Florida A&M University College of Law
Scholarly Commons @ FAMU Law

Journal Publications | Faculty Works

Summer 2007

Retaliatory Harassment: Sex and the Hostile Coworker as the Enforcer of Workplace Norms

Rhonda Reaves
Florida A&M University College of Law, rhonda.reaves@famu.edu

Follow this and additional works at: http://commons.law.famu.edu/faculty-research

 Part of the Labor and Employment Law Commons, and the Law and Gender Commons

Recommended Citation
Rhonda Reaves, Retaliatory Harassment: Sex and the Hostile Coworker as the Enforcer of Workplace Norms, 2007 Mich. St. L. Rev. 403 (2007)

This Article is brought to you for free and open access by the Faculty Works at Scholarly Commons @ FAMU Law. It has been accepted for inclusion in Journal Publications by an authorized administrator of Scholarly Commons @ FAMU Law. For more information, please contact linda.barrette@famu.edu.

RETALIATORY HARASSMENT: SEX AND THE HOSTILE COWORKER AS THE ENFORCER OF WORKPLACE NORMS

Rhonda Reaves[*]

2007 MICH. ST. L. REV. 403

TABLE OF CONTENTS

INTRODUCTION 404
I. HARASSMENT AS A METHOD OF ENFORCING WORKPLACE NORMS ... 408
II. WORKPLACE HARASSMENT: THE LEGAL FRAMEWORK 412
A. Sexual Harassment as Status-Based Discrimination 414
B. Retaliatory Harassment as Conduct-Based Discrimination 416
III. WORKPLACE HARASSMENT AND THE LIMITS OF THE CURRENT LEGAL FRAMEWORK 417
A. Retaliatory Harassment and the Limits of Retaliation Law 419
1. *Defining an "Adverse Action"* 419
a. *Burlington Northern & Santa Fe Railway Co. v. White* .420
b. Adverse Actions Post-*Burlington Northern & Santa Fe Railway Co. v. White* 422
2. *Retaliatory Harassment as an "Adverse Action"* 425
B. Retaliatory Harassment and the Limits of Sexual Harassment Law 427
1. *Defining a Hostile Work Environment* 427
2. *Retaliatory Aspects of Sexual Harassment* 429
3. *Status versus Conduct as a Basis for Liability* 432
IV. PROPOSAL 433
CONCLUSION 434

---

* Associate Professor of Law, Florida A&M College of Law. A Florida A&M University College of Law summer research grant supported work on this project. An early draft of this Article was presented at the Southeast/Southwest People of Color Legal Scholarship Conference. I would like to thank all of those who commented on earlier drafts of this Article, including Dean Cynthia Nance, Professors Laura Gomez, Terry Smith, D. Aaron Lacey, Audrey McFarlane, and Brietta Clark. I also acknowledge the helpful comments of the reviewers and article editors of the American Business Law Journal.

INTRODUCTION

According to the prevailing view, workplace harassment is sexual in nature—a male supervisor demanding sexual favors from a female subordinate typically comes to mind.[1] The law has made major strides in recognizing and addressing (but not necessarily eradicating) sexual harassment as a type of workplace discrimination.[2] Indeed, an entire body of anti-discrimination law has developed directly to address sexual harassment claims.[3] But there is another type of workplace harassment—retaliatory harassment—which is not based on an exchange of sexual favors. Instead, retaliatory harassment occurs where workers are purposely targeted for criticism, ridicule, and abuse for complaining about discrimination.[4] Re-

---

1. In 2006, the Equal Employment Opportunity Commission received 12,025 charges of sexual harassment. *See* U.S. Equal Employment Opportunity Commission, Sexual Harassment Charges, EEOC & FEPAs Combined: FY 1997-FY 2006, http://www.eeoc.gov/stats/harass.html (last visited Nov. 18, 2007).

2. By "sexual harassment" I am referring to claims arising under Section 703 of Title VII. The Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241. Section 703 is the basic provision that lays out illegal behavior under Title VII, making it unlawful for an employer to discriminate on the basis of race, color, sex, national origin, or religion. 42 U.S.C. § 2000e-2(a)(1) (2006). Section 703 gives rise to three different theories of liability—disparate treatment, disparate impact, and harassment. 42 U.S.C. § 2000e-2 (2006). While this Article focuses on sexual harassment, harassment as a basis for liability under Title VII's substantive anti-discrimination provision is recognized in other contexts, including harassment based on race, national origin, and religion. *See, e.g.*, EEOC v. Beverage Canners, Inc., 897 F.2d 1067 (11th Cir. 1990) (racial harassment); Velez v. City of Chicago, 442 F.3d 1043 (7th Cir. 2006) (national origin); Turner v. Barr, 811 F. Supp. 1 (D.D.C. 1993) (religion). Also, harassment as a theory of liability is recognized under the Age Discrimination in Employment Act and the Americans with Disabilities Act. *See, e.g.*, Crawford v. Medina Gen. Hosp., 96 F.3d 830 (6th Cir. 1996) (recognizing age harassment under the ADEA); Fox v. Gen. Motors Corp., 247 F.3d 169 (4th Cir. 2001) (recognizing disability harassment under ADA).

3. Many preeminent scholars have contributed to a growing body of sexual harassment jurisprudence. *See, e.g.*, Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169 (1998); Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691 (1997); Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177 (1990); Kimberle Crenshaw, *Race, Gender, and Sexual Harassment*, 65 S. CAL. L. REV. 1467 (1992); Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183 (1989).

4. In one case, for example, after complaining of discrimination, an employee was subjected to taunts from coworkers, calling plaintiff "stupid" and "ignorant." Richardson v. N.Y. State Dep't of Corr. Serv., 180 F.3d 426, 435 (2d Cir. 1999). The plaintiff alleged she had to suffer through manure being left in her parking spot, being struck in the head by a rubber band, having her car scratched, finding hair in her food, and a coworker being warned not to talk to her. *Id. See also* Ray v. Henderson, 217 F.3d 1234, 1238 (9th Cir. 2000) (de-

taliatory harassment is symptomatic of workplaces that continue to be hostile to traditionally-marginalized groups. Its oppressive impact works just as insidiously as overt demands for sexual favors do to prevent workplaces from becoming truly egalitarian in the treatment of workers. Consider the following:

Cynthia, a parking enforcement officer, is sexually propositioned by her supervisor. Cynthia reports the incident, her employer investigates, and the supervisor is eventually fired. So far so good—the law is working as it should. Cynthia has promptly informed her employer of the harassment and the employer has promptly responded to her complaint and taken disciplinary steps against her harasser. Are Cynthia's troubles over? No. When Cynthia returns to work, it turns out that her coworkers are displeased that her complaint resulted in the firing of their buddy. They give her the cold shoulder. One coworker shouts that Cynthia is the "scum of the earth." Another proclaims "I smell a rat, do you smell a rat?" And a third coworker announces in her presence that "a good supervisor had been drummed out of the office." A new employee is told to "stay away" from Cynthia because she is "trouble." During the company holiday party, her coworkers take up a collection for the fired supervisor and waive the money they collect in Cynthia's face, saying, "Look how much we've collected." Another coworker circulates a petition requesting that management terminate Cynthia. Another coworker refuses to pick her up from her route and yet another refuses her entry into the company van that is used to transport employees to their posts. Cynthia eventually quits.

Cynthia later sues for sexual harassment and retaliation. Although the court agrees that Cynthia was sexually harassed, it finds that she has no remedy because the employer acted promptly to address the harassment. The employer investigated and disciplined the offender. Cynthia's retaliation claim fails because the court does not view Cynthia's coworkers' actions in response to her original sexual harassment claim as rising to the level of a compensable retaliation claim.[5] Cynthia is left out of work and without remedy. Would another woman in Cynthia's position bother to report the initial harassment if she anticipated that her coworkers' hostility

---

scribing plaintiff's allegations that she was publicly berated, and called "rabble rouser" and "trouble maker" for complaining about sex discrimination).

5. These facts are based loosely on *Noviello v. City of Boston*, 398 F.3d 76 (1st Cir. 2005). The First Circuit reversed the district court's conclusion that retaliatory harassment was not actionable and remanded for a determination of whether the employer was liable for the retaliatory harassment. *Id.* While the First Circuit correctly recognizes retaliatory harassment as a form of retaliation, instead of treating it as a separate cause of action, the First Circuit and several other courts respond to claims of retaliatory harassment by importing the hostile work environment doctrine of discriminatory harassment law into the anti-retaliation context. *Id.* at 89 (citing numerous cases from several other circuits standing for this proposition).

would eventually result in the loss of her job? Most likely not.[6] This is not the outcome that forty years of anti-discrimination law intended. It is this type of retaliatory harassment—harassment endured by those who oppose discrimination in the workplace—that is the focus of this Article.

This Article focuses on the legal treatment of retaliatory harassment claims. It argues that retaliatory harassment is an often misunderstood and underanalyzed concept in the law of workplace harassment. This Article seeks to distinguish the legal treatment of retaliatory harassment from sexual harassment. Retaliatory harassment is a conduct-based claim (harassment because one has opposed discrimination). Sexual Harassment, on the other hand, is a status-based claim (harassment because of one's sex).[7] Retaliatory harassment presents an analytic challenge because courts treat it as a hybrid claim—both as a species of retaliation and as analytically similar to a claim of sexual harassment. It implicates two areas of anti-discrimination law arising under two different sections of Title VII of the Civil Rights Act of 1964: Section 703,[8] which prohibits status-based discrimination (discrimination because of one's race, color, sex, religion, or national origin) and Section 704,[9] which prohibits conduct-based discrimination (discrimination because one opposed status-based discrimination). Because courts treat retaliatory harassment as a hybrid, they have had great difficulty in recognizing and addressing retaliatory harassment as a claim distinct from its legal progenitors—retaliation and sexual harassment.[10]

---

6. Studies have shown that only a small percentage of women report harassment in the workplace and many list fear of retaliation as a reason not to report harassment. *See* Cynthia Berryman-Fink, *Women's Responses to Sexual Harassment at Work: Organizational Policy Versus Employee Practice*, EMP. REL. TODAY 57, 59-60 (2001) (citing studies that show only 2-6 percent of victims of sexual harassment formally report and that many employees believe filing a complaint amounts to "career suicide").

7. I realize the "status"-"conduct" distinction suffers from its own limitations. All "status" cases involve conduct in the sense that employers are only liable for their actions. Discriminatory thoughts without action are not actionable. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 262 (1989) (O'Connor, J., concurring) (describing congressional intent behind the passage of the Act). "The legislative history makes it clear that Congress was attempting to eradicate discriminatory actions in the employment setting, not mere discriminatory thoughts." *Id.* The relevant difference between "status" and "conduct" cases is the employer's motivation. In status cases, the employer is motivated to act because of the protected characteristics—race, color, religion, sex, or national origin. In conduct cases, the employer's action is not necessarily directly linked to the employee's protected status.

8. 42 U.S.C. § 2000e (2006). Section 703 of Title VII makes it an unlawful employment practice to fail or refuse to hire, or otherwise discriminate against an individual because of such individual's race, color, sex, religion, or national origin.

9. 42 U.S.C. § 2000e-3 (2006). Section 704 prohibits retaliation against an employee for opposing discrimination, among other things.

10. *See infra* Part III. While many of the insights in this Article are equally applicable to claims of racial or other status-based harassment, this Article focuses on sexual harassment, which dominates this area of law. Courts' early response was to regard sexual harassment as being a personal matter, not within the scope of legal inquiry. Therefore,

The relatively thin body of retaliatory harassment literature has focused on the issue of whether retaliatory harassment can constitute retaliation under Title VII.[11] This Article argues that the Supreme Court decision in *Burlington Northern & Santa Fe Railway Co. v. White*[12] further supports the contention that retaliatory harassment is a cognizable form of retaliation. It further suggests that retaliatory harassment should be analyzed as a separate method of proving retaliation, similar to how sexual harassment is treated as a separate method of proving sex discrimination.[13] This Article argues, however, that although analytically similar to sexual harassment,[14] retaliatory harassment is not coextensive with sexual harassment and therefore must be analyzed with careful attention to the distinctions between status-based discrimination claims and conduct-based discrimination claims.

Part I describes the use of harassment as a method of enforcing workplace norms; it details how harassment is used not just to further a worker's own individual sexist (or racist) agenda, but how it is used to keep women (and minority groups) in subordinate positions. Part II describes the current legal frameworks for analyzing workplace harassment cases. Part III discusses the limits of the current frameworks. Part IV proposes the creation

---

sexual harassment plaintiffs were rarely successful. *See* Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1701-05 (1998). But, ultimately, attitudes about sex in the workplace changed and courts became more receptive to such claims. *Id.*

11. *See, e.g.*, Kari Jahnke, *Protecting Employees from Employees: Applying Title VII's Anti-Retaliation Provision to Coworker Harassment*, 19 LAW & INEQ. 101 (2001); Christopher M. Courts, Note, *An Adverse Employment Action—Not Just an Unfriendly Place to Work: Co-Worker Retaliatory Harassment Under Title VII*, 87 IOWA L. REV. 235 (2001); Howard Zimmerle, Note, *Common Sense v. the EEOC: Co-Worker Ostracism and Shunning as Retaliation under Title VII*, 30 J. CORP. L. 627 (2005) (coworker harassment in the form of simple ostracism not actionable under Title VII); Scott Rosenberg & Jeffrey Lipman, *Developing a Consistent Standard for Evaluating a Retaliation Case under Federal and State Civil Rights Statutes and State Common Law Claims: An Iowa Model for the Nation*, 53 DRAKE L. REV. 359 (2005); Jonathan Gallant, Note, *Defining a Retaliatory Adverse Action from* Wideman *to* Shortz*: The Legitimacy of the Eleventh Circuit's Retaliation Case Law*, 21 GA. ST. U. L. REV. 1079 (2005); Shannon Vincent, Comment, *Unbalanced Responses to Employers Getting Even: The Circuit Split over What Constitutes a Title VII-Prohibited Retaliatory Adverse Employment Action*, 7 U. PA. J. LAB. & EMP. L. 991 (2005).

12. 126 S. Ct. 2405 (2006).

13. Susan M. Omilian & Jean P. Kamp, 2 SEX-BASED EMPLOYMENT DISCRIMINATION § 22:1 (1998) ("Sexual harassment cases have most often been examined as disparate treatment cases, but the usual requirement of proof of intent to discriminate has been modified."); *see also* Craig v. M&O Agencies, Inc., 496 F.3d 1047 (9th Cir. 2007) (describing the showing required to make out a prima facie case of sexual harassment); Hoffman-Dombrowski v. Arlington Int'l Racecourse, Inc., 254 F.3d 644 (7th Cir. 2001) (describing the showing required to make out prima facie case of sex discrimination).

14. The cornerstone of a sexual harassment and retaliatory harassment cases is that the plaintiff establishes that a hostile work environment existed. It is the source of the hostility—because of sex in sexual harassment cases and because of opposition to discrimination—that distinguishes the two causes of action.

of an independent cause of action for retaliatory harassment and describes how such a claim would operate.

I. HARASSMENT AS A METHOD OF ENFORCING WORKPLACE NORMS

Workplace harassment, whether explicitly sexual in nature or not, is an effective tool for enforcing and maintaining workplace norms—norms that are often white and male.[15] Workplace norms are those behavioral rules that are enforced by a system of formal and informal sanctions.[16] This system of informal sanctions often takes the form of workplace harassment. In many workplaces, especially traditionally male-dominated workplaces, workers understand that they must toe the gender line or risk retribution.

These traditionally male-dominated jobs create a work culture hostile to women.[17] Professor James Gruber argues that "[t]he male traditionality of an occupation creates a work culture that is an extension of male culture, and numerical dominance of the workplace by men heightens visibility of, and hostility toward, women workers who are perceived as violating male territory."[18] Not surprisingly, many harassment cases occur when women attempt to integrate into traditionally male-dominated employment sectors.[19]

---

15. While workplace harassment is often targeted at women, it can be targeted at men as well, especially men who do not conform to the "masculine" norm. *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998) (recognizing cause of action for same-sex sexual harassment under Title VII); *see also* Margaret Talbot, *Men Behaving Badly*, N.Y. TIMES, Oct. 13, 2002, (Magazine), at 52 (describing various sexually-tinged practices employed to maintain hyper-masculinized workplaces by enforcing male norms; male workers indoctrinated through such practices as bagging (grabbing of testicles), sexualized banter (upbraiding coworkers by use of the feminized insults "little girl" or "whore"), and "goosing" (pinching a man anyplace on his body)); NANCY LEVIT, THE GENDER LINE: MEN, WOMEN, AND THE LAW 82-85 (1998) (describing construction of masculinity by exclusion of femininity at Virginia Military Academy and describing a culture of "adversative" training as necessary to turn boys into men).

16. Social norms have been defined as "behavioral rule[s] supported by a pattern of informal sanctions." Alex Geisinger, *A Group Identity Theory of Social Norms and Its Implications*, 78 TUL. L. REV. 605, 608 (2004).

17. *See* James E. Gruber, *The Impact of Male Work Environments and Organizational Policies on Women's Experiences of Sexual Harassment*, 12 GENDER & SOC'Y 301, 301-20 (1998).

18. *Id.* at 303 (emphasis omitted).

19. Many retaliatory harassment cases, in particular, involve women in traditionally male-dominated employment sectors, such as law enforcement, manufacturing, and engineering. *See, e.g.*, Farra v. Gen. Motors Corp., 163 F. Supp. 2d 894 (S.D. Ohio 2001) (sexual harassment and retaliation claim by female assembly-line worker); Gunnell v. Utah Valley State Coll., 152 F.3d 1253 (10th Cir. 1998) (female employee of university maintenance staff); Jones v. District of Columbia, 346 F. Supp. 2d 25 (D.D.C. 2004), *aff'd in part, rev'd in part*, 429 F.3d 276 (D.C. Cir. 2005) (female corrections employee); Knox v. Indiana, 93 F.3d 1327 (7th Cir. 1996) (female corrections officer); Mattern v. Eastman Kodak Co., 104 F.3d 702 (5th Cir. 1997), *cert. denied*, 522 U.S. 932 (1997) (female mechanic's apprentice);

The harassment, whether explicitly sexual in nature or not, is often directed at "holding the gender line" by driving the women out.[20] For example, in *Ocheltree v. Scollon Productions, Inc.*,[21] a lone female employee in a costume-manufacturing shop was subjected to a string of sexual comments, gestures, and antics "to make her uncomfortable and self-conscious as the only woman in the workplace."[22] Men who fail to conform to gender norms are also subject to harassment.[23]

Workplace harassment is an effective mechanism to enforce gender norms. The threat of sanctions (formal and informal) discourages workers from coming forward to complain about workplace abuses. Workers often fail to complain about workplace abuses because they feel powerless to change their situations. Professors Johnson, Ford, and Kaufman studied workers' emotional responses to a disagreement over a pay increase and found that workers who had, or perceived themselves as having, little power in the workplace were least likely to express negative emotions, such as anger or resentment.[24] The Johnson, Ford, and Kaufman study also found a correlation between a sense of individual powerlessness and the perceived power of the wrongdoer.[25] When the wrongdoer is infused with an aura of legitimacy, either through the perceived approval of corporate higher-ups or coworkers, the employee is discouraged from opposing inequities in the workplace.[26] The study also found that those who occupy the least powerful positions in the workplace are the least likely to complain.[27]

Morris v. Oldham County Fiscal Court, 201 F.3d 784 (6th Cir. 2000) (female employee of county road department); Noviello v. City of Boston, 398 F.3d 76 (1st Cir. 2005) (female parking enforcement officer); Richardson v. N.Y. State Dep't of Corr. Serv., 180 F.3d 426 (2d Cir. 1999) (female corrections officer); Stutler v. Ill. Dep't of Corr., 263 F.3d 698 (7th Cir. 2001) (female corrections officer); EEOC v. Wyeth, 302 F. Supp. 2d 1041 (N.D. Iowa 2004) (female animal control officer).

20. *See, e.g.*, Ocheltree v. Scollon Prods., Inc., 335 F.3d 325 (4th Cir. 2003), *cert. denied*, 540 U.S. 1177 (2004).

21. *Id.*

22. *Id.* at 332.

23. *See, e.g.*, Franke, *supra* note 3, at 696-98 (describing same-sex sexual harassment cases between men as way of policing hetero-masculine gender norms).

24. *See* Cathryn Johnson et al., *Emotional Reactions to Conflict: Do Dependence and Legitimacy Matter?*, 79 SOC. FORCES 107, 124-34 (2000) (arguing that workers' emotional responses to conflict depend on their relative positions within the organization). For an additional discussion of how retaliation operates in the workplace, see Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 25-36 (2005).

25. *See* Johnson et al., *supra* note 24, at 128-32 (describing Emerson's dependence theory, which states that "the power of actor A over actor B is a function of B's dependence on A for scarce outcomes, and vice versa").

26. Social scientists who have studied the legitimacy of authority argue that the validity of the system is maintained by other actors behaving in accord with the system. *See* Johnson et al., *supra* note 24, at 112 (describing literature on legitimating authority, which shows how authorization (support from those higher up in the organization) and endorsement (support from peers or subordinates) serve as "mechanisms by which validity prevents

Although the study did not consider emotional reactions to harassment per se, clear parallels to harassment in the workplace exist. The Johnson, Ford, and Kaufman report concludes that those who occupy the least powerful positions in the workplace are least likely to complain about workplace abuses.[28] Those in the least powerful positions in the workplace are often women.[29] Women continue to earn less than men do and continue to disproportionately occupy low-level jobs.[30] Their low pay and low status makes women targets for harassment.[31]

The Johnson, Ford, and Kaufman study also concludes that those who feel powerless are not likely to complain.[32] Studies have shown the debilitating psychological effect of sexual harassment on the victim's self-esteem.[33] This feeling of powerlessness may be linked to women's unwill-

---

change and the stability of authority is maintained"); *see also* Morris Zelditch, Jr. & Henry A. Walker, *Legitimacy and Stability of Authority*, *in* 1 ADVANCES IN GROUP PROCESSES: THEORY AND RESEARCH 1-27 (Lawler, ed. 1984); Henry A. Walker et al., *Legitimation, Endorsement, and Stability*, 64 SOC. FORCES 378 (1986); Henry A. Walker & Morris Zelditch, Jr., *Power, Legitimacy, and the Stability of Authority: A Theoretical Research Program*, *in* THEORETICAL RESEARCH PROGRAMS: STUDIES IN THE GROWTH OF THEORY 364-81 (Berger & Zelditch eds., 1993). The effect of the legitimizing mechanisms is to produce compliance on the part of those who privately disagree with the inequalities. Johnson et al., *supra* note 24, at 112.

27. Johnson et al., *supra* note 24.

28. Johnson et al., *supra* note 24.

29. Sex segregation and stratification of the workforce continues with women often working in "female-dominated" jobs and occupying the lower-level jobs across the spectrum. *See* National Organization for Women, Facts About Pay Equity, http://www.now.org/issues/economic/factsheet.html (last visited Nov. 18, 2007) [hereinafter Facts About Pay Equity] (In 2004, fifty-five percent of women worked in "female-dominated" jobs); Myra H. Strober, *Toward a General Theory of Occupational Sex Segregation: The Case of Public School Teaching*, *in* SEX SEGREGATION IN THE WORKPLACE: TRENDS, EXPLANATIONS, REMEDIES 144 (Barbara F. Reskin ed., 1984) ("[W]ithin any single occupation, women and men are not distributed equally across the occupational hierarchy—that is, there is occupational stratification. Women are clustered at the lower levels, men at the upper levels. And this is often true even in occupations that are overwhelmingly female, such as teaching and librarianship.").

30. According to the National Organization for Women, in 2004 women earned $0.76 for every $1.00 earned by men, and the disparity is greater for women of color—African- American women earned 69 cents for every dollar and Latinas earned 58 cents per dollar. *See* Facts About Pay Equity, *supra* note 29.

31. *See* U.S. MERIT SYS. PROT. BD., OFFICE OF MERIT SYS. REVIEW & STUDIES, SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE, IS IT A PROBLEM? 40 (1981) ("Women in low-pay and low-status positions are more likely to be harassed . . . .").

32. Johnson et al., *supra* note 24, at 117.

33. *See, e.g.*, Linda M. Jorgenson & Kathaleen M. Wahl, *Workplace Sexual Harassment: Incidence, Legal Analysis, and the Role of the Psychiatrist*, 8 HARV. REV. PSYCHIATRY 94-98 (2000) (describing psychological effects of sexual harassment, including lack of self-esteem, and irritability).

ingness to complain about workplace harassment. For example, only a small percentage of women report sexual harassment in the workplace.[34]

A woman's willingness to complain about harassment also appears to be linked to the perceived power of the harasser within the organizational structure. Professor James Gruber has found that women's "responses to harassment are influenced by their perceptions of the level of risk involved in complaining about harassment, the likelihood that such complaints will be taken seriously, and the likelihood that the perpetrators will be punished."[35] If the women do not believe that their complaints will be taken seriously or believe that their perpetrators will be punished, then they are reluctant to complain.

Organizational behavior theorists demonstrate that power in the workplace is determined by a combination of dependence and authority. "[T]he power of actor A over actor B is a function of B's dependence on A . . . . The greater B's dependence on A, the greater A's power over B and the more likely that A can overcome B's resistance."[36] A's power over B is determined by the limits of A's authority—A's ability to issue directives and expect compliance.[37] Professors Zelditch and Walker describe three sources of support for authority: (1) authorization—meaning support from higher ups in the organization; (2) endorsement—support from peers and subordinates; and (3) propriety—support from individual actors.[38] In other words, Actor A can only exercise authority over Actor B with the support of the other actors—superiors, peers, and subordinates.[39] Zelditch and Walker further demonstrate how authority that is legitimated through authorization, endorsement, and propriety is used to suppress opposition within the organization.[40] In support of this, Zelditch and Walker "find that inequitable structures that are endorsed and authorized produce more compliance."[41] This power dynamic helps explain how harassment operates in the workplace.

A harasser derives his power from various sources within the organization. The harasser can be infused with power directly from the organization. This is authorization.[42] For example, where the harasser is a supervisor, by the nature of his position, he is infused with authority from the or-

---

34. *See* Berryman-Fink, *supra* note 6 and accompanying text.

35. Gruber, *supra* note 17, at 304.

36. Johnson et al., *supra* note 24, at 110.

37. *Id.* ("Authority refers to the right to allocate tasks and sanctions and to expect compliance with directives that fall within the scope of that authority.")

38. *Power, Legitimacy, and the Stability of Authority*, *supra* note 26, at 364-81; *see also* Johnson et al., *supra* note 24, at 111.

39. *Power, Legitimacy, and the Stability of Authority*, *supra* note 26, at 364-81.

40. *Id.*

41. Johnson et al., *supra* note 24, at 112.

42. Johnson et al., *supra* note 24, at 111.

ganization and has the power to affect various aspects of a subordinate's job. A harasser, who is a peer, rather than a supervisor, can draw power from these same sources. Although not infused with express power from the organization, the peer harasser takes cues from the organization's overall culture to determine its tolerance of harassment. This could be seen as a form of indirect authorization. The peer harasser also derives power from endorsement through the support and complicity of coworkers.

Peer harassment is an important and underanalyzed component in the maintenance of a woman-unfriendly work environment.[43] While support of coworkers emboldens harassment victims to come forward,[44] risk of alienation or retaliation by peers impedes victims' willingness to complain.[45] Victims fear not only lack of support from coworkers but fear retaliation by their peers. Peer harassment effectively discourages others from stepping outside the line. Yet, under the current legal framework, peer harassment is often difficult to establish.

II. WORKPLACE HARASSMENT: THE LEGAL FRAMEWORK

This Part describes the current legal framework for analyzing workplace harassment. The law separates workplace harassment into two types: sexual harassment and retaliatory harassment. This distinction arises as a result of the statutory language of Title VII of the Civil Rights Act of 1964.[46]

While the term "harassment" does not appear in the statutory language, harassment as a theory of liability has been inferred from the statute's general prohibition of discrimination (Section 703)[47] and retaliation (Section 704).[48] Sexual harassment theory derives from the language of Section 703 of Title VII, which makes it unlawful to "discriminate" against an individual because of such individual's race, color, sex, religion, or national origin.[49] Retaliatory harassment derives from Section 704 of Title VII, which makes it unlawful to "discriminate" against an employee or ap-

43. A study of federal employees for the period 1978 to 1994 indicates increasing incidents of coworker harassment in the workplace in comparison to other forms of harassment. The study further suggests that crude and offensive behavior by coworkers is on the rise. *See* Heather Antecol & Deborah Cobb-Clark, *The Changing Nature of Employment-Related Sexual Harassment: Evidence from the U.S. Federal Government 1978-1994*, 57 INDUS. & LAB. REL. REV. 443, 459 (2004).

44. *See* Johnson et al., *supra* note 24, at 112 (noting that the level of endorsement by coworkers affects an employee's willingness to express negative emotions).

45. *See* Johnson et al., *supra* note 24, at 131 (arguing that "[r]isk of alienation by peers may inhibit a subordinate's negative expressions").

46. 42 U.S.C. §§ 2000e to 2000e-17 (2006).

47. *Id.* § 2000e-2(a).

48. *Id.* § 2000e-3(a).

49. *Id.* § 2000e-2(a).

plicant "because he has opposed any practice, made an unlawful employment practice by this title"[50] (meaning those actions prohibited by Section 703).

Part of the difficulty in distinguishing between retaliatory harassment and sexual harassment stems from the limited terminology used to describe these actions. Defining the term "discriminate" continues to vex courts and commentators alike. The term "discriminate" itself has multiple meanings and encompasses multiple behaviors.[51] A candidate who is passed up for promotion because she is not "feminine enough,"[52] a woman who is subjected to a constant barrage of unwanted sexual attention in the workplace,[53] or a woman who is taunted and harassed by her coworkers after she complains of discrimination,[54] have all been "discriminated" against.[55] But, the claims are treated as legally distinct. The candidate passed up for promotion has a claim for sex discrimination. The woman subjected to the constant barrage of unwanted sexual attention has a claim for sexual harassment. The employee fired or harassed for opposing discrimination has a claim for retaliation. Title VII, then, uses the term "discrimination" broadly to encompass both adverse actions taken because of sex, and adverse ac-

---

50. *Id.* § 2000e-3(a).

51. *See* ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 77 (6th ed. 2003).

52. *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (affirming a finding of gender discrimination where gender played a motivating part in the decision to fail to promote the employee to partner).

53. *See, e.g.*, Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986) (recognizing hostile work environment sexual harassment as a cognizable claim under Title VII).

54. *See, e.g.*, Richardson v. N.Y. State Dep't Corr. Serv., 180 F.3d 426, 435 (2d Cir. 1999) (recognizing prima facie case of retaliation based on alleged harassment by coworkers).

55. One author discussed whether a statutory prohibition of "discrimination" necessarily includes a prohibition of retaliation for opposing such discrimination where the statutory language itself does not specifically incorporate an anti-retaliation provision. *See* Brake, *supra* note 24, at 21 (arguing in favor of a broader conception of "discrimination" that recognizes retaliation as a form of discrimination). "Theorizing retaliation as a form of discrimination requires moving beyond discrimination law's current dominant framework of status-based differential treatment and toward a broader conception that views discrimination as the maintenance of race and gender privilege." *Id.* This debate is also taking place in cases arising under other anti-discrimination statutes such as Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 and Section 1981 of the Civil Rights Act of 1866, 42 U.S.C. § 1981. In *Jackson v. Birmingham Board of Education*, for example, the Supreme Court held that prohibition of sex discrimination under Title IX also included a prohibition against retaliation for opposing sex discrimination, even though the statute did not contain an explicit anti-retaliation provision. Jackson v. Birmingham Bd. of Educ., 544 U.S. 167 (2005). The Supreme Court also recently granted a petition for certiorari to determine a similar issue under Section 1981 of the Civil Rights Act of 1866. *See* Humphries v. CBOCS W., Inc., 474 F.3d 387 (7th Cir. 2007), *cert. granted*, 75 U.S.L.W. 3598 (U.S. September 25, 2007) (No. 06-1431).

tions taken in retaliation for opposing discrimination because of sex. But discrimination "because of sex" is treated differently than discrimination because one opposed sex discrimination. Adverse treatment "because of sex" violates Section 703 of Title VII. Adverse treatment because one opposed sex discrimination violates Section 704 of Title VII.

In *Burlington Northern & Santa Fe Railway Co. v. White*,[56] the Supreme Court differentiates between actions that give rise to substantive liability under Title VII liability from actions that give rise to claims of retaliation. Claims of substantive liability arise under Section 703 of Title VII. Retaliation claims arise under Section 704. The Supreme Court in *Burlington Northern* defines the former as "status-based discrimination" and the latter as "conduct-based" discrimination.[57] Status-based discrimination claims are those where the unequal treatment is "because of" the victim's protected characteristic (race, sex, national origin, or religion).[58] Conduct-based discrimination claims are those where a victim is targeted because she has engaged in conduct in opposition to discrimination.[59] Sexual harassment is a form of status-based discrimination, while retaliatory harassment is a form of conduct-based discrimination.

A. Sexual Harassment as Status-Based Discrimination

This Section traces the development of sexual harassment law under Section 703 of Title VII. Sexual harassment refers to those situations where a woman is targeted for harassment because of her status, because she is a woman.[60] Sexual harassment violates Section 703 of Title VII, which prohibits discrimination "because of sex."[61]

---

56. 126 S. Ct. 2405 (2006).

57. *Id.* at 2412.

58. *Id.*

59. *Id.*

60. *See, e.g.*, Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998) ("The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." (citation omitted)).

61. In addition to harassment, Section 703 gives rise to two other theories of liability—disparate treatment and disparate impact. The term "disparate treatment" generally refers to cases of intentional discrimination. *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) ("'Disparate treatment'" such as is alleged in the present case is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical . . . ."); *see also* Michael J. Zimmer, *The Emerging Uniform Structure of Disparate Treatment Discrimination Litigation*, 30 GA. L. REV. 563 (1996) (describing the Supreme Court's use of the term "disparate treatment" to refer to cases of intentional discrimination). The term "disparate impact" has been used to refer to those cases where the employer's intent is not the basis of liability. *See Teamsters*, 431 U.S. at 33, n.15 ("Claims of disparate treatment may be distinguished from claims that stress 'disparate

Sexual harassment is considered a form of discrimination because it interferes with a protected employee's terms and conditions of employment.[62] Courts have interpreted the phrase "terms, conditions or privileges of employment" in Title VII expansively to include within the statute's proactive ambit the practice of creating a working environment hostile to traditionally marginalized groups.[63] As one court described: "One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers."[64] Subjecting women and minority groups to hostile or offensive environments is "every bit the arbitrary"[65] barrier to equality as discrimination is in the hiring or firing of workers.[66]

Sexual harassment as a form of illegal discrimination appeared some time after the Court's initial interpretation of Title VII.[67] The Court's initial interpretation focused on eliminating barriers to entry into the market.[68] Once in the workforce, however, these traditionally discriminated-against groups encountered a myriad of new challenges in the workplace itself. Women in the workplace faced a range of barriers, including stereotypes

---

impact.' The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity."). In disparate impact cases, the plaintiff challenges an employment practice that is facially neutral in its treatment of a protected group but falls more harshly on a protected group and cannot be justified by a business necessity. For a more detailed discussion of the development of liability theories, see Rhonda M. Reaves, *One of These Things is Not Like the Other: Analogizing Ageism to Racism in Employment Discrimination Cases*, 38 U. RICH. L. REV. 839, 858-71 (2004).

62. The statute says:

> It shall be an unlawful employment practice for an employer –
> to fail or refuse to hire or to discharge any 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 . . . .

42 U.S.C. § 2000e-2(a)(1) (2006).

63. *See* Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972); *see also* Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).

64. *See Rogers*, 454 F.2d at 238. *Rogers* was the first case to recognize a cause of action based upon a discriminatory work environment. *Id.*

65. *See* Henson v. City of Dundee, 682 F.2d 897, 902 (11th Cir. 1982).

66. *See* ZIMMER ET AL., *supra* note 51, at 501.

67. In *Meritor Savings Bank* the Supreme Court held that harassment because of a protected characteristic is a form of intentional discrimination actionable under Title VII. According to the Court, "a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment." 477 U.S. at 66.

68. *See* Reaves, *supra* note 61, at 858-71 (describing the development of the intent standard).

about the work they could perform.[69] They were often viewed and treated as sexual objects and as unwanted interlopers in male-dominated workplaces.[70] They had to prove that they could do "men's work," while fending off advances from men who viewed them merely as sexual objects.[71] Other workplace obstacles included demands for sexual favors, sexist comments, and other indignities. The harassment theory of liability was developed to deal with discrimination in the terms and conditions of employment.[72] A major focus of inquiry in sexual harassment cases is whether the harassment was "because of" sex; whether, for example, a woman was targeted because she is a woman, and would not have been targeted if she were a man.[73]

B. Retaliatory Harassment as Conduct-Based Discrimination

This Section traces the development of retaliatory harassment law under Section 704 of Title VII.[74] Retaliatory harassment does not necessarily target victims because of the victim's status (i.e., gender), but because of the victim's conduct. It is directed at women (and men) who oppose discrimination in the workplace. Retaliatory harassment violates Section 704 of Title VII, which prohibits employers from taking adverse actions against employees who oppose discrimination in the workplace.[75]

Conduct-based cases also turn on the issue of intent—whether the employer had a retaliatory motive. In retaliation cases, an employer's retaliatory motive can be inferred from proving that the employee engaged in protected activity, an adverse action was taken, and there was a causal connec-

---

69. *See* CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 9-23 (1979).

70. *Id.*

71. *See id.* at 47-55 (citing to study of Working Women United Institute where sexually harassed women described feeling humiliated, degraded, ashamed, embarrassed, "cheap," and angry. It also further describes sexual harassment as a form of "social control" over women, noting that the "costs of endurance can be very high, including physical as well as psychological damage") *Id.*; CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 114 (1987) ("A major part of the harm of sexual harassment is the public and private sexualization of a woman against her will.").

72. Harassment as a theory of liability developed later. In *Meritor Savings Bank* the Court held that harassment because of a protected characteristic is a form of intentional discrimination actionable under Title VII. According to the Court, "a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment." 477 U.S. at 66.

73. By using the example of a female employee who suffers harassment, I do not by any means intend to suggest that men cannot face harassment because of their sex—they do. *See, e.g.*, Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998) (involving a male victim of sexual harassment).

74. 42 U.S.C. § 2000e-3 (2006).

75. *Id.*

tion between the protected activity and the adverse employment action.[76] In the classic retaliation situation, for example, an employee is fired for complaining about discrimination in the workplace, the employee must show that she was engaged in a protected activity (complaining about discrimination), an adverse action was taken (she was fired), and there was a causal connection between the two events. But retaliation is not always as apparent as a firing.[77] Retaliation can take many forms—poor performance reviews (suddenly a formerly competent or even outstanding employee is "problematic" or "below par"), deteriorating work conditions, or unfavorable reassignments of job duties. Retaliation increasingly takes the form of retaliatory harassment.[78]

III. WORKPLACE HARASSMENT AND THE LIMITS OF THE CURRENT LEGAL FRAMEWORK

Sexual harassment law has made substantial strides in rooting out subtle forms of discrimination that have operated as barriers to keep women out of male-dominated workplaces.[79] Courts have not only outlawed the use of overt sexual intimidation, but have addressed subtler forms of gendered harassment that are directed at denying entry to women in traditionally

---

76. *See, e.g.*, Jennings v. Tinley Park Cmty. Consol. Sch. Dist. No. 146, 864 F.2d 1368 (7th Cir. 1988).

77. Retaliation continues to be one of the most active areas of discrimination law. In 2004, 22,740 claims of retaliation were filed with the EEOC. *See* EEOC, U.S. Equal Employment Opportunity Commission, Retaliation, http://www.eeoc.gov/types/retaliation.html (last visited Nov. 18, 2007).

78. The EEOC does not separately report statistics for retaliatory harassment, but as of October 20, 2007, a Westlaw search of the term "retaliatory harassment" retrieved 747 federal cases and 97 state cases in which that phrase was used. A separate search limited to federal and state labor and employment cases found 729 cases in which the phrase "retaliatory harassment" was used. The phrase has been used in 285 federal and state labor and employment cases in the last three years. *See, e.g.*, Jordan v. City of Cleveland, 464 F.3d 584 (6th Cir. 2006) (discussing standard for evaluating retaliatory harassment claims); Hisel v. City of Clarksville, No. 3:04-0924, 2007 WL 2822098 (M.D. Tenn. Sept. 26, 2007) (discussing the standard for evaluating retaliatory harassment claims); Lahar v. Oakland County, No. 05-72920, 2007 WL 2752350 (E.D. Mich. Sept. 21 2007) (discussing standards for evaluating retaliatory harassment claims).

79. Since the Supreme Court's decision in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), wherein the Court recognized sexual harassment as an illegal form of sex discrimination, many more women have entered traditionally male-dominated job sectors. *See, e.g.*, U.S. Department of Labor, Women's Bureau, Quick Facts on Nontraditional Occupations for Women, http://www.dol.gov/wb/factsheets/nontra2006.htm (last visited Nov. 20, 2007) ("As more women enter jobs that were once dominated by men, many jobs that were nontraditional for women in the 1986 were no longer nontraditional for women in 2006. Some of these occupations are physicians and surgeons, chemists, judges and magistrates, announcers, lawyers, athletes, coaches, umpires, and postal service mail carriers.").

male-dominated workplaces.[80] But the law primarily addresses one manifestation—where harassment is targeted at women "because of sex,"[81] meaning the individual was targeted because she is a woman, whereas a similarly situated man would not have been so treated.[82]

Like sexual harassment, retaliatory harassment presents a substantial barrier to achieving Title VII's goal of equality.[83] These causes of action often share the same overall goal, driving women out of the workplace. A lack of protection against retaliatory harassment preserves the gender and race status quos by discouraging employees from complaining about discrimination in the workplace. Not surprisingly, then, victims of sexual harassment are often subjected to retaliatory harassment as well.

Yet, the law has been slow to address retaliatory harassment. In *Jones v. District of Columbia*,[84] for example, after the plaintiff complained about sexual harassment in the workplace, she was called a "Red Bitch" and a "Damn Liar." But, Jones' allegation of sexual harassment and her allegation of retaliatory harassment were treated as separate legal claims.

In *Jones*, the court analyzed the alleged acts of harassment that occurred after Jones filed her sexual harassment complaint separately and de-

---

80. The illegal conduct need not be explicitly sexual in nature. Comments that indicate a general hostility to women in the workplace are also recognized as illegal sexual harassment. *See, e.g.*, Berkman v. City of New York, 580 F. Supp. 226 (E.D.N.Y. 1983), *aff'd*, 755 F.2d 913 (2d Cir. 1985); Williams v. Gen. Motors Corp., 187 F.3d 553 (6th Cir. 1999); Smith v. Sheahan, 189 F.3d 529 (7th Cir. 1999); Smith v. First Union Nat'l Bank, 202 F.3d 234 (4th Cir. 2000).

81. The term "because of sex" has been expanded to include harassment that reflects a general hostility to women in the workplace, and this theory has been employed successfully to address harassment in male-dominated workplaces. *See* Flockhart v. Iowa Beef Processors, Inc., 192 F. Supp. 2d 947 (N.D. Iowa 2001) (hostile environment sexual harassment claim recognized where plaintiff "called a 'cunt,' 'slut,' 'whore,' and 'bitch'"); Dyke v. McCleave, 79 F. Supp. 2d 98 (N.D.N.Y. 2000); Burns v. McGregor Elec. Indus., Inc., 989 F.2d 959, 964 (8th Cir. 1993); Torres v. Pisano, 116 F.3d 625, 628 (2d Cir. 1997), *cert. denied*, 522 U.S. 997 (1997); Winsor v. Hinckley Dodge, Inc., 79 F.3d 996, 1000 (10th Cir. 1996) (holding that "evidence that a woman was subjected to a steady stream of vulgar and offensive epithets because of her gender would be sufficient to establish a claim under Title VII") (citing Gross v. Burggraff Constr. Co., 53 F.3d 1531, 1537 (10th Cir. 1995)).

82. While this Article focuses on the comparison between sexual harassment and retaliatory harassment, the same reasoning applies to other forms of "discriminatory harassment," including racial harassment. All forms of discriminatory harassment require a showing that the victim was targeted "because of" her protected status—in sexual harassment cases, "because of" her sex; in racial harassment cases, "because of her race," etc.

83. As the Supreme Court has described, the overall objective of Title VII is to secure equal opportunity. Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2412 (2006). "The anti-retaliation provision seeks to secure that primary objective by preventing . . . employer[s] from interfering . . . with an employee's efforts to secure or advance [Title VII's] basic [equality] guarant[y]." *Id.*

84. 346 F. Supp. 2d 25 (D.D.C. 2004), *aff'd in part, rev'd in part*, 429 F.3d 276 (D.C. Cir. 2005).

termined that the post-complaint name-calling was not actionable. "To be sure, verbal abuse may create a hostile work environment . . . . That showing, however, is simply not relevant to the retaliation claim."[85] Moreover, presumably because the verbal harassment did not target plaintiff "because of her sex," but only because she complained, the post-complaint verbal abuse was not actionable sexual harassment either.[86]

A. Retaliatory Harassment and the Limits of Retaliation Law

Currently, courts do not consistently recognize retaliatory harassment as a separate method of proving illegal retaliation.[87] Instead, retaliatory harassment claims are analyzed as if they were any other retaliation claim. For example, many courts require the plaintiff in a retaliatory harassment case to follow the same analytical framework as a typical retaliation claim, which means that the plaintiff must show that she engaged in a protected activity, the employer took an "adverse action" against her, and there was a causal connection between the protected activity and the adverse employment action.[88]

1. *Defining an "Adverse Action"*

The legal framework for establishing a retaliation claim is based on the existence of an adverse action. This Section traces courts varied definition of an "adverse action." Section 704 of Title VII, which prohibits retaliation, provides:

> 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

---

85. *Id.* (post-complaint verbal abuse (referring to complainant as "Red Bitch" and a "Damn Liar") not "relevant" to showing of retaliation). Hostile work environment cases based purely on verbal harassment can also raise First Amendment concerns. *See, e.g.*, Andrea Meryl Kirshenbaum, *Hostile Environment Sexual Harassment and the First Amendment: Can the Two Peacefully Coexist?*, 12 TEX. J. WOMEN & L. 67 (2002); Suzanne Sangree, *Title VII Prohibitions Against Hostile Environment Sexual Harassment and the First Amendment: No Collision in Sight*, 47 RUTGERS L. REV. 461 (1995).

86. *Jones*, 346 F. Supp. 2d at 25.

87. *Compare* Morris v. Oldham County Fiscal Court, 201 F.3d 784 (6th Cir. 2000) (recognizing claim for retaliatory harassment); Richardson v. N.Y. State Dep't Corr. Serv., 180 F.3d 426 (2d Cir. 1999) (recognizing a claim for retaliatory harassment); Gunnell v. Utah Valley State Coll., 152 F.3d 1253 (10th Cir. 1998) (recognizing a claim for retaliatory harassment); Noviello v. City of Boston, 398 F.3d 76 (1st Cir. 2005) (recognizing a claim for retaliatory harassment), *with* Mattern v. Eastman Kodak Co., 104 F.3d 702 (5th Cir. 1997), *cert. denied*, 522 U.S. 932 (1997) (recognizing no claim for retaliatory harassment).

88. *See, e.g.*, Ray v. Henderson, 217 F.3d 1234, 1240 (9th Cir. 2000).

> because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.[89]

To make out a claim for retaliation, the plaintiff must prove that the employer had a retaliatory intent and that the employer took an adverse action because of the employee's protected conduct (opposing discrimination).[90] The limits of oppositional conduct, then, are determined, in part, by the parameters of the definition of an adverse action. But what types of actions are sufficiently injurious to rise to the level of a substantive violation?

a. *Burlington Northern & Santa Fe Railway Co. v. White*[91]

In the recently decided case *Burlington Northern & Santa Fe Railway Co. v. White*,[92] the United States Supreme Court sought to clarify the defini-

---

89. 42 U.S.C. § 2000e-3(a) (2006). The anti-retaliation doctrine consists of two provisions termed the "opposition clause" and the "free access" clause. 42 U.S.C. § 2000e-3 (2006); *see also* Laughlin v. Metro. Wash. Airports Auth., 149 F.3d 253 (4th Cir. 1998) ("Protected activity under Title VII is divided into two categories, opposition and participation."). The Opposition Clause ("because he has opposed any practice made an unlawful employment practice") protects a variety of conduct. 42 U.S.C. § 2000e-3(a) (2006). The Free Access Clause ("because he has made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing") protects the employee's ability to freely participate in Title VII proceedings. *Id.*; *see* Booker v. Brown & Williamson Tobacco Co., 879 F.2d 1304, 1312 (6th Cir. 1989) (describing the differences between the Participation Clause and the Opposition Clause). In general, courts grant less protection for actions under the Opposition Clause than the Free Access Clause. *Booker*, 879 F.2d at 1312. Courts grant near absolute protection under the Free Access Clause because it is narrower in scope, and it encourages employees to file charges. *Id.* It is narrower in scope because it applies to retaliation that relates in some way to the filing of a discrimination charge. *Id.* Since oppositional conduct is not related to a legal proceeding, it can look more like insubordination or other inappropriate behavior rather than vindicating a legal right; for example, refusing to remain silent about the harassment of others is protected, but calling your boss a "jerk" because he rooted against your favorite team is not. Therefore, "[c]ourts are required 'to balance the purpose of [Title VII] to protect persons engaging reasonably in activities opposing . . . discrimination, against Congress' . . . desire not to tie the hands of employers in the selection and control of personnel.'" *Id.* (quoting Hochstadt v. Worcester Found. for Experimental Biology, 545 F.2d 222, 231 (1st Cir. 1976)). This Article focuses on oppositional conduct.

90. Intent in retaliation cases is generally proved using the same proof structures adopted to prove the underlying claim of status-based discrimination. *See* Jennings v. Tinley Park Cmty. Consol. Sch. Dist. No. 146, 864 F.2d 1368 (7th Cir. 1988). It is not yet clear whether systemic disparate treatment or disparate impact applies in retaliation cases. But there appears to be no reason that they could not. For example, an employer that engages in a pattern and practice of discrimination against those who engage in protected conduct or an employer who adopts a neutral policy that adversely impacts persons who engage in protected conduct may be in violation of the anti-retaliation provisions.

91. Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2409 (2006).

92. *Id.*

tion of an adverse action and to provide some much-needed guidance to courts in determining what acts constitute illegal retaliation.

In *Burlington Northern*, a female forklift operator for a railroad accused her supervisor of sexual harassment.[93] The plaintiff alleged that her supervisor "repeatedly told her that women should not be working" in the department and made "insulting and inappropriate remarks to her in front of her male colleagues."[94] White alleged that after she complained, she was retaliated against—she was reassigned to a more arduous job and later was suspended without pay for thirty-seven days for insubordination.[95]

The *Burlington Northern* Court addressed two issues: (1) whether retaliation claims must be limited to those actions that are related to employment or occur at the workplace, and (2) what employer actions are sufficiently injurious to constitute retaliation in violation of Section 704. The Court held that retaliatory acts are not limited to employment-related acts. It further defined retaliatory acts as those employer actions that would be "materially adverse" to a reasonable person.[96] It further stated that "materiality" includes actions likely to deter victims from complaining.[97]

The Court rejected the idea that only ultimate employment decisions are actionable, as was held by some circuits.[98] And, while it agreed that some standard of materiality must be observed, it rejected the notion that material acts must be specifically work-related acts. Instead, the Court expanded the scope of "material" acts to include any action that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."[99]

---

93. *Id.*

94. *Id.* at 2415.

95. White alleged that she was removed from forklift duty after she complained of sexual harassment. *Id.* at 2409. This reassignment was the basis of White's first complaint to the EEOC. *Id.* She alleged that the reassignment was unlawful gender discrimination and retaliation. White then claimed that after she filed the initial complaint of retaliation she was again retaliated against when she was suspended without pay for insubordination. *Id.* White filed a second EEOC complaint alleging retaliation based on the suspension without pay. *Id.*

96. *Id.* at 2415.

97. *Id.* "In our view, a plaintiff must show that a reasonable employee would have found the challenged action materially adverse . . . . We speak of *material* adversity because we believe it is important to separate significant from trivial harm." *Id.*

98. *Id.* at 2414. The Court abrogated the holdings in *Von Gunten v. Maryland*, 243 F.3d 858 (4th Cir. 2001); Robinson v. City of Pittsburgh, 120 F.3d 1286 (3d Cir. 1997); Mattern v. Eastman Kodak Co., 104 F.3d 702 (5th Cir. 1997), *cert. denied*, 522 U.S. 932 (1997); Manning v. Metro. Life Ins., 127 F.3d 686 (8th Cir. 1997).

99. *See Burlington N.*, 126 S. Ct. at 2420 (quoting Rochon v. Gonzales, 438 F.3d 1211, 1219 (D.C. Cir. 2006)).

b. Adverse Actions Post-*Burlington Northern & Santa Fe Railway Co. v. White*

Burlington Northern rejects the standard for defining an "adverse action" that was applied in many of the prior circuit cases and calls into question the results in others. Prior to *Burlington Northern*, the circuits were split on what constituted an adverse action. Courts followed three approaches to defining "adverse actions" for retaliation purposes. Some defined an "adverse action" as any action "reasonably likely to deter" a discrimination complaint; [100] others defined an "adverse action" as any act that materially affects the terms and conditions of employment; [101] yet others limited the definition of "adverse action" to "ultimate employment actions."[102] The Fifth[103] and Eighth Circuits[104] adopted the most restrictive view, that only "ultimate employment actions" were actionable.[105] "Ultimate employment actions" included actions such as hiring, firing, promoting, or demoting, but did not include actions such as written reprimands[106]

---

100. Actions that are "reasonably likely to deter" an employee from complaining about discrimination include actions that do not "materially" affect the terms and conditions of employment, such as lateral transfers and negative performance ratings. *See infra* notes 108-10 and accompanying text.

101. Harassment by coworkers, unjustified discipline, and a refusal to transfer can constitute adverse actions. These courts further delineate between "material" acts that are related to employment or occur at the workplace. *See, e.g.*, Washington v. Ill. Dep't of Revenue, 420 F.3d 658, 662 (7th Cir. 2005); Rochon v. Gonzales 438 F.3d 1211, 1217-18 (D.C. Cir. 2006).

102. *See infra* notes 103-05 and accompanying text.

103. *See* Mattern v. Eastman Kodak Co., 104 F.3d 702 (5th Cir. 1997), *cert. denied*, 522 U.S. 932 (1997); Davis v. Dallas Area Rapid Transit, 383 F.3d 309 (5th Cir. 2004) (holding that only ultimate employment decisions constitute adverse employment actions); Ackel v. Nat'l Commc'ns, Inc., 339 F.3d 376 (5th Cir. 2003) (noting that adverse employment actions are limited to ultimate employment decisions).

104. *See, e.g.*, Ledergerber v. Stangler, 122 F.3d 1142, 1144 (8th Cir. 1997) (noting that while the action complained of may have had "a tangential effect on her employment, it did not rise to the level of an ultimate employment decision intended to be actionable under Title VII"). More recently the Eighth Circuit has begun to abandon the "ultimate decision" language in favor of "materially affects" language. *See, e.g.*, Henthorn v. Capitol Commc'ns, Inc., 359 F.3d 1021, 1028 (8th Cir. 2004) (saying that "a material change in employment, 'such as a change in salary, benefits or responsibilities'" constitutes an adverse employment action). Duncan v. Delta Consol. Indus., 371 F.3d 1020, 1026-27 (8th Cir. 2004) (requiring "a tangible change in working conditions that produces a material employment disadvantage") (quoting Spears v. Mo. Dep't of Corrs. & Human Res., 210 F.3d 850, 853 (8th Cir. 2000)); Bradley v. Widnall, 232 F.3d 626, 632 (8th Cir. 2000) ("An adverse employment action is exhibited by a *material* employment disadvantage, such as a change in salary, benefits, or responsibilities.").

105. *See Henthorn*, 359 F.3d at 1028.

106. *See, e.g.*, Ackel v. Nat'l Commc'ns, Inc., 339 F.3d 376, 385 (5th Cir. 2003) (holding that a written reprimand is not an ultimate employment decision).

or retaliatory harassment.[107] The Seventh[108] and Ninth Circuits[109] were at the other end of the spectrum, adopting an even more expansive view of "adverse employment action." In those circuits, an adverse action was any action that was "'reasonably likely to deter employees from engaging in a protected activity.'"[110] Such actions included lateral transfers, negative performance ratings, exclusion from meetings, and denial of support services. Increasingly, the consensus among courts was for an intermediate view defining an adverse action as an act that "materially affects" the terms and conditions of employment.[111] The First,[112] Second,[113] Third,[114] Fourth,[115]

---

107. *See Mattern*, 104 F.3d at 707 (saying hostility by coworkers in reaction to discrimination complaint is not an adverse employment action).

108. *See* Washington v. Ill. Dep't of Revenue, 420 F.3d 658, 662 (7th Cir. 2005); Smart v. Ball State Univ., 89 F.3d 437, 441 (7th Cir. 1996); Williams v. Bristol-Myers Squibb Co., 85 F.3d 270, 274 (7th Cir. 1996); Johnson v. Cambridge Indus., Inc., 325 F.3d 892 (7th Cir. 2003), *cert. denied*, 540 U.S. 1004 (2003) (saying employment action is adverse if it makes the employee worse off); McGuire v. City of Springfield, 280 F.3d 794 (7th Cir. 2002).

109. *See* Elvig v. Calvin Presbyterian Church, 375 F.3d 951, 965 (9th Cir. 2004), *reh'g denied*, 397 F.3d 790 (9th Cir. 2005) (describing an adverse employment action as one that is reasonably likely to deter; but mere ostracism is not enough); Manatt v. Bank of America, 339 F.3d 792 (9th Cir. 2003); Ray v. Henderson, 217 F.3d 1234 (9th Cir. 2000).

110. *Elvig*, 375 F.3d at 965 (quoting Ray v. Henderson, 217 F.3d 1234, 1243 (9th Cir. 2000)). Some scholars have argued that the intermediate and expansive views are more consistent with Title VII's statutory language and goals. *Compare* Michel Rusie, *The Meaning of Adverse Employment Actions in the Context of Title VII Retaliation Claims*, 9 WASH. J. L. & POL'Y 379 (arguing that the materially affects test strikes the appropriate balance between effectuating the statutory purpose and protecting employers from frivolous suits), *with* Joel A. Kravetz, *Deterrence v. Material Harm: Finding the Appropriate Standard to Define an "Adverse Action" in Retaliation Claims Brought Under the Applicable Equal Employment Opportunity Statutes*, 4 U. PA. J. LAB. & EMP. L. 315 (2002) (arguing in favor of universal adoption of the reasonable deterrence standard).

111. *See infra* notes 112-120 and accompanying text.

112. *See, e.g.*, Hernandez-Torres v. Intercontinental Trading, Inc., 158 F.3d 43, 47 (1st Cir. 1998) (adverse actions include disadvantageous transfers, unwarranted negative job evaluations, and toleration of harassment by other employees).

113. *See* Richardson v. N.Y. State Dep't of Corr. Serv., 180 F.3d 426, 446 (2d Cir. 1999) ("[A] plaintiff may suffer an 'adverse employment action' if she endures a 'materially adverse change in the terms and conditions of employment.'") (quoting Torres v. Pisano, 116 F.3d 625, 640 (2d Cir. 1997)); Torres v. Pisano, 116 F.3d 625 (2d Cir. 1997), *cert. denied*, 522 U.S. 997 (1997) (adopting the materially adverse change standard); McKenney v. N.Y. City Off-Track Betting Corp., 903 F. Supp. 619, 623 (S.D.N.Y. 1995) (saying no retaliation occurs unless there is a materially adverse change in the terms and conditions).

114. Robinson v. City of Pittsburgh, 120 F.3d 1286, 1300 (3d Cir. 1997) (saying retaliatory conduct must be serious and tangible enough to alter an employee's compensation, terms, conditions, or privileges of employment).

115. *See* Von Guten v. Maryland, 243 F.3d 858, 865-66 (4th Cir. 2001) (saying an adverse action must affect "terms, conditions, or benefits" of employment).

Sixth,[116] Tenth,[117] Eleventh,[118] and D.C.[119] Circuits followed the intermediate view and defined an adverse employment action as an action that "materially affected" the terms and conditions of employment.[120] Examples included termination, demotion evidenced by a pay cut, "a less-distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices. . . ."[121]

Burlington Northern rejects the "ultimate decision test" to adverse actions.[122] It also effectively criticizes those circuits that applied an "interme-

---

116. The Sixth Circuit appears to follow this intermediate standard as well. *See* Barton v. United Parcel Serv., Inc., 175 F. Supp. 2d 904 (W.D. Ky. 2001) (asserting that an employee must show significant change in employment status); Morris v. Oldham County Fiscal Court, 201 F.3d 784, 792 (6th Cir. 2000) (saying severe or pervasive harassment can constitute an adverse action).

117. *See* Gunnell v. Utah Valley State Coll., 152 F.3d 1253, 1264 (10th Cir. 1998) (adopting a liberal interpretation of adverse action).

118. *See* Wideman v. Wal-Mart Stores, Inc., 141 F.3d 1453, 1456 (11th Cir. 1998) ("We join the majority of circuits which have addressed the issue and hold that Title VII's protection against retaliatory discrimination extends to adverse actions which fall short of ultimate employment decisions."). *But cf.* Gupta v. Fla. Bd. of Regents, 212 F.3d 571, 587 (11th Cir. 2000), *reh'g denied*, 229 F.3d 1171 (11th Cir. 2000), *cert. denied*, 531 U.S. 1076 (2001) ("An adverse employment action is an ultimate employment decision, such as discharge or failure to hire, or other conduct that 'alters the employee's compensation, terms, conditions, or privileges of employment, deprives him or her of employment opportunities, or adversely affects his or her status as an employee.'") (quoting Robinson v. City of Pittsburgh, 120 F.3d 1286, 1300 (3d Cir. 1997)).

119. *See* Rochon v. Gonzales, 438 F.3d 1211, 1217-18 (D.C. Cir. 2006). Note that although the D.C. Circuit adopted a materially affects standard, it defined materiality more broadly to include any action likely to deter victims from complaining. *Id.* at 1217-18.

120. Even courts in circuits that initially applied one of the other tests increasingly use language to suggest that they follow the intermediate standard. The Eighth Circuit, for example, has begun to abandon the "ultimate decision" language in favor of "materially affects" language. *See, e.g.*, Henthorn v. Capitol Commc'ns, Inc., 359 F.3d 1021 (8th Cir. 2004) (holding that a material change in employment, such as change in salary, benefits, or responsibilities, is an adverse employment action). The consolidation appears to be as a result of courts' interpretation of the Supreme Court opinion in *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998), in which the Court recognized an affirmative defense to liability for hostile work environment harassment by a supervisor. Courts have also adopted the *Ellerth* defense in other non-sexual harassment cases, including constructive discharge cases and retaliatory harassment cases. *See, e.g.*, Pa. State Police v. Suders, 542 U.S. 129 (2004) (recognizing the affirmative defense in constructive discharge cases); Morris v. Oldham County Fiscal Court, 201 F.3d 784, 791 (6th Cir. 2000) (recognizing the affirmative defense in retaliatory harassment cases). *See, e.g.*, Washington v. Ill. Dep't of Revenue, 420 F.3d 658, 662 (7th Cir. 2005); *Rochon*, 438 F.3d at 1217-18.

121. *See* Ford v. Gen. Motors Corp., 305 F.3d 545 (6th Cir. 2002). A materially adverse employment action must be more disruptive than a mere inconvenience or an alteration of job responsibilities. *Id.* (citing Hollins v. Atl. Co., 188 F.3d 652, 662 (6th Cir. 1999)).

122. "We therefore reject the standards applied in the Courts of Appeals . . . that have limited actionable retaliation to so-called 'ultimate employment decisions.'" Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2412, 2414 (2006). Prior to *Burlington North-*

diate" standard, which limited adverse actions to those that materially affected the "compensation, terms and benefits" of employment. The Court did this by specifically rejecting the notion that adverse actions are limited to employment or workplace actions.[123]

Burlington Northern calls into question some aspects of the "liberal view," which defined an adverse action as any action "reasonably likely to deter" a victim from complaining as well. The Court required that an adverse action meet some standard of substantiality. In effect, the Court approved a standard that relied on concepts both from the "intermediate view" and from the "liberal view" of adverse actions. This new clarity from the Supreme Court should help get lower courts to recognize retaliatory harassment as actionable retaliation.

2. *Retaliatory Harassment as an "Adverse Action"*

This Subsection discusses whether retaliatory harassment is actionable under *Burlington Northern*'s newly articulated standard for adverse action. It first describes how retaliatory harassment claims were treated in the courts prior to *Burlington Northern*. It then discusses the likely affect of the *Burlington Northern* decision on future retaliatory harassment cases.

A review of lower court decisions rendered prior *to Burlington Northern* reveals that courts have taken a patchwork approach to retaliatory harassment claims.[124] Some courts acknowledged that retaliatory harassment can constitute an "adverse action" while others did not. The Fifth Circuit, for example, refused to recognize retaliatory harassment as an adverse employment action. In *Mattern v. Eastman Kodak Company*,[125] the Fifth Circuit concluded that retaliatory harassment was not actionable retaliation: "Hostility from fellow employees, having tools stolen, and resulting anxiety, without more, do not constitute ultimate employment decisions, and therefore are not the required adverse employment actions."[126]

---

ern, two circuits—the Fifth and the Eighth Circuits—held that only ultimate employment actions were actionable. *See supra* notes 103-04 and accompanying text.

123. *Burlington N.*, 126 S. Ct. at 2414. "We therefore reject the standards applied in the Courts of Appeal that have treated the anti-retaliation provision as forbidding the same conduct prohibited by the anti-discrimination provision. . . ." *Id.*

124. Some, but not all, courts consider retaliatory harassment to be an "adverse action" for retaliation purposes. *See, e.g.*, Richardson v. N.Y. State Dep't of Corr. Serv., 180 F.3d 426, 445 (2d Cir. 1999) (reversing district court grant of summary judgment dismissing retaliatory harassment claim and acknowledging disagreement within the courts about whether retaliatory harassment by coworkers can constitute actionable retaliation).

125. 104 F.3d 702 (5th Cir. 1997), *cert. denied*, 522 U.S. 932 (1997).

126. *Id.* at 707.

Other courts recognized retaliatory harassment as actionable retaliation. In *Ray v. Henderson*,[127] an employee who complained about the treatment of women in the workplace was publicly berated by being called a "rabble rouser" and "troublemaker." The Ninth Circuit concluded that the retaliatory harassment was actionable: "We agree with our sister circuits. Harassment is obviously actionable when based on race and gender. Harassment as retaliation for engaging in protected activity should be no different."[128]

The parties in *Burlington Northern* did not raise, and the Court did not specifically address, claims of retaliatory harassment. Nevertheless, retaliatory harassment claims should fall within the Court's newly articulated definition of a retaliatory action—materially adverse acts that dissuade a reasonable worker from making or supporting a charge of discrimination.

The reasoning of the *Burlington Northern* opinion supports the view that retaliatory harassment is an adverse action for retaliation purposes. The Court defined an adverse action as those employer actions that would be "materially adverse" to a reasonable person, meaning likely to deter victims from complaining.[129] While the *Burlington Northern* Court distinguishes between material retaliatory acts, which are covered by the statute, and trivial or insignificant acts, which are not, it acknowledges that the context in which the acts occur matters. For example, the Court stated that "an employee's decision to report discriminatory behavior cannot immunize that employee from those petty slight or minor annoyances that often take place at work that all employees experience."[130] It went on to recognize that "the significance of any given act of retaliation will often depend upon the particular circumstances."[131] The Court limits protection to materially adverse action, those likely to deter a reasonable worker. Retaliatory harassment is such an act.

Retaliatory harassment is far from inconsequential or a minor annoyance. Instead, it is quite effective in deterring workplace complaints. For example, in *Mattern v. Eastman Kodak Company*,[132] the Fifth Circuit reversed a jury verdict in favor of the plaintiff on a claim of retaliation. In *Mattern*, the plaintiff alleged that coworkers became hostile to her, and they "would not say 'hello', and would mutter 'accidents happen.'"[133] One supervisor said he would fire her. She also alleged that her locker was broken into and some of her tools were stolen. The Fifth Circuit determined that

127. Ray v. Henderson, 217 F.3d 1234 (9th Cir. 2000).
128. *Id.* at 1245.
129. Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2415 (2006).
130. *See id.*
131. *Id.*
132. 104 F.3d 702 (5th Cir. 1997), *cert. denied*, 522 U.S. 932 (1997).
133. *Id.* at 705.

the plaintiff did not suffer retaliatory harassment as a matter of law. Under the Supreme Court's new standard articulated in *Burlington Northern*, the plaintiff would have a much stronger argument that the jury verdict should not have been reversed.

Retaliatory harassment claims also likely meet the Supreme Court's "reasonable worker" standard. In *Burlington Northern*, the Court applies a "reasonable worker" standard. Only those actions likely to deter a "reasonable" worker will fit the Court's newly articulated standard. As discussed in Part I, actions of coworkers in response to discrimination in the workplace have a powerful effect on discrimination victims' willingness to complain. Many women are reluctant to report sexual harassment for fear of retaliation.[134] For already marginalized workers, even seemingly minor changes in the workplace environment can have a significant impact.[135]

B. Retaliatory Harassment and the Limits of Sexual Harassment Law

This Section describes the limits of the courts' current approach to analyzing retaliatory harassment cases. It asserts that when analyzing retaliatory harassment cases, rather than merely importing standards from sexual harassment law, courts should recognize retaliatory harassment as a distinct legal claim. Courts tend to view retaliatory harassment claims through the legal lens of sexual harassment law, often losing sight of the important legal distinctions between retaliatory harassment claims and sexual harassment claims.[136] Borrowing standards from sexual harassment law to address retaliatory harassment claims further confuses an already complex area of the law.

1. *Defining a Hostile Work Environment*

Victims of retaliatory harassment must show that they were subjected to a "hostile" work environment.[137] This requirement of showing a hostile environment derives from sexual harassment cases.

To establish a hostile work environment in a sexual harassment case, the complainant must show that the actions taken against her were sufficiently severe or pervasive so as to alter her working conditions and create

134. *See* Berryman-Fink, *supra* note 6 and accompanying text.

135. A body of medical and social science literature documents the physical and psychological effects of discrimination on African Americans, for example. *See, e.g.*, Terry Smith, *Everyday Indignities: Race, Retaliation and the Promise of Title VII*, 34 COLUM. HUM. RTS. L. REV. 529 (2003).

136. *See infra* note 138-39 and accompanying text.

137. *See, e.g.*, Noviello v. City of Boston, 398 F.3d 76, 92 (1st Cir. 2005), Ray v. Henderson, 217 F.3d 1234, 1245 (9th Cir. 2000).

an abusive environment.[138] Those courts that recognize retaliatory harassment as potentially actionable retaliation rely heavily on sexual harassment law to determine when retaliatory harassment is sufficiently severe or pervasive to sustain a claim.[139] This was the approach of the First Circuit in *Noviello v. City of Boston*.[140]

The *Noviello* Court reasoned that since a retaliatory act must "rise to some level of substantiality," then in a retaliatory harassment case the "hostile work environment doctrine" from sexual harassment law embodied that principle.[141] The court, therefore, imported the hostile work environment standard to analyze a retaliatory harassment case.[142] The Ninth Circuit in *Ray v. Henderson*[143] similarly imported the standard from sexual harassment cases to analyze retaliatory harassment cases: "[Retaliatory h]arassment is actionable only if it is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'"[144]

Requiring retaliatory harassment to meet sexual harassment law standards gives rise to two problems: (1) it adopts an already flawed structure;

---

138. Sexual harassment can also be proved under the quid pro quo theory of liability. Quid pro quo sexual harassment occurs in those situations where the acceptance of unwelcome sexual conduct is a condition of an employment benefit. Because it is so closely tied to demands for sexual favors, quid pro quo harassment is generally thought to be a theory unique to sexual harassment law and, therefore, not generally used to analyze other forms of discriminatory harassment, such as racial harassment. Clemons v. Ford Motor Co., 57 F. Supp. 2d 469 (M.D. Tenn. 1998) (allowing no quid pro quo theory of racial harassment); Lattimore v. Polaroid Corp., 99 F.3d 456, 463 (1st Cir. 1996) (no quid pro quo theory); Wright-Simmons v. City of Oklahoma City, 155 F.3d 1264, 1270 (10th Cir. 1998) (allowing no quid pro quo theory); *see also* Tam B. Tran, Comment, *Title VII Hostile Work Environment: A Different Perspective*, 9 J. CONTEMP. LEGAL ISSUES (1998); Eileen B. Goldsmith, *God's House or the Law's*, 108 YALE L.J. 1433 (1999) (quid pro quo seemed so inextricable from sexuality that its relevance to other cases is almost entirely overlooked). *But cf.* Venters v. City of Delphi, 123 F.3d 956 (7th Cir. 1997) (applying quid pro quo theory to racial harassment); Summi Cho, *"Racial Favors": The Tangibility of Racial Harassment and the Quid Pro Quo Analogy* (arguing in favor of applying quid pro quo theory in racial harassment cases) (unpublished manuscript on file with the author).

139. Robinson v. City of Pittsburgh, 120 F.3d 1286, 1300-01 (3d Cir. 1997) ("[W]e hold that the 'adverse employment action' element of a retaliation plaintiff's prima facie case incorporates the same requirement that the retaliatory conduct rise to the level of [a sexual harassment claim].").

140. 398 F.3d 76 (1st Cir. 2005).

141. *Id.* at 92.

142. *Id.* "In order to prove a hostile work environment, a plaintiff must show that she was subjected to severe or pervasive harassment that materially altered the conditions of her employment . . . . This framework is readily transferable to the retaliatory harassment context." *Id.*

143. 217 F.3d 1234 (9th Cir. 2000).

144. Ray v. Henderson, 217 F.3d 1234, 1245 (9th Cir. 2000) (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 24 (1993)).

and (2) it ignores important policy distinctions between anti-discrimination law and retaliation law. The result is that current interpretations of standards of retaliatory harassment effectively raise the bar of conduct subject to legal correction, potentially eliminating a wide swath of retaliatory conduct from the scope of the law.[145]

2. *Retaliatory Aspects of Sexual Harassment*

This Subsection describes the limitations of using the sexual harassment framework to analyze retaliatory harassment claims. One limitation of using the sexual harassment framework to analyze retaliatory harassment claims is that the sexual harassment framework already ignores the retaliatory nature of much conduct described as "sexual harassment."

While sexual harassment is a form of sex discrimination, it can also be a form of retaliation. It can be both a "gendered" harm (an action taken against a person because she is a woman) as well as an act of retaliation for stepping outside workplace norms.[146] For example, a supervisor who retaliates against an employee for the employee's refusal to succumb to the supervisor's unwanted advance by taking away a job benefit or by inflicting a job detriment retaliates against the employee for resisting sexism in the workplace.[147] Yet, the law of sexual harassment fails to explicitly address the "retaliatory" aspect of such harassment. Instead, the law treats this type of harassment as solely a form of status-based discrimination, the retaliatory aspects of sexual harassment are not separately addressed.

The analytic framework for sexual harassment cases arose in the specific and special context of addressing and eliminating sex discrimination, and out of the pioneering work of Professor Catherine MacKinnon. She argued that sexual harassment existed as another method of reinforcing women's traditionally inferior role in the workplace.[148] As a result of Pro-

145. The Sixth Circuit defines an "adverse action" as one that materially affects an employee's terms or conditions of employment. White v. Burlington N. & Santa Fe Ry. Co., 310 F.3d 443 (6th Cir. 2002) (en banc), *aff'd*, 126 S. Ct. 2405 (2006) (affirming result but rejecting argument that adverse action require a link between the retaliatory action and the terms, conditions, or status of employment). Elsewhere, the Sixth Circuit has allowed employers to assert an affirmative defense to a charge of retaliatory harassment. *See* Morris v. Oldham County Fiscal Court, 201 F.3d 784 (6th Cir. 2000). Both the standard of liability and the standard of employer liability in these cases rely heavily on similar concepts from sexual harassment law.

146. *See* MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN, *supra* note 69, at 25-47.

147. *Id.* at 35.

148. *See generally* MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN, *supra* note 69.

fessor MacKinnon's work, two distinct theories of liability, quid pro quo[149] and hostile work environment,[150] were devised to address sexual harassment in the workplace.[151] Although there is some doubt about the continuing validity of Professor MacKinnon's bilateral classifications of sexual harassment as either quid pro quo or hostile work environment, the distinction remains useful for some purposes.[152]

As Professor MacKinnon described, quid pro quo sexual harassment occurs when the acceptance of unwelcome sexual conduct is a condition of an employment benefit.[153] Professor MacKinnon's second theory of illegal harassment—hostile work environment—differs from quid pro quo in that the harasser lacks the authority to take direct job action. Hostile work environment harassment covers situations where the job consequence is indirect.[154] There is no direct threat to employment ("comply or else") but there is general hostility in the workplace.[155]

Hostile work environment harassment recognizes that hostility within the workplace can have a similar effect on the victim's job; it can make work conditions so unpleasant as to affect the employee's terms and conditions of work. It is a more subtle form of preventing women from achieving equality in the workplace. Instead of directly conditioning work benefits on succumbing to advances, it imposes a "blanket of oppression."[156]

MacKinnon acknowledged that sexual harassment often has a retaliatory component as well. For example, in those quid pro quo situations where a woman's refusal to "play along" with a supervisor's demand for

---

149. Professor MacKinnon argued that the quid pro quo theory was necessary to fill a perceived gap in traditional tort law. Traditional tort law, she argued, was inadequate to address problems of sexual harassment because it viewed the harm as an individual rather than a group injury (to women based on their status as women). *Id.* at 171-74.

150. *See id.* at 32 (describing two forms of sexual harassment: quid pro quo and hostile work environment). There is little functional difference between the two types of harassment—quid pro quo and hostile work environment—from the victim's perspective, the injury is the same. Yet, the standard of employer liability is different.

151. *See supra* note 149 and accompanying text.

152. While both theories were discussed by the Supreme Court in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), the Court questioned the continuing utility of the distinction between the two theories of liability in the more recent case, *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998). In *Ellerth*, Justice Kennedy, writing for the majority, acknowledged, however, that the distinction may be helpful in "making a rough demarcation between cases in which threats are carried out and those where they are not or are absent altogether." *Ellerth*, 524 U.S. at 751.

153. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN, *supra* note 69, at 32-40.

154. *Id.* at 40-47.

155. *Id.*

156. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 778 (1998) (requiring plaintiff to prove that harassment is severe or pervasive ensures that Title VII does not become a general civility code).

sexual favors leads to a "significant change in employment status,"[157] it is not just the demand for sexual favors that can cause injury, but the retaliation for failing to succumb to the demand that can cause specific, job-related injuries.[158] Yet, the retaliatory nature of quid pro quo harassment was not explicitly recognized in the resulting legal framework courts later adopted. To establish quid pro quo harassment, the plaintiff must establish that a supervisor took a "tangible employment action" against her because of her sex. The requirement that quid pro quo harassment involve a "tangible employment action" may tacitly acknowledge, however, that such claims have a retaliatory component.[159]

Sexual harassment that takes the form of hostile work environment harassment may also have an unstated retaliatory aspect. For example, some hostile work environment cases are triggered by male coworkers who are upset at the audacity of women who enter a traditionally-male workplace.[160] The resulting negative actions by the coworkers can be seen as retaliatory in nature. They are not retaliating just because an employee overtly complains about discrimination in the workplace, but are acting in retaliation against an employee who challenges a male-dominated workplace. The analytic framework of hostile work environment cases makes no mention of the retaliatory aspect of some harassment; instead, it focuses on

---

157. A tangible employment action is a "significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits," so unfulfilled threats are not tangible employment actions. *Ellerth*, 524 U.S. at 761.

158. *Ellerth*, 524 U.S. at 765 (stating that "tangible employment action" describes acts taken by a supervisor that affect substantive job rights). Tangible employment actions are limited to those with direct job consequences. *Id.* at 761.

159. The requirement that plaintiff prove that the sexual harassment involved a "tangible employment action" is unique to quid pro quo sexual harassment cases. Where a "tangible employment action" is proved, the employer is held to a standard of strict liability and can offer no affirmative defense to liability. The increased responsibility for employers in quid pro quo cases tacitly acknowledges that the harasser's ability to follow through on a threat of a job sanction if the plaintiff fails to comply with the sexual demand arises from the power given to the harasser by the employer. *See Ellerth*, 524 U.S. at 765. A similar concept exists under the law of retaliation. In a retaliation case, the plaintiff must show that the employer took an "adverse action" against her. The concept of an "adverse action" overlaps with, but is broader than the concept of a "tangible employment action." An "adverse action," unlike a "tangible employment action," is not limited to only those job actions taken by a supervisor as a direct result of the authority delegated to him by the employer, it includes any adverse action, whether explicitly job related or not, that "materially affects" a reasonable worker. Prior to the Supreme Court's decision in *Burlington Northern*, some circuits narrowed the definition of "adverse action" to "ultimate employment decision," making the "adverse action" standard under retaliation law similar to the "tangible employment action" standard of harassment law. *See supra* notes 103-05.

160. *See, e.g.*, Berkman v. City of New York, 580 F. Supp. 226 (E.D.N.Y. 1983), *aff'd*, 755 F.2d 913 (2d Cir. 1985); Williams v. Gen. Motors Corp., 187 F.3d 553 (6th Cir. 1999).

whether unwelcome sexual conduct is so severe and pervasive as to alter the employment conditions.[161] Using the sexual harassment framework as a basis to analyze retaliatory harassment exacerbates the problem.

3. *Status versus Conduct as a Basis for Liability*

Importing standards from sexual harassment law to analyze retaliatory harassment claims also diminishes the important policy distinctions between anti-discrimination law and anti-retaliation law. In some sense, the goal of Title VII's anti-retaliation provision is broader than its substantive anti-discrimination provisions. Title VII's anti-retaliation provision is not directed narrowly at just preventing discrimination against individuals because of their protected status, but reaches more broadly to address the other systems that help perpetuate inequality in the workplace, including those that seek to intimidate those who would otherwise oppose discriminatory practices.[162]

The Supreme Court recognized in *Burlington Northern* that the distinction between Title VII's substantive anti-discrimination provision and its anti-retaliation provision is significant:[163] "The substantive provision [of Title VII] seeks to prevent injury to individuals based on who they are, *i.e.*, their status. The anti-retaliation provision seeks to prevent harm to individuals based on what they do, *i.e.*, their conduct."[164] Anti-retaliation law supports anti-discrimination law by encouraging victims to come forward and report acts of discrimination by protecting them from any adverse consequences of reporting. As the Supreme Court described, "the anti-retaliation provision seeks to prevent an employer from interfering with an employee's efforts to secure or advance enforcement of the [anti-discrimination law's] basic guarantees."[165] Ending retaliatory harassment, then, is an important step in ending workplace discrimination. That distinction disappears/dissolves when courts conflate the two provisions into one analytic framework.

---

161. *See* Meritor Savings Bank v. Vinson, 477 U.S. 57, 67 (1986). Not all offensive or objectionable behavior in the workplace creates a hostile work environment. The behavior must be sufficiently "severe or pervasive" so as to alter work conditions. The "severity or pervasiveness" of the harassment distinguishes a "hostile work environment" from an unpleasant, but nevertheless non-discriminatory work environment. The compromise addresses the concern that Title VII not become a "general civility code of for the American workplace." Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998). Therefore, only a discriminatory environment that is so "severe or pervasive" as to alter the terms of the employment relationship is prohibited by law. *Meritor Savings Bank*, 477 U.S. at 67.

162. Brake, *supra* note 24, at 18.

163. Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2411 (2006).

164. *Id.* at 2412.

165. *Id.* at 2407.

IV. PROPOSAL

This Article suggests that the creation of a separate retaliatory harassment cause of action under a distinct analytic framework is necessary to address the subtle ways harassment is employed in the workplace.[166]

Recognition of retaliatory harassment claims will necessitate applying a framework different from that applied in garden variety retaliation claims. In retaliation cases, the complainant generally must prove that she engaged in a protected activity, that the employer took an adverse action against her, and that a causal link existed between the protected activity and the adverse action. Some courts have already acknowledged that a new framework is necessary to address retaliatory harassment claims. In *Morris v. Oldham County Fiscal Court*,[167] for example, the Sixth Circuit modified the standard for proving a prima facie case of retaliation to include cases where retaliatory harassment is alleged.

> "[W]e today modify our standard for proving a *prima facie* case of Title VII retaliation. A plaintiff must now prove that: (1) she engaged in activity protected by Title VII; (2) this exercise of protected rights was known to defendant; (3) defendant thereafter took adverse employment action against the plaintiff, *or the plaintiff was subjected to severe or pervasive retaliatory harassment by a supervisor*; and (4) there was a causal connection between the protected activity and the adverse employment action *or harassment*." [168]

This Proposal recommends that more courts follow the Sixth Circuit's lead and treat retaliatory harassment as another way of proving illegal retaliation.

This proposed framework would also require courts to interpret the phrase "severe or pervasive retaliatory harassment" differently from how courts interpret similar language in sexual harassment cases. In sexual harassment cases, only those actions that "alter working conditions" are severe or pervasive enough to give rise to a sexual harassment claim. Many courts incorrectly hold complainants in retaliatory harassment cases to this same standard (severe or pervasive enough to alter work conditions). In light of the Supreme Court's decision in *Burlington Northern*, this interpretation is surely incorrect. The Court explicitly rejects the notion that actionable re-

---

166. I realize that some may argue that the solution to these problems is to analyze retaliatory harassment claims just as a court would analyze sexual harassment claims. In other words, first, courts would determine whether the harassment "materially affects" the employee's continued employment. If it does, the employer would be liable unless it can prove as an affirmative defense that it took steps to correct the behavior. This seems to be the direction that courts are headed in (although many apply the standard incorrectly). *See supra* Part III and accompanying notes. As discussed in Section III.B *supra*, merely adopting the sexual harassment analytic framework creates problems at the theoretical and practical levels.

167. 201 F.3d 784, 792 (6th Cir. 2000)

168. *Id.*

taliation must affect working conditions. It follows, then, that retaliatory harassment, which is a form of retaliation, need not alter working conditions to be actionable. In a retaliatory harassment case, a hostile work environment would be established where the plaintiff can show that the actions would deter a reasonable plaintiff from opposing discrimination. Whereas in sexual harassment cases, only conduct that rises to a level so as to alter work conditions is actionable, in retaliatory harassment cases, actionable conduct would extend to any action that would deter a reasonable plaintiff from opposing discrimination.[169] This interpretation is consistent with the distinction recognized by the Supreme Court in *Burlington Northern*, that retaliatory conduct encompasses a wider range of behavior than substantive discrimination claims. Returning to the opening hypothetical of Cynthia, the parking enforcement officer, the post-complaint conduct would be subjected to a reasonably likely to deter standard. Under such a standard, a factfinder could determine that coworkers giving her the cold shoulder, calling her names, and circulating a petition to get her fired, were calculated to deter future complaints, and thus constituted actionable retaliatory harassment.

CONCLUSION

Retaliatory harassment represents a substantial barrier to equality in the workplace. It is a way of enforcing workplace norms—setting the boundaries of acceptable and unacceptable workplace behavior, and punishing resistance to the very change the anti-discrimination laws seek to accomplish. To address the shortcomings in courts' current approaches, this Article has outlined a superior approach that expands the concept of retaliatory harassment to include those actions that reasonably seek to deter complaints.

169. While this interpretation also has implications for the standard of employer liability that should apply in retaliatory harassment cases, that analysis is beyond the scope of this Article.