Unlawful Retaliation and Workplace Investigations—Lines, Bars, and "X" Factors

by Mark J. Flynn

Workplace retaliation claims continue to increase. This article highlights the information practitioners need to know about unlawful retaliation under Title VII and offers guidance for performance of workplace investigations as part of a preventive law practice.

Charges of unlawful retaliation under Title VII of the 1964 Civil Rights Act, as amended (Title VII), have eclipsed other types of discrimination claims filed with the Equal Employment Opportunity Commission (EEOC).[1] A list of many of the federal statutes that include retaliation prohibitions is provided in Appendix 1. Retaliation claims, including whistleblower protections, represent an "X" factor in employment law that is becoming ubiquitous.

The increase in retaliation claims has been helped by the U.S. Supreme Court's interpretation of the parameters of protected activity and what constitutes actionable retaliatory conduct.[2] On June 24, 2013, the Court seemingly curbed that trend by designating a "but for" causation standard for Title VII retaliation claims.[3] The lesser, motivating factor test created under the 1991 Civil Rights Act to codify mixed-motive claims under Title VII is no longer applicable to unlawful retaliation claims. The *University of Texas Southwest Med. Ctr. v. Nassar* decision appears to round out the Court's treatment of the three elements of Title VII unlawful retaliation prompting this review.

This article provides an overview of workplace investigations. These types of investigations focus on retaliation claims, and address retaliation concerns during investigations for both employers and participating employees. To accomplish that, investigation insights are interjected throughout the general discussion of Title VII retaliation claims. The format juxtaposes the *prima facie* case elements and case law with the preventive law approach embodied in the practice of workplace investigation.[4] (See Appendix 2.)

Themes and Building Blocks

It is important to discuss themes and building blocks at the start. This is an area where one can lose the forest for the trees. The sheer volume of case law reports involving retaliation claims in 2013 can overwhelm. Limiting the discussion to Title VII retaliation claims provides clarity. Also, it is important to recognize that retaliation claims follow protected activity; thus, a basic grasp of Title VII discrimination is necessary.

Keep these recurring fundamentals in mind. Title VII prohibits discrimination in employment. Harassment is a subset of discrimination. For either discrimination or harassment to be unlawful, it must relate to a protected status (race, color, religion, national origin, sex, age, or disability). A primary objective of Title VII is not to provide redress but to avoid harm.[5] If the damage is done—for example, where unlawful discrimination results in a tangible employment action (TEA), such as firing, demotion, or other economic harm— the law provides recourse.

Short of a TEA, a primary objective of Title VII is to incentivize remedial measures, which promotes a judicially administrable standard. The Court sets a high bar to get to "unlawful," and consistently underscores that context matters. Enter the affirmative defense, which drives the employer's exercise of reasonable care and performance of workplace investigations to address unlawful hostile work environment (harassment) claims.[6] Short of a TEA, and even assuming the high bar is met, the affirmative defense deflects vicarious liability.[7]

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The negligence standard applied to co-worker harassment cases similarly holds an employer liable for what it knew or should have known. The employer should not be liable where it took prompt action that was reasonably calculated to stop and prevent unacceptable conduct.[8]

Retaliation is Different

The anti-retaliation provision provides a separate cause of action, distinct from but tied to an initial claim of unlawful discrimination. The purpose of this provision is to provide unfettered access to the remedial mechanisms of Title VII.[9] The bar (already moving based on context[10]) lowers for the first two elements of a retaliation claim. The bar rises for the third element of causation. A common denominator in both categories is that context matters.

Workplace Investigation—Reasonable Care

A big piece of preventive law guidance to employers is reflected in two basic principles of sound human resources management: (1) be consistent; and (2) document, document, document. Workplace investigations often evaluate the former and exemplify the latter. More to the point here is that a good investigation helps demonstrate the exercise of reasonable care.[11]

- Investigation insight: A workplace investigation should be prompt, impartial, and thorough.[12] The integrity of an investigation is fundamental to its basic objective, getting to the truth of a matter in dispute. Employers are well advised to take measures that support the integrity of the investigation process.

Fundamentally, an investigation seeks to resolve a matter in dispute. Where the truth is not sufficiently motivating, recognize that an investigation that lacks integrity is more easily discredited. A central premise advanced here is that the integrity of a workplace investigation requires the employer to prohibit retaliation against employee participants.

- Investigation insight: The ability to establish rapport with participants often describes how effectively the investigator interacts with reluctant or emotional witnesses. Explaining the purpose of the investigation and communicating the employer's prohibition against retaliation for good faith participation, as well as setting confidentiality expectations when appropriate, are integral to the investigator's ability to assuage employees.[13]

Unlawful Retaliation Under Title VII

Several cases speak to protected activity, adverse employment action, and causal connection under the Title VII unlawful retaliation standard. The following discussion generally explores these themes, referencing several of these cases.

- Investigation insight: Defining and maintaining clarity of scope in any workplace investigation is critical. When collecting and assessing relevant facts and participant perceptions, the investigator also must consider the elements of potential claims and defenses, as well as applicable methods of proof in the event of litigation.[14]

Protected activity under Title VII includes: (1) protected participation and (2) protected opposition.[15] These are discussed below.

Protected Participation

Protected participation is the act of filing a charge with the EEOC or participating in that process. According to the EEOC, participation is protected regardless of whether the allegations are valid or reasonable.[16]

- Investigation insight: Investigation of an employee's EEOC complaint demands heightened sensitivity to retaliation prohibitions. This is all the more true if the charge appears unreasonable and, thus, are aggravating to leadership. Immediate and repeated admonitions regarding prohibitions against retaliation must occur. Whether the charging party followed an available complaint procedure is an important determination. If not, it is important to find out why.

Protected Opposition

What constitutes protected opposition represents the deep end of the pool. Protected opposition can range from bringing a formal EEO complaint to voicing informal complaints to supervisors.[17] That includes complaints on behalf of others. Almost anything that communicates an employee's concern that unlawful discrimination has occurred is arguably protected opposition and puts an employer on notice.[18] No magic words are required.[19]

Reasonable, good faith belief. Retaliation claims judge the workplace's reaction to alleged discrimination, even when that alleged discrimination is disproved. A retaliation claim based on protected opposition is not dependent on the underlying discrimination claim, but to be protected, the opposition must be founded in a reasonable, good faith belief that the opposed conduct (harassment) or action (discrimination) is unlawful under Title VII. The standard "empowers employees to report what they reasonably believe is discriminatory conduct without fear of reprisal" and without convincing a court that the employer actually discriminated against the employee.[20] The standard has subjective and objective components. The employee must subjectively believe that the employer engaged in an unlawful employment practice, and that belief must be objectively reasonable in light of the available facts.[21]

- Investigation insight: The gravity of this nuance in retaliation claims cannot be overstated. It must consistently inform an employer's response to alleged discrimination in the workplace. The bar is lower. A harsh reaction to a complaint that does not present potential liability to an employer can quickly create potential for liability.

Unlawful hostile work environment. The U.S. Supreme Court addressed the requirement of a reasonable, good faith belief of unlawful discrimination in 2001 in *Clark County School District v. Breeden*.[22] The opinion reads as a general rebuke on sex harassment allegations run amok.[23] While the complainant, her boss, and another male employee were reviewing psychological evaluation reports, the boss recited a sexual remark memorialized in a candidate's file.[24] The Court's brief opinion concludes that no one could reasonably believe that the incident violated Title VII.[25]

Although *Breeden* provides an efficient summary of Supreme Court case law on the onerous standard for unlawful hostile work environment, two facts make it easily distinguishable from most unlawful harassment claims. Screening candidates was a function of Breeden's job, as it was for the male employees involved. Also, Breeden conceded that it did not bother her to read the statement in the file. The debate on where the line is drawn continues because of the infinite variations on context, also described as the totality of circumstances.

Complaints made during a workplace investigation. *Crawford* dissects what it means "to oppose" unlawful discrimination and

holds that the opposition protection extends to a workplace investigation participant who describes employment discrimination even though she is not the instigating complainant. A thirty-year employee, Crawford identified instances of her supervisor's sexual harassment against her during an internal workplace investigation. Soon after, she was fired amid allegations of embezzlement.

Responding to the defense's assertion that the lower the bar for retaliation claims the less likely it is that employers will investigate as an exercise of reasonable care, the Court declared that the argument underestimates the incentive to investigate that follows from the *Faragher/Ellerth* affirmative defense.[26] Moreover, the opinion cites studies demonstrating that the affirmative defense has prompted many employers to adopt or strengthen procedures for investigating, preventing, and correcting discriminatory conduct.[27]

The Court denounced a "catch-22"—where an employee could be penalized for responding to inquiries, but if she kept quiet and later filed a charge with the EEOC, the employer could assert the affirmative defense, including that the employee unreasonably failed to avoid harm by taking advantage of preventive or corrective opportunities provided by the employer:[28]

> If it were clear law that an employee who reported discrimination in answering an employee's questions could be penalized with no remedy, prudent employees would have good reason to keep quiet about Title VII offenses against themselves or others. This is "no imaginary horrible" given the documented indications that "[f]ear of retaliation is the leading reason why people stay silent instead of voicing their concerns about bias and discrimination."[29]

The concurring opinion, authored by Justice Clarence Thomas, emphasized that the holding does not and should not extend beyond employees who participate in internal investigations or "engage in analogous purposive conduct," also noting that an expansive interpretation of protected opposition conduct likely would accelerate the proliferation of retaliation claims.[30]

- Investigation insight: A workplace investigation demonstrates an employer's "purposive" conduct. A declaration of "investigation" or just the process of interviews and documentation inspires defensive behavior, and sometimes Shakespearean-caliber drama. Fear of retaliation is not limited to investigations of unlawful bias. Rather than attempting an early determination of protected opposition, the recommendation here is that a workplace conflict that warrants an investigation process justifies measures supporting its integrity, including communicating a prohibition against retaliation for participation.[31]

Subjective good faith belief. The subjective component to protected opposition typically is examined under the good faith requirement. This would address those situations where an internal discrimination complaint is advanced not in good faith, but to find protection from anticipated disciplinary action or termination. The *Nassar* opinion cites this hypothetical as a justification for raising the bar on the causation standard for retaliation claims.

- Investigation insight: Subjective belief standards prompt some pause. Instinctively, we hesitate to reach conclusions as to what another person believes or thinks. However, investigating retaliation or any alleged unlawful motivation necessitates making subjective belief findings where the facts allow.

Typically, courts explore the subjective component in terms of whether the retaliation complainant is reasonably mistaken about whether conduct violates Title VII. For example, does a complaint against staring, presented as seductive leering, constitute protected opposition? The high bar for actionable harassment says no, but consideration of the totality of circumstances can complicate the question. A district court in Michigan recently refused to grant the employer's summary judgment motion where the plaintiff made that complaint. Complicating matters, the employer's policy included staring as conduct that may constitute harassment. Perhaps more influential to the ruling, the employer fired the plaintiff for filing a willfully false complaint on the strength of a two-page investigation report. The report made no finding regarding a willfully false claim, though it concluded the allegation was unsubstantiated and, even if it were true, it did not rise to the level of sexual harassment.[32]

It appears that the severity of adverse action and strength of the causal connection evidence can influence the assessment of protected opposition. Although this appears contrary to the successive structure of the retaliation claim, it would be consistent with the Court's emphasis on the totality of circumstances. From a preventive law perspective, it is only common sense. Lawful retaliation scenarios are "no imaginary horrible."

Lawful harassment. Where a reasonable employee could not believe that conduct at issue is so objectively offensive—so severe as to alter the conditions of employment—it is not unlawful. That would describe lawful harassment, even when the conduct is tied to a legally protected status under Title VII. For example, where complaints about a co-worker's dissemination of a sexually sugges-

tive e-mail and other conduct have been deemed inappropriate in an office environment, the court held that the plaintiff could not have reasonably believed that it rose to the level of unlawful harassment in rejecting the retaliation claim.[33]

Individuals come to work having established personal boundaries. Ideally, if someone else's behavior crosses that line, a communication is made. Of course, crossing someone's line is not meeting the bar set for unlawful harassment. Still, a preventive approach enables employers to make conscious decisions about encouraging complaints of individual perceptions of inappropriate conduct.

Protected opposition does not include general complaints. Complaints that have no connection to unlawful discrimination under Title VII or any other source of legal protection in employment do not constitute protected opposition. Unless tied to an alleged status-based discriminatory motive, general complaints about management and disagreement with a negative performance evaluation will not suffice.[34] It gets more complicated when EEO hot-button words are misapplied, such as assertions of "hostile work environment" with no connection to a legally protected status. Bullying complaints are a similar and common example for human resource professionals.[35]

Similarly Situated Requires a Reasonable Factual Basis

Discrimination complaints often rely on the employee's assertion that he or she has been treated differently than other employees. A 2013 Tenth Circuit opinion rejected the plaintiff's retaliation claim because it was not objectively reasonable to believe that he had been discriminated against. The plaintiff asserted that he was treated differently than similarly situated co-workers because of race, but examination of the facts revealed that he did not know enough about the circumstances of the comparators to support a reasonable belief that they were truly similarly situated.[36]

- Investigation insight: A prompt investigation in response to discrimination and harassment complaints provides the best opportunity to get to the truth of the matter and develop an informed understanding of all the facts. Documentation of participants' contemporaneous understanding of relevant facts is often critical.

Materially Adverse Action

Adverse action in the retaliation context is anything that might dissuade a reasonable employee from making or supporting a charge of discrimination.[37] This includes actions not directly related to employment that cause harm outside the workplace.

In *Burlington Northern & Santa Fe Railway Co. v. United States*,[38] Sheila White was hired as a "track laborer" in June 1997 at Burlington's Tennessee Yard. She was the only woman in the department. Although the track laborer position encompassed other duties, operating the forklift became White's primary responsibility. In September 1997, White complained about her supervisor's disparaging and insulting remarks to her in front of coworkers, including his declaration that women should not be working in the department. An internal investigation resulted in the supervisor's ten-day suspension and mandatory sexual-harassment training attendance. White was informed of the corrective action. She also was removed from forklift duty and assigned to perform only standard track laborer tasks purportedly influenced by complaints that a "more senior man" should have the "less arduous and cleaner job" of forklift operator.

Burlington Northern reiterates that the primary purpose of the anti-retaliation provision in Title VII is maintaining unfettered access to statutory remedial mechanisms.[39] Seeking to prevent unlawful retaliation and seeking to prevent unlawful discrimination are identified as two separate things. Because effective retaliation in the workplace can take many forms, the Court identified the need for broader protection for retaliation as compared to discrimination.[40] The Tenth Circuit provided a specific example for the Court.[41] Consistent with prior rulings, *Burlington Northern* sets a reasonable person standard to avoid the perils of a subjective standard, and emphasizes "material adversity" to find a "judicially administrable" standard.[42]

What Retaliation is Not

Petty slights, personality conflicts, snubbing, and minor annoyances do not make the grade. Importantly, context continues to matter. For example, the notion that a reassignment of duties within the same job description cannot constitute retaliatory discrimination has been rejected.[43] Also notable, after-the-fact correction of the harm does not eliminate the deterrent effect.[44]

In the Tenth Circuit, that the alleged retaliation did not actually deter continued protected participation activity may be proof that the materially adverse action standard has not been met.[45] In any case, the Tenth Circuit is not quick to see the line crossed. Typically, only

> [a]cts that carry a significant risk of humiliation, damage to reputation, and a concomitant harm to future employment prospects may be considered adverse actions . . . a mere inconvenience or an alteration of a job responsibilities will not suffice.[46]

- Investigation insight: Whether the scope of any workplace investigation includes making legal theory conclusions is an important question to ask and answer up front. Typically, workplace investigations are limited to factual conclusions—for example, eliciting the facts and perceptions of asserted harm, rather than deciding whether a reasonable worker would be deterred from making or supporting a charge of discrimination under the circumstances.

"But For" Causation Standard

Establishing a causal connection requires showing that an adverse employment action would not have occurred in the absence of (but for) the employer's alleged retaliatory motive. Under *University of Texas Southwest Medical Center v. Nassar*, Title VII retaliation claims must be proved according to traditional principles of but for causation, not the lessened causation (motivating factor) test provided in Title VII, as amended by the 1991 Civil Rights Act.[47]

- Investigation insight: The employer's knowledge of protected activity can be a critical component to causation in retaliation claims. An investigation must consider whether the discriminatory animus of another employee influenced a decision maker regarding adverse action.[48] The temporal proximity between protected activity and the adverse action is always an issue. Similarly, the delegation of duties can influence who meets the definition of supervisor under the affirmative defense.[49]

The 5–4 majority of the U.S. Supreme Court decided that when Congress introduced the mixed motive standard in 1991, it sought to separate unlawful retaliation from the status-based discrimination protections of Title VII. Acknowledging that it has inferred a congressional intent to also prohibit retaliation when interpreting broadly worded antidiscrimination statutes, the majority determined that the detailed structure of Title VII prevents that interpretation.[50]

Under the mixed-motives theory, an employee may establish employer liability if unlawful discrimination was a motivating—though not a determinative—factor in the adverse employment action. The mixed motive standard allows the employer to advance a "same decision" defense—irrespective of some status-based discrimination, it would have taken the same action for a lawful reason. The employer is deemed liable, but its damages are significantly limited. Limiting Title VII retaliation claims to but for causation arguably allows for some retaliation for protected activity, as long as it is not a determinative cause of the adverse action.

- Investigation insight: As established in the Tenth Circuit, but for cause does not mean sole cause.[51] Investigating retaliation claims still requires a comprehensive analysis of motivating factors for the alleged adverse action. Similarly, investigators must explore and anticipate the various forms of pretext arguments, including the implications of a business justification determined false.[52]

Still seeking a judicially administrable standard, the frequency of retaliation charges influenced the Court's decision.[53] The Court also described an increased potential for frivolous claims under the motivating factor standard illustrated by a hypothetical claim of unfounded discrimination brought by an employee facing discipline at work.[54]

The dissent opinion in *Nassar* is strongly worded and evidences a deep divide in the Court.[55] Its conclusion encapsulates fundamental disagreement, even calling for a legislative overall of Title VII:

> The Court holds, at odds with a solid line of decisions recognizing that retaliation is inextricably bound up with status-based discrimination, that § 2000e-2(m) excludes retaliation claims. It then reaches outside of Title VII to arrive at an interpretation of "because" that lacks sensitivity to the realities of life at work. In this endeavor, the Court is guided neither by precedent, nor the aims of legislators who formulated and amended Title VII. Indeed, the Court appears driven by a zeal to reduce the number of retaliation claims filed against employers. Congress had no such goal in mind when it added § 2000e-2(m) to Title VII. Today's misguided judgment, along with the judgment in *Vance v. Ball State Univ.*, should prompt yet another Civil Rights Restoration Act.[56]

The *Nassar* ruling sets a higher bar for plaintiffs at the summary judgment stage. Of course, the traditional *McDonnell Douglas* burden-shifting analysis remains available to prove but for causation and threaten more significant monetary damages for employers. All commentators seem to agree that mixing causation standards under Title VII will cause confusion in the courts.

Conclusion

Retaliation claims undoubtedly will persist. Under a preventive law approach, some retaliation—just like some status-based harassment—should meet zero tolerance. Zero tolerance is effectively demonstrated whenever an employer responds to unacceptable conduct with corrective action reasonably calculated to stop and prevent its recurrence, and sound policies, complaint procedures, and appropriate investigation help.

Notes

1. Pub. L. 88-352, § 704, 78 Stat. 257, as amended, 42 USC § 2000e-2(a). In addition to Title VII, the Equal Employment Opportunity Commission (EEOC) interprets and enforces companion civil rights protections in employment that prohibit disability and age discrimination, as well as the Pregnancy Discrimination Act and Equal Pay Act.

2. *Crawford v. Metro. Gov't of Nashville and Davidson County, Tenn.*, 555 U.S. 271 (2009); *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006).

3. *University of Texas Southwest Med. Ctr. v. Nassar*, 133 S.Ct. 2517 (2013).

4. Workplace investigation as a practice area may be obvious to employment law practitioners. *See also* Association of Workplace Investigators (AWI), www.aowi.org, which maintains a nationwide membership and publishes a Guiding Principles document.

5. *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998).

6. *See id.*; *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998). Absent a tangible employment action, the employer can avoid liability by establishing: (1) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer.

7. Recently, in *Vance v. Ball State Univ.*, 133 S.Ct. 2434 (2013), the Court ruled that under Title VII, a supervisor must have authority to execute tangible employment actions (hire, fire, demote, promote, transfer, or discipline other workers), rejecting the EEOC's broader standard as "nebulous." *See also Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004) (holding that the affirmative defense is not available to the employer if the plaintiff quits in reasonable response to an employer-sanctioned adverse action constituting official action (constructive discharge)); *Harrison v. Eddy Potash, Inc.*, 248 F.3d 1014 (2001) (rejecting the proposition that an employer's prompt corrective action can be sufficient by itself (absent the second prong) to avoid vicarious liability for a supervisor's unlawful harassment).

8. *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1444 (10th Cir. 1997).

9. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997).

10. *Burlington Northern*, 584 U.S. at 69, *quoting Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81-82 (1998):

> The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.

11. *See McInerney v. United Air Lines, Inc.*, 463 Fed.Appx. 709 (2011) (failure to investigate in response to employee complaint of sex discrimination as evidence supporting causal connection in retaliation claim).

12. *See* U.S. EEOC, "Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors" (June 1999), available at www.eeoc.gov/policy/docs/harassment.html.

13. Blanket requests for confidentiality are deemed unlawful by the National Labor Relations Board (NLRB) as a violation of Section 7 rights under the National Labor Relations Act. *Banner Health System*, 358 NLRB No. 93, slip op. at 2 (2012). *Banner* requires a case-by-case assessment of whether the need for confidentiality is justified because: (1) a witness needs protection; (2) evidence is in danger of being destroyed; (3) testimony is in danger of being fabricated; or (4) there is a need to prevent a cover-up.

14. *See* Flynn, "Grappling With Questions of Scope in Workplace Investigations," *AWI J.* 4 (April 2013).

15. 42 USC § 2000e-(3)(a). The anti-retaliation provision of the Act forbids an employer from discriminating against an employee or job appli-

cant because that individual "opposed any practice" made unlawful by Title VII or "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."

16. *EEOC Compliance Manual*, Section 8, Retaliation C.2. at 8-10 (May 1998), available at www.eeoc.gov/policy/docs/retal.html:

> The anti-discrimination statutes do not limit or condition in any way the protection against retaliation for participating in the charge process. [] Thus, courts have consistently held that a respondent is liable for retaliating against an individual for filing an EEOC charge regardless of the validity or reasonableness of the charge (citing *Wyatt v. Boston*, 35 F.3d 13, 15 (1st Cir. 1994)).

17. *Hertz v. Luzenac America, Inc.*, 370 F.3d 1014, 1015 (10th Cir. 2004).

18. *Crawford*, 555 U.S. at 276.

19. *Hinds v. Sprint/United Mgmt. Co.*, 523 F.3d 1187, 1203 (10th Cir. 2008).

20. *Bd. of County Comm'rs v. EEOC*, 405 F.3d 840, 852 (10th Cir. 2005); *Hertz*, 370 F.3d at 1015-16. *See also Crumpacker v. Kan. Dep't of Human Res.*, 338 F.3d 1163, 1171 n.5 (10th Cir. 2003). The employee's complaint of discrimination may constitute protected opposition even if it is mistaken, as long as the belief that discrimination occurred was objectively reasonable and made in good faith. *See Love v. RE/MAX of Am., Inc.*, 738 F.2d 383, 385 (10th Cir. 1984).

21. *Crumpacker*, 338 F.3d at 1171 (holding that a plaintiff cannot maintain a retaliation claim based on an unreasonable subjective good-faith belief).

22. *Clark County School Dist. v. Breeden*, 532 U.S. 268 (2001).

23. *Id.* at 270, *quoting Faragher*, 524 U.S. at 786:

> Just three Terms ago, we reiterated, what was plain from our previous decisions, that sexual harassment is actionable under Title VII only if it is "so severe or pervasive" as to "alter the conditions of [the victim's] employment and create an abusive working environment."

See also Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986); *Burlington Indus.*, 524 U.S. at 752; *Oncale*, 523 U.S. at 81 (Title VII "forbids only behavior so objectively offensive as to alter the conditions of the victims employment").

24. The remark at issue: "I hear making love to you is like making love to the Grand Canyon." Complainant's boss said, "I don't know what that means." The coworker replied, "Well, I'll tell you later," and both men chuckled. *Breeden*, 532 U.S. at 269.

25. *Id.* at 271, *quoting Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993). *See also id, quoting Faragher*, 524 U.S. at 788:

> Hence, [a] recurring point in [our] opinions is that simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the "terms and conditions of employment."

26. *Id.* at 278, 279, *quoting Faragher*, 524 U.S. at 807 and *Ellerth*, 524 U.S. at 765, and referencing Brief for Petitioner 24-28, and nn. 31-35:

> Employers are thus subject to a strong inducement to ferret out and put a stop to *any discriminatory activity* in their operations as a way to break the circuit of imputed liability. (Emphasis supplied.)

27. *Id.* at 279.

28. *Crawford*, 555 U.S. at 279, *quoting Ellerth*, 524 U.S. at 765.

29. *Id.* at 279, *quoting* Brake, "Retaliation," 90 *Minnesota L.Rev.* 18, 20 (2005). *See also id.* at 37, and n.58 (compiling studies).

30. *Id.* at 281 (emphasis supplied).

31. The expectation of employee participation in a workplace investigation is beyond the scope of this article. *See* Flynn, "'Detect and Deter'—Performing Workplace Investigations on Behalf of Employer-Clients," 34 *The Colorado Lawyer* 67 (Feb. 2005).

32. *Ragan v. OFS Acquition, Inc.*, slip op., WL823366 (March 6, 2013).

33. *Grosdidier v. Broadcasting Bd. of Governors*, 709 F.3d 19, 24 (D.C.Cir. 2013):

> Whatever merit there might be to her suggestion that these kinds of complaints should be protected so that an employer will take steps to ameliorate the conduct before it escalates and results in a hostile work environment . . . this court has required that under Title VII she must show that she had a reasonable belief the conduct was unlawful.

34. *See Hinds*, 523 F.3d at 1203.

35. *See supra* note 15 and accompanying text.

36. *Espinoza v. Dep't of Corr.*, No. 12-1009, 509 Fed.Appx. 724, 731 (unpublished), *citing Little v. United Tech., Carrier Trans. Div.*, 103 F.3d 956, 960 (11th Cir. 1997):

> We do not suggest that Mr. Espinoza needed to know every detail about the white sergeants' alleged absences before he could make a reasonable complaint about discrimination. But he needed to know at least some facts that would support a reasonable belief that their absences were similar to his.

37. *Burlington Northern*, 548 U.S. at 53.

38. Sheila White was hired as a "track laborer" in June 1997 at Burlington's Tennessee Yard and was the only woman in the department. Although the track laborer position encompassed other duties, operating the forklift became White's primary responsibility. In September 1997, White complained about her supervisor's disparaging and insulting remarks to her in front of co-workers, including his declaration that women should not be working in the department. An internal investigation resulted in the supervisor's ten-day suspension and mandatory sexual-harassment training attendance. White was informed of the corrective action. She also was removed from forklift duty and assigned to perform only standard track laborer tasks purportedly influenced by complaints that a "more senior man" should have the "less arduous and cleaner job" of forklift operator.

39. *Robinson*, 519 U.S. at 346.

40. *Id.* at 64.

41. *Berry v. Stevinson Chevrolet*, 74 F.3d 980 (10th Cir. 1996) (finding actionable retaliation where the employer filed criminal charges determined false against an employee who advanced a discrimination complaint at work).

42. *Id.* at 68-69.

43. EEOC, *1991 Manual* § 614.7 at 614-31 to 614-32.

44. In *Burlington Northern*, White received back pay for her overturned thirty-seven-day suspension, but the Court still found the original suspension a sufficient deterrent to filing or supporting a claim under the standard.

45. *Morehead v. Deere & Co.*, U.S. Dist. Ct. Kansas (Dec. 14, 2012) (summary judgment motion of employer upheld). *See Somoza v. Univ. of Denver*, 513 F.3d 1206, 1214 (10th Cir. 2008):

> [T]he fact that a plaintiff continues to be undeterred in his or her pursuit of a remedy, as here was the case, may shed light as to whether the actions are sufficiently material and adverse to be actionable.

46. *Reinhardt v. Albuquerque Public Schools Bd.*, 595 F.3d 1126, 1133 (10th Cir. 2010).

47. *University of Texas Southwest Medical Center v. Nassar*, 118 FEP Cases 1504 (2013) (121 DLR AA-4, June 24, 2013); Title VII § 2000e-2(m) (representing congressional action following *Price Waterhouse*).

48. *See Staub v. Proctor Hospital*, 131 S.Ct. 1186 (2011) ("cat's paw" theory).

49. *Vance,* 133 S.Ct. at 2452.

50. The *Nassar* Court deemed its holding in *Gross v. FBL Financial Servs. Inc.*, 557 U.S. 167, 106 FEP Cases 833 (2009), as "instructive," reaching the same conclusion that the but for causation test, rather than the "mixed motive" test, applies under the Age Discrimination in Employment Act.

51. *Jones v. Oklahoma City Public Schools*, 617 F.3d 1273 at 1277, 78 (2010).

52. See *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000).

53. *Nassar*, 133 S.Ct. at 2531:

> The number of these claims filed with the Equal Employment Opportunity Commission (EEOC) has nearly doubled in the past 15 years—from just over 16,000 in 1997 to over 31,000 in 2012.

54. *Id.* at 2532:

Consider in this regard the case of an employee who knows that he or she is about to be fired for poor performance, given a lower pay grade, or event just transferred to a different assignment or location. To forestall that lawful action, he or she might be tempted to make an unfounded charge of racial, sexual, or religious discrimination; then, when the unrelated employment action comes, the employee could allege that it is retaliation. If respondent were to prevail in his argument here, that claim could be established by a lessened causation standard, all in order to prevent the undesired change in employment circumstances. Even if the employer could escape judgment after trial, the lessened causation standard would make it far more difficult to dismiss dubious claims at the summary judgment stage. *Cf. Vance v. Ball State Univ.*, post at 9-11. It would be inconsistent with the structure and operation of Title VII to so raise the cost, both financial and reputational, on an employer whose actions were not in fact the result of any discriminatory or retaliatory intent.

55. Justice Ginsburg drafted the dissent joined by Justices Breyer, Sotomayor, and Kagan.

56. *Nassar*, 133 S.Ct. at 2547. ■

Appendix 1: Other Statutes Providing Retaliation Claims

Other statutes providing retaliation claims for employees who oppose unlawful practices include:

- Age Discrimination in Employment Act
- Americans with Disabilities Act
- Family and Medical Leave Act
- Fair Labor Standards Act
- Occupational Safety and Health Act
- Immigration and Nationality Act
- Whistleblower Protection Act
- Sarbanes-Oxley Act
- American Recovery and Reinvestment Act
- Patient Protection and Affordable Health Care Act
- Dodd-Frank Wall Street Reform and Consumer Protection Act

This non-exhaustive list does not include increasing state whistleblower protections.

Appendix 2: Top 3 EEOC Charges Filed