

REDEFINING PROTECTED “OPPOSITION” ACTIVITY IN EMPLOYMENT RETALIATION CASES

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Over the last decade, retaliation claims under our federal employment discrimination laws—such as Title VII of the Civil Rights Act of 1964 (Title VII), the Americans with Disabilities Act of 1990 (ADA), and the Age Discrimination in Employment Act of 1967 (ADEA)—have skyrocketed. In that period, these claims have increased in number by over fifty percent and now rank as the single most popular claim filed with the Equal Employment Opportunity Commission (EEOC).

A critical element in these retaliation claims is the presence of “protected activity” by the whistleblowing employee. One type of protected activity is “opposition” activity, which encompasses less formal reports or protests, such as making internal complaints about harassing workplace conduct to a supervisor or human resources department.

Currently, federal courts narrowly define what qualifies as protected opposition activity under the Title VII, ADA, and ADEA antiretaliation provisions. Specifically, a whistleblowing employee is protected only if two requirements are met: (i) the employee had an honest, good-faith belief that the reported conduct was unlawful under federal employment discrimination law; and (ii) the employee’s belief was either correct (i.e., the conduct was actually unlawful) or reasonably incorrect (i.e., she was at least reasonable in believing that the conduct was actually unlawful). In other words, our courts protect whistleblowing employees only if they are honest, “correct believers” or honest, “reasonably incorrect believers.”

This definition of protected opposition activity is flawed because it focuses only upon the correctness or reasonableness of a whistleblowing employee’s belief and does not accommodate the reasonableness of her action. That belief-driven focus fails to protect multitudes of employees who not only possess an honest, good-faith belief that

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workplace conduct was unlawful under federal employment discrimination law, but also then act reasonably under the circumstances to stop it by internally reporting it.

This Article argues that the definition of protected opposition activity should be expanded to protect whistleblowing employees who are honest, “reasonable actors.” Specifically, this Article proposes and defends the addition of a “Reasonable Action Option” to that definition. This proposed approach represents a significant improvement in federal antiretaliation law for three reasons: (i) It is consistent with the Supreme Court’s “reasonable worker (re)action” philosophy that is clearly evidenced in its post-1998 employment discrimination and retaliation decisions; (ii) It avoids a so-called “Goldilocks problem,” where an employee’s retaliation claim is destroyed by an internal complaint that is timed “too soon” and is only protected by one that is somehow timed “just right”; and (iii) It promotes the purpose and policy behind the antiretaliation provisions of our federal employment discrimination laws.

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INTRODUCTION

Key federal employment discrimination statutes, such as Title VII of the Civil Rights Act of 1964 (Title VII),¹ Title I of the Americans with Disabilities Act of 1990 (ADA),² and the Age Discrimination in Employment Act of 1967 (ADEA),³ prohibit employers from discriminating against individuals because of certain “protected traits” or characteristics (e.g., race, color, sex, religion, national origin, disability, and age). But these laws do much more—they also prohibit employers from retaliating against individuals because of certain “protected activity.” For example, Title VII contains the following antiretaliation provision:

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, assisted, or *participated* in any manner in an investigation, proceeding, or hearing under this subchapter.⁴

The ADA and ADEA contain virtually identical antiretaliation provisions.⁵

¹ 42 U.S.C. §§ 2000e–2000e-17 (2012). Title VII generally prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. *See id.* § 2000e-2(a)(1); *see also* Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (2012) (amending Title VII to clarify that unlawful discrimination “because of sex” includes “because of or on the basis of pregnancy, childbirth, or related medical conditions”).

² *Id.* § 12101. The ADA generally prohibits employment discrimination against a “qualified individual” because of a “disability.” *Id.* § 12112(a)–(b); *see also id.* § 12102(1) (defining the term “disability” as (i) “a physical or mental impairment that substantially limits one or more major life activities of such individual”; (ii) having “a record of such an impairment”; or (iii) “being regarded as having such an impairment”); *id.* § 12111(8) (defining the term “qualified individual” as a person “who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires”).

³ 29 U.S.C. §§ 621–634 (2012). The ADEA generally prohibits employment discrimination because of age (forty years old or older). *Id.* §§ 623(a), 631(a) (limiting the ADEA’s scope to persons “at least 40 years of age”).

⁴ 42 U.S.C. § 2000e-3(a) (emphases added).

⁵ *Id.* § 12203(a) (“No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by [the ADA] or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [the ADA].”); 29 U.S.C. § 623(d) (“It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment . . . because such individual . . . has opposed any practice made unlawful by this section, or because such individual . . . has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under [the ADEA].”). The Civil Rights Act of 1866 (section 1981) is another federal discrimination statute that protects whistleblowers from retaliation. Section 1981 prohibits, in part, race-based employment discrimination. *See*

Retaliation Claim Basics. A whistleblowing plaintiff must demonstrate three elements for a viable claim of retaliation: the presence of protected activity, a “materially adverse” action by the employer,⁶ and a causal relationship, nexus, or connection between the protected activity and adverse action.⁷

As to the protected activity element, these antiretaliation provisions contain two distinct clauses: an “opposition” clause and a “participation” clause.⁸ Protected activity under the opposition clause

Civil Rights Act of 1866, 42 U.S.C. § 1981(a) (“All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . .”); *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 459–60 (1975) (“[I]t is well settled among the federal Courts of Appeals—and we now join them—that § 1981 affords a federal remedy against discrimination in private employment on the basis of race.” (footnote omitted)). While section 1981 does not contain an express antiretaliation provision, the Supreme Court has concluded that this statute does encompass protection from retaliation. *CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 452, 457 (2008) (“[Section 1981’s] language does not expressly refer to the claim of an individual (black or white) who suffers retaliation because he has tried to help a different individual, suffering direct racial discrimination, secure his § 1981 rights. But that fact alone is not sufficient to carry the day. . . . We consequently hold that 42 U.S.C. § 1981 encompasses claims of retaliation.”).

⁶ *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57 (2006) (“We conclude that the antiretaliation provision [of Title VII] . . . covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant. In the present context that means that the employer’s actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination.”); *id.* at 68 (“In our view, a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, ‘which in this context means it well might have ‘dissuaded a reasonable worker from making or supporting a charge of discrimination.’” (citing *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2006))).

⁷ MICHAEL J. ZIMMER, CHARLES A. SULLIVAN & REBECCA HANNER WHITE, *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION* 485 (8th ed. 2013) (“[A] retaliation claim requires protected conduct, an adverse action, and a causal link between the two.”). For recent precedent enumerating these retaliation elements, see the following cases (organized by federal circuit courts of appeal): First Circuit: *Rodríguez-Vives v. P.R. Firefighters Corps.*, 743 F.3d 278, 283 (1st Cir. 2014) (Title VII retaliation); Second Circuit: *Rodas v. Town of Farmington*, 567 F. App’x 24, 25–26 (2d Cir. 2014) (Title VII retaliation); Third Circuit: *Daniels v. Sch. Dist. of Phila.*, 776 F.3d 181, 193 (3d Cir. 2015) (ADEA retaliation); Fourth Circuit: *Buchhagen v. ICF Int’l, Inc.*, 545 F. App’x 217, 221 (4th Cir. 2013) (ADEA retaliation); Fifth Circuit: *Satterwhite v. City of Hous.*, 602 F. App’x 585, 587 (5th Cir. 2015) (per curiam) (Title VII retaliation); Sixth Circuit: *Briggs v. Univ. of Detroit-Mercy*, 611 F. App’x 865, 871 (6th Cir. 2015) (Title VII retaliation); Seventh Circuit: *Castro v. DeVry Univ., Inc.*, 786 F.3d 559, 564 (7th Cir. 2015) (Title VII retaliation); Eighth Circuit: *Lenzen v. Workers Comp. Reinsurance Ass’n*, 705 F.3d 816, 821 (8th Cir. 2013) (ADA retaliation); Ninth Circuit: *Becker v. Kikiktagrak Inupiat Corp.*, 488 F. App’x 227, 228 (9th Cir. 2012) (section 1981 retaliation); Tenth Circuit: *Davis v. James*, 597 F. App’x 983, 987 (10th Cir. 2015) (Title VII retaliation); Eleventh Circuit: *Harris v. Fla. Agency for Health Care Admin.*, 611 F. App’x 949, 950 (11th Cir. 2015) (per curiam) (Title VII retaliation); D.C. Circuit: *Jones v. Bernanke*, 557 F.3d 670, 677 (D.C. Cir. 2009) (Title VII and ADEA retaliation).

⁸ See, e.g., *Armstrong v. K & B La. Corp.*, 488 F. App’x 779, 781 (5th Cir. 2012) (per curiam) (“In Title VII retaliation claims, protected activities include (1) opposing any practice deemed an unlawful employment practice (the ‘opposition clause’) or (2) making a charge, testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing

encompasses *less formal* reports or protests, such as making internal complaints about harassing workplace conduct to a supervisor or Human Resources department.⁹ In contrast, protected activity under the participation clause encompasses *more formal* reports, protests, or related conduct, such as actually filing “charges” or claims with the Equal Employment Opportunity Commission (EEOC), or otherwise testifying, assisting, or participating in ensuing investigations or proceedings.¹⁰

Retaliation Claim Frequency. Over the last decade, the EEOC (as the federal administrative agency that enforces Title VII, the ADA, and the ADEA) has seen a stunning increase in these retaliation claims. For example, in 2003, only 27.9% (or 22,690) of the 81,293 total claims filed with the EEOC alleged unlawful retaliation.¹¹ In comparison, that same

under Title VII (the ‘participation clause’).” (quoting *Douglas v. DynMcDermott Petrol. Operations Co.*, 144 F.3d 364, 372 (5th Cir. 1998)); *Brush v. Sears Holdings Corp.*, 466 F. App’x 781, 785 (11th Cir. 2012) (“[T]he two clauses of the anti-retaliation provision [of Title VII] are known as the ‘participation clause’ and the ‘opposition clause.’”); *Therault v. Dollar Gen.*, 336 F. App’x 172, 174 (3d Cir. 2009) (“To engage in protected activity, the employee must either participate in certain Title VII proceedings (the participation clause) or oppose discrimination made unlawful under Title VII (the opposition clause.)”); ZIMMER, SULLIVAN & WHITE, *supra* note 7, at 454 (discussing the “two separate clauses” as the “opposition clause” and the “free access” or “participation” clause).

⁹ See, e.g., *Daniels*, 776 F.3d at 193 (“[P]rotected ‘opposition’ activity includes . . . ‘informal protests of discriminatory employment practices, including making complaints to management.’” (quoting *Curay-Cramer v. Ursuline Acad. of Wilmington, Inc.*, 450 F.3d 130, 135 (3d Cir. 2006))); *Session v. Montgomery Cty. Sch. Bd.*, 462 F. App’x 323, 325 (4th Cir. 2012) (“Opposition activity includes internal complaints about alleged discriminatory activities”); *Wasek v. Arrow Energy Servs., Inc.*, 682 F.3d 463, 469 (6th Cir. 2012) (“[C]omplaining about allegedly unlawful conduct to company management is classic opposition activity.”); *Barrett v. Whirlpool Corp.*, 556 F.3d 502, 516 (6th Cir. 2009) (“An employee has engaged in opposing activity when she complains about unlawful practices to a manager, the union, or other employees.”); *Fantini v. Salem State Coll.*, 557 F.3d 22, 32 (1st Cir. 2009) (“[Title VII’s section] 704(a)’s opposition clause protects . . . informal protests of discriminatory employment practices, including making complaints to management”); *Johnson v. Mech. & Farmers Bank*, 309 F. App’x 675, 685 (4th Cir. 2009) (“Opposition activity encompasses utilizing informal grievance procedures as well as staging informal protests and voicing one’s opinions in order to bring attention to an employer’s discriminatory activities.” (quoting *Laughlin v. Metro. Wash. Airports Auth.*, 149 F.3d 253, 259 (4th Cir. 1998))); ZIMMER, SULLIVAN & WHITE, *supra* note 7, at 458 n.2 (“Internal complaints of discrimination . . . are opposition . . . conduct.”).

¹⁰ See, e.g., *Harris*, 611 F. App’x at 950–51 (“For retaliation to be prohibited under the participation clause of [Title VII], the plaintiff must participate in a proceeding or activity that occurs in conjunction with a formal charge to the EEOC or after the filing of a formal charge.”); ZIMMER, SULLIVAN & WHITE, *supra* note 7, at 458 n.2 (“[P]articipation includes not only filing a charge or lawsuit but testifying in court or at deposition.”).

¹¹ *Charge Statistics: FY 1997 Through FY 2014*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://www1.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Feb. 7, 2016).

year, 35.1% (or 28,526) of these total claims alleged race discrimination, and 30% (or 24,362) alleged sex discrimination.¹²

By 2008, the frequency of retaliation claims had jumped substantially, with 34.3% (or 32,690) of the 95,402 total claims filed with the EEOC alleging unlawful retaliation.¹³ In contrast, that same year, the frequency of race and sex discrimination claims remained virtually the same as it was in 2003, with 35.6% (or 33,937) of these total claims alleging race discrimination, and 29.7% (or 28,372) alleging sex discrimination.¹⁴

By 2014, the frequency of retaliation claims had increased significantly again, with 42.8% (or 37,955) of the 88,778 total claims filed with the EEOC alleging unlawful retaliation.¹⁵ In contrast, that same year, the frequency of race and sex discrimination claims again remained virtually the same as it was in 2003 and 2008, with 35.0% (or 31,073) of these total claims alleging race discrimination and 29.3% (or 26,027) alleging sex discrimination.¹⁶

Consequently, over the last ten years, retaliation claims under our federal employment discrimination laws have increased in number by over fifty percent (from 27.9% to 42.8%) and now rank as the single most popular claim filed with the EEOC under these laws.¹⁷

The Problematic Definition of Protected “Opposition” Activity. Notwithstanding their rising popularity, retaliation claims can be surprisingly difficult to win. For example, consider the following scenario and decide whether the whistleblowing employee will win her Title VII retaliation claim:

Sharon is an employee of Company A. Unprompted, Sharon’s male supervisor asked her if she wanted to have sex with him. Offended by this incident and believing that this conduct was inappropriate under federal employment discrimination law, Sharon reported the incident to the Human Resources department. The very next day, Company A terminated Sharon and told her: “We don’t want troublemakers, so we have to let you go because of your report.”

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ See also ZIMMER, SULLIVAN & WHITE, *supra* note 7, at 454 (“In 2011, the EEOC announced that the number of complaints filed for discriminatory retaliation surpassed, for the first time ever, the number filed for race discrimination, making retaliation the most frequently filed charge with the EEOC. A similar announcement occurred again in 2012, with the EEOC reporting that charges of retaliation during fiscal year 2011 had risen to 37.4 percent of its workload. Retaliation claims are not only the most frequently filed charges, but their filing has accelerated quite rapidly in recent years.”).

As an initial matter, we likely think that Sharon *should* win. After all, Sharon seems able to demonstrate the first element of a retaliation claim—protected opposition activity. She *honestly believed* that her supervisor’s sex-based request was unlawful workplace harassment. And, of equal importance, Sharon *acted reasonably* by promptly reporting that conduct to the Human Resources department in an effort to stop it. If you had been Sharon, you likely would have acted similarly under the circumstances.

To boot, Sharon seems able to demonstrate the second and third elements of a retaliation claim—“materially adverse” action (Company A firing her), and a “causal relation” or “causal nexus” between her activity and the adverse action (Company A’s clear admission¹⁸ and the immediate timing of the firing after her report¹⁹).

¹⁸ This admission would constitute “direct evidence” of Company A’s retaliatory intent and thus establish the necessary causal connection between Sharon’s protected activity and the adverse action. *See, e.g., O’Leary v. Accretive Health, Inc.*, 657 F.3d 625, 630 (7th Cir. 2011) (“The causal nexus . . . may be shown through direct evidence, which would entail something akin to an admission by the employer (‘I’m firing you because you had the nerve to accuse me of sex discrimination!’) . . .”); *Young-Losee v. Graphic Packaging Int’l, Inc.*, 631 F.3d 909, 912 (8th Cir. 2011) (“Direct evidence of retaliation is evidence that demonstrates a specific link between a materially adverse action and the protected conduct, sufficient to support a finding by a reasonable fact finder that the harmful adverse action was in retaliation for the protected conduct.”). *See generally* MARION G. CRAIN, PAULINE T. KIM & MICHAEL SELMI, *WORK LAW: CASES AND MATERIALS* 567 (3d ed. 2015) (“Direct evidence is defined as evidence that does not require the finder of fact to draw an inference of discrimination; in other words, the evidence, by itself, establishes an intent to discriminate.”); ZIMMER, SULLIVAN & WHITE, *supra* note 7, at 34 n.3 (describing direct evidence as “statements by the decisionmaker in the context of the decision that manifest bias”); *id.* at 82 (“The classic notion of ‘direct’ evidence is evidence that, if believed, proves the ultimate question at issue without drawing any inferences.” (emphasis omitted)).

¹⁹ *See, e.g., Greengrass v. Int’l Monetary Sys. Ltd.*, 776 F.3d 481, 486 (7th Cir. 2015) (“[A] plaintiff may also supply the causal link through . . . suspicious timing Suspicious timing is generally found when ‘an adverse employment action follows close on the heels of protected expression.’” (quoting *Kidwell v. Eisenhower*, 679 F.3d 957, 966 (7th Cir. 2012))); *Lawson v. City of New York*, 595 F. App’x 89, 90 (2d Cir. 2015) (“[A] causal connection may be indirectly established by demonstrating temporal proximity between a complaint of discrimination and an adverse employment action”); *Montell v. Diversified Clinical Servs., Inc.*, 757 F.3d 497, 505 (6th Cir. 2014) (“On the law, we have held that temporal proximity alone can be enough: ‘Where an adverse employment action occurs very close in time after an employer learns of a protected activity, such temporal proximity between the events is significant enough to constitute evidence of a causal connection for the purposes of satisfying a prima facie case of retaliation.’” (quoting *Mickey v. Zeidler Tool & Die Co.*, 516 F.3d 516, 525 (6th Cir. 2008))); CRAIN, KIM & SELMI, *supra* note 18, at 599 (“Timing often proves important, and while courts have generally not created bright lines, it is generally the case that the closer the time between the protected act (i.e., a complaint) and the employer’s retaliation, the more likely a court is to identify the necessary causal link.”); ZIMMER, SULLIVAN & WHITE, *supra* note 7, at 485 (“Often times, plaintiffs rely on timing as evidence of causation. When an adverse action follows closely on the heels of protected conduct, it is not a difficult inferential leap to conclude that one may have been caused by the other.”).

But, *will* Sharon win her retaliation claim? Likely not. And the reason is simple: federal courts too narrowly define what qualifies as protected opposition activity under the Title VII, ADA, and ADEA antiretaliation provisions. Specifically, a whistleblowing employee is protected only if two requirements are met:

- (1) Honest Belief: the employee had an honest, good-faith belief that the reported conduct was unlawful under federal employment discrimination law; and
- (2) Correct or Reasonable Belief: the employee's belief was *either* correct (i.e., the conduct was *actually* unlawful) *or* reasonably incorrect (i.e., she was at least *reasonable* in believing that the conduct was actually unlawful).²⁰

In other words, our courts protect employees only if they are honest, "correct believers" or honest, "reasonably incorrect believers."

When applied to Sharon's situation, this definition of protected opposition activity likely excludes Sharon's internal complaint regarding her supervisor's sex-based request. Yes, she can satisfy the first requirement of that definition, because her report was based on an honest, good-faith belief that this sex-based request was unlawful workplace harassment under Title VII. Sharon was an honest believer.

But, Sharon likely cannot satisfy the second requirement, because her belief that unlawful workplace harassment had occurred was *neither correct nor reasonably incorrect*. Why? As to the "correct" option, federal courts have long held that unlawful workplace harassment arises only from "severe or pervasive" conduct, rather than from a "single incident" or "isolated" conduct.²¹ In Sharon's situation, her supervisor's "single"

²⁰ See *infra* Sections I.A–B (setting forth applicable precedent adopting and applying this definition of protected opposition activity).

²¹ See, e.g., *Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 270 (2001) (per curiam) ("Just three Terms ago, we reiterated, what was plain from our previous decisions, that sexual harassment is actionable under Title VII only if it is 'so 'severe or pervasive' as to 'alter the conditions of [the victim's] employment and create an abusive working environment.'") (alteration in original) (quoting *Faragher v. Boca Raton*, 524 U.S. 775, 786 (1998)); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) ("When the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,' Title VII is violated." (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65, 67 (1986))); *Meritor*, 477 U.S. at 67 ("For sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" (alteration in original) (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982))); ZIMMER, SULLIVAN & WHITE, *supra* note 7, at 366 ("[T]he core question is frequently whether the conduct in question was 'severe or pervasive' enough to contaminate the work environment . . ."); *infra* Section I.B.1–2 (discussing *Breeden* and other federal circuit precedents that reiterated the "severe or pervasive" standard necessary for an unlawful harassing work environment).

sex-based request likely falls short of this “severe or pervasive” standard, thereby making her belief regarding unlawful workplace harassment *incorrect*.²² As a result, Sharon—while honest—was not a “correct believer.”

As to the “reasonably incorrect” option, federal courts have typically concluded that a whistleblowing employee is unreasonable if she believes that a “single incident” or “isolated” conduct meets the “severe or pervasive” standard for unlawful workplace harassment.²³ In Sharon’s situation, the court would likely reach the same conclusion. As a result, Sharon—while honest—was not a “reasonably incorrect believer” either.

As evidenced by Sharon’s situation, the definition of protected opposition activity is flawed, because it focuses only upon the correctness or reasonableness of a whistleblowing employee’s *belief* and does not accommodate the reasonableness of her *action*. That belief-driven focus fails to protect multitudes of employees who (like Sharon) not only possess an honest, good-faith belief that workplace conduct was unlawful under federal employment discrimination law, *but also* then act reasonably under the circumstances to stop such conduct by internally reporting it.

Consequently, this Article argues that the definition of protected opposition activity should be expanded to protect whistleblowing employees who are honest, “reasonable actors.” Specifically, this Article proposes and defends the addition of a “Reasonable Action” option to that definition. Under this proposed approach, a whistleblowing employee would still be protected only if two requirements are met, but with the second requirement now including a reasonable action alternative:

- (1) Honest Belief: the whistleblower had an honest, good-faith belief that the reported conduct was unlawful under federal employment discrimination law; and

²² See, e.g., *Breedon*, 532 U.S. at 271 (noting that in a Title VII retaliation case, a single or “isolated incident” by the plaintiff’s supervisor “cannot remotely be considered ‘extremely serious,’ as our cases require” (quoting *Faragher*, 524 U.S. at 788)); *infra* Section II.B.1–2 (discussing *Breedon* and other federal circuit precedents which concluded that a single or “isolated incident” of inappropriate workplace conduct was insufficient under the “severe or pervasive” standard).

²³ See, e.g., *Breedon*, 532 U.S. at 271 (concluding that in a Title VII retaliation case, the plaintiff did not engage in protected opposition activity because “[n]o reasonable person could have believed that the single incident . . . violated Title VII’s standard”); *infra* Section I.B.1–2 (discussing *Breedon* and other federal circuit precedents which concluded that a reasonable employee would not believe that a single or “isolated incident” met the “severe or pervasive” standard).

(2) Correct or Reasonable Belief, or *Reasonable Action*: the whistleblower's belief was either correct (i.e., the conduct was actually unlawful) or reasonably incorrect (i.e., she was at least reasonable in believing that the conduct was actually unlawful), or *the whistleblower's action of internally reporting the inappropriate workplace conduct was otherwise reasonable under the circumstances.*

Part I of this Article begins by discussing the current, belief-driven definition of protected opposition activity under the Title VII, ADA, and ADEA antiretaliation provisions.²⁴ It then highlights recent Supreme Court and other federal circuit precedent in which courts have regularly applied that definition's objective "reasonable belief" requirement to dismiss plaintiffs' retaliation claims under our federal employment discrimination laws.²⁵

Part II proposes and defends the addition of a "Reasonable Action" option to the definition of protected opposition activity. This proposed approach represents a significant improvement in federal antiretaliation law for three reasons. First, it is consistent with the Supreme Court's "reasonable worker (re)action" philosophy that is clearly evidenced in its post-1998 employment discrimination and retaliation decisions.²⁶ Second, this proposed approach avoids a so-called "Goldilocks problem," where an employee's retaliation claim is destroyed by an internal complaint that is timed "too soon" and is only protected by one that is somehow timed "just right."²⁷ And third, it promotes the purpose and policy behind the antiretaliation provisions of our federal employment discrimination laws.²⁸

I. PROTECTED OPPOSITION ACTIVITY IN EMPLOYMENT RETALIATION CASES

This Part discusses (i) the current, belief-driven definition of protected opposition activity under the Title VII, ADA, and ADEA antiretaliation provisions, and (ii) recent Supreme Court and other federal circuit precedent in which courts have regularly applied the objective "reasonable belief" requirement to dismiss plaintiffs' retaliation claims under these laws.

²⁴ See *infra* Section I.A (discussing the definition and requirements of protected opposition activity).

²⁵ See *infra* Section I.B.1–2 (discussing applicable Supreme Court and federal circuit precedents).

²⁶ See *infra* Section II.A (discussing this Supreme Court philosophy and applicable precedent).

²⁷ See *infra* Section II.B (discussing the "Goldilocks problem").

²⁸ See *infra* Section II.C (discussing federal antiretaliation purpose and policy).

A. *Definition and Requirements*

As mentioned above, under the opposition clause of our antiretaliation provisions, a whistleblowing employee is protected only if two requirements are met: (i) the employee had an honest, good-faith belief that the reported conduct was unlawful under federal employment discrimination law; and (ii) the employee’s belief was *either* correct (i.e., the conduct was *actually* unlawful) *or* reasonably incorrect (i.e., she was at least *reasonable* in believing that the conduct was actually unlawful).²⁹

²⁹ For recent precedents setting forth this definition of protected opposition activity, see the following cases (organized by federal circuit courts of appeal): First Circuit: Trainor v. HEI Hosp., LLC, 699 F.3d 19, 26 (1st Cir. 2012) (“[I]t is not necessary that the [ADEA retaliation] plaintiff succeed on the underlying claim of discrimination; [i]t is enough that the plaintiff had a reasonable, good-faith belief that a violation occurred; [and] that he acted on it.” (second alteration in original) (quoting Mesnick v. Gen. Elec. Co., 950 F.2d 816, 827 (1st Cir. 1991))); Second Circuit: Rodas v. Town of Farmington, 567 F. App’x 24, 26 (2d Cir. 2014) (“Protected activity for purposes of Title VII . . . retaliation claims encompasses an employee’s complaint to supervisors about alleged unlawful activity, even if the activity turned out not to be unlawful, provided that the employee ‘had a good faith, reasonable belief that he was opposing an employment practice made unlawful by Title VII.’” (quoting McMenemy v. City of Rochester, 241 F.3d 279, 285 (2d Cir. 2001))); Third Circuit: Daniels v. Sch. Dist. of Phila., 776 F.3d 181, 193–94 (3d Cir. 2015) (“[A]lthough a plaintiff in a retaliation case ‘need not prove the merits of the underlying discrimination complaint,’ she must have ‘act[ed] under a good faith, reasonable belief that a violation existed.’ This standard requires an ‘objectively reasonable belief’ that the activity the plaintiff opposed constituted unlawful discrimination under the relevant statute.” (quoting Wilkerson v. New Media Tech. Charter Sch. Inc., 522 F.3d 315, 322 (3d Cir. 2008))); Fourth Circuit: Johnson v. Mechs. & Farmers Bank, 309 F. App’x 675, 685 (4th Cir. 2009) (“Although the retaliation claimant does not have to show that the underlying discrimination claim was meritorious to prevail on a related retaliation claim, he must show that he ‘subjectively (that is, in good faith) believed’ that his employer violated the ADEA, and that his belief ‘was objectively reasonable in light of the facts.’” (quoting Peters v. Jenney, 327 F.3d 307, 321 (4th Cir. 2003))); Fifth Circuit: Armstrong v. K & B La. Corp., 488 F. App’x 779, 782 (5th Cir. 2012) (“For his actions to satisfy the opposition clause, Armstrong must have had an objectively reasonable belief that Rite Aid was engaged in employment practices barred by Title VII.”); Sixth Circuit: Wasek v. Arrow Energy Servs., Inc., 682 F.3d 463, 469 (6th Cir. 2012) (“[I]n order to obtain Title VII’s retaliation protections, Wasek must have had ‘a reasonable and good faith belief that the harassing acts he was reporting were Title VII violations. This rule illuminates an important point for this case: even though Wasek did not suffer sexual harassment under Title VII, he does not need to oppose actual violations of Title VII in order to be protected from retaliation.” (citation omitted) (quoting Johnson v. Univ. of Cincinnati, 215 F.3d 561, 579 (6th Cir. 2000))); Seventh Circuit: O’Leary v. Accretive Health, Inc., 657 F.3d 625, 631 (7th Cir. 2011) (“[A Title VII] plaintiff need not show that the practice he opposed was in fact a violation of the statute; he may be mistaken in that regard and still claim the protection of the statute. However, his opposition must be based on a good-faith and reasonable belief that he is opposing unlawful conduct. If he does not honestly believe he is opposing a practice prohibited by the statute, or if his belief is objectively unreasonable, then his opposition is not protected by the statute.” (citations omitted)); Eighth Circuit: Pye v. Nu Aire, Inc., 641 F.3d 1011, 1020 (8th Cir. 2011) (“This Court applies § 2000e-3(a) [(Title VII’s antiretaliation provision)] broadly to cover opposition to ‘employment actions that are not unlawful, as long as the employee acted in a good faith, objectively reasonable belief that the practices were unlawful.’” (quoting Bonn v. City of Omaha, 623 F.3d 587, 591 (8th Cir. 2010))); Ninth Circuit:

Thus, the definition's first requirement is a *subjective, good-faith requirement* of "honest belief" that unlawful conduct under federal employment discrimination law actually occurred. The definition's second requirement is an *objective, good-faith requirement* of "reasonable belief" (or "correct belief") that such unlawful conduct occurred.

B. *Judicial Application of Definition to Dismiss Retaliation Claims*

Federal courts have regularly applied this definition's objective "reasonable belief" requirement to dismiss plaintiffs' retaliation claims under our federal employment discrimination laws. A discussion of this precedent is important in understanding why the definition of protected opposition activity is flawed and how we can fix it.

1. Illustrative Supreme Court Precedent

In 2000, the Supreme Court substantively discussed and applied the objective "reasonable belief" requirement in *Clark County School*

Rodriguez v. Pierce Cty., 267 F. App'x 556, 557 (9th Cir. 2008) ("To succeed on a [Title VII] retaliation claim, the plaintiff need not show 'that the employment practice [she opposes] actually [was] unlawful; opposition thereto is protected when it is based on a *reasonable belief* that the employer has engaged in an unlawful employment practice.'" (alterations in original) (quoting Little v. Windermere Relocation, Inc., 301 F.3d 958, 969 (9th Cir. 2002))); Tenth Circuit: Clark v. Cache Valley Elec. Co., 573 F. App'x 693, 700-01 (10th Cir. 2014) ("Even if no actionable discrimination took place . . . [the plaintiff] could still meet the first element of his prima facie case [of Title VII retaliation] by showing that he had a reasonable good-faith belief, when he complained to Cache Valley, that he was engaging in protected opposition to discrimination. This 'reasonable good-faith belief' test has both subjective and objective components. 'A plaintiff must not only show that he *subjectively* (that is, in good faith) believed that his employer was engaged in unlawful employment practices, but also that his belief was *objectively* reasonable in light of the facts and record presented.'" (citation omitted) (quoting Little v. United Techs., Carrier Transcold Div., 103 F.3d 956, 960 (11th Cir. 1997))); Eleventh Circuit: Laincy v. Chatham Cty. Bd. of Assessors, 520 F. App'x 780, 782 (11th Cir. 2013) (per curiam) ("Not every act an employee takes in opposition to discrimination is protected. The employee must show: (1) that he had a subjective good-faith belief 'that his employer was engaged in unlawful employment practices'; and (2) that his belief, even if mistaken, was objectively reasonable in light of the record." (citation omitted) (quoting Butler v. Ala. Dep't of Transp., 536 F.3d 1209, 1213 (11th Cir. 2008))); D.C. Circuit: Grosdidier v. Broad. Bd. of Governors, 709 F.3d 19, 24 (D.C. Cir. 2013) ("Although opposition activity may be protected even though the employer's practices do not amount to a violation of Title VII, the employee-plaintiff must have a good faith and reasonable belief that the practices are unlawful."); see also ZIMMER, SULLIVAN & WHITE, *supra* note 7, at 458 n.2 (noting that opposition activity "must meet the reasonable, good faith belief test"); *id.* at 468 ("[O]pposition clause conduct must be anchored in a reasonable, good faith belief that the conduct complained of is unlawful.").

District v. Breeden.³⁰

Breeden (a woman) was employed by a school district and was responsible for hiring its support staff.³¹ Breeden, her male supervisor, and another male employee met to review the psychological evaluation reports of four job applicants.³² One report noted that a male applicant had said to a prior coworker (a woman): “I hear making love to you is like making love to the Grand Canyon.”³³ According to Breeden, her supervisor read the comment in the meeting and—while looking straight at her—said he “[didn’t] know what that means.”³⁴ Then, Breeden claimed, the other male employee responded that he would “tell [the supervisor] later,” and both men laughed about it.³⁵

Offended by this conduct, Breeden quickly complained to the offending employee’s boss and another assistant superintendent.³⁶ Within a month of that complaint, the school district changed Breeden’s job duties: first, by transferring most of her hiring duties to her supervisor, and second, by expanding her administrative duties (e.g., processing more leave requests).³⁷

Subsequently, Breeden filed a Title VII complaint against the school district in which she alleged, in part, that it had unlawfully retaliated against her because of her complaints.³⁸ The school district argued that “Breeden’s complaint was based on a single incident” and thus did not satisfy the objective reasonable belief requirement.³⁹ The district court agreed, granting summary judgment to the school district on that retaliation claim under Rule 56 of the Federal Rules of Civil Procedure.⁴⁰

³⁰ *Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 269–71 (2001) (per curiam).

³¹ *Breeden v. Clark Cty. Sch. Dist.*, No. 99-15522, 2000 WL 991821, at *2 (9th Cir. July 19, 2000), *rev’d*, 532 U.S. 268 (2001).

³² *Breeden*, 532 U.S. at 269.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 269–70.

³⁷ *Breeden v. Clark Cty. Sch. Dist.*, No. 99-15522, 2000 WL 991821, at *2 (9th Cir. July 19, 2000), *rev’d*, 532 U.S. 268 (2001).

³⁸ *Breeden*, 532 U.S. at 269. In her Complaint, Breeden also alleged that the school district unlawfully retaliated against her a second time—namely, after she had engaged in the protected *participation* activity of filing a formal EEOC claim (and subsequent lawsuit). *Breeden*, 2000 WL 991821, at *1, 3; *see supra* notes 8 & 10 (discussing protected activity under the “participation” clause).

³⁹ *Breeden*, 2000 WL 991821, at *1.

⁴⁰ *Id.*; *see* FED. R. CIV. P. 56(a) (“A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”).

The Ninth Circuit's Decision. On appeal, the Ninth Circuit—in a two-to-one decision—reversed and remanded, as it concluded that Breeden had engaged in protected opposition activity.⁴¹ In support of this decision, the Ninth Circuit initially noted the objective “reasonable belief” requirement for such activity:

[U]nder the opposition clause, . . . Breeden is protected from retaliation only if she had a reasonable, good faith belief that the incident involving the sexually explicit remark constituted unlawful sexual harassment. . . . To succeed in her retaliation claim, Breeden need not prove that her supervisor's conduct was in fact unlawful under Title VII. Her informal complaints to Eldfrick [her supervisor] and Rice [the assistant superintendent] are protected activities under Title VII's opposition clause so long as she can show that she had a reasonable, good faith belief that Eldfrick's conduct was prohibited by Title VII.⁴²

The court explained that this requirement “makes allowance ‘for the limited knowledge possessed by most Title VII plaintiffs about the factual and legal bases of their claims’⁴³ and should be “construed broadly” to achieve Title VII's purpose as “remedial legislation.”⁴⁴

Turning to its application, the Ninth Circuit addressed whether Breeden's belief of actual, unlawful conduct was either “correct” or “reasonably incorrect.” As to the former, the court conceded that the single “sexually offensive remark[]” at the meeting “would not support a claim of a hostile work environment, or indeed any other violation of Title VII.”⁴⁵

But, as to the latter, the Ninth Circuit concluded that “Breeden's belief that the incident constituted unlawful harassment was objectively reasonable” and that “a reasonable person in Breeden's position could have mistakenly believed that Eldfrick's behavior constituted unlawful sexual harassment.”⁴⁶ In support of that conclusion, the court relied on two supporting facts: (i) “the general content of Title VII law,” and (ii) the fact that Breeden—in making her internal complaints—had “consulted” the school district's policies, which defined “sexual harassment” to include “uninvited sexual teasing, jokes, remarks, and questions.”⁴⁷

⁴¹ *Breeden*, 2000 WL 991821, at *1.

⁴² *Id.* (citation omitted).

⁴³ *Id.* (quoting *Moyo v. Gomez*, 40 F.3d 982, 985 (9th Cir. 1994)).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

In a brief, three-sentence dissent, Judge Ferdinand Fernandez argued that Breeden’s complaint regarding a “single comment” did not satisfy the objective “reasonable belief” requirement:

Breeden has unreasonably built a whole edifice of alleged harassment and retaliation upon the shaky foundation of a single comment at a single meeting. No doubt workplaces are not Panglossian retreats. But this is not the best of all possible worlds, and I doubt that we improve it when we encourage litigation of this ilk.⁴⁸

The Supreme Court’s Decision. In a brief per curiam opinion,⁴⁹ the Supreme Court reversed the Ninth Circuit’s decision,⁵⁰ concluding that Breeden had not engaged in protected opposition activity.⁵¹ In support of its decision, the Court initially noted the objective “reasonable belief” requirement for such activity: “The Court of Appeals for the Ninth Circuit has applied § 2000e-3 [Title VII’s anti-retaliation provision] to protect employee ‘oppos[ition]’ not just to practices that are actually ‘made . . . unlawful’ by Title VII, but also to practices that the employee could reasonably believe were unlawful.”⁵² The Court then explained that it had “no occasion to rule on the propriety of this interpretation” of protected opposition activity and thus assumed its correctness for application purposes.⁵³

Turning to its application, the Court used a two-step process to explain why Breeden’s belief of any actual, unlawful conduct was neither “correct” nor “reasonably incorrect.” First, the Court highlighted that unlawful workplace harassment arises from “severe or pervasive” conduct, rather than a single or “isolated” incident:

Just three Terms ago, we reiterated, what was plain from our previous decisions, that sexual harassment is actionable under Title

⁴⁸ *Id.* at *4 (Fernandez, J., dissenting).

⁴⁹ A “per curiam opinion” is defined as “[a]n opinion handed down by an appellate court without identifying the individual judge who wrote the opinion.” *Per Curiam Opinion*, BLACK’S LAW DICTIONARY (10th ed. 2014). As a result, “the author of a per curiam opinion is meant to be institutional rather than individual, attributable to the court as an entity rather than to a single judge.” Ira P. Robbins, *Hiding Behind the Cloak of Invisibility: The Supreme Court and Per Curiam Opinions*, 86 TUL. L. REV. 1197, 1199 (2012) (noting that “per curiam” is “literally translated from Latin to ‘by the court’”); see also James Markham, Note, *Against Individually Signed Judicial Opinions*, 56 DUKE L.J. 923, 933 (2006) (“The per curiam was initially used for cases in which the issues of substantive law were so clear that no individual Justice needed to take time to craft a detailed opinion. It developed into a useful method for quickly disposing of cases (often without briefing or oral argument) The per curiam label has sometimes been used interchangeably with what might better be described as memorandum opinions.” (footnote omitted)).

⁵⁰ *Breeden v. Clark Cty. Sch. Dist.*, 532 U.S. 268, 271, 274 (2001) (per curiam).

⁵¹ *Id.* at 270.

⁵² *Id.* (alterations in original).

⁵³ *Id.*

VII only if it is “so ‘severe or pervasive’ as to ‘alter the conditions of [the victim’s] employment and create an abusive working environment.’” Workplace conduct is not measured in isolation; instead, “whether an environment is sufficiently hostile or abusive” must be judged “by ‘looking at all the circumstances,’ including the ‘frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.’” Hence, “[a] recurring point in [our] opinions is that simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the ‘terms and conditions of employment.’”⁵⁴

Second, the Court analogized the supervisor and the offending employee’s alleged conduct toward Breeden at the meeting to an “isolated” incident that was simply insufficient under the “severe or pervasive” standard and the objective “reasonable belief” requirement:

No reasonable person could have believed that the single incident recounted above violated Title VII’s standard. . . . [Breeden’s] supervisor’s comment, made at a meeting to review the application, that he did not know what the statement meant; her co-worker’s responding comment; and the chuckling of both are at worst an “isolated incident[t]” that cannot remotely be considered “extremely serious,” as our cases require.⁵⁵

Since *Breeden*, the Supreme Court has not substantively revisited this definition of protected opposition activity and its objective “reasonable belief” requirement. In 2005, however, Justice Clarence Thomas reiterated that lower federal courts have continued to apply this requirement: “Although this Court has never addressed the question, no Court of Appeals requires a complainant to show more than that he had a reasonable, good-faith belief that discrimination occurred to prevail on a retaliation claim.”⁵⁶

2. Illustrative Federal Circuit Court Precedent

Lower federal courts have regularly applied the objective “reasonable belief” requirement to dismiss plaintiffs’ retaliation claims

⁵⁴ *Id.* at 270–71 (quoting *Faragher v. Boca Raton*, 524 U.S. 775, 786–88 (1998)).

⁵⁵ *Id.* at 271 (second alteration in original).

⁵⁶ *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 187 (2005) (Thomas, J., dissenting). In *Jackson*, the plaintiff—a public school teacher—filed a Title IX complaint against the local board of education, in which he alleged that it had unlawfully retaliated against him because he had complained of sex discrimination in the high school’s athletic program. *Id.* at 171 (majority opinion).

under our federal employment discrimination laws. The following recent decisions are illustrative.

a. Eleventh Circuit: *Henderson v. Waffle House, Inc.*⁵⁷

Henderson (a woman) was a waitress at a Waffle House restaurant, and her male supervisor was the restaurant manager.⁵⁸ According to Henderson, her supervisor engaged in the following conduct over a two-month period: (i) he told her that the waitress aprons were not “big enough for people with boobs like [hers],” (ii) he laughingly commented that she “look[ed] like [she was] going to burst” in her shirt, (iii) he told her that it made him nervous when she stood close to him and that he would get in trouble if he explained why, and (iv) he pulled her hair and called her “Dolly.”⁵⁹

Offended by this conduct, Henderson complained to the assistant manager of the restaurant and the division manager for Waffle House.⁶⁰ Henderson was fired the day after she made these complaints.⁶¹

Subsequently, Henderson filed a Title VII complaint against Waffle House in which she alleged, in part, that it had unlawfully retaliated against her because of her complaints.⁶² The district court granted summary judgment to Waffle House on the retaliation claim.⁶³

In a brief per curiam decision, the Eleventh Circuit affirmed,⁶⁴ as it concluded that Henderson had not engaged in protected opposition activity.⁶⁵ In support of its decision, the court initially noted the objective “reasonable belief” requirement for such activity:

A plaintiff must demonstrate that she had a subjective, good-faith belief that her employer was engaged in unlawful employment practices and that her belief was objectively reasonable in light of the facts and record presented. The plaintiff’s subjective belief is measured against the substantive law at the time of the offense. Although the conduct opposed need not “actually be sexual harassment, . . . it must be close enough to support an objectively reasonable belief that it is.”⁶⁶

⁵⁷ 238 F. App’x 499 (11th Cir. 2007).

⁵⁸ *Id.* at 502.

⁵⁹ *Id.* (quoting Henderson’s deposition).

⁶⁰ *Id.* at 502–03.

⁶¹ *Id.* at 503.

⁶² *Id.* at 500.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 503.

⁶⁶ *Id.* at 501 (alteration in original) (citations omitted) (quoting *Clover v. Total Sys. Servs., Inc.*, 176 F.3d 1346, 1351 (11th Cir. 1999)).

Turning to its application, the Eleventh Circuit used the *Breedender*-derived, two-step process to explain why Henderson's belief of any actual, unlawful conduct was neither "correct" nor "reasonably incorrect." First, the court reiterated that unlawful workplace harassment arises from "severe or pervasive" conduct,⁶⁷ while "simple teasing,' offhand comments, and isolated incidents (unless extremely serious)" are insufficient under that standard.⁶⁸

Second, the Eleventh Circuit paralleled the supervisor's alleged conduct towards Henderson to "simple teasing,' offhand comments, and isolated incidents"⁶⁹ that were simply insufficient under the "severe or pervasive" standard and the objective "reasonable belief" requirement: "In this case, the conduct Henderson described is insufficient to support an objectively reasonable belief that [her supervisor] was engaging in an unlawful employment practice."⁷⁰

b. Third Circuit: *Theriault v. Dollar General*⁷¹

Theriault (a woman) was the manager of a Dollar General store, and her male supervisor was the district manager.⁷² According to Theriault, her supervisor engaged in the following conduct over a three-month period: (i) he told her on three occasions that she had a "nice ass," (ii) he had a sexually explicit phone call with his girlfriend in her presence, (iii) he falsely told one of her coworkers that Theriault had promised to "show him [the supervisor] the time of his life," and (iv) he told her that he could date her when he was no longer a supervisor.⁷³

Offended by this conduct, Theriault complained to her supervisor's boss (the regional manager) and the division manager.⁷⁴ Theriault was fired about two weeks after these complaints.⁷⁵

Subsequently, Theriault filed a Title VII complaint against Dollar General in which she alleged, in part, that it had unlawfully retaliated against her because of her complaints.⁷⁶ The district court granted summary judgment to Dollar General on the retaliation claim.⁷⁷

⁶⁷ *Id.* at 502–03.

⁶⁸ *Id.* at 503 (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998)).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ 336 F. App'x 172 (3d Cir. 2009).

⁷² *Theriault v. Dollar Gen.*, No. 2:07-cv-227, 2008 WL 2184977, at *1 (W.D. Pa. May 22, 2008).

⁷³ *Id.* at *1–2.

⁷⁴ *Id.*

⁷⁵ *Id.* at *3.

⁷⁶ *Theriault*, 336 F. App'x at 173–74.

⁷⁷ *Id.* at 173.

The Third Circuit affirmed,⁷⁸ as it concluded that Theriault had not engaged in protected opposition activity.⁷⁹ In support of its decision, the court initially noted the objective “reasonable belief” requirement for such activity:

To engage in protected activity, the employee must . . . oppose discrimination made unlawful under Title VII (the opposition clause). For [this] clause, “the employee must hold an objectively reasonable belief, in good faith, that the activity [she] oppose[s] is unlawful under Title VII.” Or, “[t]o put it differently, if no reasonable person could have believed that the underlying incident complained about constituted unlawful discrimination, then the complaint is not protected.”⁸⁰

Turning to its application, the Third Circuit similarly used the *Breeden*-derived, two-step process to explain why Theriault’s belief of any actual, unlawful conduct was neither “correct” nor “reasonably incorrect.” First, the court reiterated that unlawful workplace harassment arises from “severe or pervasive” conduct,⁸¹ with “a mere offensive utterance” or “single, non-serious incident” being insufficient under that standard.⁸²

Second, the Third Circuit—citing *Breeden* in support—analyzed the supervisor’s alleged conduct towards Theriault (particularly, the “show him the time of his life” comment) to a “single, non-serious incident”⁸³ that was simply insufficient under the “severe or pervasive” standard and the objective “reasonable belief” requirement: “Here, Theriault did not engage in protected activity because she complained only of a single incident that no reasonable person could have believed violated Title VII.”⁸⁴

c. Second Circuit: *Chenette v. Kenneth Cole Productions, Inc.*⁸⁵

Chenette (a woman) was a licensing coordinator for Kenneth Cole.⁸⁶ According to Chenette, her female coworkers and supervisor engaged in the following conduct over several months: (i) one coworker (after apologizing for becoming upset with Chenette the day before)

⁷⁸ *Id.*

⁷⁹ *Id.* at 174–75.

⁸⁰ *Id.* at 174 (first quoting *Moore v. City of Phila.*, 461 F.3d 331, 341 (3d Cir. 2006); then quoting *Wilkerson v. New Media Tech. Charter Sch. Inc.*, 522 F.3d 315, 322 (3d Cir. 2008)).

⁸¹ *Id.*

⁸² *Id.* at 174–75.

⁸³ *Id.*

⁸⁴ *Id.* at 174.

⁸⁵ 345 F. App’x 615 (2d Cir. 2009).

⁸⁶ *Id.* at 617.

“petted her cheek” and “kissed her on the lips,”⁸⁷ (ii) coworkers frequently discussed “sexually-charged” jokes and topics,⁸⁸ including “bras and vibrators,”⁸⁹ (iii) one coworker commented on Chenette’s “large chest size” in front of her supervisor,⁹⁰ and (iv) her supervisor commented on sexual conduct between two brothers.⁹¹

Offended by this conduct, Chenette complained to the company’s Human Resources department.⁹² Chenette received a largely negative performance review from her supervisor about two weeks after her complaint.⁹³

Subsequently, Chenette filed a Title VII complaint against Kenneth Cole in which she alleged, in part, that it had unlawfully retaliated against her because of her complaint.⁹⁴ The district court granted summary judgment to Kenneth Cole on the retaliation claim.⁹⁵

In a brief Summary Order, the Second Circuit affirmed,⁹⁶ as it concluded that Chenette had not engaged in protected opposition activity.⁹⁷ In support of its decision, the court first alluded briefly to the objective “reasonable belief” requirement for such activity.⁹⁸

Turning to its application, the Second Circuit similarly used the *Breeden*-derived, two-step process to explain why Chenette’s belief of any actual, unlawful conduct was neither “correct” nor “reasonably incorrect.” First, the court reiterated that unlawful workplace harassment does not arise from a “single incident” of improper conduct.⁹⁹

Second, the Second Circuit—also citing *Breeden* in support—paralleled the coworkers’ conduct towards Chenette (particularly, the kiss) to a “single incident”¹⁰⁰ that was simply insufficient under the “severe or pervasive” standard and the objective “reasonable belief” requirement:

We think . . . that, regardless of Chenette’s opinion, it cannot be demonstrated that, standing by itself, the kiss was violative of Title

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Chenette v. Kenneth Cole Prods., Inc.*, No. 05 Civ. 4849(DLC), 2008 WL 3176088, at *1 (S.D.N.Y. Aug. 6, 2008).

⁹⁰ *Id.* at *2.

⁹¹ *Id.* at *1.

⁹² 345 F. App’x at 617.

⁹³ *Id.* at 618.

⁹⁴ *Id.* at 617–18.

⁹⁵ *Id.* at 618.

⁹⁶ *Id.* at 620.

⁹⁷ *Id.* at 619.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

VII. Even if one considers the act as a sexual one, it is certainly wrong for Chenette to assert that it could reasonably amount to “sexual harassment” in violation of Title VII. On the contrary, “[n]o reasonable person could have believed that [a] single incident” of sexually inappropriate behavior by a co-worker could amount to sexual harassment.¹⁰¹

d. Other Circuit Precedent Regarding Unprotected Complaints

The *Henderson*, *Theriault*, and *Chenette* decisions are drops in the proverbial bucket. Many additional examples exist where lower federal courts have applied the objective “reasonable belief” requirement to dismiss plaintiffs’ retaliation claims under our federal employment discrimination laws.

Chart 1 below provides more examples of unprotected complaints in the Title VII *sex* discrimination/harassment context (like those in *Henderson*, *Theriault*, and *Chenette*). Chart 2 below provides examples of unprotected complaints in the Title VII *race*, Title VII *religion*, and ADEA *age* discrimination and harassment contexts.

Chart 1: Unprotected Complaints in the Title VII *Sex* Discrimination and Harassment Context

<u>Federal Circuit Court In Reverse Numerical Order</u>	<u>Unprotected Complaint</u>
Eleventh Circuit	<p><u>Sex</u>: Internal complaint by the plaintiff (a woman) regarding (i) her male supervisor telling her that “[i]f I was running with you, I would run behind you because it’s a better view,” (ii) the supervisor “eye[ing her] up and down,” and (iii) the supervisor asking her, “Do you need a boyfriend?”¹⁰²</p> <p><u>Sex</u>: Internal complaint by the plaintiff (a woman) regarding a male coworker walking into the women’s restroom at work, stopping and</p>

¹⁰¹ *Id.* (second and third alteration in original) (quoting *Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 271 (2001)).

¹⁰² *Ramirez v. Miami Dade Cty.*, 509 F. App’x 896, 896–97 (11th Cir. 2013) (stating that the complaint did not involve conduct “severe enough,” and then relying on the objective “reasonable belief” requirement to affirm the district court’s grant of the employer’s motion for summary judgment). The above-referenced facts are set forth in detail in the district court’s opinion. *See Ramirez v. Miami-Dade Cty.*, 846 F. Supp. 2d 1308, 1311 (S.D. Fla. 2012).

	<p>“gawking” at her as she was undressing, and then taunting her with “hand motions.”¹⁰³</p> <p><u>Sex</u>: Internal complaint by the plaintiff (a male supervisor) regarding another male supervisor asking a female coworker, “Why do you want to be [in a personal relationship] with a loan officer like that when you can be with me?”¹⁰⁴</p>
Ninth Circuit	<p><u>Sex</u>: Internal complaint by the plaintiff (a woman) regarding her male supervisor telling her about his uncle’s phone sex business and related “sexual exploits.”¹⁰⁵</p>
Eighth Circuit	<p><u>Sex</u>: Internal complaint by the plaintiff (a woman) regarding a female supervisor telling her (in front of a male coworker) that women “don’t need the training, women are better by and large as they do a better job than men do anyway and are more patient and nurturing than men.”¹⁰⁶</p>

¹⁰³ *Amos v. Tyson Foods, Inc.*, 153 F. App’x 637, 640–46 (11th Cir. 2005) (stating that the complaint only involved a “single instance,” and then relying on the objective “reasonable belief” requirement to affirm the district court’s grant of the employer’s motion for summary judgment).

¹⁰⁴ *Van Portfliet v. H & R Block Mortg. Corp.*, 290 F. App’x 301, 302–04 (11th Cir. 2008) (citing *Breeden*, stating that the complaint only involved an “isolated incident,” “simple teasing,” and “offhand comments,” and then relying on the objective “reasonable belief” requirement to affirm the district court’s grant of the employer’s motion for judgment as a matter of law under Rule 50(a)); *see also* FED. R. CIV. P. 50(a)(1) (“If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may: (A) resolve the issue against the party; and (B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.”).

¹⁰⁵ *Davidson v. Korman*, 532 F. App’x 720, 721–22 (9th Cir. 2013) (citing *Breeden*, stating that the complaint only involved “a single conversation” and “isolated incident[t],” and then relying on the objective reasonable belief requirement to affirm the district court’s grant of the employer’s motion for judgment on the pleadings under Rule 12(c)); *see also* FED. R. CIV. P. 12(c) (“After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings.”).

¹⁰⁶ *Brannum v. Mo. Dep’t of Corrs.*, 518 F.3d 542, 545–49 (8th Cir. 2008) (citing *Breeden*, stating that the complaint only involved a “single, relatively tame comment,” and then relying on the objective “reasonable belief” requirement to affirm the district court’s grant of the employer’s motion for summary judgment). A companion case to *Brannum* involved the same female supervisor’s comment, but a different plaintiff (a male employee who had assisted the coworker in drafting the internal complaint). The Eighth Circuit reached a decision identical to that in *Brannum*. *See* *Barker v. Mo. Dep’t of Corrs.*, 513 F.3d 831, 833–35 (8th Cir. 2008) (citing *Breeden*, stating that the complaint only involved a “single, isolated statement” and “isolated remark,” and then relying on the objective “reasonable belief” requirement to affirm the district court’s grant of the employer’s motion for summary judgment).

Seventh Circuit	<u>Sex</u> : Internal complaint by the plaintiff (a male supervisor) regarding a female supervisor making “sexually charged remarks” during a group employee dinner, including (i) bragging about having sex with employees of the current employer (and the CFO of a former employer), and (ii) telling a younger male coworker that she preferred men his age because “they were more her speed.” ¹⁰⁷
Fourth Circuit	<u>Sex</u> : Internal complaint by the plaintiff (a man) regarding (i) the presence of Penthouse and Playboy magazines in the employee cafeteria, (ii) the posting of at least fifteen “sexually offensive” faxes, cartoons, or e-mails in the workplace, and (iii) a male coworker showing him a picture of “a naked woman with a fish.” ¹⁰⁸
Third Circuit	<u>Sex</u> : Internal complaint by the plaintiff (a woman) regarding her male supervisor announcing (during a group employee meeting) that she “was wearing colored underwear under [her] white scrubs.” ¹⁰⁹
D.C. Circuit	<u>Sex</u> : Internal complaint by the plaintiff (a woman) regarding her male coworkers e-mailing “a sexually suggestive image of a well-known singer” to her, and viewing pornography on nearby work computers. ¹¹⁰

¹⁰⁷ O’Leary v. Accretive Health, Inc., 657 F.3d 625, 627–32 (7th Cir. 2011) (citing *Breeden*, stating that the complaint only involved “a single instance of sexually-charged remarks” and “one incident of inappropriate behavior,” and then relying on the objective “reasonable belief” requirement to affirm the district court’s grant of the employer’s motion for summary judgment).

¹⁰⁸ Greene v. A. Duie Pyle, Inc., 170 F. App’x 853, 855–56 (4th Cir. 2006) (stating that the complaint only involved “a few observations of lewd magazines and inappropriate jokes or drawings over a seven-month period of employment,” and then relying on the objective “reasonable belief” requirement to affirm the district court’s grant of the employer’s motion for summary judgment).

¹⁰⁹ Fogleman v. Greater Hazleton Health All., 122 F. App’x 581, 588 n.1 (3d Cir. 2004); see also *id.* at 583–84 (citing *Breeden*, stating that the complaint only involved “a single instance” of inappropriate conduct, and then relying on the objective “reasonable belief” requirement to affirm the district court’s grant of the employer’s motion for judgment as a matter of law).

¹¹⁰ Grosdidier v. Broad. Bd. of Governors, 709 F.3d 19, 22–24 (D.C. Cir. 2013) (stating that the complaint did not involve conduct “so ‘extreme’” or “so objectively offensive,” and then relying on the objective “reasonable belief” requirement to affirm the district court’s grant of the employer’s motion for summary judgment).

Chart 2: Unprotected Complaints in Title VII *Race*, Title VII *Religion*, and ADEA
Age Discrimination and Harassment Contexts

<u>Federal Circuit Court In Reverse Numerical Order</u>	<u>Unprotected Complaint</u>
Eleventh Circuit	<p><u>Race</u>: Internal complaint by the plaintiff (who was white) regarding a white coworker telling him that “[n]obody runs this team but a bunch of niggers and I’m going to get rid of them.”¹¹¹</p> <p><u>Race</u>: Internal complaint by the plaintiff (who was African American) regarding a white coworker telling him that he was “tired of [the plaintiff’s] black ass.”¹¹²</p> <p><u>Religion</u>: Internal complaint by the plaintiffs (who were Christians) regarding (i) the employer’s policy of prohibiting “display of religious items” in employee offices (i.e., a policy of “keep[ing] its workplace free of religious symbols”), and (ii) a supervisor instructing them to remove office artwork containing a Scripture reference.¹¹³</p>
Tenth Circuit	<p><u>Race</u>: Internal complaint by the plaintiff (who was white and who had an African American spouse) regarding a white coworker (i) telling her that he “would never date someone of another race, [because] he just couldn’t stand having to listen to them complain about the whole slavery topics,” (ii) telling her that he “didn’t have black in his bloodline because if he did he would be scraping that sh[i]t off,” and</p>

¹¹¹ Little v. United Techs., Carrier Transicold Div., 103 F.3d 956, 958–60 (11th Cir. 1997) (stating that the complaint only involved “a single comment by one co-worker to another,” and then relying on the objective “reasonable belief” requirement to affirm the district court’s grant of the employer’s motion for summary judgment).

¹¹² Wilson v. Farley, 203 F. App’x 239, 242–48 (11th Cir. 2006) (per curiam) (stating that the complaint only involved a “single derogatory remark,” and then relying on the objective “reasonable belief” requirement to affirm the district court’s grant of the employer’s motion for summary judgment).

¹¹³ Dixon v. Hallmark Cos., 627 F.3d 849, 853–57 (11th Cir. 2010) (stating that the complaint did not involve conduct prohibited by “some statute or case law,” and then relying on the objective “reasonable belief” requirement to affirm the district court’s grant of the employer’s motion for summary judgment).

	(iii) otherwise “us[ing] the word ‘Nigger’ while referring to [African Americans].” ¹¹⁴
Eighth Circuit	<u>Age</u> : Internal complaint by the plaintiff (who was sixty years old) regarding a younger coworker repeatedly calling her an “old bitch.” ¹¹⁵
Fourth Circuit	<u>Race</u> : Internal complaint by the plaintiff (who was African American) regarding a white supervisor calling her “porch monkey” on two consecutive days. ¹¹⁶
Second Circuit	<u>Race</u> : Internal complaint by the plaintiff (who was African American) regarding an assigned hospital patient “repeatedly denigrat[ing]” her with “intolerable racist comments” and “calling [her] ‘nigger.’” ¹¹⁷

As illustrated above by almost two dozen recent cases, federal courts have regularly applied the objective “reasonable belief” requirement to dismiss plaintiffs’ retaliation claims under our federal employment discrimination laws.

¹¹⁴ *Robinson v. Cavalry Portfolio Servs., LLC*, 365 F. App’x 104, 107–14 (10th Cir. 2010) (citing *Breeden*, stating that the complaint only involved “a single racist remark by a colleague,” and then relying on the objective reasonable belief requirement to reverse the district court’s denial of the employer’s motion for judgment as a matter of law).

¹¹⁵ *Moten v. Warren Unilube, Inc.*, 448 F. App’x 647, 648 (8th Cir. 2012) (per curiam) (stating that the complaint involved conduct akin to “isolated incidents” or a “single, relatively tame comment,” and then relying on the objective “reasonable belief” requirement to affirm the district court’s grant of the employer’s motion for summary judgment); *Moten v. Warren Unilube, Inc.*, No. 3:10CV00126, 2011 WL 2469850, at *1–2 (E.D. Ark. June 21, 2011).

¹¹⁶ *Boyer-Liberto v. Fontainebleau Corp.*, 752 F.3d 350, 352–60 (4th Cir. 2014) (stating that the complaint only involved conduct “isolated to one coworker about one incident over two days,” and then relying on the objective “reasonable belief” requirement to affirm the district court’s grant of the employer’s motion for summary judgment), *vacated*, 786 F.3d 264 (4th Cir. 2015) (en banc). In its en banc decision, the Fourth Circuit vacated the panel’s decision regarding the plaintiff’s retaliation claim and concluded that the “porch monkey” comments were “sufficiently severe to render reasonable [the plaintiff’s] belief that a hostile environment was occurring.” *Boyer-Liberto*, 786 F.3d at 285; *accord infra* notes 167–70 and accompanying text (discussing the Fourth Circuit’s en banc decision in *Boyer-Liberto*).

¹¹⁷ *Wright v. Monroe Cmty. Hosp.*, 493 F. App’x 233, 235–36 (2d Cir. 2012) (stating that the complaint involved conduct that was “inadequate” and “insufficient” for unlawful workplace harassment, and then relying on the objective “reasonable belief” requirement to affirm the district court’s grant of the employer’s motion for judgment on the pleadings).

II. PROPOSING A “REASONABLE ACTION OPTION” FOR PROTECTED OPPOSITION ACTIVITY

Ultimately, the key question is simple: are honest, “correct believers” and honest, “reasonably incorrect believers” the *only* whistleblowing employees who deserve protection under the opposition clause of the Title VII, ADA, and ADEA antiretaliation provisions?

What about Sharon in the Introduction’s hypothetical? Unprompted, Sharon’s male supervisor asked her if she wanted to have sex with him. Offended by this incident and believing that this conduct was inappropriate under federal employment discrimination law, Sharon reported it internally.

Or, what about the plaintiff in *Breeden*? During Breeden’s meeting with her male supervisor and another male employee, the supervisor allegedly read a sex-related comment from a psychological report (“I hear making love to you is like making love to the Grand Canyon”), looked straight at her, said that he that he “[didn’t] know what that means,” and then laughed about it with the other employee.¹¹⁸ Offended by this incident and believing that this conduct was inappropriate under federal employment discrimination law, Breeden reported it internally.¹¹⁹

Furthermore, what about the plaintiffs in *Henderson*, *Therault*, and *Chenette*? Henderson’s male supervisor (in part) allegedly told her that waitress aprons were not “big enough for people with boobs like [hers],” and laughingly commented that she “look[ed] like [she was] going to burst” in her shirt.¹²⁰ Therault’s male supervisor (in part) allegedly told her on three occasions that she had a “nice ass,” and falsely told one of her coworkers that she (Therault) had promised to “show him [the supervisor] the time of his life.”¹²¹ Chenette’s coworkers (in part) allegedly “kissed her on the lips,” and commented on her “large chest size” in front of her supervisor.¹²² Offended by these incidents and believing that the conduct was inappropriate under federal employment discrimination law, each of these women reported it internally.¹²³

Pick the scenario above that you deem most offensive or egregious. Should *that* whistleblowing employee not be protected under the opposition clause of Title VII’s antiretaliation provision? If you had

¹¹⁸ See *supra* notes 31–37 and accompanying text (discussing the facts in *Breeden*).

¹¹⁹ See *supra* notes 31–37 and accompanying text (discussing the facts in *Breeden*).

¹²⁰ See *supra* notes 58–60 and accompanying text (discussing the facts in *Henderson*).

¹²¹ See *supra* notes 72–76 and accompanying text (discussing the facts in *Therault*).

¹²² See *supra* notes 86–93 and accompanying text (discussing the facts in *Chenette*).

¹²³ See *supra* notes 58–60, 72–76, 86–93, and accompanying text (discussing the facts in *Henderson*, *Therault*, and *Chenette*, respectively).

been that woman, would you not have acted similarly under the circumstances? If that woman had been your mother, sister, or daughter, would you not have encouraged her to act similarly under the circumstances?

Simply put, the definition of protected opposition activity is flawed because it focuses only upon the correctness or reasonableness of a whistleblowing employee’s *belief* and does not accommodate the reasonableness of her *action*. This belief-driven focus fails to protect multitudes of employees who—like the employee you picked above—not only possess an honest, good-faith belief that such workplace conduct was unlawful under federal employment discrimination law, *but also* then act reasonably under the circumstances to stop such conduct by internally reporting it.

Consequently, this Article argues that the definition of protected opposition activity should be expanded to protect whistleblowing employees who are honest, “reasonable actors.” Specifically, this Article proposes and defends the addition of a “Reasonable Action” option to that definition. Under this proposed approach, a whistleblowing employee would still be protected only if two requirements are met, but with the second requirement now including a reasonable action alternative:

- (1) Honest Belief: the whistleblower had an honest, good-faith belief that the reported conduct was unlawful under federal employment discrimination law; and
- (2) Correct or Reasonable Belief; *Reasonable Action*: the whistleblower’s belief was either correct (i.e., the conduct was actually unlawful) or reasonably incorrect (i.e., she was at least reasonable in believing that the conduct was actually unlawful), *or the whistleblower’s action of internally reporting the inappropriate workplace conduct was otherwise reasonable under the circumstances.*

Overall, this proposed approach represents a significant improvement in federal antiretaliation law for three reasons. First, it is consistent with the Supreme Court’s “reasonable worker (re)action” philosophy that is clearly evidenced in its post-1998 employment discrimination and retaliation decisions. Second, this proposed approach avoids a so-called “Goldilocks problem,” where an employee’s retaliation claim is destroyed by an internal complaint that is timed “too soon” and is only protected by one that is somehow timed “just right.” And third, it promotes the purpose and policy behind the antiretaliation provisions of our federal employment discrimination laws.

A. *The Supreme Court's "Reasonable Worker (Re)Action" Philosophy*

First, the "Reasonable Action" option is consistent with the Supreme Court's "reasonable worker (re)action" philosophy that is clearly evidenced in its post-1998 employment discrimination and retaliation decisions. Over the past twenty years, the Supreme Court has clearly embraced this philosophy—specifically, the view that a whistleblowing employee should retain (rather than forfeit) the right to recover for alleged discrimination and retaliation if her report was a "reasonable (re)action" in response to inappropriate workplace conduct.

This philosophy can be seen in Supreme Court precedent regarding (i) the standard for employer liability in supervisor-created harassment cases, and (ii) the definition of "adverse action" in retaliation cases.

1. *The Standard for Employer Liability in Supervisor-Created Harassment Cases*

The Supreme Court evidenced its "reasonable worker (re)action" philosophy in its 1998 decisions in *Burlington Industries, Inc. v. Ellerth*¹²⁴ and *Faragher v. City of Boca Raton*.¹²⁵

The *Ellerth* and *Faragher* decisions both addressed the same issue under federal employment discrimination law—namely, what standard should "govern employer liability for hostile environment harassment perpetrated by *supervisory* employees."¹²⁶ Prior to these decisions, the various federal circuit courts had adopted different approaches to the issue.¹²⁷ One approach had been to apply the (more harsh) vicarious liability standard to employers for supervisor-created harassment, whereas the other had been to apply the (more lenient) negligence standard to employers for such harassment.¹²⁸

¹²⁴ 524 U.S. 742 (1998).

¹²⁵ 524 U.S. 775 (1998).

¹²⁶ *Id.* at 785 (emphasis added); see also *Ellerth*, 524 U.S. at 746–47 ("We decide whether, under Title VII of the Civil Rights Act of 1964, an employee who refuses the unwelcome and threatening sexual advances of a supervisor, yet suffers no adverse, tangible job consequences, can recover against the employer without showing the employer is negligent or otherwise at fault for the supervisor's actions." (citation omitted)); *id.* at 751 ("We granted certiorari to assist in defining the relevant standards of employer liability."); *id.* at 754 ("We must decide, then, whether an employer has vicarious liability when a supervisor creates a hostile work environment by making explicit threats to alter a subordinate's terms or conditions of employment, based on sex, but does not fulfill the threat.").

¹²⁷ *Faragher*, 524 U.S. at 785.

¹²⁸ *Ellerth*, 524 U.S. at 750 (discussing the two approaches); *Faragher*, 524 U.S. at 785–86 (collecting relevant federal circuit court cases).

While opting for the vicarious liability standard for supervisor-created harassment,¹²⁹ the Supreme Court also created a two-pronged affirmative defense for employers, as long as the harassing supervisor did not otherwise take “tangible employment action” against the plaintiff (e.g., “discharge, demotion, or undesirable reassignment”).¹³⁰ This affirmative defense has the following 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.”¹³¹

In support of its decision to create this affirmative defense, the Court relied primarily on the purpose and policy behind our federal employment discrimination laws.¹³² For example, in *Ellerth*, the Court explained that the defense’s first (employer-related) element furthered Title VII’s purpose of encouraging relevant workplace policies and procedures:

Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms. Were employer liability to depend in part on an employer’s effort to create such procedures, it would effect Congress’ intention to promote conciliation rather than litigation in the Title VII context, and the EEOC’s policy of encouraging the development of grievance procedures.¹³³

Similarly, the Court reasoned that the defense’s second (employee-related) element “could encourage employees to report harassing

¹²⁹ *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 780, 807.

¹³⁰ *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807–08.

¹³¹ *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807 (emphasis added); see also *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2439 (2013) (reiterating this vicarious liability standard for supervisor-created harassment and the two-pronged *Ellerth* and *Faragher* affirmative defense); *id.* at 2441–42 (same); *Crawford v. Metro. Gov’t of Nashville & Davidson Cty.*, 555 U.S. 271, 278 (2009) (same).

¹³² *Ellerth*, 524 U.S. at 764.

¹³³ *Id.* (citation omitted) (noting that the affirmative defense “accommodate[s] . . . Title VII’s equally basic polic[y] of encouraging forethought by employers”); see also *Faragher*, 524 U.S. at 805–06 (“Title VII[’s] . . . ‘primary objective,’ like that of any statute meant to influence primary conduct, is . . . to avoid harm. . . . It would therefore implement clear statutory policy and complement the Government’s Title VII enforcement efforts to recognize the employer’s affirmative obligation to prevent violations and give credit here to employers who make reasonable efforts to discharge their duty. Indeed, a theory of vicarious liability for misuse of supervisory power would be at odds with the statutory policy if it failed to provide employers with some such incentive.” (citations omitted)); *id.* at 807 (noting that the affirmative defense “accommodate[s] . . . Title VII’s equally basic polic[y] of encouraging forethought by employers”).

conduct *before it becomes severe or pervasive* . . . [and thus] serve Title VII's deterrent purpose."¹³⁴

As one would expect given this affirmative defense, the Court in both *Ellerth* and *Faragher* constantly emphasized the importance of an employee's *reasonable (re)action* in response to a supervisor's inappropriate, harassing conduct. For example, in *Faragher*, the Court explicitly noted that the affirmative defense "look[s] to the *reasonableness* of the *employer's conduct* as well as that of a *plaintiff victim*."¹³⁵ The Court explained that allowing this type of affirmative defense is "sensibl[e]" when "the complaining employee had failed to *act with like reasonable care* to take advantage of the employer's safeguards and otherwise to prevent harm that could have been avoided."¹³⁶ And finally, in both *Faragher* and *Ellerth*, the Court tied an employee's "obligation of reasonable care" to acting (i.e., reporting) under the employer's complaint procedures:

[W]hile proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense.¹³⁷

In sum, the Supreme Court clearly embraced a "reasonable worker (re)action" philosophy in the second element of the *Faragher* and *Ellerth* affirmative defense. That element's cornerstone is the whistleblowing employee's *reasonable (re)action* in response to inappropriate workplace conduct (harassment)—the employee must "act with like reasonable care" and otherwise evidence "reasonableness of . . . conduct" by timely reporting such conduct per the "obligation of reasonable care to avoid harm." So, if the employee's report was a reasonable (re)action to inappropriate workplace conduct (e.g., she timely reported), then the employer's affirmative defense fails, with the employee retaining (rather

¹³⁴ *Ellerth*, 524 U.S. at 764 (emphasis added); *id.* ("[The affirmative defense] accommodate[s] . . . Title VII's equally basic polic[y] of . . . saving action by objecting employees . . ."); *see also Faragher*, 524 U.S. at 807 ("[The affirmative defense] accommodate[s] . . . Title VII's equally basic polic[y] of . . . saving action by objecting employees . . .").

¹³⁵ *Faragher*, 524 U.S. at 780 (emphasis added).

¹³⁶ *Id.* at 805 (emphasis added); *see also id.* at 806–07 ("If the plaintiff unreasonably failed to avail herself of the employer's preventive or remedial apparatus, she should not recover damages that could have been avoided if she had done so. If the victim could have avoided harm, no liability should be found against the employer who had taken reasonable care, and if damages could reasonably have been mitigated no award against a liable employer should reward a plaintiff for what her own efforts could have avoided.")

¹³⁷ *Id.* at 807–08; *Ellerth*, 524 U.S. at 765.

than forfeiting) the right to recover for the supervisor-created harassment. But, if the employee’s report was an unreasonable (re)action to such conduct (e.g., she waited too long to report, or failed to report), then the employer’s affirmative defense is still viable, with the employee potentially forfeiting (rather than retaining) the right to recover for such harassment.

2. The Definition of “Adverse Action” in Retaliation Cases

More recently, the Supreme Court again evidenced its “reasonable worker (re)action” philosophy in its 2006 decision in *Burlington Northern & Santa Fe Railway Co. v. White*.¹³⁸

The *Burlington Northern* decision addressed how to define the “adverse action” element for retaliation claims—namely, whether such action “has to be employment or workplace related and . . . how harmful that action must be to constitute retaliation.”¹³⁹ Prior to this decision, the various federal circuit courts had reached different conclusions on this issue.¹⁴⁰ The most restrictive definition was that the employer’s “adverse action” must be *employment-related*, and was sufficient only if it was an “ultimate employment decision” (e.g., a discharge or non-promotion decision). A less restrictive definition was that this “adverse action” must still be *employment-related*, but was sufficient if it adversely affected any employment term, condition, or benefit. The least restrictive definition was that this “adverse action” need *not be employment-related*, and was sufficient if it would have “dissuaded a reasonable worker” from initially reporting the inappropriate workplace conduct.¹⁴¹

The Supreme Court opted for the least restrictive definition of “adverse action” and stated:

¹³⁸ 548 U.S. 53 (2006).

¹³⁹ *Id.* at 60; *see also id.* at 57 (“Does that [Title VII antiretaliation] provision confine actionable retaliation to activity that affects the terms and conditions of employment? And how harmful must the adverse actions be to fall within its scope?”); *id.* at 61 (“We granted certiorari . . . to decide whether Title VII’s antiretaliation provision forbids only those employer actions and resulting harms that are related to employment or the workplace. And we must characterize how harmful an act of retaliatory discrimination must be in order to fall within the provision’s scope.”); *supra* notes 6–7 and accompanying text (discussing the three elements for a viable claim of retaliation—namely, the presence of protected activity, a “materially adverse” action by the employer, and a causal relationship, nexus, or connection between the protected activity and adverse action).

¹⁴⁰ *Burlington N. & Santa Fe Ry. Co.*, 548 U.S. at 57, 60.

¹⁴¹ *Id.* at 60–61 (discussing the three approaches and collecting relevant federal circuit court cases).

We conclude that the antiretaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace. . . . [and] that the provision covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant[,] . . . mean[ing] that *the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination.*¹⁴²

In support of its decision, the Court relied substantially on the purpose and policy behind Title VII's antiretaliation provision.¹⁴³ For example, the Court highlighted this provision's important purpose of encouraging employee "cooperation" and reporting: "Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses. 'Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances.'"¹⁴⁴ The Court then reasoned that its newly adopted definition of "adverse action" encourages—rather than fetters—this employee cooperation: "Interpreting the antiretaliation provision to

¹⁴² *Id.* at 57 (emphasis added); *see also id.* at 64 ("[T]he antiretaliation provision . . . is not limited to discriminatory actions that affect the terms and conditions of employment."); *id.* at 67–68 ("The scope of the [Title VII] antiretaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm. . . . In our view, a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, 'which . . . means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" (quoting *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2006))).

¹⁴³ *Id.* at 63–64. In addition, the Court relied on the broad, express language of Title VII's antiretaliation provision. *Id.* at 63–67. Specifically, the Court observed that Title VII's antiretaliation provision does *not* contain any "limiting words" that confine its scope to employment-related adverse actions only. Instead, it more broadly makes it unlawful for an employer "to discriminate against" an employee because of certain protected activity. *Id.* at 61–62 (emphasis added) (quoting 42 U.S.C. § 2000e-3(a) (2012)); *see also supra* notes 4–5 and accompanying text (setting forth the Title VII, ADA, and ADEA antiretaliation provisions). In contrast, the Court noted that Title VII's *antidiscrimination* provision does contain such words that confine its scope to employment-related adverse actions only. In particular, Title VII more narrowly 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 certain protected traits or characteristics. *Burlington N. & Santa Fe Ry. Co.*, 548 U.S. at 61–62 (quoting 42 U.S.C. § 2000e-2(a)(1) (2012)) (discussing the "linguistic differences" between Title VII's antiretaliation provision and antidiscrimination provision); *see also* 42 U.S.C. § 2000e-2(a)(1) (setting forth Title VII's antidiscrimination provision).

¹⁴⁴ *Burlington N. & Santa Fe Ry. Co.*, 548 U.S. at 67 (quoting *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960)); *see also id.* at 63 ("The antidiscrimination provision seeks a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status. The antiretaliation provision seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees." (citation omitted)).

provide broad protection from retaliation helps ensure the cooperation upon which accomplishment of the Act’s primary objective [of achieving a discrimination-free workplace] depends.”¹⁴⁵

As one would expect given this definition, the *Burlington Northern* Court repeatedly highlighted the importance of an employee’s *reasonable (re)action* in response to an employer’s inappropriate, retaliatory conduct. For example, in explaining its preference for an objective—rather than subjective—definition, the Court noted:

We refer to *reactions of a reasonable employee* because we believe that the [antiretaliation] provision’s standard for judging harm must be objective. An objective standard is judicially administrable. It avoids the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff’s unusual subjective feelings. We have emphasized the need for objective standards in other Title VII contexts, and those same concerns animate our decision here.¹⁴⁶

Similarly, in explaining that this definition would not cover “trivial” employer actions, the Court reiterated its focus on how a reasonable employee would (re)act:

By focusing on the materiality of the challenged [employer] action and the perspective of a reasonable person in the plaintiff’s position, we believe this standard will screen out trivial conduct while effectively capturing those acts that are *likely to dissuade employees from complaining or assisting in complaints* about discrimination.¹⁴⁷

Finally, the Court also emphasized this definition’s focus on how a reasonable employee would (re)act through discussing how it might

¹⁴⁵ *Id.* at 67; *see also id.* at 63–64 (“[O]ne cannot secure the [antiretaliation provision’s] second objective by focusing only upon employer actions and harm that concern employment and the workplace. Were all such actions and harms eliminated, the antiretaliation provision’s objective would *not* be achieved. An employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm *outside* the workplace. A provision limited to employment-related actions would not deter the many forms that effective retaliation can take. Hence, such a limited construction would fail to fully achieve the antiretaliation provision’s ‘primary purpose,’ namely, ‘[m]aintaining unfettered access to statutory remedial mechanisms.’” (third alteration in original) (citations omitted) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997)); *id.* at 68 (“The antiretaliation provision seeks to prevent employer interference with ‘unfettered access’ to Title VII’s remedial mechanisms. It does so by prohibiting employer actions that are likely ‘to deter victims of discrimination from complaining to the EEOC,’ the courts, and their employers.” (quoting *Robinson*, 519 U.S. at 346)).

¹⁴⁶ *Id.* at 68–69 (emphasis added); *see also* *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 175 (2011) (“We emphasize . . . that ‘the [antiretaliation] provision’s standard for judging harm must be objective,’ so as to ‘avoi[d] the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff’s unusual subjective feelings.’” (quoting *Burlington N. & Santa Fe Ry. Co.*, 548 U.S. at 68–69)).

¹⁴⁷ *Burlington N. & Santa Fe Ry. Co.*, 548 U.S. at 69–70 (emphasis added).

apply to various factual situations.¹⁴⁸ In one situation, the Court said: “[T]o retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee’s professional advancement might well *deter a reasonable employee from complaining about discrimination.*”¹⁴⁹ In another situation, the Court noted: “Common sense suggests that one good way to *discourage [a reasonable] employee . . . from bringing discrimination charges* would be to insist that she spend more time performing the more arduous duties [of a job category] and less time performing those that are easier or more agreeable.”¹⁵⁰ And, in a third situation, the Court stated: “A *reasonable employee* facing the choice between retaining her job (and paycheck) and filing a discrimination complaint might well choose the former. That is to say, an indefinite suspension without pay could well act as a deterrent, even if the suspended employee eventually received backpay.”¹⁵¹

In sum, the *Burlington Northern* Court clearly embraced a “reasonable worker (re)action” philosophy in its definition of “adverse action.” That definition’s foundation is the whistleblowing employee’s *reasonable (re)action* in response to inappropriate workplace conduct (retaliation)—would a reasonable employee have skipped making the initial report, or still have made it? If a reasonable employee would have skipped making the initial report (i.e., she would have been dissuaded from making the report), then the employer’s subsequent retaliation was sufficiently “adverse,” with the employee retaining (rather than forfeiting) the right to recover for the retaliation. But, if a reasonable employee would have still made the initial report (i.e., she would not have been dissuaded from making the report), then the employer’s subsequent retaliation was insufficiently “adverse,” with the employee

¹⁴⁸ *Id.* at 69–73.

¹⁴⁹ *Id.* at 69 (emphasis added).

¹⁵⁰ *Id.* at 70–71 (emphasis added); *see also id.* at 71 (“[H]ere, the jury had before it considerable evidence that the track laborer duties were ‘by all accounts more arduous and dirtier’ . . . [and] that ‘the forklift operator position was objectively considered a better job . . .’ Based on this record, a jury could reasonably conclude that the reassignment of responsibilities would have been materially adverse to a reasonable employee.” (quoting *White v. Burlington N. & Santa Fe Ry. Co.*, 364 F.3d 789, 803 (6th Cir. 2004))).

¹⁵¹ *Id.* at 73 (emphasis added). In its 2011 decision in *Thompson v. North American Stainless, LP*, the Supreme Court reiterated this “adverse action” definition and applied it to additional factual situations. 562 U.S. 170, 174–75 (2011). For example, in one factual situation, the Court stated: “We think it obvious that a *reasonable worker might be dissuaded from engaging in protected activity* if she knew that her fiance would be fired.” *Id.* at 174 (emphasis added); *accord id.* at 175 (“We expect that firing a close family member will almost always meet the *Burlington* standard, and inflicting a milder reprisal on a mere acquaintance will almost never do so . . .”).

forfeiting (rather than retaining) the right to recover for the retaliation.¹⁵²

* * * * *

Regrettably, the current definition of protected opposition activity flatly ignores the Supreme Court’s “reasonable worker (re)action” philosophy. Contrary to this philosophy, the present definition focuses only upon the correctness or reasonableness of a whistleblowing employee’s *belief* and does not accommodate the reasonableness of a whistleblowing employee’s *action*. While the Court in *Faragher* and *Ellerth* repeatedly urged the importance of an employee “act[ing] with like reasonable care”¹⁵³ and otherwise displaying “reasonableness of . . . conduct”¹⁵⁴ by timely reporting inappropriate workplace conduct per the “obligation of reasonable care to avoid harm,”¹⁵⁵ the definition of protected opposition activity omits such reasonable (re)action as irrelevant. Additionally, while the *Burlington Northern* Court consistently highlighted the importance of the “reactions of a *reasonable* employee,”¹⁵⁶ this definition disregards such reasonable (re)action as immaterial.

Interestingly, some judges have acknowledged this blunt reality that the reasonableness of a whistleblowing employee’s *action* is simply irrelevant and immaterial under the definition of protected opposition activity. For example, in *Boyer-Liberto v. Fontainebleau Corp.*,¹⁵⁷ Boyer-Liberto (an African American) was a hostess and waitress at an oceanfront hotel, with a Caucasian food and beverage manager as one of her supervisors.¹⁵⁸ According to Boyer-Liberto, this supervisor—after yelling at her for improperly walking through the kitchen during a shift—called her a “damn porch monkey” (or “dang porch monkey”) over two consecutive days.¹⁵⁹

Offended by this conduct, Boyer-Liberto complained to the Human Resources director.¹⁶⁰ She was fired within five days after this

¹⁵² Cf. *Pa. State Police v. Suders*, 542 U.S. 129, 141 (2004) (“Under the constructive discharge doctrine, an employee’s reasonable decision to resign because of unendurable working conditions is assimilated to a formal discharge for remedial purposes. The inquiry is objective: Did working conditions become so intolerable that a reasonable person in the employee’s position would have felt compelled to resign?” (citation omitted)).

¹⁵³ *Faragher v. City of Boca Raton*, 524 U.S. 775, 805 (1998).

¹⁵⁴ *Id.* at 780.

¹⁵⁵ *Id.* at 807.

¹⁵⁶ *Burlington N. & Santa Fe Ry. Co.*, 548 U.S. at 68.

¹⁵⁷ 786 F.3d 264 (4th Cir. 2015) (en banc).

¹⁵⁸ *Id.* at 268–69.

¹⁵⁹ *Id.* at 269–70.

¹⁶⁰ *Id.* at 270.

complaint.¹⁶¹ Subsequently, Boyer-Liberto filed a Title VII complaint against the hotel in which she alleged, in part, that it had unlawfully retaliated against her because of her complaint.¹⁶² The district court granted summary judgment to the hotel on the retaliation claim.¹⁶³

At first, a three-judge panel of the Fourth Circuit affirmed,¹⁶⁴ as it concluded that Boyer-Liberto did not engage in protected opposition activity.¹⁶⁵ In support of its decision, the panel characterized the supervisor's slurs as "isolated to one coworker about one incident over two days," and thus insufficient under the "severe or pervasive" standard and the objective "reasonable belief" requirement.¹⁶⁶ But, the Fourth Circuit—in an en banc decision—subsequently vacated the panel's decision, as it concluded that Boyer-Liberto did engage in protected opposition activity.¹⁶⁷ In support of its decision, the court reasoned that the "porch monkey" comments were "sufficiently severe to render reasonable [the plaintiff's] belief that a hostile environment was occurring."¹⁶⁸

In his dissent from the en banc decision, Judge Paul V. Niemeyer clearly differentiated the reasonableness of Boyer-Liberto's *action* (her initial report in response to the slurs) from the reasonableness of her *belief*:

While Liberto had every *right to be offended* by [her supervisor]'s use of a racial epithet and *acted reasonably and responsibly in reporting the incident* to Clarion's Human Resources Director, she lacked a reasonable belief, as required by the language of Title VII, that she was opposing her employer's commission of "a[] practice made . . . unlawful . . . by [Title VII]."¹⁶⁹

Similarly, Judge Niemeyer highlighted that the objective "reasonable belief" requirement does not consider how an employee "should" act: "Nor does this case present the question of whether an employee, *justifiably offended* by being called a 'porch monkey,' *should report such an incident* to management. Rather, the issues here are substantially narrower."¹⁷⁰

¹⁶¹ *Id.*

¹⁶² *Id.* at 271.

¹⁶³ *Id.* at 268.

¹⁶⁴ *Boyer-Liberto v. Fontainebleau Corp.*, 752 F.3d 350 (4th Cir. 2014), *rev'd en banc*, 786 F.3d 264 (4th Cir. 2015).

¹⁶⁵ *Id.* at 360.

¹⁶⁶ *Id.* at 359–60.

¹⁶⁷ *Boyer-Liberto*, 786 F.3d at 285.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 305 (Niemeyer, J., dissenting) (alterations in original) (emphasis added).

¹⁷⁰ *Id.* at 295 (emphasis added); *accord id.* at 288 (majority opinion) ("[W]e are perplexed and dismayed by the dissent's assertions that, on the one hand, 'Liberto had every right to be

As evidenced by Judge Niemeyer’s dissent in *Boyer-Liberto*, the current definition of protected opposition activity flatly ignores the Supreme Court’s “reasonable worker (re)action” philosophy. In fact, this definition turns that philosophy on its head. Under the Supreme Court’s philosophy, a whistleblowing employee should retain (rather than forfeit) the right to recover for alleged harassment and retaliation if her report was a “reasonable (re)action” in response to inappropriate workplace conduct. But under the definition of protected opposition activity, the opposite occurs: that same whistleblowing employee forfeits (rather than retains) that recovery right.

In contrast, the “Reasonable Action” option is consistent with the Supreme Court’s “reasonable worker (re)action” philosophy. Consistent with this philosophy, this proposed approach unequivocally accommodates the reasonableness of a whistleblowing employee’s *action*—by adding a second avenue for the employee to engage in protected opposition activity, if her “action of internally reporting the inappropriate workplace conduct was otherwise reasonable under the circumstances.”¹⁷¹ Just as the Court in *Faragher* and *Ellerth* repeatedly emphasized the importance of an employee “act[ing] with like reasonable care”¹⁷² and otherwise displaying “reasonableness of . . . conduct”¹⁷³ by timely reporting inappropriate workplace conduct per the “obligation of reasonable care to avoid harm,”¹⁷⁴ this proposed approach includes such reasonable (re)action as relevant. And, just as the *Burlington Northern* Court consistently highlighted the importance of the “reactions of a reasonable employee,”¹⁷⁵ this proposed approach adds such reasonable (re)action as material.

In sum, the “Reasonable Action” option fully reflects the Supreme Court’s “reasonable worker (re)action” philosophy that is clearly evidenced in its *Faragher*, *Ellerth*, and *Burlington Northern* decisions. Rather than turning this philosophy on its head, this proposed approach mirrors its central tenet—that a whistleblowing employee should retain (rather than forfeit) the right to recover for alleged harassment and

offended by Clubb’s use of a racial epithet and acted reasonably and responsibly in reporting the incident,’ and that, on the other hand, Liberto spoke up too soon and thereby deprived herself of protection from retaliation. As the dissent would have it, although reporting Clubb’s slur was a sensible thing to do, Liberto should have waited for additional harassment to occur—but not so much harassment that the Clarion could avoid vicarious liability because of a lack of timely notice.” (citation omitted)).

¹⁷¹ See *supra* Part II (discussing the scope of the proposed Reasonable Action option).

¹⁷² *Faragher v. City of Boca Raton*, 524 U.S. 775, 805 (1998).

¹⁷³ *Id.* at 780.

¹⁷⁴ *Id.* at 807–08.

¹⁷⁵ *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68–69 (2006).

retaliation if her report was a “reasonable (re)action” in response to inappropriate workplace conduct.

B. *The Employee’s Duty to Report and Goldilocks Problem*

Next, the “Reasonable Action” option avoids a so-called “Goldilocks problem,” where an employee’s retaliation claim is destroyed by an internal complaint that is timed “too soon” and is only protected by one that is somehow timed “just right.”

An employee’s duty to report inappropriate workplace conduct under federal employment discrimination law is important in understanding this Goldilocks problem. Consequently, this Section will initially discuss this duty to report, and it will then describe the resulting Goldilocks problem and how the proposed approach avoids it.

1. The Employee’s Duty to Report

Regardless of whether a supervisor or nonsupervisor (e.g., a mere coworker) engages in the inappropriate workplace conduct, the affected employee has a *duty to report* such conduct to fully protect her underlying Title VII, ADA, or ADEA harassment claim.

As discussed in Section II.A.1, when a *supervisor* engages in the harassing workplace conduct, a vicarious liability standard applies to the employer.¹⁷⁶ But per *Ellerth* and *Faragher*, the employer can assert a two-pronged affirmative defense, as long as the harassing supervisor did not otherwise take “tangible employment action” against the plaintiff.¹⁷⁷ This affirmative defense has the following two elements: “(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the . . . *employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.*”¹⁷⁸

Due to the defense’s second element, federal courts have explicitly recognized that an employee has a *duty to report* the supervisor’s harassing workplace conduct to fully protect her underlying harassment claim. For example, in *Ellerth* and *Faragher*, the Supreme Court stated that the affirmative defense imposes a “corresponding obligation of reasonable care to avoid harm” on the employee.¹⁷⁹ Similarly, the

¹⁷⁶ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher*, 524 U.S. at 807.

¹⁷⁷ *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807–08.

¹⁷⁸ *Ellerth*, 524 U.S. at 765 (emphasis added); *Faragher*, 524 U.S. at 807–08.

¹⁷⁹ *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807–08.

Faragher Court noted that an employee has “a coordinate duty to avoid or mitigate harm” under the affirmative defense.¹⁸⁰ And, in *Boyer-Liberto*, the Fourth Circuit identically recognized that “[t]he *Ellerth/Faragher* defense, in essence, imposes a duty on the victim to report her supervisor’s harassing behavior to the employer.”¹⁸¹

In contrast, when a *nonsupervisor* (e.g., a mere coworker) engages in the harassing workplace conduct, “a negligence [liability] standard applies” to the employer.¹⁸² Under this standard, an employee “must

¹⁸⁰ *Faragher*, 524 U.S. at 806; see also *Crawford v. Metro. Gov’t of Nashville & Davidson Cty.*, 555 U.S. 271, 279 n.3 (2009) (“[T]hat mitigation requirement [from *Faragher* and *Ellerth*] only applies to employees who are suffering discrimination and have the opportunity to fix it by ‘tak[ing] advantage of any preventive or corrective opportunities provided by the employer,’ it is based on the general principle ‘that a victim has a duty ‘to use such means as are reasonable under the circumstances to avoid or minimize . . . damages.’” (quoting *Faragher*, 524 U.S. at 806)).

¹⁸¹ *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 278 (4th Cir. 2015) (en banc); see also *id.* at 282 (“[T]he victim is compelled by the *Ellerth/Faragher* defense to make an internal complaint, i.e., ‘to take advantage of any preventive or corrective opportunities provided by the employer.’ . . . The reporting obligation is essential to accomplishing Title VII’s ‘primary objective,’ which is ‘not to provide redress but to avoid harm.’ Thus, we have recognized that the victim is commanded to ‘report the misconduct, not investigate, gather evidence, and then approach company officials.’” (first quoting *Faragher*, 524 U.S. at 806; then quoting *Matvia v. Bald Head Island Mgmt., Inc.*, 259 F.3d 261, 269 (4th Cir. 2001))); *Boyer-Liberto v. Fontainebleau Corp.*, 752 F.3d 350, 361–63 (4th Cir. 2014) (Traxler, J., concurring in part and dissenting in part) (observing that “the Supreme Court has essentially required [employees] to [report inappropriate workplace conduct] in order to preserve their rights [under *Ellerth* and *Faragher*]”); *rev’d en banc*, 786 F.3d 264 (4th Cir. 2015); *Jordan v. Alt. Res. Corp.*, 458 F.3d 332, 354 (4th Cir. 2006) (“The *Ellerth/Faragher* defense, in essence, imposes a duty on an employee to report harassing and offensive conduct to his employer. That duty is intended to further Title VII’s ‘primary objective’ of avoiding harm, rather than redressing it.” (citation omitted) (quoting *Faragher*, 524 U.S. at 806)); *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262, 268 (4th Cir. 2001) (discussing the employee’s “reporting requirement” under the *Ellerth/Faragher* affirmative defense); Matthew W. Green, Jr., *What’s So Reasonable About Reasonableness? Rejecting a Case Law-Centered Approach to Title VII’s Reasonable Belief Doctrine*, 62 U. KAN. L. REV. 759, 781 (2014) (“The *Ellerth-Faragher* affirmative defense has been interpreted as requiring employees to bring their grievances to the attention of employers before seeking any remedial relief for alleged discrimination that Title VII may afford.”).

¹⁸² *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2456 (2013) (Ginsburg, J., dissenting); see also *id.* at 2439 (majority opinion) (“If the harassing employee is the victim’s co-worker, the employer is liable only if it was negligent in controlling working conditions.”); *id.* at 2442 (“[W]e have held that an employer is directly liable for an employee’s unlawful harassment if the employer was negligent with respect to the offensive behavior. Courts have generally applied this rule to evaluate employer liability when a co-worker harasses the plaintiff.” (citation omitted)); *id.* at 2451 (“In such cases [of harassment by coworkers], the victims will be able to prevail simply by showing that the employer was negligent in permitting this harassment to occur”); *id.* at 2453 (“Assuming that a harasser is not a supervisor, a plaintiff could still prevail by showing that his or her employer was negligent in failing to prevent harassment from taking place.”).

show that the employer knew or should have known of the offensive conduct but failed to take appropriate corrective action.”¹⁸³

Due to this standard’s “knew or should have known” aspect, federal courts have similarly recognized that an employee has a *duty to report* the coworker’s harassing workplace conduct to fully protect her underlying harassment claim. For example, in *Vance v. Ball State University*,¹⁸⁴ the Court explained that relevant evidence of an employer’s negligence includes its “fail[ure] to respond to [the employee’s] complaints”¹⁸⁵—in other words, the employee’s report is a necessary precursor to the employer’s negligent failure. In addition, in her dissent in *Vance*, Justice Ginsburg similarly referenced an employee’s implicit duty to report under the negligence standard: “It is not uncommon for employers to lack actual or constructive notice of a harassing employee’s conduct. . . . [I]f no complaint [by the employee] makes its way up to management, the employer will escape liability under a negligence standard.”¹⁸⁶ Similarly, in *Boyer-Liberto*, the Fourth Circuit observed: “[A] plaintiff seeking to impute liability to her employer for harassment by a co-worker may not be able to establish the employer’s negligence if she did not report the harassment.”¹⁸⁷

2. The Employee’s Goldilocks Problem

Given that an employee must report inappropriate workplace conduct to fully protect her underlying Title VII, ADA, or ADEA harassment claim, the key question is: *When* should the report be made? The possible answers to this question reveal a so-called “Goldilocks problem” for whistleblowing employees.

On the one hand, we know that an employee must not make a report that is timed “too late” after a supervisor’s or coworker’s harassing workplace conduct. First, under the *Ellerth* and *Faragher* affirmative defense, a “too late” report by the employee can (and often does) destroy the employee’s underlying *harassment* claim. The

¹⁸³ *Id.* at 2456 (Ginsburg, J., dissenting); *see also id.* at 2463 (“Recall that an employer is negligent with regard to harassment only if it knew or should have known of the conduct but failed to take appropriate corrective action.”).

¹⁸⁴ *Id.* (majority opinion).

¹⁸⁵ *Id.* at 2453 (“Evidence that an employer did not monitor the workplace, failed to respond to complaints, failed to provide a system for registering complaints, or effectively discouraged complaints from being filed would be relevant [in establishing employer negligence].”).

¹⁸⁶ *Id.* at 2464 (Ginsburg, J., dissenting).

¹⁸⁷ *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 278 (4th Cir. 2015) (en banc); *see also id.* at 282 (“Similarly, the victim of a co-worker’s harassment is prudent to alert her employer in order to ensure that, if the harassment continues, she can establish the negligence necessary to impute liability.”).

employer will likely prevail on this claim, because it can establish that—due to the “too late” report—the employee “unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”¹⁸⁸ Under the negligence standard, the same is true. A “too late” report will destroy the underlying harassment claim. The employer will prevail on this claim, because it can establish that—due to the “too late” report—it neither knew nor should have known about the harassing workplace conduct. As a result, the answer to the *when* question better not be “too late.”

On the other hand, we also know that an employee must not make a report that is timed “too soon” after a supervisor’s or coworker’s harassing workplace conduct. Under the objective “reasonable belief” requirement, a “too soon” report will destroy the employee’s underlying *retaliation* claim. The employer will prevail on this claim, because—due to the “too soon” report—the employee cannot show that she was an honest, “correct believer” or an honest, “reasonably incorrect believer” for purposes of protected opposition activity. Recall the Supreme Court’s decision in *Breedon*, where the plaintiff reported “too soon,” could not satisfy the objective “reasonable belief” requirement, and thus had her retaliation claim dismissed.¹⁸⁹ Also recall the Eleventh, Third, and Second Circuits’ respective decisions in *Henderson*, *Theriault*, and *Chenette*, where each plaintiff reported “too soon,” could not satisfy this requirement, and thus had her retaliation claim dismissed.¹⁹⁰ Therefore, the answer to the *when* question likewise cannot be “too soon.”

So, a “too late” report can destroy a whistleblowing employee’s underlying *harassment* claim (while a “too soon” report still protects it).¹⁹¹ A “too soon” report destroys that employee’s underlying

¹⁸⁸ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 745 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 778 (1998); see *supra* notes 131–34 and accompanying text (discussing the two elements of the *Ellerth* and *Faragher* affirmative defense); see also *Taylor v. Solis*, 571 F.3d 1313, 1332 (D.C. Cir. 2009) (Rogers, J., dissenting) (noting that “reporting [inappropriate workplace conduct] too late may bar relief altogether” on the underlying harassment claim); *Jordan v. Alt. Res. Corp.*, 458 F.3d 332, 341 (4th Cir. 2006) (“[W]e have held that employers are not liable for an employee’s unlawful harassment of another employee if the harassed employee has unreasonably refused to report or has unreasonably waited many months before reporting a case of actual discrimination.”), *overruled by Boyer-Liberto*, 786 F.3d 264; *id.* at 343 (“[A]n employee who waited unreasonably long to take advantage of an employer’s antiharassment policy [is prevented] from overcoming the employer’s affirmative defense . . . under *Ellerth* and *Faragher*.”).

¹⁸⁹ See *supra* Section I.B.1 (discussing the Supreme Court’s decision in *Breedon*).

¹⁹⁰ See *supra* Section I.B.2.a–c (discussing, respectively, the Eleventh, Third, and Second Circuits’ decisions in *Henderson*, *Theriault*, and *Chenette*).

¹⁹¹ In cases involving a “too soon” report, the employer can still lose the employee’s underlying harassment claim, because it cannot establish that (i) the employee “unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise” (per the *Ellerth* and *Faragher* affirmative defense), or (ii) it neither

retaliation claim (while a “too late” report still protects it).¹⁹² But can an employee time her internal complaint so as to protect *both* the underlying harassment claim *and* the underlying retaliation claim?

Yes, but only if the employee makes a report that is somehow timed “just right” after a supervisor’s or coworker’s harassing workplace conduct. That option is the only avenue. First, under the duty to report, a “just right” report will protect the employee’s underlying *harassment* claim. The employer can still lose on this claim, because—due to the “just right” report—it cannot establish that (i) the employee “unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise” (under the *Ellerth* and *Faragher* affirmative defense), or (ii) it neither knew nor should have known about the harassing workplace conduct (under the negligence standard). Furthermore, under the objective “reasonable belief” requirement, a “just right” report will protect the employee’s underlying *retaliation* claim. The employer can still lose on this claim, because—due to the “just right” report—the employee can show that she was an honest, “correct believer” or an honest, “reasonably incorrect believer” for purposes of protected opposition activity.

Consequently, the whistleblowing employee faces a real Goldilocks problem. Just as Goldilocks sought a chair, porridge, and a bed that were “just right,” this employee must also make a report that is somehow timed “just right” after a supervisor’s or coworker’s harassing workplace conduct in order to protect *both* the underlying harassment *and* retaliation claims. Otherwise, one of those claims is destroyed.

The following chart summarizes how current law (including the definition of protected opposition activity) creates this Goldilocks problem for whistleblowing employees:

knew nor should have known about the harassing workplace conduct (per the negligence standard). See *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

¹⁹² In cases involving a “too late” report, the employer can still lose the employee’s underlying retaliation claim, because the employee was an honest, “correct believer,” or an honest, “reasonably incorrect believer.” See *Jordan*, 458 F.3d at 343 (“[T]he employee can belatedly report discriminatory conduct and still be protected from retaliation. . . . Thus, an employee who unreasonably delays acting on his discrimination claim and thereby loses his right to a judicial remedy. . . still has the incentive to report the unlawful conduct, under the protection of the anti-retaliation statute.”).

Chart 3: Current Law: Creating the Goldilocks Problem

	If Report “Too Soon”:	If Report “Just Right”:	If Report “Too Late”:
Retaliation Claim	Destroyed (“reasonable belief” absent)	Protected (“reasonable belief” present)	Protected (“reasonable belief” present)
Harassment Claim	Protected (duty to report fulfilled)	Protected (duty to report fulfilled)	Destroyed ¹⁹³ (duty to report unfulfilled)

Thus, as courts and legal commentators have observed, current law “place[s] employees . . . in an untenable position, requiring them to report . . . hostile conduct, but leaving them entirely at the employer’s mercy when they do so.”¹⁹⁴

¹⁹³ Of course, in supervisor-created harassment cases, a “too late” report will destroy the employee’s underlying harassment claim only if the employer can also establish that it “exercised reasonable care to prevent and correct promptly any sexually harassing behavior” per the *Ellerth* and *Faragher* affirmative defense. See *supra* notes 131–34 and accompanying text (discussing the two elements of the *Ellerth* and *Faragher* affirmative defense).

¹⁹⁴ *Jordan*, 458 F.3d at 352 (King, J., dissenting); see *id.* at 355 (“[E]mployees . . . who experience racially harassing conduct are faced with a ‘Catch-22.’ They may report such conduct to their employer at their peril . . . or they may remain quiet and work in a racially hostile and degrading work environment, with no legal recourse beyond resignation. . . . [A]s our Title VII jurisprudence now stands, Farjah’s [‘black monkeys’] comment thrust Jordan into the narrows between Scylla and Charybdis.”); *id.* at 356 (“If Jordan, when he experienced the ‘black monkeys’ comment, could have foreseen the course of events that would unfold, he would have recognized that . . . he had but two choices. He could remain silent, in direct defiance of this Court’s commandment to report racially charged conduct as soon as it occurs (thereby allowing Farjah’s pattern of conduct to continue unchallenged, and forfeiting any judicial remedy he might have); or he could risk his career in an effort to attack the racist cancer in his workplace.”); see also *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 283 (4th Cir. 2015) (en banc) (“Of course, the same [Catch-22 criticism] can be, and has been, said about the *Jordan* standard [i.e., the objective “reasonable belief” requirement].”); *Boyer-Liberto v. Fontainebleau Corp.*, 752 F.3d 350, 352–60 (4th Cir. 2014) (Traxler, J., dissenting) (“I share in the sentiment Judge King expressed so well in his dissent in *Jordan* that our very narrow interpretation of what constitutes a reasonable belief in this context has ‘place[d] employees who experience racially discriminatory conduct in a classic “Catch-22” situation.’ They can either report the offending ‘conduct to their employer at their peril,’ as the Supreme Court has essentially required them to do in order to preserve their rights, or they can ‘remain quiet and work in a racially hostile and degrading work environment, with no legal recourse beyond resignation[.]’ Like Judge King, I cannot accept that an employee in circumstances like these can be forced to choose between her job and her dignity.” (quoting *Jordan*, 458 F.3d at 349, 355), *rev’d en banc*, 786 F.3d 264; ZIMMER, SULLIVAN & WHITE, *supra* note 7, at 458 n.3 (“If the [*Ellerth* and *Faragher*] affirmative defense is aimed at encouraging plaintiffs to utilize internal complaint mechanisms, why not protect employees from retaliation when they do what the affirmative defense essentially requires them to do? . . . Is *Breeden* inconsistent with *Ellerth* in yet a more fundamental way? If a purpose of the affirmative defense is to encourage victims to report offensive conduct before it becomes severe or pervasive, thereby allowing employers to

The “Reasonable Action” option avoids this Goldilocks problem, because it adds a *second avenue* for a whistleblowing employee’s report to protect *both* the underlying harassment *and* retaliation claims. Under this proposed approach, if an employee makes a report that is timed “too soon” after a supervisor’s or coworker’s harassing workplace conduct, then this report still protects the underlying *retaliation* claim if the act of reporting “was otherwise reasonable under the

promptly correct the conduct, why should retaliation against employees who do what *Ellerth* encourages plaintiffs to do *not* be protected?” (emphasis added)); Deborah L. Brake, *Retaliation in an EEO World*, 89 IND. L.J. 115, 139 (2014) [hereinafter Brake, *Retaliation in an EEO World*] (“The result is a catch-22 in which plaintiffs must promptly report harassment to preserve their right to sue under *Ellerth/Faragher*, but are unprotected from retaliation if they complain internally too soon, before the perceived harassment could be reasonably understood as severe or pervasive.”); Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 77 (2005) [hereinafter Brake, *Retaliation*] (“[C]ertain discrimination claims require prior notice to succeed, leaving claimants in a Catch-22 if complaints of discrimination did not trigger protection from retaliation unless and until the underlying incidents gave rise to a claim of unlawful discrimination.”); *id.* at 88 (“Under this [objective “reasonable belief” requirement], an employee risks legally permissible retaliation if she complains of sexually harassing conduct too soon, before it becomes pervasive enough to support a reasonable belief that it amounts to a hostile environment. The double bind created by this standard is obvious: if the employee waits too long to complain, she risks losing a potential harassment claim for . . . failing to meet an affirmative defense if her failure to complain sooner was ‘unreasonable.’”); Green, *supra* note 181, at 792 (“Yet, when employees report what they perceive to be discriminatory conduct in accordance with their employers’ policies, they may legally be penalized . . .”); Lawrence D. Rosenthal, *To Report or Not To Report: The Case for Eliminating the Objectively Reasonable Requirement for Opposition Activities Under Title VII’s Anti-Retaliation Provision*, 39 ARIZ. ST. L.J. 1127, 1158 (2007) (“One of the biggest problems with maintaining the objectively reasonable standard in these cases is that it puts employees in the unenviable position of having to decide whether to report an offending co-worker and run the risk of termination, or keep quiet and run the risk of having to endure working in a hostile environment . . . All of these issues place employees in a Catch-22 when deciding whether to report offensive conduct.”).

In *Crawford v. Metro. Gov’t of Nashville & Davidson Cty.*, 555 U.S. 271 (2009), the Supreme Court noted a similar “dilemma” for an employee “who speaks out about discrimination not on her own initiative, but in answering questions during an employer’s internal investigation.” *Id.* at 273. Concluding that Title VII’s opposition clause protects these employees, *id.*, the Court highlighted that they would otherwise face a “catch-22”:

If it were clear law that an employee who reported discrimination in answering an employer’s questions could be penalized with no remedy, prudent employees would have a good reason to keep quiet about Title VII offenses against themselves or against others. . . . [This] rule would thus create a real dilemma for any knowledgeable employee in a hostile work environment if the boss took steps to assure a defense under our cases. If the employee reported discrimination in response to the enquiries, the employer might well be free to penalize her for speaking up. But if she kept quiet about the discrimination and later filed a Title VII claim, the employer might well escape liability, arguing that it “exercised reasonable care to prevent and correct [any discrimination] promptly” but “the plaintiff employee unreasonably failed to take advantage of . . . preventive or corrective opportunities provided by the employer.” Nothing in the statute’s text or our precedent supports this catch-22.

Id. at 279 (quoting *Ellerth*, 524 U.S. at 765).

circumstances.”¹⁹⁵ The employer can still lose on this claim because—despite the “too soon” report—the employee can still show that she was an honest, “reasonable actor” for purposes of protected opposition activity.

The following chart summarizes how this proposed approach avoids the Goldilocks problem for whistleblowing employees:

Chart 4: “Reasonable Action Option”: Avoiding the Goldilocks Problem

	If Report “Too Soon”:	If Report “Just Right”:	If Report “Too Late”:
Retaliation Claim	Protected (if “reasonable action” present)	Protected (“reasonable belief” present)	Protected (“reasonable belief” present)
Harassment Claim	Protected (duty to report fulfilled)	Protected (duty to report fulfilled)	Destroyed (duty to report unfulfilled)

In sum, the “Reasonable Action” option avoids the Goldilocks problem, where an employee’s retaliation claim is destroyed by an internal complaint that is timed “too soon” and is only protected by one that is somehow timed “just right.” Under this proposed approach, a whistleblowing employee now has two avenues for her internal complaint to protect *both* the underlying harassment *and* retaliation claims: the “just right” report, or the “too soon” report that is otherwise “reasonable [action] under the circumstances.”

C. Antiretaliation Purpose and Policy

Finally, the “Reasonable Action” option promotes the purpose and policy behind the antiretaliation provisions of our federal employment discrimination laws.

The purpose and policy behind these provisions is simple: to encourage employee complaints or reports of inappropriate workplace conduct. For example, in its 2006 decision in *Burlington Northern & Santa Fe Railway Co. v. White*, the Supreme Court highlighted this important purpose of encouraging employee “cooperation” and reporting: “Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses.

¹⁹⁵ See *supra* Part II (discussing the scope of the proposed Reasonable Action option).

‘Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances.’¹⁹⁶ Similarly, the *Burlington Northern* Court emphasized the importance of employers not fettering or deterring these employee complaints: “The antiretaliation provision seeks to prevent employer interference with ‘unfettered access’ to Title VII’s remedial mechanisms. It does so by prohibiting employer actions that are likely ‘to deter victims of discrimination from complaining to the EEOC,’ the courts, and their employers.”¹⁹⁷

With this purpose and policy in mind, consider again the Introduction’s hypothetical involving Sharon and Company A:

Sharon is an employee of Company A. Unprompted, Sharon’s male supervisor asked her if she wanted to have sex with him. Offended by this incident and believing that this conduct was inappropriate under federal employment discrimination law, Sharon reported the incident to the Human Resources department. The very next day, Company A terminated Sharon and told her: “We don’t want troublemakers, so we have to let you go because of your report.”

As we know by now, Sharon likely loses her Title VII retaliation claim against Company A. Just as the plaintiffs in *Breeden*, *Henderson*, *Theriault*, and *Chenette* lost their retaliation claims—each reported “too soon,” could not satisfy the objective “reasonable belief” requirement, and thus had her retaliation claim dismissed.¹⁹⁸ Consequently,

¹⁹⁶ *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006) (quoting *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960)); *see also id.* (“Interpreting the antiretaliation provision to provide broad protection from retaliation helps ensure the cooperation upon which accomplishment of the Act’s primary objective [of achieving a discrimination-free workplace] depends.”); *id.* at 63 (“The antidiscrimination provision seeks a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status. The antiretaliation provision seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee’s efforts to secure or advance enforcement of the Act’s basic guarantees.” (citation omitted)).

¹⁹⁷ *Id.* at 68 (citation omitted) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997)); *see also id.* at 63–64 (“[O]ne cannot secure the [antiretaliation provision’s] objective by focusing only upon employer actions and harm that concern employment and the workplace. Were all such actions and harms eliminated, the antiretaliation provision’s objective would not be achieved. An employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm *outside* the workplace. A provision limited to employment-related actions would not deter the many forms that effective retaliation can take. Hence, such a limited construction would fail to fully achieve the antiretaliation provision’s ‘primary purpose,’ namely, ‘[m]aintaining unfettered access to statutory remedial mechanisms.” (citations omitted) (quoting *Robinson*, 519 U.S. at 346)); *Boyer-Liberto*, 786 F.3d at 283 (highlighting this purpose and policy language from *Burlington Northern*); *Jordan*, 458 F.3d at 352, 357 (King, J., dissenting) (same).

¹⁹⁸ *See supra* Section I.B.1 (discussing the Supreme Court’s decision in *Breeden*); Sections I.B.2.a–c (discussing, respectively, the Eleventh, Third, and Second Circuits’ decisions in *Henderson*, *Theriault*, and *Chenette*).

Company A, which clearly engaged in blatant, unlawful retaliation against Sharon, likely escapes scot-free.

The current definition of protected opposition activity clearly frustrates antiretaliation law’s purpose and policy on two levels: an employee level, and an employer level. On an employee level, this definition simply discourages reports of inappropriate workplace conduct by honest, “reasonable actors.” This subset of whistleblowing employees is wholly unprotected and ultimately punished—their “too soon” reports are insufficient under this definition, and their underlying retaliation claims are destroyed. So, think about it. Will Sharon (having lost her job and then her lawsuit against Company A) be discouraged and deterred from reporting current or future inappropriate workplace conduct? Likely, because she knows that she is unprotected if her report somehow qualifies as “too soon.” The same is true for the remaining employees of Company A who are aware of Sharon’s situation and lawsuit. Thus, while the Supreme Court has stressed the importance of “the cooperation of employees”¹⁹⁹ and the “free[dom] to approach officials with . . . grievances,”²⁰⁰ the definition of protected opposition activity stifles such “cooperation” and freedom for those whistleblowing employees who are honest, “reasonable actors.”²⁰¹

Next, on an employer level, the current definition of protected opposition activity allows blatant, retaliatory employers (like Company A) to escape scot-free. In fact, this definition—by destroying the retaliation claim of an employee who reports “too soon”—can (and often does) serve to “camouflage,” conceal, or erase an employer’s

¹⁹⁹ *Burlington N. & Santa Fe Ry. Co.*, 548 U.S. at 67.

²⁰⁰ *Id.*

²⁰¹ See *Boyer-Liberto*, 786 F.3d at 283 (“But rather than encourage the early reporting vital to achieving Title VII’s goal of avoiding harm, the *Jordan* standard [of the objective ‘reasonable belief’ requirement] deters harassment victims from speaking up by depriving them of their statutory entitlement to protection from retaliation. Such a lack of protection is no inconsequential matter . . .”); Brake, *Retaliation*, *supra* note 194, at 20 (“Fear of retaliation is the leading reason why people stay silent instead of voicing their concerns about bias and discrimination.”); *id.* at 37–39 (“Fear of provoking retaliation, in particular, drives many persons to choose not to report or challenge discrimination. . . . If a target believes, based on past observations, that confronting or reporting discrimination is likely to trigger retaliation, she will be much less inclined to engage in such a response.”); *id.* at 78 (“Without protection from retaliation at the early, less formal stages of complaining, challengers would be chilled from ever complaining . . .”); Green, *supra* note 181, at 787 (“Holding employees to such an exacting standard before protecting them from retaliation has the potential to deter complaints, undermining the informal resolution of claims and avoidance of harm principles that gave rise to the reasonable belief standard.”); Rosenthal, *supra* note 194, at 1159–60 (“Specifically, if employees . . . knew that their complaints to management would not be protected, they would never bring those concerns to management’s attention. . . . [A]fter cases . . . that require the objectively reasonable standard to be met (and which set that objective standard at a very high level), employees will be less likely to inform their employers of any offensive behavior. This, of course, frustrates Title VII’s goal of eliminating workplace discrimination.”).

original, retaliatory decision. Company A is a perfect example. It blatantly retaliated against Sharon, but the definition of protected opposition activity likely provides an escape hatch. Having escaped, elusive employers like Company A remain free to repeatedly retaliate (and discriminate), especially against whistleblowing employees who report inappropriate workplace conduct soon after it occurs.²⁰²

In contrast, the “Reasonable Action” option promotes antiretaliation law’s purpose and policy on these same two levels. On an employee level, this proposed approach encourages reports of inappropriate workplace conduct by honest, “reasonable actors.” This subset of whistleblowing employees is wholly protected—their “too soon” (but “otherwise reasonable under the circumstances”²⁰³) reports would be sufficient under the expanded definition of protected opposition activity, thus protecting their underlying retaliation claims. So, under this proposed approach, will Sharon (having lost her job and then her lawsuit against Company A) be discouraged and deterred from reporting current or future inappropriate workplace conduct? Likely not, because she knows that she is protected, even if her report somehow qualifies as “too soon,” as long as she acted reasonably in making it. The same is true for the remaining employees of Company A who are aware of Sharon’s situation and lawsuit. Thus, the proposed approach encourages “the cooperation of employees”²⁰⁴ and expands the “free[dom] to approach officials with . . . grievances”²⁰⁵ that the Supreme Court has so heavily stressed.

Finally, on an employer level, the “Reasonable Action” option potentially captures blatant, retaliatory employers (like Company A), rather than allowing them to escape scot-free. Specifically, this proposed approach—by protecting the retaliation claim of an employee who reports “too soon” as long as she acted reasonably—reduces the camouflaging, concealing, or erasing of an employer’s original, retaliatory decision. The “Reasonable Action” option closes the escape hatch that the objective reasonable belief requirement provides for retaliatory employers (like Company A); thus, it better ensures that these employers are deterred from repeatedly retaliating (and

²⁰² Cf. Craig Robert Senn, *Minimal Relevance: Non-Disabled Replacement Evidence in ADA Discrimination Cases*, 66 BAYLOR L. REV. 65, 105–06 (2014) (arguing that, similarly, requiring ADA plaintiffs to establish nondisabled replacement evidence as part of their prima facie case “can (and often does) allow an employer’s subsequent decision to ‘camouflage’ or conceal—whether intentionally or unintentionally—its original, discriminatory decision” and that such a requirement “substantially frustrates the ADA’s broad anti-discrimination policy by allowing camouflaged discriminators . . . to escape scot-free”).

²⁰³ See *supra* Part II (discussing the scope of the proposed Reasonable Action option).

²⁰⁴ *Burlington N. & Santa Fe Ry. Co.*, 548 U.S. at 67.

²⁰⁵ *Id.*

discriminating), especially against whistleblowing employees who report inappropriate workplace conduct soon after it occurs.²⁰⁶

* * * * *

Some legal commentators have argued that the definition of protected opposition activity should include *only* the subjective, good-faith requirement of “honest belief” (i.e., that the whistleblowing employee had an honest, good-faith belief that the reported conduct was unlawful under federal employment discrimination law).²⁰⁷ In support of this purely subjective definition, these commentators have correctly contended that it would provide even broader protection for whistleblowing employees, and thus encourage even more reports consistent with antiretaliation purpose and policy.²⁰⁸

Although appealing on a policy level, a purely subjective definition of protected opposition activity is problematic on a substantive one. Aside from potentially opening a floodgate of retaliation claims,²⁰⁹ a purely subjective definition would contradict the Supreme Court’s purposeful adoption of objective standards in the federal employment discrimination context. For example, in *Burlington Northern*, the Court selected an objective definition of the “adverse action” element for retaliation claims (i.e., “harmful to the point that [it] could well dissuade a reasonable worker from making or supporting a charge of

²⁰⁶ Cf. *Grosdidier v. Broad. Bd. Governors*, 709 F.3d 19, 24 (D.C. Cir. 2013) (noting that, in a Title VII retaliation case, possible “merit . . . to [the plaintiff’s] suggestion that these kinds of [early whistleblower] complaints should be protected so that an employer will take steps to ameliorate the conduct before it escalates and results in a hostile work environment”).

²⁰⁷ See, e.g., *Rosenthal*, *supra* note 194, at 1149 (arguing that a retaliation plaintiff “should be required to prove only that she had a subjective, good-faith belief that the conduct she was opposing was unlawful”).

²⁰⁸ *Id.* at 1131 (“This [purely subjective] standard would also further Title VII’s purposes by encouraging employees to come forward with complaints about potential Title VII violations and giving employers the opportunity to fix these problems before they reach the level of actionable discrimination.”); *id.* at 1158 (“If . . . courts eliminate the objectively reasonable requirement, employees will be more likely to come forward with their concerns, which is what Congress wanted to encourage when it drafted Title VII’s anti-retaliation provision.”); *id.* at 1160 (“If . . . only a subjective, good-faith belief is required, employees will be more likely to tell their employers of the potentially discriminatory conduct.”); cf. *Green*, *supra* note 181, at 799 (observing that “a purely subjective standard would provide broader protection from retaliation than the reasonable belief standard”).

²⁰⁹ See *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 303–05 (4th Cir. 2015) (Niemeyer, J., dissenting) (expressing concern that a too lenient or flexible definition of protected opposition activity “will generate widespread litigation over the many offensive workplace comments made everyday that employees find to be humiliating”); *Nelson v. Realty Consulting Servs., Inc.*, 431 F. App’x 502, 506 (7th Cir. 2011) (observing that the objective “reasonable belief” requirement was “meant . . . to weed out claims that are completely groundless”).

discrimination”).²¹⁰ More importantly, however, the Court explicitly explained its preference for an objective, rather than subjective, definition:

We refer to reactions of a *reasonable* employee because we believe that the [antiretaliation] provision’s standard for judging harm must be objective. An objective standard is judicially administrable. It avoids the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff’s unusual subjective feelings. We have emphasized the need for objective standards in other Title VII contexts, and those same concerns animate our decision here.²¹¹

Indeed, the Supreme Court has intentionally adopted “objective standards in other Title VII contexts.”²¹² One such standard appears in the context of defining actionable workplace harassment. Specifically, in *Harris v. Forklift Systems, Inc.*,²¹³ the Court explicitly noted the now-familiar objective standard that “[c]onduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII’s purview.”²¹⁴ Another such standard appears in the context of the *Ellerth* and *Faragher* affirmative defense, which has two objective 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.”²¹⁵ Consequently,

²¹⁰ *Burlington N. & Santa Fe Ry. Co.*, 548 U.S. at 57.

²¹¹ *Id.* at 68–69; *see also* *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 175 (2011) (“We emphasize . . . that ‘the [anti-retaliation] provision’s standard for judging harm must be objective,’ so as to ‘avoi[d] the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff’s unusual subjective feelings.’” (quoting *Burlington N. & Santa Fe Ry. Co.*, 548 U.S. at 68–69)); Green, *supra* note 181, at 799 (“[I]t is doubtful that the [Supreme] Court would take the former approach [of a purely subjective definition] were it to decide the issue. There is no reason to assume the Court would grant broader protection to employees regarding a belief that discrimination exists than it has regarding whether a plaintiff has been sufficiently harmed after complaining about discrimination—the issue in *Burlington Northern*. The Court demonstrated in *Burlington Northern* a continued preference for objective standards . . .” (footnote omitted)).

²¹² *Burlington N. & Santa Fe Ry. Co.*, 548 U.S. at 69.

²¹³ *Harris v. Forklift Sys.*, 510 U.S. 17 (1993).

²¹⁴ *Id.* at 21.

²¹⁵ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807–08 (1998); *see supra* Section II.A.1 (discussing the *Ellerth* and *Faragher* decisions); *cf.* *Pa. State Police v. Suders*, 542 U.S. 129, 141 (2004) (“Under the constructive discharge doctrine, an employee’s reasonable decision to resign because of unendurable working conditions is assimilated to a formal discharge for remedial purposes. The inquiry is objective: Did working conditions become so intolerable that a reasonable person in the employee’s position would have felt compelled to resign?” (citation omitted)).

a purely subjective definition of protected opposition activity would run counter to established Supreme Court precedent and preference.²¹⁶

In addition, one might argue that the “Reasonable Action” option is too “general” and fails to provide “clear rules” for determining when a whistleblowing employee’s report is “otherwise reasonable under the circumstances.” While this desire for specificity is understandable, it ignores the fact that the Supreme Court has consistently defended its adoption of such open-ended standards in the federal employment discrimination context. For example, in *Burlington Northern*, the Court noted its purposeful choice of a definition for “adverse action” that contained only “general terms”:

We phrase the standard in general terms because the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters. . . . Hence, a legal standard that speaks in general terms rather than specific prohibited acts is preferable, for an “act that would be immaterial in some situations is material in others.”²¹⁷

Similarly, in its 2011 decision in *Thompson v. North American Stainless LP*,²¹⁸ the Court addressed, in part, whether an employer’s retaliatory firing of a third party—namely, the fiancé of the employee who had internally reported inappropriate workplace conduct—could amount to “adverse action” under the *Burlington Northern* definition.²¹⁹ Concluding that such third-party reprisals could be “adverse action,”²²⁰ the Court reaffirmed its prior adoption and use of an open-ended definition:

We must also decline to identify a fixed class of relationships for which third-party reprisals are unlawful. . . . As we explained in *Burlington*, “the significance of any given act of retaliation will often depend upon the particular circumstances.” Given the . . . variety of workplace contexts in which retaliation may occur, Title VII’s antiretaliation provision is simply not reducible to a comprehensive set of clear rules.²²¹

²¹⁶ See Green, *supra* note 181, at 799 (“[W]hile a purely subjective standard would provide broader protection from retaliation than the reasonable belief standard, it is doubtful that the Court would take the former approach were it to decide the issue. . . . The Court demonstrated in *Burlington Northern* a continued preference for objective standards . . .”).

²¹⁷ *Burlington N. & Santa Fe Ry. Co.*, 548 U.S. at 69 (quoting *Washington v. Ill. Dep’t Revenue*, 420 F.3d 658, 661 (7th Cir. 2005)).

²¹⁸ *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170 (2011).

²¹⁹ *Id.* at 172–75.

²²⁰ *Id.* at 173–75.

²²¹ *Id.* at 175 (quoting *Burlington N. & Santa Fe Ry. Co.*, 548 U.S. at 69).

Consequently, a definition of protected opposition activity that seeks to include a specific “set of clear rules” would run counter to the Supreme Court’s clear preference for more open-ended, less handcuffing standards.²²²

²²² Given its open-ended and general nature, the “Reasonable Action” option would allow the federal courts to consider various forms of evidence in determining whether a whistleblowing employee’s report was “otherwise reasonable under the circumstances.” See *supra* Part II (discussing the scope of the proposed Reasonable Action option). These nonexclusive forms of evidence may include: (i) the nature of the inappropriate workplace conduct (i.e., its severity and/or pervasiveness), (ii) whether the conduct indicates that unlawful workplace harassment is “in progress” (albeit “not fully formed”), and (iii) whether the employer’s workplace policies would have led a reasonable employee to internally report the conduct (e.g., by encouraging immediate, prompt, or early reporting of any “actual or perceived” harassment or discrimination or by broadly defining such inappropriate conduct).

As to the second form of evidence, see *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 282 (4th Cir. 2015) (“[A]n employee is protected from retaliation when she opposes a hostile work environment that, although not fully formed, is in progress.”).

As to the third form of evidence, see *Breeden v. Clark Cty. Sch. Dist.*, No. 99-15522, 2000 WL 991821, at *1 (9th Cir. 2000), *rev’d*, 532 U.S. 268 (2001) (“The school district’s regulations concerning sexual harassment also would tend to support Breeden’s belief. Given that the regulations, which Breeden consulted, state that sexual harassment includes uninvited sexual teasing, jokes, remarks, and questions, . . . it is possible that a reasonable person in Breeden’s position could have mistakenly believed that Eldfrick’s behavior constituted unlawful sexual harassment.”); *Brake, Retaliation in an EEO World*, *supra* note 194, at 143–44 (“Employer policies on harassment are much broader than the law’s approach to actionable harassment. . . . Where employer policies offer more concrete examples, the examples often include the kinds of isolated, offensive comments courts dismiss as insufficient in the reasonable belief cases. Sexual jokes, remarks, and gestures are often listed as among the kinds of behaviors covered by harassment policies. Moreover, employer policies typically encourage or even require employees to report any harassing behaviors right away, without waiting for the incidents to accumulate until they become severe or pervasive.” (footnote omitted)); *id.* at 152–53 (“[E]mployer EEO policies . . . direct employees to report their concerns through the specified channels without delay. . . . [S]uch policies openly invite employees to come forward with any concerns based on their own perceptions.”); *id.* at 168 (“[C]ourts . . . [should] take into account how employer EEO policies shape employee perceptions about discrimination and expressions of complaints in retaliation claims that are decided under the opposition clause. When courts apply the reasonable belief doctrine . . . , they should carefully consider how employer nondiscrimination policies influenced the complainant’s understanding of discrimination and communications in opposition to it. . . . Such policies should be highly relevant to judicial determination of the reasonableness of the employee’s belief that discrimination occurred. . . .”); *Brianne J. Gorod, Rejecting “Reasonableness”: A New Look at Title VII’s Anti-Retaliation Provision*, 56 AM. U. L. REV. 1469, 1491–92 (2007) (observing that, given the breadth and language in standard sexual harassment policies, “employees . . . will be tempted to report such behavior the very first time it occurs, despite the fact that an isolated incident of such conduct is only rarely sufficient to establish a ‘hostile work environment.’”); *Green, supra* note 181, at 806 (“[H]arassment policies . . . may more broadly define unlawful conduct than the Supreme Court. . . . Surveys suggest that an overwhelming majority of companies have policies that prohibit sexual harassment and ‘reach broadly to forbid many forms of potentially harmless sexual conduct without demanding inquiry into the surrounding factors that would determine legal liability.’” (quoting Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2095 (2003))); *id.* at 799–800 (arguing that, thus, “internal employer policies that interpret or in many instances reinterpret the law of employment discrimination, promise zero tolerance for discrimination, or urge employees to promptly report

CONCLUSION

Federal courts too narrowly define what qualifies as protected opposition activity under the Title VII, ADA, and ADEA antiretaliation provisions. This definition is flawed, because it focuses only upon the correctness or reasonableness of a whistleblowing employee’s *belief*, and does not accommodate the reasonableness of her *action*. While the definition protects whistleblowing employees who are honest, “correct believers” and honest, “reasonably incorrect believers,” it fails to protect multitudes of employees who—possessing an honest, good-faith belief that workplace conduct was unlawful under federal employment discrimination law—act reasonably under the circumstances to stop the inappropriate workplace conduct by internally reporting it.

The “Reasonable Action” option—which is consistent with Supreme Court philosophy, avoids the Goldilocks problem for employees, and promotes antiretaliation purpose and policy—represents a needed expansion of the definition of protected, opposition activity. For whistleblowing employees, this proposed approach would provide additional protection from unlawful retaliation under our federal employment discrimination laws. For employers, the proposed approach would merely encourage more whistleblowing employees to use informal reports or complaints of inappropriate workplace conduct as the initial means of dispute resolution—a means that is much less expensive, much less time consuming, and much less litigation oriented than the filing of formal claims or charges with the EEOC.

Simply put, the “Reasonable Action” option makes the definition of protected opposition activity more reasonable—literally and figuratively.

discrimination when they perceive it” should be relevant in retaliation cases); *cf.* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764 (1998) (“To the extent limiting employer liability could encourage employees to report harassing conduct *before it becomes severe or pervasive*, it would also serve Title VII’s deterrent purpose.” (emphasis added)).