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Realizing the Potential of the Joint Harassment/Retaliation Claim

ABSTRACT. This Note assesses the relationship between hostile work environment harassment and retaliatory harassment claims by reviewing several cases in which both claims were brought. It argues that courts have unjustifiably narrowed the reach of both claims by disaggregating harassment from retaliation in a variety of ways, including considering harassment that occurs after the discrimination complaint to be solely retaliatory, rather than both retaliatory and discriminatory; interpreting harassment to be motivated simply by personal animus rather than by a retaliatory or discriminatory purpose; and disaggregating explicitly racialized or sexualized forms of harassment from nonracialized or sexualized forms of conduct. This Note concludes by describing the potential of joint harassment/retaliation claims to respond to both status-based and conduct-based discrimination and by offering specific recommendations to courts for reaching an integrated understanding of the two claims.

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INTRODUCTION

Consider the following scenario: soon after an employee begins a new job, her coworkers proposition her for sexual favors and make lewd and sexist jokes around her. The employee believes she is being sexually harassed and informs her supervisor of the behavior. Soon afterward, her working environment changes for the worse: her coworkers sabotage her workspace, scratch her car, and refuse to provide her with routine job assistance. Ultimately, she resigns and files a suit under Title VII, claiming sex-based hostile work environment harassment and unlawful retaliation.

Data from social science studies and statistics from the Equal Employment Opportunity Commission (EEOC) suggest that scenarios like this one—where a plaintiff experiences harassment alongside retaliation—are pervasive. Yet courts have not reached a consensus about how to conceptualize such situations. One response has been to disaggregate the situation into two separate claims, treating the precomplaint behavior as constituting sex harassment and considering the postcomplaint behavior as constituting retaliation alone. Alternatively, some courts have understood the entire set of behavior as hostile work environment harassment, with postcomplaint behavior understood as escalated harassment, retaliation, or both.

Courts often draw distinctions between the claims without sufficiently examining why the doctrinal boundaries have been drawn the way they have. Fragmented understandings of harassment and discrimination in turn undermine the potential of the two claims to redress discrimination by misconstruing or failing to recognize how discriminatory dynamics operate in the workplace. The lack of judicial consensus over joint claims extends to the basic legal elements of retaliation and harassment, such as causation, evidentiary burdens, and employer liability, and results in part from the absence of a coherent framework for understanding retaliation and harassment when they occur together. This gap is evident in scholarship as well. While hostile work environment harassment[1] and retaliation[2] have each received

1. For discussions of how the hostile work environment claim can address exclusion, see, for example, Tristin K. Green, *Work Culture and Discrimination*, 93 CAL. L. REV. 625 (2005) (discussing work culture as a source of discrimination); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1164 (1995) (discussing the ways in which "subtle or unconscious race and national origin discrimination" lead to exclusion); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998) (focusing on hostile work environment claims based on sex); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001); and Noah D. Zatz, *Beyond the Zero-Sum Game: Toward Title VII Protection for Intergroup Solidarity*, 77 IND. L.J.

considerable academic attention in their own right (harassment more so than retaliation), little research has been done into how they operate—and how they should be understood—when they occur in concert.

This Note seeks to bridge some of the gap in the literature. It argues that joint claims of hostile work environment harassment and retaliation have the potential to allow courts to redress dynamic forms of exclusion in the workplace, because each claim focuses upon a distinct type of harm. The harassment inquiry focuses on why and how individuals were singled out for adverse treatment, and asks whether such treatment hinders an individual's ability to pursue her work because of a protected characteristic. The retaliation inquiry, by contrast, focuses upon the conduct of a person in opposing discrimination, and asks whether the actions of the employer or coworkers could function to suppress an employee's oppositional behavior. When both claims are brought together, courts have the opportunity to recognize dynamic interactions between conduct-based and status-based forms of exclusion in the workplace. This potential has been largely unrealized, however, due to courts' failure to recognize harassment and retaliation as distinct, yet overlapping, forms of behavior.

Part I demonstrates the need for research into the joint harassment and retaliation claim by drawing on social science research and case law that illustrates how harassment and retaliation commonly interact in the workplace. I contend not only that harassment and retaliation frequently occur together, but also that they interact to shape how an individual experiences discrimination. Ongoing harassment coupled with retaliation serves not only to exclude members of protected groups who have already experienced discrimination, but also to punish them for daring to challenge their relegation to the margins of the workplace. I then discuss how the distinct legal inquiries of the harassment and retaliation claims, when employed in concert, hold the potential to address patterns of exclusion that neither claim can reach alone.

Part II surveys how appellate courts have addressed joint harassment/retaliation claims and offers three case studies to identify trends in court treatment of such claims. Part II identifies a number of ways that courts

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63, 65 (2002) (discussing the "growing understanding of how co-worker behavior and shop- and office-level work culture act as agents of inequality, even as the battle against employment discrimination shifts from overt, top-down forms to equally pervasive but often subtle practices").

2. For discussions of the retaliation claim, see, for example, Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18 (2005); Douglas E. Ray, *Title VII Retaliation Cases: Creating a New Protected Class*, 58 U. PITT. L. REV. 405, 413-16 (1997); and Terry Smith, *Everyday Indignities: Race, Retaliation, and the Promise of Title VII*, 34 COLUM. HUM. RTS. L. REV. 529 (2003).

have disaggregated behavior understood as retaliatory from behavior understood as discriminatory in a way that unjustifiably narrows the reach of each claim. I also discuss application of the *Burlington Industries v. Ellerth*[3] "affirmative defense" to cases of retaliatory harassment. Applying *Ellerth* allows employers to escape liability if they can show that they neither "knew nor should have known" about the retaliation, or that they took reasonable measures to remedy it.[4] I critique the application of the *Ellerth* defense in light of the Supreme Court's recent decision in *Burlington Northern & Santa Fe Railway Co. v. White*,[5] which indicated that retaliation plaintiffs arguably deserve greater protection than even discrimination plaintiffs under Title VII. I then discuss additional consequences of court disaggregation of the claims on tolling and damages.

Part III discusses doctrinal ways to realize the potential of the joint harassment and retaliation claims. Through a case study of an integrated claim, Part III outlines how courts can conceptualize joint claims in a way that more fully realizes how retaliation and harassment interact in the workplace. This Note concludes with specific recommendations for how courts can understand status-based and conduct-based forms of exclusion in an integrated way.

I. THE RELATIONSHIP BETWEEN HARASSMENT AND RETALIATION

Harassment and retaliation are closely related. Retaliation not only often accompanies harassment, but it also affects how individuals respond to harassment. On one level, retaliation or threat of retaliation minimizes assertive responses to discrimination, causing targets of harassment to choose not to confront harassers, not to report harassment, or not to file discrimination claims. On another level, retaliation works to underscore and amplify the effects of harassment: it further excludes the target of harassment, while also punishing her for attempting to challenge discriminatory behavior. This Part assesses how retaliation and harassment commonly interact in the workplace.

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3. 524 U.S. 742 (1998).

4. Specifically, the Court in *Ellerth* held that in cases of hostile work environment harassment that did not culminate in a "tangible" employment action – such as "discharge, demotion, or undesirable reassignment" – employers can escape liability if they can demonstrate two elements: "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Id.* at 765. This decision applied to discriminatory harassment, not retaliatory harassment.

5. 126 S. Ct. 2405 (2006).

It then turns to the legal regimes of the harassment and retaliation claims. Although retaliation and harassment frequently occur in tandem, they are addressed under distinct and nonoverlapping doctrinal frameworks. The retaliation inquiry focuses on the individual's conduct in opposing discrimination, while the harassment inquiry focuses on whether an individual was targeted for discrimination on the basis of her membership in a protected class. Because each claim involves a distinct inquiry, the joint application of these two inquiries holds potential to allow courts to understand how status- and conduct-based forms of exclusion can operate simultaneously to maintain and police discriminatory norms in the workplace.

A. Why Study Harassment and Retaliation Together?

Retaliation relates to harassment on a number of levels. First, the threat of retaliation discourages employees from confronting harassment. According to one study, an estimated seventy percent of sexual harassment victims who do not file discrimination claims cite fear of retaliation as a "moderate or strong influence on their decision" not to report the harassment.[6] The threat of retaliation deters even those employees who profess a strong belief in the importance of preventing harassment from confronting it when faced with it themselves, largely because of their belief that confronting or reporting harassment can come at a high professional price.[7] Unfortunately, this perception turns out to be correct much of the time. A number of social science studies have found not only that confronting discrimination carries penalties in the workplace, but also that the most assertive responses to harassment—such as filing formal discrimination claims about the behavior—incur the strongest

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6. Ellen R. Peirce, Benson Rosen & Tammy Bunn Hiller, *Breaking the Silence: Creating User-Friendly Sexual Harassment Policies*, 10 EMP. RESPS. & RTS. J. 225, 233 tbl.II (1997).

7. One study illustrated this phenomenon by asking college-aged women how likely they would be to confront discrimination in the form of blatantly sexist comments during a job interview and then comparing their responses to those of other subjects actually asked the same questions during an interview. The majority of the participants indicated they would confront the behavior when asked how they would respond in the abstract, but when other participants were actually asked the sexist questions in a simulated interview, fewer than half of the participants challenged the comments in any way. Janet K. Swim & Lauri L. Hyers, *Excuse Me—What Did You Just Say?!: Women's Public and Private Responses to Sexist Remarks,* 35 J. EXPERIMENTAL SOC. PSYCHOL. 68, 82 tbl.3 (1999).

   While the discrepancy between the subjects' hypothetical responses and their actual behaviors can be attributed to a number of impulses—ranging from fear of being denied the job to fear of offending a potential employer—their silence can be understood to reflect "an acute awareness of the social costs of confronting discrimination, rather than an acceptance of the situation." Brake, *supra* note 2, at 31.

backlash, with retaliation in the form of negative job evaluations, loss of promotions, adverse transfers, and terminations.[8] According to one study, one-third of victims who filed formal claims about harassment reported that it actually "made things worse" for them on the job.[9] As a result of these dynamics, few victims of harassment confront the behavior directly, choosing instead to engage in passive tactics such as avoiding the harasser or ignoring the harassment.[10] Only one percent of all targets of harassment choose the most assertive response and actually file a claim of discrimination in court.[11]

In addition to tangible forms of retaliation, such as adverse transfers or demotions, those who speak out about discrimination face a social cost in the workplace as well. In her recent article on retaliation, Deborah Brake discusses a series of social studies demonstrating that women who confront coworkers who make sexist comments, or even complain about sexism to others, incur more of a social penalty than women who ignore sexism when it occurs.[12] Individuals are stigmatized even when they simply express a belief that discrimination has occurred in their workplace, but take no measures to report or otherwise address the discrimination. Social psychologists Cheryl Kaiser and Carol Miller illustrated this phenomenon through a study that assessed how test subjects characterized African Americans based solely on the African Americans' responses to failing a career test. They found that African Americans who attributed their failure to racism were much more likely to be described as "hypersensitive, emotional, argumentative, irritating, trouble making, and complaining" by the test subjects than the African Americans who blamed themselves for the poor result.[13] This result persisted even when the subjects were shown "persuasive evidence of discrimination" in the way that the tests had been graded.[14]

This finding—that those who speak out about the possibility of discrimination encounter strong social stigma, even when they do not report or

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8. *See* Louise F. Fitzgerald, Suzanne Swan & Karla Fischer, *Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment*, 51 J. SOC. ISSUES 117, 122 (1995).

9. *Id.* at 123.

10. *Id.* at 119-20.

11. *Id.* at 123.

12. Brake, *supra* note 2, at 32-35 ("A disturbing body of research demonstrate[s] a high propensity for men and white persons to dislike women and people of color when they claim discrimination, even when the claim is meritorious.").

13. Cheryl R. Kaiser & Carol T. Miller, *Stop Complaining! The Social Costs of Making Attributions to Discrimination*, 27 PERSONALITY & SOC. PSYCHOL. BULL. 254, 261 (2001).

14. *Id.* at 258; *see also* Brake, *supra* note 2, at 32-33.

otherwise act to address the discrimination—is particularly disturbing because it indicates that members of groups most likely to experience discrimination are also likely to face retaliation if they speak out. In other words, not only do members of excluded groups face a greater likelihood of being discriminated against in the first place, but they experience high social costs when they report that discrimination as well.[15]

The threat of retaliation not only discourages individuals from reporting harassment, but also delays them from speaking out. Of the small minority of harassment victims who actually file a claim, only about ten percent do so while employed.[16] The delay in reporting discrimination likely stems from the perception that confronting harassment is risky, and that it is safer to wait until there is relatively little to lose before speaking out. But victims of employment discrimination do, in fact, have much to lose by waiting to report discrimination. First, some employees may be unable to leave a discriminatory workplace and may therefore be forced to endure harassment indefinitely. This not only creates a cost for the individual victim, but also undermines the effectiveness of Title VII, which principally relies on individuals to bring private suits for enforcement.[17] Second, the delay in reporting discrimination has feedback effects within the workplace. Employees who witness discriminatory behavior go undisciplined may conclude that challenging discrimination is futile, and therefore may be discouraged from filing claims for themselves in the future.[18] Delays in reporting discrimination also reduce the cost of discrimination for employers. The employer realizes the "benefit" of

15. Kaiser & Miller, *supra* note 13, at 259.

16. John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1031 (1991). Donohue and Siegelman also discuss the fact that most Title VII plaintiffs have been discharged by their employer. *Id.* Thus, while it could be the case that employees quit in response to harassment and then immediately bring discrimination claims, data suggest instead that most employees who bring discrimination claims are involuntarily terminated before they file suit, thereby resulting in a time lag between the start of the harassment and the filing of the discrimination suit.

17. *See, e.g.*, Rivera v. NIBCO, Inc., 364 F.3d 1057, 1067 (9th Cir. 2004) ("Title VII . . . depends almost entirely upon individual workers—private attorneys general—to achieve the deterrent purposes of the statute.").

18. *See* Holt v. Cont'l Group, Inc., 708 F.2d 87, 91 (2d Cir. 1983) ("A retaliatory discharge carries with it the distinct risk that other employees may be deterred from protecting their rights under the Act or from providing testimony for the plaintiff in her effort to protect her own rights.").

discrimination immediately, but delays the cost of discrimination to a remote and uncertain point in the future.[19]

Third, delayed claims may become time barred. Title VII states that a plaintiff shall file a charge of discrimination with the EEOC within either 180 or 300 days after an "alleged unlawful employment practice occurred."[20] The Supreme Court has interpreted this provision to mean that a plaintiff only has a viable cause of action for "discrete acts" of discrimination that occurred within the tolling period.[21] For a hostile work environment claim, the plaintiff must show that at least one act contributing to the ongoing hostile work environment occurred within the mandated period.[22] Given this strict enforcement of Title VII's tolling period, plaintiffs who delay reporting discrimination run the risk of permanently losing their chance for legal redress.

Retaliation and the threat of retaliation not only discourage employees from reporting harassment, but also affect the way they experience harassment. While retaliation is often characterized as motivated by an individual's conduct in opposing discrimination, and harassment and other forms of discrimination are understood as motivated by an individual's status as a member of a protected class,[23] these two types of behaviors are not as distinct as they may initially appear. Employees can be and frequently are simultaneously targeted for exclusion both because of who they are and because of what they do. In this

19. By "benefit," I refer generally to any utility that an employer with discriminatory preferences may derive from realizing those preferences through the composition of a hierarchical or segregated workforce. *Cf.* Donohue & Siegelman, *supra* note 16, at 1024 ("If the employer feels animus towards women or minorities, he must in addition [to the costs of paying the worker] bear some psychological costs of associating with the worker.") Conversely, this also suggests that such an employer would realize some psychological benefit from discriminating against women or minorities. There is also literature that suggests that antidiscrimination laws reduce economic efficiency. *Cf., e.g.*, RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS (1992) (arguing that antidiscrimination laws are economically inefficient because they violate freedom of contract principles).

20. 42 U.S.C. § 2000e-5(e)(1) (2000).

21. Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 113 (2002); *see also* Ledbetter v. Goodyear Tire, 127 S. Ct. 2162, 2169 (2007) ("The EEOC charging period is triggered when a discrete unlawful practice takes place.").

22. *Morgan*, 356 U.S. at 117.

23. The Supreme Court, for instance, has described the relationship between the harassment provision (or, more broadly, the antidiscrimination provision) of Title VII and the retaliation provision as follows: "The substantive provision seeks to prevent injury to individuals based on who they are, *i.e.*, their status. The anti-retaliation provision seeks to prevent harm to individuals based on what they do, *i.e.*, their conduct." Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2412 (2006).

sense, retaliation can work to underscore and amplify the effects of the harassment from the perspective of the target employee, while also deterring the target of the exclusionary behavior from challenging the discriminatory treatment.

This relationship does not lend itself as easily to empirical analysis, but can nonetheless be observed through studies of workplace dynamics or in cases where employers transparently reveal their motivations for harassing and retaliatory behavior. Such studies reveal harassment as often motivated by the desire to preserve a gender- or race-dominated work hierarchy, as well as the identities of those who engage in it.[24] Cynthia Cockburn offers one depiction of this dynamic through a large-scale, interview-based analysis of technologically based fields. Cockburn describes enclaves of predominantly male technicians who deliberately create a work environment premised upon a gender-based hierarchy, and then maintain that hierarchy through harassment and the threat of retaliation.[25] Cockburn describes the male technicians relating to each other through

> competitive swearing and obscenity and a trade in sexual stories, references and innuendo that are directly objectifying and exploitative of women. It serves the purpose of forging solidarity between them. Some men told me frankly that, yes, a woman there, it does cramp your style and spoil the conviviality. The obscenity creates a boundary across which the women will fear to step. A maintenance technician told me, "If someone [i.e. some woman] came into this set-up they would have to accept it and not try to change it."[26]

The male workers embrace a culture premised upon excluding women in order to reinforce their belief that the technician pool is an appropriately all-male enclave. The work culture then is employed as a way to justify the exclusion of women.[27] The technician's warning that a woman entering the technician pool would "have to accept it and not try to change it" suggests how the threat of retaliation can be used to silence those who would resist their relegation to the

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24. *See* Schultz, *supra* note 1, at 1755 & n.387 (citing this theory and discussing social science evidence in support of it).

25. CYNTHIA COCKBURN, MACHINERY OF DOMINANCE: WOMEN, MEN, AND TECHNICAL KNOW-HOW 175-76 (1988).

26. *Id.* at 176.

27. *See also* Schultz, *supra* note 1, at 1691 ("Harassment serves a gender-guarding, competence-undermining function: By subverting women's capacity to perform favored lines of work, harassment polices the boundaries of the work and protects its idealized masculine image—as well as the identity of those who do it.").

bottom of gender-based work hierarchies. It suggests that although a woman would be unwelcome in the pool simply because of her status as a woman, she would be more likely to be tolerated if she herself tolerated the discriminatory atmosphere. If she spoke out, not only would she be forced to endure the discriminatory environment, but she could also become the target of retaliatory behavior designed to further marginalize her and maintain the exclusionary workplace norms.

Harassment and retaliation can interrelate in far more overt ways to exclude members of protected groups. An example of how retaliation can magnify and reinforce discrimination occurs in *Slack v. Havens*,[28] where four African American women were ordered to do heavy cleaning work that was not in their job description. Their supervisor justified the assignment under the rationale that "[c]olored folks are hired to clean because they clean better."[29] As their supervisor's comment indicates, the women were targeted for the discriminatory assignment as a result of their membership in a low-status caste within the workplace. Because of their identities as African Americans, they were perceived as better suited to perform heavy cleaning than whites, and, by implication, not as well suited to perform the work for which they actually had been hired. When the women protested the assignment, they were told to perform the work "or else."[30] After they persisted in their opposition, the plaintiffs were terminated and told that "[c]olored people should stay in their places."[31] The discrimination in this instance resulted from the supervisor's caste-like understanding of what kinds of jobs "colored" people were fit to perform, as well as stereotypes about how members of the group ought to behave. By refusing to accept both the discriminatory assignment as well as the order to "stay in their places," the women became the targets of additional exclusionary behavior. The retaliatory action amplified the effects of the discrimination by imposing an additional penalty—termination from employment—because the plaintiffs refused to conform to racial stereotypes, accept a discriminatory work assignment, and act in accordance with their supervisor's racist (and possibly sexist) views that African American women are naturally better suited to do heavy cleaning.

Because retaliation and harassment so commonly interact in the workplace, plaintiffs frequently bring harassment and retaliation charges together. Today,

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28. 7 Fair Empl. Prac. Cas. (BNA) 885 (S.D. Cal. 1973), *aff'd as modified*, 522 F.2d 1091 (9th Cir. 1975).

29. *Id.* at 887.

30. *Id.*

31. *Id.*

the retaliation claim is one of the most common claims brought under Title VII.[32] Since 1997, charges of retaliation under Title VII have increased by nearly twenty percent, and by 2006, over a quarter of all complaints filed with the EEOC alleged retaliation.[33] While it is hard to determine accurately how often retaliation claims are brought alongside harassment claims in particular, existing data indicate that there is a high correlation. A recent empirical study estimates that nearly half of the claimants in racial harassment cases also bring retaliation claims.[34] Research into sexual harassment suggests a similarly strong correlation, with one survey finding that sixty-two percent of women who reported sexual harassment—both through internal grievance procedures and by filing claims—also reported retaliation.[35]

Given the frequency with which harassment and retaliation accompany each other, and the precipitous rise in retaliation claims overall in the last fifteen years, there is an increasingly urgent need for a systemic response by courts to joint harassment/retaliation claims.

B. The Legal Regimes of the Claims

Although retaliation and hostile work environment harassment frequently occur in concert, they are addressed under distinct legal frameworks.[36] Hostile work environment harassment is governed by section 703(a)(1) of Title VII, which makes it unlawful for an employer

> to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.[37]

To succeed in a claim for hostile work environment harassment, a plaintiff is required to prove as a threshold matter that: (1) the discrimination has been

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32. U.S. Equal Opportunity Comm'n, Charge Statistics FY 1997 Through FY 2006 (Feb. 26, 2007), *available at* http://www.eeoc.gov/stats/charges.html (indicating that retaliation charges are exceeded in frequency only by charges of sex and race discrimination).

33. *Id.*

34. Pat K. Chew & Robert E. Kelley, *Unwrapping Racial Harassment Law*, 27 BERKELEY J. EMP. & LAB. L. 49, 80 (2006).

35. Fitzgerald et al., *supra* note 8, at 122.

36. *See* Brake, *supra* note 2, at 46-51 (discussing how the retaliation inquiry differs from the discrimination inquiry).

37. 42 U.S.C. § 2000e-2(a)(1) (2000).

"sufficiently severe or pervasive 'to alter the conditions of . . . employment and create an abusive working environment'"[38] and (2) the discrimination is based upon the "individual's race, color, religion, sex, or national origin."[39] Both of these requirements pose substantial hurdles for plaintiffs. The "severe or pervasive" prong requires courts to engage in detailed, fact-specific examinations of how frequently discriminatory conduct occurred. If a court finds that the harassment occurred only sporadically, or that it was regular but trivial in nature, the plaintiff cannot establish a hostile work environment claim.[40] The requirement that a plaintiff prove the discrimination occurred because of membership in a protected group can also be difficult to satisfy. In the case of sex-based harassment, for instance, the Supreme Court has stressed the importance of evidence of sexual desire on the part of the harasser and evidence that the harassment included "sex-specific and derogatory terms."[41] Because of the emphasis on sexist or sexualized commentary as well as sexual contact, plaintiffs who lack this kind of anecdotal evidence have difficulty establishing that the discrimination occurred because of sex.[42] In particular, women (or men) who are harassed because of their sex in less overtly sexual ways—such as through the denial of access to training opportunities, sabotaged work, exclusion from networking opportunities, or the denial of routine job privileges—often face more difficulty in proving their case than those who are harassed in explicitly sexual terms.[43] Similar trends occur in race-based cases, where judges stress the need for evidence in the form of race-specific derogatory language.[44]

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38. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986) (quoting Henson v. Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

39. 42 U.S.C. § 2000e-2(a)(1) (2000).

40. Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 115 (2002).

41. Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 80 (1998). For one critique of the *Oncale* paradigm, see Reva B. Siegel, *Introduction: A Short History of Sexual Harassment*, *in* DIRECTIONS IN SEXUAL HARASSMENT LAW 1, 23-26 (Catherine A. MacKinnon & Reva B. Siegel eds., 2004), which argues that the *Oncale* paradigm, in which sexual harassment is understood as motivated either by "desire" or by "hostility to women in the workplace," has the potential to obscure as much as it illuminates.

42. *See generally* Schultz, *supra* note 1 (discussing sex-based harassment as action that takes many different forms, many of which are not predominantly sexual).

43. *Id.* at 1687.

44. *See* Chew & Kelley, *supra* note 34, at 87 (analyzing survey results showing that outcomes in racial discrimination cases vary depending on the type of harassment, and explaining that "when defendants use ostensibly race-linked physical objects (such as nooses or Ku Klux Klan-associated attire) (33.3% success rate) or race-obvious verbal harassment (such as the use of 'nigger') (25.9%), plaintiffs are more likely to win than the average").

In sexual harassment claims only, plaintiffs also face the additional burden of showing that the harassment was "unwelcome," at least when the conduct consists of sexual advances.[45] Because of this complicated framework, plaintiffs who experience a hostile work environment often face difficulty proving that harassment occurred because of a protected characteristic, rather than because of factors such as pure personal animus.[46]

As briefly noted above, plaintiffs in harassment claims must prove an additional element in order to establish employer liability. *Burlington Industries v. Ellerth*[47] established a special liability scheme in the case of hostile work environment harassment where the harassment is perpetrated by a supervisor and does not culminate in a tangible employment action, such as termination or demotion.[48] If the employer can establish that it has taken reasonable measures to remedy the harassing behavior, or that it neither "knew [n]or should have known" about the harassment, then the employer can escape liability.[49] Notably, this divided liability regime departs from the standard practice of holding employers vicariously liable for harms inflicted by employees during the course of an employment relationship.[50]

Retaliation is addressed in a different substantive provision of Title VII, section 704(a), which states:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified,

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45. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 68 (1986) (quoting 29 C.F.R. § 1604.11(a) (1985)).

46. *See, e.g.*, Theresa M. Beiner, *Let the Jury Decide: The Gap Between What Judges and Reasonable People Believe Is Sexually Harassing*, 75 S. CAL. L. REV. 791, 796-805 (2002) (discussing in detail the elements of proving a sexual harassment claim).

47. 524 U.S. 742 (1998).

48. Note that while *Ellerth* dealt specifically with hostile work environment based on sex, its holding has also been understood as applicable to race-based harassment cases. *See, e.g.*, Cooper-Schut v. Visteon Auto. Sys., 361 F.3d 421, 428 (7th Cir. 2004) (finding no employer liability because employer promptly investigated plaintiff's reports of racial harassment and reminded all employees of zero-tolerance policy toward racial harassment); McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1120 (9th Cir. 2004) (finding a material issue of fact as to whether an employer's response to racist graffiti had been adequate).

49. *Ellerth*, 524 U.S. at 759.

50. *See, e.g.*, Justin P. Smith, Note, *Letting the Master Answer: Employer Liability for Sexual Harassment in the Workplace After* Faragher *and* Burlington Industries, 74 N.Y.U. L. REV. 1786 (1999).

> assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.[51]

The elements required to make a prima facie case for retaliation are distinct from those required for a hostile work environment claim. In a retaliation claim, the focus is not upon an individual's status as a member of a protected class, but rather upon her conduct in opposing discrimination.[52] To succeed, a plaintiff must show that she "opposed any practice made . . . unlawful" or "participated in" protected behavior, and then experienced retribution as a result of her protected behavior.[53] Participation in protected conduct is satisfied by showing that a plaintiff filed a charge with the EEOC, informed her employer that she intended to file a charge, or initiated other investigations or proceedings.[54] Opposition behavior covers a wider range of activity, and includes actions such as complaining to a supervisor or protesting a discriminatory assignment.[55] The type of activity in which a plaintiff engages is important; it must clearly signal the plaintiff's opposition to the unlawful employment practice, but must not be seen as unreasonably infringing upon an employer's right to run its business without undue interference.[56] Plaintiffs who simply refuse to perform an assignment, for instance, run the risk of being considered insubordinate and crossing the threshold into engaging in unreasonable behavior that is not protected under section 704(a).[57]

In addition to establishing engagement in a protected activity, most circuits also require that the plaintiff demonstrate a good faith, reasonable belief that the opposed practices violated Title VII.[58] The reasonable belief doctrine can be applied to encompass behavior not actually protected under Title VII. For instance, plaintiffs who file sexual orientation discrimination claims have been found by some courts to be protected under section 704(a), even though Title

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51. 42 U.S.C. § 2000e-3(a) (2000).

52. *See generally* Brake, *supra* note 2 (discussing retaliation as conduct-based).

53. 42 U.S.C. § 2000e-3(a) (2000).

54. *See* 2 ARTHUR LARSON & LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 34.03 (2d ed. 2007).

55. *Id.*

56. *See, e.g.*, Hochstadt v. Worcester Found. for Experimental Biology, 545 F.2d 222, 231 (1st Cir. 1976) (discussing the need to "balance the purpose of the Act to protect persons engaging reasonably in activities opposing sexual discrimination, against Congress' equally manifest desire not to tie the hands of employers in the objective selection and control of personnel").

57. *See, e.g.*, Smith v. Tex. Dep't of Water Res., 799 F.2d 1026 (5th Cir. 1986).

58. 2 LARSON & LARSON, *supra* note 54, § 35.02[2][a].

VII's substantive provision does not reach sexual orientation.[59] The reasonable belief doctrine makes it possible for a plaintiff who alleges both discrimination and retaliation to recover for the retaliation, even if the court ultimately determines that the discrimination claim was without merit.[60]

Retaliation plaintiffs also must demonstrate that they experienced harm. In *Burlington Northern*, decided in 2006, the Supreme Court resolved a circuit split over what conduct qualifies as sufficiently adverse to sustain a cause of action for retaliation.[61] The Court defined actionable retaliation as a "materially adverse" action which "could well dissuade a reasonable worker from making or supporting a charge of discrimination."[62] The holding thus clarified that a plaintiff who experiences retaliatory harassment need not prove that she suffered a materially adverse change in the "terms and conditions" of employment.[63]

Finally, the retaliation plaintiff must also demonstrate that the adverse action ensued because of her opposition or other protected behavior. The plaintiff can usually do this by showing that an adverse action followed soon after she engaged in the protected activity.[64]

If a plaintiff can establish the foregoing elements, she will have made a prima facie case of unlawful retaliation. The employer then has the opportunity

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59. Martin v. N.Y. State Dep't of Corr. Servs., 224 F. Supp. 2d 434, 448 (N.D.N.Y. 2002) (stating that a plaintiff who filed a sexual orientation claim could have "reasonably believed" that sexual orientation discrimination was prohibited). *But cf.* Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc., 224 F.3d 701 (7th Cir. 2000) (reaching the opposite result).

60. *See, e.g.*, Wideman v. Wal-Mart Stores, 141 F.3d 1453 (11th Cir. 1998) (finding a cognizable retaliation claim while upholding a dismissal of the harassment claim). For an argument that the reasonable belief doctrine leads to selective and narrow interpretations of discrimination, masks the complexity of discrimination, and imposes a "court-centric" understanding of retaliation that "evaluates reasonableness from the perspective of judges," see Brake, *supra* note 2, at 76-104.

61. Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405 (2006).

62. *Id.* at 2409.

63. *Id.* at 2412-13.

64. *See* 2 LARSON & LARSON, *supra* note 54, § 35.02[2][2d] ("If the adverse action occurs within a matter of days or hours of the employee's protected activity, the inference of retaliation is certainly strong, and the employee will likely succeed in making out a prima facie case. On the other hand, there are occasional cases in which only a day or two passes between the protected activity and the adverse action, and in which the courts nonetheless have held that the plaintiff failed to prove causation. . . . In other words, though there may indeed have been a short period of time between the plaintiff's protected activity and the employer's adverse action, if other factors are present which suggest the lack of a retaliatory motive, the causation issue will tip in favor of the employer.").

to rebut the claim by providing proof of a "legitimate, nondiscriminatory reason" for the action.[65]

Because of its different standard of proof, retaliation is in many ways easier to prove than harassment. Under the retaliation framework, the claimant need not establish that she was treated worse because of membership in any protected category. Instead, she must show that she suffered harm for challenging discrimination.[66] The standard for proving harm from retaliation after *Burlington Northern* is also substantially lower than that required for hostile work environment claims. In hostile work environment cases, the plaintiff must establish severe or pervasive harm, but in retaliation cases, the plaintiff need not show either of these elements; rather, any single act can be actionable, as long as it may have deterred a reasonable employee from complaining.

The same remedies are available to plaintiffs under both retaliation and harassment claims: injunctive relief, back pay, and front pay.[67] Under the Civil Rights Act of 1991, compensatory and punitive damages are also available.[68]

But even though retaliation doctrine offers an alternate route to recovery, court recognition of retaliation does not substitute for recovery under a hostile work environment harassment claim. On the contrary, recognition of both claims is necessary to achieve Title VII's purpose of responding to unlawful discrimination. Relief awarded under a claim of retaliation alone makes no substantive judgment about whether the conduct complained about was actually discriminatory. As a result, retaliation claims fail to give employers sufficient institutional feedback about whether discriminatory dynamics exist within their workplace and provide less of an incentive for employers to monitor and enforce nondiscrimination policies. Moreover, when courts fail to recognize harassment as actionable, they leave intact social norms that tolerate, or even fail to recognize, discriminatory practices when they occur.

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65. *Id.* § 35.03 (discussing defendant's rebuttal burden).

66. Brake, *supra* note 2, at 22 ("The retaliation claimant need not establish that she was treated worse 'as a woman,' but rather that she was penalized for challenging sexist practices."). The retaliation standard can be easier to meet in cases in which there is no overt evidence to indicate discriminatory intent. For instance, a member of a racial minority who experiences harassing behavior in the form of denial of routine job assistance, abusive language, or physical violence may have difficulty establishing that the adverse actions occurred because of her race without explicit evidence of racial animus in the form of racially derogatory comments. The same actions, however, would be sufficient to prove retaliation if they followed closely after the filing of a discrimination complaint. Part II, *infra*, further discusses this trend.

67. 42 U.S.C. § 2000e-5(g)(1) (2000).

68. *Id.* § 1981a(b).

Relief under the retaliation claim alone also fails to make whole a plaintiff who has experienced both retaliation and unlawful harassment. In addition to the important psychological value that comes with having the experience of discrimination validated by a court, judicial recognition of discriminatory harassment also affects the monetary awards a plaintiff is eligible to receive. Retaliation awards are by definition limited to conduct that occurs only after the plaintiff "opposes" the original harassment, thereby providing no remedy for the harassing activity that triggered the original discrimination complaint. Recovery for retaliation alone also fails to adequately redress a plaintiff who has experienced overlapping retaliation and harassment. In the zone of overlap, the plaintiff has two distinct causes of action, but may use the same evidence to support each claim. Court recognition of one claim but not the other can potentially deny the plaintiff the opportunity to be fully compensated by receiving damages for each injury.

Because of their substantially distinct inquiries and different burdens of proof, joint retaliation and harassment claims have the potential to allow courts to understand and respond to forms of exclusion that neither claim alone can reach. When employed in concert, the claims can illuminate the interrelationship between two substantively different ways of addressing discrimination. Since the hostile work environment harassment analysis focuses on whether adverse actions interfere with an employee's ability to pursue her work because of a protected characteristic, it allows courts to redress status-based forms of exclusion. The retaliation inquiry, which focuses on how an employee's response to harassment affects how she is treated in the workplace, allows courts to protect those who, through their conduct, oppose discrimination. The two claims, used in concert, have the potential to allow courts to recognize how these two types of behaviors—status-based discrimination and conduct-based retaliation—can be employed in overlapping ways to maintain and police discriminatory hierarchies.

But the realization of this potential depends on how courts understand the doctrinal boundaries of harassment and retaliation. The next Part assesses how courts have framed joint harassment and retaliation claims in practice.

II. TRENDS IN JUDICIAL ASSESSMENT OF HARASSMENT AND RETALIATION CLAIMS

To assess how courts frame joint claims, I surveyed circuit court decisions involving joint claims that have arisen since *Ellerth*. The survey showed that courts unjustifiably limit the reach of joint harassment/retaliation claims by disaggregating harassing and retaliatory behavior in a number of ways, including considering escalated harassment that occurred after a complaint to

be solely retaliatory, rather than both retaliatory and discriminatory; interpreting harassment to be motivated by simple animus rather than by an unlawful discriminatory or retaliatory purpose; and disaggregating explicitly racialized or sexualized conduct from nonracialized or nonsexualized forms of harassment when considering joint claims. My survey also found that courts allowed the *Ellerth* affirmative defense to apply to cases of retaliatory harassment, which limited a plaintiff's ability to recover for retaliation. Taken together, these trends reflect an overly narrow conception of discrimination and retaliation, and unjustifiably limit a plaintiff's ability to depict how she experienced discriminatory workplace dynamics. They also have important consequences for the types of damages available to plaintiffs, and on the tolling period for each claim. This Part discusses these trends and their consequences through three case studies.

A. Disaggregation of Hostile Work Environment from Retaliation

In *Morris v. Oldham County Fiscal Court*, Judy Morris brought a claim of harassment and retaliation against her former supervisor, Brent Likins, and her former employer, the Oldham County Fiscal Court.[69] Morris had worked as a secretary within the Fiscal Court in Oldham County, Kentucky, for ten years when Likins was hired as her supervisor. Immediately after he was hired, Likins made crude jokes with sexual overtones, described Morris's dress as "sexy," and once referred to her as "Hot Lips." Five months after he was hired, he lowered his own evaluation of Morris's performance from "excellent" to "very good." When Morris asked him about the decline, he propositioned her, telling her to "come into his office and then after [they] were finished he would mark [her] excellent[]."[70]Morris confronted Likins and complained to the fiscal court county judge, John Black, who had executive authority over the department.[71] At this meeting, she also informed Black for the first time of Likins's history of making offensive jokes and his other behavior. Black initially responded by writing to Likins and urging him to "work out any problems and differences" with Morris, but then transferred Likins to the County Courthouse when Morris persisted in her complaints.[72] Black informed Likins

69. 201 F.3d 784 (6th Cir. 2000).

70. *Id.* at 787.

71. The statements of facts in Black's appellate brief state that Morris "immediately" complained to him after her confrontation with Likins. Final Brief of Defendants-Appellees at 4, *Morris*, 201 F.3d 784 (No. 98-6117).

72. *Morris*, 201 F.3d at 787.

that the transfer was best for "everyone's working environment," and ordered him not to communicate with Morris.[73] In spite of the warning, Likins called and visited Morris over thirty times. He also parked outside her window and stared at her for long intervals, followed her home from work, destroyed the television she occasionally watched at the office, and threw roofing nails on her driveway on multiple occasions.[74] As a result of this behavior, Morris experienced anxiety attacks and left work on sick leave in May 1996, approximately one year after she had first complained to Black.[75]

Morris brought claims of sexual harassment and retaliatory harassment on the basis of the above conduct. Both of her claims were dismissed by a district court on a motion for summary judgment.[76] On appeal, the Sixth Circuit affirmed the lower court's dismissal of the harassment claim, but reversed its grant of summary judgment for the defendant on the retaliation claim.

With regard to the retaliation claim, the Sixth Circuit found that Morris had alleged sufficient facts to allow a reasonable juror to conclude that she had been the subject of retaliation.[77] The court found that Likins's actions, including continued visits to Morris's workplace, following her from work, throwing roofing nails on her driveway, and other conduct, constituted "severe or pervasive" retaliatory harassment.[78] (Although the court applied a pre-*Burlington Northern* standard of requiring proof of "severe or pervasive" retaliatory harassment, Likins's behavior would also undoubtedly satisfy the current standard of "materially adverse" conduct under *Burlington Northern*.[79]) As discussed in the next Section, the court also indicated that the dual liability framework adopted in *Ellerth* was applicable to Morris's retaliation claim and remanded the decision to a lower court to determine whether the employer had established the elements of an affirmative defense.[80]

While it reversed the grant of summary judgment on retaliation, the appeals court affirmed the lower court's dismissal of the harassment claim, finding that Morris had failed to establish "severe or pervasive" harassment on the basis of sex.[81] Notably, the court considered only the precomplaint

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73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 787-88.

77. *Id.* at 793.

78. *Id.*

79. Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2409 (2006).

80. *Morris*, 201 F.3d at 793.

81. *Id.* at 790.

behavior as harassment. As a result, the court regarded the "sum total" of the harassment to consist of Likins's "several dirty jokes," his "alleged verbal sexual advance," his "one-time reference to plaintiff as 'Hot Lips,'" and his "isolated comments about plaintiff's state of dress."[82] The court concluded that Morris was unable to establish "severe or pervasive" harassment or the presence of a "tangible employment action"[83] on the basis of this evidence.[84]

The Sixth Circuit's determination that Morris could not meet her evidentiary burden turned upon its decision to recognize only the precomplaint behavior as harassment. The court denied Morris's express request to include Likins's repeated phone calls and his other posttransfer behavior as evidence for the hostile work environment claim. It attributed Likins's posttransfer behavior to his "personal displeasure" and "simple belligerence" and determined that there was no reason to think that it had been motivated "because of sex."[85] As a result of its decision to consider the harassment as having ended when Likins was transferred, the court barred the most severe allegations from consideration when evaluating Morris's harassment claim, thus making it substantially more difficult for her to prove "severe or pervasive" harassment. The court offered no reasoned explanation for its conclusion that Likins's posttransfer conduct did not occur because of sex, but rather, summarily concluded that it would be a "mistake" to understand the behavior as sex-based.[86] Since the court readily concluded that the precomplaint behavior was motivated by sex—the court faulted Morris only for failing to meet the "severe or pervasive" element in regard to the earlier behavior, not for failing to show causation because of sex[87]—the court likely understood the sexualized commentary to constitute harassment "because of sex" and the nonsexual behavior to be motivated purely by personal "belligerence."

The court's theory of the case seems to be that Morris experienced harassment on the basis of her status as a woman before she reported Likins's behavior, and experienced harassment based solely on her conduct after filing

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82. *Id.*

83. The Sixth Circuit adopted a somewhat puzzling formulation, finding first that Morris had not established a tangible employment action and then considering whether the conduct had been "severe or pervasive." *Id.* at 789-90. I will not discuss this issue here, as the court's analysis on this point is ultimately not relevant to either the harassment or retaliation claim.

84. *Id.* at 789-91.

85. *Id.* at 791.

86. *Id.*

87. *Id.* at 789-91.

the complaint. Thus, in the court's mind, the harassment and the retaliation comprised two distinct, nonoverlapping forms of behavior.

Theorizing Morris's claim in this way is highly problematic. First, it reflects an unsupported assumption that only sexualized forms of behavior constitute harassment on the basis of sex. This approach to sexual harassment—what Vicki Schultz has described as the disaggregation of conduct considered to be sexual from other forms of gender-based exclusion—provides a highly misleading and incomplete portrait of sexual harassment.[88] Schultz explains that this type of disaggregation "serve[s] to exclude from legal understanding many of the most common and debilitating forms of harassment faced by women," such as deliberate interference with work, refusal to provide work assistance, and denial of routine work-related courtesies.[89] In Morris's case, the court's focus on sexualized behavior led it to understand only sexualized commentary as occurring "because of sex," and to understand the nonsexualized intimidation as motivated by different impulses altogether.

But if sex-based harassment is understood broadly as motivated by the desire to undermine an employee's ability to pursue her work because of her status as a woman,[90] then Likins's entire range of conduct can be understood as harassment based on sex. Likins's conduct before the transfer—inappropriately commenting on Morris's dress and insinuating that she should perform sexual favors to improve her performance evaluation—was harassment not because it involved sexual commentary per se, but rather because it marked her as a subordinate and excluded her from full participation in the workplace because of her status as a woman.[91] By implying that her performance evaluation had more to do with her willingness to perform sexual favors than with her work performance, Likins marked Morris "as an outsider in the workplace—de-authorized and denigrated, in her own eyes and in the eyes of others."[92] Likewise, Likins's stalking of Morris, his phone calls to her, and his

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88. *See* Schultz, *supra* note 1, at 1686-87.

89. *Id.*; *see also* Beiner, *supra* note 46, at 808 (discussing similar patterns as a "divide and conquer" approach to sexual harassment).

90. *See* Schultz, *supra* note 1, at 1755 (describing a "competence-centered" paradigm for sexual harassment).

91. Indeed, this understanding of Likins's conduct is particularly salient when viewed in the context of additional exclusionary behavior alleged in the appellate brief filed in the case, though ignored by the court. According to the facts laid out in the Defendant's brief, filed by the Fiscal Court and Judge Black, Likins commented that he would "never work under a woman" in front of Morris and another supervisor immediately after he began work. Brief of Defendants-Appellees at 3, Morris v. Oldham County Fiscal Court, 201 F.3d 784 (6th Cir. 2000) (No. 98-6117).

92. Siegel, *supra* note 41, at 22.

other conduct after she reported him just as clearly represented attempts to diminish Morris's status as a worker, while also punishing her for speaking out against the discrimination.

In this situation in particular, the court had every reason to view the ongoing harassment as sex-based, because Morris had experienced regular exclusionary behavior perpetrated by the same individual throughout the course of employment. Rather than positing that Likins's motivations for the harassment shifted after she reported the harassment, the court ought to have presumed that once she had established sex-based discrimination, the ongoing harassment continued to be motivated by sex.

The court's reasoning is also problematic insofar as it attributed Likins's behavior to "simple belligerence" and "personal displeasure." By attributing Likins's motivations to these factors and then concluding that Likins was therefore not motivated by sex-based reasons, the court depicted employees as motivated either by belligerence or by discriminatory purposes, with no room for these impulses to overlap. Such a depiction bears little relationship to actual workplace dynamics. As discussed in Part I, it is true that those who speak out about retaliation tend to be disliked by their coworkers, but such animus often coexists with discriminatory or retaliatory impulses, particularly when stereotypes about how a particular group member ought to behave conflict with the individual's actual behavior. In this case, Likins's belligerence can be understood as responsive to Morris's refusal to accept his attempt to marginalize her as a worker. By ignoring the ways in which personal dislike can be causally connected to discriminatory stereotypes, the court created an unreasonably difficult burden on Morris to demonstrate that Likins's behavior was not motivated by animosity.

Richardson v. New York State Department of Correctional Service provides another example of problematic disaggregation of a harassment claim from a retaliation claim.[93] While working as a clerk at a corrections facility, Cynthia Richardson, an African American, reported ten instances of race-based harassment over the course of three years. Her complaints included allegations that a coworker stated in her presence that a Caucasian had "some nerve bringing his brown-skinned wife to the party"; another coworker described African American men as looking like "apes or baboons"; another coworker described her as a "light-skinned nigger[]"; and two coworkers distributed a racial joke that included the word "nigger."[94] Richardson internally reported

93. 180 F.3d 426 (2d Cir. 1999).

94. *Id.* at 433-34. The court did not discuss the race of these coworkers or the overall racial composition of the workforce when describing her allegations.

these incidents as they occurred and eventually took a one-year administrative leave due to emotional distress.[95] During her leave, she filed a charge of racial discrimination against the corrections facility with the EEOC.[96] When she returned to work, Richardson was transferred to a different corrections facility, where she was placed in a new, less desirable position that involved a greater degree of contact with inmates.[97] In the new facility, Richardson claimed that she became the subject of retaliation and continued harassment, with her coworkers disclosing her home address to prison inmates, deliberately placing hair in her food on four occasions, putting horse manure in her parking spot, scratching her car while it was parked in the office lot, ignoring her, and making continuous references to her as a troublemaker who would "do anything for money."[98]

In assessing her appeal, the Second Circuit determined that while Richardson could arguably make a case for severe or pervasive harassment based on race during her employment in the first facility, she could not do so in the second facility.[99] The Second Circuit also remanded the question of whether the employer had taken reasonable measures to correct the harassing behavior in the first facility,[100] thus leaving open the possibility of an affirmative *Ellerth* defense.[101]

The court held that because the majority of the incidents that occurred in the second facility—the continuous "troublemaker" comments, the scratches on her car, the hair in her food—were not related directly to race, Richardson failed to demonstrate that these incidents had occurred because of her race. The court reasoned as follows:

> Of the fifteen incidents about which Richardson complains, only three have any racial overtones whatsoever, and these . . . are isolated, mild, and cannot, under any objective standard, suffice to create a hostile working environment. Indeed, only one involves Richardson's protected racial category. The balance may reflect that Richardson was not liked by her [Cayuga Correctional Facility] co-workers and may be relevant to her retaliation claim . . . . But to sustain a Title VII hostile

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95. *Id.* at 434.

96. *Id.*

97. *Id.* at 435.

98. *Id.*

99. *Id.* at 449-50.

100. *Id.* at 442-43.

101. *See infra* Section II.B.

> environment claim Richardson must show more—she must produce evidence that she was discriminated against because of her race, and this she has not done.[102]

The court disaggregated explicitly racial comments from other conduct that the court considered nonracial in a way that is directly analogous to the disaggregation of explicitly sexual conduct from nonsexual conduct in sex discrimination cases.[103] That is, just as the *Morris* court considered Likins's sexual jokes and advances to be motivated by Morris's status as a woman, while considering his other acts of harassment to be motivated by simple displeasure, here the court considered the racial jokes to be motivated by Richardson's status as an African American, while considering the other exclusionary conduct to be motivated by different impulses. Again, this led to the perverse result that the most severe forms of exclusion that Richardson experienced—the sum of the behavior that took place in the second facility—were excluded from consideration when she attempted to show "severe or pervasive" harassment.

In *Richardson,* the court's summary conclusion that the harassment ceased to be motivated by Richardson's status as an African American at the time of her transfer is particularly disturbing because the court found the adverse transfer itself to be a form of retaliation.[104] By disaggregating the motives for harassment, the court created perverse incentives for employers, who may seek to immunize themselves from liability for discrimination by simply transferring a plaintiff who complains into a different setting. That is, because "severity and pervasiveness" becomes much more difficult to prove when the harassing actions are broken into separate categories,[105] employers who transfer plaintiffs in response to harassment claims can reduce the likelihood of liability, while doing nothing to address the behavior that led to the complaint.

While the court refused to consider the sum total of the behavior as ongoing racial harassment, it held that Richardson had a viable retaliation claim based on her experiences in the second facility. In addition to finding that the transfer itself could constitute retaliatory action, the court found that coworker harassment, if left unchecked, could constitute an "adverse action"

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102. *Richardson*, 180 F.3d at 440.

103. *See* Schultz, *supra* note 1, at 1713-14.

104. Because Richardson's position in the new facility involved substantially more contact with inmates, the court concluded that Richardson had been transferred to an objectively undesirable position in a way that constituted an "adverse employment decision" in response to her speaking out about discrimination. *Richardson*, 180 F.3d at 444.

105. *See* Schultz, *supra* note 1, at 1798.

for the purposes of proving retaliation.[106] The court found that the harassment Richardson experienced at the second facility was adverse and causally connected to her discrimination claim because many of the incidents had occurred shortly after deposition notices were served for her original discrimination claim.[107] As a result, the court denied the employer's motion for summary judgment with respect to retaliation, even while granting summary judgment with respect to discrimination in the second facility.

Because the court refused to consider the conduct in the second facility as harassment, the sum total of the behavior that it considered to be potentially discriminatory amounted to the ten racial comments made in the first facility. The court remanded the question of whether these statements, standing alone, constituted "severe or pervasive" harassment. However, as the court itself acknowledged,[108] such thin evidence is unlikely to support a claim for race-based harassment when considered on the merits. In the end, the court's reasoning left Richardson with the probable outcome of sustaining a judgment for retaliation, but losing her claim for discrimination—a judgment that would signal that her ongoing trials at the correctional department amounted to nothing more than retaliation for having reported her ultimately misguided belief in race-based discrimination.[109]

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106. The court defined an "adverse employment action" to apply when plaintiff "endures a 'materially adverse change in the terms and conditions of employment.'" *Richardson*, 180 F.3d at 446 (quoting Torres v. Pisano, 116 F.3d 625, 640 (2d Cir. 1997)). Presumably, if this case were decided today, the Second Circuit would apply the materially adverse standard set out in *Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2412 (2006).

107. *Richardson*, 180 F.3d at 446-47.

108. The court stated that a decision maker "may well conclude" that the incidents in the first facility were "not so objectionable as to alter negatively the terms and conditions of a reasonable person's employment," but refused to conclude that the evidence presented "compels only that result." *Id.* at 440.

109. Other recent appellate cases discuss related forms of disaggregation. *See, e.g.*, Nair v. Nicholson, 464 F.3d 766, 768-69 (7th Cir. 2006) (finding that the plaintiff did not experience national origin harassment because she could not provide evidence that her coworkers directly referred to her national origin when harassing her); Phelan v. Cook County, 463 F.3d 773, 785-86 (7th Cir. 2006) (criticizing a lower court for "split[ting] the hostile work environment issue into two inquiries"); Freitag v. Ayers, 463 F.3d 838, 849 (9th Cir. 2006) (considering a hostile work environment claim to include a plaintiff's allegations that she was "repeatedly exposed to conduct of a sexual nature," but not discussing nonsexual forms of workplace exclusion, such as plaintiff's allegations that her coworkers undermined her authority and interfered with her work, as also potentially relevant to the hostile work environment claim).

B. Applying the Ellerth *Affirmative Defense to Retaliation*

Both *Richardson* and *Morris* also illustrate a second doctrinal move that has unreasonably restricted the scope of the joint harassment/retaliation claim: the application to retaliation claims of the *Ellerth* affirmative defense, which allows employers to escape liability for harassment if they can prove that they neither knew nor should have known about the harassment or that they took reasonable remedial measures to correct the harassing behavior.[110]

In *Morris*, the Sixth Circuit drew an analogy between sexual harassment and retaliatory harassment, and held that "just as an employer has the opportunity to prove an affirmative defense to severe or pervasive sexual harassment by a supervisor, it follows that an employer should also have the opportunity to prove an affirmative defense to severe or pervasive *retaliatory* harassment by a supervisor."[111] Moreover, the court held that the *Ellerth* dual liability framework was applicable to all retaliation cases where the retaliatory activity consists of harassment, thus formally modifying its standard for proving a prima facie case of retaliation under Title VII.[112] The court offered no analysis for why the defense should apply, but rather summarily concluded that an employer is "entitled" to the affirmative defense whenever the unlawful action consists of harassment, regardless of whether the harassment is motivated by discriminatory purposes or by retaliatory purposes.

Likewise, in *Richardson*, the court reasoned that just as an employer will be held liable for "a racially or sexually hostile work environment created by a victim's co-workers if the employer knows about (or reasonably should know about) that harassment" but fails to address it, "so too will an employer be held accountable for allowing retaliatory co-worker harassment to occur if it knows about that harassment but fails to act to stop it."[113] The Second Circuit offered no reasoned analysis regarding whether or why retaliatory harassment should be considered sufficiently analogous to discriminatory harassment so as to justify applying the affirmative defense.

Despite the Second and the Sixth Circuit's conclusions to the contrary, there are compelling reasons why the *Ellerth* affirmative defense should not apply to cases of retaliatory harassment. First, the defense creates an unreasonably high burden on retaliation plaintiffs continually to report harassment to their employers. In a retaliation case, by the time a court

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110. Burlington Indus. v. Ellerth, 524 U.S. 742, 769 (1998).

111. Morris v. Oldham County Fiscal Court, 201 F.3d 784, 792 (6th Cir. 2000).

112. *Id.*

113. *Richardson*, 180 F.3d at 446.

examines the question of employer liability, the court must have already found that the plaintiff experienced harm for opposing an allegedly unlawful practice. The plaintiff must thus have already met the burden of informing her employer at least once about an unlawful practice, either through filing a charge with the EEOC (which courts assume gives the employer notice of the complaint) or by engaging in oppositional conduct. Morris had put her employer on notice by twice reporting Likins's behavior to Judge Black. Richardson had filed both internal grievances at her workplace and a charge with the EEOC. Only after the plaintiffs had alerted their employers to their belief that they were being discriminatorily harassed did they claim to experience retaliatory harassment. While the behavior they initially complained about was arguably distinct from the behavior they experienced in their retaliation claim, their initial reports of harassment were sufficient to put the employer on notice that they were targets for reprisal. By allowing employers the opportunity to assert an affirmative defense, the Sixth and Second Circuits place a burden on potential plaintiffs to inform employers about harassment repeatedly. The burden this creates on plaintiffs is unjustified, both because the plaintiff has already put the employer on notice of the possibility of retaliatory conduct, and because the costs associated with speaking out about discrimination are so high for plaintiffs in the first instance.[114]

Moreover, as the Supreme Court recognized in *Burlington Northern,* in order for Title VII to be effective, it must grant special protection to those who speak out about discrimination. The Court in *Burlington Northern* reasoned that Title VII could be read to grant retaliation plaintiffs even broader protection than discrimination plaintiffs, and explained,

> differences in the purpose of the two provisions [i.e., anti-discrimination and anti-retaliation] remove any perceived "anomaly," [in granting retaliation broader protection] for they justify this difference of interpretation. . . . Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses. . . . Interpreting the anti-retaliation provision to provide broad protection from retaliation helps assure the cooperation upon which accomplishment of the Act's primary objective depends.[115]

The Court's recognition of Title VII as designed to grant robust protection to those who speak out against discrimination requires rejection of the *Ellerth* affirmative defense to cases of retaliatory harassment. As the Court explained,

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114. *See supra* Section I.A.

115. Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2414 (2006).

if fear of reprisal deters employees from reporting discrimination, then the enforcement mechanism behind Title VII suffers as well. Making meaningful remedies readily available to plaintiffs who can prove retaliation is one essential way of encouraging retaliation plaintiffs to come forward to report discrimination. Such remedies are also necessary in order for plaintiffs to find and retain private counsel willing to represent them in the enforcement of Title VII.

*C. Court Construction of Retaliation Post-*Burlington Northern

Morris and *Richardson* were decided before the Supreme Court issued the *Burlington Northern* decision, so in theory, *Burlington Northern* could alter the way that lower courts understand retaliation and lead judges to protect reporting of retaliatory harassment. But judging from *Moore v. Philadelphia*,[116] one of the few post-*Burlington Northern* decisions that considered retaliatory harassment, *Burlington Northern* is not necessarily having that effect.

The *Moore* plaintiffs were three white male police officers who claimed to have experienced retaliation by their white coworkers and by their supervisor for socializing with black officers and for objecting to racism in the department. The *Moore* plaintiffs worked with black officers in a seven-person squad assigned to a sector in Philadelphia known as the "Badlands" for its high violent crime rate.[117] The plaintiffs experienced retaliation after objecting to their supervisor's use of racially derogatory epithets and his practice of giving the African American officers discriminatory assignments (such as assigning a female African American officer to patrol a high-crime neighborhood alone, on foot, on a rainy night, when the standard practice was to patrol with a partner in a car).[118] After the plaintiffs complained about the discriminatory treatment of African American officers, their supervisor's behavior toward them worsened; he stopped granting them routine lunch breaks, closely monitored their behavior, and gave them undesirable assignments.[119] On one occasion, the supervisor threatened to "make [a claimant's] life a living nightmare" if he complained to the EEOC.[120]

The plaintiffs also experienced harassment by their white coworkers. The coworker harassment originally began as a result of socializing with black

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116. 461 F.3d 331 (3d Cir. 2006).

117. *Id.* at 334.

118. *Id.* at 335.

119. *Id.* at 338.

120. *Id.* at 337.

officers, and then escalated when the plaintiffs filed grievances regarding racial harassment in the workplace and other violations of officer policy.[121] The first complaints made by the plaintiffs with regard to their coworkers did not discuss harassment, but instead related how certain coworkers had violated department policy and improperly handled a drug case.[122] However, subsequent complaints reported race-related antagonism and ostracism of the black officers by the white officers.[123]

Before filing complaints, the officers claimed to experience harassment in the form of "not getting courtesy rides from other officers, not having access to radios on their shift, [and] other officers interfering with their radio communication . . . etc.," which they attributed to their socialization with the black officers.[124] After the plaintiffs complained about the conduct, their coworkers repeatedly referred to them as "rat" and "snitch," made "rat noises" at them, and wrote graffiti on bathroom walls describing the plaintiffs as "rats," "snitches," and "pussies."[125] The coworker exclusion escalated, and culminated in an incident where the plaintiffs' fellow officers refused to respond to one of their calls for backup during a shooting.[126] The *Moore* plaintiffs reported the incidents of coworker harassment to their supervisor as they occurred, and brought a claim for retaliatory harassment based on all of the above conduct.[127]

In analyzing whether the plaintiffs had presented sufficient evidence to survive a motion for summary judgment for their retaliation claim, the court

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121. *Id.* at 336.

122. *Id.*

123. *Id.*

124. *Id.* at 334-35.

125. Id. at 336.

126. *Id.*

127. The plaintiffs in *Moore* only pursued a retaliation claim, not a joint harassment and retaliation claim. The court indicated that if the plaintiffs had brought a hostile work environment harassment claim, it likely would have been dismissed because of their race, but that this did not prevent them from bringing a viable retaliation claim. The court noted that

> the fact that the plaintiffs are white is not a "threshold problem" for their retaliation claims. While white workers may be unable to successfully complain under the antidiscrimination provision of Title VII solely because they are required to work in an environment hostile to blacks, if they became the victims of "materially adverse actions" because they reasonably perceived that environment as violative of Title VII and objected, they have a valid retaliation claim.

Id. at 342 (footnote omitted).

broke down the plaintiffs' claims into two causes of action, and assessed the supervisor's retaliatory actions as a distinct claim from the coworkers' retaliatory actions. With regard to the claim against the supervisor, the court found that a factfinder could reasonably conclude that the plaintiffs had engaged in protected opposition conduct by speaking out against their supervisor's racist comments, and that they had suffered an adverse action designed to prevent them from complaining about discrimination.[128] In reaching this judgment, the court placed particular emphasis on the fact that the supervisor had directly threatened to make the life of one of the plaintiffs a "living nightmare" if he filed a discrimination suit.[129]

Although the court found sufficient evidence to support a prima facie case of retaliation on the part of the supervisor, it also found that the plaintiffs had failed to prove a prima facie case of retaliatory harassment with regard to their coworkers' behavior. The court faulted the plaintiffs for failing to provide enough evidence to show a causal connection between speaking out about discrimination and experiencing reprisals.[130] The court found that the harassment could not "be reasonably linked to retaliatory animus" because the harassment was related to their having filed complaints about their fellow officers' handling of the drug report, rather than their race-related complaints.[131] Moreover, the court found that even if the coworker conduct was intended to be impermissibly retaliatory (insofar as it was intended to punish the plaintiffs for reporting racial tensions within the department, and not to punish them for complaining about the improper handling of the drug report), the City of Philadelphia would not be vicariously liable for the retaliatory acts of the coworkers because it had taken reasonable measures to address graffiti and investigate why the plaintiffs had not received backup during the shooting incident.[132] In this respect, the court applied traditional agency principles to retaliatory harassment and found that an employer should only be liable for coworker harassment if the employer was negligent with respect to discovering or responding to the harassment.[133]

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128. *Id.* at 345-46.

129. *Id.* at 343.

130. *Id.* at 349.

131. *Id.* While the preceding summary of *Moore* is highly simplified (because the Seventh Circuit analyzed the case of each plaintiff individually, and each plaintiff alleged distinct facts), the overarching conclusion—denying summary judgment for the employer on the question of supervisor retaliation but allowing it for coworker retaliation—was applied to all three plaintiffs.

132. *Id.* at 350.

133. *Id.* at 349.

In reaching its conclusion, the court applied the agency principles that have been applied to coworker discriminatory harassment to retaliatory harassment.[134] In light of *Burlington Northern*, however, this standard ought to be revisited with respect to retaliatory harassment. Given the importance of creating a liability framework that encourages retaliation plaintiffs to come forward, as well as the Supreme Court's recognition of Title VII's broad protection of retaliation plaintiffs, lower courts ought to reconsider the question of whether retaliation plaintiffs should face the burden of demonstrating employer negligence with regard to coworker conduct in order to attach employer liability.

Another potential problem in the court's assessment of this case involves the disaggregation of the supervisor's retaliation and the coworker's retaliatory harassment. The court's decision to consider the retaliation by the supervisor as being distinct from the coworker retaliation is problematic because it prevented the court from being able to consider how the entire range of harassing behavior could have affected the plaintiffs. By breaking the retaliatory harassment down into two smaller claims, the court overlooked the possibility that both forms of harassment, viewed together, could have deterred the plaintiffs from complaining more fully than either behavior alone. Put in the language of *Burlington Northern*, the disaggregation in this instance prevented the plaintiffs from being able to demonstrate how the combined supervisor and coworker retaliation "could well dissuade" them from filing a claim for discrimination.[135]

The court's assessment of the supervisor's behavior also points to a potentially disturbing trend to the extent that the court justified its finding of retaliation by relying on the supervisor's statement that he would make a plaintiff's life a "living nightmare" if he filed a complaint with the EEOC.[136] While this statement undoubtedly demonstrates an impermissible retaliatory motive, the supervisor's other behavior—the denial of routine breaks and close monitoring of their behavior—should also be interpreted as reflective of an impermissible retaliatory motive. The court's assessment of retaliation in *Moore* indicates that after the *Burlington Northern* decision, courts may look for direct, rather than indirect, evidence of retaliatory intent similar to how some courts currently look for evidence of direct racial or sexual epithets to show race- or

134. Burlington Indus. v. Ellerth, 524 U.S. 742, 760 (1998) (discussing agency principles as applied to the employment relationship, and the "negligence" standard for coworker harassment).

135. Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2409 (2006).

136. *Moore*, 461 F.3d at 337.

sex-based animus. Since it is fairly unusual for supervisors or other employees to express their retaliatory motives in such a transparent way, requiring proof in this form, if it becomes standard for demonstrating causation, could have the potential to severely constrict the applicability of retaliation doctrine.

D. Consequences of Disaggregating Retaliation from Harassment

The discussion of the preceding cases illustrates some of the major consequences of disaggregating retaliation from harassment. First, separating a pattern of ongoing harassment into distinct, nonoverlapping claims of retaliation and harassment misconstrues workplace dynamics. It depicts harassers as motivated by only one impulse at a time and fails to allow for the possibility that harassment can often ensue both in order to maintain a discriminatory hierarchy and to punish the victim for challenging the hierarchy. Disaggregation that attributes harassment solely to personal animus also ignores how discriminatory stereotypes can inform such animus.[137]

Second, disaggregation in the form of excluding postcomplaint conduct from the harassment inquiry severely undermines a plaintiff's ability to prove status-based discrimination. It places an unjustifiably high burden on the plaintiff to show that harassment was "severe or pervasive" on the basis of only a portion of the overall exclusionary behavior. Such disaggregation not only unreasonably restricts the range of evidence plaintiffs can present in proving their claim, but also fails to give sufficient institutional feedback to employers with regard to the presence of discriminatory workplace dynamics.

Third, disaggregation of retaliation from harassment and the application of the *Ellerth* affirmative defense operate to reduce employee incentives to report discriminatory behavior. If harassment and retaliation inquiries are seen as nonoverlapping, then the evidence available to support each claim is diminished, which makes it less likely that a claimant can establish either claim. A diminished likelihood of success can, in turn, discourage potential plaintiffs from bringing claims or make it more difficult for them to find attorneys willing to represent their claims. The *Ellerth* affirmative defense, which can operate to prevent a successful retaliation plaintiff from recovering from her employer, undermines the enforcement of Title VII for the same reasons.

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137. *See* Schultz, *supra* note 1, at 1760 n.407 ("There is . . . a voluminous literature on the link between a group's numerical underrepresentation (or 'token' status) in an occupation or job and the incidence of stereotyping, discrimination, and harassment that the token group experiences from the dominant group.").

Disaggregation also has extremely important consequences for two other areas: tolling and damages.

1. Tolling

To bring a timely hostile work environment claim, a plaintiff must demonstrate that at least one of the incidents contributing to the creation of a hostile work environment occurred within either 180 or 300 days, depending on whether the plaintiff has filed her claim with a nonfederal agency. Under a "continuing violations" theory of harassment, if a plaintiff can demonstrate that a series of events constitutes a larger hostile work environment claim, then the relevant period begins anew for each contributing event.[138] However, events that fall outside of the hostile work environment claim cannot be used to extend the tolling period.

To put this in more concrete terms, suppose that the pattern of events in *Morris* had unfolded in this way: On days 0-100, Morris was harassed by Likins in the original office. On day 101, she complained about his behavior to Judge Black, resulting in Likins's transfer. On days 101-401, Likins stalked Morris and committed other acts of retribution. On day 402, Morris filed a claim for harassment and retaliation. If the court considered the hostile work environment harassment claim to encompass only the set of events that occurred prior to Morris's complaint—the events that occurred on days 0-100—then her harassment claim would be time-barred, because it would fall outside the requisite period. But if the entire pattern of behavior is considered one continuous case of hostile work environment harassment, then she would have an additional 300 days (until day 701) to file a timely charge for harassment.

Reed v. Cracker Barrel Old Country Store, Inc.[139] illustrates how this dynamic can play out in practice. Laurie Reed, a server at Cracker Barrel, brought a suit for retaliation and harassment against her supervisor, Kirk Hooper. Reed alleged that from the commencement of her employment in February 1996, Hooper harassed her by making a series of sexualized comments and jokes around her. These comments persisted until October 1997, when she directly confronted Hooper about his behavior and told him to stop.[140] After that point, Hooper's behavior changed; while his sexualized commentary ceased, he began engaging in nonsexualized forms of harassment, such as assigning her to

138. Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002).

139. 133 F. Supp. 2d 1055 (M.D. Tenn. 2000).

140. *Id.* at 1061.

undesirable shifts, telling other employees to ignore her, and stationing her in unpopular sections of the restaurant so that she would earn fewer tips. This behavior continued until January 1998, when he terminated her for not charging her brother for a drink with his meal.[141]

The court found that Reed had alleged sufficient facts to establish both claims of retaliation and harassment under Title VII and under a state antidiscrimination statute, but found the sex harassment claim time-barred under the state statute of limitations. The court reasoned:

> [T]here are separate claims of sexual harassment and retaliation, and there seems to be a clear demarcation where the former ended and the latter began. For that reason, the court has examined the sexual harassment claims as terminating with the plaintiff's confrontation of Mr. Hooper in late October 1997. Given that approach, the plaintiff has not shown that any acts of sexual harassment occurred within one year prior to January 8, 1999. As a result, the plaintiff's state law claims for *quid pro quo* and hostile environment sexual harassment under the Tennessee Human Rights Act are barred by the statute of limitations.[142]

As a result of the court's conclusion that Reed ceased to experience sex-based harassment the day she complained to Hooper, she was barred from bringing a harassment claim and recovering for discrimination.

2. Damages

Disaggregation of retaliation from harassment claims limits a plaintiff's ability to collect compensatory and punitive damages, which are available for both claims under the Civil Rights Act of 1991.[143] Specifically, when courts make the doctrinal moves illustrated in *Morris*, *Richardson*, and *Reed* and consider the hostile work environment claim to end when the plaintiff speaks out about harassment, they limit the plaintiff's ability to recover for harassment that occurs either before or after lodging the complaint, depending on how the court constructs each claim. In *Reed,* for instance, the court's tolling of the statute of limitations for the sex harassment claim prevented Reed from receiving any compensation—compensatory and punitive damages, as well as attorney's fees—for the behavior that occurred prior to her confrontation with

141. *Id.* at 1063.

142. *Id.* at 1075.

143. Pub. L. No. 102-166, 105 Stat. 1071 (1992) (codified as amended in scattered sections of 42 U.S.C.).

Hooper in October 1997. Likewise, the court's decision to consider Hooper's conduct after October 1997 as retaliation alone, rather than both harassment and retaliation, prevented Reed from recovering under each theory of liability. The potential for recovery under the retaliation claim alone is insufficient to remedy the consequences of the court's disaggregation because compensatory and punitive damages are widely understood as available in response to each unique injury, regardless of whether or not those injuries are supported by the same set of evidence.

Allowing the same events as evidence for purposes of proving both harassment and retaliation will sometimes, but not always, make a difference in the amount of recovery a plaintiff can receive. Section 102(b)(3) of the Civil Rights Act of 1991 caps the total amount of damages a claimant can receive based on the employer's total number of employees. For employers with fewer than 101 workers, punitive and compensatory damages are capped at $50,000; for employers with over 500 employees, damages are capped at $300,000.[144] If the total amount of damages under one claim is equal to the statutory cap, then the plaintiff will not be able to recover additional damages for overlapping retaliation and harassment under Title VII. Jury damage awards in excess of the Title VII cap, however, can be allocated to state law claims and to § 1981 claims, if applicable, thus allowing a plaintiff to recover the full amount of damages allocated by the jury.[145]

But even in situations where the absolute amount that a plaintiff can recover is limited by the cap, damages serve an important signaling function. In Title VII cases, juries are not instructed on the existence of statutory caps; they make decisions about damages based on what they believe is necessary to provide adequate redress.[146] If the total amount of damages granted exceeds the statutory cap, then judges adjust the amount to accord with § 1981a. But employers learn of the original jury awards, even if they do not have to pay them. Particularly high damage awards also sometimes circulate in the media,

144. 42 U.S.C. § 1981a(b)(3) (2000).

145. Damages are treated as fungible where the standards of liability under Title VII and the state law claim are the same. For instance, if a damage award exceeds $300,000 and a plaintiff has brought claims under Title VII as well as an equivalent state statute, then $300,000 of the damages can be awarded under Title VII, and the rest to a state law claim. *See, e.g.*, Pavon v. Swift Transp. Co., 192 F.3d 902, 910 (9th Cir. 1999).

146. *See* Baty v. Willamette Indus., Inc., 172 F.3d 1232, 1245-46 (10th Cir. 1999); Sasaki v. Class, 92 F.3d 232, 236 (4th Cir. 1996) (requiring a new trial for damages determination because counsel informed the jury of statutory caps on damages).

pressuring employers to create stronger internal mechanisms for preventing retaliation and discrimination.[147]

III. TOWARD REALIZING THE POTENTIAL OF THE JOINT HARASSMENT/RETALIATION CLAIM

Despite the fact that some courts have diminished the effectiveness of joint harassment and retaliation claims through various forms of disaggregation and other limitations, such claims nonetheless hold enormous potential to allow courts to respond to complex forms of workplace exclusion if they are framed in an integrated way. The distinct legal inquiries under each claim create room for courts to recognize ways in which status-based and conduct-based forms of exclusion can interrelate in the workforce. Concurrent examination of the claims thereby allows courts to recognize how individuals can simultaneously be marginalized because of their status, as well as because of their oppositional conduct.[148] This Part discusses the potential of the joint claim through a case study and outlines three doctrinal approaches that are necessary to reach an integrated understanding of joint claims.

A. Case Study of an Integrated Claim

Valentín-Almeyda v. Municipality of Aguadilla[149] illustrates an integrated approach to joint harassment/retaliation claims. In that case, the court considered claims of hostile work environment and retaliation brought by a female police officer, Blanca Valentín-Almeyda, against her employer and supervisor. From February 15, 1997, until January 27, 2003, Valentín-Almeyda had worked for a municipal district in Puerto Rico, where she was supervised for part of the time by Justo Cruz, an administrative sergeant who had authority to impose sanctions and control work assignments.[150] Valentín-Almeyda contended that Cruz began to sexually harass her in August 2000. He referred to her as "hot-hot-hot," told her she had "horny" eyes, and said that

147. *See, e.g.*, Eyal Press, *Family-Leave Values*, N.Y. TIMES MAG., July 29, 2007, at 37-38 ("[C]ompanies are well aware of the negative publicity lawsuits can generate"); Heidi Benson, *Sex Harassment Prevention Classes May Be Paying Off*, S.F. CHRON., Sept. 4, 2006, http://sfgate.com/cgi-bin/article.cgi?file=/c/a/2006/09/04/MNGIEKV0CM1.DTL (discussing increased jury awards in discrimination cases).

148. *See* Brake, *supra* note 2, at 95 & n.269 (discussing the interconnectedness of different kinds of subordination).

149. 447 F.3d 85 (1st Cir. 2006).

150. *Id.* at 89.

her husband (who she was in the process of divorcing) did not appreciate her.[151] He also rubbed against her at work and drove by her house multiple times a day.[152] In October 2000, Valentín-Almeyda reported the behavior to a designated grievance officer, and attempted to meet with the Commissioner of the department to report the harassment.[153] The Commissioner turned her away, however, directing her to an internal affairs investigator, who, in turn, told her that Cruz's behavior was "[her] fault because [she] had him bedazzled."[154]

Shortly after meeting with the investigator, Valentín-Almeyda was transferred to a "remote" and "solitary" unit, where Cruz visited her and told her that he could have her returned to the regular unit if she "stopped being such a spoiled rotten kid."[155] Between October 2000 and January 2001, Valentín-Almeyda was also assigned to a number of double shifts and continued to be harassed by Cruz, who left an intimidating note on her car and threatened her with more undesirable work assignments.[156] On February 14, shortly after noticing Cruz stalking her and her son at a mall, she tried again to complain to the Commissioner. On her way to the meeting, Cruz called her and ordered her to come to the police station, where he and two other officers kept her for several hours, wrote up admonishments against her, and physically took a phone away from her when she tried to call a legal services organization.[157] The incident culminated with her having a nervous breakdown, leaving in an ambulance, and taking an extended sick leave.[158] She returned to work in October 2001, but then left again in January 2002 because Cruz, the Commissioner, and one of the officers who had helped Cruz detain her began visiting her work station one or two times a week, and these visits left her too uncomfortable to continue working.[159] She again went on a stress-induced medical leave and, in January 2003, filed a claim for harassment and retaliation under Title VII, Puerto Rican antidiscrimination law, and the Due Process Clause.[160] At the trial, the jury awarded her substantial monetary

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151. *Id.*

152. *Id.* at 90.

153. *Id.*

154. *Id.* (alteration in original).

155. *Id.* at 90-91.

156. *Id.* at 91.

157. *Id.* at 92.

158. *Id.*

159. *Id.*

160. *Id.* at 92-93.

damages against the municipality and Cruz on the basis of all of the above actions.[161]

The defendants appealed the verdict, arguing that Valentín-Almeyda had not alleged sufficient facts to sustain a judgment for either harassment or retaliation. They characterized the harassment claim as comprised solely of Cruz's sexually explicit remarks and behavior, and argued that "any woman, particularly a police officer, could handle them."[162] The court rejected this theory of the case, and instead considered the entire range of exclusionary behavior experienced by Valentín-Almeyda as constituting harassment on the basis of sex. The court noted that in addition to the unwanted sexual overtures, Cruz

> threatened to and did make compliance with his demands a condition of avoiding punishment at work. He threatened Valentín that she would be "screwed" if she would not react more affectionately to his unwanted advances. The threat was not an empty one. He had already seen to it that she received unfavorable work assignments . . . .[163]

The court found Cruz's entire set of behavior—his sexually explicit remarks, his abuse of his power over work assignments, and his threats of further retribution—relevant to the harassment inquiry. The court's analysis of the sexual harassment claim was grounded in its implicit assumption that sex-based harassment can take many forms, and that exclusionary behavior need not be sexual in nature to reflect discriminatory intent. By allowing Valentín-Almeyda to make the case that Cruz's sexual propositions, his threats to punish her, and her transfer to an undesirable unit constituted ongoing discriminatory harassment, the court gave Valentín-Almeyda a chance to depict how the entire range of behavior engaged in by Cruz (and the other complicit officers) marked

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161. The breakdown of the damage award was as follows:

> The jury found the Municipality liable for $250,000 in compensatory damages on the Title VII claim. The jury awarded $250,000 against the Municipality and $80,000 against Cruz individually in compensatory damages on the Law 17 [Puerto Rican antidiscrimination law] claims. Finally, the jury found the Municipality liable for $125,000 in compensatory damages on the due process claim. The total initial jury award was $705,000. After the verdict, Valentín sought and obtained reinstatement and doubling of the damages on the Law 17 claims; this doubling of the Law 17 amounts resulted in a total jury award that just topped $1 million.

Id. at 93.

162. *Id.* at 96.

163. *Id.*

her as a subordinate, delegitimized her status as a worker, and interfered with her ability to pursue her work because of her sex.

The court found this same pattern of behavior relevant to Valentín-Almeyda's retaliation claim. The First Circuit found that Valentín-Almeyda had engaged in protected activity by complaining to the Commissioner and to the internal grievance officer and that she had experienced retaliation in the form of adverse assignments, extra double shifts, and transfer to the remote unit in response to her complaint.[164] By recognizing these behaviors as both retaliatory and discriminatory, the court recognized how Valentín-Almeyda's sex and her opposition to discrimination had both functioned to make her a target for harassment.

The court's approach to the case allowed it to recognize retaliatory harassment and hostile work environment harassment as dynamically interrelating to create heightened forms of exclusionary treatment. It understood the escalating harassment as motivated not only by retaliatory purposes, but also by a normative belief on the part of Cruz and others that Valentín-Almeyda ought to tolerate the behavior rather than speak out against it. The grievance officer's comment, for instance, that the harassment was "her" fault because she had Cruz "bedazzled"[165] expresses a motive similar to that of the supervisor in *Slack v. Havens* who claimed that "[c]olored people should stay in their places."[166] In both instances, underlying assumptions about how members of a particular group ought to behave affected how their opposition to discrimination was viewed in the workplace. By recognizing this fact, the court also recognized how Valentín-Almeyda became subject to harassment not only because of her status as a woman, but because of her status as a woman who sought to confront discrimination.

B. Recommendations for Reaching an Integrated Understanding of Joint Claims

There are several steps, some of which are illustrated in *Valentín-Almeyda,* that courts can take to reach an integrated understanding of joint hostile work environment/retaliation claims. First, courts should allow the same evidence to count for purposes of proving harassment and retaliation. This doctrinal move

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164. *Id.* at 97 ("The jury could easily regard the totality of these assignments, following swiftly on the heels of her complaints, as well as the disciplinary letters, as adverse employment actions caused by Valentín's complaints.").

165. *Id.* at 90.

166. 7 Fair Empl. Prac. Cas. (BNA) 885, 887 (S.D. Cal. 1973), *aff'd as modified*, 522 F.2d 1091 (9th Cir. 1975).

is necessary to allow plaintiffs to depict fully the exclusionary dynamics that often exist within a workplace. Only by allowing the same evidence to count for both claims will courts be able to recognize and respond to the reality that status-based discrimination is often intimately related to employee conduct, and that assertive responses to discrimination can incur a backlash in the form of escalated discrimination as well as retaliation.

Applying the same evidence to multiple claims within a single case is not a new development in Title VII. To the contrary, courts often allow the same evidence to be used in claims of disparate treatment and retaliation, as well as in other types of joint claims.[167] Likewise, the same statistical evidence often supports both claims of disparate impact and disparate treatment.[168] As courts have recognized in these types of cases, plaintiffs often cannot adequately portray exclusionary workplace dynamics unless they are allowed to present the same evidence in multiple claims. Allowing evidence of retaliation to apply also toward discrimination is particularly important in joint harassment and retaliation claims, because otherwise, the tolling period bars plaintiffs from even having the opportunity to litigate their discrimination claim. In Valentín-Almeyda's case, for instance, if the court had considered harassment to consist only of the conduct that occurred before she initially complained about Cruz's behavior, then her discriminatory harassment claims almost certainly would have been time-barred, resulting not only in reduced damage awards, but also in the court's failure to recognize the discriminatory dynamics at work in the police department.

Second, in cases where plaintiffs report the existence of harassment both before and after they file a complaint or otherwise report discrimination, courts should adopt a rebuttable presumption that harassment occurring after the complaint constitutes a continuation of the original hostile work environment. The presumption should be particularly robust if the harassing behavior has been perpetrated by the same individuals. Thus, in the *Morris* case, the court should have presumed that Likins's posttransfer harassment of Morris was motivated by sex, because it had found his precomplaint conduct to be sex-based. The employer could have rebutted the presumption by providing

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167. *See, e.g.*, McGinest v. GTE Serv. Corp., 360 F.3d 1103 (9th Cir. 2004) (allowing evidence of failure to promote to count toward disparate treatment and retaliation); Chungchi Che v. Mass. Bay Transp. Auth., 342 F.3d 31 (1st Cir. 2003) (allowing evidence that plaintiff was called a "chink" and subjected to excessive discipline to count for the purposes of proving both disparate treatment and retaliation).

168. Statistics comparing employee composition to that of the relevant labor market are used in both disparate treatment and disparate impact cases. For further discussion, see 1 LARSON & LARSON, *supra* note 54, § 9.04; and 2 LARSON & LARSON, *supra* note 54, § 22.02.

evidence that the ongoing harassment was motivated by nondiscriminatory purposes, but, notably, the burden to rebut the presumption would have been the employer's. The rebuttable presumption is important in allowing courts to recognize the reality that those who perpetrate their harassment are unlikely to shift their motivations for the harassment completely once the target of the harassment reports the behavior. It would also serve an important function by not requiring a plaintiff to show twice—both before and after filing a complaint—that harassment occurred because of a protected characteristic.

On a related note, in cases where harassment ensues or escalates after a complaint is filed, courts should import the "motivating factor" standard of liability employed in disparate treatment cases under section 107 of the Civil Rights Act of 1991.[169] Section 107 provides that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."[170] In disparate treatment cases, this means that an employee succeeds in a discrimination claim if she can show that an employment decision was even partially motivated by discriminatory purposes, even if other, nondiscriminatory motivations were also at work. If applied to joint harassment/retaliation claims, in practical terms, the section 107 standard would hold an employer who discriminates to any degree liable, even if the employer could demonstrate that a particular plaintiff was also targeted because she was disliked or regarded as a "troublemaker" or "complainer."

Section 107 also allows an employer to limit its liability to declaratory and injunctive relief and attorneys fees (and avoid liability for damages) if it can show that it would have made the same decision with respect to the employee in the absence of the discriminatory motive.[171] The same decision test allows courts to signal that discrimination in any degree is unacceptable in the workplace, but avoids the prospect of punishing employers for decisions that would have been made anyway, regardless of the discrimination. Taken together, the motivating factor analysis and the "same decision test" would allow courts to apply familiar analytical tools to joint harassment and retaliation claims and to respond more effectively to the complex and overlapping motivations that can often inform workplace exclusion.

To illustrate how these suggestions would function in practice, consider how *Richardson* would have been litigated had the court adopted the rebuttable

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169. 42 U.S.C. § 2000e-2(m) (2000).

170. *Id.*

171. *Id.* § 2000e-5(g)(2)(B).

presumption and motivating factor analysis. In *Richardson,* once the court determined that the plaintiff had experienced race-based harassment in the first facility, it would have presumed that the harassment that occurred after she was transferred was also race-based. The corrections facility would then have had an opportunity to rebut this presumption and offer evidence to show that the behavior was motivated by reasons unrelated to race. The employer could have attempted to rebut such a presumption, for example, by discussing and comparing the racial composition of the second workforce with that of the first (i.e., by arguing that the workforce in the second facility was more racially integrated and thus it was unlikely that the harassment was motivated by racially discriminatory purposes), or by attempting to show that there was little interaction between the employees in the two facilities. By offering various forms of evidence, the employer could have attempted to make the case that Richardson's status as an African American played no motivating role in her harassment in the second facility. Notably, under this analysis, the employer's ability to offer proof that personal dislike contributed to the harassment would not be relevant to the court's liability determination. Rather, the threshold question for the court would have been whether discriminatory motivations played any motivating role in the harassment. By applying this framework, the court would have more systematically considered whether and to what degree discriminatory dynamics were at work in the second facility, rather than summarily concluding that the presence of personal animus precluded discrimination.

In broader terms, the adoption of the rebuttable presumption of ongoing discrimination and the "motivating factor" standard of liability is one way of allowing courts to recognize and respond to conduct that occurs at the intersection of harassment and retaliation. As the social science studies discussed in Part I reveal, racism and sexism are often closely related to retaliation, and, likewise, those who report harassment tend to be disliked by their fellow coworkers and supervisors for complaining. Indeed, that dislike and personal animus may actually be evidence of underlying sexism and/or racism, insofar as it is motivated by a belief that members of a certain group should not step above their stations and speak out about discrimination. Adopting the presumption that harassment which initially arises from discrimination continues to be motivated by discrimination comports with the practical reality that discriminatory motivations are not likely to disappear once the target of discrimination speaks out.

Finally, the third doctrinal move that is necessary to reach an integrated understanding of harassment/retaliation is that the affirmative *Ellerth*[172] defense should not be applied to cases of retaliatory harassment. The affirmative defense should not be applied for the reasons the Court gave in *Burlington Northern*: the vitality of the Title VII regime depends on the willingness of individuals to come forward and report harassment, and if courts fail to sufficiently protect these individuals from retaliation, then they risk undermining the effectiveness of the antidiscrimination regime itself.[173] The promise of holding employers financially accountable for the consequences of retaliation is necessary to encourage plaintiffs to come forward with retaliation complaints, to allow them to find counsel willing to represent their claims, and to create incentives for employers to monitor workplaces more closely and prevent retaliation from occurring.

These recommendations constitute the minimal changes necessary for courts to respond effectively to joint claims of retaliation and harassment. While these changes are far from sufficient to resolve all of the doctrinal inconsistencies in judicial understandings of joint harassment and retaliation, they provide a basic framework from which courts can begin to consider the overlapping nature of the claims. By considering how worker status and conduct interrelate in the workplace, courts can begin to engage in the broader task of responding to dynamic forms of workplace exclusion.

CONCLUSION

Hostile work environment harassment doctrine and retaliation doctrine hold enormous potential to redress intersectional forms of exclusion in the workplace. Within Title VII, they are the two doctrines that arguably confer on courts the greatest flexibility in recognizing and responding to unlawful employment practices. Hostile work environment harassment doctrine invites courts to look beyond the content of any individual act of harassment and consider how a series of harassing events—some of which may seem small or relatively innocuous in and of themselves—can create an unlawfully discriminatory environment. Retaliation doctrine invites courts to consider how various forms of exclusion may have deterred an individual from speaking out about behavior that she considers to be discriminatory. Both of these doctrines implicitly allow courts to recognize and respond to the fact that

172. Burlington Indus. v. Ellerth, 524 U.S. 742 (1998).

173. Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2414 (2006).

conduct-based and status-based exclusion, respectively, can take a number of different dimensions.

Yet in order to fully realize the potential of both of these doctrines, courts must recognize how the joint application of harassment and retaliation can reinforce and police discriminatory hierarchies more thoroughly than either behavior alone. In light of the growing rate at which retaliation has been reported in the workplace and given an increasing body of social science research suggesting that retaliation often occurs alongside harassment and other forms of discrimination, it is essential that courts adopt rules that allow them to recognize how retaliation can amplify the effects of harassment, while simultaneously deterring individuals from reporting it. Only by developing doctrines that recognize and respond to retaliation and harassment occurring in concert will courts be able to further the goal of defending those who would speak out about discrimination and uphold Title VII's mission of protecting those most likely to be relegated to the margins of the workplace.