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## What's So Reasonable About Reasonableness? Rejecting a Case Law-Centered Approach to Title VII's Reasonable Belief Doctrine

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# What's So Reasonable About Reasonableness? Rejecting a Case Law-Centered Approach to Title VII's Reasonable Belief Doctrine

*By Matthew W. Green Jr. \**

## I. INTRODUCTION

Laura and her husband Jamal met while working for their employer, Octogon, Inc. Laura is white and Jamal is black. One day over lunch in the company break room, another employee, Joe Simmons, asked Laura whether she exclusively dated white guys. Laura told Joe, who is also white, that she previously had dated white men, but that she fell in love with and married Jamal. Joe responded that he would never date a black person because he “could not stand listening to them complain about slavery.” Moreover, during their conversation, he repeatedly used the word “nigger” and told Laura that he did not understand why blacks could use the word “nigger” while he could not. He assured her that he was not racist but that he “just really did not like blacks.” He said that he felt lucky that he did not have any black blood in him because if he did, he would have “to scrape that shit off.” Laura became offended and told Joe about her displeasure. Although Joe apologized, Laura thought Joe’s behavior was inappropriate and violated company policy. Octogon’s employee handbook contained prohibitions on discriminatory conduct in the workplace. The handbook provided that Octogon “did not tolerate discrimination on the basis of race, sex, religion, marital status, or any other characteristic protected by law” and directed employees to report “any perceived discriminatory conduct” to human

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resources. Pursuant to the handbook, Laura reported the lunchtime incident. Subsequently, Laura's workload and pay were cut. She was also told that she could not "mingle" with Jamal on company time, although other couples were allowed to associate at work. Laura filed a lawsuit under Title VII of the Civil Rights Act of 1964 ("Title VII"), alleging she was retaliated against for complaining about what she perceived to be race discrimination, particularly that Joe's conduct amounted to a form of racial harassment. The court, however, determined that under circuit precedent the incident with Joe did not amount to a legally cognizable racial harassment claim under Title VII. Should Laura's retaliation claim fail as a result?<sup>1</sup>

This article addresses the issue raised by the aforementioned hypothetical, a common one under Title VII and other federal employment discrimination statutes. Title VII's anti-retaliation provision protects individuals who oppose "any practice made an unlawful employment practice" by Title VII.<sup>2</sup> Lower federal courts have consistently held that, literally read, the provision protects only workers who oppose practices that are proven to be actually unlawful under the statute.<sup>3</sup> Such a reading would doom Laura's retaliation claim. Because that interpretation of the statute might deter employees from bringing possible discrimination to their employer's attention, courts uniformly have held that employees challenging alleged discrimination do not have to show that the underlying discriminatory practice reported is actually unlawful.<sup>4</sup> Rather, the employee only has to show that when she complained, at a minimum, she held an objectively reasonable belief that the challenged action was unlawful.<sup>5</sup> This standard makes sense in theory. If the law were clear that employers could discriminate against employees unless they had a perfect understanding of Title VII law, employees would have good reason to keep quiet about potential discrimination. Broad protection from retaliation is warranted because employees should be encouraged to bring potential discrimination to

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1. The hypothetical represents a composite of court decisions involving Title VII retaliation claims. See *Robinson v. Cavalry Portfolio Servs., LLC*, 365 F. App'x 104, 107–10, (10th Cir. 2010) (reversing jury verdict in favor of plaintiff, a white woman married to a black man, who alleged retaliation after complaining about a coworker's racially discriminatory remarks, where the coworker knew that her husband was African-American); *Jordan v. Alt. Res. Corp.*, 458 F.3d 332, 337, 350 (4th Cir. 2006) (affirming motion to dismiss plaintiff's Title VII retaliation claim, where he alleged that he was fired after reporting remarks the court labeled as being "crude" and "racist" and despite the fact that the employer's policy manual required that he report "any perceived" discrimination).

2. 42 U.S.C. § 2000e-3(a) (2006).

3. See discussion *infra* Part II.B.1.b.

4. See *infra* notes 49–51 and accompanying discussion.

5. See *infra* note 50 and accompanying discussion.

the attention of employers for informal resolution. For this reason, the Supreme Court has consistently interpreted Title VII in a manner that recognizes the importance of informal dispute resolution.<sup>6</sup> Requiring an employee to show a challenged practice was actually unlawful undermines this goal.<sup>7</sup>

Although the reasonable belief doctrine is sound in theory, its application has become problematic to plaintiffs challenging discrimination. The Supreme Court has decided a number of retaliation cases in recent years,<sup>8</sup> yet has failed to define the reasonable belief doctrine despite the frequency with which the issue arises in the federal courts.<sup>9</sup> This Article examines the origins and purposes of the reasonable belief doctrine, and demonstrates how recent application of the doctrine undermines those purposes. It then proposes remedying those issues by re-conceptualizing the reasonable belief doctrine to broaden its scope of protection.

A principal concern with the reasonable belief doctrine involves the narrow manner in which reasonableness is determined. Similar to Laura's case set forth above, in many instances, whether an employee's belief about the illegality of a challenged practice is deemed reasonable is based only on the facts surrounding the conduct about which the plaintiff complains and on the current substantive law.<sup>10</sup> Under this approach, the litmus test for reasonableness is case law. Employees are given no leeway to be wrong about judicial interpretations of Title VII. Indeed, employees have been required to understand circuit splits and how the particular court hearing the

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6. See discussion *infra* Part II.B.2.a.

7. See *id.*

8. The Court has recently addressed Title VII retaliation claims in a number of decisions. See, e.g., *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2522–23 (2013) (holding that Title VII's anti-retaliation provision requires something less than but-for causation); *Thompson v. N. Am. Stainless, LP*, 131 S. Ct. 863, 870 (2011) (holding that third-party retaliation claims are cognizable under Title VII's anti-retaliation provision); *Crawford v. Metro. Gov't of Nashville and Davidson Cnty. Tenn.*, 555 U.S. 271, 271 (2009) (resolving circuit split regarding whether an employee is protected under Title VII's anti-retaliation provision for not only speaking out about discrimination on her own initiative, but also "in answering questions during an employer's internal investigation" into potential discrimination); *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57 (2006) (resolving circuit split that had developed regarding two issues: whether Title VII's anti-retaliation provision confined "actionable retaliation to activity that affects the terms and conditions of employment" and "how harmful . . . the adverse actions [must] be to fall within its scope"); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 339 (1997) (resolving circuit split regarding whether Title VII's anti-retaliation provision protects current as well as former employees of an employer).

9. The reasonable belief doctrine arises with frequency in the federal courts. In 2013, a Westlaw search of federal district court cases yielded more than 1,000 cases referencing the reasonable belief doctrine. The Supreme Court, however, has not yet decided the propriety of this standard. See discussion *infra* Part III.A.

10. See *infra* discussion Part III.

plaintiff's claim has interpreted Title VII.<sup>11</sup> Thus, employee beliefs about illegal discrimination have been held to be unreasonable even where legal support for such a belief exists based on another court's holding.<sup>12</sup>

Under this "case-law litmus test," before a plaintiff may complain about discrimination and receive protection against retaliation for that complaint, she first would have to seek legal counsel to ascertain whether the complained-of conduct violates discrimination law.<sup>13</sup> She is mistaken at her own peril. Commenting on the stringency of the reasonable belief doctrine, Professors Deborah Brake and Joanna Grossman have explained that employees who have a "near-perfect understanding . . . of current discrimination law" may be protected for complaining about alleged discrimination, but "[e]mployees who do not meet this ideal take a grave risk . . ."<sup>14</sup> For that reason, another commentator has called the reasonable belief doctrine "[p]erhaps the most significant limitation to coverage under the opposition clause" of Title VII's anti-retaliation provision.<sup>15</sup>

This Article argues that the case-law litmus test approach to reasonableness is as problematic an interpretation of Title VII's anti-retaliation provision as conditioning protection on proof that the practice an employee opposed was actually unlawful. The latter approach has been, and, as argued here, should be rejected because to do otherwise would deter complaints and undermine the purposes and goals of the statute.<sup>16</sup> The case-law litmus test raises the same concerns.<sup>17</sup> Although plaintiffs are not required to prove a practice is actually unlawful, commentators argue, and the case law demonstrates, that to meet the reasonableness standard plaintiffs must be able to survive a motion for summary judgment on the underlying claim.<sup>18</sup> In other words, a plaintiff's belief is reasonable if she can demonstrate that the complained-of conduct would be sufficient to permit a jury to rule in her favor under existing law. This standard is obviously problematic. Unlike a lay employee challenging discrimination in the workplace, a juror determining whether discrimination has occurred is armed both with facts the employee may not have known at the time of her

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11. See *infra* discussion Part III.C.3.

12. See *id.*

13. See *id.*

14. Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII As a Rights-Claiming Statute*, 86 N.C. L. REV. 859, 913 (2008).

15. Alex B. Long, *The Troublemaker's Friend: Retaliation Against Third Parties and the Right of Association in the Workplace*, 59 FLA. L. REV. 931, 955 (2007).

16. See discussion *infra* Part II.B.2.

17. See discussion *infra* Part III.C.1–3.

18. See discussion *infra* Part III.C.1 and accompanying notes.

complaint and with a detailed explanation of applicable law.<sup>19</sup>

The concerns raised by the reasonable belief doctrine have led commentators to argue for its rejection in favor of a purely subjective good faith standard.<sup>20</sup> Under that standard, an employee would be protected from retaliation if she had a subjective, honest belief that the complained-of practice violated Title VII. For reasons explained later, this Article does not disagree that a subjective standard would be preferable to one requiring reasonableness in light of existing case law. This Article, however, does question whether a purely subjective standard is practical considering recent precedent from the Supreme Court, which shows a preference for using objective factors when interpreting Title VII. In *Burlington Northern & Santa Fe Railway Co. v. White*,<sup>21</sup> the Court both emphasized the need for broad protection from retaliation for effective enforcement of Title VII and reaffirmed its commitment to using objective standards when interpreting the statute, including the anti-retaliation provision.<sup>22</sup> Although *Burlington Northern* did not address the propriety of the reasonable belief standard, the Court's analysis in that case is predictive of the approach it might take on this issue.

This Article, therefore, does not outright reject reasonableness or objective standards. It seeks instead to expand the concept of reasonableness for purposes of the reasonable belief doctrine. This Article offers a middle ground between the purely subjective approach scholars have advocated and the purely objective approach of the case-law litmus test. It argues for a reasonableness standard that considers the totality of the circumstances, including tangible factors—those beyond case law—that may influence an employee's belief. No one factor would be determinative in a

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19. See, e.g., *Palmer v. Bd. of Regents of Univ. Sys.*, 208 F.3d 969, 975 (11th Cir. 2000) (“In examining a trial court’s formulation of jury instructions, we apply a deferential standard, looking at the instructions as a whole ‘to determine whether they fairly and adequately addressed the issue and correctly stated the law.’” (citations omitted)); *Farley v. Nationwide Mut. Ins. Co.*, 197 F.3d 1322, 1330–31 (11th Cir. 1999) (holding the trial court did not err in instructing the jury in a claim arising under the Americans with Disabilities Act (ADA), as the instructions were taken from the pattern jury instructions and “accurately reflected” the court’s case law on the definition of “qualified individual[] with a disability”).

20. See, e.g., Lawrence D. Rosenthal, *To Report or Not to Report: The Case for Eliminating the Objectively Reasonable Requirement for Opposition Activities Under Title VII’s Anti-Retaliation Provision*, 39 ARIZ. ST. L.J. 1127, 1129 n.7, 1129–30 (2007) (noting that every appellate court has adopted the reasonableness standard, detailing the flaws with the standard, and arguing that it should be replaced by a good faith standard); Brienne J. Gorod, *Rejecting “Reasonableness”: A New Look at Title VII’s Anti-Retaliation Provision*, 56 AM. U. L. REV. 1469, 1473 (2007) (arguing for protection unless plaintiff has acted in bad faith).

21. 548 U.S. 53 (2006).

22. *Id.* at 62–69.

totality of the circumstances reasonableness calculus. Such a test is a logical extension of existing precedent interpreting Title VII and is consistent with the Court's approach to interpreting the statute.<sup>23</sup> Under such a test, factors that may be relevant to a belief about the illegality of an employment practice include the fundamental characteristics of the plaintiff (such as race and sex) that might influence her perception about whether the conduct is discriminatory, as well as employer representations about the scope of discrimination protections under the law. Certainly, how an employer defines discrimination may shape an employee's reasonable understanding of it. The totality of the circumstances approach advocated here is not only consistent with the Court's approach to reasonableness under Title VII, but also better effectuates the goal the Court recognized in *Burlington Northern* and other recent retaliation decisions: to provide workers with broad protection from retaliation so that they are not dissuaded from reporting alleged discrimination—a first step to remedying it.

Part II of this Article examines the scope of protection under Title VII's anti-retaliation provision and addresses the impetus for the reasonable belief doctrine. It demonstrates that courts have relied correctly on numerous policy reasons to justify adoption of the reasonable belief standard. Part III examines recent criticism of the reasonable belief doctrine among legal commentators. It demonstrates that because of the stringency of its application, particularly the case-law litmus test approach to reasonableness, the reasonable belief doctrine raises the same concerns that led to its adoption. Part IV argues for abandoning the case-law litmus test in assessing reasonableness, and explains why a good faith belief subjective standard, although preferable to current standards, is inconsistent with the approach the Court has taken in interpreting Title VII. Finally, it proposes a new totality of the circumstances reasonableness test that should provide greater protection against workplace retaliation than is provided under the case law approach and that better effectuates the purposes of Title VII.

## II. TITLE VII'S ANTI-RETALIATION PROVISION: DEFINING THE SCOPE OF PROTECTION

Title VII's anti-retaliation provision in pertinent part provides:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . [1] because he has *opposed* any practice made an

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23. See discussion *infra* Part II.B.2.c.



unlawful employment practice by [Title VII], or [2] because he has made a charge, testified, assisted, or *participated* in any manner in an investigation, proceeding, or hearing under [Title VII].<sup>24</sup>

As is clear from the language above, Title VII's anti-retaliation provision contains two clauses relevant to the protected activity inquiry: the opposition clause and the participation clause.<sup>25</sup> The scope of protection under the clauses differs.

### A. *Participation Clause*

It is generally recognized that the participation clause affords broader protection than the opposition clause,<sup>26</sup> in part because participation activity occurs in the context of formal proceedings. Although the Supreme Court has yet to weigh in on the matter, courts that have decided the issue have held that the participation clause protects employees for activities that occur in conjunction with, or after the filing of, a formal charge of discrimination with the EEOC or an analogous state agency.<sup>27</sup>

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24. 42 U.S.C. § 2000e-3(a) (2006) (emphasis added).

25. See *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2525 (2013) (explaining that Title VII's anti-retaliation provision protects "the employee's opposition to employment discrimination, and the employee's submission of or support for a complaint that alleges employment discrimination").

26. See *Deravin v. Kerik*, 335 F.3d 195, 203, 203 n.6 (2d Cir. 2003) (noting that the opposition clause is narrower than the participation clause and that courts have held that the participation clause, which protects participation in any manner, "is expansive and seemingly contains no limitations"); *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1312 (6th Cir. 1989) (recognizing that "courts have generally granted less protection for opposition than for participation in enforcement proceedings"); *Sias v. City Demonstration Agency*, 588 F.2d 692, 695 (9th Cir. 1978) ("The opposition clause . . . serves a more limited purpose [than the participation clause].").

27. See, e.g., *Crawford v. Metro. Gov't of Nashville and Davidson Cnty. Tenn.*, 555 U.S. 271, 275, 280 (2009) (declining to address Sixth Circuit holding that participation clause applies only upon filing of a discrimination complaint with the EEOC); *EEOC v. Total Sys. Servs. Inc.*, 221 F.3d 1171, 1174 n.2 (11th Cir. 2000) ("[S]ome employee must file a charge with the EEOC (or its designated representative) or otherwise instigate proceedings under the statute for the conduct to come under the participation clause."); *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 581 (6th Cir. 2000) (noting that to establish a prima facie case of retaliation under the participation clause, plaintiff must show that "he filed a claim with the EEOC"); *Booker*, 879 F.2d at 1313 (holding that the participation clause applies when administrative proceedings are instituted and lead to the filing of a complaint or charge, and this includes a visit to a government agency to inquire about filing a charge); *Aguilar v. Arthritis Osteoporosis Ctr.*, No. M-03-243, 2006 WL 2478476, at \*6 (S.D. Tex. Aug. 25, 2006) (collecting cases). In some courts, informing one's employer of an intent to file a charge also implicates the participation clause. *Hashimoto v. Dalton*, 118 F.3d 671, 680 (9th Cir. 1997) (plaintiff's act of informing her employer about her intent was sufficient to trigger the participation clause). Participation in an employer's internal investigation into allegations of discrimination conducted apart from a formal charge filed with an administrative agency does not typically fall within the scope of participation clause protection. See *Aguilar*, 2006 WL 2478476, at

The participation clause offers broad protection from retaliation to ensure that employers cannot coerce employees into foregoing the Title VII grievance procedure and to ensure that EEOC investigators will have access to the unchilled testimony of witnesses.<sup>28</sup> The EEOC principally relies on employees who are willing to file charges of discrimination with the agency to bring alleged discrimination to its attention.<sup>29</sup> Because the EEOC—the agency Congress created to enforce Title VII—depends primarily on the charge alleging discrimination to function, it is imperative that employees feel free to file charges with the EEOC about perceived discrimination without fear of retaliation. Accordingly, protection under the participation clause is necessarily broad because it is “essential to the machinery set up by Title VII” to root out and eliminate workplace discrimination.<sup>30</sup>

That Congress intended the participation clause to offer broad protection is also reflected in its language. The clause protects employees or applicants from discrimination if they have “participated *in any manner* in” a Title VII action.<sup>31</sup> The phrase “in any manner” has been interpreted liberally or at least expansively by most courts.<sup>32</sup> While authority on the issue is split, many courts hold that an employee is protected even if the charge lacks merit or contains allegations that are wrong, defamatory or malicious.<sup>33</sup>

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\*6–7 (collecting cases).

28. See, e.g., *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006) (explaining the need for a broad interpretation of the participation clause because the statute’s effectiveness depends on “employees who are willing to file complaints and act as witnesses,” and employees must feel “free to approach officials with their grievances” (citations omitted)).

29. See Joseph Kattan, *Employee Opposition to Discriminatory Employment Practices: Protection From Reprisal Under Title VII*, 19 WM. & MARY L. REV. 217, 226–27 (1977) (“Because the EEOC, with certain exceptions, investigates allegations of [discrimination] only upon the filing of a charge with the EEOC by or on behalf of an aggrieved party, the agency relies on individual initiative as a significant aid to enforcement.”).

30. *Laughlin v. Metro. Wash. Airport Auth.*, 149 F.3d 253, 259 n.4 (4th Cir. 1998). See also Kattan, *supra* note 29, at 224 (“Congress created an elaborate statutory framework, administered by the EEOC, that was designed to eliminate employment discrimination.”).

31. 42 U.S.C. § 2000e-3(a) (2006) (emphasis added). See also *Laughlin*, 149 F.3d at 259; *Booker*, 879 F.2d at 1312 (“The ‘exceptionally broad protection’ of the participation clause extends to persons who have ‘participated in any manner’ in Title VII proceedings.” (citations omitted)).

32. See, e.g., *Booker*, 879 F.2d at 1312 (6th Cir. 1989) (applying broad interpretation of “in any manner”).

33. *Booker*, 879 F.2d at 1312 (citing *Pettway v. Am. Cast Iron Pipe Co.*, 411 F.2d 998, 1007 (5th Cir. 1969)). See also *Deravin v. Kerik*, 335 F.3d 195, 203 (2d Cir. 2003) (allowing for protection where plaintiff’s complaint was inaccurate due to what he claimed was administrative error); *Sias v. City Demonstration Agency*, 588 F.2d 692, 695 (9th Cir. 1978) (participation clause shields an employee from retaliation even if the charge lacks any merit); *Pettway*, 411 F.2d at 1005–07 (explaining that because of the purposes underlying the participation clause, employees filing charges with EEOC deserve broad protection from retaliation even if the charge contains allegations that later proved to be untrue or malicious); *Booth v. Pasco Cnty.*, 829 F. Supp. 2d 1180, 1200–01

That the participation clause protects individuals from retaliation regardless of the merits of the charge is also implied by the statute's enforcement provision. Under that provision, Congress left it to the EEOC and not employees to establish the merit of a charge. After a charge is filed, the statute directs the EEOC, among other things, to conduct an investigation of the charge to determine whether there is "reasonable cause" to believe the charge is true.<sup>34</sup> In conducting its investigation to make that determination, the EEOC's authority is broad. It may, among other things, copy evidence in the possession of the employer, interview employees, issue subpoenas and seek judicial enforcement of those subpoenas.<sup>35</sup> It seems obvious that an employee who suspects discrimination has occurred, yet has none of the investigative tools that are at the EEOC's disposal, should be able to file a charge with the agency with some measure of protection without knowing if the charge has merit. The Supreme Court has recognized as much, explaining that under Title VII "an aggrieved private party" is not "held to any prescribed level of objectively verifiable suspicion at the outset of the enforcement procedure. . . . [T]he determination whether there [is] any basis to the[] allegations of discrimination [is] postponed until after the Commission ha[s] completed its inquiries."<sup>36</sup>

Thus, the lower courts have been correct to protect employees from retaliation under the participation clause regardless of the merits of a charge. The scope of protection under the opposition clause, however, has been heavily debated and is less clear from the statute's text.

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(M.D. Fla. 2011) (declining to read a good faith and reasonableness requirement into the participation clause in light of *Pettway*, which declined any such standard, and cataloguing the weight of authority that has been "sympathetic to the *Pettway* rule"); *Ayala v. Summit Constructors, Inc.*, 788 F. Supp. 2d 703, 721 (M.D. Tenn. 2011) (recognizing that courts are split on the issue of a good faith, reasonable standard under the participation clause, and declining to adopt such a standard). *But see* *Mattson v. Caterpillar, Inc.*, 359 F.3d 885, 890–91 (7th Cir. 2004) (holding that claims that are baseless or lacking good faith do *not* deserve protection under the participation clause); *Moore v. City of Phila.*, 461 F.3d 331, 341 (3d Cir. 2006) (suggesting that under either the opposition or participation clause, to be protected from retaliation, a plaintiff "must hold an objectively reasonable belief, in good faith, that the activity [he] oppose[s] is unlawful under Title VII" (citation omitted)).

34. 42 U.S.C. § 2000e-5(b) (2006).

35. *Id.* § 2000e-8(b). The EEOC has all the powers conferred upon the National Labor Relations Board to determine whether there is reasonable cause to believe the charge has merit. *See id.* § 2000e-9 (noting that in the context of its investigations, the EEOC has the authority set forth in 29 U.S.C. § 161, which grants the NLRB its authority).

36. *EEOC v. Shell Oil Co.*, 466 U.S. 54, 76–77 (1984) (emphasis added). Although the Court did not say so, it would appear from the context of the statement that the Court meant that an employee is not required to hold a *reasonable* basis that the charge has merit when it is filed, as that is for the EEOC to determine. *See id.*

## B. *Opposition Clause*

Complaints about discrimination that are not made in conjunction with an EEOC charge are protected, if at all, under the opposition clause. The clause is generally considered to protect employees who complain informally about discrimination by, for instance, raising the issue of alleged discrimination directly with an employer.<sup>37</sup> The opposition clause is worded more narrowly than the participation clause. Unlike its sister clause, it does not protect employees who oppose unlawful discrimination *in any manner*.<sup>38</sup> Congress arguably intended to place some limits on the circumstances in which employees are protected for protesting alleged discriminatory practices in the workplace. However, neither the statute's text nor its legislative history indicates how far protection should extend.<sup>39</sup> It left that task to the courts.<sup>40</sup>

### 1. Conditioning Protected Opposition

#### a. The Manner in Which Opposition Is Expressed

There are many reasons why an employee's opposition to alleged

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37. See, e.g., Brake & Grossman, *supra* note 14, at 914 (explaining courts that have recognized the opposition clause encourage employees to bring suspected discrimination to the attention of employers before involving the courts and the EEOC). Employees also may oppose alleged unlawful discrimination other than by directly raising it with employers. See e.g., *Adams v. Northstar Location Servs.*, No. 09-CV-1063-JTC, 2010 WL 3911415, at \*4 (W.D.N.Y. Oct. 5, 2010) (opposition conduct may include "making complaints to management, writing critical letters to customers, protesting against discrimination by industry, and expressing support of co-workers who have filed formal charges").

38. See 42 U.S.C. § 2000e-3(a) (2006).

39. See Kenneth T. Lopatka, *Protection Under the National Labor Relations Act and Title VII of the Civil Rights Act for Employees Who Protest Discrimination in Private Employment*, 50 N.Y.U. L. REV. 1179, 1183, 1183 n.22 (1975) (stating "the legislative history of the 1964 Civil Rights Act does not help to define the contours of the section 704(a) right to 'oppose,' a right theretofore not included in the anti-reprisal provisions of any federal labor statute[]") and providing a detailed legislative history of the "opposed" language in the anti-retaliation provision); Kattan, *supra* note 29, at 218 ("The Act's legislative history indicates only that Congress gave scant attention to the provision."); see *id.* at 222 (noting that Congress gave "cursory consideration or appreciation" to the impact of the anti-retaliation provision of Title VII); see also *Sias v. City Demonstration Agency*, 588 F.2d 692, 695 n.4 (9th Cir. 1978) ("The legislative history sheds no light on Congress' intention behind the opposition clause."); *Hochstadt v. Worcester Found. for Experimental Biology*, 545 F.2d 222, 230 (1st Cir. 1976) (explaining that legislative history does not address what Congress intended by the term "oppose. . . . The statute says no more, and the committee reports on the Civil Rights of 1964 and the Equal Employment Opportunity Act of 1963, which later became Title VII of the Civil Rights Act, repeat the language of 704(a) without any explanation. . . . [t]he proceedings and floor debates over Title VII are similarly unrevealing." (citations omitted)).

40. *Hochstadt*, 545 F.2d at 230.

unlawful discrimination might fail to qualify as statutorily protected activity. For instance, it has long been held that the manner in which an employee engages in opposition may stymie protection. To determine whether opposition conduct is protected, courts balance the Act's purpose of protecting individuals engaging in reasonable opposition activities against Congress's desire not to tie the hands of employers in selecting, controlling, and disciplining personnel.<sup>41</sup> Where exactly the line is drawn between protected and unprotected opposition conduct is not precise. Certain acts, however, have been held to be beyond the pale of protection, including conduct that is unlawful,<sup>42</sup> violent,<sup>43</sup> disloyal and a breach of trust,<sup>44</sup> or

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41. See *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1312 (6th Cir. 1989) (noting employees are not protected when they violate legitimate employer rules and orders, disrupt the employment environment, or interfere with the employer's goals); *Laughlin v. Metro. Wash. Airports Auth.*, 149 F.3d 253, 257 (4th Cir. 1998) (explaining the test under the opposition clause "balances the purpose of the Act to protect persons engaging in reasonable activities opposing discrimination, against Congress' desire not to prevent employers from legitimately disciplining their employees"); see also *Shoaf v. Kimberly-Clark Corp.*, 294 F. Supp. 2d 746, 755 (M.D.N.C. 2003) (holding that employee's action providing confidential information to another employee who had filed a discrimination claim against their employer was not protected opposition under Title VII; the employee supplying the information breached the employer's trust and confidence).

42. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 803 (1973) (noting that "[n]othing in Title VII compels an employer to absolve and rehire one who has engaged in such deliberate, unlawful activity against it" in reference to a plaintiff who was arrested and pleaded guilty to a charge of obstructing justice while protesting employer); *Laughlin*, 149 F.3d at 259 n.3 (collecting cases that stand for the proposition that "[i]t is black letter law that illegal actions are not protected activity under Title VII").

43. See *Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 567 (2d Cir. 2000) (slapping coworker in response to alleged sexual harassment was not protected activity).

44. See, e.g., *Laughlin*, 149 F.3d at 259–60 (holding that employee who, unbeknownst to her supervisor, took from his desk "sensitive personnel documents" about another employee's discrimination action, copied them and sent them to the other employee did not engage in protected opposition conduct as her actions breached her employer's trust); *O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 763–64 (9th Cir. 1996) (holding an employee did not engage in protected activity when he "committed a serious breach of trust, not only in rummaging through his supervisor's office for confidential documents, but also in copying those documents and showing them to a co-worker"); *Jennings v. Tinley Park Cmty. Consol. Sch. Dist. No. 146*, 864 F.2d 1368, 1375 (7th Cir. 1988) (employee's "unreasonable conduct" was not protected activity when she went above supervisor's head regarding a salary dispute in a "deliberate attempt[] to undermine a superior's ability to perform his job"); *Hochstadt*, 545 F.2d at 227–28, 234 (employee's actions "constituted serious acts of disloyalty" and thus were unprotected conduct when employee, among other things, interrupted meetings, spread unfounded rumors about her employer, permitted a local reporter to examine files containing confidential salary information and incurred nearly \$1,000 in charges on her employer's telephones for personal calls to her lawyers). But see *EEOC v. Crown Zellerbach Corp.*, 720 F.2d 1008, 1014–15 (9th Cir. 1983) (noting that all opposition is "in some sense disloyal" and that disloyalty alone would not strip protection against retaliation and distinguishing *Hochstadt* because in that case the plaintiff's actions were not only disloyal but "resulted in poor work performance by her and also in diminished performance and reduced morale in other employees who worked with her"); see also *Jennings*, 864 F.2d at 1375 ("It is doubtful whether loyalty alone can be a legitimate, nondiscriminatory reason for disciplining an employee

unduly disruptive to the workplace and working relationships.<sup>45</sup>

Aside from denying protection based on the manner in which opposition is expressed, more recently, some courts also have denied protection for opposition that is non-purposive.<sup>46</sup> In other words, unless the employee challenges alleged discrimination with the purpose of eliminating or remedying it, she has not engaged in protected activity. For example, an employee complaint about discrimination made to a coworker in passing that happens to make its way back to a supervisor would *not* be protected conduct if the supervisor takes adverse action against the employee because of it.<sup>47</sup>

#### b. Belief about the Unlawfulness of the Conduct Opposed

In addition to the conditions placed on the manner of expressing protected opposition noted above, an employee must also hold a reasonable belief about the unlawfulness of the complained-of conduct in order to be protected by the opposition clause. Courts that have analyzed the text of the clause have concluded that its “plain meaning” bars an employer from retaliating against an employee because she has opposed “an actual unlawful employment practice.”<sup>48</sup> Reading the statute in this manner would require a plaintiff to plead and prove not only that she was retaliated against for opposing unlawful discrimination, but also to prove that the underlying practice she opposed was, in fact, unlawful under Title VII. In Title VII’s early days, several district courts read the statute in this manner.<sup>49</sup> That

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engaged in opposition to an unlawful employment practice.”).

45. See *Hochstadt*, 545 F.2d at 227–28 (finding employee’s numerous acts of opposition disrupted the working environment and undermined working relationships).

46. See *Pitrolo v. County of Bucombe*, No. 07-2145, 2009 WL 1010634, at \*3 (4th Cir. Mar. 11, 2009) (holding that plaintiff’s non-purposive complaints of gender discrimination made to her father did not constitute protected activity even if her employer learned of the complaint); see also *Crawford v. Metro. Gov’t of Nashville and Davidson Cnty. Tenn.*, 555 U.S. 271, 281 (2009) (Alito, J., concurring) (arguing that the opposition clause should be interpreted to protect only purposive conduct).

47. See *supra* note 46.

48. See, e.g., *Jordan v. Alt. Res. Corp.*, 458 F.3d 332, 338 (4th Cir. 2006) (“The plain meaning of the statutory language provides protection of an employee’s opposition activity when the employee responds to an actual unlawful employment practice.”); *Payne v. McLemore’s Wholesale & Retail Stores*, 654 F.2d 1130, 1137 (5th Cir. 1981) (considering and rejecting the proposition that the opposition clause requires proof that an actual unlawful employment practice occurred); *Sias v. City Demonstration Agency*, 588 F.2d 692, 695 (9th Cir. 1978) (explaining that, by its terms, the opposition clause “could be said to be limited to cases where the employer has in fact engaged in an unlawful employment practice”).

49. See *EEOC v. C&D Sportswear Corp.*, 398 F. Supp. 300, 306 (M.D. Ga. 1975) (rejecting

interpretation has now been rejected by every federal court of appeals to decide the issue. Instead, those courts have adopted the reasonable belief standard.<sup>50</sup>

At the outset, conditioning the viability of a retaliation claim on a determination (presumably by a court or jury) that the alleged underlying discrimination is actually unlawful would be extremely unfair to employees. As one commentator has remarked “[t]he complexity of the law and of various factual situations surrounding discrimination make an employee’s correct assessment of the merits of his claim difficult in all but the most egregious instances of discrimination.”<sup>51</sup> Predetermining what employment

plaintiff’s retaliation claim, and holding that text of the statute requires plaintiff to complain about discrimination that is “well-founded”; otherwise plaintiffs complain about discrimination at their peril); *see also* *Kinard v. Nat’l Supermarkets, Inc.*, 458 F. Supp. 106, 111 (S.D. Ala. 1978) (relying on *C&D Sportswear* for proposition that even assuming employee was retaliated against for opposing discrimination, “she would not be protected under [Title VII] because the employment practice she opposed was not unlawful”); *Winsey v. Pace Coll.*, 394 F. Supp. 1324, 1331 (S.D.N.Y. 1975) (explaining that the employment practice “which [the] plaintiff opposes must be, when engaged in, unlawful under Title VII in order to support a later charge of retaliation”); *cf.* *Berg v. La Crosse Cooler Co.*, 612 F.2d 1041, 1043 (7th Cir. 1980) (reversing grant of summary judgment to employer; district court granted judgment for employer after the Supreme Court, in another case, held that the same practice the plaintiff opposed in this case did not violate Title VII).

50. *See* *Wyatt v. Boston*, 35 F.3d 13, 15 (1st Cir. 1994) (protected opposition requires both subjective good faith and objective reasonable belief that challenged practice violated Title VII); *Wimmer v. Suffolk Cnty. Police Dep’t*, 176 F.3d 125, 134 (2d Cir. 1999) (protected opposition requires only a good faith, reasonable belief that the challenged practice was unlawful); *Moore v. City of Phila.*, 461 F.3d 331, 341 (3d Cir. 2006) (“Whether the employee opposes, or participates in a proceeding against, the employer’s activity, the employee must hold an objectively reasonable belief, in good faith, that the activity they oppose is unlawful under Title VII.” (citation omitted)); *Jordan*, 458 F.3d at 337–38 (4th Cir. 2006) (opposition activity is protected when it responds to an employment practice that the employee in good faith reasonably believes is unlawful); *Payne*, 654 F.2d at 1137 (considering and rejecting the proposition that the opposition clause requires proof that an actual unlawful employment practice had occurred); *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 579 (6th Cir. 2000) (opposition must be based on a good faith, reasonable belief about the unlawfulness of an employer’s action); *Tate v. Exec. Mgmt. Servs. Inc.*, 546 F.3d 528, 532 (7th Cir. 2008) (reasonable, good faith belief is required); *Barker v. Mo. Dep’t of Corr.*, 513 F.3d 831, 834 (8th Cir. 2008) (opposition is protected if employee had good faith, objectively reasonable belief that practices were unlawful); *Sias*, 588 F.2d at 695 (“When an employee reasonably believes that discrimination exists, opposition thereto is opposition to an employment practice made unlawful by Title VII even if the employee turns out to be mistaken as to the facts.” (citations omitted)); *Crumpacker v. Kan. Dep’t of Human Res.*, 338 F.3d 1163, 1172 (10th Cir. 2003) (holding that employee must hold both good faith and objectively reasonable belief about unlawful discrimination to be protected from retaliation); *Weeks v. Harden Mfg. Corp.*, 291 F.3d 1307, 1311–12 (11th Cir. 2002) (to engage in protected activity, an employee only has to show a good faith, reasonable belief that the employer committed unlawful discrimination); *Parker v. Balt. & Ohio R.R. Co.*, 652 F.2d 1012, 1020 (D.C. Cir. 1981) (“[A]n employee seeking the protection of the opposition clause [must] demonstrate a good faith, reasonable belief that the challenged practice violates Title VII.” (citations omitted)).

51. *Kattan*, *supra* note 29, at 228; *see also* *Gorod*, *supra* note 20, at 1490–91 (noting that

practices a court might hold unlawful or what conduct a trier of fact might determine to be unlawful under Title VII is guesswork.<sup>52</sup> While it undoubtedly still occurs, the instances of an employer announcing it will not hire an individual because of her race, sex, religion, or national origin are thankfully much rarer than they used to be.<sup>53</sup> Because most cases of employer conduct will be much less clear-cut, courts' decisions are not often predictable. For the aforementioned reasons, to the extent courts have correctly determined that, literally read, the opposition clause requires employees to prove that the complained-of conduct is unlawful, courts have been correct to reject that interpretation.

## 2. Rejecting a Literal Interpretation of the Clause

Undoubtedly, the Supreme Court's most recent method of statutory interpretation emphasizes the primacy of a statute's text over its purposes in giving its language meaning.<sup>54</sup> However, the Court has held that it is appropriate to look beyond the statute's language in search of meaning when

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judges and scholars have a difficult time determining what constitutes harassment and if they cannot do so, "how are workers supposed to anticipate how the courts will define it in any given case").

52. Two concepts are at play here. On the one hand, a court may hold that certain practices are not unlawful under Title VII. See, e.g., *Weeks*, 291 F.3d at 1315 (requiring employees to arbitrate employment discrimination disputes was not an unlawful employment practice violative of Title VII); *Wimmer*, 176 F.3d at 134–35 (affirming dismissal of plaintiff's Title VII retaliation claim where plaintiff police officer protested alleged discriminatory comments and conduct by co-employees against non-employee minority citizens; plaintiff failed to show discrimination affected the terms and conditions of employment, which is the only type of conduct Title VII bars). On the other hand, a particular employment practice may be unlawful (e.g., racial harassment), but the employee must then show that the particular conduct complained of or facts in her case rise to the level of an actionable claim. See, e.g., *Jordan*, 458 F.3d at 338–40 (holding that plaintiff failed to show that one racist, crude comment could result in a reasonable belief the plaintiff had suffered a racially hostile work environment).

53. See Pat K. Chew, *Seeing Subtle Racism*, 6 STAN. J. CR. & C.L. 183, 199 (2010) ("Instances of blatant and explicit racial discrimination . . . unfortunately still occur—but much less frequently. Employment discrimination cases prohibiting expressly racist employment decisions, as well as evolving social norms in our language and conduct, help to explain [the] decline . . .").

54. See, e.g., Robert J. Gregory, *Overcoming Text in an Age of Textualism: A Practitioner's Guide to Arguing Cases of Statutory Interpretation*, 35 AKRON L. REV. 451, 455–60 (2002) (explaining that for much of the twentieth century, "the predominate view of statutory interpretation emphasized the statute's purpose more so than literal textual meaning" but beginning in the 1980s an interpretative methodology described as "new textualism" took hold; text "is not merely a means to an end . . . in ascertaining congressional intent; . . . it is the end itself"); see also Alex Long, *Employment Retaliation and the Accident of Text*, 90 OR. L. REV. 525, 531 (2011) (explaining that while courts at one time were willing to "gloss over statutory language" that was inconsistent with the statute's purpose, a textualist approach to interpretation began to arise in the 1980s and 1990s and "[e]ven the devoted purposivist Justices on the Court now feel compelled to emphasize text at the expense of legislative purpose").



“the effect of implementing the ordinary meaning would be ‘patently absurd’ or the result would be demonstrably at odds with the intention of its drafters.”<sup>55</sup> Protecting employees against retaliation for only those practices that are determined by judge or jury to be unlawful would be patently at odds with congressional intent, Title VII’s purposes, and the Court’s interpretation of the statute. Specifically, such an interpretation would hamper informal resolution of claims and undermine both the statute’s objective of avoiding harm as well as the anti-retaliation provision’s principal purpose of maintaining unfettered access to Title VII’s statutory remedial mechanisms.

#### a. Informal Resolution of Claims

First, tying a retaliation claim to the success of the underlying discrimination claim would undermine Congress’s desire to have workplace discrimination disputes resolved by informal resolution instead of litigation.<sup>56</sup> That Congress intended to eliminate workplace discrimination via informal resolution in the first instance is evidenced by Title VII’s statutory scheme, which encourages conciliation rather than litigation.<sup>57</sup> If, after investigating charges of discrimination, the EEOC determines that there is reasonable cause to believe the charge is true, it must attempt to resolve the charge through informal methods of conference, conciliation, and persuasion.<sup>58</sup> The EEOC may sue the employer in court only if those informal methods fail.<sup>59</sup> Incentivizing the informal resolution of claims, however, is achievable outside of the formal proceedings before the EEOC

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55. Gregory, *supra* note 54, at 464; *see also* United States v. Ron Pair Enters., Inc., 489 U.S. 235, 242 (1989) (“The plain meaning of legislation should be conclusive, except in the ‘rare case [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.’” (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982))).

56. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764 (1998) (explaining that Congress intended “to promote conciliation rather than litigation in the Title VII context”).

57. *See* EEOC v. Shell Oil Co., 466 U.S. 54, 77–78 (1984) (stating the one goal of Congress under Title VII was that violations of Title VII could be resolved without entering the court system).

58. *See* 42 U.S.C. § 2000e-5 (2006) (“If the Commission determines after . . . investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.”).

59. *See id.* § 2000e-5(f)(1) (explaining that EEOC may file a civil action if it has been unable to secure an acceptable conciliation agreement); *see also* Shell Oil, 466 U.S. at 63–64 (explaining that if informal resolution measures fail, the EEOC is “empowered to bring a civil action against the employer”); *see also* EEOC v. Great Atl. & Pac. Tea Co., 735 F.2d 69, 72 n.2 (3d Cir. 1984) (explaining The Civil Rights Act of 1964 empowered the EEOC to bring civil claims against a party if conciliation of the charges of discrimination could not be reached).

because of the opposition clause.<sup>60</sup> Without broad protection from retaliation under the opposition clause, an employee would have no incentive to bring perceived discrimination to the attention of an employer and thereby affording the employer the opportunity to correct the problem.<sup>61</sup> Requiring an employee to be absolutely certain about the merits of perceived discrimination before protecting her from retaliation is inconsistent with the goal of informal resolution of claims. Rather than report discrimination to her employer, the employee would be forced to run to the EEOC in the first instance where she would be protected under the participation clause regardless of the ultimate merits of her claim.<sup>62</sup> While legislative history of the anti-retaliation provision is sparse,<sup>63</sup> the opposition clause demonstrates Congress's intent to encourage employees and employers to try to resolve alleged workplace discrimination, quite literally, before making a federal case out of it.<sup>64</sup>

## b. Avoiding Harm

Tying the retaliation claim to underlying discrimination would also undermine Title VII's primary objective: to prevent or avoid the harm caused by unlawful discrimination.<sup>65</sup> The Court has articulated this objective in several decisions interpreting Title VII.<sup>66</sup> That objective has led the Court to interpret Title VII in ways that encourage employers to educate

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60. See *Parker v. Balt. & Ohio R.R. Co.*, 652 F.2d 1012, 1019 (D.C. Cir. 1981) (“[B]y extending protection to employees who oppose discriminatory practices without recourse to the EEOC, Congress encouraged voluntary internal attempts to remedy discrimination.”); see also *Brake & Grossman*, *supra* note 14, at 914 (explaining that courts have “recognized the importance of providing protection from retaliation under the opposition clause in order to encourage employees to seek to resolve . . . disputes informally, before involving the courts and the EEOC.”); *Gorod*, *supra* note 20, at 1507–08 (“[T]he very existence of the opposition clause suggests Congress’ interest in promoting informal, internal resolution of disputes under Title VII.”).

61. *Gorod*, *supra* note 20, at 1470.

62. *Id.* See also *Berg v. La Crosse Cooler Co.*, 612 F.2d 1041, 1046 (7th Cir. 1980) (explaining that a literal interpretation of the opposition clause would “tend to force employees to file formal charges rather than seek conciliation or informal adjustment of grievances” (quoting *Sias v. City Demonstration Agency*, 588 F.2d 692, 695 (9th Cir. 1978))).

63. *Lopatka*, *supra* note 39, at 1183; *Kattan*, *supra* note 29, at 218.

64. See *Sias*, 588 F.2d at 695 (adopting the reasonable belief standard because “[i]t should not be necessary for an employee to resort immediately to the EEOC or similar State agencies in order to bring complaints of discrimination to the attention of the employer with some measure of protection”).

65. See *Faragher v. City of Boca Raton*, 524 U.S. 774, 806 (1998) (noting the primary objective of Title VII is to avoid harm).

66. See *Crawford v. Metro. Gov’t of Nashville and Davidson Cnty. Tenn.*, 555 U.S. 271, 279 (2009); *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526, 545 (1999); *Faragher*, 524 U.S. at 805–06.

themselves and their employees about Title VII's prohibitions and implement anti-discrimination programs, including effective employee grievance procedures, that serve to prevent discrimination from occurring and serve to correct alleged discriminatory practices promptly when they come to light.<sup>67</sup> To achieve the objective, the Court has indicated that employees should report alleged discrimination to their employers and report it early. The objective underlies an affirmative defense the Court created from whole cloth in two seminal cases addressing hostile work environment sexual harassment, *Burlington Industries v. Ellerth*<sup>68</sup> and *Faragher v. City of Boca Raton*.<sup>69</sup> The *Ellerth-Faragher* affirmative defense demonstrates why a literal interpretation of the opposition clause is contrary to Title VII's main objective.

In instances where alleged harassment is committed by a supervisor, an employer is entitled to assert the affirmative defense as long as the harassment does not culminate in a tangible employment action<sup>70</sup>—i.e., “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.”<sup>71</sup> The defense requires a showing of two elements: “(a) that the employer exercised reasonable care to prevent and correct promptly any . . . harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”<sup>72</sup> In explaining its rationale for the affirmative defense, the Court noted that it advances the statute's primary objective of avoiding harm by recognizing the employer's affirmative obligation to prevent alleged statutory violations from occurring and gives credit to employers who make reasonable efforts to discharge their duties.<sup>73</sup> The defense also advances the objective of avoiding harm by requiring the employee to promptly report alleged harassment.<sup>74</sup> Although neither *Ellerth* nor *Faragher* addressed the

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67. See *Kolstad*, 527 U.S. at 544–45 (discussing the incentive Title VII provides employers to implement anti-discrimination programs).

68. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

69. *Faragher*, 524 U.S. at 775.

70. See *Ellerth*, 524 U.S. at 761–62, 765 (explaining that employers are only liable for a supervisor's “tangible employment decision[s]” inflicted upon subordinate employees; and the lack of a tangible action creates an affirmative defense for the employer).

71. *Id.* at 761.

72. *Faragher*, 524 U.S. at 807.

73. See *id.* at 806–07 (explaining that the statute's “primary objective” is to prevent harm, rather than redress harm, by “encouraging forethought by employers”).

74. See *id.* (barring recovery for plaintiffs who do not use the employer's complaint procedures to report harassment); see also Gorod, *supra* note 20, at 1506 (“The Supreme Court's language [in

scope of the opposition clause, the affirmative defense articulated in those cases presupposes that the employee will be afforded broad protection from retaliation for reporting perceived harassment.<sup>75</sup> Otherwise, the employee would have no incentive to take advantage of the employer's grievance mechanism.<sup>76</sup> Requiring the employee to be certain she is challenging an actual hostile work environment before protecting her from retaliation would undermine the principle of avoiding harm that forms the basis for the affirmative defense.<sup>77</sup> It would have the opposite effect. An employee would be more likely to endure the harm of discrimination if she knew that complaining might result in termination if she is mistaken about the merits of her claim.<sup>78</sup>

Indeed, it is particularly in the context of a hostile work environment that certainty presents difficulties. As explained earlier, determining when conduct will satisfy the standard of an actual statutory violation is guesswork.<sup>79</sup> That is no more evident than with regard to hostile work environment claims. The Supreme Court has recognized as much. A hostile work environment claim often arises from a series of conduct that alone may not suffice to violate the statute but cumulatively might do so.<sup>80</sup> The point at which abusive conduct becomes actionable, or in hostile work environment terms, the point at which it becomes "sufficiently severe or pervasive to alter the terms and conditions of employment," by its nature, is not "a mathematically precise test."<sup>81</sup> One commentator has explained hostile work environment in the following way:

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*Faragher and Ellerth*] could not be clearer. Employees should report sexual harassment not only early, but before it is even harassment.").

75. See *Crawford v. Metro. Gov't. of Nashville and Davidson Cnty. Tenn.*, 555 U.S. 271, 278–79 (2009) (explaining that broad protection under the opposition clause was necessary so as not to undermine the *Faragher–Ellerth* affirmative defense and the statute's goal to incentivize employers to strengthen investigation procedures).

76. See *id.* at 279 (arguing that decreased protection would allow employers to penalize employees for complaining about harassment).

77. See *id.* (noting that employees would not complain about harassment if extensive evidence and investigation was required to prevent termination for voicing concern).

78. See *id.* (pointing out that an employee's fear of retaliation is already "the leading reason why people stay silent instead of voicing their concerns about bias and discrimination" (quoting Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 20 (2005))).

79. See discussion *supra* Part II.B.1.b.

80. See *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115 (2002) ("Hostile environment claims are different in kind from discrete acts. Their very nature involves repeated conduct. . . . Such claims are based on the cumulative effect of individual acts.").

81. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21, 23 (1993) (explaining that determining the required hostility and abuse requires examination of circumstances unique to each case).

[T]heir beginnings may be inappropriate, but not unlawful. Thus, this context seems to threaten to produce a high number of false positives, or situations in which members of the general public might assume that conduct was unlawful even though the conduct clearly is not unlawful under well-established case law.<sup>82</sup>

Considering the difficulty in determining the moment when, if at all, harassing conduct rises to the level of being actually unlawful, it would set up an employee for failure to permit her to only challenge a hostile work environment informally without fear of retaliation when she is absolutely certain about the validity of the claim.

### c. Access to Title VII's Statutory Remedial Mechanisms

Requiring an employee to show she is challenging an unlawful employment practice would also undermine the principal purpose of the anti-retaliation provision itself: to maintain unfettered access to Title VII's statutory remedial mechanisms.<sup>83</sup> The purpose is arguably most readily implicated in participation clause cases because the charge begins the process of seeking remedies for alleged statutory violations.<sup>84</sup> Title VII grants the EEOC and courts broad powers to remedy alleged discrimination.<sup>85</sup> Because filing a charge is often a precursor to pursuing those remedies, barriers that might impede the willingness of employees to file charges and to participate in EEOC proceedings would undermine the anti-retaliation provision's principal purpose.<sup>86</sup> As explained below, however, interpreting Title VII in a manner that would deter employees from making informal complaints to employers about alleged discrimination might also thwart access to statutory remedies. Such an interpretation

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82. Gorod, *supra* note 20, at 1493.

83. See *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997) (outlining importance of easy access to EEOC reporting procedures).

84. See discussion *supra* Part II.A.

85. See 42 U.S.C. § 2000e-5(g) (2006) (setting forth remedies available to employees when a court finds that an employer has engaged in unlawful discrimination; if the discrimination was intentional, then the court may award other "affirmative action as may be appropriate," including, among other things, "reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate"); 42 U.S.C. § 2000e-16(b) (2006) (listing authority of the EEOC to award "appropriate remedies" for statutory violation); 42 U.S.C. §§ 1981a(a)(1), (b)(1) (2006) (explaining entitlement to compensatory and punitive damages in cases of intentional discrimination); see also *Robinson*, 519 U.S. at 342-43 (identifying remedial mechanisms available to employees under Title VII).

86. See *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006) (explaining that Title VII depends "on employees who are willing to file complaints and act as witnesses" and effective enforcement of the statute is only possible "if employees [feel] free to approach officials").

should be rejected, consistent with recent Supreme Court decisions broadly interpreting the anti-retaliation provision in recognition of its principal purpose.

The Court repeatedly has interpreted the anti-retaliation provision broadly to effectuate its primary purpose. For instance, in *Burlington Northern & SantaFe Railway. Co. v. White*, the Court addressed, among other things, whether the phrase “discriminate against” used in the anti-retaliation provision confines itself to activity that affects the terms and conditions of employment or reaches more broadly to include adverse actions that do not directly implicate the employment relationship.<sup>87</sup> The Court held that the broader reading was proper.<sup>88</sup> In reaching its holding, the Court first noted that the anti-retaliation and substantive provisions are not coterminous, and thus, the two sections should not be read *in pari materia*.<sup>89</sup> The substantive provision, among other things, bars employers from discriminating against individuals “with respect to . . . compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”<sup>90</sup> Thus, the text limits the scope of the provision’s protection to actions that affect or alter the conditions of employment.<sup>91</sup> The anti-retaliation provision contains no such limiting language. The language merely provides that an employer may not “discriminate against” an employee because of that individual’s protected activity.<sup>92</sup> The language in the two provisions differs, and the Court presumed that “Congress intended” that difference to matter.<sup>93</sup> Moreover,

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87. See *id.* at 57 (noting a circuit split on scope of retaliation provision in Title VII).

88. See *id.* (concluding that the anti-retaliation provision covers actions that occur outside of the workplace when the actions are “materially adverse to a reasonable employee or job applicant”).

89. See *id.* at 61 (explaining that Burlington and the government, which filed an *amicus* brief, advanced the position that the two provisions should be read *in pari materia*; a position with which the Court did not agree).

90. Under 42 U.S.C. §§ 2000e-2(a)(1)–(2) (2006):

It shall be an unlawful employment practice for an employer

- (1) 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;
- or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities . . . because of such individual’s race, color, religion, sex, or national origin.

91. See *Burlington*, 548 U.S. at 62 (discussing limiting function of various words in the substantive part of Title VII’s discrimination provision).

92. See *id.* at 62 (quoting 42 U.S.C. § 2000e-3(a) (2006)) (highlighting importance of wording differences between anti-relation and anti-discrimination provisions).

93. See *id.* at 62–63 (noting wording differences in statutes create a presumption of congressional intent to create a “legal difference” between the statutes).

according to the Court, the underlying purpose of the anti-retaliation provision reinforces what the language already indicates: broader protection against retaliation than is applicable to the substantive provision.<sup>94</sup> The purposes of the substantive provision of Title VII include securing a workplace where individuals are free from discrimination based on who they are, i.e., their status.<sup>95</sup> The Court reasoned that Congress only needed to bar employment-related discrimination to secure that objective.<sup>96</sup> Conversely, the anti-retaliation provision seeks to secure Title VII's "primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts" to enforce the statute's basic guarantees.<sup>97</sup> That objective could only be achieved by eliminating the many ways an employer might stymie an employee's efforts to enforce his or her rights under the Act.<sup>98</sup> According to the Court, "[a]n employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm *outside* the workplace."<sup>99</sup> As Judge Richard Posner has colorfully put it, "[s]hooting a person for filing a complaint of discrimination would be an effective method of retaliation . . ."<sup>100</sup> Such an act would certainly deter an employee from complaining about discrimination, but would have nothing to do with the workplace in the way that docking an employee's pay or demoting him would. A limited construction of the anti-retaliation provision would thus undermine its primary purpose, which is to "[m]aintain[] unfettered access to statutory remedial mechanisms."<sup>101</sup> After all, an employee would clearly be hesitant to complain about discrimination if she knew an employer was free to retaliate against her as long as the retaliatory act did not directly affect her employment.<sup>102</sup> The Court further explained that a broad interpretation of

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94. *See id.* at 63–64 (explaining that the purpose of the anti-retaliation provision is to prevent harms based on employee conduct, and a broad category of non-employment activities must be included to achieve that purpose).

95. *Id.* at 63.

96. *Id.*

97. *Id.*

98. *See id.* at 63–64 (explaining that the anti-retaliation provision's purpose would be defeated if employers could take actions against employees that were "not directly related to" employment or occurred outside the workplace, such as filing false criminal charges or other means of harassment (citing *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 984 (10th Cir. 1996))).

99. *Id.*

100. *McDonnell v. Cisneros*, 84 F.3d 256, 259 (7th Cir. 1996).

101. *Burlington*, 548 U.S. at 64 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997) (internal quotation marks omitted)).

102. *See id.* at 63–64 (noting that employees would refrain from reporting harassment if employers could only be liable for work-related actions occurring at the workplace).

the anti-retaliation provision was necessary because Title VII depends on individuals “who are willing to file complaints and act as witnesses.”<sup>103</sup> The statute cannot be effectively enforced unless individuals feel “free to approach officials with their grievances” without fear of reprisal.<sup>104</sup>

In *Robinson v. Shell Oil*,<sup>105</sup> the anti-retaliation provision’s principal purpose led the Court to interpret the term “employee” broadly.<sup>106</sup> The issue was whether the anti-retaliation provision extended protection to former employees even though its language references only applicants and employees.<sup>107</sup> The Court acknowledged that at first blush, the term “employee” appears to refer only to persons who have an existing relationship with their employer.<sup>108</sup> However, the Court found that the term standing alone was ambiguous.<sup>109</sup> In reaching that conclusion, the Court noted that the term “employee” was not preceded by a temporal qualifier, such as former or current, in either the anti-retaliation provision or the statute’s general definition section.<sup>110</sup> Moreover, the Court considered the broader context of the statute and noted that other Title VII provisions use the term “employee” and appear to contemplate something more than a current employee. For instance, the statute authorizes a court and the EEOC to order reinstatement or hiring of employees as a remedy to unlawful discrimination.<sup>111</sup> Because an employer cannot reinstate a current employee, the term envisions that former employees would avail themselves of the statute’s remedial mechanisms.<sup>112</sup> Having found the term “employee” ambiguous, the Court determined that it was far more consistent to include former employees within the scope of employees protected from retaliation, particularly as the broader context of the statute contemplates that former employees will access Title VII’s remedies.<sup>113</sup> It would have made little sense and would have been inconsistent with Title VII’s statutory scheme to

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103. *Id.* at 67.

104. *Id.* (quoting *Mitchell v. Robert DeMario Jewelry*, 361 U.S. 288, 292 (1960)).

105. 519 U.S. 337 (1997).

106. In *Robinson*, the plaintiff alleged that his employer fired him because of his race. *Id.* at 339. He subsequently filed a charge of discrimination with the EEOC. *Id.* After doing so, he applied for another job. *Id.* The plaintiff alleged that in retaliation for his charge, his former employer gave him a negative reference when contacted by his prospective employer. *Id.*

107. *Id.* at 339–40.

108. *Id.* at 341.

109. *Id.* at 344.

110. *Id.*

111. See *id.* at 342 (referencing the text of 42 U.S.C. §§ 2000e-5(g)(1) and 2000e-16(b) (2013)).

112. See *id.*; see also *id.* at 345 (noting that “several sections of the statute plainly contemplate that former employees will make use of the remedial mechanisms of Title VII”).

113. *Id.*



interpret the statute to exclude from access to statutory remedial mechanisms a class of employees Congress clearly intended to include among the individuals who could access them. The EEOC also supported the more inclusive interpretation of “employee”, arguing that excluding former employees would provide employers a perverse incentive to fire workers who file charges of discrimination.<sup>114</sup> *Burlington Northern and Robinson* illustrate the importance of the anti-retaliation provision to Title VII’s statutory scheme. Without broad protection from retaliation, employees would be deterred from filing the charges and engaging in EEOC proceedings that provide access to the statutory remedial mechanisms available to employees aggrieved by discrimination.

A narrow, literal interpretation of the opposition clause also would undermine the provision’s principal purpose. This result is demonstrated by (again) considering hostile work environment claims. The *Ellerth–Faragher* affirmative defense has been interpreted as requiring employees to bring their grievances to the attention of employers before seeking any remedial relief for alleged discrimination that Title VII may afford.<sup>115</sup> Thus, generally, an employee who files an EEOC charge alleging hostile work environment without first taking advantage of an employer’s internal, informal grievance mechanism will likely have any subsequent lawsuit dismissed, regardless of the merits of the claim.<sup>116</sup> However, without extending broad protection from retaliation following an informal complaint, an employee has no incentive to raise suspected discrimination with her employer outside of the context of the EEOC. In another of its recent retaliation decisions, *Crawford v. Metropolitan Government of Nashville and Davidson County*,<sup>117</sup> the Court broadly interpreted Title VII’s opposition clause for this very reason.

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114. See *id.* at 346 (referencing the EEOC’s conclusion that excluding former employees would hinder the effectiveness of Title VII).

115. See *Jones v. Lakeland*, 318 F. App’x 730, 737 (11th Cir. 2008) (plaintiff’s subsequent harassment claim was barred because instead of filing a grievance under employer’s anti-discrimination and harassment policies, plaintiff filed an EEOC charge). The result is required by the holdings in *Ellerth* and *Faragher*. See, e.g., *Faragher v. City of Boca Raton*, 524 U.S. 775, 807–08 (1998) (adopting same rule as was adopted in *Ellerth* and holding that a showing that a plaintiff failed to take advantage of an employer’s grievance procedure will normally suffice to satisfy the second prong of the affirmative defense and absolve the employer of liability).

116. See *Jones*, 318 F. App’x at 733, 737 (despite hearing a daily barrage of opprobrious racial slurs by coworkers, judgment in favor of employer affirmed as plaintiff filed an EEOC charge without first taking advantage of employer’s grievance procedure); see also *Brake & Grossman*, *supra* note 14, at 915–16 (explaining that employees must use “specified employer challenges” to promptly report harassing conduct to protect their legal right to later sue for that harassment).

117. 555 U.S. 271 (2009).

*Crawford* resolved whether an employee responding to employer questions during an internal investigation about sexual harassment is opposing an unlawful employment practice.<sup>118</sup> The Court held the anti-retaliation provision protects employees in these instances.<sup>119</sup> The employer and *amici* argued that unless the bar is set high regarding the type of conduct deemed to be opposition, employers would have little incentive to investigate possible discrimination because they will want to avoid the headache of asking about possible discrimination, which could then result in liability.<sup>120</sup> The Court rejected the argument, explaining that such reasoning ignores the strong incentive employers have under the *Ellerth-Faragher* affirmative defense to ferret out and put a stop to discriminatory activity in their operations.<sup>121</sup> Further, the Court explained that the Sixth Circuit's rule would create an untenable catch-22 for employees.<sup>122</sup> If the employee speaks up in response to an employer's inquiry during an internal investigation about harassment, the employer would be free to sanction the employee without penalty.<sup>123</sup> If, however, that employee keeps quiet and later files a Title VII claim, the employer may escape liability by arguing that while it took reasonable care to prevent and correct discrimination, the employee failed to take advantage of the opportunities the employer provided during the investigation.<sup>124</sup> Moreover, the Court explained that the Sixth Circuit's rule would undermine the *Ellerth-Faragher* defense and the statute's primary objective of avoiding harm.<sup>125</sup> According to the Court, "[i]f it were clear law that an employee who reported discrimination in answering an employer's questions could be penalized with no remedy, prudent employees would have a good reason to keep quiet about Title VII offenses against themselves or against others."<sup>126</sup> The Court explained that this is no "imaginary horrible" given that the leading reason why employees fail to report discrimination is fear of retaliation.<sup>127</sup>

The Court's analysis in *Crawford* applies equally here. It would

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118. *Id.* at 273.

119. *Id.* at 284. In reaching its holding, the Court considered such factors as dictionary definitions of the term "opposed" and the EEOC's position on the issue. *Id.* at 276.

120. *See id.* at 278 (referring to these arguments as "unconvincing" given precedent).

121. *Id.*

122. *See id.* at 279 (noting that the appellate court's decision creates a "real dilemma for any knowledgeable employee in a hostile work environment if the boss took steps to assure a defense").

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

similarly undermine the effectiveness of the *Ellerth-Faragher* defense to protect employees who complain about harassment only if they are certain how a judge or jury will ultimately decide their claim. In these circumstances, employees would have good reason to keep quiet instead of bringing grievances to an employer's attention. The failure to do so would undermine the principle of avoiding harm and also strip employees of the ability to pursue statutory remedies for the alleged harassment. Thus, a literal interpretation of the provision would undermine its principal purpose of maintaining unfettered access to statutory remedial mechanisms and serves as yet another reason why such an interpretation should be rejected.

In sum, assuming the plain meaning of the opposition clause ties the success of a retaliation claim to the success of the underlying discrimination being challenged, there are sound reasons to reject that interpretation. Considering that a literal interpretation of the opposition clause would undermine congressional intent and Title VII's goals, it stands to reason that the standard used to determine when opposition will be protected should avoid such issues. As explained in the next section, however, application of the objective reasonable belief standard has raised the same concerns that gave rise to its creation.

### III. THE REASONABLE BELIEF STANDARD—A LIMITED BASELINE

#### A. *Assessing Reasonableness*

Rejecting a literal reading of the statute requires determining when an employee is protected for opposing perceived discrimination. At one time, there was no uniform standard for determining when opposition was protected. Some courts protected employees who complained about discrimination if the employee held a subjective, good faith belief that the challenged practice was unlawful.<sup>128</sup> A lack of good faith was shown if the facts demonstrated that the plaintiff alleged discrimination for reasons other than to challenge honestly perceived discrimination or knowingly engaged in

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128. See, e.g., *Love v. Re/Max of America, Inc.*, 738 F.2d 383, 385 (10th Cir. 1984) (noting that the plaintiff's good faith belief in discrimination was sufficient); *Montiero v. Poole Silver Co.*, 615 F.2d 4, 9 (1st Cir. 1984) (declining to decide whether plaintiff needed to show only that he harbored an honest or a reasonable belief about the illegality of the challenged practices but holding that plaintiff's claim failed as it did not violate Title VII and was "insincerely raised"); see also *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1313 (6th Cir. 1989) (explaining that to be protected, a plaintiff must have harbored "a good faith belief that the practice is unlawful"). See generally Rosenthal, *supra* note 20, at 1135–39 (explaining that of the courts of appeals, the Tenth Circuit consistently used a subjective good faith standard until after the Supreme Court's decision in *Clark County School Dist. v. Breeden*, 532 U.S. 268 (2001)).

outright misrepresentations in reporting the alleged discrimination.<sup>129</sup>

In addition to requiring a showing of good faith, most courts early on also required plaintiffs to demonstrate that they held a reasonable belief about the illegality of the challenged discrimination. Requiring “objective reasonableness” as a threshold for protection begs the question: by what measure does a belief satisfy that standard? Those parameters are paramount in determining how to assess reasonableness. As one commentator has explained:

While the courts of appeals seem to have largely settled on [the reasonable belief] standard, differences are starting to emerge in how that standard is applied . . . . What does it mean, one might well wonder, for an individual’s belief to be reasonable? Because the standard is . . . objective, it makes sense that there must be some baseline against which the plaintiff’s beliefs are measured, but what is the appropriate standard? Should it be the governing case law, or the general public’s views, or some other alternative altogether?<sup>130</sup>

The answer to that question among the lower federal courts appears to be the case law. That approach is supported to some degree by the Court in its only decision to date to address the matter. In *Clark County School District v. Breeden*,<sup>131</sup> the Court *did not* settle whether the reasonable belief standard is a proper interpretation of the opposition clause, but the decision nevertheless did two things: (1) it solidified the use of an objective reasonableness (versus a subjective good faith) standard as the starting point for when an employee’s belief about discrimination should count as protected opposition, and (2) it justified in some courts limiting the factors used to determine the reasonableness of an employee’s belief to case law governing the underlying complained-of conduct.

### B. *Breeden and the Case-Law Litmus Test*

In *Clark County School District v. Breeden*,<sup>132</sup> a female plaintiff whose job required that she review the psychological evaluation reports of

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129. See, e.g., *Montiero*, 615 F.2d at 9 (plaintiff did not engage in protected opposition as the district court found that his accusations of discrimination were not voiced in good faith but as a smoke screen for challenging legitimate criticism); see also *Wilson v. UT Health Ctr.*, 973 F.2d 1263, 1266 (5th Cir. 1992) (plaintiff did not engage in protected activity as facts demonstrated that she knowingly made misrepresentations in reporting alleged harassment and thus her conduct was opposite of good faith).

130. Gorod, *supra* note 20, at 1484.

131. 532 U.S. 268 (2001).

132. *Id.*

applicants, complained after her supervisor and a coworker joked about the contents of one of the reports as they were reviewing it.<sup>133</sup> The report for one applicant revealed that the individual had once told a coworker “I hear making love to you is like making love to the Grand Canyon.”<sup>134</sup> Plaintiff’s supervisor read the comment aloud, looked at her and said “I don’t know what that means.”<sup>135</sup> The other employee said “Well, I’ll tell you later.”<sup>136</sup> Both men then chuckled.<sup>137</sup> Plaintiff reported the comments to her coworker’s supervisor and to an assistant superintendent.<sup>138</sup> She further alleged that her employer retaliated against her after she reported these comments.<sup>139</sup> In her subsequent lawsuit alleging retaliation, the district court granted summary judgment in favor of the employer, which was reversed by the Ninth Circuit.<sup>140</sup> The Supreme Court granted *certiorari* and reversed the court of appeals.<sup>141</sup>

The Court explained that the Ninth Circuit extended protection against retaliation under the opposition clause to individuals who not only complain about practices that are actually unlawful under Title VII, but also to those who complain about practices an employee could reasonably believe are unlawful.<sup>142</sup> The Court did not rule on the propriety of that interpretation, but it held that even if extending protection to employees holding a reasonable belief about the unlawfulness of an action was a proper interpretation of Title VII, Plaintiff failed to meet that standard.<sup>143</sup> The Court examined Plaintiff’s claim in light of the Court’s precedent on hostile work environment claims.<sup>144</sup> A plaintiff succeeds in a hostile work environment claim by showing the challenged conduct resulted in a workplace permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the terms and conditions of the plaintiff’s employment.<sup>145</sup> Whether a work environment is sufficiently abusive for an actionable hostile work environment claim to arise is

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133. *Id.* at 269.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 269–70.

139. *Id.* at 270.

140. *Id.* at 271.

141. *Id.*

142. *Id.* at 270.

143. *See id.*

144. *See id.* at 270–71.

145. *See id.* at 270 (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 786 (1998)).

determined by considering the totality of the circumstances, including the frequency of the conduct; its severity; and whether it is physically threatening or humiliating as opposed to a mere offensive utterance.<sup>146</sup> “Teasing, offhand comments, and isolated incidents (unless extremely serious)” are typically not actionable discrimination.<sup>147</sup> The Plaintiff in *Breeden* acknowledged that she was not offended by the statement in the file and that it was part of her job to read sexually explicit statements.<sup>148</sup> Considering the substantive law, the Court held that no reasonable person could have believed this single incident amounted to a hostile work environment claim.<sup>149</sup>

The conduct challenged in *Breeden* clearly did not rise to the level of an actionable hostile work environment claim under the case law governing such claims. Whether, however, the Plaintiff might have reasonably believed the comment violated the law is another matter. In holding that the Plaintiff might have reasonably believed the challenged conduct was unlawful, the Ninth Circuit did not ignore the case law of sexual harassment. It did, however, “make[] allowance for the limited knowledge possessed by most Title VII plaintiffs about the factual and legal bases of their claims.”<sup>150</sup> The court also relied on the fact that before complaining, Plaintiff consulted the school district’s regulations concerning sexual harassment, which was described as including “uninvited sexual teasing, jokes, remarks, and questions.”<sup>151</sup> In support of her reasonableness argument, the Plaintiff pointed to those regulations in her opposition brief before the Supreme Court,<sup>152</sup> which failed to address the argument in its short opinion. Why it failed to do so is peculiar because the employer’s policies were part of the circumstances Plaintiff considered in her understanding of sexual harassment law. The regulations were a tangible factor for the Court to consider in assessing reasonableness. It is unclear why any lay employee reading the same information would not have thought that sexual jokes constituted unlawful sexual harassment.

After *Breeden*, courts universally adopted reasonableness as the standard for determining when a belief about unlawful employment

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146. See *id.* at 270–71.

147. *Id.* at 271 (quoting *Faragher*, 524 U.S. at 788).

148. *Id.*

149. *Id.*

150. *Breeden v. Clark Cnty. Sch. Dist.*, No. 99-15522, 2000 WL 991821, at \*1 (9th Cir. July 19, 2000) (internal quotations omitted), *rev’d*, 532 U.S. 268 (2001).

151. *Id.*

152. See Brief in Opposition, *Clark Cnty. Sch. Dist. v. Breeden*, 232 F.3d 893 (9th Cir. 2000), (No. 00-866), 2001 WL 476883, at \*17.

discrimination is protected.<sup>153</sup> Similar to the approach the Court took in *Breedon*, many courts solely use the facts known to the plaintiff and existing case law in applying the standard. This section examines troubling concerns with this approach to the reasonableness issue. It demonstrates that the approach raises the same concerns that gave rise to the reasonable belief doctrine.

### C. *The Trouble with Being Reasonable*

#### 1. Adopts a Summary Judgment Standard

Although retaliation protection does not require employees to actually prove that a challenged practice is actually unlawful, as Deborah Brake and Joanna Grossman note, the reasonable belief doctrine “comes perilously close to the standard for surviving summary judgment on the underlying discrimination claim.”<sup>154</sup> Under the standard, plaintiffs must possess a mastery of Title VII case law, and in some cases, must know the law as interpreted by a particular court. Holding employees to such an exacting standard before protecting them from retaliation has the potential to deter complaints, undermining the informal resolution of claims and avoidance of harm principles that gave rise to the reasonable belief standard.

To appreciate how the reasonable belief standard may deter complaints, it is important to understand the stringency with which some courts have applied it. A few examples demonstrate this point. In *George v. Leavitt*,<sup>155</sup> the D.C. Circuit rejected hostile work environment and retaliation claims of Plaintiff, a black woman from Trinidad and Tobago, who alleged that “[o]n different occasions,” she was told to “go back to Trinidad or to go back to where [she] came from.”<sup>156</sup> On other occasions, Plaintiff, an engineer, was told “she should never have been hired, and . . . to shut up.”<sup>157</sup> The court affirmed judgment against her on the hostile work environment claim, indicating that no reasonable jury could conclude she satisfied the standard

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153. See Rosenthal, *supra* note 20, at 1135–39 (explaining that prior to *Breedon*, the Tenth Circuit consistently used a good faith standard for determining protected opposition, but that after *Breedon* it joined those courts that require plaintiffs also to harbor an objective, reasonable belief about the unlawfulness of a challenged practice).

154. Brake & Grossman, *supra* note 14, at 916. See also *id.* at 928 (“An employee who complains of perceived discrimination without sufficient factual or legal support to withstand summary judgment on a legal challenge to the underlying discrimination may have no legal recourse for the retaliation that follows.”).

155. 407 F.3d 405 (D.C. Cir. 2005).

156. *Id.* at 407–08.

157. *Id.* at 408.

for a hostile work environment.<sup>158</sup> The court also held that in light of existing substantive law, she could not have reasonably believed her working environment was sufficiently abusive to constitute a hostile work environment.<sup>159</sup> The court gave no indication how many times Plaintiff should have been told to go back to Trinidad in order for her to reasonably believe she was being discriminated against because of her national origin. It also did not discuss whether Plaintiff's belief might have been bolstered by being told to shut up and questioning why she was even hired. The court appears to have affirmed judgment on the reasonable belief issue for the same reason it did on the underlying claim: a "reasonable jury" would have been unable to find in her favor.<sup>160</sup>

In *Hart v. Community Group, Inc.*, a district court dismissed a complaint alleging retaliation after concluding that the plaintiff could not have reasonably believed a coworker's sexual joke was discriminatory.<sup>161</sup> At a social, where ice cream was being served, the Plaintiff's male coworker said to her, "you look like you know what you are doing with that whipped cream. You look like you use that all the time."<sup>162</sup> Plaintiff reported the comment and was fired several days later.<sup>163</sup> The court concluded that the single offensive statement did not satisfy the standard for an actionable hostile work environment claim, which is undoubtedly true considering case law on the matter.<sup>164</sup> Relying on circuit precedent, the court also dismissed her retaliation claim. It held that the case did not involve "difficult questions regarding the interpretation or application of the law."<sup>165</sup> The court's view that hostile work environment claims do not involve complex questions about the law ignores the issue of complexity from the perspective of lay employees.<sup>166</sup>

In *Butler v. Alabama Department of Transportation*,<sup>167</sup> the Eleventh Circuit reversed a jury verdict in favor of an African-American plaintiff who

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158. *Id.* at 416-17.

159. *Id.* at 417.

160. *See id.* (explaining that plaintiff could not have reasonably believed the conduct about which she complained was discriminatory).

161. No. 3:08-CV-175, 2008 WL 1924031, at \*1 (E.D. Va. Apr. 28, 2008).

162. *Id.*

163. *Id.*

164. *Id.* at \*3.

165. *Id.* Moreover, the court explained that her belief regarding harassment may have been reasonable, pursuant to circuit precedent, had she alleged facts showing that her employer had put in place a plan to create a hostile work environment, even though the plan had not yet been fully implemented. *Id.*

166. *See supra* note 51 and accompanying discussion.

167. 536 F.3d 1209 (11th Cir. 2008).



alleged that several adverse actions were taken against her after she reported that a white coworker had used racist language in her presence. Plaintiff and her coworker, Karen Stacey, who was white, were going to lunch together when Stacey's vehicle collided with another vehicle driven by an African-American man.<sup>168</sup> Stacey turned to Plaintiff and asked: "Did you see that stupid mother fucking nigger hit me?"<sup>169</sup> She later added, "Look at . . . that stupid ass nigger down there [] trying to direct traffic."<sup>170</sup> Plaintiff attempted to report this behavior to her immediate supervisor, who told her he did not want to hear it.<sup>171</sup> However, after the supervisor learned of the behavior, Plaintiff suffered several adverse actions, including having previously approved leave revoked.<sup>172</sup> A jury determined that her employer in fact had retaliated against her.<sup>173</sup> The Eleventh Circuit reversed, holding that based on the substantive law, her allegations did not come "near enough to create a racially hostile environment."<sup>174</sup> How close she needed to come for her belief to be reasonable was left unclear.

While the underlying incidents described in the aforementioned decisions may not have actually violated Title VII under existing law, the point of the reasonable belief doctrine is that plaintiffs should not have to make that showing and should receive some measure of protection even when they are wrong on the merits.<sup>175</sup> Moreover, other than citing the standard for hostile work environment claims, which undoubtedly is a high bar, none of these decisions explained how close to an actual violation the plaintiffs had to come in order for their belief about discrimination to be reasonable. Under the case-law litmus test approach, as suggested earlier, plaintiffs will be protected if they are able to show sufficient facts to survive an employer's motion for summary judgment on the underlying claim.<sup>176</sup>

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168. *Id.* at 1210.

169. *Id.*

170. *Id.*

171. *Id.* at 1210–11.

172. *See id.* at 1211 (adverse actions also included "a letter of reprimand based on her failure to correctly complete a training form" and a "'letter of written counsel' regarding excessive absenteeism").

173. *Id.* at 1212.

174. *Id.* at 1214.

175. *See Sias v. City Demonstration Agency*, 588 F.2d 692, 695 (9th Cir. 1978) (rejecting a literal interpretation of the statute and explaining that employees should not have to resort to the EEOC "to bring complaints of discrimination to the attention of the employer with some measure of protection").

176. To survive an employer's motion for summary judgment, an employee would have to show there is a dispute of material fact such that summary judgment in the employer's favor would be improper. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986) (explaining that summary judgment is proper if "there is no genuine issue as to any material fact and that the moving party is

This would permit a trier of fact to find the challenged practice was actually unlawful under substantive law.<sup>177</sup> Requiring employees to make such a showing defeats the purpose of the reasonable belief standard. The standard recognizes that it would deter plaintiffs from opposing perceived discrimination if they must first be sure about the unlawfulness of a challenged practice to safely bring a complaint. A standard approximating summary judgment comes close to requiring that plaintiffs prove an actual violation.<sup>178</sup>

These decisions highlight an additional problem with the case-law litmus test approach to testing reasonableness—the standard advances what Professor Deborah Brake has called a “court-centered” approach to understanding reasonableness.<sup>179</sup> To that end, the standard fails to recognize that minorities and women often hold different perceptions from others about whether a practice is discriminatory.<sup>180</sup> While Congress left it to the courts to determine when discrimination occurs, this does not mean that it intended courts to ignore the validity of perceptions concerning discrimination other than the court’s own. Adopting a court-centered view of whether an event may reasonably be perceived as discrimination is a choice the courts are making that too often favors employers rather than the employees Title VII is designed to protect.

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entitled to a judgment as a matter of law.” (quoting FED. R. CIV. P. 56(c)). Under this standard, materiality is judged by the substantive law. *Id.* at 248. Only facts that make a difference to the outcome of the case are material. *Id.* Thus, under the standard, the facts must be assessed in light of existing law to determine if they are material. *Id.* Under the case-law litmus test, it appears that plaintiffs are being held to this standard on the underlying claim.

177. See *id.* at 248 (explaining that summary judgment is inappropriate “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party”).

178. See Brake & Grossman, *supra* note 14, at 929 (“[M]any courts effectively equate a reasonable belief in unlawful discrimination with the actuality of unlawful discrimination.”).

179. Professor Deborah Brake has argued that the reasonable belief doctrine not only adopts a “court-centered approach” to assessing reasonableness, but that courts have used the standard to “enforce a narrow understanding of discrimination and silence alternative perspectives.” See Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 89, 98–102 (2005).

180. See Gorod, *supra* note 20, at 1495–96 (referencing studies that show that women and men view sexual harassment differently; “women have a broader, more inclusive definition of sexual harassment and are more likely than men to view mild social sexual behavior as sexual harassment”). The Ninth Circuit also has recognized that women and men may have different understandings of what constitutes sexually harassing behavior, and, as a result, has adopted a reasonable woman standard for assessing reasonableness in the context of hostile work environment claims. See *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991). See also *infra* notes 236–44 and accompanying discussion; Terry Smith, *Everyday Indignities: Race, Retaliation, and the Promise of Title VII*, 34 COLUM. HUM. RTS. L. REV. 529, 565–66 (2003) (noting that studies show that “minorities are considerably more likely to perceive an event as discriminatory than are whites”).

## 2. Ignores Tangible Factors that Weigh on Reasonableness

The case-law litmus test is also troubling because it fails to take into account tangible factors that undisputedly weigh into the employee's decision to voice concerns about possible discrimination. In *Breeden*, for instance, while the complained-of conduct clearly did not satisfy the standard for an actionable harassment claim as interpreted by the Court, Plaintiff never claimed to consult that authority, and it is quite reasonable to believe that few employees would do so. She did, however, consult her employer's policies regarding harassment, which included sexual joking as a form of sexual harassment. The Court failed to consider that factor in evaluating reasonableness.

The Fourth Circuit took a similar approach in *Jordan v. Alternative Resources Corp.*<sup>181</sup> There, an African-American plaintiff alleged he was terminated after reporting to management a racist remark made by a white coworker.<sup>182</sup> Both men were in a company office watching a news report of the arrest of two black men, who were suspected of engaging in a killing spree. Plaintiff's coworker stated that "They should put those two black monkeys in a cage with a bunch of black apes and let the apes f---k them."<sup>183</sup> Plaintiff reported this remark to management only after learning that his coworker had previously made similar racist remarks "many times before."<sup>184</sup> Plaintiff argued that after he reported his coworker's remark, he should have been protected against retaliation because when he complained, he held a good faith, reasonable belief that he was complaining about a racially hostile work environment. The Fourth Circuit affirmed the district court's judgment in favor of the employer on its motion to dismiss, finding that no reasonable person could have believed that the statement, which the court labeled "crude" and "racist," amounted to racial harassment under Title VII.<sup>185</sup> The result in the case seems particularly unfair because the employer's policy manual required employees to report "any conduct that the employees perceive to be discriminatory."<sup>186</sup> Yet, the court ignored that

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181. 458 F.3d 332 (4th Cir. 2006).

182. *Id.* at 336. Jordan alleged that following his complaints to various management employees, his schedule was changed, he was assigned additional work assignments, he suffered derogatory comments, and he was ultimately fired. *Id.* at 337.

183. *Id.* at 336.

184. *Id.* at 347.

185. *Id.* at 337, 339–40.

186. *Jordan v. Alt. Res. Corp.*, No. Civ.A. DKC 2004–1091, 2005 WL 736610, at\*6 (D. Md. Mar. 30, 2005). *See also Jordan*, 458 F.3d at 350 (King, J., dissenting) (noting that under the employer's policy "employees were obliged to report racially discriminatory conduct to

an African American might have perceived comments comparing persons of his race to apes to be discriminatory. Despite the employment manual, which may have factored into Plaintiff's decision to complain, the only perception that mattered was that of the court.

The results in *Breeden* and *Jordan* seem particularly unjust considering that many employers have employment policies that claim zero tolerance for harassment and other forms of discrimination, largely as a result of the *Ellerth-Faragher* affirmative defense. In response to the affirmative defense, many employers have adopted anti-discrimination policies, which are now a staple in many employee handbooks and manuals.<sup>187</sup> These policies often proclaim that employees should feel free to report discrimination and promise that employees will not be retaliated against for doing so.<sup>188</sup> Yet, when employees report what they perceive to be discriminatory conduct in accordance with their employers' policies, they may legally be penalized because they did not correctly understand judicial interpretation of Title VII.<sup>189</sup>

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management”).

187. See Brake & Grossman, *supra* note 14, at 884–85 (discussing the trend in recent years, in part because of the *Ellerth-Faragher* affirmative defense, of employers to establish internal complaint procedures for reporting perceived discrimination); Deborah L. Brake, *Retaliation in an EEO World*, 89 IND. L.J. 115, 128–30 (2014) (articulating reasons why employers are incentivized to adopt internal nondiscrimination policies and complaint procedures); Wendy E. Wunsch, *The “Seinfeld” Case Tempts Litigation, But Employers Remain “Masters of Their Domain”*, 15 LAB. LAW. 265, 276–77 (1999) (“[I]t is increasingly common, and somewhat necessary, for employers to adopt standards and procedures addressing their anti-harassment and Equal Employment Opportunity provisions, and to include such policies in their employee handbooks and policy manuals.”).

188. The Society of Human Resources Management (“SHRM”), a membership organization of human resources professionals, offers a template of an anti-harassment/discrimination policy on its website. According to its website, SHRM has over 250,000 members who work for companies throughout the world, including 575 affiliated chapters within the United States. SOCIETY FOR HUMAN RESOURCE MANAGEMENT, <http://www.shrm.org/about/pages/default.aspx> (last visited Mar. 11, 2014). The template suggests that company policies offer to protect individuals from discrimination on the basis of race, color, religion, and sex, which are covered by Title VII, as well as sexual orientation and marital status, which are not. SOCIETY FOR HUMAN RESOURCE MANAGEMENT, [http://www.shrm.org/TemplatesTools/Samples/Policies/Pages/CMS\\_000551.aspx](http://www.shrm.org/TemplatesTools/Samples/Policies/Pages/CMS_000551.aspx) (last visited Mar. 11, 2014). Moreover, the template directs company policies to “encourage[] reporting of all perceived incidents of discrimination or harassment” and provides that the company “prohibits retaliation against any individual who reports discrimination or harassment or participates in an investigation of such reports.” *Id.*; see also Brake, *supra* note 187, at 132 (explaining that “[e]mployer [nondiscrimination] policies and EEOC staff encourage employees to raise their concerns through . . . internal channels instead of taking them outside of the organization”).

189. In *Jordan*, the plaintiff alleged that his employer promulgated anti-harassment policies outlining steps for alerting supervisors to workplace harassment and thereby encouraged him to report his coworker's racist comments. *Jordan*, 458 F.3d at 347. The dissent noted that pursuant to IBM's policy Jordan was “obliged to report racially discriminatory conduct to management.” *Id.* at

### 3. Requires Expert Knowledge of Title VII, Including Interpretations by a Particular Court

The case-law litmus test is also problematic because employees have been required to understand the law as interpreted by a particular court even if there is conflicting authority from another court or the EEOC. Thus, retaliation claims have failed under the reasonable belief doctrine although authority exists that supports the employee's belief. For instance, in *Weeks v. Harden Manufacturing Corp.*, the Eleventh Circuit reversed judgment in favor of plaintiffs who were fired in retaliation for refusing to sign agreements compelling mandatory arbitration of all workplace disputes, including any employment discrimination claims.<sup>190</sup> The court noted that other than the Ninth Circuit, most courts had held that such claims were subject to compulsory arbitration agreements.<sup>191</sup> Further, the EEOC had adopted a position in accord with that of the Ninth Circuit's approach.<sup>192</sup> The Eleventh Circuit held that considering the weight, although not unanimity, of authority on the issue, Plaintiffs could not have reasonably believed that compelling them to arbitrate their discrimination claims was unlawful.<sup>193</sup> What is striking about the court's opinion is that the EEOC—the agency entrusted with interpretation of Title VII and overseeing its administration—held the same view as Plaintiffs about the unlawfulness of the practice.<sup>194</sup> Yet, the court determined that Plaintiffs' belief about forced

350 (King, J., dissenting). After doing so, however, he was terminated.

190. *Weeks v. Harden Mfg. Corp.*, 291 F.3d 1307, 1310–11 (11th Cir. 2002). There, the employer admitted that it terminated the employees for refusing to sign the arbitration provision.

191. *Id.* at 1312–15.

192. *See id.* at 1315–16 (noting EEOC policy statement that compulsory arbitration agreements may be unenforceable or illegal, but that does not mean requiring employees to sign such an agreement violates Title VII).

193. *Id.* at 1315. In 1999, when the employees complained of having to sign the arbitration provisions in their employee handbook, the Supreme Court had not definitively decided that employers could require employees to arbitrate discrimination claims. *See id.* at 1310, 1314 (explaining that plaintiffs protested in 1999 and the Supreme Court reached the issue in 2001 in *Circuit City Stores v. Adams*, 532 U.S. 105 (2001)). In a decision issued prior to *Circuit City*, the Court had reserved ruling on the exact issue in *Weeks*, and finally ruled on that issue two years after the plaintiffs in *Weeks* protested their employer's decision to force them to arbitrate any employment dispute. Thus, when the plaintiffs complained of discrimination, the Court had not decided whether compelling arbitration in employment contracts was lawful, and the circuits were split on the issue. *See generally*, Edward A. Marshall, *Title VII's Participation Clause and Circuit City Stores v. Adams: Making The Foxes Guardians of the Chickens*, 24 BERKELEY J. EMP. & LAB. L. 71, 76–83 (2003) (discussing the trajectory of the Court's rulings on arbitration agreements in the employment context).

194. *Weeks*, 291 F.3d at 1315–16.

arbitration of Title VII claims was unreasonable.<sup>195</sup>

In *Talanda v. KFC National Management Co.*, a case that arose under the Americans with Disabilities Act (ADA) which contains an anti-retaliation provision similar to Title VII's,<sup>196</sup> the Seventh Circuit also held that the Plaintiff's belief was unreasonable despite the fact that it was supported by the EEOC's interpretation of the ADA.<sup>197</sup> In *Talanda*, Plaintiff was fired for refusing to follow an order he believed was discriminatory.<sup>198</sup> His supervisor had asked that he reassign an employee who was missing several front teeth from a counter position to a position that would prevent customers from seeing her because of her dental issues.<sup>199</sup> In Plaintiff's subsequent retaliation action, the Seventh Circuit held that he could not have had a reasonable belief that the reassignment order violated the ADA.<sup>200</sup> However, commenting on this particular decision, Professor Alex Long has noted the court reached its holding despite the fact that the EEOC had used a virtually identical scenario to demonstrate when an employer unlawfully discriminates against an individual whom the employer regards as having a disability.<sup>201</sup>

The aforementioned discussion demonstrates that Professor Long is correct when he argues that "courts appear to hold an employee to the standard of what a reasonable labor and employment attorney would believe, rather than what a reasonable employee would believe."<sup>202</sup> From hotel

195. *Id.*; see also *Bazemore v. Ga. Tech. Auth.*, No. 1:05-cv-1850-WSD-WEJ, 2007 WL 917280 (N.D. Ga. Mar. 23, 2007) (black, male plaintiff could not have reasonably believed that he had been the victim of discrimination considering Eleventh Circuit law, which required the plaintiff to show that he and his coworker were "similarly situated in all relevant respects" because even if the plaintiff and his coworker had engaged in similar conduct for which he alone was fired, he failed to provide information showing their past performance and disciplinary history were "nearly identical").

196. *Talanda v. KFC Nat'l Mgmt. Co.*, 140 F.3d 1090, 1095 (7th Cir. 1998) (explaining that because the ADA and Title VII are similarly worded, Title VII decisions would serve as useful guidance in interpreting the ADA).

197. *Id.* at 1097-98 & n. 13.

198. *Id.* at 1092-94.

199. *Id.* at 1092-93.

200. See *id.* at 1097.

201. Long, *supra* note 15, at 955. The EEOC's Interpretive Guidance states that an employer regards an individual as having a disability when the individual has an impairment (such as a disfigurement or anatomical loss) that is substantially limiting only because of the attitudes of others toward the condition. See 29 C.F.R. § 1630(g)(iii). In *Talanda*, the plaintiff argued that he reasonably believed that by refusing his supervisor's order he was opposing unlawful discrimination against his subordinate, "an individual who, because of her severe facial disfigurement, . . . was regarded by [his employer] as having an impairment that constitutes a disability under the ADA." *Talanda*, 140 F.3d at 1096.

202. Long, *supra* note 15, at 955.

conciere to Wal-Mart cashier, nurse, doctor, or lawyer, the same case-law litmus test standard applies, despite the fact that it is more likely than not that most persons in these disparate professions are unfamiliar with Title VII case law, let alone the law in particular circuit courts.

Considering that the reasonable belief doctrine was created to provide broad protection from retaliation, but, for many of the reasons discussed above, has failed to live up to that promise, it is unsurprising that commentators have called for its demise in favor of a subjective good faith standard. While understandable, the position is likely impractical considering recent Supreme Court authority interpreting Title VII. The following section explores that authority, which weighs against complete abandonment of all objective criteria in determining the scope of protection under the anti-retaliation provision.

#### IV. MODIFYING REASONABLENESS

##### A. *The Good Faith Alternative*

To quell concerns about the objective reasonableness standard, commentators have argued in favor of rejecting it and using a purely subjective, good faith standard in its place.<sup>203</sup> That standard would likely provide employees greater protection against retaliation than the purely objective standard. The standard is judicially administrable as demonstrated by the fact that some courts used it pre-*Breedon*, and its application did not appear to raise concerns.<sup>204</sup> Under a good faith, honesty-in-fact standard, protection may be lost if the facts demonstrate that the plaintiff was motivated by factors other than challenging perceived discrimination. Moreover, such factors as the plaintiff's education, history of filing frivolous complaints, if any, and credibility for honesty as determined by a court or jury might also be relevant.<sup>205</sup>

A good faith standard also better effectuates the goals of the opposition clause than the case-law litmus test. The latter standard all but encourages employees to seek the expert advice of counsel before they oppose perceived

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203. See Gorod, *supra* note 20, at 1474 (arguing that court should reject reasonableness and adopt a good faith standard); Rosenthal, *supra* note 20, at 1130.

204. See *supra* notes 128–29 and accompanying discussion.

205. Professor Rosenthal proposes the following test that might be used to demonstrate good faith: “(1) the employee’s testimony, (2) her actions taken in response to the allegedly unlawful conduct, (3) the timing between the allegedly unlawful conduct and when the employee reported it, (4) the employee’s education, and (5) to whom the employee reported the conduct.” Rosenthal, *supra* note 20, at 1169 n.263.

discrimination. Congress could not have intended that employees possess expert knowledge of case law and more specifically the law of a particular circuit court before daring to challenge suspected discrimination informally.

A good faith standard also would be no more inconsistent with the language of the provision than a reasonableness standard. Assuming the opposition clause requires an employee to complain about practices that are actually unlawful, then protecting an employee for holding either a reasonable or good faith belief that discrimination has occurred deviates from that interpretation.

Another reason to reject the reasonable belief standard in favor of a good faith standard is because the reasonable belief standard yields inconsistent results. For instance, as evidenced in such cases as *Hart*, *Butler*, and *Jordan*, discussed previously, many courts have held that no reasonable person could believe that one incident of blatant racist or sexually inappropriate conduct constitutes a hostile work environment. Other courts, however, have held to the contrary.<sup>206</sup> Protection from retaliation should not depend on the court in which an employee is fortunate enough to have her claim heard. A good faith standard would go far to remedy instances of inconsistent results in factually similar cases.<sup>207</sup> Thus, I agree with other commentators that the subjective good faith standard is preferable to the objective reasonableness standard. However, as a predictive matter, such a standard is unlikely to find favor with the Court because it is arguably inconsistent with recent authority interpreting Title VII's anti-retaliation provision.

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206. For instance, in *Greene v. MPW Indus. Servs., Inc.*, a plaintiff alleged that he was fired after reporting that a coworker had made a comment about "nigger rigging equipment." No. 06-647, 2006 WL 3308577, at \*1 (W.D. Pa. Oct. 4, 2006). The plaintiff was not even sure of the precise wording of the comment. *Id.* at \*1 n.2. The plaintiff did not allege that the comment was made in his presence, to him or about him. *Id.* Rather, he heard from someone else that another coworker made the remark. *Id.* Relying on the Fourth Circuit's opinion in *Jordan*, the employer argued that the plaintiff could not have held a reasonable belief that this single comment constituted a hostile work environment. *Id.* at \*3. The district court disagreed. The court believed that the rule set forth in *Jordan* would require an employee to sit back and wait until harassment has become severe or pervasive before bringing it to an employer's attention, an approach the court opined was at odds with the Court's *Burlington Northern* decision, which granted expansive protection against retaliation so that employees felt free to bring their grievances forward. *Id.* While the court did not go so far as to conclude that a complaint about "any behavior" would warrant protection from retaliation, it found that the "nigger rigging" comment "was unquestionably the type [of comment] of which racially hostile work environments are made." *Id.*

207. See Rosenthal, *supra* note 20, at 1169-76 (arguing that a good faith standard would eliminate the inconsistent results that arise under the reasonable belief doctrine, and examining cases in which courts, contrary to the court in *Jordan*, held that a plaintiff's reasonable belief regarding whether an event was discriminatory could be based on a single incident).



### B. A Preference for Objective Standards

As explained earlier, in *Burlington Northern*, the Court addressed whether the term “discriminate against” used in the anti-retaliation provision confines itself to activity that affects the terms and conditions of employment or reaches more broadly to include adverse actions that do not directly implicate the employment relationship.<sup>208</sup> After determining that protection under that clause swept more broadly, the Court then addressed how harmful an adverse action had to be to fall within the scope of the provision’s protection.<sup>209</sup> The Court adopted a standard of material adversity, i.e., the challenged action must be harmful enough that “it might well have dissuaded a reasonable person” from engaging in protected activity.<sup>210</sup> The Court adopted the standard because “[i]t avoids the uncertainties of unfair discrepancies that can plague a judicial effort to determine a plaintiff’s unusual subjective feelings.”<sup>211</sup> The Court also noted that it has “emphasized the need for objective standards in other Title VII contexts.”<sup>212</sup> It is noteworthy that the Court adopted this standard after discussing at length the need for broad protection from retaliation.<sup>213</sup> Yet, it held that the provision only protects individuals from harms that are material

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208. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57 (2006).

209. *Id.*

210. *Id.* at 67–68.

211. *Id.* at 68–69. Of course, the good faith standard is judicially administrable as well. Prior to *Breedon*, courts used the standard and it posed none of the problems the Court seemed concerned about in *Burlington Northern*. See, e.g., *Love v. Re/Max of Am., Inc.*, 738 F.2d 383, 386 (10th Cir. 1984) (plaintiff believed in good faith that defendant discriminated against her by paying her less than male employees). However, consistent with its approach in *Burlington Northern*, the Court may well opt to impose a more stringent requirement than good faith. In that regard, it is worth noting that for several years prior to *Burlington Northern*, the Ninth Circuit applied a standard to assess harm under Title VII’s anti-retaliation provision that was arguably less stringent than the material adversity standard; yet the Court ultimately chose not to adopt the Ninth Circuit’s standard for the reasons explained in the text of this article. See *Burlington N.*, 548 U.S. at 60–61, 67–68 (rejecting Ninth Circuit’s test); see also *Sillars v. Nev.*, 385 F. App’x 669, 671 (9th Cir. 2010) (noting that under circuit precedent prior to *Burlington Northern*, a lateral transfer might have constituted an adverse employment action for purposes of Title VII’s anti-retaliation provision but that *Burlington Northern* clarified that an adverse action had to meet a materiality standard; plaintiff’s transfer was not materially adverse as she failed to allege the “position to which she was moved differed in any material way from the position she occupied prior to her complaints”). But see *Ray v. Henderson*, 217 F.3d 1234, 1241–43, 1241 n.4 (9th Cir. 2000) (adopting standard (pre-*Burlington Northern*) that would protect employees if an adverse action “is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity” and noting that a job transfer even if did not result in a change in pay might constitute an adverse action for purposes of Title VII’s anti-retaliation provision).

212. See *Burlington Northern*, 548 U.S. at 68–69 (noting that it had used an objective standard in harassment and constructive discharge cases).

213. *Id.* at 63–66.

or significant.<sup>214</sup> The upshot is that while protection from retaliation is broad, it is not unlimited. The clause permits employers to engage in some retaliation without sanction.<sup>215</sup>

The dividing line between the “material” or “significant” harm the Court held is actionable and the “trivial harm” the Court indicated is not was left unclear. However, “context matters.”<sup>216</sup> Whether a particular act satisfies the material adversity standard will depend on the particular circumstances of each case.<sup>217</sup> According to the Court, whether an act is materially adverse can only be determined by considering the “constellation of surrounding circumstances, expectations, and relationships” at play in a given situation.<sup>218</sup> The Court provided a couple of examples to demonstrate when the standard may be met. For instance, it explained that typically a schedule change may matter little to an employee, but may matter a great deal to a young mother with school age children.<sup>219</sup> Similarly, a supervisor’s refusal to invite a subordinate to lunch is a petty, non-actionable slight. However, if that lunch is part of a weekly training program that contributes *significantly* to the employee’s professional development, the refusal to invite the employee becomes actionable.<sup>220</sup>

*Burlington Northern* highlights several points relevant to the present discussion. It recognizes the need for broad protection from retaliation for effective enforcement of Title VII.<sup>221</sup> Despite that need, the decision also demonstrates the Court’s continued preference for objective standards, even in the context of retaliation.<sup>222</sup> Finally, the Court indicates that although it is an objective standard, material adversity should be analyzed through the lens of the plaintiff’s particular circumstances.<sup>223</sup> For instance, while a particular adverse action may not be actionable when taken against a reasonable person in the abstract, that result may be different when the victim is a mother with young children.<sup>224</sup> Thus, even under an objective standard, the facts of the

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214. See *id.* at 68 (“We speak of *material* adversity because we believe it is important to separate significant from trivial harms.”).

215. See *id.* (explaining that in the context of hostile work environment claims, Title VII does not protect against “sporadic use of abusive language, gender-related jokes and occasional teasing” (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (2006))).

216. *Id.* at 69.

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.* at 63–66.

222. *Id.* at 68–69.

223. *Id.* at 69.

224. *Id.*

case as seen from the plaintiff's unique perspective are relevant.<sup>225</sup>

Regarding the opposition clause, while a purely subjective standard would provide broader protection from retaliation than the reasonable belief standard, it is doubtful that the Court would take the former approach were it to decide the issue.<sup>226</sup> There is no reason to assume the Court would grant broader protection to employees regarding a belief that discrimination exists than it has regarding whether a plaintiff has been sufficiently harmed after complaining about discrimination—the issue in *Burlington Northern*. The Court demonstrated in *Burlington Northern* a continued preference for objective standards, albeit with a nuanced, circumstances-based approach. The remainder of this Article proceeds under the assumption that the current law favors a similar approach when determining the scope of protection under the opposition clause.

### C. *A Totality of the Circumstances Approach*

If the Court opts for a reasonableness standard under the opposition clause,<sup>227</sup> this article proposes a totality of the circumstances test—i.e., whether a reasonable person in plaintiff's position considering all the circumstances would believe the complained-of act was unlawful discrimination. In many instances, courts now purport to consider “all the circumstances” when assessing reasonable belief, but, as set forth previously, the statement is often shorthand for the case-law litmus test: the underlying facts regarding the alleged discrimination and the established case law.<sup>228</sup> No limits are proposed under this standard for what circumstances may be relevant in a particular case, but there are three factors that generally should be considered: (1) the fundamental characteristics of

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225. *Id.*

226. Indeed, one of the proponents of the good faith standard concedes that the Court is “unlikely to adopt” the standard in light of the Court's rationale for adopting a reasonableness standard in *Burlington Northern*. See Rosenthal, *supra* note 20, at 1169 n.263. See also Brake, *supra* note 187, at 168 (explaining that it is “likely too late to convince the Court to abandon an objective reasonableness requirement under the opposition clause in favor of a subjective good-faith standard” but recommending that employer policies defining discrimination be used in determining whether an employee's belief about discrimination is reasonable).

227. Considering the language and purposes of the participation clause, it is less likely—but still possible—that the Court could impose a reasonableness standard under the participation clause as well. See discussion *supra* Part III.A. If it does so, this discussion would apply to that clause as well.

228. See, e.g., *Jordan v. Alt. Res. Corp.*, 458 F.3d 332, 340–41 (4th Cir. 2006) (explaining that an employee asserting a hostile work environment claim must show a fear of retaliation that is an “objectively reasonable belief in light of all the circumstances” in order to satisfy the objectivity test for the claim).

the plaintiff (whether a woman, African-American, or a member of some other protected group) that may affect perception concerning the discriminatory conduct; (2) internal employer policies that interpret or in many instances reinterpret the law of employment discrimination, promise zero tolerance for discrimination, or urge employees to promptly report discrimination when they perceive it; and (3) lack of unanimity among judicial or administrative authorities on whether a particular practice violates Title VII.

Moreover, consistent with *Burlington Northern*, these factors should be assessed through the lens of a lay employee unversed in Title VII. Context mattered in *Burlington Northern*.<sup>229</sup> It should also matter when assessing reasonableness. It makes little sense to hold cashiers and bank tellers to the same standard as labor and employment attorneys regarding precise understandings of judicial interpretations of Title VII.<sup>230</sup>

### 1. The Reasonable Victim Standard

A totality of the circumstances approach is not unheard of in employment discrimination. In *Burlington Northern*, for instance, the Court held that whether an act is materially adverse will depend on a “constellation of surrounding circumstances.”<sup>231</sup> The Court drew support for the standard from its hostile work environment cases.<sup>232</sup> To be actionable in this context, a plaintiff must show a work environment that is “sufficiently severe or pervasive” to alter the terms and conditions of employment and create an abusive or hostile work environment.<sup>233</sup> Whether the work environment is sufficiently abusive or hostile is determined by looking at the totality of the circumstances.<sup>234</sup> To constitute actionable harassment, the workplace must

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229. See *Burlington N.*, 548 U.S. at 68 (explaining that context matters in assessing whether the “reasonable employee” would find a particular act harmful).

230. Courts in the Ninth Circuit apply a similar standard. When assessing reasonableness, allowance is given for an employee’s “lack of legal knowledge.” *Whitley v. Portland*, 654 F. Supp. 2d 1194, 1215 (D. Or. 2009) (citation omitted).

231. *Burlington N.*, 548 U.S. at 69 (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998)).

232. See *id.* (citing *Oncale*, 523 U.S. at 81–82).

233. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21–22 (1993) (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986)) (providing threshold requirements for hostile work environment claim and explaining that mere insults do not alter the terms of employment).

234. See *id.* at 23 (“Whether an environment is ‘hostile’ or ‘abusive’ can be determined only by looking at all the circumstances.”). See also *Clark Cnty. Sch. Dist. v. Breedon*, 532 U.S. 268, 270–71 (2001) (listing a variety of circumstances, such as threats or frequency of alleged discriminatory acts, that factor into hostile work environment claims).

be both subjectively and objectively abusive; that is, the plaintiff must honestly believe the workplace was abusive and a reasonable person would have found the workplace abusive as well.<sup>235</sup>

With regard to the objective prong, courts at one time universally used an abstract reasonable person test.<sup>236</sup> In 1991, in *Ellison v. Brady*, the Ninth Circuit adopted a reasonable woman standard to analyze hostile work environment claims.<sup>237</sup> Thus, the inquiry was not whether a reasonable person in the abstract would find the work environment sufficiently hostile or abusive, but whether a reasonable woman would find the work environment sufficiently hostile or abusive.<sup>238</sup> In adopting the standard, the Ninth Circuit recognized that most victims of sexual harassment are women, and that women's experience with harassment and perception of what constitutes sexual harassment differs from that of men.<sup>239</sup> The court noted that in many situations where women had been harassed, men had not perceived any harassment and saw the conduct as harmless social interaction.<sup>240</sup> A sex-blind reasonable person standard tends to take on the perspective of the male harasser and ignores these experiences unique to women.<sup>241</sup> Thus, the reasonable woman standard considers a "victim" rather than a "perpetrator" perspective of discrimination.

The court acknowledged that not all women think alike, but nevertheless they may share certain concerns and experiences that are not shared by most men.<sup>242</sup> For instance, most men do not experience rape or sexual assault,

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235. See *Harris*, 510 U.S. at 21–22 (clarifying that the plaintiff must meet both an objective and subjective test to establish hostility).

236. See Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548, 582 (2001) (explaining that the reasonable person standard required courts to examine the victim's viewpoint and perspective).

237. 924 F.2d 872, 879 (9th Cir. 1991) (using the reasonable woman standard to establish a prima facie case of a hostile work environment).

238. See *id.* at 879–80 (explaining that the reasonable person standard must be interpreted from a reasonable woman's viewpoint when a female employee brings a sexual discrimination claim).

239. See *id.* at 879 (explaining that the current reasonable person interpretation "tends to systematically ignore the experiences of women").

240. See *id.* at 878–79 (noting that men may not consider conduct offensive despite women being offended).

241. See *id.* at 879 (showing how men view sexual harassment in a vacuum, while women may see conduct as a string of advances that could culminate in sexual assault). According to the court, adopting the standard "does not establish a higher level of protection for women than men." *Id.* Rather, taking into account gender consciousness allows women to participate on equal footing with men in the workplace by ensuring that "neither men nor women will have to run the gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living." *Id.* (citation omitted) (internal quotation marks omitted).

242. See *id.* ("We realize that there is a broad range of viewpoints among women as a group, but we believe that many women share common concerns which men do not necessarily share.").

and thus their perceptions of the risk of sexual harassment morphing into a sexual assault is low compared to the perception of many women, which may affect how women respond to perceived harassment.<sup>243</sup>

Although two years after *Ellison*, the Supreme Court in *Harris v. Forklift Systems, Inc.*<sup>244</sup> used a reasonable person test to analyze the objective prong of a hostile work environment claim, the Court did not explicitly reject the reasonable woman test.<sup>245</sup> Moreover, the Court later reiterated a requirement for objective reasonableness in *Oncale v. Sundowner Offshore Services, Inc.*,<sup>246</sup> but emphasized that reasonableness must be determined from the viewpoint of the reasonable person in the plaintiff's position, giving careful consideration to "the social context in which particular behavior occurs and is experienced by its target."<sup>247</sup> As explained previously, the Court adopted a similar standard in the context of retaliation under the material adversity standard. That standard supports viewing reasonableness from the viewpoint of the victim.<sup>248</sup>

The Ninth Circuit later extended its holding in *Ellison* to a reasonable victim standard—or the reasonable person with the same fundamental characteristic as the plaintiff.<sup>249</sup> Other courts have also used the reasonable victim standard in harassment cases. Indeed, courts have used the standard despite the Supreme Court's emphasis on using "objective standards" in areas of employment discrimination.<sup>250</sup> Applying that standard in the

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243. See *id.* ("Women who are victims of mild forms of sexual harassment may understandably worry whether a harasser's conduct is merely a prelude to violent sexual assault. Men, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the social setting or the underlying threat of violence that a woman may perceive.").

244. 510 U.S. 17 (1993).

245. See *id.* at 21–22 (highlighting the importance of evaluating the employee's subjective belief that discriminatory acts occurred, but maintaining a general reasonable person standard by not labeling it a reasonable woman standard). See also Juliano & Schwab, *supra* note 236, at 582 ("Despite the Court's use of the "reasonable person" standard, it did not explicitly reject the 'reasonable woman' test." (citation omitted)).

246. See 523 U.S. 75, 81 (1998) (viewing the "objective severity of harassment" through the subjective perception of a reasonable person in the employee's situation).

247. *Id.* Professor Terry Smith has argued that "[t]he Court's willingness to consider social context" in *Oncale* "may foretell a willingness to consider the uniqueness of race," or the perspective of the victim, "in relation to opposition conduct." Smith, *supra* note 180, at 558.

248. See *supra* notes 218–225 and accompanying text.

249. See, e.g., *Woods v. Champion Chevrolet*, 35 F. App'x 453, 456 (9th Cir. 2002) ("Whether the workplace is objectively abusive is evaluated 'from the perspective of a reasonable person with the same fundamental characteristics' as the plaintiff." (quoting *Fuller v. Oakland*, 47 F.3d 1522, 1527 (9th Cir. 1995))).

250. See, e.g., *EEOC v. Prospect Airport Servs., Inc.*, 621 F.3d 991, 1000 (9th Cir. 2010) (using reasonable victim standard in hostile work environment claim); *Stephenson v. Philadelphia*, 293 F. App'x 123, 124 (3d Cir. 2008) (applying reasonable woman standard).

context of retaliation, the inquiry would be whether a reasonable person with the same fundamental characteristic as the plaintiff (woman, African-American, Latino, etc.) might have believed that the complained-of action was unlawful discrimination.<sup>251</sup>

Judge King, who dissented in *Jordan v. Alternative Resources Corp.*,<sup>252</sup> applied the reasonable victim approach, which, had it been used by the majority, may have yielded a different result in that case. In *Jordan*,<sup>253</sup> as discussed earlier, the Plaintiff alleged he was retaliated against after reporting that a coworker had referred to African Americans as black monkeys and had allegedly made similar comments previously.<sup>254</sup> Judge King believed that the black monkeys comment, coupled with similar racist comments made previously by the same individual, could have led Jordan reasonably to believe that African-American employees had been or were in the process of being exposed to a racially charged hostile work environment.<sup>255</sup> As to the black monkeys comment, Judge King believed the majority gave it too little weight in its analysis.<sup>256</sup> According to Judge King, referring to African Americans as monkeys reflects a deep hostility toward that group on the basis of color.<sup>257</sup> Such comments, he argued, “constitute[] profound insults to our friends in the African-American community.”<sup>258</sup> Further, referring to African Americans as monkeys plays on historic,

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251. Brianne Gorod has argued against adopting the reasonable woman standard in the context of retaliation claims. See Gorod, *supra* note 20, at 1497 (explaining that one solution to the reasonable person standard might be to adopt a reasonable woman standard but questioning whether such a standard would be an effective solution: “A ‘reasonable woman’ standard is hardly more concrete than any other ‘reasonableness’ standard, and it is unlikely that the courts will find it any easier to apply”). These concerns aside, as explained in the main text, a reasonable woman or victim standard might offer broader protection from retaliation than would a purely objective standard. Moreover, this article proposes a totality of the circumstances approach that would consider more than just the reasonable victim perspective. While any reasonableness standard has its drawbacks, the totality of the circumstances approach advocated here, where the victim’s perspective is merely one factor, might expand protection against retaliation more than merely adopting a reasonable victim versus a reasonable person standard alone would.

252. 458 F.3d 332, 349 (4th Cir. 2006) (King, J., dissenting).

253. *Id.*

254. See *id.* at 337 (noting that coworker said African Americans were monkeys that should be put in cages).

255. See *id.* at 352–53 (finding the fact that Jordan’s coworker made black monkeys comment as well as similar comments in the past according to other employees led Jordan to reasonably believe that “African-American workers at IBM’s facility were regularly exposed to conduct akin to the ‘black monkeys’ comment, and that such conduct would continue unless [Jordan’s coworker] was confronted”).

256. See *id.* at 350 (“To begin with, the severity of Farjah’s racially hostile ‘black monkeys’ comment merits our consideration.”).

257. See *id.* (noting that color was the sole basis for the hostile remark).

258. *Id.*

bigoted stereotypes that have characterized them as “uncivilized, non-human creatures who are intellectually and culturally inferior to whites.”<sup>259</sup> Judge King stated that although a panel of white male judges must try to do so, it “is scarcely qualified to comprehend the impact such a remark would have on the reasonable African-American listener.”<sup>260</sup> Judge King therefore strived to consider the comment from the perspective of the reasonable victim, here an African-American plaintiff, and, based on his analysis, King concluded that the case should have been decided differently from this perspective.<sup>261</sup>

The propriety of adopting the reasonable victim standard has been the subject of much scholarly debate.<sup>262</sup> However, the reasonable victim

259. *Id.* at 351.

260. *Id.* (emphasis added).

261. Courts using the *reasonable victim* standard have routinely found that such an individual might perceive a single incident or comment to be unlawful, particularly considering the person’s unfamiliarity with the law. See *Whitley v. Portland*, 654 F. Supp. 2d 1194, 1213–15 (D. Or. 2009) (reasonable woman could find that single comment made about her clothing and breast violate Title VII, giving due allowance for the lack of legal knowledge; rejecting argument that a single incident could never be considered unlawful harassment because it would mean that a plaintiff would either have to undergo a serious incident such as rape or have an in-depth knowledge of harassment law to be protected against retaliation for complaining about harassment); *Figueroa v. Paychex, Inc.*, No. CIV. 99-797-ST, 1999 WL 717349, at \*11–12 (D. Or. 1999) (applying Ninth Circuit law to state statute, which protects against discrimination on the basis of marital status, and finding that unmarried plaintiff could have found that single comment calling her child a “bastard child” was unlawful discrimination considering lack of legal knowledge). In addition, there is also a study that suggests that the reasonable victim standard may provide broader support than a reasonable person standard for plaintiffs alleging retaliation. In a study released in 2001, Professors Ann Juliano and Stewart J. Schwab examined every reported federal district and appellate court opinion between 1986 and 1995 (650 total), which among other things, identified broad trends in the harassment decisions. See *Juliano & Schwab, supra* note 236, at 551–52. One factor the authors considered was the number of times courts analyzed hostile work environment claims under a reasonable woman standard. See *id.* The authors acknowledged that there had been much debate among commentators about the propriety of adopting the reasonable woman versus the reasonable person standard. The authors “found more articles discussing the reasonable woman standard than courts adopting” it. *Id.* at 584. The authors noted that many commentators criticized the reasonable person standard as contrary to the intent of Title VII, while others argued that a reasonable victim standard “is contrary to the principle of equality or that it is unfair to hold men to an unclear standard.” *Id.* at 583. Of the courts that used the standard, however, plaintiffs had a higher success rate than in cases where courts referred only to the reasonable person. See *id.* at 583–84. The authors warned, however, that “[f]ewer than one-quarter of the district court cases mentioned any ‘reasonable[ness] standard’ at all.” *Id.* at 584. Thus, “[g]iven how few cases mentioned the reasonable standard at all, the specific ‘reasonable’ standard used is not statistically significant in predicting win rates.” *Id.* at 585. The authors still noted that the interplay between reasonableness and cases in which plaintiffs lost painted “an interesting story.” See *id.* Of the twenty-seven cases in which courts held that “plaintiffs should not reasonably [have been] affected by the [challenged] conduct, courts discussed the reasonable person test in eighteen cases and the reasonable woman standard in a mere three cases.” *Id.*

262. See *Juliano & Schwab, supra* note 236, at 583 & nn.140–41 (citing articles setting forth debate regarding the propriety of using the reasonable woman versus the reasonable person



standard is preferable to the *purely* abstract reasonable person approach because it takes into account the experiences of people of color, women, and other protected groups, which may affect how individual members of these groups perceive discrimination and react to it.<sup>263</sup>

## 2. Employer Representations about the Scope of the Law

It goes without saying that most employees are unfamiliar with the intricacies of employment discrimination law as handed down by courts. However, in many cases employees are held to a case-law litmus test standard—and in some cases they must be familiar with the law of a particular circuit.<sup>264</sup> The Eleventh Circuit has explained that the reasonableness of employees' beliefs must be based on substantive knowledge of the law because, otherwise, "the reasonableness inquiry becomes no more than speculation regarding their subjective knowledge."<sup>265</sup> That is not necessarily so. Many tangible factors may influence employee understanding of the law,<sup>266</sup> including employer policies that often explain harassment or other discrimination law and set forth an employee's duties to report it.

Despite the case-law litmus test standard, judicial interpretation of Title VII and particularly hostile work environment claims do not stand alone in giving meaning to what the statute proscribes. That interpretation is often re-interpreted in the policy manuals of many organizations. Because of the two-part *Ellerth-Faragher* affirmative defense, many employers incorporate anti-harassment policies in their employment handbooks and manuals.<sup>267</sup> Further, as explained below, employees are held responsible for knowing

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standard).

263. Employees should be able to rely on anecdotal and expert testimony to show that particular conduct might cause a reasonable employee of the same race or sex to perceive that conduct as discriminatory. Professor Terry Smith has argued for allowing African-American employees to use similar proof as a means to justify the particular method of opposition the employee engaged in to respond to perceived discrimination. See Smith, *supra* note 180, at 566 (arguing that black employees should be able to rely on anecdotal or expert testimony to show that "the totality of the employee's experience with his employer [would] cause a reasonable employee of the same race to behave" in the same way the employee behaved to oppose perceived discriminatory conduct).

264. See *supra* Part III.C.3.

265. Harper v. Blockbuster Entm't Corp., 139 F.3d 1385, 1388 n.2 (1998).

266. For instance, one commentator has noted that "employees' understandings of what constitutes harassment [may] be shaped in large part by media accounts . . . to the extent that the media paints a broader picture of sexual harassment, the general public may begin to accept that belief." Gorod, *supra* note 20, at 1494.

267. See *supra* notes 187–89 and accompanying discussion.

and following any procedures set forth in these policies to report discrimination. Thus, looking beyond judicial decisions to ascertain employee understanding of the law does not necessarily become an exercise in speculation.

There is some evidence that harassment policies are prevalent among businesses and that such policies may more broadly define unlawful conduct than the Supreme Court. As explained previously, the Court has held that a hostile work environment claim is viable only if there is conduct that is severe or pervasive enough to alter the conditions of employment and create an abusive work environment.<sup>268</sup> “Teasing, offhand comments, and isolated incidents (unless extremely serious)” generally will not meet that standard.<sup>269</sup> Despite the Court’s attempt to exclude certain conduct from the definition of actionable harassment, such exclusion may be missing from employer policies.

Vicki Schultz has noted that because of *Ellerth* and *Faragher*, American companies have been pressured by legal experts to “go beyond the dictates of the law to curtail broad forms of sexual conduct—including conduct that does not satisfy the legal definition of sexual harassment . . . in order to avoid liability for sexual harassment.”<sup>270</sup> Surveys suggest that an overwhelming majority of companies have policies that prohibit sexual harassment and “reach broadly to forbid many forms of potentially harmless sexual conduct without demanding inquiry into the surrounding factors that would determine legal liability.”<sup>271</sup> Professor Schultz further cites one study that invited human resources professionals to relate the primary types of harassment alleged in complaints received by their companies.<sup>272</sup> One of the

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268. See *supra* Part IV.C.1. See also *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 270 (2001) (citing previous decisions which held that the discrimination must be so “severe or pervasive” that it “create[s] an abusive working environment”).

269. *Breeden*, 532 U.S. at 271. In *Breeden*, for instance, the plaintiff complained about a single incident that occurred when she, her supervisor and coworker were reviewing files that contained sexually explicit material. Her supervisor said he did not know what the statement in one of the reports meant, and the coworker said he would explain it to him later and both men chuckled. *Id.* at 269. The Court described this conduct as “at worst an ‘isolated incident[t]’ that cannot remotely be considered ‘extremely serious,’ as our cases require.” *Id.* at 271.

270. Vicki Schultz, *The Sanitized Workplace*, 112 *YALE L.J.* 2061, 2090 (2003). Professor Schultz describes an *American Bar Association Journal* article that warns companies to establish sexual harassment policies that bar employees from making “sexual jokes” or innuendoes or engaging in office romance. See *id.* at 2091. The article quotes one ABA official who proclaims that “suggestive joking of any kind simply must not be tolerated.” *Id.* at 2092.

271. *Id.* at 2095.

272. See *id.* at 2095–96. The study was conducted by the Society for Human Resource Management, “the leading organization of professionals responsible for designing and implementing sexual harassment policies.” *Id.* at 2096.

most prevalent forms of harassment reported was “sexual jokes, remarks and teasing,”<sup>273</sup> conduct the Court has determined does not typically satisfy the standards set forth in its harassment decisions. According to Professor Schultz, this survey demonstrates that “many employees now conceive of sexual harassment in the terms established by the HR professionals”—not the Court.<sup>274</sup>

Another commentator also has explained that the prevalence of sexual harassment and efforts to thwart it have resulted in much writing aimed at helping women to spot it when they see it. Moreover, because of that advice,

[m]any employers now have sexual harassment materials that warn employees against any teasing or flirting behavior in the workplace. While the fineness of the line between the legal and the illegal makes it sensible for such material to warn against any potentially inappropriate behavior, it may cause individuals to believe that any such conduct is not only inappropriate, but also illegal. Thus, employees . . . will be tempted to report such behavior the very first time it occurs, despite the fact that an isolated incident of such conduct is only rarely sufficient to establish a “hostile work environment.”<sup>275</sup>

Although these commentators have focused principally on sexual harassment policies, employers may also have policies that address harassment or discrimination more broadly on other bases, including race or religion, which are also protected by Title VII. In *Jordan*, for instance, the plaintiff alleged that his employer’s policy manual “required” employees to report “any conduct that employees perceive to be discriminatory,” including “racially discriminatory conduct.”<sup>276</sup> How the employer defines discrimination should factor into whether an employee reasonably believes he would be protected for his report.<sup>277</sup> Recognizing as much, some courts

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273. These forms of activity “were the *primary* types of harassment alleged in nearly half (48 percent) of the 1,214 sexual harassment complaints.” *Id.* at 2096 (emphasis added). Professor Schultz states that in her research she reviewed “numerous sex harassment policies adopted by companies or proposed by experts” and “most prohibit a broad range of sexual conduct that would not necessarily be legally actionable.” *Id.* at 2098.

274. *Id.* at 2096.

275. Gorod, *supra* note 20, at 1491–92.

276. First Amended Complaint for Relief from Unlawful Discharge at 3, *Jordan v. Alt. Res. Corp.*, No. Civ.A. DKC 2004–1091, 2005 WL 736610 (D. Md. Mar. 30, 2005). *See also* *Jordan v. Alt. Res. Corp.*, 458 F.3d 332, 350 (4th Cir. 2006) (King, J., dissenting) (noting that under the employer’s policy “employees were obliged to report racially discriminatory conduct to management”).

277. *See* Brake, *supra* note 187, at 168 (explaining that it is “likely too late to convince the Court to abandon an objective reasonableness requirement under the opposition clause in favor of a

have considered employer policies as probative when determining whether an employee acted reasonably in complaining about conduct perceived as discriminatory.<sup>278</sup> The case-law litmus test takes the opposite approach.<sup>279</sup>

It is also noteworthy that while some courts fail to consider employer policies for purposes of assessing an employee's belief about unlawful activity, they have little trouble holding employees responsible for knowing and following reporting procedures set forth in those same policies. Under prong two of the *Ellerth–Faragher* affirmative defense, an employer may prevail on the affirmative defense if it can show employees failed to take advantage of the employer's preventative or corrective opportunities (typically set forth in the same policies that define harassment), or to avoid harm otherwise.<sup>280</sup> Plaintiffs are often held to have fallen short under prong two because they failed to use the exact procedure for reporting set forth in the employer's policy or delayed too long in reporting discrimination despite the policy.<sup>281</sup> Accordingly, courts have no problem holding employees accountable for the contents of these policies when employees allegedly do not follow the detailed protocol for reporting harassment; yet, some courts take the opposite approach when considering what an employee perceives to be unlawful based on these exact policies.<sup>282</sup> In sum, the totality of the

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subjective good-faith standard" but recommending that employer policies defining discrimination be used in determining whether an employee's belief about discrimination is reasonable). Policies will differ from company to company and thus what may be reasonable in one instance may not be in another depending on the content of the policy. However, that is the product of a reasonableness inquiry where all the circumstances are considered.

278. See, e.g., *Watson v. Sutton, Inc.*, No. 02 Civ. 2739(KMV), 2005 WL 2170659, at \*10 (S.D.N.Y. Sept. 6, 2005) (finding that evidence at trial supported finding that plaintiff had a reasonable belief that complaining about an "an inappropriate sexual comment" was protected activity). Among other things, employer's policy stated that "[s]lurs and certain jokes or attempts at humor are inappropriate and may be actionable"). *Id.* at \*7.

279. See *supra* Part III.C.2 and accompanying notes.

280. For instance, in *Faragher v. City of Boca Raton*, the Court explained that "[w]hile proof that an employer had promulgated an anti-harassment policy with a complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense." 524 U.S. 775, 778 (1998). Further, "proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense." *Id.*

281. See Matthew W. Green Jr., *Express Yourself: Striking a Balance Between Silence and Active, Purposeful Opposition under Title VII's Anti-Retaliation Provision*, 28 HOFSTRA LAB. & EMP. L.J. 107, 147–49 & nn.241–55 (2010) (raising this point and citing cases and literature discussing reasons that plaintiffs fall short under prong two of the affirmative defense).

282. See *supra* Part III.C.2.

circumstances in assessing reasonableness should take into account employer representations defining discriminatory conduct and when to report it.

### 3. Lack of Unanimity Among Judicial or Administrative Authorities Regarding Whether a Particular Practice Violates Title VII

Another circumstance that should be considered in the reasonableness inquiry is whether there is any legal support for the plaintiff's belief that a practice is unlawful under Title VII, regardless of whether that support is found in the circuit in which the case arises, another court, dissenting opinions, or EEOC guidance. Thus, conflicts in the law should be considered as a circumstance in the reasonableness determination, and the benefit of the doubt should be given to the plaintiff where conflicts exist.

Under the reasonable belief standard, some courts have required that the plaintiff show an objectively reasonable belief about the illegality of a practice as determined by existing circuit precedent.<sup>283</sup> However, that conflicting authority exists regarding the legality of a practice should necessarily mean that a lay employee's belief that aligns with any of those conflicting positions is reasonable. Indeed, one court applying the reasonable belief doctrine recognized as much. In *Berg v. La Crosse Cooler Co.*,<sup>284</sup> an early case applying the reasonable belief doctrine, the plaintiff, a personnel clerk, was terminated after she opposed her employer's decision to deny temporary disability leave to another employee for reasons related to pregnancy.<sup>285</sup> Plaintiff alleged that she based her opinion on a seminar she attended where she was informed that under state law an employer offering comprehensive disability benefits to employees could not lawfully exclude from coverage compensation for the inability to work due to pregnancy.<sup>286</sup> The district court granted summary judgment in favor of the employer on the plaintiff's Title VII retaliation claim because after the plaintiff's termination, the Supreme Court in *General Electric Co. v. Gilbert*<sup>287</sup> held that employers

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283. See *supra* Part III.C.3.

284. 612 F.2d 1041 (7th Cir. 1980).

285. *Id.* at 1041–42.

286. *Id.* at 1042.

287. 429 U.S. 125 (1976). Congress later abrogated *Gilbert* by amending Title VII to define discrimination on the basis of sex to include “pregnancy, childbirth, or related medical conditions.” 42 U.S.C. § 2000e(k) (2006). See *Berg*, 612 F.2d at 1044 (“As a result of this legislation and inasmuch as it is an unlawful employment practice to discriminate against any of his employees ‘because of sex,’ under present law the defendant’s temporary disability benefits program . . . would constitute an unlawful employment practice.”).

that excluded disability benefits for pregnancy in otherwise comprehensive disability plans did not discriminate against women on the basis of sex.<sup>288</sup> The Seventh Circuit reversed.<sup>289</sup> It noted that at the time the plaintiff lodged her complaint, six courts of appeals and the EEOC had addressed the issue and had agreed with the position taken by the plaintiff.<sup>290</sup> Moreover,

[e]ven at the time that *Gilbert* was decided, the plaintiff here was in distinguished intellectual company in maintaining her belief that the defendant's program was an unlawful employment practice. Justices Brennan, Marshall and Stevens [in dissent in *Gilbert*] concluded that the language of the statute, motive, administrative expertise [of the EEOC] and policy required the result which the courts of appeals had reached unanimously.<sup>291</sup>

As *Berg* suggests, a plaintiff's belief about the lawfulness of an employment practice cannot be considered unreasonable if the same position is taken by jurists, even if that view is not held by a majority of jurists. *Berg* also shows that a plaintiff's belief may be reasonably shaped by interpretations of state statutes analogous to Title VII.<sup>292</sup> States typically have their own anti-discrimination statutes, which are often but not always interpreted similarly to Title VII.<sup>293</sup> At times, as in *Berg*, however, state courts may interpret their statutes to provide broader coverage from discrimination than federal courts provide under Title VII.<sup>294</sup> Moreover,

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288. *Berg*, 612 F.2d at 1043.

289. *Id.* at 1047.

290. *Id.* at 1043.

291. *Id.* at 1044.

292. Harkening back to an earlier point, *Berg* also demonstrates the importance of perspective in assessing reasonableness. As one commentator has noted, the decision is a "textbook example[] of the effects of . . . insensitivity . . . [i]magine what the presence of even one woman Justice would have meant to the Court's conferences" in determining whether discrimination on the basis of sex includes discrimination on the basis of pregnancy. Stephanie S. Gold, *An Equality Approach to Wrongful Birth Statutes*, 65 FORDHAM L. REV. 1005, 1024 & n.105 (1996) (citing Kenneth L. Karst, *The Supreme Court 1976 Term, Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 54 n.304 (1977)).

293. Compare *Booker v. Brown & Williamson Tobacco Co., Inc.*, 879 F.2d 1304, 1310 (6th Cir. 1989) (applying same standard to a claim brought pursuant to a Michigan anti-discrimination statute that would apply under Title VII), and *Dias v. Goodman Mfg. Co.*, 214 S.W.3d 672, 677 (Tex. App. 2007) (adopting interpretation of Title VII for purposes of similarly worded state anti-discrimination statute), with *Alexander v. Seton Hall Univ.*, 8 A.3d 198, 205-06 (N.J. 2010) (rejecting the Court's analysis of pay discrimination claim arising under Title VII that arose under similarly worded state anti-discrimination statute).

294. *Berg* dealt with a plaintiff who based her belief that her employer's policy toward pregnant women was unlawful on a Wisconsin Supreme Court decision declaring it unlawful under the Wisconsin Fair Employment Law. *Berg*, 612 F.2d at 1045 (citing *Ray-O-Vac, Div. of E.S.B., Inc. v. Wisconsin Dep't of Indus., Labor & Human Relations*, 236 N.W.2d 209, 216 (Wis. 1975)).

employer anti-discrimination policies may fail to distinguish between federal and state law when setting forth prohibited discriminatory practices. In those instances, employees may reasonably conclude that the policy applies to both federal and state law.<sup>295</sup>

The EEOC's position on an issue also should be taken into account in assessing reasonableness. The Court has found the EEOC's interpretation of the statute to be persuasive and has adopted its interpretation in many instances.<sup>296</sup> Moreover, the agency is the entity Congress charged with administration of the statute, and the Court has explained that its pronouncements regarding Title VII may be "properly" consulted by courts and litigants for guidance.<sup>297</sup> Accordingly, it would seem odd if an employee's belief aligned with the EEOC's position regarding the unlawfulness of a particular practice but the employee's belief was considered unreasonable. If the reasonableness of the employee's belief must be assessed, at least in part, by "substantive law,"<sup>298</sup> the fact that there is some authority that supports the belief should satisfy any requirement that the employee *reasonably* believed "he has opposed a practice made an unlawful employment practice."<sup>299</sup>

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295. The Society for Human Resources Management, for instance, recommends that company anti-discrimination policies state that employees are protected from discrimination on the basis of "any . . . characteristic protected by law." See SOCIETY FOR HUMAN RESOURCES MANAGEMENT, [http://www.shrm.org/TemplatesTools/Samples/Policies/Pages/CMS\\_000551.aspx](http://www.shrm.org/TemplatesTools/Samples/Policies/Pages/CMS_000551.aspx) (last visited Mar. 11, 2014). There is no recommendation that the policy distinguish the traits that are protected by federal law from those that are protected by state law. Moreover, it recommends that companies protect individuals on the basis of characteristics that are clearly not protected by Title VII, such as marital status and sexual orientation. See *id.*

296. See, e.g., *Burlington N. and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 65 (2006) (citing EEOC Compliance Manual for the proposition that the anti-retaliation provision should provide "exceptionally broad protection" to those challenging discrimination); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 345–46 (1997) (holding that Title VII's anti-retaliation provision protects former employees as well as current employees, which is the EEOC's position as set forth in its Compliance Manual; Court found persuasive EEOC's argument that a contrary position would undermine Title VII's purposes); *Griggs v. Duke Power Co.*, 401 U.S. 424, 433–34 (1971) (holding that intelligence tests are authorized under Title VII if they are job-related and relying on EEOC guidelines for support on the matter: "[t]he administrative interpretation of the Act by the enforcing agency is entitled to great deference").

297. See *Gilbert v. Gen. Elec. Co.*, 429 U.S. 125, 141–42 (1976) (EEOC interpretations of Title VII are not controlling on courts but do "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance").

298. See *Weeks v. Harden Mfg. Corp.*, 291 F.3d 1307, 1317 (11th Cir. 2002) (holding that plaintiffs may not disclaim knowledge of substantive law for purposes of the reasonableness inquiry lest "the reasonableness inquiry becomes no more than speculation regarding their subjective knowledge").

299. 42 U.S.C. § 2000e-3(a) (2014).

## V. CONCLUSION

Courts recognized early on that it would undermine Title VII's objectives to protect employees from retaliation under the opposition clause only on condition that they possess an expertise in the law and an aptitude for predicting the outcomes of Title VII cases. Thus, the reasonable belief doctrine was adopted and was deemed necessary to effectuate the statute's goals. Somewhere along the way, the noble purpose of the doctrine was lost.

It may be true that determining reasonableness requires some objective benchmarks. Considering the bases for the reasonable belief doctrine, however, those benchmarks should not begin and end at case law, which most lay employees do not know and indeed are not expected to know. If employees were expected to know the law and appreciate its intricacies, including circuit splits, the original purpose behind the creation of the reasonable belief doctrine would be thwarted. Thus, the case-law litmus test for determining reasonableness should be discarded.

Despite its flaws, however, the reasonable belief doctrine, in some form, is unlikely to be replaced by a purely subjective good faith standard. The approach proposed here—the totality of the circumstances test—occupies the middle ground between purely objective and purely subjective standards. It should provide greater protection against retaliation than does the narrow case-law approach, and better effectuate the original goals of the reasonable belief doctrine. The totality of the circumstances test would be a step, even if a small one, toward making the rhetoric of broad protection from retaliation a reality.