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AN UNREASONABLE APPLICATION OF A REASONABLE STANDARD: TITLE VII AND SEXUAL ORIENTATION RETALIATION

JORDEN COLALELLA*

INTRODUCTION

Sexual orientation occupies a twilight zone in the area of employment discrimination. As a result, courts have applied varying interpretations of Title VII's antiretaliation provision to cases involving sexual orientation discrimination. In the quintessential retaliation scenario, an employer discriminates against an employee, the employee complains about it, and that complaint results in the employee's termination or demotion.¹ Title VII specifically forbids employers from engaging in this practice.²

There is a very real possibility that an employee's complaint about sexual orientation discrimination could severely affect that employee's livelihood, resulting in

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1 *See, e.g.*, *Folkerson v. Circus Circus Enters.*, 107 F.3d 754 (9th Cir. 1997) (describing Title VII as making it unlawful to discriminate against an employee for opposing a practice made unlawful by Title VII); *EEOC v. Avery Dennison Corp.*, 104 F.3d 858 (6th Cir. 1997) (defining the prima facie case for retaliation claims); *Nowlin v. Resolution Trust Corp.*, 33 F.3d 498 (5th Cir. 1994) (holding that a claimant must demonstrate that she engaged in protected activity, experienced an adverse employment action following that activity, and that causation existed between protected activity and adverse employment action).

2 42 U.S.C. § 2000e-3(a) (2006) ("It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, . . . to discriminate against any individual . . . 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." (emphasis added)).

termination, decrease in pay, or loss of privileges.³ An individual who complains of discrimination faces the danger of being viewed as a “problem employee” and may face consequences for complaining. The purpose behind the antiretaliation provision is to ensure that employers do not respond to employees’ complaints by firing or demoting them.⁴ This encourages employees to report instances of discrimination without fear of repercussion and discourages employers from discriminating in the first place.⁵ Refusing to recognize retaliation claims where an employee was fired for opposing sexual orientation discrimination frustrates this purpose, and courts should not dismiss these cases outright.

3 *See, e.g.*, Dawson v. Entek Int’l, 630 F.3d 928, 933 (9th Cir. 2011) (involving a gay plaintiff who visited human resources and filed a complaint for sexual orientation discrimination and was terminated from his employment less than 48 hours later); Hamner v. St. Vincent Hosp., 224 F.3d 701, 703 (7th Cir. 2000) (involving a homosexual male nurse working at a hospital who alleged that he was fired by his employer after having complained about harassment because of his sexual orientation); Martin v. Dept. of Corr. Servs., 224 F. Supp. 2d 434, 447 (N.D.N.Y. 2002) (involving a homosexual department of corrections officer who alleged he was increasingly harassed by co-workers, had his weapons privileges restricted, and lost time and wages after he complained about being harassed regarding his sexual orientation); Ianetta v. Putnam Invs., Inc., 142 F. Supp. 2d 131, 133 (D. Mass. 2001) (involving a plaintiff who was threatened with termination after inquiring with human resources about the company’s policy regarding sexual orientation discrimination).

4 *See* Pettway v. Am. Cast Iron Pipe Co., 411 F.2d 998, 1005 (5th Cir. 1969) (holding that the purpose behind the antiretaliation clause of Title VII is “to protect the employee who utilizes the tools provided by Congress to protect his rights” and that “[t]he Act will be frustrated if the employer may unilaterally determine the truth or falsity of charges and take independent action.”).

5 *See* Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1996) (holding that “maintaining unfettered access to [Title VII’s] statutory remedial mechanisms” is the primary purpose of the retaliation clause.); McMenemy v. City of Rochester, 241 F.3d 279, 284 (2d Cir. 2001) (holding that “Title VII protects an employee from *any* employer, present or future, who retaliates against him because of his prior or ongoing opposition to an unlawful employment practice or participation in Title VII proceedings.”); Pettway, 411 F.2d at 1005 (noting that the purpose of the antiretaliation clause is “to protect the employee who utilizes the tools provided by Congress to protect his rights.”); Ghirardelli v. McAvery Sales & Serv., Inc., 287 F. Supp. 2d 379, 387 (S.D.N.Y. 2003) (holding that “[p]ermitting employers to discriminate against an employee because of an employee’s past use of Title VII’s remedial mechanisms could significantly deter employees from engaging in such proceedings.”).

Unfortunately, because sexual orientation is not explicitly included in Title VII,⁶ courts are in disarray as to the result when the employer fires an employee for complaining about discrimination that is clearly the result of the employee's sexual orientation.⁷

Most circuits have held that the antiretaliation provision in Title VII does not extend to sexual orientation; thus the plaintiffs in these cases generally cannot establish the elements of a *prima facie* case.⁸ A small minority of circuits has held that a plaintiff may establish a *prima facie* claim for retaliation when the underlying discrimination is because

6 42 U.S.C. § 2000e-2(a)(1) (2006) (“It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”); *See also* *Williamson v. A.G. Edwards & Sons*, 876 F.2d 69, 70 (8th Cir. 1989) (per curiam) (holding that “Title VII does not prohibit discrimination against homosexuals”); *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979) (holding that “discharge for homosexuality is not prohibited by Title VII”); *Kelley v. Vaughn*, 760 F. Supp. 161, 163 (W.D. Mo. 1991) (holding that “[b]ecause homosexuality pertains to sexual preference, and not to gender, ‘Title VII does not prohibit discrimination against homosexuals.’”).

7 *See infra* Part II.

8 *See, e.g.*, *Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058, 1062 (7th Cir. 2003) (rejecting an employee’s retaliation claim because he had not shown discrimination because of sex); *Hamner*, 224 F. 3d at 707 (holding that because Title VII does not include sexual orientation as a protected category for the purposes of antidiscrimination, it follows that protections for retaliation cannot extend to sexual orientation either); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999) (holding that the plaintiff did not have a reasonable belief that his conduct was protected by Title VII); *Ianetta*, 142 F. Supp. 2d at 135 (holding that because complaining about sexual orientation discrimination is not statutorily protected activity, the plaintiff’s retaliation claim fails to make out a *prima facie* case based on sexual orientation, but there remains a retaliation claim on sexual stereotyping protected by gender discrimination.).

of sexual orientation.⁹ These courts have allowed retaliation claims to proceed to the merits.¹⁰

The circuits are fractured because they differ on the very narrow question of whether it is reasonable for an employee to believe that his or her sexual orientation would be protected by Title VII. Following the Supreme Court's holding in *Clark County School District v. Breeden*,¹¹ nearly all of the circuits have adopted a reasonable standard with respect to retaliation.¹² In order to state a claim for retaliation, an employee must reasonably believe that the conduct that prompted the complaint is protected by Title VII.¹³ To be "reasonable," a claim must be subjectively reasonable, meaning it is sincere and in good faith, and objectively reasonable.¹⁴ While it is clear that the subjective requirement is

⁹ See, e.g., *Dawson*, 630 F.3d at 936–37 (holding that complaining to human resources about sexual orientation discrimination was protected activity under Title VII, and a decision on the merits was not foreclosed.); *Martin*, 224 F. Supp. 2d at 447–51 (holding that it was reasonable for an individual to believe that discrimination because of sexual orientation was actionable under Title VII, and therefore may establish a prima facie case for retaliation.).

¹⁰ See, e.g., *Dawson*, 630 F.3d at 937.

¹¹ 532 U.S. 268 (2001) (per curiam).

¹² See, e.g., *Brannum v. Mo. Dep't of Corr.*, 518 F.3d 542, 547 (8th Cir. 2008); *Stone v. Geico Gen. Ins. Co.*, 279 F. App'x 821, 823 (11th Cir. 2008); *Moore v. City of Phila.*, 461 F.3d 331, 341 (3d Cir. 2006); *Lang v. Nw. Univ.*, 472 F.3d 493, 495 (7th Cir. 2006); *Darmanin v. S.F. Fire Dep't*, 46 F. App'x 394, 395 (9th Cir. 2002).

¹³ See *supra* note 12; see also *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 270 (denying relief to an employee who had no reasonable belief that the conduct complained of was made unlawful under Title VII).

¹⁴ See, e.g., *Armstrong v. K & B La. Corp.*, 488 F. App'x 779, 782 (5th Cir. 2012); *Guimaraes v. SuperValu, Inc.*, 674 F.3d 962, 977–78 (8th Cir. 2012); *Bryant v. U.S. Steel Corp.*, 428 F. App'x 895, 898 (11th Cir. 2011); *Moore*, 461 F.3d at 341; *Jordan v. Alt. Res. Corp.*, 458 F.3d 332, 343 (4th Cir. 2006); *Hamner v. St. Vincent Hosp.*, 224 F.3d 701, 707–08 (7th Cir. 2000); *Moyo v. Gomez*, 40 F.3d 982 (9th Cir. 1994); *Rodas v. Town of Farmington*, 2013 WL 178152, at *6 (W.D.N.Y. Jan. 16, 2013); *Grosdidier v. Chairman, Broad. Bd. Of Governors*, 774 F. Supp. 2d 76, 108 (D.D.C. 2011); *Zimpfer v. Aramark Mgmt. Servs., LP*, 795 F. Supp. 2d 1249, 1253 (D. Utah 2011); *Figueroa Garcia v. Lilly Del Caribe, Inc.*, 490 F. Supp. 2d 193, 208–09 (D.P.R. 2007).

tantamount to a good faith requirement,¹⁵ the objective requirement is patently more obscure. Even though most courts have essentially equated objectiveness with knowledge of Title VII,¹⁶ some courts have taken a more nuanced approach that considers the confusion surrounding the distinction between sex and sexual orientation. Adding to the confusion is a patchwork of state laws that provides some protections against sexual orientation discrimination.¹⁷ Such courts have not required lawyer-like knowledge of Title VII for plaintiffs to recover.

The blurry line between sex and sexual orientation should compel courts to rethink equating reasonableness with knowledge of Title VII. The purpose of the antiretaliation statute is not met through a narrow interpretation of the meaning of “objectively reasonable.” Reworking the application of the retaliation standard would be a conservative modification to the law surrounding retaliation, and is consistent with both the policy of Title VII’s prohibition on retaliation and the Supreme Court’s interpretation and application of the antiretaliation provision.

Changing the application of the retaliation statute is an approach that has been hinted at in academic scholarship. Deborah Brake’s influential article, *Retaliation*,¹⁸

¹⁵ See, e.g., *Moore*, 461 F.3d at 341 (holding that “the employee must hold an objectively reasonable belief, in good faith, that the activity opposed is unlawful under Title VII”); *Crumpacker v. Kansas Dept. of Human Res.*, 338 F.3d 1163, 1171 (10th Cir. 2003) (noting that claims on the basis of an unreasonable good-faith belief that the underlying conduct violated Title VII are without merit).

¹⁶ See, e.g., *Hamner*, 224 F.3d at 707 (7th Cir. 2000).

¹⁷ See *infra* note 139–43.

¹⁸ Debora L. Brake, *Retaliation*, 90 MINN. L. REV. 18 (2005).

acknowledges the problems associated with courts' strict adherence to a narrow interpretation of reasonableness. Rote application of the statute fails to address the interrelationship between sexual orientation and sex.¹⁹ Courts should be flexible in their application of the objective standard and should hold that retaliation resulting from a complaint about sexual orientation discrimination is actionable. This flexible application of what it means for an employee to act "objectively reasonable" would foster better working environments by allowing gay and lesbian employees to bring incidents of discrimination to the attention of their employers without fear of reprisal.

In this Note, I argue that the objective standard ought to be revised so as to allow remedy for gays and lesbians who suffer from retaliation after filing discrimination complaints. Courts will further the policy considerations inherent in the antiretaliation provision, by refusing to equate objective reasonableness with knowledge of Title VII. Part I of this Note provides an overview of retaliation claims and the analytical framework that courts use to interpret these claims. In Part II, the analytical framework and general Title VII considerations are applied to sexual orientation. Specifically, Part II includes the evaluation of the different approaches courts have taken towards sexual orientation retaliation. Part III explains how revising the objectively reasonable standard would better reflect the experience of gay and lesbian employees likely to be affected by retaliation. Finally, Part IV advocates that courts adopt the new application of the objectively

¹⁹ *Id.* at 93.

reasonable standard, and explains why this revision is consistent with, and complementary to, the objectives of Title VII.

I. RETALIATION CLAIMS GENERALLY

Retaliation claims are one type of claim that may be filed pursuant to the protections of Title VII.²⁰ Congress intended the antiretaliation provisions to protect individuals from discrimination in instances where they seek to enforce their rights or otherwise oppose the discrimination.²¹ The purpose of the antiretaliation provision is related to, but distinct from, the purpose of Title VII's antidiscrimination provision.²² In *Burlington Northern & Santa Fe Railway Co. v. White*, the Supreme Court explained this distinction, noting that the antidiscrimination provision seeks a workplace where individuals are not discriminated against because of their race, color, national origin, religion, or sex. The antiretaliation provision "seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance

²⁰ See 42 U.S.C. § 2000e-3(a) (2006).

²¹ *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006) (holding that the antidiscrimination provision of Title VII seeks a workplace where individuals are not discriminated against while the antiretaliation provision prevents employers from interfering through retaliation with the Title VII's guarantees).

²² Compare 42 U.S.C. § 2000e-2(a) (2006) ("It shall be an unlawful employment practice for an employer— (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."), with *Pettway v. Am. Cast Iron Pipe Co.*, 411 F.2d 998, 1005 (5th Cir. 1969) (holding that the purpose behind the antiretaliation provision of Title VII is "to protect the employee who utilizes the tools provided by Congress to protect his rights" and that "[t]he Act will be frustrated if the employer may unilaterally determine the truth or falsity of charges and take independent action.").

enforcement of Title VII's basic guarantees."²³ The antidiscrimination provision prevents "injury to individuals based on who they are, for example, their status," while the antiretaliation provision prevents "harm to individuals based on what they do, for example, their conduct."²⁴ As a result of this policy distinction between the two provisions, to win a retaliation claim, the plaintiff does not have to prove that the underlying conduct she complained about violated Title VII; instead, all that is required is a reasonable belief that the conduct violated Title VII.²⁵ The policy concerns surrounding retaliation were further expanded in *Crawford v. Metropolitan Government*.²⁶ The Court in *Crawford* noted that without protection against retaliation, employees would "have a good reason to keep quiet about Title VII offenses against themselves or against others."²⁷ The Court also acknowledged the fact that "[f]ear of retaliation is the leading reason why people stay silent instead of voicing their concerns about bias and discrimination."²⁸

The antiretaliation clause reduces the likelihood that employees will fear reprisals if they decide to take advantage of Title VII's protections. Congress intended to "[maintain] unfettered access to [Title VII's] statutory remedial mechanisms."²⁹ If an employer can discriminate against an employee for having enforced her statutorily protected rights, then it

²³ *Burlington N. & Santa Fe Ry. Co.*, 548 U.S. at 63.

²⁴ *Id.*

²⁵ *See Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 270 (2001) (per curiam); *see also supra* note 15.

²⁶ 555 U.S. 271 (2009).

²⁷ *Id.* at 279.

²⁸ *Id.* (quoting Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 20 (2005)).

²⁹ *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1996).

would have the effect of “significantly deter[ing] employees from engaging in such proceedings.”³⁰ If a successful disparate treatment (discrimination) claim is a prerequisite to establishing a retaliation claim, the purpose of the antiretaliation clause—“unfettered access” to Title VII remedies—would be frustrated because it would deter individuals from complaining unless they could be sure that the conduct prompting the complaint violated Title VII. Courts have refused to go down that road.³¹ By not requiring an actual Title VII violation in order to proceed with the retaliation claim, courts ensure that employees can bring potential discrimination to the attention of their employers without fear of reprisal.³² The antiretaliation protection incentivizes employers to investigate claims of discrimination rather than firing the complaining employee, which furthers Title VII’s general purpose of preventing discrimination.

Courts have come up with a burden-shifting scheme for retaliation claims. There are three phases,³³ of which the first phase, the prima facie case, is the most relevant to claims

30 *Ghirardelli v. McAvery Sales & Serv., Inc.*, 287 F. Supp. 2d 379, 387 (S.D.N.Y. 2003) (“Title VII protects an employee from *any* employer, present or future, who retaliates against him because of his prior or ongoing opposition to an unlawful employment practice or participation in Title VII proceedings.”).

31 *See supra* note 15.

32 *See Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 73 (2006) (noting that the threat of retaliatory practice by employer might well have dissuaded a reasonable worker from making or supporting a complaint of discrimination).

33 First, the plaintiff begins by establishing a prima facie case. *See, e.g., Ackel v. Nat’l Comm., Inc.*, 339 F.3d 376, 381 (5th Cir. 2003) (holding that the plaintiff carries the initial burden of establishing a prima facie case of retaliation). If the plaintiff can successfully establish all the elements of her prima facie case, she is entitled to a rebuttable presumption that she was retaliated against. *See, e.g., Pighee v. L’Oreal U.S.A. Prods., Inc.*, 351 F. Supp. 2d 885, 894 (E.D. Ark. 2005). Second, the defendant is given the opportunity to rebut this presumption. To do so, the defendant must offer a legitimate, nondiscriminatory rationale for the action that it took against the plaintiff. *See, e.g., Crossley v. Ga. Pac. Corp.*, 355 F.3d 1112, 1113 (8th Cir. 2004). If the defendant has a legitimate reason, the case enters the third phase. The burden again shifts to the plaintiff, who

of sexual orientation. To establish the prima facie case, a plaintiff must establish three elements, the first of which has been held to bar claims of sexual orientation retaliation.³⁴ First, the plaintiff must show that she was engaging in activity protected by Title VII. Second, she must show that she was subjected to an adverse employment action. Third, she must demonstrate that there is reason to believe that engaging in the statutorily protected activity was the cause of the adverse employment action taken against her.³⁵ Additionally, some courts require proof that the defendant-employer knew that the plaintiff engaged in the protected activity.³⁶

A plaintiff may satisfy the first prong of the prima facie case by showing that she was engaged in statutorily protected activity. Title VII protects two types of activity: participation and opposition.³⁷ Participation claims usually involve cases where employees have instituted some sort of formal proceedings against the employer.³⁸ Because sexual

must convince the trier-of-fact that the employer's rationale is pretext. *See, e.g., Jimenez v. City of New York*, 605 F. Supp. 2d 485, 497 (S.D.N.Y. 2009).

34 *See e.g., Hamner v. St. Vincent Hosp.*, 224 F.3d 701, 705, 708 (7th Cir. 2000); *see also infra* Part II.

35 *See, e.g., Banks v. E. Baton Rouge Parish Sch. Bd.*, 320 F.3d 570, 575 (5th Cir. 2003) (defining the elements required in a prima facie case of retaliation).

36 *See, e.g., Salas v. Wis. Dept. of Corr.*, 493 F.3d 913, 924 (7th Cir. 2007) (requiring employer knowledge as part of the prima facie case); *Thomas v. City of Beaverton*, 379 F.3d 802, 812 n. 4 (9th Cir. 2004) (explaining that the causal link prong of the prima facie case is established by knowledge on the part of employer of protected activity).

37 42 U.S.C. § 2000e-3(a) (2006) ("It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, . . . to discriminate against any individual . . . 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." (emphasis added)).

38 For example, filing a complaint with the Equal Opportunity Commission (EEOC) is sufficient to establish participation. *Riley v. Del. River & Bay Auth.*, 661 F. Supp. 2d 456, 470 (D. Del. 2009) (holding that filing a

orientation discrimination is not explicitly included in Title VII, claims of participation are of little interest for the purposes of this Note.

Retaliation cases dealing with sexual orientation discrimination are claims of opposition.³⁹ To satisfy the first prong of the prima facie case through a showing of opposition, the plaintiff must show that she “opposed any practice made an unlawful employment practice by [Title VII].”⁴⁰ This definition brings up two questions: (1) what activities constitute opposition; and (2) what practices, if opposed, trigger protection from retaliation. The Supreme Court answered the first question in *Crawford v. Metropolitan Government*⁴¹ and the second in *Clark County School District v. Breeden*.⁴²

After much confusion among the lower courts, the Supreme Court clarified the meaning of opposition in its decision in *Crawford*. The Court recognized that opposition does not require active resistance, finding that an employee’s response to an inquiry about instances of a supervisor’s inappropriate behavior was sufficient to establish opposition.⁴³

The Court cited with approval a guideline provided by the Equal Employment Opportunity

claim with the EEOC was sufficient to establish participation, and was protected by Title VII). The source does not state this and actually in the footnote talks about the elements of opposition outlined in the paper.
39 See, e.g., *Dawson v. Entek Int’l*, 630 F.3d 928 (9th Cir. 2011); *Hamner*, 224 F.3d 701; *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252 (1st Cir. 1999).

40 42 U.S.C. § 2000e-3(a).

41 555 U.S. 271 (2009).

42 532 U.S. 268 (2001).

43 *Crawford*, 555 U.S. at 277–78. In *Crawford*, the plaintiff claimed that she was terminated because she had alleged that she was sexually harassed by her supervisor. She did not initiate the complaint, however. An internal investigation had already commenced and she was interviewed as part of the process. A human resources official asked the plaintiff if she had ever witnessed any “inappropriate behavior” on the part of her supervisor. In response, she described several instances of sexually harassing behavior. Although the company took no action against the supervisor, the plaintiff and two other accusers were fired soon after. *Id.* at 273–74.

Commission (EEOC), which defined opposition as including “[w]hen an employee communicates to her employer a belief that the employer has engaged in . . . a form of employment discrimination.”⁴⁴ *Crawford* stands for the proposition that initiating a complaint against an employer is not necessary to satisfying opposition.

In *Breeden*, the Court clarified the types of employer practices that, if opposed pursuant to the definition in *Crawford*, would trigger Title VII’s retaliation protections.⁴⁵ The *Breeden* Court rejected the plaintiff’s retaliation claim.⁴⁶ There, a female employee met with her male supervisor and another male employee to review psychological evaluations of job applicants. One of the reports showed that an applicant once made a crude comment to a co-worker. The comment was repeated, and the male supervisor and the male employee made some offhand jokes in reference to the applicant’s comment, offending the female employee. She later complained, and argued that her subsequent firing (which occurred two years later), was punishment for her filing a complaint.⁴⁷ The Court noted found that “no one could reasonably believe that the incident [she complained of] . . . violated Title VII.”⁴⁸ Following the decision in *Breeden*, a plaintiff’s claim that an employer retaliated against her because of her opposition to some employment practice requires that the plaintiff

⁴⁴ *Id.* at 276.

⁴⁵ *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268 (2001).

⁴⁶ *Id.* at 274.

⁴⁷ *Id.* at 269–70.

⁴⁸ *Id.* at 270.

reasonably believed that the protested conduct was unlawful under Title VII.⁴⁹ Although the Supreme Court did not specifically answer the question of what the plaintiff must prove on this issue, nearly all of the circuits have adopted a “reasonable” standard.⁵⁰ The employee must have an objectively and subjectively reasonable belief that the conduct being opposed constitutes a violation of Title VII.⁵¹

The second element of the prima facie case is the plaintiff’s showing that she was subjected to a materially adverse employment action.⁵² Title VII forbids an employer from “discriminating against” an employee or job applicant because that individual opposed a practice made unlawful by Title VII.⁵³ The Supreme Court defined discrimination as a materially adverse employment action.⁵⁴ In order to be materially adverse, the employer’s actions must be harmful to the extent that they “might have ‘dissuaded a reasonable worker from making or supporting a charge of discrimination.’”⁵⁵

The plaintiff also has to show that her opposition to an employer’s practice was the reason for the materially adverse action taken against her.⁵⁶ Usually the best evidence would show the employer’s intent to retaliate or would utilize comparators to support an

49 *See supra* note 14.

50 *See supra* note 15.

51 *See supra* note 14.

52 *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006); *see, e.g.*, *Daniels v. United Parcel Serv., Inc.*, 701 F.3d 620, 637–38 (10th Cir. 2012).

53 42 U.S.C. § 2000e-3(a) (2006).

54 *Burlington N. & Santa Fe Ry. Co.*, 548 U.S. at 68.

55 *Id.* at 68 (citing *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2006)).

56 *See, e.g.*, *Hoppe v. Lewis Univ.*, 692 F.3d 833, 841 (7th Cir. 2012); *Bucalo v. Shelter Island Union Free Sch. Dist.*, 691 F.3d 119, 131 (2d Cir. 2012); *Palmquist v. Shinseki*, 689 F.3d 66, 70 (1st Cir. 2012).

inference that the employer treated the individual differently because of her opposition. In the absence of such evidence, a showing that the adverse employment action occurred soon after the opposition may be sufficient, at least at the prima facie stage.⁵⁷

Finally, the employer must have knowledge that the employee engaged in the protected activity.⁵⁸ Although many courts do not specifically articulate this requirement, it is implicit in the other requirements of the prima facie case. An employer cannot retaliate against an employee without knowledge of the employee's conduct.⁵⁹

II. APPLICATION OF THE PRINCIPLES OF RETALIATION TO SEXUAL ORIENTATION DISCRIMINATION

Every circuit agrees that a claim for disparate treatment cannot be based on sexual orientation.⁶⁰ In a disparate treatment case, the plaintiff is asserting that the employer discriminated against her because of her sexual orientation. The fact that sexual orientation is not listed as a protected class by the statute serves to bar these types of claims.⁶¹

⁵⁷ The Supreme Court addressed the issue of causation specifically in *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001) (per curiam). In that case, the plaintiff relied wholly on temporal proximity of the filing of her complaint and her subsequent transfer. The Court intimated that the temporal proximity between the protected activity and an adverse employment action must be "very close." Nearly two years had passed between filing of the complaint and the plaintiff's termination. The Court rejected the contention that a two-year time delay was probative of causation. *Id.*

⁵⁸ *See, e.g.*, *Salas v. Wis. Dep't. of Corr.*, 493 F.3d 913, 924 (7th Cir. 2007) (holding that a plaintiff must show actual knowledge in a case of retaliation).

⁵⁹ *See id.*

⁶⁰ *See, e.g.*, *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000) (stating that "[t]he law is well-settled in this circuit and in all others to have reached the question that [an individual] has no cause of action under Title VII because Title VII does not prohibit harassment or discrimination because of sexual orientation.").

⁶¹ *See id.*

In contrast to a disparate impact case, in a retaliation case the employee feels discriminated against because of sexual orientation, reports the conduct, and is subsequently terminated for complaining. Many—though not all—courts have extended disparate treatment analysis to claims of sexual orientation retaliation.⁶² Despite these holdings, however, a plaintiff should be able to make out a retaliation claim. That the majority of courts hold otherwise frustrates the purpose of the antiretaliation clause.⁶³

The circuit courts are in disagreement over how to analyze such retaliation claims, and most of the circuits hold that those complaining of sexual orientation retaliation cannot recover.⁶⁴ Those courts that do not allow sexual orientation retaliation claims hold that because gay and lesbian victims of discrimination cannot state a claim under a disparate treatment theory, they cannot state a claim on a retaliation theory either.⁶⁵ This holding fails

62 *See, e.g.*, Hamm v. Weyauwega Milk Prods., Inc., 332 F.3d 1058, 1066 (7th Cir. 2003) (rejecting an employee's retaliation claim because he had not shown discrimination because of sex); Hamner v. St. Vincent Hosp., 224 F.3d 702, 708 (7th Cir. 2000) (holding that because Title VII does not include sexual orientation as a protected category for the purposes of antidiscrimination, it follows that protections for retaliation cannot extend to sexual orientation either); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 262 (1st Cir. 1999) (holding that the plaintiff did not have a reasonable belief that his conduct was protected by Title VII); Ianetta v. Putnam Invs., Inc., 142 F. Supp. 2d 131, 135 (D. Mass. 2001) (holding that because complaining about sexual orientation discrimination is not statutorily protected activity, the plaintiff's retaliation claim must fail because he could not make out a prima facie case). *But see, e.g.*, Dawson v. Entek Int'l, 630 F.3d 928, 936–37 (9th Cir. 2011) (holding that complaining to human resources about sexual orientation discrimination was protected activity under Title VII, and a decision on the merits was not foreclosed); Martin v. Dep't. of Corr. Servs., 224 F. Supp. 2d 434, 447–48 (N.D.N.Y. 2002) (holding that it was reasonable for an individual to believe that discrimination because of sexual orientation was actionable under Title VII, and therefore a prima facie case for retaliation had been satisfied).

63 Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 63 (2006) (“The antiretaliation provision seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees.”).

64 *See supra* note 63 and accompanying text.

65 *See supra* note 63–64 and accompanying text; *see also Hamner*, 224 F.3d at 707 (“The plaintiff must not only have a subjective (sincere, good faith) belief that he opposed an unlawful practice; his belief must also be

to take into consideration the difference between retaliation claims and disparate treatment claims. These decisions are at odds with the policy of the antiretaliation statute, and Congress's intent would be better served by victims of this type of retaliation to recover.

In analyzing sexual orientation retaliation claims, most courts have rejected them at the prima facie stage. The retaliation claim is often dismissed,⁶⁶ the apparent rationale being that it is unreasonable for one to believe that discrimination on the basis of sexual orientation is protected by Title VII.⁶⁷ However, this analysis is overly simplistic and ignores the basic rationale of Title VII. In addition, it misapplies the Supreme Court's holding in *Breedon* as well as the reasonableness standard that has been adopted in all of the circuits. In order to understand the different positions taken by the circuit courts, it is necessary to revisit the elements of the prima facie case for retaliation.

The prima facie case for retaliation is no different in cases involving sexual orientation. The plaintiff must have engaged in statutorily protected opposition that caused the employer to subject her to a materially adverse employment action.⁶⁸ However, retaliation cases brought by employees claiming that they have been fired for complaining

objectively reasonable, *which means that the complaint must involve discrimination that is prohibited by Title VII.*") (emphasis added).

⁶⁶ See, e.g., *Ianetta*, 183 F. Supp. 2d at 423 ("As sexual orientation is not protected under Title VII, Ianetta's [complaint] . . . was not a protected activity. The first claim of retaliation, therefore, is without merit and will not be further addressed.").

⁶⁷ See *supra* note 62–63 and accompanying text.

⁶⁸ See, e.g., *Banks v. E. Baton Rouge Parish Sch. Bd.*, 320 F.3d 570, 575 (5th Cir. 2003).

about sexual orientation discrimination have often not been able to make out these preliminary requirements.

While a “plain language” argument would seem, at least superficially, to foreclose an action for retaliation,⁶⁹ this argument fails in light of the Court’s holding in *Breedon* as well as subsequent lower courts’ interpretations. Courts have long refused to enforce the plain language of the provision. Following the Supreme Court’s ruling in *Breedon*, an employee must only reasonably believe that her opposition to her employer’s conduct violated Title VII.⁷⁰ As a result, the circuit courts have interpreted this to mean that a plaintiff has to show that her belief was both objectively and subjectively reasonable.⁷¹ The rejection of the plain language argument is consistent with the purpose of the retaliation provision, which is to encourage employees to bring complaints to their employers without fear of reprisal, even if the underlying conduct does not rise to the level of a disparate treatment claim. At the same time, the application of the “reasonable” test has led to much confusion among the circuits, and it remains unclear whether an employee’s belief that

69 A plain language argument would proceed as follows: The antidiscrimination provision of Title VII does not include sexual orientation in its list of protected classifications. 42 U.S.C. § 2000e-2(a)(1) (2006). The wording of the antiretaliation provision makes it unlawful for an employer to discriminate against an employee for opposing conduct “*made an unlawful practice by this subchapter.*” 42 U.S.C. § 2000e-3(a) (2006) (emphasis added). Therefore, because sexual orientation discrimination is not made an unlawful practice by the subchapter, it is unprotected even in retaliation claims that are made independent of a disparate treatment claim. This was the argument utilized in *Hamner v. St. Vincent Hospital*.

70 *Clark Cnty. Sch. Dist. v. Breedon*, 532 U.S. 268, 270–71 (2000); *see also*, *Brannum v. Mo. Dep’t. of Corr.*, 518 F.3d 542, 547 (8th Cir. 2008); *Stone v. Geico Gen. Ins. Co.*, 279 F. App’x 821, 823 (11th Cir. 2008); *Moore v. City of Phila.*, 461 F.3d 331, 341 (3d Cir. 2006); *Lang v. Nw. Univ.*, 472 F.3d 493, 495 (7th Cir. 2006); *Darmanin v. S. F. Fire Dep’t.*, 46 F. App’x 394, 395 (9th Cir. 2002).

71 *See supra* note 14.

sexual orientation violates Title VII is reasonable. If the employee did act reasonably in opposing the employer's conduct, then the employee can satisfy her prima facie case. If the employee was not reasonable in believing the employer's conduct violated Title VII, then the retaliation claim will fail because she was not able to make out her prima facie case. It is also important to note that the reasonableness standard should apply to employees as opposed to lawyers, as complaining employees are often acting on their own without the assistance of lawyers.

The major problem with analyzing sexual orientation retaliation claims stems from the requirement that the plaintiff show that she has engaged in statutorily protected opposition. Those complaining of sexual orientation retaliation can often show a materially adverse employment action; in many cases, they can also show causation.⁷² The Seventh Circuit addressed the issue of engaging in protected activity in *Hamner v. St. Vincent Hospital*.⁷³ In that case, the plaintiff complained to the hospital-employer because he felt that he was being harassed by his supervisor because of his sexual orientation. Hamner alleged that his supervisor harassed him by "lipping at him, flipping his wrists, and making jokes about homosexuals."⁷⁴ He was fired a few weeks later.⁷⁵

⁷² Although the *Hamner* court did address the merits of plaintiff's claim, it was the first prong of the prima facie case that stood in the way of the plaintiff's recovery. *Hamner v. St. Vincent Hosp.*, 224 F.3d 701, 708 (7th Cir. 2000). The other prongs, causation and adverse employment action, seemed, at least from the facts, to be satisfied. *Id.* at 703–04. The plaintiff was presumably able to show that he was discriminated against because of his sexual orientation, and he was able to show that he had been fired as a result of it. *Id.*

⁷³ 224 F.3d 701.

⁷⁴ *Id.* at 703.

⁷⁵ *Id.*

The Seventh Circuit upheld the district court's decision to grant summary judgment, noting that Hamner was subjected to an adverse employment action on the basis of sexual orientation, which is not protected by Title VII.⁷⁶ More importantly, the Seventh Circuit also rejected Hamner's claim that he reasonably believed that he was opposing an employment practice that violated Title VII.⁷⁷ The plaintiff pointed to the fact that the Seventh Circuit, like other circuits, had held that a retaliation claim may proceed past the prima facie stage so long as the plaintiff has a "sincere and reasonable belief that he is opposing an unlawful practice."⁷⁸ In other words, the plaintiff argued that even if the challenged practice does not actually violate Title VII, an employee may still engage in protected activity under the antiretaliation provision. This is consistent with the policy of the antiretaliation statute, which is to ensure that employees who feel discriminated against may bring such incidents to their employers without fear of reprisal.⁷⁹ The Seventh Circuit, however, rejected this argument because it requires both that the plaintiff has a subjective, good faith belief that the activity he was opposing violated Title VII as well as an objectively reasonable belief that this conduct violated Title VII.⁸⁰ The court noted that while Hamner met the subjective requirement, he did not meet the objective requirement

⁷⁶ *Id.* at 707.

⁷⁷ *Id.*

⁷⁸ *Id.* at 706–707.

⁷⁹ See *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2005); *Pettway v. Am. Cast Iron Pipe Co.*, 411 F.2d 998, 1005 (5th Cir. 1969).

⁸⁰ *Hamner*, 224 F.3d at 707.

because sexual orientation is not a protected class under Title VII.⁸¹ Essentially, the court equated the objective requirement with knowledge of Title VII. Under *Hamner*, to meet the objective requirement, the complaint must involve discrimination that is *in fact* prohibited by Title VII.⁸²

Not all courts have accepted the conclusion in *Hamner*. Some have taken a more nuanced approach to the objectively reasonable test, refusing to equate objective reasonableness with knowledge of Title VII. The Ninth Circuit implicitly addressed this issue in *Dawson v. Entek International*.⁸³ In that case, Dawson, a gay man, alleged that his employer had retaliated against him for filing a complaint. In his complaint, he alleged that his coworkers and his supervisor made derogatory comments about his sexual orientation.⁸⁴ Dawson testified that he had been called a “worthless queer” and had been referred to as “a homo, a fag, and a queer.”⁸⁵ He took his situation to human resources and was fired two days later.⁸⁶

The facts of this case were similar to the facts of *Hamner*. Both cases involved a gay employee who was discriminated against because of his sexual orientation. Both *Hamner* and Dawson complained about the discrimination, and both were fired shortly after

81 *Id.*

82 *See id.*

83 630 F.3d 928 (9th Cir. 2011).

84 *Id.*

85 *Id.* at 933.

86 *Id.*

complaining.⁸⁷ However, the Ninth Circuit held that Dawson had established a prima facie case of retaliation.⁸⁸ The court noted that “Dawson engaged in protected activity when he visited . . . human resources to discuss his treatment and file a complaint.”⁸⁹ The court accepted without further discussion that Dawson had engaged in protected activity by opposing the actions of his supervisor and coworkers.⁹⁰ As a result, Dawson had established the prima facie case that had been rejected in *Hamner*. The Ninth Circuit concluded that Dawson had provided sufficient evidence to create a “genuine issue of material fact on his claim of retaliation.”⁹¹ Unlike the *Hamner* court, the *Dawson* court held that a sexual orientation retaliation claim is actionable, and remanded the proceedings to the district court for further proceedings on the retaliation claim.⁹²

Similarly, in *Martin v. New York Department of Correctional Services*,⁹³ the federal district court reasoned that the plaintiff had shown that he had engaged in protected activity because he met the objective and subjective requirements. In that case, Martin alleged that

⁸⁷ Compare *Dawson*, 630 F.3d at 933, with *Hamner*, 224 F.3d at 703–04.

⁸⁸ *Id.* at 942.

⁸⁹ *Id.* at 936.

⁹⁰ Addressing protected activity, the Ninth Circuit noted only that “Dawson engaged in protected activity when he . . . visited human resources to discuss his treatment and file a complaint . . . based directly on sexual orientation discrimination.” *Id.* at 936 Although the court in *Dawson* did not address the issue of objective/subjective reasonableness, the Ninth Circuit, like the Second and Seventh Circuits, has adopted a standard of “reasonableness.” This standard incorporates the objective/subjective test. In *Moyo v. Gomez*, the Ninth Circuit held that “opposition clause protection will be accorded whenever the opposition is based on a ‘reasonable belief’ that the employer has engaged in an unlawful employment practice.” 40 F.3d 982, 984 (9th Cir. 1994). The court continued, noting that reasonableness “must be assessed according to an objective standard—one that makes due allowance, moreover, for the limited knowledge possessed by most Title VII plaintiffs about the factual and legal bases of their claims.” *Id.* at 985.

⁹¹ *Dawson*, 630 F.3d at 942.

⁹² *Id.*

⁹³ 224 F. Supp. 2d 434 (N.D.N.Y. 2002).

he was routinely harassed and verbally abused by his coworkers. In addition, Martin's coworkers left sexually explicit pictures in his work area.⁹⁴ Martin alleged that this conduct went on for years. He claimed that he was retaliated against after having complained about this conduct to his supervisors.⁹⁵ Martin was subjected to hostile and offensive sexual comments, jokes, and gestures by his coworkers;⁹⁶ crude and humiliating sexually explicit pictures and statements on the bathroom walls, yard booths, and time cards;⁹⁷ and newspaper articles advertising items such as "penile pumps" and "dildos."⁹⁸

The Second Circuit, like the Seventh Circuit and the Ninth Circuit, adopted both the objective and subjective requirements as necessary to establish a prima facie case of retaliation.⁹⁹ The employer in *Martin* produced a line of argument similar to the argument accepted in *Hamner*. The employer argued that because sexual orientation is not protected by Title VII, Martin must have known that his complaint about sexual orientation was not protected.¹⁰⁰ The Second Circuit, however, rejected the *Hamner* argument:

There is no evidence in the record, however, that Martin, a lay person, was aware of Second Circuit case law. The State Defendants have also failed to proffer any reason why such knowledge should be imputed to non-lawyers.

94 *Id.* at 441.

95 *Id.*

96 Second Am. Compl. and Demand for Jury Trial at ¶ 14, *Martin v. N.Y. Dept. of Corr. Servs.*, 224 F. Supp. 2d 434 (N.D.N.Y. 2002) (No. 99-CV-1364 (LEK/RWS)).

97 *Id.* at 21.

98 *Id.* at 22.

99 See *Galdieri-Ambrosini v. Nat'l Realty & Dev. Corp.*, 136 F.3d 276, 292 (2d Cir. 1998) (holding that satisfaction of the prima facie element of protected activity does not require a showing that the opposed conduct actually violated Title VII, but rather that the plaintiff reasonably and in good faith believed that it did).

100 *Martin*, 224 F. Supp. 2d at 448.

Accordingly, the State Defendant's contention is rejected and Martin has established the first element of his prima facie case.¹⁰¹

Unlike the *Hamner* court, the *Martin* court refused to equate objective reasonableness with knowledge of Title VII. Although the underlying conduct was not protected by Title VII, Martin was reasonable in thinking that he was opposing conduct made unlawful by Title VII.

III. "REASONABLE" BELIEF THAT SEXUAL ORIENTATION DISCRIMINATION VIOLATES
TITLE VII

In analyzing the issue of objective reasonableness with regard to retaliation claims, the question that courts need to ask is simple: whether it was reasonable for the employee to think that sexual orientation is protected by Title VII. The better view is that the purpose of Title VII and its subsequent interpretation by the Supreme Court imply that it is reasonable for an employee to file a complaint with the assumption that sexual orientation is protected. The belief that Title VII would protect an employee from sexual orientation discrimination is reasonable because (1) sexual orientation shares many of the same qualities as the classes that are explicitly protected by Title VII, (2) the Supreme Court and the lower courts have blurred the line between discrimination on the basis of sex and discrimination on the basis of sexual orientation, and (3) there is a patchwork of state laws that provides some protections against sexual orientation discrimination by employers. Additionally, courts

101 *Id.*

should recognize that encouraging gay and lesbian individuals to file a complaint without fear of reprisal furthers the purpose of the antiretaliation provision.

Title VII's general prohibition on discrimination makes it illegal for employers to discriminate on the basis of race, color, national origin, religion, and sex.¹⁰² The same factors that led to the inclusion of those classifications make it reasonable, albeit mistaken, for an employee to believe that Title VII protects sexual orientation. Like the protected classifications, sexual orientation brings up similar issues of innateness and immutability. It is at least reasonable for an employee to believe that sexual orientation is just as innate and immutable as gender. Therefore, in opposing an employer's discrimination against gays and lesbians, an employee could reasonably believe that he or she would have some sort of redress under Title VII. The facts of *Dawson*, *Hamner*, and *Martin* make it clear that discrimination because of sexual orientation is a very real problem, and it would be reasonable for an employee to file a complaint. Just because the conduct giving rise to the complaint does not violate Title VII does not mean that an employee should not be protected from being discharged if he or she decides to complain about it. This is especially true when the discrimination reaches the severity and pervasiveness that it did in *Martin*. An employee whose coworkers "left sexually explicit pictures in his work area and written statements and pictures on the restroom walls, yard booths, his time card and his interoffice

¹⁰² 42 U.S.C. § 2000e-2(a)(1) (2006) ("It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin").

mail”¹⁰³ could reasonably be expected to complain. His complaint should not be the basis for his subsequent termination or demotion.

For courts to equate objective reasonableness with knowledge that sexual orientation is not protected by Title VII is to ignore the Supreme Court’s treatment of gender discrimination. Requiring that an employee have knowledge of courts’ esoteric distinction between sex discrimination and sexual orientation discrimination is a much higher standard than the “objectively reasonable” standard. In fact, as evidenced by the circuit split itself, even lawyers differ on the question of whether it is reasonable for an employee to believe that sexual orientation is protected by Title VII. The standard should be modeled on the basis of a reasonably objective employee, not a reasonably objective lawyer practicing employment discrimination law.

The Supreme Court’s treatment of claims of individual disparate treatment on the basis of sex—particularly sexual harassment and gender stereotyping—could lead an individual to reasonably conclude that she is protected under Title VII. As a result, complaining to her employer would be reasonable and should be protected from retaliation. Same-sex harassment and gender stereotyping are two areas in particular where the Supreme Court has blurred the line between sex, which is protected under Title VII, and sexual orientation, which is not. The fact that this distinction is in place argues in favor of a more flexible application of *Breedon*’s reasonableness standard. In both sexual harassment

103 *Martin*, 224 F. Supp. 2d at 441.

and gender stereotyping, the distinction between sex discrimination and sexual orientation discrimination has a tendency to break down.

In *Oncale v. Sundowner Offshore Services, Inc.*,¹⁰⁴ an apparently straight¹⁰⁵ male employee brought a Title VII sexual harassment action against his male coworkers and supervisors. The Supreme Court reversed the Fifth Circuit’s interpretation and held that same-sex harassment is in fact actionable as “sex discrimination.”¹⁰⁶ The plaintiff worked for Sundowner Offshore Services on a platform in the Gulf of Mexico. There, he was “forcibly subjected to sex-related, humiliating actions against him by [his coworkers].”¹⁰⁷ The plaintiff was sexually assaulted and threatened with rape.¹⁰⁸ He ultimately quit his job and filed suit against his employer, alleging discrimination on the basis of sex. The district court, which was subsequently affirmed by the Fifth Circuit, held that “Mr. Oncale, a male, has no cause of action under Title VII for harassment by male co-workers.”¹⁰⁹

The Supreme Court unanimously reversed the Fifth Circuit, holding that nothing in Title VII necessarily bars a claim of discrimination merely because the plaintiff and his alleged abuser are of the same sex.¹¹⁰ Thus, the Court in *Oncale* held that same-sex harassment is actionable discrimination under Title VII.¹¹¹ The relevant issue, according to

104 523 U.S. 75 (1998).

105 SHANNON GILREATH, THE END OF STRAIGHT SUPREMACY: REALIZING GAY LIBERATION 196 (2011).

106 *Oncale*, 523 U.S. at 79.

107 *Id.* at 77.

108 *Id.*

109 *Id.*

110 *Id.* at 79.

111 *Id.*

the Court, is whether the individual was harassed *because of* his or her sex.¹¹² In the opinion, Justice Scalia notes three “evidentiary routes” by which an individual may pursue his or her claim of same-sex sexual harassment. The first is credible evidence that the harasser was homosexual.¹¹³ The second is evidence that a victim was abused by a member of the same-sex because of general hostility to the presence of men or women in the workplace.¹¹⁴ The third is comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace.¹¹⁵ A showing of such evidence would be considered relevant in making a claim of same-sex sexual harassment.¹¹⁶ The critical issue, according to the Court, is “whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.”¹¹⁷

The Court’s holding in *Oncale* is inconsistent with a rigid distinction between sex and sexual orientation. The effect of the discrimination tends to be the same, whether the discrimination was motivated by sex or sexual orientation. The facts of *Oncale* are not all that different from *Martin*; in both cases, the plaintiffs were subjected to systematic abuse at the hands of their coworkers and supervisors. The Supreme Court did not go so far as to say that abuse that is sexual in nature or content is always sexual harassment.¹¹⁸ However,

112 *Id.* at 79–81.

113 *Id.* at 80.

114 *Id.* at 80–81.

115 *Id.*

116 *Id.*

117 *Id.* at 80 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Ginsberg, J., concurring)).

118 *Id.* at 80.

based on the Court's analysis in *Oncale*, it seems that the sexual content of the abuse is at least a substantial factor in considering whether same-sex harassment existed.¹¹⁹ The harassment in *Martin* was of a similar nature.¹²⁰ A plaintiff in Martin's position would be very likely to rely on the abuse complained of in *Oncale* as giving rise to an actionable complaint under Title VII. This reliance, though technically an incorrect interpretation of precedent surrounding Title VII, is at least a patently reasonable one, passing both the objective and subjective standards.

The second category of cases in which courts have blurred the line between sex discrimination and sexual orientation discrimination is cases involving gender stereotyping. While sexual orientation discrimination is not prohibited by Title VII, discrimination on the basis of gender stereotypes is prohibited. In *Price Waterhouse v. Hopkins*,¹²¹ the Supreme Court held that an employer discriminates on the basis of sex when it requires employees to conform to gender norms. Price Waterhouse, a professional accounting partnership, denied the plaintiff's candidacy for partnership. The plaintiff alleged that she was discriminated against because she behaved too aggressively. Price Waterhouse had a history of "an

119 *Id.* at 81–82.

120 *See supra* notes 92–97 and accompanying text.

121 490 U.S. 228 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102–66, 105 Stat. 1074–75, *as recognized in* *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1997). Although Congress superseded the Court's holding with regard to mixed motive analysis, the Court's interpretation of gender stereotyping remains unchanged by any amendment to the statute and is still good law.

impermissibly cabined view of the proper behavior of women,”¹²² and the Court concluded that such gender stereotyping was impermissible discrimination on the basis of sex.¹²³

The Ninth Circuit addressed similar questions in *Rene v. MGM Grand Hotel, Inc.*¹²⁴ The court was presented with the question of “whether an employee who alleges that he was subjected to severe, pervasive, and unwelcome ‘physical conduct of a sexual nature’ in the workplace asserts a viable claim of discrimination based on sex.”¹²⁵ In that case, the Ninth Circuit held that an employee’s sexual orientation is irrelevant for the purposes of Title VII because it “neither provides nor precludes a cause of action for sexual harassment.”¹²⁶ That the harasser was, or may have been, “motivated by hostility based on sexual orientation is similarly irrelevant.”¹²⁷ It was sufficient that the harasser engaged in harassment of a sexual nature.¹²⁸ In addition, as the concurrence notes, such harassment was discrimination based on gender stereotyping, which is tantamount to discrimination based on sex under Title VII.¹²⁹

In *Rene*, the plaintiff was an openly gay man who alleged sexual harassment by his male co-workers and supervisors. His supervisors’ and fellow butlers’ conduct included caressing and hugging. Rene alleged that his coworkers often “grabbed him in the crotch”

122 *Id.* at 236–37.

123 *See id.* at 256–58.

124 305 F.3d 1061 (9th Cir. 2002) (en banc), *cert. denied*, 538 U.S. 922 (2003).

125 *Id.* at 1063.

126 *Id.* at 1063–64.

127 *Id.* at 1063.

128 *See id.* at 1068.

129 *Id.* at 1069 (Pregerson, J., concurring).

and “poked their fingers in his anus through his clothing.”¹³⁰ Rene argued that his sex was “a factor in the adverse treatment [he] received.”¹³¹ The district court granted MGM Grand’s motion for summary judgment, holding that his claim was not actionable because he was gay.¹³² The Court of Appeals for the Ninth Circuit reversed, citing the Supreme Court’s holding in *Oncale* as applicable to the plaintiff’s claim.¹³³ Relying on *Oncale*, the Ninth Circuit noted that “Title VII forbids severe or pervasive same-sex offensive sexual touching.”¹³⁴ The Ninth Circuit also held that offensive sexual touching is discrimination based on sex.¹³⁵ In a special concurrence, three Ninth Circuit judges argued that this was a case of “actionable gender stereotyping harassment.”¹³⁶

Relying on the analyses of *Price Waterhouse* and *Rene*, gender-stereotyping and inappropriate sexual conduct are actionable as discrimination based on sex. Discrimination on the basis of sexual orientation will almost always include these elements. In the same way that it is a gender stereotype to expect women to act as though they had taken “a course at charm school,”¹³⁷ it is a gender stereotype to believe that all women are attracted to men or that all men are attracted to women. Gay and lesbian individuals simply do not fit into

130 *Id.* at 1064.

131 *Id.*

132 *Id.* at 1066.

133 *Id.* at 1068.

134 *Id.* at 1067.

135 *Id.*

136 *Id.* at 1068 (Pregerson, J., concurring).

137 *Price Waterhouse*, 490 U.S. 228, 235 (1989).

this gender stereotype.¹³⁸ In addition, on the basis of *Price Waterhouse* and *Rene*, it appears that the application of the distinction between sex and sexual orientation leads to the absurd conclusion that an “effeminate” male employee will be protected under Title VII regardless of his sexual orientation (because he does not conform to male stereotypes), but a “straight-acting” gay male employee will not be protected because he is supposed by courts to have conformed to gender stereotypes. The distinction between the “straight-acting” gay male employee and the “effeminate” male employee seems to defy both logic and the policy of Title VII, which is to prevent discrimination on the basis of sex.¹³⁹ This strange result makes it objectively and subjectively reasonable for the average employee to conclude that sexual orientation is protected by Title VII.

In addition to the problem of distinguishing sex discrimination from sexual orientation discrimination, the fact that states vary in their treatment of sexual orientation as a protected class further supports that it is reasonable for an employee to believe that sexual orientation discrimination is actionable under Title VII. Twenty-one states and the District

138 Andrew Koppelman, for example, has made the argument that sexual orientation discrimination *is* sex discrimination. Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994). He argues that discrimination because of sexual orientation rests upon “normative stereotype[s].” *Id.* at 219. In particular, the stereotype that certain conduct is permissible for one sex but is not permissible for the other. As Koppelman puts it, sex with a woman is appropriate for men, but is inappropriate for women. *Id.* Although his argument is tethered primarily to the area of constitutional law, his analysis lends itself to Title VII and employment discrimination. Koppelman argues that much of the “stigmatization” of gays and lesbians stems from “the homosexual’s supposed deviance from traditional sex roles.” *Id.* at 234. He notes a “correlation” between “sexism” and “heterosexism,” bolstering his argument that sexual orientation discrimination and sex discrimination are really two sides of the same coin. *Id.* at 240.

139 *See generally* Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 63 (2006) (holding that the substantive provision of Title VII prevents discrimination against employees because of their status).

of Columbia protect sexual orientation in their versions of Title VII.¹⁴⁰ These statutes protect gay and lesbian employees from being discriminated against by their employers. These state statutes protect employees in the public and private sector.¹⁴¹ Additionally, nine states have an executive order, administrative order, or personnel regulation that prohibits discrimination against public employees based on sexual orientation.¹⁴² These orders apply only to state agencies. Such states allow employees to bring a retaliation claim on the basis of sexual orientation.¹⁴³ Of course, there are less damages available than under federal law. In addition, numerous employers prohibit discrimination on the basis of sexual orientation in their employment policies, even if they are not required to do so under applicable law.¹⁴⁴ This, too, would make it reasonable for an employee to believe that she would be protected if she complained about sexual orientation discrimination.

Finally, concluding that it would be reasonable for an employee to believe that discrimination on the basis of sexual orientation is actionable under Title VII would further

140 *Statewide Employment Laws & Policies*, HUMAN RIGHTS CAMPAIGN, http://www.hrc.org/files/assets/resources/employment_laws_and_policies.pdf.

141 *Id.*

142 *Id.*

143 For example, New York law includes sexual orientation in its substantive provision and provides relief for retaliatory practices. N.Y. EXEC. LAW § 296(1)(a) (McKinney 2010) (“[It shall be unlawful] [f]or an employer . . . because of an individual’s age, race, creed, color, national origin, *sexual orientation*, military status, sex, disability, predisposing genetic characteristics, marital status, or domestic violence victim status, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment”) (emphasis added); N.Y. EXEC. LAW § 296(1)(e) (McKinney 2010) (“[It shall be unlawful] [f]or any employer . . . to discharge, expel or otherwise discriminate against any person because he or she has *opposed* any practices forbidden under this article . . .”) (emphasis added).

144 HUMAN RIGHTS CAMPAIGN, CORPORATE EQUALITY INDEX 2012: RATING AMERICAN WORKPLACES ON LESBIAN, GAY, BISEXUAL, AND TRANSGENDER EQUALITY 20 (2012), *available at* http://issuu.com/humanrightscampaign/docs/corporateequalityindex_2012.

the purpose of the antiretaliation statute. The difference in policy between antiretaliation and antidiscrimination is subtle, but vital. The policy underlying antidiscrimination is simply to protect individuals from discrimination on the basis of race, color, national origin, religion, or sex.¹⁴⁵ The purpose of the antiretaliation statute is to encourage individuals to come forward with complaints of discrimination.¹⁴⁶ This is why the standard in *Breeden* does not require a meritorious claim under Title VII. An individual can succeed on a retaliation claim despite failing on a claim of disparate treatment. If courts hold that sexual orientation discrimination would reasonably incite an employee to file a complaint under Title VII, then employees that feel discriminated against (or see someone being discriminated against) will not have to fear for their jobs just because they happened to be wrong about what is actually protected under Title VII. By encouraging individuals to complain without fear of reprisal from their employers, Title VII helps to create a more harmonious work environment in which employees are not “chilled” from complaining.

CONCLUSION

The lower courts have stated that the standard that applies to retaliation cases is a reasonable belief that the opposed conduct violated Title VII.¹⁴⁷ The test requires both an objective and subjective component. Courts should hold that it is objectively and

¹⁴⁵ See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424, 429–30 (1971) (noting that the objective of Title VII is “to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees”).

¹⁴⁶ See *supra* note 4.

¹⁴⁷ See *supra* note 15 and accompanying text.

subjectively reasonable for a gay or lesbian employee to believe that the conduct underlying his or her retaliation claim violated Title VII. Courts should explicitly reject the holding in *Hamner* and adopt the holding in *Martin*. Although *Hamner* and *Martin* use the same rule, *Hamner* amounts to an unreasonable application of the reasonable requirement explained in *Breeden*.

The “objectively reasonable” standard adopted by circuit courts should not be applied so as to require that employees have lawyer-like knowledge of the workings of Title VII. Requiring a lay employee to understand the Supreme Court’s nuanced distinction between discrimination on the basis of sexual orientation and discrimination on the basis of sex is an untenable standard. The treatment of same-sex harassment and gender stereotyping, as well as the array of state antidiscrimination statutes and employer policies have complicated the legal status of sexual orientation. Taken together, these complications make it quite reasonable for an ordinary employee to believe that the law protects her from sexual orientation discrimination. A mistaken belief that sexual orientation discrimination is unlawful under Title VII satisfies both the subjective and objective components of the reasonableness standard, and it is therefore reasonable. The subjective component is met as long as the complaint is made in good faith, and the objective test is met because of the immense confusion surrounding the treatment of sexual orientation under Title VII. Courts should recognize the standard as met, and hold that a plaintiff can make a prima facie claim of retaliation even where the opposed conduct is discrimination based on sexual orientation.

Sexual orientation claims should follow the same burden-shifting scheme as a retaliation claim made on the basis of race or sex.

The purpose of the anti-retaliation provision is to encourage employees to file complaints against offending employers.¹⁴⁸ If employers can retaliate against employees for filing these sorts of complaints, this purpose is frustrated. Because the validity of a retaliation claim is a separate issue from the incident giving rise to the complaint, the antiretaliation provision does not require that the plaintiff have a meritorious discrimination claim to win on the retaliation claim—only a reasonable belief that the employer violated Title VII is required. An employee acts reasonably, subjectively and objectively, when he or she complains about sexual orientation discrimination. As a result, the employee should be protected from retaliation.

¹⁴⁸ *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997) (noting that the primary purpose of the antiretaliation statute is “maintaining unfettered access to Title VII’s remedial mechanisms”).