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Retaliation in an EEO World

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Retaliation in an EEO World

DEBORAH L. BRAKE*

This Article examines how the prevalence of internal policies and complaint procedures for addressing discrimination in the workplace are affecting legal protections from retaliation. Retaliation has been an unusually active field of law lately. The Supreme Court's heightened interest in taking retaliation cases in recent years has highlighted the central importance of retaliation protections to the integrity of discrimination law. The Court's string of plaintiff victories in retaliation cases has earned it the reputation as a pragmatic, pro-employee Court when it comes to retaliation law. However, this view does not account for the proliferation and influence of employer EEO policies and complaint procedures. Reviewing the socio-legal scholarship on the structure and functioning of the EEO workplace reveals important insights into how retaliation law operates. This Article contends that, considered against the backdrop of how employer policies channel employee complaints, the picture of retaliation law for employees is not nearly as rosy as the Court's decisions have led legal scholars to believe. Focusing on the interplay between retaliation doctrine and employers' internal discrimination policies, the Article demonstrates that the lesser level of protection afforded to internal discrimination complaints creates stark dilemmas for employees who follow employer policies to complain about perceived inequality in the workplace. Two doctrines in particular, the reasonable belief doctrine and the notice requirement, clash with the role of employer policies in shaping employee perceptions of and responses to discrimination in the workplace. The Article concludes by offering a proposal for revamping retaliation law to better accommodate the realities of the EEO workplace.

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INTRODUCTION

Most employees know something about employment discrimination law, or at least believe that they do. Their knowledge comes not from statutory language, court cases, or regulations, but from their own employers' policies and procedures for addressing discrimination. Employees today operate in an EEO world—the familiar acronym for Equal Employment Opportunity—and have for quite some time. Specialized compliance personnel, often working out of discrete EEO offices, oversee these policies and exhort employees to follow them. And yet, the EEO workplace is barely visible in the world that the Supreme Court has conjured when it has addressed claims alleging retaliation for challenging discrimination. Notwithstanding the Court's seemingly pro-plaintiff stance in retaliation cases in recent years,¹ this Article contends that retaliation law has failed to come to terms with the EEO workplace, leaving employees vulnerable if they raise discrimination complaints through these processes.

It is not as if the Supreme Court has kept its peace on retaliation law while the EEO workplace has taken hold. The Court has been unusually prolific on the subject of retaliation in recent years. From 2005 to 2011, the Court decided seven cases involving retaliation for challenging discrimination—an average of one per year.² In each of these, the Court reversed a narrow lower court ruling to decide the issue in favor of the plaintiff. This track record has caused many observers to view the Court as pro-plaintiff when it comes to retaliation.³

This reputation has developed especially because of the contrast with the Court's approach to the rest of its employment discrimination docket. During the same time period, the Court has developed a reputation for being pro-employer based on several decisions that take a restrictive view of employment discrimination. In *Ledbetter v. Goodyear Tire & Rubber Co.*,⁴ although clothed in

1. As this Article was nearing publication, the Supreme Court decided *University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517 (2013), a case that breaks the string of plaintiff victories in retaliation cases in the Supreme Court. In a 5–4 decision, the Court rejected the mixed-motive framework, requiring employees to prove but-for causation in retaliation cases under Title VII. While this ruling creates additional hurdles for plaintiffs in causation cases, it does not directly affect the interaction of the EEO workplace and the retaliation doctrines discussed in this Article. For a critique of the decision, see Joanna L. Grossman & Deborah L. Brake, *Revenge: The Supreme Court Narrows Protection Against Workplace Retaliation in University of Texas Southwestern Medical Center v. Nassar*, VERDICT (July 9, 2013), <http://verdict.justia.com/2013/07/09/revenge-the-supreme-court-narrows-protection-against-workplace-retaliation-in-university-of-texas-southwestern-medical-center-v-nassar>.

2. *Thompson v. N. Am. Stainless, LP*, 131 S. Ct. 863 (2011); *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325 (2011); *Crawford v. Metro. Gov't of Nashville & Davidson Cnty.*, 555 U.S. 271 (2009); *CBOCS West, Inc. v. Humphries*, 553 U.S. 442 (2008); *Gomez-Perez v. Potter*, 553 U.S. 474 (2008); *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005).

3. It is too soon to say how the recently decided *Nassar* case will affect the Court's reputation in retaliation law, but the tenor of this case is certainly more in line with the rest of the Court's discrimination cases than the prior seven retaliation cases.

4. 550 U.S. 618 (2007).

the procedural garb of Title VII's statute of limitations, the Court's decision betrayed a narrow, individualistic view of the intent required to prove pay discrimination.⁵ In *Wal-Mart Stores, Inc. v. Dukes*,⁶ while ruling on class action certification, the Court took a skeptical view of systemic disparate treatment, casting doubt on the long-standing theory that substantial and unexplained underrepresentation of the plaintiff class in specific job categories raises an inference of a pattern and practice of discrimination.⁷ In the realm of age discrimination, the Court surprised even the litigants in the case, who had not briefed the issue, by eviscerating the mixed-motive framework under the Age Discrimination in Employment Act.⁸ More recently, the Court expanded the scope of the judicially implied ministerial exception, expanding the numbers of jobs at religiously affiliated workplaces exempted from coverage.⁹ And even though the Court decided for the firefighter-plaintiffs in the "reverse discrimination" case of *Ricci v. DeStefano*,¹⁰ the decision lowers incentives for employers to abide by disparate impact law, possibly heralding the demise of the disparate impact claim itself.¹¹

Against this backdrop, the Court's retaliation cases appear, on balance, pro-employee. While the Court's decisions reveal skepticism about the extent of employment discrimination in the modern era, fueled by a narrow understanding of what counts as discrimination, the Court has been more receptive to retaliation claims by persons challenging discrimination. Among the commentators taking note of the Court's different tune, the prevailing view is that retaliation law, unlike employment discrimination law, adequately protects employees.

This Article challenges that understanding, arguing that it does not account for the most significant development in the field in the past two decades: the growth and influence of internal channels for addressing discrimination complaints. The Supreme Court's retaliation decisions have been described as pragmatic and purposive, settling on interpretations that cohere with the purpose of enabling the full enforcement of antidiscrimination statutes. However, the Court has not grappled with the single most troubling aspect of retaliation law in light of the

5. See Deborah L. Brake, *What Counts as "Discrimination" in Ledbetter and the Implications for Sex Equality Law*, 59 S.C. L. REV. 657, 657-58 (2008); Tristin K. Green, *Insular Individualism: Employment Discrimination Law After Ledbetter v. Goodyear*, 43 HARV. C.R.-C.L. L. REV. 353 (2008).

6. 131 S. Ct. 2541 (2011).

7. See, e.g., Tristin K. Green, *The Future of Systemic Disparate Treatment Law*, 32 BERKELEY J. EMP. & LAB. L. 395 (2011); Melissa Hart, *Civil Rights and Systemic Wrongs*, 32 BERKELEY J. EMP. & LAB. L. 455 (2011).

8. *Gross v. FBL Fin. Servs.*, 557 U.S. 167 (2009); see also Melissa Hart, *Procedural Extremism: The Supreme Court's 2008-2009 Labor and Employment Cases*, 13 EMP. RTS. & EMP. POL'Y J. 253, 264-74 (2009) (critiquing *Gross*).

9. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012).

10. 557 U.S. 557 (2009).

11. E.g., Allen R. Kamp, *Ricci v. DeStefano and Disparate Treatment: How the Case Makes Title VII and the Equal Protection Clause Unworkable*, 39 CAP. U. L. REV. 1 (2011); Joseph A. Seiner & Benjamin N. Gutman, *Does Ricci Herald a New Disparate Impact?*, 90 B.U. L. REV. 2181 (2010).

proliferation of internal EEO processes: the law's lower level of protection for employees who pursue internal complaints compared to those who pursue external enforcement through courts or government agencies. As a result, the lower courts have developed a body of law that creates stark dilemmas for employees who use employers' internal channels for complaining about discrimination—that is, employees who follow the employer's rules and norms for trying to resolve problems internally first. This body of law, as yet unchecked by the Supreme Court, is anything but pragmatic, and undermines the Court's promise of a well-functioning enforcement mechanism for securing compliance with employment discrimination statutes.

Scholars working in the interdisciplinary field of sociology and law have long known the importance of internal governance mechanisms for shaping employee understandings of, and responses to, discrimination. Their studies of the EEO workplace have explored the role played by personnel experts in determining the content of employer nondiscrimination policies in ways that broaden narrower, legalistic understandings.¹² The resulting employer policies channel employee complaints through the filters created by specialized EEO personnel. This scholarship contains useful insights for exploring how retaliation law actually functions in the EEO workplace.

Two doctrines in particular pose problems for employees who use their employer's EEO policies to complain internally.¹³ First, internal reports of discrimination are protected from retaliation only if predicated on an objectively reasonable belief that the employer engaged in unlawful discrimination.¹⁴ While an objective reasonableness constraint sounds innocuous enough, courts use the substantive law of discrimination as the outer limit on reasonableness.¹⁵ Employer EEO policies, however, go far beyond legalistic definitions of discrimination to reach a much broader range of practices. Encompassing sexual harassment, racial harassment, diversity management, affirmative action efforts, and broad promises of respect, fairness, and collegiality, employer policies far exceed the minimum of what discrimination law requires. Employees who take these promises seriously and raise concerns when they fall short can find themselves ensnared in the reasonable belief doctrine, with no allowance for how their employer's EEO policy shaped their beliefs.

12. See *infra* text accompanying notes 91–120.

13. The problems with retaliation law addressed in this Article are compounded by a distinct trend in the lower courts that leaves the employees who manage and investigate EEO complaints without adequate protection from retaliation for their role in these processes. This doctrine, and the dilemmas facing EEO compliance personnel, is the subject of a future article. See Deborah L. Brake, *Retaliation in the EEO Office*, (working draft) (on file with author). The present Article focuses on the problems facing the employees who use employer EEO processes.

14. *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 271 (2001) (finding internal complaint about sexual harassment unprotected from retaliation because plaintiff lacked an objectively reasonable belief that what she complained about was actually unlawful under Title VII).

15. See *infra* text accompanying notes 130–83.

Second, retaliation law requires employees who complain internally to be clear and precise in phrasing their complaints in terms of discrimination. For example, complaining about disrespectful treatment or incivility in the workplace may not be specific enough, under this doctrine, to put an employer on notice that the employee is complaining about discriminatory harassment.¹⁶ However, employer EEO policies and the personnel who oversee them often steer employees in other directions. EEO policies need not track legal nondiscrimination rights, and often merge broader promises of fairness with nondiscrimination guarantees. Internal complaint processes channel complaints away from rights-claiming language and into the vernacular of managerial and professional concerns. Courts applying this doctrine leave some complaints about inequality in the workplace unprotected for lack of specificity without accounting for how EEO policies shape the framing of employees' complaints.¹⁷

Despite the proliferation of internal EEO systems for handling discrimination complaints and renewed academic interest in retaliation law, legal scholarship has not explored the interaction between the two. The Supreme Court's retaliation cases paint a mostly rosy impression of the state of retaliation law, one that does not match up with the body of law developing in the lower courts. The Court's decisions do not speak to the binds facing employees who report discrimination under employer nondiscrimination policies. By exposing these dilemmas, this Article contributes both to the literature on retaliation law and to critiques of employer EEO processes. Critiques have questioned the effectiveness of such processes in ending discrimination but have not recognized that gaps in retaliation law may make such policies not just ineffective but actually harmful. Evaluation of the efficacy of internal EEO policies must consider not just prevention of discrimination but the likelihood of retaliation and the adequacy of legal protections against it.

Part I of this Article reviews recent developments in retaliation law in the Supreme Court and in academic literature. The past seven years have witnessed a surge in retaliation cases in the Court. This Part explains those decisions and the issues left undecided. The uptick in retaliation cases has drawn attention from the legal academy, and the second half of this Part surveys the new retaliation scholarship. With few exceptions, commentators have reacted favorably to the Court's retaliation case law, depicting it as an exception to the Court's pro-employer perspective in employment discrimination law generally.

Part II describes the EEO world in which retaliation law operates. It sketches the explosion of employer policies addressing discrimination and the legal developments that incentivize them. Such policies have become so integral to discrimination law that it is a mistake to see them as separate and independent from it. Employers have much to gain by having antidiscrimination policies and much to lose if they do not. The resulting internal governance structure has a greater day-to-day influence on employee understandings of discrimination than the external law does. This structure shapes how employees think about, express, and complain about discrimination. The proliferation of internal employer processes for handling

16. *See infra* text accompanying notes 253–54.

17. *See infra* text accompanying notes 307–12.

discrimination complaints has important implications for the workings of retaliation law, which are taken up in Part III.

Part III examines how retaliation doctrine intersects with employer EEO processes to the detriment of employees. In particular, two developments—the reasonable belief doctrine and the notice requirement—create troubling roadblocks for employees using internal employer channels to raise concerns about perceived discrimination. These doctrines undermine the promising notes sounded by the Supreme Court’s headliner retaliation cases.

Part IV concludes by considering the implications of this clash, both for retaliation law and for assessing the role of internal EEO governance. The prominent role of EEO policies in channeling employee responses to discrimination leaves retaliation law in dire need of an overhaul. As a starting point, courts should reconsider the formalistic split between internal and external complaints in cases where employees use the EEO policies their employers have established—an issue that the Supreme Court has left undecided. By placing internal complaints made pursuant to an employer’s established EEO procedures on the same level as complaints filed with the government, retaliation law can resolve the dilemmas now facing employees who follow EEO policies to complain internally. In addition, in cases where courts continue to evaluate internal complaints under the opposition clause, they should evaluate the reasonableness and specificity of employee complaints in light of how they are shaped by employer EEO policies. Unless retaliation law adjusts to keep pace with the EEO workplace, retaliation law will fall far short of the Supreme Court’s expressed aims and will function to legitimate discrimination law’s failings rather than to secure its enforcement.

I. THE RETALIATION REVIVAL

Retaliation law has been an active field lately. This Part summarizes developments in Supreme Court case law and in legal scholarship. Despite the pro-plaintiff decisions in the Court’s cases, its precedents continue to leave internal complaints of discrimination with significant gaps in legal protection. And despite their out-sized role in channeling employee complaints, internal EEO systems have not been the central focus of legal commentary on retaliation. As a result, the overarching message of a pro-plaintiff body of law collides with the actual experiences of many employees who forfeit meaningful protection from retaliation when they press their concerns about discrimination through internal EEO channels.

A. The Retaliation Docket in the Supreme Court

Since 2005, the Supreme Court has decided seven retaliation cases, a veritable bonanza given the size of the Court’s docket.¹⁸ The cases can be grouped into two

18. That number has now reached eight, with the *Nassar* case, which was decided while this Article was being finalized. *See supra* note 1. This case will likely dampen the Court’s reputation for being pro-employee in retaliation cases. However, in following the theory of causation first set down in *Gross v. FBL Financial Services*, 557 U.S. 167 (2009), the *Nassar* decision likely reflects the Court’s strict approach to causation in a discrimination statute,

classes. The first group addresses the question of whether protection from retaliation follows implicitly from a general ban on discrimination that does not mention retaliation. A second set of cases required the Court to determine the scope of a specific provision covering retaliation. In both groups of cases, the Court dodged strict textual arguments to embrace broad readings of the statutes, highlighting the need for adequate protection in order to ensure effective enforcement of statutory bans on discrimination.

The cases in the first group—*Jackson v. Birmingham Board of Education*,¹⁹ *CBOCS West, Inc. v. Humphries*,²⁰ and *Gomez-Perez v. Potter*²¹—involve the nature of the relationship between retaliation and discrimination. In *Jackson*, a former girls' basketball coach lost his coaching position after he advocated his team's right to equal treatment under Title IX.²² The lower court had ruled that Title IX, which prohibits discrimination because of sex, does not support a claim for retaliation. In a 5-4 decision, the Supreme Court disagreed. Unlike Title VII, Title IX contains an implied private right of action, so Congress's failure to mention retaliation in the statute was not dispositive, the Court reasoned.²³ That left the Court to consider the nature of the relationship between a general ban on discrimination and a retaliation claim. With cryptic reasoning, the Court asserted that retaliation for complaining about sex discrimination is a form of sex discrimination itself.²⁴ The Court's logic is underwhelming, as it turns on the illegality of the discriminatory practice underlying the complaint, even though courts have never required proof of unlawful discrimination as a predicate to a retaliation claim.²⁵ Indeed, in *Jackson* itself, the Court did not examine the merits of the coach's discrimination complaint in upholding the retaliation claim. The Court's primary concern was not theoretical consistency, but rather ensuring that the statute could be effectively enforced. This led the Court to extend protection beyond the victims of sex discrimination to include complainants such as Coach Jackson. While the connections between discrimination and retaliation are under-theorized, the Court's opinion reflects the very real and important concern that unchecked retaliation would eviscerate the effective enforcement of the statute.

The next two cases, decided three years after *Jackson*, were somewhat easier for the Court to decide, but still involved textual hurdles. In *CBOCS West, Inc. v. Humphries*,²⁶ the Court had to decide whether 42 U.S.C. § 1981, a Reconstruction-era statute prohibiting race discrimination in the creation and enforcement of contracts, supported a retaliation claim. Like Title IX, the statute did not mention retaliation. Along with *Jackson*, the Court relied on an older precedent for support.

rather than a wholesale backpedaling in retaliation cases more specifically.

19. 544 U.S. 167 (2005).

20. 553 U.S. 442 (2008).

21. 553 U.S. 474 (2008).

22. He retained his position as a teacher, but lost the supplemental pay and responsibilities attached to the coaching position. *Jackson*, 544 U.S. at 172.

23. *Id.* at 174–75.

24. *Id.* at 173–74, 178.

25. *See id.* at 185–87 (Thomas, J., dissenting). For a critique of the Court's reasoning, supplemented with a theoretical justification for recognizing the retaliation claim, see Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18 (2005).

26. 553 U.S. 442 (2008).

Decades earlier, in *Sullivan v. Little Hunting Park, Inc.*,²⁷ the Court construed a similarly worded statute—42 U.S.C. § 1982, barring race discrimination in contracts for property rights—to support a white lessor’s challenge to retaliatory actions when he rented his house to a black man. At the time, the Court invoked the doctrine of third-party standing, allowing the white lessor to bring a race discrimination claim.²⁸ The *Humphries* Court now explained the case as involving retaliation, citing *Jackson* in support of this reading.²⁹ This time, only Justices Thomas and Scalia dissented, arguing that the text, which guarantees to “all persons” the “same right” to contract as “white citizens,” encompasses only race discrimination and not retaliation.³⁰ The majority’s broader reading traced back to the same concerns about effective enforcement underlying its earlier decision in *Sullivan*.

A more recent enactment, the federal employment provision of the Age Discrimination in Employment Act (ADEA), presented the Court with a similar but somewhat harder problem. Although the ADEA’s general provisions include a section forbidding retaliation, the 1974 amendment adding coverage of federal sector workers did not. This provision is worded more simply, forbidding “discrimination based on age” without detailing specific practices or mentioning retaliation.³¹ In *Gomez-Perez v. Potter*,³² decided the same term as *Humphries*, the Court held that this provision implicitly encompasses protection from retaliation. This time three Justices dissented, with Chief Justice Roberts joining the two *Humphries* dissenters, arguing that the inclusion of a retaliation provision elsewhere in the statute foreclosed finding retaliation implicitly covered.³³ The majority’s way around this textual roadblock was to circle back to Congress’ choice of a broad general ban on discrimination, and its determination in *Jackson* that such a broad ban implicitly encompasses retaliation. The Court also noted that the omission was unsurprising given the choice of general language in lieu of the detailed listing of specific practices elsewhere in the statute.³⁴

In all three cases, the Court took a purposive approach to the statutes, recognizing protection from retaliation as necessary and implicit in a ban on discrimination where not otherwise excluded. While essential for securing any retaliation protections at all under these provisions, these cases did not address the scope of protections provided or how they apply to internal complaints.

In the second set of cases, the statute’s coverage of retaliation was a given, but the Court had to address disputes about the scope of protection provided. Again, the Court decided each case in favor of the plaintiff. In the first, *Burlington Northern & Santa Fe Railway Co. v. White*,³⁵ the Court rejected the strict material adversity test some lower courts had embraced under Title VII, in which retaliation is actionable

27. 396 U.S. 229 (1969).

28. *Id.* at 237.

29. *Humphries*, 553 U.S. at 451.

30. *Id.* at 457–73 (Thomas & Scalia, JJ., dissenting).

31. The federal sector provision is 29 U.S.C. § 633a(a) (2006).

32. 553 U.S. 474 (2008).

33. *Id.* at 496–500 (Roberts, C.J., dissenting).

34. *Id.* at 486–88 (majority opinion).

35. 548 U.S. 53 (2006).

only if it alters the terms and conditions of employment. Instead, the Court took a more liberal approach, tying material adversity to the purpose of the retaliation claim.³⁶ The standard the Court adopted reaches retaliatory acts that “could well dissuade a reasonable worker from making or supporting a charge of discrimination.”³⁷ The Court was careful to explain that the standard applies objectively, but in light of the plaintiff’s circumstances.³⁸ This time the Court was on firm textual ground in refusing to tie the threshold for retaliation to the differently worded antidiscrimination provision, but the ruling was also supported by the purpose of enabling strong enforcement of the statute.³⁹

Three years later, in *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*,⁴⁰ the Court again rejected a stingy reading of Title VII’s retaliation provision that would have undercut enforcement of the statute. In that case, the plaintiff was a witness, at the behest of the employer, in an internal investigation into sexual harassment charges brought by a colleague. The Sixth Circuit had ruled that participation as a witness did not amount to the kind of “active” or “overt” opposition to discrimination that the statute protected.⁴¹ The Supreme Court rejected this interpretation, focusing on the mischief that would ensue if employers could freely retaliate against participating witnesses in an internal investigation into a discrimination complaint. The Court cited the “ordinary meaning” of the term “oppose,” but the policy implications of an alternative interpretation also informed the Court’s understanding of the term.⁴² The Court described as “freakish” a rule that would protect “an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when her boss asks a question.”⁴³

A tougher obstacle to a broad reading of Title VII’s retaliation provision presented itself in *Thompson v. North American Stainless, LP*.⁴⁴ That case required the Court to decide an issue that had long vexed the lower courts: whether retaliation against someone other than the plaintiff, as a way of punishing the plaintiff by association, is actionable under Title VII. By its terms, Title VII protects only those individuals who engage in protected activity. Accordingly, the lower court ruled that an employee who did not complain about discrimination could not sue for retaliation when he was terminated, allegedly due to his fiancé’s discrimination charge.⁴⁵ The Court found a path around this unpalatable result by using a different section of the statute setting out remedies for a “person aggrieved,” and by defining that provision to include persons “within the zone of

36. *Id.* at 68.

37. *Id.* at 57.

38. *Id.* at 69–71.

39. *Id.* at 62–63.

40. 555 U.S. 271 (2009).

41. *Crawford v. Metro. Gov’t of Nashville & Davidson Cnty.*, 211 F. App’x 373, 376 (6th Cir. 2005), *rev’d*, 555 U.S. 271 (2009).

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

43. *Id.* at 278.

44. 131 S. Ct. 863 (2011).

45. *Thompson v. N. Am. Stainless, LP*, 567 F.3d 804 (6th Cir. 2009), *rev’d*, 131 S. Ct. 863 (2011).

interests” of the statute.⁴⁶ This necessarily includes an employee who suffers harm because of his relationship to the complainant, the Court reasoned, permitting the claim to proceed as a third-party claim for the violation of the complainant’s rights to be free from retaliation. The “zone of interests” test invited the Court’s inquiry into the purpose of the statute, which strongly supported its result.⁴⁷ Otherwise, a spiteful employer could punish complaints by targeting an employee in a close relationship with the complainant.⁴⁸

Finally and most recently, in *Kasten v. Saint-Gobain Performance Plastics Corp.*,⁴⁹ the Court interpreted the retaliation provision of the Fair Labor Standards Act (FLSA). Although not a discrimination statute per se, dealing mostly with wage and hour practices, the FLSA was amended in 1963 to include the Equal Pay Act, which covers pay discrimination between women and men.⁵⁰ Accordingly, the case sits among the class of cases in this time span extending protection from retaliation to challenging discrimination. Of all the cases, this one required the starkest choice between a literal reading and a purposive approach to statutory interpretation. The FLSA’s retaliation provision forbids an employer to “discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under” the statute.⁵¹ The language “filed any complaint” was the stumbling block, since the plaintiff had only complained verbally to a supervisor, following the company’s internal grievance policy. The lower court ruled that the language “filed any complaint” did not encompass oral complaints.⁵² The Supreme Court disagreed, citing the circuit split on the issue to “conclude that the language of the provision, considered in isolation, may be open to competing interpretations.”⁵³ But while the Court made an attempt to counterbalance the dictionary definition of “filed” with more obscure usages, its interpretation reflected attention to the policies behind the Act and how they would be thwarted if oral complaints were not covered.⁵⁴

Together, these seven cases give the impression of a Court strongly guided by the policy objectives of retaliation law and cognizant of the real-world setting in which retaliation takes place. The cases do not come entirely out of the blue. An earlier case, *Robinson v. Shell Oil Co.*,⁵⁵ read the term “employees” broadly enough to include former employees who experience postemployment retaliation, influenced largely by the policies underlying the statute. But the sheer number of

46. *Thompson*, 131 S. Ct. at 870.

47. *Id.*

48. Justice Scalia, a strong proponent of textualism, authored the Court’s opinion. *Id.* at 866.

49. 131 S. Ct. 1325 (2011).

50. 29 U.S.C. § 206(d)(1) (2006).

51. 29 U.S.C. § 215(a)(3) (2006).

52. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 570 F.3d 834, 838–40 (7th Cir. 2009), *vacated*, 131 S. Ct. 1325 (2011).

53. *Kasten*, 131 S. Ct. at 1330–31.

54. *Id.* at 1333–34. The Court side-stepped the employer’s alternative argument, deeming it waived, that the Act does not cover complaints directed to employers at all, only those made to the government. The two dissenting Justices and the Seventh Circuit below agreed with this position.

55. 519 U.S. 337 (1997).

the cases and their common theme, rejecting narrow textual readings, strike a seemingly new—or at least louder—chord.

Despite their pro-employee bent, none of these cases closes the gap in retaliation law addressed below: the inadequate protection for employees who complain internally to their employer instead of externally to a government agency or court. All but two of the Court's decisions say nothing about protection of internal complaints. And even the two that do, *Crawford* and *Kasten*, stop short of addressing the doctrinal challenges employees face in bringing retaliation claims based on internal complaints.⁵⁶ While both cases are necessary and welcome decisions for employees, since they reject alternative rulings that would have barred some complainants from any protection whatsoever (witnesses in internal investigations in *Crawford* and oral complainants challenging FLSA violations in *Kasten*), they do not address the doctrinal hurdles discussed below that employees must clear in bringing such claims.

While these seven cases together set up a laudable image of an anti-retaliation Court, they are overshadowed in their actual impact by one outlier in this plaintiff-friendly show, a case decided over a decade ago. In *Clark County School District v. Breeden*,⁵⁷ decided in 2001, the Court set lower courts on a path of markedly different doctrinal protections for internal discrimination complaints versus external complaints. The *Breeden* case is discussed in greater detail below, but its primary significance is to deny retaliation protection for internal complaints if the complainant lacked an objectively reasonable belief that the employer engaged in unlawful discrimination.⁵⁸ The decision has had a devastating impact for employees complaining internally about discrimination, as discussed in Part IV below, but it has done little to temper positive reactions to the Court's seven recent decisions. Now more than twelve years old, *Breeden* has faded into the background, where it remains, shrouded in the sheep's clothing of a per curiam opinion. While criticism of *Breeden* has sharpened somewhat in recent years, it has not detracted from the story line of a plaintiff-friendly Court in retaliation cases. Legal scholars have taken notice of the Court's new tune.

B. Retaliation in the Legal Scholarship

The Court's burgeoning retaliation docket has been accompanied by a surge in scholarly interest in retaliation. The size of this body of work pales in comparison to the volume of literature on discrimination, but the uptick nevertheless marks a renewed interest among academics in studying the claim. Most scholars writing in the wake of the recent cases explore what they see as a contrast between the Court's pro-plaintiff retaliation cases and its more employer-friendly readings of discrimination law, lauding the Court's recognition of the realities of retaliation in the workplace.

56. See *Kasten*, 131 S. Ct. at 1329–30; *Crawford v. Metro. Gov't of Nashville & Davidson Cnty.*, 555 U.S. 271, 273–74, 280 (2009).

57. 532 U.S. 268 (2001).

58. *Id.* at 271.

Writing in this vein, Michael Zimmer describes the Court's recent retaliation decisions as pro-employee, from an otherwise pro-employer Court, and pragmatic, in the sense of considering the consequences of competing interpretations and weighing arguments about text, legislative intent, and precedent.⁵⁹ Professor Zimmer sees in the Justices' opinions a model of statutory interpretation that aims to determine the legislative purpose behind the statute and ensure that its enforcement scheme works consistently with that purpose.⁶⁰ He praises the Court's decisions for moving the law forward and creating potentially "robust" protection from retaliation.⁶¹ Other scholars have likewise remarked upon the pragmatic bent of the decisions, contrasting it with the Court's more formalist and pro-employer approach to employment discrimination cases.⁶²

Richard Moberly joins in describing the Court's retaliation cases as pro-employee, but goes a step further to articulate a guiding theory beneath the Court's decisions: an anti-retaliation principle that is pro-law enforcement as its guiding norm.⁶³ Viewed through this lens, the Court treats retaliation law as a law-enforcement tool that benefits society and the legal system, and not just as a balancing act between employee rights and employer prerogatives. Professor Moberly distinguishes this core principle from one that is guided by the substantive norms of antidiscrimination law. He takes as the lesson from the Court's retaliation precedents "that the Court rightly values retaliation protection" for its enhancement of law enforcement.⁶⁴ Richard Carlson joins in viewing the enhancement of law enforcement as the guiding norm animating the Court's retaliation precedents, which he discusses in terms of protecting "citizen employees."⁶⁵ While Professor Carlson sees greater ambivalence in the law's overall protection of employees, he holds up Title VII retaliation law as a robust example against which other areas of employment law fail to measure up.⁶⁶

Other scholars have addressed particular retaliation decisions, raising questions about the scope of the rulings, while expressing general agreement with the overall pro-employee tenor of the Court's decisions. Matthew Green has explored the question of what counts as "opposition" after *Crawford*,⁶⁷ and discussed what kinds

59. Michael J. Zimmer, *A Pro-Employee Supreme Court?: The Retaliation Decisions*, 60 S.C. L. REV. 917 (2009).

60. *Id.* at 924.

61. *Id.* at 923.

62. See, e.g., Matthew W. Green, Jr., *Family, Cubicle-Mate and Everyone in Between: A Novel Approach to Protecting Employees from Third-Party Retaliation Under Title VII and Kindred Statutes*, 30 QUINNIPIAC L. REV. 249, 283–84, 299 (2012); Alex B. Long, *Employment Retaliation and the Accident of Text*, 90 OR. L. REV. 525 (2011); Michael Selmi, *The 2007-2008 Term: The Government Changes Its Tune and the Supreme Court Takes a Pragmatic Turn*, 12 EMP. RTS. & EMP. POL'Y J. 161 (2008); Charles A. Shanor, *Employment Cases from the 2007-2008 Supreme Court Term*, 24 LAB. LAW. 147 (2008).

63. Richard Moberly, *The Supreme Court's Antiretaliation Principle*, 61 CASE W. RES. L. REV. 375 (2010).

64. *Id.* at 451.

65. Richard R. Carlson, *Citizen Employees*, 70 LA. L. REV. 237 (2009).

66. *Id.* at 243 ("There is no master anti-retaliation law of the order of Title VII to fill the gaps . . .").

67. Matthew W. Green, Jr., *Express Yourself: Striking a Balance Between Silence and*

of relationships are protected from third-party retaliation after the Court's ruling in *Thompson*.⁶⁸ Jessica Fink has also addressed the question of third-party relationships, taking a narrower view than Professor Green does of the relationships protected under *Thompson*.⁶⁹ Finally, Sandra Sperino has raised questions about agency standards for determining liability for retaliation after *Burlington Northern*, pointing to a potential disconnect if liability for retaliatory harassment proceeds on a different course than sexual harassment.⁷⁰ While articulating lingering uncertainty and discussing ways to fill in the gaps, these scholars have not taken issue with the general story line of a pro-plaintiff tilt in the Court's recent retaliation jurisprudence.⁷¹

The major exception to the pro-employee view of retaliation law from the academy takes the form of critiques of the Court's earlier decision in *Clark County School District v. Breeden*,⁷² a case discussed in detail in Part III.A. Even here, however, the case is treated as an anomaly in an otherwise pro-employee body of law, rather than as a major impediment to the law's overarching protection of employees.⁷³ Despite registering dissatisfaction with the decision, the critiques of *Breeden* have not captured the magnitude of the problem with retaliation law and its interaction with employers' internal EEO processes.

In the sections that follow, this Article takes a broader lens in examining just how badly retaliation law fits with the proliferation of internal employer processes for addressing discrimination. In doing so, it provides a correction to the overly optimistic view that the Supreme Court has created a plaintiff-friendly body of law

Active, Purposive Opposition Under Title VII's Anti-Retaliation Provision, 28 HOFSTRA LAB. & EMP. L.J. 107, 150–51 (2010) (arguing for a standard requiring expressive activity, but rejecting a stricter “active and purposive” standard).

68. Green, *supra* note 62, at 251–52 (arguing for a broad standard inclusive of coworker relationships in applying *Thompson*'s protection from third-party retaliation).

69. See Jessica K. Fink, *Protected by Association? The Supreme Court's Incomplete Approach to Defining the Scope of the Third-Party Retaliation Doctrine*, 63 HASTINGS L.J. 521 (2012) (arguing for limits on protected relationships derived from the doctrine of negligent infliction of emotional distress).

70. Sandra F. Sperino, *The 'Disappearing' Dilemma: Why Agency Principles Should Now Take Center Stage in Retaliation Cases*, 57 U. KAN. L. REV. 157 (2008) (arguing for applying the *Ellerth/Faragher* liability standards to retaliation claims).

71. See, e.g., Melissa Hart, *Procedural Extremism: The Supreme Court's 2008-2009 Labor and Employment Cases*, 13 EMP. RTS. & EMP. POL'Y J. 253 (2009).

72. 532 U.S. 268 (2001); see Brianne J. Gorod, *Rejecting “Reasonableness”: A New Look at Title VII's Anti-Retaliation Provision*, 56 AM. U. L. REV. 1469 (2007); Alex B. Long, *The Troublemaker's Friend: Retaliation Against Third Parties and the Right of Association in the Workplace*, 59 FLA. L. REV. 931, 955 (2007); Lawrence D. Rosenthal, *To Report or Not to Report: The Case for Eliminating the Objectively Reasonable Requirement for Opposition Activities Under Title VII's Anti-Retaliation Provision*, 39 ARIZ. ST. L.J. 1127 (2007).

73. See, e.g., Moberly, *supra* note 63, at 389 n.71 (stating that “*Breeden* likely does not represent a serious deviation from the Antiretaliation Principle,” and citing commentators' belief that *Breeden* “may simply be a case of unsympathetic plaintiffs making “bad law,”” rather than a “signal [of] the Supreme Court's hostility to retaliation cases in general.”) (quoting MARK A. ROTHSTEIN, CHARLES B. CRAVER, ELINOR P. SCHROEDER & ELAINE W. SHOBEN, *EMPLOYMENT LAW* 160 (3d ed. 2005)).

protecting employees from retaliation for challenging employment discrimination. Although the seven recent Supreme Court decisions discussed above are indeed pro-employee and pragmatic insofar as they go, focusing on the Court's decisions misses the forest for the trees. As applied in the lower courts, the law falls far short of a pragmatist's desire for retaliation protections that cohere with the purpose of antidiscrimination statutes. Beneath the pro-plaintiff veneer is a hornet's nest of problems. These failings have left a much greater mark on the law in practice than the Supreme Court's exhortations about the importance of protecting employees from retaliation. Before turning to the law's doctrinal failings, it is important to acknowledge just how pervasive and influential internal EEO processes have become.

II. A BRIEF OVERVIEW OF THE EEO WORKPLACE

Perhaps the most significant development in employment discrimination law in the past two decades is the extent to which internal EEO policies and complaint procedures have become normalized in the American workplace. They are overseen and implemented by compliance personnel with responsibility over EEO matters, including but not limited to the legal requirements of nondiscrimination. A range of legal incentives strongly encourage employers to adopt and publicize these policies, and encourage employees to use them.

A. Legal Incentives for Antidiscrimination Policies and Complaint Procedures

Of the many ways the law incentivizes employer nondiscrimination policies, the most well-known apply to sexual harassment policies. In a pair of cases decided on the same day in 1998, the Supreme Court incorporated the existence of employer policies into the legal framework for determining employer liability for sexual harassment. Both *Burlington Industries, Inc. v. Ellerth*⁷⁴ and *Faragher v. City of Boca Raton*⁷⁵ involved allegations of a supervisor's sexual harassment of a subordinate. Although the Supreme Court decided in 1986 that such harassment violates Title VII, it did not at that time decide on a liability standard for such cases, indicating only that agency principles would guide the development of the law.⁷⁶ In the intervening period, lower courts adopted a wide range of approaches, including predicating liability on the supervisor's use of the agency relation to further the harassment, a standard tantamount to automatic liability.⁷⁷ The Court reined in this more expansive approach to liability in these twin cases, giving

74. 524 U.S. 742 (1998).

75. 524 U.S. 775 (1998).

76. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986). The Court rejected the employer's argument that the bank's sexual harassment policy should immunize it from liability, noting the policy's deficiency in requiring reporting to the target's supervisor, which in that case would have meant the harasser himself. In an aside, the Court suggested the argument would have been "substantially stronger" if the policy had been better designed to encourage victims to come forward. *Id.* at 73.

77. *See, e.g., Karibian v. Columbia Univ.*, 14 F.3d 773 (2d Cir. 1994).

employers an affirmative defense in cases where no tangible employment action was taken.

The affirmative defense has two prongs: first, that the employer acted reasonably to prevent and correct harassment; and second, that the employee unreasonably failed to take advantage of the employer's channels to prevent or correct harm.⁷⁸ Employers can meet the first prong by having an adequate policy and complaint procedure for reporting sexual harassment. The second prong is designed to encourage employees to use the employer's complaint process, although, as much scholarship documents, many employees do not, often for good reason.⁷⁹ Since courts strictly apply prong two to employees who do not promptly report harassment through employer channels, employers often escape liability by having a policy and complaint procedure for addressing sexual harassment.⁸⁰ Despite the origin of the affirmative defense as a limitation to vicarious liability for supervisor harassment, lower courts are increasingly using employer policies to mitigate liability in cases involving coworker sexual harassment too.⁸¹ With the prominent role such policies now play in sexual harassment cases, it would be foolhardy for an employer not to have such a policy.⁸²

Sexual harassment law is the beginning, not the end, of the legal incentives for employer policies and complaint procedures. For starters, the affirmative defense applies to all forms of harassment covered by discrimination law, not just sexual harassment. So employer policies on racial harassment and other forms of actionable harassment are also incentivized through the same employer liability standards as those adopted for sexual harassment. And regardless of the type of harassment involved, employer liability for a constructive discharge, absent a

78. See *Faragher*, 524 U.S. at 807; *Burlington*, 524 U.S. at 765.

79. See, e.g., *Lissau v. Southern Food Serv., Inc.*, 159 F.3d 177, 182 (4th Cir. 1998); *Green*, *supra* note 62, n.253. Courts can be tough on employees who do not report sexual harassment through employer grievance policies. See, e.g., *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262 (4th Cir. 2001) (plaintiff's failure to report alleged harasser because he was close friends with the company president and vice-president was not reasonable); *Matvia v. Bald Head Island Mgt., Inc.*, 259 F.3d 261 (4th Cir. 2001) (plaintiff did not act reasonably in delaying reporting supervisor's sexual harassment).

80. See Susan Bisom-Rapp, *An Ounce of Prevention Is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law*, 22 BERKELEY J. EMP. & LAB. L. 1, 5–6 (2001).

81. E.g., *Hall v. Bodine Elec. Co.*, 276 F.3d 345, 356 (7th Cir. 2002) (explaining that employer liability for coworker harassment depends on whether the employer took "reasonable steps to discover and rectify acts of sexual harassment," which turns on "whether the employer designated a channel for complaints of harassment" (internal quotation marks omitted)); *Madray v. Publix Supermarkets*, 208 F.3d 1290 (11th Cir. 2000) (employer not liable under the knew or should have known standard where plaintiff failed to report the harassment to the point-person identified in the employer's sexual harassment policy).

82. See, e.g., *Crawford v. Metro. Gov't of Nashville & Davidson Cnty.*, 555 U.S. 271, 278 (2009) (rejecting employer's argument that applying the opposition clause to protect witnesses in employer investigations would discourage employers from investigating at all, and explaining that the argument "underestimates the incentive" to have policies and do such investigations under *Ellerth* and *Faragher*).

tangible employment action, is also limited by the affirmative defense, again making employer policies and complaint procedures highly relevant to an employer's liability risk.⁸³

More broadly still, the role of employer policies in limiting liability risks is not limited to harassment cases. Employer policies are highly relevant to punitive damages for all types of discrimination. In Title VII cases, in order to recover punitive damages, the plaintiff must show that the employer acted in bad faith or with reckless disregard of employee rights.⁸⁴ In a 1999 decision, the Supreme Court explained that employers can avoid such a finding if they "adopt anti-discrimination policies and . . . educate their personnel on Title VII's prohibitions."⁸⁵ This standard encourages employers to have broad policies covering all types of actionable discrimination, not just harassment.

In addition to judicially crafted liability rules, the Equal Employment Opportunity Commission (EEOC) also encourages employers to adopt nondiscrimination policies and grievance procedures and to conduct regular trainings to prevent discrimination.⁸⁶ As if making good on this recommendation, empirical research has found that the EEOC is significantly less likely to find "cause" for discrimination in charges filed against employers who have EEO policies in place than in charges filed against employers who do not.⁸⁷ As this finding suggests, the incentives for employers to adopt nondiscrimination policies and complaint procedures go beyond the strictly doctrinal. Even when not directly tied to a liability standard, internal policies provide employers with a certain amount of insulation from legal claims. By establishing EEO offices, adopting affirmative action plans, and having policies and complaint processes for addressing discrimination, employers can demonstrate a visible commitment to nondiscrimination when legal challenges are brought.⁸⁸ Employers with such policies achieve better outcomes in the legal system than those without them.⁸⁹

One reason for this is that the most common type of discrimination complaint, disparate treatment, requires challengers to prove intentional discrimination. Legal actors take employer EEO policies and grievance procedures as an indication of the absence of a discriminatory intention.⁹⁰ As Lauren Edelman and her colleagues

83. Pa. State Police v. Suders, 542 U.S. 129, 145 (2004).

84. Kolstad v. Am. Dental Ass'n, 527 U.S. 526 (1999).

85. *Id.* at 545.

86. *E.g.*, EEOC, EEOC COMPLIANCE MANUAL, NO. 915.003, SECTION 15: RACE & COLOR DISCRIMINATION 1104-21 (Apr. 19, 2006), available at eeoc.gov/policy/docs/race-color.html; EEOC Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors, 8 Fair Empl. Prac. Manual (BNA) No. 966, at 405:7651, 7661 (July 1999).

87. C. Elizabeth Hirsh & Sabino Kornrich, *The Context of Discrimination: Workplace Conditions, Institutional Environments, and Sex and Race Discrimination Charges*, 113 AM. J. SOCIOLOGY 1394, 1424-25 (2008).

88. C. Elizabeth Hirsh, *Settling for Less? Organizational Determinants of Discrimination-Charge Outcomes*, 42 LAW & SOC'Y REV. 239 (2008).

89. *Id.*

90. See Lauren B. Edelman, Linda H. Krieger, Scott R. Eliason, Catherine R. Albiston & Virginia Mellema, *When Organizations Rule: Judicial Deference to Institutionalized Employment Structures*, 117 AM. J. SOCIOLOGY 888, 906, 929-30 (2011).

have shown, employer EEO processes have greatly influenced legal norms and understandings about what it means to comply with antidiscrimination law—so much so that judges have come to equate the presence of such policies with legal compliance itself.⁹¹ As a result, “grievance procedures have emerged over the past few decades as the primary symbol of nondiscrimination and as the most rational way for employers to insulate themselves from legal liability.”⁹² This is true not just for sexual harassment policies, but employer nondiscrimination policies in general.⁹³

Picking up on this theme, Frank Dobbin’s book, *Inventing Equal Opportunity*, offers a historical view of the role personnel specialists, styled as equal opportunity consultants or (later) diversity consultants, have played in shaping understandings of, and compliance with, discrimination law.⁹⁴ In his account, the combination of a broad statutory framework and a weak regulatory state left a vacuum in which employers responded to legal uncertainty by delegating authority to personnel professionals to develop detailed internal regulatory programs.⁹⁵ In the process, employers did not merely respond to legal mandates, but played a key role in defining the meaning of discrimination. Courts responded, in turn, with legal rules that rewarded what proactive employers were already doing. Dobbin contends that the proliferation of employer EEO strategies—including policies, grievance procedures, and training programs—was not merely a response to the development of discrimination law but a driving force in the law’s development.⁹⁶

Whether a response to legal incentives or an agent in their development, employer policies for handling discrimination complaints are now standard fare in the American workplace. They simultaneously reflect legal incentives, shape the meaning of the law’s requirements, and determine institutional compliance. As Dobbin summarizes the extent of their influence, both “[j]ob hunters and judges are suspicious of firms that don’t have them.”⁹⁷

91. Lauren B. Edelman, *Law at Work: The Endogenous Construction of Civil Rights*, in HANDBOOK OF EMPLOYMENT DISCRIMINATION RESEARCH 337 (Laura Beth Nielson & Robert L. Nelson eds., 2005); Lauren B. Edelman, Christopher Uggen & Howard S. Erlanger, *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, 105 AM. J. SOC. 406, 407 (1999) (discussing the great weight given to the existence of antidiscrimination grievance procedures in assessing compliance with antidiscrimination law).

92. Edelman et al., *The Endogeneity of Legal Regulation*, *supra* note 91, at 407.

93. Lauren B. Edelman, *Rivers of Law and Contested Terrain: A Law and Society Approach to Economic Rationality*, 38 LAW & SOC’Y REV. 181, 190 (2004).

94. FRANK DOBBIN, *INVENTING EQUAL OPPORTUNITY* (2009).

95. One of Dobbin’s insights in telling this history is that lawyers, who were more cautious about predicting how the law would develop, lost their authority to personnel professionals, who were bolder in asserting risk-management schemes, despite the lack of a clear legal basis for doing so. *Id.* at 1–21.

96. *Id.*

97. *Id.* at 2.

B. The Realities of EEO Governance

The EEO office is a fixture of the modern workplace. This is especially true for medium- and large-sized firms, but even companies too small to support an independent EEO office make sure that these responsibilities are handled by some staff person, along with other human resources matters.⁹⁸ At the heart of these responsibilities is the obligation to manage employer policies for addressing discrimination.⁹⁹

Sexual harassment policies and complaint procedures, supplemented with sexual harassment training programs for employees, are by now an established part of the legal landscape.¹⁰⁰ As early as 1993, a survey of human resources directors found that 95% of large employers, those with 500 or more employees, had policies specifically designed for handling sexual harassment complaints.¹⁰¹ And that was five years before the Supreme Court's decisions in *Ellerth* and *Faragher*. According to Dobbin, by 1998, when the two cases were decided, 95% of all employers (large and small) already had grievance procedures in place that could be used for reporting sexual harassment.¹⁰²

Sexual harassment policies tend to get the most attention, but employer policies do not stop there. Policies on harassment cover not just sexual harassment but also racial harassment and harassment based on other status characteristics.¹⁰³ Nor are employer policies limited to harassment. Beyond harassment, employer policies cover the gamut of potentially discriminatory practices of all kinds.¹⁰⁴ In addition to setting up policies and complaint procedures, many employers have training programs designed to prevent discrimination and manage intergroup relations, often styled "diversity training[s]."¹⁰⁵

Reliable data is hard to come by, but it is the rare employer today that lacks an internal policy and complaint procedure for addressing allegations of

98. *Id.* at 86–88, 95–97, 130–31.

99. *See id.* at 93–94; *see also* Crawford v. Metro. Gov't of Nashville and Davidson Cnty., Tenn., 555 U.S. 271, 278–79 (2009) (noting petitioner's brief's citation of "studies demonstrating that *Ellerth* and *Faragher* have prompted many employers to adopt or strengthen procedures for investigating, preventing, and correcting discriminatory conduct").

100. *See* Susan Bisom-Rapp, *Fixing Watches with Sledgehammers: The Questionable Embrace of Employee Sexual Harassment Training by the Legal Profession*, 24 U. ARK. LITTLE ROCK L. REV. 147, 147–55 (2001) (explaining the history of employers' embrace of sexual harassment policies, complaint procedures, and training programs).

101. Bonnie G. Mani, *The Employer's Advantage in Sexual Harassment Cases: How the Courts Have Discouraged the Victims of Sexual Harassment*, 24 REV. PUB. PERSONNEL ADMIN. 41, 45 (2004).

102. DOBBIN, *supra* note 94, at 4, 191; *see also id.* at 213 (noting that by 1997, 75% of employers in national sample had sexual harassment training and 96% had a sexual harassment grievance procedure).

103. *Id.* at 201 (explaining that human resources experts recommended broad harassment policies, not limited to sexual harassment but including other forms of harassment as well).

104. *Id.* at 93–94.

105. Marc Bendick, Jr., Mary Lou Egan & Suzanne M. Lofhjelm, *Workforce Diversity Training: From Anti-Discrimination Compliance to Organizational Development*, 24 HUM. RESOURCE PLAN., no. 2, 2001, at 10, 11.

discrimination in the workplace.¹⁰⁶ As these policies have proliferated, they have become increasingly dominant in shaping employee responses to discrimination. Employer policies and EEO staff encourage employees to raise their concerns through these internal channels instead of taking them outside the organization.¹⁰⁷ Few employees take the drastic step of formal legal action, such as filing a charge with the EEOC, to challenge discrimination and certainly not as a first resort.¹⁰⁸ Most workers, if they complain at all about perceived discrimination, first attempt to informally negotiate their rights.¹⁰⁹ Even if employees ultimately do seek legal recourse, they typically first try to address problems through their employers' internal complaint processes.¹¹⁰

Beyond shaping the process by which employees complain about discrimination, employer policies have had a marked effect on the culture of the workplace, including on how employees perceive equal opportunity and what it means to discriminate. As Frank Dobbin has pointed out, the law's open-ended ban on discrimination left room for personnel offices and EEO consultants to read their own content into the law.¹¹¹ Their interpretations often exceed the strict legal requirements of antidiscrimination law. For example, one comprehensive text written for human resources professionals describes civil rights laws as a general mandate for workplace fairness and diversity.¹¹² Referring to Title VII, the Equal Pay Act, and other federal nondiscrimination laws, the manual declares, "In combination these laws serve as levers to pry open the doors of economic opportunity for others to enter and to maintain reasonable working conditions once they are inside."¹¹³ Altogether, it concludes, federal nondiscrimination laws "can be

106. See Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 334–36 (2005).

107. Edelman et al., *The Endogeneity of Legal Regulation*, *supra* note 91, at 427–29.

108. Laura Beth Nielsen & Robert L. Nelson, *Scaling the Pyramid: A Sociolegal Model of Employment Discrimination Litigation*, in HANDBOOK OF EMPLOYMENT DISCRIMINATION RESEARCH, *supra* note 91, at 3, 30 (concluding from the available data that less than one percent of African American employees who believe they have experienced workplace discrimination file a charge with the EEOC); *cf.* Hirsh & Kornrich, *supra* note 87, at 1424–25 (noting that employees in EEO workplaces who experience discrimination are less likely to file formal legal charges with external enforcement agencies, such as the EEOC; of those who do, few are resolved with favorable outcomes).

109. See Catherine R. Albiston, *Bargaining in the Shadow of Social Institutions: Competing Discourses and Social Change in Workplace Mobilization of Civil Rights*, 39 LAW & SOC'Y REV. 11, 14–15 (2005).

110. Moberly, *supra* note 63, at 435 ("Social science studies, for example, suggest that most reports of wrongdoing begin as internal reports."); *see also* Sonia Goltz, *Women's Appeals for Equity at American Universities*, 58 HUM. REL. 763, 771–73 (2005) (finding that in a study of fourteen women's experiences suing their universities for discrimination, all fourteen turned to internal informal processes first).

111. See DOBBIN, *supra* note 94, at 4–5; *id.* at 6 (describing how discrimination has come to be understood as the absence of measures recommended by employer EEO personnel).

112. Mary E. Guy & Meredith A. Newman, *Valuing Diversity in the Changing Workplace*, in HANDBOOK OF HUMAN RESOURCE MANAGEMENT IN GOVERNMENT 149 (Stephen E. Condrey ed., 3d ed. 2010).

113. *Id.* at 165.

viewed as a collective wind sock, indicating the necessity to open the workplace to a more heterogeneous workforce.”¹¹⁴ In the sections that follow, this Article details several specific areas where EEO understandings diverge from judicial interpretations of the meaning of discrimination, with poor results for employees under retaliation law.

The gap is particularly problematic because the interpretations of EEO personnel have greatly shaped employee understandings of what it means to discriminate. Internal policies and training programs now likely play a bigger role in setting norms and behavior in the everyday workplace than the external law. As Dobbin puts it, by “operationalizing” antidiscrimination law, human resources staff and other EEO compliance personnel have greatly influenced how people understand workplace discrimination.¹¹⁵

Although the jury is still out on the effectiveness of these processes in preventing discrimination, the academic literature is skeptical at best.¹¹⁶ A common complaint is that these processes protect employers, giving the appearance of legitimacy, without helping the employees who use them.¹¹⁷ Employees report that employers frequently respond with retaliation and inaction.¹¹⁸ The literature on employee “voice” in organizations suggests that the mishandling of complaints is now the primary way that organizations manifest tolerance of discrimination, using terms for such reactions as “deaf ear syndrome” and “nullification.”¹¹⁹ On measures of job satisfaction, psychological well-being, and health, employees who pursue discrimination complaints with their employers generally fare worse than those who do not.¹²⁰

While the academic literature is largely critical of the effect of EEO policies in actually preventing and remedying discrimination, it has not examined the poor fit between these processes and the law’s protection against retaliation for the

114. *Id.* at 165–66.

115. DOBBIN, *supra* note 94, at 4–6.

116. *E.g., id.* at 21 (noting absence of research on the effectiveness of employer EEO policies and practices, but noting that “[w]hat we do know is discouraging”); *id.* at 219 (discussing skepticism in the literature about the effectiveness of sexual harassment policies); Bisom-Rapp, *supra* note 100, at 163–64 (arguing that training programs may create a false sense of security without reducing the incidence of sexual harassment); 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, 3–5 (2003) (questioning the effectiveness of internal complaint procedures and sexual harassment policies). *But see* Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 460–64 (2001) (discussing potential benefits of internalization of antidiscrimination regulation).

117. *E.g., Goltz, supra* note 110, at 786 (discussing a common impression by the women in the study that the internal complaint procedures were “designed primarily to discourage people from suing” and to create the appearance of fairness).

118. *Id.* at 776 (reporting the most common responses to informal complaints as retaliation, intimidation, inaction, and denying responsibility).

119. *Id.* at 764, 791; Karen P. Harlos, *When Organizational Voice Systems Fail: More on the Deaf-Ear Syndrome and Frustration Effects*, 37 J. APPLIED BEHAV. SCI. 324 (2001).

120. Goltz, *supra* note 110, at 765.

employees who use them. The next section addresses the mismatch between retaliation doctrine and the EEO workplace.

III. RETALIATION LAW IN THE EEO WORKPLACE

The starting point for understanding how retaliation law intersects with employer policies addressing discrimination is the law's distinction between internal and external complaints. Title VII's retaliation provision has two distinct clauses, the participation clause and the opposition clause. Complaints filed with a government enforcement agency or a court fall under the participation clause.¹²¹ Complaints made to the employer, either informally or through a formalized internal complaint process, fall under the opposition clause.¹²² To date, absent the prior filing of an external complaint with the EEOC or other relevant government agency, the lower courts have consistently placed internal complaints solely under the opposition clause and outside of the participation clause, while the Supreme Court has stayed silent on this issue.¹²³ The differentiation of internal and external complaints has its roots in the two separate clauses in Title VII, but it has worked its way into retaliation law under other statutes too, despite the absence of comparable statutory language.¹²⁴ Given the significance of internal EEO complaint processes in shaping discrimination claims, the dichotomy between the participation and opposition clauses is now the central defining feature of retaliation law.

Protection from retaliation is at its zenith for claims brought under the participation clause. An employee who files a complaint with the EEOC, a state fair employment agency, or a court has robust protection under this clause.¹²⁵ The opposition clause offers much more limited protection. Two doctrines in particular

121. 42 U.S.C. § 2000e-3(a) (2006) (protecting an employee from retaliation if he or she “has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter”).

122. *Id.* (making it unlawful “for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by [Title VII]”).

123. *Townsend v. Benjamin Enters., Inc.*, 679 F.3d 41, 49 (2d Cir. 2012) (so holding and collecting cases); *see also Crawford v. Metro. Gov't of Nashville and Davidson Cnty., Tenn.*, 555 U.S. 271, 280 (2009) (not deciding whether the plaintiff's participation in an internal employer investigation might also fall under the participation clause, since the claim could proceed under the opposition clause).

124. *Jackson v. GEO Grp., Inc.*, 312 F. App'x 229, 234 (11th Cir. 2009) (importing Title VII's reasonable belief requirement to retaliation claim under 42 U.S.C. § 1981); *Jordan v. Alt. Res. Corp.*, 458 F.3d 332, 343–44 (4th Cir. 2006) (same); *Mitchell v. Barnard Constr. Co.*, 107 Fair Empl. Prac. Cas. (BNA) 661, 664 (S.D. Fla. 2009) (same); *Bryant v. Gardner*, 587 F. Supp. 2d 951, 964 nn.5–6 (N.D. Ill. 2008) (same with respect to Title IX).

125. *See, e.g., Breeden v. Clark Cnty. Sch. Dist.*, 85 Fair Empl. Prac. Cas. (BNA) 726, 727 (9th Cir. 2000) (explaining that the opposition clause requires a reasonable belief in discrimination, but the participation clause does not), *rev'd per curiam on other grounds*, 532 U.S. 268 (2001); *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1312 (6th Cir. 1989) (discussing broad scope of the participation clause); *Pettway v. Am. Cast Iron Pipe Co.*, 411 F.2d 998, 1006 (5th Cir. 1969) (same).

restrict the scope of the opposition clause in ways likely to clash with EEO policies. First, employees lodging internal complaints must have an objectively reasonable belief that the conduct complained about was actually unlawful.¹²⁶ Second, they must make clear that the subject of the complaint is discrimination and not some more general concern.¹²⁷ The rest of this Part explores these two problems, which have the potential to derail the pragmatic path set by the Supreme Court's decisions.

A. "Tell Someone"/"How Could You Have Thought That?": The Reasonable Belief Trap and Employer EEO Policies

When legal scholars have criticized retaliation law, they have mostly taken issue with the reasonable belief doctrine. Several scholars have criticized lower court decisions for taking too narrow a view of reasonableness in gauging whether opposition to perceived discrimination qualifies as protected conduct.¹²⁸ In prior articles, I have argued that courts mistakenly judge reasonableness by imposing their own understanding of the law without taking into account the inherent ambiguity in the meaning of "discrimination," even as manifested in judicial opinions.¹²⁹ The more recent reasonable belief cases have only strengthened this view. My focus in this Article, however, is the troubling lack of attention courts pay to how employer EEO policies shape employee perceptions of, and responses to, discrimination. The gap between the broad scope of employer nondiscrimination policies and the much narrower category of actionable discrimination has not been sufficiently explored in the legal scholarship. This Part examines recent court decisions rejecting retaliation claims for lack of a reasonable belief in discrimination. As these cases illustrate, courts often fail to consider how employers' own policies and procedures shape employee understandings of discrimination, to the detriment of employees claiming retaliation.

With few exceptions, courts use the established legal meaning of discrimination, backed up by citations to case law, as the outer limit of reasonableness. An employee's broader understanding is deemed unreasonable, even if it dovetails with the approach taken in the employer's own EEO policies.

The trouble began with a seemingly innocuous Supreme Court decision, one apparently so noncontroversial that it came in the guise of a per curiam opinion. In *Clark County School District v. Breeden*,¹³⁰ the plaintiff repeatedly complained about one incident of mildly explicit sexual banter. The plaintiff, her male supervisor, and a male colleague had been in a meeting together reviewing job applicants' psychological evaluations. During the meeting, the plaintiff's supervisor read aloud a report from one of the files that the applicant had once said to a female coworker, "I hear making love to you is like making love to the Grand

126. See *infra* text accompanying notes 134–35.

127. See *infra* text accompanying notes 253–54.

128. See sources cited *supra* note 72.

129. Brake, *supra* note 25, at 82–83; Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859, 919 (2008).

130. 532 U.S. 268 (2001).

Canyon.”¹³¹ After reading the comment aloud, the supervisor looked at the plaintiff and said, “I don’t know what that means.”¹³² The coworker replied, “Well, I’ll tell you later,” and both men chuckled.¹³³ No further information is given about the incident, but apparently the plaintiff interpreted it as an offensive reference to female anatomy and objected to her male colleague’s reading of the comment aloud and the two men’s ensuing laughter. The plaintiff complained doggedly about the incident, first internally, and later by filing a formal sexual harassment charge with the state fair employment agency. In response to the internal complaint, the plaintiff alleged that the company changed her job duties. The Court evaluated this claim under the opposition clause and ruled that the plaintiff failed to prove that she engaged in protected activity because she lacked an objectively reasonable belief that the incident in question amounted to unlawful discrimination.¹³⁴ Judging the one incident against the severe or pervasive standard, the Court found it “at worst an ‘isolated incident[t]’” and concluded that no reasonable person could have believed that it created a hostile environment.¹³⁵

The case exemplifies the adage about bad facts making bad law. Clearly the Court was correct that the incident, standing alone, did not create an actionable hostile environment. The Court’s reasoning, however, laid the groundwork for future problems by focusing on the absence of enough incidents to meet the severity or pervasiveness threshold at the time that the plaintiff complained. The Court might have avoided future problems by deciding the case on narrower grounds, either ruling that the incident, ambiguous as it was, was not the type of conduct, even cumulatively, that could create a hostile environment, or rejecting the claim for lack of proof of causation. Instead, the case stands as a potent precedent for ruling against retaliation plaintiffs whose understanding of discrimination is broader than the courts’ narrower view.

Notably, the Court did not inquire into the existence of an employer policy on sexual harassment. However, the Ninth Circuit’s opinion noted the school district’s broadly worded policy on sexual harassment and counted it in support of the reasonableness of the plaintiff’s belief.¹³⁶ Explaining that the plaintiff consulted the policy before complaining, the court observed that the policy defined sexual harassment to include “uninvited sexual teasing, jokes, remarks, and questions,” concluding “it is possible that a reasonable person in Breedon’s position could have mistakenly believed that [her supervisor’s] behavior constituted unlawful sexual

131. *Id.* at 269. The disclosure was in response to a question about whether the applicant had ever told sexually explicit jokes in the workplace.

132. *Id.*

133. *Id.*

134. *Id.* at 270–71. The Court assumed, without deciding, that the reasonable belief standard governs, leaving open the possibility that the complained-of conduct must actually be unlawful. *Id.* at 270. The lower court decisions after *Breedon* have likewise assumed that the reasonable belief standard governs claims under the opposition clause.

135. *Id.* at 271 (quoting *Faragher v. Boca Raton*, 524 U.S. 775, 788 (1998) (alteration in original)).

136. *Breedon v. Clark Cnty. Sch. Dist.*, 85 Fair Empl. Prac. Cas. (BNA) 726, 728 (9th Cir. 2000), *rev’d per curiam on other grounds*, 532 U.S. 268 (2001).

harassment.”¹³⁷ The Supreme Court’s failure to consider the employer’s sexual harassment policy and its bearing on the employee’s belief has had ripple effects in the years since *Breedon* was decided. The discussion below shows how courts respond, in cases involving a wide range of discriminatory allegations, when plaintiffs’ beliefs about discrimination clash with those of the court, regardless of how well they mesh with the employer’s nondiscrimination policy.

1. Harassment Complaints

Not surprisingly, since *Breedon* itself involved a sexual harassment complaint, the reasonable belief requirement has spawned a now-sizeable body of cases in which internal complaints about harassment are unprotected because the underlying conduct was not severe or pervasive enough to be actionable. As in *Breedon*, employer policies on harassment do not enter into the courts’ analysis. Most of the time, courts do not even mention the existence of employer policies; when they do, it is by way of an aside instead of integrating them into the analysis of reasonableness.¹³⁸

One of the more troubling examples of the *Breedon* standard in action is the Fourth Circuit’s decision in *Jordan v. Alternative Resources Corp.*¹³⁹ In that case, the plaintiff, an African American male employee, complained after hearing a coworker’s racial slur. The incident occurred in the office break room, where a number of employees were gathered around a television set watching news of the capture of a notorious pair of snipers, both of whom were black, who had been terrorizing the D.C. metropolitan area. In the presence of the plaintiff, the coworker exclaimed, “They should put those two black monkeys in a cage with a bunch of black apes and let the apes f—k them.”¹⁴⁰ This remark bothered the plaintiff, and he discussed it with two other coworkers, who told him that this same coworker often made such comments. Following the employer’s harassment policy, the plaintiff reported the incident to management.¹⁴¹ He was subsequently terminated, allegedly in retaliation for his complaint.

Applying *Breedon*, the Fourth Circuit affirmed the dismissal of the complaint for failure to state a claim on the ground that the plaintiff lacked a reasonable belief that the coworker’s single outburst created a racially hostile environment. The court agreed that the coworker’s comment “was unacceptably crude and racist,” but called it “an isolated response” to the news coverage and a “far cry” from the severe or pervasive conduct that violates Title VII.¹⁴² While the court

137. *Id.*

138. *See infra* text accompanying notes 153–63.

139. 458 F.3d 332 (4th Cir. 2006).

140. *Id.* at 336.

141. Jordan worked as a network technician for Alternative Resources Corp. (ARC), which assigned him to do work at IBM’s office. He sued both entities, jointly, as his employers. The incident happened at IBM’s offices while Jordan was on assignment at IBM, and he reported the incident pursuant to IBM’s policy on harassment. *Id.*

142. *Id.* at 339–40.

acknowledged that repeated conduct of this ilk could potentially create a hostile environment, there was no proof that “a plan was in motion” to do so.¹⁴³

As an application of *Breeden*, the *Jordan* decision is troubling enough, illustrating the perils of applying this standard to a complaint about conduct that, when combined with more like it, might well create an actionable environment. More troubling still is the failure of the court to consider how the employer’s harassment policy shaped the reasonableness of the plaintiff’s response. *Jordan*’s employer had a fairly standard policy on harassment, obliging employees to report racially discriminatory harassment to management.¹⁴⁴ The existence of the policy, however, had no bearing on the court’s analysis of the reasonableness of the plaintiff’s belief, which was measured solely by the substantive law of racial harassment.¹⁴⁵

Like *Jordan*, some of the worst offenders among the reasonable belief cases involve complaints about harassment, both racial and sexual. Many of these cases involve much more objectionable behavior than the single, allegedly off-color remark and laughter that occurred in *Breeden*. The result is a catch-22 in which plaintiffs must promptly report harassment to preserve their right to sue under *Ellerth/Faragher*, but are unprotected from retaliation if they complain internally too soon, before the perceived harassment could be reasonably understood as severe or pervasive. Most of the legal scholarship critiquing the reasonable belief doctrine focuses on the narrow space left for employees to preserve their right to sue for sexual harassment without forfeiting protection from retaliation for complaining too soon.¹⁴⁶ While these critiques are important, there has not been enough attention to the role employer policies play in shaping employee perceptions of, and responses to, harassment.

Courts applying the reasonable belief doctrine to harassment complaints give scant attention to how employer policies define harassment and direct employees to handle it. The courts’ failure to do so is not surprising, since in *Breeden* itself the Supreme Court did not examine the employer’s policy. Taking this cue, lower courts have neglected to consider how employer harassment policies influence employees’ perceptions and responses. The following discussion highlights some of the more recent cases in this vein. The cases involve reports of racial as well as sexual harassment, and the strictness of the reasonable belief doctrine does not vary by the type of harassment alleged.

143. *Id.* at 340.

144. *Id.* at 350 (King, J., dissenting). Unfortunately, neither the majority nor the dissent included the actual language of the policy in their opinions—itsself an indication of judges’ refusal to permit employer policies to influence their views of the reasonableness of employees’ beliefs.

145. See *Jordan v. Alt. Res. Corp.*, 467 F.3d 378, 379–80 (4th Cir. 2006) (denying petition for rehearing en banc), *cert. denied*, 549 U.S. 1362 (2007). Judge King’s dissent reiterates the troubling implications of the ruling for the *Faragher/Ellerth* liability framework, in which employees lose the right to sue for harassment if they do not promptly report harassment pursuant to employer policies. *Id.* at 381 (King, J., dissenting).

146. See, e.g., B. Glenn George, *Revenge*, 83 TUL. L. REV. 439, 493–94 (2008) (arguing for a more generous interpretation of reasonableness in reporting sexual harassment in order to better cohere with the affirmative defense).

A typical case applying the reasonable belief doctrine to a racial harassment report is *Butler v. Alabama Department of Transportation*,¹⁴⁷ which is frequently cited and relied on by district courts. In this case, the plaintiff, an African American woman, complained about two racial slurs a white coworker made while they were driving back from lunch together. She alleged that she was fired for complaining about the coworker's use of a racist epithet. The jury found for the plaintiff on the retaliation claim, but the appellate court reversed. As the court saw it, the plaintiff's belief that two uses of an "ugly, racist" epithet created a hostile environment was "not even close" to being objectively reasonable.¹⁴⁸ Citing circuit precedent, the court found the conduct fell far short of the legal standard.¹⁴⁹ Significantly, the court evaluated the reasonableness of the plaintiff's belief without any reference to the existence or content of any employer policies covering racial harassment. As a state employer, there likely would have been a detailed nondiscrimination policy covering harassment, including racial harassment, and encouraging employees to report it. It would be curious and unusual if such a policy exempted lunch breaks or told employees not to bother if the harassment only amounted to two "ugly, racist" epithets.

The cases take a similar approach to employee complaints of sexual harassment. Another Eleventh Circuit case, *Henderson v. Waffle House, Inc.*,¹⁵⁰ is illustrative. There, the court ruled that the plaintiff, a waitress, could not have had a reasonable belief that the manager's demeaning comments about her breasts, combined with other sexually tinged comments, amounted to a hostile environment.¹⁵¹ Remarkably, the court upheld summary judgment for the employer despite the EEOC's issuance of a for-cause determination on the plaintiff's underlying sexual harassment charge. The court not only ruled against her on the harassment claim, but rejected her retaliation claim because it was *unreasonable* to believe that the harassment was unlawful.¹⁵² The court made no mention of a company policy covering sexual harassment in the workplace.

There are myriad cases like these that use the reasonable belief test to exclude allegations that fall short of actionable harassment but go well beyond what occurred in *Breeden*. In many cases, an employer policy on harassment is mentioned in the background but not considered in the court's analysis. In one of these, *Van Portfliet v. H&R Block Mortgage Corp.*,¹⁵³ the plaintiff, a male sales manager, reported two accounts of harassment relayed to him by a female loan manager whom he supervised. Both accounts involved their superior, a district manager. The first occurred at a company-sponsored happy hour, in which the district manager put his arm around the female loan officer and made an inappropriate remark.¹⁵⁴ The second happened that same evening, when the same

147. 536 F.3d 1209, 1214 (11th Cir. 2008).

148. *Id.* at 1213.

149. *Id.* at 1214.

150. 238 F. App'x 499 (11th Cir. 2007).

151. *Id.* at 503.

152. *Id.* at 501-03.

153. 101 Fair Empl. Prac. Cas. (BNA) 1294 (M.D. Fla. 2007), *aff'd per curiam*, 290 F. App'x 301 (11th Cir. 2008).

154. Specifically, the subject of the complaint was that the district manager, who was the

district manager made a racial slur in the presence of an African American loan officer.¹⁵⁵ After learning of these incidents, the plaintiff reported them to the human resources department. An investigation ensued, resulting in the district manager's termination. The plaintiff claimed that the new manager retaliated against him for his role in these events. The jury agreed, but the verdict was overturned for lack of a reasonable belief that the district manager had engaged in actionable harassment. As the court put it, "The notion that this conduct comes close to constituting unlawful sexual harassment is patently unreasonable."¹⁵⁶

In this case, the court acknowledged that the plaintiff had followed the company's harassment policy in reporting the two incidents to the company's human resources department.¹⁵⁷ That was the extent of the court's attention to the policy, however. It had no bearing on the court's analysis, which began from the premise that the reasonableness of the plaintiff's belief is measured by existing law.¹⁵⁸ Nor did the plaintiff receive any leniency for acting on behalf of people he supervised.¹⁵⁹ The court applied the reasonable belief doctrine with the same stringency as if he himself had experienced the offensive behaviors.

Other courts likewise ignore harassment policies in judging the reasonableness of employee beliefs about harassment. In *Hill v. Guyoungtech USA, Inc.*,¹⁶⁰ the court ruled that the plaintiff's complaint about her male manager slapping her on the buttocks lacked an objectively reasonable belief since it was a single incident. The court sounded almost gleeful in citing a plethora of precedents with detailed parentheticals describing more explicit and offensive sexual conduct where courts nonetheless granted summary judgment to employers for lack of sufficient severity or pervasiveness.¹⁶¹ Lest one misinterpret these citations for judicial approval of the behavior, the court added a disclaimer that the manager's "act of slapping [plaintiff] on the buttocks in an effort to make her comply with his demand [to pick up equipment that had spilled onto the floor] is certainly not condoned by this

plaintiff's supervisor, had put his arm around the female loan officer, pulled her into him, and said, "Why would you want to be with him [a male friend] when you can be with me?" 290 F. App'x at 302-03.

155. *Van Portfliet*, 101 Fair Empl. Prac. Cas. (BNA) at 1295-96.

156. *Id.* at 1299.

157. *Id.* at 1296, 1300-01.

158. *Id.* at 1298; *see also* George, *supra* note 146, at 487-89, 492 (discussing and critiquing *Van Portfliet* for not considering reasonableness from the perspective of the employer's sexual harassment policy, but limiting her critique of the reasonable belief doctrine to sexual harassment complaints).

159. In this case, the loan officer reportedly did not ask the plaintiff to report it. *Van Portfliet*, 101 Fair Empl. Prac. Cas. (BNA) at 1296. Nonetheless, an employer policy may not permit such allegations to be kept confidential and may instead place a duty on supervisors to report potential or suspected harassment. *See, e.g.*, Ellen McLaughlin & Carol Merchasin, *Training Becomes an Important Step to Avoid Liability*, NAT'L L.J., Jan. 29, 2001, at B10, available at http://www.seyfarth.com/dir_docs/publications/AttorneyPubs/McLaughlin.pdf (suggesting that managers and supervisors have a "heightened duty to report potential harassment or discrimination even if no complaint is made").

160. No. 07-0750-KD-M, 2008 U.S. Dist. LEXIS 69388 (S.D. Ala. Aug. 26, 2008).

161. *See id.* at *22-27 (citing cases with sexually explicit facts to support conclusion that the behavior, while reprehensible, was not actionable).

court, however, it was not an act which reasonably could be perceived as sexual harassment under Eleventh Circuit law.”¹⁶²

This court too observed that the company had a sexual harassment policy. In a cryptic description of the policy, the court noted that it instructed employees who believed they had experienced sexual harassment to report it to human resources, which the plaintiff did.¹⁶³ The court said nothing further about the substance of the policy or how the plaintiff understood it to apply to her. The policy had no effect on the court’s assessment of the reasonableness of the plaintiff’s belief that she had been harassed.

It is a common refrain in the reasonable belief cases involving harassment complaints that isolated or sporadic offensive comments do not meet the severity or pervasiveness test for a hostile environment, so objecting to them is not protected activity.¹⁶⁴ In none of these cases do the courts consider how the plaintiffs’ beliefs are influenced by employer policies on harassment.

Although these kinds of decisions have accelerated in the aftermath of *Breeden*, there was some movement in this direction even before. In one of the earliest, *Little v. United Technologies*,¹⁶⁵ the Eleventh Circuit ruled as a matter of first impression that an employee’s complaint about a coworker’s single racially offensive remark was not “protected activity” under the opposition clause.¹⁶⁶ The court reasoned that the incident was not an unlawful employment practice because an employer is liable for coworker harassment only if it knew or should have known of the harassment and failed to take prompt remedial action.¹⁶⁷ The decision leaves employees in a catch-22: in order to put the employer on notice of coworker harassment, an employee must report it. If the employer can retaliate against the reporting employee with impunity, on the theory that the harassment is not yet attributable to the employer, the chilling effect of potential retaliation could insulate

162. *Id.* at *30.

163. *Id.* at *11.

164. *E.g.*, *Session v. Montgomery Cnty. Sch. Bd.*, 462 F. App’x 323, 326 (4th Cir. 2012) (finding it was not reasonable to believe that two perceived insults about being light-skinned could have created a hostile environment); *Wilson v. Farley*, 203 F. App’x 239, 247–48 (11th Cir. 2006) (rejecting retaliation claim because white coworker’s single remark that he was tired of the plaintiff’s “black ass” did not support an objectively reasonable belief in a hostile work environment); *Robinson v. Nielsen Co.*, No. 3:10-CV-9, 2011 U.S. Dist. LEXIS 138077, at *17 (E.D. Va. Dec. 1, 2011) (holding that a single reference to the plaintiff, an African American woman, as “chocolate,” combined with a comment supporting Don Imus’s racial insult to the Rutgers women’s basketball team, were too isolated to support a reasonable belief in a racially hostile work environment); *Butts v. Ameripath, Inc.*, 794 F. Supp. 2d 1277, 1293 (S.D. Fla. 2011) (suggesting, in dicta, that one-time exposure to concededly offensive, racially insensitive emails was insufficient to support a reasonable belief in a racially hostile environment); *Mitchell v. Barnard Constr. Co.*, 107 Fair Empl. Prac. Cas. (BNA) 661, 665 (S.D. Fla. 2009) (granting employer summary judgment on 42 U.S.C. § 1981 retaliation claim because coworker’s single racist remark referring to the plaintiff as a “black monkey” did not support an objectively reasonable belief in a racially hostile environment).

165. 103 F.3d 956 (11th Cir. 1997).

166. *Id.* at 959–60.

167. *Id.*

the employer from liability for coworker harassment. Few employees would risk reporting harassment if doing so might not only get them fired, but also leave them without recourse for any ensuing retaliation.

The *Little* case was decided one year before the Supreme Court's decisions in *Ellerth* and *Faragher*, so it is not so surprising that the court did not consider how a workplace policy on harassment might affect the reasonableness of the employee's response; such policies, though common in the workplace, were not yet on the radar screen of courts deciding harassment cases. However, the court's reasoning makes employer policies irrelevant even now, despite their prominence and integration into harassment liability standards. The *Little* decision and the cases following it create an especially difficult situation for employees responding to coworker harassment through employer anti-harassment policies.

The problems with the reasonable belief doctrine in these cases are compounded by the sheer breadth of employer harassment policies. Employer policies on harassment are much broader than the law's approach to actionable harassment.¹⁶⁸ As Vicki Schultz pointed out in her critique of employer responses to sexual harassment law, employers prohibit conduct far exceeding what would violate the law.¹⁶⁹ The language in employer policies moves seamlessly from the legal requirements of a harassment claim to much broader notions of incivility and disrespect.¹⁷⁰ Even where employer policies purport to track legal definitions of harassment, the legal standards themselves are anything but precise. For example, harassment policies often incorporate the definition from the 1980 EEOC guidelines:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when . . . such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.¹⁷¹

168. See DOBBIN, *supra* note 94, at 201 ("The general anti-harassment policy might cover activities not yet imagined by plaintiffs, but which would someday be forbidden by the courts."); *id.* at 204 (explaining that human resources experts counseled employers to adopt harassment policies "forbidding behavior—a pat on the shoulder or romance between colleagues—that no court had questioned"); *id.* at 201 (discussing breadth of employer harassment policies, including one "designed to stop 'any sort of disruptive or harassing behavior'" (emphasis omitted)).

169. Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2093–2103 (2003).

170. See, e.g., Rod P. Githens, *Diversity and Incivility: Toward an Action-Oriented Approach*, 13 ADVANCES IN DEVELOPING HUM. RESOURCES 40, 40–41, 44 (2011) (referring to "incivility" interchangeably with subtle forms of discrimination).

171. EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a) (2012); see also DOBBIN, *supra* note 94, at 198 (noting that many employer policies on sexual harassment incorporate the definition from the EEOC Guidelines); Michele M. Hoyman & Jamie R. McCall, *Sexual Harassment*, in HANDBOOK OF HUMAN RESOURCE MANAGEMENT IN GOVERNMENT, *supra* note 112, at 475, 478, 484–85 (admonishing employers to adopt the 1980 EEOC definition of sexual harassment in their own policies on sexual harassment).

This language encompasses a much broader category of conduct than what a court would necessarily find to be actionable. Even the relatively mild innuendos in *Breeden* could arguably fall under this definition.¹⁷² Where employer policies offer more concrete examples, the examples often include the kinds of isolated, offensive comments courts dismiss as insufficient in the reasonable belief cases. Sexual jokes, remarks, and gestures are often listed as among the kinds of behaviors covered by harassment policies.¹⁷³ Moreover, employer policies typically encourage or even require employees to report any harassing behaviors right away, without waiting for the incidents to accumulate until they become severe or pervasive.¹⁷⁴ In fact, a directive to wait to report until the harassment becomes severe would be inconsistent with the reason why the law incentivizes having harassment policies and why it behooves employers to have them: to stop harassing behaviors before they violate the law. The bottom line is, the reasonable belief cases do not account for how employer policies shape employee perceptions of, and responses to, harassment in the workplace, to the peril of the employees who report it.

2. Beyond Harassment: Other Discrimination Complaints

The harassment cases are just the tip of the *Breeden* iceberg. Sexual harassment policies get the most attention, but employer nondiscrimination policies reach much further than harassment, setting up the reasonable belief doctrine to clash with other kinds of discrimination complaints as well. This tension between broadly worded EEO policies and a strict application of the reasonable belief doctrine arises in cases involving a wide range of discrimination complaints. Here too, the reasonable belief cases fail to account for gaps between the scope of employer policies and the narrower reach of discrimination law. Courts maintain their resolve that the reasonableness of the employee's perception of discrimination is measured against the substantive law, unaffected by broader coverage in employer policies.

While harassment complaints appear the most frequently in the reasonable belief cases, examples of other kinds of discriminatory practices can also be found in the case law. In one such case, *EEOC v. Kumi Manufacturing Alabama, LLC*,¹⁷⁵ the court faulted the EEOC for failing to prove that an African American employee held an objectively reasonable belief that he was opposing unlawful discrimination when he objected to the employer's use of written employment tests—specifically, its accommodation of Hispanics but not African Americans with a modified oral test. To rebut the reasonableness of the employee's belief, the court cited case law approving the use of written exams absent proof of a discriminatory intent or

172. While clearly not actionable under judicial precedents, the conduct arguably included an unwelcome sexual comment and created an offensive working environment for the plaintiff.

173. See, e.g., DOBBIN, *supra* note 94, at 198.

174. See, e.g., Hoyman & McCall, *supra* note 171, at 487 (advising employers to conduct training on their sexual harassment policies and to “encourage victims to come forward when genuine problems exist”).

175. No. 2:09-CV-260-WKN, 2011 U.S. Dist. LEXIS 3051 (M.D. Ala. Jan. 11, 2011).

application against African Americans.¹⁷⁶ Since the employee had no evidence that the employer acted with a discriminatory intent, he was obliged to accept the employer's explanation that the accommodation was warranted only for Spanish-speaking employees. Accordingly, the court reasoned, the employer's refusal to offer the accommodation to African American test takers could not reasonably be viewed as discriminatory under the governing law.¹⁷⁷ As this case illustrates, the reasonable belief test applies just as strictly to complaints about employer practices with a disparate impact as it does to complaints about perceived harassment. EEO policies and practices, however, have evolved to include broad oversight of employer practices with a disparate impact, even beyond what is strictly required by discrimination law.¹⁷⁸

Complaints about disparate treatment in the workplace get the same treatment. Indeed, there appear to be many ways the reasonable belief doctrine can ensnare an unsuspecting complainant who is not steeped in the nuances of discrimination law. Unfamiliarity with the materially adverse requirement is one of them. In *Howard v. Walgreen Co.*,¹⁷⁹ the appellate court invoked the reasonable belief doctrine to overturn a jury verdict for the plaintiff on his retaliation claim, reversing the district court's denial of judgment as a matter of law. In this case, the flaw in the underlying merits of the discrimination complaint was that the purportedly discriminatory action did not rise to the level of material adversity required under Title VII.¹⁸⁰ The plaintiff, an African American pharmacist, had complained about what he perceived as a racially discriminatory threat to terminate him in a message left on his voicemail.¹⁸¹ In the message, his white supervisor threatened to fire him, and the plaintiff had reason to believe that the threat was motivated by racial bias. After he complained about the threatening message, he actually was fired.¹⁸² He brought a retaliation claim and won before a jury. The appeals court overturned the verdict, ruling that a discriminatory threat to fire an employee (as opposed to a later termination) is not materially adverse. Since the threat was not materially adverse, the plaintiff did not have a reasonable belief that it violated Title VII.¹⁸³ The court did not mention the existence of an employer policy, but its reasoning makes plain

176. *Id.* at *30–31.

177. *Id.* at *35–37.

178. Stephen E. Condrey, *Introduction: Toward Relevant Human Resource Management*, in HANDBOOK OF HUMAN RESOURCE MANAGEMENT IN GOVERNMENT, *supra* note 112, at xxxix, xli–ii (detailing how human resources functions came to encompass a wide range of employment practices monitoring diversity); Guy & Newman, *supra* note 112, at 167 (describing how human resources professionals oversee and implement selection processes to “ensure that protected groups are not inadvertently or disproportionately screened out during the hiring process”).

179. 605 F.3d 1239 (11th Cir. 2010).

180. *Id.* at 1245.

181. *Id.* at 1241.

182. *Id.* at 1242.

183. *Id.* at 1245; *see also* Brokaw v. Weiser Sec., 780 F. Supp. 2d 1233, 1246 n.21 (S.D. Ala. 2011) (stating, in dicta, that plaintiff's opposition to the employer's stated preference for hiring male guards may have lacked a reasonable belief because the plaintiff did not point to any actual hiring decision in which the stated preference was carried out).

that even a broadly worded policy promising nondiscriminatory treatment in all instances would have made no difference.

As these examples show, it is not just harassment complaints that get sacked by the reasonable belief doctrine. The lower court cases have traveled far from the facts in *Breeden* to deny protection to any complaints about discriminatory practices that do not conform to the substantive law of discrimination.

3. Complaints Blurring the Boundary Between Affirmative Action and Nondiscrimination

The boundary between nondiscrimination and affirmative action is an especially thorny one for complainants. Courts have applied the reasonable belief doctrine strictly, and with no regard for employer policies blurring these principles, to employee complaints about the employer's failure to implement an affirmative action plan. Employer EEO policies and practices, however, often mix promises of nondiscrimination with commitments to affirmative action.¹⁸⁴ As Frank Dobbin explains in his study of how personnel offices invented modern understandings of employment discrimination, EEO staff merged their compliance strategies for nondiscrimination with their affirmative action efforts.¹⁸⁵ As a result, affirmative action and nondiscrimination may be lumped together in the same policies and administered by the same staff persons.¹⁸⁶ The reasonable belief cases, however, treat these obligations as separate and unrelated. Courts reject retaliation claims involving complaints about the employer's failure to implement affirmative action plans for want of an objectively reasonable belief that an employer's refusal to engage in affirmative action violates Title VII.

In one of the first cases to take this approach, *Holden v. Owens-Illinois, Inc.*,¹⁸⁷ the plaintiff, who managed the company's affirmative action office, claimed that she suffered retaliation for attempting to bring the employer into compliance with the federal executive order requiring contractors with the federal government to meet affirmative action goals and timetables.¹⁸⁸ In a bench trial, the district court ruled for the plaintiff, but the Sixth Circuit reversed, finding a lack of protected activity because it was unreasonable to believe that failure to meet the affirmative action requirements of the executive order violated Title VII.¹⁸⁹ The court's reasoning posited a clear separation between affirmative action and nondiscrimination, with only the latter required by Title VII.¹⁹⁰

184. Norma M. Riccucci, *Affirmative Action*, in HANDBOOK OF HUMAN RESOURCE MANAGEMENT IN GOVERNMENT, *supra* note 112, at 455, 469 (describing employer EEO oversight in terms that merge nondiscrimination and affirmative action).

185. DOBBIN, *supra* note 94, at 14.

186. For a model policy where this is the case, see Riccucci, *supra* note 184, at 471–72 (presenting Exhibit 19.1 Sample Table of Contents and Language for an Affirmative Action Plan for Midtown, USA).

187. 793 F.2d 745 (6th Cir. 1986).

188. *Id.* at 746.

189. *Id.* at 749.

190. *See id.* at 748–49.

Subsequent cases have reached similar results. In *Phillips v. Pepsi-Cola General Bottlers, Inc.*,¹⁹¹ the Sixth Circuit used similar reasoning to uphold summary judgment for the employer in a retaliation claim brought by the company's affirmative action officer. The court followed *Holden* to rule that the plaintiff's efforts to increase the representation of women and minorities were not protected activity under Title VII.¹⁹² Similarly, in *Manoharan v. Columbia University College of Physicians & Surgeons*,¹⁹³ the plaintiff's complaints that the university failed to follow its affirmative action goals and gave insufficient attention to minority candidates in a particular hiring decision were not protected activities.¹⁹⁴ In these and other cases, courts have labeled it unreasonable to believe that an employer's failure to follow its affirmative action goals violates Title VII.¹⁹⁵

These decisions fail to recognize that the legal terrain separating affirmative action from nondiscrimination is slippery at best. Judges and legal scholars alike have struggled with the boundary between these two conceptions of equal opportunity.¹⁹⁶ Indeed, a small but notable body of legal precedent holds that the knowing failure to take specific action to increase minorities' or women's representation in the workplace might, in some circumstances, amount to intentional discrimination.¹⁹⁷ The uncertainty facing employees over where to draw this line is compounded by employers merging the two concepts and their requirements under the same policy. EEO policies generally locate responsibility for both sets of obligations in the same office or person and cover both obligations under common language in the same policies. The widely used self-identification as an EEO employer has come to stand both for an employer who complies with nondiscrimination requirements and for one who affirmatively undertakes to have a diverse workforce that includes members of historically underrepresented groups. Courts gloss over this complexity, and the role of employer policies in contributing to it, when they label it unreasonable to pursue affirmative action goals under the guise of opposing discrimination.

191. No. 90-5603, 1991 U.S. App. LEXIS 3856 (6th Cir. Mar. 5, 1991) (per curiam).

192. *Id.* at *2.

193. 842 F.2d 590 (2d Cir. 1988).

194. *Id.* at 593-94.

195. *See also* *Montgomery v. DePaul Univ.*, No. 10 C 78, 2012 U.S. Dist. LEXIS 128206, at *25-26 (N.D. Ill. Sept. 7, 2012) (advocating for greater diversity in university hiring was not protected activity under the opposition clause because failure to engage in affirmative action does not violate Title VII); *cf.* *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 575-80 (6th Cir. 2000) (rejecting district court's ruling that plaintiff, director of the university affirmative action office, lacked a reasonable belief that his opposition to the university's refusal to implement affirmative action violated Title VII but emphasizing that the plaintiff's advocacy was not limited to affirmative action and included opposition to discrimination in hiring).

196. For a critique of *Holden* that expands upon the overlap in the substantive law between the failure to implement affirmative action and discrimination, especially disparate impact, see Floyd D. Weatherspoon, "Don't Kill the Messenger": *Reprisal Discrimination in the Enforcement of Civil Rights Laws*, 2000 L. REV. M.S.U.-D.C.L. 367.

197. *See, e.g.*, *EEOC v. Dial Corp.*, 469 F.3d 735 (8th Cir. 2006).

4. Complaints Challenging Discrimination Against Unprotected Groups

The reasonable belief case law is equally unforgiving when employees complain about discrimination on the basis of a status that is not protected under federal employment discrimination law. Employer nondiscrimination policies are often much broader than the scope of discrimination law, promising equal opportunity to groups left outside the protected categories of Title VII and other federal statutes. This problem arises most often in the realm of sexual orientation and gender identity discrimination, since these characteristics are frequently covered by employer policies but are outside the scope of federal employment discrimination protections.

Courts routinely apply the reasonable belief doctrine to dismiss retaliation claims where the underlying complaint involves discrimination based on sexual orientation, an unprotected status under Title VII. In *Hamner v. St. Vincent Hospital & Health Care Center, Inc.*,¹⁹⁸ one of the earlier cases of this order, the plaintiff, a gay man employed as a nurse, complained about harassment through the hospital's grievance procedure.¹⁹⁹ The harassment included conduct by a supervisor who mocked him by lisping, flipping his wrists, and making anti-gay jokes.²⁰⁰ The plaintiff considered these behaviors to be sexual harassment, but the court characterized this belief as unreasonable, viewing the harassment as targeting the plaintiff's sexual orientation.²⁰¹ Since sexual orientation is not a protected class under Title VII, the court reasoned, the complaint was not protected activity under the opposition clause.²⁰² Other than to note that the plaintiff pursued the complaint through the employer's grievance procedure, the court said nothing about the hospital's EEO policies—neither how the hospital defined sexual harassment nor the scope of coverage in the policy and whether it extended to sexual orientation.²⁰³

Under the court's reasoning, it would have made no difference if the employer's EEO policies had expressly included sexual orientation along with the protected classes covered under Title VII, as many employer policies do.²⁰⁴ Indeed, courts have ruled the same way despite the existence of employer policies specifically prohibiting sexual orientation discrimination. In *Higgins v. New Balance Athletic*

198. 224 F.3d 701 (7th Cir. 2000).

199. *Id.* at 703.

200. *Id.* at 703, 705–706.

201. *Id.* at 705.

202. *Id.* at 707.

203. *See also* Hamm v. Weyauwega Milk Prods., Inc., 332 F.3d 1058, 1066 (7th Cir. 2003) (opposing harassment based on sexual orientation is not protected under the opposition clause because it is not unlawful under Title VII); Ogle v. Wal-Mart Stores E., LP, No. 2:09-CV-317-PPS, 2011 U.S. Dist. LEXIS 116212, at *15 (N.D. Ind. Sept. 23, 2011) (same).

204. *See* DOBBIN, *supra* note 94, at 201 (noting a personnel journal article showcasing the anti-harassment policy for Madison, Wisconsin's city workers, which prohibited harassment based on "race, sex, religion, color, national origin, handicap, and sexual orientation"); *id.* at 144 (noting the expansion of protected categories beyond those in discrimination law in employer diversity/EEO policies).

Shoe, Inc.,²⁰⁵ the inclusion of sexual orientation in the employer's nondiscrimination policy did not help the plaintiff past the reasonable belief hurdle. Although decided before *Breedon*, the court anticipated and applied the reasonable belief requirement without regard to the broader coverage of protected groups under the employer's nondiscrimination policy.²⁰⁶

In recent years, more employers have added sexual orientation and gender identity to their nondiscrimination policies.²⁰⁷ Employer EEO practices are nowhere near as insistent as courts in delineating a sharp boundary between sex and sexual orientation in overseeing fair employment practices. For example, a leading text for human resources professionals describes a case in which an employee was harassed for being "a gay female" as a case involving "sexual harassment."²⁰⁸ However, courts continue to rule sexual orientation outside the protections of Title VII.²⁰⁹ This gap between employer policies and Title VII coverage leaves employees highly vulnerable to retaliation when they challenge bias against a group that is included in the employer nondiscrimination policy but outside the protections of employment discrimination law. Once again, courts strictly apply the reasonable belief doctrine based on existing law, unmediated by the broader scope of employer policies.

5. Complaints About the Treatment of Non-Employees

Complaints about the discriminatory treatment of non-employees have also butted up against the reasonable belief doctrine. Courts have ruled unreasonable employee understandings that extend nondiscrimination commitments to persons who are not employed by the employer, such as clients or members of the community. When these kinds of complaints are involved, courts use the reasonable belief doctrine to draw a sharp line between the employer's treatment of its employees and the employer's treatment of others. A recent case of this order, *Bonn v. City of Omaha*,²¹⁰ involved a complaint by a city employee whose job as public safety auditor required her to review and audit citizen complaints about police officers' treatment of citizens. She lost her job after writing a report criticizing the police department for tolerating racially biased policing practices. In

205. 194 F.3d 252 (1st Cir. 1999).

206. *See id.* at 262 ("Certainly, the mere inclusion in the record of New Balance's internal policy against discrimination based on sexual orientation does not, as the appellant now suggests, evidence either his state of mind or the reasonableness of his beliefs.").

207. Brad Sears, Nan Hunter & Christy Mallory, *Report Update: Sexual Orientation and Gender Identity Non-Discrimination Policies of the Top 50 Contractors, FY 2011*, WILLIAMS INST. (Apr. 2012), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Sears-Hunter-Mallory-Report-Update-Top50-Contractors-April-2012.pdf> (stating that 86% of top federal contracting companies have employer nondiscrimination policies covering sexual orientation and 55% of them cover gender identity).

208. Hoyman & McCall, *supra* note 171, at 475.

209. *E.g.*, *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757 (6th Cir. 2006); *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2d Cir. 2005); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257 (3d Cir. 2001).

210. 623 F.3d 587 (8th Cir. 2010).

the report, she chided the department's lack of success in "recruiting or maintaining a diverse workforce" and connected this failing to its poor relations with the minority community.²¹¹ Rejecting her retaliation claim for lack of protected activity, the court explained that racially biased policing was not an unlawful employment practice under Title VII.²¹² Although the court did not disagree that such practices might negatively affect the recruiting of minority officers, it found the allegations "far too attenuated from actual employment practices" to support a reasonable belief that the department was violating Title VII.²¹³ Other courts have used similar reasoning to reject retaliation claims by employees who complained about police department bias against persons of color in the community.²¹⁴

In ruling the plaintiff's belief unreasonable, this approach overstates the degree of attenuation between racial bias in policing and in the hiring of police officers. For instance, the court in *Bonn* emphasized that the plaintiff did not allege that the department intended to affect minority recruiting through its police practices.²¹⁵ However, such tactics might nevertheless have a disparate impact on minority applications that could plausibly form the basis for a Title VII disparate impact claim. The court's reasoning also ignores the possibility, recognized in early Title VII case law, that the discriminatory treatment of clients can potentially create a racially hostile environment for employees.²¹⁶

Indeed, media coverage of the class action lawsuit against Denny's, in which African American customers challenged discriminatory service at the restaurant, revealed links between discrimination against customers and the racial environment for employees, connecting the all-white management team and a racially hostile workplace to the discriminatory treatment of customers.²¹⁷ The settlement, while primarily focused on the restaurant's relations with its customers, also included provisions addressing race discrimination against employees.²¹⁸ As the Denny's litigation illustrates, it is far from unreasonable to think that the racially discriminatory treatment of clients and constituents is related to racial inequality in employee work environments.

211. *Id.* at 591.

212. *Id.*

213. *Id.* at 592.

214. *See, e.g.,* *Wimmer v. Suffolk Cnty Police Dep't*, 176 F.3d 125 (2d Cir. 1999) (plaintiff lacked a reasonable belief that police department's discriminatory treatment of civilians established an unlawful employment practice); *Crowley v. Prince George's Cnty*, 890 F.2d 683 (4th Cir. 1989) (plaintiff's investigation of police department's alleged racial harassment of the black community was not protected activity because he could have no reasonable belief that this violated Title VII); *cf. Neely v. City of Broken Arrow*, 100 Fair Empl. Prac. Cas. (BNA) 1549 (N.D. Okla. 2007) (plaintiff could not have reasonably believed that firefighters' sexual harassment of members of the public violated Title VII).

215. 623 F.3d at 592.

216. *Rogers v. EEOC*, 454 F.2d 234, 238–39 (5th Cir. 1971) (recognizing a claim for hostile environment racial harassment based in part on employer's racial segregation of clientele in waiting room).

217. Bendick et al., *supra* note 105, at 21.

218. *Id.* at 21–22 (noting that the settlement increased the number of minority managers and prompted company-wide diversity training).

Most problematic, the court in *Bonn* did not consider how the employer's nondiscrimination policy might have influenced the plaintiff's view that the city's nondiscrimination obligations included a duty to weed out practices that interfere with the recruitment of a diverse workforce. The opinion is silent with respect to the city's internal policies, but as a public employer, the city likely had a detailed EEO policy.²¹⁹ Such policies often lump together loosely related promises of nondiscrimination, equal employment opportunity, and a commitment to diversity.²²⁰

A related collection of cases applies a similar principle to employees of educational institutions complaining about perceived discrimination against students.²²¹ The court in *Bonn* cited some of them, noting with a tinge of impatience, "[w]e have explained more than once that 'opposing an employer's actions outside the ambit of an employment practice is unprotected by Title VII.'"²²² These cases draw a similar line, ruling that Title VII does not protect employee complaints about the discriminatory treatment of students since it would be unreasonable to believe that discrimination against students violates Title VII.²²³ These courts, too, make no reference to school or university nondiscrimination policies, which may combine in the same policy the institution's nondiscrimination obligations toward faculty, staff, and students alike, and invite broad input and participation from the educational community in securing these promises.²²⁴ After the Supreme Court's decision in *Jackson*, an employee experiencing retaliation for such complaints might still find protection under Title IX (for sex) or Title VI (for race), even if not under Title VII. Nevertheless, the more holistic approach to nondiscrimination reflected in the EEO policies of educational institutions belie such a fine parsing of lines as to negate a Title VII retaliation claim protecting

219. An Internet search for related city personnel policies in Omaha turned up an Executive Order declaring it city policy to promote diversity in city employment. Exec. Order No. S-2-10, City of Omaha Statement of Zero Tolerance for Racism and Discrimination, <http://www.cityofomaha.org/humanresources/public-documents/executive-orders>.

220. See DOBBIN, *supra* note 94, at 42 (explaining how EEO experts broadened nondiscrimination mandates to encompass practices focusing on minority recruitment, and that "[i]n choosing these interventions, personnel experts redefined the public's understanding of workplace discrimination"); *id.* at 72 (noting merger of nondiscrimination, minority recruitment, and training programs in EEO compliance strategies).

221. *E.g.*, *Lamb-Bowman v. Del. State Univ.*, 152 F. Supp. 2d 553 (D. Del. 2001) (complaints by plaintiff, head coach for women's basketball program, about unequal treatment of women's teams were not protected activity under Title VII since discrimination against students does not violate Title VII); *Hill v. Chi. Bd. of Educ.*, 93 Fair Empl. Prac. Cas. (BNA) 1134 (N.D. Ill. 2004) (employee's complaint about perceived discrimination against students was not protected activity under Title VII).

222. *Bonn v. City of Omaha*, 623 F.3d 587, 592 (8th Cir. 2010) (quoting *Artis v. Francis Howell N. Band Booster Ass'n*, 161 F.3d 1178, 1183 (8th Cir. 1998)).

223. *Bakhtiari v. Lutz*, 507 F.3d 1132 (8th Cir. 2007); *Artis v. Francis Howell N. Band Booster Ass'n*, 161 F.3d 1178 (8th Cir. 1998); *Evans v. Kansas City, Mo. Sch. Dist.*, 65 F.3d 98 (8th Cir. 1995).

224. See, *e.g.*, UNIV. OF GA., NON-DISCRIMINATION AND ANTI-HARASSMENT POLICY (Nov. 28, 2012), available at <http://eoo.uga.edu/pdfs/NDAH.pdf> (applying to any member of the university community).

employee complaints about the discriminatory treatment of other members of the educational community.

Through promises of diversity, broad definitions of equal employment opportunity, and inclusive commitments of nondiscrimination toward all persons served, EEO policies blur lines that discrimination statutes sharply and rigidly enforce. As a result, employees who act on these promises to protect the rights of nonemployees cross these lines at their peril.

6. The Factual Support Required to Complain

The reasonable belief doctrine requires not only support in the substantive law but also sufficient facts to support an objectively reasonable belief that unlawful discrimination has occurred. This too creates tensions with employer policies. Employees risk being labeled unreasonable and left unprotected from retaliation for stepping forward to complain about discrimination based on speculative reasons without hard, cold facts to support them. And yet, employer EEO policies may offer little guidance about the kinds of facts an employee should know before complaining about discrimination and instead direct employees to report their concerns through the specified channels without delay.²²⁵ Waiting to gather facts takes time and may not be compatible with reporting problems as soon as they arise.

The case law illustrates this bind. If the employee's complaint objects to a form of disparate treatment, the factual support for a legal challenge would require proof that the employer acted with the kind of discriminatory intent the law requires. For example, in *Butler v. Raytel Medical Corp.*,²²⁶ the plaintiff complained to the company's human resources department about what he perceived as racial "favoritism" by his supervisor.²²⁷ The court rejected his retaliation claim, faulting him for not having had a reasonable belief that discrimination occurred since he "put forward little, if any, evidence of [his supervisor's] racial animus" and "spoke in vague terms and could not give details."²²⁸ He lost the retaliation claim, in part, for lack of the kind of factual record necessary to support an objectively reasonable belief in discrimination.²²⁹ Similarly, in *Woods v. Enlarged City School District*,²³⁰ the court ruled that a female African American assistant principal's complaint

225. See, e.g., N.Y. UNIV., NON-DISCRIMINATION AND ANTI-HARASSMENT POLICY AND COMPLAINT PROCEDURES FOR EMPLOYEES (Aug. 12, 2012), available at <http://www.nyu.edu/about/policies-guidelines-compliance/policies-and-guidelines/anti-harassment-policy-and-complaint-procedures.html> ("Any employee who believes that he or she has been a victim of discrimination . . . should immediately report the circumstances in accordance with the procedure set forth below."); *id.* ("The University encourages prompt reporting of complaints Because it is not always easy to interpret words or actions, employees are further encouraged to bring forward any concerns under this policy before they rise to the level of violating the law.")

226. No. 98 CV 6446 (SJ), 2004 U.S. Dist. LEXIS 26023 (E.D.N.Y. Aug. 31, 2004).

227. *Id.* at *3.

228. *Id.* at *11.

229. *Id.*

230. 473 F. Supp. 2d 498 (S.D.N.Y. 2007).

about race discrimination was not supported by a reasonable belief because “the record is devoid of any evidence showing racial animus or bias,” and “shows, at most, that plaintiff was shamefully mistreated by a group of teachers who were Caucasian and that her supervisor ineffectually handled the situation.”²³¹ In such cases, employees have no recourse for retaliation if they complain about perceived discrimination without specific examples of more favorably treated comparators who are outside of their protected class but are otherwise sufficiently similar to support an inference of unlawful discrimination.²³²

Once again, the courts’ application of the reasonable belief doctrine does not comport with how employer EEO policies approach employee complaints. Employees are not all cut from the same cloth; they make inferences about discrimination with varying levels of factual support.²³³ But employer policies do not come with warnings to employees to wait to complain until they have adequate factual support, nor do they instruct employees on what kind of factual record they should compile before they complain. Rather, such policies openly invite employees to come forward with any concerns based on their own perceptions.²³⁴ This presents a conflict with the stringency of the reasonable belief doctrine, which requires the kind of factual support necessary to make a reasonable claim of unlawful discrimination.

7. Special Problems for Supporting Witnesses in Internal EEO Processes

In addition to the gap between how courts understand discrimination and how complainants who consult employer policies are likely to understand it, the reasonable belief doctrine creates other difficulties in the EEO workplace as well. Special problems arise when the retaliation is directed against an employee other than the complainant who provides helpful information in the complaint-investigation process. In *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*,²³⁵ the Supreme Court ruled that participating as a

231. *Id.* at 527.

232. *See, e.g.,* *Diamond v. Morris, Manning & Martin, LLP*, 457 F. App’x 844 (11th Cir. 2012) (per curiam) (complaints that white paralegals received better assignments were not protected where complainant lacked knowledge of specific assignments given to white employees); *Muhammad v. Audio Visual Servs. Grp.*, 380 F. App’x 864 (11th Cir. 2010) (complaint that overtime pay was calculated in a discriminatory manner lacked a reasonable belief since complainant did not identify a similarly situated white comparator).

233. *E.g.,* Katie R. Eyer, *That’s Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1315 (2012) (discussing research showing that people’s backgrounds significantly affect their likelihood of making attributions to discrimination based on a particular set of facts); Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1127–31 (2008) (discussing studies showing racial differences in inferring discrimination from a given set of facts).

234. *See, e.g.,* *Sample Anti-Discrimination and Harassment Policies*, FINDLAW, <http://smallbusiness.findlaw.com/employment-law-and-human-resources/sample-anti-discrimination-and-harassment-policies.html> (“If an employee feels that he or she has been harassed on the basis of his or her sex, race, national origin, ethnic [sic] background, or any other legally protected characteristic they should immediately report the matter to his or her supervisor.”).

235. 555 U.S. 271 (2009).

supporting witness in an employer's internal investigation of a discrimination complaint is protected activity under Title VII's opposition clause.²³⁶ The Court's ruling is surely correct, since leaving witnesses unprotected from retaliation would call into question the very legitimacy of such processes and tear large loopholes in the fabric of retaliation law. However, by deciding the case under the opposition clause instead of the participation clause, the decision does not adequately protect supporting witnesses, who still must clear the reasonable belief hurdle in order to obtain protection. This was not a problem in *Crawford* itself since the sexual harassment allegations clearly met the legal threshold for an actionable hostile environment, but it is likely to pose problems in other cases.

Under *Crawford*, an employee who provides supporting statements in an internal investigation into discrimination is only protected from retaliation if the statements are based on an objectively reasonable belief that the underlying conduct was actually unlawful.²³⁷ The same level of stringency with respect to the governing substantive law and necessary factual support would still apply. These difficulties are magnified when applied to corroborating witnesses in an employer's internal investigation. The employee may have little choice but to answer questions and provide relevant information in such an investigation, and indeed, may be required to do so under the employer's discrimination policy.

Although few reported cases involve claims of retaliation against noncomplainants under the opposition clause, so far courts have applied the reasonable belief requirement unmodified in such settings. For example, in the pre-*Crawford* case of *Barker v. Missouri Department of Corrections*,²³⁸ the plaintiff claimed retaliation after assisting another employee in making a discrimination complaint. The plaintiff, a union shop steward, helped his male coworker file a sexual harassment grievance. The court rejected the retaliation claim on the grounds that the plaintiff lacked a reasonable belief that what happened to his coworker was unlawful discrimination.²³⁹ The underlying allegations consisted of a comment made to the coworker, a correctional officer in a women's prison, by his female supervisor, stating that he would need training to work in a particular unit even though a female coworker did not because "women are better by and large as they do a better job than men do anyway and are more patient and nurturing than men and we have no complaints about them."²⁴⁰

Consistent with other decisions applying the reasonable belief doctrine to harassment complaints, this court explained that, even if offensive, this single comment did not create an actionable hostile work environment for the male coworker.²⁴¹ Accordingly, any belief that it did was objectively unreasonable. What stands out about this case is that the court applied the reasonable belief doctrine not to the actual complainant, the target of the alleged harassment, but to the fellow employee who assisted him in filing a grievance. The court's reasoning would lead to the same result if, instead of helping the coworker file a grievance, the plaintiff

236. *Id.* at 273.

237. *Id.* at 276.

238. 513 F.3d 831 (8th Cir. 2008).

239. *Id.* at 835.

240. *Id.* at 833.

241. *Id.* at 835.

had testified truthfully in support of the coworker in an internal investigation. Like the other reasonable belief cases discussed above, the court did not mention the employer's policies despite the likely existence of a collective bargaining agreement.

When employer EEO policies establish complaint procedures and processes for investigating complaints, employees other than the complainant may become involved in the ensuing investigations. Even more so than the complainant, these employees may not have enough factual or legal knowledge to objectively evaluate the reasonableness of the underlying complaint. Applying the reasonable belief doctrine to them, when they may have little choice but to participate in the employer's process, raises the same kinds of concerns that the Supreme Court strived to avoid in the *Crawford* decision—it makes a mockery of EEO processes if supportive witnesses are vulnerable to retaliation when the underlying complaint lacks a sufficient legal or factual foundation. By leaving the claim under the opposition clause, without any modification of the reasonable belief doctrine, the Court failed to secure either the integrity of retaliation law or the legitimacy of the EEO processes that the law so heavily incentivizes.

8. Concluding Thoughts on Causation, Complexity, and the Clash with EEO Policies in the Reasonable Belief Doctrine

The strictness of the reasonable belief doctrine may well mask an unarticulated concern in retaliation cases that the law not intrude too deeply into employer prerogatives to base employment decisions on discretionary reasons—for example, the employment at-will doctrine.²⁴² On my reading of these cases, judicial skepticism about the plaintiff's ability to prove causation (that the adverse action stemmed from a retaliatory reason) pervades the reasonable belief cases. Indeed, in many of the cases discussed above, the facts on causation do appear quite weak for the plaintiff. After a close reading of these decisions, I am left with the impression that the courts' disbelief of a retaliatory motive is a driving force behind the stringency of the reasonable belief doctrine. In this vein, courts may be more tentative about granting summary judgment and motions to dismiss for lack of causation, which is almost always a contested issue of fact, and more comfortable deciding them on the threshold question of whether the plaintiff engaged in protected activity, which is a question of law.²⁴³

And yet, the application of the reasonable belief doctrine to determine whether the plaintiff engaged in protected activity purports to be a discrete and prior issue, separate from causation.²⁴⁴ As it should be. The reasonable belief doctrine is a poor

242. This same concern also pervades the Supreme Court's recent *Nassar* decision. See Grossman & Brake, *supra* note 1.

243. Lower courts have, however, rejected Seventh Amendment objections to resolving disputes about causation in retaliation cases in granting employers' motions for summary judgment. See *Schechter v. Ga. State Univ.*, 341 F. App'x 560, 562–63 (11th Cir. 2009); *Hill v. City of Scranton*, 411 F.3d 118, 127 (3d Cir. 2005); *Pospisil v. O'Reilly Auto, Inc.*, 619 F. Supp. 2d 614, 622, 629–30 (N.D. Iowa 2007).

244. For a pre-*Nassar* summary laying out the basic framework of how courts determine causation in retaliation cases, see George, *supra* note 146, at 458–59. After *Nassar*,

proxy for addressing weaknesses in the plaintiff's proof of causation. This is especially so where the subject of the plaintiff's complaint falls within the scope of the employer's EEO policies. There is no obvious reason why retaliation would be less likely to trigger an adverse action when the complaint falls within the scope of the employer's nondiscrimination policy, though not within judicial interpretations of discrimination law, than when the complaint meets the legal and factual requirements for proving discrimination. Concerns about causation should be dealt with forthrightly and transparently, instead of bleeding into the threshold determination of whether the plaintiff engaged in protected activity.

Whatever the reason for the stringency with which lower courts are applying this doctrine, courts are quick to reject employees' broader understanding of nondiscrimination rights and emphatically recite the principle that the reasonableness of employee beliefs is measured solely by the contours of existing law. As one court put it, in finding the plaintiffs' beliefs that they were opposing discrimination unreasonable, the plaintiffs "called attention to no statutory or case law that can reasonably be believed" to support their understanding.²⁴⁵ Other courts put it even more bluntly: "A plaintiff may not stand on his ignorance of the substantive law to argue that his belief was reasonable."²⁴⁶ This articulation of reasonableness as capped by the content of the governing law imposes a false clarity on the meaning of discrimination. Lacking any fixed or easily discernible meaning, the law's promise of nondiscrimination can accommodate a broad range of understandings, as it has at various points in history.²⁴⁷ Members of "outsider" groups in particular—people of color, women, and sexual minorities—tend to take a broader view of the definition of discrimination and to perceive it more frequently in comparison to more powerful social groups, whose views are more likely to match those held by judges.²⁴⁸

Most importantly, courts' insistence on judging reasonableness by a strict legal meaning does not take into account how employer policies shape employees' understandings of their rights at work. As a result, employers reap the legal and professional benefits of EEO policies without bearing legal responsibility for

causation remains a discrete issue, but employees are now restricted to the but-for method of proof and may not proceed on an alternative mixed motive theory of causation. *See Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013).

245. *Dixon v. Hallmark Cos.*, 627 F.3d 849, 857 (11th Cir. 2010) (rejecting the reasonableness of plaintiffs' belief that they were opposing unlawful religious discrimination by refusing to remove a religious picture from the workplace).

246. *Mitchell v. Barnard Constr. Co.*, 107 Fair Empl. Prac. Cas. (BNA) 661, 664 (S.D. Fla. 2009); *see also Clover v. Total Sys. Servs., Inc.*, 176 F.3d 1346, 1351 (11th Cir. 1999) (explaining that reasonable belief is an objective standard that is measured against the content of existing law); *Harper v. Blockbuster Entm't Corp.*, 139 F.3d 1385, 1388 n.2 (11th Cir. 1998) ("If the plaintiffs are free to disclaim knowledge of the substantive law, the reasonableness inquiry becomes no more than speculation regarding their subjective knowledge.").

247. George Rutherglen, *Concrete or Abstract Conceptions of Discrimination?* (Univ. of Va. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Paper No. 2012-58), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2148435; *see also* George Rutherglen, *Disparate Impact, Discrimination, and the Essentially Contested Concept of Equality*, 74 *FORDHAM L. REV.* 2313 (2006).

248. *See Robinson*, *supra* note 233, at 1107–39.

retaliation against the employees who use them. While courts limit protection from retaliation to those internal complaints that match their own narrow legalistic conceptions of discrimination, much broader employer policies have expanded popular understanding of the meaning of discrimination.²⁴⁹ The resulting incongruity is not so much because companies are more progressive than the law, although some may be, but because many employers have recognized that strong EEO policies promote their self-interest. They offer some measure of “bullet-proofing” from discrimination lawsuits and provide mechanisms for holding employees accountable for failing to meet company norms and professional expectations.

The reasonable belief cases have utterly failed to grapple with the realities of employer EEO policies and their effect on employee understandings of discrimination and responses to it.²⁵⁰ Even when courts mention the existence of an employer policy, the scope, language, and promises of the policy have no bearing on the court’s reasonable belief analysis. This is a glaring hole in the reasonable belief case law given the role that EEO policies play in the modern workplace. In the reasonable belief case law, it is as if the revolution in EEO policies, catalyzed and accelerated by the *Faragher* and *Ellerth* decisions over fifteen years ago, has never taken place.

B. Communicating Opposition: Discrimination Versus General Unfairness

The reasonable belief doctrine is not the only challenge retaliation law faces in coming to terms with the EEO workplace. Another retaliation doctrine that clashes with employer EEO policies is the requirement that employee opposition to discrimination be expressed in terms that are clear and specific enough to put the employer on notice that the complaint is about discrimination in particular and not more generalized concerns about workplace fairness. Certainly, requiring some degree of specificity under the opposition clause is appropriate. An employee should not be protected from retaliation under an antidiscrimination statute for complaining that meetings should end at five o’clock instead of six o’clock even if the employee’s real concern is that the meetings were scheduled to penalize working mothers. Employers must be able to comprehend the nature of the complaint in order to determine and comply with the obligation not to retaliate. The problem is that, as some courts have applied it, the requirement of employer

249. DOBBIN, *supra* note 94, at 7–8 (“Legal consciousness often corresponds not to black letter law but to social ideas about what should be lawful, and so it is not just that case law changed over time, but that notions of what should be lawful changed. . . . Employees thought that the law must protect rights they believed they should have. . . . Americans came to view as unlawful what personnel manuals prohibited.”).

250. For an all-too rare counterexample, see *Nuskey v. Hochberg*, 657 F. Supp. 2d 47, 61 (D.D.C. 2009) (“If plaintiff relied on an EEO training to conclude that Title VII had been violated, her belief was in good faith and was not unreasonable—even if her conclusion ultimately proved to be incorrect.”). Although the court’s statement of this principle is reassuring, notably this was not a case where the EEO training lulled the plaintiff into a broader understanding of discrimination than that supported in the law.

knowledge demands a more precise terminology than employees use when they follow employer policies to voice their concerns about discrimination.

Employer policies often address equal opportunity and nondiscrimination in broad terms of professionalism, respect, and fairness. As Frank Dobbin explains, when personnel departments took over the implementation of EEO mandates, they incorporated systems to promote fairness and merit under the equal opportunity mantle.²⁵¹ In the 1980s, the terminology of equal opportunity and nondiscrimination was rebranded under more general headings like “human resources” and “diversity management.”²⁵² As a result, instead of helping plaintiffs over the notice/specificity hurdle, the language of EEO policies can steer employees down a path that jeopardizes their protection from retaliation for complaining about matters that the employee perceives as discriminatory, but describing their complaints in more general terms.

When a discrimination complaint is pursued through an official statutory enforcement mechanism (by filing a charge with the EEOC or a lawsuit in court), and therefore falls under the participation clause, notice of the discrimination complaint is provided to the employer through that process itself. But when a complaint is made directly to the employer, and therefore falls under the opposition clause, retaliation law requires enough specificity to inform the employer that the complainant is asserting statutory nondiscrimination rights. All of the statutes protecting discrimination complainants from retaliation share this requirement. Under the Fair Labor Standards Act, for example, which includes the Equal Pay Act, courts have emphasized that “not all ‘abstract grumblings’ or vague expressions of discontent” amount to the kind of protected activity necessary to support a retaliation claim.²⁵³ The notice requirement for opposition under Title VII’s retaliation provision is similar. As the Third Circuit explains it: “A general complaint of unfair treatment is insufficient to establish protected activity under Title VII.”²⁵⁴

While this requirement is sound in theory, depending on how it is applied and on how the employer’s policies shape and channel grievances, it may ensnare employees who use the terminology of human resources and EEO policies to express their complaints instead of the rights-claiming language of the underlying statutes. For example, in *Barber v. CSX Distribution Services*,²⁵⁵ the court ruled that a letter sent by the plaintiff to the company’s human resources department was not protected under the Age Discrimination in Employment Act because, in complaining that a position was filled with a less-qualified person, the letter did not

251. DOBBIN, *supra* note 94 *passim*.

252. *Id.* at 133, 143–44.

253. *Hagan v. Echostar Satellite, LLC*, 529 F.3d 617, 626 (5th Cir. 2008) (using this terminology to describe the notice requirement and faulting plaintiff because “he did not frame *any* of his objections in terms of the potential illegality”); *see also* *Valerio v. Putnam Assocs.*, 173 F.3d 35, 44 (1st Cir. 1999) (“Of course, not all abstract grumblings will suffice to constitute the filing of a complaint with one’s employer.”).

254. *Curay-Cramer v. Ursuline Acad. of Wilmington, Del., Inc.*, 450 F.3d 130, 135 (3d Cir. 2006).

255. 68 F.3d 694 (3d Cir. 1995).

specify age discrimination as the reason.²⁵⁶ In the letter, the employee stated that he had twenty-one years of experience in the field, which exceeded that of the “less qualified individual” who got the job.²⁵⁷ The letter did not mention the selected employee’s age (forty-four), however. The court construed the letter as a complaint “about unfair treatment in general,” explaining that it expressed “dissatisfaction with the fact that someone else was awarded the position, but it does not specifically complain about age discrimination.”²⁵⁸ As a result, the letter was “too vague” to establish protected activity under the statute.²⁵⁹ No mention was made of the employer’s nondiscrimination policy or how it may have shaped how the employee expressed his grievance.

The case is similar to others requiring employees to specify bias against a protected class in order to gain statutory protection from retaliation for opposing discrimination. Expressing a general complaint about fairness or injustice is not enough. In *Graham v. Methodist Home for the Aging*,²⁶⁰ for example, the plaintiff’s internal complaint in which she accused the employer of replacing her for speaking out about “injustices” was not specific enough to support her retaliation claim. Although her prior history with the employer included instances in which she had challenged racial bias on behalf of herself and others, the court reasoned that her reference to having spoken out about “injustices” was too vague, faulting her for not mentioning “race” or “discrimination,” as the opposition clause requires.²⁶¹

Another example of how insufficient specificity of a protected class derails the retaliation claim is *Miller v. American Family Mutual Insurance*.²⁶² In that case, the plaintiff was paid less than any other employee in her position or in her department, including some colleagues she helped train. When she learned of this disparity, she confronted her supervisor and asked whether it was because she had been pregnant and had taken pregnancy leave.²⁶³ The supervisor said nothing in reply, but allegedly turned away and slammed a drawer. The next year, the plaintiff met with this same supervisor and one other manager and again protested her pay. In this meeting, she strenuously objected to being paid less than her coworkers, noting that she had trained some of them, but did not again mention her suspicion that pregnancy might be the reason.²⁶⁴ The court ruled that the plaintiff’s complaints about her pay at that meeting were not protected activity because she did not make clear that she was alleging pregnancy discrimination.²⁶⁵ While an employee “need not use the words ‘pregnancy discrimination’ to bring her speech within Title VII’s retaliation protections,” the court explained, “she has to at least say something to

256. *Id.* at 701–02.

257. *Id.* at 697.

258. *Id.* at 701.

259. *Id.* at 702.

260. No. 2:11-CV-1416-SLB, 2012 U.S. Dist. LEXIS 117194 (N.D. Ala. Aug. 20, 2012).

261. *Id.* at *66–67.

262. 203 F.3d 997 (7th Cir. 2000).

263. *Id.* at 1001.

264. *Id.* at 1001–02.

265. The earlier conversation, in which she did mention pregnancy, could not be causally linked to the termination, so the retaliation claim depended on this second conversation as the protected activity. *Id.* at 1005 n.6.

indicate her pregnancy is an issue.”²⁶⁶ The court rejected as speculative the plaintiff’s “subjective belief” that the supervisors already knew that her complaints about pay “centered around” her belief of pregnancy discrimination,” notwithstanding her earlier question linking the two.²⁶⁷

Other plaintiffs have also lost retaliation claims for opposing pay inequality without specifically mentioning pay discrimination based on a protected class status. In *Hunt v. Nebraska Public Power District*,²⁶⁸ the plaintiff had complained about receiving lower pay despite taking on extra responsibilities that had been handled by higher-paid men.²⁶⁹ The court upheld the dismissal of her retaliation claim for lack of protected activity, ruling that her protestations about her pay did not specifically mention sex discrimination as the cause of the pay disparity that she challenged.²⁷⁰

These cases keep company with others rejecting generalized complaints about unfair treatment as a trigger for retaliation protections. In *Galdieri-Ambrosini v. National Realty & Development Corp.*,²⁷¹ the plaintiff, a secretary, had complained about having to perform personal tasks for her male boss and about the more favorable treatment given to other secretaries.²⁷² Her theory behind her sex discrimination complaint was that she was punished for failing to conform to gender stereotypes about how secretaries should comport themselves in the workplace.²⁷³ She sued for both gender discrimination and retaliation and won a jury verdict of \$100,000 for combined compensatory and punitive damages. The lower court granted judgment as a matter of law for the defendant and the appellate court affirmed.²⁷⁴ In rejecting the retaliation claim, the court faulted the plaintiff for not notifying her employer that she was complaining about sex discrimination specifically, as opposed to unfair treatment in general. Since she did not articulate her internal complaints in terms of sex discrimination, she did not sufficiently communicate her opposition to an unlawful employment practice under Title VII.²⁷⁵ This is a common refrain, that an employee must assert bias against a protected class in order to find protection from retaliation under the opposition clause.²⁷⁶

266. *Id.* at 1007–08.

267. *Id.* at 1008 n.9.

268. 282 F.3d 1021 (8th Cir. 2002).

269. *Id.* at 1024.

270. *Id.* at 1028–29.

271. 136 F.3d 276 (2d Cir. 1998).

272. *Id.* at 280–81.

273. *Id.* at 282–83.

274. *Id.* at 284–85, 292.

275. *Id.* at 292.

276. *See, e.g.,* *Brown v. City of Opelika*, 211 F. App’x 862, 864 (11th Cir. 2006) (per curiam) (complaint about supervisor’s harassing behavior was not protected because plaintiff “never mentioned the word ‘race’” or racial discrimination); *Sitar v. Ind. Dep’t of Transp.*, 344 F.3d 720, 727 (7th Cir. 2003) (plaintiff’s complaint that she felt “picked on” did not apprise employer that she was complaining of sex discrimination); *Genosky v. Minnesota*, 244 F.3d 989, 993 (8th Cir. 2001) (complaint about “unfair treatment” was not protected activity where plaintiff never mentioned sex discrimination); *Van Orden v. Wells Fargo Home Mortg., Inc.*, 443 F. Supp. 2d 1051, 1063–64 (S.D. Iowa 2006) (plaintiff’s complaints

In communicating bias against a protected class, clarity is prized, and veiled references to discrimination are disfavored. In *Boyd v. Honda Manufacturing of Alabama, LLC*,²⁷⁷ for example, an African American employee did not engage in protected activity under the opposition clause when he complained to his employer about the selection process, unequal training, and disparities in overtime and job assignments. Despite his reference to being “treated as a black sheep” of the department, his complaints were not protected activity because he did not “mention discrimination based on his race.”²⁷⁸

Much like the reasonable belief cases, courts fail to consider how the employer’s nondiscrimination policies influence the employee’s communication of his or her concerns and the language used to complain. The cases rarely mention the existence of employer EEO policies in applying the notice requirement, much less incorporate them into the legal analysis. In *Boyd*, the case in which the employee complained of unequal treatment and being treated as a “black sheep,” the court did acknowledge the existence of a company nondiscrimination policy but did not connect the policy to its analysis of the notice requirement. Had it done so, the court may have been more accepting of the employee’s more general way of communicating his grievance. The very title of the policy suggests a merging of the employer’s promises of nondiscrimination with a more general conception of fairness: the “Equal Employment Opportunity and Mutual Respect Policies.”²⁷⁹ Without giving further details, the court described the policy as “prohibit[ing] any form of discrimination in all terms and conditions of employment, including, but not limited to, discrimination based upon race, sex, and age,” and any “retaliation against an associate who reports a concern about discrimination.”²⁸⁰ It further noted that the policy requires an employee “who believes he or she has witnessed or been subject to discrimination or harassment to immediately report it” to a designated person.²⁸¹ Given the “including but not limited to” language in the policy and the broad-sounding title, an employee might reasonably construe the policy as being open-ended enough to sweep beyond the narrow set of employment practices made unlawful under discrimination law. Moreover, nothing about the court’s description of the policy suggests that it made employees aware of the importance of specifying whether their concern was about unlawful discrimination on the basis of a protected class or some more general maltreatment, such as a lack of respect.

about unfair treatment of two African American employees, without mentioning race, did not communicate opposition to race discrimination).

277. 111 Fair Empl. Prac. Cas. (BNA) 1286 (N.D. Ala. 2010).

278. *Id.* at 1290–91, 1296. Courts impose stringent clarity requirements on employees articulating complaints of violations under the Family Medical Leave Act as well. *See Cook v. CTC Commc’ns. Corp.*, No. 06-cv-58-JD, 2007 U.S. Dist. LEXIS 96979 at *30–31 (D.N.H. Oct. 20, 2007) (finding that plaintiff’s opposition to FMLA violations were only “abstract grumblings,” even though she referenced the FMLA by name, because she “spoke . . . only generally about unlawful terminations”).

279. *Boyd*, 111 Fair Empl. Prac. Cas. (BNA) at 1289; *see also* DOBBIN, *supra* note 94, at 16 (explaining how EEO personnel merged legal requirements of nondiscrimination with broader notions of fairness).

280. *Boyd*, 111 Fair Empl. Prac. Cas. (BNA) at 1289.

281. *Id.*

Complaints about harassment are especially likely to get swept up in the lack-of-specificity net. Numerous cases involve complaints of harassing and disrespectful conduct that fall short of what is required for “protected activity” because they fail to specify the plaintiff’s protected class as the basis for the harassment. For example, in *Smith v. International Paper Co.*,²⁸² an African American employee’s complaint to the employer’s human resources department about workplace “civility” problems and “harassment” by his white supervisor were not specific enough to signal that he was complaining about racial harassment or race-based discrimination.²⁸³ Other complaints of harassment, lacking specification of a protected class, have met a similar fate.²⁸⁴ Employer policies, however, often combine discriminatory harassment, including racial and sexual harassment, with broader references to collegiality, respect, and professionalism.²⁸⁵

In addition to the hurdle of specifying a protected class in order to meet the specificity requirement, the employee must also communicate the specific employment actions or practices that the employee believes are discriminatory. This too poses a problem for employees whose communications are less precise than what courts require. For example, in *Dupont-Lauren v. Schneider (USA), Inc.*,²⁸⁶ the plaintiff complained to her supervisor “about the difficulties of being a female in the company.”²⁸⁷ The reference to being female surely indicated that the complaint concerned conduct affecting the plaintiff because of her protected class. The court nevertheless granted summary judgment on the retaliation claim for lack of protected activity because the plaintiff’s statements about the difficulties facing women in the company were vague and did not identify any particular employment practice as discriminatory.²⁸⁸ Employer terminology in EEO matters, however, often steers employees away from the rights-claiming language of discrimination and toward more general and diffuse labels like “diversity.”²⁸⁹

Other cases also involve complaints that could be reasonably construed as alleging bias against a protected class but are denied protection for failing to specify an unlawful employment practice. In *Pope v. ESA Services, Inc.*,²⁹⁰ the plaintiff, a black male of Liberian descent, did not engage in protected conduct when he prefaced his inquiry expressing interest in being moved up to a management level position with the observation that there were no black district managers in the region.²⁹¹ Because he did not attribute the absence of black managers to a discriminatory practice, the court ruled that he did not oppose an

282. 523 F.3d 845 (8th Cir. 2008).

283. *Id.* at 849–50.

284. *See, e.g.*, *Jeronimus v. Polk Cnty. Opportunity Council, Inc.*, 145 F. App’x 319, 322, 326 (11th Cir. 2005) (finding that an email complaining of being “unjustly singled out,” “a campaign of harassment,” and “a truly hostile environment” was not protected activity where the plaintiff made no mention of race).

285. *See supra* text accompanying notes 169–74.

286. 994 F. Supp. 802 (S.D. Tex. 1998).

287. *Id.* at 811.

288. *Id.* at 823.

289. DOBBIN, *supra* note 94, at 16.

290. 406 F.3d 1001 (8th Cir. 2005).

291. *Id.* at 1010.

unlawful employment practice.²⁹² And in *Rone v. U.S. Sprint*,²⁹³ the court ruled that the plaintiff's expression of offense at racial insensitivity by the company was not sufficiently connected to any unlawful employment practice by the employer.²⁹⁴ In that case, the plaintiff was terminated after complaining to the human resources department about an internal company newsletter using racially insensitive terms to describe a company training program in which the plaintiff participated. The newsletter described the training program, "which consisted entirely of minorities, targeted members of the Kansas City urban community who were welfare recipients or rehabilitated drug users."²⁹⁵ The plaintiff complained that the article was offensive, but she did not accuse the company of any particular unlawful employment practice.²⁹⁶ Accordingly, the court ruled, her complaint was not protected activity.²⁹⁷

A final example of a plaintiff's failure to link a complaint about the treatment of a protected class to an unlawful employment action comes from *Hill v. IGA Food Depot*.²⁹⁸ In that case, the court ruled that the plaintiff, an African American grocery store clerk, did not engage in protected activity when he asked his supervisor why the store had so few African American cashiers. The court explained, a plaintiff must "at the very least, communicate [his] belief that discrimination is occurring to the employer. It is not enough for the employee merely to complain about a certain policy . . . and rely on the employer to infer that discrimination has occurred."²⁹⁹ The court acknowledged that the plaintiff's inquiry was "about race," but viewed it as merely "asking a question about race or suggesting the desirability of diversity," and "a far cry from alleging that an employee or the company is intentionally refusing to hire African-Americans."³⁰⁰ The court added that the plaintiff's questioning was motivated by "personal reasons," since his daughter had applied for a cashier position.³⁰¹ However, there is no support in the statute for according a lower level of protection to opposition that is personally motivated rather than principled, even if such an elusive distinction could be drawn. Nor do employer policies make such a distinction in encouraging employees to come forward with concerns about discrimination. Regardless of the plaintiff's motivation for complaining, courts require complaints to do more than specify a protected form of bias; the complaint must link the bias to a particular practice being challenged.³⁰²

292. *Id.*

293. 49 F. App'x 659 (8th Cir. 2002) (per curiam).

294. *Id.* at 660.

295. *Id.*

296. *Id.* at 660-61.

297. *Id.*

298. No. 2:04-cv-00966-WKW-VPM, 2006 U.S. Dist. LEXIS 80455 (M.D. Ala. Nov. 2, 2006).

299. *Id.* at *17-18 (quoting *Webb v. R&B Holding Co.*, 992 F. Supp. 1382, 1389 (S.D. Fla. 1998)).

300. *Id.* at *18-19.

301. *Id.* at *19.

302. *E.g.*, *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1313 (6th Cir. 1989) (plaintiff's accusations of his supervisor's "ethnocism" and racist remark were too

Some courts have taken the notice requirement one step further to insist not only that employees specify a protected class and complain about a particular employment practice, but also that they express a conclusion that the practice is indeed unlawful. In *Cyrus v. Hyundai Motor Manufacturing of Alabama, LLC*,³⁰³ the court ruled that the plaintiff's complaints about allegedly preferential treatment by the Korean-owned company of its Korean employees were too ambiguous to qualify as protected activity under Title VII. To be protected, the court explained, the plaintiff must make clear his belief that what he is complaining about is actually unlawful.³⁰⁴ In that case, the plaintiff had expressed opposition to what he perceived as the preferential treatment of Korean employees but did not explicitly state a belief that the preferential treatment was national origin discrimination in violation of Title VII. As the court explained, "it is Plaintiff's responsibility to alert Defendant that, not only is he complaining about unequal treatment, but that he also believes that the root cause of the unequal treatment is a form of discrimination prohibited by Title VII."³⁰⁵ While courts offer general disclaimers that an employee "need not refer to the statute by name,"³⁰⁶ this kind of reasoning comes awfully close to requiring that very thing.

Despite the pervasiveness of employer EEO policies, the case law fails to consider how the notice requirement comports with the way employer policies channel and frame employee complaints. Much sociolegal research demonstrates that workplace policies and cultures significantly affect how employees perceive and respond to discrimination.³⁰⁷ Strict notice requirements are in tension with EEO policies that lump together discrimination under broader promises of workplace fairness and eschew rights-claiming language about discrimination for the managerial language preferred by human resources staff.³⁰⁸ Employer policies blend nondiscrimination guarantees with more general concerns about fairness and diversity, without any cautionary instruction to employees about the importance of preserving their rights against retaliation and articulating specific complaints about

vague to be protected activity).

303. No. 2:07cv144-ID, 2008 U.S. Dist. LEXIS 33826 (M.D. Ala. April 24, 2008).

304. *Id.* at *29.

305. *Id.* at *32.

306. *Lambert v. Ackerley*, 180 F.3d 997, 1008 (9th Cir. 1999); *cf.* *EEOC v. Romeo Cmty. Schs.*, 976 F.2d 985, 989 (6th Cir. 1992) (holding that plaintiff engaged in protected activity when she "told them she believed they were 'breaking some sort of law' by paying her lower wages than previously paid to male temporary custodians").

307. *E.g.*, *Hirsh & Kornrich*, *supra* note 87, at 1394 (stating that variations in workplace conditions and institutional factors influence how workers perceive discrimination, their rights, and whether they make a complaint); *cf.* Barry M. Goldman, *The Application of Referent Cognitions Theory to Legal-Claiming by Terminated Workers: The Role of Organizational Justice and Anger*, 29 J. MGMT. 705, 720 (2003) (discussing the tendency of employer procedures, when perceived as fair, to "mitigate a worker's legal-claiming behavior that may otherwise be expected to result when termination is accompanied by interactionally unjust treatment").

308. *See DOBBIN*, *supra* note 94, at 94 (quoting TWA's 1980 grievance procedure and explanation of its purpose "to assure that the policies of the Company are applied to its employees in [a] fair, reasonable, and nondiscriminatory fashion"); *Goltz*, *supra* note 110, at 763-97 (noting the use of a cautious voice when women do report/complain in a study of women's experiences using internal complaint procedures to challenge discrimination).

discrimination.³⁰⁹ Instead, the policies steer employees toward more general terminologies, which employees internalize and use in expressing their concerns.³¹⁰ Complaints about what might be labeled “discrimination” are channeled into more general complaints about unfair treatment and interpersonal conflicts.³¹¹ Employee training programs reinforce this by going beyond conveying legal rules against discrimination to include broader kinds of diversity training.³¹² Instead of cautioning plaintiffs to take care in identifying discrimination, employer policies use directive language instructing employees to report their concerns under broad headings that lump potentially actionable complaints in with other grievances. When employee complaints are successfully channeled in this way, they lose out on the protections of retaliation law.

Together, these two doctrines make for a troubling disconnect between retaliation law and the realities of EEO governance. The concluding section considers some of the implications of this mismatch and sketches the outlines of a proposal for resolving them.

IV. TWO DOCTRINAL FIXES AND A CONCLUDING ANALYSIS

Unless retaliation law catches up with the integrated role employer policies and complaint processes play in the overall legal framework of employment discrimination law, the Supreme Court’s pro-plaintiff cases and exhortations about the importance of retaliation protections will have a hollow ring. Two fixes would go a long way toward securing the integrity of retaliation law against the background of EEO realities, without requiring statutory amendment or reversal of any Supreme Court decision.

First, it is time to recognize that the sharp split between internal and external complaints as the dividing line between Title VII’s opposition and participation clauses no longer makes sense. Placing internal EEO complaints under the participation clause, instead of casting them off to the weaker protections of the opposition clause, would avoid the harshness of the reasonable belief doctrine since

309. See, e.g., Claire Armstrong, Patrick C. Flood, James P. Guthrie, Wenchuan Liu, Sarah MacCurtain & Thadeus Mkamwa, *The Impact of Diversity and Equality Management on Firm Performance: Beyond High Performance Work Systems*, 49 HUM. RESOURCES MGMT. 977, 978 (2010) (using the terminology of “diversity and equality management systems” and explaining how the term “equal opportunity” came to encompass broader concepts than antidiscrimination).

310. See Edelman, *Rivers of Law*, *supra* note 93, at 191; see also Hirsh & Kornrich, *supra* note 87, at 1398 (discussing how the organizational environment affects worker perceptions of discrimination, and observing that managers often dissuade employees from perceiving problems in terms of discrimination and seek to recast them in terms of fairness, professionalism, and personality).

311. Estlund, *supra* note 106, at 336 (“Internal grievance processes . . . tend to assimilate complaints of discrimination to other complaints of unfair treatment, and indeed to the ordinary run of personnel conflicts.”); see also Edelman et al., *When Organizations Rule*, *supra* note 90, at 899 (stating that “internal dispute handlers tend to recast discrimination complaints as typical managerial problems (e.g., poor management or interpersonal difficulties) rather than as legal violations”).

312. Bendick et al., *supra* note 105, at 10–11.

only subjective, good-faith participation is required by the participation clause. It would also avoid the problems of the notice/specificity requirement if courts treated notice of a complaint brought pursuant to an employer policy that covers discrimination as sufficient notice for protected activity, much as they do for externally filed complaints under the participation clause.

Using the participation clause for internal complaints pursuant to employer discrimination policies would recognize the extent to which such policies have become integrated into the legal framework of employment discrimination law. Only the most formalistic reading of the participation clause supports excluding internal complaints from the protections of that clause.

A recent case from the Second Circuit typifies the reasoning lower courts have used to exclude internal complaint processes from the participation clause. In *Townsend v. Benjamin Enterprises*,³¹³ the plaintiff, a human resources director, alleged that she was fired for conducting an investigation into an employee's charge that she was sexually harassed by the company vice president.³¹⁴ Since the plaintiff had not yet completed the investigation when she was fired, and therefore could not have had a reasonable belief that unlawful discrimination occurred, she chose to forego a claim under the opposition clause and instead sought the protections of the participation clause.³¹⁵ The Second Circuit rejected this claim, joining the other lower courts that have ruled on this issue in reading the participation clause as not encompassing internal complaints.³¹⁶

Under this view, the language of the participation clause, which protects an employee "because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter,"³¹⁷ refers only to the enforcement mechanisms codified in the statute—that is, filing a charge with a government enforcement agency or suing in court.³¹⁸ Like other circuit courts, the court in *Townsend* read this language to exclude any internal complaint process that takes place in the absence of a formal charge filed with the EEOC or parallel state enforcement agency.³¹⁹ Despite the unanimity on this point in the lower courts, the Supreme Court has left this an open issue; in allowing the claim in *Crawford* to proceed under the opposition clause, the Court specifically left undecided the question of whether internal employer investigations of discrimination complaints might fall within the participation clause.³²⁰ Recognizing coverage under the participation clause would best serve the goals the Court has identified in ensuring a workable statutory enforcement scheme.

313. 679 F.3d 41 (2d Cir. 2012).

314. *Id.* at 46.

315. *Id.* at 48.

316. *Id.* at 49 (citing authorities).

317. 42 U.S.C. § 2000e-3(a) (2006).

318. *Townsend*, 679 F.3d at 48–49.

319. *Id.* at 49. Indeed, the court left open the possibility that participation in an employer's internal EEO processes may not fall under the participation clause even if it were preceded by the filing of a formal charge with the EEOC. *Id.* at 48 n.6; *see also* *Hatmaker v. Mem'l Med. Ctr.*, 619 F.3d 741, 747 (7th Cir. 2010) (reserving judgment on this question).

320. *Crawford v. Metro. Gov't of Nashville & Davidson Cnty.*, 555 U.S. 271, 280 (2008).

The lower courts' reading of the participation clause divorces the lodging of formal complaints from the liability rules courts have crafted to decide them. This approach treats statutory interpretation, regulatory guidance, and everyday employer practices for complying with the law as not "law" at all and therefore not operating "under this subchapter." Their narrow, technical reading of the participation clause contrasts with the purposive approach taken by the Supreme Court in its retaliation decisions, which places a premium on the effectiveness and workability of the statute. Unless the gaps in retaliation doctrine are closed, any triumph of pragmatism over formalism will bypass the employees who address concerns about discrimination through the internal EEO processes their employers have set up to capitalize on the legal incentives for creating such processes.

The more purposive reading of the participation clause advocated here is not foreclosed by the literal text of the clause.³²¹ Although Congress may not have originally intended internal employer investigations and complaint processes to fall within that clause,³²² it could not have foreseen the proliferation and subsequent connection of such policies, through judicial interpretation, to the official enforcement scheme established by the statute. So far, lower courts have failed to appreciate that their narrower reading reflects an interpretive choice, not only about how to read the participation clause, but also about whether to acknowledge the role played by employer EEO policies in the enforcement of discrimination law.

As employer EEO processes have become more integral to statutory enforcement, the sharp split between the participation and opposition clauses has become increasingly anachronistic. The existence of employer policies for handling employee complaints about discrimination is now firmly embedded in the liability rules crafted by the Court for harassment claims specifically, and more generally with respect to punitive damages, for all kinds of discrimination claims. Employer EEO policies are also expressly encouraged by the EEOC, and as sociolegal scholarship discussed above demonstrates, these policies greatly influence both courts and the EEOC in their determinations of whether the employer complied with the law. These policies also operate in the workplaces to set the norms and expectations for employee nondiscrimination rights at work. Treating employer EEO processes as outside of Title VII's statutory enforcement framework does not comport with their place in employment discrimination law or with the Supreme Court's purposive approach to statutory interpretation in its retaliation decisions.

Roping internal complaints into the participation clause would also better comport with the law's incentives for voluntary compliance. Otherwise, the broader retaliation protections of the participation clause create the incentive for employees to bypass internal complaint processes and go straight to formal enforcement in order to maximize protection from retaliation. Such an incentive is terribly at odds

321. See, e.g., *Townsend*, 679 F.3d at 61 (Lohier, J., concurring) (noting that this same subchapter "suggest[s] a role for non-governmental enforcement" and citing section 705(g)(1), which "authorizes the EEOC to cooperate with and . . . utilize regional, State, local, and other agencies, both public and private, and individuals").

322. See *id.* (acknowledging that Congress did not anticipate internal EEO policies falling under the participation clause).

with the Court's pronouncements encouraging voluntary compliance and internal employer processes for resolving complaints.³²³

In addition to treating internal complaints pursuant to employer discrimination policies under the participation clause, a second doctrinal fix is for courts to take into account how employer EEO policies shape employee perceptions about discrimination and expressions of complaints in retaliation claims that are decided under the opposition clause. When courts apply the reasonable belief doctrine and the notice/specificity requirement under the opposition clause, they should carefully consider how employer nondiscrimination policies influenced the complainant's understanding of discrimination and communications in opposition to it.

While it is likely too late to convince the Court to abandon an objective reasonableness requirement under the opposition clause in favor of a subjective good-faith standard, there is no reason why reasonableness should be determined independent of employer policies defining and prohibiting discrimination. Such policies should be highly relevant to judicial determination of the reasonableness of the employee's belief that discrimination occurred, regardless of the narrower scope of unlawful discrimination in the governing law. Neither the text of the opposition clause nor the Supreme Court's precedent forecloses such a result. Although in *Breedon* itself the Court did not discuss how the employer's sexual harassment policy affected the plaintiff's actions, it did not foreclose lower courts from taking into account such considerations. Over a decade of experience with the reasonable belief doctrine in the lower courts since *Breedon* demonstrates the need for courts to take employer policies into account in determining the reasonableness of employee understandings of discrimination.

Likewise, the way employees frame discrimination complaints may reflect the terminology and direction of employer EEO policies. Rather than rigidly demanding that employees use the terminology of discrimination and unlawful employment practices in order to protect a complaint under the opposition clause, courts should allow employees as much flexibility as employer policies do in framing their complaints. If the employer understands the complaint to fall within the contours of its policy covering discrimination, that should be enough to satisfy the specificity requirement of the opposition clause.

Unless courts do a better job integrating retaliation law with employer's internal complaint processes, there will be a vast gulf between the on-paper protections of retaliation law promised by the Supreme Court and the day-to-day risks employees face in actually using these processes to address discrimination. The gaps in retaliation law identified in this Article give cause for concern that employer antidiscrimination policies and complaint processes are not fulfilling the role that the law has set for them. Existing academic critiques of internal EEO governance have not paid enough attention to the potential for such mechanisms to undermine legal protections from retaliation for complaining about inequality in the

323. See *Pa. State Police v. Suders*, 542 U.S. 129, 145 (2004) (noting Title VII's statutory purpose of promoting conciliation and voluntary compliance rather than litigation); *McKennon v. Nashville Banner Publ'g. Co.*, 513 U.S. 352, 358 (1995) (noting Title VII's purpose to promote self-regulation and self-examination of any discriminatory practices to enable voluntary compliance).

workplace. While the train toward internal EEO governance has long left the station and is likely unstoppable, there should at least be recognition of how that train is derailing the increasingly pro forma protections of retaliation law.

Focusing only on the pro-plaintiff cases in the Supreme Court docket leaves an overly rosy view of retaliation law. Adjusting the lens to spotlight internal complaints against the backdrop of employer EEO policies reveals a different picture. Instead of a contrast with the Court's pro-employer bent in employment discrimination cases, there is a consistency in how retaliation law functions to reinforce the Court's worldview. The anti-retaliation story line from the Supreme Court docket feeds into the Court's skeptical approach to discrimination claims and a belief that real discrimination—what the law recognizes as unlawful discrimination—is rare and is adequately addressed when it does occur. The veneer of robust protection from retaliation gives the impression of full and open access for employee complaints about discrimination—which in turn supports judicial skepticism about the prevalence of discrimination. Through this feedback loop, retaliation law functions not to enhance law enforcement, but to legitimate the narrow scope of discrimination law and to support a skeptical view of the prevalence of discrimination in the modern EEO-saturated workplace.