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Retaliation and the Reasonable Person

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RETALIATION AND THE REASONABLE PERSON

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Abstract

When a worker complains about discrimination, federal law is supposed to protect that worker from later retaliation. Recent scholarly attention focuses on how courts limit retaliation claims by narrowly framing the causation inquiry. A larger threat to retaliation law is developing in the lower courts. Courts are declaring a wide swath of conduct as insufficiently serious to constitute retaliation.

Many courts hold that it is legal for an employer to threaten to fire a worker, to place the worker on administrative leave, or to negatively evaluate the worker because she complained about discriminatory conduct. Even if the worker has evidence that her complaint caused the negative consequence, some judges refuse to call the employer's conduct legal retaliation.

This growing body of retaliation harm jurisprudence is surprising. Under existing U.S. Supreme Court precedent, a worker suffers an adverse action if the negative consequence would dissuade a reasonable person from complaining about discrimination. Yet, lower courts routinely dismiss cases by ruling that consequences such as threatened termination or negative evaluations would not dissuade a reasonable person from filing a discrimination complaint.

In doing so, courts are making factual determinations about what reasonable people think. Using empirical evidence, this Article demonstrates that these factual determinations are incorrect. This Article then explores how structural and substantive features of retaliation law and judicial decision-making skew retaliation law in a narrow direction.

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INTRODUCTION

Federal employment discrimination law relies on worker complaints for its enforcement. The law requires workers to report discrimination to the Equal Employment Opportunity Commission (EEOC) or a state agency before filing suit.[1] Court-created doctrines also require or encourage employees to complain about inappropriate discriminatory conduct.[2]

The discrimination statutes ostensibly protect workers through anti-retaliation provisions.[3] To prevail on a retaliation claim, a person must show that she engaged in protected activity, that she suffered an adverse action, and that there was a causal connection between the activity and

1. *See, e.g.*, 42 U.S.C. §§ 2000e-5(e)(1), (f)(1) (2012).

2. *See infra* Section V.B.

3. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a) (2012); Americans with Disabilities Act (ADA), 42 U.S.C. § 12203 (2012); Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623(d) (2012).

the consequence.[4] Recent scholarly attention focuses on how courts limit retaliation claims by narrowly framing the causation inquiry.[5] A larger threat to retaliation law is developing in the lower courts. Courts are declaring a wide swath of conduct as insufficiently serious to constitute retaliation.

If an employer threatens to fire an employee, places her on administrative leave, or gives her a bad evaluation because she complained about discriminatory conduct, many courts will dismiss the employee's retaliation claim.[6] Even if the employee has evidence that her complaint caused the negative consequence, some courts refuse to call such conduct legal retaliation.

This growing body of retaliation harm jurisprudence is surprising. Under existing U.S. Supreme Court precedent, a worker suffers an adverse action if the negative consequence would dissuade a reasonable person from complaining about discrimination.[7] Yet, lower courts routinely dismiss cases by ruling that certain consequences, such as threatened termination or negative evaluations, would not dissuade a reasonable person from filing a discrimination complaint.[8]

In doing so, courts are making factual determinations about what reasonable people think. Using empirical evidence, this Article demonstrates that these factual determinations are incorrect.[9] I asked study participants if facing certain negative consequences would dissuade them from complaining about discrimination. An overwhelming percentage of study participants perceived a wide range of negative consequences as likely to deter them from complaining about discrimination. These results held true for both men and women.

The study results demonstrate that lower courts have set the harm threshold too high. Borrowing from past critiques of the reasonable person standard, it is tempting to conclude that such results merely reflect bias. However, combining an extensive review of the retaliation cases with the study results suggests that something else is happening in the retaliation context.

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4. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2525 (2013); *see also* Crawford v. Metro. Gov't of Nashville & Davidson Cnty., Tenn., 555 U.S. 271, 274 (2009) (discussing opposition and participation conduct under Title VII).

5. *See, e.g.*, Lawrence D. Rosenthal, *A Lack of "Motivation," or Sound Legal Reasoning? Why Most Courts Are Not Applying Either* Price Waterhouse*'s or the 1991 Civil Rights Act's Motivating-Factor Analysis to Title VII Retaliation Claims in a Post-*Gross *World (but Should)*, 64 ALA. L. REV. 1067, 1068 (2013).

6. *See infra* Part I.

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

8. *See, e.g.*, Brown v. SDH Educ. E. LLC, No. 3:12-cv-2961-TLW, 2014 WL 468974, at *6–7 (D.S.C. Feb. 4, 2014).

9. *See infra* Part II.

This Article explores the role of perceived precedent in shaping retaliation law. When courts rule that a particular action is not serious enough to trigger retaliation liability, the resulting decision appears as if the court is making the determination as a matter of law for all similar actions.[10] Lower courts in subsequent cases are therefore often not making independent decisions about whether a particular action is harmful. Rather, they are following what they perceive to be precedent.

In contrast, when courts rule that certain actions are serious enough to create liability, they often discuss the particular circumstances of the plaintiff or his workplace and why the negative consequences are serious in the particular context.[11] Judges in subsequent cases do not as readily perceive these earlier cases as precedent because the earlier cases rely so heavily on the underlying facts of the cases to justify their conclusions.

Additionally, current retaliation law contains two different strands: one that uses the harm standard to further the goals of retaliation law and another that uses harm doctrine to limit the scope of retaliation claims. The empirical research in this Article shows that these two strands are in tension with one another and may lead to different answers about whether particular actions should create liability.

Shifting the focus away from bias allows for a fuller exploration of how structural and substantive features of discrimination law generally and retaliation law specifically push the law in a restrictive direction. In some ways, this turn away from bias as a central motivation mirrors a conceptual change in how we understand discrimination itself. In the early decades after the passage of Title VII of the Civil Rights Act of 1964 (Title VII), courts and academics often described discrimination as resulting from bias or personal animus.[12] While bias still exists, modern academic commentary often explores how structural features of the workplace and workplace decision-making lead to discrimination.[13] In a similar vein, this Article explores how the structures of judicial decision-making generally and in the specific context of retaliation lead to high harm thresholds.

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10. *See infra* Part IV.A.

11. *See id.*

12. Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 14 n.67 (2006).

13. *See, e.g.*, *id.* (describing and critiquing the structural turn); Martha Chamallas, *Structuralist and Cultural Domination Theories Meet Title VII: Some Contemporary Influences*, 92 MICH. L. REV. 2370 (1994) (exploring structuralist and cultural domination influences); Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 95 (2003) ("[A] mounting body of evidence indicates that a number of social and structural changes in the workplace have affected the ways in which discrimination operates."); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 460 (2001) ("[S]econd generation manifestations of workplace bias are structural, relational, and situational.").

Given that courts themselves were largely responsible for incentivizing employers to create internal complaint procedures and for encouraging employees to complain, courts have a special responsibility to correctly align the harm standard with retaliation law's underlying goals. To do this, courts should do two things. First, courts should enshrine cautionary language within the retaliation harm doctrine that warns courts that summary judgment in the employer's favor is typically inappropriate when the worker presents evidence of a negative consequence. Second, courts should clarify that any action that is more than *de minimis* meets the harm threshold as a matter of law.

In a small subset of cases, courts may determine that the consequences the worker faced would typically be regarded as *de minimis*. In these instances, the worker would still have the opportunity to prove that the action was harmful in her circumstances. Assuming that the worker presents evidence supporting a material dispute of fact regarding whether the action was harmful in her particular case, summary judgment would be inappropriate on the harm element of the retaliation claim.

Redescribing the harm inquiry in this way comports best with the underlying goals of retaliation law. If the harm threshold is pegged to the consequences that would dissuade a reasonable person from complaining, the courts should recognize as a matter of law that most negative consequences would dissuade a reasonable person. If the purpose of retaliation law is to encourage workers to complain about discrimination, then the law should protect workers who make a complaint.

Part I of the Article begins with an in-depth discussion of harm thresholds in retaliation law. Part II provides the results of an empirical study, which shows that the reasonable person standard enunciated by a substantial number of courts is inconsistent with the views of reasonable people. Part III explores the major implications of the study results. Part IV discusses how perceived precedent pushes the law in a conservative direction and describes the complexities in the current standard, including two divergent strands within the retaliation harm doctrine. Finally, Part V proposes two structural changes to the way courts approach retaliation harm.

I. THE REASONABLE PERSON IN RETALIATION LAW

In numerous cases, federal appellate and district courts hold that a worker's failure to allege sufficient harm is fatal to establishing a retaliation claim. These cases hold that an employee cannot establish a cognizable retaliation claim, even if he alleged that his employer took the following actions because of a discrimination complaint:

- Threatening to fire the employee;[14]
- Negatively evaluating the employee or making disciplinary write-ups;[15]
- Threatening the employee with a suspension or disciplinary action;[16]
- Placing the employee on disciplinary or administrative leave;[17]
- Making a shift change;[18]
- Removing the employee from his office;[19] or
- Falsely reporting poor performance.[20]

Title VII, the Age Discrimination in Employment Act (ADEA), and the Americans with Disabilities Act (ADA) are the main federal statutes that prohibit employment discrimination.[21] When taken together, these statutes prohibit employment discrimination against individuals that is based on their sex, race, color, national origin, religion, disability, or

14. *See, e.g.*, Hellman v. Weisberg, 360 F. App'x 776, 779 (9th Cir. 2009); Brown v. SDH Educ. E. LLC, No. 312-cv-2961-TLW, 2014 WL 468974, at *7 (D.S.C. Feb. 4, 2014); Gutierrez v. GEO Grp., No. 11-cv-02648-PAB-KLM, 2012 WL 2030024, at *3 (D. Colo. June 6, 2012); Jantz v. Emblem Health, No. 10 Civ. 6076 (PKC), 2012 WL 370297, at *14 (S.D.N.Y. Feb. 6, 2012); Pugni v. Reader's Digest Ass'n, No. 05 Civ. 8026 (CM), 2007 WL 1087183, at *23 (S.D.N.Y. Apr. 9, 2007).

15. *See, e.g.*, Gómez-Pérez v. Potter, 452 F. App'x 3, 8 (1st Cir. 2011); Sconfienza v. Verizon Pa. Inc., 307 F. App'x 619, 622, 624 (3d Cir. 2008); Sesay-Harrell v. N.Y.C. Dep't of Homeless Servs., No. 12 Civ. 925(KPF), 2013 WL 6244158, at *19 (S.D.N.Y. Dec. 2, 2013); Augustus v. Napolitano, No. 11-120-JJB, 2013 WL 530586, at *5 (M.D. La. Feb. 11, 2013); Wilson-Robinson v. Our Lady of the Lake Reg'l Med. Ctr., Inc., No. 10-584, 2012 WL 5940912, at *5–7 (M.D. La. Nov. 27, 2012); Palmer-Williams v. Yale New Haven Hosp., Civ. No. 3:08cv1526 (JBA), 2011 WL 1226022, at *10 (D. Conn. Mar. 27, 2011); Carmellino v. Dist. 20 of N.Y.C. Dep't of Educ., No. 03 Civ. 5942 PKC, 2006 WL 2583019, at *32 (S.D.N.Y. Sept. 6, 2006).

16. *See, e.g.*, Littleton v. Pilot Travel Ctrs., LLC, 568 F.3d 641, 644 (8th Cir. 2009); Ballard v. Donahoe, No. 2:11-cv-2576 JAM AC PS, 2014 WL 1286193, at *13 (E.D. Cal. Mar. 27, 2014); Baloch v. Kempthorne, 550 F.3d 1191, 1199 (D.C. Cir. 2008); *see also* Chang v. Safe Horizons, 254 F. App'x 838, 839 (2d Cir. 2007) (holding that oral reprimands were not sufficient).

17. *See, e.g.*, McKneely v. Zachary Police Dep't, No. 12-354-SDD-RLB, 2013 WL 4585160, at *10–11 (M.D. La. Aug. 28, 2013); Muse v. Jazz Casino Co., No. 09-0066, 2010 WL 2545278, at *3 (E.D. La. June 16, 2010).

18. *See, e.g.*, Lushute v. La., Dep't. of Social Servs., 479 F. App'x 553, 555 (5th Cir. 2012) (analyzing an action arising from the Family and Medical Leave Act (FMLA) using a Title VII standard); *McKneely*, 2013 WL 4585160, at *10.

19. *See, e.g.*, Rodriguez-Monguio v. Ohio State Univ., 499 F. App'x 455, 464 (6th Cir. 2012).

20. *See, e.g.*, *Littleton*, 568 F.3d at 644.

21. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (2012); Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101–12213 (2012); Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621–634 (2012).

age.[22] These statutes also contain anti-retaliation provisions.[23] For example, Title VII prohibits an employer from discriminating against an employee or job applicant because that individual "opposed any practice" made unlawful by Title VII or "made a charge, testified, assisted, or participated in" a Title VII proceeding or investigation.[24]

This Part first explores the origins of the reasonable person harm threshold in retaliation law. It then discusses how courts interpret the reasonable person standard in the retaliation context. It concludes with an overview of scholarly critiques of the reasonable person construct.

A. *Adverse Actions*

Courts typically describe retaliation cases as requiring three elements. First, the worker must engage in activity that the statutes protect, such as complaining to the employer or an administrative agency about discrimination.[25] Second, the worker must suffer a negative consequence, which the courts call an "adverse action."[26] Third, there must be a causal connection between the protected activity and the negative consequence.[27]

Over time, the courts developed the concept of an adverse action to define how serious a negative consequence must be before it could potentially lead to liability for retaliation.[28] The courts began to use the term "adverse action" or similar language to separate actions that would potentially lead to liability from those that would not.[29]

In 2006, the Supreme Court decided *Burlington Northern & Santa Fe Railway v. White*,[30] which resolved a circuit split regarding the meaning of the adverse action requirement in retaliation cases.[31] Knowing the facts of the case is necessary to understanding some of the later problems with the retaliation harm threshold.

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22. 42 U.S.C. § 2000e-2(a) (a primary operative provision of Title VII); 42 U.S.C. § 12112(a)–(b) (same for ADA); 29 U.S.C. § 623(a) (same for ADEA).

23. 42 U.S.C. § 2000e-3(a); 42 U.S.C. § 12203(a); 29 U.S.C. § 623(d).

24. 42 U.S.C. § 2000e-3(a).

25. Adams v. City of Montgomery, 569 F. App'x 769, 773 (11th Cir. 2014).

26. *Id.*

27. *Id.* This Section emphasizes the core elements of a retaliation claim. Some courts, however, articulate the test differently. *See, e.g.*, Stover v. Martinez, 382 F.3d 1064, 1070–71 (10th Cir. 2004) (using a modified *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) burden-shifting test to evaluate a retaliation claim).

28. *See generally* Shannon Vincent, *Unbalanced Responses to Employers Getting Even: The Circuit Split over What Constitutes a Title VII-prohibited Retaliatory Adverse Employment Action*, 7 U. PA. J. LAB. & EMP. L. 991 (2005) (analyzing the various adverse employment action standards).

29. *See id.* at 992–93.

30. 548 U.S. 53 (2006).

31. *Id.* at 57.

Plaintiff Sheila White worked for Burlington Northern in its Tennessee Yard as a track laborer.[32] Although Ms. White performed other tasks, her primary responsibility was to drive a forklift.[33] In September of 1997, Ms. White lodged an internal complaint that her immediate supervisor frequently told her that women should not work in his department, and he insulted her in front of her male coworkers.[34] The company placed the supervisor on a ten-day suspension and required him to attend sexual harassment training.[35]

Later that month, Burlington's "roadmaster" removed Ms. White from her forklift responsibilities, instead assigning her other job duties within the track laborer's job description.[36] Ms. White filed a charge of discrimination with the EEOC, alleging that the company discriminated against her and retaliated against her after she made the discrimination complaint.[37] Ms. White then alleged that the roadmaster started to closely monitor her daily activities and placed her under surveillance at work.[38] Ms. White filed another charge of discrimination based on the surveillance.[39]

A few days later, Ms. White had a disagreement with another supervisor.[40] The supervisor alleged that Ms. White had been insubordinate, and the roadmaster placed her on an unpaid suspension.[41] After an internal grievance procedure, the company determined that Ms. White had not been insubordinate and reinstated her with backpay for the thirty-seven days of her suspension.[42]

Ms. White later filed claims in federal court alleging that her employer retaliated against her by changing her job responsibilities and suspending her without pay.[43] A jury found in Ms. White's favor on the retaliation claim and awarded her compensatory damages.[44]

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32. *Id.*
33. *Id.*
34. *Id.* at 58.
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.* at 59.
40. *Id.* at 58.
41. *Id.*
42. *Id.* at 58–59.
43. *Id.* at 59. Although the Supreme Court mentioned the increased supervision of Ms. White as the basis for one of her EEOC charges, it did not further discuss this aspect of her retaliation claim. *See id.* at 60–72. Ms. White also alleged that her supervisor discriminated against her based on her sex. White v. Burlington N. & Santa Fe Ry. Co., 364 F.3d 789, 791 (6th Cir. 2004).
44. *Burlington*, 548 U.S. at 59. The district court denied the defendant's post-trial motions. A divided panel of the U.S. Court of Appeals for the Sixth Circuit reversed the decision below on

The Supreme Court took Ms. White's case to determine the meaning of "discriminate[s] against" in the context of Title VII's anti-retaliation provision, including the more specific issue of how much harm adverse actions must cause to constitute discrimination.[45] The Court held that the anti-retaliation provisions cover those employer actions that "would have been materially adverse to a reasonable employee or job applicant."[46] The Court further indicated that "the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination."[47]

The Court's description of this standard did not end there. The Court emphasized that the harm to the employee must be material and that the *Burlington* decision is not meant to insulate employees against "petty slights, minor annoyances, and simple lack of good manners."[48]

The Court further explained that "[n]o one doubts that the term 'discriminate against' refers to distinctions or differences in treatment that injure protected individuals."[49] The Court specifically rejected the idea that an adverse action required a negative impact on compensation, terms, conditions, or privileges of employment.[50] It held that Congress omitted these terms from the retaliation provision and that this omission must reflect a lower harm threshold for retaliation claims than the one found in the statute's discrimination provisions.[51]

The Court also held that Title VII's anti-retaliation provisions are not confined to actions relating to employment or occurring in the workplace.[52] By way of example, the Court noted that the goals of the anti-retaliation provisions would not be met if employers could escape liability by filing false criminal charges against an employee who complained.[53] Instead, the goal of Title VII's retaliation provision is to provide unfettered access to the statutory remedial scheme.[54]

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the retaliation claim; however, the Sixth Circuit, sitting en banc, affirmed the district court's decision regarding the retaliation issues. *Id.* The Sixth Circuit held that a retaliatory action must meet the level of an adverse employment action to be cognizable under Title VII, concluding that a suspension without pay and reallocating job responsibilities constituted adverse employment actions. *White*, 364 F.3d at 796, 803–04.

45. *Burlington*, 548 U.S. at 56–57 (internal quotation marks omitted).
46. *Id.* at 57.
47. *Id.*
48. *Id.* at 68.
49. *Id.* at 59.
50. *Id.* at 61–62.
51. *Id.* at 62–63.
52. *Id.* at 63.
53. *Id.* at 63–64.
54. *Id.* at 64.

The reasonable person standard contemplated by the Court is that of an objectively reasonable person.[55] However, the Court noted that in some circumstances the courts might alter the reasonable person standard to include the perspective of a reasonable person in the plaintiff's position.[56] For example, a schedule change might be inconsequential to many workers but could dissuade a working mother from submitting a complaint.[57] The Court emphasized that the objective standard was meant to eliminate a need for courts to interpret a plaintiff's unusual, subjective feelings.[58]

The Court found it difficult to fully articulate the types of actions that constitute retaliation.[59] Rather, the Court indicated that the context of each particular case would matter: "The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed."[60] The Court continued by noting that, in some circumstances, changes in an employee's work schedule or a supervisor's exclusion of an employee from a weekly training lunch might be actionable.[61] Importantly, the Court specifically stated that it did not want to provide a list of specific prohibited acts because of the contextual nature of the harm inquiry.[62]

The way the Court applied its new standard to the facts of Ms. White's case is important. The Court held that the change in Ms. White's job duties was actionable because "[c]ommon sense suggests that one good way to discourage an employee such as [Ms.] White from bringing discrimination charges would be to insist that she spend more time performing the more arduous duties and less time performing those that are easier or more agreeable."[63] It then cited an EEOC Manual indicating that Title VII prohibited retaliatory work assignments.[64]

But, in the following paragraph of the opinion, the Court indicated that reassignment of job duties is not always actionable by stating that "[w]hether a particular reassignment is materially adverse depends upon the circumstances of the particular case, and should be judged from the perspective of a reasonable person in the plaintiff's position, considering

55. *Id.* at 68–69.

56. *Id.* at 69.

57. *Id.*

58. *Id.* at 68–69.

59. *Id.* at 69.

60. *Id.* (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81–82 (1998) (internal quotation marks omitted)).

61. *Id.*

62. *Id.*

63. *Id.* at 70–71.

64. *Id.* at 71.

all the circumstances."[65] The Court noted that there was ample evidence in Ms. White's case that the change in her job responsibilities would be materially adverse. This Article later explores how this particular paragraph in *Burlington* has been problematic in subsequent cases.

In considering whether the rescinded suspension constituted an adverse action, the Court noted that a month without pay would deter most employees from filing a discrimination complaint.[66] Although the Court noted Ms. White's particular evidence and the jury's conclusion in light of her evidence, the Court's opinion strongly suggested that a month-long suspension without pay would always be serious enough to trigger protection under the retaliation provision.[67]

In his concurrence, Justice Samuel Alito noted that following the majority's interpretation of the statute would mean that "a retaliation claim must go to the jury if the employee creates a genuine issue on . . . [questions such as] whether the employee was given any more or less work than others, was subjected to any more or less supervision, or was treated in a somewhat less friendly manner because of his protected activity."[68]

B. *Post*-Burlington

After *Burlington*, lower courts began to apply the Supreme Court's language to different kinds of retaliation cases. Lower courts generally agreed that terminations, pay reductions, and demotions are adverse actions.[69] Outside of these categories, the courts often denied relief to employees, holding that the employee cannot prevail because he failed to establish an adverse action.

In hundreds of subsequent cases, federal circuit and district courts construed the adverse action requirement narrowly. Courts routinely dismiss cases by concluding that workers did not suffer enough harm. As discussed earlier, courts dismiss cases when workers allege that employers subjected them to threatened termination; negative evaluations; disciplinary write-ups; threatened suspensions; disciplinary and administrative leave; shift changes; threatened criminal prosecution; removal from an office; threatened disciplinary action; and reports of poor performance.[70]

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65. *Id.* (quoting *Oncale*, 523 U.S. at 81 (internal quotation marks omitted)).

66. *Id.* at 72.

67. *See id.* at 72–73.

68. *Id.* at 75 (Alito, J., concurring).

69. *See, e.g.*, Murphy v. Ohio State Univ., 549 F. App'x 315, 321 (6th Cir. 2013) (ruling in context of FMLA but citing to Title VII's retaliation standard).

70. *See supra* notes 14–20 and accompanying text. As discussed later, the case law is not completely uniform.

When employees allege that employers take more than one action against them, some courts divide the alleged actions and individually determine whether each action meets the materiality requirement.[71] Some courts then determine that, even when combined, the alleged consequences do not meet the adverse action requirement.[72] As one court colorfully stated: "[z]ero plus zero is zero."[73]

Once a court finds that a particular consequence is not an adverse action, subsequent courts often cite the earlier holding without exploring any possible contextual differences between the two cases. This outcome is especially puzzling in retaliation cases because the Supreme Court provided examples of the same conduct that would be cognizable in one context but not in another. The Court indicated that in some instances exclusion from lunch would meet the harm threshold, but in other circumstances it would not.[74] The Court's standard, while supposedly an objective one, also contemplates a reasonable person in the plaintiff's circumstances.

Courts assert numerous rationales for their holdings. They do not explain many of these rationales well, and courts often refer to more than one of the following reasons for denying relief to a plaintiff. One rationale is that the retaliation statutes require a showing of harm and that the negative consequence suffered by the employee is not an injury or harm.[75] Courts often combine this rationale with the second, related concern that retaliation law should not respond to trivial harms, petty slights, or minor annoyances.[76] Another concern is that a lower harm threshold will unreasonably shield the employee from subsequent, appropriate discipline for misconduct.[77]

II. THE STUDY: THE IMPACT OF NEGATIVE CONSEQUENCES

This Article's study used a paper survey to test how individuals perceived retaliation harms. The survey first instructed participants to imagine that they witnessed discrimination in the workplace. It then

71. *See, e.g.*, McKneely v. Zachary Police Dep't, No. 12-354-SDD-RLB, 2013 WL 4585160, at *10–12 (M.D. La. Aug. 28, 2013).

72. *E.g.*, *id.* at *11.

73. Tepperwien v. Entergy Nuclear Operations, Inc., 663 F.3d 556, 572 (2d Cir. 2011) (quoting MacDraw, Inc. v. CIT Grp. Equip. Fin., Inc., 138 F.3d 33, 38 (2d Cir. 1998) (internal quotation marks omitted)).

74. Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 69 (2006).

75. Littleton v. Pilot Travel Ctrs., LLC, 568 F.3d 641, 644 (8th Cir. 2009).

76. *See, e.g.*, Szeinbach v. Ohio State Univ., 493 F. App'x 690, 693 (6th Cir. 2012); Lushute v. La., Dep't of Soc. Servs., 479 F. App'x 553, 555 (5th Cir. 2012); Wilson-Robinson v. Our Lady of the Lake Reg'l Med. Ctr, Inc., No. 10-584, 2012 WL 5940912, at *7 n.3 (M.D. La. Nov. 27, 2012).

77. *See, e.g.*, Mitchell v. Med. Univ. Hosp. Auth., No. 2:11-2028-RMG, 2013 WL 4041954, at *24 (D.S.C. Aug. 7, 2013); Rattigan v. Holder, 604 F. Supp. 2d 33, 49 (D.D.C. 2009).

asked the participants a series of ten questions about whether certain actions would dissuade them from submitting a complaint about the discrimination to an employer. The eleventh question asked participants to indicate which actions in the list the participant considered to be only minor annoyances or petty slights.

The original hypothesis for this study was that the results would show that participants would define conduct that would dissuade a reasonable person from filing a complaint at a different level than that found in most court opinions. Another hypothesis was that study participants would disagree with courts' characterizations about what constitutes a minor annoyance or petty slight in the workplace.

More than half of the study participants stated that the following consequences would or might dissuade them from complaining about discrimination: (1) being threatened with termination, (2) receiving a paid seven-day suspension, (3) being moved to an office in another location, (4) facing social ostracism from coworkers, and (5) facing a change in job responsibilities with the same pay. Additionally, more than seventy-five percent of the study participants thought that a negative evaluation placed in their file would or might dissuade them. These results stand in stark contrast to the reasonable person harm threshold enshrined in many court opinions.

A. *Survey Design and Sample*

The study's sample consisted of ninety-five law students at the University of Cincinnati College of Law. The age range for study participants was twenty-one years of age to forty-five years of age, and the median age was twenty-four years old. There were fifty-two men who completed the survey and forty-two women. One student declined to provide age and sex data. All participants responded to the eleven substantive inquiries on the survey instrument.

The survey started by instructing each participant to imagine that he witnessed discrimination in the workplace. Next, the survey asked the participants a series of ten questions about whether certain actions would dissuade them from submitting a complaint about the discrimination to an employer. The survey asked participants about the following ten actions:

- A coworker stares rudely every day for a week;
- Being fired;
- A negative evaluation in an employment file;
- A supervisor threatened termination but did not immediately carry out the threat;

- A paid seven-day suspension;
- An office move to another location;
- A demotion;
- Criticism from a supervisor about work performance during a meeting attended by coworkers;
- Social ostracism by coworkers; and
- A change in job responsibilities with the same pay.

For each action, the survey participant could answer yes, no, maybe, or do not know. The last question asked the survey participants to indicate which of the above-listed actions the participant would consider to be only minor annoyances or petty slights in the workplace. The participant could circle as many items from the list as the participant thought qualified as a minor annoyance or petty slight. The "minor annoyances" or "petty slights" language mirrors the standard courts apply when determining whether a plaintiff meets the required harm threshold.

B. *Survey Results and How They Differ from Court Opinions*

The study results show a strong consensus about what actions would dissuade a reasonable person from filing a complaint. More than ninety percent of the study participants thought that termination would or might dissuade them from filing a complaint. About eighty percent thought that a negative evaluation in their employment file or a demotion would or might dissuade them. More than half of the study participants indicated that the following consequences would or might dissuaded them from filing a complaint: threatened termination, a paid seven-day suspension, an office move to another location, social ostracism by coworkers, or a change in job responsibilities with the same pay.

There were only two potential job consequences that a majority of participants thought would be unlikely to prevent them from filing a complaint: a coworker staring rudely every day for a week and criticism from a supervisor about work performance during a meeting attended by coworkers. However, a sizable portion of the study participants still thought these actions would dissuade them from filing a complaint, with slightly more than seventeen percent indicating that stares from a coworker would or might dissuade them and more than forty-one percent indicating that criticism from a supervisor would or might dissuade them.

The study results show that study participants viewed the most harmful consequence as termination, followed in order of seriousness by demotion, a negative evaluation in an employment file, threatened termination, a change in job responsibilities with the same pay, an office

move to another location, a paid seven-day suspension, and social ostracism by coworkers. Participants rated criticism from a supervisor about work performance during a meeting with coworkers and a coworker staring rudely every day for a week as the least serious.

This data shows that the courts are correct in holding that termination and demotion are likely to deter a person from filing a discrimination complaint. More than ninety percent of participants thought termination would or might dissuade them, and more than eighty-three percent thought that a demotion would or might dissuade them.

Notably, eighty percent responded that a negative evaluation would or might dissuade them. Recall that many courts hold that a negative evaluation is not an adverse action because it does not result in any harm to the employee.[78] Additionally, more than sixty-eight percent of study participants ranked a threatened termination as likely to dissuade. A long line of cases, however, hold that a threatened termination would not dissuade a reasonable person from filing a complaint.[79] Thus, the most important takeaway from this data is how significantly it differs from most written judicial opinions.

Chart 1 provides the number and percentage of study participants who marked that a particular negative consequence would or might dissuade them from filing a complaint. The chart shows, in descending order, the actions that participants viewed as most harmful to least harmful.

Chart 1. Percentage of Participants Who Would Not or Might Not Complain if Faced with Consequence

Negative Consequence	Percentage of Participants Who Would or Might Be Dissuaded
Being fired	90.53%
Demotion	83.16%
A negative evaluation in an employment file	80%
Supervisor threatened termination but did not immediately carry out the threat	68.42%
A change in job responsibilities with the same pay	62.11%
Office move to another location	55.79%
Paid seven-day suspension	53.68%
Social ostracism by coworkers	50.53%
Criticism from a supervisor about work performance during a meeting attended by coworkers	41.05%
A coworker stares rudely every day for a week	17.89%

78. *E.g.*, sources cited *supra* note 15.

79. *E.g.*, sources cited *supra* note 14.

In most categories, significant differences did not exist based on whether the response was from a female or male participant. Chart 2 provides the data based on the sex of the participant.

Chart 2. Percentage of Participants Who Would Not or Might Not Complain if Faced with Consequence, Differentiated by Sex

Negative Consequence	**Percentage of Participants Who Would or Might Be Dissuaded (Male/Female)**
Being fired	90.38% (male) 90.48% (female)
Demotion	84.62% (male) 80.95% (female)
A negative evaluation in an employment file	82.69% (male) 78.57% (female)
Supervisor threatened termination but did not immediately carry out the threat	63.46% (male) 73.81% (female)
A change in job responsibilities with the same pay	63.46% (male) 59.52% (female)
Office move to another location	65.38% (male) 45.24% (female)
Paid seven-day suspension	53.85% (male) 52.38% (female)
Social ostracism by coworkers	57.69% (male) 42.86% (female)
Criticism from a supervisor about work performance during a meeting attended by coworkers	40.38% (male) 40.48% (female)
A coworker stares rudely every day for a week	17.31% (male) 16.67% (female)

In many categories, men and women reported nearly identical views of what negative consequences would or might dissuade them from complaining. Furthermore, for many actions where there was some overall difference between male and female participants, a higher percentage of male participants reported that the negative consequence would dissuade them from complaining. Two data points are especially interesting: both an office move and social ostracism were far more likely to dissuade men in the study from complaining than women.

Chart 2 only included participants who stated that the negative consequence would or might dissuade them from complaining and excluded those who were uncertain about their reaction. In some categories, a higher percentage of women than men answered that they did not know whether the negative consequence would dissuade them from complaining. For example, when responding to whether an office move would dissuade a complaint, only two of the fifty-two male

respondents answered "do not know," while five of the forty-two female respondents answered "do not know."

This data conflicts with the harm threshold expressed in many judicial opinions.[80] The data also demonstrates that any claim that a high retaliation harm threshold somehow reflects a male view of retaliation is likely wrong.

C. *Suggestions for Future Research*

Researchers should conduct future studies to determine whether others can replicate this study's results with a larger sample size and non-student participants. It is possible that law students possess knowledge or beliefs that differ from those possessed by non-students or from students in other disciplines. For example, some studies suggest that students are likely to overestimate both their willingness to complain about workplace problems and their participation in altruistic behavior.[81] Other studies show that people answering surveys are likely to overestimate their willingness to stand up to discriminatory conduct.[82] It also is possible that law students as a group feel less economically vulnerable than workers and that law students' training in professional responsibility makes them more attuned to the importance of raising complaints about illegal activity. Therefore, it is possible that results from this Article's study overestimate the likelihood that the person would complain. Future research could also determine whether adjustments to the provided discrimination hypothetical would change participants' willingness to complain. This Article's study instructed participants to imagine that they had witnessed discrimination against a coworker but did not provide additional details about the discriminatory act. It would be interesting to know whether changes in the prompt would alter participants' reactions. Adjustments to the prompt could include indicating the severity of the discrimination and indicating the basis of the discriminatory act (such as race, religion, or sex). Future studies could also evaluate whether workers are more likely to complain about discrimination if it happens to them or to others. Although this Article's study focused on discrimination to others, workers may be more motivated to complain about discrimination happening to them. Further research is necessary to determine whether the target of the discrimination affects the harm threshold.

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80. *See supra* Section I.B.

81. *See* Robert A. Prentice, *Beyond Temporal Explanations of Corporate Crime*, 1 VA. J. CRIM. L. 397, 417–18 (2013).

82. *See* Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859, 894–95 (2008).

Other studies might also explore ways to reduce the possibility of demand effects.[83] A demand effect is when the study prompt might signal that the researchers desire a particular outcome.[84] In this Article's study, participants might perceive that the right thing to do if they witness discrimination in the workplace is to report it. Some study participants may have felt obligated to claim that they would not be dissuaded from complaining about discrimination, even if they might be dissuaded in a real life scenario. In an actual work environment, a worker may be able to hide the fact that he witnessed discrimination, or the worker may think that others will complain to stop the behavior.

Other research could also interrogate this study's underlying question using alternate methodologies, such as qualitative interviewing or allowing study participants to witness a taped or live performance of actors reenacting the discriminatory act.[85] While a change in methodology might triangulate the results and perhaps provide greater nuance, most study-based methodologies are limited in that they do not provide the full context of real-world retaliation, where workers may have ongoing relationships with the person that the employer is discriminating against and others in the workplace.

The survey instrument also did not take into account the possibility of ambiguity in the underlying act of discrimination. It would be interesting to know whether workers perceive the harm threshold differently if they are less certain about whether the underlying conduct occurred or whether it was discriminatory. Future projects might also consider how uncertainty about the likelihood of a retaliatory consequence affects results. This Article's study asked participants to respond to concrete consequences that the participants "knew" would occur. In the real world, workers often do not know the consequences of complaining; rather, they assume the risk of unknown consequences.

D. *A Supplement to the Survey: Triangulating the Data*

The study's results show differences in the way that courts and law students perceive the seriousness of workplace consequences. But even prior to this study, courts had access to other data that suggested that narrow judicial views of harm were not in line with how others would

83. *See* Rachel Croson, *Why and How to Experiment: Methodologies from Experimental Economics*, 2002 U. ILL. L. REV. 921, 940 (defining a demand effect as "when a subject acts in a particular way to please the experimenter").

84. *Id.*

85. *See, e.g.*, Barbara A. Gutek et al., *The Utility of the Reasonable Woman Legal Standard in Hostile Environment Sexual Harassment Cases: A Multimethod, Multistudy Examination*, 5 PSYCHOL. PUB. POL'Y & L. 596, 603 (1999), *available at* http://psycnet.apa.org/journals/law/5/3/596.pdf.

view the retaliation standard. This Section explores ways to supplement the survey results with existing data points. This data comes from three different places: jury verdicts, contrary judicial opinions, and academic research.

In many adverse action cases, courts grant summary judgment on behalf of the employer.[86] The few reported decisions involving jury decisions suggest that courts are setting the adverse action standard higher than some juries would. In some cases, a trial court submits a case to a jury that rules in favor of the worker, only to have that determination overturned on appeal or questioned on post-trial motions.[87] These cases provide an opportunity to understand what a jury concluded on the adverse action prong.

In one case, a jury found for the plaintiff on a retaliation claim and awarded $500,000 in punitive damages.[88] The district court granted the employer's renewed motion for judgment as a matter of law on the retaliation claim, and the federal appellate court affirmed the trial court's decision.[89] The appellate court found that the actions taken against the employee included three investigations to determine whether the plaintiff engaged in misconduct, a counseling statement that was later rescinded, a never-completed threat to terminate the plaintiff, and stares and negative comments from others.[90]

Despite the jury's verdict, the appellate court rejected the claim that each of the above actions was adverse.[91] The appellate court held that investigating an employee's conduct does not produce any injury or harm and that such conduct is trivial and akin to a "petty slight[]" or "minor annoyance[]."[92] The court also concluded that empty verbal threats do not produce injury.[93] Thus, the jury verdict in favor of the worker contradicts the findings of the appellate court.

In another case, a worker recorded a conversation in which a supervisor threatened to terminate him for complaining to the EEOC about discrimination.[94] There was evidence that the supervisor told the worker: "You aren't going to work here until you get it reversed."[95] The

86. *See, e.g.*, *supra* notes 14–20 and accompanying text.

87. *See, e.g.*, Miller v. City of Ithaca, 914 F. Supp. 2d 242, 249–50 (N.D.N.Y. 2012) (granting a new trial on an adverse action issue).

88. Tepperwien v. Entergy Nuclear Operations, Inc., 663 F.3d 556, 566 (2d Cir. 2011).

89. *Id.* at 566, 574.

90. *Id.* at 568–71.

91. *Id.*

92. *Id.* at 569–70 (quoting Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006)).

93. *Id.* at 571.

94. Chapin v. Fort-Rohr Motors, Inc., 621 F.3d 673, 675–76 (7th Cir. 2010).

95. *Id.* at 676.

worker alleged that "it" referred to the charge submitted to the EEOC.[96] There was some evidence that after the conversation, the supervisor acted as if the employee was not fired and that he sent a letter to the employee asking him to return to work.[97] The employee filed a retaliation claim under Title VII.[98] The jury found for the worker on this claim, awarding him $100,000 in compensatory damages and $1 million in punitive damages.[99] The trial court denied the employer's motion for judgment as a matter of law.[100]

The U.S. Court of Appeals for the Seventh Circuit reversed the jury verdict.[101] Even though the court acknowledged some prior cases that recognized that a singular threat of termination might be enough to create a cognizable claim, the court cryptically noted that the district court did not consider that argument, and the appellate court declined to consider it.[102] Therefore, the Seventh Circuit held that the worker failed to establish an adverse action.[103]

As described in Section I.B, many federal courts grant summary judgment to employers in cases where workers allege that employers retaliated against them through actions such as poor evaluations, shift changes, and threatened terminations.[104] These courts hold, as a matter of law, that the alleged actions do not constitute adverse actions, a determination based on whether the action would dissuade a reasonable person from filing a discrimination complaint. However, some courts do not grant summary judgment in similar circumstances.

Part I contained a list of actions that courts hold are not adverse actions for retaliation claims. Considering that same list, it is possible to find cases in which courts hold the exact opposite—that each of the following consequences constitutes an adverse action:

- Unrealized threat to terminate employee;[105]
- Negative evaluations and disciplinary write-ups;[106]

96. *See id.* at 675.
97. *Id.* at 677.
98. *Id.*
99. *Id.* This amount exceeds the damages caps under Title VII and would be subject to them.
100. *Id.*
101. *Id.* at 681.
102. *See id.* at 681, n.2.
103. *Id.* at 681.
104. *See supra* Section I.B.
105. *See, e.g.*, Maron v. Va. Polytechnic Inst. & State Univ., 508 F. App'x 226, 230–31 (4th Cir. 2013); Eldredge v. City of St. Paul, 809 F. Supp. 2d 1011, 1036 (D. Minn. 2011); E.E.O.C. v. Collegeville/Imagineering, No. CV-05-3033-PHX-DGC, 2007 WL 2051448, at *8 (D. Ariz. July 16, 2007).
106. *See, e.g.*, Bixby v. JP Morgan Chase Bank, N.A., No. 10 C 405, 2012 WL 832889, at *13 (N.D. Ill. Mar. 8, 2012). Courts have held that a written warning or letter of counseling may

- Threat of suspension or disciplinary action;[107]
- Placement on disciplinary or administrative leave;[108]
- A shift change;[109]
- An office move to another location;[110]
- False report of poor performance.[111]

Indeed, even within the same circuit, some court of appeals panels will hold that a certain action does not constitute an adverse action, while another panel will hold that it does. For example, in one case the U.S. Court of Appeals for the Second Circuit held that reprimands are adverse employment actions.[112] The Second Circuit reasoned that

> a letter of reprimand would deter a reasonable employee from exercising his FMLA rights. A formal reprimand issued by an employer is not a "petty slight," "minor annoyance," or "trivial" punishment; it can reduce an employee's likelihood of receiving future bonuses, raises, and promotions, and it may lead the employee to believe (correctly or not) that his job is in jeopardy.[113]

However, in another Second Circuit case, the court held that reprimands are not adverse employment actions.[114] This panel indicated that such reprimands are merely petty slights and minor annoyances.[115]

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rise to the level of an adverse employment action "if it affects the likelihood that the plaintiff will be terminated, undermines the plaintiff's current position, or affects the plaintiff's future employment opportunities." Medina v. Income Support Div., 413 F.3d 1131, 1137 (10th Cir. 2005); *see also* Roberts v. Roadway Express, 149 F.3d 1098, 1104 (10th Cir. 1998) (holding that the written warnings constituted adverse employment actions, where "the record indicate[d] that the more warnings an employee received, the more likely he or she was to be terminated for a further infraction").

107. *See, e.g.*, Rattigan v. Holder, 604 F. Supp. 2d 33, 52–53 (D.D.C. 2009); O'Neal v. State Univ. of N.Y., No. 01–CV–7802, 2006 WL 3246935, at *13 (E.D.N.Y. Nov. 8, 2006) (informing an employee that she was the subject of a disciplinary investigation was a material adverse action).

108. *See, e.g.*, Killen v. Nw. Human Servs., Inc., No. 06-4100, 2007 WL 2684541, at *7 (E.D. Pa. Sept. 7, 2007).

109. *See, e.g.*, Taylor v. Roche, 196 F. App'x 799, 803 (11th Cir. 2006) (holding that a refusal to grant a shift change is an adverse action).

110. *See, e.g.*, Knox v. Indiana, 93 F.3d 1327, 1334 (7th Cir. 1996) (indicating that "actions like moving the person from a spacious, brightly lit office to a dingy closet" would constitute an adverse action).

111. *See, e.g.*, Williams v. W.D. Sports, N.M., Inc., 497 F.3d 1079, 1087, 1090–91 (10th Cir. 2007).

112. Millea v. Metro-North R.R. Co., 658 F.3d 154, 164–65 (2d Cir. 2011).

113. *Id.* at 165.

114. Leifer v. N.Y. State Div. of Parole, 391 F. App'x 32, 35 (2d Cir. 2010).

115. *Id.*

There are also cases in which courts hold that a combination of some of these consequences constitutes an adverse action.[116] In one case, the court found that an adverse action existed when the worker complained about inappropriate conduct and subsequently experienced delayed paychecks, denial of personal time, criticism of her work performance, and a shift change.[117]

In some of these cases, the courts articulate why the alleged action might constitute an adverse action. One trial court reasoned that negative evaluations constitute adverse employment actions because they "can serve to have a chilling effect on an employee's decision whether to engage in statutorily protected activity."[118] Another court reasoned that "[p]oor evaluations and letters of reprimand seem plainly to qualify" as adverse actions.[119] In cases where the employer threatens discipline but does not carry it out, courts reason that this may deter employees from filing discrimination complaints, even if future harm never materializes.[120] The fear of future harm is itself a deterrent.

These results complement academic research regarding retaliation. The research shows that only a small percentage of people who experience harassment in the workplace formally report it to their employer.[121] Workers are reluctant to complain about discrimination because they fear being labeled a troublemaker and being subjected to adverse consequences.[122]

III. IMPLICATIONS AND THE REASONABLE PERSON STANDARD

The study results in this Article provide key insights about the retaliation harm threshold. The most important insight relates to the accuracy of the lower courts' factual determinations that negative consequences, such as threatened termination or negative evaluations, would not dissuade reasonable people from complaining. These determinations are likely incorrect. The current retaliation harm threshold

116. *See, e.g.*, Alvarado v. Fed. Express Corp., 384 F. App'x 585, 589 (9th Cir. 2010); Davis v. City of Springfield, No. 03-3007, 2008 WL 361025, at *2 (C.D. Ill. Feb. 8, 2008) (denying an employer's post-trial motions regarding whether denial of a transfer was an adverse action).

117. *Alvarado*, 384 F. App'x at 589.

118. Bixby v. JP Morgan Chase Bank, N.A., No. 10 C 405, 2012 WL 832889, at *13 (N.D. Ill. Mar. 8, 2012).

119. Ashby v. Shinseki, No. 2:11-1050-RMG-BHH, 2012 WL 6772175, at *7 (D.S.C. Dec. 12, 2012).

120. *See, e.g.*, Rattigan v. Holder, 604 F. Supp. 2d 33, 52–53 (D.D.C. 2009) ("[W]hether an action is 'materially adverse' is determined by whether it holds a deterrent *prospect* of harm, and not by whether the harm comes to pass or whether any effects are felt in the present.").

121. Brake & Grossman, *supra* note 82, at 896.

122. *See id.* at 873; *see also* L. Camille Hébert, *Why Don't "Reasonable Women" Complain About Sexual Harassment?*, 82 IND. L.J. 711, 712 (2007).

is too high to accomplish one of the goals the courts created it for—to provide a remedy whenever an employer takes an action that would dissuade a reasonable person from complaining about discrimination.

The study results also provide a basis for challenging the applicability of traditional critiques of the reasonable person standard in the retaliation context. Drawing on past critiques of the reasonable person standard, it might seem plausible that the current case law reflects a male view of the workplace. Others might claim that the case law enshrines a majority view about retaliation harm but fails to reflect the views of certain subgroups of people. This Article's empirical research calls both of these ideas into question.

For decades, scholars have criticized procedural and substantive standards that require courts to evaluate facts through the lens of a reasonable person or a reasonable juror.[123] These scholars criticize the reasonable person standard as having no fixed meaning and as being merely a vehicle for judicial discretion.[124] They have called the standard "vague,"[125] and one scholar noted that the standard only makes sense "if it is not taken too seriously."[126]

Some critiques stem from the standard's origins as a reasonable man standard. Scholars criticize the semantic change from reasonable man to reasonable person as masking underlying male preferences that continue to define the standard.[127] In the sexual harassment context, scholars criticize the reasonable person standard for enshrining the viewpoint of a reasonable man and not that of a reasonable woman.[128] Also in this context, scholars have questioned whether courts should ever evaluate

123. *See, e.g.*, Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445, 455–56 (1997); Jane L. Dolkart, *Hostile Environment Harassment: Equality, Objectivity, and the Shaping of Legal Standards*, 43 EMORY L.J. 151, 198 (1994); Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1177–78 (1990); Caroline Forell, *Essentialism, Empathy, and the Reasonable Woman*, 1994 U. ILL. L. REV. 769, 769; Ann C. McGinley, *Reasonable Men?*, 45 CONN. L. REV. 1, 25–26 (2012); Mayo Moran, *The Reasonable Person: A Conceptual Biography in Comparative Perspective*, 14 LEWIS & CLARK L. REV. 1233, 1234 (2010).

124. *See, e.g.*, Bernstein, *supra* note 123, at 456 (discussing the difference between reason as the hallmark of the reasonable person and reason as "something like sensible, ordinary, moderate, or average"); Moran, *supra* note 123, at 1234.

125. *E.g.*, Bernstein, *supra* note 123, at 464.

126. George Rutherglen, *Sexual Harassment: Ideology or Law?*, 18 HARV. J.L. & PUB. POL'Y 487, 496 (1995).

127. Naomi R. Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice*, 77 CORNELL L. REV. 1398, 1404 (1992); McGinley, *supra* note 123, at 5; *see also* Martha Chamallas, *Gaining Some Perspective in Tort Law: A New Take on Third-Party Criminal Attack Cases*, 14 LEWIS & CLARK L. REV. 1351, 1357–58 (2010) (discussing semantic changes in tort law).

128. *See* Moran, *supra* note 123, at 1250.

harm that women experience differently under a reasonable person standard or whether a gender-specific reasonable woman standard is more appropriate.[129]

The reasonable woman standard draws critiques as artificially constructing a unitary woman and as being insufficiently attentive to the experiences of people of color. [130] When male judges apply a reasonable woman standard, they may only pay "lip service" to the woman's perspective and actually apply the judge's own perspective to the particular problem.[131] Additionally, even if one wanted to undertake a reasonable person inquiry that accounts for relevant protected traits, defining the reasonable person across a broad spectrum of race, sex, disability, age, and religion is difficult.

Given these problems, the reasonable person standard often allows courts to apply their own "common sense" notions about what constitutes harm. These notions may be far different from what the normal female worker would think of as sexual harassment.[132] Using the reasonable person standard suggests broad consensus on the appropriate standard for sexual harassment, even when no consensus exists.[133] These critiques have been especially boisterous in the employment discrimination context, where a reasonable person standard defines when employees suffer enough harm to present a cognizable claim of workplace harassment or retaliation.[134]

Scholars also often critique the standard as centered on a reasonable white man and not representing the interests of women and people of color.[135] In the summary judgment context, one widely cited study showed that while the Supreme Court Justices' views of a videotaped encounter with police comported with the views of a substantial number of people, identifiable groups of people viewed the videotaped evidence differently.[136]

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129. *See, e.g.*, Bernstein, *supra* note 123, at 479–82.

130. *E.g.*, *id.* at 473; Dolkart, *supra* note 123, at 206; Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 588–89 (1990) (criticizing feminist theory for being essentialist); Maria L. Ontiveros, *Three Perspectives on Workplace Harassment of Women of Color*, 23 GOLDEN GATE U. L. REV. 817, 824–27 (2010) (critiquing harassment law).

131. Dolkart, *supra* note 123, at 200.

132. Ehrenreich, *supra* note 123, at 1206.

133. *Id*.

134. *See* sources cited *supra* note 123.

135. *See, e.g.*, Bernstein, *supra* note 123, at 473; Dolkart, *supra* note 123, at 206; Ontiveros, *supra* note 130, at 824–27; Harris, *supra* note 130, at 582–83; David Schultz, *From Reasonable Man to Unreasonable Victim?: Assessing* Harris v. Forklift Systems *and Shifting Standard of Proof and Perspective in Title VII Sexual Harassment Law*, 27 SUFFOLK U. L. REV. 717, 717–20 (1993) (summarizing critiques).

136. *See generally* Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 848–79 (2009).

This Article's study results show that the courts' retaliation harm threshold cases do not present two of the common flaws associated with the reasonable person construct. As discussed throughout this Section, scholars critique the reasonable person standard because although it represents a majority view, it fails to capture the views of other identifiable groups of people. This Article shows that the reasonable person standard created by courts in the retaliation context fails to reflect the views of most reasonable people.

In the sexual harassment context, scholars argue that the standard represents a male view. This Article's study shows that men and women have strikingly similar views of retaliation harm.[137] This is not a case where male judges are creating a harm standard that reflects the views of men. Rather, many courts are creating a standard that contradicts what most reasonable workers, whether male or female, would perceive as harmful.

IV. THE TURN AWAY FROM BIAS

If bias is operating in the retaliation context, it is demonstrably different than the bias theorized by two of the dominant accounts discussed above.[138] The results from this Article's study, when combined with a review of the relevant court opinions, suggest two other explanations for the resulting case law: norms of judicial decision-making and a complex and internally inconsistent harm doctrine.

When judges write opinions advocating a high harm threshold, they often issue broad opinions that appear to hold, as a matter of law, that a particular action is never serious enough to create liability. In contrast, court opinions that find that a particular action might be cognizable tend to discuss the particular circumstances of the plaintiff and read as if the court perceives the remaining question as one of fact. Thus, the high harm threshold cases appear to be precedent for subsequent cases, while the cases supporting a lower threshold do not.

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137. *See* Section II.B.

138. It is possible that federal judges, as a group, view workplace harms differently than a reasonable worker. *See* Michael Selmi, *Subtle Discrimination: A Matter of Perspective Rather Than Intent*, 34 COLUM. HUM. RTS. L. REV. 657, 675 (2003). Federal district and appellate court judges possess greater job security than the majority of workers. *See* Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 23–24 (1984). Their income level is also higher than most workers. Michael J. Frank, *Judge Not, Lest Yee Be Judged Unworthy of a Pay Raise: An Examination of the Federal Judiciary Salary "Crisis,"* 87 MARQ. L. REV. 55, 81 n.155 (2003). They also work in an atypical environment, surrounded by many employees whom they personally hired. Article III judges are not subjected to a typical annual review process. *See id.* at 108 & n.308. These judges have higher levels of education than the typical worker. Further, they understand, at least to some degree, the protections afforded under federal discrimination law. These facts may account for some of the disconnect in retaliation law.

Additionally, some of the high harm threshold cases appear to be cases where the court is actually concerned about whether the worker can establish causation. The court often rules for the employer on both the adverse action element and the causation element. The adverse action doctrine seemingly serves as a proxy argument for the court's real concern about causation.

Judicially constructed retaliation doctrines unnecessarily complicate the harm question. The doctrine is difficult to navigate, especially because it invokes a reasonable person construct that is unlike the reasonable person inquiry used in other types of cases. This Article's survey research also reveals an internal tension within the Supreme Court's description of retaliation harm.

This move away from bias as the sole driver of outcomes mirrors a similar ongoing change in understanding discrimination itself. Early descriptions of discrimination often relied heavily on explicit animus.[139] Discrimination happened because supervisors disliked people with certain traits or felt that they did not belong in the workplace. Later work added the idea of implicit bias.[140]

Some recent scholarship, however, has focused on the structural turn in discrimination.[141] The remainder of this Article discusses how the structure and substance of retaliation law itself contributes to a jurisprudence that favors a higher harm threshold, even when the articulated standard for defining harm seems to point to a lower harm requirement.

This Part does not argue that some judges are not biased against retaliation claims. Rather, it argues that many judges are not imposing their own viewpoints on retaliation law. They are, in a formalist way, trying to apply law they believe governs the claims. This Part argues that the way courts approach the adverse action requirement plays a significant role in shaping the law in a conservative direction.

A. *The Problem of Perceived Precedent*

Some readers may ask themselves how a judge could credibly claim that an employee is not harmed if she receives a negative evaluation or if her supervisor threatens to fire her. Even without this Article's survey

139. *See, e.g.*, Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 321 (1987).

140. *See, e.g.*, *id.* at 327–28; *see also generally* Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893 (2009) (exploring the law's ability to affect implicit bias).

141. *See, e.g.*, Bagenstos, *supra* note 12, at 1–4; Tristin K. Green, *A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong*, 60 VAND. L. REV. 849, 850 (2007); Green, *supra* note 13, at 138; Sturm, *supra* note 13, at 459–60.

data, it seems to be common sense that threats of termination or negative evaluations would affect an employee's willingness to complain.

But, this question assumes that courts are actually conducting an inquiry into what the harm threshold should be when they issue opinions. This is not happening in all cases. In many instances, court opinions reflect little independent analysis of whether a particular action would dissuade a reasonable person from complaining. Many trial and appellate courts are not asking how a reasonable person might think about a particular kind of harm.

Rather, their opinions cite prior cases that appear to hold that particular actions are not adverse actions. I call this phenomenon "perceived precedent." This phenomenon occurs when a lower court or appellate court perceives a prior decision as determining as a matter of law that certain actions are not cognizable. Consequently, subsequent courts see no reason to revisit the harm inquiry and may feel compelled to reach the same result as the prior case. Even in instances where the prior case law is not technically precedent, the court follows what it perceives to be the majority view on whether a particular form of conduct constitutes an adverse action.

In one case, the U.S. Court of Appeals for the Ninth Circuit affirmed a grant of summary judgment for the employer on an employee's retaliation claim.[142] The court opined that reprimands and "the mere threat of termination do[] not constitute an adverse employment action."[143] In later cases, trial courts read the Ninth Circuit opinion as stating that such conduct cannot constitute an adverse action.[144]

In another case, the U.S. Court of Appeals for the Fifth Circuit held that a wide swath of conduct does not constitute an adverse action, including issuing a disciplinary warning for reporting late to work, denying the plaintiff time off from work and overtime, denying the plaintiff a shift change, and assigning the plaintiff more difficult tasks than coworkers.[145] The court engaged in very little discussion about why these events either separately or together do not constitute an adverse action.[146] The decision includes no discussion of the worker's individual circumstances, even though the Fifth Circuit cited *Burlington*.[147] Nonetheless, a subsequent district court cited the Fifth Circuit opinion to

142. Hellman v. Weisberg, 360 F. App'x 776, 779 (9th Cir. 2009).

143. *Id.*

144. *See, e.g.*, Bogner v. R&B Sys., Inc., No. CV-10-193-JLQ, 2011 WL 1832750, at *7 (E.D. Wash. May 12, 2011); Campbell-Thomson v. Cox Commc'ns, No. CV-08-1656-PHX-GMS, 2010 WL 1814844, at *6 (D. Ariz. May 5, 2010); Yee v. Solis, No. C-08-4259 MMC, 2010 WL 1655816, at *5 (N.D. Cal. Apr. 22, 2010).

145. Hart v. Life Care Ctr. of Plano, 243 F. App'x 816, 818 (5th Cir. 2007).

146. *See id.*

147. *Id*.

justify its holding that assigning more arduous work is not an adverse employment action.[148]

Appellate courts often make strong pronouncements that certain actions do not constitute an adverse action.[149] In subsequent cases, courts then cite the earlier decision for the broad proposition that the actions are not adverse actions.[150] In some cases, the original case provides some discussion of the plaintiff's circumstances, but these subjective circumstances do not make it into later summaries of the case. This especially happens through string cites, where one court cites several prior cases simply by summarizing the holding in an explanatory parenthetical following the citation. It is easy to understand how the nuances of a case can become lost when a subsequent court reduces its facts to a parenthetical.

Over time, these opinions have developed into a body of case law that appears to be precedent requiring subsequent lower courts to reach a particular result, without any independent reasoning or consideration of any subjective aspects of the particular case. Other opinions have developed into what appears to be a majority view of whether, as a matter of law, certain actions should be adverse actions. While this "majority view" is not technically binding on courts, it does have significant persuasive power.

Holdings that favor a higher harm threshold often read as binding authority because courts frame them as questions of law. In contrast, cases favoring a lower harm threshold read as ad hoc determinations based on the facts of the case.

When courts deny summary judgment motions on the adverse action element, their opinions often read as if they are not binding on future

148. Belcher v. Fluor Enters., Inc., 4:10-CV-3475, 2013 WL 499858, at *6, *12 (S.D. Tex. Feb. 8, 2013).

149. *See, e.g.*, Brown v. Advocate S. Suburban Hosp., 700 F.3d 1101, 1108 (7th Cir. 2012) (holding that the denial of a transfer can only be an adverse action if the transfer would have resulted in higher pay or benefits and that isolated name calling is not actionable); *see also* Fiero v. CSG Sys., Inc., 759 F.3d 874, 880 n.2 (8th Cir. 2014) (finding that placement on a performance improvement plan is not an adverse action); Smith v. City of Fort Pierce, 565 F. App'x 774, 778 (11th Cir. 2014) ("As an initial matter, glaring, slamming a door in an employee's face, inquiring into retirement plans, commenting that an employee is not a team player, blaming an employee for failed union negotiations, or harboring concerns over an employee's dependability and trustworthiness are not actions that would dissuade a reasonable worker from making or supporting a charge of discrimination.").

150. For example, subsequent cases cite to *Brown* for the proposition that certain actions cannot constitute adverse actions. Rohler v. Rolls-Royce Corp., 523 F. App'x 418, 421 (7th Cir. 2013); Fabiyi v. McDonald's Corp., 11 CV 8085, 2014 WL 985415, *8 (N.D. Ill. Mar. 13, 2014); Selan v. Valley View Cmty. Unit Sch. Dist. 365-U, 10 CV 7223, 2013 WL 146415, *6 n.7 (N.D. Ill. Jan. 14, 2013) (indicating that "[t]hose claims are thus clearly not adverse employment actions and will not be discussed further").

cases. This is because many of these opinions note the plaintiff's individual circumstances as one of the factors militating against summary judgment and also note how a reasonable person would perceive particular actions in the plaintiff's particular workplace.[151] If a subsequent court read this type of case, it would be easy for that later court to distinguish the new case from the prior case by contrasting the two factual scenarios.

Some of these low harm threshold cases assume, without deciding, that the alleged action constitutes an adverse action and then focus on other elements of the retaliation claim. For example, in one case where a referral for discipline constituted an adverse action, the court's opinion noted that the defendant largely challenged other elements of the retaliation claim.[152] These cases would not count as precedent in a subsequent case.

When a jury finds that a certain action is or is not an adverse action, that finding is not precedent. Even though jury verdicts provide a body of law that might contain information about the harm threshold, it is easy for courts to disregard this body of law in subsequent cases. It is not precedent; rather, it is the application of law to a particular set of circumstances.

The higher harm threshold cases tend to focus only on the action taken and make broad statements about that action in a vacuum. These cases read as if they are pronouncements of law, and subsequent courts often seem to perceive them that way. If just a handful of appellate decisions hold that a particular action is not serious enough to create liability for retaliation, this handful of decisions can have a large impact in subsequent cases. Courts in these subsequent cases may feel that they are unable to change the existing law.

Perceived precedent is problematic for several reasons. First, as discussed throughout this Article, it is likely wrong regarding the severity of harm needed to dissuade a reasonable person from complaining. This Article's study and jury verdicts show that workers perceive threatened terminations, negative evaluations, and other actions as being harmful and likely to dissuade them from complaining about discrimination.

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151. *See, e.g.*, Maron v. Va. Polytechnic Inst. & State Univ., 508 F. App'x 226, 231 (4th Cir. 2013); Rattigan v. Holder, 604 F. Supp. 2d 33, 54 (D.D.C. 2009) ("Here, there is evidence that the security investigation posed an objective threat to plaintiff's career, such that a jury could find that the investigation was 'materially adverse.' . . . [A]n allegation that an FBI agent was a security risk, particularly an agent 'in such a sensitive assignment as Riyadh,' is a 'very serious allegation' with 'potentially devastating effects' on that agent's career."). Not all lower threshold cases rely heavily on the worker's circumstances. *See, e.g.*, Bixby v. JP Morgan Chase Bank, N.A., No. 10 C 405, 2012 WL 832889, at *13 (N.D. Ill. Mar. 8, 2012).

152. Widomski v. State Univ. of N.Y. at Orange, 933 F. Supp. 2d 534, 547 (S.D.N.Y. 2013).

But more importantly, the high harm threshold cases disregard *Burlington*. In *Burlington*, the Supreme Court provided examples of when an action might be severe enough to cross the harm threshold.[153] The Court provided a specific example—whether not receiving an invitation to lunch would be cognizable.[154] The Court indicated that normally a supervisor excluding an employee from lunch would not be actionable.[155] But, the Court continued: "[T]o retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee's professional advancement might well deter a reasonable employee from complaining about discrimination."[156] Thus, anything as serious as or more serious than exclusion from a training lunch is potentially cognizable under *Burlington*.

In situations where the kind of negative consequence does not seem to be serious in the run of the mill case, the Supreme Court explicitly indicated that the particular circumstances of the plaintiff or her workplace might change the normal outcome. The reasonable person contemplated by the Court is an objectively reasonable person in the plaintiff's position.[157] The standard expressly incorporates subjective aspects of the plaintiff and the plaintiff's workplace.[158]

As the Court specifically stated, "Context matters."[159] It elaborated:

> The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school-age children. . . . Hence, a legal standard that speaks in general terms rather than specific prohibited acts is preferable, for an act that would be immaterial in some situations is material in others.[160]

In case after case, appellate courts determine that a certain action does not constitute an adverse action without mentioning any of the individual circumstances of the plaintiff or his workplace. While purporting to apply

153. 548 U.S. 53, 67–68 (2006).

154. *Id.* at 69.

155. *Id.*

156. *Id.*

157. *Id.* at 68–69.

158. *Id.* at 69.

159. *Id.*

160. *Id.* (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81–82 (1998) and Washington v. Ill. Dep't of Revenue, 420 F.3d 658, 661 (7th Cir. 2005) (citations omitted) (internal quotation marks omitted)).

Burlington, courts also ignore a significant portion of the opinion and consequently are not following the applicable law. As discussed below, the confusing *Burlington* opinion has led to inconsistent case law in lower courts. The perceived precedent ignores this inconsistency.

It would be a major advance in retaliation harm jurisprudence for courts to understand that very few decisions are binding precedent in subsequent cases. In most cases, it is incorrect to make broad, categorical claims that certain actions can never lead to liability. Litigants arguing for a lower harm threshold may need to educate courts about the perceived precedent problem.

B. *Alternate Holdings and Proxy Arguments*

Similarly, alternate holdings push adverse action law in a conservative direction. In many cases where a court rules that a certain action is not an adverse action, the case does not rest solely on this ground.[161] For example, the court will hold that a particular action is not an adverse action and that the plaintiff failed to establish a causal connection between protected activity and the negative consequence.[162]

Courts in many adverse action cases seem concerned about whether the worker can establish causation—the required link between the protected activity and the adverse action. Professor Deborah Brake has argued that courts have unnecessarily construed the protected activity element of retaliation cases narrowly in cases where the real concern appears to be causation.[163] The same phenomenon happens in adverse action cases.

This pressure may occur because many courts are unhappy with causation jurisprudence. In many circuits, a worker can establish the required causal connection by showing a temporal connection between her protected activity and the negative consequence.[164] For example, if a worker complains about discrimination and then two months later she receives a bad evaluation, some courts will hold that the worker's claim should survive summary judgment on the causation element. The short time span between the complaint and the bad evaluation suggests that the prior complaint may have motivated the bad evaluation.[165]

Some courts are uncomfortable with causation law because they believe it improperly insulates the worker from legitimate discipline after

161. *See, e.g.*, Brown v. Advocate S. Suburban Hosp., 700 F.3d 1101, 1107–08 (7th Cir. 2012).

162. *See, e.g.*, *id.*

163. Deborah L. Brake, *Retaliation in an EEO World*, 89 IND. L.J. 115, 155 (2014).

164. *See, e.g.*, Mickey v. Zeidler Tool & Die Co., 516 F.3d 516, 525–26 (6th Cir. 2008); Grier v. Snow, 206 F. App'x 866, 869 (11th Cir. 2006).

165. *See, e.g.*, *Mickey*, 516 F.3d at 527–28.

he complains about discrimination.[166] Some of them use adverse action arguments as proxies for the causation question. Others use the adverse action argument to bolster the conclusion they already reached on causation. If a court is uncomfortable with the causation analysis, it is easier to rule in favor of the employer by limiting the reach of the adverse action prong, which some courts view as a question of law. In contrast, questions of fact often exist about the causation element, making it more difficult to dispose of causation issues at the summary judgment stage.[167]

This places unnecessary pressure on the adverse action element, making the substantive standard more onerous than it should be to accomplish its underlying goals. The reasoning for the adverse action element often feels unsatisfactory because it is often a proxy argument for causation concerns.

C. *Inherent Tension Within Retaliation Doctrine*

This Article's empirical research demonstrates that the current adverse action standard is problematic because it asks courts to navigate two separate, and sometimes contradictory, strands of the *Burlington* decision. In *Burlington*, the Court explained that adverse actions are "employer actions that would have been materially adverse to a reasonable employee or job applicant."[168] The Court also indicated that "the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination."[169] Additionally, the reasonable person standard is not meant to insulate employees against "petty slights, minor annoyances, and simple lack of good manners."[170]

According to *Burlington*, the adverse action requirement encompasses multiple inquiries: one question of what actions would dissuade a reasonable person and another about whether the action rises above the level of petty slights and minor annoyances.[171] The Court's description of the adverse action requirement suggested that both of these inquiries should yield the same answer. In other words, if a person perceives an action as only being a petty slight, then that person should also think that the same action would not dissuade a reasonable person from complaining about discrimination.

This Article's survey results show that an overwhelming number of participants answered these two questions differently when considering

166. *See, e.g.*, Chivers v. Wal-Mart Stores, Inc., 641 F.3d 927, 933 (8th Cir. 2011).

167. *See, e.g.*, Smith v. Koch Foods of Miss., LLC, No. 3:09CV668 DPJ–FKB, 2011 WL 2415336 at *2 (S.D. Miss. 2011).

168. 548 U.S. 53, 57 (2006).

169. *Id.* at 57.

170. *Id.* at 68.

171. *Id.*

the same underlying conduct. The study asked participants to first determine whether ten actions would dissuade them from complaining about discrimination against a coworker. The eleventh question asked the survey participants to indicate which of those ten actions the participant would consider to be only minor annoyances or petty slights. The participant could circle as many items from the list as the participant thought met the criteria of being a minor annoyance or petty slight.

Only twenty-two of the ninety-five participants—less than twenty-four percent—answered questions 1 through 10 in a way that was consistent with their answer to question 11. In other words, more than seventy-five percent of study participants did not get the same answers when asked to apply the two legal standards to the same conduct. For example, although social ostracism by coworkers was enough to dissuade a participant from complaining, the same participant could still consider social ostracism to only be a petty slight. These results indicate that the two ideas—willingness to complain and perceptions of annoyance or pettiness—are not necessarily consistent.

The participants' answers point to a possible tension in the underlying law. When courts consider whether an adverse action would dissuade a reasonable person and whether it is more than a petty slight, these two questions do not necessarily lead to the same result. However, the current doctrine does not recognize this tension.

D. *An Inconsistent History*

As discussed in the prior Section, existing doctrine contains two strands: one that uses the harm doctrine to limit claims and the other that uses it to further the underlying goals of retaliation law. The current doctrine does not inform courts on how to navigate between these potentially contradictory views of the retaliation standard. Nor does it adequately explain how the reasonable person standard furthers the underlying goals of retaliation law. If examined carefully, it is questionable whether the substantive standard even does so. Faced with a convoluted standard with unclear goals, it is understandable that courts would refuse to navigate the complexity and favor bright-line rules.

This is especially true when considering that the harm standard is not the only complex question facing courts in many retaliation cases. Although this Article has isolated the applicable law and highlighted the relevant issues, this is not how cases look when courts evaluate them. For example, many retaliation cases also raise discrimination claims. If an employee complained about discrimination by her employer and then faced a negative consequence, the worker could raise both a discrimination claim and a retaliation claim.

Over time, discrimination law has become extraordinarily complex. It consists of a series of complicated frameworks[172] that each contains numerous subparts.[173] The subparts themselves are often complicated, and some are even the basis of circuit splits.[174] By the time courts analyze the retaliation case, they have often already navigated a complex set of analytical frameworks for the discrimination claim.[175]

Even standing alone, the retaliation harm doctrine is not simple. It combines three different sets of legal terminology with further explanatory language added by the Supreme Court.[176] Looking at how retaliation harm jurisprudence developed over time shows that some of this history pulls the law toward a narrow construction of the adverse action element.

The language of Title VII's retaliation provisions makes it unlawful for an employer to "discriminate" against an employee "because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."[177] The ADEA and ADA contain similar language.[178] However, these statutes' retaliation provisions do not use the words "adverse action" or "adverse employment action."[179]

The words "adverse action" or "adverse employment action" originally developed in the discrimination context.[180] Courts used these words to summarize all of the potential actions that might result in liability for discrimination under Title VII. Rather than list that Title VII prohibits terminations, failures to promote, failures to hire, pay differentials, and other actions based on a protected trait, the courts used the shorthand reference of "adverse action" or "adverse employment action."[181]

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172. *See generally* Sandra F. Sperino, *Rethinking Discrimination Law*, 110 MICH. L. REV. 69, 70–81 (2011).

173. *See id.* at 118–21 (arguing that the use of judicially created frameworks in employment discrimination law results in a faulty conceptualization of discrimination).

174. *Id.* at 120, 123.

175. This inquiry can become even more complex when the worker brings state law claims. States often have laws that prohibit discrimination and retaliation. Although many state laws follow federal law, some require a different analysis. In these instances, courts apply multiple tests to evaluate one set of facts.

176. *See infra* notes 177–86 and accompanying text.

177. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–3(a) (2012).

178. *See* ADA, 42 U.S.C. § 12203(a) (2012); ADEA, 29 U.S.C. § 623(d) (2012).

179. *See* 29 U.S.C. § 623(d) (2012); 42 U.S.C. § 2000e–3 (2012); *id.* § 12203(a).

180. *See* Vincent, *supra* note 28, at 991–92.

181. *See, e.g.*, Ray v. Henderson, 217 F.3d 1234, 1240 (9th Cir. 2000) (noting that adverse action is defined broadly).

In discrimination law, the purpose of the adverse action element then changed. Courts began using the words "adverse action" or similar language as words of limitation.[182] These words came to denote a distinction between those actions for which the law would provide a remedy and those for which it would not.[183]

Courts then adopted the adverse action language in the retaliation context. In *Burlington*, the Supreme Court held that the adverse action concept in Title VII's retaliation provision was much broader than adverse action in the discrimination context.[184] Yet, the Court continued to use the words "adverse action" to describe harm required in the retaliation context. *Burlington* used the phrase "adverse action" but never discussed how the term related to the actual text of the retaliation provision itself, even though the doctrine the court articulated varied from how most courts defined this term prior to *Burlington*.[185]

The way the Court described the adverse action inquiry suggested at least two different functions of the element. The Court explained the element as limiting the reach of retaliation law by denying a remedy to workers who faced only petty slights.[186] But, the provision also tried to connect harm doctrine to the broader goals of retaliation law generally by trying to determine what actions would deter a reasonable worker from complaining about discrimination. As discussed in the prior Section, the two functions sometimes point in different directions. It is easy to understand how a court that perceives the words "adverse action" as being words of limitation would interpret the term conservatively.

However, there are additional layers of complexity. The statute uses the word "discriminate" to describe what employers cannot do,[187] and the courts use the words "adverse action" to describe when the statute provides a remedy.[188] In *Burlington*, the Court described the term adverse action as incorporating the concept of a reasonable person.[189] The Court then imbued the reasonable person concept with its own meaning.[190] Thus, courts interpreting the harm doctrine are navigating three different sets of terminology: the word "discriminate" used in the statute, the term "adverse action" created by the courts and interpreted differently over time, and the term "reasonable person."

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182. *See supra* Section I.A.

183. *See, e.g.*, Brown v. Advocate S. Suburban Hosp., 700 F.3d 1101, 1107–08 (7th Cir. 2012).

184. 548 U.S. 53, 70–71 (2006).

185. *Id.* at 57.

186. *Id.* at 69.

187. *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–3 (2012).

188. *See, e.g.*, *Burlington*, 548 U.S. at 57.

189. *Id.*

190. *Id.*

On top of this is the Supreme Court's interpretive gloss, which fails to describe how these three terms fit together or how the reasonable person standard supports the underlying goals of retaliation law. It is easy to see how lower courts, when faced with this complexity, would produce case law that is poorly reasoned.

In a sense, the courts' difficulty with the reasonable person standard in retaliation cases highlights an inherent problem in reasonable person doctrine. The law generally uses the words "reasonable person" in many different contexts, from contract law to criminal law to tort law.[191] Yet, the courts have never reconciled what exactly the reasonable person test is supposed to accomplish in each circumstance.[192]

To make matters worse in the retaliation context, the meaning of "reasonable person" is different than the meaning of the same words in tort law. In recent years, the Supreme Court has touted the purported connection between tort law and discrimination law.[193] The Court has called Title VII a tort and robustly incorporated tort concepts into discrimination and retaliation doctrine.[194] If lower courts believe this framing device—that discrimination law belongs under the umbrella of tort law—it would be natural for those courts to apply tort concepts such as the reasonable person construct to discrimination and retaliation law.

There is one major problem with this application. The reasonable person standard articulated by the Supreme Court in *Burlington* is substantively different than tort law's reasonable person standard. Tort law's reasonable person construct ignores many of the subjective traits of the individual, with some well-recognized exceptions. Under tort law, the reasonable person standard properly takes into account subjective factors such as the wrongdoer's age and certain physical limitations.[195]

However, at least as articulated in many legal opinions, the standard does not consider many other characteristics of the wrongdoer, even if these traits are arguably relevant to deciding legal culpability. For example, tort law does not typically allow a judge or jury to consider a wrongdoer's mental or emotional disability.[196] Tort law also does not consider whether the wrongdoer was poor, a single mother, or lacked a certain level of intelligence.[197] Under tort law, these subjective circumstances of the wrongdoer generally are irrelevant to the legal

191. Moran, *supra* note 123, at 1234.

192. *See id.* at 1234–38.

193. *See* Sandra F. Sperino, *The Tort Label*, 66 FLA. L. REV. 1051, 1052 (2014).

194. *Id.* at 1063–68.

195. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM §§ 9–11 (2010).

196. *Id.* § 11.

197. *See id.* § 12.

inquiry. However, the retaliation doctrine requires that these subjective circumstances be taken into account.

The retaliation reasonable person is radically different for several reasons. In tort law, the reasonable person standard inquires into the conduct of a wrongdoer to establish whether the wrongdoer breached a duty of care.[198] In contrast, in retaliation law, courts evaluate the perspective of a potential victim, cloaked with some of the individual plaintiff's subjective characteristics and viewed through the lens of an objectively reasonable person.[199] This inquiry focuses on the level of harm that must occur and the underlying goals of retaliation law.

In tort law, the reasonable person question arises most often in the context of negligence.[200] In retaliation law, the courts use the reasonable person standard to define the level of harm needed to create liability for what the courts deem to be intentional conduct.[201] In tort law, it is sometimes possible to declare, as a matter of law, that certain conduct does not create liability because the defendant violated no duty. The court must ignore many of the subjective characteristics of the wrongdoer. But, this is not the case with retaliation law, where the doctrine expressly calls for the court to consider some characteristics of both the victim and the workplace in a particular case, at least in some instances.[202]

Tort law uses the words "reasonable person" to describe one concept, and retaliation law uses those same words to describe a substantively different concept. It is easy to see how a court not steeped in the nuances of discrimination and tort law might miss these substantive differences. In doing so, the court is likely to ignore the subjective elements of a particular case.

The *Burlington* decision adds another layer of difficulty because the legal standard it announced does not clearly align with the goals the Court expressed for Title VII's retaliation provision. *Burlington* does not provide lower courts with clear guidance on when to invoke the worker's subjective circumstances and when to view the harm question purely through an objective lens. As discussed earlier, many courts seem to ignore *Burlington*'s language indicating that the worker's subjective circumstances should sometimes play a role.[203] One reason courts may ignore the subjective analysis is that it does not seem to make sense for most cases.

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198. *Id.* § 7.

199. *See* Richard Moberly, *The Supreme Court's Antiretaliation Principle*, 61 CASE W. RES. L. REV. 375, 446–51 (2010).

200. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 3 (2010).

201. *See supra* Section I.B.

202. *See supra* Section I.A.

203. *See supra* Section IV.A.

Courts are not always required to consider the worker's subjective circumstances. For example, if a worker claims her employer fired her for complaining about discrimination, courts do not conduct an individual analysis to see if the worker's particular circumstances affected the harm inquiry. A termination is always serious enough to create liability. Other actions, such as failing to promote or paying a worker less because of a discrimination complaint, also fall within that category. There is no subjective analysis needed.

When do the subjective circumstances of the worker start to matter? *Burlington* suggests that a subjective inquiry is required for changes in job assignments and is unclear about whether the subjective inquiry is required for unpaid suspensions. But, if this is the correct way to read *Burlington*, it makes little sense in actual litigation or in enforcing the goals of retaliation law.

In a large number of cases, the worker will not be able to tell whether she faced cognizable retaliation harm until summary judgment or trial. She would be required to wait until a judge or a jury weighs all of her subjective circumstances. Likewise, the employer will not know whether the employer violated the retaliation provision until litigation. The harm standard for retaliation law would allow juries to make ad hoc determinations about a wide range of conduct in a wide range of particular circumstances.

Further, it is unclear why *Burlington* asks whether the action would dissuade a reasonable person in the plaintiff's circumstances from complaining about discrimination. In most retaliation cases, the plaintiff has already complained. He can bring the retaliation claim because he is alleging that his complaint led to a negative consequence.

Adding in the subjective element in these cases makes for a strange analysis. It is not clear what a lower court is supposed to do. Is the court supposed to pretend to go back in time and imagine whether this particular worker would have complained if she had known that a particular outcome would occur? Not only does this analysis not make sense, it also ignores that part of the power of retaliatory actions is that workers do not know the full extent of what might happen to them.

Burlington does a poor job of explaining how its test navigates the purposes of retaliation law. Retaliation law provides an individual remedy, but it also does much more. The Supreme Court has repeatedly invoked what Professor Richard Moberly refers to as a law enforcement rationale for retaliation law.[204] Retaliation doctrine exists, in part, to protect society's interest in having its laws enforced.[205] It seems odd that

204. Moberly, *supra* note 199, at 380.

205. *Id.* at 378–79.

society's interest is met by having the harm threshold depend on an individual plaintiff's subjective circumstances in a wide range of cases.

V. BEYOND JUDICIAL MODESTY

Some possible solutions for dealing with these problems include encouraging courts to exercise judicial modesty in undertaking inquiries based on the reasonable person standard or encouraging courts to actively seek out and consider the perspectives of others.[206] These proposals exist in other contexts, and they move in the right direction.[207] However, they are insufficient in the retaliation context.

Judicial modesty and similar perspective-shifting proposals respond to the idea that court opinions capture the view of some, but not all, relevant people. This Article, however, suggests that retaliation law's harm standard fails to capture the views of *most* people. The majority of courts do not actually inquire about what a reasonable person would do in a particular circumstance because so many courts follow prior cases that they consider to be binding. Further, the retaliation harm doctrine is so difficult to navigate that the resulting decisions are understandably unsatisfying.

Identifying structural and substantive problems with the retaliation harm standard makes it easier to see that structural and substantive responses could better align the law with its underlying goals. The available evidence shows that court rulings about these underlying questions do not align with the articulated purpose of retaliation law. If the underlying purpose of retaliation law is to encourage people to complain about discrimination, then the current majority rules fail to accomplish this for a wide swath of potential retaliatory conduct.

This Article argues that courts should refrain from navigating the harm threshold in these fine-grained ways. Rather, courts should use the results of this Article's study to understand that many negative consequences would dissuade reasonable people from complaining about discrimination.

The retaliation harm standard should focus on one goal—separating *de minimis* harm from all other actions. Any negative consequence that is more than *de minimis* should create liability under retaliation law, if the worker can meet the other elements of the retaliation claim. For actions that would typically be considered *de minimis*, the worker would still have an opportunity to show that in his subjective circumstances, the actions caused material harm. In cases with contested facts, the fact finder then would determine whether liability exists in the particular case.

206. *See* Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 881–82 (1990).

207. *See id.*

This Part describes what function the harm threshold should perform. It then explores why the *de minimis* standard better aligns judicial inquiry with judicial and procedural competence, with the underlying policy of retaliation law, and with broader concerns about judicial credibility and consistency. Courts have a special responsibility to care about the retaliation harm threshold because the discrimination doctrine they created largely contributed to current practices encouraging and sometimes requiring workers to complain about discrimination.

A. *The* De Minimis *Standard*

As noted above, there are three main inquiries in a retaliation claim: whether the worker engaged in protected activity, whether the worker suffered an adverse action, and whether there is a causal connection between the two. This Section argues for two important shifts in the way courts approach the adverse action requirement.

First, courts should enshrine cautionary language within the retaliation harm doctrine warning that the harm standard should not be onerous. If the purpose of retaliation law is to prevent actions that would dissuade workers from complaining, this Article (as well as some jury decisions and judicial opinions) shows that much of the current case law sets the standard too high.

Second, courts should clarify that any action that is more than *de minimis* meets the harm threshold as a matter of law. The courts should stop trying to navigate whether non-*de minimis* harms are cognizable in specific circumstances. When a court asks whether the consequence would dissuade a reasonable person from filing a discrimination complaint, it should assume that most negative consequences would meet this threshold.

Of course, some conduct would qualify as *de minimis*. In these instances, the worker would still have the opportunity to prove that in his circumstances, the action caused material harm. Assuming that the worker presents evidence supporting a material dispute of fact regarding whether the action was *de minimis* in his particular case, summary judgment would be inappropriate on the harm element of the retaliation claim. Only in this small subset of *de minimis* cases should a jury determine whether potentially actionable conduct does indeed meet the harm threshold given the relevant circumstances in the underlying case.

Redescribing the harm inquiry in this way comports best with the underlying goals of retaliation law. Courts already do this for some consequences. For example, if a worker claims that her employer fires her because she complained, courts do not determine whether termination counts as a harm in the plaintiff's work environment and in her personal circumstances. Courts assume that in all circumstances a termination would dissuade a reasonable person from complaining. The results of this

Article's survey show that courts should assume that a much wider swath of conduct would dissuade a reasonable employee from complaining in all circumstances. Therefore, in most cases, courts need not consider the subjective characteristics of the individual employee.

This change does not require the courts to ignore *Burlington*, but it does require some clarification about the way the Supreme Court described the underlying inquiry. Ms. White met the harm threshold in *Burlington* because any objective worker would perceive what happened to her change in job responsibilities as negative and as being a punishment for complaining.[208] This is especially true when considering both the change in her job responsibilities and the unpaid suspension. This finding does not and should not depend on examining Ms. White's particular subjective circumstances.

However, the Court was correct to worry about providing a list of actions that counted as retaliation and actions that would not.[209] In essence, the Court was worried about the "bad man" problem.[210] If it provided a list of retaliatory actions and a list of non-retaliatory actions, unscrupulous employers or supervisors could protect themselves from liability by refraining from the retaliatory actions and punishing employees through other "non-retaliatory" actions to cause employees distress. This would circumvent the underlying law.

For example, assume that after a discrimination complaint a supervisor changes a worker's shift to end at 4 p.m. rather than 3 p.m. For many workers, this change would be inconsequential and perhaps not even a consequence that they consider to be negative. But for some workers, such as working parents with children in school, an employer might intend this shift change to make the worker's life harder as a punishment for complaining. The *Burlington* standard recognized that these cases should result in liability.

This approach to the retaliation harm standard is not only most consistent with the underlying goals of retaliation law, but it also aligns better with the summary judgment standard and with the institutional competence of judges and juries. As currently conceived by many lower courts, the retaliation harm doctrine asks courts to calibrate a standard that accurately reflects all of the current underlying goals of the retaliation harm standard for each possible retaliatory action in each particular workplace and for each particular worker. As discussed earlier, this is substantively difficult given the inherent tension within the retaliation doctrine.[211]

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208. *See* 548 U.S. 53, 70 (2006).
209. *Id.* at 57, 69.
210. *Id.* at 69.
211. *See supra* Section IV.C.

Burlington provides no guidance on how courts should determine what actions would dissuade an objectively reasonable person from complaining about discrimination. There is no available empirical research that determines what a reasonable person would think about every possible act of retaliation. There is very little empirical evidence about retaliation that tests the reasonable person's response using the legal standard enunciated by courts. Additionally, it would be impossible for empirical research to calibrate an accurate view of what a reasonable person with some of the plaintiff's characteristics and experiences would perceive as retaliatory.

To date, courts have not had enough empirical data to make fine-grained determinations about reasonableness. It is tempting to suggest that with enough available empirical research, courts should be able to perfectly calibrate the retaliation harm standard. Indeed, it may be tempting to take the data from this study and make judgments about where to specifically draw the harm threshold. However, overly specific attempts are misguided and likely to produce unsatisfactory results.

The U.S. legal system does not currently have a procedural framework for incorporating or evaluating empirical evidence in individual cases in any systematic way. There is too much uncertainty in the current system regarding how courts are to obtain the underlying data needed to evaluate what a reasonable person would do in a particular instance, how courts are supposed to evaluate available data, and what effect one court's conclusions about the data should have on future cases.[212] Further, the judicial system does not have a good mechanism for correcting judicial findings based on incomplete or incorrect data or for incorporating more nuanced data over time. Nor do litigants possess a clear procedural mechanism for presenting such data.[213] It also is unclear how legal standards should respond to changes in the underlying data that might naturally occur in the future.

For all of these reasons, using empirical data in specific cases would be difficult. Even assuming that the retaliation harm inquiry can proceed without empirical evidence, it is still problematic. When federal trial courts consider issues related to the harm standard, they often do so at the summary judgment stage. Rule 56 of the Federal Rules of Civil Procedure permits courts to grant summary judgment only if there is no dispute as to any material fact and judgment as a matter of law in the moving party's favor is appropriate.[214] Judgment as a matter of law is appropriate when

212. John Monahan et al., *Contextual Evidence of Gender Discrimination: The Ascendance of "Social Frameworks*,*"* 94 VA. L. REV. 1715, 1721 (2008).

213. *See generally id.* at 39–41 (discussing difficulties that courts have with understanding how to use social science research in discrimination class actions).

214. FED. R. CIV. P. 56(a).

a reasonable jury would not have a legally sufficient basis for ruling in favor of the nonmoving party.[215]

With the current retaliation harm threshold, it is unclear whether many courts are appropriately applying the summary judgment standard. A court using a summary judgment record is ill-suited to identify the myriad characteristics and circumstances that might affect a reasonable person in the employee's position. These include a whole host of factors, such as the person's age, race, sex, economic vulnerability, and status as the family's primary breadwinner. Further, the court has limited resources to determine the severity of the potential action in the context of a particular workplace. Returning to the Supreme Court's example about a lunch invitation, it is impossible to tell in the abstract whether a missed lunch is trivial or whether lunch is where critical networking occurs.[216]

A *de minimis* standard avoids or diminishes these problems. It removes the courts from the tricky business of trying to weigh many subjective elements in each retaliation case. In a way, many current courts have tried to take the subjective elements out of most determinations, but they have done so at the price of making the retaliation harm threshold too high. The *de minimis* standard also takes courts out of the business of making fine-grained determinations about how objectively reasonable workers would act in a variety of cases by assuming that most negative circumstances meet the threshold. Courts trying to place each potential kind of retaliatory harm along a spectrum of cognizability face an almost impossible task.

More importantly, the *de minimis* standard aligns with overarching goals of the judicial system, such as credibility and consistency.[217] When courts rule, as a matter of law, that threatening to fire a worker would not dissuade a reasonable person from complaining about discrimination, those courts appear disingenuous. Current practice has created an inconsistent standard with courts making facially absurd rulings about when harm does and does not occur.

Some might argue that the reasonable person standard is a corrective, rhetorical device designed to get courts to consider harm from a potential victim's perspective. This perspective-forcing element is the goal of the rhetorical device, and it is simply irrelevant whether the law actually approximates the view of any real people. That view of the reasonable person inquiry makes the inquiry even more opaque in the retaliation context and makes it impossible to determine what the court is supposed to accomplish when making the harm determination. The *de minimis*

215. FED. R. CIV. P. 50(a).

216. Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53, 69 (2006).

217. One risk of the *de minimis* standard is that courts will simply begin to characterize a wide swath of conduct as *de minimis*. While recognizing this risk, the use of the *de minimis* language itself makes it more difficult for courts to credibly make such an argument.

standard better aligns judicial inquiry, judicial and procedural competence, the underlying policy of retaliation law, and broader concerns about judicial credibility and consistency.

B. *The Courts' Special Responsibility*

Courts bear a special responsibility in correctly navigating the difference between cognizable and non-actionable harms given their role in requiring and incentivizing employees to complain about discrimination. Courts have created a discrimination jurisprudence that relies heavily on workers complaining about ongoing discrimination. Creating a system that requires or encourages employees to complain but that does not protect them when they do is simply unfair. Further, the unfairness is even more pronounced when courts ensconce the harm threshold in the language of when a reasonable person would perceive harm.

The discrimination statutes themselves and the courts' interpretations of them require and incentivize complaints. In all cases, workers must formally invoke the administrative process.[218] To bring a successful discrimination or retaliation claim, the worker must first file a charge of discrimination with the EEOC or a comparable state agency.[219] If the worker does not do this, the worker cannot successfully pursue his claim. In some cases, the worker still works for the employer when he files the charge of discrimination.[220]

If the EEOC or state agency investigates the worker's allegations, the worker who filed the charge must participate in the investigation.[221] The administrative agency may interview other employees at the workplace or ask them to provide statements about the allegations.[222] The employer may also conduct a separate, internal investigation into the allegations, interviewing the complaining worker or other employees.[223] A legal doctrine that forces workers to invoke an administrative process or to cooperate in subsequent investigations should protect workers who comply.

Under the current majority view, an employer could legally threaten to fire a worker, place negative evaluations in the worker's file, or engage in other negative conduct because of the worker's participation in these

218. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–5(e)(1), (f)(1) (2012).

219. *Id.*

220. *See, e.g.*, *Burlington*, 548 U.S. at 61.

221. *See* Hébert, *supra* note 122, at 721 & n.48 (showing that courts would not define an employee as acting reasonably who filed the charge but refused to participate in the investigation).

222. *See* Alex B. Long, *The Troublemaker's Friend: Retaliation Against Third Parties and the Right of Association in the Workplace*, 59 FLA. L. REV. 931, 934–35 (2007).

223. *Id.*

formal processes. Applying this harm doctrine, the courts would not define what happened to the worker as retaliation, even if the employer acted because of the participation in the formal process.

In some cases, court-created doctrine requires employees to complain internally to their employer to later bring a successful claim. When the Supreme Court decided that a worker could bring a claim for sexual harassment under Title VII, the Court noted that the employer would not always be liable for the harassment.[224] In two subsequent cases, the Court developed rules that require employees, in certain instances, to complain to their employer about harassment.[225] If the employee fails to complain, she is unable to prevail on her harassment claim, even if she can show that the employer harassed her.[226]

The Court held that employers are automatically liable for harassment if an employee's supervisor takes a tangible employment action against the employee.[227] In other instances, the employer may still face liability, but the employer has an available affirmative defense to escape liability.[228] The employer must establish that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior" and that the worker "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[229]

When creating this affirmative defense, the Court imported a policy goal for Title VII that is not explicitly enshrined in the statute. The Court stated that "Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms."[230] The Court also imported into Title VII the idea of avoidable consequences—that employees should try to avoid litigation and provide employers with an opportunity to remedy harassment without litigation.[231] The Court also drew on the idea of deterrence, arguing that the law should encourage employees "to report harassing conduct before it becomes severe or pervasive."[232]

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224. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 71–72 (1986).

225. Faragher v. City of Boca Raton, 524 U.S. 775, 806–07 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 773 (1998); *see also* Hébert, *supra* note 122, at 712 (discussing the complaint requirement).

226. *See* Hébert, *supra* note 122, at 712, 721 n.48.

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

228. *Id.*

229. *Burlington Indus.*, 524 U.S. at 765.

230. *Id.* at 764.

231. *See id.*

232. *Id.*

If a worker does not complain about harassment or if he fails to participate in an employer's investigation of his harassment claim, his harassment claim may fail in court.[233] These employer protections are not limited to the harassment context. Employers can also use the existence of complaint and investigation procedures to avoid punitive damages.[234]

These court-created doctrines provide employers with a legal incentive to create complaint procedures, to publicize the procedures to employees, and to encourage employee complaints. Many employers have policies that encourage employees to complain about actions that may not even be cognizable under the federal discrimination statutes or that the employee may not need to first report to the employer under federal law.[235]

Not only did the courts enshrine complaint procedures as an important part of discrimination law, they also placed retaliation law at the center of discrimination enforcement. The Supreme Court has repeatedly stated that "Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses."[236] The Court has also stated that "the leading reason" that workers do not complain about discrimination is the "[f]ear of retaliation."[237]

Under the current system, workers must complain in certain circumstances to later maintain a cognizable harassment claim.[238] In these and other cases, workers are told that it is preferable to complain because this provides the employer the opportunity to fix problems without litigation.[239] The discrimination statutes provide that employers shall not discriminate against these workers for complaining about discrimination, and case law nominally invokes a protective reasonable person standard.

This entire structure is undermined by a growing body of case law that defines the reasonable person unreasonably. Given the courts' role in creating the complaint apparatus, the courts have a special responsibility to protect employees against adverse actions that occur because of complaints.

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233. *See, e.g.*, Hébert, *supra* note 122, at 721 & n.48.

234. Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 544 (1999).

235. Brake, *supra* note 163, at 118.

236. Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53, 67 (2006).

237. Crawford v. Metro. Gov't of Nashville & Davidson Cty., Tenn., 555 U.S. 271, 279 (2009).

238. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 71–72 (1986).

239. *See, e.g.*, Faragher v. City of Boca Raton, 524 U.S. 775, 806–07 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 773 (1998).

C. *Floodgates of Litigation?*

The *de minimis* standard does not mean that plaintiffs will always be able to survive summary judgment or that workers will always win retaliation cases.[240] Several structural features of retaliation law limit claims. Focusing on *de minimis* harms may place greater pressure on other elements of the retaliation inquiry, especially the causation element.

The federal discrimination statutes already contain numerous procedural and substantive provisions that limit potential claims. Before filing suit in court, plaintiffs must file a charge of discrimination with the EEOC or state agency within a specified time period, and then they must file the lawsuit within a specified time period.[241] Plaintiffs typically must file a charge within either 180 or 300 days from the discriminatory act and must file their claim in court within 90 days of receiving a right to sue letter.[242] If a plaintiff does not file the charge or lawsuit within the required period, the claim is usually barred.[243]

The administrative process is ostensibly designed to reduce the number of claims that make it to court. The EEOC or state agency sometimes operates in an advisory role, advising workers about the scope of the discrimination statutes.[244] Sometimes potential claimants realize that they have no claim after speaking with employees from the administrative agency. The EEOC or the state agency also mediates claims, sometimes after finding that the employer likely engaged in inappropriate conduct and sometimes through voluntary mediation between the parties.[245] Administrative agencies may also find that there is no reasonable cause for the claim.[246]

Other statutory provisions also limit the number of claims. Title VII plaintiffs may only bring claims against employers who employ at least fifteen employees.[247] Additionally, the person bringing the claim must be

240. Although the *de minimis* standard might lead to uncertainty in some cases, fewer cases would fall into this gray area than under current practice.

241. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–5(e)(1), (f)(1) (2012). The requirements under the ADEA vary slightly, but they still require the filing of a charge. *See* Lowe v. Am. Eurocopter, LLC, No. 1:10CV23–A–D, 2010 WL 5232523, at *2 (N.D. Miss. Dec. 16, 2010) (discussing how Title VII requires plaintiffs to receive a right to sue letter from the EEOC while the ADEA does not require this).

242. 42 U.S.C. §§ 2000e–5(e)(1), (f)(1) (2012).

243. *Id.* § 2000e–5(e)(1).

244. *Filing a Charge of Discrimination*, U.S. E.E.O.C., http://eeoc.gov/employees/charge.cfm (last visited Sept. 26, 2015).

245. *Id.*

246. *Id.*

247. 42 U.S.C. § 2000e(b) (2012).

an individual that falls within the statutory protections, such as an employee or former employee.[248]

Congress also limited the relief available to employees under Title VII. The total combined compensatory and punitive damages a plaintiff may recover under Title VII is dependent upon the number of employees employed by the defendant.[249] The highest cap, which applies to employers with more than 500 employees, is $300,000.[250] The statute also explicitly defines the type of compensatory damages available.[251]

Substantive retaliation doctrine also contains limits. The worker must establish that she engaged in protected activity.[252] The statute defines the protected activity as falling into one of two categories: opposition conduct and participation conduct.[253] Most conduct that falls within the participation prong involves some formal type of conduct, such as submitting a charge of discrimination to the EEOC, participating in an EEOC investigation, or testifying as part of court proceedings.[254] As argued above, it seems especially unfair for the law to not recognize harm if the worker formally invokes the federal statute's administrative or court process and is subjected to negative actions because of this activity.

The courts place additional restrictions on opposition conduct. Opposition conduct typically refers to internal complaints to the employer.[255] Such conduct must be reasonable in its form and must be reasonably interpreted as complaining about discrimination.[256] For example, an employee cannot hit his supervisor and claim that he was complaining about discrimination. The worker also must have a reasonable belief that what he is complaining about constitutes legal discrimination.[257]

Most importantly, the Supreme Court recently heightened the causal standard in Title VII retaliation cases. To prevail, a worker must establish that her protected activity was a "but for" cause of the adverse action.[258] This means that plaintiffs in Title VII retaliation cases must establish a higher level of causation than plaintiffs in Title VII discrimination cases.

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248. *Id.* § 2000e–2(a).

249. *Id.* § 1981a(b)(3).

250. *Id.* § 1981a(b)(3)(D).

251. *Id.* § 1981a(b)(3).

252. *See* Crawford v. Metro. Gov't of Nashville & Davidson Cty., 555 U.S. 271, 282 (2009) (Alito, J., concurring).

253. *Id.* at 274 (majority opinion) (discussing opposition and participation conduct).

254. 42 U.S.C. § 2000e–3(a) (2012).

255. *Crawford*, 555 U.S. at 274–75.

256. *Id.* at 276.

257. Clark Cty. Sch. Dist. v. Breeden, 532 U.S. 268, 271 (2001).

258. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2525 (2013).

The *de minimis* standard will likely place more pressure on the causation element of retaliation claims. In some of the adverse action cases, the court seems to be concerned about whether the worker can establish causation—the required link between the protected activity and the adverse action. In fact, Professor Brake has argued that courts have unnecessarily construed the protected activity element of retaliation cases narrowly in cases where the real concern appears to be causation.[259] This same phenomenon happens in adverse action cases.

Recalibrating the current understanding of the retaliation standard does not mean that plaintiffs will start winning cases involving trivial harms. Courts will still have the ability to rule as a matter of law that trivial harms are non-cognizable, subject to the worker's ability to show that in her particular circumstances the action was not *de minimis*. When fact questions remain in these cases, juries can still determine that harm within a specific context was not material.

CONCLUSION

As currently framed, the retaliation harm standard is problematic. It is ostensibly designed to prohibit actions that would dissuade a reasonable person from complaining about discrimination. Yet, the results of this Article's study show that the current case law does not align with this goal. This Article's study results also point to an inherent tension within existing retaliation doctrine. Current retaliation law contains two different strands: one that uses the harm standard to further the goals of retaliation law and another that uses harm doctrine to limit the scope of retaliation claims. Survey participants did not view these two threads as coterminous.

The standard appears to contemplate that courts make fine-grained determinations about whether workers suffered harm, taking into account the subjective circumstances of both the worker and the work environment. The resulting case law shows that courts have difficulty navigating this complex doctrine. If courts have consistent difficulty in navigating these questions, perhaps the law should not require them to do so. The *de minimis* standard better aligns retaliation harm doctrine with the purposes of retaliation law.

Most importantly, this Article raises questions about whether bias explains case outcomes in the retaliation context. Additionally, it has implications for sexual harassment law, which also relies on a reasonable person standard to assess harm.[260] To constitute sexual harassment, the

259. Brake, *supra* note 163, at 155.

260. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81–82 (1998); Harris v. Forklift Sys., Inc., 510 U.S. 17, 22–23 (1993). The reasonable person concept is also used in

employee must face actions that are severe or pervasive enough to affect the terms and conditions of employment from the perspective of an objectively reasonable person. Academic critiques of the outcomes in sexual harassment cases complain that the objectively reasonable person standard actually enshrines a male view of workplace harm.[261] The empirical work in this Article provides an important potential challenge to this critique. Sexual harassment law may fail to represent the views of both men and women. If this is the case, it raises important questions about the role and implications of the reasonable person standard.

constructive discharge cases. *See generally* Martha Chamallas, *Title VII's Midlife Crisis: The Case of Constructive Discharge*, 77 S. CAL. L. REV. 307, 316–17 (2004).

261. Because many of the critiques are decades old, it is possible that the case law represented a male view of harm at the time, but that view has changed over time in response to changing workplace norms.