

Suppressed Anger, Retaliation Doctrine, and Workplace Culture

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ABSTRACT

Suppressed Anger, Retaliation Doctrine, and Workplace Culture is an interdisciplinary piece combining legal analysis with organizational behavior/psychology research. *Suppressed Anger* examines and critiques two employment law doctrines on retaliation—the “reasonable belief” doctrine and, what we call, the “manner of the complaint” doctrine and argues that beyond hindering employees’ rights as has been examined in prior scholarship, the law in this area also does a significant disservice to employers by inhibiting emotion expression and thereby negatively affecting workplace culture and productivity. The “reasonable belief” doctrine essentially dictates that for retaliatory conduct to be unlawful, the complaining party must have an objectively reasonable belief that the practices he or she opposed were unlawful, basing the assessment of reasonableness on whether a court would find the practices to be unlawful discrimination. The “manner of the complaint” doctrine arises in cases in which an employer deems the manner of the employee’s complaint regarding discriminatory practices to be insubordinate and fires the employee on that basis. In these cases, courts rarely question an employer’s claim of insubordination, ignoring the circumstances that gave rise to the complaint and focusing solely on the employer’s subjective belief that the employee’s demeanor was unacceptable. The result of both of these doctrines, we argue, is a legal framework that incentivizes employees to stay quiet and refrain from making any complaints.

This piece breaks new ground by drawing on existing scholarship in the psychology and organizational behavior field detailing the negative outcomes when employees suppress anger and other emotions in the workplace, particularly in response to perceived injustice. We use this research to argue that retaliation doctrine inhibits the useful airing of problems that require management attention, instead fomenting worker dissatisfaction and even leading to psychological and physiological issues for individual employees that negatively impact the workplace as a whole. As a result, we maintain that changing retaliation doctrine should not be a goal of workers alone but that employers, upon examining the research on expressions of anger in the workplace should find common ground with their employees.

INTRODUCTION

In March 2015, a former Google engineer tweeted the following statement: “Rod Chavez is an engineering director at Google, he sexually harassed me, Google did nothing about it. Reprimanded me instead of him.”¹ Kelly Ellis explained the circumstances in a series of tweets throughout the day, describing inappropriate comments by the engineering director and others. Ultimately, she “reacted badly to something he said and ended up pouring a drink over his head.”² Rather than take her complaints of sexual harassment seriously, Ellis alleged that Human Resources focused on the “humiliation” suffered by the director as a result of being soaked by the drink.³ In a stark description of the situation she faced, Ellis tweeted: “My choices were: speak up loudly, lose my job, burn bridges . . . , leave quietly . . . , or not say anything.”⁴ She had earlier tweeted the following: “I wonder how many other women don’t report or discuss their harassment, for their careers’ sake.”⁵

The choice Ellis eventually made, to leave on her own and then speak up about the behavior online, is becoming a more common one in the tech world.⁶ In February 2017, a former Uber engineer left her job at Uber and then wrote a lengthy blog post alleging sexual harassment and other forms of sex discrimination by her former employer and a massive failure on the part of Human Resources to investigate or take any action in response.⁷ But this choice is not limited to tech workplaces, to those alleging sexual harassment, or to women. And it is not new. The risk that complaining about discriminatory comments will end one’s career and leave little legal recourse is a reality for many workers. The fear that management will retaliate against the employee for his complaint or focus on his anger in response to the discrimination rather than the discrimination itself incentivizes workers to suppress those emotions and ignore the problem. But the problem rarely ends with that worker. In fact, the overly narrow legal protections available in such cases serve to incentivize workers to stay quiet (or leave and speak up online later), thereby damaging the entire workplace culture.

¹ Mark Wilson, *Google hit with sexual harassment complaint from ex-employee*, BETANEWS (March 8, 2015), <https://betanews.com/2015/03/08/google-sexual-harassment/>.

² *Id.*

³ *Id.* See also Rob Price, *A former Google employee claims she was reprimanded for speaking out about sexual harassment*, BUSINESS INSIDER (March 9, 2015), <http://www.businessinsider.com/kelly-ellis-claims-she-was-sexually-harassed-at-google-2015-3>.

⁴ Wilson, *supra* note 1.

⁵ *Id.* (quoting – Kelly Ellis (@justkelly_ok) January 22, 2015).

⁶ Klint Finley, *Tech Still Doesn’t Take Discrimination Seriously*, WIRED (Feb. 20, 2017), <https://www.wired.com/2017/02/tech-still-doesnt-take-discrimination-seriously/>.

⁷ Susan J. Fowler, *Reflecting On One Very, Very Strange Year At Uber*, SUSAN J. FOWLER BLOG (Feb. 19, 2017), <https://www.susanjfowler.com/blog/2017/2/19/reflecting-on-one-very-strange-year-at-uber>. See also Sam Levin, *Female engineer sues Tesla, describing a culture of ‘pervasive harassment’*, THE GUARDIAN (Feb. 28, 2017), https://www.theguardian.com/technology/2017/feb/28/tesla-female-engineer-lawsuit-harassment-discrimination?CMP=oth_b-aplnews_d-1 (current Tesla engineer suing company for sexual harassment and other sex discrimination and claiming retaliation for her complaints).

Consider this scenario: James, a long term employee, approaches his human resources representative to complain about a horribly offensive comment made by his supervisor in the workplace. The comment is race-related and to James's ears (and to many people), it is outright racist. James is visibly distressed, cannot imagine working with the supervisor after this incident, and wants action taken against the speaker. The human resources representative agrees that the comment is unacceptable in the workplace, promises some action, and follows up by approaching the supervisor to ask about the incident. The supervisor, in turn, claims that James misheard or misinterpreted the comment and that it is simply "not as bad" as James is making it sound. But, he promises to follow up with James to "smooth things over." This meeting, as one might imagine, goes horribly wrong, ending in even greater tension between the supervisor and employee. Three weeks later, when upper management begins to put pressure on the supervisor to cut costs, he takes the opportunity to terminate James who is not nearly as effective as he had been in the past and who he now feels uncomfortable supervising. The supervisor consults with Human Resources and feels comfortable proceeding with the termination because he understands that it is highly unlikely that any court will uphold a retaliation claim under these circumstances.

After his termination, James returns to his desk to collect his personal items before leaving the building. His co-workers see him packing up and learn that he has been fired. Some of these co-workers knew of James's complaint to Human Resources or, at the very least, knew of his tense conversation with the supervisor. Several employees make the assumption that James was fired as a result of his complaint. Concluding that the incident is over and no good can come from re-hashing it, neither management nor Human Resources ever raises it again and neither takes any action against the supervisor. The lower level employees are left to talk among themselves about this sequence of events. Six months later, the same or a different supervisor makes offensive comments about women. This time, despite being deeply upset, not a single employee comes forward to complain to management or Human Resources. Instead, employees talk to one another, becoming more upset as they re-tell the story. Management notices increasing tension between the supervisor and his employees but cannot get anyone to explain it. After several months, the department's output begins to drop, several key employees quit, and management is left wondering what happened.

Why has this occurred? How did the existing legal doctrine on workplace discrimination and retaliation contribute to this breakdown in workplace health? And how could the law have helped to prevent it?

Now imagine if this scenario played out slightly differently. When James initially complains about racially biased comments, he does not go to his Human Resources representative but instead complains directly to the manager who made the comments. The manager becomes defensive and tells James he is "out of line" and that there is nothing to complain about. This further inflames James, who grows increasingly agitated and begins to speak loudly and more forcefully, necessitating a call to upper management. When a more senior supervisor joins the conversation, James feels attacked and continues speaking loudly and

angrily. The senior supervisor views James's demeanor as unacceptable and terminates him on the spot. When James later files suit, claiming discrimination and retaliation for his complaint of discrimination, the employer responds that it did not terminate James for making the complaint but rather for insubordination. It was his tone and demeanor in making the complaint rather than the substance of it that was the problem. The court accepts this explanation and dismisses the retaliation claim on summary judgment.

Is the court's conclusion reasonable? And how does the employer's response to this situation, as supported by the court, impact the rest of its employees?

Deborah Brake, in her groundbreaking piece on retaliation, highlights three aspects of the phenomenon that make it an important focus of scholarly attention: (1) Retaliation is highly prevalent. Owing to "social dynamics within institutions" and the negative perception of women and people of color who complain about discrimination, retaliation is a likely response to such claims.⁸ (2) Retaliation is "powerful medicine, functioning to suppress discrimination claims and preserve the social order."⁹ The primary reason that employees stay quiet instead of speaking up about experiences of discrimination is the "[f]ear of retaliation."¹⁰ And (3) an examination of "the extent of protection from retaliation found in discrimination law tells us a great deal about the scope of discrimination law and the values it protects."¹¹

This article is particularly concerned with two aspects of retaliation doctrine illustrated in the hypotheticals above. The first is what we refer to as the "Reasonable Belief" doctrine, explored in the Supreme Court's 2001 decision in *Clark County School District v. Breeden*.¹² The doctrine essentially dictates that for retaliatory conduct to be unlawful, the complaining party must have an objectively reasonable belief that the practices he or she opposed (which, in turn, gave rise to the retaliation) were unlawful and that the "reasonableness" of that belief will be based on whether a court would find the practices to be unlawful discrimination.¹³ In the hypothetical scenario above, under this doctrine, the employee complaining about the offensive race-related comment would likely find his complaint unprotected and his termination lawful because under existing case law, one biased comment does not create an unlawful hostile work environment,¹⁴ so it is not "objectively reasonable" to think that one comment constitutes unlawful discrimination.¹⁵ As a result, a complaint about the one comment does not constitute protected activity, making it acceptable to terminate the employee as a result of his complaint.¹⁶

⁸ Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 20 (2005).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 21.

¹² 532 U.S. 268 (2001).

¹³ See *id.* at 270-71; *Satterwhite v. City of Houston*, 602 F. App'x 585, 588 (5th Cir. 2015).

¹⁴ See *Breeden*, 532 U.S. at 271.

¹⁵ *Id.*; see also *Satterwhite*, 602 F. App'x at 588.

¹⁶ *Id.*

Despite numerous problems with this approach, the doctrine has been adopted by every circuit in the country.¹⁷

The second doctrine is one we refer to as the “Manner of the Complaint” doctrine and is illustrated in the second hypothetical. In considering whether an employee’s “opposition conduct” is protected, courts often consider the manner in which the complaint was made and claim to weigh employer and employee interests in reaching a conclusion about reasonable behavior.¹⁸ In practice, courts rarely question an employer’s claim of insubordination, ignoring the circumstances that gave rise to the complaint, and focusing solely on the employer’s subjective belief that the employee’s demeanor was unacceptable.¹⁹ Wanting to avoid a deep dive into the employer’s workplace culture and judgment, courts generally blindly accept the claim of insubordination, thus turning it into a “get out of liability free card.”

These doctrines, while problematic to say the least, are not new and come as no surprise to the scholarly community. A number of scholars, including Matthew Green, Craig Senn, Lawrence Rosenthal, Susan Carle, and Terry Smith have criticized these doctrines as undermining the goals of Title VII of the Civil Rights Act²⁰ and other anti-discrimination statutes²¹ and the basic need to protect workers who come forward to challenge bias in the workplace.²² While we agree with these scholars’ opposition to these doctrines and the reasons they cite, this article takes a different approach. By drawing on extensive organizational behavior and psychology research on anger in the workplace, and particularly on the dual threshold model (DTM) of workplace anger, we present new arguments for a doctrinal change.

We contend that in addition to undermining anti-discrimination protections, these retaliation doctrines also negatively impact the overall health of workplaces. Both doctrines have the effect of incentivizing workers to suppress their anger and any expressive displays of anger in the workplace. They thus inhibit the useful airing of problems that require management attention, instead fomenting worker dissatisfaction and even leading to psychological and physiological issues for individual employees that negatively impact the workplace as a whole.

¹⁷ Lawrence D. Rosenthal *To Report or Not to Report: The Case for Eliminating the Objectively Reasonable Requirement for Opposition Activities Under Title VII's Anti-Retaliation Provision*, 39 ARIZ. ST. L.J. 1127, 1129 n.7 (2007).

¹⁸ See Susan D. Carle, *Angry Employees: Revisiting Insubordination in Title VII Cases*, 10 HARV. L. & POL'Y REV. 185, 208-09 (2016).

¹⁹ *Id.* at 186, 200-09 (“[C]ourts routinely enter judgment in favor of employers where the facts show that employees were mildly or moderately insubordinate in reaction to their perceptions of discriminatory treatment.”).

²⁰ 42 U.S.C. § 2000e-2000e-17 (2000).

²¹ See, e.g., Age Discrimination in Employment Act (hereinafter ADEA), 29 U.S.C. §§ 621-634 (2000) (ADEA) (prohibiting age discrimination in employment); Americans with Disabilities Act (hereinafter ADA), 42 U.S.C. §§ 12101-12117 (2000) (ADA) (prohibiting disability discrimination in employment).

²² See generally Matthew W. Green Jr., *What's So Reasonable About Reasonableness? Rejecting a Case Law-Centered Approach to Title VII's Reasonable Belief Doctrine*, 62 KAN. L. REV. 759 (2014); Craig Robert Senn, *Redefining Protected "Opposition" Activity in Employment Retaliation Cases*, 37 CARDOZO L. REV. 2035 (2016); Rosenthal, *supra* note 17; Carle, *supra* note 18; Terry Smith, *Everyday Indignities: Race, Retaliation, and the Promise of Title VII*, 34 COLUM. HUMAN RIGHTS L. REV. 529 (2003).

As a result, we maintain that changing retaliation doctrine should not be a goal of workers alone but that employers, upon examining the research on expressions of anger in the workplace should find common ground with their employees. Although creation of healthy and productive workplaces is, by no means, a goal of Title VII and other anti-discrimination statutes, the pragmatic consequences of court-created doctrines should not be ignored. In fact, consideration of the actual impact of these doctrines on worker and workplace health should spur support for change among employees and employers alike.

I. PROBLEMATIC DOCTRINES

As illustrated in the introductory hypotheticals, this article is concerned with two court-created doctrines on retaliation—what we have called the “Objectively Reasonable Belief” doctrine and the “Manner of the Complaint” doctrine. These doctrines typically arise in the context of disparate treatment or “intentional” discrimination cases wherein an employee brings a claim of retaliation either in addition to a discrimination claim or as a stand-alone claim.²³ There is no shortage of such cases in the federal courts. In fact, more retaliation claims are brought than any other type of discrimination claim (race, sex, age, disability, etc.). In 2016, the EEOC reported that retaliation charges under all of the federal anti-discrimination statutes came to 45.9% of all charges. Retaliation claims under Title VII came to 36.2% of all charges, which is still considerably more than any other category.²⁴ Retaliation protections are made explicit in all of the federal anti-discrimination statutes,²⁵ and retaliation is often thought of as itself a form of discrimination.²⁶

²³ See Jessica Fink, *Unintended Consequences: How Antidiscrimination Litigation Increases Group Bias in Employer-Defendants*, 38 N.M.L. REV. 333, 352 n.87 (citing John Sanchez, *The Law of Retaliation After Burlington Northern and Garcetti*, 30 AM. J. TRIAL ADVOC. 539, 541-42 (2007) (for proposition that plaintiffs often bring both a discrimination claim and a retaliation claim in one action, but that a plaintiff “can recover on a retaliation claim even when the court dismisses her underlying [discrimination] claim”)).

²⁴ See EEOC Charge Statistics, <https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm>. There are likely multiple causes of these high numbers of retaliation claims including (1) human nature that leads managers to react poorly when confronted with claims of discrimination; (2) doctrine that makes it possible to prove retaliation without explicit evidence of intentional action; (3) an expansion in recent years of who is protected by retaliation protections and when such protections may be invoked. See Alan D. Berkowitz and Leora Eisenstadt, *The Ever-Expanding World of Retaliation: The Supreme Court Continues the Trend*, BNA Daily Labor Report (June 2011) (discussing *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006) (broadening the definition of “adverse action” for retaliation claims); *CBOCS West Inc. v. Humphries*, 553 U.S. 442 (2008) (applying retaliation protection to employees who complain about the employer's violation of another employee's contract-related rights); *Crawford v. Metropolitan Government of Nashville and Davidson County, Tenn.*, 129 S. Ct. 846 (2009) (providing retaliation protection to employees who respond to questions during internal investigations); *Thompson v. North American Stainless LP*, 131 S. Ct. 863 (2011) (finding that Title VII prohibits retaliation against third-party employees who are closely related to the employee exercising his or her statutory rights); *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325 (2011) (finding oral complaints to be protected under the Fair Labor Standards Act)).

²⁵ See Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a); ADEA, 29 U.S.C. § 623(d); ADA, 42 U.S.C. § 12203(a)-(b).

²⁶ See Brake, *supra* note 8 at 21 (“Recognizing retaliation as a form of discrimination, one that is implicitly banned by general proscriptions of discrimination, pushes the boundaries of dominant understandings of discrimination in

At its core, Title VII provides protection against workplace discrimination based on race, color, religion, sex, and national origin. As part of the historic Civil Rights Act of 1964, section 703(a) of Title VII made it unlawful for an employer with fifteen or more employees:

[T]o fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.²⁷

The statute also very clearly prohibits retaliation for complaining about discrimination, opposing discriminatory conduct, and participating in an investigation or proceeding under the statute:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.²⁸

As a result, the statute makes retaliation protection available for two types of conduct: "opposition conduct" and "participation conduct."²⁹ "Opposition conduct" includes internal complaints about discriminatory conduct regardless of whether the complaint is written or verbal, formal or informal, proactively made by an employee or in response to a question by management.³⁰ In contrast, "participation conduct" refers specifically to an employee's participation in an investigation by the EEOC, a proceeding in court, or the employee's own filing of charges or suit.³¹

Retaliation cases typically play out as follows: An employee believes he or she was the victim of discrimination. The employee then complains to a manager or immediately files a

useful and productive ways."); *see also* Brief of Employment Law Professors as Amici Curiae in Support of Respondent at 5, *Univ. of Tex. Southwestern Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013) (No. 12-484) ("A long line of cases confirms that when Congress uses the word "discriminate" that term encompasses retaliation.").

²⁷ 42 U.S.C. § 2000e-2(a)(1)–(3).

²⁸ 42 U.S. Code § 2000e–3(a).

²⁹ *Crawford v. Metro. Gov't of Nashville & Davidson County*, 555 U.S. 271, 274 (2009) ("The Title VII antiretaliation provision has two clauses, making it 'an unlawful employment practice for an employer to discriminate against any of his employees . . . [1] because he has opposed any practice made an unlawful employment practice by this subchapter, or [2] because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.' The one is known as the 'opposition clause,' the other as the 'participation clause.'").

³⁰ *See Crawford*, 555 U.S. at 277-78; *Kasten*, 131 S.Ct at 15.

³¹ *See Crawford*, 555 U.S. at 274.

charge with the EEOC. A short time later,³² the employee is terminated, demoted or faces some other adverse action with the employer providing non-discrimination, non-complaint related reasons for it if a reason is discussed at all. The employee then sues, claiming retaliation either alone or in addition to a claim of discrimination. In order to prevail on the retaliation claim, the employee, now plaintiff, must demonstrate that he (1) engaged in a statutorily protected activity or expression (e.g. a complaint of discrimination); (2) that he suffered an adverse action by the employer (e.g. the termination); and (3) that there was a causal link between the protected action or expression and the adverse action (the short time between complaint and termination often provides this causal link without any other evidence of causation).³³ Upon demonstration of these three factors, the plaintiff has met his prima facie case, and the employer has an opportunity to present a legitimate non-retaliatory reason for the termination. Finally, the employee has a chance to demonstrate that the legitimate non-retaliatory reason is, in fact, pretext for retaliation.³⁴ For our purposes, we must begin by focusing on the first factor in the retaliation prima facie case—the protected activity. Whether or not the activity or expression is protected is the focus of the “Objectively Reasonable Belief” doctrine while the form in which the activity or expression emerges (and whether it constitutes the true reason for the adverse action) is the focus of the “Manner of the Complaint” doctrine.

A. The “Objectively Reasonable Belief” Doctrine

The “Objectively Reasonable Belief” doctrine is best explained by consideration of the cases that created and applied the doctrine. By necessity, we begin with the Supreme Court’s 2001 decision in *Clark County School District v. Breeden*,³⁵ a case with bizarre facts that gave rise to an even stranger conclusion. The case emerged out of a meeting between a female employee of the school district, her male supervisor, and another male colleague. The purpose of the meeting was to review psychological evaluation reports of several job applicants.³⁶ The report for one of the applicants disclosed that the applicant had once made the following comment to a co-worker: “I hear making love to you is like making love to the Grand Canyon.”³⁷ The plaintiff’s supervisor read the comment aloud at the meeting and stated, “I don’t

³² The Supreme Court has noted that Court then noted that different courts have reached “different conclusions regarding how close the timing between the protected activity and the adverse employment action must be to establish the causal connection element of the [retaliation] prima facie case.” Lawrence D. Rosenthal, *Timing Isn’t Everything: Establishing a Title VII Retaliation Prima Facie Case After University of Texas Southwestern Medical Center v. Nassar*, 69 SMU L. REV. 143, 152 (2016) (citing *Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001)).

³³ *Id.* See also *EEOC v. Avery Dennison Corp.*, 104 F.3d 858, 860 (6th Cir. Ohio 1997) (“In order to find a prima facie case of retaliation under Title VII a plaintiff must prove by a preponderance of the evidence: 1) plaintiff engaged in activity protected by Title VII; 2) plaintiff’s exercise of his civil rights was known by the defendant; 3) that, thereafter, the defendant took an employment action adverse to the plaintiff; and 4) that there was a causal connection between the protected activity and the adverse employment action.”).

³⁴ See *Satterwhite*, 602 F. App’x at 587.

³⁵ 532 U.S. 268 (2001).

³⁶ *Breeden*, 532 U.S. at 269.

³⁷ *Id.*

know what that means,” to which the other male employee responded, “Well, I’ll tell you later.” Then both men chuckled.³⁸ The plaintiff apparently found this interaction to be highly offensive and complained to the offending employee, to the employee’s supervisor, and to another management-level employee.³⁹ The plaintiff claimed that she was punished for making these complaints.⁴⁰

To the casual observer, these facts probably suggest two things: that the plaintiff in this case was perhaps overly sensitive to comments of a sexual nature and that she did, in fact, make an earnest complaint about perceived discriminatory behavior in the workplace. The Court, however, was not sympathetic. In no more than three paragraphs, the Court dispensed with the first factor of the *prima facie* case, concluding essentially that the plaintiff did not demonstrate protected conduct. The Court began by noting that the Ninth Circuit has applied Title VII’s retaliation provision “to protect employee ‘opposition’ not just to practices that are actually ‘made . . . unlawful’ by Title VII, but also to practices that the employee could reasonably believe were unlawful.”⁴¹ The Court did not disagree and, in fact took no position on this holding, concluding that it had “no occasion to rule on the propriety of this interpretation, because even assuming it is correct, no one could reasonably believe that the incident recounted above violated Title VII.”⁴²

How did the Court reach this conclusion? It did not rule that the plaintiff in this case did not, in fact, believe there was a violation of Title VII or that her complaint was in bad faith. Instead, the focus of the court’s attention was on the objective reasonableness of that belief. To assess reasonableness, the Court considered the underlying incident that led to the complaint to determine whether it actually constituted unlawful discrimination under Title VII. Because the incident involved comments of a sexual nature, the Court examined whether these comments amounted to sexual harassment in the form of a hostile work environment.⁴³ Noting that “sexual harassment is actionable under Title VII only if it is ‘so severe or pervasive as to ‘alter the conditions of [the victim’s] employment and create an abusive working environment,’”⁴⁴ the Court determined that the “isolated incident” involving the sexual comments could not possibly constitute unlawful sexual harassment.⁴⁵ As a result, the Court concluded that “no reasonable person could have believed that the single incident recounted above violated Title VII’s standard.”⁴⁶

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 269-70.

⁴¹ *Id.* at 270.

⁴² *Id.*

⁴³ *Id.* at 270-71.

⁴⁴ *Id.* (citing *Faragher v. Boca Raton*, 524 U.S. 775, 786 (1998)).

⁴⁵ *Id.* at 271.

⁴⁶ *Id.*

The disconnect between the Ninth Circuit’s standard and the Court’s approach is subtle but essential. Whereas the Ninth Circuit was concerned with an average employee’s “reasonable belief” regarding the legality of workplace incidents, the Supreme Court in *Breeden* chose to judge that “reasonable belief” by considering how a court would interpret the underlying conduct. Because the standard for finding sexual harassment requires a finding of “severe or pervasive” behavior, it concluded that no reasonable person could believe that unlawful sexual harassment had occurred unless it met this standard. The average employee, in the Supreme Court’s estimation, is aware of the details of Supreme Court jurisprudence on discrimination so that he or she knows how to differentiate between offensive and inappropriate behavior and actionable discrimination. That employee can then make a decision about whether to complain because she can accurately pinpoint when Title VII has been violated and when it has not. This is the Supreme Court’s interpretation of “reasonable belief.” It was not concerned with good faith or sincere belief, nor did it concede that an employee untrained in the law might reasonably conflate offensive or biased comments with actionable discrimination. The formula is strange but simple: If a court would determine that the underlying conduct violates Title VII, then an average employee may reasonably believe that it does. And the reverse is also true: If a court would find that the conduct does not constitute unlawful discrimination (whether because it is not severe or pervasive or for any other reason), an employee who complains about that conduct did so unreasonably and thus is unprotected by retaliation protections.

While the Supreme Court laid out this conclusion in several sentences, refusing to elaborate on this novel interpretation, *Breeden*’s progeny—cases in every circuit—have adopted this standard and provided more details on its use.⁴⁷ One of the more recent illustrative cases emerged from the Fifth Circuit in 2015. In *Satterwhite v. City of Houston*,⁴⁸ a city employee complained to Human Resources about a supervisor using the phrase “Heil Hitler” during a work meeting at which his Jewish co-worker was present.⁴⁹ The supervisor was verbally reprimanded by a more senior manager. A short time later, the offending supervisor became Satterwhite’s direct supervisor. Around the same time, the Anti-Defamation League sent letters to the Office of Inspector General (OIG) for the City that complained about the Hitler comment and prompted the OIG to investigate. The OIG also found the supervisor at fault. Over the next few months, the offending supervisor disciplined the plaintiff several times and eventually demoted him two grades. At that point, Satterwhite filed a complaint with the EEOC, claiming retaliation under Title VII and Texas law.

Mr. Satterwhite did not fare well at either the district or circuit court levels. The district court rejected his claim because he failed to prove a causal link between his protected activity and his demotion.⁵⁰ At the Fifth Circuit, however, the court, citing *Breeden* and prior Fifth

⁴⁷ See Rosenthal, *supra* note 17, at 1129, n.7.

⁴⁸ 602 F. App’x 585(2015).

⁴⁹ *Id.* at 586-87.

⁵⁰ *Id.* at 586.

Circuit precedent, focused not on the causal link but rather on whether the opposition conduct was protected under Title VII's retaliation provision. And like in *Breeden*, the court concluded that "While Satterwhite's actions could qualify as *opposing* under 42 U.S.C. § 2000e-3(a), for his actions to be protected activities, Satterwhite must also have had a reasonable belief that [the] comment created a hostile work environment under Title VII."⁵¹ This, the court concluded, he could not demonstrate since isolated incidents generally do not amount to unlawful conduct under Title VII. As a result, the plaintiff "could not have reasonably believed that this incident was actionable under Title VII, and therefore, it 'cannot give rise to protected activity.'"⁵² The Fifth Circuit simply and with little explanation utilized *Breeden*'s formula: if the underlying conduct does not, according to a court, amount to unlawful discrimination under Title VII, then the plaintiff, a non-lawyer city employee, could not have reasonably believed that the conduct violated Title VII and, as a result, his complaint was not protected against retaliation.⁵³

Although the Fifth Circuit in *Satterwhite* gave this doctrine slightly more consideration than *Breeden*, an even more extensive discussion of the issue appears in two cases out of the Fourth Circuit, from 2006 and 2015 respectively. In *Jordan v. Alternative Resources Corporation*,⁵⁴ the court faced a set of facts similar to those in *Breeden* and *Satterwhite*. An employee was present while a co-worker made offensive comments, complained about those comments, and was ultimately terminated. In *Jordan*, the African American plaintiff and his white co-worker were in the break room watching television coverage of several highly publicized sniper shootings in the Washington, D.C. area when the white employee stated: "They should put those two black monkeys in a cage with a bunch of black apes and let the apes fuck them."⁵⁵ The plaintiff complained to supervisors and upper level managers. One month later, he was terminated for being "disruptive," because his position had "come to an end," and because, he was told, IBM employees and officials (with whom he worked) "don't like you and you don't like them."⁵⁶

When the plaintiff claimed retaliation, his claim was rejected by both the district and circuit courts because one racist comment does not create an actionable hostile work environment and, as a result, the plaintiff did not engage in protected activity when he

⁵¹ *Id.* at 588.

⁵² *Id.* at 589.

⁵³ In another surprising passage, the Fifth Circuit rejected Satterwhite's argument that the conduct was an unlawful employment practice because the OIG determined that it "violated an executive order of the mayor of Houston prohibiting the use of racial, ethnic, and gender slurs." *Satterwhite*, 602 F. App'x 589. The court responded that "the definition of 'unlawful employment practice' in Title VII is defined by Congress not state or local laws, and . . . no reasonable person could find the 'Heil Hitler' incident alone satisfied Congress's definition." *Id.* Despite the fact that the interpretation of hostile work environment upon which the court relies is drawn from court precedent and that nowhere in Title VII does the statute define hostile work environment or explain that a single incident cannot give rise to a claim of unlawful sexual harassment, the court refers to the statute as if it provides a clear and obvious definition of an unlawful employment practice such that all employees should understand its meaning.

⁵⁴ 458 F.3d 332 (4th Cir. 2006).

⁵⁵ *Id.* at 336.

⁵⁶ *Id.* at 337.

complained about it.⁵⁷ At the Fifth Circuit, Jordan raised the argument that as a policy matter and in light of Supreme Court precedent in *Burlington Industries Inc. v. Ellerth*⁵⁸ and *Faragher v. City of Boca Raton*,⁵⁹ this conclusion placed employees in an impossible “double bind.”⁶⁰ On the one hand, prior precedent encourages early reporting of harassment in order to prevent hostile environments from arising⁶¹ and even requires such reporting in order to hold an employer liable for unlawful harassment.⁶² But, as the plaintiff noted, “Few workers would accept this early-reporting invitation if they knew they could be fired for their efforts.”⁶³ Nonetheless, the court rejected this argument, maintaining first that the plain meaning of the statute provides protection when “the employee responds to an actual unlawful employment practice.”⁶⁴ Second, the court noted that this language may be interpreted “generously” to provide protection when an employee “responds to an employment practice that the employee *reasonably believes* is unlawful.”⁶⁵ Then, like the courts in *Breeden* and *Satterwhite*, the Fourth Circuit concluded that based on the allegation of a single incident, “no objectively reasonable person could have believed that the IBM office was, or was soon going to be, infected by severe or pervasive racist, threatening, or humiliating harassment.”⁶⁶ In other words:

Although Jordan could reasonably have concluded that only a racist would resort to such crudity even in times when emotions run high, the mere fact that one’s *coworker* has revealed himself to be racist is not enough to support an objectively reasonable conclusion that the *workplace* has likewise become racist.⁶⁷

Again, the court surmised that an average “reasonable” worker should know the difference between offensive, troubling, and even racist comments and behavior and an unlawful act.

In light of this strange conclusion by the majority, the dissent raised concerns about some of the more troubling aspects of this holding. First, the dissent pointed to the severity of the conduct in this case and its particularly humiliating and degrading nature to African Americans.⁶⁸ Perhaps even more importantly, the dissent noted that in judging what is and is not an unlawful discriminatory act, particularly with regards to hostile work environment sexual harassment, the legal test “can be a bit of a moving target; there is no mathematically precise

⁵⁷ *Id.* at 338.

⁵⁸ 524 U.S. 742 (1998).

⁵⁹ 524 U.S. 775 (1998).

⁶⁰ *Jordan*, 458 F.3d at 341.

⁶¹ *Id.*

⁶² *Id.* at 342 (Plaintiffs are in a “double bind—risking firing by reporting harassing conduct early, or waiting to report upon pain of having an otherwise valid claim dismissed.”)

⁶³ *Id.* at 339.

⁶⁴ *Id.* at 340.

⁶⁵ *Id.* (italics in original).

⁶⁶ *Id.* at 341.

⁶⁷ *Id.* at 341.

⁶⁸ *Id.* at 350-51.

test.”⁶⁹ This point cannot be understated—if courts might differ as to whether or not a hostile work environment has been created, how can an employee without legal training be expected to make the determination before complaining to management? As the dissent ultimately concluded: “It is not for unelected judges to decide that Congress’s chosen remedy is unimportant, and that it may be effectively eviscerated by some judicially created ‘reasonable belief’ requirement.”⁷⁰

Given the intensity of the disagreement between the majority and dissent in *Jordan*, it is perhaps not surprising that the Fourth Circuit chose to revisit this issue again in 2015. In *Boyer-Liberto v. Fontainebleau Corp.*,⁷¹ the dissenting judge in *Jordan*, now writing for the court en banc, reversed the original panel’s affirmation of summary judgment for the employer in a case with facts that are remarkably similar to those in *Jordan*.⁷² In *Boyer-Liberto*, a cocktail waitress at a resort was called a “porch monkey” twice in a twenty-four hour period, threatened with job loss by her white manager and was fired soon after she reported the racial harassment to management.⁷³ The initial panel had concluded that in this case, like in *Jordan*, no employee could have reasonably believed that a hostile work environment was present.⁷⁴ The *en banc* panel reversed, differing specifically on the existence of a hostile work environment and concluding that despite it being an isolated incident, the severity of the comments and the supervisor’s threats of discharge made it an extremely serious incident that could rise to the level of a hostile work environment.⁷⁵

The Fourth Circuit’s change in this case is subtle. The court was clearly uncomfortable with the initial ruling given the extreme nature of the comments at issue. As a result, it essentially lowered the standard for finding the potential for a hostile work environment and indicated that even an isolated incident, if serious enough, could constitute an unlawful act giving rise to an objectively reasonable belief and retaliation protection. The court also commented on the difficulty of limiting retaliation protection when there is bias in the workplace: “[A] lack of protection is no inconsequential matter, for ‘fear of retaliation is the leading reason why people stay silent instead of voicing their concerns about bias and discrimination.’”⁷⁶ Nonetheless, the actual difference between *Jordan* and *Boyer-Liberto* is quite slim. Despite acknowledging the dangers of narrow retaliation protections, the court did not change the “objectively reasonable belief” standard in any meaningful way. Instead of acknowledging that a lay person’s “reasonable belief” likely differs dramatically from a court’s

⁶⁹ *Id.* at 351.

⁷⁰ *Id.* at 357.

⁷¹ 786 F.3d 264 (4th Cir. 2015).

⁷² *Id.* at 268.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 285 (Awarding relief on the retaliation claims by “finding that [defendant’s] conduct was severe enough to give plaintiff a reasonable belief that a hostile environment, although not fully formed, was in progress.”).

⁷⁶ *Id.* at 282.

view, the Fourth Circuit maintained its approach and merely adjusted its conclusion about when a court might find a hostile work environment.⁷⁷

The Fourth and Fifth Circuits are by no means alone in applying the “reasonable belief” doctrine in such a narrow way. The Second Circuit, considering a case involving allegations that a co-worker petted the plaintiff’s cheeks with her hands and kissed her on the lips, in addition to an overall working environment “characterized by lewd, racial, and sexual comments and innuendos,” concluded that “no reasonable person could have believed that [a] single incident of sexually inappropriate behavior by a co-worker could amount to sexual harassment” and thus deemed the plaintiff’s complaint to be unprotected.⁷⁸ The Second Circuit likewise reached a similar conclusion in a case involving sex stereotyping rather than harassment.⁷⁹ Considering the plaintiff’s claim that she, as a female secretary, received a certain type of assignment because of her sex, the court relied again on the reasonable belief doctrine to reject her retaliation claim.⁸⁰ Despite the fact that the jury found in her favor on the underlying discrimination claim, the court concluded that without male comparators and without additional evidence of gender discrimination, the plaintiff could not have had a reasonable belief that the conduct she complained of was unlawful.⁸¹ The Third Circuit, considering a case involving a single allegation of sexual harassment concluded that the plaintiff’s efforts to report sexual comments did not constitute protected activity.⁸² The Eleventh Circuit reached the same conclusion but in a case in which the plaintiff, a waitress at Waffle House, alleged that her manager made numerous comments about the size of her breasts, called her “Dolly,” and pulled her hair, and that an assistant manager admitted that he had been accused of sexual harassment but that “nothing happened” as a result of the accusation.⁸³ The Eleventh Circuit noted specifically that for opposition conduct to be protected, “[a] plaintiff must demonstrate that she had a subjective, good-faith belief that her employer was engaged in unlawful employment practices and that her belief was objectively reasonable in light of the facts and record presented. The plaintiff’s subjective belief is measured against the substantive law at the time of the offense.”⁸⁴ The court seemed to admit that the law on discriminatory practices is in flux but nonetheless expected the

⁷⁷ Even still, the dissent in *Boyer-Liberto* voiced serious concerns about a “sub voce chipping away at the objectively reasonable belief standard.” *Id.* at 290. In particular the dissent worried about an increase in unfounded retaliation claims, the trammeling of free speech values if “all manner of perceived slights” becomes reportable, and the construction of workplace barriers between the races and sexes. *Id.* at 291. The problem with the dissent’s concerns, as will be discussed in greater detail in Part III, is that the psychology research demonstrates that the opposite is true. The suppression of anger that results from a lack of protection for employee complaints is what causes unhealthy workplaces not the reverse. See *infra* Parts II and III.

⁷⁸ *Chenette v. Kenneth Cole Prods.*, 345 F. App’x 615, 619 (2nd Cir. 2009).

⁷⁹ See *Galdieri-Ambrosini v. Natl. Realty & Devpt. Corp.*, 136 F.3d 276 (2nd Cir. 1998).

⁸⁰ *Id.* at 292.

⁸¹ *Id.* at 272.

⁸² *Therault v. Dollar Gen.*, 336 F. App’x 172 (3rd Cir. 2009).

⁸³ *Henderson v. Waffle House, Inc.*, 238 F. App’x 499, 502 (11th Cir. 2007). Presumably, the name calling referred to Dolly Parton because of her famously large breasts. See Frances Romero, Dolly Parton’s Breasts, *TIME* (Sept. 1, 2010), http://content.time.com/time/specials/packages/article/0,28804,2015171_2015172_2015159,00.html (describing Parton’s “two most famous assets”).

⁸⁴ *Henderson*, 238 F. App’x. at 501.

plaintiff to be knowledgeable about the state of the law at the time of her complaint. Finally, the Tenth Circuit, in a case involving racial comments directed at a white woman who was married to a black man, concluded that despite a jury verdict in her favor on the underlying discrimination claim, “No reasonable person could have believed that the single . . . incident violated Title VII’s standard.”⁸⁵ These cases are a sampling of likeminded rulings in all the circuits where the doctrine continues to be upheld and applied in somewhat shocking ways.⁸⁶

B. *The “Manner of the Complaint” Doctrine*

The second doctrine that this article considers is the “manner of the complaint” doctrine⁸⁷ and focuses both on the first prong of the prima facie case of retaliation and on the pretext consideration. In a “manner of the complaint” case, the plaintiff typically complains in an angry or aggressive manner about some experience of bias in the workplace. The employer responds by punishing the employee through termination, demotion, or some other means. When the employee sues claiming retaliation, the employer responds that the “punishment” was in response to the way in which the employee complained and not to the complaint itself. And courts, generally hesitant to question the business judgment of employers, typically side with the employer without a serious consideration of the details of the employee’s complaint, the context in which his or her outburst occurred, the culture of the workplace and the behavior that the employer generally tolerates, or any other factors.⁸⁸ As with the “reasonable belief” doctrine, it is helpful to examine the details of some of the cases that apply this “manner of the complaint” doctrine, which spans multiple circuits and has been in use since at least the 1980’s.

One of the clearest examples of this doctrine came out of the Seventh Circuit and involved an employee at a sugar company.⁸⁹ As a result of the disappearance of some sugar, the company began random searches. The plaintiff, an African American warehouse manager, was accused of stealing sugar and subjected to searches, and the Director of Operations called him a “black thief” despite the fact that the searches did not yield any evidence of theft.⁹⁰ The plaintiff filed a complaint with both the EEOC and the Indiana Civil Rights Commission alleging race-based disparate treatment and another charge with the EEOC alleging retaliation based on overtime disbursements.⁹¹

Approximately two months after receiving his right to sue letter from the EEOC, a series of events occurred that ultimately led to the plaintiff’s termination.⁹² First, the Director of

⁸⁵ Robinson v. Cavalry Portfolio Servs. LLC, 365 F. App’x 104, 113 (10th Cir. 2010).

⁸⁶ See Senn, *supra* note 22 at charts 1 & 2 (compiling “unprotected complaint” cases in the circuit courts) (note that Lexis version of article contains no page numbers).

⁸⁷ We have chosen to name this approach to insubordination cases the “manner of the complaint” doctrine to highlight that employers and courts focus here on the form in which the complaint is made rather than its substance.

⁸⁸ See *infra* Part I.B.

⁸⁹ See McClendon v. Indiana Sugars, 108 F.3d 789 (7th Cir. 1997).

⁹⁰ *Id.* at 792.

⁹¹ *Id.*

⁹² *Id.*

Operations sent a memo asking the operations managers to list their five main performance goals. The plaintiff, believing he was being singled out for this task went to the Director's office to complain and, per the employer's testimony, "became very loud and angry."⁹³ A few days later, despite the fact that the plaintiff complied with the task, the Director gave him "a written warning stating that any future incidents of insolent or disrespectful behavior would not be tolerated and would result in disciplinary action, including possible termination."⁹⁴ The plaintiff responded with a written memorandum stating that "he did not intend to appear hostile."⁹⁵ Thereafter, the President of the company met with the plaintiff, intending to reprimand the plaintiff for his "insubordinate conduct" during his meeting with the Director.⁹⁶ The conversation escalated to an argument of sorts with the plaintiff allegedly interrupting the President and shouting.⁹⁷ The President testified that he told the plaintiff he "was not going to engage in a shouting match" and then terminated him for "grossly insubordinate conduct during the meeting."⁹⁸

The Seventh Circuit quickly established that the plaintiff had met his *prima facie* case of retaliation and focused on the pretext question. The court concluded that the employer's legitimate reason—insubordination—could not be shown to be pretextual, dooming the plaintiff's claim. In reaching this conclusion, the court clarified the lens with which it evaluates claims of insubordination:

Although there is some disagreement about the details of that encounter, the record does not place in doubt ISI's contention that it made a good-faith estimation that Mr. McClendon had been disrespectful. *It is important to recall that it is not relevant whether Mr. McClendon actually was insubordinate. All that is relevant is whether his employer was justified in coming to that conclusion. . . . The record before us raises no genuine issue of triable fact as to whether Mr. McClendon's superiors believed in good faith that he was insubordinate.*⁹⁹

The essential question, as posed by the court, is whether the employer demonstrates that it acted in *good faith* when claiming that the employee was insubordinate, not whether that determination was accurate, objectively reasonable, or consistent with prior decisions. The court is similarly unconcerned with the factors that precipitated the plaintiff's insubordinate behavior or comments but only with the employer's subjective determination that it was inappropriate.

The Seventh Circuit's approach, with its focus on the employer's subjective finding of insubordination, was echoed by the Sixth Circuit in a 2008 case involving a line-worker in a

⁹³ *Id.*

⁹⁴ *Id.* at 793.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 794.

⁹⁸ *Id.*

⁹⁹ *Id.* at 799.

recycled paperboard plant.¹⁰⁰ In *Clack v. Rock-Tenn Company*, the court considered a case in which the plaintiff walked off the floor of the plant to report perceived harassment rather than comply with his supervisor's direction.¹⁰¹ The court rejected the plaintiff's claim that he was not actually insubordinate but was merely following a prior instruction to immediately report harassment. Like the Seventh Circuit, the court here concluded that:

[S]o long as the employer honestly believed in the proffered reason given for its employment action and that honest belief is reasonably grounded on particularized facts that were before it at the time of the employment action, a plaintiff cannot establish pretext even if the employer's reason is ultimately found to be mistaken, foolish, trivial or baseless. . . . [A]rguing about the accuracy of the employer's assessment is [merely] a distraction because the question is not whether the employer's reasons for a decision are *right* but whether the employer's description of its reasons is *honest*.¹⁰²

Again, the court focused on the subjective belief of the employer, refusing to discuss the context in which the employee acted insubordinately and any justification for his angry, hostile, or unruly behavior. Here too, the claim of insubordination receives little scrutiny—as long as it appears to be a sincere belief on the part of the employer, it is almost automatically accepted by the court as a legitimate nondiscriminatory reason for the termination, precluding any further consideration of the retaliation claim.

The Sixth and Seventh Circuits are by no means alone in this determination. The Second Circuit, citing cases in the First, Eighth, Ninth, Tenth, and D.C. Circuits reached a similar conclusion and even more explicitly explained the irrelevance of the factors that precipitated the outburst including the fact that the plaintiff was responding to perceived bias.¹⁰³ *Matima v. Celli* involved a pharmacist employee who made numerous complaints about perceived bias and unlawful actions taken against him by his superiors.¹⁰⁴ Unsatisfied with the response from his employer, the plaintiff became increasingly more agitated in his discussions with management.¹⁰⁵ Ultimately, the employer terminated the plaintiff for “gross insubordination,” claiming that the plaintiff had become unbearably disruptive and had caused “such havoc and discontent in the lab that it was not a suitable work environment for the remaining people on the staff.”¹⁰⁶

While the facts in *Matima*, as relayed by the court, certainly suggest that the employer was out of options and could no longer work with this particular employee, the court's rhetoric is

¹⁰⁰ See *Clack v. Rock-Tenn Co.*, 304 F. App'x 399 (6th Cir. 2008).

¹⁰¹ *Id.*

¹⁰² *Id.* at 406 (quoting *Smith v. Chrysler Corp.*, 155 F.3d 799, 806 (6th Cir. 1998) (internal quotations omitted)).

¹⁰³ *Matima v. Celli*, 228 F.3d 68 (2d Cir. 2000).

¹⁰⁴ *Id.* at 72-75.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 77.

not limited to such an extreme situation and could be applied to curtail far less egregious behavior. Noting the existence of complaints of bias in this case, the court explained:

We have held generally that insubordination and conduct that disrupts the workplace are legitimate reasons for firing an employee. . . . We see no reason why the general principle would not apply, even when a complaint of discrimination is involved. . . . Many of our sister circuits have come to a similar conclusion, holding that disruptive or unreasonable protests against discrimination are not protected activity under Title VII and therefore cannot support a retaliation claim.¹⁰⁷

Again, here, the court notes that the context of the complaint is irrelevant if the employer concludes that the manner in which the complaint was made was somehow unacceptable or disruptive. It is easy to imagine a scenario in which an employee who feels he is the victim of extreme workplace bias might react less than professionally while complaining about the discriminatory conduct. Nonetheless, the Second Circuit made clear that the reason for the outburst is irrelevant so long as the employer honestly believes it to be unacceptable.

Finally, at least one court has applied this logic to cases in which the plaintiff's outburst is physical in nature and is a response to sexually aggressive behavior by a supervisor. In *Cruz v. Coach Stores, Inc.*, the plaintiff claimed that her supervisor commented on her erect nipples, which lead to an altercation between the two and finally, her supervisor "stepping extremely close to her and calling her a "fucking cunt."¹⁰⁸ The plaintiff responded by slapping her supervisor, who then placed her in a headlock. The incident only ended when upper management intervened.¹⁰⁹ The employer eventually terminated both the plaintiff and her supervisor "pursuant to Coach's rule against 'physical or verbal assault while on company premises.'"¹¹⁰ In response to the plaintiff's retaliation claim, the court noted that "[s]lapping one's harasser, even assuming *arguendo* that Cruz did so in response to Title VII-barred harassment, is not a protected activity."¹¹¹ The court opined that the plaintiff had other options including leaving the room and reporting the incident to Human Resources. Finally, in its most

¹⁰⁷ *Id.* at 79 (internal quotations omitted) (citing *Robbins v. Jefferson County Sch. Dist.*, 186 F.3d 1253, 1260 (10th Cir. 1999); *Kempcke v. Monsanto Co.*, 132 F.3d 442, 445 (8th Cir. 1998) (court "must also consider whether [oppositional] conduct was so disruptive, excessive, or 'generally inimical to [the] employer's interests . . . as to be beyond the protection' of [the retaliation provision of the ADEA]"); *O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 763 (9th Cir. 1996) ("An employee's opposition activity is protected only if it is 'reasonable in view of the employer's interest in maintaining a harmonious and efficient operation.'"); *Pendleton v. Rumsfeld*, 202 U.S. App. D.C. 102, 628 F.2d 102, 108 (D.C. Cir. 1980) ("A question of retaliation is not raised by a removal for conduct inconsistent with [the employee's] duties, unless its use as a mere pretext is clear."); *Hochstadt v. Worcester Foundation for Experimental Biology*, 545 F.2d 222, 230 (1st Cir. 1976) (addressing "whether plaintiff's overall conduct was so generally inimical to her employer's interests, and so 'excessive,' as to be beyond the protection of section 704(a) even though her actions were generally associated with her complaints of illegal employer conduct.").

¹⁰⁸ *Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 564 (2d Cir. 2000).

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 564-65.

¹¹¹ *Id.* at 566.

telling statement, the court noted that although the plaintiff claimed that she believed her physical response to be in self-defense, the act still does not receive protection under Title VII's retaliation provision.¹¹² Again, the court deemed plaintiff's viewpoint to be irrelevant to the analysis. The fact that the plaintiff in this case may very well have felt threatened by her supervisor's verbal and physical aggression did not aid her claim that her opposition conduct should be protected.¹¹³ Again, the court generally disregarded the context of the outburst, the reason for the plaintiff's anger, and the victim's viewpoint overall, giving the employer something akin to *carte blanche* so long as it sincerely believed the employee's conduct to be unacceptable.¹¹⁴

As is evident from the numerous cases described previously, despite a seeming trend in Supreme Court jurisprudence to broaden retaliation protection,¹¹⁵ the "objectively reasonable belief" doctrine and the "manner of the complaint" doctrine are highly effective in dramatically narrowing the conduct that ultimately receives retaliation protection. The next section will discuss existing scholarly critiques of these doctrines and proposals to undo some of the damage they have created.

C. Scholarship on these Problematic Doctrines

This article is by no means the first to raise concerns about these two retaliation doctrines. A number of scholars have, over the last ten years, taken issue with the narrow way in

¹¹² *Id.* at 567. The court did, however, specifically state: "We need not decide here whether violence in opposition to Title VII-prohibited behavior might, in some circumstances, be protected under Title VII's retaliation provision." *Id.*

¹¹³ There is at least one recent case that takes an opposing view on the issue of physical resistance to sexual harassment. In *Speed v. WES Healthcare System*, the plaintiff alleged that she was verbally sexually harassed for thirteen months by her co-worker and that she made complaints to management at least twice during this time. 93 F. Supp. 3d 351, 354 (E.D. Pa. Feb. 26, 2015). The long period of verbal harassment culminated in a physical touching in which the harasser groped her leg. *Id.* After the first touching, the plaintiff warned her co-worker that if he touched her again, she would defend herself. When he then reached out to touch her, she struck him on the side of his face, and he stopped his efforts. *Id.* After an investigation, the employer determined that the co-worker had sexually harassed the plaintiff but terminated both employees, one for sexual harassment and the other for physically assaulting a co-worker. *Id.* at 354, 359. The court in *Speed* found for the plaintiff despite the employer's argument that the physical assault was a legitimate nondiscriminatory reason for the termination. *Id.* at 364-65. In so doing, the court distinguished its holding from *Cruz*, where the slap itself was the only purported opposition conduct whereas in *Speed*, the plaintiff had complained to management multiple times. *Id.* at 360. The court then specifically considered the viewpoint of the victim and concluded, "If physically striking her alleged harasser resulted from the mindset of a person suffering ongoing harassment and fearing for her bodily security, the proposition that Title VII would not afford *Speed* protection under those circumstances seems inconsistent with the purposes of the statute." *Id.* at 361.

¹¹⁴ In addition to the types of cases we discuss where the court views an angry complaint as insubordination rather than protected opposition conduct, there are also cases in which the "insubordination" is one factor among many that motivated the termination. See Carle, *supra* note 18, at 204-07. In mixed motive cases, the employer's liability is drastically reduced if it can demonstrate that it would have taken the adverse action absent the retaliatory motive. *Id.* at 204. But, as Susan Carle points out, "[l]ogically, if the decision-maker finds that discrimination or retaliation was a motivating factor, it cannot then be said that the employer had an *independent* legitimate reason for its action when it fires an employee for insubordination related to or caused by that discrimination or retaliation." *Id.* at 205. Nonetheless, courts often disregard this "logical point," essentially taking the teeth out of retaliation protection. *Id.*

¹¹⁵ See generally Berkowitz and Eisenstadt, *supra* note 24.

which courts have seen fit to protect opposition conduct under these doctrines. These scholars have typically focused on one doctrine or the other, and each scholar offers a different approach to correct the problems created by these doctrines. Nonetheless, their overall critiques focus on retaliation protection as serving the ultimate goals of Title VII and the way in which these doctrines undermine those goals. This section will briefly discuss some of the existing scholarship in this area in order to highlight the new lens that this article brings to the discussion.

Deborah Brake's 2005 article on retaliation protections was one of the first recent works to focus exclusively and extensively on the subject of retaliation.¹¹⁶ Brake posits that retaliation is a form of discrimination and that protecting against it is integral to Title VII.¹¹⁷ With regard to the "reasonable belief" doctrine, Brake makes clear that "as applied by the courts, the . . . doctrine severely undercuts the law's protection of persons who challenge inequality."¹¹⁸ Beyond this general critique, Brake discusses several specific problems with courts' use of the doctrine in harassment cases in particular. For example, she notes that its application "masks the complexity of discrimination and squeezes out broader, competing understandings."¹¹⁹ The notion that a worker's "reasonable belief" about the unlawful nature of the underlying biased conduct is determined by the court's interpretation of statutory protections ignores the fact that courts, relying on "common sense," often reach vastly different conclusions when interpreting Title VII and other federal anti-discrimination statutes.¹²⁰ Expecting an ordinary worker to understand the nuances in the law and interpret workplace behavior as the court would is problematic to begin with but is compounded by the fact that even courts disagree among themselves about what is covered.¹²¹ In addition, Brake notes that average workers' main sources of information about bias (and sexual harassment in particular) are (1) cultural norms and (2) employee handbooks, both of which suggest that a broad array of behaviors is unacceptable in the workplace despite the fact that many of these behaviors would not rise to the level of unlawful harassment.¹²² This makes it inordinately difficult for an employee to meet the "reasonable belief" requirement in questionable situations. Moreover, the "severe or pervasive" standard that courts apply to determine whether harassment is unlawful means that an employee who complains too early in the harassment period (i.e. after only one or two instances of harassment) may be terminated without protection because the underlying conduct has not yet become "pervasive."¹²³ Finally, Brake notes:

The double bind created by this standard is obvious: if the employee waits too long to complain, she risks losing a potential harassment claim for not having done

¹¹⁶ See generally Brake, *supra* note 8.

¹¹⁷ *Id.* at 20-22.

¹¹⁸ *Id.* at 23.

¹¹⁹ *Id.* at 86.

¹²⁰ *Id.* 86-87.

¹²¹ As Brake notes, "the problem is not simply that most people lack the legal expertise to ascertain where that line begins and ends, but that the uncertainties of litigation prevent such a determination from being made in advance." *Id.* at 89.

¹²² *Id.* at 86-87.

¹²³ *Id.* at 87-88.

enough to demonstrate that the harassment was unwelcome, as well as for failing to meet an affirmative defense if her failure to complain sooner was "unreasonable." In addition, certain harassment claims require persons to complain internally as a prerequisite for institutional liability, thus putting them in a risky position unless accorded full protection from retaliation.¹²⁴

Overall, Brake takes issue with the overly restrictive nature of the "reasonable belief" doctrine, the way in which it inhibits employees with serious complaints from coming forward, and the confusion it can create among employees who are trying to protest biased workplaces.

Two years after Brake's article, two more scholars tackled the "reasonable belief" doctrine exclusively, and suggested reforms to better promote the purposes of Title VII. Lawrence Rosenthal, like Brake, contends that the doctrine is overly restrictive and creates numerous problems for victims of workplace discrimination.¹²⁵ He suggests that instead of requiring a plaintiff to prove both subjective, good faith belief that the underlying conduct she opposes is unlawful *and* that the belief was objectively reasonable, that good faith on its own should be enough.¹²⁶ In support of this proposition, Rosenthal notes that his approach would further Title VII's goals by encouraging employees to come forward with complaints.¹²⁷ In addition, the good faith approach would be in keeping with the notion that Title VII, as a remedial statute, should be interpreted broadly.¹²⁸ The subjective standard would eliminate the double bind discussed by Brake and would create greater consistency among courts since the issue would be the sincerity of the plaintiff's belief (a factual matter) rather than the objectively reasonable nature of the determination (a legal conclusion).¹²⁹ Finally, and perhaps most importantly, Rosenthal points out the common sense nature of using a good faith standard:

Although requiring an objective component makes sense in the context of a hostile environment claim, in which an employee is seeking damages for an employer's or a co-worker's behavior, requiring an objective component in an anti-retaliation case makes no such sense, as the inappropriate conduct is not the basis of the employer's potential liability, but rather it is the employer's response to the employee's complaint about that conduct that forms the basis of any potential liability.¹³⁰

Similarly, Brianne Gorod, argues for a rejection of the "reasonableness" requirement and a replacement with an assessment of whether the plaintiff was acting in good faith at the time of

¹²⁴ *Id.* at 88 (citing *Blankenship v. Parke Care Ctrs.*, 123 F.3d 868, 873 (6th Cir. 1997) (requiring notice to establish employer liability for co-worker sexual harassment)).

¹²⁵ See generally Rosenthal, *supra* note 17.

¹²⁶ *Id.* at 1130-31.

¹²⁷ *Id.* at 1131.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

the complaint.¹³¹ Gorod focuses on the benefits of a good faith approach and particularly the benefits of encouraging early reporting of harassment.¹³² Early reports have the capacity to (1) prevent further harassment, (2) allow employees and employers to conciliate claims and avoid the costs of litigation, (3) enable victims of harassment to “ameliorate the psychological and dignitary harms that harassment causes,” and (4) most importantly, makes it easier to change stereotypes that continue to permeate the workplace.¹³³

Perhaps noting the agreement in the scholarly community with regard to the critique of the doctrine but frustrated by the lack of any doctrinal change, in the last several years, two additional scholars have written on this topic with particularly innovative proposals. Matthew Green questions the practicality of proposing a subjective standard given that courts generally prefer objective standards in interpreting Title VII.¹³⁴ Green’s proposal is to use the objective standard but to expand the meaning of “reasonableness” using a totality of the circumstances approach.¹³⁵ For example, Green suggests that to determine what constitutes “reasonable belief,” courts should consider all of the factors that may influence the employee’s belief including his identity (race, sex etc.) and the employer’s representations about what constitutes discrimination and what to report to management. Craig Senn’s piece on the “reasonable belief” doctrine is similarly innovative.¹³⁶ Recognizing the difficulty in eliminating the “reasonableness” component of the standard, Senn proposes that courts interpret opposition conduct to include a “reasonable action” option.¹³⁷ Senn suggests moving the inquiry away from whether the belief was reasonable in light of case law precedent and focusing instead on whether the action the employee took was reasonable in light of his honest belief. For example, instead of questioning whether the employee’s belief that she was the victim of unlawful discrimination was reasonable, the court should look at whether her complaint to human resources was a reasonable action to take in light of her honest belief.¹³⁸ Again, both of these scholars present novel approaches with the goals of protecting deserving employees and promoting the purpose and goals of anti-discrimination laws.

The same focus is evident in the scholarship on the insubordination defense. Terry Smith begins to tackle the problem with insubordination cases in her article on “everyday indignities” and race discrimination.¹³⁹ She considers cases in which courts focus on the disruptive nature of the employee’s complaint or response to perceived discrimination to the exclusion of all else, including the underlying discrimination itself. In particular, Smith discusses those actions and comments that appear minor to a court but have far greater significance to a member of a racial

¹³¹ Brianne J. Gorod, *Rejecting "Reasonableness": A New Look at Title VII's Anti-Retaliation Provision*, 56 AM. U. L. REV. 1469 (2007).

¹³² *Id.* at 1504.

¹³³ *Id.*

¹³⁴ See Green, *supra* note 22, at 763.

¹³⁵ *Id.*

¹³⁶ See generally Senn, *supra* note 22.

¹³⁷ *Id.* at _____. (Note that Lexis version of article contains no page numbers.)

¹³⁸ *Id.* at _____.

¹³⁹ See Smith, *supra* note 22, at 533.

minority and that, as a result, historical context, workplace context, and “cultural meaning” are essential to understanding an employee’s response to perceived bias.¹⁴⁰ Smith argues that “[t]he employee who chooses to exercise self-help in opposing workplace racism rather than remaining silent or availing herself of the cumbersome and expensive recourse of formal charge and suit is entitled to greater protection than the courts have heretofore afforded.”¹⁴¹

Similarly, Susan Carle’s recent article on insubordination cases considers several types of cases where this doctrine is used: (1) those in which courts view the insubordination (even if mild) as the legitimate reason for termination precluding recovery for the plaintiff, (2) those in which a mixed motive analysis applies with the insubordination as one motive for termination, and (3) those in which the court considers the reasonableness of a plaintiff’s opposition conduct, finding it unprotected if it is unreasonable.¹⁴² Carle argues that there are numerous problems with courts’ approaches in these cases—namely, that they demonstrate faulty logic, that they undermine the objectives of Title VII, and that they create disincentives for employees and employers to resolve disputes before litigation.¹⁴³ In response, Carle proposes several avenues to reform the problematic approach used in these cases, looking primarily to NLRB precedents for guidance. As she notes, federal courts and the NLRB have different tolerance levels for angry employees.

Even if employees go a bit over the line in their efforts at self-advocacy, the NLRB reasons that it is better to err in the direction of protecting self-advocacy because doing so ensures more secure protection of employees’ exercise of statutorily protected rights. Under Title VII courts’ very different way of looking at employee conduct, on the other hand, employee self-expression at the moment of a dispute risks termination without later legal protection. . . . [T]he current Title VII regime insists on a kind of “sanitized workplace” where employees must behave with decorum, remaining docile to the point of virtual passivity or risk termination.¹⁴⁴

Looking to NLRB precedents, Carle argues, will benefit employees and the underlying goals of Title VII.¹⁴⁵

Although each of these scholars takes a slightly different approach to the problem of overly narrow retaliation protection under the two doctrines discussed, the focus of their critiques is essentially the same—these doctrines undermine Title VII’s goal of eradication of workplace discrimination by making it easier to punish employees who come forward to complain. In so doing, these scholars also highlight the overwhelming unfairness of the doctrines and the

¹⁴⁰ *Id.* at 536-37.

¹⁴¹ *Id.* at 533.

¹⁴² See Carle, *supra* note 18, at 189.

¹⁴³ *Id.* at 186.

¹⁴⁴ *Id.* at 187-88.

¹⁴⁵ See also Charles Sullivan, *Taking Civility Too Far?* WORKPLACE PROF BLOG (Aug. 9, 2013), http://lawprofessors.typepad.com/laborprof_blog/2013/08/takingcivilitytoofar.html (discussing problem of courts concluding that an employer can legitimately fire an employee for “misconduct” during an EEOC mediation.)

disservice they do to workers' rights. While we agree with these analyses, our approach is somewhat different. The next Part will consider the impact of these doctrines on worker and workplace health and will critique the doctrines from the viewpoint of employers rather than only the workers.

II. RETALIATION DOCTRINES INCENTIVIZE UNHEALTHY WORKPLACE BEHAVIOR

As is likely evident from a consideration of the jurisprudence and scholarship on retaliation, the federal courts' narrow approach to protecting opposition conduct and hasty dismissals of cases where the employee engaged in any disruptive behavior certainly undermine the primary goal of Title VII—eradication of discrimination in the workplace.¹⁴⁶ If employees feel unsafe coming forward to report perceived bias, a large portion of unlawful discriminatory conduct will go unreported and thus unanswered. But the hesitation to report created by retaliation doctrines impacts more than the continued existence of discrimination. Consideration of employees' emotions and their impact on the workplace suggests that these doctrines likely also impact employees' overall health and the health of the environment in which they spend the large majority of their time. This Section will detail behavioral psychology research on anger in the workplace, its benefits, problems, and consequences and will consider the ways in which the above-described retaliation doctrines serve to incentivize unhealthy behavior.

A. *The Dual Threshold Model of Workplace Anger*

There are a number of significant studies of anger in the workplace.¹⁴⁷ This article focuses on the dual threshold model of workplace anger because of its consideration of the impacts of three forms of anger in the organization: suppressed, expressed, and deviant.¹⁴⁸ The model incorporates two “thresholds” (expression and impropriety) that reflect organizational emotion display norms and separate the three anger categories.¹⁴⁹ The dual threshold model identifies

¹⁴⁶ See Brake, *supra* note 8 at 70-72.

¹⁴⁷ See, e.g., Thomas M. Begley, *Expressed and suppressed anger as predictors of health complaints*, 15 JOURNAL OF ORGANIZATIONAL BEHAVIOR 503 (1994); Theresa M. Glomb & Charles L. Hulin, *Anger and gender effects in observed supervisor-subordinate dyadic interactions*, 72 ORGANIZATIONAL BEHAVIOR & HUMAN DECISION PROCESSES 20 (1997); Leigh L. Thompson, Janice Nadler, & Peter H. Kim, *Some like it hot: The case for the emotional negotiator*, in SHARED COGNITION IN ORGANIZATIONS: THE MANAGEMENT OF KNOWLEDGE 139 (Leigh L. Thompson, et al. eds., 1999); Julie Fitness, *Anger in the workplace: An emotion script approach to anger episodes between workers and their superiors, co-workers, and subordinates*, 21 JOURNAL OF ORGANIZATIONAL BEHAVIOR 147 (2000); Theresa A. Domagalski & Lisa A. Steelman, *The impact of work events and disposition on the experience and expression of employee anger*, 13 ORGANIZATIONAL ANALYSIS 31 (2005); Donald E. Gibson & Ronda Roberts Callister, *Anger in organizations: Review and integration*, 36 JOURNAL OF MANAGEMENT 66 (2010); JEFFREY W. KASSING, *DISSENT IN ORGANIZATIONS* (2011).

¹⁴⁸ See generally Deanna Geddes & Ronda R. Callister, *Crossing the line(s): A dual threshold model of expressing anger in organizations*, 32 ACADEMY OF MANAGEMENT REVIEW 721 (2007).

¹⁴⁹ See Anat Rafaeli & Robert I. Sutton, *The expression of emotion in organizational life*, in RESEARCH IN ORGANIZATIONAL BEHAVIOR 1 (L. L. Cummings & Barry M. Staw eds., 1989); John Van Maanen & Gideon Kunda, *'Real feelings': Emotional expression and organizational culture*, 11 RESEARCH IN ORGANIZATIONAL BEHAVIOR 43 (1989).

anger's potential for both favorable and unfavorable outcomes at work depending on the particular category of anger present and the organization's tolerance for anger expression. The model's authors argue that negative consequences are most likely with suppressed and deviant anger.¹⁵⁰

Suppressed workplace anger can take two forms. One is felt anger kept silent inside oneself. Suppressed anger can also take the form of anger that is deliberately hidden from those able to address the anger-provoking incident, for example, management. As a result, this form of anger is "organizationally silent," meaning it is displayed only to people unrelated to the incident - including sympathetic office mates. It fails to cross the organization's *expression* threshold because those who should hear it, do not, making it *organizationally silent*.¹⁵¹

In contrast, when organizational members (i.e. employees) do display their anger, but in a manner deemed inappropriate by the organization, it also crosses an *impropriety* threshold. This becomes "deviant" anger - meaning it deviates from formal or informal norms of what constitutes appropriate emotion expression.¹⁵² The determination of what constitutes appropriate expression can vary by industry, geographic region, and individual organization.¹⁵³ Anger becomes deviant either because it is viewed as an improper emotional response to something that occurred in the workplace or because the manner in which the emotion was expressed exceeded the norm in that particular workplace.¹⁵⁴

Expressed anger is best understood in relation to suppressed and deviant anger. Expressed anger is the anger form found between the two thresholds. It is anger conveyed to relevant parties in a manner deemed acceptable by organizational members.¹⁵⁵ Expressed anger is an "emotion-based form of employee voice."¹⁵⁶ It can be a form of challenging but proactive expression of dissatisfaction in an "attempt to change rather than escape from, an objectionable state of affairs."¹⁵⁷ Thus, expressed anger can be a form of "prosocial dissent" reflecting an employee's social conscience in the workplace.¹⁵⁸

The dual threshold model challenges traditional views that workplace anger displays are, at best, unprofessional, and at worst, hostile actions.¹⁵⁹ Intensely expressed anger, for instance, is commonly portrayed as intentionally harmful, aggressive behavior, and thus, fundamentally

¹⁵⁰ See Geddes and Callister (2007), *supra* note 148.

¹⁵¹ See Elizabeth W. Morrison & Frances J. Milliken, *Organizational silence: A barrier to change and development in a pluralistic world*, 25 ACADEMY OF MANAGEMENT REVIEW 706 (2000); Craig C. Pinder & Karen Harlos, *Employee silence: Quiescence and acquiescence as response to perceived injustice*, 20 RESEARCH IN PERSONNEL AND HUMAN RESOURCES MANAGEMENT 331 (2001).

¹⁵² See Geddes and Callister (2007), *supra* note 148; Danielle E. Warren, *Constructive and Destructive Deviance in Organizations*, 28 ACADEMY OF MANAGEMENT REVIEW 622 (2003).

¹⁵³ See generally Geddes and Callister (2007), *supra* note 148.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 729.

¹⁵⁷ ALBERT O. HIRSCHMAN, *EXIT, VOICE AND LOYALTY: RESPONSES TO DECLINES IN FIRMS, ORGANIZATIONS, AND STATES* (1970).

¹⁵⁸ See Kassing, *supra* note 147.

¹⁵⁹ See Deanna Geddes & Lisa T. Stickney, *The trouble with sanctions: Organizational responses to deviant anger displays at work*, 64 HUMAN RELATIONS 201 (2011).

antisocial and destructive.¹⁶⁰ The dual threshold model argues instead that anger, rather than inherently aggressive or abnormal, is a natural response to intolerable situations such as workplace injustice and impropriety.¹⁶¹ Displayed anger can provide valuable information to management,¹⁶² signal problems or violations at work that could negatively impact fellow employees and the organization,¹⁶³ and help initiate necessary responses by management that address existing problems and facilitate improved organizational functioning and learning.¹⁶⁴ Interpersonally, anger displays provide opportunities for offending parties to apologize, redress the wrong, and/or explain more clearly their position or intention.¹⁶⁵ Given anger's potential to help change intolerable and unfair situations at work and promote better understanding among organizational members, it should be not only acceptable, but appreciated or even honored.¹⁶⁶ In contrast, when employees feel unable to express anger and dissent, they can retain silent rage and possibly engage in retaliatory behavior in an effort to "seek justice" for wrongs committed against them.¹⁶⁷

Believing in expressed anger's potential to promote favorable outcomes at work is easiest if one finds the displayed anger to be a reasonable response to unjust or inappropriate actions by another. Particularly relevant to this concept is the "placement" of the two thresholds. The threshold placement is symbolic of an organization's idiosyncratic notions of "acceptable" emotional expression at work. As such, *deviant* anger, in particular, is a relative concept.¹⁶⁸ Assessment of anger display propriety reflects salient codes of conduct in relation to the manner of expression. For instance, in some workplaces, cursing under one's breath could be considered unacceptable, while other work environments allow heated emotional exchanges. Given that threshold placement is dynamic and dependent on varied cultural norms, organizational tolerance for anger displays can range from limited to broad.¹⁶⁹ Organizations also may restrict displayed employee anger to such a degree that essentially no space exists between the expression and

¹⁶⁰ *Id.* at 204-05.

¹⁶¹ See James R. Averill, *Illusions of anger*, in AGGRESSION AND VIOLENCE: SOCIAL INTERACTIONIST PERSPECTIVES 171 (R. B. Felson & J. T. Tedeschi eds., 1993); Daniel J. Canary, Brian H. Spitzberg, & Beth A. Semic, *The experience and expression of anger in interpersonal settings*, in HANDBOOK OF COMMUNICATION AND EMOTION: RESEARCH, THEORY, APPLICATION AND CONTEXTS 189 (Peter A. Andersen & Laura K. Guerrero eds., 1998).

¹⁶² See Gerald L. Clore, Karen Gasper, Erika Garvin, *Affect as information*, in HANDBOOK OF AFFECT AND SOCIAL COGNITION 121 (J.P. Forgas ed. 2001); Stephané Côté, *A social interaction model of the effects of emotion regulation on work strain*, 30 ACADEMY OF MANAGEMENT REVIEW 509 (2005); Mario Mikulincer, *Adult attachment style and individual differences in functional versus dysfunctional experiences of anger*, 74 JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY 513 (1998).

¹⁶³ See Michael W. Kramer & Jon A. Hess, *Communication rules for the display of emotions in organizational settings*, 16 MANAGEMENT COMMUNICATION QUARTERLY 66 (2002); Sandra L. Robinson & Rebecca J. Bennett, *A typology of deviant workplace behaviors: A multidimensional scaling study*, 38 ACADEMY OF MANAGEMENT JOURNAL 555 (1995).

¹⁶⁴ See Quy Nguyen Huy, *Emotional capability, emotional intelligence, and radical change*, 24 ACADEMY OF MANAGEMENT REVIEW 325 (1999).

¹⁶⁵ See Geddes & Callister (2007), *supra* note 148.

¹⁶⁶ See Debra E. Meyerson, *If emotions were honoured: A cultural analysis*, in EMOTION IN ORGANIZATIONS 167 (S. Fineman ed. 2000).

¹⁶⁷ See Robert J. Bies & Thomas M. Tripp, *A passion for justice: The rationality and morality of revenge*, in JUSTICE IN THE WORKPLACE 197 (R. Cropanzano ed. 2000); Leslie Perlow & Stephanie Williams, *Is silence killing your company?*, 81 HARVARD BUSINESS REVIEW 52 (2003).

¹⁶⁸ See generally Warren, *supra* note 152.

¹⁶⁹ See generally Geddes & Callister (2007), *supra* note 148.

impropriety thresholds.¹⁷⁰ In these environments, any displayed anger by employees is seen as inappropriate, and hence, punishable.¹⁷¹ When this occurs, organizations promote suppressed anger among employees.¹⁷²

Even with restrictive anger display norms in the organization, situational circumstances may help expand the space between the expression and impropriety thresholds. This enhanced opportunity to display anger reduces the tendency to judge expressed anger as “crossing the line” into deviant anger. Consequently, if an employee finds a situation highly provocative, unethical, or discriminatory and responds angrily, those observing this emotional display may find it completely appropriate, “given the circumstances.”¹⁷³ Coworker and leader “forbearance,” where organizational members show increased leniency given circumstances leading to one’s anger, helps eliminate the moniker of deviant anger, and correspondingly, prevents sanctions against the angry employee.¹⁷⁴ Overall, the more space between the expression and impropriety thresholds, or “zone of expressive tolerance,”¹⁷⁵ the more organizational members will find employee anger expression acceptable and punitive actions unnecessary. In contrast, less space between thresholds symbolizes a more constraining and sanctioning culture, one with limited opportunities for “expressed” anger and increased instances of “deviant” and “suppressed” anger.¹⁷⁶

Research testing the dual threshold model generally supports its key propositions regarding potential benefits of workplace anger expression. For instance, in a study of deviant anger displays, results indicate that supportive responses by management and coworkers promoted favorable situational change at work, while sanctioning or doing nothing following these intense outbursts did not.¹⁷⁷ Management responding to angry employees in a more supportive rather than sanctioning manner, was seen as a way to “expand the space” between thresholds and promote more positive outcomes from expressed anger.¹⁷⁸ Most interesting was the fact that researchers found no correlation between firing the angry individual and the belief among co-workers that the situation improved at work.¹⁷⁹ In many instances, deviant, unexpected and intense angry outbursts reflect “state” versus “trait” anger,¹⁸⁰ demonstrating a serious issue in the work environment, rather than within the supposed “troublemaker.” For example, an intense outburst often reveals previously unexposed but widely felt unfairness, bias, or harassment of some kind as opposed to a personality trait in the employee who finally broke and exposed her anger.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ George Nelson & John Dyck, *Forbearance in leadership: Opportunities and risks involved in cutting followers some slack*, 16 LEADERSHIP QUARTERLY 53 (2005).

¹⁷⁵ STEPHEN FINEMAN, EMOTION IN ORGANIZATIONS (1993); Stephen Fineman, *Emotional arenas revisited*, in EMOTION IN ORGANIZATIONS 1 (Stephen Fineman ed. 2000).

¹⁷⁶ See generally Geddes & Callister (2007), *supra* note 148.

¹⁷⁷ See generally Geddes & Stickney (2011), *supra* note 159.

¹⁷⁸ *Id.* at 221.

¹⁷⁹ *Id.* Those surveyed were witnesses to the anger episode. *Id.*

¹⁸⁰ See Charles D. Spielberger, Susan S. Krasner, & Eldra P. Solomon, *The experience, expression, and control of anger*, in INDIVIDUAL DIFFERENCES, STRESS, AND HEALTH PSYCHOLOGY 89 (Michel Pierre Janisse ed. 1988).

In addition, there is increasing research on the positive implications of an employee's expression of anger. Recent research reports that higher levels of organizational commitment and positive affectivity prompt employees to express anger, while lower levels of organizational commitment and negative affectivity increase the tendency to suppress anger at work.¹⁸¹ These findings challenge those who characterize employee anger expression as deviant, inappropriate, and/or insubordinate and provide data demonstrating that emotionally strong, optimistic, and prosocial employees express anger at work, typically to the betterment of the organization.¹⁸²

The reverse is also clear in the research as studies of suppressed versus expressed anger overwhelmingly show a strong relationship between suppressed anger and negative workplace and relational outcomes.¹⁸³ Research on suppressed anger identifies problems both with silent anger, kept inside oneself, as well as anger that is "organizationally silent," meaning it is displayed only to people unrelated to the incident - including sympathetic office mates. When anger is kept silent and unspoken, also known as "anger-in,"¹⁸⁴ employees believe the benefits of keeping quiet outweigh the costs of speaking up. They may decide the issue is not that significant, worth the hassle of a challenge, or too costly due to the potential for negative repercussions. However, significant research is clear that efforts to hide negative emotion, especially when one wants to speak out,¹⁸⁵ produce detrimental cognitive, psychological, and physiological effects.¹⁸⁶ These can include rumination - where the person cannot remove the incident from his or her mind,¹⁸⁷ feelings of humiliation or resentment,¹⁸⁸ demoralization,¹⁸⁹ and such physical problems as raised blood pressure and heart disease.¹⁹⁰

Studies show that similarly negative consequences result from the other form of suppressed anger as well, where employees intentionally hide their anger from management (or those responsible for their frustration) and instead vent to sympathetic coworkers. The dual threshold model labels this suppression "muted" or "muffled" anger.¹⁹¹ Research shows that such "muffled anger" often causes "negative emotional contagion," where the employee's anger

¹⁸¹ See Lisa T. Stickney & Deanna Geddes, *Positive, proactive, and committed: The surprising connection between good citizens and expressed (vs. suppressed) anger at work*, 7 NEGOTIATION AND CONFLICT MANAGEMENT RESEARCH 243 (2014).

¹⁸² See *id.*

¹⁸³ *Id.*; see also Deanna Geddes & Lisa T. Stickney, *Muted anger in the workplace: Changing the "sound" of employee emotion through social sharing*, in EXPERIENCING AND MANAGING EMOTIONS IN THE WORKPLACE: RESEARCH ON EMOTION IN ORGANIZATIONS 85 (Charmine E.J. Härtel Neal M. Ashkanasy, Wilfred J. Zerbe ed. 2012); Lisa T. Stickney & Deanna Geddes, *More than just "blowing off steam": The roles of anger and advocacy in promoting positive outcomes at work* 9 NEGOTIATION AND CONFLICT MANAGEMENT RESEARCH 141 (2016).

¹⁸⁴ See generally Spielberger, Krasner, & Solomon, *supra* note 180.

¹⁸⁵ See JAMES W. PENNEBAKER, OPENING UP: THE HEALING POWER OF CONFIDING ON OTHERS (1990).

¹⁸⁶ See Jane M. Richards & James J. Gross, *Composure at any cost? The cognitive consequences of emotion suppression*, 25 PERSONALITY AND SOCIAL PSYCHOLOGY BULLETIN 1033 (1999).

¹⁸⁷ See Dianne M. Tice & Roy F. Baumeister, *Controlling anger: Self-induced emotion change*, in HANDBOOK OF MENTAL CONTROL 393 (Daniel M. Wegner & James W. Pennebaker eds., 1993).

¹⁸⁸ See generally Perlow & Williams, *supra* note 167.

¹⁸⁹ See Gina Vega & Debra R. Comer, *Sticks and stones may break your bones, but words can break your spirit: Bullying in the workplace*, 58 JOURNAL OF BUSINESS ETHICS 101 (2005).

¹⁹⁰ See generally Begley, *supra* note 147.

¹⁹¹ See generally Geddes & Callister (2007), *supra* note 148.

is transferred to others originally unaware of and uninvolved in the initial incident.¹⁹² This, in turn, can damage employee morale and raise indignation among sympathetic colleagues who support their coworker.¹⁹³ Ironically, until management hears of the employees' anger, the problematic situation remains unaddressed and unresolved and may, in fact, escalate.¹⁹⁴

The implications are clear. Organizations and management benefit by recognizing that expressed anger by employees can promote favorable workplace outcomes. As a consequence, it is ultimately beneficial to an organization to provide opportunities and even incentives for angry employees to come to management and speak up, rather than hide their anger or only share it with people unrelated to the problem and not in a position to help make necessary changes at work. Employees willing to approach management to express disapproval and indignation over perceived unethical, illegal, or insensitive practices or policies at work more often than not reflect a strong commitment to their company, their colleagues, and their work.¹⁹⁵

B. Retaliation Doctrines' Impact on Anger Expression

Both the "reasonable belief" doctrine and the "manner of the complaint" doctrine have the effect of incentivizing anger suppression among employees. In the first instance, it is clear that if complaints about biased conduct go unprotected unless the employee is complaining about conduct that a court would consider to be unlawful, most employees, untrained in the law, will choose to remain silent, not wanting to risk demotion or termination without legal recourse. Similarly, if an employee has to worry about becoming agitated, angry, or somehow disruptive when complaining about harassment or discrimination and thus losing his right to retaliation protection, he will likely choose not to complain at all.

1. Reasonable Belief Doctrine and Suppression

In terms of the "reasonable belief" doctrine, there are three likely potential outcomes once employees begin to understand that only a narrow portion of their complaints will be protected and that they cannot effectively predict when they are at risk: (1) employees may keep quiet, choosing not to tell anyone about the potentially discriminatory conduct, (2) they may tell their co-workers but not a supervisor, or (3) they may choose to report the conduct directly to a federal or state agency and bypass the employer's internal investigation mechanisms.

First, it is highly likely that employees will simply choose to remain silent in the face of a potential risk of adverse action without protection. If, to be protected, an employee must be relatively certain that the conduct of which he is complaining would meet the legal definition of an unlawful employment practice as interpreted by the federal circuit in which he would bring

¹⁹² Sigal G. Barsade, *The Ripple Effect: Emotional Contagion and Its Influence on Group Behavior*, 47 ADMINISTRATIVE SCIENCE QUARTERLY 644 (2002).

¹⁹³ See Ronda Roberts Callister, Deanna Geddes, & Donald F. Gibson, *When is anger helpful or hurtful? Status and role impact on anger expression and outcomes*, NEGOTIATION AND CONFLICT MANAGEMENT RESEARCH (forthcoming 2017).

¹⁹⁴ See Stickney & Geddes (2014), *supra* note 181, at 252.

¹⁹⁵ See *id.*

his case, most of the time he will, and probably should, choose not to complain. As the Court in *Crawford v. Metropolitan Government of Nashville & Davidson County*, noted:

If it were clear law that an employee who reported discrimination . . . could be penalized with no remedy, prudent employees would have a good reason to keep quiet about Title VII offenses against themselves or against others. This is no imaginary horrible given the documented indications that fear of retaliation is the leading reason why people stay silent instead of voicing their concerns about bias and discrimination.¹⁹⁶

Although the act of keeping silent in the face of harassment or discrimination may be a reasonable legal choice in light of the existing precedent, it will likely have a significant impact on the employee's emotional life. It is uncontroversial to imagine that anger (and humiliation, fear, frustration and a host of other negative emotions) is a likely result when one feels himself to be a victim of harassment or some other form of discriminatory conduct. As a result, the choice not to complain also means that the employee is likely holding in his or her anger despite the negative effects. This "anger-in" form of anger suppression does not mean that the anger dissipates or resolves. On the contrary, the anger continues to negatively affect the employee's mental and physical state regardless of the fact that it has been suppressed.

Consider the following hypothetical situation: A female employee endures sexual comments from her co-workers every few months. The comments are directed at her and occasionally at other women and involve female body parts, sexual acts, and her co-workers' sexual experiences. There is no physical touching, and her co-workers often have a playful tone and laugh briefly before returning to work. The comments are infrequent—they do not come every day or even every week but are sporadic and unpredictable. And yet, the comments begin to loom large in the employee's psyche. She is constantly waiting for the next comment, building up her defenses, imagining what she might say in response, steeling herself for what feels to her like an attack.

This employee has seen something similar happen before. Her colleague at her prior position in the company endured a similar situation involving racial comments. But in that instance, the employee went to management to complain about the comments. Management initially told him there would be an investigation but nothing much came of it. Instead, at the mid-year review, the complaining employee was terminated, allegedly for coming late to work several times without an excuse. When the employee filed suit for retaliation, his case was dismissed at summary judgment. The female target of sexual comments cannot be sure that her own situation rises to the level of a hostile work environment (if she even knows that word) and, in fact, different courts would likely reach different conclusions when presented with the facts in her case.¹⁹⁷ And so, recalling her colleague's situation and the rejection in the courts, she chooses to do nothing about her own predicament.

¹⁹⁶ 555 U.S. 271, 279 (2009) (citing *Brake*, *supra* note 8, at 20 (internal quotations omitted)).

¹⁹⁷ See *Gorod*, *supra* note 131, at 1490 ("In determining whether conduct is "severe or pervasive," the Supreme Court has instructed the lower courts to consider "all the circumstances, including the frequency of the

But her choice to remain silent has consequences of its own. She becomes increasingly upset and angry, has trouble focusing on anything else, and eventually her work begins to suffer. She misses deadlines, appears distracted and unfocused at meetings, and begins to avoid interactions with many of her colleagues despite the social nature of her work. Her silence does nothing to dissipate her anger and, in fact, may actually allow it to grow, ultimately making her a far less effective worker and a troubled person.¹⁹⁸ In addition to affecting her own mental state, the employee's failure to express her anger means that management is either not aware of the inappropriate conduct or knows about it but assumes it is not negatively affecting employees. Management thus allows it to continue, thereby tacitly signaling that it is acceptable behavior, which, in turn, leads other employees to act similarly, perpetuating and even growing the problem.¹⁹⁹

Alternatively, as a second possibility, instead of complaining to management or remaining silent, the employee who feels victimized by the sexual conduct may begin telling her co-workers about it. She is, in essence, complaining to her equals rather than complaining to a superior who might be able to do something about the problem. In other words, she is displaying the "muffled anger" form of suppression. The employee's co-workers, in turn, can do nothing to help but become upset on her behalf and begin to feel angry that they work in an environment where such behavior is tolerated. This "emotional contagion" then impacts the effectiveness of numerous workers and not just the initial victim. The first two possibilities thus result in (1) an increase in anger and discontent, (2) possible spread of anger beyond the initial victim, and (3) a perception that the employer permits such discriminatory behavior, likely leading to more anger, more misconduct in the future, and eventually a culture permeated with bias and discontent.

Finally, the third likely possible response in this scenario is that the employee, fearing repercussions for complaining internally, will seek to protect herself by complaining directly to the Equal Employment Opportunity Commission (EEOC) or the equivalent state agency.²⁰⁰ Under the "participation clause" in Title VII's retaliation provision, employees who file a charge or participate in an investigation, proceeding, or hearing are protected against retaliation,

discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Thus, the Court has tried to provide some guidance as to when conduct is unlawful, but that guidance hardly provides definitive answers as to how a court will rule in any given case." (internal citations omitted)).

¹⁹⁸ See *infra* text accompanying notes 204-06. Victims of sexual harassment often report that they become focused on the harassment and find themselves unable to focus on or perform their work effectively at some point. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993) ("a discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers.") (cited in Margaret E. Johnson, *Avoiding Harm Otherwise": Reframing Women Employees' Responses to the Harms of Sexual Harassment*, 80 TEMP. L. REV. 743, 770 (2007)).

¹⁹⁹ See *supra* text accompanying notes 181-83.

²⁰⁰ Of course, as described in the Introduction, the employee may also make the choice to leave her job and subsequently take her complaints online. See *supra* text accompanying notes 1-8. A former employee tweeting and blogging about alleged discrimination can be a public relations nightmare for a company even without a lawsuit. The benefit to handling such complaints internally should be obvious.

regardless of the merits of the underlying discrimination claim.²⁰¹ While this option certainly provides a forum for the employee to channel her anger, it is likely not the most desirable option from the employer's perspective. Answering an EEOC charge requires time, resources, and potentially assistance from legal counsel. The eventual litigation costs can grow quickly should the employee proceed with filing a lawsuit.²⁰² It is far easier and more efficient for the employer to resolve situations internally and avoid the costs and demands of the agency and court systems.

The first two possibilities—internal anger suppression and “muffled anger”—both have negative outcomes that compound the already harmful nature of discrimination in the workplace. A number of commentators have explained the devastating impact of sexual harassment on its victims. “Sexual harassment harms its victims psychologically, physically, and financially, producing serious, even devastating, effects. One commentator has gone so far as to liken it to a form of psychological pollution that corrodes the well-being of ... [its] victims.”²⁰³ Similarly, Terry Smith describes the significant psychological and physical injury that results from racial discrimination.²⁰⁴ For example, she describes a study of black women who experienced “increased cardiovascular reactivity and emotional distress when confronted with racist provocation.”²⁰⁵

The harm that results from the underlying conduct is compounded when the victim feels the need to suppress his or her powerful emotional response to the biased conduct. As Gorod notes, “if women come to believe that they cannot speak out about . . . harassment – that they cannot give voice to their feelings of frustration, anger, and fear – it seems reasonable to believe that those feelings, borne of the initial harassment *but compounded by the forced silence*, will manifest themselves in other, potentially destructive, ways.”²⁰⁶ Smith describes a Harvard University and Kaiser Foundation study of working class black women and men that found just such destructive results when victims keep silent:

Working-class black women who responded to discriminatory treatment by accepting it as inevitable and remaining silent about it posted higher blood pressure levels than those who tried to respond to unfair treatment and who shared their experiences with others. Likewise, among working-class black men, those reporting that they usually accepted their unfair treatment as a fact of life reported higher systolic blood pressure than those who tried to respond to unfair treatment.²⁰⁷

²⁰¹ See 42 U.S. Code § 2000e–3(a). See also Brake, *supra* note 8, at 79, n.201.

²⁰² See Jean Sternlight, *In Search of the Best Procedure for Enforcing Employment Discrimination Laws: A Comparative Analysis*, 78 TUL. L. REV. 1401, 1423 (“From the employer's perspective, the litigation system is also quite problematic. First, it is very time consuming and expensive, so that even those employers who believe they have valid defenses to claims of discrimination find they are paying a great deal in legal fees.”).

²⁰³ Gorod, *supra* note 131, at 1513 (internal quotations and citations omitted).

²⁰⁴ Smith, *supra* note 22, at 545.

²⁰⁵ *Id.* at 547 (citing Maya Dominguez et al., *Effects of Racist Provocation and Social Support on Cardiovascular Reactivity in African American Women*, 2 INT'L J. BEHAV. MED. 321, 321–22 (1995)).

²⁰⁶ Gorod, *supra* note 131, at 1515.

²⁰⁷ Smith, *supra* note 22, at 547 (citing Nancy Krieger & Stephen Sidney, *Racial Discrimination and Blood Pressure: The CARDIA Study of Young Black and White Adults*, 86 AM. J. PUB. HEALTH 1370, 1373–74 (1996)).

Moreover, it is clear from the psychological research described in the prior section that we don't need to imagine the harms caused by suppressed anger and emotion. Those harms are real, having been studied and documented, and they take both psychological and physical forms and impact both the victims themselves as well as the workplace overall.²⁰⁸ Thus, while harassment and other forms of discrimination clearly take a severe toll on victims, the failure to fully protect those victims against retaliation and the victim's resulting choice to remain silent and suppress the emotional response to it has its own extremely detrimental impact on workers and the working environment.

2. "Manner of the Complaint" Doctrine and Suppression

As with the "reasonable belief" doctrine, courts' proclivity to dismiss retaliation claims when the employer alleges insubordination as its legitimate reason for termination also has the effect of incentivizing suppression of anger in the workplace. In addition, this approach tends to ignore psychological research on the contextual nature of anger and its acceptability in a variety of workplaces.

First, and most importantly, the almost automatic dismissal of cases when insubordination is alleged creates a clear takeaway message for employees: unless you complain (about harassment, discrimination, or anything else) in the most respectful manner possible, you run a significant risk of losing your eventual retaliation claim because any disruptive behavior can be deemed unacceptable and grounds for termination without recourse in the law. The suppression of anger that will likely result from this approach is clear. Anger is a natural human emotion that often arises when we feel victimized by injustice.²⁰⁹ When employees begin to see that any display of anger may be used against them when making complaints, the reasonable response is to suppress all complaints in an attempt to suppress the emotions that will inevitably escape them. If employees cannot trust themselves to complain without becoming angry, disruptive, or hostile, they will often choose to say nothing at all.

As a secondary but still important matter, the way in which courts have approached the insubordination issue suggests that they are relying on "common sense" without considering the existing research on the way in which anger manifests, is tolerated, and is dealt with in the workplace. Recall the Seventh Circuit's approach to an employer's use of the insubordination defense in *McClendon*. The court explicitly stated that it was "not relevant whether Mr. McClendon actually was insubordinate."²¹⁰ Instead, the court was concerned only with the employer's good faith belief that the employee's behavior was unacceptable. In the large majority of cases, courts, not wanting to question employers' business judgment or delve too far into "the weeds," simply accept the employer's assertion that the determination of

²⁰⁸ See *supra* Part II. A.

²⁰⁹ See *id.*

²¹⁰ *McClendon*, 108 F.3d at 799.

insubordination was honest.²¹¹ Thus, the mere allegation of insubordination is enough to defeat a retaliation claim. In addition, several courts have made clear that the factors leading to the disruptive outburst are similarly irrelevant to the analysis.²¹² But as the Geddes and Stickney research demonstrates, the factors that contribute to a finding of deviant anger or anger that crosses the threshold from acceptable to unacceptable are not static nor does the determination lend itself to a single standard.²¹³ Instead, that determination is different for every organization and may, in fact, differ even within an organization depending on the context and dynamics that led to the particular outburst at issue.²¹⁴

Anger may be deemed deviant because the employee works in an environment that tolerates no emotional expressions at all, because the volume and tone of the expression exceeded the acceptable standards in a workplace that tolerates a moderate level of anger expression, or because the factors leading to the outburst do not justify the type of expression.²¹⁵ The notion that courts should blindly accept an employer's subjective assessment that the employee was insubordinate without consideration of what made the expression "deviant" ignores the reality of workplace cultures. To deprive a worker of retaliation protection without consideration of the context of the outburst is irresponsible at best. It feels particularly egregious in cases of discrimination where the impact on the employee may be profound and should not be ignored. As Terry Smith has pointed out, "Courts cannot intelligently evaluate the permissible bounds of opposition conduct without some appreciation of the nature of the harm the employee is opposing. Concomitantly, courts cannot properly assess opposition conduct without an understanding of the effects of perceived discrimination on the minority worker and, thus, the psychological and physiological factors that inform and shape his opposition conduct."²¹⁶

C. Using the Dual Threshold Model as a Guide to Reforming Retaliation Doctrine

The Geddes/Callister dual threshold model of workplace anger reaches several important conclusions that are relevant to retaliation doctrine. First, the overall conclusion that the expression of anger in the workplace is generally positive both for the individual and for the workplace as a whole should impact employers' views of the incentive structure created by existing legal doctrine and precedents. Second, the emphasis on the contextual nature of anger and varying degrees of anger acceptance should impact the way in which courts approach cases involving angry employees. What follows is a proposal to reform the two retaliation doctrines discussed above in a way that should serve the goals of Title VII, allow for more context-based and nuanced legal conclusions, and yield healthier workplaces. It bears repeating that although the health and culture of a workplace is not the concern of Title VII, it is, or should be, the concern of employers. As a result, consideration of the dual threshold model should push

²¹¹ See Carle, *supra* note 18, at 201-210.

²¹² *Id.*

²¹³ See *supra* Part II.A.

²¹⁴ *Id.*

²¹⁵ See *supra* text accompanying notes 152-53.

²¹⁶ Smith, *supra* note 22, at 545.

employers to support changes to retaliation doctrine that workers' advocates have been promoting for some time.

1. *Court-Created Doctrines and Reforms*

Before delving into our reform proposal, it is important to point out that the doctrines and approaches discussed in this article are entirely court created. There is nothing in the statutory language of Title VII or other anti-discrimination statutes that compels courts to define protected opposition conduct as requiring that the employee possess an "objectively reasonable belief" that the conduct about which he is complaining would be viewed as unlawful by the relevant court.²¹⁷ As Deborah Brake has pointed out,

The standard explanation for the tighter requirement applied to Title VII retaliation claims under the opposition clause is that Congress did not write the opposition clause to encompass as broad a level of protection as afforded under the participation clause. However, the use of the reasonable belief doctrine does not follow from any linguistic differences between the two clauses, but rather from a desire to protect employer prerogatives to retaliate against persons who raise complaints in the workplace that stray too far from dominant legal understandings of discrimination.²¹⁸

As a result, the incentives and practical reality created by this court-created standard can and should be considered by courts when deciding whether and how to apply it.

Similarly, the approach courts take in insubordination cases is not based on any statutory imperative.²¹⁹ The decision to consider insubordination as a legitimate nondiscriminatory reason for termination or to conclude that the manner in which an employee complained about discrimination exceeded the bounds of reasonableness and thus left him unprotected against retaliation is a creation of courts alone. Thus, as Susan Carle notes with respect to her proposals on this issue, "the reforms suggested do not require major statutory reforms but instead doctrinal tweaks that courts can make in exercising their interstitial interpretative power in applying law to facts."²²⁰

2. *History of Considering Incentives in Creating Employment Doctrine*

In addition to reforms being somewhat straightforward in this area since statutory changes are unnecessary, reforms of these doctrines based on consideration of the incentives they create should also fit with courts' general approach and concerns in the Title VII arena. Courts

²¹⁷ See Brake, *supra* note 8 at 102-03 ("Having recognized that protection of oppositional activities is not limited to complaints about practices that are actually illegal, there is nothing in the language of Title VII's opposition clause that requires courts to use a reasonable belief standard as the boundary for such claims, and certainly not one bounded to dominant judicial interpretations of current legal precedent.").

²¹⁸ *Id.* at 103, n.293 (citing *Parker v. Balt. & Ohio R.R. Co.*, 652 F.2d 1012, 1019 (D.C. Cir. 1981)).

²¹⁹ See Carle, *supra* note 18, at 210.

²²⁰ *Id.*

assessing Title VII cases have, for decades, been interested in the incentive structures that flow from the extra-statutory doctrines they create.

This incentives-focused concern is perhaps most evident in the *Ellerth/Faragher* cases in which the Supreme Court created an affirmative defense to Title VII discrimination claims in order to incentivize certain behavior on the part of employers. In *Burlington Industries Inc. v. Ellerth*,²²¹ the plaintiff alleged sexual harassment at the hands of a mid-level manager who made offensive remarks and gestures, including threats to deny her tangible job benefits.²²² Similarly, in *Faragher v. City of Boca Raton*,²²³ a lifeguard employed by the city alleged sexual harassment by two of her immediate male supervisors.²²⁴ The Court established in these cases that an employer could be liable for hostile work environment sexual harassment by a supervisor even when no tangible employment action is taken against the alleged victim of harassment.²²⁵ Most importantly, for our purposes, in these cases the Supreme Court also created (without any statutory requirement) an affirmative defense to sexual harassment claims that looked to “the reasonableness of the employer's conduct as well as that of a plaintiff victim.”²²⁶ More specifically, the Court held that a “defending employer may raise an affirmative defense to liability or damages” by demonstrating “(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”²²⁷ The primary motivation for creating this affirmative defense was a desire to incentivize specific behavior on the part of employers. As made clear in *Ellerth*:

Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms. Were employer liability to depend in part on an employer's effort to create such procedures, it would effect Congress' intention to promote conciliation rather than litigation in the Title VII context. . . . To the extent limiting employer liability could encourage employees to report harassing conduct before it becomes severe or pervasive, it would also serve Title VII's deterrent purpose.²²⁸

The Court in *Faragher* further provided:

It would . . . implement clear statutory policy and complement the Government's Title VII enforcement efforts to recognize the employer's affirmative obligation to prevent violations and give credit here to employers who make reasonable efforts to discharge their duty. Indeed, a theory of vicarious liability for misuse of

²²¹ 524 U.S. 742 (1998).

²²² *Id.* at 747-48.

²²³ 524 U.S. 775 (1998).

²²⁴ *Id.* at 780.

²²⁵ 524 U.S. at 765.

²²⁶ 524 U.S. at 780.

²²⁷ *Id.* at 808.

²²⁸ 524 U.S. at 764.

supervisory power would be at odds with the statutory policy if it failed to provide employers with some such incentive.²²⁹

It is clear from the *Ellerth/Faragher* opinions that the Court is not only concerned with the real-world consequences of its conclusions but that the way in which its doctrines impact employer and employee behavior is a primary concern that, in fact, motivates doctrinal innovations.

In the context of retaliation doctrine, the Supreme Court made a similar incentive-based determination when defining the term “adverse employment action” for purposes of retaliation suits. In *Burlington Northern & Santa Fe Railway v. White*,²³⁰ the Court considered what standard should apply when determining whether adverse conduct constituted possible retaliation.²³¹ The Court determined that the definition of adverse conduct in the retaliation context should be different from that in the discrimination context. Whereas in discrimination cases, a plaintiff must demonstrate that the conduct he complains of constitutes “a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits,”²³² in the retaliation context, the Court adopted a broader standard under which “a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.”²³³

In explaining this different approach, the Court focused on the real-world impact of the standard it applies. “By focusing on the materiality of the challenged action and the perspective of a reasonable person in the plaintiff’s position, we believe this standard will screen out trivial conduct while effectively capturing those acts that are likely to dissuade employees from complaining or assisting in complaints about discrimination.”²³⁴ The Court recognized that the way in which it defined “adverse action” would either have the effect of encouraging or deterring complaints about discrimination and chose the course that would encourage employees to come forward.²³⁵

These significant decisions reinforce the importance of the real-world impact of employment doctrine on the creation of those doctrines. Absent clear statutory direction, courts

²²⁹ 524 U.S. at 806.

²³⁰ 548 U.S. 53 (2006).

²³¹ *Id.* at 69-70.

²³² *Id.* at 75-76 (Alito, J. concurring).

²³³ *Id.* at 68 (internal quotations omitted).

²³⁴ *Id.* at 69-70.

²³⁵ Interestingly, the Court also noted the way in which the real world behavior it was focused on could itself have varied meanings and impacts depending on context. “Context matters. 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. A supervisor’s refusal to invite an employee to lunch is normally trivial, a nonactionable petty slight. But to 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.” *Id.* at 69.

consistently look to the incentive structures created by their conclusions and to the behavior of employers and employees that are desirable and likely to result from their decisions. In something akin to a “legal realism” approach, courts in the employment context often seek “to understand legal rules in terms of their social consequences.”²³⁶ It is in this context that we suggest doctrinal reform of the retaliation doctrines discussed in this article and that we propose consideration of the impact these doctrines have on employee health and workplace culture.

3. *Employer-Employee Alignment of Interests*

While consideration of incentives is a regular component of doctrinal discussions in the Title VII context, it is less common to find a doctrinal proposal that has benefits for both employers and employees alike. Our proposal to reform specific retaliation doctrines to incentivize anger expression does just that. The benefits to workers are obvious in that expanded protection from retaliation ultimately encourages more workers to come forward with complaints, increasing the efficacy of the antidiscrimination laws in protecting workers. As we have discussed above, although it may seem counterintuitive, employers also ultimately benefit from an environment in which workers feel comfortable coming forward and expressing their anger and distress.

We have focused on the organizational behavior research on workplace anger expression but this notion of a healthy workplace culture that supports complaints and emotional expression is already beginning to take hold among business leaders and advisors. From the perspective of litigation avoidance, corporate counsel generally recognize the benefits of early complaints that allow for conciliation or some form of alternative dispute resolution rather than costly court battles.²³⁷ As Deborah Thompson Eisenberg points out in her recent article, the increasing effort at conciliation has also grown out of “dramatic changes in the structure of many organizations” from top-down hierarchies to “team-based work” that spreads out the control and decision making authority. Given this new organizational structure, employers must take new steps to attract and retain talent including developing “conflict management systems that give employees a greater sense of empowerment, voice, and self-determination in addressing workplace issues.”²³⁸

²³⁶ Joseph William Singer, *Legal Realism Now*, 76 CALIF. L. REV. 467, 468-69 (1988) (reviewing LAURA KALMAN, *LEGAL REALISM AT YALE: 1927-1960* (1986)).

²³⁷ Deborah Thompson Eisenberg, *The Restorative Workplace: An Organizational Learning Approach to Discrimination* 5 (Univ. of Maryland Francis King Carey School of Law Legal Studies Research Paper No. 18, 2015) (“Having an employee raise a concern or, even worse, file a lawsuit alleging discrimination or harassment can be a frightening, highly disruptive, and expensive prospect. Corporate counsel report that ‘workplace litigation—and especially class action and multi-plaintiff lawsuits—remains one of the chief exposures driving corporate legal budget expenditures, as well as the type of legal dispute that causes the most concern for their companies.’” *Id.* at 5 (citing SEYFARTH SHAW, LLP, ANNUAL WORKPLACE CLASS ACTION LITIGATION REPORT 3 (2014 ed.), <http://www.seyfarth-classaction.com/2014/2014wcar/index.html>)).

²³⁸ *Id.* (citing KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 174-83 (2004); David B. Lipsky & Ariel C. Avgar, *Toward a Strategic Theory of Workplace Conflict Management*, 24 OHIO ST. J. ON DISP. RESOL. 143, 153-54 (2008); DAVID B. LIPSKY ET AL., EMERGING SYSTEMS FOR MANAGING WORKPLACE CONFLICT: LESSONS FROM AMERICAN CORPORATIONS FOR MANAGERS AND DISPUTE RESOLUTION PROFESSIONALS 68 (2003)).

Corporate counsel and compliance professionals also point out that in order to limit or eliminate bad behavior in the workplace, employers must focus on more than policies and complaint systems and should turn their attention to workplace culture. As corporate consultants advise:

The only thing that can prevent corporate misconduct is an employee base that's not afraid to speak up when it sees something amiss. If misconduct is immediately called out, it will stop. The solution is an open and transparent culture. But in trying to defeat misbehavior, companies ignore culture and mistakenly focus on policies, processes and systems instead. These things have little impact. Our research shows this conclusively: Only humans can identify a social problem, and it turns out that policies have very little influence on human behavior. We're looking in the wrong place for the solution to corporate misconduct. The solution is culture.²³⁹

A culture in which complaints receive no meaningful response encourages employees to remain silent rather than expose themselves to the vulnerabilities of speaking up. The cycle then becomes difficult to break—"Silence begets misconduct, misconduct begets more silence."²⁴⁰ Of course, any corporate attempts to change workplace culture and to encourage employees to come forward will likely be stymied by a legal regime that promotes the opposite behavior and incentivizes silence and suppression. If courts ultimately protect retaliatory conduct, it will be far more difficult to convince stakeholders to make real and lasting institutional change. Employers should favor changes in retaliation doctrine in order to support the forward thinking changes they are already beginning to make in their workplaces.²⁴¹ As a result, the proposals we make here that have obvious benefits to workers also positively impact their employers and corporate efforts to create healthier workplaces overall.

4. *Proposal: Flipping the Standards*

This article proposes that courts reconsider the standards they apply to complaining employees under the two doctrines discussed. Our proposals are not significantly different than those suggested by other scholars. But, in contrast to most commentators, who have considered only one or the other of the doctrines, our analysis of the two doctrines together lends itself to a reform proposal that highlights their relationship.

In looking at the two doctrines side by side, we focus on two aspects of the court-created approaches: (1) the objective or subjective nature of the standard applied or, in other words, whether the standard requires "reasonableness" or "good faith" and (2) the actor to whom the standard is applied—employee or employer. In the first instance, the problematic component of

²³⁹ Dan Currell and Aaron Kotok, *Preventing Bad Behavior at Your Company*, CORPORATE COUNSEL (March 17, 2015), <http://www.corpcounsel.com/id=1202720828160/Preventing-Bad-Behavior-at-Your-Company>.

²⁴⁰ *Id.*

²⁴¹ Eisenberg points to Southwest Airlines and Ford as companies that have begun to make these changes. See Eisenberg, *supra* note 237, at 8. Southwest Airlines now promotes middle managers based in part on "their ability to spark vigorous but respectful internal debates." *Id.*

the “reasonable belief” doctrine is that it applies an *objective* standard to the question of an *employee’s* belief that the conduct he complained about was unlawful. As described previously, courts do not ask whether the employee honestly believed that the behavior was unlawful, nor do they consider whether the employee held an objectively reasonable belief that the conduct was offensive or inappropriate, necessitating a simple common sense judgment. Rather, the court’s only concern is whether it was objectively reasonable to conclude that the behavior was unlawful, a determination that requires a legal analysis to determine how a court in that particular circuit would view the underlying conduct. In contrast, when faced with a claim of insubordination, courts explicitly reject any kind of reasonableness standard, focusing instead on the *honest* belief of the *employer* that the employee’s conduct or manner in complaining was inappropriate. As the Seventh Circuit in *Clack* made abundantly clear, “[A]rguing about the accuracy of the employer’s assessment is [merely] a distraction because the question is not whether the employer’s reasons for a decision are *right* but whether the employer’s description of its reasons is *honest*.”²⁴²

Because our focus is on maximizing the productive expression of workplace anger by employees, the solution we propose is aimed at incentivizing anger expression by giving workers a sense of comfort in those expressions. This, in turn, will create a healthier workplace culture in which workers feel secure coming forward to complain about bias or any other workplace problems. If the goal is maximizing worker comfort, the solution should be the flipping of the two standards: employees should be held to an *honest belief* standard when complaining about behavior that they believe is unlawful discrimination whereas employers should be held to an *objectively reasonable* standard when concluding that an employee’s behavior crossed the line from productive expression into insubordination in light of the context and workplace culture in which the expression occurred.

There are numerous reasons to reverse the standards so that employees are held to a good faith or honest belief standard and employers to an objective reasonableness standard. First, from a common sense perspective, there is a distinct imbalance in terms of access to legal information between employees and their employers. Employers generally have far easier access to legal counsel, whether in-house or external, than do average employees.²⁴³ As a result, when making termination decisions in insubordination cases, employers may and often do consult with attorneys to confirm that the planned termination does not run afoul of anti-discrimination laws and regulations.²⁴⁴ Application of an objective reasonableness standard would require employers and their attorneys to assess the decision as part of their overall consideration of the propriety of the termination. Objective reasonableness necessitates something more than a gut reaction, instead requiring a consideration of the context of the employee’s conduct, the culture of the

²⁴² *Clack*, 304 F. App’x at 406 (quoting *Smith v. Chrysler Corp.*, 155 F.3d 799, 806 (6th Cir. 1998) (internal quotations omitted)).

²⁴³ See Lisa Bernt, *Tailoring a Consent Inquiry to Fit Individual Employment Contracts*, 63 SYRACUSE L. REV. 31, 44 (2012) (“Employers typically have legal counsel to help them sort out the complexities of employment law, but few employees or job applicants have meaningful access to reliable information or advice regarding the laws that govern their livelihood.”).

²⁴⁴ *Id.*

workplace overall, and the factors that led to the employee's outburst. This is not a particularly onerous task to begin with but is made far simpler by consulting with counsel who have likely seen similar occurrences in the past and are familiar with courts' views on reasonable behavior in this context.²⁴⁵

In contrast, employees deciding whether and when to complain about perceived discrimination rarely have access to legal advice of any kind.²⁴⁶ Faced with the task of determining alone whether the conduct of which they are complaining constitutes unlawful conduct, the wise employee will choose to keep silent rather than risk lawful termination or demotion in retaliation for the complaint. As the dissent in *Boyer-Liberto* pointed out, "An employee is not an expert in hostile work environment law."²⁴⁷ Even without legal counsel, however, employees can feel comfortable basing their actions on their "honest" beliefs. As a result, imposing a subjective or good faith standard on employee complaints would create an environment in which employees can "feel safe and secure in bringing an incident . . . to the attention of management."²⁴⁸

Beyond the imbalance in access to legal counsel, a reversal of the standards would also recognize the dangers in removing the employee's perception of discrimination from the analysis. It is well documented that racial and gender identity can significantly impact an individual's perception of reasonableness or the existence of discrimination in a given situation.²⁴⁹ For example, Russell Robinson's article *Perceptual Segregation* convincingly argues that insiders and outsiders (or members of majority and minority identities) tend to perceive allegations of discrimination through fundamentally different psychological frameworks.²⁵⁰ Robinson points to a "growing body of empirical evidence on how outsiders anticipate discrimination, perceive that they are being discriminated against, and then attempt to manage discrimination."²⁵¹ While courts have primarily focused on the mental state of employers, the alleged perpetrators of discrimination, Robinson highlighted the viewpoint of victims and the dramatic differences in how victims of discrimination understand comments or

²⁴⁵ There is precedent for applying an objective reasonableness standard in insubordination cases. In at least two cases involving an employee who was fired for physically striking someone in the workplace, courts have assessed the reasonableness of the plaintiff's conduct in light of the circumstances surrounding the incident. See *Folkerson v. Circus Circus Enters.*, 1995 U.S. App. LEXIS 34491, *13-14 (9th Cir. 1995) (in assessing retaliation and sex discrimination claims of a mime who struck a patron who touched her and was fired, court considers the "reasonableness" of her conduct under the circumstances); *Speed*, 93 F. Supp. 3d at 361 (court assessed conduct of plaintiff who struck her harasser by considering surrounding circumstances and plaintiff's viewpoint).

²⁴⁶ See Bernt, *supra* note 243, at 44.

²⁴⁷ *Boyer-Liberto*, 786 F.3d at 290. See also Bernt, *supra* note 243, at 44 ("Studies show that employees are systematically uninformed about their rights, lacking the most basic knowledge about the law of the workplace." (internal quotations omitted)).

²⁴⁸ *Boyer-Liberto*, 786 F.3d at 290.

²⁴⁹ See generally Dan M. Kahan, David A. Hoffman, and Donald Braman, *Whose Eyes Are You Going To Believe? Scott V. Harris and The Perils Of Cognitive Illiberalism*, 122 HARV. L. REV. 838 (2009) (critiquing the Supreme Court's determination of "reasonable" behavior in high speed chase video that conflicts with minority population's perception of events in video).

²⁵⁰ See generally Russell Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093 (2009).

²⁵¹ *Id.* at 1103.

conduct as discriminatory.²⁵² With this in mind, the notion that an employee can be judged on whether he or she possessed an “objectively reasonable” belief that unlawful discrimination has occurred seems overly simplistic. When it comes to assessing the existence of discrimination in particular, “reasonable belief” is deeply connected to the identity of the believer.²⁵³

Finally, and most importantly, reversal of the standards used in these doctrines would incentivize the type of anger expression that yields healthier workplaces. From the perspective of an employer who wants to create a workplace culture in which employees feel free to come forward with good faith complaints in the hopes of addressing problems early, it clearly makes sense to impose an “honest belief” or “good faith” standard on opposition conduct. In other words, if an employee can demonstrate that he honestly believed that the conduct about which he was complaining rose to the level of unlawful discrimination, he will be assured of legal protection against retaliation. The feeling of security that would flow from such an approach cannot be underestimated. An employee need not know or seek out a detailed understanding of discrimination precedents in his circuit to benefit. He need only have a general understanding of the protections available under law and make a sincere assessment about whether the conduct or comments he endured violate the law.

Such increased comfort would likely also result from application of an objective reasonableness standard to employers’ decisions to terminate based on insubordination. In contrast to the existing “honest belief” standard, an objective standard would require the court to seek out more than the employer’s point of view. It would necessitate consideration of the context of the employee’s expression, the employee’s viewpoint, and the circumstances that gave

²⁵² *Id.* at 1102-03. As an example, Robinson suggests the following hypothetical: “Imagine that I conducted an experiment in which I randomly selected ten white people and ten black people and asked them to watch a scenario involving potential discrimination. The setting is a mostly white, fancy restaurant situated in a suburb at 8:00 pm on a Saturday. The only all-black party is an African American family, which is seated near the back of the restaurant. The parents try in vain several times to flag down the waiters to ask for menus and to order food. This goes on for ten minutes. Perceptual segregation theory predicts that if we asked our ten black and ten white people whether it is likely that race played a factor in the restaurant staff failing to attend to the black family, the black participants would be significantly more likely to reply that race was a factor. Specifically, the black participants would tend to recognize, recall, and consider different information than the white participants. For instance, the blacks might be keenly aware that the restaurant is dominated by white staff and patrons and the black family was seated near the back, while the white participants might say that they did not even notice race or think that the placement of the family’s table might have correlated with race. The black participants might also take note that this is an upscale restaurant in a wealthy suburb, where black patrons might be relatively unusual, and potentially less welcome. By contrast, the white participants might focus on a race-neutral explanation: the fact that the incident occurred during prime dinner hours on a weekend and the possibility that the staff may have just been busy, rather than racially motivated.” *Id.* at 1118.

²⁵³ See also Gorod, *supra* note 131 at 1495-96 (“Studies have shown that there is a gender gap in the definition of sexual harassment. In general, women have a broader, more inclusive definition of sexual harassment and are more likely than men to view mild social sexual behavior as sexual harassment. These studies not only support the idea that popular understandings of sexual harassment often differ from the legal definition, but they also suggest an additional reason not to employ the “reasonable juror” standard in determining what conduct is protected under Title VII. After all, if women tend to have a broader view of what conduct constitutes sexual harassment, then women, one of the groups Title VII was intended to protect, will be most likely to get caught in the gap between what members of the public may view as reasonable and what the law does.” (internal quotations omitted)).

rise to the incident. For example, several courts have conducted such an analysis in cases in which employers claim that the plaintiff cannot make out a *prima facie* case of retaliation because she did not engage in protected opposition conduct, reasoning that the angry or physical outburst was not “reasonable” opposition conduct and was thus unprotected. This was the case in *Folkerson v. Circus Circus Enterprises*, in which the plaintiff, a mime hired to perform as a mechanical doll, struck a patron (with a stuffed animal) after he came toward her with arms outstretched and touched her shoulder.²⁵⁴ The employer reviewed a video tape of the incident and terminated the plaintiff on the spot, concluding that her behavior was inappropriate. The argument made by the employer was not that the plaintiff was fired for insubordination but rather that she lacked an actionable retaliation claim because “physical violence can never constitute protected opposition to unlawful discrimination.”²⁵⁵ In other words, the employer claimed that the plaintiff’s striking of the patron could not constitute protected opposition conduct. In assessing the reasonableness of the employee’s behavior on this case, the Ninth Circuit considered the surrounding circumstances and the employee’s point of view:

Folkerson was miming a mechanical doll when a man began to come toward her, repeatedly asking whether she was real. An employee at a nearby rental car booth repeatedly told the man not to touch Folkerson. The man refused to listen. Rather, he came toward Folkerson in an aggressive manner with both arms outstretched as though he was going to put his arms around her and squeeze her. He succeeded in touching her shoulder. Not wanting to break out of character, Folkerson raised her arm, in which she held a stuffed animal, to keep the man away. In so doing, she hit him in the mouth. The man laughed and the audience applauded. Based on this evidence, Folkerson’s conduct appears proportionate to the degree of threat this man posed.²⁵⁶

This is essentially the approach we recommend in insubordination cases as well—consideration of the circumstances that led to the angry outburst and an attempt to view the scenario from all relevant perspectives, not just the employer’s. This more global approach would undoubtedly create a greater sense of security in employees. Knowing that any expressions of anger would be evaluated based on the “totality of circumstances” and would not be accepted by a court as *per se* grounds for termination (if the employer argued that it was insubordinate) should alleviate concerns that all anger can be lawfully punished and lead to greater willingness on the part of employees to speak up without fear of lawful retribution should the complaint come out in some loud, hostile, or assertive manner.

In sum, applying a good faith standard to employees and a reasonableness standard to employers, in addition to embodying a more fair approach in keeping with the goals of Title VII, would also incentivize anger expressions lead to healthier workers and workplace cultures, and benefit both workers and employers.

²⁵⁴ 1995 U.S. App. LEXIS 30137, *5.

²⁵⁵ *Id.* at *12.

²⁵⁶ *Id.* at *14.

III. OBSTACLES TO REFORM AND RESPONSES

A. *The Courts and Workplace Culture*

We anticipate that upon considering our proposal to reform retaliation doctrine in the interest of creating healthier workplaces, a likely argument in response will be that Title VII and the courts that enforce it have no business considering workplace culture, employee emotional and physical health, or any aspects of workplace management beyond elimination of discrimination. Our response to this argument is twofold. First, as we have already alluded to, our goal in making this proposal is not to suggest that courts will be convinced to change retaliation doctrine on this basis. In fact, articulation of the doctrines' negative consequences for workplace anger expression should not be necessary for courts to implement this change. Existing scholarship already adequately lays out the ways in which the doctrines we discuss impede the goals of Title VII, and those arguments alone should be sufficient reason for courts to consider rectifying the problems.²⁵⁷ Our purpose instead is to highlight for employers the negative consequences for workplace health and productivity that also result from the existing doctrinal regime. As employers increasingly focus on creating non-hierarchical, team-based structures, encouraging meaningful debate as a means of promoting innovation and worker satisfaction, and developing procedures and mechanisms for employees to express their opinions and make complaints, it is important to point out the ways in which the law, as it currently stands, hinders these important developments. It is our hope that employers will support doctrinal reform in this area because, despite the fact that reform would benefit workers by increasing retaliation protection and encouraging more complaints of discrimination, it would likewise benefit employers' bottom lines.

Second, we must point out that despite workplace health being beyond the purview of Title VII and the courts, judges are already considering these issues when discussing retaliation doctrine. Unfortunately, in doing so, judges often rely on their common sense evaluation of a situation when reference to extensive social science research would provide a better understanding of the incentives and likely consequences of their decisions. For example, in *Boyer Liberto*, Judge Wilkinson's opinion, concurring in part and dissenting in part, voices concern about any attempts to turn the "reasonable belief" standard into a subjective rather than objective one.²⁵⁸ Judge Wilkinson is concerned both with undermining free speech values in the workplace and with what he perceives will be detrimental consequences for co-worker relationships. Without any citation to social science research, Wilkinson opines that "[t]urning someone in as a course of first resort or on insubstantial grounds may perpetuate resentment and bring the prospect of employee dialogue to a premature end."²⁵⁹ He further contends that a subjective standard that protects a greater swath of employee complaints will unnaturally hamper co-worker communication across races and sexes.

²⁵⁷ See *supra* Part I.C.

²⁵⁸ *Boyer-Liberto*, 786 F.3d at 290-91.

²⁵⁹ *Id.* at 292.

In an ideal world, the races and sexes would interact spontaneously, in natural and creative ways. . . . Title VII must not contribute an added element of inhibition when we communicate with those of another sex or race. And yet I fear that is precisely what will happen if the objectively reasonable standard is diluted in favor of retaliation protection for any report, however marginal, trivial, or unsubstantiated. . . . [W]here every ambiguous or unintentionally insensitive remark is going to be reported upstairs, employees naturally will seek to cluster with those who look, act, and think “like themselves.” Instead of an interactive community in which individual attributes can be recognized, understood, celebrated, and embraced, the result will be a more fractious and walled-off working environment where noxious stereotypes persist. Keeping interracial distance and maintaining interracial silence will become the safest course, the easiest way to avoid a blot on one’s record that comes even with a co-worker’s erroneous report.²⁶⁰

Again, the judge made these comments based on his own sense of interpersonal dynamics without reference to any social science research despite the fact that a great deal of work has been done in this area.²⁶¹ The research we discuss in this article itself demonstrates that speaking up and reporting distressing incidents and comments whether or not they amount to actionable discrimination actually creates a healthier more expressive culture and not the opposite. Openly discussing troubling incidents brings workers closer rather than silencing and isolating them further.

Similarly, in discussing free speech values in the workplace, Judge Wilkinson makes an assumption about co-worker interactions that flies in the face of the research on anger expression. He contends that “[w]orkplaces in their own way are our town squares. John talking to Kathy may prove in the end more fruitful than John running to a higher authority to have Kathy’s point-of-view condemned.”²⁶² But as the Geddes and Stickney research demonstrates, John talking to Kathy about his anger rather than reporting it is a form of suppressed or muted anger that does not solve the problem but rather causes it to grow and spread.²⁶³ Our secondary goal in drawing connections between retaliation doctrine and research on workplace anger is thus to educate lawyers and the judiciary about this well-established body of research that studies the actual impacts of the doctrines and theories embodied in cases. When establishing court-created doctrinal standards based on policy considerations around the real-world impact these doctrines have, it behooves parties and courts to reference that research.

B. Widespread Increase in Litigation and Frivolous claims

Given critiques of other proposals to expand retaliation protection, it is likely that the other major concern about our proposal is the supposed increase in litigation over minor

²⁶⁰ *Id.* at 293.

²⁶¹ *See supra* Part II.A.

²⁶² *Boyer-Liberto*, 786 F.3d at 292.

²⁶³ *See supra* Part II.A.

workplace tussles and a rise in frivolous complaints made in order to protect one's job by obtaining retaliation protection. These related concerns are based on misunderstandings of the impact of retaliation doctrine.

First, the concern about an overall increase in litigation emerges from the notion that employees who are protected against retaliation when complaining about any comment or incident will thus complain far more often and ultimately sue more often. If they feel entitled to complain about everything, the argument goes, they will also be empowered to bring their complaints to court. This was exactly the critique raised by the dissent in *Boyer-Liberto* when the Fourth Circuit expanded its definition of a "reasonable belief" that a hostile work environment was being created. The dissent warned that the new standard "will generate widespread litigation over the many offensive workplace comments made everyday that employees find to be humiliating."²⁶⁴ But, as the majority points out in that case, litigation will only occur if employees are discharged or otherwise punished for complaints. "Our standard is implicated solely when an employee suffers retaliation for engaging in an oppositional activity."²⁶⁵ In other words, if employers heed the research we present here on anger expression in the workplace and are focused on creating more open and engaged workplace cultures, they will likewise be educating management not to react punitively to complaints whether or not they rise to the level of actionable discrimination. That education, more than anything else, will lower the number of discrimination claims regardless of the nature of the underlying workplace incident. As a result, providing legal protection against retaliation simply buttresses an already wise and fiscally beneficial approach to complaints.

Second, and relatedly, there will likely be concern that expansion to a "good faith" standard for providing retaliation protection to employee complaints about discrimination will result in an expansion of fake or frivolous complaints made in order to secure job protection. The notion here is that an employee who suspects that her job is in jeopardy for whatever reason will be incentivized to make a complaint about alleged discrimination in order to make it more difficult for the employer to terminate or take other adverse actions against her since that will give rise to a retaliation claim as well. This concern was raised by Justice Kennedy in *University of Texas Southwestern Medical Center v. Nassar* in which the Supreme Court considered whether plaintiffs should be required to meet a "but for" standard for retaliation claims.²⁶⁶ The Court seemed to focus on this concern both at oral argument and in the decision itself.²⁶⁷

[L]essening the causation standard could also contribute to the filing of frivolous claims, which would siphon resources from efforts by employer, administrative agencies, and courts to combat workplace harassment. Consider in this regard the case of an employee who knows that he or she is about to be fired for poor

²⁶⁴ *Boyer-Liberto*, 786 F.3d at 304.

²⁶⁵ *Id.* at 287-88.

²⁶⁶ 133 S. Ct. 2517, 2523 (2013). See also Sandra F. Sperino and Suja A. Thomas, *Fakers and Floodgates*, 10 *Stan. J.C.R. & C.L.* 223, 224 (2014).

²⁶⁷ Transcript of Oral Argument at 32, 45-48, *University of Texas Southwestern Medical Ctr. v. Nassar*, 133 S. Ct. 2517, 2523 (2013).

performance, given a lower pay grade, or even just transferred to a different assignment or location. To forestall that lawful action, he or she might be tempted to make an unfounded charge of racial, sexual, or religious discrimination; then, when the unrelated employment action comes, the employee could allege that it is retaliation. If respondent were to prevail in his argument here, that claim could be established by a lessened causation standard, all in order to prevent the undesired change in employment circumstances. Even if the employer could escape judgment after trial, the lessened causation standard would make it far more difficult to dismiss dubious claims at the summary judgment stage.²⁶⁸

However, as at least one scholar has pointed out, the Court's concern about employees with such ill motives was based on nothing more than pure conjecture. Michael Zimmer took issue specifically with Justice Kennedy's point about frivolous lawsuits, noting that

The Court's opinion does not cite any cases that involved facts like the hypothetical; nor did the employer's counsel in oral argument. None of the briefs filed in the case cite any cases either. That is not a surprise since the hypothetical is based on a dubious assumption that employees who would engage in this scheming have some rather sophisticated knowledge of employment discrimination law.²⁶⁹

The concern applied to a "good faith" standard for making complaints should face similar critique. In addition, in the context of changing the standard to "good faith" when assessing reasonable belief that a particular incident violated Title VII, there is some additional insurance provided by juries evaluating such claims. The "good faith" standard suggests a sincerity of belief that must be evaluated by the factfinder.²⁷⁰ This is not an uncommon standard and is in use in multiple areas of law, relying on factfinders to determine whether the holder of the "good faith belief" is being honest and sincere in describing his or her state of mind.²⁷¹ Both judges

²⁶⁸ *Id.* at 2531-32.

²⁶⁹ Michael J. Zimmer, *Hiding the Statute in Plain View: University of Texas Southwestern Medical Center v. Nassar* 18 (Loyola Univ. Chi. Sch. of Law Pub. Law & Legal Theory Research, Paper No. 2013-011, 2014), available at <http://ssrn.com/abstract=2341828>. We must note here as well that there may be a similar critique of our proposal. We argue that average employees do not possess sophisticated legal knowledge to make an accurate determination about whether unlawful discrimination has actually occurred. At the same time, we contend that the current retaliation doctrine will directly impact employee behavior and incentivize suppression of anger. How can we reject employee's knowledge of employment law in one context but assume they are aware of retaliation law such that it impacts their behavior? However, we do not assume that employees will understand retaliation doctrine from reading cases or studying the law, but rather that they will come to understand the extremely limited nature of retaliation protection from watching what happens to their friends and colleagues. In contrast, it is virtually impossible to gain a clear understanding of the definition of actionable discrimination or a hostile work environment from observing a small sampling of cases. The inquiry is typically so fact specific that it is likely that a number of courts presented with the same facts will themselves reach different conclusions on the question of actionable discrimination. See *Gorod*, *supra* note 132, at 1490. Thus, employee understanding of law is reasonable in the retaliation context but not in determining the existence of unlawful discrimination.

²⁷⁰ See, e.g., *Ceja v. Rudolph & Sletten, Inc.*, 56 Cal. 4th 1113, 1116 (Cal. 2013) (concluding that "good faith" is a subjective standard involving a "genuine and honest belief.").

²⁷¹ *Id.* (involving good faith belief in the validity of a marriage). See also *Hogan v. New York Times Co.*, 211 F. Supp. 99, 110, (D. Conn. 1962) (involving a libel suit where court considered "good faith belief by the defendant in the facts as published"); *Bay v. Goodyear Tire & Rubber Co.*, 1980 U.S. Dist. LEXIS 11706, *50 (S.D. Tex. Apr.

and juries are competent at determining trumped up complaints from those based on sincere belief, essentially eliminating this possibly imaginary problem of a rise in frivolous complaints.²⁷²

CONCLUSION

There is no shortage of angry workers in the United States and around the world. From reports of angry Starbucks employees who have had their hours cut²⁷³ to angry workers in Italy's historic Pompeii site who allegedly tore down an ancient wall over a dispute with management²⁷⁴ to an assessment by the new UK Jobs Tsar that "[a] feeling among workers that they lack control or a voice in the workplace is fuelling 'misery and anger in British society,'"²⁷⁵ reports of employees upset over working conditions, loss of jobs to lower paid workers, and general discontent abound. Numerous news reports have attributed both the "Brexit" vote and the election of Donald Trump to angry working class individuals who feel left behind by an economy that has improved without benefiting them.²⁷⁶ It is in this context that we have sought to explore expressions of anger in the workplace and court-created retaliation doctrines that impact whether and how employees feel comfortable speaking up about their discontent. While the anger expressed by working class individuals around the world is not attributed to discrimination but to broader societal and economic forces affecting their jobs and future prospects, the plight and outspokenness of these workers has brought a renewed focus on anger in the workplace that should provide an opportunity to rethink existing laws that impact it.

That workers respond to the perception of discriminatory comments or treatment with feelings of anger is understandable. The outpouring of online allegations of sexual harassment and discrimination by former employees of tech companies is a testament to the fact that these feelings do not easily abate even after an employee has made the decision to quit.²⁷⁷ As a result, the important question for employers is how to address those emotions while the employee is still in the workplace—whether to encourage expression of anger in the form of complaints to management or suppress it by keeping silent or reporting it only to their co-workers and others who have no power to respond or effect change. The psychological research demonstrates that expression to management in any form whether it be in calm and respectful complaints or in

14, 1980) (examining defendant's good faith belief that Plaintiffs were not as qualified as the individuals selected because that belief would constitute a legitimate, non-discriminatory reason for its decision).

²⁷² See Gorod, *supra* note 131 at 1473 (good faith standard "will offer employers some protection from retaliation suits based on frivolous complaints without compromising the significant goals the retaliation provision can serve.")

²⁷³ See Cristina Alesci, *Starbucks attempts to appease angry workers, but falls short*, CNN MONEY (Aug. 4, 2016), <http://money.cnn.com/2016/03/09/news/economy/donald-trump-bernie-sanders-angry-america/>.

²⁷⁴ See Chris Kitching, *Angry Pompeii workers 'tear down part of ancient Roman house in clash with management*, (Feb. 1, 2017), Mirror, <http://www.mirror.co.uk/news/world-news/angry-pompeii-workers-tear-down-9734826>.

²⁷⁵ Robert Booth, *Workers' feelings of powerlessness fuelling anger, says jobs tsar*, THE GUARDIAN (Feb. 13, 2017), <https://www.theguardian.com/money/2017/feb/13/workers-feelings-of-powerlessness-fuelling-anger-says-jobs-tsar>.

²⁷⁶ See Jon Swaine, *White, working-class and angry: Ohio's left behind help Trump to stunning win*, THE GUARDIAN (Nov. 9, 2016), <https://www.theguardian.com/us-news/2016/nov/09/donald-trump-ohio-youngstown-voters>; see also Andrew Higgins, *Wigan's Road to 'Brexit': Anger, Loss and Class Resentments*, N.Y. TIMES (July 5, 2016), https://www.nytimes.com/2016/07/06/world/europe/wigan-england-brexit-working-class-voters.html?_r=0.

²⁷⁷ See *supra* text accompanying notes 1-8.

emotional or even intense outbursts is far healthier and more productive for both the worker at issue and the workplace overall. With this knowledge in mind, we propose a rethinking of court-created retaliation doctrines that discourage such displays of worker anger. The “objectively reasonable belief” doctrine protects only those employees who complain about conduct that courts would deem to be unlawful discrimination while the “manner of the complaint” doctrine validates employers who claim “insubordination” as the legitimate non-retaliatory reason for discharge any time any employee makes a discrimination complaint in an openly angry or emotional manner. The net impact of these doctrines is clear—employees, upon seeing how these doctrines play out for their co-workers will (and should) choose to keep silent in the face of perceived discrimination. That choice, in turn, has two distinctly negative consequences: (1) the overall goals of Title VII are hindered as fewer employees come forward to make complaints and (2) workplace culture and worker health and productivity suffer as angry emotions are bottled up. While scholars and workers’ advocates have for years highlighted the former, our aim in this article is to illuminate the latter consequence and to propose changes that benefit both workers and their employers. While it is rare that a proposal to expand workers’ rights and protections also benefits employer interests, that is decidedly the case here. It is time for courts to take note of the real-world social consequences of their doctrines and to make changes for the benefit of all.