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### Relationships and Retaliation in the #MeToo Era

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## RELATIONSHIPS AND RETALIATION IN THE #METOO ERA

*Nicole Buonocore Porter*\*

### Abstract

In this #MeToo era, so much important work is being done (and so many stories are being told and listened to), but very little of the work focuses on retaliation. And none of the work focuses on situations where the fear of retaliation is not necessarily job loss (although that certainly happens) but rather, it is the fear of harming workplace relationships. This Article will use a real-life story of harassment to demonstrate how much workplace relationships matter—especially to women—and how the fear of harming those relationships often affects an employee’s willingness to report harassment. Thus, this Article argues for reforms surrounding harassment and retaliation law that recognize this reality. Right now, courts penalize victims of harassment for not reporting harassment soon enough because they feared harming their workplace relationships; or, when they do report, courts penalize them by holding that the relationship-based harm they experienced after reporting was not a real harm worthy of a remedy. These courts reason that reasonable employees would not and should not be deterred from reporting harassment because they fear relationship-based harms. And yet, most of the empirical evidence shows that the opposite is true: reasonable employees (sometimes men, but especially women) often do avoid reporting because they fear harming their relationships in the workplace. The law should reflect this reality.

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#### INTRODUCTION: NINA'S STORY

This is a true story about a friend who experienced harassment and stayed silent. This friend (Nina) was also a lawyer. Nina was working as an in-house lawyer for a manufacturing company, handling the labor and employment work of the entire company. This company had about twenty-five plants across the country. Her “clients” were the human resources (HR) personnel at all of the plants and the headquarters, where Nina worked. She was new to this in-house job, and she knew that she needed to work hard at establishing good relationships with the clients; otherwise, when a problem arises at a plant, the HR manager would either forego getting legal advice at all or would use an outside lawyer, wasting company resources.

Nina spent the first couple of months traveling to several plants, meeting as many HR managers as possible to get to know them, to talk about the plant's employment issues, and to offer her services. On one of these visits she met a man (John), who was an HR regional manager in charge of HR for eight other plants (i.e., HR managers at those eight plants reported to John). Nina knew it was important to make a good impression. She met John over dinner and drinks with the plant's HR manager and a couple of other managers from the plant. John was friendly to the point of being flirtatious, and as the night wore on, the flirtation seemed to cross the line into advances. Nina assumed John's excessive drinking explained his behavior and she did not really let it bother her too much. She traveled back home the next morning and put it behind her.

Two months later, Nina traveled to another state where the company was having a weekend-long retreat for all of the HR managers in the company. This was going to be a great opportunity for Nina to meet the HR managers that she had not already met and to establish herself as an employment law expert and a team player.

On the first night of the retreat, those who had already arrived (about ten people, including Nina) were having drinks outside on the patio of the hotel. John was one of those people and seemed to pick up right where he left off two months earlier. He was much more brazen this time. He kept leaning over to whisper in Nina's ear the graphic sexual things he wanted to do to and with her. He also kept putting his hand on her knee or thigh. Nina tried to ignore him, but John was relentless. In addition to the graphic statements whispered in her ear and the touching, he kept trying to get her to walk down to the beach with him. Others at the table could tell something was not right. One of the female HR managers caught Nina's eyes and quietly asked if she was okay. Nina assured her she was fine.

Because what were her choices? She could tell John off, privately or loud enough for the others to hear. She could just get up and leave. Or she could do nothing. She chose to do nothing, other than to constantly move John's hand off her knee and repeatedly tell him "no" in response to every one of his crude comments or suggestions. Nina chose to do nothing because the other choices possibly involved harming her relationships with these clients. She was embarrassed by his attention and did not want the other HR managers thinking that she had done something to bring it on or that she was overly sensitive or "uptight." She already had a sense of the culture at this company. These people worked hard, played hard, and were very thick-skinned. Generally, Nina was too. She thought that raising a stink about John's behavior would contradict the impression she wanted them to have of her.

And, just as importantly, she was worried about offending John by calling him out on his boorish behavior. Because if she angered him, she knew there was a strong likelihood that he would not only stop using her legal services, but he would convince the HR managers that he supervised to stop calling her too. Nina knew that her relationships with these people were important.

This is also why Nina did not tell the other lawyer when he arrived at the retreat or the director of HR, who was John's boss. She also did not say anything to the general counsel (Nina's boss) when she returned home after the retreat. She thought long and hard about saying something. Nina knew that John's behavior was inappropriate and bordered on violating the law, and even though she knew she could handle the situation, she was nervous about seeing him again (especially if there were not plenty of other people around). Nina also knew that John could

be a liability risk for the company. Even though she had no intention of suing, if John was doing this to her, he was possibly (maybe likely?) doing it to others who might sue the company. Her job as an in-house lawyer was to minimize the company's employment risks. And yet she still said nothing.

Why? Because Nina imagined the reaction, especially of the HR director but possibly of the general counsel or the other lawyers in the department, and it was not good. Knowing the culture of this company, Nina was fairly certain that they would think that she was overreacting and being a whiny troublemaker, or they would think she was not cut out to work in a male-dominated manufacturing environment. Someone who rocked the boat like this was not someone they would respect. Nina was also worried about what everyone would be thinking or saying about her if (really, when) her complaint became public knowledge. Nina was raised as a people pleaser, and she believed one of her strongest assets was her ability to get along with others. The chance that several people would be mad at her for complaining, or the possibility of them talking about her behind her back, was unthinkable and anxiety producing.

So she stayed quiet, even though she knew better. Two years later, when she had decided to leave for another job, she found out from the HR director that John had made advances at a company picnic towards the wife of one of the plant managers, and he was fired for it. At this point, Nina felt it was safe to tell the HR director what had happened to her two years earlier. He asked her why she had not said anything before, and she responded with a question: "What would you have thought about me if I had brought this complaint to your attention?" He just laughed and agreed she had made the right decision not to say anything at the time.

So what is the point of this story? The point is that if you have not experienced harassment and feared retaliation, it is hard to understand why harassment victims do not come forward, even when the feared retaliation is not termination.

This Article argues that workplace relationships matter (especially to women) and demonstrates how the fear of harming those relationships often affects an employee's willingness to report harassment. Thus, this Article argues for two reforms surrounding harassment and retaliation law that recognize this reality.

This Article proceeds in three parts. Part I introduces the problem. Specifically, it argues that reporting levels of harassment are very low in large part because victims of harassment fear retaliation. This Part then introduces the legal rules for sexual harassment and retaliation. It also explains the catch-22 that the law surrounding these two doctrines creates: if harassment victims wait too long to report the harassment, they might lose their harassment claim, but if they complain too early and are retaliated against, they will likely lose their retaliation claim.

Part II then turns to the specific focus of this Article, which is relationship-based harm. It discusses social science literature and provides caselaw examples where the retaliation a plaintiff is claiming is some type of relationship-based harm, such as being ostracized in the workplace. It also explains how “cultural” (or “relational”) feminism helps to explain why women are much more likely than men to be worried about relationship-based harms.

Finally, Part III provides a two-part proposal. First, the affirmative defense for harassment claims should be amended to allow plaintiffs to survive summary judgment when they delay reporting harassment because of fear of harming their workplace relationships. Second, the retaliation doctrine should be expanded to consider relationship-based harms as “adverse employment actions.”

## I. EXPLAINING THE PROBLEM

The #MeToo movement has told a narrative that is not quite true. This narrative is that women are reporting harassment at a much higher rate than ever before, and that they are doing so without penalty.<sup>1</sup> That might be true for high-profile Hollywood types<sup>2</sup> who shared their stories to have them heard<sup>3</sup> and not to necessarily seek a remedy in the workplace.<sup>4</sup> But reporting harassment against a current supervisor or coworker is fraught

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1. See Nicole Buonocore Porter, Essay, *Ending Harassment by Starting with Retaliation*, 71 STAN. L. REV. ONLINE 49, 49 (2018), <https://review.law.stanford.edu/wp-content/uploads/sites/3/2018/06/71-Stan.-L.-Rev.-Online-Porter-1.pdf> [<https://perma.cc/Y8Y6-7Y7E>].

2. Cf. Deborah Tuerkheimer, *Beyond #MeToo*, 94 N.Y.U. L. REV. 1146, 1173 (2019) (noting that women whose abusers are not famous would have a hard time getting the media to listen to their stories); Lesley Wexler et al., *#MeToo, Time's Up, and Theories of Justice*, 2019 U. ILL. L. REV. 45, 53 (noting that public shaming might not help those who are not in positions of power or in the public eye). To be clear, even Harvey Weinstein's victims of harassment avoided reporting for many years, in part because he threatened to destroy their reputations if they spoke out. Elizabeth C. Tippet, *The Legal Implications of the MeToo Movement*, 103 MINN. L. REV. 229, 234 (2018).

3. See Jessica A. Clarke, *The Rules of #MeToo*, 2019 U. CHI. LEGAL F. 37, 41 (stating that the originators of the #MeToo movement saw it as a “‘therapeutic, restorative, and educational’ effort” (quoting Lesley Wexler, *#MeToo and Law Talk*, 2019 U. CHI. LEGAL F. 343, 345)); Tuerkheimer, *supra* note 2, at 1174 (noting the benefits of the #MeToo movement as catharsis, validation, and solidarity).

4. See Clarke, *supra* note 3, at 46–47 (“[I]ncapacitating and deterring high-level harassers only assists a privileged pool of potential victims, and only in a limited set of circumstances . . . . Survivors without fame and fortune are less likely to find investigative journalists eager to tell their stories.”); Porter, *supra* note 1, at 49, 51–52; Wexler et al., *supra* note 2, at 51 (noting that Alyssa Milano's #MeToo movement was not intended to be a call for action and was more of an attempt to get the public to understand the prevalence of harassment and assault and to enhance the believability of victims); *id.* at 54 (stating that the naming and shaming campaign does not solve the issue of workplace protections for victims).

with risk and often brings little reward for one very simple reason—retaliation.<sup>5</sup>

### A. *Fear of Retaliation Leads to Low Reporting Rates*<sup>6</sup>

For an employer to stop and remedy harassment, the victim of the harassment needs to report it.<sup>7</sup> And yet, by all accounts, reports of harassment are very low.<sup>8</sup> Despite the fact that in one study, four in ten

5. Porter, *supra* note 1, at 50; *see also* Tuerkheimer, *supra* note 2, at 1166 (stating that most victims of harassment often end up worse off after reporting and that it thus is actually unreasonable for them to report); Carly McCann & Donald T. Tomaskovic-Devey, *Nearly All Sexual Harassment at Work Goes Unreported—and Those Who Do Report Often See Zero Benefit*, CONVERSATION (Dec. 14, 2018), <http://theconversation.com/nearly-all-sexual-harassment-at-work-goes-unreported-and-those-who-do-report-often-see-zero-benefit-108378> [<https://perma.cc/BR9T-GXV3>] (stating that the #MeToo and #TimesUp movements have brought renewed attention to workplace sexual harassment but the vast majority of allegations go unreported and those who do report tend to face troubling outcomes). In fact, as noted by Professor Brake, the fact that #MeToo has bolstered the credibility of women complaining about sexual harassment is not likely to reduce retaliation and might even make it worse because many people think that the #MeToo movement has gone too far. *See* Deborah L. Brake, *Coworker Retaliation in the #MeToo Era*, 49 U. BALT. L. REV. 1, 2 (2019).

6. This Section is derived in part from Porter, *supra* note 1, at 51–52.

7. Obviously, some harassment is so open and notorious that the employer might be aware of it without a complaint by the victim. But generally speaking, victims need to report harassment before employers can remedy it. *See* Ivan E. Bodensteiner, *The Risk of Complaining—Retaliation*, 38 J.C. & U.L. 1, 36 (2011) (“Of course, if the victims of discrimination do not complain, discrimination is likely to continue unchecked.”); Joanna L. Grossman, *Moving Forward, Looking Back: A Retrospective on Sexual Harassment Law*, 95 B.U. L. REV. 1029, 1031 (2015) (stating that only when someone names, blames, and claims harassment will anything be done about it); Anne Lawton, *The Bad Apple Theory in Sexual Harassment Law*, 13 GEO. MASON L. REV. 817, 846 (2005) (stating that many courts assume that the employer is powerless to stop harassment unless employees report it); *cf.* Vicki Schultz, *Open Statement on Sexual Harassment from Employment Discrimination Law Scholars*, 71 STAN. L. REV. ONLINE 17, 39 (2018), <https://review.law.stanford.edu/wp-content/uploads/sites/3/2018/06/71-Stan.-L.-Rev.-Online-Schultz-2.pdf> [<https://perma.cc/V972-XDDN>] (“Discouraging victims from reporting not only robs them of relief . . . [but] also deprives employers . . . of the victims’ view of what harassment is.”).

8. U.S. EEOC, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE: REPORT OF CO-CHAIRS CHAI R. FELDBLUM & VICTORIA A. LIPNIC 15 (2016); Anne Lawton, *Operating in an Empirical Vacuum: The Ellerth and Faragher Affirmative Defense*, 13 COLUM. J. GENDER & L. 197, 208 (2004) (stating that reporting harassment is a “very uncommon occurrence” (quoting Bonnie S. Danský & Dean G. Kilpatrick, *The Effects of Sexual Harassment, in SEXUAL HARASSMENT: THEORY, RESEARCH, AND TREATMENT* 152, 158 (William O’Donohue ed., 1997))); Lawton, *supra* note 7, at 847 (describing the very low reporting rates of harassment); McCann & Tomaskovic-Devey, *supra* note 5 (stating that about “[five] million people experience sexual harassment at work every year, yet on average only around 9,200 file a charge with the EEOC or [the state equivalent],” which amounts to 99.8% of people who do not file a charge).

women stated they experienced harassment in the workplace,<sup>9</sup> the number who reported this harassment is much, much lower.<sup>10</sup> For instance, one study revealed that although 44% of those who experienced harassment at work took no action, only 12% reported the conduct.<sup>11</sup> Another study revealed that large employers receive only six complaints per year, about .02% of employees.<sup>12</sup> Instead, most victims ignore incidents of harassment or take costly steps to avoid the harasser or the job.<sup>13</sup> In fact, of all of a victim's responses, the most infrequent is to report.<sup>14</sup>

The reason for this low rate of reporting is because victims of harassment fear all types of retaliatory actions,<sup>15</sup> including, as described

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9. Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form Over Substance in Sexual Harassment Law*, 26 HARV. WOMEN'S L.J. 3, 5 (2003).

10. *Id.* at 23 ("Sexual harassment victims have traditionally tended not to utilize internal complaint procedures or otherwise formally report problems of harassment.").

11. *Id.*

12. *Id.* at 24; see also Lawton, *supra* note 8, at 208 (citing several studies of very low reports of harassment: 2–6% in one study, 13.3% in the private sector and 6% in the university setting in another study, and other studies indicating a low of 5% and a high of 18%).

13. Kimberly M. Cummings & Madeline Armenta, *Penalties for Peer Sexual Harassment in an Academic Context: The Influence of Harasser Gender, Participant Gender, Severity of Harassment, and the Presence of Bystanders*, 47 SEX ROLES 273, 274 (2002) (stating that the most common responses to harassment are to ignore it or avoid it and that reporting it is the least common response); Grossman, *supra* note 9, at 25; see also U.S. EEOC, *supra* note 8, at v (stating that harassment victims tend to avoid the harasser, deny the significance or seriousness of the harassment, ignore it, or endure it); Lilia M. Cortina et al., *What's Gender Got to Do with It? Incivility in the Federal Courts*, 2002 LAW & SOC. INQUIRY 235, 259 (stating that, in a study of mistreatment suffered by attorneys (much of it gender-related), most attorneys ignored, denied, or minimized the mistreatment).

14. Grossman, *supra* note 9, at 26; see U.S. EEOC, *supra* note 8, at 15 ("[T]he extent of non-reporting is striking."); Lawton, *supra* note 8, at 208 (discussing the underreporting problem); see also U.S. EEOC, *supra* note 8, at 17 ("[I]n many work environments, the most 'reasonable' course of action for the victim to take is to avoid reporting the harassment."); Shereen G. Bingham & Lisa L. Scherer, *Factors Associated with Responses to Sexual Harassment and Satisfaction with Outcome*, 29 SEX ROLES 239, 240–41, 247 (1993) (stating that employees seldom report harassment and that formal and informal complaints were the least likely used responses to harassment); Louise F. Fitzgerald et al., *Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment*, 51 J. SOC. ISSUES 117, 121 (1995) (stating that the most infrequent response to harassment is to seek organizational relief).

15. U.S. EEOC, *supra* note 8, at 16 (stating that many victims of harassment never report it because they anticipate social retaliation, including humiliation and ostracism); Grossman, *supra* note 9, at 51 & n.294 (citing Mary P. Rowe, *People Who Feel Harassed Need a Complaint System with Both Formal and Informal Options*, 6 NEGOT. J. 161, 164 (1990)) (referring to an estimate based on personal experience that indicated that 75% of victims express serious concerns about retaliation); see also Cortina et al., *supra* note 13, at 259–60 (stating that the primary reason lawyers participating in the study did not report mistreatment "was fear—of harming their clients' cases, damaging their professional image, losing favor with the judge," and work-related retaliation); Fitzgerald et al., *supra* note 14, at 122 (stating that many victims do not report because they fear retaliation, as well as fear not being believed and being humiliated); Anne Lawton,



more below, being ostracized by coworkers.<sup>16</sup> Social science research “consistently has shown that women do not report (or delay reporting) harassment because they fear retaliation, they believe no one will believe them, or they think reporting will make the situation at work worse.”<sup>17</sup> This fear of retaliation in all forms is not unfounded.<sup>18</sup> In fact, studies demonstrate that employees who report harassment often face adverse consequences, including termination.<sup>19</sup>

But employers do not even need to retaliate to deter reports. Retaliation performs most of its work simply by being threatened (explicitly or implicitly).<sup>20</sup> As Professor Deborah L. Brake notes, “[d]ecisions about whether to challenge discrimination rest on a careful balancing of the costs and benefits of doing so.”<sup>21</sup> Women who choose not to report harassment do so because they believe that the costs of

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*Between Scylla & Charybdis: The Perils of Reporting Sexual Harassment*, 9 U. PA. J. LAB. & EMP. L. 603, 604–05 (2007) (discussing how fear of retaliation stops victims from reporting).

16. L. Camille Hébert, *Why Don't “Reasonable Women” Complain About Sexual Harassment?*, 82 IND. L.J. 711, 731, 741 (2007) (describing employees’ fear of how their coworkers would treat them after reporting harassment); Lawton, *supra* note 15, at 621 (discussing the fact that after the author reported harassment by one of her more senior colleagues, the silence inside the department was “deafening”); *see also* U.S. EEOC, *supra* note 8, at 16 (separating out professional retaliation that affects the job directly and “social retaliation,” such as being ostracized).

17. Lawton, *supra* note 15, at 618–19.

18. Lawton, *supra* note 8, at 258 (stating that the fear of retaliation is “not baseless”); *see also* Rebecca Walker, *Mitigating the Fear of Retaliation: Helping Employees Feel Comfortable Reporting Suspected Misconduct*, J. HEALTH CARE COMPLIANCE, Mar.–Apr. 2008, at 19, 20 (stating that one in eight employees experience some form of retaliation for reporting suspected misconduct).

19. Grossman, *supra* note 9, at 52; *see* Lawton, *supra* note 8, at 266. A 2003 study indicated that 75% of those who reported harassment experienced retaliation. U.S. EEOC, *supra* note 8, at 16. Although this is merely anecdotal evidence, the Author found it interesting that in the harassment stories that the EEOC discussed in the Task Force report, all of them involved the harassment victim being retaliated against. *Id.* at 3–5; *see also* Mindy E. Bergman et al., *The (Un)reasonableness of Reporting: Antecedents and Consequences of Reporting Sexual Harassment*, 87 J. APPLIED PSYCHOL. 230, 237 (2002) (finding in their study that reporting triggers retaliation and causes victims harm); Bingham & Scherer, *supra* note 14, at 263 (stating that filing formal or informal complaints did not resolve the harassing situation); Fitzgerald et al., *supra* note 14, at 122 (stating that 62% of workers who reported harassment experienced retaliation, including lower job evaluations, denial of promotions, and being transferred or fired); Hébert, *supra* note 16, at 740 (stating that women are not unreasonable for fearing negative consequences from reporting harassment because negative consequences often occur and those who complain often get evaluated more negatively); McCann & Tomaskovic-Devey, *supra* note 5 (stating that the low proportion of employees who file sexual harassment claims is likely a function of employers’ punitive responses where two-thirds of those employees will lose their jobs).

20. Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 39 (2005).

21. *Id.* at 36.

reporting outweigh the benefits.<sup>22</sup> As is discussed more below,<sup>23</sup> the organizational culture of an employer greatly influences how much of a role retaliation plays in that organization.<sup>24</sup>

### B. *Harassment Claims*

To bring a successful harassment claim under Title VII of the Civil Rights Act of 1964,<sup>25</sup> the plaintiff must demonstrate: (1) that the harassment was because of a protected trait; (2) that the harassment was unwelcome; (3) that it was severe or pervasive so as to create an abusive work environment; and (4) some basis for establishing employer liability.<sup>26</sup>

Before elaborating on the employer liability issue (which is often the hardest element for plaintiffs in harassment claims), this Article analyzes Nina's potential harassment claim. Because Nina's experience involved sexual comments and overtures, it certainly would be considered "because of sex." Based on the facts, it seems obvious that Nina did not "welcome" the harassment, but some courts would use the fact that Nina did not explicitly tell John to stop as evidence that the harassment was not unwelcome.<sup>27</sup> Assuming Nina could prove that the harassment was unwelcome, proving the severe or pervasive element is likely difficult for Nina. The first incident of harassment was strictly verbal. The second time John harassed Nina, there was some "touching," but it was not the type of touching that would normally be considered "severe"—he had his hand on her knee or thigh but he did not grope her private parts.<sup>28</sup> It is unlikely that even the two instances together would be considered pervasive.<sup>29</sup> Thus, even before getting to the employer liability issue, it is

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22. *Id.* at 36–37.

23. *Infra* Section III.B.

24. *See* Brake, *supra* note 20, at 39–40; *see also* Walker, *supra* note 18, at 20 (stating that where employees have a fear of retaliation, the employer's compliance program suffers).

25. Pub. L. No. 88-352, § 704, 78 Stat. 241, 257 (codified as amended at 42 U.S.C. § 2000e-3 (2012)).

26. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (describing the severe or pervasive standard); Meritor Sav. Bank v. Vinson, 477 U.S. 57, 66–68, 72 (1986).

27. *See, e.g.,* Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 829–30 (1991) (stating that courts use women's silence to demonstrate that the harassment was not unwelcome, but the silence is usually attributable to shame, humiliation, fear, and dependence of the victim).

28. *See, e.g.,* Gerald v. Univ. of P.R., 707 F.3d 7, 18 (1st Cir. 2013) (holding that one incident where the supervisor grabbed plaintiff's breast was sufficient to meet the standard). *But see* Clarke, *supra* note 3, at 43 ("Some courts have held that even repeated instances of unwanted sexual touching do not count as harassment."); Tippet, *supra* note 2, at 241 (stating that some scholars have highlighted cases where even egregious harassment was found not to meet the severe or pervasive standard).

29. *See* Estrich, *supra* note 27, at 842, 846 (discussing how courts have a difficult time judging pervasiveness from a woman's perspective); *id.* at 846 ("[T]he objective standard of

unclear whether Nina would have an actionable harassment claim had she chosen to bring one.

Moving on to the fourth element of the harassment claim, even when the harassment claim is otherwise actionable—it is because of a protected trait, unwelcome, and severe or pervasive—the plaintiff still must establish that the employer should be held liable for the harassment perpetrated by its employees.<sup>30</sup> Employers are not automatically liable for the harassment of their employees.<sup>31</sup> Whether the employer can be held liable is determined through different tests depending on whether the harasser is a supervisor or a coworker.<sup>32</sup>

If the harasser is a coworker (or a customer, client, or other third party), the test for determining whether the employer will be held liable is one of negligence—whether the employer knew or should have known about the harassment and failed to take appropriate steps to remedy it.<sup>33</sup> As should be obvious from this, if the employee who was harassed does not report the harassment, then it is unlikely that the court will hold that the employer should have known about the harassment, unless it was so open and notorious that everyone knew about it.<sup>34</sup>

For instance, in our Nina story, John would not be considered Nina's supervisor;<sup>35</sup> he would be considered a coworker or maybe even a client. Thus, the employer would only be liable if it failed to take appropriate action after Nina reported. Because Nina never reported, the employer could not have been expected to take remedial actions. And if Nina did report and the employer took some reasonable measure to remedy the harassment (such as giving John a warning or making sure that John is not left alone with Nina), the employer would not be liable for the harassment. This is true even if Nina suffered some mental anguish or anxiety from the harassment, and this is true even if the employer's remedy interfered with her ability to work with John and the HR managers he supervised.

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pervasiveness is defined by an idealized woman who simply may not exist. Such a woman is tough, not 'hypersensitive'; she is aggressive, not passive . . . . In short, the 'reasonable woman' is very much a man.").

30. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).

31. *Meritor*, 477 U.S. at 72; see also *Faragher*, 524 U.S. at 804 (preserving *Meritor*'s holding on this point).

32. *Faragher*, 524 U.S. at 803 (discussing the differences between supervisor harassment and coworker harassment); see also Tippet, *supra* note 2, at 238 (same).

33. *Faragher*, 524 U.S. at 799; see also Grossman, *supra* note 9, at 8 (noting that the standard for coworker harassment is one of negligence).

34. See Grossman, *supra* note 9, at 50 (noting that, if victims do not complain about harassment, employers will not be able to remedy it).

35. For the definition of "supervisor," see *infra* note 36.

If the harasser is a supervisor,<sup>36</sup> unless the supervisor takes a “tangible employment action”<sup>37</sup> against the victim, the employer has the opportunity to establish a two-part affirmative defense: “(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”<sup>38</sup>

The first prong is all about the employer: the employer must show that it took reasonable steps to prevent and correct harassment.<sup>39</sup> The prevention part of this is usually very easy for employers to meet. As long as employers have and disseminate an anti-harassment policy that gives employees multiple avenues to report the harassment, employers will likely be able to demonstrate reasonable steps to prevent harassment.<sup>40</sup> Training employees and supervisors on the harassment policy also helps, but is not strictly necessary.<sup>41</sup> The correction part of the first prong requires the employer to take reasonable steps to remedy harassment after

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36. The United States Supreme Court defined “supervisor” in *Vance v. Ball State Univ.*, 570 U.S. 421 (2013), as someone who is “empowered by the employer to take tangible employment actions against the victim,” *id.* at 450. *See also* Grossman, *supra* note 7, at 1042 (stating that *Vance* omits the consideration of “supervisors” who dictate many or all of a worker’s daily working conditions but lack the ultimate power over the worker’s job).

37. A “tangible employment action” is described as “discharge, demotion, or undesirable reassignment.” *Faragher*, 524 U.S. at 808.

38. *Id.* at 807; *see also* *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) (applying the same two-part affirmative defense).

39. *Faragher*, 524 U.S. at 807 (stating that although “proof that an employer had promulgated an antiharassment policy with a complaint procedure is not necessary in every instance as a matter of law,” the need for one is important to the first element of the defense).

40. *See, e.g.*, *Lauderdale v. Tex. Dep’t of Criminal Justice*, 512 F.3d 157, 164 (5th Cir. 2007) (stating that the employer satisfied the first prong of the affirmative defense “by virtue of its institutional policies and educational programs regarding sexual harassment”); *see also* Grossman, *supra* note 9, at 10, 12 (noting that employers can prove prevention fairly easily through having an adequate policy be distributed and appropriate training).

41. *See, e.g.*, *Lauderdale*, 512 F.3d at 164 (noting with approval the employer’s training programs for sexual harassment); Grossman, *supra* note 9, at 13 (noting that training is not specifically required but can be a factor in favor of demonstrating that the employer was reasonable in its prevention efforts). *But see* Susan Bisom-Rapp, *An Ounce of Prevention Is a Poor Substitute for a Pound of Cure: Confronting the Development Jurisprudence of Education and Prevention in Employment Discrimination Law*, 22 BERKELEY J. EMP. & LAB. L. 1, 4, 29–30, 35, 38 (2001) [hereinafter Bisom-Rapp, *An Ounce of Prevention*] (discussing the fact that, even though courts use training programs as evidence of employers’ prevention efforts, there is actually a dearth of research indicating that training programs are successful in preventing harassment); Susan Bisom-Rapp, *Sex Harassment Training Must Change: The Case for Legal Incentives for Transformative Education and Prevention*, 71 STAN. L. REV. ONLINE 62, 68 (2018) [hereinafter Bisom-Rapp, *Training Must Change*], <https://review.law.stanford.edu/wp-content/uploads/sites/3/2018/06/71-Stan.-L.-Rev.-Online-Bisom-Rapp.pdf> [<https://perma.cc/VPW6-DGGC>] (stating that sexual harassment training programs, “as generally practiced, do[] not prevent harassment”).

it is reported to them.<sup>42</sup> Obviously, employers do not always succeed in proving this, but as long as they take some reasonable steps to stop the harassment after it is reported to them, they should be able to succeed on this prong.<sup>43</sup>

The second prong is all about the plaintiff: the employer has to prove that the plaintiff failed to take advantage of preventive opportunities or to otherwise avoid harm.<sup>44</sup> If the plaintiff delays reporting, the employer will likely win on this prong of the affirmative defense.<sup>45</sup>

For instance, in *Phillips v. Taco Bell Corp.*,<sup>46</sup> the plaintiff was harassed by her supervisor on March 13, June 12, June 13, June 17, and June 18.<sup>47</sup> She reported the harassment on June 20.<sup>48</sup> The court held that the delay was unreasonable despite the fact that the plaintiff reported shortly after the harassment had started escalating.<sup>49</sup> In another case, the court held that even seventeen days was too long to delay reporting.<sup>50</sup> Notably, even if employees delay reporting because they are at a new job

42. See, e.g., *Lauderdale*, 512 F.3d at 165 (stating that the employer promptly investigating the plaintiff's allegations of harassment and disciplining the harasser were sufficient actions to satisfy the employer's first prong of the affirmative defense).

43. See, e.g., *Conatzer v. Med. Prof'l Bldg. Servs., Inc.*, 255 F. Supp. 2d 1259, 1270 (N.D. Okla. 2003) (stating that the employer can prove the first prong of the affirmative defense when it responds to a report of harassment "in a prompt and reasonable manner"), *aff'd sub nom.* *Conatzer v. Med. Prof'l Bldg. Servs. Corp.*, 95 F. App'x 276 (10th Cir. 2004); see also Grossman, *supra* note 9, at 15–16 (stating that adequate correction requires employers to have an appropriate grievance procedure and respond appropriately to complaints by taking actions "reasonably calculated to stop the harassment"); Tippet, *supra* note 2, at 246–47 (stating that employers do not consider an employer's failure to fire a harasser to be unreasonable and that this prong can often be satisfied by a warning or transferring the victim away from the harasser).

44. *Faragher*, 524 U.S. at 807–08 ("[W]hile proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense.").

45. See, e.g., Grossman, *supra* note 9, at 21 ("[C]ourts have strictly enforced the victim's duty to complain."); Hébert, *supra* note 16, at 721–29 (discussing cases where victims failed to report right away and courts held that they were unreasonable, thereby allowing the employer to win on the affirmative defense); Lawton, *supra* note 8, at 254–59 (discussing cases where employees were afraid to report harassment because of retaliation but the courts held that a delay of as little as six weeks from the first incident could mean that the plaintiffs "unreasonably failed to avail themselves of their employer's grievance mechanism[s]").

46. 83 F. Supp. 2d 1029 (E.D. Mo. 2000).

47. *Id.* at 1033.

48. *Id.*

49. *Id.* at 1034.

50. *Conatzer v. Med. Prof'l Bldg. Servs., Inc.*, 255 F. Supp. 2d 1259, 1270 (N.D. Okla. 2003), *aff'd sub nom.* *Conatzer v. Med. Prof'l Bldg. Servs. Corp.*, 95 F. App'x 276 (10th Cir. 2004).

when they first experience the harassment, the delay is not excused.<sup>51</sup> In one case, the court held that a seven-day delay in complaining was unreasonable even though the harassment began on the plaintiff's first day of employment.<sup>52</sup>

And even if the plaintiff's delay is because she fears retaliation, the courts will likely find her behavior unreasonable.<sup>53</sup> In one case, the plaintiff was deemed unreasonable in failing to report even though her supervisor told her she would be terminated if she made such a report.<sup>54</sup> In another especially egregious case, the plaintiff's claim was dismissed despite the fact that her supervisor had forcibly raped her and had showed her his gun several times; the court held that her fear was not enough to excuse her delay in reporting.<sup>55</sup>

Perhaps most frustratingly, some courts have held that if the employer satisfies prong one of the affirmative defense (takes reasonable steps to prevent and correct harassment), it does not have to also satisfy the second prong of the defense.<sup>56</sup> These courts have so held even though the United States Supreme Court made clear in both *Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Boca Raton* that the test is conjunctive.<sup>57</sup> When employees do gather up enough nerve to report harassment, they frequently experience retaliation.<sup>58</sup> And as demonstrated below, plaintiffs often have difficulty with this claim as well.

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51. Hébert, *supra* note 16, at 728 (citing *Dennis v. Nevada*, 282 F. Supp. 2d 1177, 1185 (D. Nev. 2003)) (discussing a case in which the plaintiff failed to report harassment right away because she was a probationary employee and the court held that her failure to report was unreasonable).

52. *Marsicano v. Am. Soc'y of Safety Eng'rs*, No. 97 C 7819, 1998 WL 603128, at \*7 (N.D. Ill. Sept. 4, 1998).

53. See *Grossman*, *supra* note 9, at 22 (stating that a generalized fear of retaliation is likely not going to be a sufficient justification for not promptly reporting); Hébert, *supra* note 16, at 725 (stating that subjective fear of retaliation is not enough to allow the plaintiff to survive the defendant's proof of the affirmative defense).

54. *Sconce v. Tandy Corp.*, 9 F. Supp. 2d 773, 778 (W.D. Ky. 1998).

55. *Walton v. Johnson & Johnson Servs., Inc.*, 347 F.3d 1272, 1276, 1289–90 (11th Cir. 2003) (*per curiam*).

56. See, e.g., *McCurdy v. Ark. State Police*, 375 F.3d 762, 772 (8th Cir. 2004) (allowing the employer to meet the affirmative defense despite the inability to prove the second element); *Brown v. Henderson*, 155 F. Supp. 2d 502, 512 (M.D.N.C. 2000) (holding that the employer need not prove the second element when the first element is met); *Jaudon v. Elder Health, Inc.*, 125 F. Supp. 2d 153, 164 (D. Md. 2000) (same).

57. *Grossman*, *supra* note 7, at 1044; see also *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998) (stating that the affirmative defense “comprises two necessary elements: (a) . . . and (b)” (emphasis added)).

58. E.g., *U.S. EEOC*, *supra* note 8, at 16.

### C. *Retaliation Basics*

Section 704(a) of Title VII states:

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 title, or because he has made a charge . . . or participated in any manner in an investigation, proceeding, or hearing . . . .<sup>59</sup>

To establish a *prima facie* case for retaliation, plaintiffs must demonstrate (1) protected activity, either participation or opposition; (2) an adverse employment action; and (3) causation between the two.<sup>60</sup> All three of these elements present roadblocks for a plaintiff bringing a retaliation claim.

First, to meet the “protected activity” element, a plaintiff either needs to engage in “participation”—bringing a charge of discrimination or participating in any proceeding—or “opposition”—opposing a practice made unlawful by Title VII.<sup>61</sup> Participation activities, such as complaints or charges filed with the EEOC or a state antidiscrimination agency, or a lawsuit in court, are typically external to the company.<sup>62</sup> Opposition activity, such as complaining to an HR officer or supervisor, is typically internal and often informal.<sup>63</sup>

The participation clause receives almost absolute protection.<sup>64</sup> Courts have held that participation is protected even if the underlying claim is without merit—and even when the plaintiff was unreasonable in believing it did have merit.<sup>65</sup> For example, imagine an employee files a charge with the EEOC alleging that he was harassed because of his class (e.g., because he was poor). Title VII clearly does not protect against income-based discrimination or harassment<sup>66</sup> and yet, as long as the employee filed the charge in good faith, honestly believing it was a valid charge, he would be protected if he experienced retaliation for having filed that charge.<sup>67</sup>

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59. Pub. L. No. 88-352, § 704(a), 78 Stat. 241, 257 (1964) (codified as amended at 42 U.S.C. § 2000e-3(a) (2012)).

60. *See, e.g.,* *Durant v. D.C. Gov’t*, 875 F.3d 685, 696–97 (D.C. Cir. 2017) (citing *Holcomb v. Powell*, 433 F.3d 889, 901–02 (D.C. Cir. 2006)).

61. 42 U.S.C. § 2000e-3(a).

62. B. Glenn George, *Revenge*, 83 TUL. L. REV. 439, 446–47 (2008).

63. *Id.* at 448.

64. *Id.* at 446–47.

65. *See, e.g.,* *Glover v. S.C. Law Enf’t Div.*, 170 F.3d 411, 412 (4th Cir. 1999).

66. 42 U.S.C. § 2000e-3(a).

67. *See Sanders v. Madison Square Garden, LP*, 525 F. Supp. 2d 364, 366 (S.D.N.Y. 2007).

The opposition clause, however, does not receive such absolute protection.<sup>68</sup> Instead, courts have required the plaintiff to demonstrate that she had a reasonable and good faith belief that the conduct she complained about was unlawful.<sup>69</sup> In the context of an employee's complaints about sexual harassment, the employee would have to demonstrate that she had a reasonable belief she was the victim of unlawful harassment.<sup>70</sup> As discussed above, one element the plaintiff must prove is that the harassment was "severe or pervasive."<sup>71</sup> Individual instances of harassment, unless they amount to an unwanted touching that is sexual in nature, are not likely to be considered "severe."<sup>72</sup> For instance, rubbing someone's shoulders is not likely to be considered severe but grabbing someone's breasts would likely be seen as severe.<sup>73</sup> If conduct is not severe, it must be pervasive.<sup>74</sup> Thus, if a woman complains about one offensive or demeaning statement or joke, and the employer retaliates against her for complaining, courts will likely hold that she did not have a reasonable, good faith belief that the conduct she complained about violated Title VII, and her retaliation claim will fail.<sup>75</sup>

This "reasonable belief" rule interacts with the second step of the employer's affirmative defense in harassment claims in especially pernicious ways. As explained above, employers can avoid liability for a supervisor's harassment if they can establish a two-prong affirmative defense.<sup>76</sup> The second prong of the affirmative defense is that the plaintiff failed to take advantage of preventative opportunities.<sup>77</sup> The most

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68. Thus, using the above example, because a reasonable person would not believe that income-based discrimination or harassment is unlawful under Title VII, if an employee complained to HR that he was the victim of income-based harassment, this would not be protected activity and the employer could terminate him for that complaint with impunity.

69. *See Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 270 (2001) (per curiam) (assuming without deciding that the reasonable, good faith belief rule is correct).

70. *Wyatt v. City of Boston*, 35 F.3d 13, 15 (1st Cir. 1994) (per curiam); *see Breeden*, 532 U.S. at 270.

71. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (quoting *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986)).

72. *See Breeden*, 532 U.S. at 271 (citing *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998)).

73. *See, e.g., Gerald v. Univ. of P.R.*, 707 F.3d 7, 18 (1st Cir. 2013) (stating that a single incident in which the supervisor grabbed plaintiff's breast was sufficient to meet the standard). *But see Clarke, supra* note 3, at 7 (stating that some courts have held that even repeated instances of unwanted sexual touching do not count as harassment).

74. *Lauderdale v. Tex. Dep't of Criminal Justice*, 512 F.3d 157, 163 (5th Cir. 2007) ("Frequent incidents of harassment, though not severe, can reach the level of 'pervasive' . . .").

75. *Breeden*, 532 U.S. at 271; *see also Grossman, supra* note 7, at 1040 (stating that the *Breeden* standard "unleash[ed] a torrent of bad case law").

76. *See supra* Section I.B.

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



common way the employer proves this prong is to show that the plaintiff delayed in reporting the harassment.<sup>78</sup> When this affirmative defense is combined with the reasonable belief rule, the catch-22 emerges.<sup>79</sup> Assume a victim of harassment reports harassment right away, when it first occurs, and assume the harassment is verbal and not physical. If the employee is retaliated against, she will likely lose the retaliation claim because the court will hold that she did not have a reasonable belief that the harassment she complained of was “severe or pervasive.”<sup>80</sup> But if she waits until she has been harassed several more times, so that she has a reasonable belief that the harassment she experienced was “pervasive,” she will very likely lose on the harassment claim because the employer will be able to establish that she failed to take advantage of preventive opportunities by complaining earlier.<sup>81</sup> In other words, she loses her retaliation claim if she reports too early, and she loses her harassment claim if she reports too late.

The second hurdle a plaintiff experiences in bringing a valid retaliation claim is that she has to prove that she suffered an adverse employment action.<sup>82</sup> The U.S. Supreme Court’s decision in *Burlington Northern & Santa Fe Railway v. White*<sup>83</sup> announced the standard for determining whether a retaliatory employment action is sufficiently severe to qualify as an adverse employment action. The Court held that to meet the standard, the plaintiff must demonstrate that the action “would have been materially adverse to a reasonable employee.”<sup>84</sup> The action must be “harmful to the point that [it] could well dissuade a reasonable worker from making or supporting a charge of discrimination.”<sup>85</sup>

Although this seems like a fairly broad standard,<sup>86</sup> the lower courts have held that many actions are not “materially adverse.”<sup>87</sup> Of relevance to this Article, courts almost uniformly hold that “shunning,”

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78. See Grossman, *supra* note 7, at 1045 & n.103 (“[C]ourts took [an] . . . unrealistic view of how quickly and assertively employees must complain.”).

79. See *id.* at 1045 (noting that at the same time courts were insisting that employees rush to file complaints for fear of forfeiting their harassment claims, the courts were also weakening retaliation protections).

80. *Id.* at 1046.

81. *Id.* at 1044–46.

82. See, e.g., *Durant v. D.C. Gov’t*, 875 F.3d 685, 696–97 (D.C. Cir. 2017).

83. 548 U.S. 53 (2006).

84. *Id.* at 57.

85. *Id.*

86. See Grossman, *supra* note 7, at 1039 (construing the *Burlington* standard broadly); Walker, *supra* note 18, at 21.

87. See Sandra F. Sperino, *Retaliation and the Reasonable Person*, 67 FLA. L. REV. 2031, 2041–42 (2015).

“ostracizing,” and being harassed do not rise to the level of an adverse employment action.<sup>88</sup>

The courts’ reasoning in these cases varies widely. Often courts simply hold, without much explanation, that the harm was not significant enough to deter someone from filing a charge.<sup>89</sup> These courts argue that “retaliation law should not respond to trivial harms, petty slights, or minor annoyances.”<sup>90</sup> Scholars have also theorized that when judges write opinions holding that certain conduct does not constitute an adverse employment action, they tend to “issue broad opinions that appear to hold, as a matter of law, that a particular action is never serious enough to create liability.”<sup>91</sup> Lower courts then rely on these opinions in subsequent cases where a similar adverse action is present.<sup>92</sup> Professor Sandra F. Sperino calls this the “problem of perceived precedent.”<sup>93</sup> Or perhaps, the reason for the courts’ constrained interpretation of what constitutes an adverse employment action is that federal judges, who have lifetime job security, are less likely to feel threatened or deterred by actions that would deter a reasonable worker, who does not enjoy such job security.<sup>94</sup>

The third hurdle in bringing a successful retaliation claim is that the plaintiff must prove causation—she must prove that her complaint (“protected activity”) was a but-for cause of the adverse employment action she suffered.<sup>95</sup> Employers are often smart enough to hide any retaliatory motive. Furthermore, unless a plaintiff has been a perfect

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88. See, e.g., *Brown v. Advocate S. Suburban Hosp.*, 700 F.3d 1101, 1106–07 (7th Cir. 2012) (being called “cry babies” and “trouble makers” by supervisor was not adverse action); *Hernandez v. Yellow Transp., Inc.*, 670 F.3d 644, 657–58 (5th Cir. 2012) (holding that coworker harassment, including name-calling, physical intimidation, false accusations, vandalizing belongings, and verbal threats, was not retaliatory); *Stephens v. Erickson*, 569 F.3d 779, 790–92 (7th Cir. 2009) (holding that supervisors yelling at plaintiff and physically isolating him from other employees did not rise to level of adverse employment action); *Reeves v. Tenn. Farmers Mut. Ins.*, No. 1:12-cv-00018, 2013 WL 2177918, at \*9, \*12–13 (M.D. Tenn. May 20, 2013) (finding that intimidation, unprofessional behavior, and rudeness would not dissuade a reasonable employee from complaining), *aff’d*, 555 F. App’x 509 (6th Cir. 2014); *Clay v. Lafarge N. Am.*, 985 F. Supp. 2d 1009, 1030–33 (S.D. Iowa 2013) (holding that shunning and ostracism at work did not satisfy the standard).

89. See *Brake*, *supra* note 5, at 32–33 (stating that courts tend to assume that people will put up with a lot of “pushback from colleagues without it weakening their resolve to complain”).

90. *Sperino*, *supra* note 87, at 2042.

91. *Id.* at 2055.

92. *Id.* at 2057.

93. *Id.* at 2056–61.

94. See *Estrich*, *supra* note 27, at 846–47 (discussing the distance between appellate judges and everyday women who need to keep their jobs and thus do not object to or report harassment like judges think they should).

95. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 362 (2013) (requiring but-for causation in retaliation cases under Title VII).

employee, an employer can easily generate a legitimate, nonretaliatory motive for the adverse employment action. Often the only evidence plaintiffs have to prove causation is the temporal proximity between the two events. Thus, if a woman complains about harassment one day and is terminated the next, that is pretty strong evidence that retaliation was at play.<sup>96</sup> But most employers are savvy enough to avoid such a close temporal proximity. And some courts hold that even a two- or three-month temporal proximity is too long to be indicative of a retaliatory motive.<sup>97</sup>

Now, revisiting Nina's story, change the facts to imagine that Nina decided to report to the director of HR (John's boss) the harassment she experienced at the HR retreat. Further, imagine that John is angry with her and refuses to talk to or call her to get her legal advice or schedule trainings at the plants (something that comprises a large part of Nina's job). Nina is not sure whether he has turned the other HR managers against her, but she does notice that the frequency of calls from the eight plant managers John supervises has decreased dramatically. At headquarters, where Nina works, she notices some of the other lawyers hunched together, whispering to each other while glancing over at her, which she takes as a pretty clear sign that they know about her complaint and are talking about her. At the next company-wide HR event six months later, John and the other plant managers that he supervises refuse to talk to her and ignore her when she tries to approach them. All of this is very upsetting to Nina who, as stated in the original story, is a people pleaser and usually gets along with everyone.

If Nina filed a retaliation claim against the employer, it would not stand much chance of success. The first hurdle would be the reasonable belief rule.<sup>98</sup> In other words, when Nina reported harassment, did she have a reasonable belief that the harassment she was reporting was unlawful? This is a close call, but at least some courts would say that the two instances of harassment by John, even with him touching her thigh, would not be considered severe or pervasive; therefore, Nina, especially because she is expected to know the law,<sup>99</sup> could not have reasonably

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96. See, e.g., *Lord v. High Voltage Software, Inc.*, 839 F.3d 556, 563–64 (7th Cir. 2016) (holding that termination two days after protected expression was sufficiently suspicious, unless other evidence showed that plaintiff would have been terminated anyway).

97. See, e.g., *Sherris v. City Colls. of Chi.*, No. 15 C 9078, 2018 WL 999902, at \*8 (N.D. Ill. Feb. 21, 2018) (holding that even a seven-week time gap between plaintiff's initial report of harassment and termination was too long to support a finding of retaliation).

98. See *Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 271 (2001) (per curiam).

99. To be clear, judges often hold nonlawyers to a reasonable belief standard that assumes knowledge of the appropriate law, including circuit-specific precedent. See, e.g., *Brianne J. Gorod, Rejecting "Reasonableness": A New Look at Title VII's Anti-Retaliation Provision*, 56 AM. U. L. REV. 1469, 1492 & n.104 (2007) (criticizing a decision where the court assumed that

believed that she was opposing unlawful behavior. The second hurdle would be establishing that the relationship-based harms Nina experienced were adverse employment actions.<sup>100</sup> As discussed above and below,<sup>101</sup> most courts hold that these types of relationship-based harms are not adverse employment actions because they would not dissuade a reasonable worker from bringing a charge of discrimination. And yet, in the actual Nina story (not the modified one for purposes of analyzing the potential retaliation claim), Nina *was* dissuaded from complaining about the harassment because of the fear of relationship-based harms. Finally, Nina might have difficulty proving causation. Assuming there are no emails or other evidence demonstrating that John and the other HR managers were ignoring her because of her complaint against John, Nina would only have the temporal proximity between her report of the harassment and the ostracization she experienced. Because some of this did not occur until six months later at the subsequent HR retreat, most courts would hold that Nina could not establish causation, and her claim would fail.

## II. THE SIGNIFICANCE OF WORKPLACE RELATIONSHIPS

This Part will outline the argument that workplace relationships are important for many workers, but especially for women. Scholarship, caselaw, and theory all support the reality that workplace relationships matter.

### A. *How Workplace Relationships Interact with Harassment and Retaliation*

There is a great deal of evidence supporting the idea that maintaining relationships in the workplace motivates women to forego reporting or complaining about harassment. This Section first discusses some of the literature on this topic before turning to some specific caselaw examples.

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the appropriate benchmark for assessing the reasonableness of the plaintiff's belief in reporting harassing behavior was the definition of sexual harassment established in the caselaw). As Gorod states, the courts often determine reasonableness of the plaintiff's belief based on what the law says, rather than what the general public believes. *Id.* at 1492. This approach holds plaintiffs responsible for understanding the current state of the law. *Id.* And in areas where the law surrounding harassment or discrimination is uncertain, Gorod points out: "If the courts cannot agree, how are individual citizens supposed to know?" *Id.* at 1495.

100. See, e.g., *Durant v. D.C. Gov't*, 875 F.3d 685, 696–97 (D.C. Cir. 2017).

101. See *supra* note 88; *infra* Section II.A.2.

## 1. Scholarship on Women and Workplace Relationships

As mentioned earlier, the empirical evidence demonstrates that very few women complain about harassment.<sup>102</sup> Both legal scholars and social scientists have discussed the reasons for this lack-of-reporting phenomenon. According to Professor Anne Lawton, one of the reasons that plaintiffs do not complain is because they are worried about making the workplace “unpleasant.”<sup>103</sup> Other scholars confirm that employees do not report harassment in part because they are worried about the hostility of coworkers.<sup>104</sup>

Professor L. Camille Hébert explained that women are socialized to avoid conflict and therefore are more likely than men to indicate that they did not report harassment because of fear of being labeled a troublemaker.<sup>105</sup> Many victims who reported harassment subsequently had a sense that coworkers were talking about them behind their back.<sup>106</sup>

Researchers in one study found that claiming that one has been a victim of discrimination is not “socially desirable” because these individuals risk being labeled as “hypersensitive, emotional, and generally unpleasant.”<sup>107</sup> When individuals consider reporting discrimination or harassment, they consider how it will affect their relationships and influence their peers’ perceptions of them.<sup>108</sup> They also worry about the backlash of confronting discrimination: “This blame-pointing process may be unpleasant for stigmatized people, especially if the perpetrator of discrimination is someone whom they will have to interact with on a regular basis.”<sup>109</sup> And their fears are warranted, according to this study. Participants in the study devalued a black man who attributed his failure to discrimination, rating him as more

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102. See Lawton, *supra* note 8, at 209, 243, 254–55.

103. *Id.* at 256.

104. Bergman et al., *supra* note 19, at 237; Grossman, *supra* note 9, at 51–52 (noting that victims do not complain about harassment because they are worried about being ostracized by their coworkers); Walker, *supra* note 18, at 19 (“Being a ‘snitch,’ ‘ratting out’ or ‘telling on’ one’s peers is behavior that even my 6-year-old has already learned to condemn . . . .”); see also Fitzgerald et al., *supra* note 14, at 127 (stating that “[s]tudies of victims consistently report that fear of personal or organizational retaliation is the major constraint” for responding assertively to harassment).

105. Hébert, *supra* note 16, at 731 (citing Denise H. Lach & Patricia A. Gwartney-Gibbs, *Sociological Perspectives on Sexual Harassment and Workplace Dispute Resolution*, 42 J. VOCATIONAL BEHAV. 102 (1993)).

106. See, e.g., Lawton, *supra* note 15, at 621 (stating that the silence after she reported harassment was “deafening” and that she was certain that her colleagues were talking about her behind closed doors).

107. Cheryl R. Kaiser & Carol T. Miller, *Stop Complaining! The Social Costs of Making Attributions to Discrimination*, 27 PERSONALITY & SOC. PSYCHOL. BULL. 254, 255 (2001).

108. *Id.*

109. *Id.*

“hypersensitive, emotional, argumentative, irritating, trouble making, and complaining.”<sup>110</sup> This negative impression was created even when the study was manipulated so that discrimination was certain to have occurred (thus justifying the man’s attribution).<sup>111</sup>

In addition to social pressures to maintain workplace relationships, some women also feel social pressure to be polite and passive rather than aggressive.<sup>112</sup> Scholars explained that women often felt guilty about being too assertive.<sup>113</sup> In a study of lawyers who experienced incivility or mistreatment, very few complained to anyone and none of them reported formally because they were worried about being labeled “weak” or a “feminazi.”<sup>114</sup> They also did not want to be seen as “whining [or] complaining” and did not want to be labeled as a “troublemaker.”<sup>115</sup> Being ostracized by coworkers is one type of retaliation that women experience when they report harassment, and they often believe they are worse off after they report.<sup>116</sup>

Women want to preserve not only their relationships with coworkers<sup>117</sup> (who might be angry if they report harassment of a beloved coworker or supervisor) but they also often care deeply about preserving the relationship with the harasser himself.<sup>118</sup> Women often respond passively to harassment by a supervisor to remain friendly and preserve the working relationship with the supervisor.<sup>119</sup> Some victims of harassment are worried that the harasser will lose his job and that the

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110. *Id.* at 261.

111. *Id.* at 262.

112. *Id.* at 256 (pointing to a study suggesting that one of the perceived costs of reporting is the violation of norms governing polite behavior); Janet K. Swim & Lauri L. Hyers, *Excuse Me—What Did You Just Say?!*: Women’s Public and Private Responses to Sexist Remarks, 35 J. EXPERIMENTAL SOC. PSYCHOL. 68, 69 (1999).

113. See, e.g., Fitzgerald et al., *supra* note 14, at 127.

114. Cortina et al., *supra* note 13, at 249, 251.

115. *Id.* at 266.

116. Hébert, *supra* note 16, at 741; see also Bodensteiner, *supra* note 7, at 38–39 (stating that when those who complain “are disliked and viewed as ‘troublemakers’ [or] ‘hypersensitive,’ then complaining carries a social cost”).

117. See Hébert, *supra* note 16, at 740 (stating that women often believe that reporting sexual harassment will prevent them from being accepted by their coworkers and many women believe that acceptance is “critical”).

118. See, e.g., Fitzgerald et al., *supra* note 14, at 122 (stating that many victims are reluctant to cause problems for the harasser); Hébert, *supra* note 16, at 739 (stating that women are more often concerned about harming the harasser because they are socialized to be more relationship-oriented than men); see also Grossman, *supra* note 7, at 51–52 (noting that some women do not want to report harassment by a supervisor because they fear losing the mentoring relationship they have with the supervisor).

119. See Bingham & Scherer, *supra* note 14, at 253; Hébert, *supra* note 16, at 739.

harasser's family members would suffer as well.<sup>120</sup> Other scholars confirmed that one inhibitor to reporting harassment was "not wanting to hurt the man involved—clearly a gender-linked cultural value."<sup>121</sup>

Both Professor Hébert and the EEOC Task Force Report explain that women's primary objective after experiencing harassment is to preserve the relationship, rather than to punish the harasser.<sup>122</sup> As stated by Professor Hébert: "[E]xpecting women to react to sexually harassing conduct in a way that is different than the manner in which they have been socialized—and to react that way immediately and as their first response to such conduct—punishes women for acting in precisely the ways that they are generally expected to act."<sup>123</sup>

The research discussed thus far has addressed why women do not report harassment at all or delay doing so. Professor Sperino's work addresses whether employees would consider various harms to be "adverse," such that they would dissuade employees from reporting discrimination.<sup>124</sup> Her study revealed that many individuals would find relationship-based harms to be materially adverse.<sup>125</sup> Professor Sperino conducted an empirical study using her law students, asking them to imagine that they witnessed discrimination in the workplace.<sup>126</sup> The study

120. Cummings & Armenta, *supra* note 13, at 278 (stating that when women are asked to punish hypothetical harassers, they are often unwilling to punish them out of fear that the harasser could lose his job or innocent family members might suffer); *see also* Hébert, *supra* note 16, at 739 (discussing how women are less likely to report for fear that reporting would harm the harasser).

121. Fitzgerald et al., *supra* note 14, at 127. Other literature describes the fact that a woman's normal response to incidents of harassment is to ignore or avoid it in large part because women "choose to remain friendly in order to maintain comfortable working relationships," and that "this behavior is consistent with traditional . . . relationship-oriented feminine behavior." Suzanne L. Osman, *Victim Resistance: Theory and Data on Understanding Perceptions of Sexual Harassment*, 50 SEX ROLES 267, 267 (2004). Osman explains that because women desire to maintain friendly relationships at work, their most assertive response might be asking the perpetrator to stop. *Id.* Although, sometimes this approach backfires because men might see friendly behavior as sexual interest, even when the woman says to stop. *Id.* at 270. Some men in this study interpreted smiling as sexual interest. *Id.* at 273.

122. *See* U.S. EEOC, *supra* note 8, at 40 (stating that many employees avoid reporting harassment because they do not want a coworker to lose his job over relatively minor harassing behavior; they simply want the harassment to stop); Hébert, *supra* note 16, at 732.

123. Hébert, *supra* note 16, at 733; *see also* Lawton, *supra* note 8, at 209 ("[I]f the vast majority of harassment victims do not report harassment, then the reasonable response is *not* to report . . .").

124. *See* Sperino, *supra* note 87, at 2042–43.

125. *See id.* at 2044; *see also* Walker, *supra* note 18, at 19 (stating that retaliation can be "exceedingly subtle").

126. Sperino, *supra* note 87, at 2043. Of course, the scenario in Professor Sperino's study is a bit different than what this Article discusses, because in her study, participants did not

then asked the participants questions about whether certain anticipated actions would dissuade them from complaining about the discrimination to an employer.<sup>127</sup> The survey results revealed that many study participants believed that various employment actions would be materially adverse in situations where courts have routinely held those employment actions to not be materially adverse.<sup>128</sup> Of relevance here, 50.53% of participants said that social ostracism by coworkers would dissuade them from reporting discrimination.<sup>129</sup>

## 2. Caselaw on Relationship-Based Harms

As mentioned above, many plaintiffs claim retaliation when the only (or primary) harm they experienced was relationship-based harm (and they almost always lose). For instance, in *Dennis v. Nevada*,<sup>130</sup> the plaintiff's retaliation claim failed because the court held that the ostracization she experienced by her coworkers, along with being assigned undesirable shifts, was not enough to constitute an adverse employment action.<sup>131</sup> In *Hellman v. Weisberg*,<sup>132</sup> the plaintiff alleged retaliation after she participated in an investigation of a discrimination complaint.<sup>133</sup> Specifically, the plaintiff alleged that she received "snubbing" from her coworkers, but because the court had previously held that ostracism by coworkers does not constitute an adverse employment action unless it has an effect on the ability to do the job, the ostracism she suffered was mostly social in nature and therefore was not actionable.<sup>134</sup>

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experience harassment directly; they witnessed someone else experiencing discrimination or harassment.

127. *Id.*

128. *Id.* at 2045.

129. *Id.* Professor Brake agrees that courts often are not in tune with how reasonable employees will react: "[S]hunning the complainant and siding with the accused appears highly likely to dissuade many, if not most, persons from complaining." Brake, *supra* note 5, at 34. In fact, Professor Brake notes that some research on workplace dynamics indicates that the harm from ostracism is actually worse from coworkers than supervisors. *Id.* at 35 ("[S]hunning, social exclusion, and incivility [by coworkers] push targeted employees to leave their employers at a greater rate than similar conduct by supervisors.").

130. 282 F. Supp. 2d 1177 (D. Nev. 2003).

131. *Id.* at 1186.

132. 360 F. App'x 776 (9th Cir. 2009).

133. *Id.* at 777.

134. *Id.* at 778–79; *see also* Mannat v. Bank of Am., 339 F.3d 792, 803 (9th Cir. 2003) (stating that ostracism is not an adverse employment action); Brooks v. City of San Mateo, 229 F.3d 917, 929 (9th Cir. 2000) (stating that ostracism suffered at the hands of coworkers cannot constitute an adverse employment action).



Similarly, in *Recio v. Creighton University*,<sup>135</sup> the plaintiff argued that after she filed an EEOC complaint, she suffered “shunning” by her coworkers.<sup>136</sup> The court held that the instances of ostracism experienced by the plaintiff were no more than “nonactionable petty slights” under *Burlington*.<sup>137</sup> In *Rennard v. Woodworkers Supply, Inc.*,<sup>138</sup> the plaintiff testified that she was shunned by her coworkers.<sup>139</sup> The court held that although coworker retaliatory harassment can sometimes constitute an adverse employment action, it will only rise to this level if management either orchestrated the harassment or knew about it and acquiesced in it, and there was no evidence of that occurring here.<sup>140</sup>

In *Brown v. Advocate South Suburban Hospital*,<sup>141</sup> after reporting the harassment, the plaintiffs were called crybabies, troublemakers, and spoiled children by their managers.<sup>142</sup> The court stated that this behavior does not constitute a materially adverse employment action and that “[p]ersonality conflicts at work that generate antipathy” and “snubbing by supervisors and co-workers” are not actionable . . . .<sup>143</sup>

Finally, Nina feared relationship-based retaliation. Nina first feared that other HR managers would think poorly of her if she made a fuss about John’s boorish behavior. She also feared that, if she reported John’s behavior, the HR director for the corporation and the general counsel would perceive her as “whiny,” “ultra-sensitive,” and “not a good fit.” She was even worried about harming her relationship with John. As much as John’s behavior irritated her, Nina did not want him to get in trouble. She knew John had a wife and a small child and that if he was fired for harassment, it would likely affect his family. Thus, although she was not seriously worried about losing her job or suffering any other type of economic, tangible harm, the concern over relationship-based harms was enough to keep her from reporting the harassment.

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135. 521 F.3d 934 (8th Cir. 2008).

136. *Id.* at 939.

137. *Id.* at 940–41 (quoting *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 69 (2006)).

138. 101 F. App’x 296 (10th Cir. 2004).

139. *Id.* at 308.

140. *Id.*

141. 700 F.3d 1101 (7th Cir. 2012).

142. *Id.* at 1107.

143. *Id.* (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006)); see also *Fercello v. Cty. of Ramsey*, 612 F.3d 1069, 1081 (8th Cir. 2010) (holding that coworkers’ actions of making plaintiff feel unwelcome at meetings, rolling their eyes at her, interrupting her, and ignoring her contributions were not sufficient to be an adverse employment action). *But see* *Burrell v. Shepard*, 321 F. Supp. 3d 1, 13–14 (D.D.C. 2018) (denying summary judgment for employer on plaintiff’s retaliation claim where plaintiff alleged “that her coworkers refused to speak to her, ‘making it very difficult for her to perform her assigned tasks,’” and “made derogatory comments about [her] on social media”).

To be clear, although many of the victims in the above cases are women, certainly some men suffer from relationship-based harms. For instance, in *Somoza v. University of Denver*,<sup>144</sup> the plaintiff was a man who complained of retaliation that consisted of his coworkers laughing at his opinions and talking behind his back.<sup>145</sup> The court held these actions were not materially adverse.<sup>146</sup>

Interestingly, the results of Professor Sperino's study are inconsistent with the literature discussed above. In her study, when she asked her students whether they would be deterred from reporting discrimination if they knew they would suffer "social ostracism" by their coworkers, more men (57.69%) than women (42.86%) stated that they would be deterred by such relationship-based harms.<sup>147</sup> One explanation for this is simply that it does not necessarily reflect reality, either because the research participants were law students or simply because they were research participants—other scholars have noted that there is often a "striking gap between expected and actual responses to bias"; people think they will report much more often than they actually do.<sup>148</sup>

Even if men sometimes suffer relationship-based harms, the above discussion in this Section should make clear that it is more often women who worry about their workplace relationships.<sup>149</sup> And regardless of the employee's sex, the reality is that many employees will forego reporting harassment or discrimination because they fear relationship-based harms.<sup>150</sup>

Even if it is intuitive to some readers that women are more likely than men to be dissuaded from reporting by relationship-based harms, the Section below both reinforces what might be intuitive to many and also

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144. 513 F.3d 1206 (10th Cir. 2008).

145. *Id.* at 1215.

146. *Id.*

147. Sperino, *supra* note 87, at 2046.

148. Bodensteiner, *supra* note 7, at 38 (quoting Brake, *supra* note 20, at 30); Fitzgerald et al., *supra* note 14, at 119 (noting that real victims "behave quite differently than research participants or the general public say they would behave"); Grossman, *supra* note 9, at 25 (stating that real victims often do not behave like fake victims in research studies); Swim & Hyers, *supra* note 112, at 80–81, 85 (discussing studies that demonstrated that women believed they would be more direct and more likely to confront harassment than how they would actually behave if it happened to them). In other words, merely labeling a remark as prejudicial and wanting to respond is not predictive of actually responding because there are normative pressures not to respond.

149. See, e.g., Bingham & Scherer, *supra* note 14, at 260 (stating that the response to harassment was gendered; women talked to family and friends about harassment more often than men) (stating that women find more support in friendships than men do); Hébert, *supra* note 16, at 732 (stating that women are more comfortable using informal means of trying to resolve problems in the workplace because formal means are inconsistent with the manner in which they view conflict resolution).

150. See Sperino, *supra* note 87, at 2046.

explains why—why is it that women are more likely to worry about workplace relationships than men? This Article explains how one feminist theory can help to reinforce this intuitive claim that women are generally more relationship-oriented than men. As an initial disclaimer: despite the Author’s belief that it is more often women who fear and experience these relationship-based harms in the workplace, the reforms proposed below should, of course, apply to all sexes and genders.

### B. *Relational Feminism Basics*<sup>151</sup>

The relational (or cultural)<sup>152</sup> feminism movement is said to have begun with Psychologist Carol Gilligan and her influential book, *In a Different Voice: Psychological Theory and Women’s Development*.<sup>153</sup> Gilligan’s book is based on research projects involving moral choice.<sup>154</sup> In her studies, she began to hear distinctions in the voices of men and women.<sup>155</sup> Prior research regarding moral development had always been based almost exclusively on male subjects, which allowed male norms to prevail, and women were therefore seen as deviant from the norm.<sup>156</sup> For instance, in one psychologist’s study, models for a healthy life cycle were men who seem distant in their relationships and who subordinate relationships to achievement.<sup>157</sup> Because women keep and place an emphasis on relationships, they appear deficient in moral developmental studies that focus only on men.<sup>158</sup>

Although Gilligan never announced a new theory of cultural or relational feminism, her work is said to have begun the relational feminism strand of feminist theory and feminist legal theory.<sup>159</sup> According to relational feminism, “women value intimacy, develop a capacity for nurturance, and an ethic of care for the ‘other’ with which we are connected, just as we learn to dread and fear separation from the

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151. This Section is derived in part from an earlier work of mine. See Nicole Buonocore Porter, *Embracing Caregiving and Respecting Choice: An Essay on the Debate over Changing Gender Norms*, 41 SW. L. REV. 1, 6–11 (2011) (discussing cultural feminism).

152. Different scholars use different words—either “cultural” feminism or “relational” feminism. See, e.g., Aya Gruber, *Neofeminism*, 50 HOUS. L. REV. 1325, 1338 (2013). This Article uses them interchangeably, though it prefers “relational” feminism because it is more descriptive, but so much of the early scholarship on this theory uses “cultural” feminism.

153. CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT* (1982); see also Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 15 (1988) (“‘Cultural feminism’ . . . is in large part defined by Gilligan’s book.”).

154. GILLIGAN, *supra* note 153, at 2–3.

155. *Id.* at 1.

156. *Id.* at 6, 18–19, 22.

157. *Id.* at 154.

158. *Id.* at 170.

159. See, e.g., West, *supra* note 153, at 15.

other.”<sup>160</sup> Women also view themselves as fundamentally connected to others in their lives.<sup>161</sup>

Gilligan’s discussion of women’s emphasis on relationships is noteworthy—a search in the electronic version of the book reveals the word “relationship” 389 times. Gilligan states that women often “try to change the rules in order to preserve relationships,”<sup>162</sup> and that women’s sense of self is “organized around being able to make and then to maintain affiliations and relationships.”<sup>163</sup> As seen in some harassment and retaliation cases, Gilligan notes that women have difficulty putting themselves first.<sup>164</sup> And finally, Gilligan notes that “in all of the women’s descriptions, identity is defined in context of relationship . . . .”<sup>165</sup>

As stated by Professor Robin West, one of the most prominent proponents of relational feminism,<sup>166</sup> “women are more nurturant, caring, loving and responsible to others than are men.”<sup>167</sup> These attributes dictate the way that women define social relationships: “[W]omen view the morality of actions against a standard of responsibility to others, rather than against a standard of rights and autonomy from others.”<sup>168</sup> Another scholar describes cultural feminism as an ideology of female nature reappropriated by feminists themselves in an effort to validate undervalued female attributes.<sup>169</sup> As Professor West argues, women are more likely to sacrifice themselves in the care of others—what has been called “care unconstrained by justice.”<sup>170</sup> Professor West argues that women often identify themselves by referencing their relationships.<sup>171</sup> Not only do women enjoy the intimacy of relationships, according to Professor West, but they also fear separation from others.<sup>172</sup>

Professor Aya Gruber describes the basic premise of cultural feminism as women “valuing intimacy, prioritizing relationships over competition, and being caring rather than dominating.”<sup>173</sup> Professor

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160. *Id.*

161. *Id.* at 17.

162. GILLIGAN, *supra* note 153, at 44.

163. *Id.* at 48 (quoting JEAN BAKER MILLER, *TOWARD A NEW PSYCHOLOGY OF WOMEN* 83 (1976)).

164. *See id.* at 66.

165. *Id.* at 160.

166. Linda C. McClain, *The Liberal Future of Relational Feminism: Robin West’s Caring for Justice*, 24 *LAW & SOC. INQUIRY* 477, 478 (1999).

167. West, *supra* note 153, at 17.

168. *Id.* at 17–18.

169. Linda Alcoff, *Cultural Feminism Versus Post-Structuralism: The Identity Crisis in Feminist Theory*, 13 *SIGNS* 405, 408 (1988).

170. McClain, *supra* note 166, at 482–83.

171. West, *supra* note 153, at 16–17.

172. *Id.* at 18–19, 28.

173. Gruber, *supra* note 152, at 1338.

Gruber explains that the women described in Gilligan's book are communicative and not aggressive and value relationships over individual interests.<sup>174</sup> Professor Martha Chamallas also states that "[c]ultural [feminism] emphasize[s] relationships, the value of intimacy, [and] the importance of . . . caretaking."<sup>175</sup> This emphasis on relationships means that women suffer more from the harm of separation and isolation than men.<sup>176</sup> Another scholar describes relational feminism as being "premised on the centrality of relationships" in women's lives.<sup>177</sup> This same scholar also argues that relational feminism pleads for the nurturing of relationships and for legal intervention into relationships that cause harm.<sup>178</sup>

Even though much of cultural feminism has been focused on women's caregiving capacity, Professor Carrie Menkel-Meadow has addressed whether and how women's "different voice" could affect them in other areas of life, such as in the workplace and how they handle dispute resolution.<sup>179</sup> For instance, she queried whether women's care for others could be helpful to women in unions; if women are more "self-sacrificing, then they should be naturals for the collective action of unions in which all work is for the [greater] good . . . ."<sup>180</sup> Professor Menkel-Meadow also noted that women's ethic of care could affect how they negotiate; specifically, she believed that women were more likely to compromise in negotiation when there is an ongoing relationship involved.<sup>181</sup> Although not reporting harassment because of fear of harming workplace relationships is different from the more typical illustrations of relational feminism, it is easy to see that many women's self-identification as being relationship-oriented affects their willingness to potentially harm their workplace relationships by reporting harassment.

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174. *Id.* at 1338.

175. Martha Chamallas, *Past as Prologue: Old and New Feminisms*, 17 MICH. J. GENDER & L. 157, 162 (2010).

176. McClain, *supra* note 166, at 493.

177. Roxana Banu, *A Relational Feminist Approach to Conflict of Laws*, 24 MICH. J. GENDER & L. 1, 17 (2017).

178. *Id.*

179. See Carrie Menkel-Meadow, *Mainstreaming Feminist Legal Theory*, 23 PAC. L.J. 1493, 1528 (1992).

180. *Id.* (footnote omitted). Although not relying on cultural feminism, I have made similar arguments with respect to women and unions. See, e.g., Nicole Buonocore Porter, *Women, Unions, and Negotiation*, 14 NEV. L.J. 465, 487–91 (2014).

181. Carrie Menkel-Meadow, *Women in Dispute Resolution: Parties, Lawyers and Dispute Resolvers: What Difference Does "Gender Difference" Make*, DISP. RESOL. MAG., Spring 2012, at 5. Although, to be clear, Professor Menkel-Meadow argues in this piece that her impression of gender difference has changed. She used to think that women's "different voice" would bring a change to dispute resolution practice but now thinks that, although gender difference matters, context may matter more. *Id.* at 4–5.

As for why cultural feminists believe that women are more focused on relationships, Professor West argues that it is because women raise children more often than men do.<sup>182</sup> Because of this fact, Professor West argues that women are “capable of a degree of physical as well as psychic *intimacy* with the other which greatly exceeds men’s capacity.”<sup>183</sup> Professor West advances what she calls a “connection thesis”—that women’s moral voice and ethic of care happen because women learn to be responsible for those who are physically attached and then physically and emotionally dependent on them.<sup>184</sup> Of course, Professor West’s explanation of why women are more relationship-oriented than men leads to many of the criticisms of cultural feminism, which this Article turns to next.

### C. Addressing the Critics of Relational Feminism

The criticisms of relational/cultural feminism are aplenty. The three most prominent criticisms of it are that: (1) if women do have an “ethic of care,” as Gilligan argues, it is socially constructed, not biologically based;<sup>185</sup> (2) it is essentialist to claim that all women have an ethic of care or speak in a “different voice”; and (3) this “ethic of care” attribute is problematic if it becomes normative rather than descriptive, i.e., suggesting that women should be focused on relationships rather than simply recognizing that they are.<sup>186</sup>

#### 1. Nature versus Nurture<sup>187</sup>

Professor Mary Joe Frug explains that the level of criticism of Gilligan’s work is partially based on whether the critic reads Gilligan as asserting that there are inherent, biological differences between men and women or that these differences are socially constructed.<sup>188</sup> Critics generally focus on how Gilligan’s work can be read as referring to all women and then those critics allege that Gilligan is arguing that these

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182. West, *supra* note 153, at 13.

183. *Id.* at 16.

184. *Id.* at 14, 21.

185. To be clear, there is plenty of debate about whether Gilligan was suggesting that cultural feminism was socially constructed or biological. See, e.g., Gruber, *supra* note 152, at 1339 (discussing this nature versus nurture debate of other scholars, comparing Gilligan to Professor West; Professor Gruber believes Gilligan makes no normative judgment about the cause of women’s different voice, but Professor West seems to link it with biology).

186. Professor Gruber describes this problem as the moral superiority of women. See *id.* at 1341–42.

187. See Menkel-Meadow, *supra* note 181, at 6–7 (discussing the nature versus nurture debate with respect to the “ethic of care”).

188. See Mary Joe Frug, *Progressive Feminist Legal Scholarship: Can We Claim “A Different Voice”?*, 15 HARV. WOMEN’S L.J. 37, 51–53 (1992).

differences are biological.<sup>189</sup> Not all scholars agree. Professor Frug argues that a better reading of Gilligan's work reveals that Gilligan is aware of differences between women.<sup>190</sup> But because Gilligan's work has sometimes been read as assuming that sex differences are biological, this "artificially valorizes domestic roles traditionally assumed by white middle-class women."<sup>191</sup>

Professor Catharine MacKinnon's critique of cultural feminism can be placed in this category. Her argument is that this ethic of care is not authentic—that "[w]omen value care because men have valued us according to the care we give them . . . . Women think in relational terms because our existence is defined in relation to men."<sup>192</sup> Similarly, Professor Joan Williams questions whether women naturally have nurturing skills or whether they acquire them because they are forced to.<sup>193</sup> Other scholars echo this criticism.<sup>194</sup>

In response to this criticism, the Author personally does not think an ethic of care is biologically based—instead, the Author believes it is socially constructed (and that Gilligan does not believe that women's "different voice" is biological).<sup>195</sup> But just because it is socially constructed does not mean that it does not feel like a genuine, authentic identity for many women.<sup>196</sup> When borrowing from other scholars' theories, the Author tends to follow the motto: take what you like and leave the rest behind. To the extent that Gilligan, Professor West, or any other feminist scholars think that women's "ethic of care," "different

189. See *id.* at 55.

190. *Id.*

191. *Id.* at 63.

192. CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* 39 (1987); see also Alcoff, *supra* note 169, at 405–06 (stating that an assumption that we can know how women truly are is "foolhardy given that every source of knowledge about women has been contaminated with misogyny and sexism").

193. See JOAN WILLIAMS, *UNBENDING GENDER* 188 (2000); see also Fernanda G. Nicola, *Intimate Liability: Emotional Harm, Family Law, and Stereotypes Narratives in Interspousal Torts*, 19 WM. & MARY J. WOMEN & L. 445, 464 n.135 (2013) ("'Cultural feminism' . . . refers to the view that 'women have a distinct consciousness and/or culture. . . . [that] [sic] derives from their biological situation . . . [or] emerges from their historical oppression by men. Some versions . . . take [sic] both "essentialist" forms (women are naturally maternal) and "social constructionist" ones (men made women do all of the mothering).'" (alterations in original) (quoting JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* 58–59 (2006))).

194. See, e.g., Alcoff, *supra* note 169, at 411 (stating that it is a problem that cultural feminists are not clear about whether this identity of women is innate or socially constructed).

195. See Frug, *supra* note 188, at 57 (stating that there is an ambiguity in the book as to whether Gilligan is talking about all women or not).

196. See, e.g., Gruber, *supra* note 152, at 1355 (stating that women's choice to mother is authentic despite the fact that society constructs social structures in such a way that basically forces women to mother).

voice,” or focus on relationships is biologically based, the Author chooses to leave that behind. But that does not mean that the cultural feminist theory does not offer some valuable insights worth taking. Because even if it is socially constructed, many women see themselves in the work of Gilligan. Many women cannot stop themselves from caring about their relationships, even those that might not deserve their attention or care. The law should recognize how most women feel and behave, even if it is socially constructed.

## 2. Essentialism of Relational Feminism

Note that the last sentence used the words “most women.” Some criticize Gilligan’s work (and those who followed her) for assuming that all women are socialized to have an ethic of care.<sup>197</sup> For instance, Professor Williams argues that those who do not see themselves in Gilligan’s descriptions feel violated because they see relational feminism as marginalizing their definition of womanhood.<sup>198</sup> Professor Gruber also recognizes that there are those who critique relational feminism because it does not describe them.<sup>199</sup> Similarly, Professor Frug states that the problem with one view of Gilligan’s work is that it excludes the women who do not see themselves in Gilligan’s descriptions, such as women of color, non-middle class women, lesbian women, non-Western women, or older women.<sup>200</sup> Professor West has also been criticized for assuming that all women have this ethic of care, which seems to ignore women’s autonomy.<sup>201</sup>

The Author is sensitive to the essentialism argument but thinks society is making a mistake if it ignores the way most women feel and act even if not all women feel and act that way.<sup>202</sup> As stated by one scholar: “[W]e can say at one and the same time that gender is not natural, biological, universal, ahistorical, or essential and yet still claim that gender is relevant because we are taking gender as a position from which to act

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197. See Frug, *supra* note 188, at 48 (stating that the danger with Gilligan’s work is that it has the “effect of perpetuating gender as an essential, irreducible part of identity”); Carrie Menkel-Meadow, *What’s Gender Got to Do with It?: The Politics and Morality of an Ethic of Care*, 22 N.Y.U. REV. L. & SOC. CHANGE 265, 270, 275–78 (1996) (stating that the ethic of care is criticized because it is assumed to be essentialist); see also Porter, *supra* note 151, at 20–21 (“What matters to me is not whether [an ethic of care] is biologically based or socially constructed but that we stop penalizing women for engaging in caregiving.”).

198. WILLIAMS, *supra* note 193, at 194.

199. See Gruber, *supra* note 152, at 1347.

200. Frug, *supra* note 188, at 64.

201. See McClain, *supra* note 166, at 481.

202. See Menkel-Meadow, *supra* note 197, at 285 (stating that the ethic of care is empirically connected to gender).



politically.”<sup>203</sup> Perhaps more simply, as discussed below, women who do not see themselves in the work of Gilligan—women who are not so concerned about their workplace relationships that they avoid or delay reporting harassment—are not at all penalized by this Article’s proposals. Women who do not have an “ethic of care” and are therefore willing to report harassment right away are already adequately protected by the law—in fact, they are the “reasonable” women so many courts insist upon.

### 3. Normative versus Descriptive

A third critique of cultural feminism is that some see it as not just arguing that women do have a “different voice” or “ethic of care” but that they should.<sup>204</sup> For instance, Professor Williams argues that people should link the ethic of care not with biology but with gender role allocations. She argues that feminists can embrace the value of domesticity even if they “seek to change the subordinated context in which family and caring work occurs.”<sup>205</sup> Professor Williams further argues that this distinction matters to those who do not feel like they have an ethic of care and therefore feel like other feminists are telling them to behave more femininely.<sup>206</sup>

Another scholar echoes this concern, stating that although it is good to celebrate what women do well, society should not promote the restrictive conditions that gave rise to those attributes—the forced parenting, the lack of autonomy.<sup>207</sup> Society is “in danger of solidifying an important bulwark for sexist oppression: the belief in an innate ‘womanhood’ to which we must all adhere lest we be deemed inferior or not ‘true’ women.”<sup>208</sup> Professor Frug also argues that one problem with how some view Gilligan’s work (and cultural feminism more broadly) is that “[i]t sentimentalizes and romanticizes self-sacrifice . . . [without] acknowledg[ing] the costs and problems of this attitude.”<sup>209</sup>

Related to this critique is the fear that describing women in this way—as more nurturing and focused on relationships—perpetuates stereotypes

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203. Alcott, *supra* note 169, at 433.

204. *See id.* at 413 (stating that the problem with cultural feminism is that it can promote unrealistic expectations about “normal” human behavior that many cannot satisfy); Menkel-Meadow, *supra* note 197, at 277 (stating that the problem with attributing the ethic of care to women is that it becomes normative—women will only be valued if they are nurturing, caring, and relationship-oriented).

205. *Id.*

206. *Id.* at 198.

207. Alcott, *supra* note 169, at 414.

208. *Id.*

209. Frug, *supra* note 188, at 63.

that could be used against women.<sup>210</sup> The fear is that cultural feminism appeals to conservatives and is then used to celebrate women's role as both mother and nurturer and to reject reforms aimed at improving women's work lives.<sup>211</sup> Professor West addresses this critique by arguing that there are differences between patriarchy and cultural feminism: "[P]atriarchy devalues women" and "celebrates women's different sphere in order to reinforce women's powerlessness" while "[c]ultural feminism does not."<sup>212</sup> She also argues that society needs to show that "community, nurturance, responsibility, and the ethic of care are values at least as worthy of protection as autonomy, self-reliance, and individualism."<sup>213</sup>

Although focused on the mothering aspect of cultural feminism, one scholar's response to this criticism is especially compelling:

[E]ven though it is true that arguing for adequate childcare as one obvious way of meeting the needs of mothers does suppose an orthodox division of labour, in which responsibility for children is the province of women and not of men, nevertheless this division is what, by and large, actually obtains. Recognition of that in no way commits you to supposing that the care of children is fixed eternally as female.<sup>214</sup>

It is unnecessary to "invoke a rhetoric of idealized motherhood to demand that women here and now need child care."<sup>215</sup>

Extrapolating that response to the argument here, the law can account for the fact that women often care more about relationships without creating a normative argument that women should care more about relationships. In other words, even if this Article's reforms—helping to protect women who were afraid to come forward to complain about harassment because of the fear of hurting their workplace relationships—were enacted, this would not harm women who do come forward right away to report because they are not relationship oriented. These women are still the ideal victims, according to most courts.<sup>216</sup>

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210. See Gruber, *supra* note 152, at 1340; see also Menkel-Meadow, *supra* note 197, at 276 (stating that an ethic of care is often created through subordination).

211. See Gruber, *supra* note 152, at 1388; see also Alcoff, *supra* note 169, at 435 (stating that some feminist demands associated with cultural feminism can "reinforce the right-wing's reification of gender differences unless and until we can formulate a political program that can articulate these demands in a way that challenges rather than utilizes sexist discourse").

212. West, *supra* note 153, at 50.

213. *Id.* at 66.

214. DENISE RILEY, *WAR IN THE NURSERY: THEORIES OF THE CHILD AND MOTHER* 194 (1983).

215. Alcoff, *supra* note 169, at 427.

216. See Niloofar Nejat-Bina, *Employers as Vigilant Chaperones Armed with Dating Waivers: The Intersection of Unwelcomeness and Employer Liability in Hostile Work Environment Sexual Harassment Law*, 20 BERKELEY J EMP. & LAB. L. 325, 335 (1999).

### III. REFORM: RECOGNIZING RELATIONSHIP-BASED HARMS

This Article's reform proposal is twofold. First, victims who eventually report harassment should not have their harassment claims dismissed for failing to report earlier if they feared retaliation, even if the retaliation they feared was only relationship based. Second, the law should recognize relationship-based harms as adverse employment actions under the retaliation doctrine.

#### A. *Excusing Delays in Reporting Harassment*

As discussed above, even when an employee has a valid harassment claim—she suffered unwelcome harassment because of her sex that was severe or pervasive—the employer might not be held liable. This can, and often does, happen if the court determines that the employee failed to timely report the harassment. As discussed above, the specific rules regarding employer liability vary depending on whether the harasser is a supervisor.<sup>217</sup>

If the harasser is a supervisor,<sup>218</sup> unless the supervisor takes a “tangible employment action”<sup>219</sup> against the victim, the employer has the opportunity to establish a two-part affirmative defense: “(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”<sup>220</sup> Because the second prong requires the employer to prove that the plaintiff failed to take advantage of preventive opportunities,<sup>221</sup> if the plaintiff delays reporting, the employer will likely be able to prove its affirmative defense.<sup>222</sup>

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217. *Faragher v. City of Boca Raton*, 524 U.S. 775, 803 (1998) (discussing the differences between supervisor harassment and coworker harassment).

218. The Supreme Court defined “supervisor” in *Vance v. Ball State University*, 570 U.S. 421 (2013), as someone who is “empowered by the employer to take tangible employment actions against the victim.” *Id.* at 450.

219. *Faragher*, 524 U.S. at 808. A tangible employment action is described as “discharge, demotion, or undesirable reassignment.” *Id.*

220. *Id.* at 807; *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 745 (1998).

221. *Faragher*, 524 U.S. at 778 (“[W]hile proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer’s burden under the second element of the defense.”).

222. *See, e.g.*, Hébert, *supra* note 16, at 721–29 (discussing cases where victims failed to report right away and courts held that they were unreasonable, thereby allowing the employer to win on the affirmative defense); Lawton, *supra* note 8, at 253–59 (discussing cases where employees were afraid to report harassment because of retaliation, but the courts held that a delay

Similarly, if the harasser is a coworker, the plaintiff has the burden of proving that the employer was negligent, which requires the plaintiff to demonstrate that the employer knew or should have known about the harassment and failed to take reasonable steps to prevent and remedy it.<sup>223</sup> This test also requires the plaintiff to timely report harassment.<sup>224</sup>

And yet plaintiffs often delay reporting, in large part because they fear retaliation. In some cases, they might not fear retaliation that results in tangible consequences, such as a loss of job (although that is certainly a realistic fear for many employees). Instead, they might fear retaliatory acts (such as being shunned, ignored, humiliated) or other relationship-based harms.<sup>225</sup> As discussed in Part II, many employees, especially women, fear relationship-based harms in the workplace. Because many “reasonable” women might delay reporting, this Article proposes that courts should not use a plaintiff’s delay in reporting harassment to dismiss the plaintiff’s harassment claim at the summary judgment stage. In other words, plaintiffs should be allowed to survive summary judgment in harassment cases even if they delayed reporting as long the delay was based on a fear of retaliation, and even if the only retaliation they feared was some type of relationship-based harm.

This proposal is likely to face significant pushback. Employers will argue that if they take reasonable steps to both prevent harassment before it occurs and to remedy harassment once they learn of it, why should they be liable for harassment that was not timely reported to them? This is a fair criticism, to which there are two responses.

First, if the plaintiffs in these cases are also acting “reasonably,” as Part II argued, then between the two “reasonable” actors, who should bear the burden of the loss? The employer should, in part because it is the less vulnerable party,<sup>226</sup> but also, and more importantly, because it is in the best position to prevent both the harassment and the retaliation that many employees fear. This naturally leads to the second response to this criticism: in the wake of the #MeToo era, employers can and should do better at preventing harassment and retaliation from occurring.

As discussed in the EEOC Task Force Report (which, interestingly, predated the #MeToo movement), preventing harassment is all about

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of six weeks from the first incident means that the plaintiffs unreasonably failed to avail themselves of their employer’s grievance mechanisms); *supra* Section I.B.

223. See *Faragher*, 524 U.S. at 799–800.

224. See *id.* at 806–08.

225. See, e.g., Brake, *supra* note 5, at 37–38 (noting that, when coworkers side with the harasser, the risk of shunning may very well chill reasonable employees from complaining about the harassment).

226. Cf. Estrich, *supra* note 27, at 838–39 (arguing that between the supervisor demanding sex and the less powerful victim, the supervisor should bear the responsibility for the coerced sex).

culture changes in the organization.<sup>227</sup> Leadership (from the C-suite all the way down) and a commitment to a “diverse, inclusive, and respectful workplace in which harassment is simply not acceptable” is necessary.<sup>228</sup> Organizations must have systems in place that hold supervisors and managers accountable for identifying and calling out harassment when they see it; responding in a meaningful, proportional way; and insuring that the employee reporting harassment is not retaliated against.<sup>229</sup> If supervisors fail to respond appropriately to a complaint of harassment or fail to protect employees from retaliation, that supervisor should be held accountable for those actions.<sup>230</sup> Companies should evaluate supervisors and managers according to how well they prevent and respond to harassment.<sup>231</sup> And companies should prepare for the number of harassment incidents to rise after developing a more robust culture that encourages reporting.<sup>232</sup> Increased reporting is a sign that the culture changes are working and that employees feel safe to report the harassment.<sup>233</sup> Eventually, the reporting rates should be expected to decline after the culture changes have permeated the entire organization.<sup>234</sup> In sum, according to the EEOC, “organizational culture is one of the key drivers of [minimizing] harassment.”<sup>235</sup>

How companies achieve this culture change is a tricky question. While some of it will come from decisions made in the C-suite, changing the way that supervisors treat harassment and retaliation will obviously

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227. See U.S. EEOC, *supra* note 8, at 31.

228. *Id.*

229. See *id.*

230. *Id.* at 35.

231. See *id.* at 35–36.

232. See *id.* at 36.

233. See *id.* (stating that “[p]ositive organizational change can be reflected in an initial increase of complaints”; this means that employees have faith in the system).

234. See *id.* at 36, 56 (discussing the experience of one company that experienced greater reporting rates in the first three years of initiating a training program but then saw their complaints decline by 70%, along with a decrease in the severity of the types of harassment complaints).

235. *Id.* at 54 (emphasis omitted).

An organization’s culture is set by the values of an organization. To achieve a workplace without harassment, the values of the organization must put a premium on diversity and inclusion, must include a belief that all employees in a workplace deserve to be respected, regardless of their race, religion, national origin, sex (including pregnancy, sexual orientation, or gender identity), age, disability, or genetic information, and must make clear that part of respect means not harassing an individual on any of those bases. In short, an organization’s commitment to a harassment-free workplace must not be based on a compliance mindset, and instead must be part of an overall diversity and inclusion strategy.

*Id.* at 31 (emphasis omitted).

require those supervisors and managers to be appropriately trained. The Author is reluctant to suggest more training given the uncertainty of the success of training.<sup>236</sup> But as noted by the EEOC Task Force Report, training can be effective if it is not just focused on a compliance mindset (i.e., checking off boxes to avoid liability) but is instead focused on changing the culture of the company to increase diversity<sup>237</sup> and inclusion and to make sure supervisors understand how to handle complaints appropriately.<sup>238</sup> Employers need to acknowledge and own “well-handled complaints, instead of burying the fact that there had been a complaint and that discipline had been taken.”<sup>239</sup>

Another response to the critics of this proposal is that this Article is not suggesting that plaintiffs will necessarily win when they delay reporting—it is only proposing that they survive summary judgment so that they can have their day in court. Part of the problem with the summary judgment standard is that judges seem to be unable (or unwilling) to put themselves into the shoes of harassment victims. Perhaps this is not surprising; as stated by one scholar, society should not expect women to behave how judges think they would behave because judges are very rarely victims of harassment.<sup>240</sup> Juries (especially gender-diverse juries) are in a much better position to gauge whether a harassment victim has behaved reasonably.<sup>241</sup>

Perhaps a final response to employers’ criticisms of this proposal is that, even if plaintiffs are more successful when their cases proceed to trial, this Article is not proposing a change to the standard of proof a

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236. See *id.* at 45 (stating that there are deficiencies in empirical evidence that indicates that training alone is effective to minimize harassment); Bisom-Rapp, *An Ounce of Prevention*, *supra* note 41, at 37 (stating that some studies indicate training can be negative in that it might cause male supervisors to forego mentoring women and because it made some employees angry about participating); *id.* at 44 (stating that people should not use training as a way of limiting damages unless they know that it works); Bisom-Rapp, *Training Must Change*, *supra* note 41, at 63–64 (noting the uncertainty about the effectiveness of training).

237. Professor Jessica A. Clarke points out that many of the institutions that have fired men in leadership positions in the wake of the #MeToo movement have used it as an opportunity to consider and increase gender diversity. Clarke, *supra* note 3, at 13. “[O]f [the] 201 male leaders who lost their positions due to sexual harassment, almost half were replaced by women.” *Id.*

238. See U.S. EEOC, *supra* note 8, at 31.

239. *Id.* at 35; see also McCann & Tomaskovic-Devey, *supra* note 5 (stating that harassment claims are “better addressed by managers treating harassment claims as managerial responsibilities, rather than outsourcing them as strictly legal problems. Past research suggests that the most effective [method] to ending . . . harassment . . . [is] getting managers to take ownership of the problem”).

240. Hébert, *supra* note 16, at 734–36.

241. *Cf. id.* at 736 (stating that most actual victims do not behave the way that research participants say they would behave). For a discussion about how real victims tend to behave differently than the way that the public thinks that they would, see sources cited *supra* note 148.

plaintiff must meet for the court to award her punitive damages. Right now, employers can avoid punitive damages if they “engage in good-faith efforts to comply with Title VII.”<sup>242</sup> Courts have held that training (even compliance-focused training that may or may not be effective) can allow employers to avoid punitive damages.<sup>243</sup> Of course, plaintiffs will critique this aspect of this Article’s proposal. But reform is often about compromise.<sup>244</sup> And allowing plaintiffs to survive summary judgment in cases where they often would have had their claims dismissed at the summary judgment stage is a fairly big win for them. As most employment attorneys know, getting past summary judgment dramatically increases the settlement potential of claims.<sup>245</sup>

### *B. Relationship-Based Harms as Adverse Employment Actions*<sup>246</sup>

The second part of the proposed reform is for courts to recognize relationship-based harms as adverse employment actions under the retaliation doctrine.<sup>247</sup> Right now, courts almost universally hold that when reporters of harassment or discrimination are shunned or ostracized in the workplace, they did not experience an adverse employment

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242. See *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526, 546 (1999) (quoting *Kolstad v. Am. Dental Ass’n*, 139 F.3d 958, 974 (D.C. Cir. 1998) (Tatel, J., dissenting), *vacated*, 527 U.S. 526 (1999)).

243. See Bisom-Rapp, *An Ounce of Prevention*, *supra* note 41, at 11.

244. See, e.g., Nicole B. Porter, *The Perfect Compromise: Bridging the Gap Between At-Will Employment and Just Cause*, 87 NEB. L. REV. 62, 108 (2008).

245. Nicole Buonocore Porter, *Disabling ADA Retaliation Claims*, 19 NEV. L.J. 823, 836 (2019).

246. The Author needs to acknowledge another hurdle to the proposal and to retaliation claims more generally. In addition to the three elements discussed above, see *supra* Section I.C. (stating that plaintiffs must demonstrate: (1) protected activity; (2) adverse employment action; and (3) causation), some courts will also make it difficult for a plaintiff to bring a retaliation claim if the retaliation was at the hands of a coworker rather than a supervisor, see *supra* Section I.B. As discussed in detail in her article, Professor Brake notes that there is currently a circuit split regarding whether and when employers should be held liable for retaliation by coworkers. See Brake, *supra* note 5, at 11–31 (discussing the circuit split). Thus, in some circuits, even if this Article’s proposal to classify relationship-based harms as adverse employment actions under the retaliation doctrine were successful, there would be an additional hurdle if the relationship-based harm (shunning, etc.) was coming from coworkers rather than supervisors. This is obviously a real impediment to the potential success of the proposal but because this Article also deals with relationship-based harms between employees and supervisors (and not just coworker retaliation), it leaves a more robust discussion of the issue identified by Professor Brake for another day.

247. As recognized by Professor Brake, the promise of the #MeToo movement “is more dependent on the law of retaliation than the scope of sexual harassment law.” Brake, *supra* note 5, at 6. I made a similar argument in my prior work. See Porter, *supra* note 1, at 58 (having the title *Ending Harassment by Starting with Retaliation* and arguing that ending harassment must start with preventing retaliation).

action.<sup>248</sup> The reasoning of these courts is that reasonable people would not be deterred from reporting if they knew that they would experience relationship-based harms in the workplace.<sup>249</sup> And yet, most of the empirical evidence tells us that the opposite is true—that employees (sometimes men, but especially women) often do avoid reporting because of fear of ruining their workplace relationships and sometimes even because they care enough about their harasser that they do not want to get that person in trouble.<sup>250</sup>

There have been many calls for strengthening the protection against retaliation more broadly.<sup>251</sup> This proposal is specific in that it is only addressing the second element of the *prima facie* case, whether the plaintiff suffered an adverse employment action. Reforming this element could be accomplished in a couple of different ways. The standard for proving an adverse employment action could be broadened for all types of actions, such as disciplines, transfers to undesirable positions, etc.<sup>252</sup> Or it could simply be specified that relationship-based harms would count as adverse employment actions. This would mean that being shunned or ostracized in the workplace—having coworkers or your supervisor ignore you, slam doors in your face, noticeably talk behind your back, etc.—would constitute adverse employment actions. To be clear, there are compelling arguments to be made in favor of reform efforts that would

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248. See *supra* note 88 and accompanying text.

249. Brake, *supra* note 5, at 33 (noting that courts minimize the deterrent effect of actions such as shunning and ostracizing); Grossman, *supra* note 7, at 1046 (“[T]he implication of *Burlington Northern* and its progeny is that reasonable employees are ‘resilient, self-sufficient, and willing to risk the loss of congenial relationships at work in exchange for the assertion of civil rights.’” (quoting Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859, 907 (2008))).

250. See Brake, *supra* note 5, at 34; *supra* Section II.A.1.

251. See Porter, *supra* note 246, at 852–54 (arguing for changes to all three elements of the *prima facie* retaliation claim under the Americans with Disabilities Act); Porter, *supra* note 1, at 56–57 (arguing for changes to all three elements of the *prima facie* retaliation claim in harassment cases); Schultz, *supra* note 7, at 38 (arguing that protection against retaliation for victims of harassment must be strengthened because “[h]arassment can be eliminated only if people who are harassed are safe in coming forward”); Sperino, *supra* note 87, at 2069 (arguing for a broader standard for determining adverse employment action); see also Brake, *supra* note 20, at 102–03 (arguing for a new retaliation standard); Deborah L. Brake, *Retaliation in an EEO World*, 89 IND. L.J. 115, 165–69 (2014) (recommending two fixes to the retaliation doctrine).

252. See Porter, *supra* note 1, at 55 (arguing that the narrow standard for adverse employment action “does not comport with reality”); Schultz, *supra* note 7, at 41 (stating that the adverse employment action should be broadly defined); Sperino, *supra* note 87, at 2069 (arguing for a standard where anything more than *de minimis* harm is protected).



more generally broaden the definition of adverse employment action,<sup>253</sup> but that reform is beyond the scope and purpose of this Article.

Similar to the proposal regarding delays in reporting, this reform would allow the plaintiff to survive summary judgment on her retaliation claim if she suffered relationship-based harms. Just as judges have proven themselves incapable of understanding why women might avoid reporting harassment, they are perhaps even more incapable of imagining what would “dissuade a reasonable worker”<sup>254</sup> from reporting harassment or discrimination. As I have previously argued elsewhere, “federal judges, who have lifetime job security, are less likely to feel threatened or deterred by actions that would deter a reasonable worker, who does not enjoy such job security.”<sup>255</sup>

The major criticism to this proposal would likely take the form of the following question: how do employers control the actions of their employees, especially when those employees are not supervisors?<sup>256</sup> In other words, although society might expect an employer to be liable for the retaliatory actions of its supervisors (such as terminations and demotions), can society expect employers to be able to stop their employees from shunning or ostracizing those who report harassment in the workplace?<sup>257</sup> And perhaps even more fundamentally, how would the employers even know this was happening?<sup>258</sup>

The answer is similar to the response above: it is all about changing the workplace culture. In this case, it is about celebrating a culture of reporting rather than punishing reporting.<sup>259</sup>

253. See Porter, *supra* note 246, at 852–54; Porter, *supra* note 1, at 54–55. As noted by one scholar, most employees consider a broad range of actions to be retaliatory, even things that merely cause discomfort. Walker, *supra* note 18, at 21.

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

255. Porter, *supra* note 1, at 55. But see Brake, *supra* note 5, at 40–41 (discussing a recent case, *Minarsky v. Susquehanna Cty.*, 895 F.3d 303 (3d Cir. 2018), where the court acknowledged the difficulty of speaking up about harassment).

256. For instance, this issue arose in *Rennard v. Woodworker’s Supply, Inc.*, where the court noted that the plaintiff was shunned by her coworkers, but the court held that, although coworker retaliatory harassment can sometimes constitute an adverse employment action, it only will if management either orchestrated the harassment or knew about it and acquiesced in it, and there was no evidence of that occurring here. 101 F. App’x 296, 308 (10th Cir. 2004).

257. The importance of accomplishing this cannot be overstated. As Professor Brake has noted, coworkers’ reactions to reports of harassment are really important. Brake, *supra* note 5, at 7. “[A] lack of coworker support can make employees more vulnerable to harassment . . .” *Id.* at 7–8. Moreover, “coworkers can be an equally powerful force in establishing cultures of silence and discrimination.” *Id.* at 8. If coworkers side with the harasser, they might exclude the victim from key informal networks that are important to job success. *Id.*

258. See *id.* at 18 (noting that the Tenth Circuit requires actual knowledge of the retaliation).

259. See Bingham & Scherer, *supra* note 14, at 245 (hypothesizing that power, gender, and perceived work climate are associated with employees’ responses to sexual harassment and their

However, as some scholars have noted, most employers do not actually want to encourage complaints.<sup>260</sup> In fact, many employers often react to complaints with “aggressive attacks on those who complain,” which are “designed to isolate the charging party and to send a message to other workers that the cost of pursuing legal remedies to discrimination will be prohibitively high.”<sup>261</sup>

And as another scholar has stated, “[c]reating a work environment in which employees . . . feel comfortable reporting suspected misconduct . . . is something that . . . few[] companies have managed to do [well].”<sup>262</sup> This is not surprising because most people have internalized a message of not wanting to be a “snitch.”<sup>263</sup> And even minor retaliation “can have a deleterious impact on reporting procedures.”<sup>264</sup>

Thus, as other scholars have argued, managers should be trained to eliminate all forms of retaliation, even the more subtle retaliation, because it can have a detrimental impact on the willingness of employees to come forward about harassment or discrimination.<sup>265</sup> “[Reporting] should be viewed as an attempt to improve the organization . . . not as a betrayal or something to be punished.”<sup>266</sup> Companies should create a climate where victims do not fear reporting.<sup>267</sup> Organizations need to support whistleblowers by minimizing retaliation against those who report.<sup>268</sup>

As stated by one scholar: “When training management, it is also helpful to let them know that it is natural to feel angry, fearful or defensive toward an employee who accuses them of unlawful conduct. However, they should be reminded that showing anger or acting upon it . . . may give rise to a retaliation claim.”<sup>269</sup>

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satisfaction with the outcome of sexual harassment situations). One scholar has suggested that employers implement a multitiered reporting system that would allow employees to report confidentially or anonymously. Tuerkheimer, *supra* note 2, at 1191–92. She suggests that such a system would signal to employees that the employer is interested in receiving complaints and will act upon them (even the anonymous ones) whenever possible. *Id.* at 1205.

260. Grossman, *supra* note 9, at 14.

261. McCann & Tomaskovic-Devey, *supra* note 5.

262. Walker, *supra* note 18, at 19. In fact, because most employers do not like complaints of discrimination or harassment, retaliation or the threat of retaliation might be viewed by employers as an important means of discouraging complaints. See Bodensteiner, *supra* note 7, at 39.

263. Walker, *supra* note 18, at 19.

264. *Id.* at 23.

265. *See id.*

266. Bergman et al., *supra* note 19, at 230 (quoting Robert J. Paul & James B. Townsend, *Don't Kill the Messenger! Whistle-Blowing in America—A Review with Recommendations*, 9 EMP. RESPS. & RTS. J. 149, 157 (1996)).

267. *See id.* at 241.

268. *See id.* at 232.

269. Walker, *supra* note 18, at 23 (quoting Greg J. Richardson, *Whistleblowing and Other*

How employers address harassment can also affect the likelihood of retaliation.<sup>270</sup> To punish harassers in a way that avoids them striking back, employers should “discipline” but not “demean” because “[h]uman nature suggests that one who feels demeaned, embarrassed, or unfairly treated is more likely to contest the adverse action than is one who feels respected.”<sup>271</sup> The EEOC also suggests making sure penalties for harassment are proportional to the offense; “zero tolerance” policies may contribute to underreporting of harassment in part because employees may not want to get an employee fired for what might be a relatively minor infraction.<sup>272</sup>

Furthermore, the culture change discussed earlier must include protection against retaliation. As recommended in the EEOC Task Force Report, employers need to give “[c]lear assurance that employees who make complaints” (and those who support other employees who have made complaints) “will be protected against retaliation.”<sup>273</sup> If this is not happening, and employees are experiencing retaliation when they report, their coworkers will think twice before reporting.<sup>274</sup> Therefore, the company’s established reporting system must provide a “supportive environment where employees feel safe to express their views and do not experience retribution.”<sup>275</sup> Once an employee reports, there should be a procedure in place that not only avoids management retaliating in a direct way (e.g., termination, failure to promote, etc.) but also identifies other, more subtle types of retaliation.<sup>276</sup> Not allowing employers to win summary judgment in retaliation cases will hopefully provide them the incentive to change their workplace cultures to encourage reporting, so that employees feel safe in coming forward.

### CONCLUSION

The #MeToo movement has made a great deal of progress bringing attention to the problems of harassment in the workplace.<sup>277</sup> But compared to the Hollywood victims that began the current version of this movement in late 2017, most workers do not feel nearly as comfortable reporting harassment. This is because the average worker fears the workplace consequences that can come from complaining about the

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*Retaliation Claims*, 762 PLI/LIT 869, 916 (2007)).

270. See, e.g., Bergman et al., *supra* note 19, at 232.

271. Bodensteiner, *supra* note 7, at 43.

272. U.S. EEOC, *supra* note 8, at 40.

273. *Id.* at 38.

274. *Id.* at 40.

275. *Id.* at 42.

276. See *id.* at 67.

277. See Porter, *supra* note 1, at 49. But cf. Brake, *supra* note 5, at 53–58 (stating that it is uncertain whether the #MeToo movement will actually help or hurt the state of the law).

actions of another employee, whether that other employee is a coworker or a supervisor. Often that fear is not about being fired (although it certainly sometimes is) but is instead about the more subtle types of retaliation, such as being ignored, shunned, or humiliated, that can make being at work uncomfortable or even unbearable. This Article has established that women often care about harming their workplace relationships. Thus, this Article has argued in favor of reforms that would provide more protection to those employees who fear or experience relationship-based harms in the workplace, similar to the fears Nina had in the story that began this Article. The Author is certainly not naïve enough to believe that this reform proposal is feasible in today's political climate and also does not believe it would be an immediate panacea to the very large problem of harassment in the workplace. But as stated by Professor Vicki Schultz, although law alone cannot create change, "change rarely occurs without the law."<sup>278</sup>

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278. Schultz, *supra* note 7, at 17.