The Necessity of Expanding Protection from Retaliation for Employees Who Complain About Hostile Environment Harassment

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The Necessity of Expanding Protection from Retaliation for Employees Who Complain About Hostile Environment Harassment

by Ernest F. Lidge III*

I. Introduction

Our nation’s employment discrimination laws contain an inherent contradiction. The law imposes a greater duty on employees to complain when they have suffered a discriminatory hostile environment than when they have been subject to a discriminatory tangible employment action. However, the anti-retaliation laws, as a practical matter, provide less protection for such complaints of harassment. The laws’ lack of protection for employees opposing a hostile environment can be demonstrated by the following actual cases. Courts have found complaints about the following conduct unprotected, leaving the employer free to discipline the complaining employee.

1. While at work watching television reports about the capture of two African-American suspects in a series of random sniper shootings, a white employee exclaimed, in the presence of an African-American fellow employee, “they should put those two black monkeys in a cage with a bunch of black apes and let the apes f_ _k them.” When the African-American employee complained, the court found his complaints unprotected.1

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2. An employee’s supervisor made two highly sexual comments, referring very graphically to pubic hair and male masturbation. The court found the employee’s complaints unprotected.\(^2\)

3. A co-employee called a Hispanic employee a “sp*c.” A court found that the employee’s complaint about the incident was unprotected.\(^3\)

There are other examples of courts failing to offer protection to complaints about discriminatory harassment.\(^4\) The reason for this lack of protection is the courts’ adoption of a


[H]e asked Plaintiff whether she found him attractive; he asked Plaintiff why she was not wearing her wedding ring; . . .He asked Plaintiff where she lived, because he said he had a grass-cutting business on the side and wanted to cut her grass [:]. . .[he] told her he found her attractive, asked a co-worker whether Plaintiff would be willing to “mess around” with him [:]. . .asked Plaintiff to visit his office, even though he had no apparent job-related reason for her to be there[: and]. . .would sit near Plaintiff in the office and “act as though he was using the phone” but instead would “just look at [Plaintiff].”

\textit{Id.} at *2.

In spite of the fact that the EEOC had found that the manager’s actions had violated the employer’s anti-harassment policy and the court itself said that the comments “may indeed have violated that policy” (\textit{id.} at *9), the court found that the plaintiff’s complaints about the comments were not protected because she could not “show that her belief that she was opposing unlawful sexual harassment was objectively reasonable.” \textit{Id.} at *13. Thus the employer’s anti-harassment policy encouraged reporting the manager’s comments but the employer was free to fire her for such reporting.
“reasonable belief” test to determine whether an employee’s opposition to employer actions is protected from employer retaliation.

Employees who oppose an employer’s discriminatory employment practice are protected from retaliation only if they “reasonably believe” that the complained–of conduct violated the law. It is usually not difficult for an employee who complains that she suffered a tangible employment action, such as a pay cut or a demotion, to meet this test. However, it may be very difficult for an employee suffering an allegedly discriminatory hostile environment to do so.

Other cases also show some courts’ failure to protect employees who complain about harassment. See, e.g., Session v. Anderson, 719 F.Supp.2d 650, 651-54 (W.D. Va. 2010) (stating that a lighter-skinned plaintiff teacher’s complaint about a darker-skinned superintendent’s racially derogatory comments directed at plaintiff—“oh, you have that good hair” and “some of us have more melanin in our skin than others”—was unprotected); Ferguson v. New Venture Gear, Inc., No. 5:04-CV-1181 (FJS/GHL), 2009 WL 2823892, at **6-7 (N.D.NY. Aug. 31, 2009) (finding that African-American plaintiff employees’ complaints about “inappropriate” comments made by white employees were unprotected; white employees had grumbled “that Martin Luther King, Jr. Day – and not Columbus Day – was a paid holiday” and said “that if five more black people or the Jackson Five were killed the employees would receive five vacation days”); cf. Tyrrell v. Oaklawn Jockey Club, No. 6:10-CV-06102, 2012 WL 5397610 (W.D. Ark. Nov. 2, 2012). In Tyrrell, African American co-workers engaged in heavy use of the n-word in the plaintiff African-American employee’s presence, the court left open the question whether the latter’s complaints about the language were unprotected. The court found that the co-workers’ language did not rise to the level of a hostile environment. Id. at *3-*4. In regard to her retaliation claim, the court assumed, without deciding, that the plaintiff Tyrrell’s complaints about her co-workers’ language were protected. Id. at *5. The plaintiff, however, had failed to show that there was a causal connection between her complaints and her discharge. Id. at *5-*6. The court, therefore granted summary judgment in favor of the employer on both the hostile environment and retaliation claims. Id. at *7.
Discriminatory harassing conduct is unlawful only if it is severe or pervasive enough to rise to the level of an abusive, hostile working environment that alters the employee’s terms and conditions of employment. Thus, if an employee is subjected to harassing conduct and complains about it, the employer is free to fire the employee unless the employee “reasonably believed” that the harassing conduct was severe or pervasive enough to alter the employee’s terms or conditions of employment. Most employees will not be aware of this test. A typical employee probably believes that most harassment based on race, sex, color, religion, national origin, age, or disability is illegal. And even assuming that an employee is aware that harassing conduct must be severe or pervasive to be illegal, the employee must guess whether her workplace environment meets that test. It is difficult for a lawyer, much less an employee, to predict when harassing conduct creates an unlawful hostile environment. If a court finds that an employee has guessed wrong and finds that the employee’s belief that the harassing conduct was unlawful was not “reasonable,” the employer will be free to discharge her in retaliation for her complaints. Yet the law and public policy demand that employees make complaints about harassing conduct.

If a supervisor or co-employee engages in sexual, racial, religious or other discriminatory harassment against an employee, the law imposes harsh consequences if the employee fails to complain about the harassment. The failure to report will often result in defeat for an employee’s harassment claim for two reasons. First, a court may find that the employee failed to demonstrate the conduct was “unwelcome.” Second, an employee’s failure to report a supervisor’s harassment may result in a court’s refusal to find the employer liable for the harassment. Furthermore, there are important policies supporting the early reporting of harassing conduct. Policies underlying the employment discrimination laws support the private resolution
of disputes, employer discipline of harassers, and nipping harassment in the bud before it becomes severe or pervasive. For these policies to be effectuated, employees must feel free to complain about harassing conduct.

When a supervisor allegedly discriminates against an employee by cutting her pay, demoting her, denying a promotion, or some other tangible action, the employee has no duty to complain about the action to company officials. In a logical world, the employee who complains about harassment would receive greater protection from Title VII’s anti-retaliation provision than an employee who complains about a discriminatory tangible employment action. The law, however, as a practical matter, often gives employees who complain about harassment less protection. An employee can easily be caught between the Scylla mandating that she report harassment and the Charybdis providing inadequate protection from employer retaliation if she reports. The Supreme Court has called an analogous situation a “catch-22” for employees. The problem can be further illustrated by two hypotheticals.

Suppose Tom Harris, a male supervisor employed by Acme Company, shows a photo of a scantily-clad woman to a female subordinate, Joan Larson, and tells her, “You would look

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5 As stated by one federal appellate judge:

In Homer’s Odyssey, Odysseus is presented with a difficult choice: he must sail through straits that are bracketed by two monsters, and he is forced to navigate closer to one or the other. One choice, Scylla, is a six-headed creature who is certain to eat six of his crewman, while the other, Charybdis, spews forth a whirlpool that poses an uncertain risk to the entire ship and crew. On the advice of the sorceress Circe, Odysseus chose Scylla, and six of his men perished.


good in this clothing at the office.” Joan Larson immediately complains to higher management, informing them that she strongly objects to such sexual harassment. The next day Acme Company informs her that she has been terminated for poor performance. The company has not previously complained about her performance and Joan believes the company terminated her because she complained about the supervisor’s comment. Joan Larson files a charge with the Equal Employment Opportunity Commission (“EEOC”), alleging that she had been fired in retaliation for opposing her supervisor’s sexual harassment.

Or suppose, before the start of a department meeting, George Jones, an Acme supervisor and Protestant, is discussing the day’s events with employee John Smith, a Roman Catholic. A new Pope has been elected, and Jones remarks to Smith, “Hey, you’re one of those mackerel-eating Papists, aren’t you?” Later that day Smith talks to his manager, Mike Morris, about Jones’ comment. Jones says that he believes he has been harassed because of his religion. Morris tells Jones “You are too sensitive to work here. You’re fired.” Smith files a charge with the EEOC, alleging that the company fired him because he had opposed his supervisor’s religious harassment.

Although the EEOC may find reasonable cause that the employer’s termination of Larson and Smith violated Title VII, many, if not most, courts would find that Joan Larson and John Smith had not engaged in conduct protected by Title VII because “no one could reasonably believe” that the supervisor’s single act of harassment violated Title VII. Therefore, Acme was free to terminate them for their complaints.

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7 For a discussion of the EEOC’s view of protected conduct, see infra text accompanying note 234.

This “reasonable belief” test may be appropriate when an employee has complained about a discriminatory tangible employment action. However, applying this “reasonable belief” test to employee complaints about sexually hostile environments or applying this test to employee complaints about hostile environment cases based on race, religion, national origin, age or disability, undermines other Title VII principles. As in the two hypotheticals, if the

9 See, e.g., id. (applying, without adopting, the Ninth Circuits “reasonable belief” test and finding that “no one could reasonably believe that [a single crude sexual comment] . . . violated Title VII”); Crews v. Ennis, Inc., No. 4:12-CV-00009, 2012 WL 5929032, at *9 (W.D. Va. Nov. 27, 2012) (finding that plaintiff could not reasonably believe that two extremely graphic sexual comments constituted an unlawful hostile environment).

10 Courts have applied the reasonable belief test in a number of different contexts, sometimes finding the complaints protected and sometimes finding them unprotected. See, e.g., Trujillo v. Henniges Auto. Sealing Sys. N. Am., Inc., 495 Fed. Appx. 651, 656 (6th Cir. 2012) (when employer’s senior manager made a number of racial comments in a short time period, a “reasonable person in [the plaintiff/employee’s] position, particularly one without legal training, could conclude that [the manager’s] comments constituted [racially] hostile environment discrimination in violation of Title VII”); Loudermilk v. Best Pallet Co., LLC, 636 F.3d 312, 315-16 (7th Cir. 2011) (stating that the employee’s complaints were protected when the employee opposed the employer’s condonation of a racially hostile workplace that the employee reasonably believed violated Title VII); EEOC v. Evergreen Alliance Golf Ltd., LP, No. CV-11-0662-PHX-JAT, 2013 WL 4478870, at *9-*10 (D. Ariz. Aug. 21, 2013) (finding in ADA retaliation claim that plaintiff employee’s complaint about manager’s use of the word “retarded” was not protected because employee could not have had a reasonable belief that the single use of the term created a disability-based hostile environment); Munoz v. Centro Latino Ser-Jobs for Progress, No. C09-05644-RJB, 2010 WL 4063349, at *6-*8 (W.D. Wash. Oct. 12, 2010) (finding that plaintiff employee’s complaint about several derogatory comments made about Latinos by managers were protected because employee had a reasonable belief that the comments created a hostile environment based on national origin). Cf. Short v. Battle Ground Sch. Dist., 169 Wash. App. 188, 205-06, 279 P.3d 902, 912 (Wash. Ct. App. 2012) (stating that under Washington state law, “reasonable belief” test applied to employee’s retaliation claim based on employee’s opposition to employer’s alleged unlawful failure to accommodate employee’s religious practices and assuming, without deciding, that employee had met this threshold).
employees’ complaints do not rise to the level of a reasonable belief that Title VII was violated, then the employees’ complaints would be unprotected under the retaliation clause and the employer could freely discipline them. The problem is aggravated by the fact that the test for what constitutes an unlawful hostile environment is very nebulous. It is often difficult to predict whether a court will find that certain harassing conduct has risen to the level where it violates the law. A further layer of unpredictability is added by the “reasonable belief” test for protection under the antiretaliation provisions. In essence, an employee’s complaints about harassing conduct will not be protected from employer retaliation unless the employee had a “reasonable belief” that a “reasonable person” would find the working environment hostile or abusive.\(^{12}\) It is difficult for a trained attorney to predict with certainty when the complained of conduct would justify a reasonable belief that an unlawful hostile environment has been created. It is very difficult for an average employee to make such a prediction. This uncertain standard deters employees from complaining and this directly contravenes several Title VII policies that encourage, and even demand, employee complaints about harassment.

First, in any hostile environment harassment case, the employee must show that the complained-of activity was “unwelcome.”\(^{13}\) One of the most effective ways an employee can

\(^{11}\) Three earlier articles describing some aspects of the problem in the sexual harassment context, but taking a different approach than this article, are B. Glenn George, Revenge, 83 Tul. L. Rev. 439 (2008); Brianne J. Gorod, Rejecting “Reasonableness”: A New Look at Title VII’s Anti-Retaliation Provision, 56 Am. U.L. Rev. 1469 (2007); 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 (2007).


\(^{13}\) See Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 68 (1986) (“The gravamen of any sexual harassment claim is that the alleged sexual advances were ‘unwelcome’”) (quoting 29 C.F.R. § 1604.11(a) (1985)).
establish the harasser’s actions were unwelcome is by showing that she complained to the
employer about those actions. Requiring an employee, on the one hand, to prove
“unwelcomeness,” and, on the other hand, allowing the employer to fire her for complaining,
puts the employee in an impossible position.

Second, showing that an employee complained to the employer about harassing conduct
is a key element in holding an employer vicariously liable for the harasser’s actions. In the case
of a co-employee harasser, the plaintiff must show that the employer knew or should have known
of the harassment and failed to take corrective action.\textsuperscript{14} In the case of a supervisor harasser, the
employer may escape liability if it proves “that the employer exercised reasonable care to
prevent and correctly prompt any sexually harassing behavior” (usually by promulgating and
enforcing an anti-harassment policy with a complaint procedure), and establishing “that the
plaintiff employee unreasonably failed to take advantage of any preventive or corrective
opportunities provided by the employer or to avoid harm otherwise.”\textsuperscript{15} If an employee fails to
complain about harassing conduct, then the employee has “failed to take advantage” of an
employer’s anti-harassment policies. Thus, in cases involving harassment by either supervisors
or non-supervisors, the operation of the law strongly encourages a victim to complain of
unwanted sexual harassment. Allowing an employer to terminate an employee for making such
complaints undermines this policy.

Third, a related policy mandates that employers act upon complaints that could rise to the
level of a hostile environment. When faced with an employee’s complaints about hostile
environment harassment, employers have a duty to “correct promptly any sexually harassing

\textsuperscript{14} Faragher v. City of Boca Raton, 524 U.S. 775, 799-800 (1998) (quoting 29 C.F.R. § 1604.11(d) (1997)).

\textsuperscript{15} Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998).
behavior." Generally, this requires the employer to take action reasonably calculated to end the harassment. For an employer to take action against harassment, the employer has to know about it.

Fourth, employers, employees and the nation have an interest in providing employers with the opportunity to deal with harassing behavior before the behavior becomes severe and pervasive, \textit{i.e.}, before it develops into an unlawful hostile environment. Assuming that the terms black monkey/black ape; the heavy use of the n-word, or graphic references to male masturbation and pubic hair do not rise to the level of a hostile environment, it is still desirable that employees report the conduct to allow the employer to deal with it before it becomes worse. It is a complete contradiction to hope that employers will prevent harassing conduct \textit{before} it becomes severe or pervasive while only protecting employees from retaliation when they reasonably believe that it \textit{has} become severe and pervasive.

Fifth, Title VII favors the informal, in-house, resolution of discrimination complaints, including complaints of discriminatory harassment. Allowing an employer to fire an employee for complaining about harassing conduct undermines this policy. As one court has stated, Title VII’s “central purpose” is “the elimination of employment discrimination by informal means” and “one of the chief means” of meeting that goal is “the frank and non-disruptive exchange of

\begin{itemize}
  \item \textit{Id.}
  \item \textit{See, e.g.}, EEOC v. Cent. Wholesalers, Inc., 573 F.3d 167, 177 (4th Cir. 2009); Nichols v. Azteca Rest. Enters., Inc. 256 F.3d 864, 875 (9th Cir. 2001).
\end{itemize}
ideas between employers and employees.”

Title VII’s central purpose cannot be achieved in the hostile environment context unless the “reasonable belief” test is relaxed and complaints about hostile environments receive broad protection from employer retaliation.

These policies favoring employee reporting of harassment to the employer are thwarted by the retaliation “reasonable belief” standard. This Article will examine the need for a modification of the “reasonable belief” rule when an employee claims that the employer retaliated against her for complaining about hostile environment harassment. Part II summarizes the law of harassment based on the employee/victim’s membership in a group protected by the employment discrimination laws. Included is a discussion of the two types of sexual harassment, quid pro quo and hostile environment and a discussion of hostile environments based on an employee’s membership in one of the other groups protected by the employment discrimination laws—race, religion, national origin, age, and disability. Part II also discusses the elements of a hostile environment claim. In addition to showing that the harassment was based on membership in a protected group, the plaintiff must show that the harassment altered the terms and conditions of her employment (that the harassment was severe or pervasive). In addition, the plaintiff-employee must show that the complained-of harassment was “unwelcome.” This Part also examines what an employee must show to impose vicarious liability on the employer. In addition, this Part makes several other points about the law surrounding hostile environments based on an employee’s membership in a protected group. Often, an employee cannot guess when a hostile environment has been created or when a person could “reasonably believe” that a hostile environment has been created. Furthermore, the operation of the law strongly encourages an employee to complain in order to demonstrate “unwelcomeness” and in order to impose

19 Berg v. LaCrosse Cooler Co., 612 F.2d 1041, 1045 (7th Cir. 1980).
vicarious liability on the employer. Thus, the policies behind the employment discrimination laws favor early reporting in order that the problem can be resolved informally and to allow the employer to take action to stop the harassment.

Part III of this Article examines the law of retaliation under Section 704 of Title VII and the comparable provisions in the ADEA and the ADA. This Part examines the two basic types of retaliation cases: participation and opposition claims. Under the opposition clause, the one relevant to this Article, most courts require that the plaintiff establish that she had a “reasonable belief” that the employer violated the law.

Part IV of this Article examines the tensions between the realities of the law of hostile environment harassment and the “reasonable belief” requirement. The law of hostile environment harassment strongly encourages complaining to the employer about the unwanted actions while the “reasonable belief” requirement discourages reporting.

Part V discusses authorities that support broader protection for employee complaints about hostile environment harassment and Part VI proposes a test that would grant broad protection. Under the proposed test, if the complained-of action is a tangible employment action, then the reasonable belief test is appropriate. However, when an employee complains of non-tangible employment actions/hostile environment harassment, courts should apply a different test. If the unwelcome, complained-of conduct, repeated on a daily basis, could eventually rise to the level of a hostile environment, then courts should consider the complaints “protected” conduct under Section 704 of Title VII and the equivalent anti-retaliation provisions of the ADEA and the ADA. If the conduct, even though repeated daily, would never rise to the level of a hostile environment, then courts should consider the conduct unprotected.

II. Harassment
A. There are Four Elements to a Harassment Claim

The employment discrimination laws ban hostile environments based on membership in a protected group. The employment discrimination laws do not expressly ban such harassment. Rather, harassment is a type of discrimination. Title VII makes it unlawful for an employer “to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”20 In Meritor Savings Bank, FSB v. Vinson,21 the Supreme Court reasoned that “when a supervisor sexually harasses a subordinate because of the subordinate’s sex, that supervisor ‘discriminate[s]’ on the basis of sex.”22 Thus, sexual harassment is a type of sex discrimination.23 Similarly, when a supervisor or co-employee harasses another employee because of her race, religion, national origin or age or disability, that is a form of racial discrimination, national origin discrimination, age discrimination or disability discrimination.

The elements of a hostile environment claim are the same, regardless of whether the claim is based on sex or one of the other protected groups.24 There are four elements to a

22 Id. at 64. Courts have recognized two types of sexual harassment: quid pro quo, “a demand that an employee provide sexual favors to gain an employment benefit or to avoid an adverse employment action” and hostile environment, “defined as a workplace permeated with unwelcome intimidation, ridicule, or insult, based on the plaintiff’s membership in a protected class, that is sufficiently severe or pervasive to create an abusive work environment.” 1 BARBARA T. LINDEMANN, PAUL GROSSMAN & C. GEOFFREY WEIRICH, EMPLOYMENT DISCRIMINATION LAW 20-7 (5th ed. 2012). This article is concerned with the latter form of harassment, hostile environment harassment.
23 1 LINDEMANN, ET AL., supra note 22, at 20-4 (“sexual harassment is a form of gender discrimination”).
24 Harrison v. Metro. Gov’t, 80 F.3d 1107, 1118 (6th Cir. 1996) (“the elements and burdens of proof that a
First, the plaintiff must establish that the discrimination occurred “because of . . . sex” or because of his membership in one of the other protected groups. Second, the plaintiff must establish that the conduct was “sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working requirement.” Third, the plaintiff must establish “that the alleged sexual advances were ‘unwelcome.’” Fourth, there

Title VII plaintiff must meet are the same for racially charged harassment as for sexually charged harassment”); EEOC, Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors, No. 915.002 (June 18, 1998) (“the Commission has always taken the position that the same basic standards apply to all types of prohibited harassment”), available at http://www.eeoc.gov/policy/docs/harassment.html”; 1 LINDEMANN, ET AL., supra note 22, at 20-101 (“[c]laims of harassment based on characteristics other than sex are evaluated under the same legal standard as applied to sexual harassment claims”); see also EEOC v. Evergreen Alliance Golf Ltd., LLP, No. CV-11-0662-PHX-JAT, 2013 WL 4478870, at *9 (D. Ariz. Aug. 21, 2013) (stating that the Ninth Circuit had not decided whether hostile environment claims exist under the ADA, but if such a claim did exist, it “would be governed by the same legal standards as hostile work environment claim [sic] under Title VII”) (quoting Road v. Umatilla Cnty., 526 F. Supp. 2d 1164, 1176 (D. Or. 2007)).


27 See, e.g., EEOC v. Sunbelt Rentals, Inc., 521 F.3d 306, 314 (4th Cir. 2008) (in a case involving hostile environment religious harassment, the plaintiff “must . . . establish that the harassment was based on [the employee’s] religion”).


29 Id. at 68.
must be a basis for establishing the employer’s liability for the acts of the harasser.\textsuperscript{30} The last three elements are of particular relevance to the discussion at hand.

\textbf{B. It is Often Difficult to Determine When Harassing Conduct has Become Severe or Pervasive}

In regard to the requirement that the plaintiff establish a hostile or abusive working environment, the Supreme Court in \textit{Harris v. Forklift Systems, Inc.},\textsuperscript{31} stated that the conduct had to be “severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive.”\textsuperscript{32} Furthermore, the victim had to “subjectively perceive the environment to be abusive.”\textsuperscript{33} In determining whether the conduct rose to the level of creating a hostile or abusive environment the court listed a number of factors: “the frequency of the 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.”\textsuperscript{34} The Court noted that the issue of whether particular conduct has reached the level of actionable harassment is “one of the issues most frequently litigated in hostile environment cases” and “drawing a precise and consistent dividing line is not a simple task.”\textsuperscript{35} Certain severe conduct, occurring only once, may constitute

\textsuperscript{30} \textit{See id.} at 72 (stating that courts should look at agency principles to guide them in determining employer liability for the acts of the harasser).

\textsuperscript{31} 510 U.S. 17 (1993).

\textsuperscript{32} \textit{Id.} at 21.

\textsuperscript{33} \textit{Id.}

\textsuperscript{34} \textit{Id.} at 23.

\textsuperscript{35} \textit{LINDEMANN, ET AL., supra} note 22, at 20-41.
a hostile environment. However, in many, if not most, circumstances the plaintiff will have to establish repeated actions. This makes it difficult to determine when the conduct rises to the level of a hostile environment. As the *Harris* Court acknowledged, there is not a “mathematically precise test” and, as one treatise has stated, “[c]ourts have reached different conclusions about how severe or pervasive verbal harassment must be to constitute actual harassment.” The following examples illustrate the problem.

In *Powell v. Yellow Book USA, Inc.*, the plaintiff Ms. Powell alleged that a co-employee, Ms. Kreuz, on several occasions, “talked about her (Ms. Kreuz’s) sexual exploits outside the office, described particular fantasies that she harbored concerning co-workers, and propositioned [the plaintiff] for sex.” The court found that such harassment was not severe or pervasive enough to alter the plaintiff’s terms or conditions of employment and thus did not constitute actionable harassment. Similarly, in *Patt v. Family Health Systems, Inc.*, the plaintiff alleged that male colleagues made eight gender-related comments, including the “statement to a female nurse that ‘the only valuable thing to a woman is that she has breasts and

36 Id. at 20-42, 20-48 to -49; cf. Vance v. Southern Bell Tel. & Co., 863 F.2d 1503, 1511 (11th Cir. 1989) (holding in racial hostile environment case that two occasions of a noose hanging over an African-American employee’s desk along with several other incidents could create a hostile environment).

37 Id., at 20-46 (“[a] hostile environment claim that does not usually involve “severe” conduct normally will require a showing of multiple instances”).

38 *Harris*, 510 U.S. at 22.

39 1 LINDemann, ET Al., supra note 22, at 20-46.

40 445 F.3d 1074 (8th Cir. 2006).

41 Id. at 1077.

42 Id.

43 280 F.3d 749 (7th Cir. 2002).
a vagina.” The court found that, these comments, while “offensive, . . . were too isolated and sporadic to constitute severe or pervasive harassment.” Similarly, in a racial harassment case, \textit{Canady v. Wal-Mart Stores, Inc.}, the plaintiff’s supervisor told the African-American plaintiff-employee that he (the supervisor) had a reputation as a “slave driver,” asked the plaintiff, “What’s up n..ga?,” referred to the plaintiff as a “lawn jockey,” said that all African Americans looked alike, and stated that his “skin color seemed to wipe off into towels.” Nevertheless, the remarks “did not give rise to an actionable claim of racial hostility.”

On the other hand, in \textit{Aponte-Rivera v. DHL Solutions (USA) Inc.}, the plaintiff alleged that her supervisor and another manager made several gender-based harassing comments. The managers allegedly stated that they had been taught that “women were supposed to do household chores”; referred to a woman executive as “jeficita” or “little boss”; said that a man had to run the operation; and referred to females as “dumbies,” “brutas,” and “pendela” (another perjorative term for females). The employer argued that the comments were not severe or pervasive. The court, however, found that they were sufficiently pervasive that a reasonable jury could find they created a hostile environment.

\footnote{\textit{Id.} at 754.}
\footnote{\textit{Id.}}
\footnote{440 F.3d 1031 (8th Cir. 2006).}
\footnote{\textit{Id.} at 1033.}
\footnote{\textit{Id.} at 1035.}
\footnote{650 F.3d 803 (1st Cir. 2011).}
\footnote{\textit{Id.} at 809.}
\footnote{\textit{Id.} at 808.}
\footnote{\textit{Id.} at 809.}
As these examples illustrate, it is difficult to tell when a court will find that the work environment has reached the level of an illegal hostile environment. A further level of uncertainty is engendered by the “reasonable belief” test. In order for an employee’s complaints about harassment to be protected from employer retaliation, the employee must reasonably believe that the harassment is severe or pervasive. If the harassed employee complains before it has reached that level, the complaints will be unprotected and the employer will be free to retaliate against the employee/victim. Yet the operation of the law and policies favored by the employment discrimination laws mandate that employees report harassment and report it early.\footnote{See infra Parts II.C. through II.E.}

The problem of predictability is compounded by the fact that the “common sense” definition of sexual harassment is different from the legal “severe or pervasive” definition. Many, if not most, employees would believe that sexually or racially offensive comments constitute sexual or racial harassment. This is borne out by the fact that employers’ harassment policies often define harassment in very broad terms. Thus, for example, one employer’s harassment policy defined sexual harassment as “encompass[ing] a wide variety of activities,” including “unwelcome sexual advances or comments,” “sexual innuendo,” and “pressure for sexual activity.”\footnote{See Dorsey v. Fulton Cnty., No. 1:10-CV-679-TWT-ECS, 2012 WL 3871921, at *2 (N.D. Ga. Aug. 1, 2012). See also Glaskox v. Harris Cnty., Tex., 537 Fed. Appx. 525, 527 (5th Cir. 2013) (employer’s official sexual harassment policy stated that “[s]exual harassment may constitute . . .verbal abuse or kidding that is sexually oriented and considered unacceptable by another individual . . .or any other tasteless, sexually oriented, comments, innuendos, or actions that offend others’); Bond v. City of Bethlehem, 505 Fed. Appx. 163, 165 (3d Cir. 2012) (employer’s sexual harassment policy prohibited “excessively offensive remarks and inappropriate use of sexually explicit or offensive language”).} Other employer’s policies are often similar.\footnote{This engenders an added}
difficulty. An employer’s harassment policy may demand reporting of conduct, while the employer is free to retaliate against the employee for so reporting.

It will often be difficult for a lawyer to predict whether a given set of facts rise to the level of an unlawful hostile environment or not. How much more difficult would such a prediction be for a non-legally trained employee? Yet, if an employee complains about sexually based conduct and the employer terminates him for complaining, his complaints may be considered unprotected by the anti-retaliation provision of Title VII. A court may find that his conduct is unprotected because the plaintiff could not reasonably believe that the conduct was unlawful. Yet if the plaintiff does not complain, a future law suit might be barred because he might not be able to meet the two other elements of a Title VII claim, proving unwelcomeness and establishing employer liability.

C. The Law Mandates Employee Reporting in Order for the Plaintiff-Employee to Establish that the Harassment was “Unwelcome”

The plaintiff must establish that the complained-of conduct was “unwelcome.” As one treatise notes about sexual harassment:

Unwelcomeness is usually examined by looking at the complainant’s participation in or response to the conduct. Although the complainant has the burden of proving that a sexual advance was unwelcome, he or she need not necessarily show resistance. In order to establish liability, however, the complainant will usually have to show that he or she complained of the conduct or that the employer otherwise knew of the offensive conduct. Thus, even though the

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55 See e.g., Glaskox v. Harris County, Texas, ___Fed. Appx.____, 2013 WL 3957767, at *1 (5th Cir. 2013) (employer’s official sexual harassment policy stated that “[s]exual harassment may constitute . . .verbal abuse or kidding that is sexually oriented and considered unacceptable by another individual. . .or any other tasteless, sexually oriented, comments, innuendos, or actions that offend others”); Bond v. City of Bethlehem, 505 Fed. Appx. 163, 165 (3d Cir. 2012) (employer’s sexual harassment policy prohibited “excessively offensive remarks and inappropriate use of sexually explicit or offensive language”).
complainant’s objection or resistance may not be dispositive, the absence of some conduct or comment indicating that the alleged harasser’s conduct was unwelcome is highly relevant.56

Thus, for example, in Munoz v. Centro Lantino Ser-Jobs For Progress,57 the plaintiff alleged, *inter alia*, that he had suffered a sexually and racially hostile work environment. The court found that the plaintiff had not proven that the conduct was unwelcome, because there was insufficient evidence that he had informed the employer of his objections to the insensitive comments.58 The necessity of establishing “unwelcomeness” applies to other forms of illegal harassment.59

**D. The Law Mandates that the Employee Complain in Order to Establish the Employer’s Liability for the Harassing Conduct**

Another element of a sexual harassment claim also punishes a plaintiff for failing to complain about sexual harassing conduct. Under our federal employment discrimination laws, the court must find that the employer is liable for the actions of the harasser. In regard to the principles behind holding employer’s liable for the actions of an employee/harasser, the courts have distinguished between situations where the harasser is a supervisor and situations where the harasser is not a supervisor. In two cases decided the same day, Burlington Industries, Inc. v.

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58 *Id.* at *10. *See also* Reed v. Shepard, 939 F.2d 484, 492 (7th Cir. 1991) (agreeing with district court that plaintiff’s failure to prove “unwelcomeness” was fatal to her sexual harassment claim and noting that the plaintiff “was quizzed on why she tolerated *without complaint* activity she now characterizes as harassing and abusive”) (emphasis added).

Ellerth and Faragher v. City of Boca Raton, the Supreme Court established the principles for courts to use when the harasser is a supervisor who has “immediate (or successively higher) authority over the employee.” When the harassment results in a tangible employment action, such as “hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits,” then the employer will be vicariously liable. If, however, the supervisor’s harassment does not result in a tangible employment action, the employer may raise a two-part affirmative defense. In order to escape liability, the employer must prove, by a preponderance of the evidence: “(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.” In regard to the first element of the defense, the employer’s promulgation of an anti-harassment policy with an appropriate complaint procedure is highly relevant and an employer’s demonstration of the employee’s “unreasonable failure to use any complaint procedure provided by the employer . . . will normally suffice to satisfy the employer’s burden under the second element of the

62 Ellerth, 524 U.S. at 765. In Vance v. Ball State Univ., __ U. S. __, __, 133 S.Ct. 2434, 2439 (2013), the Supreme Court held that “an employee is a ‘supervisor’ for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim . . . .”
63 Ellerth, 524 U.S. at 761.
64 Id. at 765.
65 Id.
defense.” The principles enunciated in Ellerth and Faragher regarding an employer’s liability for a supervisor’s creation of a hostile environment have been applied to hostile environments based on protected categories other than gender.

Thus, in a typical supervisor-generated hostile environment case not involving a tangible employment action, the victim’s filing of a complaint of sexual harassment can be crucial. As one treatise states, “if an employee fails to assert an internal complaint of sexual harassment, courts typically find the employee unreasonably failed to take advantage of the preventive or corrective opportunities provided by the employer.” There are many cases in which the failure to file a complaint was fatal to the employee’s employment discrimination claim.

66 See, e.g., Ayissi-Etoh v. Fannie Mae, 712 F.3d 572, 577-78 (D. C. Cir. 2013) (applying Faragher and Ellerth to § 1981 claim of racially hostile work environment). See also EEOC, Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors, No. 915.002 (June 18, 1998), available at http://www.eeoc.gov/policy/docs/harassment.html. (“[t]he rule in Ellerth and Faragher regarding vicarious liability applies to harassment by supervisors based on race, color, sex (whether or not of a sexual nature), religion, national origin, protected activity, age, or disability”).

67 1 LINDEMANN, ET AL., supra note 22 at 20-88. See also Matvia v. Bald Head Island Mgmt., Inc., 259 F.3d 261, 269 (4th Cir. 2001) (plaintiff’s failure to use “the company’s complaint procedure will normally suffice to satisfy [the company’s] burden under the second element of the defense” (quoting Barnett v. Applied Radiant Energy Corp., 240 F.3d 262, 267 (4th Cir. 2001)); Kerri Lynn Stone, Consenting Adults?: Why Women who Submit to Supervisory Sexual Harassment are Faring Better in Court than those who Say No. . . And Why They Shouldn’t, 20 YALE J.L. & FEMINISM 25, 40 (2008) (“[w]here a plaintiff who did not suffer a tangible employment action fails to report her harassment, this failure will be fatal to her claim unless the court finds that the defendant’s antiharassment policy was missing or defective or that the plaintiff’s behavior was reasonable”).

68 See 1 LINDEMANN, ET AL., supra note 22, at 20-88 n. 304 (listing cases).
If the harasser, however, is not a supervisor, courts apply a negligence standard.\footnote{Faragher v. City of Boca Raton, 524 U.S. 775, 799 (1998).} An employer will be liable for a co-worker’s harassment of the victim if the employer “knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.”\footnote{Id. at 799-800 (quoting 29 C.F.R. § 1604.11(d) (1997)).} A similar standard is applied to harassment by non-employees, such as a customer.\footnote{See 1 LINDEMANN, ET AL., supra note 22, at 20-99 n.336 (quoting 29 C.F.R. § 1604.11(e) (“an employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisor employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action.”).} Obviously, one efficient way of proving that the employer “knew” of the harassment is for the employee to complain about it. The failure to prove the employer’s knowledge of the harassment has been fatal to the plaintiff in a number of Title VII cases.\footnote{See, e.g., Neview v. D.O.C. Optics Corp., 382 Fed. Appx. 451, 456 (6th Cir. 2010) (finding that the plaintiff had “not established a hostile work environment claim, because she failed to provide notice to her employer of [her co-worker’s] alleged offensive behavior”); Burrell v. Star Nursery, Inc., 170 F.3d 951, 955 (9th Cir. 1999) (since plaintiff failed to come forward with evidence that the defendant employer’s management knew or should have known that co-employees harassed her, the employer cannot be held liable for the co-employee’s actions).}

E. Important Policies Also Mandate that Employees Report Harassment Early

In addition to the fact that the operation of the employment discrimination laws demand that employees report harassment, several significant policies also make such reporting highly important. First, employers have a duty to act upon complaints of harassment. As the \textit{Ellerth} Court stated in regard to harassment by supervisors, the employer has a duty to exercise “reasonable care to prevent and correct \textit{any} sexually harassing behavior.”\footnote{Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (emphasis added).}
case Faragher v. City of Boca Raton, the Court noted that, in regard to employer liability for the acts of co-workers, courts uniformly applied a “negligence” standard, imposing liability on the employer “if it ‘knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.’” How can an employer correct “any” sexually harassing behavior and take “immediate” corrective action unless the employer knows about the harassing conduct? And how will the employer know about the conduct unless the victim/employee tells the employer? And how can the victim/employee inform the employer if the employer can retaliate against the employee with impunity?

The necessity that the employer tailor the corrective response to the situation also demands that the law encourage victim/employees to be completely forthcoming. The employer’s response must be “reasonably calculated to end the harassment.” The inquiry as to what constitutes a reasonable response to harassment is “fact-specific.” Employer responses may include investigating the complaints, discussing the allegations with the perpetrators,

76 Id. at 799.
77 Id. at 799-800 (quoting 29 C.F.R. § 1604.11(d) (1997)).
78 See Matvia v. Bald Head Island Mgmt., 259 F.3d 261, 269 (4th Cir. 2001) (“the law against sexual harassment is not self-enforcing and an employer cannot be expected to correct harassment unless the employee makes a concerted effort to inform the employer that a problem exists”) (quoting Parkins v. Civil Contractors, Inc., 163 F.3d 1027, 1038 (7th Cir. 1998)).
80 1 LINDEMANN, ET AL., supra note 22, at 20-84 and -96.
demanding that the harassing conduct stop, and threatening greater discipline if it does not stop.\textsuperscript{81} To conduct such an inquiry and response, the employer must be able to gather all the relevant facts. The employer will not be able to gather all the facts unless complaining employees feel safe from retaliation.

Another policy inherent in our discrimination laws also mandates that the law protect employee complaints about harassing conduct. The employment discrimination laws rest on the informal, private resolution of charges of employment discrimination.\textsuperscript{82} One court has stated that Title VII’s “central purpose” is “the elimination of employment discrimination by private informal means” and “one of the chief means of achieving that purpose” is through “the frank and nondisruptive exchange of ideas between employers and employees.”\textsuperscript{83}

The central role of voluntary compliance has also been emphasized by the Supreme Court:

> Congress enacted Title VII. . . to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin. [Citations omitted]. Cooperation and voluntary compliance were selected as the preferred means for achieving this goal.\textsuperscript{84}

\textsuperscript{81} Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864, 876 (9th Cir. 2001).

\textsuperscript{82} See Hearth v. Metro. Transit Comm’n, 436 F. Supp. 685, 688-89 (D. Minn. 1977) (“informal opposition to perceived discrimination must not be chilled by the fear of retaliatory action. . . . [t]he resolution of such charges without government prodding should be encouraged”).

\textsuperscript{83} Berg v. LaCrosse Cooler Co., 612 F.2d 1041, 1045 (7th Cir. 1980).

Furthermore, and related to the employer’s duty to take corrective action against harassment, is the fact that employers, employees, and the nation have a strong interest in ending harassment before it becomes illegally severe and pervasive. In *Burlington Industries Inc. v. Ellerth*, the Supreme Court limited employer liability for supervisor harassment in some circumstances. The Court explained that Title VII was “designed to encourage grievance procedures.” If employer liability depended in part on the creation of anti-harassment policies, “it would affect Congress’ intention to promote conciliation rather than litigation in the Title VII context.” This could also “encourage employees to report harassing conduct before it becomes severe or pervasive. . . [thus] serv[ing] Title VII’s deterrent purpose.” Similarly, in *Faragher v. City of Boca Raton*, the Court said that Title VII’s “primary objective”. . .is not to provide redress but to avoid harm.

This “primary” deterrent purpose is served by a generous interpretation of the anti-retaliation provision. In *Burlington Northern & Santa Fe Railway Co. v. White*, the Supreme Court said that Title VII’s primary objective was to seek “a workplace where individuals are not discriminated against because of their racial, ethnic, religious or gender-based status” and

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86 Id. at 764.
87 Id.
88 Id. (emphasis added).
90 Id. at 806 (emphasis added). See also Jordan v. Alt. Res. Corp., 458 F.3d 332, 354 (4th Cir. 2006) (King, J., dissenting) (“we require employees to report such incidents in order to prevent hostile work environments from coming into being”); McCurdy v. Ark. State Police, 375 F.3d 762, 772 (8th Cir. 2004) (“[t]he underlying theme under Title VII is employers should nip harassment in the bud”).
“[i]nterpreting the anti-retaliation provision to provide broad protection from retaliation helps assure the cooperation upon which accomplishment of the Act’s primary objective depends.”\textsuperscript{92}

Early prevention allows an employer to avoid liability and protects employees from having to endure harassing conduct that has become severe or pervasive. It is completely contradictory to say that we want employers to prevent conduct before it becomes illegally severe or pervasive while, at the same time, we fail to protect employees who complain about harassment from retaliation until they reasonably believe that it already has become illegally severe or pervasive.

As the above discussion demonstrates, the operation of the employment discrimination laws virtually compels employees to report harassment and important policies also mandate such reporting. As one court stated, “If Title VII’s prohibitions against sexual harassment are to be effective, employees must report improper behavior to company officials.”\textsuperscript{93} But what if a victim/employee complains of harassment either by a supervisor, co-worker, or a third party (such as a customer), and the employer responds by terminating the victim/employee? The discharged employee’s recourse is to file a retaliation claim under Section 704(a) of Title VII or the comparable provisions in the ADEA or the ADA. However, in many circumstances, courts have found that an employee’s retaliation claim failed because she did not “reasonably believe” that the harassing conduct was severe or pervasive enough to alter her terms and conditions of employment.

\textbf{III. The Law of Retaliation under Title VII, the ADEA, and the ADA}

Section 704(a) of Title VII provides:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has

\textsuperscript{92} Id. at 63, 67.

\textsuperscript{93} Matvia v. Bald Head Island Mgmt., 259 F.3d 261, 269 (4th Cir. 2001) (emphasis added).
opposed any practice made an unlawful employment practice by this Title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this Title.\textsuperscript{94}

The Age Discrimination in Employment Act (ADEA) and the Americans with Disabilities Act (ADA) contain similar provisions.\textsuperscript{95}

The Supreme Court has stated that the purpose of the antiretaliation provision is to secure the objective of discrimination-free workplaces by preventing employers “from interfering (through retaliation) with an employee’s efforts to secure or advance enforcement of the Act’s basic guarantees.”\textsuperscript{96} In light of that purpose, the Supreme Court has said that “the antiretaliation provision must be construed to cover a broad range of employer conduct.”\textsuperscript{97}

Courts have recognized that Section 704(a) contains two clauses. The “participation clause” “protects employees against retaliation for their participation in the procedures established by Title VII to enforce its provisions.”\textsuperscript{98} The opposition clause “provides protection against retaliation for employees who oppose unlawful employment practices committed by an employer.”\textsuperscript{99}

In order “[t]o establish a prima facie case under [§ 704(a)] the plaintiff must establish (1) statutorily protected expression, (2) an adverse employment action, and (3) a causal link between

\textsuperscript{94} Title VII of the Civil Rights Act of 1964 § 704(a), 42 U.S.C. § 2000e-3(a) (2012).


\textsuperscript{99} Payne, 654 F.2d at 1135.
the protected expression and the adverse action.” The key issue in this article is the first element of the prima facie case. What constitutes “statutorily protected expression”? Under the participation clause, the plaintiff has very broad protection. Thus, if a plaintiff files a charge of discrimination with the EEOC and the employer terminates him in retaliation, most courts would find a violation, even if the underlying charge proves meritless. Protection under the

100 Id. at 1136 (quoting Smalley v. City of Eatonville, 640 F.2d 765, 769 (5th Cir. 1981)). Once the plaintiff establishes the elements of a prima facie case by a preponderance of the evidence, the burden shifts to the employer to produce “evidence of a legitimate, nondiscriminatory reason” for the adverse employment action. Id. at 1141. If the employer meets this burden of production, then the plaintiff has an opportunity to “show that the defendant’s proffered explanation was in fact pretextual.” Id. at 1142. The Supreme Court has held that “a plaintiff making a retaliation claim under [Title VII] must establish that his or her protected activity was a but-for cause of the alleged action by the employer,” not the less demanding standard applicable under Title VII § 703(m), § 2000e-2(m) to claims of discrimination based on race, color, religion, sex, or national origin. Univ. of Tex. Sw. Med. Cent. v. Nassar, ___ U. S. ___, 133 S. Ct. 2517, 2534 (2013).

101 1 LINDEMAN, ET AL., supra note 22, at 15-5.

102 In Johnson v. Univ. of Cincinnati, 215 F.3d 561 (6th Cir. 2001), the Sixth Circuit described the broad protection afforded by the participation clause. The court stated:

The “exceptionally broad protection of the participation clause extends to person who have “participated in any manner” in Title VII proceedings. Protection is not lost if the employee is wrong on the merits of the charge, nor is the protection lost if the contents of the charge are malicious and defamatory as well as wrong. Thus, once the activity in question is found to be within the scope of the participation clause, the employee is generally protected from retaliation.

Id. at 582 (quoting Booker v. Brown & Williamson Tobacco Co., Inc., 879 F.2d 1304, 1312 (6th Cir. 1989) (internal citations omitted)). See also Slagle v. City of Clarion, 435 F.3d 262, 268 (3d Cir. 2006) (quoting EEOC Compliance Manual § 8-11) (as long as a charge filed with the EEOC is facially valid, the plaintiff’s action is protected under the participation clause “regardless of whether the allegations in the original charge were valid or reasonable”). Many courts find even participation in bad faith protected, although “a few courts have imposed a
opposition clause, however, is more limited. The opposition clause, unlike the participation clause, contains limiting language stating that the statute protects the employee if he has “opposed any practice *made an unlawful employment practice by this Title.*” \(^{103}\)

Based on the “made an unlawful employment practice” language, some employers argued that to establish a prima facie case of retaliation, the plaintiff had to prove that the defendant employer had actually committed an unlawful employment practice that the plaintiff had opposed. \(^{104}\) Courts generally rejected this approach, reasoning that such an approach would chill informal opposition, involving the “frank and nondisruptive exchange of ideas between employers and employees,” which is one of the “chief means” of eliminating employment discrimination. \(^{105}\)

Instead of requiring a plaintiff to prove that the employer actually violated the law, most courts require that under the opposition clause the plaintiff employee prove that he had “a good faith requirement on protectable participation to deter employees from using or manipulating Title VII processes for inappropriate reasons.” 1 LINDEMANN, ET AL., *supra* note 22, at 15-5 n.12. Thus, the Seventh Circuit has held that Title VII’s participation clause does not protect an employee who files a baseless charge in bad faith. Mattson v. Caterpillar, Inc., 359 F.3d 885, 891-92 (7th Cir. 2004).


\(^{104}\) See, e.g., Payne v. McLemore’s Wholesale & Retail Stores, 654 F.2d 1130, 1137 (5th Cir. 1981) (rejecting employer’s argument that plaintiff had to prove that the employer had acted unlawfully); Berg v. LaCrosse Cooler Co., 612 F.2d 1041, 1045 (5th Cir. 1981) (rejecting district court’s literal interpretation of the “unlawful employment practice” language).

\(^{105}\) Berg, 612 F.2d at 1045. *See also* Payne, 654 F2d at 1137 (requiring plaintiff to show actual illegality “would not only chill the legitimate assertion of employee rights under Title VII but would tend to force employees to file formal charges rather than seek conciliation or information adjustment of grievances”) (quoting Sias v. City Demonstration Agency, 588 F.2d 692, 695 (9th Cir. 1978)(internal citations omitted)).
reasonable and good faith belief that the practice opposed was in fact and in law a violation of Title VII.” 106 This test works well when the conduct the victim/employee opposes is a tangible employment action. However, requiring a plaintiff to show a reasonable belief that the law has been violated creates problems when the plaintiff complains that he or she has been a victim of hostile environment harassment. As discussed above, courts applying the reasonable belief test must take into account the following factual, legal, and policy realities confronting an employee faced with discriminatory harassing conduct:

1. It is difficult for a lawyer, much less an employee, to predict when harassing conduct has become severe or pervasive, thereby creating an illegal hostile environment. Indeed, the standard itself is very nebulous.

2. The common understanding of what constitutes sexual harassment is very different from the legal standard.

3. In order to succeed in a hostile environment harassment claim, the law demands that employees inform the employer of the harassing conduct, in order to:
   a. establish that the conduct was “unwelcome,” and
   b. impose vicarious liability on the employer for the harasser’s conduct.

4. Early reporting of harassing conduct is mandated by the following important policy considerations, that:
   a. employers are required to “correct promptly any . . . harassing behavior” by taking action that is reasonably calculated to end the harassment; 107

106 1 LINDEMANN, ET AL., supra note 22, at 15-5 (emphasis added).

b. it is better that employers stop harassing conduct before it reaches the severe and pervasive level; and

c. it is better that employers resolve complaints of harassment informally (in-house), rather than requiring employees to litigate such complaints.

The Supreme Court has warned about the dangers of not protecting employees from retaliation when harassment law mandates that they complain about harassing conduct. In *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*, the plaintiff employee Crawford responded to questions from her employer during an internal investigation of rumored sexual harassment. She reported that the employer’s public relations director had sexually harassed her. The employer subsequently terminated Crawford, alleging embezzlement. She filed a Title VII retaliation claim. The district court granted summary judgment in favor of the employer and the Sixth Circuit affirmed, holding that the opposition clause required “active, consistent opposing activities,” whereas Crawford had not instigated any complaints.

The Supreme Court rejected the Sixth Circuit’s narrow construction of the opposition clause. The Court believed that such a construction undermined the scheme in *Ellerth* and *Faragher* that demanded reporting of harassment in order to avoid harm to employees. The *Crawford* opinion is worth quoting at length because the problems the Supreme Court identified are analogous to the dangers of the “reasonable belief” rule. The Court stated:

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109 *Id.* at 273-74.

110 *Id.* at 275 (quoting Crawford v. Metro. Gov’t of Nashville and Davidson Cnty., Tenn., 211 Fed Appx. 373, 376 (6th Cir. 2006)).

111 *Id.* at 279.
If it were clear law that an employee who reported discrimination in answering an employer’s questions could be penalized with no remedy, prudent employees would have a good reason to keep quiet about Title VII offenses against themselves or against others. This is no imaginary horrible given the documented indications that “[f]ear of retaliation is the leading reason why people stay silent instead of voicing their concerns about bias and discrimination.” [Citation omitted] The appeals court’s rule would thus create a real dilemma for any knowledgeable employee in a hostile work environment if the boss took steps to assure a defense under our cases. If the employee reported discrimination in response to the enquiries, the employer might well be free to penalize her for speaking up. But if she kept quiet about the discrimination and later filed a Title VII claim, the employer might well escape liability, arguing that it “exercised reasonable care to prevent and correct [any discrimination] promptly” but “the plaintiff employee unreasonably failed to take advantage of …preventive or corrective opportunities provided by the employer.” [Citation omitted]. Nothing in the statute’s text or our precedent supports this catch-22.112

The problems of failing to protect employees who complain, thereby, placing them in a “catch 22,” can be further illustrated by looking at a number of cases applying the “reasonable belief” test. The analysis, however, must start with the leading Supreme Court case in the area.

IV. The “Reasonable Belief” Test Applied to Hostile Environment Harassment

In Clark County School District v. Breeden,113 the plaintiff, Shirley Breeden, alleged that her employer had retaliated against her for complaining about sexual harassment. At a meeting with her male supervisor and another male employee in which the participants were reviewing the psychological evaluation reports for job applicants, one of the applicant’s reports stated that the applicant had said to a co-worker, “I hear making love to you is like making love to the Grand Canyon.”114 The Supreme Court described the objected-to conduct in the following manner:

112 Id.


114 Id. at 269.
At the meeting [the plaintiff’s] supervisor read the comment aloud, looked at [the plaintiff] and stated, “I don’t know what that means.” The other employee then said, “Well, I’ll tell you later,” and both men chuckled.\textsuperscript{115}

The plaintiff complained about the comment and alleged that she was punished for those complaints.\textsuperscript{116} The district court granted summary judgment to the employer, but a panel of the Ninth Circuit Court of Appeals reversed.\textsuperscript{117} The Ninth Circuit reasoned that the plaintiff did not have to prove that her supervisor’s conduct had actually violated Title VII. She only had to show that she had a “reasonable, good faith belief that . . . [the] conduct was prohibited by Title VII.”\textsuperscript{118} Although the single incident would not rise to the level of creating a hostile work environment, the Ninth Circuit found that “[the plaintiff’s] belief that the incident constituted unlawful harassment was objectively reasonable.”\textsuperscript{119} According to the court, “the bar set by the ‘reasonable belief’ standard used for Title VII retaliation claims in the Ninth Circuit [was] very low.”\textsuperscript{120}

The United States Supreme Court, however, reversed the Ninth Circuit. The Court stated that, although it had never ruled on the propriety of the “reasonable belief” standard, even assuming that this standard was correct, “no one could reasonably believe that the incident . . . violated Title VII.”\textsuperscript{121} The Court noted that, under its prior case law, sexual harassment was only

\textsuperscript{115}Id. (citations omitted).
\textsuperscript{116}Id. at 269-70.
\textsuperscript{117}Id. at 269.
\textsuperscript{119}Id.
\textsuperscript{120}Id.
\textsuperscript{121}Breeden, 532 U.S. at 270.
actionable under Title VII if it was “so severe or pervasive as to alter the condition of [the victim’s] employment and create an abusive working environment.”\textsuperscript{122} The Supreme Court’s prior opinions had emphasized “that simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the ‘terms and conditions of employment.’”\textsuperscript{123} In regard to the plaintiff Breeden’s retaliation claim, the Supreme Court stated:

No reasonable person could have believed that the single incident recounted above violated Title VII’s standard. The ordinary terms and conditions of respondent’s job required her to review the sexually explicit statement in the course of screening job applicants. Her co-workers who participated in the hiring process were subject to the same requirement, and indeed, in the District Court respondent “conceded that it did not bother or upset her” to read the statement in the file. Her supervisor’s comment, made at a meeting to review the application, that he did not know what the statement meant; her co-worker’s responding comment; and the chuckling of both are at worst an “isolated inciden[t]” that cannot remotely be considered “extremely serious,” as our cases require . . . .\textsuperscript{124}

Two points about \textit{Breeden} need to be made: a minor one and a more significant one.

First, the minor point. The \textit{Breeden} Court did \textit{not} adopt the “reasonable belief” standard for all Title VII retaliation opposition cases. The Court applied the test without adopting it. The Supreme Court has not addressed the question.\textsuperscript{125} Some lower court cases have mistakenly


\textsuperscript{123} \textit{Id.} (quoting \textit{Faragher}, 524 U.S. at 788).

\textsuperscript{124} \textit{Id.} at 271 (citations omitted).

\textsuperscript{125} \textit{See} Jackson v. Birmingham Bd. Of Educ., 544 U.S. 167, 187 (2005) (Thomas, J., dissenting) (“[a]lthough this Court has never addressed the question, no Court of Appeals requires a plaintiff to show more than that he had a reasonable, good-faith belief that discrimination occurred to prevail on a retaliation claim”); Bonn v. City of Omaha, 623 F.3d 587, 591 (8th Cir. 2010) (stating that in \textit{Breeden}, the Supreme Court left the question “unanswered”).
stated that the *Breeden* Court had adopted the reasonable belief standard.\(^{126}\) Second, and more importantly, post *Breeden* cases demonstrate that the “reasonable belief” test puts plaintiffs in a very difficult position and undermines some significant Title VII policies.\(^{127}\)

In *Jordan v. Alternative Resources Corp.*,\(^{128}\) a co-employee of the plaintiff was in the employer’s offices watching television reports about the capture of two black men suspected in the random sniper shootings of numerous individuals in the Maryland/Virginia/District of Columbia area. The co-employee exclaimed, “they should put those two black monkeys in a cage with a bunch of black apes and let the apes f - - k them.”\(^{129}\) The plaintiff Robert Jordan, an African-American, was in the room. He discussed the incident with other co-workers who told him that the offending employee had made similar comments before. Jordan reported the employee’s comment to management. One month later, the company terminated Jordan, “purportedly because he was ‘disruptive,’ his position ‘had come to an end,’ and management personnel ‘don’t like you and you don’t like them.’”\(^{130}\)

Robert Jordan sued, alleging, *inter alia*, that his employer had violated Title VII by retaliating against him for his complaints about his co-worker’s comments. The district court,


\(^{127}\) In addition to the cases discussed below, see the cases discussed at *supra* notes 1-4 and accompanying text.

\(^{128}\) 458 F.3d 332 (4th Cir. 2006).

\(^{129}\) Id. at 336.

\(^{130}\) Id. at 337.
however, dismissed Jordan’s complaint “because no objectively reasonable person could have
believed that, in reporting the incident to management, Jordan was opposing an unlawful hostile
work environment.”131 In other words, the district court found that the plaintiff Jordan has failed
to allege that he had engaged in statutorily protected activity when he complained about the
“black monkey”/“black ape” comment.132 Citing Clark County School District v. Breeden133 for
the proposition that the “objective reasonableness” of “plaintiff’s beliefs” could be resolved at
the summary judgment stage,134 the Fourth Circuit affirmed the judgment of the district court.135

The Fourth Circuit first concluded that the comment did not rise to the level of an
unlawful hostile environment. While “unacceptably crude and racist,” the remark was
“rhetorical,” “not directed at any fellow employee,” and “singular and isolated.”136 Therefore the
“racist conditions” were not “so severe or pervasive that they altered the conditions of Jordan’s
employment.”137

The court then turned to the question of whether the plaintiff could have “reasonably
believed” that the offending comment created an unlawful hostile work environment.138 The
court found that “no objectively reasonably person could have believed that [the employer’s]
office was, or was soon going to be infected by severe or pervasive racist, threatening, or humiliating harassment.”\textsuperscript{139}

The court rejected the plaintiff’s contention that the law puts employees in a bind by both encouraging and discouraging early reporting.\textsuperscript{140} The court said that the law does not subject employees to conflicting incentives. Title VII protects employees “once they have an objectively reasonable belief that a Title VII violation has occurred.”\textsuperscript{141}

Judge King dissented, stating that the majority’s decision placed employees “in a classic ‘catch 22’ situation.”\textsuperscript{142} Judge King first noted the severity of the “black monkeys” comment, reflecting “deep hostility” towards African Americans.\textsuperscript{143} Such comments constituted “profound insults.”\textsuperscript{144} The labels denoted intellectual and cultural inferiority and, in essence, placed African Americans outside the human race.\textsuperscript{145}

Judge King said that since the co-employee had made similar statements in the past, it was reasonable for Jordan to believe that they would be repeated.\textsuperscript{146} Under \textit{Faragher} and \textit{Ellerth}, Jordan had a duty “to report harassing and offensive conduct to his employer.”\textsuperscript{147} Judge King stated:

\textsuperscript{139} \textit{Id.} at 341.

\textsuperscript{140} \textit{Id.} at 342-43.

\textsuperscript{141} \textit{Id.} at 343.

\textsuperscript{142} \textit{Id.} at 349 (King, J., dissenting).

\textsuperscript{143} \textit{Id.} at 350 (King, J., dissenting).

\textsuperscript{144} \textit{Id.} (King, J., dissenting).

\textsuperscript{145} \textit{Id.} at 350-51 (King, J., dissenting).

\textsuperscript{146} \textit{Id.} at 353 (King, J., dissenting).

\textsuperscript{147} \textit{Id.} at 354 (King, J., dissenting).
As a result of today’s decision, employees in this circuit who experience racially harassing conduct are faced with a “Catch-22.” They may report such conduct to their employer at their peril (as Jordan did), or they may remain quiet and work in a racially hostile and degrading work environment with no legal recourse beyond resignation. Of course, the essential purpose of Title VII is to avoid such situations.148

According to Judge King, the court’s prior decision in Matvia v. Bald Head Island Management, Inc.,149 “command[ed]” Jordan to report the ‘black monkeys’ comment”150 and this reporting duty was not excused by the employee’s fear of retaliation by the employer “because such retaliation [was] expressly prohibited by Title VII.”151 As Judge King correctly stated, “Jordan thus acted at our command and with our offer of protection, but he has nevertheless been denied our promised lifeline, and has been left entirely vulnerable.”152

Judge King has the better argument. As he pointed out, the plaintiff has a duty under Faragher and Ellerth to report the harassing conduct to the employer. Furthermore, although not mentioned by Judge King, at trial the plaintiff would have had to establish that the “black monkeys” comment was “unwelcome.” This might have been difficult if he had not complained about the comment. The majority’s response to the dilemma – that Title VII protects the employee from retaliation “once they have an objectively reasonable belief that a Title VII violation has occurred or is in progress” – does not solve the problems raised by Judge King. How is an employee to know when the harassing conduct has risen to the level that belief in its severity and pervasiveness is objectively reasonable? Using a “common sense” definition of harassment, many employees would believe that the “black monkeys” comment constituted

148 Id. at 355 (King, J., dissenting).
149 259 F.3d 261 (4th Cir. 2001).
150 Jordan, 458 F.3d at 355 (King, J. dissenting) (quoting Matvia, 259 F.3d at 269).
151 Id. (King, J., dissenting) (quoting Matvia, 259 F.3d at 270).
152 Id. (King, J., dissenting).
harassment. And what about such policy considerations as allowing an employer to deal with harassing conduct before it becomes severe or pervasive and allowing employees and employers to resolve discrimination complaints in-house?

In *Crews v. Ennis, Inc.*, the plaintiff’s supervisor made two comments that were very lewd and sexual in content. The plaintiff filed suit, alleging that he had been discharged in retaliation for complaining about these two statements. The defendant/employer argued that the comments were not “because of . . . sex” because, although that they were lewd and sexual in nature, they were not “sexually motivated.” The plaintiff contended that males were subject to working conditions that females were not exposed to because the supervisor only made such comments around male employees. The court noted that the plaintiff did not have to prove an actual violation. The plaintiff only had to “show that he subjectively (that is, in good faith) believed that his employer violated [Title VII], and that his belief was objectively reasonable in light of the facts.” The court found that plaintiff did subjectively believe that “he was opposing an unlawful employment practice.” The question at the summary judgment stage, was “whether that belief was objectively reasonable.” The court stated that since the off-color

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154 The comments very graphically referred to pubic hair and male masturbation. *Id.* at *2.
155 *Id.* at *4.
156 *Id.* at *5.
157 *Id.* at *6.
158 *Id.* (quoting Johnson v. Mechs. & Farmers Bank, 309 Fed. Appx. 675, 685 (4th Cir. 2009) (*per curiam*) (unpublished)).
159 *Id.* at *7.
160 *Id.*
statements had only occurred twice, were neither humiliating nor threatening to any individual, and did not interfere with any employee’s work performance, the statements were merely “crude, vulgar humor that, while certainly boorish and offensive, did not rise to the level of harassment.”\textsuperscript{161} According to the court, the plaintiff could not reasonably believe that these two comments rose to the level of a hostile work environment and therefore his “belief that he was opposing an unlawful employment practice was not objectively reasonable.”\textsuperscript{162}

The \textit{Crews} court relied on another case, \textit{EEOC v. Bud Foods, LLC}.\textsuperscript{163} The \textit{Crews} court’s reliance on \textit{Bud Foods} is very instructive. In \textit{Bud Foods}, the plaintiff had complained that a manager made some incredibly crude, sexually explicit, demeaning comments to the plaintiff.\textsuperscript{164} The plaintiff eventually resigned in protest.\textsuperscript{165} She then filed suit, alleging sexual harassment and a constructive discharge. Because the plaintiff had resigned, she could not claim retaliation, but the \textit{Bud Foods} court’s reasoning on the sexual harassment issue is instructive. First, the court found that the harassment was not severe or pervasive enough to create a hostile work environment.\textsuperscript{166} This was why the \textit{Crews} court relied on \textit{Bud Foods}.\textsuperscript{167} However, the \textit{Bud Foods} court stated further that even if the harassment had risen to the level of a hostile environment, the employer was not liable for that harassment because the plaintiff had failed to

\begin{footnotes}
\item[161] \textit{Id.} at *8.
\item[162] \textit{Id.} at *9.
\item[164] \textit{Id.} at *2-*3.
\item[165] \textit{Id.} at *6.
\item[166] \textit{Id.} at *12.
\item[167] The question in \textit{Crews} was a different, although related, question, \textit{i.e.}, whether the plaintiff’s belief that the employer had violated Title VII was reasonable.
\end{footnotes}
report the harassment to the proper management authorities, as outlined in the employer’s anti-
harassment policy. Although the plaintiff had reported some of the comments to a management
trainee, the court found that this was not enough. Therefore, under *Burlington Industries, Inc. v.
Ellerth* ¹⁶⁸ and *Faragher v. City of Boca Raton*,¹⁶⁹ the employer could not be held liable for the
manager’s alleged sexual harassment because the plaintiff(employee) failed to take advantage of
the corrective or preventive opportunities that the employer provided.¹⁷⁰ The *Bud Foods* court
stated that, “Proof that a plaintiff employee failed to follow a complaint procedure will generally
suffice to satisfy the employer’s burden under the second element of the [*Faragher/Ellerth]*
affirmative defense.”¹⁷¹ Futhermore the court noted that the employer’s written “policy
contain[ed] a non-retaliation provision, reassuring employees that they can report complaints of
harassment. . .without fear of retaliation.”¹⁷²

The *Crews* court cited the vulgar language in the *Bud Foods* case for the proposition that
if the language in *Bud Foods* did not rise to the level of a hostile environment, then the plaintiff
in *Crews* could not reasonably believe that the comments in that (latter) case created a hostile
environment. Therefore, the plaintiff Crews’ complaints were unprotected.¹⁷³ Yet the *Crews*
court failed to note that *Bud Foods* had imposed on the plaintiff a duty to report harassing
conduct and assured that such a plaintiff was protected from retaliation. Thus *Crews* relied on
*Bud Foods* to prove the plaintiff’s complaints were unprotected, while in *Bud Foods* the court


¹⁷¹ *Id.*

¹⁷² *Id.* at *15.

had deep-sixed the plaintiff’s claims in that case precisely because the plaintiff failed to complain. In other words, “damned if you do; damned if you don’t.”

A case involving allegations of a racially hostile work environment and retaliation is also instructive. In *Tyrrell v. Oaklawn Jockey Club*, the plaintiff, Helene Tyrrell, alleged that she was subjected to a racially hostile work environment because of the heavy use of the n-word by co-workers, who were also African American. Except for one occasion, the co-employees’ directed the comments at each other, and not at the plaintiff.175

The plaintiff first appealed to her co-workers about their language but to no avail. She then went to her immediate supervisor, Chef Richard Davis, who told the employees to cease using the offending language. When that failed to end the conduct, the plaintiff went to the person who had hired her for the position, Chef Howard Brooks. Brooks told her that the workers would be let go at the end of the season. The plaintiff had at least two other discussions with Brooks and another confrontation with her co-employees about the language. Some managers then became involved and told Davis and Brooks to “document and follow up on any offensive-language issues.”176 The offending employees were warned that the use of language could lead to discipline, including termination. She again complained about offensive language and two of her co-employees were sent home with a warning that they would be suspended if the incidents were repeated.177 The season ended and plaintiff was let go along with 423 other seasonal workers. Only five were kept on after the season ended.

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175 Id. at *1.

176 Id.

177 Id. at *2.
The plaintiff alleged, *inter alia*, that her employer had violated Title VII by subjecting her to a hostile work environment and retaliated against her by terminating her for complaining about the hostile environment. In regard to the racially hostile work environment claim, the court focused on whether the work environment rose to the level that would make it actionable, stated that it had to look at “all the circumstances” and “[r]acial comments often tread a fine line.” The court noted that “not all harassment is actionable, because not all harassment is enough to affect a term, condition or privilege of employment. . . .” Therefore the utterance of a racial epithet might be offensive but not, in itself, enough to be actionable. The court found that the plaintiff’s claim sought to impose a general civility code on the workplace “rather than to curb heinous harassment.” The court said that the utterance of a racial epithet had to be “extreme in nature,” rather than “merely rude or unpleasant.” The court stated that the fact that the offensive language was used by African American co-workers did not, in itself, preclude the plaintiff’s hostile work environment claim. However, since “Plaintiff was only once the target of the language, and [it was said] in a non-derogatory context,” the court did not believe that an “objective person in Plaintiff’s position would have found her co-workers’ jesting ‘extreme in nature.’”

178 *Id.*

179 *Id.* at 3.

180 *Id.*

181 *Id.*

182 *Id.*

183 *Id.* at *4.*

184 *Id.*
The court also found that, even if the plaintiff did experience a racially hostile work environment, she had not shown that her employer failed to take the proper remedial action. According to the court, the employer’s admonishment of the offending co-employees, passing her complaints up the managerial ladder, meeting with her several times, threatening the offenders with suspension, and sending one worker home, complied with the employer’s duties to take reasonable remedial action. Thus the plaintiff’s hostile environment claim failed.

In regard to the plaintiff’s retaliation claim, the court outlined the elements of a *prima facie* case. Those were: “(1) she engaged in activity protected by the statute; (2) Defendant took adverse employment action against her; and (3) the adverse action was connected to the protected activity.” In regard to the first element, that the plaintiff engaged in protected activity, the court noted that “[t]he fact that Title VII does not in fact prohibit the working environment she complained of [the court’s finding, above] does not by itself mean that her complaints were unprotected.” In other words, she did not have to establish the existence of a hostile environment in order for her retaliation claim to be successful. The plaintiff “merely had to be reasonable in her belief that the environment ran afoul of Title VII.” The court, however, assumed *without deciding* that Ms. Tyrrell’s compliant about the allegedly racially hostile environment constituted protected activity.

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185 *Id.*

186 *Id.*

187 *Id.* at *5.*

188 *Id.*

189 *Id.* The court also assumed, without deciding, that the defendant/employer had taken an adverse action against the plaintiff when the employer failed to re-hire her after the season ended. *Id.*
However, the court found that the plaintiff failed to elucidate a *prima facie* case of retaliation because she failed to show a causal connection between her complaints and her termination. The court noted that the employer had thoroughly investigated and followed up on Ms. Tyrrell’s complaints and had threatened the offending co-workers with suspension. In addition, a supervisor had encouraged the plaintiff to stay at work because the offending co-employees would be gone at the end of the season. In regard to the employer’s motivation, the court said that it was unlikely that the employer would terminate Ms. Tyrrell for complaining about a hostile environment after it had already assured her that her environment would improve because the harassers would be leaving soon. The court, therefore, granted summary judgment to the employer.

Two things should be noted about this case. First, of course, is the issue of what constitutes protected activity. The court assumed, without deciding, that the plaintiff’s numerous complaints about “heavy use of the n-word” constituted protected activity. The fact that the court left this question open is disconcerting, to say the least. If an employee cannot be ensured that his or her complaint about “heavy use of the n-word” is protected, the employee will probably be afraid to complain. The message the court is sending to employees is “keep your mouth shut.”

Second, in addition to finding that the plaintiff had failed to show that the “heavy use of the n-word” rose to the level of a hostile work environment, the court also denied the plaintiff’s hostile work environment claim because the employer took remedial action that was “reasonably

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190 *Id.* at *6.

191 Furthermore, the court properly took into account, in deciding the issue of causation, the fact that the defendant/employer “thoroughly investigated and followed up on [the plaintiff’s] complaints.” *Id.*
calculated to end the hostile environment.”¹⁹² The defendant/employer’s ability, however, to take such remedial action obviously rested on the fact that the plaintiff complained about the allegedly racially hostile actions. For there to be a question about whether plaintiff’s complaints are protected or not discourages plaintiffs from making such complaints, thereby rendering such remedial actions by the employer impossible.

Presumably, the courts that have adopted the “reasonable belief” test for retaliation claims envision three types of situations. First, if the complained-of conduct rises to the level of a hostile environment, all authorities agree that complaints about the hostile acts constitute protected activity. Then there is a second “level” of actions in which the conduct does not rise to the level of a hostile environment but a plaintiff can “reasonably believe” that they do. And plaintiff’s complaints about those hostile actions are also protected. Then, there is a third level of hostile acts in which the conduct does not rise the level of hostile environment and the plaintiff cannot reasonably believe that the conduct rose to this level. Under these circumstances, plaintiff’s complaints are unprotected. The Tyrrell court recognized the distinction between the first two categories when it stated that, even if the plaintiff failed to produce enough facts to show a hostile environment, she only had to show that she was “reasonable in her belief that the environment ran afoul of Title VII in order to demonstrate that the complaints were protected activity for the purposes of a retaliation claim.”¹⁹³ However, sometimes a court can come close to conflating the “reasonable person” standard required to show that a hostile environment was abusive and the “reasonable belief” standard for retaliation

¹⁹² Id. at * 4.

¹⁹³ Id. at *5.
claims. In *Kummerle v. E. M. J. Corp.*, the plaintiff alleged that a female co-worker and a male supervisor were in close physical contact four or five times a day, the female giving back rubs and the male stroking the female’s back or neck and both of them having intimate conversations in full view of other employees. The two participants were engaged in consensual activity. In regard to the plaintiff’s hostile work environment sexual harassment claim, the court found that the intimate contact between the employee and the supervisor would have been equally offensive to both women and men and did not meet the “based on sex” element of a sexual hostile work environment. In regard to the plaintiff’s retaliation claims, the court stated that the plaintiff had to have a reasonable belief that her employer was violating the law. The court stated that, “a plaintiff’s belief is not objectively reasonable if the law is settled that the employment practice complained of is not unlawful under Title VII.” The court therefore granted judgment on the pleadings to the employer on both the sexual harassment and retaliation claims.

The court’s holding is unrealistic. By applying the “settled law” test, the court is narrowing the retaliation reasonable belief standard. The court, while purporting to use a “reasonable employee” test, is in essence requiring plaintiff/employees to meet a “reasonable employment lawyer” test. How can an employee know what is “settled” law in a given jurisdiction? In fact, a lot of *lawyers* would not necessarily know what is settled law without

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195 *Id.* at *1.

196 *Id.* at *3-*4.

197 *Id.* at *4* (emphasis added).

198 *Id.* at *4-*5.
first doing research. Holding employees to this higher standard is unrealistic and further undermines the policies discussed above.

V. Some Authorities Grant Broader Protection to Employee Complaints About Hostile Environment Harassment

Not all authorities narrowly construe the statutory protection afforded to employee complaints about hostile environment harassment. For example, one court appeared to grant almost absolute protection to such complaints. In *Kienzle v. General Motors, LLC*, the plaintiff alleged, *inter alia*, that the employer unlawfully retaliated against her for complaining about a sexually hostile environment. The court found that the plaintiff had not shown that she had been subjected to a hostile environment because the six complained-of incidents did not rise to the level of an abusive work environment sufficient to alter the conditions of the plaintiff’s employment. However, in reference to whether the complaints constituted

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200 *Id.* at 535.
201 *Id.* at 549. The court also found that most of the six complained-of incidents were not “because of [the plaintiff’s] sex.” The court erred in regard to two of these incidents. These actions were, “(2) [a manager] told Kienzle that if she wanted to have work done for her group, she needed to write her requests down and take them to the wall, but male managers were not told to do the same, even for simple requests like paper towel holders; (3) [another manager] yelled at and degraded her for being a female supervisor, and called into doubt her skills and abilities. . . .” *Id.* The court stated that this “rude behavior would not have created a hostile work environment that violated Title VII . . .unless they treated the plaintiff poorly because of her sex.” The court then said that none of the six incidents, “except possibly the third, are related to sex.” *Id.* at 550. The court’s analysis is surprising. It is very certain, not just ‘possible,’ that a manager yelling at the plaintiff and degrading her for being a female supervisor is “because of her sex.” Similarly the second challenged action, telling the plaintiff that she needed to write her requests down for every simple thing including paper towel holders but not requiring male managers to fill out such forms also is “because of her sex.”
protected activity for purposes of a retaliation claim, the court said that it was “beside the point” whether or not the plaintiff had actually been exposed to a hostile or abusive working environment. According to the court, “[i]f the plaintiff complained about a hostile work environment due to her sex, and [the employer] retaliated against her for doing so, the company violated Title VII.” The court went on to say, “[c]omplaining about alleged unlawful conduct to company management is classic opposition activity.” The court did not mention the retaliation “reasonable belief” standard. It simply stated that if the plaintiff “complained about a hostile work environment due to her sex,” then such complaints constituted protected activity. However, the court also found that she had failed to establish that the employer had taken an adverse action against her and that she did not report the harassing conduct to any of her supervisors and therefore the company could not be charged with that knowledge. The employer was therefore “entitled to judgment as a matter of law on the plaintiff’s retaliation claims.”

Two points can be made about Kienzle. First, the court was willing to give very broad protection for complaints about hostile environment harassment. Second, in spite of that broad protection, plaintiffs alleging retaliation do not have an easy time of it. The plaintiff’s retaliation claim in Kienzle did not succeed both because of her failure to properly report the harassment and because of her failure to establish an adverse action.

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202 Id. at 550.
203 Id.
204 Id.
205 Id.
206 Id. at 551.
In another case, a Second Circuit panel applied the reasonable belief test but gave it a very broad construction. In *LaGrande v. Decrescente Distributing Co., Inc.*,\(^{207}\) at the district court level, the plaintiff alleged, *inter alia*, that he had been subjected to a racially hostile work environment, involving physical threats and being called [n-word] by a manager.\(^{208}\) In addition, a coworker “made racial comments about ‘Black Men’ being lazy and about ‘Black Men’ using ‘White Females’ to take care of them.”\(^{209}\) The plaintiff also contended that he was retaliated against for opposing the racially hostile work environment.\(^{210}\)

In regard to his race-based hostile work environment claim, the trial court found that even accepting his allegations as true, the allegations were “insufficient to state a race-based hostile work environment claim.”\(^{211}\) According to the court, since the actions involved two different people and occurred more than seven months apart, they were only isolated incidents and, therefore, could not be considered pervasive or severe. The court, therefore, dismissed the race-based hostile work environment claim.\(^{212}\) In regard to the retaliation claim, although the court acknowledged that the plaintiff only need demonstrate a good faith reasonable belief that the challenged actions had violated the law, the plaintiff could not “have reasonably believed that two isolated incidents of race-based comments, occurring more than seven months apart, could

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\(^{207}\) No. 1:06-CV-467 (FJS/DRH), 2008 WL 2385799 (June 9, 2008 N. D. N.Y), aff’d in part, vacated, and remanded, Nos. 8-3010-CV, 09-1789-CV, 370 Fed. Appx. 206 (2d Cir. 2010).

\(^{208}\) Id. at *2.

\(^{209}\) Id. at *4.

\(^{210}\) Id. at *6.

\(^{211}\) Id. at 5.

\(^{212}\) Id.
constitute misconduct that was severe or pervasive.” Accordingly, the court found that the plaintiff’s complaints about the race-based comments did not constitute protected activity. The trial court, therefore, dismissed the plaintiff’s retaliation claims.

The Second Circuit Court of Appeals, however, vacated the relevant part of the district court’s decision. Although the court of appeals acknowledged that the plaintiff had to show more than just a few isolated incidents involving racial misconduct, the court noted that the use of the n-word could quickly alter the terms and conditions of an employee’s employment. The court found that the sum total of the alleged race-based comments could amount to a hostile environment and therefore vacated the district court’s decision and remanded the case in regard to the race-based hostile work environment claim. In regard to the retaliation claim and whether the complaints about the allegedly racially hostile work environment amounted to protected activity, the court stated that, in spite of the district court’s finding that the plaintiff could not have reasonably believed that two isolated race based comments could have been severe or pervasive enough to create an unlawful hostile environment:

The test for whether someone has “a good faith reasonable belief” that the underlying complained of conduct violated the law does not turn on whether the claim was ultimately “severe or pervasive” enough to constitute a violation of Title VII.

213 Id. at *6.
214 Id.
215 Id.
217 Id. at 210-11.
218 Id.
219 Id. at 212.
The appellate court vacated the district court’s decision regarding the retaliation claim and remanded the case.

In one case the court seemed to waver between the “reasonable belief” test and a simple, very broad, “good faith” test. In *Trujillo v. Henniges Automotive Sealing Systems North America, Inc.*, the court at one point stated that opposition conduct was protected simply if the plaintiff/employee had a “good faith belief” that the employer’s discriminatory conduct violated Title VII. However, the court went on to apply the “reasonable belief” test. The court distinguished *Breeden*, stating that multiple racial comments made by a manager were “far more serious than the singular allegation in *Breeden*.” On the other hand, “a reasonable person in Trujillo’s position, particularly one without legal training, could conclude that [the manager’s] comments constituted hostile environment discrimination in violation of Title VII.”

The EEOC ostensibly uses the “reasonable belief” test in determining whether opposition to an employer’s allegedly discriminatory conduct is protected activity under the employment discrimination laws’ anti-retaliation provisions. However, the EEOC appears to apply this “reasonable belief” test much more broadly than most courts. In its Compliance Manual, the EEOC gives several examples of protected opposition activity. Two examples are particularly relevant:

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221 *Id.* at 656.

222 *Id.*

223 *Id.*

224 See EEOC, Facts About Retaliation, available at http://www1.eeoc.gov/laws/types/facts-retal.cfm?renderforprint=1 (“Opposition [to an employment practice] is protected from retaliation as long as it is based on a reasonable, good-faith belief that the complained of practice violates anti-discrimination law”).
CP complains to co-workers about harassment of a disabled employee by a supervisor. This complaint constitutes “opposition.”

CP complains to her foreman about graffiti in her workplace that is derogatory toward women. Although CP does not specify that she believes the graffiti creates a hostile work environment based on sex, her complaint reasonably would have been interpreted by the foreman as opposition to sex discrimination, due to the sex-based content of the graffiti. Her complaint therefore constitutes “opposition.”

The Examples do not seem to require that the harassing actions rise to any particular level of severity or pervasiveness. The examples only speak of complaints about “harassment” and “graffiti,” stating that such complaints are protected opposition activity.

The EEOC also proposed a very relaxed test in an amicus brief. The brief proposed that “an employee should be deemed protected from retaliation…when he reports conduct by a co-worker or supervisor which, if repeated often enough, would create a hostile working environment.”

VI. Toward Broader Protection of Employee Complaints About Hostile Environment Harassment

The employment discrimination laws do not provide enough protection for employees who complain about hostile environment harassment. As discussed above, such employees often must report such harassment in order to demonstrate that the harassment was unwelcome and in order to impose vicarious liability on the employer. Furthermore, important policy considerations mandate employee reporting of harassing conduct. The employment discrimination laws favor reporting in order to allow employers to nip harassment in the bud before it becomes severe or pervasive and to resolve the complaints privately, without recourse

225 EEOC Compliance Manual § 8-II.B.2., Examples 2 and 3.

to the EEOC and the courts. Yet under the reasonable “belief test,” the laws against employer retaliation provide only spotty and unpredictable protection to employees who complain about harassment.

Contrast this with employees who complain that they suffered from an employer’s tangible employment action. Suppose an employer demotes an employee, or cuts her pay significantly, or refuses her a promotion and the employee complains to management, alleging that the company had unlawfully discriminated against her. If the employer discharges her in retaliation for her complaint, she will almost assuredly be protected by the laws against retaliation. She will probably be able to meet the “reasonable belief” test since she does not have to show that the conduct was severe or pervasive. Indeed, a tangible employment action, by definition, alters the employee’s terms or conditions of employment. Yet, the laws do not mandate that the employee complain to the employer about the discriminatory tangible employment action. She will not have to show at trial that the conduct was “unwelcome” and, as mandated by the *Ellerth* Court, employers will always be vicariously liable for discriminatory tangible employment actions.\(^{227}\)

Thus an employee who suffers discriminatory hostile environment harassment has a duty to notify his employer about the harassment, while an employee who suffers a tangible employment action does not. Yet the employee who suffers hostile environment harassment receives *less* protection from retaliation. A change is needed.

Courts should broaden the protection afforded to employees who complain about hostile environment harassment. Courts can accomplish this either by abandoning the reasonable belief test for those types of claims or by defining the test itself more broadly. Either way, the test for protected conduct has to be re-defined.

One scholar has opined that, for complaints about sexual harassment, courts could use the parameters of an employer’s sexual harassment policy to establish what constitutes protected conduct. This would often, but not always, afford employees greater protection from retaliation. It would also prevent the occurrence of one type of unfair situation – where an employer’s policy encourages (or requires) reporting but the employer is free to fire the employee for doing so.

However, there are problems with defining protected conduct with reference to an employer’s harassment policy. First, an employer’s harassment procedure may not be coterminous with Title VII – an employer’s policy may be broader. For example, an employer may have a policy that encourages complaints about harassment based on physical appearance or political belief. Certainly, Title VII should not protect complaints based on membership in a group that is not protected by the statute.

Furthermore, basing the definition of protected activity on the employer’s harassment policy would punish employers for having a broad policy and reward employers for having a narrow policy. If an employer’s harassment policy encouraged employees to complain about any offensive behavior based on sex, religion, color, race, national origin, age or disability, then any complaint about offensive conduct would be protected. The employer would be subject to lawsuits anytime the employer disciplined an employee after the employee complained about

228 George, supra note 11, at 490-92.
230 Cf. Oliver v. Microsoft Corp., ___ F.Supp. 2d ___, ___, 2013 WL 4008193, at *4 (N.D. Cal. 2013) (the plaintiff argued that since the employer admitted it violated its own antidiscrimination policies, it also therefore violated the legal standards under California’s Fair Employment and Housing Act; the court rejected plaintiff’s argument).
such conduct. On the other hand, suppose the employer’s harassment policy only encouraged complaints if the employee reasonably believed that the conduct rose to the level of an unlawful hostile environment? Such a policy would narrow the scope of the employer’s liability. Thus, basing the definition of protected conduct on this employer’s harassment policy would encourage employers to promulgate narrower policies.

Two scholars have proposed an even broader test for protected conduct. These scholars would only require subjective “good faith” from the plaintiffs, eliminating the objective reasonableness requirement altogether.\(^\text{231}\)

While this would provide very broad protection for employee complaints about harassment, there are some problems with only requiring “good faith” on the plaintiff’s part. First, requiring only good faith removes the opposition clause from its statutory moorings. Section 704(a) of Title VII states:

It shall be 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 Title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this Title.\(^\text{232}\)

When Congress enacted Section 704(a), it used different language for the opposition clause and the participation clauses. Unlike the participation clause, the opposition clause contained the limiting language “made an unlawful employment practice by this Title.” The “only good faith” test reads this language out of the statute. For better or worse, it seems that

\(^{231}\) See Gorod, supra note 11 at 1502 (contending that a plaintiff’s complaint should “be protected unless the employer can prove that it was made in bad faith”); Rosenthal supra note 11, at 1176 (stating that courts should “require only a subjective, good-faith belief that the opposed conduct violated Title VII.”

Congress, by including the “made an unlawful employment practice” language, intended to impose some kind of objective test on complaining employees.

Second, because of this language and because there have been many cases adopting the reasonable belief test, courts will be very reluctant to completely abandon any objective component in determining what constitutes harassment under the opposition clause. Indeed, even the EEOC test, while very broad, includes an objective component.233

Third, this test might simply be too broad. Plaintiffs could make very frivolous complaints and sue employers if they subsequently were disciplined. If an employee complained because his supervisor smiled at him or made fun of his astrological sign, the employee’s complaints would be protected so long as he genuinely believed the smile or the ribbing about his astrological sign violated Title VII. While I have argued that the reasonable belief test is unfair because it requires employees to have a lawyer’s knowledge of employment discrimination law, perhaps it is not unfair to require complaining employees to have some rudimentary knowledge of the law (e.g., astrological signs are not protected and one smile cannot be harassment).

The EEOC has also proposed a broad definition of protected conduct when an employee complains of a hostile environment. In an amicus brief, the EEOC proposed that an employee’s complaints should be protected when “if repeated often enough,” the actions “would create a hostile working environment.”234

233 See infra text accompanying note 234.
This test might sweep a bit too broadly. To take a crazy hypothetical, a simple smile, if repeated 500 times daily, for weeks on end and directed only at a female because of her sex, may become creepy enough to rise to a hostile environment. Taking the EEOC test literally, if an employee complained about a single smile directed at her because of her sex, that would constitute protected conduct. This could encourage very frivolous complaints. The EEOC test is generally a good one, if it is modified slightly.

A test for protected conduct must take into account all the problems and policies discussed in this Article. The proper test would also rest on the distinction the Supreme Court made in *Faragher* and *Ellerth* between tangible and non-tangible actions.

Here is the proposed test. If the employee opposes an allegedly discriminatory tangible employment action committed by her supervisor (such as a demotion, failure to promote, or a significant pay cut), then such complaints will be protected if the employee had a reasonable, good faith belief that the supervisor’s actions violated the employment discrimination laws. If, however, the employee’s complaints are in opposition to non-tangible actions by a supervisor or co-employees, then the complaints will be deemed protected opposition conduct if the complained-of conduct, repeated on a daily basis, would eventually rise to the level of a hostile environment. This can be called the “if repeated on a daily basis” test. Under this test, an employee’s complaint about a supervisor’s smile directed at her because of her sex would not constitute protected conduct because one smile a day would never be severe or pervasive. Similarly, an employee’s complaints about harassment directed against her because of her astrological sign would not be protected because, no matter how severe or pervasive, the harassing actions could never violate Title VII, or the ADEA, or the ADA. The harassment is not based on the employee’s membership in a protected group.
However, complaints about most of the conduct described in the Introduction to the article would be protected. Calling African Americans black apes and black monkeys; or referring to pubic hair and male masturbation; or using terms like sp*c or the “n” word; or showing an employee a photo of a scantily clad woman and saying she would look good in that clothing; or calling a Catholic a mackerel eating Papist would, if repeated on a daily basis, be severe or pervasive and therefore rise to the level of a hostile environment.

Courts could shift to this test in one of two ways. First, courts could simply abandon the “reasonable belief” test and replace it with the “if repeated on a daily basis test.” Or courts could simply define a “reasonable” belief in a manner consistent with the “if repeated on a daily basis” test. The latter approach would also conform with a “common sense” definition of what most people think constitutes harassment.

Indeed, what is reasonable for a typical employee to complain about? If a co-employee or supervisor uses explicit derogatory sexual language, most employees would believe that this constitutes sexual harassment. This belief is reasonable. Employees are not trained in the nuances of the law and courts should not expect them to know that the harassment must be severe and pervasive enough to alter the victim’s terms and conditions of employment. Similarly, if a co-employee or supervisor uses the “N” word in an African-American employee’s presence, most employees would believe that this constitutes racial harassment. Such a belief is reasonable, even if many courts would find that a complaint about one use of the “N” word would not be protected opposition conduct under the anti-retaliation provisions.

Furthermore, this broad definition is consistent with the fact that employer sexual harassment policies often define harassment very broadly. Defining statutory protection broadly will prevent mixed signals employees get when the employer’s harassment policy

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235 See supra note 54 and accompanying text.
encourages them to report while the employer is free to discharge her for reporting violations that do not rise to a level that meets the “reasonable belief” test.\textsuperscript{236}

While the adoption of the “if repeated on a daily basis” test will allow some plaintiffs to succeed in the retaliation claims when they would have been unsuccessful under the reasonable belief test, retaliation plaintiffs will still have a significant task. If they succeed in establishing that they engaged in protected conduct under the “if repeated on a daily basis test,” the plaintiff employee must still establish that the employer took an adverse action against her \textit{and} that there was a causal connection between the protected conduct and the adverse action.\textsuperscript{237} Many plaintiffs fail to meet these requirements.\textsuperscript{238} Thus, providing broader protection for employer complaints about harassing conduct will not engender a flood of litigation.

The “if repeated on a daily basis” test will protect employees and thus allow them to establish that harassing conduct is unwelcome and allow them to meet the \textit{Ellerth} and \textit{Faragher} requirements for establishing employer liability. The test will provide employers the opportunity to discipline the harassing employees, nip the harassment in the bud before it becomes severe or pervasive, and resolve the complaints in-house, without litigation.


\textsuperscript{237} \textit{See} 1 \textsc{Lindemann}, \textsc{et al.}, \textit{supra} note 11, at 15-32 (listing the elements of a retaliation claim including that “the employer must have imposed on the plaintiff some cognizable adverse action; and . . .Causal Connection – the employer must have taken the adverse action \textit{because} the plaintiff engaged in protected conduct (i.e., the employer must have had a retaliatory motive”).

\textsuperscript{238} \textit{See id.} at 15-38 n. 163 (listing numerous cases where the plaintiff failed to meet the adverse action requirement and 15-50 to -51 nn. 188-190) (listing numerous cases where the plaintiff failed to establish causation).
In *Burlington Industries, Inc. v. Ellerth*, the Supreme Court said that Title VII’s deterrent purpose is served by encouraging employees to report harassing conduct “*before it comes severe or pervasive*” and that employers have a duty to exercise “reasonable care to prevent and correct *any* sexually harassing behavior.” Broadening the protection against retaliation for employees who do report is necessary to accomplish these goals.

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240 *Id.* at 764 (emphasis added).

241 *Id.* at 765 (emphasis added).