A Self-Fulfilling Prophecy:

How Inadequate Protection From Retaliation Discourages Reporting of Sexual Harassment

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In the past few years, Roger Ailes,[1] Bill O'Reilly,[2] Harvey Weinstein,[3] Mark Halperin,[4] and Travis Kalanick[5] (to name a few) have been accused of—and in many cases settled substantial claims for—sexual harassment or sexual assault. Whether this is simply the way things have always have been or instead how things have become, sexual harassment is a major issue that has been thrust to the forefront of concerns in modern society. For that reason, it is critical that victims and witnesses of sexual harassment can report what they have seen or experienced free of fear from retaliation by their employer. Thus, it is necessary to provide adequate safeguards to ensure that these victims and witnesses come forward and, in some cases, help prevent further unlawful conduct.

Over the course of a decade, the Supreme Court both expanded and contracted the protections of Title VII's retaliation provisions.[6] Regardless of their legal merits, these decisions, together with the statutory scheme in Title VII and decisions of the lower courts, have a chilling effect on the enforcement of Title VII. Specifically, these decisions have left employees in the dark as to when an employer can retaliate against them for reporting unlawful discrimination in the workplace. An employee seeking to prevent or stop such discrimination faces an unfortunate paradox: Ignore the unlawful discrimination or risk retaliation by his or her employer.

One particular area of ambiguity that discourages reporting is confusion over what constitutes "protected conduct" within the meaning of § 704(a) of Title VII. Absent a bright-line rule for "protected conduct" within § 704(a) of Title VII, the Supreme Court has created a world where a victim or witness wishing to prevent the kind of insidious sexual harassment that has been brought to our nation's attention through high-profile cases can do the right thing and report the conduct, but only at his or her own peril.

The Law of Retaliation

General Overview of Retaliation Claims Under Title VII

Title VII § 704(a), codified at 42 U.S.C. § 2000e-3(a), provides, in relevant part:

> 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 title, or because he has

made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this title.

In order to establish a prima facie case of retaliation in violation of Title VII, a plaintiff must show: (1) the employee engaged in protected conduct, (2) the employer's conduct had an adverse effect on the employee, and (3) the employer acted *because of* the employee's protected conduct.[7]

Typically, the first element is considered to protect two separate types of conduct. First, the "opposition clause" protects employees from retaliation for opposing employment practices that are unlawful.[8] Second, the participation clause prohibits retaliation when an employee "has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing."[9] The former creates more uncertainty for employees.

Burlington Northern and *Nassar* Change the Retaliation Landscape

Two decisions, within a decade of each other, vastly expanded and then contracted the viability of retaliation claims under Title VII. First, in *Burlington Northern & Santa Fe Railway Co. v. White*, the Supreme Court held that in a retaliation suit under Title VII, the employer's "adverse conduct" within the meaning of the second element of the prima facie case, discussed above, need not be a "tangible employment action."[10] Instead, the plaintiff must only show that a "reasonable employee would have found the challenged action materially adverse."[11] This had the effect of broadening what employer conduct qualifies as "adverse," arguably making it easier for plaintiffs to recover. The Court opined that a supervisor not inviting an employee to lunch is "normally trivial" and would not be considered a tangible employment action, but excluding an employee from a weekly training lunch that contributes significantly to the employee's professional advancement likely qualifies.[12]

This decision had a dramatic effect. As noted in *University of Texas Southwestern Medical Center v. Nassar*, retaliation claims filed with the Equal Employment Opportunity Commission (EEOC) increased from just over 16,000 in 1997, approximately nine years prior to *Burlington Northern*, to over 31,000 in 2012, nearly seven years after.[13]

In *Nassar*, the Supreme Court scaled back the dramatic increase of retaliation claims. There, the Court heightened the causation standard of retaliation claims, the third element discussed above, by holding: "Title VII retaliation claims must be proved according to traditional principles of but-for causation, not the lessened causation test in § 2000e-2(m)."[14] In other words, this decision raised the standard of "because of" within the context of the third element of a prima facie case, from requiring proof that a retaliatory motive was a "substantial motivating factor" in the adverse action, to requiring that the retaliatory motive was the "but-for" cause of that adverse action."[15]

The *Nassar* majority relied heavily on statutory text and structure in reaching its decision, explaining that "the text, structure and history of Title VII demonstrate that a plaintiff making a retaliation claim under § 2000e-3(a) must establish his or her protected activity was the but-for cause of the alleged adverse action by the employer."[16] It is worth noting, however, that this decision was a 5-4 decision on ideological lines, with the majority five conservative justices voting in favor of a heightened causation standard, which arguably benefits employers.[17]

The dissent highlighted the inherent contradiction created by the majority's decision, explaining the "symbiotic relationship between proscriptions on discrimination and proscriptions on retaliation."[18] Justice Ruth Bader Ginsburg, writing the dissent, relied heavily on the Court's *Burlington Northern* decision in explaining that the antidiscrimination provisions of Title VII "endeavor to create a workplace where individuals are not treated differently on account of race, ethnicity, religion, or sex."[19] She then explained, "anti-retaliation provisions 'see[k] to secure that primary objective by preventing an employer from interfering … with an employee's effort to secure or advance enforcement of [antidiscrimination] guarantees.'"[20] Further, and most significantly for present purposes, Justice Ginsburg stressed that Title VII depends on the cooperation of employee-victims and witnesses coming forward to file complaints and act as witnesses.[21]

Problems in the Wake of *Burlington Northern* and *Nassar*

One common problem for which *Burlington Northern* and *Nassar* provide little guidance is determining what qualifies as "protected conduct" for the purposes of the first element of a prima facie retaliation case. Protection for "participation" activity is more comprehensive and straight-forward than "opposition."[22] For example, when an employee enters a formal EEOC charge, the protection afforded is "expansive" if not absolute.[23] This protection may even extend to charges filed in bad faith.[24]

Despite the policy rationale for encouraging internal complaint procedures, however, "opposition" activity receives less protection.[25] Opposition activity includes, for example: "formal and informal internal complaints made directly to a supervisor or other representative of the employer, peaceful picketing at the employer's place of business, refusal to follow an order that the employee reasonably believes constitutes unlawful discrimination, and requesting an accommodation for a disability or religious practice."[26] These activities are protected only if (1) the conduct was based on a reasonable and good-faith belief that the complained-of practice was in violation of Title VII and (2) the opposition conduct is "legitimate and lawful."[27]

Although the second prong of the analysis is straightforward, the first prong has caused much confusion in the courts. Before addressing such decisions, however, it is worth noting that in *Clark County School District v. Breeden*, the Supreme Court did not endorse the "reasonable belief" standard, but instead, simply held that under the facts of that case, no reasonable person would believe that one offhand remark of a sexual nature rose to a Title VII violation.[28] Thus, it is at least arguable that the reasonable belief standard is not rooted in Supreme Court jurisprudence.

Many courts, however, apply the reasonable belief standard in determining what conduct is protected, and its application has led to much confusion. For example, in *Jordan v. Alternative Resources Corp.*,[29] a plaintiff complained after he heard a co-employee, while watching the news on television, exclaim: "They should put those two black monkeys in a cage with a bunch of black apes and let the apes f--k them."[30] The plaintiff reported the employee's comment to management.[31] In the month following his complaint, the plaintiff was given additional work assignments, had his shift changed, and was eventually terminated.[32] The trial court held that the plaintiff had failed to allege participation in a protected activity when he complained.[33] The Fourth Circuit affirmed, holding that the plaintiff could not have reasonably believed that the offending comment rose to the

level of a Title VII violation, thus, his conduct was not protected.[34]

Similarly, in *Crews v. Ennis Inc.*, a manager made two lewd, sexual comments, one referencing pubic hair and the other male masturbation.[35] The plaintiff complained about these two incidents and was subsequently terminated.[36] He brought a Title VII retaliation suit in response.[37] The court held that because these comments were merely "crude, vulgar humor that, while certainty boorish and offensive, did not rise to the level of harassment[,]" the plaintiff's belief he was engaging in protected activity was not "objectively reasonable."[38]

In addition to questions over whether certain conduct qualifies as "protected" for the purposes of retaliation suits, some courts have explained that even otherwise-protected conduct may exceed the bounds of Title VII's protections. In *Payne v. McLemore's Wholesale & Retail Stores*, the Fifth Circuit Court of Appeals noted that there are instances "where the employee's conduct in protest of an unlawful employment practice so interferes with the performance of his job that it renders him ineffective in the position for which he was employed."[39] Under such circumstances, the court explained, courts must engage in a balancing test to determine whether the conduct is protected by § 704(a).[40]

These issues are further complicated for victims in sexual harassment cases. These complications arise because failure to report alleged harassment will often defeat an employee's harassment claims for two reasons.[41] First, failure to report may make it difficult to prove certain conduct was "unwelcome."[42] Second, "an employee's failure to report a supervisor's harassment may result in a court refusing to find the employer liable for the harassment."[43]

A Final Layer of Difficulty in Hostile Environment Claims

With the deck already stacked against him, a victim or witness who seeks to take action in the case of a hostile environment in the workplace faces a nearly impossible burden in a subsequent retaliation suit. Hostile environment claims were first recognized by the Supreme Court in *Meritor Savings Bank v. Vinson*.[44] There, the plaintiff employee alleged she had been fondled, followed into the women's restroom, and forcibly raped by her supervisor over the course of several years.[45] The Court held that the plaintiff could maintain a sex discrimination claim under Title VII, despite the absence of any negative economic consequences, by showing that conduct in the workplace was "sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment."[46]

In applying this decision in subsequent decisions, the lower courts together with the Supreme Court developed the following required elements to state a hostile environment sexual harassment claim under Title VII:

> (1) the plaintiff must identify a protected category as the basis of the harassment (sex, in this case); (2) the plaintiff "was subjected to unwelcomed sexual harassment in the form of sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature"; (3) the harassment was based on or "because of" sex; (4) the harassment "must be sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment"; and (5) the employer could be held liable for the harassment under the doctrine of respondeat superior. Such claims thus require the courts to distinguish between isolated and minor incidents and more serious acts and patterns of harassment to determine if the offensive behavior rises to the level of "severe and pervasive."[47]

The Need for Clear Standards

As a result of decisional and statutory law, a victim or witness debating about taking an "opposition" action in response to conduct they believe is unlawful sexual harassment, must weave the following maze to know whether they may recover in a retaliation suit, should they be retaliated against for their opposition conduct:

1. The plaintiff must prove that a reasonable person in that employee's position (victim or witness) would have reasonably believed that the experienced or observed conduct was unlawful; meaning, the sexual harassment was so "severe or pervasive [as] 'to alter the conditions of [the victim's] employment and create an abusive working environment'"[48];
2. The retaliatory conduct was such that it would have "dissuaded a reasonable worker from making or supporting a charge of discrimination"[49]; and
3. The employer would not have taken the retaliatory action *but for* the employer's retaliatory intent.[50]

This test has but one clear result: it discourages victims and witnesses of unlawful sexual harassment in the workplace from taking *any kind of action*, unless they are willing to risk nearly unfettered retaliation. Despite the arguably sound legal analysis of the *Nassar* majority, its outcome presents problems for employees, employers, the legislature, and the judiciary.

First, employees have almost no clarity as to what opposition activities are protected. One need look no further than the test, outlined above, to see the difficulty an employee faces when determining whether to take any action in opposition to sexual harassment in the workplace. In essence, this test requires that an employee tackle complex legal issues on which seasoned attorneys may disagree. This is exacerbated by the multiple levels of "reasonableness" through which a plaintiff in a retaliation suit must weave. Thus, the "reasonable employee" may simply be the employee "reasonable" enough to ignore the very conduct Title VII is designed to prevent.

Second, employers are forced to gamble in everyday personnel decisions given the tremendous uncertainty surrounding what conduct is protected. If an employee takes an action that the employer fears is protected, despite the reality that the employer has a legitimate, non-retaliatory reason for taking some adverse action against the employee, ranging from something as simple as giving that employee extra work all the way to termination, the employer will have to think twice before taking any action outside of the "norm." Admittedly, it is likely an employer will be able to rely on the heightened causation standard of *Nassar*; however, this does not prevent litigation or serve the purpose of encouraging reporting.

Another reason clear lines are necessary for employees and

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employers alike is the need to reduce litigation. In short, *Burlington Northern* arguably made litigation more favorable for plaintiffs, thus encouraging litigation, while *Nassar* arguably shifted the favorability back to defendants, thus discouraging litigation. What neither case did, however, is focus on conduct that *prevents* litigation. Further, there are many policy reasons in favor of early reporting of sexual harassment. "Policies underlying the employment discrimination laws support the private resolution of disputes, employer discipline of harassers, and nipping harassment in the bud before it becomes severe or pervasive."[51] By encouraging reporting, it is possible to prevent unnecessary litigation while also leading to a safer work environment.

Third, this complex framework has greatly inhibited the underlying policy rationale of Title VII. In *Burlington Northern*, the Court explained, the anti-retaliation provision seeks to secure the primary objective of eliminating discrimination in the workplace based on race, religion, or sex "by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the act's basic guarantees."[52] Thus, by removing the protections for employees' opposition conduct, the courts together with the statutory scheme have undermined the utility of employee-victims and witnesses coming forward to file complaints and act as witnesses.

Finally, just as the lack of clear lines provides unique problems for employees and employers, such ambiguity puts great strain on the courts. As noted above, courts have struggled with determining what constitutes a "protected activity" within the meaning of Title VII. Thus, a clear rule as to what constitutes a "protected activity" would also benefit the courts.

A Better Test

The courts should adopt the test suggested by professor B. Glenn George in a 2008 article entitled *Revenge*: explicitly extending "absolute protection against retaliation to employees who file complaints under an employer's sexual harassment policy, unless the complaint is knowingly false or fabricated."[53] Such a policy would help simplify the complex maze with which employees are faced when determining whether to report experienced or witnessed sexual harassment. This would serve the interests of employees and employers by providing clear lines of demarcation, encouraging the underlying policy rationale set forth in Title VII, and giving the courts guidance as to what conduct is protected for the purposes of Title VII retaliation suits.

Conclusion

Given the underlying policy rationale for employees to report observed or experienced sexual harassment in the workplace, it is critical to encourage employees to report. Although *Burlington Northern* and *Nassar* helped define the elements necessary to recover for retaliation under Title VII, there is still a great deal of uncertainty as to what conduct is protected. This issue presents particular difficulties within the context of retaliation suits under Title VII when an employee complains of sexual harassment in the context of a hostile work environment claim and is subsequently retaliated against. The proper solution to this problem is to abandon the "reasonable belief" test in favor of a bright-line rule that looks to an employer's sexual harassment policy. This test would provide much-needed clarity for employees, employers, and the courts, alike, while also supporting the underlying policy rationale behind Title VII. ⊙

Endnotes

[1]Manuel Roig-Franzia et al., *The Fall of Roger Ailes: He Made Fox News His "Locker Room"—and Now Women Are Telling Their Stories,* Wash. Post (July 22, 2016), https://www.washingtonpost.com/lifestyle/style/the-fall-of-roger-ailes-he-made-fox-his-locker-room--and-now-women-are-telling-their-stories/2016/07/22/5eff9024-5014-11e6-aa14-e0c1087f7583_story.html?utm_term=.5a6780459db7.

[2]Emily Steel & Michael S. Schmidt, *Bill O'Reilly Settled New Harassment Claim, Then Fox Renewed His Contract*, N.Y. Times (Oct. 21, 2017), https://www.nytimes.com/2017/10/21/business/media/bill-oreilly-sexual-harassment.html.

[3]Jacey Fortin, *The Women Who Have Accused Harvey Weinstein*, N.Y. Times (Oct. 10, 2017), https://www.nytimes.com/2017/10/10/us/harvey-weinstein-accusations.html.

[4]Oliver Darcy, *NBC News, MSNBC Cut Ties With Halperin*, CNN (Oct. 30, 2017, 10:38 AM), http://money.cnn.com/2017/10/30/media/mark-halperin-nbc-sexual-harassment/index.html.

[5]Maya Kosoff, *Uber's Sexual-Harassment Crisis Just Got Even Darker*, Vanity Fair (June 15, 2017, 4:45 PM), https://www.vanityfair.com/news/2017/06/uber-india-rape-survivor-sues-medical-files.

[6]*See generally Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013); *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006).

[7]*See, e.g., Archuleta v. Colo. Dep't of Insts., Div. of Youth Servs.*, 936 F.2d 483, 486 (10th Cir. 1992) (citing *Allen v. Denver Sch. Bd.*, 928 F.2d 978 (10th Cir. 1991)); *accord Jones v. Flagship Int'l*, 793 F.2d 714, 724 (5th Cir. 1986).

[8]Ernest F. Lidge III, *The Necessity of Expanding Protection From Retaliation for Employees Who Complain About Hostile Environment Harassment*, 53 U. Louisville L. Rev. 39, 59-61 (2014) (footnotes and citations omitted).

[9]*Id.*

[10]*Burlington N.,* 548 U.S. at 67-69.

[11]*Id.*

[12]*Id.*

[13]*Nassar*, 133 S. Ct. at 2531 (citing *Charge Statistics FY 1997 Through FY 2012*, EEOC, http://www.eeoc. gov/eeoc/statistics/enforcement/charges.cfm (last visited June 20, 2013) (available in Clerk of Court's case file)).

[14]*See id.* at 2532-34.

[15]*Id.*

[16]*Id.*

[17]*Id.*

[18]*Id.* at 2537 (Ginsburg, J., dissenting).

[19]*Id.*

[20]*Id.* (quoting *Burlington N.*, 548 U.S. at 63) (alterations in original).

[21]*Id.*

[22]B. Glenn George, *Revenge*, 83 Tul. L. Rev. 439, 447-48 (2008).

[23]*Id.* (citing an assortment of cases).

[24]*Id.*

[25]*Id.*

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[26]*Id.* (footnotes and citations omitted).
[27]*Id.* at 448-49.
[28]*Clark Cty. Sch. Dist. v. Breeden,* 532 U.S. 268, 270-71 (2001); *see also* Lidge, *supra* note 8, at 66 ("Some lower courts have mistakenly stated that the Breeden Court adopted the 'reasonable belief' standard.").
[29]Although this case dealt with discrimination based on race, rather than sexual harassment, it is instructive as it pertains only to "protected conduct" within the meaning of a retaliation suit.
[30]*Jordan v. Alternative Res. Corp.,* 458 F.3d 332, 336-37 (4th Cir. 2006), *overruled by Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264 (4th Cir. 2015).
[31]*Id.*
[32]*Id.*
[33]*Id.* at 339-40.
[34]*Id.* at 339-40, 349.
[35]*Crews v. Ennis Inc.*, No. 4:12-cv-00009, 2012 WL 5929032, at *1-3 (W.D. Va. Nov. 27, 2012).
[36]*Id.*
[37]*Id.* at *4.
[38]*Id.* at *8.
[39]Susan A. Omilian & Jean P. Kamp, 1 Sex-Based Employment Discrimination § 12:6 (citing *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1142 (5th Cir. 1981)).
[40]*Id.*
[41]Lidge, *supra* note 8, at 42 (footnotes and citations omitted).
[42]*Id.*
[43]*Id.*
[44]*Meritor Sav. Bank v. Vinson,* 477 U.S. 57 (1986).
[45]*Id.* at 59-61.
[46]*Id.* at 67 (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)).
[47]George, *supra* note 22, at 471.
[48]*Meritor Sav. Bank,* 477 U.S. at 67 (citing *Henson*, 682 F.2d at 902).
[49]*Burlington N.*, 548 U.S. at 67-68 (citing *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2006)).
[50]*Nassar*, 133 S. Ct. at 2533.
[51]Lidge, *supra* note 8, at 42 (footnotes and citations omitted).
[52]*Burlington N.*, 548 U.S. at 63.
[53]George, *supra* note 22, at 490-92.