctant to tell members of high-status groups that they have been discriminated against); cf. Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 7, 7-8 (1989) (describing multiple consciousness and posing the hypothetical example of a woman of color who shapes her responses in a first-year criminal law class on rape, depending on the race and gender of the professor).

226. See, e.g., Karen M. Ruggiero & Donald M. Taylor, *Why Minority Group Members Perceive or Do Not Perceive the Discrimination That Confronts Them: The Role of Self-Esteem and Perceived Control*, 72 J. PERSONALITY & SOC. PSYCHOL. 373, 386 (1997) (explaining the results of an earlier study in which male subjects did not minimize perceived discrimination but were highly vigilant in perceiving discrimination against themselves); Stangor et al., *supra* note 140, at 72-73 (discussing the results of control groups using men and white persons as discrimination claimants and showing little evidence of high social costs when men and white persons attribute their own negative outcomes to discrimination).

227. See, e.g., Bergman et al., *supra* note 182, at 230-42 (explaining that individuals decide how to respond to perceived discrimination strategically, carefully weighing the predicted costs of complaining); see also DEP'T OF DEF., *supra* note 191, at vi (finding that among female military personnel who experienced harassment, twenty-five percent did not report their experience because "they thought it would make their work situations unpleasant"; seventeen percent did not complain because they would be labeled troublemakers; and twenty percent said they believed nothing would be done in response to their complaint).

rationality of deciding not to complain. One study of women who filed sex discrimination complaints against their employer with the Wisconsin Equal Rights Division showed that forty percent of the complainants reported experiencing retaliation.<sup>228</sup> Another study of state employees found that sixty-two percent of those who reported sexual harassment experienced retaliation.<sup>229</sup> EEOC charge-filing statistics also reveal the depth of the problem of retaliation—twenty-five percent of all charges filed under Title VII include a claim of retaliation.<sup>230</sup> The pervasiveness of retaliation in response to discrimination claims cannot seriously be doubted.<sup>231</sup> Moreover, ironically, given the law's expectation of prompt and assertive complaints of discrimination, studies universally find that formal complaints of discrimination trigger worse outcomes than less assertive responses.<sup>232</sup> And in the harassment context, studies have shown that

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228. Janet P. Near & Tamila C. Jensen, *The Whistleblowing Process: Retaliation and Perceived Effectiveness*, 10 WORK & OCCUPATIONS 3, 17 (1983).

229. Fitzgerald, Swan & Fischer, *supra* note 200, at 122–23 (describing the results of a study of state employees finding that sixty-two percent of the women who reported sexual harassment experienced retaliation, with the most assertive responses often triggering the harshest response); see also DEP'T OF DEF., *supra* note 191, at 28 (finding that twenty percent of female military personnel who complained about harassment reported experiencing "performance ratings that were unfairly lowered" as a result). For a first-person narrative about a law professor's experience reporting harassment, see generally Anne Lawton, *Between Scylla and Charybdis: The Perils of Reporting Sexual Harassment*, 9 U. PA. J. LAB. & EMP. L. 603 (2007).

230. See EEOC, Charge Statistics FY 1997 Through FY 2006, <http://www.eeoc.gov/stats/charges.html> (last visited Apr. 11, 2008).

231. See, e.g., Jane Adams-Roy & Julian Barling, *Predicting the Decision to Confront or Report Sexual Harassment*, 19 J. ORGANIZATIONAL BEHAV. 329, 334 (1998) (finding that women who reported sexual harassment through formal organizational channels experienced more negative outcomes than those who did nothing); Beiner, *supra* note 197, at 124–25 ("[M]any plaintiffs' lawyers would tell you that once an employee complains about discrimination on the job, he or she can usually consider that employment relationship over."). For a summary of other studies of retaliation, see Brake, *supra* note 176, at 32–42.

232. See, e.g., Bergman et al., *supra* note 182, at 230 (describing the results of a study finding that even in those situations where women believed that confronting the harassment "made things better," the empirical outcomes demonstrated the opposite); Shereen G. Bingham & Lisa L. Scherer, *Factors Associated with Responses to Sexual Harassment and Satisfaction with Outcome*, 29 SEX ROLES 239, 247–48 (1993) (finding that making a formal or informal complaint produced worse outcomes than alternative responses, such as doing nothing, talking to the harasser, or seeking social support); Fitzgerald, Swan & Fischer, *supra* note 200, at 123 (describing the results of another study finding that one-third of the persons who filed formal harassment claims said that it "made things worse," and still another study finding that "assertive [responses were] associated with more negative outcomes of every type," even after controlling for the severity of the harassment (quoting USMSPB 1981, *supra* note 195, at 71)); Matthew S. Hesson-McInnis & Louise F. Fitzgerald, *Sexual Harassment: A Preliminary Test of an Integrative Model*, 27 J. APPLIED SOC. PSYCHOL. 877, 896 (1997) ("Contrary to conventional wisdom, assertive and formal responses were actually associated with more negative outcomes of every sort."); Quinn, *supra* note 8, at 1154 (concluding that failing to complain is not unreasonable since "research has found that victims are often worse off after a direct complaint" (citation omitted)).

"women experienced increasingly negative consequences of sexual harassment as their responses became more assertive, controlling for the severity of harassment."<sup>233</sup>

Retaliation functions not only to punish individuals who complain, but also, perhaps more importantly for the success of a rights-claiming system, to suppress future challenges to perceived discrimination.<sup>234</sup> Research clearly establishes that the decision of whether to challenge discrimination turns on the careful weighing of the anticipated costs and benefits of doing so.<sup>235</sup> The failure to report or confront discrimination is a response to the expected costs of doing so, rather than a determination that the event was not discriminatory or harmful.<sup>236</sup> The decision not to report is based largely on employees' fears of retaliation and other adverse consequences.<sup>237</sup>

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233. See Quinn, *supra* note 8, at 1173.

234. Retaliation is perhaps the most important factor in suppressing challenges to discrimination, but not the only one. Employees may face other consequences for complaining, such as being sued by the alleged perpetrator for defamation. See, e.g., *Paisey v. Vitale*, 634 F. Supp. 741, 745 (S.D. Fla. 1986) (refusing to enjoin defamation action against professor for assertions made in affidavit charging discrimination); *Herlihy v. Metro. Museum of Art*, 633 N.Y.S.2d 106, 112 (App. Div. 1995) (holding that statutory provisions prohibiting retaliatory conduct do not confer, upon bad faith complainants making false discriminatory-related charges, absolute immunity from defamation actions that may arise out of those charges). But see *EEOC v. Levi Strauss & Co.*, 515 F. Supp. 640, 644 (N.D. Ill. 1981) (concluding that a defamation action may constitute illegal retaliation).

235. See, e.g., Bergman et al., *supra* note 182, at 230–42 (discussing research on whistleblowing generally, and sexual harassment specifically, and finding that persons engage in cost-benefit analysis to decide how to respond to wrongdoing).

236. See, e.g., Kaiser & Miller, *supra* note 176, at 169 ("The most commonly documented barrier to confronting discrimination is interpersonal costs, such as being perceived as a troublemaker or experiencing retaliation." (citation omitted)); Knapp et al., *supra* note 194, at 702–03 (identifying fear of retaliation or isolation and not wanting to be labeled a troublemaker or victim as primary reasons for not reporting sexual harassment); Stangor et al., *supra* note 140, at 73 (describing research showing that even when persons accurately perceive discrimination, they often choose not to report it because of the social costs of doing so); Swim & Hyers, *supra* note 177, at 68 (describing research on the influence of social context on confronting discrimination and concluding that women who choose not to confront sexism act as "strategic negotiators of threatening situations" (citation omitted)); cf. Crosby, *supra* note 215, at 174 (1993) ("It is . . . widely known that to speak out against injustice is to invite condemnation, and this knowledge, added to the other disincentives, can be enough to assure at least temporary silence.").

237. See, e.g., Dodd et al., *supra* note 140, at 569 (explaining that fears of not being believed, being retaliated against, being humiliated or of having one's job negatively affected all contribute to the reluctance of women to confront sexism); Fitzgerald, Swan & Fischer, *supra* note 200, at 127 ("Studies of victims consistently report that fear of personal or organizational retaliation is the major constraint on assertive responding."); Gutek & Koss, *supra* note 198, at 39 (explaining that women rarely confront or report sexual harassment because they fear that it will not accomplish anything and fear retaliation); see also Kaiser & Miller, *supra* note 176, at 169 (describing one study finding that women perceive confronting sexist remarks to be as equally risky as responding with physical aggression against the perpetrator); *id.* at 175 (concluding that fear of the consequences explains much of the gap between labeling a behavior as discrimination

This literature demonstrates that full and secure protection from retaliation is critical for the effectiveness of a rights-claiming system. The absence of such protection only heightens the costs of complaining and further suppresses the already pronounced reluctance to assert discrimination claims. Unfortunately, the law's treatment of employees who do come forward with discrimination complaints provides little reassurance to prospective claimants in their own cost-benefit analysis of how to respond.

### III. TITLE VII'S FAILURE TO PROTECT EMPLOYEES WHO ASSERT THEIR RIGHTS

Title VII doctrine makes grand promises about the law's protection from retaliation in exchange for demanding that discrimination plaintiffs promptly assert their rights. The cases are replete with expansive proclamations of the law's generous protection.<sup>238</sup> Courts have even pointed to the availability of retaliation claims to belittle employees' excuses for not reporting discrimination.<sup>239</sup> But, in reality, Title VII provides only partial protection, even less so than a decade ago as a result of recent doctrinal developments and workplace trends.

Title VII retaliation doctrine restricts protection to those claimants deemed worthy of the law's protections—those who are highly vigilant, not easily deterred from asserting their rights, and fully informed of the factual and legal predicates of the alleged discrimination before challenging it. The gap between this ideal and the typical claimant marks the limits of the law's protection against retaliation as a mechanism for encouraging discrimination claimants to come forward. Two recent developments in retaliation law merit particular attention: the materially adverse standard for retaliatory acts and the requirement that employee complaints of discrimination rest on a reasonable belief in unlawful discrimination. Both doctrines leave claimants woefully unprotected from the very retaliation

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and confronting those responsible or reporting it to others); *cf.* Knapp et al., *supra* note 194, at 703 (observing that younger workers are more likely to make formal complaints than older workers because younger workers have more positive expectations about the reporting process).

238. *See, e.g.*, *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. \_\_\_, \_\_\_, 126 S. Ct. 2405, 2407 (2006) ("[T]he anti-retaliation provision seeks to prevent an employer from interfering [through retaliation] with an employee's efforts to secure or advance enforcement of the Act's basic guarantees."); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997) ("[A] primary purpose of antiretaliation provisions [is] [m]aintaining unfettered access to statutory remedial mechanisms.").

239. *See supra* text accompanying notes 104–17; *see also* *Beckel v. Wal-Mart Assocs., Inc.*, 301 F.3d 621, 624 (7th Cir. 2002) (ruling that employer threat of retaliation does not excuse failure to file a charge for purposes of tolling the limitations period).



that stokes fears of complaining and deters prospective claimants from challenging discrimination.

A. *The Materially Adverse Requirement*

Until the Supreme Court's 2006 decision in *Burlington Northern & Santa Fe Railway Co. v. White*,<sup>240</sup> lower courts struggled for years to set the bar for determining what types of negative responses suffice to establish unlawful retaliation. Some courts limited protection from retaliation to those actions considered "materially adverse," using fixed lists of employment actions that qualified and those that did not.<sup>241</sup> Other courts eschewed a categorical list and inquired whether the particular action was likely to deter an employee from engaging in protected activity under Title VII.<sup>242</sup> Still others were more strict, denying any protection from retaliation that fell short of an "ultimate employment decision" such as a termination or pay cut.<sup>243</sup> This disparity in approaches recently prompted the Supreme Court to clarify the level of severity required to establish unlawful retaliation.

In *Burlington Northern*, a relatively easy case under any but the strictest test, the Supreme Court considered the plight of a woman who was reassigned from her job operating a forklift to more demanding manual work and suspended without pay for thirty-seven days after she complained of gender-based and sexual harassment.<sup>244</sup> A divided appellate panel had ruled that these actions were not materially adverse, but a unanimous en banc court disagreed, with even the dissenting judges from the original panel changing their minds after reargument.<sup>245</sup>

In an opinion by Justice Breyer, the Supreme Court affirmed the en banc decision and clarified the threshold of adversity necessary for a retaliation claim. The Court rejected arguments by the employer and the

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240. 548 U.S. \_\_\_, 126 S. Ct. 2405 (2006).

241. These courts, like the Sixth Circuit in *Burlington Northern*, typically used the same standard as Title VII's substantive provision, § 703(e), which requires a materially adverse change in the terms, conditions, or benefits of employment. See, e.g., *White v. Burlington N. & Santa Fe Ry. Co.*, 2004 FED App. 0102P, ¶¶ 28–30, 35 (6th Cir.) (en banc), 364 F.3d 789, 797–99, *aff'd* 548 U.S. \_\_\_, 126 S. Ct. 2405 (2006); *Von Gunten v. Maryland*, 243 F.3d 858, 864–65 (4th Cir. 2001); *Robinson v. Pittsburgh*, 120 F.3d 1286, 1297 (3d Cir. 1997).

242. See, e.g., *Rochon v. Gonzales*, 438 F.3d 1211, 1217–18 (D.C. Cir. 2006); *Washington v. Ill. Dep't of Revenue*, 420 F.3d 658, 662 (7th Cir. 2005); *Ray v. Henderson*, 217 F.3d 1234, 1242–43 (9th Cir. 2000).

243. See, e.g., *Manning v. Metro. Life Ins. Co.*, 127 F.3d 686, 692 (8th Cir. 1997); *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997).

244. Her pay was later reinstated for that thirty-seven-day period, but she testified that the deprivation of pay during that time caused her financial and psychological hardship. *Burlington Northern*, 548 U.S. at \_\_\_, 126 S. Ct. at 2417–18.

245. *Burlington Northern*, 2004 FED App. 0102P, ¶¶ 1–2, 364 F.3d at 791.

United States that the standard for a claim under Title VII's provision banning retaliation should be construed as strictly as the ban on discrimination in the terms and conditions of employment.<sup>246</sup> Instead, the Court required that the challenged action be "materially adverse," which it defined to include employer actions that "well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" <sup>247</sup> In a confusing twist, the Court effectively adopted the most lenient of the lower court standards but used the somewhat tougher "materially adverse" terminology to describe it.

Early commentary on *Burlington Northern* construed it as generally pro-plaintiff, since the Court rejected the strictest of the tests offered.<sup>248</sup> However, an analysis of the first year of decisions in the wake of *Burlington Northern* casts doubt on this initial reaction. The fairness of the "objective" reasonableness standard turns on the assumed attributes and behaviors of the hypothetical "reasonable" person. The Court's somewhat cryptic opinion contained hints as to its vision of such a person: a relatively thick-skinned employee who is not easily deterred from taking an assertive stand against discrimination.<sup>249</sup> The Court concluded that the jury could have reasonably found that the plaintiff's thirty-seven-day suspension without pay and reassignment to more arduous and "dirtier" labor would likely deter a reasonable employee from complaining, but that

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246. The two sections are structured differently. Section 703(a) ties the unlawful practices covered to actions taken in the workplace. See Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (2000) ("It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge an individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."). The retaliation provision is not so limited. See *id.* § 2000e-3(a) ("It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . 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.").

247. *Burlington Northern*, 548 U.S. at \_\_\_, 126 S. Ct. at 2415 (emphasis added) (quoting *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2006)).

248. See, e.g., Scott Brutocao, *The U.S. Supreme Court and Retaliation: Employees' New Favorite Weapon*, 70 TEX. J. BUS. L. 422, 422 (2007) (predicting that *Burlington Northern* "should make it even easier for employees to make a claim of retaliation"); Lisa M. Durham Taylor, *Adding Subjective Fuel to the Vague-Standard Fire: A Proposal for Congressional Intervention After Burlington Northern & Santa Fe Railway Co. v. White*, 9 U. PA. J. LAB. & EMP. L. 533, 533–34 (2007) ("While protection for whistleblowers is of utmost importance in today's workplace, the Court went too far in *White*, implementing a vague and highly subjective standard that affords employees who complain of discrimination, whether founded or not, what in practicality amounts to near immunity from even the slightest changes in working conditions."); Nicholas Villani, Note, *A Bridge Too Far: The Supreme Court Overextends the Anti-Retaliation Provision of Title VII*, 56 CATH. U. L. REV. 715, 738–43 (2007).

249. See *Burlington Northern*, 548 U.S. at \_\_\_, 126 S. Ct. at 2415–16.

“trivial harms,” “petty slights,” and “minor annoyances” would not.<sup>250</sup> The opinion suggests that “the sporadic use of abusive language, gender-related jokes, and occasional teasing,” and “‘snubbing’ by supervisors and coworkers” fall on the trivial side of the line.<sup>251</sup> Reasonable employees, in other words, are resilient, self-sufficient, and willing to risk the loss of congenial relationships at work in exchange for the assertion of civil rights.

To its credit, the Court did recognize that the reasonableness of employee behavior should be evaluated from “the perspective of a reasonable person in the plaintiff’s position.”<sup>252</sup> Thus, the Court noted, while a retaliatory schedule change may make little difference to some employees, a young mother with school-age children might well be deterred from complaining by such a schedule change.<sup>253</sup> But this example nevertheless reveals the Court’s default view of a reasonable employee as one who, absent special circumstances, withstands social ostracism and workplace annoyances and boldly asserts antidiscrimination rights, with little regard for all but the most serious consequences.

*Burlington Northern* is still a relatively new decision, but early indicators suggest that lower courts expect the reasonable employee to endure a substantial degree of adversity for the sake of challenging discrimination.<sup>254</sup> Although the Court explicitly rejected a “tangible” harm requirement for retaliation claims,<sup>255</sup> a number of recent lower court decisions have expressed skepticism that anything short of that would deter reasonable employees from complaining. For example, in *Higgins v. Gonzales*,<sup>256</sup> the Eighth Circuit ruled that withholding mentoring or supervision did not meet the standard without proof that the disparate

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250. *Id.* at \_\_\_, 126 S. Ct. at 2415. Eric Schnapper has observed that, even though the Court in *Burlington Northern* clearly indicated that the question of whether employer conduct is materially adverse is a question of fact for the jury, most lower courts continue to treat it as an issue of law for the court to decide. See ERIC SCHNAPPER, *BURLINGTON NORTHERN V. WHITE IN THE LOWER COURTS: AN INTERIM REPORT 4–5* (2007), available at [https://courses.law.washington.edu/schnapper/A556\\_Wi07/Documents/BurlingtonNorthernApril\\_2007\\_1.pdf](https://courses.law.washington.edu/schnapper/A556_Wi07/Documents/BurlingtonNorthernApril_2007_1.pdf) (reporting on case law in the first nine months after *Burlington Northern*). The distinction is an important one. Of the cases not involving lost wages, courts that treated the issue as a question of law found the retaliation to be *lawful* about eighty percent of the time, while those that made it a question of fact virtually always found sufficient evidence to support a jury determination of *unlawful* retaliation. *Id.* at 5.

251. *Burlington Northern*, 548 U.S. at \_\_\_, 126 S. Ct. at 2415 (citations omitted) (internal quotation marks omitted).

252. *Id.* at \_\_\_, 126 S. Ct. at 2416.

253. *Id.* at \_\_\_, 126 S. Ct. at 2415–16.

254. In the first nine months after *Burlington Northern*, “about half of the lower court decisions reported in Westlaw have held that Title VII permitted the particular retaliatory actions allegedly engaged in by the defendant employer.” SCHNAPPER, *supra* note 250, at 2.

255. *Burlington Northern*, 548 U.S. at \_\_\_, 126 S. Ct. at 2413.

256. 481 F.3d 578 (8th Cir. 2007).

treatment had an actual impact on the plaintiff's employment situation.<sup>257</sup> Even transfer to a lateral position in a different city would not suffice.<sup>258</sup> The court instead dismissed the plaintiff's concerns about having to start over in a new job and move her family to a new school setting as "the normal inconveniences associated with any transfer," emphasizing the lack of proof that her new duties were "more difficult, less desirable or less prestigious."<sup>259</sup>

Courts also have found negative job evaluations insufficiently adverse absent proof of tangible harm. In *Halfacre v. Home Depot, U.S.A., Inc.*,<sup>260</sup> the plaintiff allegedly received less favorable performance reviews after complaining of race discrimination in a promotion decision.<sup>261</sup> The appellate court ruled that a lower performance evaluation might deter a reasonable employee from complaining of discrimination because it could affect promotion and earning potential, but remanded the case to determine whether the lower evaluations had "actually impacted [the plaintiff's] wages or promotion potential."<sup>262</sup> Other courts simply presume that negative job evaluations do not cause tangible harm, putting the burden on plaintiffs to show that the negative evaluation would have dissuaded a reasonable employee from complaining—a paradoxical quest given that the plaintiff *has* complained in that very case.<sup>263</sup>

The post-*Burlington Northern* cases also pay little heed to individual circumstances that might make certain employees especially sensitive to particular adverse actions. For example, courts have found scheduling decisions and job reassignments to fail the materially adverse standard, without inquiring into the reasons such decisions mattered to the plaintiff.

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257. *Id.* at 585–86, 590.

258. *Id.* at 590. The court in this case took issue with the plaintiff's allegation of retaliatory transfer since her original position was only for a fixed, two-year term, which had expired. *Id.* at 581 n.2, 583–84. However, the court opined that lateral transfer to another city still would not have been adverse if her move had qualified as a "transfer" rather than a new hire because she did not "allege the new position was qualitatively more difficult or less desirable than the one she held in Rapid City." *Id.* at 590.

259. *Id.* at 591 (citation omitted).

260. 2007 FED App. 0246N (6th Cir.), 221 F. App'x 424.

261. *Id.* ¶¶ 1–13, 221 F. App'x at 425–27.

262. *Id.* ¶ 39, 221 F. App'x at 433 (emphasis omitted) (reading *Burlington Northern*'s discussion of the exclusion of an employee from a weekly training lunch as a materially adverse act to mean that "markedly lower performance-evaluation scores that significantly impact an employee's wages or professional advancement are also materially adverse. The question is whether that is the case here.").

263. *Kennedy v. Guthrie Pub. Schs.*, No. CIV-05-1440-F, 2007 WL 895145, at \*7 (W.D. Okla. Mar. 22, 2007) ("[Plaintiff] has failed to demonstrate that the Superintendent's letter would have dissuaded a reasonable employee from pursuing his rights under Title VII—which is precisely what [plaintiff] did in this case.").

In *McGowan v. City of Eufala*,<sup>264</sup> the plaintiff's request to transfer from the night shift to the day shift was denied after she supported her coworker's discrimination charge.<sup>265</sup> Because there were "no differences in pay and benefits, nor was the night shift more arduous," the court found that the denial was not materially adverse.<sup>266</sup> Contrary to *Burlington Northern's* sensitivity to how the plaintiff's circumstances might bear on the hardship of schedule changes, the court's opinion did not discuss the plaintiff's particular circumstances or the reasons underlying her desire to switch to the day shift.<sup>267</sup> Instead, the court belittled the significance of the scheduling decision, describing the plaintiff's desire to switch to the day shift as "purely for personal reasons" and "an undefined subjective preference."<sup>268</sup> Likewise, in *Reis v. Universal City Development Partners, Ltd.*,<sup>269</sup> the court disregarded the employee's particular circumstances in evaluating the adversity of the retaliatory action.<sup>270</sup> In that case, the court ruled that the denial of the plaintiff's request to transfer to a position where she could work indoors to accommodate a congenital heart condition was not materially adverse because it did not negatively impact the plaintiff's pay, opportunities for advancement, or prestige.<sup>271</sup> The court did not discuss the medical concerns prompting the transfer request.

While ignoring *Burlington Northern's* call for context, these courts follow *Burlington Northern's* misstep by minimizing the importance of social costs. The Court in *Burlington Northern* indicated that "snubbing" and social ostracism would rarely deter a reasonable employee from challenging discrimination.<sup>272</sup> Citing this part of the Court's opinion, lower courts have rejected retaliation claims alleging social ostracism and

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264. 472 F.3d 736 (10th Cir. 2006).

265. *Id.* at 739–40.

266. *Id.* at 742–43. The court also supported this result by noting that a witness testified that the plaintiff possessed insufficient clerical skills to meet the requirements of the day shift and that a similar request had been denied before the plaintiff supported her coworker's claim. *Id.* at 743. However, these facts, if true, go to the very different issue of causation, which is an independent element of a retaliation claim.

267. *Id.* at 743; *see also* Higgins v. Gonzales, 481 F.3d 578, 590–91 (8th Cir. 2007) (stating that the "normal inconveniences" associated with relocating and establishing new contacts at a job are not alone sufficient to qualify as materially adverse actions, absent evidence that the new job required more difficult or less desirable duties or was less prestigious).

268. *McGowan*, 472 F.3d at 743. And yet, as Professor Schnapper pointedly observed, "[F]ederal judges would resign on [sic] mass if Congress required them to work on a night shift." SCHNAPPER, *supra* note 250, at 12.

269. 442 F. Supp. 2d 1238 (M.D. Fla. 2006).

270. *Id.* at 1252–54.

271. *Id.* at 1253–54. Although the claim was brought under the Family Medical Leave Act and the Florida Civil Rights Act, the court borrowed the *Burlington Northern* standard on the issue of material adversity. *Id.* at 1252–53.

272. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. \_\_\_, \_\_\_, 126 S. Ct. 2405, 2415 (2006).

harassment that do not result in tangible harm. For example, in *McGowan*, the retaliatory harassment of the plaintiff's son and his girlfriend was deemed insufficiently adverse because it was not directed at the plaintiff herself, thereby constructing the reasonable employee as someone who is exclusively concerned with herself and her job, not the welfare of persons close to her.<sup>273</sup>

Courts are dismissive of social ostracism even when it does target the plaintiff, absent a showing of tangible harm. For example, in *Halfacre*, the court ruled that ostracism by management would be sufficient only if plaintiff could "establish that management's conduct was more than 'simple lack of good manners.'" <sup>274</sup> Together, these decisions depict the "reasonable" claimant as one who is thick-skinned, resilient, and undeterred by "petty slights, minor irritations, or the simple lack of civility" in pursuing nondiscrimination rights.<sup>275</sup> They contrast starkly with the social science research discussed in the prior section, demonstrating that the fear of social ostracism does indeed deter people from challenging discrimination.

Finally, although *Burlington Northern* did not address the issue of whether Title VII protects the friends and family of a complainant from retaliation, recent case law in the lower courts leaves gaping holes in Title VII's protection from retaliation on this score as well. Although there is wide variation in how lower courts treat so-called "third-party retaliation," numerous courts have held that Title VII does not protect an employee from retaliation based on her relationship to an employee who has engaged in protected opposition to discrimination.<sup>276</sup> Yet, employees who have family members or other persons close to them working for the same employer might well be deterred from challenging discrimination by the

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273. *McGowan*, 472 F.3d at 743. The alleged harassment included citing them for having unleashed dogs and serving them with arrest warrants based on this citation. *Id.* at 739.

274. *Halfacre v. Home Depot, U.S.A., Inc.*, 2007 FED App. 0246N, ¶ 39 n.1 (6th Cir.), 221 F. App'x 424, 433 n.1 (quoting *Burlington Northern*, 548 U.S. at \_\_\_, 126 S. Ct. at 2415).

275. *Sykes v. Pa. State Police*, No. Civ.A.05-1349, 2007 WL 141064, at \*6 (W.D. Pa. Jan. 17, 2007).

276. See, e.g., *Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 568–70 (3d Cir. 2002) (refusing to recognize retaliation claims raised by third parties); *Smith v. Riceland Foods, Inc.*, 151 F.3d 813, 819 (8th Cir. 1998) (same); *Washco v. Fed. Express Corp.*, 402 F. Supp. 2d 547, 556 (E.D. Pa. 2005) (same); see also *Holt v. JTM Indus.*, 89 F.3d 1224, 1226–27 (5th Cir. 1996) (refusing to grant spouse of employee who allegedly suffered age discrimination automatic standing to sue for retaliation); *EEOC v. Ohio Edison Co.*, 7 F.3d 541, 546 (6th Cir. 1993) (permitting plaintiff to sue for retaliation based on the opposition activity of a co-employee as long as there was a "causal connection between the participation in protected activity and the adverse employment action" (citation omitted)). See generally Long, *supra* note 22 (discussing and critiquing constraints on retaliation suits where the employer targeted a relative or friend of the complaining employee for retribution).

prospect of retaliation against such persons.<sup>277</sup> It remains to be seen whether *Burlington Northern* will make headway in closing this loophole in retaliation law, but current case law is not promising.

The confident assertions by courts that certain actions would not deter a reasonable employee from complaining are remarkable given that they fail to cite any empirical evidence on how typical employees would respond. Yet the assertion of unlikely deterrence is a distinctly empirical claim. Stripped of empirical support, judicial claims about what actions are likely to deter a reasonable employee from complaining mask normative judgments about the level of adversity employees *should* tolerate in exchange for the privilege of asserting Title VII rights.

Narrow as this vision of a worthy claimant is, it is further narrowed by constraints on appropriate employee behavior at the opposite end of the spectrum. While “unreasonably” thin-skinned employees are unprotected from “trivial” adverse actions under the *Burlington Northern* standard, employees who are too vigilant in pursuing their Title VII rights may undercut their own retaliation claims. Through rights-claiming actions, a plaintiff may inadvertently demonstrate that the adverse action of the employer was *not* sufficient to deter further complaints. *Sykes v. Pennsylvania State Police*,<sup>278</sup> for example, held that a retaliatory action is not materially adverse if the complainant continues to vigorously pursue and supplement the discrimination charges.<sup>279</sup> The plaintiff, a black female police communications officer, received lower performance ratings in response to her internal and EEOC complaints of race discrimination.<sup>280</sup> Even if she proved causation, the court ruled, the retaliation was not materially adverse because, “whether characterized as major or minor, [it] did not deter [the plaintiff’s] pursuit of new and expanded allegations of discrimination, either internally or administratively.”<sup>281</sup> This reasoning departs from *Burlington Northern*, which requires only that the action would *likely* deter a reasonable employee from complaining—not that it

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277. See, e.g., *Fogleman*, 283 F.3d at 568–69 (acknowledging that the failure to protect against third-party retaliation might deter employees from challenging discrimination); see also Long, *supra* note 22, at 950 (“[A]ssociational retaliation would deter individuals who believe they have been discriminated against from exercising their statutory rights, thus frustrating the purpose of statutory anti-retaliation provisions.”).

278. No. Civ.A.05-1349, 2007 WL 141064 (W.D. Pa. Jan. 17, 2007).

279. *Id.* at \*7 (“[The plaintiff’s] vigorous and repeated use of all available means to supplement, expand, and pursue allegations of discrimination destroys the second element of her prima facie retaliation claim. . . . [The plaintiff’s] own aggressive response to what she identified as instances of discrimination belies any argument she might make that a reasonable person confronted with the ‘adverse employment actions’ that she describes would have been dissuaded from voicing additional allegations of discrimination.”).

280. *Id.* at \*2–4.

281. *Id.* at \*6.

actually did—but if adopted more broadly, such reasoning potentially could unravel the retaliation claim entirely.<sup>282</sup>

Not all of the post-*Burlington Northern* case law is so stringent; some courts have given employees more leeway to challenge retaliatory actions than earlier case law in the stricter circuits would have allowed.<sup>283</sup> Nevertheless, as a whole, the post-*Burlington Northern* cases are surprisingly tough on retaliation claimants, given that the decision was widely heralded as a victory for employees soon after it was issued.<sup>284</sup>

The underlying difficulty with the “likely to deter” standard is the mismatch between widely shared expectations about how employees respond to discrimination and their actual responses. As explained above, common assumptions that people are strident and vigilant in responding to discrimination—assumptions reflected in *Burlington Northern* and the case law it has spawned—turn out to be false. As a result, much employer retaliatory behavior that is likely to actually deter employees from complaining is left unregulated and fully lawful by recent interpretations of this standard.

#### B. *The Reasonable Belief Doctrine*

Retaliation law uses idealized images of discrimination claimants to limit actual employees’ protection from retaliation in other ways as well. Title VII retaliation doctrine posits a complainant who has solid evidentiary support for believing that discrimination occurred and a near-perfect understanding and acceptance of the limits of current discrimination law. Employees who do not meet this ideal take a grave risk in challenging perceived discrimination.

The source of these limits is the reasonable belief doctrine, an understanding of which requires some background on Title VII’s retaliation framework. Title VII divides retaliation claims into two camps, depending on which of two statutory clauses apply: the participation clause or the opposition clause. The participation clause covers employee participation in Title VII’s statutorily authorized enforcement mechanisms, such as filing

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282. See Mary Newman, *Burlington Northern & Santa Fe Railway Co. v. White: The Scope of Retaliatory Actions and a Legal Catch-22*, 30 HARV. J.L. & GENDER 519 (2007) (observing that Sykes “seemed to turn the *Burlington* reasoning on its head”).

283. See, e.g., *Moore v. City of Phila.*, 461 F.3d 331, 347–48 (3d Cir. 2006); *Kessler v. Westchester County Dep’t of Soc. Servs.*, 461 F.3d 199, 209–10 (2d Cir. 2006).

284. See, e.g., E.J. Graff, *Striking Back: The Supreme Court Recently Handed Workers a 9–0 Victory in a Pivotal Workplace Discrimination Case*, BOSTON GLOBE, Sept. 3, 2006, at D1; Linda Greenhouse, *Supreme Court Gives Employees Broader Protection Against Retaliation in Workplace*, N.Y. TIMES, June 22, 2006, at 22; L.M. Sixel, *Supreme Court: Ruling Widens Ability To Sue; Decision Favors Workers, Defines Retaliation Broadly*, HOUSTON CHRON., June 23, 2006, Business, at 1.



a charge with the EEOC or a lawsuit in court.<sup>285</sup> The opposition clause covers a broader range of protected activity where Title VII's formal enforcement processes have not yet been invoked.<sup>286</sup>

The reasonable belief doctrine originally developed as an extension of protection from retaliation in claims falling under the opposition clause. While the participation clause broadly protects employees who participate "in any manner" in Title VII's enforcement mechanisms, seemingly without regard to the merits of the charge, a strict and literal reading of the opposition clause might limit protected activity to challenging only those employment actions that are deemed actually unlawful. However, courts recognized early on that employees must be given some leeway if they mistakenly believe that their employer violated Title VII in order to provide meaningful protection to persons who complain outside of Title VII's formal channels.<sup>287</sup> At the same time, courts also recognized the importance of providing protection from retaliation under the opposition clause in order to encourage employees to seek to resolve such disputes informally, before involving courts and the EEOC.<sup>288</sup>

Courts thus developed the reasonable belief doctrine to extend protection to employees who informally challenge employer practices that turn out to be lawful, so long as they had a reasonable, good faith belief that the challenged conduct violated Title VII. Early cases emphasized the predicament that would otherwise confront employees, given the difficulty of determining, short of final adjudication, whether any particular employer action actually violates Title VII.<sup>289</sup>

This rationale for the reasonable belief doctrine is sound. Discrimination is a complex legal and social phenomenon, and potential challengers cannot be certain in advance that the court that ultimately hears their retaliation claim will agree with their assessment of unlawful discrimination. Few potential challengers would be willing to take the risk if their employer could punish them for complaining unless they could win

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285. 42 U.S.C. § 2000e-3(a) (2000) (making it unlawful to discriminate against an employee "because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter").

286. *Id.* (making it unlawful to discriminate against an employee "because he has opposed any practice made an unlawful employment practice by this subchapter").

287. *See, e.g.,* *Payne*, 654 F.2d at 1139; *McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1139 (5th Cir. 1981); *Parker v. Balt. & Ohio R.R. Co.*, 652 F.2d 1012, 1019 (D.C. Cir. 1981); *Sias v. City Demonstration Agency*, 588 F.2d 692, 695 (9th Cir. 1978).

288. *See, e.g.,* *Payne*, 654 F.2d at 1139; *Parker*, 652 F.2d at 1019; *Berg v. La Crosse Cooler Co.*, 612 F.2d 1041, 1045 (7th Cir. 1980); *Hearth v. Metro. Transit Comm'n*, 436 F. Supp. 685, 688-89 (D. Minn. 1977).

289. *See, e.g.,* *Payne*, 654 F.2d at 1139; *Parker*, 652 F.2d at 1019; *Berg*, 612 F.2d at 1045; *Sias*, 588 F.2d at 695; *EEOC v. C & D Sportswear Corp.*, 398 F. Supp. 300, 306 (M.D. Ga. 1975).

a court case proving unlawful discrimination. As many commentators have pointed out, employment discrimination cases are notoriously difficult to win.<sup>290</sup> Limiting protection from retaliation to only those employees able to win a discrimination case would eviscerate Title VII's protection from retaliation.

Yet the reasonable belief doctrine has failed to honor its original purpose—to protect the employee whose belief in unlawful discrimination turns out to be mistaken. The turning point in derailing the reasonable belief doctrine was the Supreme Court's 2001 decision in *Clark County School District v. Breeden*.<sup>291</sup> In *Breeden*, the plaintiff alleged that her employer retaliated after she complained of an incident involving a sexually charged verbal exchange between her supervisor and a coworker.<sup>292</sup> The incident involved a meeting between the plaintiff, her supervisor, and a male coworker in which they were reviewing a personnel file and came across a comment stating, "I hear making love to you is like making love to the Grand Canyon."<sup>293</sup> One of the men read the comment out loud and stated, "I don't even know what that means." The other man replied, "I'll tell you later," and both men chuckled.<sup>294</sup> The plaintiff later complained to a supervisor that the incident made her feel uncomfortable, and she was allegedly retaliated against in response.<sup>295</sup> Evaluating this claim under the opposition clause,<sup>296</sup> the Supreme Court ruled unanimously that the alleged retaliation was not covered by Title VII as a matter of law because "[n]o reasonable person could have believed that the single incident recounted above violated Title VII's standard."<sup>297</sup>

Although little-noticed at the time, *Breeden* established a significant and troubling limitation on employees' protection from retaliation. The Court was correct that the facts before it would not constitute actionable harassment, but the reasonable belief requirement it adopted sets up a difficult dilemma for employees. Though employees are widely encouraged to promptly report all sexually offensive conduct through specified employer channels, and indeed must do so to protect their later right to sue for harassment, they are left vulnerable to retaliation if they

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290. See, e.g., Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 556–57 (2001).

291. 532 U.S. 268 (2001).

292. *Id.* at 269.

293. *Id.*

294. *Id.*

295. *Id.* at 269–70.

296. As noted later in this section, the case also involved a claim under the participation clause for retaliation that the plaintiff allegedly experienced after filing a charge based on this incident with the EEOC. *Id.* at 271–74.

297. *Id.* at 271.

report conduct that is not legally actionable. The *Breeden* case itself might be dismissed as aberrational—bad facts making bad law—but it has served as the catalyst for an increasingly strict approach to protection from retaliation in the lower courts. The post-*Breeden* reasonable belief cases are a sorry lot, strictly evaluating the reasonableness of the employee's belief both factually and legally.

### 1. The Factual Basis for Complaining

Courts require retaliation plaintiffs to show sufficient factual evidence of underlying discrimination to enable a reasonable person to conclude that discrimination occurred, a standard that comes perilously close to the standard for surviving summary judgment on the underlying discrimination claim. This requirement creates a dilemma for employees, who are pressured to promptly assert their rights but are unprotected by retaliation law if they challenge discrimination without first gathering facts to prove it.

A recent district court decision, *Kennedy v. Guthrie Public Schools*,<sup>298</sup> highlights the tensions created by the *Ledbetter* ruling in particular. The plaintiff in that case, the principal of an alternative high school for at-risk students, was the only African American administrator employed by the district.<sup>299</sup> Based on a voluntary salary study, the district gave raises to eleven of the district's administrators, all of whom were white, but not to ten other administrators, including the plaintiff.<sup>300</sup> The plaintiff raised his suspicion of race discrimination and allegedly experienced retaliation as a result.<sup>301</sup>

The court ruled that the plaintiff's perception of pay discrimination was unreasonable, and that the school district had denied the plaintiff a raise because its salary study had classified him as an assistant principal due to the smaller size of his school.<sup>302</sup> The court emphasized that no one had told the plaintiff that the denial of a raise was racially motivated and that the plaintiff could not point to any witnesses who could testify that

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298. No. CIV-05-1440-F, 2007 WL 895145 (W.D. Okla. Mar. 22, 2007).

299. *Id.* at \*1–3.

300. *Id.* at \*1–2.

301. *Id.* at \*2. As often occurs in retaliation cases, this case involved complicated issues of causation, but the court's reasonable belief ruling purports to stand apart from causation as an independent basis for throwing out the claim. In addition to finding against the plaintiff on reasonable belief and causation grounds, the court held that the allegedly retaliatory action, a letter detailing steps the plaintiff must take to avoid being placed on administrative leave, did not amount to a materially adverse action. *Id.* at \*3, \*6–7.

302. *Id.* at \*5.

race was the reason for the pay decision.<sup>303</sup> The court also rejected the argument that the decision to classify him as an assistant principal, rather than a principal, was a pretext made “to obscure the fact that as a building principal he was making less than the survey average.”<sup>304</sup> The court dismissed the retaliation claim with the same analysis it used to grant summary judgment to the employer on the pay discrimination claim itself.<sup>305</sup>

Other court decisions have been similarly strict in applying the reasonable belief standard to the factual basis for the plaintiff's belief. In *Bazemore v. Georgia Technology Authority*,<sup>306</sup> for example, the court granted summary judgment to the defendant on a retaliation claim because the plaintiff had insufficient proof of discrimination.<sup>307</sup> The African American plaintiff had complained of discrimination to his employer because he was subjected to disciplinary action while a white female coworker who engaged in similar conduct was not.<sup>308</sup> The court explained, “the record is devoid of evidence that a similarly situated white woman was treated more favorably than Plaintiff,” and cited case law from that circuit requiring “ ‘that the quantity and quality of the comparator's misconduct be nearly identical.’ ”<sup>309</sup> It was not enough to show, as the plaintiff had, that a similarly situated white comparator engaged in similar behavior and that the plaintiff was punished while she was not. The court instead required the plaintiff “to show that he and [the white employee] are similarly situated ‘in all relevant respects,’ including [her] past performance and disciplinary history.”<sup>310</sup> The court gave no indication of how an employee is expected to acquire such information, short of discovery. This case is part of a broader trend in which courts apply the same standard for judging the reasonableness of the employee's belief in discrimination under the

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303. *Id.* at \*3. The court also noted that nine of the other administrators who were denied raises were white and that the plaintiff remained the fifth highest paid administrator in the district. *Id.* at \*2–3.

304. *Id.* at \*4–6.

305. *Id.* at \*6 (“As discussed above, [plaintiff] has failed to offer any evidence that [defendant] denied him a salary increase on the basis of his race. That dearth of evidence calls into serious question the reasonableness of [plaintiff's] belief that he was the subject of race discrimination.”).

306. No. 1:05-cv-1850-WSD-WEJ, 2007 WL 917280 (N.D. Ga. Mar. 23, 2007).

307. *Id.* at \*1.

308. *Id.* at \*2 (quoting *Maniccia v. Brown*, 171 F.3d 1364, 1368–69 (11th Cir. 1999)).

309. *Id.* at \*4 (citation omitted). As an alternative ruling, the court also supported its grant of summary judgment on the ground that it was not reasonable to believe that the disciplinary action in question amounted to an adverse employment action as a matter of law. *Id.* This part of the ruling addresses the legal sufficiency of the plaintiff's belief that discrimination occurred, and is in line with cases discussed and criticized in Part III.B.2 below.

310. *Id.* at \*4.

retaliation claim as they apply to the merits of the underlying discrimination claim itself.<sup>311</sup>

Courts also impose constraints on the kinds of evidence that can support a reasonable belief that discrimination occurred. The reasonableness of the plaintiff's belief in discrimination is measured by what the plaintiff herself experienced and her personal knowledge at the time she complained, not by what she later learned herself or learned from others secondhand. For example, in *Anduze v. Florida Atlantic University*,<sup>312</sup> the court found insufficient evidence to support an employee's belief that discrimination occurred, discounting the affidavits of two African American students at the college who alleged that the plaintiff's supervisor also treated them differently based on their race.<sup>313</sup> Because a discriminatory motive is usually proven circumstantially, the students' reports could well have been relevant to the plaintiff's belief that her supervisor engaged in racially disparate treatment, even if such evidence would not be admissible in a trial on the underlying discrimination charge. The court's refusal to consider the evidence illustrates the predicament confronting employees who must immediately challenge possible discrimination but are vulnerable to retaliation if they lack the facts to prove it.

These cases leave employees who object to employer practices without sufficient evidence to back up their concerns in jeopardy of retaliation without legal recourse. When courts evaluate the reasonableness of the plaintiff's belief on a retaliation claim under the same strict standard they use for deciding summary judgment on the discrimination claim itself,<sup>314</sup> the difficulty plaintiffs encounter in surviving summary judgment

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311. See, e.g., *Zappan v. Pa. Bd. of Prob. & Parole*, 152 F. App'x 211, 218 (3d. Cir. 2005) (finding an insufficient factual belief of discrimination because of the absence of evidence, apart from the plaintiff's subjective belief, that the disciplinary measures were taken for racial or retaliatory motives); *Kaplan v. City of Arlington*, 184 F. Supp. 2d 553, 565 (N.D. Tex. 2002) (finding plaintiff had an insufficient factual belief of religious discrimination because she offered only "conclusory" statements about her supervisor's intent).

312. 151 F. App'x 875 (11th Cir. 2005).

313. *Id.* at 879 ("The record reveals no evidence that she had suffered any change in her compensation, terms, conditions or privileges of employment at the time of her internal grievances that would constitute an adverse employment action."); see also *Clover v. Total Sys. Servs., Inc.*, 176 F.3d 1346, 1352 (11th Cir. 1999) ("For opposition clause purposes, the relevant conduct does not include conduct that actually occurred . . . but was unknown to the person claiming protection under the clause.").

314. See, e.g., Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71, 74-75 (1999); Carolyn Shapiro, *The Limits of the Olympian Court: Common Law Judging Versus Error Correction in the Supreme Court*, 63 WASH. & LEE L. REV. 271, 301 (discussing courts' "chaotic" and "arbitrary" approach to whether to award summary judgment to defendants in employment discrimination cases); Michael J. Zimmer,

on discrimination claims bleeds into retaliation claims through the reasonable belief doctrine.

## 2. Reasonable Beliefs About the Reach of Title VII Law

Perhaps the most problematic turn in the reasonable belief cases after *Breedon* is the increasing stringency of courts in measuring the reasonableness of employee beliefs in discrimination as a matter of law. In addition to a reasonable factual basis, an employee who opposes discrimination also must have a legally sound belief that Title VII was violated in order to secure the law's protection from retaliation. The reasonableness of the employee's belief is measured by existing law, and courts charge employees with full knowledge of existing law—including circuit-specific precedents—even if an employee had a good faith belief that the law reached farther.<sup>315</sup>

Recent cases testing the legal sufficiency of employee beliefs in discrimination unduly constrain the permissible interpretations of discrimination law in order to label plaintiffs' more expansive views unreasonable. Courts' use of the "unreasonableness" label squelches constructive dialogue about the proper scope of nondiscrimination requirements and grossly oversimplifies complex legal and social questions about what "discrimination" the law does and should encompass. The following discussion illustrates the problems this doctrine has created for employees.<sup>316</sup>

Numerous court decisions oversimplify and even misstate the law to find the plaintiff's understanding of Title VII to be unreasonable, notwithstanding specific actions taken by the employer to encourage that very belief. In one case, for example, the plaintiff complained about conduct that qualified as sexual harassment—a sexual assault by coworkers—but she was left without recourse for the retaliation that followed because she lacked a legally sufficient basis for holding the

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*Slicing & Dicing of Individual Disparate Treatment Law*, 61 LA. L. REV. 577, 592–603 (2001) (criticizing lower courts' overuse of summary judgment in employment discrimination cases).

315. See, e.g., *Weeks v. Harden Mfg. Corp.*, 291 F.3d 1307, 1317 (11th Cir. 2002) ("[P]laintiffs may not stand on their ignorance of the substantive law to argue that their belief was reasonable."); *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701, 707 (7th Cir. 2000) (rejecting plaintiff's retaliation claim for lack of reasonable belief; plaintiff's complaint of sexual orientation discrimination was not objectively reasonable because such discrimination is not prohibited under Title VII); *Clover*, 176 F.3d at 1351 (in retaliation claim, measuring plaintiff's underlying claims of sexual harassment against "existing substantive law" and whether conduct was "severe or pervasive enough that a reasonable person would find it hostile or abusive").

316. The discussion herein focuses on cases decided since January 2005. For a discussion and critique of earlier reasonable belief cases, see generally Brake, *supra* note 176. The reasonable belief case law has only gotten worse since that article was written.

employer liable for the assault.<sup>317</sup> The plaintiff was allegedly assaulted by two male police officers with whom she went out for drinks after a late shift.<sup>318</sup> She claimed she was placed on light duty and eventually terminated after she reported the assaults.<sup>319</sup> Even though the facts were in dispute both as to the assault and the retaliation, the court granted summary judgment because the plaintiff could not show that the coworkers' sexual assault was endorsed or exacerbated by any conduct of the employer, a prerequisite for employer liability for coworker sexual harassment under Title VII.<sup>320</sup>

The court's reasoning in that case is particularly egregious because the Title VII standard for employer liability for coworker harassment requires notice to the employer, followed by a failure to take appropriate action.<sup>321</sup> Proof that the employer acquiesced in the coworkers' assaults or responded indifferently to the plaintiff's complaint, for example, by requiring her to continue to work with the two officers, could well have led to employer liability for the failure to correct a hostile environment. The dilemma for employees under the court's ruling is stark. Caught in a chicken-and-egg cycle, the plaintiff could receive no protection from retaliation for complaining of coworker harassment without a prior basis for establishing employer liability, but employer liability for coworker harassment may not be established without first complaining about the harassment and waiting for the employer's response. To require a legal predicate for employer liability *before* complaining about coworker harassment utterly defeats Title VII's substantive rights against sexual harassment.<sup>322</sup>

Another unforgiving court left a plaintiff unprotected from retaliation for complaining about sexual favoritism in the workplace on the grounds that no reasonable employee could believe that a supervisor's favoritism toward a paramour violated Title VII.<sup>323</sup> The court charged the plaintiff

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317. See *Bicknell v. City of St. Petersburg*, No. 8:03-CV-1045-T-27, 2006 WL 560167, at \*6 (M.D. Fla. Mar. 7, 2006).

318. *Id.* at \*1.

319. *Id.* at \*3–4.

320. The court's discussion of the liability question is cryptic, but it concludes that "a sexual assault by a coworker does not constitute an employment practice proscribed by Title VII." *Id.* at \*6.

321. See *supra* note 121 and accompanying text; see also Grossman, *supra* note 91, at 689–90.

322. Another possibility, albeit one that the court did not discuss or appear to consider, might be that the retaliation could itself create employer liability on a hostile environment claim for coworker harassment by establishing that the employer failed to act promptly and appropriately once on notice of the harassment. However, this would effectively require prevailing on the merits of the discrimination claim in order to secure any recovery for the retaliation, something retaliation doctrine purports not to require—and must not require, if Title VII's protection from retaliation is to be anything more than empty rhetoric.

323. See *Sherk v. Adesa Atlanta, L.L.C.*, 432 F. Supp. 2d 1358, 1372 (N.D. Ga. 2006).

with knowledge of Eleventh Circuit precedent on sexual favoritism claims<sup>324</sup> and deemed the plaintiff's belief that sex discrimination had occurred unreasonable because the plaintiff could not show that a male manager would have been treated more favorably than she was.<sup>325</sup>

The court's discussion, however, grossly oversimplified the state of the law. In actuality, whether sexual favoritism in the workplace constitutes discrimination under Title VII is a complicated question.<sup>326</sup> The court's ruling in this case is particularly egregious because the plaintiff's belief that sexual favoritism is a form of sexual harassment was encouraged and supported by the employer's own policies, which prohibited supervisor-subordinate consensual relationships, in part because of concerns about sexual harassment liability.<sup>327</sup> While the plaintiff claimed that she relied on the company policy in formulating her belief that the favoritism was a form of unlawful sexual harassment, the court measured the reasonableness of her belief against its own view of current law and disregarded the employer's role in shaping the plaintiff's belief.<sup>328</sup>

Plaintiffs have also lost retaliation claims where they opposed harassment of persons other than employees, such as members of the public or clients. These rulings also oversimplify complex questions about the proper scope of Title VII and its coverage of hostile environment harassment. For example, in *Neely v. City of Broken Arrow*,<sup>329</sup> the court ruled that it was not reasonable, as a matter of law, to believe that Title VII bars firefighters from sexually harassing members of the public.<sup>330</sup> The plaintiff in that case, a deputy fire chief, had been notified that three firefighters allegedly engaged in a pattern of sexually harassing conduct

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324. *Id.* at 1370 ("The court measures the objective reasonableness of an employee's belief against existing substantive law and, accordingly, charges the plaintiff with substantive knowledge of the law."); *id.* ("[T]he unanimity with which the courts have declared favoritism of a paramour to be gender-neutral belies the reasonableness of Plaintiff's belief that such favoritism created a hostile work environment.").

325. *Id.* at 1371 ("[W]hen a supervisor gives favorable treatment to his paramour, every other employee 'with whom he is not having sex' experiences the resultant discrimination or harassment, regardless of their gender." (quoting Complaint at 10, *Sherk*, 432 F. Supp. 2d 1358 (No. 3:04-CV-051))).

326. *See, e.g.*, KATHARINE T. BARTLETT & DEBORAH L. RHODE, GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY 421, 423 (4th ed. 2006) (discussing legal uncertainty over the treatment of sexual favoritism); MICHAEL J. ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 498-501 (6th ed. 2003) (discussing the controversy over whether sexual favoritism is a form of sexual harassment).

327. *Sherk*, 432 F. Supp. 2d at 1363.

328. *Id.* at 1372 (rejecting plaintiff's argument that her belief was reasonable given that the employer's handbook specifically linked sexual favoritism and sexual harassment "because Plaintiff is charged with knowledge of the substantive law").

329. No. 07-CV-0018-CVE-FHM, 2007 WL 1574762 (N.D. Okla. May 29, 2007).

330. *Id.* at \*4.



while on duty attending a training program in another town and while driving a fire department vehicle to the training program.<sup>331</sup> Even though city officials strongly encouraged the plaintiff to conduct an investigation into the allegations, “and informed plaintiff of their belief that a failure to do so might expose the city to liability under Title VII,” the court ruled that any resulting retaliation for the plaintiff’s investigation and discipline of the firefighters was not protected under Title VII because a reasonable employee would know that Title VII only protects *employees* from discrimination.<sup>332</sup>

Once again, the limits of Title VII law are not so obvious or clear-cut as the court suggests. One of the earliest hostile environment cases, *Rogers v. EEOC*,<sup>333</sup> cited approvingly by the Supreme Court in *Meritor Savings Bank v. Vinson*,<sup>334</sup> recognized that race discrimination against clients might contribute to a racially hostile work environment for employees.<sup>335</sup> In addition to the *Neely* court’s overly simplistic view of Title VII law, its reasoning can also be faulted for measuring the reasonableness of the plaintiff’s belief exclusively against existing law, without regard to how the employer’s own actions shaped the employee’s beliefs. Much like the court’s decision in *Sherk*, the court here made no allowance for how the employer’s statements influenced the plaintiff’s understanding of Title VII law by raising the concern about potential Title VII liability from the firefighters’ misconduct.<sup>336</sup>

Although many of the decisions rejecting the legal sufficiency of the employee’s belief involve applications of harassment law, the standard applies to other legal limits on discrimination as well. For example, in *Bazemore*, the court ruled that the plaintiff lacked a reasonable belief that the challenged discrimination was unlawful because the alleged discrimination did not, as a matter of law, amount to an adverse

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331. *Id.* at \*1.

332. *Id.* at \*3 (“Harassment of members of the public, however vulgar and inappropriate, is not covered by Title VII. . . . It follows that a retaliation claim based on opposition to or investigation of a co-worker’s harassment of the public does not state a claim of action under Title VII.”). The court did, however, allow leave for the plaintiff to amend his complaint in case he could allege facts that might connect the firefighters’ harassment to discrimination against city employees, such as “evidence that they recounted their exploits to fellow firefighters . . . in the presence of female [city] Fire Department employees.” *Id.* at \*4.

333. 454 F.2d 234 (5th Cir. 1972), *cert. denied*, 406 U.S. 957 (1972).

334. 477 U.S. 57, 65 (1986).

335. *Rogers*, 454 F.2d at 239; *see also* Brake, *supra* note 139, at 18, 94–98 (discussing and criticizing other retaliation cases rejecting retaliation claims where the underlying conduct opposed involved harassment of non-employees such as clients or members of the public).

336. *Neely*, 2007 WL 1574762, at \*5 (“Mere statements that other persons told plaintiff that the underlying conduct could subject the Fire Department to Title VII liability is not sufficient.”).

employment action.<sup>337</sup> In that case, the plaintiff had complained of discrimination in the employer's administration of a "Performance Improvement Discussion," an informal, critical evaluation.<sup>338</sup> The court ruled that because the criticism was not part of a formal disciplinary process and did not result in a demotion, pay cut, or other tangible harm, it did not constitute an adverse employment practice at the time the plaintiff complained of it.<sup>339</sup> The court's cursory discussion of the requirements for an adverse employment action obscures the complexity of debate on this issue and the uncertainty surrounding the threshold required for an adverse employment action under Title VII.<sup>340</sup>

Even in situations where the legal contours of discrimination law are clear and not oversimplified by courts, it is still questionable whether employees should be held to strict conformity with current law in opposing what they believe to be discriminatory. For example, in *Dinicola v. Chertoff*,<sup>341</sup> an employee lost a retaliation claim where he had complained about an employer's refusal to consider him for a position because of his age. Although the age discrimination in that case was undisputed, the plaintiff was only thirty-seven years old, and the ADEA limits the protected class to persons forty years of age and older. Accordingly, any retaliation against the plaintiff for complaining was lawful because he did not have a reasonable belief that the employer had violated the ADEA.<sup>342</sup> Although this case is on stronger ground than those previously discussed, because at least the legal limits were clear and the employer did not appear to have encouraged the plaintiff's mistaken understanding of the law, it still places an unduly heavy burden on employees to thoroughly understand the limitations of discrimination law before voicing a complaint, however informally.

One of the more troubling developments since *Breeden* has been the plethora of court decisions finding employees' beliefs that they were opposing unlawful harassment to be unreasonable because they complained of harassment too soon, before enough incidents had occurred to create a

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337. *Bazemore v. Ga. Tech. Auth.*, No. 1:05-cv-1850-WSD-WEJ, 2007 WL 917280, at \*2 (N.D. Ga. Mar. 23, 2007).

338. *Id.*

339. *Id.* at \*1-2, \*3.

340. See ZIMMER ET AL., *supra* note 326, at 104-06 (discussing the controversy over what counts as a materially adverse employment action under Title VII).

341. No. 05-CV-4968, 2007 WL 1456224 (E.D.N.Y. May 16, 2007).

342. *Id.* at \*6 (stating that "though it is clear that defendant engaged in the activity that plaintiff first complained of, denying him an employment interview based solely on his age, it is equally clear that this activity is not unlawful under the ADEA" because "plaintiff was not within the class of individuals protected by the act").

hostile environment.<sup>343</sup> These cases address employee challenges to both racial harassment and sexual harassment and introduce an additional complication for employees. In addition to oversimplifying the limits of discrimination law and discounting the ways employers shape employee understandings of discrimination, these decisions create a distinct dilemma for employees who experience individual incidents of harassment. In numerous recent decisions, plaintiffs have lost retaliation cases on the ground that no reasonable employee could have believed that the challenged conduct was sufficiently severe or pervasive to create an actionable hostile environment.<sup>344</sup> Such rulings leave employees in the untenable position of having to promptly report acts of harassment through employer channels in order to preserve their right to later challenge the harassment under Title VII, yet risk *lawful* retaliation by employers if they complain too soon, before the offending conduct comes close enough to an actionable hostile environment. These doctrines converge to leave an increasingly narrow space for employees to protect their rights to a nondiscriminatory work environment. The following examples illustrate how this doctrine punishes employees who speak up too soon against workplace harassment.

One of the more notorious reasonable belief cases in recent years is the Fourth Circuit's decision in *Jordan v. Alternative Resources Corp.*<sup>345</sup> The plaintiff in that case was allegedly terminated for opposing what he believed was racial harassment, and the court applied the reasonable belief doctrine to uphold summary judgment for the employer.<sup>346</sup> The conduct precipitating the plaintiff's underlying complaint occurred when a white coworker in a company office was watching television coverage of the capture of the D.C. snipers, two African American men, and exclaimed in front of the plaintiff, an African American man, " 'They should put those two black monkeys in a cage with a bunch of black apes and let the apes f--k them.' " <sup>347</sup> When plaintiff, who was upset by the comment, discussed the incident with two coworkers, they told him that this employee had made similarly offensive remarks many times before.<sup>348</sup> The plaintiff complained through the appropriate channels under the company policy on racial harassment and allegedly suffered retaliation as a result.<sup>349</sup>

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343. In addition to the more recent cases discussed here, see also Brake, *supra* note 139, at 88 n.242.

344. See *supra* notes 298–311 and accompanying text.

345. 458 F.3d 332 (4th Cir. 2006), *cert. denied*, 549 U.S. \_\_\_, 127 S. Ct. 2036 (2007).

346. *Id.* at 336.

347. *Id.*

348. *Id.* at 337.

349. *Id.*

Over a strong dissent by Judge King, the majority held that no reasonable employee could believe that this isolated remark amounted to a racially hostile environment in violation of Title VII.<sup>350</sup> The majority cited circuit court precedent for the principle that an isolated racist remark does not amount to a hostile environment and emphasized the sine quo non of actionable hostile environment as repeated and sustained conduct.<sup>351</sup> Minimizing the severity of the remark, the majority characterized it as “rhetorical,” not directed at the plaintiff, and prompted by an emotional reaction to a major news event, “a far cry” from racist conditions so severe as to alter the terms and conditions of the plaintiff’s employment.<sup>352</sup> To the allegation that the plaintiff’s coworkers told him that this same employee had repeatedly made similar remarks in the past, the court responded that plaintiff had not himself experienced such remarks in the four years he worked there.<sup>353</sup> The majority’s ruling puts the onus on employees to show that “a plan was in motion” that would create an actionable hostile environment, and that such a result was “likely to occur” before complaining about conduct which, if it persisted, would create such an environment.<sup>354</sup>

The court’s decision is particularly egregious because the employer’s nondiscrimination policy required employees to report any racial harassment to a supervisor, which the plaintiff did.<sup>355</sup> The majority responded to the plaintiff’s arguments about the resulting double-bind facetiously, insisting that there is no double-bind if the harassment is close enough to an unlawful hostile environment to meet the reasonable belief test and attributing whatever hardship resulted from its ruling to Congress’s judgment and not the court’s.<sup>356</sup>

Like many of the reasonable belief decisions, the majority’s reasoning overstates the clarity of harassment law by citing conservative decisions that support its result, without engaging reasonable arguments for setting a different threshold for severity and pervasiveness. Judge King’s dissent masterfully exposes the extreme and threatening racism in the offending

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350. *Id.* at 340–44.

351. *Id.* at 339–40.

352. *Id.* at 340–41.

353. *Id.* at 341.

354. *Id.* at 340–41.

355. *Id.* at 347.

356. *Id.* at 341–43. For other critiques of these cases and the weakening of Title VII’s opposition clause, see generally Brianne J. Gorod, *Rejecting ‘Reasonableness’: A New Look at Title VII’s Anti-Retaliation Provision*, 56 AM. UNIV. L. REV. 1469 (2007); Lawrence D. Rosenthal, *To Report or Not To Report: The Case for Eliminating the Objectively Reasonable Requirement for Opposition Activities Under Title VII’s Anti-Retaliation Provision*, 39 ARIZ. ST. L.J. 1127 (2007).

comment and vividly describes the resulting Catch-22 for employees, who are required to report such conduct under employer policies, and must do so to preserve their Title VII rights to challenge such harassment, yet are left vulnerable to retaliation when they do.<sup>357</sup> The harshness of the court's decision contrasts sharply with the majority's rhetoric promising generous protection from retaliation under Title VII.<sup>358</sup>

The *Jordan* decision is one of several recent cases in which employees report racial harassment through employer-directed channels, allegedly experience retaliation in response, and are left with no legal recourse because the racially offensive conduct they reported was not severe or pervasive enough to support a reasonable belief that the company violated Title VII.<sup>359</sup> The resulting predicament is devastating for Title VII's effectiveness as a mechanism for addressing racial harassment.

Cases applying the reasonable belief test to employees who challenge sexually harassing conduct create a similar dilemma. In *Lowry v. Regis Salons Corp.*,<sup>360</sup> for example, the plaintiff claimed that she experienced retaliation for complaining to her employer of sexually offensive behavior by a coworker.<sup>361</sup> In the incident in question, a coworker asked the plaintiff to go with him to a back room for the ostensible purpose of showing her a

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357. *Jordan*, 458 F.3d at 350–51 (King, J., dissenting) (explaining how the comment “play[ed] on historic, bigoted stereotypes that have characterized [African Americans] as uncivilized, non-human creatures who are intellectually and culturally inferior to whites,” and that the comment is “acutely insulting” and threatening to African Americans in a way “our panel is scarcely qualified to comprehend”); *id.* at 352–53 (“[I]ts decision has placed employees like *Jordan* in an untenable position, requiring them to report racially hostile conduct, but leaving them entirely at the employer’s mercy when they do so”; citing Fourth Circuit precedent interpreting the affirmative defense to require employees to promptly report harassment rather than wait to investigate and gather evidence).

358. *Id.* at 338–39 (majority opinion) (characterizing the circuit’s reasonable belief precedent as “[r]eading the language generously to give effect to its purpose,” rather than limiting protection to complaints of actually unlawful discrimination); *id.* at 343 (“Congress limited the scope of retaliation claims, and [Fourth Circuit precedent] amply, indeed generously, protects employees who reasonably err in understanding those limits.”).

359. See *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 348–49 (5th Cir. 2007) (plaintiff lacked a reasonable belief that supervisor’s “racially inappropriate” reference to “ghetto children” was sufficiently severe or pervasive to violate Title VII); *Carlisle v. Sallie Mae, Inc.*, No. 5:05cv188/MCR/EMT, 2007 WL 141138, at \*3, \*9 (N.D. Fla. Jan. 17, 2007) (plaintiff lacked a reasonable belief that four incidents involving racially derogatory comments, including supervisors’ reference to Martin Luther King day as “spook day,” was sufficiently severe or pervasive to violate Title VII); *Wilson v. Dep’t of Children and Families*, No. 302CV357J32MMH., 2006 WL 66723, at \*8 (M.D. Fla. Jan. 10, 2006) (rejecting plaintiff’s retaliation claim for lack of reasonable belief and stating, “[n]or is the allegation, which we must accept as true for summary judgment purposes, that Day made a single racially derogatory remark a basis for bringing a charge of discrimination”).

360. No. 1:05-cv-1970-WSD, 2006 WL 2583224 (N.D. Ga. Sept. 6, 2006).

361. *Id.* at \*1–2.

rash on his leg.<sup>362</sup> When she did, instead of lifting his pant leg as she had expected, he unfastened his pants and dropped them to floor, revealing red bikini underwear that left part of his genitals exposed, and he “had his hands on his hips and was moving them toward his waistline and genital area.”<sup>363</sup> The plaintiff quickly left the room.<sup>364</sup> Plaintiff complained to a store manager about the incident, and in her retaliation claim, alleged that she was fired as a result.<sup>365</sup>

The court granted summary judgment to the employer, ruling that the plaintiff could not have reasonably believed that the one incident in question created an unlawful hostile environment.<sup>366</sup> Measuring the reasonableness of the plaintiff’s belief under the existing law of the circuit, the court ruled that the underlying incident was not severe or pervasive enough to support a reasonable belief that it was unlawful because it did not make the plaintiff feel “intimidated, threatened, or humiliated,” but only uncomfortable, and it did not affect her job performance.<sup>367</sup> The court summed up the gap between the plaintiff’s understanding and existing law as follows:

[A]s a matter of law in this Circuit, a single incident of stripping down to one’s underwear in front of an employee, for the purpose of showing a rash on the leg, absent a showing of additional gender related harassment, does not constitute sexual harassment when judged by existing substantive law.<sup>368</sup>

Like many of the reasonable belief decisions, the court’s ruling made no allowance for how employer policies and pronouncements shape the reasonableness of an employee’s belief about how she should respond to sexually offensive behavior. When the plaintiff was hired, she was required to sign an acknowledgement form stating that she had received, read, and understood the employer’s sexual harassment policy, and “that she ‘understood her obligation as an employee to promptly report to the

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362. *Id.* at \*4.

363. *Id.*

364. *Id.* Soon after this incident, the same coworker remarked to the plaintiff, “in front of a client, that she had seen him ‘in the buff.’” *Id.* (quoting Plaintiff’s Response to Defendant’s Statement of Material Facts as to Which There Is No Genuine Issue To Be Tried ¶ 11, *Lowry*, 2006 WL 2583224 (No. 1:05-cv-1970-WSD))

365. *Id.* at \*5, \*9.

366. *Id.* at \*11. The court also faulted the plaintiff for inadequate proof of causation, an independent requirement for succeeding on a retaliation claim. *Id.* at \*16–17. Our criticism is limited to the court’s application of the reasonable belief doctrine.

367. *Id.* at \*11 (“Under the law of this Circuit, the conduct of which Plaintiff complained was not severe or pervasive enough to have interfered with her job performance, so that it could constitute, or reasonably be believed to constitute, unlawful behavior under Title VII.”).

368. *Id.* at \*12.

appropriate persons activities and/or conduct which may constitute harassment.’ ”<sup>369</sup> The court’s decision leaves employees with little margin for error if they follow employer instructions to report behavior they understand to be harassment but cannot later convince a court, in the event of employer retaliation, that this belief was reasonable as measured by existing law. Like the cases involving challenges to racial harassment, *Breeden* has prompted a trend of lower court decisions deeming employees unreasonable for challenging perceived sexual harassment without a sufficient quantity of conduct to amount to unlawful harassment.<sup>370</sup>

Taken as a whole, the most recent cases applying the reasonable belief requirement paint a picture that contrasts starkly with judicial rhetoric about the generosity of the reasonable belief standard as an alternative to requiring the challenged conduct to actually violate Title VII.<sup>371</sup> Although courts continue to tout the liberality of the reasonable belief doctrine for going beyond opposition to conduct that is actually illegal, instances of judicial generosity in applying the reasonable belief standard are in fact few and far between.<sup>372</sup> An employee who complains of perceived discrimination without sufficient factual or legal support to withstand summary judgment on a legal challenge to the underlying discrimination may have no legal recourse for the retaliation that follows.

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369. *Id.* at \*4 (quoting Defendant’s Statement of Material Facts as to Which There Is No Genuine Issue To Be Tried ¶ 7, *Lowry*, 2006 WL 2583224 (No. 1:05-cv-1970-WSD)). The court also faulted the plaintiff for insufficient proof of causation and for failing to report the conduct to the proper persons, notwithstanding the plaintiff’s efforts in leaving numerous unreturned phone messages. *Id.* at \*4–5, \*12–13.

370. *See, e.g., Greene v. A. Duie Pyle, Inc.*, 170 F. App’x 853, 856 (4th Cir. 2006) (plaintiff, a male and self-identified Christian employee, could not reasonably have believed that sexually explicit jokes and pornography in the workplace was sufficiently severe or pervasive to violate Title VII’s ban on a sexually hostile environment); *Amos v. Tyson Foods, Inc.*, 153 F. App’x 637, 640, 646 (11th Cir. 2005) (finding it unreasonable for plaintiffs to have believed that a single incident of a male employee entering a women’s dressing room and stopping to “gawk[]” and “taunt[] [one of them] with hand motions” while they were dressing violated Title VII); *Tatt v. Atlanta Gas Light Co.*, 138 F. App’x 145, 148 (11th Cir. 2005) (not reasonable for plaintiff to have believed that supervisor’s once-a-week conduct of pretending to unzip his pants and urinate all over the paperwork she brought him and daily obnoxious, although not necessarily sexual, taunts violated Title VII).

371. *See, e.g., Moore v. City of Phila.*, 461 F.3d 331, 345 (3d Cir. 2006) (stating that employees “are not required to collect enough evidence of discrimination to put the discrimination case before a jury before they blow the whistle”); *Geer v. Marco Warehousing, Inc.*, 179 F. Supp. 2d 1332, 1343 (M.D. Ala. 2001) (“The action opposed need not have actually been sexual harassment, however. It would be impertinent of the court to require lay persons to possess an intimate understanding of the law, particularly in an area as nuanced as this one.”).

372. *See, e.g., Burroughs v. Smurfit Stone Container Corp.*, 506 F. Supp. 2d 1002, 1011–20 (S.D. Ala. 2007); *Garcia v. Lewis*, No. 05 Civ. 1153(SAS), 2005 WL 1423253, at \*3–6 (S.D.N.Y. June 16, 2005).

As these cases show, many courts effectively equate a reasonable belief in unlawful discrimination with the actuality of unlawful discrimination. Particularly when it comes to mistaken legal understandings, there is very little room for employee error. As one district court forthrightly described the reasonable belief standard and its relationship to actual unlawful discrimination,

[t]he critical inquiry is whether plaintiff has a reasonable, good faith belief that he opposes conduct that is unlawful under Title VII. However, whether it is reasonable for a plaintiff to believe that the conduct is unlawful under Title VII depends on whether, as a general matter, the underlying conduct is unlawful under Title VII.<sup>373</sup>

The circularity here is notable. If the conduct opposed turns out not to violate Title VII, employees take a considerable risk in reporting or challenging it.

### 3. The Expansion of the Reasonable Belief Doctrine: The Shrinking Protection of the Participation Clause and the Increasing Privatization of Discrimination Complaints

It is tempting to think, based on the earlier discussion locating the origins of the reasonable belief standard in the language of the opposition clause, that the problems created by the above body of case law might be avoided by filing a discrimination complaint directly with the EEOC and bypassing employer channels for complaining, thereby triggering the broader protection of the participation clause and steering clear of the reasonable belief doctrine in an action for subsequent retaliation. There are two problems with this as a strategy for escaping the reasonable belief predicament.

First, it is no longer so clear that the reasonable belief requirement applies only to retaliation claims that fall under the opposition clause. Recent case law suggests that the reasonable belief test developed under the opposition clause is beginning to bleed into participation clause claims as well.<sup>374</sup> In light of this trend, it is no longer clear that an employee may

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373. *Neely v. City of Broken Arrow, Okla.*, No. 07-CV-0018-CVE-FHM, 2007 WL 1574762, at \*3 (N.D. Okla. May 29, 2007); *see also Bazemore v. Ga. Tech. Auth.*, No. 1:05-cv-1850-WSD-WEJ, 2007 WL 917280, at \*2 n.1 (N.D. Ga. Mar. 23, 2007) (“To determine whether Plaintiff’s belief was objectively reasonable, the Court must analyze, under substantive law, whether Defendants actually engaged in an unlawful employment practice by disciplining him more severely than [a similarly situated white female].”).

374. *See Mattson v. Caterpillar, Inc.*, 359 F.3d 885, 891–92 (7th Cir. 2004) (stating that both the participation clause and the opposition clause require “the same threshold standard” of reasonableness); *Neely*, 2007 WL 1574762, at \*1–2 (construing Tenth Circuit precedent to require the application of *Breedon*’s reasonable belief requirement to retaliation claims brought



avoid the reasonable belief requirement by foregoing internal complaint procedures and filing directly with the EEOC.

Second, and most importantly, in the current environment of employer privatization of discrimination claims and the increasing pressure to channel discrimination complaints into employer grievance processes, it is utterly unrealistic to expect employees to bypass such procedures, remain silent about their concerns, and go straight to the EEOC. Indeed, the increasing privatization of employment discrimination disputes has made the reasonable belief doctrine all the more problematic.

As discussed previously, employers increasingly instruct employees to report perceived discrimination and harassment internally through employer-specified procedures.<sup>375</sup> Training of employees on sexual harassment and discrimination policies and the channels for reporting has become a cottage industry.<sup>376</sup> This trend has effectively expanded the scope of the increasingly strict reasonable belief test in the post-*Breedon* environment. Because employee participation in such procedures falls under the opposition clause rather than the participation clause,<sup>377</sup> the trend

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under the participation clause); see also *Moore*, 461 F.3d at 341 (describing applicable standard as requiring an objectively reasonable belief without distinguishing between the opposition and participation clauses); *Crumpacker v. Kan. Dep't of Human Res.*, 338 F.3d 1163, 1172 (10th Cir. 2003) (rejecting Eleventh Amendment challenge to retaliation claims based on the court's view that such claims require an objectively reasonable belief in underlying discrimination, without distinguishing between the opposition and participation clauses); *Bazemore*, 2007 WL 917280, at \*2 (requiring plaintiff to show an objectively reasonable belief but not discussing the opposition or participation clauses); *Soto v. Bank of Am., NA*, No. 6:04-CV-782-ORL28JGG, 2005 WL 2861116, at \*10 (M.D. Fla. Nov. 1, 2005) (stating that the Eleventh Circuit has not decided whether an objective reasonable belief requirement applies to participation clause claims). In our view, the application of the reasonable belief test to participation clause claims rests on a misreading of *Breedon*, since the participation clause claim in that case was disposed of on the alternate ground of causation, but could have been easily swept into the reasonable belief analysis had that standard applied. See *Clark County Sch. Dist. v. Breedon*, 532 U.S. 268, 271–73 (2001).

375. See *supra* notes 125–33 and accompanying text.

376. See Grossman, *supra* note 92, at 17–22 (describing the role of human resources culture in the proliferation of antiharassment policies, procedures, and training).

377. Lower courts have required a prior EEOC filing in order to consider an employee's participation in an employer's internal investigation into discrimination as protected activity under the participation clause. See, e.g., *Abbott v. Crown Motor Co.*, 2003 FED App. 0388P, ¶ 10 (6th Cir.), 348 F.3d 537, 543; *EEOC v. Total Sys. Servs., Inc.*, 221 F.3d 1171, 1174 n.2 (11th Cir. 2000); *Byers v. Dallas Morning News*, 209 F.3d 419, 428 (5th Cir. 2000); *Brower v. Runyon*, 178 F.3d 1002, 1006 (8th Cir. 1999); *Vasconcelos v. Meese*, 907 F.2d 111, 113 (9th Cir. 1990). Our research uncovered only one court decision that treats participation in an employer's internal investigation of discrimination, absent or prior to the filing of an EEOC charge, as protected activity under the participation clause. See *Maclean v. City of St. Petersburg*, 194 F. Supp. 2d 1290, 1298 (M.D. Fla. 2002). This decision relied on a dissenting opinion from the Eleventh Circuit's refusal to reconsider its ruling in *EEOC v. Total System Services, Inc.*, 240 F.3d 899 (11th Cir. 2001), which the district court in *Maclean* mistakenly referred to as the decision of the Eleventh Circuit. *Maclean*, 194 F. Supp. 2d at 1298. Although this court properly recognized the risks to employees if such conduct were placed outside the participation clause,

toward privatization has effectively expanded the scope of the reasonable belief test. Accordingly, the channeling of discrimination complaints into employers' internal dispute resolution processes has come at a high cost that generally has not been acknowledged. To the extent that protection from retaliation is greater under the participation clause than the opposition clause, which has long been recognized as the general rule,<sup>378</sup> the privatization of discrimination complaints leaves employees with less protection from retaliation than if they had initiated formal charges under the statute in lieu of pursuing internal procedures.

Despite the increasing linkage between employer procedures for addressing discrimination and Title VII's liability framework, courts stubbornly have held that employee participation in an employer's internal grievance process is governed only by the opposition clause and not by the more generous participation clause.<sup>379</sup> In order to trigger the participation clause, courts require a prior filing with the EEOC as a bright-line rule.<sup>380</sup>

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the decision is, unfortunately, an anomalous one and appears to rest on a misreading of circuit court precedent. *Id.*

378. See, e.g., *Breeden v. Clark County Sch. Dist.*, No. 99-15522, 2000 WL 991821, at \*1 (9th Cir. July 19, 2000) (noting that protection under the opposition clause required a "reasonable, good faith belief" that discrimination has occurred while the participation clause has no such requirement), *rev'd on other grounds*, 532 U.S. 268 (2001); *Total Sys. Servs.*, 221 F.3d at 1175-76 (same); *Glover v. S.C. Law Enforcement Div.*, 170 F.3d 411, 415 (4th Cir. 1999) (holding that the scope of protection is broader under the participation clause than under the opposition clause); *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1312 (6th Cir. 1989) (same); *Womack v. Munson*, 619 F.2d 1292, 1298 (8th Cir. 1980) (same); *Pettway v. Am. Cast Iron Pipe Co.*, 411 F.2d 998, 1004-07 (5th Cir. 1969) (same).

379. See *supra* note 377 and accompanying text. However, as this Article was nearing the final stages of publication, the U.S. Supreme Court granted certiorari in *Crawford v. Metro. Gov't of Nashville & Davidson County, Tenn.*, 2006 FED App. 0828N (6th Cir.), 211 F. App'x 373, *cert. granted*, 75 U.S.L.W. 3663 (U.S. Jan. 18, 2008) (No. 06-1595). In that case, the Sixth Circuit denied the plaintiff relief under both the participation and opposition clauses in her claim that she was fired for cooperating as a witness in the employer's internal investigation of sexual harassment allegations by a coworker. *Id.* ¶¶ 1-10, 211 F. App'x at 374-76. This case provides the Court with the opportunity to reject this line of cases and hold that employee participation in an employer investigation into discrimination is protected under the participation clause regardless of whether or when an EEOC charge was filed. The United States, in an amicus curiae brief urging the Court to grant the writ of certiorari, has taken the position that the Court should correct this reading of the participation clause. Brief for the United States as Amicus Curiae at 10-14, *Crawford v. Metro. Gov't of Nashville & Davidson County, Tenn.*, No. 06-1595 (U.S. Dec. 18, 2007). On the other hand, the Court could decide the case on narrower grounds by overturning the Sixth Circuit's outrageous ruling that the plaintiff did not "oppose" discrimination when she gave testimony corroborating allegations of discrimination against the employee relations director. If the Court upholds the plaintiff's claim under the opposition clause, it would not have to reach the Sixth Circuit's ruling under the participation clause. We hope the Court accepts the government's invitation to reject the lower court's narrow reading of the participation clause, for the reasons explained in this Article.

380. There is, however, an exception to this bright-line rule where the employer knows that an employee is about to file an EEOC charge and acts preemptively to retaliate. See, e.g., *Geer v. Marco Warehousing, Inc.*, 179 F. Supp. 2d 1332, 1343 (M.D. Ala. 2001) (acknowledging that the

Even if an EEOC charge is eventually filed, employee participation in an employer's internal proceedings before the charge was filed falls under the opposition clause and not the participation clause. Consequently, any communications about alleged discrimination that occur before an EEOC charge has been filed are not protected from retaliation unless they pass the reasonable belief test under the opposition clause.<sup>381</sup>

The courts' insistence on a prior EEOC filing as a prerequisite for establishing "participation" in Title VII's enforcement mechanisms rests on an increasingly obsolete distinction between Title VII's statutorily specified enforcement provisions and voluntary, proactive measures to address discrimination. As discussed above, recent developments in Title VII case law, including the *Faragher/Elzerth* and *Kolstad* cases, place strong legal incentives on employers to address discrimination internally in order to minimize their potential Title VII liability. Treating employee participation in employer IDR processes for addressing discrimination as separate from official Title VII enforcement mechanisms makes little sense in the current environment, where such processes have been specifically developed for the very purpose of ensuring Title VII compliance.<sup>382</sup> Thus, the courts' distinction between the enforcement processes specified in the statute and employers' voluntary dispute resolution processes has become increasingly artificial. The failure of courts to recognize the fallacy of this

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participation clause may extend to "the expression of an intent to file a charge" because "employees should not be bullied out of filing E.E.O.C. charges"). However, this exception is limited by the specificity courts require in showing that the employee made a specific, imminent threat to file a charge, rather than mere vague statements and speculative intentions. *See, e.g.,* *Brower v. Runyon*, 178 F.3d 1002, 1006 (8th Cir. 1999) (plaintiff's conversation with an internal EEO officer inquiring about her EEO options and the plaintiff's conversation with the employer's human relations office the next day in which she vaguely threatened legal action did not trigger protection under the participation clause); *Geer*, 179 F. Supp. 2d at 1336, 1343 (plaintiff's actions in seeking the advice of an attorney, sending a certified letter specifically stating that she was the victim of sexual harassment, and putting her employer on notice that "attorneys might involve themselves in the matter," did not amount to a threat to file a formal EEOC charge as required to trigger the participation clause).

381. *See, e.g., Abbott*, 2003 FED App. 0338P, ¶ 10, 348 F.3d at 543 (stating, with respect to participation clause coverage, "Title VII protects an employee's participation in an employer's internal investigation into allegations of unlawful discrimination where that investigation occurs pursuant to a pending EEOC charge"); *Total Sys. Servs.*, 221 F.3d at 1174 (stating that protected activity under the participation clause "does not include participating in an employer's internal, in-house investigation, conducted apart from a formal charge with the EEOC"); *Booker*, 879 F.2d at 1313 (stating that "the instigation of proceedings leading to the filing of a complaint or a charge . . . is a prerequisite to protection under the participation clause," and "any activity by the employee prior to the instigation of statutory proceedings is to be considered pursuant to the opposition clause").

382. The United States made a similar argument in its amicus curiae brief supporting the request for certiorari in *Crawford*. Brief for the United States as Amicus Curiae on Petition for Writ of Certiorari, *supra* note 379, at 6.

distinction leaves employees with *less* protection from retaliation than if employer IDR processes did not exist. That is an odd result for a statute that purports to encourage employers to take voluntary compliance measures as a way of expanding the protections from discrimination for the benefit of employees.<sup>383</sup>

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Recent trends in retaliation law provide increasingly diluted protection from retaliation for engaging in rights-claiming behavior. These trends contrast starkly with courts' repeated exhortations about the generosity of Title VII protections. While the reality of protection falls far short, the rhetoric of broad protection feeds into and reinforces the strictness of the timely complaint doctrines. The shibboleth allows courts to insist that fear of retaliation provides no excuse for not reporting or complaining of discrimination without delay, while the employees who do complain take great risks if they find themselves in need of the promised protection.

### CONCLUSION

Negative reaction to the Supreme Court's recent *Ledbetter* decision was swift and fervent.<sup>384</sup> Critics chastised the Court for tightly restricting the time for filing pay discrimination claims without sufficient attention to the difficulties people face in discerning whether they are paid fairly.<sup>385</sup> The introduction of the Ledbetter Fair Pay Act of 2007 and its recent passage in the U.S. House of Representatives suggest that the time may be

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383. See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417–18 (1974) (describing Title VII's "prophylactic" purpose of encouraging voluntary self-compliance for the sake of protecting workers from discrimination).

384. For a taste of some of the many editorial pieces criticizing the Court's decision, see Clarence Page, Op-Ed., *Supreme Injustice on Worker Equality*, BALT. SUN, June 5, 2007, at 11A; Editorial, *An Absurd Bias Ruling*, HARTFORD COURANT, June 5, 2007, at A10; Editorial, *Injustice 5, Justice 4*, N.Y. TIMES, May 31, 2007, at A18; Editorial, *Life vs. the Law*, L.A. TIMES, May 31, 2007, at A26; Editorial, *A Matter of Justice: Congress Should Correct Ruling on Fair Pay*, DALLAS MORNING NEWS, June 5, 2007, at 14A; Editorial, *Narrow and Insidious*, ST. LOUIS POST-DISPATCH, May 31, 2007, at D8; Editorial, *Sterile Thinking on Pay Equity*, CHI. TRIB., June 4, 2007, § 1, at 18; *Supreme Letdown; The High Court Finds a Way To Accept Discrimination*, PITT. POST-GAZETTE, June 6, 2007, at B6.

385. Robert Barnes, *Over Ginsburg's Dissent, Court Limits Bias Suits*, WASH. POST, May 30, 2007, at A1; Linda Greenhouse, *Justices' Ruling Limits Lawsuits on Pay Disparity*, N.Y. TIMES, May 30, 2007, at A1; Francine Knowles, *Top Court Limits Pay Discrimination Suits; Decision Could Hamper Future Cases*, CHI. SUN-TIMES, May 30, 2007, at 63; Jacqueline Palank, *Democrats Will Try To Counter Ruling on Discrimination Suits*, N.Y. TIMES, July 13, 2007, at A13.

ripe for evaluating the fairness of Title VII's rights-claiming system more broadly.<sup>386</sup>

*Ledbetter* is an important and unfortunate decision for employees who experience pay discrimination, but its impact is better understood as a "piling on" rather than an anomalous roadblock for employees in need of the law's protections. Increasingly demanding doctrines at each end of the rights-claiming process fail employees, closing off Title VII's substantive protections to all but the most vigilant and assertive workers and leaving even those employees who do assert their rights in time at great risk of retaliation. These doctrines work synergistically to reinforce the widespread and endemic reluctance to perceive and claim discrimination that is documented by social science literature. As Beth Quinn observed in a study of harassment complaints, "[t]he power of the law as a tool rests in the power of the victim to complain in legally sanctioned ways."<sup>387</sup> Our analysis of rights-claiming doctrines suggests that law's power, understood in this way, has been curtailed. Title VII thus does not live up to Felstiner, Abel, and Sarat's measure of a "healthy social order," as one that "minimizes barriers inhibiting the emergence of grievances and disputes and preventing their translation into claims for redress."<sup>388</sup>

The past decade's surge of employer policies and procedures for resolving discrimination complaints internally plays an important role in contributing to the problems we identify. The channeling of discrimination complaints into internal employer processes intersects with both ends of the doctrine: the timely filing rules and the retaliation protections. By failing to toll the limitations period on formal remedies, participation in internal grievance processes can run out the clock on an unsuspecting employee's formal assertion of rights. In addition, because employer nondiscrimination policies shape employees' beliefs about the scope of discrimination law, and because participation in such processes falls under Title VII's opposition clause instead of its more generous participation clause, employees who participate in such processes may find themselves without protection from retaliation if their perception of unlawful discrimination turns out to be false. Supporters of an expanded role for such internal processes have failed to consider the full costs of such measures, at least under existing doctrine. In the current Title VII rights-claiming framework, such measures risk supplanting, not merely supplementing, Title VII's formal mechanisms for protecting substantive rights.

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386. See *supra* note 1.

387. See Quinn, *supra* note 8, at 1155.

388. Felstiner, Abel & Sarat, *supra* note 6, at 654.

As a whole, our analysis suggests much deeper problems than those created by the Court's *Ledbetter* decision alone. Salvaging meaningful access to Title VII's substantive protections requires a much broader look at the flaws of Title VII as a rights-claiming system.

