



## ESSAY

## Ending Harassment by Starting with Retaliation

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### Introduction

The #MeToo movement has had a transformative effect on the discussion surrounding harassment in the workplace. As more women came forward to tell their stories of harassment, often against high-profile entertainment moguls or politicians, the public story that emerged was one of surprise and anger. But perhaps more importantly, the stories inspired hope that the prevalence of harassment in the workplace would lessen because we were finally taking harassment seriously.<sup>1</sup>

This is good news, but it's important to be realistic about whether the #MeToo movement will lead to any real transformation in workplaces around the country. Many of the people who complained were not current employees of the companies who employed the men who harassed them.<sup>2</sup> Many were complaining about harassment that had occurred many years ago, long past the statute of limitations. In short, many of these stories were told for the cathartic effect of telling a story of pain and outrage.

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1. The best example is the 2017 firing of the *Today* show host, Matt Lauer. NBC fired him two days after they received the complaint from one employee about instances of Lauer's "inappropriate sexual behavior" in the workplace. See Corinne Heller, *Matt Lauer Fired amid Sexual Misconduct Allegations: Everything We Know*, E! NEWS (Dec. 1, 2017, 11:50 AM), <https://perma.cc/39UF-K7KF>.
2. For instance, many of the women who accused Harvey Weinstein of harassment and assault were not his employees at the time of the harassment. See Yohana Desta & Hillary Busis, *These Are the Women Who Have Accused Harvey Weinstein of Sexual Harassment and Assault*, VANITY FAIR (Oct. 12, 2017, 7:34 AM), <https://perma.cc/L38L-T9Y3>.

But for women reporting harassment of a current supervisor or coworker, telling their story likely does not have the same cathartic effect. For some women, reporting harassment is fraught with risk,<sup>3</sup> and often brings very little reward. The reason for that is simple—retaliation.

When we think about retaliation, we usually think about an employer terminating an employee who has complained about harassment or discrimination.<sup>4</sup> But employees fear more than just termination. Other adverse employment actions can have a significant effect on many women's willingness to report harassment. These include: discipline, negative evaluations, department or shift changes, demotion, increased surveillance, and others. Unless a woman works for a company that has a great reputation for being free from retaliation, a would-be harassment reporter never knows whether she will face retaliation. Often, this is a risk she cannot take. Even when a woman is not fearful of consequences that might threaten her livelihood, she still might fear one of the most common types of retaliation—being ostracized or snubbed in the workplace.

This Essay posits that the fear of retaliation significantly contributes to the problem of harassment—we cannot hope to end harassment without starting by addressing the reality of retaliation. Although some scholars have argued that the fear of retaliation is one reason women don't report harassment, and some scholars have discussed the inadequacies of anti-retaliation law, this Essay breaks new ground by arguing that ending harassment must start with preventing retaliation. Part I backs up what seems to be a commonsense proposition: Many victims of harassment do not report it because they fear retaliation.<sup>5</sup> Part II then describes the difficulty in proving a valid retaliation claim. Finally, Part III explores possible solutions, supporting reforms first offered by others as well as suggesting reforms of my own that will hopefully help to stop retaliation before it starts.

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3. See Anne Lawton, *Between Scylla and Charybdis: The Perils of Reporting Sexual Harassment*, 9 U. PA. J. LAB. & EMP. L. 603, 632 (2007) (discussing harm to one's professional reputation as a consequence of reporting harassment); *id.* at 605 (stating that after a woman experiences harassment, all of her choices are bad choices).
  4. Not all workers fear termination equally. For instance, the more power and prestige one has within a company, the less likely she is to be worried about termination. But for the vast majority of workers—single moms, lower-income workers, women who are the primary breadwinners—common sense suggests that the fear of a retaliatory discharge is real. Cf. Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form over Substance in Sexual Harassment Law*, 26 HARV. WOMEN'S L.J. 3, 60 (2003) (noting that women who are relatively powerless in an institution may be more likely to suffer retaliation if they complain).
  5. See CHAI R. FELDBLUM & VICTORIA A. LIPNIC, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, REPORT OF THE CO-CHAIRS OF THE SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE 16 (2016) [hereinafter EEOC TASK FORCE REPORT], <https://perma.cc/2K3M-MMRL>.

## I. Fear of Retaliation Leads to Fewer Reports of Harassment

In order for an employer to remedy harassment, the victim of the harassment needs to report it.<sup>6</sup> And yet, by all accounts, reports of harassment are very low.<sup>7</sup> Despite the fact that in one study, 44% of women stated they experienced harassment in the workplace,<sup>8</sup> the number who report workplace harassment is much, much lower.<sup>9</sup> For instance, one study revealed that 44% of those who experienced harassment at work did nothing, compared to the 12% of respondents who reported the conduct.<sup>10</sup> Another study revealed that large employers receive an average of only six complaints per year, around two-tenths of one percent per 100 employees.<sup>11</sup> Instead, a common reaction by victims is to ignore the harassment or take “costly steps” to avoid the harasser or the job.<sup>12</sup> In fact, of all of a victim’s responses, the least frequent response is to report.<sup>13</sup>

One reason for this low rate of reporting is that victims of harassment fear retaliatory actions,<sup>14</sup> including being ostracized by coworkers.<sup>15</sup> Social science research “consistently has shown that women do not report (or delay reporting) harassment because they fear retaliation, they believe no one will believe them, or they think that reporting will make the situation at work worse.”<sup>16</sup> This fear

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6. Obviously, some harassment is so open and notorious that the employer might be aware of it without a complaint by the victim. But generally speaking, victims need to report harassment before employers can remedy it.
  7. See EEOC TASK FORCE REPORT, *supra* note 5, at 15-16; Anne Lawton, *Operating in an Empirical Vacuum: The Ellerth and Faragher Affirmative Defense*, 13 COLUM. J. GENDER & L. 197, 208 (2004) (stating that reporting harassment is not common).
  8. U.S. MERIT SYS. PROT. BD., *SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: TRENDS, PROGRESS, CONTINUING CHALLENGES* vii (1995) [hereinafter U.S. MSPB REPORT].
  9. Grossman, *supra* note 4, at 23 (“Sexual harassment victims have traditionally tended not to utilize internal complaint procedures or otherwise formally report problems of harassment.”).
  10. U.S. MSPB REPORT, *supra* note 8, at 30 tbl.7.
  11. Grossman, *supra* note 4, at 24; see also Lawton, *supra* note 7, at 208 (citing several studies finding very low rates of initiating a formal action, including 2-6% among federal employees; 13.3% in the private sector; 6% at a university; and other studies indicating a low of 5% and a high of 18% reporting).
  12. Grossman, *supra* note 4, at 25.
  13. *Id.* at 26; EEOC TASK FORCE REPORT, *supra* note 5, at 15-16 (“[T]he extent of non-reporting is striking.”); cf. Lawton, *supra* note 3, at 622 (discussing the underreporting problem).
  14. See Grossman, *supra* note 4, at 51 & n.294 (collecting sources and citing a study that indicated 75% of victims worry about retaliation).
  15. See L. Camille Hébert, *Why Don't “Reasonable Women” Complain About Sexual Harassment?*, 82 IND. L.J. 711, 731, 741 (2007) (describing employees’ fear of how their coworkers would treat them after reporting harassment); Lawton, *supra* note 3, at 621 (discussing the fact that after she reported harassment by one of her more senior colleagues, “the silence inside the department was deafening”); see also EEOC TASK FORCE REPORT, *supra* note 5, at 16 (separating out “professional retaliation” that affects the job directly and “social retaliation,” such as being ostracized).
  16. Lawton, *supra* note 3, at 618-19.

of retaliation in all forms is not unfounded.<sup>17</sup> In fact, studies demonstrate that negative consequences often follow reports of harassment.<sup>18</sup>

But employers do not even need to retaliate in order to deter reports. Retaliation performs most of its work simply by being threatened (explicitly or implicitly).<sup>19</sup> As Deborah L. Brake notes, “[d]ecisions about whether to challenge discrimination rest on a careful balancing of the costs and benefits of doing so.”<sup>20</sup> Women who choose not to report harassment often do so because “they believe that the costs of confrontation outweigh the benefits . . . .”<sup>21</sup> And the organizational structure of an employer greatly influences how much of a role retaliation plays in that organization.<sup>22</sup> An institutional climate that fosters the threat of retaliation can deter reports without anyone ever actually retaliating.<sup>23</sup>

## II. Hurdles to a Successful Retaliation Claim

To make matters worse, when a woman *does* report harassment in the workplace and experiences retaliation, her claim often fails. Section 704(a) of Title VII states:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, . . . or participated in any manner in an investigation, proceeding, or hearing under this subchapter.<sup>24</sup>

In order to establish a *prima facie* case for retaliation, plaintiffs must demonstrate (1) protected activity, either participation or opposition; (2) an adverse employment action; and (3) causation between the two.<sup>25</sup> All three of these elements present roadblocks for a plaintiff bringing a retaliation claim.

First, in order meet the “protected activity” element, a plaintiff either needs to engage in participation—bringing a charge of discrimination or participating in any proceeding—or opposition—opposing a practice made unlawful by Title

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17. See Lawton, *supra* note 7, at 258.

18. See Grossman, *supra* note 4, at 52 & n.300; see also Lawton, *supra* note 7, at 265–66 (describing a story of the negative consequences that face a woman after she complains about harassment). A 2003 study indicated that 75% of those who reported harassment experienced retaliation. EEOC TASK FORCE REPORT, *supra* note 5, at 16.

19. See Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 39–40 (2005).

20. *Id.* at 36.

21. *Id.* at 36–37.

22. *Id.* at 39–40.

23. See Ivan E. Bodensteiner, *The Risk of Complaining—Retaliation*, 38 J.C. & U.L. 1, 39 (2011).

24. Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, § 704(a), 78 Stat. 241, 257 (codified as amended at 42 U.S.C. § 2000e-3(a) (2016)).

25. See, e.g., *Durant v. D.C. Gov't*, 875 F.3d 685, 696–97 (D.C. Cir. 2017), *reh'g en banc denied*, No. 13-7060, 2018 U.S. App. LEXIS 1147 (D.C. Cir. 2018), *petition for cert. filed*, No. 17-1402 (U.S. Apr. 9, 2018).

VII.<sup>26</sup> Participation activity is typically external to the company—such as complaints or charges filed with the Equal Employment Opportunity Commission (EEOC) or a state antidiscrimination agency, or a lawsuit in court.<sup>27</sup> Opposition activity is typically internal and often informal—such as complaining to a human resources officer or supervisor.

Protected activity that falls under the participation clause receives almost absolute protection. Courts have held that participation is protected even if the claim is not only incorrect but unreasonably so.<sup>28</sup> Less formal opposition behavior, however, does not receive such absolute protection. Instead, courts have required the plaintiff to demonstrate that she had a *reasonable* and good faith belief that the conduct she complained about is unlawful.<sup>29</sup> In the context of an employee’s complaints about sexual harassment, the employee would have to demonstrate that she had a reasonable belief she was the victim of unlawful harassment. In order for harassment to be unlawful under Title VII, one element the plaintiff has to prove is that the harassment was “severe or pervasive.”<sup>30</sup> Individual instances of harassment (unless they amount to an unwanted touching that is sexual in nature)<sup>31</sup> are not likely to be considered “severe.”<sup>32</sup> For instance, rubbing someone’s shoulders is not likely to be considered severe, but “[g]rab[bing] [someone] by the pussy”<sup>33</sup> *would* likely be seen as severe.<sup>34</sup> If conduct is not severe, it must be pervasive.<sup>35</sup> Thus, if a woman complains about one offensive or demeaning statement or joke, and the employer retaliates against her for complaining, courts will often hold that she did not have a reasonable, good faith belief that the conduct she complained about violated Title VII, and her claim will fail.<sup>36</sup>

The second hurdle a plaintiff experiences in bringing a valid retaliation claim is that she has to prove that she suffered an adverse employment action. The Supreme Court’s decision in *Burlington Northern & Santa Fe Railway Co. v.*

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26. 42 U.S.C. § 2000e-3(a).

27. See B. Glenn George, *Revenge*, 83 TUL. L. REV. 439, 446-47 (2008).

28. See, e.g., *Glover v. S.C. Law Enft Div.*, 170 F.3d 411, 414 (4th Cir. 1999).

29. *Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 270–71 (2001) (per curiam) (assuming without deciding that the reasonable, good faith belief rule is correct, and holding that the plaintiff did not have a reasonable belief that the incident violated Title VII).

30. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).

31. *Gerald v. Univ. of P.R.*, 707 F.3d 7, 18 (1st Cir. 2013) (stating that one incident where the supervisor grabbed plaintiff’s breast was sufficient to meet the standard).

32. *Breeden*, 532 U.S. at 271.

33. *Transcript: Donald Trump’s Taped Comments About Women*, N.Y. TIMES (Oct. 8, 2016), <https://perma.cc/73GA-7R JL>.

34. See, e.g., *Gerald*, 707 F.3d at 18.

35. See *Lauderdale v. Tex. Dep’t of Criminal Justice*, 512 F.3d 157, 163 (5th Cir. 2007) (“Frequent incidents of harassment, though not severe, can reach the level of ‘pervasive’ . . .”).

36. See *Breeden*, 532 U.S. at 271.

*White*<sup>37</sup> announced the standard for determining whether a retaliatory employment action is sufficiently severe to qualify as an adverse employment action. The Court held that in order to meet the standard, the plaintiff has to demonstrate that the action “would have been materially adverse to a reasonable employee . . . .”<sup>38</sup> The action “must be harmful to the point that [it] could well dissuade a reasonable worker from making or supporting a charge of discrimination.”<sup>39</sup>

Although this seems like a fairly broad standard, the lower courts have held many actions to not be “materially adverse.”<sup>40</sup> For instance, lower courts have found discipline, reprimands, and negative evaluations to not be materially adverse.<sup>41</sup> Changes to an employee’s schedule or work assignments are also found not to meet the standard.<sup>42</sup> Courts have also held that administrative leaves or paid suspensions do not meet the materially adverse standard.<sup>43</sup> Courts almost uniformly hold that shunning, ostracizing, and harassing do not rise to the level of an adverse employment action.<sup>44</sup>

The courts’ reasoning in these cases varies widely. Often courts simply hold, without much explanation, that the harm was not significant enough to deter someone from filing a charge. These courts argue that retaliation law

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37. 548 U.S. 53 (2006).

38. *Id.* at 57.

39. *Id.*

40. See Sandra F. Sperino, *Retaliation and the Reasonable Person*, 67 FLA. L. REV. 2031, 2041-42 (2015) (stating that, in hundreds of cases after *Burlington Northern*, courts have construed the adverse employment action requirement narrowly).

41. See, e.g., *Adams v. Anne Arundel Cty. Pub. Schs.*, 789 F.3d 422, 431 (4th Cir. 2015) (stating that the alleged “reprimands and poor performance evaluations” were not adverse actions); *Mlynczak v. Bodman*, 442 F.3d 1050, 1061 (7th Cir. 2006) (acknowledging that negative performance appraisals alone do not qualify as adverse actions).

42. See, e.g., *Morales-Vallellanes v. Potter*, 605 F.3d 27, 37-38 (1st Cir. 2010) (holding the grant of less favorable break times and temporary assignment to post office window duty were not adverse employment actions); *Lucero v. Nettle Creek Sch. Corp.*, 566 F.3d 720, 729-30 (7th Cir. 2009) (determining that a teacher’s reassignment to teach seventh grade rather than high school was not materially adverse); *Aryain v. Wal-Mart Stores Tex. LP*, 534 F.3d 473, 485 (5th Cir. 2008) (holding that transfer to another department was not materially adverse); *Higgins v. Gonzales*, 481 F.3d 578, 590-91 (8th Cir. 2007) (holding that the alleged transfer of an Assistant U.S. Attorney to another district was not materially adverse), *abrogated in other part by Torgerson v. City of Rochester*, 643 F.3d 1031 (8th Cir. 2011).

43. See, e.g., *Jones v. Se. Pa. Transp. Auth.*, 796 F.3d 323, 326 (3d Cir. 2015) (holding that suspension with pay was not an adverse employment action); *Joseph v. Leavitt*, 465 F.3d 87, 91 (2d Cir. 2006) (holding that placement on administrative leave with pay for almost a year was not an adverse employment action).

44. See, e.g., *Brown v. Advocate S. Suburban Hosp.*, 700 F.3d 1101, 1107 (7th Cir. 2012) (being called a “cry baby” and “troublemaker” by a supervisor was not adverse action); *Stephens v. Erickson*, 569 F.3d 779, 790 (7th Cir. 2009) (finding that supervisors yelling at plaintiff and physically isolating him from other employees did not rise to level of an adverse employment action).

“should not respond to trivial harms, petty slights, or minor annoyances.”<sup>45</sup> Scholars have also theorized that when judges write opinions holding that certain conduct does not constitute an adverse employment action, they tend to “issue broad opinions that appear to hold, as a matter of law, that a particular action is never serious enough to create liability.”<sup>46</sup> Lower courts then rely on these cases in subsequent cases where a similar adverse action is present. Sandra F. Sperino calls this the problem of “perceived precedent.”<sup>47</sup> My own sense is that federal judges, who have lifetime job security, are less likely to feel threatened or deterred by actions that would deter a reasonable worker, who does not enjoy such job security.

Despite this body of case law indicating that many retaliatory actions do not qualify as adverse actions, the law does not comport with reality. According to one study, many individuals would find many of the above actions materially adverse. Sperino conducted an empirical study using law students, asking the students to “imagine that [they] witnessed discrimination in the workplace.”<sup>48</sup> She then asked the participants questions about whether certain actions would dissuade them from complaining about the discrimination to an employer.<sup>49</sup> The survey results revealed that many study participants thought employment actions that courts routinely have held are *not* materially adverse would dissuade them from complaining.<sup>50</sup> For instance, 80% of the study participants said that a negative evaluation would or might dissuade them from reporting discrimination; 68.42% reported that a threatened termination would or might dissuade them; 62.11% reported that a change in job responsibilities would or might dissuade them; 55.79% said that a change in office location would or might dissuade them; 53.68% reported that a paid seven-day suspension would or might dissuade them; and 50.53% of participants said that social ostracism by coworkers would or might dissuade them.<sup>51</sup> What this study tells us is that law and reality do not match up.

The third hurdle in bringing a successful retaliation claim is that the plaintiff must prove causation—i.e., she must prove that her complaint (“protected activity”) was a but-for cause of the adverse employment action she suffered.<sup>52</sup> Employers are often smart enough to hide any retaliatory motive. Furthermore, unless a plaintiff has been a perfect employee, an employer can easily generate a legitimate, non-retaliatory motive for the adverse employment

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45. Sperino, *supra* note 40, at 2042.

46. *See id.* at 2055.

47. *Id.* at 2056-61 (giving examples of this phenomenon).

48. *Id.* at 2043-44.

49. *Id.*

50. *Id.* at 2045.

51. *Id.*

52. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2533 (2013) (requiring but-for causation in retaliation cases under Title VII).

action. Often the only evidence plaintiffs have to prove causation is the temporal proximity between the two events. Thus, if a woman complains about harassment one day and is terminated the next, that is pretty strong evidence that retaliation was at play.<sup>53</sup> But most employers are savvy enough to avoid such a close temporal proximity. And some courts hold that even a two-month temporal proximity is too long to be indicative of a retaliatory motive.<sup>54</sup>

### III. Possible Solutions

#### A. Changes to Anti-Retaliation Law

If we hope to increase the reporting rates of victims of harassment, we must at a minimum protect those employees who experience retaliation after reporting harassment. Thus, solving this problem must start with changes to the anti-retaliation law. Although each of these proposed changes could be independent full-length articles, I am necessarily giving them very brief attention.

First, we should abandon the requirement that the employee have a *reasonable* belief that the harassment (or discrimination) complained of violates Title VII. In a similar context, I have argued that courts should dispense with the reasonableness requirement and only require that an employee has a *good faith* belief that she is complaining about conduct that violates the law and that she act *reasonably* in bringing the complaint.<sup>55</sup> Similar arguments have been made by other scholars in the Title VII context.<sup>56</sup> The criticisms of the “reasonable” standard are several: It stifles the broad remedial goals of Title VII;<sup>57</sup> it places employees in an unfair catch-22 with respect to reporting harassment;<sup>58</sup> it judges the reasonableness of the belief based on a judge’s law-trained perspective, rather than the perspective of a layperson;<sup>59</sup> and it

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53. *See, e.g.,* Lord v. High Voltage Software, Inc., 839 F.3d 556, 564 (7th Cir. 2016) (determining that termination two days after protected expression was sufficiently suspicious to prove the prima facie element of causation, but ultimately holding that the plaintiff could not prove that the employer’s reason for termination was pretextual), *cert. denied*, 137 S. Ct. 1115 (2017).

54. *See, e.g.,* Sherris v. City Colls. of Ohio, No. 15 C 9078, 2018 WL 999902, at \*8 (N.D. Ill. Feb. 21, 2018) (holding that even a seven-week time gap between plaintiff’s initial report of harassment and termination was too long to support a finding of retaliation).

55. *See* Ann C. McGinley & Nicole Buonocore Porter, Public Policy and Workers’ Rights: Wrongful Discharge Discipline Actions and Reasonable Good-Faith Beliefs, 21 EMP. RTS. & EMP. POL’Y J. 511, 533–43 (2018).

56. *See* Brake, *supra* note 19, at 102-03; Deborah L. Brake, *Retaliation in an EEO World*, 89 IND. L.J. 115, 165-66 (2014); Craig Robert Senn, *Redefining Protected “Opposition” Activity in Employment Retaliation Cases*, 37 CARDOZO L. REV. 2035, 2060-61 (2016).

57. *See, e.g.,* Senn, *supra* note 56, at 2081

58. *See, e.g.,* Brake, *supra* note 56, at 138-39; Senn, *supra* note 56, at 2074-77.

59. *See, e.g.,* Brake, *supra* note 19, at 98-99.

discourages, rather than encourages, informal complaints.<sup>60</sup> These are all valid reasons for dispensing with the requirement that the employee’s belief that the harassment violated the law was reasonable, as long as the employee made the complaint in good faith.

Second, we need to lower the threshold of harm needed to meet the “materially adverse” standard. The Supreme Court’s standard in *Burlington Northern & Santa Fe Railway Co. v. White*<sup>61</sup> is not the problem. The problem, as noted by Sperino, is that the reasonable person standard has been interpreted by lower courts in a way that “fails to reflect the views of most reasonable people.”<sup>62</sup> Sperino argues that this inquiry “should focus on one goal—separating *de minimis* harm from all other actions.”<sup>63</sup> Sperino argues that a *de minimis* standard “takes courts out of the business of making fine-grained determinations about how objectively reasonable workers would act in a variety of cases by assuming that most negative circumstances meet the threshold.”<sup>64</sup> Although space limitations prevent me from fully exploring and evaluating Sperino’s *de minimis* standard, I agree with her that the standard for determining whether an employee suffered an adverse employment action should be much lower.

Third, I also find fault with the courts’ jurisprudence on the causation inquiry.<sup>65</sup> As noted above, the determination of causation inevitably involves looking at the temporal proximity between the protected activity and the adverse employment action. Very short gaps between the two events will help a plaintiff make her prima facie case.<sup>66</sup> But most courts hold that the temporal proximity *alone* is insufficient to survive summary judgment in a case of retaliation.<sup>67</sup> Moreover, courts take an overly restrictive view on what is “too long” to support an inference of causation. I have seen firsthand some employers waiting for six months before taking a retaliatory action. A savvy, well-counseled employer knows that it cannot take an adverse employment action immediately after a harassment or discrimination complaint. But many employers simply bide their time, waiting until they can terminate or take other adverse employment actions without raising suspicion of retaliation. Overly stringent temporal proximity rules ignore this reality.

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60. See, e.g., Brake, *supra* note 19, at 77-80; Senn, *supra* note 56, at 2079-81.

61. 548 U.S. 53 (2006).

62. Sperino, *supra* note 40, at 2055.

63. *Id.* at 2069.

64. *Id.* at 2073.

65. See Bodensteiner, *supra* note 23, at 7 (“The most difficult hurdle for retaliation plaintiffs . . . is showing a causal connection or link . . . . Absent any remarks made by those responsible for the challenged decision, the most telling evidence may be the temporal proximity between the protected activity and the adverse action.”).

66. George, *supra* note 27, at 458.

67. *Id.*

Thus, I propose that, when establishing the prima facie case of retaliation, which is not supposed to be an onerous burden, there should be a one-year cutoff. Anything shorter than that would be presumed to meet the prima facie element of causation and then the burden of production would shift to the employer to demonstrate a non-retaliatory reason for the adverse employment action.<sup>68</sup> I recognize that these reforms to the prima facie case do not move the ball very far, because many of these cases turn on the third step of the burden-shifting framework—whether or not the plaintiff can prove that the defendant’s non-retaliatory reason for the action was pretextual—but it would at least force the court to analyze the pretext element.<sup>69</sup>

B. The Culture of Retaliation—Why Changing the Law Is Not Enough

Although I believe that all of the above changes should be made, these changes alone are insufficient to end harassment because the *fear* of retaliation is often enough to stop an employee from reporting harassment. In other words, even if a victim of harassment believes she would have a successful retaliation lawsuit if her complaint of harassment resulted in retaliation, she might still choose to avoid the negative consequences of retaliation in the first place.<sup>70</sup>

Until we can prevent retaliation (not just remedy it after it happens), we will not effectuate meaningful change in minimizing harassment. Because as long as employees fear retaliation, they are unlikely to report harassment.<sup>71</sup> And if they don’t report harassment, employers cannot remedy it.

In order to prevent retaliation, we have to understand why it happens. When someone gets accused of harassment, his natural reaction to the accusation may be one of anger and revenge.<sup>72</sup> He is likely angry<sup>73</sup> about one of two things—either he thinks the alleged victim is overblowing a small, unimportant infraction (is being too sensitive), or he knows what he did is wrong and is afraid of being punished for his infraction.

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68. *See id.* at 457 (explaining the burden-shifting framework first announced in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973)).

69. *See id.* (stating that once the employer has asserted a legitimate, non-retaliatory reason for the adverse employment action, the burden remains with the plaintiff to prove that the defendant’s articulated reasons are a pretext for unlawful retaliation).

70. *Cf.* Lawton, *supra* note 3, at 648-49 (stating that allowing employers to escape liability for retaliation by subsequently curing the retaliation “does not make the victim whole”).

71. *See* Brake, *supra* note 19, at 36-37.

72. *See* George, *supra* note 27, at 440 (discussing retaliation as a natural reaction to accusations of discrimination or harassment).

73. *See, e.g.*, Rebecca Walker, *Mitigating the Fear of Retaliation: Helping Employees Feel Comfortable Reporting Suspected Misconduct*, 10 J. HEALTH CARE COMPLIANCE 19, 23 (2008) (recognizing that it is natural for employees to feel angry or defensive when someone has accused them of unlawful conduct).

As to the first reason, social science research supports that, even when a claim of harassment or discrimination is meritorious, it is likely that the complaining employee will be disliked because she will be perceived as a “troublemaker” or “hypersensitive.”<sup>74</sup> One would hope that simply enlightening employees on what harassment is and why it is harmful would help those employees accused of harassment better understand that the victim is not just being “whiny.” But there is very little evidence that the decades of harassment and diversity training have been effective in either eliminating harassment or lessening retaliation.<sup>75</sup>

There is hope on this front. Many scholars have written about changing the organizational culture to minimize discrimination and harassment and maximize equality.<sup>76</sup> These are very important efforts. But cultural shifts at institutions take time. In the meantime, we need to explore other ways to discourage retaliation.

As to the second reason an employee might get angry when he is accused of harassment—because he fears discipline—there *is* something employers might do *now* to ameliorate that reaction. The 2016 EEOC task force report on harassment discusses the problem with companies who refer to their harassment policies as “zero tolerance” policies.<sup>77</sup> The problem with such policies is that they send the message that anyone who engages in harassment will be swiftly and severely punished, regardless of the severity of their infraction.<sup>78</sup> If an employer has such a policy or uses a phrase such as “zero tolerance,” the accused harasser is likely to fear severe discipline, which might make the accused employee more likely to retaliate against the accuser, either in retribution for “getting him in trouble” or because he hopes to silence her. Instead, employers should emphasize fair and proportional responses to reports of harassment (after fair and thorough investigations). The hope is that such a response by employers will ameliorate the natural inclination of an accused

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74. See George, *supra* note 27, at 466 & n.129 (citing Brake, *supra* note 19, at 32–36); see also Lawton, *supra* note 3, at 616 (stating that women who report harassment are viewed as “overly sensitive”).

75. See EEOC TASK FORCE REPORT, *supra* note 5, at 50–54 (discussing the lack of positive studies about the effectiveness of training); Susan Bisom-Rapp, *An Ounce of Prevention Is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law*, 22 BERKELEY J. EMP. & LAB. L. 1, 29–38 (2001) (same).

76. See, e.g., Grossman, *supra* note 4 at 37–38 (“Workplace norms is a promising area of inquiry.”); see also EEOC TASK FORCE REPORT, *supra* note 5, at 31 (stating that remedying harassment starts “from the very top” and that organizations need both leadership and accountability); cf. Lawton, *supra* note 3, at 616–17 (stating that the predictors of harassment are “largely organizational in nature”).

77. EEOC TASK FORCE REPORT, *supra* note 5, at 40 (cautioning employers about referring to their harassment policies as zero tolerance policies).

78. See *id.*

employee to seek revenge. After all, not every offensive joke warrants termination.

Importantly, this is not inconsistent with what many victims of harassment want. Most victims simply want the harassment to stop.<sup>79</sup> They often do not want the harasser punished,<sup>80</sup> in fact, many avoid reporting in part because they are afraid of their harassers being punished too severely for the harassment.<sup>81</sup>

I realize that the current law surrounding harassment might incentivize employers to engage in swift, harsh discipline for incidents of harassment.<sup>82</sup> Although not the subject of this essay, there needs to be some room between doing nothing when a victim complains of harassment, and immediately and sharply punishing the perpetrator without a thorough investigation and without considering the nature of the offense and achieving a proportional response.<sup>83</sup>

It's possible that an employer might feel compelled to immediately fire an alleged harasser in order to cut off the chances that the harasser will retaliate against the harassment victim. This is more of a threat for retaliatory actions that could be done secretly, such as snubbing or ostracizing the harassment victim. For employment-related retaliatory actions, such as a written discipline, demotion, transfer, or termination, employers should (and usually do) have systems set up that require any official employment action to obtain the approval of someone besides the immediate supervisor. Even so, I recognize that this is a realistic threat. Employers should head this off by making clear in their policies that responses to harassment will be fair and proportional, but that the employer's response to (true) allegations of retaliation will be swift and harsh. This result strikes the right balance between harassment and retaliation

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79. Hébert, *supra* note 15, at 732.

80. *Id.* (“[W]omen who have been sexually harassed have expressed that their primary objective is to stop the harassing behavior and preserve the relationship between the parties, rather than to punish the harasser.”).

81. *Id.* at 731 n.114 (noting that some victims of harassment did not want to harm the person who harassed them); *id.* at 732 (stating that “women who have been sexually harassed have expressed that their primary objective is to stop the harassing behavior and preserve the relationship between the parties, rather than to punish the harasser.”).

82. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998) (requiring an employer, in order to prove an affirmative defense when a supervisor engages in harassment, to “correct promptly” any harassing behavior); *see also* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 759 (1998) (stating that an employer is liable under a negligence standard for coworker harassment if it knew or should have known about the harassment and failed to take remedial action). Because so many cases turn on whether the employer acted appropriately in attempting to remedy the harassment, there is an incentive to over-discipline in harassment cases.

83. *See* EEOC TASK FORCE REPORT, *supra* note 5, at 31, 34 (arguing for proportional response to harassment depending on the nature of the offense).

because although harassment is sometimes performed without the intent to harm the victim,<sup>84</sup> retaliation is often revengeful.<sup>85</sup>

### **Conclusion**

Ideally, the #MeToo movement will lead to all workers being more sensitive to harassment, which would ideally lead to less workplace harassment. Until that ideal is realized, we need to encourage reports of harassment so that employers can remedy them. But we will not succeed in encouraging harassment reports until we can prevent retaliation and remedy it when it happens. In other words, ending harassment has to start with thinking about retaliation and the role it plays in fostering harassment in the workplace.

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84. Jane Byeff Korn, *The Fungible Woman and Other Myths of Sexual Harassment*, 67 TUL. L. REV. 1363, 1397 (1993) (recognizing that it is subject to debate whether harassers intend to harm their victims).

85. See George, *supra* note 27, at 440.