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## Angry Employees: Revisiting Insubordination in Title VII Cases

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# ANGRY EMPLOYEES: REVISITING INSUBORDINATION IN TITLE VII CASES

*Susan D. Carle* \*

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## ABSTRACT

*In too many Title VII cases, employees find themselves thrown out of court because they reacted angrily to reasonable perceptions of employer discrimination. In the race context, supervisors repeatedly call employees the n-word and use other racial epithets, order African American employees to perform work others in the same job classification do not have to do, and impose discipline white employees do not face for the comparable conduct. In the gender context, courts throw out plaintiffs' cases even where supervisors engage in egregious sexual harassment. Employees who react angrily to such demeaning treatment—by cursing, shouting, refusing an order or leaving the workplace—find themselves fired for “insubordination.” Their acts fall short of threats of violence and are brief in duration, but courts nonetheless uphold employers' invocation of “insubordination” as a “legitimate, nondiscriminatory reason” for plaintiffs' discharge. The article argues that courts should more carefully scrutinize the relationship between discrimination-tinged work environments and employees' angry reactions.*

*This article makes specific proposals about how Title VII courts should handle insubordination cases that raise discrimination concerns. To gain ideas for this purpose it looks both to Title VII precedent and doctrines the National Labor Relations Board has developed in the exercise of its special expertise in regulating workplace relations. Unlike many Title VII courts, the NLRB and courts reviewing its decisions often grant some leeway to “angry employees”—i.e., employees who have gone some distance past the line of proper decorum (but not too far) in expressing indignation at what they reasonably perceive as violations of their statutorily protected rights. Instead of routinely accepting insubordination as legitimate grounds for an adverse employment action, as Title VII courts often do, the NLRB more carefully scrutinizes the context giving rise to “angry employees.”*

*This article argues that Title VII courts should do more of that scrutiny too. It proposes doctrinal modifications Title VII courts could implement in the exercise of their interstitial statutory interpretative powers to better serve Title VII's dual purposes of (1) better enforcing the workplace antidiscrimination mandate and (2) encouraging employers and employees to resolve discrimination disputes in real time in workplaces rather rendering employees so docile that they must “make a federal case” out of all discrimination disputes.*

## INTRODUCTION

To read federal case law decided under Title VII of the Civil Rights Act of 1964<sup>1</sup>—the provision that prohibits employment discrimination on the basis of race, sex and other characteristics—is to be struck by the continuing racial and sexual hostility in U.S workplaces today, and also at courts’ too frequent unwillingness to address it. Courts throw out plaintiffs’ cases even where the facts involve such egregious employer behavior as, in the race context, supervisors repeatedly calling employees the n-word and using other racial epithets, ordering African American employees to perform work others in the same job classification do not have to do, and imposing discipline white employees do not face for the comparable conduct.<sup>2</sup> In the gender context, courts throw out plaintiffs’ cases even where supervisors have engaged in egregious sexual harassment.<sup>3</sup> Why such results? In all the cases just described, employees reacted angrily to employers’ demeaning treatment, and then found themselves fired for “insubordination.” In other words, employees cursed, shouted, refused an order, or left the workplace in response to what they reasonably regarded as humiliating discriminatory treatment. (The article will refer to such acts, which fall short of threats of violence and are brief in duration, as “mild to moderate” insubordination). When these plaintiffs filed cases to challenge their terminations, courts upheld their employers’ invocation of “insubordination” as the legitimate, nondiscriminatory reason for the plaintiffs’ discharge.

To be sure, employers are entitled to enforce legitimate workplace rules prohibiting employee insubordination. But in the cases just described, the scenarios were more complex than courts were willing to recognize. Employee insubordination occurred in reaction to troubling evidence of employer discrimination—even though the evidence did not suffice to establish a Title VII violation under the high burdens of proof plaintiffs bear in proving an actionable claim.<sup>4</sup> The case law reveals troubling cases of employers whose agents engaged in conduct rife with blatant and provocative race and/or sex animus, yet received no censure for terminating employees on insubordination grounds because the employees reacted,

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<sup>1</sup> Civil Rights Act of 1964, Pub. L. 88-352, 86 Stat. 109 (1964).

<sup>2</sup> See cases discussed in Section II-A *infra*.

<sup>3</sup> See text accompanying notes 96-97 *infra*.

<sup>4</sup> In many of these cases, the plaintiff cannot prove an underlying discrimination claim because the acts do not rise to the “severe and pervasive” level necessary to prove a hostile environment harassment claim and/or lead to an adverse employment action only after the plaintiff has been insubordinate. For a discussion of the high burden of proof Title VII plaintiffs bear, see *infra* notes 31 & 261 and accompanying text.

understandably enough, with anger at the treatment they endured. This article will argue that, in such cases involving evidence of provocative discriminatory acts, courts should examine with special care an employer's reliance on insubordination as the legitimate, nondiscriminatory reason for an adverse employment action.

The scenarios just described have thus far received too little attention from Title VII courts, scholars and policy makers. As this article will show, some courts' reasoning in Title VII insubordination cases is not only logically untenable but also undermines the objectives of Title VII. Mishandling insubordination leads to premature dismissal of lawsuits despite strong evidence of discrimination-tinged work environments. Indeed, mishandling insubordination cases creates perverse incentives, resulting in employers having higher chances of prevailing in discrimination suits when their conduct is so infuriating that it causes employees to lose their temper. Moreover, Title VII courts' failure to deal thoughtfully with insubordination cases contravenes the statute's objective of encouraging employees and employers to resolve antidiscrimination disputes in the nation's workplaces, *before* cases end up in court.

This article will propose a number of ways that Title VII courts could improve their jurisprudence in the insubordination situation. To gain ideas for this purpose it looks both to Title VII precedent and to the doctrines the National Labor Relations Board (NLRB or "the Board") has developed in insubordination cases. Unlike many Title VII courts, the NLRB and courts reviewing its decisions often grant some leeway to what this article will refer to as "angry employees"—*i.e.*, employees who have gone some distance past the line of proper decorum (but not too far) in expressing their indignation at what they perceive to be illegal treatment.

Take, for example, the contrast between the Instead of routinely accepting insubordination as legitimate grounds for an adverse employment action as Title VII courts often do, the NLRB scrutinizes the relationship between insubordination and an employee's exercise of statutorily protected rights. This article will argue that Title VII courts should do more of that scrutiny too.

The NLRB's institutional capacity and historical experience shape its perspective on the acceptable dynamics of workplace relations between employers and employees. Contrasting images of acceptable employee conduct emerge as a result. Whereas Title VII courts protect employees only if they are docile and impeccably behaved, the NLRB is more likely to protect employees even when their conduct is less than perfect, as discussed further in Section III *infra*. Employees in NLRB cases sometimes argue with supervisors, raise their voices, curse, and refuse an order—all without

losing their statutory protections.<sup>5</sup> To be sure, the Board draws lines as to when insubordinate conduct goes too far and becomes the legitimate basis for discipline. The conduct may not involve violence or actual threats of violence; it may not substantially interfere with workplace productivity; and it may not continue over a sustained period rather than being a short, spontaneous outburst by an employee who generally exhibits acceptable workplace conduct but has been angered by a supervisor's problematic act.<sup>6</sup>

In other words, both Title VII courts and the NLRB draw lines as to acceptable employee conduct, but they draw those lines in different places. Under NLRB precedent employees may stick up for themselves more vigorously at the moment of offense. Even if employees go a bit over the line in their efforts at self-advocacy, the NLRB reasons that it is better to err in the direction of protecting self-advocacy because doing so ensures more secure protection of employees' exercise of statutorily protected rights.<sup>7</sup> Under Title VII courts' very different way of looking at matters of employee conduct, on the other hand, employees engage in self-expression at the moment of a dispute only at serious risk of termination without later legal protection. The current Title VII regime insists on a kind of "sanitized workplace"<sup>8</sup> where employees must behave with decorum, remaining docile to the point of virtual passivity, or risk termination. To energetically express outrage at discrimination in real time at the workplace is to risk creating a fact scenario that will prevent later prevailing in court.

In other areas of Title VII doctrine, however, the U.S. Supreme Court has crafted federal common law doctrines explicitly so as to create incentives for parties to resolve discrimination allegations in workplaces

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<sup>5</sup> See, e.g., *NLRB v. Steinerfilm, Inc.*, 669 F.2d 845, 851-52 (1<sup>st</sup> Cir. 1982); *Opelika Welding*, 305 NLRB 561, 568 (1991); *Atlantic Steel*, 245 NLRB 814, 816 (1979);

<sup>6</sup> See *infra* Part III.

<sup>7</sup> To reiterate, this argument is *not* that "anything goes"; angry behavior can obviously go far over the line of what can be tolerated in a work environment. See, e.g., *Smith v. Bennett*, 50 FEP Cases 1762 (D.D.C. 1989) (employee allegedly repeatedly phoned her supervisor and swore at him while he was in meetings; banged on his door until led away, requiring three employees to spend the afternoon calming her; and confronted the supervisor by the elevator and screamed threats using swear words). Likewise, some kinds of conduct by employees in special positions of trust cannot be tolerated even if it might be protected in other contexts. See, e.g., *Laughlin v. Metropolitan Washington Airports Authority*, 149 F.3d 253, 260 (4<sup>th</sup> Cir. 1998) (confidential employee who stole company documents lost opposition clause protection). This article's point is simply that courts applying antidiscrimination law err in the opposite direction, by holding that *no* emotional outburst or expression of anger is tolerable in the workplace regardless of the circumstances leading to such acts.

<sup>8</sup> Cf. Vicki Schultz, *The Sanitized Workplace*, 112 *YALE L.J.* 2061 (2003). Schultz's classic article focused on employers stripping romance and sex out of the workplace but many of her insights apply to the sanitization of workplaces of other emotions as well.

rather than courts. The vicarious liability affirmative defense to supervisor sexual harassment, which calls on employers to set up internal complaint and investigation procedures, is a prime example of the Court's initiative in this regard.<sup>9</sup> Title VII courts could similarly fashion doctrines to encourage employers to rectify the kinds of offensively discriminatory workplace environments and supervisor actions that provoke insubordination in reaction to reasonably perceived humiliating treatment.

It is no wonder, then, that courts become the primary adjudicators of Title VII discrimination disputes. Employees in Title VII cases end up "making a federal case" out of matters that could be better resolved in real time between the parties, precisely because Title VII courts lack sufficiently robust employee self-help doctrines. Just as the NLRB has done, Title VII courts could develop doctrines that better protect employees who have been provoked into conduct that somewhat exceeds the bounds of polite workplace behavior. This suggestion helps not only employees but also courts and even employers in the long run. Angry employees apprise employers of festering discriminatory situations; a bit of low-level workplace friction is better than later litigation. With this aim in mind, this article will propose a number of doctrinal "tweaks" that are within the courts' federal common law powers and could further the goal of creating incentives for employers to rectify race- and sex-based friction before it blows up into a federal lawsuit.

To develop its argument, this article proceeds as follows: Section I situates this article in the important current recent literature examining Title VII's failures on a variety of fronts, because any proposal for reform must take into account these critiques. Section II documents examples of Title VII courts' approaches to assessing discrimination-related insubordination cases, some erroneous and some handled properly.<sup>10</sup> More specifically, Section II identifies three categories of cases: (A) those in which courts regard employee verbal outbursts or similar acts of mild or moderate

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<sup>9</sup> See *Burlington Indus. v. Ellerth*, 524 U.S. 742 (U.S. 1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). These two cases announced a new affirmative defense that the Court crafted in the exercise of its interstitial common law powers. Under it an employer would not be held vicariously liable for supervisor sexual harassment provided the employer could show that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior" and "the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer." *Ellerth*, 524 U.S. at 765.

<sup>10</sup> In the interests of manageability, this article confines its discussion to Title VII federal court of appeal cases, but its analysis can be easily extended to other antidiscrimination statutes, such as the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, and Title I of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.*

insubordination as the “legitimate nondiscriminatory reason” for an adverse employment action; (B) those in which courts use mixed motive analysis, sometimes correctly and sometimes not; and (C) those in which courts analyze facts under the “opposition conduct” clause of the Title VII anti-retaliation provision, intended to protect employees against retaliation for exercising rights to complain about conduct unlawful under the Act.<sup>11</sup>

Section III compares this body of Title VII case law to NLRB doctrine, discussing: (A) the NLRB’s *Atlantic Steel* doctrine, used to evaluate whether an employer should have tolerated an employee’s brief angry outburst or other form of insubordination (such as disobeying an order) when the employee was pursuing statutorily protected rights; (B) its “provoked insubordination” doctrine, which holds that in certain circumstances an employer may not discipline an employee for insubordination when it was provoked by the employer’s conduct regardless of whether statutory rights are involved; and (C) the Board’s general principle of granting employees the benefit of a doubt when behavior is mildly insubordinate but understandable in overall context.

Next, Section IV suggests a series of “tweaks” to Title VII jurisprudence, all easily accomplished through the courts’ exercise of their interstitial common law authority in areas of federal statutory interpretation, that could serve to better protect “angry employees.” More specifically, Sections IV-A-1 & 2 propose that courts more carefully examine employer assertions of insubordination as the “legitimate, nondiscriminatory reason” for taking an adverse employment action against an employee by (A) looking for evidence of either discriminatory animus, a discrimination-charged work environment, and/or hostile acts towards the plaintiff that a reasonable person in the plaintiff’s position would perceive as evidence of discriminatory treatment, even if this evidence is insufficient to satisfy the high standards for proving underlying discrimination claims. Where such evidence is present, courts should (B) examine whether the plaintiff’s insubordination was related to these conditions. Where the answers to questions (A) and (B) are affirmative, courts should (C) decline to accept on face value the employer’s proffered reason of insubordination as a legitimate, nondiscriminatory reason for an adverse employment action. Instead, court should (D) engage in searching scrutiny of the facts, as indeed, some Title VII judges have already called for in insubordination

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<sup>11</sup> See 42 U.S.C. § 2000e-3(a). This provision states, in relevant part: “It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has *opposed* any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or *participated* in any manner in an investigation, proceeding, or hearing under this subchapter.” (emphasis supplied).

cases. Even better, in the presence of evidence raising discrimination concerns, courts could even (E) switch the burden of *disproving* pretext to employers when an employee has allegedly been terminated for insubordination. Courts should also (F) expand the scope of *manner* of conduct protected under the opposition clause of Title VII's anti-retaliation provision in order to protect mild to moderate insubordination that is proportionate in relation to the egregiousness of the employer conduct the plaintiff sought to oppose (Section IV-A-3).

Finally but no less importantly, courts could (G) adapt the NLRB's provoked insubordination and *Atlantic Steel* doctrines to more finely calibrate the balance between plaintiffs' conduct in insubordination cases raising discrimination concerns and the egregiousness of employer agents' misconduct, as further discussed in Section IV-B below. Taken together, these doctrinal reforms would better advance Title VII's important dual objectives of eliminating problematic discrimination in the nation's workplaces while also encouraging employers and employees to work out discrimination-related disputes by addressing them in real time in workplaces rather than later in courts.

## I. THE SETTING FOR TITLE VII REFORM

Proposals for reform of Title VII must take account of the statute's background and the current state of Title VII law. Reforms proposals should be in the realm of the possible, and should also address scholars' assessments of the flaws and limits of Title VII's functioning in today's political and judicial climate. As this Section will argue, in today's "second generation" stage of developing employment antidiscrimination law, doctrine should seek to shape employers' incentives to deal with discrimination problems *before* they become court cases. This Section briefly sketches the state of Title VII enforcement and lays the background against which this Article's reform proposals will be made.

### A. *Title VII's Enforcement Scheme*

Today's Title VII jurisprudence arises from peculiarities of Title VII's legislative history that have caused federal courts to become inundated with Title VII cases. As a result, these courts are ever more eager to dismiss Title VII cases at the earliest stage of litigation possible. The courts have developed a number of short cuts to accomplish this, with results many employment discrimination scholars find unfairly stacked against plaintiffs.

It is no wonder this is true. When Congress first proposed Title VII, its drafters envisioned a regime in which complaints of discrimination would be resolved by an adjudicatory agency much like the NLRB— where

complainants have a limited right to federal court review.<sup>12</sup> In an attempt to “defang” this newly proposed federal administrative agency, however, congressional Republicans altered this proposal so that plaintiffs would have to maintain lawsuits in court.<sup>13</sup> At the time Republicans apparently believed that this statutory scheme would be less onerous on employers, both because of the short timelines involved and because they hoped that conciliation would often resolve disputes.<sup>14</sup> What resulted instead, however, was enormous pressure of privately filed Title VII federal court cases, especially because the EEOC’s conciliation process rarely results in settlement.<sup>15</sup>

Today many courts and policymakers rue Title VII’s statutory design.<sup>16</sup> Civil rights advocates, however, often see the private federal right of de novo action as a great benefit to plaintiffs—which it might be if Title VII jurisprudence had developed to grant plaintiffs’ strong enforcement

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<sup>12</sup> See H.R. REP NO. 88-914, *reprinted in* LEGISLATIVE HISTORY OF TITLES VII AND XI OF THE CIVIL RIGHTS ACT OF 1964, at 2001, 2057 (1964) (reflecting Congress’s intent to create an enforcement regime for Title VII similar to the enforcement powers set forth for the NLRB under the NLRA).

<sup>13</sup> 42 U.S.C. § 2000e-5(f)(1). As finally enacted in 1964, Title VII gave the EEOC no litigation authority but only powers to investigate and attempt to “conciliate” employment discrimination claims. See H.R. REP NO. 87-1370 *reprinted in* LEGISLATIVE HISTORY OF TITLES VII AND XI OF THE CIVIL RIGHTS ACT OF 1964, at 2155, 2057 (1964) (promoting conciliation under Title VII, and noting that the EEOC will have less enforcement power than the NLRB). For a comprehensive historical analysis of the EEOC’s use of informal procedures to resolve discrimination complaints, see generally Marjorie A. Silver, *The Uses and Abuses of Informal Procedures in Federal Civil Rights Enforcement*, 55 GEO. WASH. L. REV. 482 (1987).

Amendments in 1972 granted the EEOC more enforcement powers. See 42 U.S.C. §2000e-5. To this day, however, the EEOC litigates only a minuscule number of all cases filed under the several statutes it is charged with enforcing. See CHARGE STATISTICS FY 1997 THROUGH FY 2013, EEOC, <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited May 28, 2014) (reporting a total of 93,727 charges filed with the Commission in 2013); see also EEOC LITIGATION STATISTICS, FY 1997 THROUGH 2013, EEOC, <http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm> (last visited May 28, 2014) (noting that the EEOC sponsored a total of 148 suits in 2013, which was less than 1% of all cases filed with the Commission).

<sup>14</sup> 1 STATUTORY HISTORY OF THE UNITED STATES CIVIL RIGHTS 090-91 (Bernard Schwartz ed.) (detailing the importance of the congressional compromise that emphasized private initiative in enforcement).

<sup>15</sup> Indeed the agency has come under fire in recent cases in which employers have used the lack of meaningful conciliation attempts by the EEOC as a defense to Title VII liability. See *Mach. Mining v. EEOC*, Case No. 13-1019 (U.S. 2014) (Cert. Granted)

<sup>16</sup> See, e.g., Stanley Sporin, *Reforming the Federal Judiciary*, 46 SMU L. REV. 751, 157 (1992) (arguing that Title VII cases contribute to an overload of the judicial system and arguing that specialized courts should be established to address this overflow issue).

rights.<sup>17</sup> The real fact, however, is that, in a host of ways, courts engage in improper or illogical reasoning to rid their dockets of Title VII cases. Many of these trends have been well documented, as the section below will summarize briefly.

### B. *Low Win Rates for Title VII Plaintiffs*

In the first decade and a half after Congress passed Title VII of the Civil Rights Act of 1964, committing the country to a new era of nondiscrimination in employment,<sup>18</sup> many federal courts battled entrenched traditions to demand that employers eliminate discriminatory employment practices.<sup>19</sup> But after that early heady period, federal courts, and especially the U.S. Supreme Court—turned conservative by the early 1980s—began a period of retrenchment on employment anti-discrimination doctrine.<sup>20</sup> In the 1980s and 1990s, the Court issued many pro-defendant opinions that heightened the standards for proving employment anti-discrimination claims.<sup>21</sup> Plaintiffs found it increasingly difficult to prevail, law firms that specialized in bringing plaintiffs-side employment antidiscrimination cases found it increasingly difficult to stay afloat, and juries and public opinion generally took a turn against employment discrimination plaintiffs.<sup>22</sup>

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<sup>17</sup> See, e.g., Richard D. Kahlenberg & Mosha Marvit, *WHY LABOR ORGANIZING SHOULD BE A CIVIL RIGHT* (2012) (arguing that labor rights should be re-codified in the U.S. statutory code under Title VII because its de novo right to federal court is better than the NLRB adjudication scheme).

<sup>18</sup> See 9 LEGISLATIVE HISTORY OF THE CIVIL RIGHTS ACT OF 1964 PUBLIC LAW 88-352 14135 (1964) (statement of Congressman Abernathy) (“Just as with the Declaration of Independence and the Constitution, enactment of the civil rights bill marks the beginning of a new era in our life as a free people . . .”).

<sup>19</sup> Key U.S. Supreme Court cases from this era include *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) (discussed *infra* text accompanying notes 215-218); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (approving disparate impact theory of discrimination); and *Teamsters v. U.S.*, 431 U.S. 324 (1977) (approving a large “pattern or practice” employment discrimination case).

<sup>20</sup> See William A. Wines, *Title VII Interpretation and Enforcement in the Reagan Years (1980 - 89): The Winding Road to the Civil Rights Act of 1991*, 77 MARQ. L. REV. 645, 659–89 (1994) (conducting a statistical analysis of Title VII opinions throughout the 1980s to show the trend towards restricting Title VII’s provisions).

<sup>21</sup> *Id.*

<sup>22</sup> A large literature has studied this trend among the public, the media, and judicial decision-makers. See, e.g., Katie R. Eyer, *That’s Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275 (2012) (surveying the social psychology literature documenting fact-finders’ tendency to discount evidence of discrimination); Laura Beth Nielsen & Aaron Beim, *Media Misrepresentation: Title VII, Print Media, and Public Perceptions of Discrimination Litigation*, 15 STAN. L. & POL’Y REV. 237, 238 (2004) (analyzing media reporting and negative public perception of Title VII cases, such as a case in which the media portrayed a plaintiff as “not strong-willed enough to withstand teasing”); Elizabeth Schneider, *The Changing Shape of Federal Civil*

Although evidence points to continuing discrimination in employment,<sup>23</sup> courts are failing to penalize employers for conduct that is troubling in relation to Title VII's anti-discrimination goals. A number of studies expose these statistics: even though workplace discrimination remains a serious national problem, Title VII plaintiffs rarely win their cases.<sup>24</sup>

More specifically, plaintiffs in Title VII cases fare remarkably less well in federal court than do plaintiffs in any other kind of case, including torts and contracts.<sup>25</sup> The win rate was especially low in cases tried before judges.<sup>26</sup> These results cannot be accounted for by Title VII plaintiffs' proclivity to file weak cases: Most Title VII plaintiffs' lawyers rely on

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*Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517 (2010) (discussing the trend by federal courts to prematurely dismiss employment discrimination and other civil rights cases); Michael J. Zimmer, *Systemic Empathy*, 34 COLUM. HUM. RTS. L. REV. 576 (2002-03) (analyzing causes of legal system's lack of empathy for employment discrimination plaintiffs); Michael Selmi, *Why Are Employment Discrimination Cases So Hard To Win?*, 61 LA. L. REV. 555 (2001) (arguing that various kinds of bias account for inordinately low win rates for plaintiffs and ruling out other explanations).

<sup>23</sup> See, e.g., Marc Bendick Jr. & Ana P. Nunes, *Developing the Research Basis for Controlling Bias in Hiring*, 68 J. SOC. ISS. 238, 243-249 (2012) (noting net rates of 20-40% discrimination in employment tester studies); see also Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1154-55 (2012) (providing examples of implicit bias leading to discrimination as identified in various tester studies).

<sup>24</sup> One such study comes from the Federal Judicial Center. See Joe Cecil & George Cort, "Report on Summary Judgment Practice across Districts with Variations in Local Rules" (Aug. 13, 2008), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/sujulrs2.pdf>.

<sup>25</sup> *Id.* at 9, 16, 17 and accompanying tables. According to a study by the Federal Judicial Center, plaintiffs in employment discrimination cases during the period between 1970 and 2006 won 3.59 percent of pretrial adjudications, whereas plaintiffs in non-employment cases won 21 percent of their pretrial adjudications. For the small group of employment discrimination cases that did make it to trial, the win rate for plaintiffs in federal district court was fifteen percent, much lower than the fifty-one percent win rate for non-employment cases. Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 128-29 (2009); see also Kevin M. Clermont and Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 CORNELL LAW FACULTY PUBLICATIONS 429, 444 (2004); Wendy Parker, *Lessons in Losing: Race Discrimination in Employment*, 81 NOTRE DAME L. REV. 889, 940 (2006) (providing "a comprehensive, national examination of routine race and national origin employment discrimination lawsuits" and concluding that, "[a]lthough all types of employment discrimination cases are 'hard to win,' that difficulty is especially pronounced for race and national origin claims," which "are proving almost impossible to win in federal court.")

<sup>26</sup> Clermont & Schwab, *supra* note 25, at 130 (before judges employment discrimination plaintiffs won only 19.62% of trials, whereas plaintiffs with other claims won 45.53% of trials before judges). Employment discrimination plaintiffs' likelihood of winning trials in state courts is higher than that in federal court. See Cecil & Cort, *supra* note 23, at 4.

awards of attorneys' fees under civil rights fee shifting statutes, which courts may award only when plaintiffs prevail in their lawsuit.<sup>27</sup> Title VII plaintiffs' lawyers accordingly should be even less willing to file weak cases than lawyers whose clients pay them by the hour to handle their cases, as is typical in contracts and insurance disputes.<sup>28</sup>

Even when plaintiffs in Title VII cases prevail before lower courts, appellate courts reverse judgments far more often in Title VII cases than in any other cases.<sup>29</sup>

Scholars have generated a large literature examining the factors that account for these statistics.<sup>30</sup> These factors include cognitive biases that lead courts and juries to favor employers' explanations.<sup>31</sup> In addition, in an attempt to mitigate the problem of so many Title VII cases flooding federal courts, courts have turned many issues that might be viewed as questions of fact into questions of law that result in early dismissal of cases even when underlying facts strongly suggest discrimination.<sup>32</sup> At the most basic level,

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<sup>27</sup> Michael Kao, *Calculating Lawyers' Fees: Theory and Reality*, 51 UCLA L. REV. 825, 826–30 (2004) (discussing the incentives statutory attorneys' fees schemes create to bring winnable cases).

<sup>28</sup> Selmi, *supra* note 22, at 569 (analyzing various incentives on Title VII lawyers to avoid filing non-meritorious cases).

<sup>29</sup> Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 112 (2009) (in the small group of cases in which employment discrimination plaintiffs win at the pretrial stage, federal appellate courts reverse at a rate of 30 percent, as compared to only 11 percent in other types of cases. In appeals from cases in which employment discrimination plaintiffs win after trial, federal appellate courts reverse 41 percent of the time as compared to 9 percent in other kinds of cases).

<sup>30</sup> A recent symposium entitled *Trial by Jury or Trial by Motion: Summary Judgment, Iqbal, and Employment Discrimination*, 57 N.Y.L. SCH. L. REV. 659 (2012-2013), explores these issues in detail in a collection of articles by leading scholars, some of which will be cited below.

<sup>31</sup> See, e.g., Ann McGinley, *Cognitive Illiberalism, Summary Judgment, and Title VII: An Examination of Ricci v. DeStefano*, 57 N.Y.L. SCH. L. REV. 865 (2012-2013) (using the social psychology literature on "cognitive illiberalism," pioneered by scholars such as Dan Kahan, to analyze judges' unwillingness to fairly evaluate facts in Title VII cases); Kang, *supra* note 22, at 1156–59 (noting that jurors "frequently engage in motivated reasoning" and thus commit errors of implicit bias in civil rights cases).

<sup>32</sup> See generally Kerri Lynn Stone, *Shortcuts in Employment Discrimination Law*, 56 ST. LOUIS U. L.J. 111, 113, 168 (2011) (identifying "short cuts" courts use in Title VII cases and arguing that, taken together, these "compris[e] a larger movement of the judiciary toward foreclosing employment discrimination plaintiffs' cases without the necessary analysis"); see also Anne Lawton, *The Meritocracy Myth and the Illusion of Equal Employment Opportunity*, 55 MINN. L. REV. 587, 634-42 (2000) (demonstrating how courts are "converting contested issues of fact into issues of law," and in so doing increasing employers' chances of winning on summary judgment and on circumstantial evidence cases after trial).

courts have set very high standards of proof in Title VII cases: Under disparate treatment theory plaintiffs must persuade the trier of fact that it is more likely than not that an invidious discriminatory motive led the employer to take an adverse employment action against the plaintiff.<sup>33</sup> Under disparate impact analysis plaintiffs must put forth elaborate statistical analysis and expert testimony identifying a specific practice and proving it had a statistically significant adverse impact on members of plaintiff's class merely to make out a prima facie case.<sup>34</sup>

A host of other pro-employer doctrines contribute to plaintiffs' loss rate as well. One example is the Court's evolving "stray comments" doctrine, which distinguishes between supervisor statements that can be taken as admissions of discriminatory motive and mere "stray comments" that cannot be accorded such strong evidentiary weight. Expansive use of this doctrine has made it harder for plaintiffs to meet their burden of proving discrimination because evidence that is arguably probative of a supervisor's state of mind, such as the use of racial epithets, ends up being dismissed as mere "stray comments."<sup>35</sup> On top of these hurdles, new opinions heightening the pleading standards for federal court filings, which the Court announced in recent years in the *Iqbal* and *Twombly* cases, further decrease Title VII plaintiffs' chances.<sup>36</sup>

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<sup>33</sup> The Court's latest articulation of this burden of proof is in *Reeves*, 530 U.S. 133, as discussed *infra* note 65.

<sup>34</sup> Title VII, § 703 (k), 42 U.S.C. § 2000e-2(k).

<sup>35</sup> See Keri Lynn Stone, *Taking in Strays: A Critique of the Stray Comment Doctrine in Employment Discrimination Law*, 77 MO. L. REV. 149 (2012) (persuasively arguing that courts too often dismiss probative evidence of discrimination as mere "stray comments" in order to grant summary judgment to employers despite strong evidence of discriminatory motive).

<sup>36</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (holding that new pleading standards apply to all types of cases including Title VII claims); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 544 (2007) (holding that plaintiffs' claims must have facial plausibility to survive a motion to dismiss and that to have such plausibility complaints must aver facts detailed enough that, if proved true, they would allow a court to enter judgment in the plaintiff's favor). These standards require plaintiffs to plead very specific facts to support their legal claim of discrimination, even before they have begun discovery. In many instances plaintiffs cannot meet these heightened pleading standards and find their claims thrown out of court for failure to state a claim upon which relief can be granted, even though discovery could have produced ample concrete evidence to support plaintiffs' case theories. For further discussion, see See Joseph A. Seiner, *After Iqbal*, 45 WAKE FOREST L. REV. 179, 187 (2010) (finding that federal courts grant motions to dismiss in employment discrimination cases far more often under the *Twombly* standard than under the standard applied previously); Suzette M. Malveaux, *Front Loading and Heavy Lifting: How Pre-Dismissal Discovery Can Address the Detrimental Effect of Iqbal on Civil Rights Cases*, 14 LEWIS & CLARK L. REV. 65 (2010) (finding civil rights cases particularly vulnerable to dismissal under the new *Iqbal* standards); Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553, 608-09 (2010) (finding

Of course, there is not necessarily anything “wrong” with the fact that few Title VII cases result in wins for plaintiffs in court today, provided that Title VII’s employment nondiscrimination goals are being satisfied despite the trends just noted. Thoughtful scholars have argued that assessments of Title VII’s efficacy should include its symbolic and incentive-producing effects. If Title VII law can induce employers to strive to achieve its antidiscrimination polices without being hauled into court, then its objectives are being met regardless of plaintiffs’ win rates through lawsuits. Put otherwise, plaintiff wins are not the goal of Title VII: employment nondiscrimination is. An important article making this argument is Susan Sturm’s “Second Generation Discrimination: A Structural Approach.”<sup>37</sup> Sturm calls on courts, policymakers and scholars to adopt a new approach to the way they think about Title VII law. Her analysis of how Title VII law can create incentives for resolving disputes outside courts can help guide proposals for Title VII doctrinal reform going forward in today’s judicial climate.

### C. *Finding Paths to Address Second Generation Discrimination*

In her classic article, Sturm identifies the problem of “second generation” discrimination. Such discrimination is not blatant (such as signs saying “no Irish need apply”) but instead involves “patterns of interaction” and cognitive bias.<sup>38</sup> Sturm points out that second generation discrimination is much harder to reach by simple legal edicts: “the complex and dynamic problems inherent in second generation discrimination cases pose a serious challenge for a first generation system that relies solely on courts (or other governmental institutions) to articulate and enforce specific, across-the-board rules.”<sup>39</sup> She thus argues that antidiscrimination law should approach second generation discrimination in a problem solving mode that “shifts emphasis away from primary reliance on after-the-fact enforcement of centrally defined, specific commands.”<sup>40</sup> Rather than thinking about law in terms of rule enforcement, which focuses the creation of legal claims, lawyers and other legal actors should think about using law to create incentives for employers to “identify, prevent, and redress

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rising rates of dismissals on 12(b)(6) motions in Title VII cases following the Court’s decisions in *Iqbal* and *Twombly*); Joseph A. Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011 (2009) (finding a higher percentage of decisions granting motions to dismiss in employment discrimination cases after *Twombly*).

<sup>37</sup> Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001).

<sup>38</sup> *Id.* at 460.

<sup>39</sup> *Id.* at 461.

<sup>40</sup> *Id.* at 462.

exclusion, bias, and abuse,” *before* cases get to court.<sup>41</sup>

Sturm gives several examples of how the Court’s Title VII jurisprudence has sought to create incentives for employers to address discrimination problems internally. Chief among her examples is the Court’s initiative in crafting an affirmative defense to vicarious liability in supervisor sex harassment cases.<sup>42</sup> This defense allows employers to avoid liability for supervisor sex harassment if (1) they have set up reasonable policies to deter and investigate sex harassment cases and (2) plaintiffs have failed to use them.<sup>43</sup> Sturm argues, against a number of critics of this doctrine,<sup>44</sup> that this example of a “second generation” approach to employment antidiscrimination rules will help eliminate discrimination by encouraging plaintiffs to raise issues within the workplace to be dealt with effectively there, even though it also makes cases much harder for plaintiffs to win later.<sup>45</sup> Sturm’s point is that the main objective of civil rights law is not necessarily to create more opportunities for plaintiffs to win cases in courts; rather, the core objective may be to bring about workplaces in which lawsuits are not needed, because problems have been resolved there rather than being removed to outside institutions.

Sturm goes on to identify the criteria for evaluating the effectiveness of such second generation antidiscrimination doctrines. These include whether they “[s]et the stage for institutional self-reflection,” enable “organizations to address new problems,” produce information about second generation problems, and “build the capacity of workplace participants to prevent and address bias.”<sup>46</sup> Sturm describes in depth the

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<sup>41</sup> *Id.* at 463.

<sup>42</sup> See *supra* note 8 and accompanying text for a discussion of this doctrine.

<sup>43</sup> *Id.*

<sup>44</sup> See, e.g., Anne Lawton, *Operating in an Empirical Vacuum: The Ellerth and Faragher Affirmative Defense*, 13 COLUM. J. GENDER & L. 197 (2004) (arguing that courts’ focus on paper policies and procedures ends up shifting the burden of proof on prevention back to employees, contrary to the Court’s intent); John H. Marks, *Smoke, Mirrors, and the Disappearance of “Vicarious” Liability: The Emergence of A Dubious Summary-Judgment Safe Harbor for Employers Whose Supervisory Personnel Commit Hostile Environment Workplace Harassment*, 38 HOUS. L. REV. 1401, 1405 (2002) (“This Article challenges the logic and the policy implications of [the *Ellerth*] safe-harbor strategy and argues that post-*Ellerth* lower courts have been far too deferential to the strategy at the summary judgment stage of litigation.”); Susan D. Carle, *Acknowledging Informal Power Dynamics in the Workplace: A Proposal for Further Development of the Vicarious Liability Doctrine in Hostile Environment Sexual Harassment Cases*, 13 DUKE JOURNAL OF GENDER LAW & POLICY 85 (2006) (arguing that the Court’s affirmative defense fails to appreciate workplace power dynamics).

<sup>45</sup> Sturm, *supra* note 37, at 483 (the sexual harassment affirmative defense “creates considerable incentives for [the] employer to focus on the meaning and application of the antidiscrimination norm in relation to its own workplace culture and dynamics.”)

<sup>46</sup> *Id.* at 489-90.

policies of three model employers: Deloitte & Touche, an major accounting firm; Intel Corporation, a “driving force behind the global technology revolution,”<sup>47</sup> and home improvement retail chain Home Depot. Focusing on sex discrimination, Sturm shows how these progressive employers sought to set up internal processes to examine policies and reform them to increase women’s career success.

Sturm also identifies “the pivotal role of intermediaries”<sup>48</sup> in these processes, and also discusses some of the problems these employers encountered, including the fact that a large employer like Home Depot still faced discrimination suits where local managers circumvented central administration policies designed to promote fair and inclusive hiring and promotion processes. Thus, Sturm notes, litigation may still sometimes prove “essential to focus attention on identified problems where internal systems failed to correct them.”<sup>49</sup> In addition, Sturm acknowledges, power imbalances stemming from differences in status may reemerge in the dynamics of internal processes.<sup>50</sup> Sturm closes by calling for further inquiry into the role of intermediaries, and calls on companies to “learn from the Intels and Home Depots,” to avoid becoming the next notoriously bad actor in the employment discrimination world.<sup>51</sup>

Sturm’s analysis focuses on the practices of the “best,” most well-meaning employers. These are often (though not always) employers who draw their employees from a professional, highly educated, and thus relatively privileged labor pool: The Intel Corp. and Deloitte and Touche are cases in point: These employers must compete for top talent and use their progressive employment policies to do so.<sup>52</sup> Far too many other employers are less motivated to achieve high marks for their employment practices, especially if they rely on less skilled workers who are easily replaced. Thus Sturm’s excellent ideas may need modification to extend them to working environments in which employers are less willing to engage in self-examination of their workplace practices. Law should

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<sup>47</sup>See <http://www.intel.com/content/www/us/en/company-overview/company-overview.html> (last visited June 23, 2014).

<sup>48</sup> *Id.* at 522. These intermediaries in her case examples included senior officials, independent consultants, problem solving lawyers and employee identity caucuses. *Id.* at 522, 531, 544.

<sup>49</sup> *Id.* at 544.

<sup>50</sup> *Id.* at 545.

<sup>51</sup> *Id.* at 568.

<sup>52</sup> Cf. Sarah Lacy, *Google Takes Another Big Step to Retain Employees: Autonomous Business Units*, TECHCRUNCH, Dec. 17, 2010, available at <http://techcrunch.com/2010/12/17/google-takes-another-big-step-to-retain-employees-autonomous-business-units/> (discussing Google’s policy of providing greater employee autonomy to retain workforce talent).

motivate them to do so anyway.

In this context the concept of the angry employee, joined to Sturm's concept of "second generation" approaches, points to new directions for Title VII doctrine. Law can create incentives for managers to listen to discrimination complaints and strive to investigate and resolve them even among less ideal employers. And just as employers may be less than ideal, so too may employees behave less than perfectly. Indeed, the less ideal the employer the more likely is the possibility of less ideal employee behavior in reaction to perceived and unrectified discrimination.

This article will argue that, from a second-generation regulatory perspective, employee self-help (within limits) is a laudatory phenomenon. Even court-focused civil rights advocates should recognize the importance of employee self-help before resort to court, given the low chances of plaintiffs' success through litigation. If federal courts can no longer be looked to as staunch guardians of Title VII's nondiscrimination edicts in individual cases, might they still be convinced to set up "second generation" rules that would create incentives for employers to clean up discrimination-laden working environments without generating additional Title VII complaints on courts' dockets?

In sum, today's federal courts, burdened by huge case dockets and guided by the Supreme Court's directives encouraging dismissal of Title VII cases at early stages of litigation, do not engage in searching scrutiny of the facts underlying Title VII cases to ensure that discrimination in the workplace is stamped out. Facts that might have troubled pro-civil rights courts in an earlier period receive cursory treatment before case dismissal today. A "buzzing atmosphere" of discrimination—*i.e.*, manifest hostility around race, sex, and other protected characteristics—is evident in many case narratives even when plaintiffs do not succeed, as this article will discuss in detail in Section II below. Into this atmosphere steps the angry worker—a worker who has experienced situations indicative of discrimination, has complained about it internally, but has not received satisfaction. Attempting to engage in self-help, this angry employee engages in mildly or moderately insubordinate behavior, such as an angry outburst, uttering swear words and/or refusal to follow an instruction of a supervisor. The typical result is termination for insubordination. The terminated employee files a lawsuit, only to have the court uphold the employer's action on insubordination grounds. Section II explores this pattern of cases as a prerequisite to proposing doctrinal reform.

## II. HOW TITLE VII COURTS GET INSUBORDINATION CASES WRONG

In thinking about the state of Title VII insubordination law today, consider the following facts, taken from the record in *Morgan v. National*

*Railroad Passenger Corp.*: Abner Morgan, a trained and experienced electrician, applied for a position at an Amtrak maintenance yard in Oakland, California.<sup>53</sup> Amtrak offered Morgan a job, which he believed was as an electrician.<sup>54</sup> When he began work, however, he received the title of “electrician helper.”<sup>55</sup> Morgan was the only person ever hired as a “helper” in this yard. Because of his job classification he was paid less than other workers who were doing the same electrician’s work. As Morgan saw it, the relevant difference was that these other workers were white and Morgan was black.

Morgan complained of race discrimination, setting in motion a series of negative interactions with management.<sup>56</sup> He eventually succeeded in having his salary equalized through union arbitration, but he continued to face discipline that was harsher than sanctions imposed on other workers. His supervisors ordered him to do demeaning cleanup work others did not have to do and called him racially derogatory names.<sup>57</sup> The final incident leading to Morgan’s termination took place when a supervisor yelled at Morgan to “get his ‘black ass’ into the office.” Morgan refused and went home, and Amtrak terminated him for violating the company’s rule prohibiting insubordination.<sup>58</sup>

Morgan filed a lawsuit under Title VII of the Civil Rights Act of 1964,<sup>59</sup> offering as evidence not only his own treatment but also the testimony of fellow employees who described a “racially-laden atmosphere

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<sup>53</sup> *Morgan v. National RR Passenger Corp.*, 232 F.3d 1008, 1010-11 (9<sup>th</sup> Cir. 2000). The facts offered here are those the court took as true for purposes of summary judgment. *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> For example, Morgan was asked to attend a meeting in a supervisor’s office, but when he insisted on union representation, as was his right under federal labor law, a supervisor refused to allow this and then fired Morgan for failing to obey orders to attend the meeting. Morgan filed a union grievance and his termination was reduced to a 10-day suspension, which was the most severe discipline ever imposed on an employee at the yard for more than a decade. When he came back to work Morgan’s problems at his job became even worse. When he applied to participate in an apprenticeship program, the yard supervisor told him he had “a snowball’s chance in hell of becoming an electrician” at his yard. *Id.* at 1011. Morgan never received a response from the main office about his application. Based on this and other incidents, Morgan filed a race discrimination complaint with the EEOC. He and other employees met with their congresswoman to complain about conditions at the yard. But instead of conditions improving, Morgan began to receive various disciplinary charges he believed were unfounded, such as a charge of absenteeism for taking leave he had properly requested and had approved. *Id.*

<sup>57</sup> *Id.* at 1012.

<sup>58</sup> *Id.* at 1013.

<sup>59</sup> 42 U.S.C. § 2000 et seq.

at the Yard.”<sup>60</sup> He lost his first jury trial following the district court’s decision to exclude evidence as to this long history of race-based treatment against Morgan and others. His appeal from this ruling eventually produced an important U.S. Supreme Court opinion holding that pre-limitations incidents may be used to establish “hostile environment” discrimination<sup>61</sup> but not to support claims involving “discrete” acts of discrimination.<sup>62</sup>

A virtually unnoticed aspect of the *Morgan* case, however, was Amtrak’s invocation of “insubordination” as its “legitimate, nondiscriminatory reason”<sup>63</sup> for firing Morgan. As this article has already pointed out, Amtrak’s theory that termination for insubordination constituted a legitimate, nondiscriminatory reason for Morgan’s termination was problematic, however: The alleged insubordination took place in reaction to provocative, race-related acts of the employer’s supervisors, and thus logically could not be said to be a reason for his termination independent of the alleged discrimination.

This logical flaw in the employer’s case theory in *Morgan* could be dismissed as an isolated fact-based anomaly, if it were not for the fact that, in other cases as well, courts are routinely entering judgment in favor of employers where the facts show that an employee was mildly or moderately insubordinate in reaction to perceptions of discriminatory treatment.<sup>64</sup> To

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<sup>60</sup> This evidence included testimony of approximately a dozen employees, including a former manager, stating that supervisors frequently made racial jokes, used the “n” word and other racial epithets, called an African American employee “boy,” performed racially derogatory acts in front of higher management officials, and made negative comments about the capacity of African American employees. *Morgan*, 232 F.3d at 1010-11.

<sup>61</sup> Under this theory of discrimination a plaintiff must show that racial harassment was so “severe and pervasive” as to constitute discrimination because it altered the “terms and conditions of employment” for the plaintiff. *See infra* note 268.

<sup>62</sup> *National RR Passenger Comm’n v. Morgan*, 122 S. Ct. 2061 (2002). Commentators have criticized the Court’s formulation of continuing violations theory in *Morgan*. *See, e.g.*, Vincent Cheng, *National Railroad Passenger Corporation v. Morgan: A Problematic Formulation of the Continuing Violation Theory*, 91 CAL. L. REV. 1417, 1442 (2003) (arguing that *Morgan* rests on a “dubious doctrinal distinction.”). In the case itself, however, admission of the additional evidence of a long pattern of race-based harassment led to victory for the plaintiff on retrial. *See* May 5, 2004 Jury Verdict, in Case No. C96-03585 SI, United States Dist. Court for the Northern District of California. Morgan won a \$500,000 jury verdict, which the judge adjusted downward, and the parties then entered into a confidential settlement dismissing an appeal. *See* Stipulation to Dismiss the Appeal, Jan. 3, 2005, Dist. Ct. No. c-96 03 585 SI.

<sup>63</sup> Under Title VII, an employer must present a “legitimate, nondiscriminatory reason” for an adverse employment action after the plaintiff has made out a prima facie case of discrimination, and the plaintiff then bears the burden of persuasion that discrimination was the real reason for the action. *See generally* *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 142-43 (2000) (citations omitted).

<sup>64</sup> In other words, an employee has made an angry outburst, cursed, and/or refused to carry out a supervisor’s order but has not gone so far as to engage in physical violence or

be sure, most employers have legitimate work rules prohibiting insubordination, just as Amtrak did.<sup>65</sup> On first glance, finding an employee insubordinate under such rules appears to be an easy way to dispose of Title VII cases: an employer alleges that an employee has violated reasonable rules prohibiting insubordination and the employee essentially admits to having failed to obey an order or using intemperate language towards a superior. Under the relevant three-step test for satisfying the elements of proof in a Title VII case,<sup>66</sup> the decision-maker can quickly conclude that the employer's stated reason is the "real" reason for the termination, in which case the plaintiff's case fails. The result is a body of cases similar to *Morgan*, in which courts uphold plaintiffs' terminations despite troubling facts attesting to workplace atmospheres and supervisor conduct reflecting discriminatory animus.

The cases in which Title VII courts have gotten insubordination wrong span the lifetime of Title VII; they are neither a historical relic nor a recent development.<sup>67</sup> However, the number of these cases may be increasing as courts stretch for ways to dismiss Title VII cases summarily. This trend should give observers reason for concern: logical sloppiness may be developing into a line of doctrine that threatens to undermine employment antidiscrimination law. In the interests of space and reader attention, this Section highlights only a handful of these cases, selecting a representative sample that spans a variety of federal courts of appeals in order to show that this problem of analytic error extends across jurisdictions, though some courts, especially in the Third Circuit,<sup>68</sup> have better track records than others. I examine federal courts cases only, since that is the focus of this article; state courts may be making similar errors (or, conversely, doing a better job).

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threats of violence nor engaged in a long, sustained course of misconduct.

<sup>65</sup> Amtrak's rules stated "[e]mployees must obey instruction, directions and orders from Amtrak supervisor personnel and officers. . . . Insubordinate conduct will not be tolerated," and further prohibited "profane or vulgar language." 232 F. 3d. at 1011-12 nns. 5 & 9.

<sup>66</sup> As the Court most recently discussed in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), this three-step test requires (1) the plaintiff to make out the elements of the prima facie case, (2) the defendant to offer a legitimate, non-discriminatory reason for taking an adverse employment action against the plaintiff, and then (3) the plaintiff to persuade the finder of fact by a preponderance of the evidence that a discriminatory reason was the real reason for the action.

<sup>67</sup> As I discuss further below, Terry Smith identified a similar phenomenon, which he called "subtle discrimination," in his powerful article, Terry Smith, *Everyday Indignities: Race, Retaliation, and the Promise of Title VII*, 34 COLUM. HUM. RTS. L. REV. 529, 535 (2003).

<sup>68</sup> See, e.g., *Robinson v. Septa*, 982 F.2d 892 (1993); *Goodwing v. City of Pittsburgh*, 480 F. Supp. 627 (W. D. Pa. 1979) *aff'd* 624 F.2d 1090 (3rd Cir. 1980).

The cases discussed below can be broken into several categories, namely: (A) single motive cases in which courts regard employee verbal outbursts as the legitimate, nondiscriminatory reason for an adverse employment action, despite evidence of related discrimination or retaliation; (B) cases applying Title VII mixed motive analysis but reaching similar result; and (C) cases analyzed under Title VII's "opposition conduct" clause, which protects employees against retaliation for opposing workplace discrimination.<sup>69</sup> The parts below discuss each category in turn.

A. *Insubordination as the Legitimate Nondiscriminatory Reason for an Adverse Employment Action*

As already noted, the *Morgan* case,<sup>70</sup> better known for announcing new rules for application of continuing violations theory, is also, if read carefully, an insubordination case. Its facts follow a pattern seen in a troubling number of cases: an African American employee alleges that he has been "consistently harassed and disciplined more harshly than other employees on account of his race," through such steps as denying him the right to participate in training opportunities and assigning him demeaning work beneath his job classification.<sup>71</sup> He also has evidence of supervisors' repeated use of racial epithets.<sup>72</sup> These incidents lead to an escalation of hostility between the employee and management that ultimately culminates in an altercation and the employee's termination for insubordination, later upheld in court.<sup>73</sup> Here are a few examples:

*Clack v. Rock-Tenn Co.* arose in the Sixth Circuit on appeal from a district court's grant of summary judgment to an employer.<sup>74</sup> Clack, an African American line worker in a recycling plant, presented considerable evidence that he had been subjected to a long series of harassing statements and conduct by Murphy, his direct supervisor.<sup>75</sup> Murphy was white and known to openly express racial prejudice.<sup>76</sup> The incident that led to the Clack's termination occurred when Murphy ordered Clack to carry out a clean-up task that Clack believed was not within his job duties.<sup>77</sup> Clack refused and left the area to find the plant superintendent, after which Murphy sent him home for insubordination. The company general manager then conducted a limited investigation and accepted the plant

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<sup>69</sup> Title VII, § 704(a), 42 U.S.C. § 2000e-3(a).

<sup>70</sup> 536 U.S. 101 (2002).

<sup>71</sup> *Id.* at 105-08.

<sup>72</sup> *Id.* at 105 & n.1.

<sup>73</sup> 536 U.S. at 114 & n.8.

<sup>74</sup> 304 F.App'x 399 (6<sup>th</sup> Cir. 2008).

<sup>75</sup> *Id.* at 401.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

superintendent's recommendation that Clack be fired.<sup>78</sup>

On these facts, the majority opinion upheld the district court's grant of summary judgment for the employer, reasoning that, "although plaintiff established a *prima facie* case of both discrimination and retaliation, he has not demonstrated that defendants' stated reason for termination—insubordination—was pretextual."<sup>79</sup> The majority further opined that the evidence of Murphy's racial animus could not be imputed to higher management because Murphy's role had been limited to reporting the incident and letting higher management form their own opinions.<sup>80</sup> This circuit followed similar dubious logic in other recent opinions in favor of employers in Title VII insubordination cases as well.<sup>81</sup>

The *Clack* court's ruling produced a strong dissent from Judge Karen Nelson Moore. This dissent, along with others, can provide helpful guidance into how courts could better handle insubordination cases. Judge Moore pointed out that the record could well support the inference that higher management "knew about Murphy's racist remarks, his discriminatory treatment of African-American employees, and his hostility toward Clack particular," as shown by an affidavit of a fellow supervisor

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 401-02.

<sup>80</sup> *Id.* at 405-06. This reasoning rested in part on the "cat's paw" theory of when discrimination by non-decision makers can be imputed to an employer's managers, which has since been clarified by the U.S. Supreme Court in *Staub v. Proctor Hospital*, 131 S.Ct. 1186 (2011) (holding that illegally motivated actions by non-decision makers can be attributed to the employer where they are the proximate cause of an adverse employment action because they influenced the decisionmaker's deliberations).

<sup>81</sup> For example, in *Davis v. Omni-Care, Inc.*, 482 F.App'x 102 (6<sup>th</sup> Cir. 2010), the African American plaintiff, who worked as a driver for a pharmaceutical provider, had been subjected to co-worker race harassment in the form of a noose hanging in the workspace. He complained to his employer but it merely promised to carry out diversity training. The employee became agitated when he learned that nothing more would come of his complaint. He began to fail to respond from the road to calls from his supervisor. When his supervisors informed him that he could either talk with them about his communications problems or go home, he opted to leave, after which he was fired. The district court granted summary judgment to the employer and the Sixth Circuit affirmed, holding that the plaintiff had failed to demonstrate that the decision-maker's legitimate, non-discriminatory reason for terminating employee for refusal to speak with a supervisor was a pretext for retaliation for his claims of hostile work environment.

Similarly, in *Tibbs v. Calvary Methodist Church*, 505 F. App'x 508 (6<sup>th</sup> Cir. 2012), an African American teacher alleged both age discrimination under the ADEA and race discrimination under Title VII after she was reassigned to a new classroom. She expressed hurt feelings and abruptly ended a meeting with her supervisor about the situation. Her supervisor then terminated her for insubordination for her conduct at the meeting. *Id.* at 509. The Sixth Circuit held that "Tibbs has failed to create a genuine issue of material fact on the pretext issue because she does not deny that she left the 'heated' meeting early, and her belief that she was not insubordinate is irrelevant in the analysis." *Id.* at 515.

“who detailed a series of racist remarks by Murphy, some of which were specifically directed at Clack.”<sup>82</sup> Given this background, Judge Moore argued, it was noteworthy that the company decision-makers did “nothing to probe what role Murphy’s racial animus might have played in the events in question”; they instead “conducted an investigation with blinders on.”<sup>83</sup> Moore argued that the district court should instead have considered the “taint of Murphy’s discriminatory animus” and concluded that Clack had produced enough evidence of pretext to allow the case to be submitted to a jury.<sup>84</sup> This article will return to Judge Moore’s approach for further discussion in Section IV-A-1.

The Seventh Circuit committed the same kind of logical error as the Sixth Circuit majority did in *Clack* in *McClendon v. Indiana Sugars, Inc.*<sup>85</sup> In that case, McClendon, an African American man, had worked his way up in a sugar processing plant from janitor to warehouse manager.<sup>86</sup> He then found himself subjected to random searches after sugar disappeared from the plant. During the course of one such search a plant manager allegedly called McClendon a “black thief.”<sup>87</sup> McClendon filed EEOC charges and also subsequently complained of unlawful retaliation when the company assigned overtime work to a less senior white employee. When asked to develop a list of performance goals for himself, he objected, believing he had been singled out for this task. McClendon became increasingly confrontational in several meetings with supervisors in which he questioned their motivations, and found himself terminated for insubordination.<sup>88</sup>

A state agency ruling on McClendon’s unemployment compensation

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<sup>82</sup> *Clack*, 304 F.App’x at 408–9 (Moore, J., dissenting).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 409-10. Applying similar reasoning the First Circuit recently reached a correct result in a disability discrimination insubordination case. *See Kelley v. Corr. Med. Servs., Inc.*, 707 F.3d 108, 110 (1st Cir. 2013). In that case the plaintiff, who had suffered a shattered pelvis, faced a variety of disability-related harassment incidents and then refused an impromptu work re-assignment on the ground that she did not yet have the stamina or capability to respond adequately to the intensive demands of that assignment, after which she was terminated for insubordination. *Id.* at 114-15. The district court held that Kelley presented a prima facie case of disability discrimination but that she failed to survive summary judgment because she could not show that the stated cause for her termination – insubordination – was a pretext for discriminatory intent. *Id.* at 118. The First Circuit reversed, however, holding that the court had disregarded the evidence of “ongoing disability-based animus and the way in which that animus might have influenced [the] adverse employment action” against the plaintiff. *Id.* Moreover, the court held that the employer should not be permitted to invoke the specter of insubordination in order to “mask [ ] retaliation for requesting [an] accommodation.” *Id.* (citation omitted).

<sup>85</sup> 108 F.3d 789 (7<sup>th</sup> Cir. 1997).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 792-94.

claim found as a matter of fact that he had not been insubordinate, but the Seventh Circuit found this evidence irrelevant because in those proceedings the burden of proof had been on the employer rather than on McClendon as it would be in a Title VII case. In affirming the district court's grant of summary judgment to the employer, the Seventh Circuit held that it was "not relevant whether Mr. McClendon actually was insubordinate. All that is relevant is whether his employer was justified in coming to that conclusion."<sup>89</sup> Concluding that the record raised no triable issue of fact "as to whether Mr. McClendon's supervisors believed in good faith that he was insubordinate," the Seventh Circuit found no reason to disturb the lower court's judgment for the employer.<sup>90</sup>

Here as in *Clack*, evidence of discrimination that rendered that the situation more complicated than simple insubordination did not motivate the court to take a closer look. But as Judge Moore argued in dissent in *Clack*, the Seventh Circuit should have done so.<sup>91</sup> Morgan, Clack and McClendon are examples of recent court of appeals cases. There are also many more,<sup>92</sup> as prior scholars have documented in unearthing a host of cases that pose similar logical fallacies. For example, more than a decade ago Professor Terry Smith noted the many cases involving employee "self-help" responses to what Smith called "subtle" workplace discrimination (which, in many of the cases he described, often seemed far from subtle indeed).<sup>93</sup> Smith culled the psychology and sociological literature to illuminate the special harm minority workers experience when they confront such discrimination, and argued for courts to show greater sensitivity to the special injury these employees endure.

Smith based his analysis on a set of primarily district court cases he found in his research, and concluded with the suggestion that courts view these scenarios involving employees who respond strongly to perceived patterns of race discrimination as opposition conduct cases and expand employee protections for such conduct, as I will discuss further in Section

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<sup>89</sup> *Id.* at 799.

<sup>90</sup> *Id.*

<sup>91</sup> *Clack v. Rock Tenn. Co.*, 304 F.App'x 399, 408-09 (6<sup>th</sup> Cir. 2008). (Moore, J., dissenting).

<sup>92</sup> See, e.g., *Stallworth v. Singing River Health Sys.*, 469 F. App'x 369, 370 (5<sup>th</sup> Cir. 2012). *Stallworth*, a religious discrimination case, involved a plaintiff's complaint to her supervisor about coworker harassment when she engaged in lunchtime prayer, after which her supervisor declined her requests to take part in a training program. When she contacted another official in an attempt to obtain the training, her employer fired her on insubordination grounds. *Id.* at 370. Both the district court and Fifth Circuit rejected Stallworth's claims on summary judgment, holding that her "subjective belief that her actions did not constitute insubordination is insufficient to create an inference of discriminatory intent by" the defendant. *Id.* at 372.

<sup>93</sup> Smith, *supra* note 67.

IV-A-3 below. Key at this point is the similarity between the “subtle discrimination” cases Smith collected and the insubordination cases I have collected here. Here is Smith’s description of one such representative district court case:

As Donald Edwards entered the coffee room of the factory where he worked, the plant manager offered a curious salutation, “Good morning, sunshine.” Edwards parried, “Don’t call me ‘sunshine,’ you motherfucker. My name is Donald Edwards.” The plant manager, Donald Johnson, immediately fired Edwards for “gross insubordination.” Their confrontation would later escalate into fisticuffs. Edwards, a forty-nine-year-old black man, sued his employer, alleging racial discrimination in violation of Title VII. In finding for the employer, the court noted several facts without apparent appreciation of their inconsistency with its judgment. First, Johnson, who is white, had previously referred to Edwards as “sunshine,” a moniker that Edwards had earlier requested that Johnson not use. There was also evidence that Edwards had previously charged Johnson with racially motivated employment practices, such as denying the plaintiff proper routes, overtime, and equipment. Finally, under the relevant collective bargaining agreement, the plaintiff could not be fired merely for calling a supervisor “motherfucker,” a fact that the court noted but did not impute to Johnson. Notwithstanding the racial aura—and the evident provocation—shrouding Edwards’s dismissal, the court found that the dismissal was justified, not because of Edwards’s initial response but because of the later physical altercation. Thus, Title VII’s prohibition against discrimination on grounds of race did not protect the plaintiff.<sup>94</sup>

Professor Anne Levy has also contributed a fascinating article that collects egregious cases in the sex harassment context.<sup>95</sup> Levy analyzes opinions such as *Bohen v. City of East Chicago*,<sup>96</sup> a case involving

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<sup>94</sup> *Id.* at 530, discussing *Edwards v. Foucar, Ray & Simon, Inc.*, 23 Fair Empl. Prac. Cas. (BNA) 1644, 1645 (N.D. Cal. Aug. 19, 1980).

<sup>95</sup> Anne C. Levy, *Righting the “Unrightable Wrong:” A Renewed Call for Adequate Remedies under Title VII*, 34 ST. LOUIS U. L.J. 567 (1990) (noting that courts are unlikely to find a nexus between sex harassment and discharge for insubordination).

<sup>96</sup> 799 F.2d 1180 (7th Cir. 1986).

“allegations of egregious sexual harassment,” in which the Seventh Circuit refused to overturn the district court’s ruling that the plaintiff’s insubordination was not linked to the abuse she suffered. Levy argues that this plaintiff’s conduct “may have been appropriate behavior in light of the outrageous facts in the case.”<sup>97</sup> After analyzing additional cases as well,<sup>98</sup> Levy concludes:

It appears that many courts are either unable to understand or refuse to become involved in the possibility that management may have forfeited its right to subservient and respectful behavior in circumstances where it condones or engages in egregious harassment of its employees and when it has, in fact, broken the law and disregarded the rights of the victim.<sup>99</sup>

Smith and Levy’s analyses differs from this article’s in a number of respects,<sup>100</sup> but the phenomenon we each independently observe is similar:

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<sup>97</sup> Levy, *supra* note 95, at 582. As an example of a case in which the court got the analysis right, Levy cites *Broderick v. Ruder*, 685 F.Supp. 1269 (D.D.C. 1988), where the plaintiff demonstrated through ample evidence that “her failure to interact with her supervisors was directly attributable to the atmosphere in which she worked.” Levy, *supra* note 103, at 583-84, citing 685 F. Supp. at 1280 (footnote omitted).

<sup>98</sup> In the analogous race discrimination context, Levy analyzes *EEOC v. Murphy Motor Freight Lines*, 488 F. Supp. 381, 387 (D.Minn. 1980). There the district court concluded, erroneously in Levy’s view, that “a combination of rules violations, insubordinate attitude, and low productivity is sufficient to negate any alleged causal link between race and discharge.” Levy points out that this “conclusion was reached despite the court’s additional finding that the plaintiff was subjected to ‘vicious, frequent, and reprehensible instances of racial harassment.’” 488 F.Supp. at 384. As Levy further explains, “[t]he facts of *Murphy* are particularly compelling. Written continually on blackboards and inside freight trailers in the workplace were such phrases as: ‘Ray Wells [the plaintiff] is a nigger’; ‘The only good nigger is a dead nigger’; and ‘Niggers are a living example that the Indians screwed buffalo.’ A wooden cross identified with the Ku Klux Klan was attached to a cart used to move freight and a special lunchroom, where plaintiff was forced to sit alone, was identified by a sign as “nigger lunchroom.” Anti-black articles and graffiti were continually on the wall and on company bulletin boards, the tires on plaintiff’s car were slashed, and a foul-smelling substance was put in his shoes. All of this harassment apparently occurred with the knowledge and, at least, acquiescence of the supervisors who testified to seeing it. Levy, *supra* note 95, at 583, citing 488 F. Supp. at 384-85.

<sup>99</sup> Levy, *supra* note 95, at 583.

<sup>100</sup> For example, Smith’s approach covers race discrimination only, because, as he persuasively argues, race is “different,” Smith, *supra* note 67 at 529, whereas my approach would cover all types of Title VII discrimination as well as those covered by analogous anti-discrimination statutes such as the ADEA and ADA. Smith focuses his proposed remedy on reforming retaliation opposition conduct law; I briefly discuss my agreement with his proposal but also offer a number of additional reforms in Section IV *infra*. Levy’s purpose is to analyze the many ways in which Title VII courts are failing to grant adequate relief in hostile environment cases and she offers a statutory overhaul in Title VII’s

In too many cases involving troubling facts about workplaces full of signs of discriminatory animus, plaintiffs routinely lose because they have reacted with anger, leading to their dismissal for insubordination.<sup>101</sup>

Still another helpful intervention comes from Prof. Charles A. Sullivan. He writes about a retaliation case<sup>102</sup> (in this instance under the participation clause<sup>103</sup>), in which a plaintiff was fired for telling an employee representative in an EEOC-arranged mediation to “shove” a settlement proposal “up your ass.”<sup>104</sup> Sullivan notes that “[v]oices are raised and tempers flare in mediations across the country,” and warns against creation of “a kind of civility code” in retaliation cases, noting that “it’s scarcely surprising that etiquette will sometimes go by the wayside. Sullivan urges court to accept the reality that not all disputes are conducted in the stately minuet” the *Hatmaker* court seemed to expect.<sup>105</sup>

Smith, Levy, Sullivan and I have all pointed to cases we view as having strong facts in plaintiffs’ favor despite acts of mild to moderate insubordination. Sometimes, however, the facts for the plaintiff are not particularly strong. The background evidence of discrimination may be quite weak, for example, or the plaintiff’s reaction may go beyond what this article has termed mild or moderate insubordination.<sup>106</sup> Reviewing courts nevertheless get the analysis wrong by failing to consider the employer’s reason for discharge in light of whether a reasonable plaintiff would have cause to display indignation in light of justified perceptions of discrimination. The answer to this question may be no, but courts should at least consider it.<sup>107</sup>

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remedies provisions as her main proposed reform. See Levy, *supra* note 95, at 568, 600.

<sup>101</sup> Another article that collects additional race discrimination/insubordination cases not discussed here is R. Bales, *A New Standard for Title VII Opposition Cases: Fitting the Personnel Manager Double Standard into a Cognizable Framework*, 35 S. TEX. L. REV. 95 (1994) (discussing insubordination cases involving personal managers) (citing EEOC v. Kendon of Dallas, Inc., 34 Empl. Prac. Dec. (CCH) ¶ 34,393 (E.D. Tex. Mar. 8, 1984)); see also Elizabeth Chambliss, *Title VII as Displacement of Conflict*, 6 TEMPLE POL. & CIV. RTS. L. REV. 1 (1997) (analyzing and critiquing courts’ unwillingness to protect EEO officers from employer retaliation).

<sup>102</sup>[title], 691 F.3d 741 (7<sup>th</sup> Cir. 2010).

<sup>103</sup> For discussion of participation clause retaliation see *infra* text accompanying note 113.

<sup>104</sup> Charles A. Sullivan, “Taking Civility Too Far?” Workplace Prof Blog (Aug. 9, 2013), [http://lawprofessors.typepad.com/laborprof\\_blog/2013/08/taking-civility-too-far.html](http://lawprofessors.typepad.com/laborprof_blog/2013/08/taking-civility-too-far.html) (last visited Jan. 30, 2014).

<sup>105</sup> *Id.*

<sup>106</sup> See *infra* note 116.

<sup>107</sup> A case in this category is the Eighth Circuit’s opinion in *Garrett v. Mobil Oil Corp.*, 531 F.2d 892 (8<sup>th</sup> Cir. 1976). There the plaintiff, an African American mailroom employee, believed she had been the victim of a discriminatory performance evaluation. Without permission from her supervisor she left her work station in an attempt to see a

Mixed motive analysis is available in Title VII cases to deal with situations such these — where both legitimate and illegitimate reasons, such as a legitimate performance evaluation documenting inadequate performance as well as discrimination and/or opposition conduct—may have motivated an employer’s adverse employment action against a plaintiff.<sup>108</sup> One might therefore hope that in mixed motive cases courts would do a better job of analyzing insubordination cases. Unfortunately, this is not always true. Although some courts do a good job with these cases, other courts do not. Cases in which courts do correct analysis can help point the way towards the development of proper principles to analyze insubordination cases generally, as discussed below.

### B. *Mixed Motive Analysis*

In the cases discussed in Part II-A above, insubordination cases are handled as “single motive” cases, meaning that the parties are contesting whether a single discriminatory or a nondiscriminatory reason was the real reason for an employee’s termination. In many other cases, often involving facts in which employee conduct really is quite troubling, either the plaintiff, or in some cases the employer, requests that the case proceed with instructions to the fact-finder to evaluate the mixed motive affirmative defense. In these cases the parties have essentially acknowledged that multiple factors, some discriminatory and some legitimate or nondiscriminatory, motivated the employer’s action. The job for the trier of fact is to determine whether, at bottom, the employer would have made the same decision even if discrimination was not a causative factor in its conduct.<sup>109</sup> Congress introduced more remedial complexity for mixed motive Title VII cases under the Civil Rights Amendment of 1991, but for our purposes these changes do not alter the analysis: plaintiffs win complete relief if they show discrimination was a “motivating factor” in an

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manager, and resisted with rude language when ordered to return to work. Later she and several other African American women with similar complaints again tried to visit this manager; he came out of his office and demanded that they leave. The company later notified her that she was fired for “repeated violation of by-passing your supervis[or] in presenting complaints to management and disrupting work.” *Id.* at 895.

After a bench trial, the court found that the employer properly discharged the plaintiff for “leaving her work station, disobeying work rules in presenting her complaint to management and disrupting operations.” *Id.* The Eighth Circuit affirmed, holding that the employer presented a valid reason for the discharge because “[c]ertainly an employer can fire a worker who refuses to obey reasonable regulations, leaves the work area without permission, and barges in on conferences and meetings of management personnel.” *Id.* at 895-96.

<sup>108</sup> See generally Harold S. Lewis, Jr. and Elizabeth J. Norman, *EMPLOYMENT DISCRIMINATION LAW AND PRACTICE* 365 (2d ed. 2004).

<sup>109</sup> *Id.*

adverse employment decision and the employer then fails to show that it would have made the same decision absent the discriminatory factor; employers receive a far less painful liability judgment (consisting of declaratory relief only) if they show they would have made the same decision even if discrimination had not been a motivating factor.<sup>110</sup>

In cases arising in a mixed motive posture one might think that the link between the underlying allegations of discrimination and the allegedly independent nondiscriminatory reason for the discharge—*i.e.*, insubordination—would be clearer: After all, if the employer’s asserted legitimate reason for the discharge, namely, insubordination, was itself provoked by the very discrimination acknowledged to be a motivating factor in the employer’s conduct, then the employer has not shown that it would have taken the same action absent discrimination. Logically, if the decision-maker finds that discrimination or retaliation was a motivating factor, it cannot then be said that the employer had an *independent* legitimate reason for its action when it fires an employee for insubordination related to or caused by that discrimination or retaliation. Discrimination or retaliation are instead intertwined with discrimination; the “reason” for the discharge would not have occurred if the discrimination or retaliation had not occurred.

Courts applying mixed motive analysis, however, have sometimes disregarded this logical point. A few examples can suffice as illustration. In *Matima v. Celli*,<sup>111</sup> the plaintiff, a black South African national with a master’s degree in pharmaceuticals, engaged in a long series of escalating verbal protests at the pharmaceutical company where he worked.<sup>112</sup> Some of these protests were disruptive of the manager’s time and efficiency.<sup>113</sup> Matima’s belief that he was being subjected to unlawful race and national origin discrimination triggered his protests.<sup>114</sup> A jury found that he had not been subject to unlawful discrimination but had been subject to unlawful retaliation after he began to complain of discrimination. The jury next concluded, on the basis of the court’s jury instructions, that the employer would have discharged the plaintiff even in the absence of retaliation, and the district court entered judgment for the employer.

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<sup>110</sup> See Title VII, § 706(g)(B); 42 U.S.C. § 2000e-5(g)(B). Moreover, in the retaliation clause context, the Court recently held that *no* mixed motive analysis is available, meaning that plaintiffs now must prove that retaliation is the “but for” cause of the adverse employment action they endured. See *Univ. of Texas Southwestern Medical Ctr. v. Nassar*, 133 S.Ct. 2517, 2528 (2013). This makes retaliation cases even harder for plaintiffs, but further consideration of *Nassar* falls beyond the scope of this article’s proposals for reform.

<sup>111</sup> 228 F.3d 68 (2d Cir. 2000).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

On appeal, the plaintiff pointed out that there was a patent logical flaw in the jury's conclusion that the employer would have fired Matmi even if he had not complained of discrimination, since it was his perception of discrimination that led him to complain.<sup>115</sup> The Second Circuit did not find this point compelling, however. Instead it pointed out, "We have held generally that insubordination and conduct that disrupts the workplace are 'legitimate reasons for firing and employee,' and we see no reason why the general principle would not apply, even when a complaint of discrimination is involved."<sup>116</sup> But this cannot be true in a mixed motive case where the insubordination and the discrimination are casually connected, as already discussed.

The Second Circuit further opined, "An employer does not violate Title VII when it takes adverse employment action against an employee to preserve a workplace environment that is governed by rules, subject to a chain of command, free of commotion, and conducive to the work of the enterprise."<sup>117</sup> The court noted that it was the employer that opted to proceed under a mixed motive analysis and thus agreed to shoulder the burden of proving that it fired the plaintiff for legitimate reasons. But because a "wealth of testimony and incident was available to show that the plaintiff's behavior was disruptive," the Second Circuit concluded that record amply supported the jury's verdict.<sup>118</sup>

Here again the Court must be wrong as a matter of logic. It may well be that Matima's termination was justified because his behavior went too far. But it was not justified because it was a cause "independent" of the perceived discrimination.<sup>119</sup> In cases like these, the underlying claim of discrimination and the resulting "insubordination" are not alternative, separate, and distinct causal factors; instead, one factor allegedly caused the other. The correct way to decide such cases, as discussed further in Part IV-A-2, would (1) consider the relationship, if any, between the insubordination and the perceived discrimination, and then, if such a relationship exists, (2) balance the circumstances causing the insubordination against the nature or degree of the response.

Some Title VII courts correctly perform this analysis under mixed motive doctrine in insubordination cases, as already noted. The Third Circuit's analysis in *Goodwin v. City of Pittsburgh*<sup>120</sup> is an example of such

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<sup>115</sup> *Id.* at 71.

<sup>116</sup> *Id.* at 79 (citations omitted).

<sup>117</sup> *Id.* (citations omitted).

<sup>118</sup> *Id.* at 81.

<sup>119</sup> *Cf. Staub*, 131 S. Ct. at 1192 (citing *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 837 (1996)) (explaining proximate cause and independent cause analysis in employment discrimination cases).

<sup>120</sup> 480 F. Supp. 627 (W. D. Pa. 1979) *aff'd* 624 F.2d 1090 (3rd Cir. 1980).

a well-reasoned case. There the plaintiff, an African American traffic control worker, experienced discrimination in his wages and job classification.<sup>121</sup> The EEOC conciliated this dispute and the employer adjusted the employee's pay prospectively.<sup>122</sup> Soon afterwards, however, a white supervisor berated the employee with swear words and racial epithets.<sup>123</sup> The plaintiff left his jobsite to find another supervisor and the situation eventually ended in a "heated verbal exchange" that resulted in the police and fire departments being brought in to calm the situation.<sup>124</sup> The plaintiff received a suspension and filed a new charge with the EEOC for racial harassment, after which he was called to a meeting in which city managers asked him to withdraw his EEOC charge. In the course of a discussion in which he refused to do so, he called one of these superiors a liar, and was terminated because of his "uncooperative attitude" and "disruptive influence."<sup>125</sup>

After a bench trial, the district court held that the city's contention that it fired Goodwin for insubordination must be considered *in relation to* his prior protected activities.<sup>126</sup> It concluded that a "retaliatory motive . . . played a substantial causal role in the decision to fire Goodwin when, on only one occasion, he called his boss "a 'liar,' under circumstances which were, at the least, provoked, and, at most justified."<sup>127</sup> The court continued, "[t]o be sure, calling a supervisor a liar is a serious matter. However, it takes on less significance if it occurs privately, during a heated debate initiated by the employer, about the employee's decision to engage in protected activities."<sup>128</sup> The court ruled that Goodwin had satisfied Title VII's burden of showing pretext and entered judgment in his favor.<sup>129</sup>

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<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 690.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 630-31.

<sup>126</sup> *Id.* at 634.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 645-46. Another recent case from the Third Circuit likewise balanced the underlying situation of egregious racial hostility against the workplace tension arising from opposition to this workplace culture. In *Moore v. City of Philadelphia*, white police officers brought suit under Title VII alleging that their supervisors retaliated against them for opposing racist slurs and other discriminatory practices against the African American officers in their police department. 462 F.2d 331 (3d Cir. 2006). The facts as to the egregious racial hostility in the workplace were compelling, as were the facts as to the retaliation the plaintiffs had endured for opposing it. The district court nevertheless granted summary judgment to the police department, holding that the plaintiffs could not claim protection against retaliation for protesting discrimination against a racial group in which they were not members. The court further opined that the situation was better viewed as one of mounting workplace tension and clashing personalities.

*Robinson v. SEPTA* presents another correctly reasoned analysis from the Third Circuit.<sup>130</sup> There the district court entered judgment for the plaintiff on race discrimination and retaliation claims involving multiple incidents of harassment and other employer conduct that, the district court found, were aimed at “generally trying to provoke Robinson to insubordination.”<sup>131</sup> The employer claimed that Robinson had been fired for insubordination, but the district court rejected this argument. The Third Circuit affirmed, noting that “[a] play cannot be understood on the basis of some of its scenes but only on its entire performance, and similarly, discrimination analysis must concentrate not on individual incidents, but on the overall scenario.”<sup>132</sup>

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The Third Circuit reversed, correctly viewing the complex mix of motives and causal factors in the case in explaining:

These three police officers have sought to recover for a long, unpleasant experience working at the Philadelphia Police Department. We find that a jury might well believe that their supervisors made their lives the “living nightmare” one supervisor promised as payment for opposing unlawful discrimination. It is true enough that only a portion of that nightmare can be attributed to a desire to retaliate against them . . . These officers have claimed many wrongs by many foes for many reasons. But this cannot obscure the fact that a jury might properly conclude that some of those wrongs by some of those foes were intended to silence the plaintiffs from identifying and opposing unlawful discrimination.

462 F.3d at 352.

<sup>130</sup> 982 F.2d 892 (1993).

<sup>131</sup> *Id.* at 897.

<sup>132</sup> *Id.* at 896 (quoting *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1484 (3d. Cir. 1990)). Still another correctly reasoned case is *Brown v. Scotland County*, 2003 WL 21418099 (M.D. N.C. 2003). This case involved two plaintiffs: Brown, an African American detective who was fired after he truthfully described to the press an incident in which a fellow white detective called him the “n” word in front of a prisoner; and Jones, an African American deputy sheriff who was fired after he questioned Brown’s termination. Brown filed suit raising First Amendment claims. The county claimed in response that its interest in sustaining discipline outweighed Brown’s free speech rights, but the district court rejected this claim in light of Brown’s “substantial interest in speaking about racial prejudice and discrimination in the Sheriff’s department.” *Id.* at \*6. Jones sued, alleging that the county had engaged in unlawful retaliation and discrimination against him; the county argued that it had fired Jones for legitimate reasons because he had been “insubordinate” in the way he had raised questions about Brown’s firing. The court rejected the county’s argument, noting that the county’s version of what transpired during the altercation was in dispute and, if Jones’ version was believed, it would significantly undermine the county’s “argument that firing Jones was necessary to maintain discipline.” *Id.* at \*6. But the court did grant summary judgment to the county on Jones’ race discrimination claim, concluding that Jones had failed to offer any evidence that a white deputy would have been treated differently in the circumstances because of race. *Id.* at \*11. This case is thus an example of facts that, while not strong enough to support a

*Robinson* captures an important point about mixed motive insubordination cases: To determine whether insubordination is an independent, legitimate reason or a related reason for employee discipline, courts must look at all the “scenes in the play” to understand the context underlying the insubordination. Insubordination provoked by perceptions of discrimination should not be accepted as an independent factor for mixed motive analysis.

As the facts in *Robinson* reflect, insubordination cases often include retaliation claims. A plaintiff complains about discrimination and then experiences treatment the plaintiff perceives as employer retaliation for complaining. In reaction to escalating tension the employee displays anger, which the employer labels as insubordination and grounds for disciplining the employee. Title VII explicitly protects employees from retaliation, so any analysis of insubordination doctrine must study retaliation doctrine as a potential source of protection for employees in such scenarios. Unfortunately, Title VII law has not developed robust protections for employees in such situations, as Part II-C discusses.

### C. Retaliation Cases: The Unduly Narrow Confines of “Reasonable” Opposition Conduct

Another common scenario in which courts almost always fail to protect employees who have engaged in mildly or moderately insubordinate conduct involves “opposition conduct” retaliation cases. All major federal employment antidiscrimination statutes contain anti-retaliation provisions.<sup>133</sup> These generally distinguish between two types of retaliation, which correspond to two potential stages of antidiscrimination legal proceedings. The first stage, which is the one most often relevant here, involves employee complaints about discrimination that take place before or in the absence of a formal charge of discrimination filed with a public agency.<sup>134</sup> This type of conduct is known as “opposition conduct.”<sup>135</sup>

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judgment of race discrimination under Title VII, could still present circumstances in which an employer’s proffered explanation for an adverse employment action based on “insubordination” should lead a court to engage in further scrutiny of the potential link between a workplace “tinged” with a negative racial relations and an aggrieved employee’s allegedly “insubordinate” reaction.

<sup>133</sup> See, e.g., 29 U.S.C. § 623(d) (2012) (ADEA anti-retaliation provisions); 42 U.S.C. § 2000e-5(b) (2012) (ADA anti-retaliation provisions); 29 U.S.C. § 215(a)(3) (2012) (FLSA anti-retaliation provisions); 29 U.S.C. § 58(a)(4) (2012) (NLRB anti-retaliation provisions); 42 U.S.C. § 2000e-3(a) (Title VII anti-retaliation provisions).

<sup>134</sup> The second stage is the period after the employee has filed a discrimination charge with a public agency. Conduct in this later period is known as *participation* conduct. The protections at this stage are usually more robust and will not be my focus here. See generally Lewis and Norman, *supra* note 117, at 148-52.

Employees typically lose their protection against retaliation when they engage in opposition conduct that the employer labels insubordination.

A classic case in this category is *Pendleton v. Rumsfeld*, which the Circuit Court of Appeals for the District of Columbia decided in 1979 over a powerful dissent by Judge Patricia Wald.<sup>136</sup> In *Pendleton*, the Walter Reed Army Medical Center fired one African American EEO officer and demoted another for attending a meeting of employees called to discuss and protest perceived employer discrimination. There was strong evidence of racial troubles in the institution, including a job structure that placed African Americans in lower-level positions. Other facts reflected management hostility towards efforts to fix these problems.<sup>137</sup> Nevertheless, the lower court and the court of appeals both concluded that this background evidence was irrelevant to the case's proper disposition.<sup>138</sup> There was some dispute about whether the two EEO counselor plaintiffs in the case had merely watched the protest or had actively taken part in it by speaking out against the perceived discrimination.<sup>139</sup> The circuit court majority opinion, however, did not find this dispute material. It instead agreed with the trial court that the plaintiffs' "manner" of protesting—in other words, their activity of attending a demonstration against race discrimination—was not protected opposition conduct because a "reasonable person" would have felt that EO officers' attendance at a protest "fatally compromised their ability to gain the confidence of middle management."<sup>140</sup>

In dissent, however, Judge Wald argued: "I do not think a simple finding that two EEO Counselors 'actively participated' in a peaceful if noisy protest during a turbulent period in race relations at the medical complex, without more, renders their conduct unprotected under Title VII's ban against retaliation for opposition to discriminatory practices."<sup>141</sup> Judge Wald pointed out that the counselors' presence at the protest may have helped them in their duties, as defined in their employment manual, to serve as "bridges" and attempt "informal resolution of disputes while keeping management informed of employee grievances."<sup>142</sup> Judge Wald argued that the case should have remanded for "more detailed findings about what they did and why it was inconsistent with their EEO Counselors' roles in

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<sup>135</sup> *Id.* at 146-48.

<sup>136</sup> 628 F.2d 102 (D.C. Cir. 1979).

<sup>137</sup> *Id.* at 109 (Wald, J., dissenting).

<sup>138</sup> *Id.* (affirming the district court's decision)

<sup>139</sup> *Id.* at 106.

<sup>140</sup> *Id.* at 108. Chambliss collects and criticizes other EEO officer cases that adopt similar reasoning. See Chambliss, *supra* note 101.

<sup>141</sup> *Id.* at 114

<sup>142</sup> *Id.* at 113.

context.”<sup>143</sup>

Despite Wald’s dissenting view opposition conduct analysis, the case law has continued to develop in restrictive directions. Courts have drawn the bounds of “reasonableness” for opposition conduct so narrowly as to the acceptable *manner* of protest as to exclude all mild to moderate insubordination, even when the facts show why an employee exhibited anger in complaining.<sup>144</sup>

One example comes from another foundational opposition conduct case, *Hochstadt v. Worcester Foundation for Experimental Biology*.<sup>145</sup> In *Hochstadt* a biological research foundation discharged a cell biologist after she protested a disparity in her pay as compared to that of male Ph.D.s in the same job classification.<sup>146</sup> The district court found, in rejecting the plaintiff’s motion for a preliminary injunction reinstating her to her job, that the employer discharged Dr. Hochstadt for legitimate, nondiscriminatory reasons.<sup>147</sup> These reasons were that Hochstadt had complained about various discrimination-related matters in meetings to discuss workplace issues among her small group of cell biologists. Her complaints included her salary and the inadequacy of the Foundation’s affirmative action program.<sup>148</sup> The court found that these complaints had “interfered with the meetings, disrupted the discussions, and eventually caused the discontinuation of the meetings.”<sup>149</sup> Hochstadt had also sought to elicit salary information from other employees and had spread a rumor that the Foundation might lose federal funding for failing to comply with affirmative action regulations. The court concluded that these actions “showed a lack of cooperation, disruptive influence, hostility and threats towards the Institution and its Directors.”<sup>150</sup>

The First Circuit agreed, concluding that the plaintiff was not insulated from adverse action for conduct that “went beyond the pale of reasonable opposition activity.”<sup>151</sup> The court opined, “Congress certainly did not mean to grant sanctuary to employees to engage in political activity

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<sup>143</sup> *Id.* at 114.

<sup>144</sup> Briane J. Gorod argues that another problem with opposition conduct retaliation analysis is the limited scope of reasonableness accorded to employees’ perceptions of what constitutes illegal activity. See Briane J. Gorod, *Rejecting Reasonableness: A New Look at Title VII’s Anti-Retaliation Provision*, 6 A.U. LAW REV. 1469 (2007). In contrast, the analysis in this article focuses on a different prong of the reasonable analysis, namely, that regarding the *manner* of protest.

<sup>145</sup> 545 F.2d 222 (1<sup>st</sup> Cir. 1976).

<sup>146</sup> *Id.* at 226.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 227.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 228.

<sup>151</sup> *Id.* at 230.

for women's liberation on company time."<sup>152</sup> Instead, it concluded, "[a]n employer remains entitled to loyalty and cooperativeness from employees."<sup>153</sup> The court then articulated a test for assessing opposition conduct that is still used to assess whether the manner of opposition is protected. Under it courts are called to "balance the employer's right to run his business" against "the rights of the employee to express his grievances and promote his own welfare."<sup>154</sup> In application, this balancing results in courts always find that insubordination goes beyond the bounds of protected opposition conduct.<sup>155</sup>

To be sure, the narrow scope of protection for opposition conduct presents a problem broader than insubordination cases alone. Other scholars have amply documented this general problem, as I discuss further in Section IV-A-3 below. Preliminarily, suffice it to say that opposition clause jurisprudence produces perverse incentives: Employees risk being fired without recourse if they express themselves adamantly, and opposition clause jurisprudence thus pushes employees towards the courts for help in the first instance. In short, this jurisprudence "sanitizes" workplaces—reflecting a vision of employees as docile and passive persons who should do what they are told and refrain from all but polite complaints about perceived discrimination.

In Section III below I contrast this vision of acceptable employee conduct with that which emerges from the jurisprudence of the NLRB. That agency and reviewing courts more robustly protect employees as they seek to resolve employees' perceptions of law violations in the workplace.

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<sup>152</sup> *Id.* More than a tinge of sexism can be detected in the court's attitude; as discussed in Part III *infra*, a different results would have been likely in the union context, which would have been more typically dominated by male employees in this historical period. NLRA doctrine would place less emphasis on the need for employees to display "cooperativeness"—also connoting docility—where they sought to protest perceived violations of statutorily protected rights.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 233.

<sup>155</sup> *See, e.g., Clack*, 304 F.App'x 399, 403-07 (affirming the trial court's holding that an employee was insubordinate for abandoning his post to call a superior officer after being subjected to discriminatory conduct); *McClendon*, 108 F.3d 789, 799 (holding that management may properly terminate an employee if they have a good faith belief that he is insubordinate); *Matima*, 228 F. 3d 68, 79 (finding employees' disruptiveness justified termination despite retaliation motive); *Rollins v. Florida Dep't of Law Enforcement*, 868 F.2d 397 (11<sup>th</sup> Cir. 1989) (denying a plaintiff protection from retaliation under the *Hochstadt* balancing test where his manner of complaining about race discrimination was deemed disruptive and impaired unit morale); *Whatley v. Metropolitan Atlanta Rapid Transit Authority*, 632 F.2d 1325, 1329 (5<sup>th</sup> Cir. Unit B 1980) (denying a retaliation claim where the plaintiff voiced discrimination complaints in a hostile and accusatory manner). *But see Moore v. City of Philadelphia*, 462 F.3d at 352 (upholding the plaintiff's retaliation claims as discussed further *supra* note 128).

To be sure, Title VII and the NLRA are different statutes with different purposes. But Title VII courts have long borrowed from NLRB jurisprudence where they have found it helpful to do so, as discussed further in Part IV-B below.<sup>156</sup> Looking to the jurisprudence of the NLRB can help illuminate ideas for doctrinal reform even though those reforms should be adapted for the Title VII context. This is the purpose of Part III below.

### III. CONTRASTING THE NLRB'S APPROACH IN INSUBORDINATION CASES

The NLRB's approach to insubordination differs from that of Title VII courts. Over decades the NLRB has developed specialized expertise in regulating workplace relations. Its doctrines tend to be more finely calibrated than those of Title VII courts, based on its long observation of dynamics between employers and employees. It strives to balance protection of workers' rights with employers' ability to run their workplaces effectively. To this end, the NLRB has addressed insubordination in several ways. One longstanding doctrine, commonly known as the *Atlantic Steel* test, applies four factors to analyze the relationship between employee insubordination and the exercise of protected statutory rights.<sup>157</sup> A second doctrine, aptly termed the "provoked insubordination" doctrine, scrutinizes employer insubordination claims to see if there is evidence that the employer provoked the insubordination.<sup>158</sup> If so, the Board holds that the insubordination cannot be grounds for the adverse employment action, provided that it did not go too far beyond the bounds of appropriateness, in which case it loses this protection. A final set of Board cases does not so much define a doctrine as apply the general principle that fact-finders should view employee conduct through a context-specific lens. This lens often gives some benefit of the doubt to employees for brief angry outbursts, harsh words or otherwise moderately inappropriate conduct in situations in which the conduct is understandable in context. The sections below sketch each of these areas of NLRB case law in turn.

#### A. *The NLRB's Atlantic Steel Doctrine*

The *Atlantic Steel* doctrine arises out of a Board opinion of that name.<sup>159</sup> In it the NLRB clarified its protections for employee insubordination that occurs in the course of exercising protected statutory rights.<sup>160</sup> The facts arose out a dispute between a worker active in his union and a foreman about a probationary worker performing overtime work. The

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<sup>156</sup> See *infra* Part IV-B (text accompanying notes 255-62).

<sup>157</sup> *Atlantic Steel*, 245 NLRB 814, 816 (1979).

<sup>158</sup> See *infra* Part III-B.

<sup>159</sup> See generally *Atlantic Steel*, 245 NLRB 814 (1979).

<sup>160</sup> *Id.*

worker called the foreman either a “lying son of a bitch” or a “m-- f” liar, and the employer suspended and then terminated the worker for doing so.<sup>161</sup> He alleged that the same foreman had repeatedly harassed him for circulating a petition concerning benefits, and that the real reason for his discharge was his exercise of his rights under Section 7 of the NLRA to engage in “concerted activities for the purpose of collective bargaining or other mutual aid or protection.”<sup>162</sup>

In considering this case, the Board announced that it would assess the inappropriateness of an employee’s conduct by examining four factors: “(1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee’s outburst; and (4) whether the outburst was in any way provoked by the employer’s unfair labor practice.”<sup>163</sup> Under the facts at issue in *Atlantic Steel*, the Board held that the employee’s action failed this test and therefore lost its protection.<sup>164</sup> Thus, the *Atlantic Steel* doctrine is far from “any anything goes” rule: the extent of tolerable employee insubordination depends on careful analysis of the circumstances.

The Board and reviewing courts frequently apply the *Atlantic Steel* doctrine. A sampling of recent cases shows that the doctrine sometimes produces favorable results for employees, though this certainly is not

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<sup>161</sup> *Id.*

<sup>162</sup> *Id.* In arbitration, the employer argued that the employee had been discharged for insubordination and the arbitrator upheld the discharge on these grounds. In a collateral unfair labor practice proceeding, however, the ALJ refused to defer to the arbitrator’s decision. Instead, the ALJ found that the employer had unlawfully terminated the employee. The Board, in turn, overruled the ALJ and deferred to the arbitrator, holding that the ALJ had improperly applied its previous authorities, which provided that during “formal grievances or negotiating sessions which were conducted away from the production area . . . in the heat of the discussion, an employee [who] uttered an obscenity or used extremely strong language . . . was found to be protected as part of the *res gestae*.”<sup>162</sup>

<sup>163</sup> *Id.* at 816. The *Atlantic Steel* doctrine derives from earlier cases that delineated broad bounds of protection for employee outbursts and similar behavior in the exercise of rights protected under the NLRA. See, e.g., *Hawaiian Hauling Serv., Ltd.*, 219 NLRB 765 (1975) (using broad language to protect an employee discharged for calling his supervisor a liar during a grievance proceeding). These cases emphasized the need for “[a] frank, and not always complimentary, exchange of views” in furtherance of the collective bargaining process. *Bettcher Mfg. Corp.*, 76 NLRB 526, 527 (1948). The test excluded from protection only those “flagrant cases in which the misconduct is *so violent or of such a serious character as to render the employee unfit for further service.*” *NLRB v. Illinois Tool Works*, 153 F.2d 811, 815-16 (7<sup>th</sup> Cir. 1946) (emphasis supplied; citations omitted). The *Atlantic Steel* test narrowed this doctrine. This article focuses on post-*Atlantic Steel* cases, though decision-makers, especially courts, still occasionally quote from these earlier cases.

<sup>164</sup> *Atlantic Steel Co.*, 245 NLRB at 817 (“[W]e conclude that it will effectuate the purposes of the Act to give conclusive effect to the grievance award, and, on that basis, we shall dismiss the complaint in its entirety.”).

always the case, as the disposition in *Atlantic Steel* shows. In one recent case, *Kiewit Power Constructors Co. v. NLRB*,<sup>165</sup> for example, two employees disagreed with an employer's decision to shorten their break period.<sup>166</sup> When their supervisor warned them that they had taken too long a break, they shouted back that "things would get ugly" if they were disciplined.<sup>167</sup> They also told the supervisor that he had "better bring [his] boxing gloves."<sup>168</sup> The employer fired both employees and they filed unfair labor practice charges, alleging that their statements were protected as concerted action under Section 7 of the NLRA.

The Board ruled in the employees' favor, concluding that the two employees should be reinstated because their statements were merely figures of speech made in the course of exercising their rights to protest working conditions.<sup>169</sup> The Board emphasized that the statements, in context, were not real physical threats.<sup>170</sup> On review the D.C. Circuit affirmed the Board's ruling, noting that in context it was reasonable for the employees to object forcefully to enforcement of the new break policy on the spot so that other employees would not think they consented to it. The court also noted that the supervisor had chosen to "pick a public scene" for what was "likely to lead to a quarrel."<sup>171</sup> Freely acknowledging the soundness of the employer's argument that it should have the right to maintain rules prohibiting harassment and abusive or threatening language, the D.C. Circuit nevertheless concluded that the statements at issue "did not involve the kind of insubordination that requires withdrawing the Act's protection. It would defeat section 7 if workers could be lawfully discharged every time they threatened to 'fight' for better working conditions."<sup>172</sup>

In another recent example, *Hitachi Capital America Corp.*, an ALJ found in favor of an employee in a disagreement over how her employer counted work hours.<sup>173</sup> In the course of this dispute the employee had written an email that her employer regarded as intemperate. This contributed to the employer's decision to discharge her for insubordination. Applying *Atlantic Steel* and citing much other precedent as well, the ALJ found in favor of reinstating the employee, noting that "[t]he protections of

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<sup>165</sup> 652 F.3d 22 (D.C. Cir. 2011).

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 29.

<sup>170</sup> *Id.* at 24.

<sup>171</sup> *Id.* at 27, citing *NLRB v. Southwest Bell Tel. Co.*, 694 F.2d 974, 978 (5th Cir. 1982).

<sup>172</sup> 652 F.2d at 29, citing *Southwest Bell*, 694 F.2d at 978.

<sup>173</sup> See *Hitachi Capital America Corp.*, 2012 WL 2861686 (NLRB Div. of Judges, July 11, 2012).

Section 7 would be meaningless were we not to take into account the realities of industrial life and the facts that disputes over wages, bonus and working conditions are among the disputes most likely to engender ill feelings and strong responses.”<sup>174</sup> The ALJ also rejected the employer’s mixed motive defense, concluding that it had not shown that it would have fired this employee even if she had not written her email complaint..<sup>175</sup>

The NLRB has decided similar cases throughout its many decades of NLRA enforcement, including a few that involve quite egregious employee misconduct. In reverse chronological order, examples include *NLRB v. Plaza Auto Center*, in which an employee protested the way his employer calculated commissions on car sales and charged salespersons for damage found on cars.<sup>176</sup> In the course of a meeting the employer called to discuss these complaints, the employee told his supervisor that he was a “F’ing mother F’ing,” a “f’ing crook,” and “an asshole,” and further told his supervisor that “he was stupid, nobody liked him, and everyone talked about him behind his back.”<sup>177</sup> The employer fired this employee, and he filed unfair labor practice charges. The ALJ considering these charges found the employee’s behavior to exceed the bounds of protected conduct.

The Board, however, reversed, finding the conduct protected under *Atlantic Steel*.<sup>178</sup> Applying that test, the Board in *Plaza Auto* held that most of the relevant factors weighed in the employee’s favor, including that (1) his cursing had taken place with only other supervisors present so his remarks did not undermine morale among other employees, (2) he was protesting pay policies and related terms and conditions of employment, and thus was clearly engaged in concerted action protected under NLRA Section 7, and (3) the employer’s repeated invitations to quit if he did not like his work situation had been provocative. The Board further found that the employee’s profanity was not as belligerent as the ALJ had characterized it, and that his conduct therefore did not render him “unfit for further service” as prior precedents had articulated as the bottom-line question underlying the *Atlantic Steel* four-factor inquiry.<sup>179</sup>

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<sup>174</sup> *Id.* (citing *Consumers Power Co.*, 282 NLRB 131, 132 (1986)).

<sup>175</sup> *Id.*, aff’d 361 NLRB 19.

<sup>176</sup> 664 F.3d 286 (9th Cir. 2011).

<sup>177</sup> *Id.* at 294; see also *Plaza Auto Ctr., Inc. v. NLRB*, 664 F.3d 286, 290 (9th Cir. 2011) (further discussing these facts in the course of enforcing the Board’s order).

<sup>178</sup> 355 NLRB 493 (2010).

<sup>179</sup> *Id.* at 496 (“[W]e conclude that Aguirre’s outburst, while vehement and profane, was brief and unaccompanied by insubordination, physical contact, threatening gestures, or threat of physical harm. Therefore, we find that his conduct did not render him unfit for further service and thus did not exceed the bounds of statutory protection under *Atlantic Steel*’s third factor.”)

Another employee-protective case example is *NLRB v. Air Contact Transport Inc.* There an employee had become loud and boisterous in the course of a discussion that arose after the general manager asked if employees had questions on work-related matters at the end of a work party held in a restaurant. The Board concluded, and the Fourth Circuit affirmed, that the employee's conduct, while "perhaps imprudent," was not "undefensible." The Board noted that it had taken place during "undisputedly protective activity" and was "not so egregious as to remove him from § 7."<sup>180</sup>

The Board reached a similar conclusion in *Cibao Meat Products*, where an employer fired an employee for protesting after a supervisor told employees they must arrive early to open up the plant gate before starting work. The employee responded, in front of other employees, that opening the gate was the job of security, and that "we are the workers, the employees, after you open the factory."<sup>181</sup> Upholding the ALJ's findings, the Board reasoned that the employee's conduct "in the presence of other employees" was a protected initiation of concerted action, not unprotected insubordination as the employer claimed.<sup>182</sup>

In *Cibao Meat Products* the employee's language had been fairly temperate, but in *NLRB v. Southwestern Bell Telephone Co.* the Board protected a union shop steward who engaged in an intemperate spontaneous outburst after learning that the company had cancelled an agreement with the union over the allocation of overtime.<sup>183</sup> The employee's outburst included statements such as "I'll see you fry."<sup>184</sup> The next day the employee was called to a disciplinary meeting in which he told a supervisor to "shut up" and said "I don't have to take this [expletives deleted]," leading to his suspension for insubordination.<sup>185</sup> Agreeing with the Board that the employee's conduct did not cause him to lose his protection under the NLRA, the Fifth Circuit held that the first outburst had taken place in the context of discussion of terms and conditions of employment, activity protected under Section 7, and that the second outburst had been provoked by the earlier disciplinary action.<sup>186</sup>

The Board has even protected use of strings of strong curse words in

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<sup>180</sup> *NLRB v. Air Contact Transport Inc.*, 403 F.3d 206, 212 (4<sup>th</sup> Cir. 2005).

<sup>181</sup> 338 NLRB 134 (2003).

<sup>182</sup> *Id.*

<sup>183</sup> *NLRB v. Sw. Bell Tel. Co.*, 694 F.2d 974, 978 (5<sup>th</sup> Cir. 1982) (holding that a company could not lawfully suspend an employee where it has unlawfully provoked a basis for disciplining an employee).

<sup>184</sup> *Id.* at 975.

<sup>185</sup> *Id.* at 976.

<sup>186</sup> *Id.* at 978

some contexts. In *CKS Tool and Engineering, Inc.*, for example, a supervisor called a meeting about the need to increase employee production and an employee began to use loud and vulgar language towards the supervisor.<sup>187</sup> The employer fired the employee for doing so, but the ALJ reached his own conclusion that the “disrespectful conduct was not so egregious as to take [the employee] outside the protection of the Act.” The ALJ further held that the proffered reasons for the discharge, namely, “insubordination,” were pretextual and rejected the employer’s mixed motive argument as well. Subsequently the Board affirmed the ALJ in all respects.<sup>188</sup>

Finally, in *Severance Tool Industries*, the ALJ found that an employee had used the term “son of a bitch” and “raised his voice in a disrespectful manner” in complaining about the employer’s vacation pay policy.<sup>189</sup> The ALJ concluded that “the evidence of disrespect, rudeness, and the use of vulgar language,” did not bar the employee from the Act’s protection, noting that numerous Board precedents “established that a ‘certain amount of salty language and defiance’ must be tolerated during such confrontations.”<sup>190</sup> Thus, the ALJ reasoned, even though the employer “characterized [the employee’s] conduct as insubordinate, belligerent, and threatening, the record only supports a finding of disrespectful, rude and defiant demeanor and the use of a vulgar word.” This level of misconduct, involving “an absence of any threats of violence, actual insubordination, or acts of violence,” did not cause the employee to lose the protections of the Act. The Board affirmed on review.<sup>191</sup>

In short, the Board and reviewing courts’ opinions applying the *Atlantic Steel* doctrine stand in contrast to many of the Title VII cases cited in Section I above, in which vulgar language, a raised voice, or disrespectful conduct towards a supervisor immediately cause an employee to lose protection under Title VII. Decision-makers in the NLRA context are more lenient about the bounds of protected conduct.<sup>192</sup> The image of the worthy employee under the NLRA encompasses a more active, emotional, and sometimes ribald or vulgar human being. That image arguably embodies a more realistic view of individuals contending with, and sometimes reacting imperfectly and overly strongly to, the stress of workplace interactions

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<sup>187</sup> 332 NLRB 1578 (2000).

<sup>188</sup> *Id.*

<sup>189</sup> 301 NLRB 1166, 1169 (1991).

<sup>190</sup> *Id.* at 1170 (quoting *NLRB v. Chelsea Laboratories*, 825 F.2d 680, 683 (2d Cir. 1987); *Syn-Tech Windows Systems*, 294 NLRB 791 (1989)).

<sup>191</sup> *Id.* at 1166.

<sup>192</sup> *See, e.g., NLRB v. Starbucks Corp.*, 679 F.3d 70, 78-80 (2d Cir. 2012) (noting that the Board has recognized “some leeway for impulsive behavior” by an employee), quoting *Piper Realty Co.*, 313 NLRB 1289, 1290 (1994).

related to the exercise of protected rights.

To point this out is not to say that anything goes under the Board's precedents. To the contrary, employees found to have engaged in threatening behavior, or to have exceeded what a reasonable employer should tolerate by way of outbursts, swearing, harassment, or other inappropriate conduct, lose their Section 7 protection.<sup>193</sup> But the contrast remains clear: NLRB precedent recognizes more room for active protest in furtherance of protected statutory rights than Title VII federal court opinions do.

The NLRB's *Atlantic Steel* doctrine is not the only helpful contrast to Title VII insubordination law. Another helpful doctrine looks for "provoked insubordination," as discussed in Part II-B below.

### B. *The NLRB's Provoked Insubordination Doctrine*

As we have seen, whether management conduct has "provoked" an employee's response is factor four in the *Atlantic Steel* test. But the Board's doctrines extend even beyond the *Atlantic Steel* context of Section 7 rights. The Board has held that employee insubordination cannot be grounds for discharge where an agent of the employer *provoked* an angry outburst or similar act, even when the employee was not engaged in action protected under Section 7.

In brief, the Board's provoked insubordination doctrine holds that an "employer cannot provoke an employee to the point where she commits . . . an indiscretion . . . and then rely on this to terminate her employment."<sup>194</sup> To determine whether application of this principle is appropriate, the Board balances the severity of the provocation against the response, so that the "more an employer's wrongful provocation the greater would be the employee's justified sense of indignation and the more likely its excessive expression."<sup>195</sup>

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<sup>193</sup> See, e.g., *NLRB v. Starbucks Corp.*, 679 F.3d at 78-80 (reversing the Board's application of the *Atlantic Steel* test where an employee engaged in an outburst in a public area in which customers as well as employees could see her, even though it was brief in duration and connected with her protected conduct of wearing a button indicating union support); *Felix Industries v. NLRB* 251 F.3d 1051 (D.C. Cir. 2001) (reversing the Board where the level of the employee's vitriol in calling his supervisor a "f--king kid" three times in a short conversation about the employee's right to receive premium pay for working night shifts was abusive and unprovoked).

<sup>194</sup> *Opelika Welding*, 305 NLRB 561, 568 (1991).

<sup>195</sup> *Id.* Situations in which the Board has applied this reasoning include "where the supervisor came up close to the employee and shouted at him, whereupon the employee placed his hand on the supervisor's chest and pushed him back; and where the supervisor appeared to be waving his finger in the employee's face, whereupon the employee defensively clenched his fists." *Id.* (citations omitted).

Appellate courts reviewing Board cases have approved and applied the Board's provoked insubordination doctrine in many cases. To take but one example, the First Circuit in *NLRB v. Steinerfilm, Inc.*, upheld the Board's reinstatement of an employee fired for insubordination on the reasoning that "[w]e think the Board could reasonably conclude that the insubordination was an excusable, if a regrettable and undesirable, reaction to the unjustified warning [the employee] had received just minutes before, and that the discharge was therefore improper."<sup>196</sup> The court went on to observe that "[o]ther circuits have similarly recognized that, in a proper case, the Board may order reinstatement of an employee whose rudeness and 'excessive expression' were the result of unjustified treatment by the employer."<sup>197</sup>

To be sure, NLRB provoked subordination cases rest on rules that do not apply in the individual employment rights context typically at issue under Title VII. In a unionized workplace, a collective bargaining agreement typically mandates a "just cause" standard for employee discipline, meaning that an employee cannot be terminated for reasons that are unfair, unjustified, or arbitrary.<sup>198</sup> The Board's provoked insubordination doctrine essentially assumes a just cause standard in reasoning that an employer should not discharge an employee for insubordination where a supervisor's conduct unfairly provoked the employee's misconduct. In the nonunion context, in contrast, an at-will employment regime applies, under which employees can be discharged for any reason except a discriminatory or otherwise illegal one.<sup>199</sup> Thus the provoked insubordination doctrine cannot be imported wholesale into the individual employment antidiscrimination rights context because employees have no general protection against an employer treating them unfairly. But a more limited version, which protects employees where provocation relates to discrimination, or would at least lead a reasonable employee to perceive such a relationship between employer provocation and discrimination, would go far to advance Title VII's objectives. Such a rule would address the kinds of troubling cases documented in Part II *supra*, in

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<sup>196</sup> 669 F.2d 845, 851-52 (1<sup>st</sup> Cir. 1982) (citing *Trustees of Boston University v. NLRB*, 548 F.2d 391, 392-93 (1<sup>st</sup> Cir. 1977)).

<sup>197</sup> *Id.* at 851-52 (citing *Crown Central Petroleum Corp. v. NLRB*, 430 F.2d 724 (5<sup>th</sup> Cir. 1970); *Hugh H. Wilson Co. v. NLRB*, 414 F.2d 1345, 1355-56 (3<sup>d</sup> Cir. 1969), cert. denied, 397 U.S. 935 (1970); *NLRB v. Thor Power Tool Co.*, 351 F.2d 584 (7<sup>th</sup> Cir. 1965); *NLRB v. M&B Headwear Co.*, 349 F.2d 170, 174 (4<sup>th</sup> Cir. 1965)).

<sup>198</sup> See Roger I Abrams & Dennis R. Nolan, *Toward a Theory of "Just Cause" in Employee Discipline Cases*, 1985 DUKE L.J. 594, 611-12.

<sup>199</sup> See Clyde W. Summers, *The Contract of Employment and the Rights of Individual Employees: Fair Representation and Employment at Will*, 52 FORDHAM L. REV. 1082, 1097 (1984).

which discrimination triggers alleged insubordination. This suggestion will be further developed in Section IV-B-1 below.

Before moving on to discuss in more detail how courts might adapt Board doctrine to fit the needs of Title VII cases, it is worth examining one additional feature of the NLRB's approach to the imperfections of employees' conduct in the workplace. This involves the NLRB's more tolerant approach in general towards employees whose contribution to the workplace, while valuable, comes with some nonconforming conduct. Here too, the Board tends to grant greater leeway than Title VII courts, and here too, those courts would gain from borrowing from the NLRB's institutional wisdom and historically experience with regulating workplaces. Section III-C briefly discusses the Board's general approach to analyzing the appropriateness of employee conduct and suggests how it might help inform revisions in the way antidiscrimination courts approach questions of employee misconduct.

### C. The NLRB's General Approach to the Appropriateness of Employee Conduct

Not only specific doctrines the NLRB has developed, but also Board's general approach to alleged employee misconduct can inform Title VII reform. The Board, possibly because of its specialty focus on the workplace and many decades of expertise in regulating the permissible bounds of employer-employee interactions, frequently displays particular sensitivity to the ways in which employee behavior might seem inappropriate from outside the particulars of an employment setting but may not in fact fall outside the scope of tolerable employee conduct in context. Again, its approach would have to be adapted somewhat to fit the needs of antidiscrimination analysis, but courts could easily do so.

Sometimes employees have personality traits that render them difficult in the workplace. Employees may be defensive, blunt, prickly, slightly paranoid, antagonistic and/or rigid. As already noted, under an at-will employment regime antidiscrimination law does not protect employees from adverse employment actions based on these attributes, such as quirky or difficult personality traits (at least outside any protections under the Americans with Disabilities Act on the basis of psycho-social disability).<sup>200</sup> This article's argument does not depend on expanding antidiscrimination doctrine to contravene the at-will employment regime that governs many of the nation's workplaces. In the discrimination context, however, sorting through what aspects of employee behavior are attributable to personality or

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<sup>200</sup> See Susan D. Carle, *Accommodating Social Disability in the Workplace* (unpublished manuscript on file with author).

other non-protected traits and what aspects are related to the experience of workplace discrimination can be extremely complex.

Professor Terry Smith has discussed this phenomenon in his excellent article on the everyday effects of what he calls “subtle” discrimination.<sup>201</sup> As Smith persuasively argues, we live in a nation that includes many individuals for whom the experience of discrimination is pervasive, raw, and mostly un-redressed. A bad experience or encounter that would seem relatively minor absent the element of a discriminatory atmosphere feels very different when it is the culmination of many similar experiences building up over time.<sup>202</sup> Individuals bring such background experiences with them into the workplace. A more context-sensitive approach in Title VII cases would take more account of this broad range in employee understandings of both appropriate supervisor and employee conduct.

Here employment antidiscrimination courts might again take their lead from the NLRB, which in a variety of contexts “lets slide,” in the interests of promoting the NLRA’s objectives, employee behavior bordering on insubordination. The Board has faced particular challenges in assessing employee conduct in Internet and social media communications, where employer expectations and employee assumptions as to the bounds of appropriate behavior are very much in flux.<sup>203</sup> In much the same way, understandings about what constitutes discriminatory behavior in the workplace—for example, what jokes are acceptable, and what ways of speaking to others are unacceptably rude—are also in flux. There may be wide divergences in generally held understandings on these questions. In these conditions, courts should err on the side of protecting employees whose conduct reacts to perceptions of discrimination.

An example of a Board case erring on the side of the employee for allegedly insubordinate conduct after undertaking adjustments based on workplace context is *Timekeeping Systems, Inc.*<sup>204</sup> There an employee of a small software engineering firm who worked on computer programming, Larry Leinweber, sent a lengthy “reply all” email complaining about the employer’s change in its vacation policy and pointing out what he saw as errors in the way the firm’s CEO, Markwitz, had described the policy.

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<sup>201</sup> See Smith, *supra* note 67.

<sup>202</sup> See *id.* at 535-45; see also text accompanying note 102 (quoting case example Smith offers). The recently coined term microaggression captures a similar insight. See Tanzina Vega, *Students See Many Sights as Racial “Microaggressions,”* N.Y. TIMES, June 27, 2014, p. A1.

<sup>203</sup> Compare *Hispanics United of Buffalo, Inc.*, 359 NLRB 1, 4 (2012) (majority op.) (holding that Facebook postings were “concerted and protected”), with *id.* at 5 (Hayes, dissenting) (arguing that communications were not for mutual aid and protection).

<sup>204</sup> 322 NLRB 956 (1997).

Markwitz found Leinweber's tone in the emailed memo inappropriate, viewing it as a personal attack and a slap in the face of employees "with good attitudes." After Leinweber avoided making the public apology Markwitz requested and the two had a few more minor clashes, Markwitz fired Leinweber.

The Board affirmed the ALJ's findings that Leinweber's termination violated the Act. The employer argued that it would be wrong to "saddle Markwitz for many years into the future with the burden of a reinstated employee the likes of Leinweber," but the ALJ noted that:

Leinweber is, I concede, a rather unusual person, perhaps one of the new breed of cyberspace pioneers who are attracting public attention, and at the same time—how else can I say it—a bit of a wise guy. Still Markwitz [had previously] described Leinweber as "talented and intelligent," and he was willing to retain Leinweber after receipt of the offending message if Leinweber would publicly apologize.

Thus, the ALJ reasoned, reinstating Leinweber would not leave Markwitz "totally distraught," and this supervisor's "feelings must take second place to the dictates of the statute." In other words, the ALJ, as approved by the Board, considered the offending conduct in context, balancing the offense caused by the employee against the statutory purposes at issue and also factoring in the potentially unsettled norms in the particular employment setting—here involving "the new breed of cyberspace pioneers" who may hold different norms as to appropriate tone in work emails.

In a world of clashing perspectives, where norms of behavior and perceptions of discrimination often differ markedly and are in flux, institutions charged with regulating workplaces must adapt to ensure continued protection of employees' statutory rights. Just as "wise guy" cyberspace pioneers like Leinweber sometimes require an extra dose of tolerance, so too do indignant employees of color who live in the world Professor Smith describes of constantly experienced discrimination—or, as the recently coined term puts it, "microaggressions"—or Professor Levy's context of outrageous sexual harassment.<sup>205</sup> Like the Board, Title VII courts could err on the side of protecting these employees' communications, even when they are quite intemperate, in the interests of preserving the "collective action" aspect of employee workplace rights. This focus on collective action has necessarily remained more salient under the NLRA than under individual employment antidiscrimination statutes, since

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<sup>205</sup> Smith, *supra* note 67; Vega, *supra* note 202; Levy, *supra* note 95.

collective action is the very right the NLRA protects.<sup>206</sup> But the protest aspect of Title VII, as recognized in its opposition conduct clause and exemplified by early cases such *McDonnell Douglas v. Green*,<sup>207</sup> remains important to implementation of that statute. Employees do still try to protest what they reasonably perceive as discrimination in a world in which prejudice is far from gone, and when they do so it would behoove Title VII courts to recognize and protect them as imperfect and possibly annoying “squeaky wheels” who nonetheless function to further important public values.

#### IV. REVISING TITLE VII INSUBORDINATION DOCTRINE

This article has argued that courts should be more cautious about accepting insubordination as the legitimate, nondiscriminatory reason for discharge in cases with evidence raising discrimination concerns. In these situations, some workplace friction may be necessary—even desirable—as employers and employees engage in dialogue about fairness in employment practices “under the shadow” of antidiscrimination law.<sup>208</sup> If these arguments have merit, the question becomes: what can be done to improve Title VII courts’ handling of insubordination cases? This section proposes a variety of measures that Title VII courts could take towards this end. Courts interpreting Title VII could exercise their interstitial common law power to fill in statutory gaps<sup>209</sup> in a similar way to that in which the U.S. Supreme Court created the *Ellerth/Faragher*<sup>210</sup> affirmative defense to employer vicarious liability in supervisor sexual harassment cases. The courts could do so by developing Title VII doctrines that provide greater protection to employees in insubordination cases. This section will propose several steps courts could take in this direction, recognizing, however, that the precise contours of the development of better doctrine will have to await the gradual development of law through decisions in specific cases decided

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<sup>206</sup> See Laura Beth Nielsen et al., *Individual Justice or Collective Legal Mobilization?: Employment Discrimination Litigation in the Post-Civil Rights United States*, 7 JOURNAL OF EMPIRICAL LEGAL STUDIES 175, 175 (2010) (conducting an extensive analysis of Title VII lawsuits filed in federal court from 1988 and 2003 and concluding that in this era collective legal mobilization was very rare and most cases were individual cases ending in small settlements).

<sup>207</sup> 411 U.S. 782 (1973).

<sup>208</sup> Cf. Robert N. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L. J. 950 (1979) (examining how legal rules affect parties’ negotiations conduct).

<sup>209</sup> See Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 525–37 (1954) (explaining that federal courts retain interstitial powers to clarify statutory uncertainty and create uniformity in federal policy).

<sup>210</sup> *Ellerth*, 524 U.S. 742; *Faragher*, 524 U.S. 775. These cases are further discussed *supra* note 19.

by courts that have been sensitized to the issues this article raises.

More specifically, this section will suggest that courts could, in appropriate cases, revise Title VII doctrine to protect employees from termination for mild or moderate insubordination in reaction to reasonable perceptions of discrimination in the following ways:

(A) Where an employer offers insubordination as the legitimate, nondiscriminatory reason for employee discipline, courts should consider whether discrimination concerns motivated the insubordination. If so, courts should decline to accept the employer's reason without more searching scrutiny. Courts should grant the plaintiff the opportunity for further fact development including the opportunity to demonstrate pretext as discussed in *McDonnell Douglas Corp. v. Green*.<sup>211</sup>

(B) When discrimination and insubordination are factually intertwined, courts should reject mixed motive defenses in Title VII insubordination cases. Under basic causation principles, such related causes are not independent causes.

(C) When considering retaliation claims, courts should broaden the protections accorded opposition conduct to extend to "mild or moderate" insubordination<sup>212</sup> in reaction to reasonable perception of discrimination.

(D) Where an employer has provoked an employee's insubordination through conduct a reasonable person in the employee's circumstances would view as discrimination, courts should apply a provoked insubordination doctrine modelled on the NLRB's jurisprudence of the same name.

(E) Finally, in all insubordination cases raising discrimination concerns, Title VII courts should apply the NLRB's *Atlantic Steel* factors to scrutinize the context underlying the inappropriate employee behavior.

Some of these doctrinal revisions involve reexamining Title VII precedent while others call for adapting doctrine from the NLRB. The discussion below will start with a discussion of the first category of reforms and then offer suggestions about borrowing from NLRB precedent.

#### A. *Reforming Title VII Insubordination Doctrine from Within*

Title VII doctrine has not developed uniformly or as a monolith. Courts have disagreed with each other and judges have disagreed within courts. Law established at one historical moment has been disregarded or deemphasized at another. Highlighting these moments of disagreement and historical forgetting illuminates junctures for future change. Section IV-A-1 notes some of these pivot points that illuminate opportunities for doctrinal

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<sup>211</sup> 411 U.S. 792.

<sup>212</sup> See *supra* notes 12 & 17 (discussing the scope and limits of mild and moderate insubordination).

revision going forward.

1. Probing Insubordination Cases where the Record Contains Evidence of Discrimination

A first helpful step in reforming Title VII insubordination doctrine would look to the dissents of judges such as Judge Karen Nelson Moore on the Sixth Circuit and Judge Patricia Wald on the D.C. Circuit, as well as to the Court's early Title VII jurisprudence. As already discussed in Section II-B, Judge Moore's dissent in *Clack v. Rock-Tenn Co.* can provide helpful guidance. There she called on the district court to probe the "taint of . . . discriminatory animus" evident in the background facts in that case—including evidence of racist remarks by decision-makers, instances of discrimination against other employees, and displays of hostility towards the plaintiff that preceded the plaintiff's moderately insubordinate conduct (which was going home rather than carrying out his supervisor's order to perform a cleanup task the plaintiff believed was not in his job description).<sup>213</sup> Judge Moore also would have had the district court probe the possibility of pretext in the employer's decision to terminate Clack; in other words, the district court should have allowed the plaintiff to offer evidence that other employees who engaged in similar conduct after an altercation with a supervisor were not fired.<sup>214</sup> These kinds of evidence—background discrimination, expressed animus, and/or pretext—should have, in Judge Moore's opinion, sufficed to send the plaintiff's case to a jury rather than dismissal on summary judgment.<sup>215</sup>

Judge Wald's dissent in *Pendleton v. Rumsfeld* is similarly instructive. Like Judge Moore, Judge Wald would have required a much more searching inquiry into the background facts in order to assess the reasonableness of the plaintiffs' conduct in the situation. Judge Wald offered this dissent in an opposition conduct case, but the basic point remains the same: insubordination cases that arise in the context of protests about perceived discrimination fall in a special category and require more searching scrutiny before accepting an employer's asserted reason of insubordination for disciplining an employees.<sup>216</sup>

Still more helpful guidance comes from returning to the historical precedent of *McDonnell Douglas v. Green* to extract from it the wisdom of

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<sup>213</sup> 304 F.App'x 399, 409–10 (6<sup>th</sup> Cir. 2008) (Moore, J., Dissenting).

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* Employment discrimination scholars have likewise underscored the need for courts to take a more careful contextual view of the facts in Title VII cases. *See, e.g.,* Stone, [shortcuts] *supra* note 32, at 169 (arguing that, in a host of ways, judges should carefully evaluate facts and explain why they are choosing to dim their relevance rather than applying "shortcut" doctrines to terminate assessment of facts in context).

<sup>216</sup> 628 F.2d at 109-14.

the Court's basic start in developing Title VII jurisprudence. Green's conduct was not simply a short angry outburst or an unreasonably insistent pursuit of complaints of discrimination, as in many insubordination cases today. Instead Green's behavior involved leading an organization that engaged in an extended course of plainly illegal actions, including stalling cars on company property to block others from coming to work and a "lock in," in which protestors barred the employer's workforce from leaving the plant by placing chains and padlocks on the workplace doors.<sup>217</sup> Nonetheless, even on these vivid facts, the *McDonnell Douglas* Court held that Green's race discrimination case should be retried.<sup>218</sup> The Court reasoned that the employer's proffered legitimate, nondiscriminatory reason: namely, its policy of not rehiring employees who had previously engaged in illegal activity, had to be tested for pretext before being accepted as the "real" reason for not recalling him to work.<sup>219</sup> The Court instructed the lower court to compare the employer's treatment of Green to that of other employees who had engaged in illegal acts.

Title VII courts today no longer have patience for this kind of close, skeptical analysis of employers' assertions that they are terminating employees due to misconduct, and this is one of a number of reasons why they often get insubordination cases wrong.

The Court in *McDonnell Douglas* cautioned that even what undoubtedly might look like an imminently valid, "legitimate, nondiscriminatory reason" for an adverse employment action—such as Green's leadership role in persistent, unlawful protest activity at the plant—could mask an invidiously discriminatory motive. To prevent such subterfuge, the Court held (noting similar case law developed under the NLRA), that finders of fact should look probingly into questions of pretext.<sup>220</sup> In other words, the decision maker should ask whether other employees with different racial identities—or, to extend the analysis to opposition conduct claims, other employees who had not engaged in protected opposition conduct<sup>221</sup>—were treated similarly for similar misconduct. If the answer to this question is "no"—in other words, if identity or protected opposition conduct are the "but for" cause of the employer's challenged act— then unlawful discrimination has been proved

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<sup>217</sup> *Id.* at 795 n.3.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *McDonnell Douglas, Corp. v. Green*, 411 U.S. 792 (1973).

<sup>221</sup> The Court in *Green* did not consider the retaliation issue because Green lost on that issue below and did not appeal this ruling. See *Green v. McDonnell Douglas Corp.*, 463 F.2d 337 (8th Cir. 1972), *vacated on other grounds*, 411 U.S. 792 (1973) (holding that participation in an unlawful "stall in" was not protected activity under Section 704 (a)).

and the plaintiff should prevail.<sup>222</sup>

Indeed, to better protect employees and deter the kinds of discriminatory atmospheres that often produce insubordination cases, courts could shift the burden of proof of pretext onto employers in insubordination cases raising discrimination concerns. This would help deter the continued existence of the kinds of discriminatory environments that still emerge from the facts of too many insubordination cases despite plaintiffs' inability to win their claims of underlying discrimination under the current high standards for proving such claims.<sup>223</sup> When an employer asserts insubordination as the reason for taking an adverse action against an employee who has raised discrimination concerns, courts could require the employer to prove that it would have taken the adverse action against the employee even if he or she had not complained of discrimination. In a discrimination case the employer would do so by putting on persuasive evidence that other employees who were not in the protected identity category suffered comparable discipline after engaging in a similar degree of insubordination. In a retaliation case based on opposition conduct, the employer's burden would be to persuade the finder of fact by putting on evidence that it had in the past taken the same adverse action against employees engaged in similar insubordination even when the underlying facts did not involve a discrimination complaint. In cases in which this evidence was unavailable or inconclusive, the plaintiff would win.

Such a burden-shifting rule would encourage employers to take steps to deter supervisor conduct that generates evidence typical of the cases discussed in Part II *supra*—such as blatant statements of prejudice against protected identity groups, low-grade harassment, failure to discipline co-workers, discriminatory task assignments, and the like. Just as the *Faragher/Ellerth* affirmative defense encourages employers to set up complaint procedures for sexual harassment,<sup>224</sup> an affirmative defense that made it worthwhile for employers to eradicate discrimination-tinged workplace environments could be expected to reduce the instances of discrimination-related insubordination cases coming to the courts.

In sum, the basic analysis when an employer alleges insubordination as the reason for an employee's discharge should involve applying a several-part test that asks:

1) Is there evidence of discriminatory animus, a discrimination-charged work environment, and/or hostile acts towards the plaintiff that a reasonable person in the plaintiff's position would perceive as evidence of discriminatory treatment (even if insufficient to satisfy the high standards

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<sup>222</sup> *Green*, 411 U.S. at 805-07.

<sup>223</sup> See discussion Part I-B *supra*.

<sup>224</sup> See *Sturm*, *supra* note 36.

for proving the underlying discrimination claim)?

2) If so, was the plaintiff's insubordination related to these conditions?

Where the answer to questions (1) and (2) is affirmative, courts should:

3) Decline to accept on face value the employer's proffered reason of insubordination as a legitimate, nondiscriminatory reason for an adverse employment action, and instead

4) Engage in searching scrutiny of the facts, and in appropriate cases find the plaintiff's conduct protected, so long as it was not too extreme (as further discussed in Section IV-C below), and

5) Finally, in the presence of background evidence raising discrimination concerns, switch the burden of *disproving* pretext to employers in insubordination cases.

These steps would go a long way towards improving Title VII courts' handling of insubordination cases. But additional steps could help as well.

## 2. Rejecting Mixed Motive Defenses when Discrimination and Insubordination Interrelate

Another simple but important step Title VII courts can take would involve declining to entertain mixed motive defenses where facts involve (1) employer conduct that raises discrimination concerns and (2) employee insubordination in reaction to it. As discussed in Section II-B, insubordination cannot serve as an employer's legitimate, nondiscriminatory reason for disciplining an employee if the employer's discrimination and the employee's insubordination are factually intertwined. As discussed in Section II-B, such reasoning contravenes standard causation principles: A factually related reason is not an independent cause; insubordination would not have happened if discrimination concerns had not triggered this reaction. Thus no mixed motive defense should be available to an employer that states that insubordination was the reason for an adverse employment action where the insubordination arose from an employee's reasonable perceptions of discrimination. To be sure, under such facts an employer may have a defense that the insubordination went too far and thus lost its protection under Title VII opposition conduct doctrine. But that is a different argument, and should be handled under opposition conduct doctrine as discussed further below.

## 3. Expanding Opposition Conduct Protection

As discussed in Section II-C, courts draw the bounds of reasonable conduct in opposition cases far too narrowly, typically excluding any degree

of employee misconduct from the opposition clause's protections. As a result, courts usually refuse to grant opposition clause protection to an employee whose conduct falls with an employer's legitimate insubordination policy. But this approach compounds the problem of unaddressed discrimination in the nation's workplaces, permitting employers to fire employees for insubordination with impunity and leaving unaddressed the legitimate complaints that may have caused the employee's intemperate reaction. Improving Title VII courts' approach to insubordination cases thus requires revisiting opposition conduct doctrine.

Other scholars have already forcefully argued for the need to expand opposition conduct doctrine to more securely protect plaintiffs who engage in opposition conduct. This literature has discussed many aspects of this complex doctrine,<sup>225</sup> but one revision most obviously emerges as of key importance in insubordination cases—namely, the need to expand the bounds of reasonableness as to the *manner* of opposition in order to protect instances of mild or moderate insubordination that are understandable in reaction to reasonable perceptions of discrimination. This article will build from this helpful literature and then offer some additional points to further support these important calls for reform.

Terry Smith, Richard Bales, Elizabeth Chambliss and others argue that more robust protection for opposition clause conduct would be an excellent way of granting greater protection to employees disciplined for seeking to protest discrimination.<sup>226</sup> As Smith explains, “the neglect and judicial misapprehension of [the opposition clause] is especially deleterious to the outspoken employee—the “race man,” the “uppity nigger”—who, in short, dares to talk back to the boss, to cause trouble.”<sup>227</sup> Thus Smith argues that courts should grant protection to the “employee who chooses to exercise self-help in opposing workplace racism rather than remain silent or avail herself of the cumbersome and expensive recourse of formal charge and suit.”<sup>228</sup>

Similarly Richard Bales, in an article considering the appropriate rules for personnel managers' opposition conduct, criticizes the narrowness of the *Hochstadt* test,<sup>229</sup> pointing out that it causes far too many employees

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<sup>225</sup> See, e.g., Gorod, *supra* note 156 (arguing that courts should eliminate the aspect of the opposition clause reasonableness requirement that requires employees to demonstrate that they had a good faith, reasonable belief that a challenged practice violates Title VII); Matthew W. Green, Jr., *Express Yourself: Striking a Balance between Silence and Active, Purposive Opposition under Title VII's Anti-Retaliation Provision*, 28 HOFSTRA LAB. & EMP. L.J. 107 (2010) (analyzing issue of silent opposition).

<sup>226</sup> Smith, *supra* note 67; Bales, *supra* note 101; Chambliss, *supra* note 101.

<sup>227</sup> Smith, *supra* note 67, at 533 (citations omitted).

<sup>228</sup> *Id.* at 533-34.

<sup>229</sup> The *Hochstadt* test is discussed in Section II-C *supra*.

to lose protection for opposition clause conduct because most such conduct is at least a bit disruptive.<sup>230</sup> Bales would have the courts craft a rule that would protect all opposition conduct provided it was not illegal or in conflict with the job duties the plaintiff was hired to perform.<sup>231</sup>

Elizabeth Chambliss, too, notes these problems with the *Hochstadt* test in her article focused on EEOC officer retaliation clause protection. As she notes in quoting a Ninth Circuit case, “almost every form of opposition to an unlawful employment practice is in some sense disloyal to the employer, since it entails a disagreement with the employer’s views and a challenge to the employer’s policies. Otherwise the conduct would not be ‘opposition.’”<sup>232</sup> Pointing to Title VII’s legislative history, in which Congress’s intent to promote private resolution of workplace disputes is clear, Chambliss argues for the importance of “hold[ing] Title VII to its original promise, by encouraging—and protecting—private workplace regulation.”<sup>233</sup>

Chambliss’s proposal, in the context of her focused examination of EEO officers’ opposition conduct, is that all “[g]ood faith opposition that causes no measurable harm should be protected to protect the EEO officer’s regulatory role.”<sup>234</sup> This proposal is a sensible one, but should be expanded to cover all employees in the insubordination context. Starting with Professor Sturm’s ideas about “second generation” anti-discrimination rules, which should foster conditions for resolving continuing discrimination problems in workplaces rather than courts, this article has argued for an expanded idea of protecting *the whole host of figures* who may play crucial roles in resolving persisting discrimination problems in the nation’s workplaces. These “key intermediaries,” to use Sturm’s term, must include the regular, line-level, non-managerial employees on which this article’s analysis has primarily focused.<sup>235</sup> Chambliss’s point thus should be expanded to counsel a similar adjustment in the standard for protecting employee opposition conduct generally: Where such conduct does not cause appreciable harm—*i.e.*, harm beyond minor disruption and supervisor pique—it should be protected even if it arguably goes a bit too far, all in

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<sup>230</sup> Cf. *Kiewit Power Constructors Co. v. NLRB*, 652 F.2d at 29, citing *Southwest Bell*, 694 F.2d at 978 (holding that the employee’s act “did not involve the kind of insubordination that requires withdrawing the Act’s protection. It would defeat section 7 if workers could be lawfully discharged every time they threatened to ‘fight’ for better working conditions.”)

<sup>231</sup> Bales, *supra* note 109, at 117.

<sup>232</sup> Chambliss, *supra* note 109 at 28 (quoting *EEOC v. Crown Zellerbach Corp.*, 720 F.2d 1008, 1014 (9<sup>th</sup> Cir. 1983)).

<sup>233</sup> Chambliss, *supra* note 101, at 54.

<sup>234</sup> *Id.* at 52.

<sup>235</sup> See *supra* Section II-C.

order to better foster the conditions for on-site resolution of discrimination protests. Such protests are likely to be, as Chambliss notes, inherently somewhat “oppositional”—*i.e.*, something a bit more than polite—but protecting them as they occur in the workplace is a far more economical approach than later processing them as lawsuit in courts.<sup>236</sup>

In sum, many scholars have offered various rationales that provide strong support for expanding the scope of the acceptable manner of opposition conduct in insubordination cases to cover what this article has defined as mild to moderate insubordination—*i.e.*, conduct that is nonviolent, brief and spontaneous rather than sustained or lengthy in duration, and has been provoked by reasonable perceptions of discrimination.

The analysis offered in this article further supports taking opposition conduct analysis a step further in the following way: The more outrageous the facts regarding background discrimination, the broader should be the zone of protection for opposition conduct the court should observe. In other words, humiliating treatment, as seen through the eyes of the reasonable person in the plaintiff’s position,<sup>237</sup> should create a broader zone of protection with regard to the manner of opposition conduct than an insignificant slight.<sup>238</sup> Courts, understandably enough, often have trouble putting themselves in the shoes of average employees—a problem compounded by the likely class and social location differences between federal judges and the less privileged workers that make up much of the U.S. workforce.<sup>239</sup> But they could strive to develop increased sensitivity by applying such a sliding scale rule that starts by considering the situation from the perspective of a reasonable person in the plaintiff’s position.

Workplaces need not be sanitized forums full of docile employees for purposes of Title VII law any more than they need be this under the NLRB’s more expansive jurisprudence. Indeed, importing more of the NLRB’s understanding of the realities of U.S. workplaces would be another excellent step in reforming Title VII courts’ view of insubordination cases, as Section IV-B will discuss below.

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<sup>236</sup> Chambliss, *supra* note 101, at 28 (citation omitted).

<sup>237</sup> *Cf.* Harris v. Forklift Systems, 510 U.S. 17, 23 (using this formulation of the reasonable person standard in the context of Title VII sex harassment).

<sup>238</sup> *Cf.* Opelika Welding, Mach. And Supply, Inc. v. AFL-CIO, 305 NLRB 561, 568 (1991) (“An employer cannot provoke an employee to the point where she commits such an indiscretion as is shown here and then rely on this to terminate her employment [citation omitted]. The more an employer’s wrongful provocation the greater would be the employee’s justified sense of indignation and the more likely its excessive expression.”)

<sup>239</sup> *Cf.* Smith, *supra* note 67.

### B. *Borrowing from the NLRB*

As this article has suggested in Section II-C above, one fruitful area for comparison on insubordination doctrine involves the NLRB's precedents, developed under a different statute to be sure, but likewise addressing workplace disputes that potentially implicate employees' statutory rights. This Section draws on the various lines of NLRB precedent discussed in Section II-B above to suggest additional avenues for improving insubordination doctrine under Title VII.

Wholesale importation of the NLRB's case law would not be appropriate, of course. The statutory purposes underlying Title VII and the NLRA are in many ways different—for example, Title VII protects individual rights and pushes externally mandated nondiscrimination principles, whereas the NLRA's central concern is with protecting collective rights and permitting the parties to collective bargaining agreements to arrive at their own decisions about how to handle workplace relations. Even with these differences laid on the table, however, similar questions often arise in both the Title VII and NLRA contexts as to how to investigate, prove, and remedy violations of the respective workplace statutory rights the two laws protect.<sup>240</sup> As Professor Michael Green has recently pointed out, borrowing across these two statutes can present useful directions for the development of law.<sup>241</sup>

Indeed, in developing Title VII doctrine courts already have frequently looked to NLRB precedent, on a wide range of issues.<sup>242</sup> A comprehensive discussion of these fascinating parallels is beyond the scope of this article, but a few examples can illustrate this long tradition: Title VII courts have frequently and explicitly borrowed from the NLRB to fashion doctrines on reinstatement and back pay,<sup>243</sup> mixed-motive

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<sup>240</sup> Cf. Michael Z. Green, *How the NLRB's Light Still Shines on Anti-Discrimination Law Fifty Years after Title VII*, 14 NEVADA L.J. \* (forthcoming 2014) (arguing that NLRB law should be used to strengthen anti-discrimination protection in areas where Title VII enforcement leaves gaps).

<sup>241</sup> *Id.*

<sup>242</sup> See, e.g., *Franks v. Bowman Transp. Co., Inc.*, 424 U.S. 747, 775 n.34 (1976) (using NLRA remediation models for Title VII); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 355, 366 (1977) (borrowing from NLRB reinstatement doctrine in allowing a non-applicant to proceed with discrimination claims); *McDonnell Douglas v. Green*, 411 U.S. 792, 804 (1973) (following NLRB precedent on employers' rights to not rehire an employee who has committed an illegal act).

<sup>243</sup> In *Albemarle Paper Co. v. Moody* the Court explicitly fashioned rules for Title VII backpay to comport with NLRB practices. See *Albemarle Paper Co.*, 422 U.S. 405, 419-20 (1975) (acknowledging that “the Board, since its inception, has awarded backpay as a matter of course—not randomly or in the exercise of a standardless discretion, and not merely where employer violations are peculiarly deliberate, egregious, or inexcusable,” and adopting the same standards for Title VII). See also *Ford Motor Co. v. EEOC*, 458 U.S.

analysis,<sup>244</sup> and retaliation.<sup>245</sup> Similarly, Title VII courts have borrowed from NLRB doctrine to establish tests for enterprise liability and liability for acts of agents.<sup>246</sup> Due to such explicit borrowing across statutes, the case law on enterprise liability<sup>247</sup> and liability for the acts of agents<sup>248</sup> under the two statutes remains very similar to this day.

In other areas, such as constructive discharge, members of the Court began by taking account of NLRB doctrine, but then reshaped or

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219, 226 n.8 (1982) (citing *Albemarle Paper Co.*, 422 U.S. at 419 n.11) (observing that Title VII's remedial provisions are modeled after the NLRB's). Other examples of the Court explicitly borrowing from NLRB case law in fashioning remedies under Title VII include *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 849 (2001) (citing *Culpepper v. Reynolds Metals Co.*, 442 F.2d 1078, 1080 (5<sup>th</sup> Cir. 1971); *United States v. Georgia Power Co.*, No. 12355, 1971 WL 162 (N.D. Ga. June 30, 1971)) ("Consistent with the Board's interpretation of this provision of the NLRA, courts finding unlawful intentional discrimination in Title VII actions awarded this same type of backpay under § 706(g)").

<sup>244</sup> See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 245-50 (1989) (citing *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 403 (1983)) ("We have, in short, been here before. Each time, we have concluded that the plaintiff who shows that an impermissible motive played a motivating part in an adverse employment decision has thereby placed upon the defendant the burden to show that it would have made the same decision in the absence of the unlawful motive. Our decision today treads this well-worn path.") *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074.

<sup>245</sup> See, e.g., *Thompson v. N. Am. Stainless, LP*, 131 S. Ct. 863, 871 (2011) (Ginsburg, J., Concurring) (citing *NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086, 1088-89 (7<sup>th</sup> Cir. 1987)) (observing that the EEOC's retaliation doctrine is much like the NLRB's).

<sup>246</sup> *EEOC v. Wooster Brush Co. Employees Relief Ass'n*, 727 F.2d 566, 571-72 (6<sup>th</sup> Cir. 1984) (citing *Baker v. Stuart Broadcasting Co.*, 560 F.2d 389 (8<sup>th</sup> Cir. 1977)) (providing a four-part test to assess whether common enterprise liability might apply under both the NLRA and Title VII); *Sargent v. McGrath*, 685 F. Supp. 1087, 1089 (E.D. Wis. 1988) (citing *Radio Union v. Broadcast Service*, 380 U.S. 255 (1965); *Ambruster v. Quinn*, 711 F.2d 1332 (6<sup>th</sup> Cir. 1983)) (noting that "several cases from other jurisdictions" adopting the NLRA test for enterprise liability provide a roadmap for Title VII enterprise analysis). Courts have recognized that the factual circumstances through which agency or enterprise liability might arise are similar under Title VII and the NLRA and thus the analysis should also be similar. See, e.g., *Ambruster v. Quinn*, 711 F.2d at ("[W]e adopt a "facts and circumstances" test which pays heed to the factors found relevant to the question of single-employer status in the National Labor Relations Act context. This test seeks to effectuate the broad and remedial purposes of the Act reaffirmed in the comprehensive Equal Employment Opportunity Act of 1972.") *Abrogated on other grounds by Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006).

<sup>247</sup> See, e.g., *NLRB v. Palmer Donavin Mfg. Co.*, 369 F.3d 954, 957 (6<sup>th</sup> Cir. 2004) (providing a four part test for common enterprise liability under the NLRA); *EEOC v. Wooster Brush Co. Employees Relief Ass'n*, 727 F.2d 566, 571-72 (6<sup>th</sup> Cir. 1984) (providing an identical four-part test for common enterprise liability under Title VII).

<sup>248</sup> See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 75 n.2 (1986) (Stevens, J., Concurring) (citing *Graves Trucking, Inc. v. NLRB*, 692 F.2d 470 (7<sup>th</sup> Cir. 1982)) (highlighting the identical tests for agency liability under Title VII and the NLRA).

reformulated it to take account of the different context of Title VII.<sup>249</sup> In much the same fashion, Title VII courts could look to NLRB doctrines on (1) provoked insubordination and (2) the *Atlantic Steel* factors, and then modify them as necessary to fit the Title VII context.

1. Borrowing from the NLRB's Provoked Insubordination Doctrine

As discussed in Section III-B above, the Board's provoked insubordination doctrine seeks to deter supervisors from goading disfavored employees into misconduct that then becomes grounds for termination. Similar considerations should guide Title VII courts in fact scenarios raising discrimination concerns. In these situations it may be even more important to deter supervisors from engaging in treatment tinged with discrimination, both because that kind of conduct may be especially provocative and because it violates Title VII's goal of reducing discrimination in the nation's workplaces.

As noted in Section II-C, however, a provoked insubordination doctrine in the Title VII context must be narrower than under the NLRA. This is because Title VII protects employees against discrimination but no other manifestations of workplace unfairness. In contrast, the NLRB's cases applying its provoked insubordination doctrine typically arise under the "just cause" rules applicable in workplaces governed by collective bargaining agreements. Provoked insubordination is much more broadly impermissible in the union context because it violates the standards for "just cause" termination, whereas Title VII grants no right against provoked insubordination unless related to discriminatory motives. For this reason, a provoked insubordination doctrine under Title VII should be confined to provocations related to discrimination, because that is the only kind of fairness in employment Title VII protects.

In cases raising potential provoked insubordination issues, Title VII courts should ask whether reasonable perceptions of discrimination triggered an employee's mild or moderate insubordination. Where the evidence supports this conclusion, the court should invoke a provoked insubordination rule to bar the employer from terminating the employee on

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<sup>249</sup> See *Pennsylvania State Police v. Suders*, 542 U.S. 129, 141 (2004) (looking to the NLRB's development of constructive discharge analysis as a starting point for developing Title VII doctrine). Even the term "affirmative action" comes from the NLRA, though the story of that concept's transformation in the public mind in the antidiscrimination context is long and complex. Compare 42 U.S.C. § 2000e-5(g)(1) (2012) with 29 U.S.C. 160(c) (2012). See *Franks v. Bowman Transp. Co., Inc.*, 424 U.S. 747, 770 (1976) (pointing to NLRB doctrine on affirmative action and holding that "[p]lainly the "affirmative action" injunction of § 706(g) has no lesser reach in the district courts" under Title VII).

grounds of insubordination even if the evidence of discrimination is insufficient to prove a Title VII discrimination claim. Introducing a provoked insubordination doctrine to Title VII jurisprudence would help ensure that courts take a second look in the many cases described in Section II above involving workplace atmospheres tinged with discrimination, even where facts are not sufficient to meet the plaintiff's high burden of proof on a discrimination claim.

At bottom, such provoked insubordination cases will become opposition conduct cases, in the sense that they fall within the category of cases in which an employee is seeking to protest discrimination but has been provoked to intemperate conduct through the acts of the employers' agents. The provoked insubordination doctrine remains a helpful additional tool for courts, however, because identifying the existence of provoked insubordination points out why the plaintiff's conduct should not lose its protection even if it goes somewhat beyond the strict decorum Title VII courts typically expect of employees. The doctrine explains why an employee's outburst or short-term refusal to follow a supervisor's order was reasonable opposition conduct in context—*i.e.*, because it was provoked. If a court were to apply the provoked insubordination doctrine in the *Morgan* case, for example, Morgan's insubordination in refusing to go into his supervisor's office and going home instead would remain protected conduct even though it violated Amtrak's insubordination policy. His supervisor's comment that Morgan must "get his black ass" into his office, coupled with a long history of supervisors' use of such racial epithets and other incidents of harassment, provoked Morgan's intemperate response. Plaintiffs' lawyers handling cases with facts supporting provoked insubordination claims, like those in *Clack* and *Morgan*, could use this concept to direct the fact finder's attention to the connection between workplace atmospheres tinged with discrimination and subsequent alleged "insubordination" by employees subject to it.

Many additional considerations counsel in favor of recognizing such a provoked insubordination doctrine in Title VII insubordination cases as well. Disapproving of provoked insubordination by protecting employees from discharge in such scenarios would deter employers' agents from exacerbating negative dynamics in workplaces tinged with discrimination—as, for example in workplaces in which supervisors use racially derogatory language, even of the "stray remarks" variety.<sup>250</sup> In the cases discussed in Section II-B above in which plaintiffs lost their discrimination claims, for example, such language included, in the race context, "nigger," "black ass,"

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<sup>250</sup> For an excellent critique of "stray comments" doctrine, see Stone, *supra* note 53 (arguing that the stray comments doctrine results courts discounting probative evidence of discriminatory intent).

“black thief,” and “sunshine,” and acts such as hanging nooses. Such statements are surely provocative, even if not ultimately sufficient to prove discrimination. In these many cases discussed above, the controversy might never have come to court if agents of the employer had not berated the plaintiffs with racial or sexual epithets and/or assigned demeaning work outside the employee’s job classification.

Importing a provoked insubordination doctrine into Title VII would also encourage employers to conduct more effective anti-discrimination training. Just as the Court’s *Ellerth/Faragher* affirmative defense in supervisor sexual harassment cases motivates employers to set up sexual harassment trainings,<sup>251</sup> a provoked insubordination doctrine in the Title VII context would create incentives for managers to emphasize the need to avoid demeaning racial or sexual epithets and/or other acts encoding messages that reasonable employees could perceive to be discriminatory and thus provocative.

Title VII hostile environment discrimination cannot alone take care of such cases involving such abusive and provocative, racially or sexually “loaded,” language. Hostile environment discrimination is a Title VII doctrine for proving discrimination in both the race and sex contexts, which holds that harassment on the basis of a protected characteristic, such as race, sex, religion, or national origin, constitutes discrimination if it is so “severe and pervasive” that it literally alters the terms and conditions of employment for the plaintiff.<sup>252</sup> This doctrine cannot suffice to handle provoked insubordination cases because in many instances plaintiffs are unable to show a situation *so* “severe and pervasive” as to literally “change the terms and conditions of employment” for affected employees. Thus many of the cases discussed in Section II-B did not meet this high standard required for a plaintiff to prevail on a hostile environment theory; the decision maker remained unconvinced that the evidence of hostile environment, even when abundant, had risen to such a level of severity and

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<sup>251</sup> Sturm, *supra* note 37 at 483.

<sup>252</sup> See *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 69-72 (1986) (citations omitted) (announcing this standard for hostile environment sex harassment); *Cerros v. Steel Technologies, Inc.*, 288 F.3d 1040, 1044-45 (2002) (applying the same standard for racial harassment). As Evan White persuasively points out, the combination of this high “severe and pervasive” standard with the *Ellerth/Faragher* affirmative defense to hostile environment liability makes it very difficult for plaintiffs to prevail in hostile environment cases because “once the harassment has gone on long enough to become severe or pervasive, the employer’s affirmative defense is increasingly likely to bar the plaintiff’s prima facie case. The result is that as the plaintiff’s prima facie case grows stronger, the probability that the employer will prevail on its affirmative defense also increases.” Evan D. H. White, *A Hostile Environment: How the “Severe or Pervasive” Requirement and the Employer’s Affirmative Defense Trap Sexual Harassment Plaintiffs in A Catch-22*, 47 B.C. L. REV. 853 (2006).

pervasiveness as to change the terms and conditions of employment.<sup>253</sup>

Even though plaintiffs cannot win hostile environment discrimination claims where they cannot make out these high proof standards, courts should not disregard the effects on employees of workplaces tinged with discrimination. Without a doctrine of provoked insubordination under Title VII courts essentially come to ignore—and thus in essence tacitly approve—workplace situations that are highly problematic even if not illegal under the nation’s antidiscrimination laws.<sup>254</sup> By ruling in defendants’ favor to uphold the discharges of employees who react to discrimination-related provocation, courts send the message that such provocation is acceptable. Law should not send such signals, which encourage rather than deter discrimination-related talk and employee abuse and thus fuel, rather than alleviate, tensions within U.S. workplaces based on race, sex, and other sensitive protected identity characteristics.<sup>255</sup>

## 2. Applying the *Atlantic Steel* Factors in Title VII Discrimination Cases

A final proposal for helping courts properly handle Title VII cases involving employee insubordination under facts raising discrimination concerns would have courts apply the *Atlantic Steel* factors for evaluating whether an employee’s conduct has gone too far in response to perceptions of discrimination. Those factors, as discussed in Section II-C, look not only to the issue of provocation as just discussed above, but also to the time, place and manner of the employee’s insubordination, the subject under discussion at the time, and the nature of the employee’s reaction.<sup>256</sup> All of these factors would be equally appropriate to discuss in evaluating insubordination cases under Title VII. Applying them, courts might often hold that an employee’s insubordination was too extreme in context to be tolerated, as, for example, under facts involving violence, threats of violence, or prolonged insubordination that substantially undermined the efficiency of the workplace or the authority of the boss. All of these considerations have frequently led the NLRB and/or administrative law judges to find that an employee’s actions, though potentially protected under the NLRA, lost their protection by becoming too extreme. Similar

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<sup>253</sup> See, e.g., *Clack*, 304 F.App’x 399.

<sup>254</sup> Smith, *supra* note 67.

<sup>255</sup> Cf. *Hitachi Capital America Corp.*, 2012 WL 2861686, citing *Consumers Power Co.*, 282 NLRB 131, 132 (1986) (“[t]he protections of Section 7 would be meaningless were we not to take into account the realities of industrial life and the facts that disputes over wages, bonus and working conditions are among the *disputes most likely to engender ill feelings and strong responses.*” (emphasis supplied).

<sup>256</sup> *Atlantic Steel*, 245 NLRB 814.

results could be expected in Title VII insubordination cases. Plaintiffs would often lose, and would deserve to do so.<sup>257</sup> But applying the *Atlantic Steel* factors would still signal an important advance from Title VII courts' current jurisprudence because judges would at least be called upon to focus on and evaluate the connection between insubordination and underlying discrimination-tinged scenarios. Under current Title VII doctrine, which simply accepts insubordination as a legitimate reason for discharge and/or finds insubordination inappropriate opposition conduct *per se*, these inquiries do not even begin to occur. In the interests of promoting nondiscrimination in the nation's workplaces, they should.

## V. CONCLUSION

This article has argued that courts evaluating employment antidiscrimination claims should borrow from the insights and approaches of both some Title VII courts and the NLRB in order to more sensitively and correctly handle "angry employee" cases. Doing so would not result in an "anything goes" philosophy towards angry employees; physically threatening, violent, or persistently inappropriate workplace behavior remains beyond the line under Board law just as it should in Title VII cases. However, Title VII courts could do a better job of protecting employee conduct directed against perceived discriminatory workplace treatment by giving more searching scrutiny to the facts in Title VII insubordination cases'; the specific doctrinal reforms proposed above have this goal as their aim. Title VII courts could also attend to the factors the NLRB applies in deciding whether employee misconduct warrants loss of statutory protections. The approaches outlined above call on courts to interpret employment antidiscrimination rights so as to preserve a space for somewhat imperfect, sometimes intemperate, expressions of protest by employees who are experiencing workplaces in which troubling signs of discrimination continue to exist. By enhancing the legal protection of employees who challenge employer authority when exercised discriminatory ways, all actors in the employment context are granted more power to achieve change from within. Modification of Title VII courts' approach to tolerate a broader range of employee protest behavior would have salutary results in encouraging employers and employees to work out problems in workplaces rather than in courts.

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<sup>257</sup> See, e.g., cases cited in n. 116 *supra*.