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Coworker Retaliation in the #MeToo Era

Deborah L. Brake
University of Pittsburgh School of Law, dlb21@pitt.edu

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I. INTRODUCTION: #METOO, RETALIATION, AND THE SIGNIFICANCE OF COWORKER REACTIONS

For over a year now, the #MeToo movement has spread like wildfire, galvanizing feminist legal scholars to reconsider how law should respond to sexual harassment in the workplace and to assess the potential for #MeToo to change workplace culture.[1] In the feminist legal scholarship considering #MeToo to date, less attention has been paid to how the movement and its fallout intersect with retaliation law than to the movement's incongruity with the substantive law of sexual harassment.[2] Given that the fear of retaliation is a primary reason for not confronting sexual harassment,[3] retaliation law necessarily plays an outsized role in shaping responses to sexual harassment.[4] This Article focuses on retaliation as a key site of inquiry in exploring the transformative potential of #MeToo.[5]

Although the growing strength of #MeToo suggests that social norms tolerating sexual harassment may be changing, the likelihood of negative reactions to sexual harassment disclosures remains high.[6]

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* Associate Dean for Research and Faculty Development, John E. Murray Faculty Scholar and Professor of Law, University of Pittsburgh School of Law.

1. *See* Lesley Wexler et al., *#MeToo, Time's Up, and Theories of Justice*, 2019 U. ILL. L. REV. 45, 47–48 (explaining that #MeToo caused a "cultural reckoning" and inspired efforts to "amplify and credit survivors' voices, seek accountability, change workplace practices, and encourage access to the legal system").
2. One notable exception is Nicole Buonocore Porter, *Ending Harassment by Starting with Retaliation*, 71 STAN. L. REV. ONLINE 49, 50 (2018) (arguing that prevention of retaliation should be the starting point for ending sexual harassment).
3. *Id.* (citing 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://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf [https://perma.cc/PAY2-WZG8]).
4. *See* EEOC TASK FORCE REPORT, *supra* note 3, at 16 (documenting fear of retaliation as a primary force suppressing reporting of sexual harassment).
5. *See infra* Part III.
6. *See* Stefanie K. Johnson et al., *Has Sexual Harassment at Work Decreased Since #MeToo?*, HARV. BUS. REV. (July 18, 2019), https://hbr.org/2019/07/has-sexual-harassment-at-work-decreased-since-metoo [https://perma.cc/EHG2-C7HY]

The psychological and social forces that make retaliation likely predate #MeToo.[7] The prevalence of retaliation reflects a common tendency to blame persons who identify themselves as victims of discrimination, a tendency that is enhanced by the belief in a just and meritocratic society.[8] One troubling finding in the social psychology literature on this phenomenon is that the inclination to blame persons who attribute negative outcomes to discrimination is not abated by reliable evidence that discrimination, in fact, occurred.[9] People ascribe negative qualities to individuals who attribute their failures to discrimination as opposed to some other hurdle, even when it is evident that discrimination occurred.[10] To the extent that #MeToo has bolstered the credibility of women complaining about sexual harassment, that shift is not likely to reduce retaliatory responses.[11] Indeed, as the #MeToo movement expands to push the boundaries of conventional understandings of sexual harms, retaliatory responses may become even more likely.[12] As socio-legal scholars have shown, reforms that deviate too far from prevailing understandings of what constitutes "discrimination" tend to provoke a backlash.[13]

Evidence suggests that backlash to #MeToo is already ascendant.[14] A recent poll conducted by National Public Radio found that more than 40% of people surveyed agreed with the statement that #MeToo has gone too far.[15] One indicator of a growing backlash can be found in the public response to the Senate hearings on the nomination of

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(reporting that negative backlash towards women in the workplace has increased since the #MeToo movement).

7. *See* EEOC TASK FORCE REPORT, *supra* note 3, at 16 (explaining, a year before the #MeToo movement, the prevalence of social and professional retaliation).
8. *See* Katie R. Eyer, *That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1309 (2012).
9. *See id.*
10. *See id.*
11. *See id.* (concluding that strong evidence of discrimination will not prevent negative reactions towards victims); *see also* Johnson et al., *supra* note 6 (finding that negative reactions towards women in the workplace have increased since #MeToo).
12. The controversy over the alleged encounter with Aziz Ansari is a case in point. *See* Katie Way, *I Went on a Date with Aziz Ansari. It Turned into the Worst Night of My Life*, BABE (Jan. 13, 2018), https://babe.net/2018/01/13/aziz-ansari-28355 [https://perma.cc/XMC2-PRLM].
13. *See* Eyer, *supra* note 8, at 1332.
14. *See infra* notes 15–18 and accompanying text.
15. Tovia Smith, *On #MeToo, Americans More Divided by Party than Gender*, NAT'L PUB. RADIO (Oct. 31, 2018, 5:00 AM), https://www.npr.org/2018/10/31/662178315/on-metoo-americans-more-divided-by-party-than-gender [https://perma.cc/SZ6C-NZST] (reporting results of National Public Radio poll finding that more than 40% of Americans surveyed said the movement had gone too far).

Brett Kavanaugh to the United States Supreme Court.[16] While reactions were highly polarized, they included pronounced hostility toward sexual assault accusers writ large.[17] #DefendOurMen became a mantra of some Kavanaugh supporters, who framed men as the victims of the #MeToo movement on a rampage to derail the careers of successful men with bright futures.[18]

As disclosures of sexual harassment continue to flood social media,[19] opportunities for negative reactions at work remain abundant.[20] It remains to be seen whether Title VII retaliation law is up to the task.[21] One commentator argued that despite a series of pro-plaintiff retaliation decisions by the Supreme Court in the first decade of the twenty-first century, more recent developments portend a judicial backlash in retaliation law in the lower courts.[22]

In highlighting the importance of retaliation law for the future of #MeToo, I do not intend to suggest that the retaliation claim has the potential to capture all, or even most, negative reactions to #MeToo disclosures at work. The limited scope of retaliation law necessarily leaves many #MeToo moments outside the law's protection.[23] Perhaps the most significant limitation is that a complaint of sexual harassment by someone who is not connected to the workplace is not protected activity under Title VII.[24] Many of the high-profile

16. *See* Eugene Scott, *Amid Allegations Against Kavanaugh, Worry About the Future of Boys and Men*, WASH. POST (Oct. 2, 2018, 1:54 PM), https://www.washingtonpost.com/politics/2018/10/02/amid-allegations-against-kavanaugh-worry-about-future-boys-men/ [https://perma.cc/S2X2-WCZ4].
17. *See generally id.* (reporting that reactions to Kavanaugh's nomination were split along political and gender lines, and that conservative men called for pushback against accusers' claims).
18. *See id.*
19. *#MeToo Floods Social Media with Stories of Sexual Harassment and Abuse*, CBS NEWS (Oct. 17, 2017, 11:57 AM), https://www.cbsnews.com/news/me-too-campaign-floods-social-media-sexual-harassment-abuse/ [https://perma.cc/TF98-SLDF].
20. *See* Alex Press, *Women Are Filing More Harassment Claims in the #MeToo Era. They're Also Facing More Retaliation*, VOX (May 9, 2019, 3:50 PM), https://www.vox.com/the-big-idea/2019/5/9/18541982/sexual-harassment-me-too-eeoc-complaints [https://perma.cc/PXH7-5DCX].
21. *Cf.* Alex B. Long, *Retaliation Backlash*, 93 WASH. L. REV. 715, 717–18 (2018) (discussing whether Title VII retaliation law is effective at protecting workplace retaliation).
22. *See id.* at 715, 717, 723–24, 726–27.
23. *Cf. id.* at 717–19 (discussing how the courts narrowly interpret Title VII retaliation law).
24. *See* Joshua Colangelo-Bryan, *"Title VII Retaliation Claims: What Constitutes Protected Activity?," New York Law Journal*, DORSEY (Mar. 9, 2004),

#MeToo disclosures were from women who were not employed at the site where they were sexually harassed, or were not sexually harassed by a person working for their employer.[25] For example, the Harvey Weinstein allegations that sparked outrage came from women who were not employed by the Weinstein Corporation at the time.[26] Similarly, many #MeToo reports about workplace harassment came from women who had long since left the place of employment where the abuse occurred.[27] This is not surprising because fear of retaliation prevents many women from speaking up about sexual harassment and other forms of discrimination, while they are still employed.[28]

Of course, Title VII's limited scope in covering only the employment setting in which the harassment occurred is not unique to the #MeToo setting.[29] Protection from retaliation has never extended to blacklisting by future employers.[30] The plaintiff in the Supreme Court's first sexual harassment case, Mechelle Vinson, experienced this first-hand when she was unable to find employment

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https://www.dorsey.com/newsresources/publications/2004/03/title-vii-retaliation-claims-what-constitutes-pr__ [https://perma.cc/U6RA-4747].

25. *See* Alex Johnson, *Judge Again Throws Out Ashley Judd's Sexual Harassment Claim Against Harvey Weinstein*, NBC NEWS (Jan. 9, 2019, 9:53 PM), https://www.nbcnews.com/storyline/harvey-weinstein-scandal/judge-again-throws-out-ashley-judd-s-sexual-harassment-claim-n957011 [https://perma.cc/B7GE-4JPE]; *see also* Ashley Louszko et al., *Rose McGowan Describes Alleged Rape by Harvey Weinstein, Her Thoughts on the Hollywood 'System'*, ABC NEWS (Jan. 30, 2018, 3:20 PM), https://abcnews.go.com/Entertainment/rose-mcgowan-describes-alleged-rape-harvey-weinstein-thoughts/story?id=52684109 [https://perma.cc/X5RV-EMTK].

26. *See* sources cited *supra* note 25.

27. *See* Suzy Strutner, *How to Report Sexual Harassment at a Previous Job*, HUFFINGTON POST (Dec. 2, 2017, 9:07 AM), https://www.huffpost.com/entry/how-to-report-sexual-harassment-at-old-job_n_5a2190ade4b03c44072d5077 [https://perma.cc/VDX2-B2YL].

28. *See* Maya Raghu, *We Can't Stop Sexual Harassment Without Addressing Retaliation*, NAT'L WOMEN'S L. CTR. (Jan. 23, 2018), https://nwlc.org/blog/we-cant-stop-sexual-harassment-without-addressing-retaliation/ [https://perma.cc/35TW-LM5L].

29. *See* Bryce Covert, *Actresses–and Millions of Other Workers–Have No Federal Sexual Harassment Protections*, NATION (Oct. 19, 2017), https://www.thenation.com/article/actresses-and-millions-of-other-workers-have-no-federal-sexual-harassment-protections/ [https://perma.cc/J3FQ-TJT9]; *cf.* Meritor Sav. Bank, F.S.B. v. Vinson, 477 U.S. 57, 63, 66 (1986) (holding that Title VII applies to sexual harassment by employers against employees).

30. *Cf.* Tanya Kateri Hernandez, *"What Not to Wear"—Race and Unwelcomeness in Sexual Harassment Law: The Story of Meritor Savings Bank v. Vinson*, *in* WOMEN AND THE LAW STORIES 277, 292–93 (Elizabeth M. Schneider & Stephanie M. Wildman eds., 2011) (discussing the story of Mechelle Vinson, who was "blacklisted in the banking industry" after she filed a sexual harassment suit against her employer).

in the banking industry after suing her employer, Meritor Savings Bank, for sexual harassment.[31] Although hardly a new problem, Title VII's limited reach may have broader repercussions as the path widens, through newer forms of mass communication, for calling out sexual harassment that is not tied to the accuser's current place of employment.[32]

But the importance of retaliation law in connection with the #MeToo movement transcends the law's scope of protection for the new strain of #MeToo disclosures.[33] #MeToo has sparked a cultural reckoning with sexual harassment that promises to spur more outspoken opposition to sexual harassment in the workplace;[34] and the beginnings of a #MeToo backlash signal that many of these challenges to sexual harassment at work will prompt retaliation in response.[35] Title VII's capacity to respond commensurately is of paramount importance to the strength of #MeToo and the movement's potential to spark increased opposition to sexual harassment at work.[36]

Of equal importance to protecting complainants is the expressive force of retaliation law in messaging and norm-setting about appropriate, non-retaliatory responses to sexual harassment complaints.[37] The fallout from #MeToo requires the law to grapple anew with questions about what kinds of reactions are retaliatory and what obligations employers have to encourage a non-retaliatory tone and to police negative reactions.[38] As Title VII law contends with these questions, employers will respond with their understanding of the law, sending signals about proper boundaries and incorporating their understandings into their workplace policies and training materials.[39]

One notable attribute of the #MeToo movement is that it has proceeded as an extra-legal channel for addressing sexual harms and seeking accountability.[40] Indeed, the movement stands as a scathing

31. *See id.* at 293.
32. *See supra* notes 19–31 and accompanying text.
33. *See infra* Part III.
34. *See supra* notes 1–12 and accompanying text.
35. *See supra* notes 13–18 and accompanying text.
36. *See infra* notes 455–63, 466–68 and accompanying text.
37. *See infra* notes 512–14 and accompanying text.
38. *See infra* notes 486–500 and accompanying text.
39. *See infra* notes 492–501, 505–06, 508, 513–14 and accompanying text.
40. *See* Catharine A. MacKinnon, *Where #MeToo Came From, and Where It's Going*, ATLANTIC (Mar. 24, 2019), https://www.theatlantic.com/ideas/archive/2019/03/

critique of law, its very strength serving as a stark indicator of the failure of law to eradicate sexual harassment.[41] The movement's echoes amplify critiques from within legal discourse, such as Tristin Green's recent missive, asking "Was Sexual Harassment Law a Mistake?"[42] Green faults legal doctrine for distorting and diluting the stories that women tell of sexual harassment,[43] as in the foundational case against Meritor Savings Bank in which Mechelle Vinson was forced to articulate her case as the story of one victim of one sexual harasser.[44] The institutional hierarchy that marginalized women in lower status positions, and enabled men such as the Vice President of the bank to pervasively abuse power, was obscured.[45] The court did not permit Mechelle Vinson to bring in the stories of other women harassed by the bank Vice President, Sidney Taylor, making her own story resemble a romance-gone-wrong, and eclipsing some of the more pernicious and institutionally ingrained elements of the abuse.[46] It is easier to discount women's stories when they appear aberrational[47]—and all the more so for women of color.[48] In the wake of sexual harassment law's failures,[49] #MeToo intervenes as both a corrective and a critique; its power residing in the collective, the "me *too*."[50]

Precisely because of its extra-legal position, #MeToo is more dependent on the law of retaliation than the scope of sexual harassment law for its continued strength.[51] Protecting the space for sharing stories and initiating conversations about sexual harassment may be more important than expanding the reach of what counts as actionable sexual harassment at work.[52] Ensuring this protection is of the utmost importance because the movement's power has been

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catharine-mackinnon-what-metoo-has-changed/585313/ [https://perma.cc/RVG9-WCVG].

41. *See infra* notes 42–50 and accompanying text.
42. *See* Tristan K. Green, *Was Sexual Harassment Law a Mistake? The Stories We Tell*, 128 YALE L.J. FORUM 152, 153–54 (June 18, 2018), https://www.yalelawjournal.org/forum/was-sexual-harassment-law-mistake [https://perma.cc/RVG9-WCVG].
43. *See id.* at 153.
44. *See id.* at 160–61.
45. *See id.* at 154–55.
46. *See id.* at 160.
47. *See id.* at 154.
48. *See* Alicia Sanchez Gill et al., *Women and Girls of Color Need Justice Too*, REWIRE NEWS (Jan. 14, 2019, 11:16 AM), https://rewire.news/article/2019/01/14/women-and-girls-of-color-need-justice-too/ [https://perma.cc/VMN7-6E8J].
49. *See supra* notes 23–30 and accompanying text.
50. *See* MacKinnon, *supra* note 40.
51. *See infra* notes 52–79 and accompanying text.
52. *See infra* notes 53–79 and accompanying text.

acquired through the telling of people's stories and in the collective opposition to sexual harassment it engenders, as the mover of norms.[53]

One type of retaliation in particular, coworker retaliation, has escaped the attention of #MeToo scholarship.[54] Already underdeveloped as a species of retaliation law, coworker retaliation has important implications for #MeToo for several reasons.[55] First, the Supreme Court's decision in *Vance v. Ball State University*[56] means that many employees with day-to-day supervisory responsibilities over other workers will be treated as coworkers and not as supervisors for the purposes of employer liability for retaliatory harassment.[57] Although *Vance*'s holding addressed employer liability for sexual harassment, its reasoning fully extends to retaliatory harassment as well.[58] After *Vance*, more retaliatory conduct that Title VII otherwise might have captured as retaliation by a supervisor will now fall under the murkier legal standards applicable to coworker retaliation.[59]

A second reason for focusing on coworker retaliation in relation to #MeToo is that coworker reactions are an important yet often overlooked influence on both the targets of sexual harassment and the harassers.[60] Having the support of coworkers greatly increases the likelihood that a victim will report incidents of harassment.[61] Conversely, a lack of coworker support can make employees more

53. *See* MacKinnon, *supra* note 40.
54. *See infra* Part II.
55. *See infra* notes 56–79 and accompanying text.
56. Vance v. Ball State Univ., 570 U.S. 421, 424 (2013) (holding "that an employee is a 'supervisor' for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim").
57. *See id.* at 431.
58. *See id.*
59. *See id.*
60. *See infra* notes 61–79 and accompanying text.
61. *See* Naomi Schoenbaum, *Towards a Law of Coworkers*, 68 ALA. L. REV. 605, 609, 621–24 (2017) (discussing the importance of coworker support for employee willingness to report misconduct and harassment in the workplace); *see also* Shankar Vedantam, *Why Now?*, NAT'L PUB. RADIO (July 27, 2018, 6:16 PM), https://www.npr.org/templates/transcript/transcript.php?storyId=633199277 [https://perma.cc/T4BV-2NRS] (interviewing political scientist Timur Kuran about the phenomenon of "preference falsification"—the belief that your experience runs counter to public opinion—and psychology professor Betsy Paluck on "social proof"—looking at reactions to persons who have spoken as precedent for what would happen if you did—in exploring the question of why women do and do not speak up about sexual harassment and abuse).

vulnerable to harassment and more likely to be harassed.[62] For the potential harasser, the perception that they have coworker support for their conduct is a significant factor in their likelihood of engaging in sexual assault and harassment.[63] When coworkers support the harasser and react negatively to sexual harassment disclosures, it contributes to a workplace culture that normalizes harassment and chills reporting.[64]

Coworker retaliation also has pronounced harms on the persons targeted.[65] Although retaliation law prioritizes retaliation by supervisors,[66] coworkers can be an equally powerful force in establishing cultures of silence and discrimination.[67] A recent article by Catherine Albiston and Tristin Green uses the term "social closure discrimination," drawing on Max Weber's theory of social closure,[68] to explain the discriminatory harms that result when people draw boundaries and construct identities to bolster their ingroup, and then accumulate resources and status by excluding others.[69] Albiston and Green critique the substantive law of employment discrimination for its failure to capture the phenomenon of social closure at work.[70] A similar phenomenon results when people side with harassers over complainants and close ranks around the accused.[71] Retaliation, as much as discrimination, can reinforce ingroup identities, and coworkers, no less than supervisors, can enforce social closure.[72] Even without formally delegated power, coworkers can close ranks and exclude others from key informal networks, which are integral to

62. *See* Schoenbaum, *supra* note 61, at 625.
63. *Cf.* Noah D. Zatz, *Beyond the Zero-Sum Game: Toward Title VII Protection for Intergroup Solidarity*, 77 IND. L.J. 63, 69–78 (2002) (discussing the importance of coworkers in preventing or encouraging harassment and discrimination).
64. *See id.* at 69–75 (explaining the consequences of coworkers supporting a harasser in the workplace).
65. *See infra* notes 66–75 and accompanying text.
66. *See* Long, *supra* note 21, at 719–23.
67. *See* Zatz, *supra* note 63, at 69–75.
68. Catharine Albiston & Tristin K. Green, *Social Closure Discrimination*, 39 BERKELEY J. EMP. & LAB. L. 1, 2, 12 (2018).
69. *See id.* at 4–22.
70. *See id.* at 23–34.
71. *See* Zatz, *supra* note 63, at 69–75; *see* Susan Chira & Catrin Einhorn, *How Tough Is It to Change a Culture of Harassment? Ask Women at Ford*, N.Y. TIMES (Dec. 19, 2017), https://www.nytimes.com/interactive/2017/12/19/us/ford-chicago-sexual-harassment.html [https://perma.cc/68LF-3BBK] (describing women's allegations that they were "mocked, dismissed, threatened and ostracized" for complaining, called a "snitch bitch," and accused of "raping the company").
72. *See* Zatz, *supra* note 63, at 69–75; *see* Chira & Einhorn, *supra* note 71.

job success.[73] A *New York Times* magazine article on the saga of sexual harassment at a Ford motor plant in Chicago offers a poignant illustration of how retaliation and sexual harassment intertwine to create social closure, largely by coworkers.[74] Women who worked at the plant, many of whom were women of color, suffered protracted and escalating harassment that was both sexually (and often racially) explicit and retaliatory, enforcing a culture of silence and submission for those who stayed.[75]

The use of social media to spread #MeToo disclosures makes coworker reactions all the more likely to affect workplace culture.[76] Coworkers may be especially likely to see and react to social media disclosures, sometimes supportively, sometimes negatively, because of the sprawling connections on Facebook, Twitter, and other platforms that draw acquaintances from work into each other's social media orbits.[77] What may begin as venting on social media can cross over into traditional channels of opposition to sexual harassment at work.[78] The connectedness of colleagues through social media creates an integrated web of knowledge and social norms that can easily spill over into the workplace.[79]

For all of these reasons, #MeToo is on a collision course with the nascent law of coworker retaliation.[80] Despite its significance to workplace culture, coworker retaliation has long been the poor stepchild of Title VII retaliation law.[81] The doctrine on coworker retaliation is less developed and rarely the subject of study.[82] This Article takes a closer look at coworker retaliation and considers how emerging lessons from #MeToo might be productively brought to

73. *See* Albiston & Green, *supra* note 68, at 9.
74. *See* Chira & Einhorn, *supra* note 71.
75. *See id.*
76. *See infra* notes 77–79 and accompanying text.
77. *See generally* Lisa A. Mainiero & Kevin J. Jones, *Workplace Romance 2.0: Developing a Communication Ethics Model to Address Potential Sexual Harassment from Inappropriate Social Media Contacts Between Coworkers*, 114 J. BUS. ETHICS 367, 368 (2013) ("The use of new social media technologies such as Facebook, LinkedIn, and Twitter . . . have created situations where some employees complain another employee may have created a hostile environment for them outside the office which then impacts their behavior inside the office."); *see generally* Christopher E. Parker, *Rising Tide of Social Media*, 58 FED. LAW. 14, 14 (2011) (explaining the vast number of individuals who communicate on social media platforms).
78. *See* Mainiero & Jones, *supra* note 77, at 368.
79. *See id.*
80. *See supra* notes 54–79 and accompanying text.
81. *See infra* Part II.
82. *See infra* Part II.

bear on the development of Title VII law as applied to coworker retaliation for opposition to sexual harassment.[83] Because of the role coworker reactions play in individual decisions about whether to speak up about personal experience with sexual harassment,[84] retaliation law's response to coworker retaliation has an integral relation to the #MeToo movement.[85] This Article explores several fault lines in the doctrine governing employer responsibility for coworker retaliation that may affect—and potentially hinder—the transformative impact of #MeToo in the workplace.[86]

II. UNCERTAINTIES AND GAPS IN TITLE VII'S COVERAGE OF COWORKER RETALIATION

Title VII has long been in need of an overhaul of its framework for addressing coworker retaliation.[87] While other aspects of retaliation have given rise to sustained attention and Supreme Court decisions, the law governing coworker retaliation remains underdeveloped.[88] Even without #MeToo, the *Vance* decision, which narrows the category of "supervisor" and leaves more retaliatory actions in the realm of coworker retaliation, harkens a shift in the paradigmatic retaliation case.[89] #MeToo makes lingering questions about the law's treatment of coworker retaliation all the more pressing. This Article takes a closer look at three doctrines that pose difficulties for Title VII's applicability to coworker retaliation: the standard of employer liability;[90] the extent of severity required to reasonably chill a complainant;[91] and the parsing of retaliatory causation from sex-based motivation.[92] This section considers each issue in turn.[93]

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83. *See infra* Parts II–III.
84. *See* Schoenbaum, *supra* note 61, at 621–22.
85. *See infra* Part III.
86. *See infra* Part II.
87. *See* Donna Lenhoff, *The #MeToo Movement Will Be in Vain if We Don't Make These Changes*, WASH. POST (Jan. 25, 2018), https://www.washingtonpost.com/opinions/the-metoo-movement-will-be-in-vain-if-we-dont-make-these-changes/2018/01/25/5add95a8-0090-11e8-8acf-ad2991367d9d_story_html [https://perma.cc/FVT3-MGPS].
88. *See* Thompson v. N. Am. Stainless LP, 562 U.S. 170, 172 (2011); *see* Crawford v. Metro. Gov't of Nashville, 555 U.S. 271, 279 (2009); *see* CBOCS W. v. Humphries, 553 U.S. 442, 452 (2008); *see* Gomez-Perez v. Potter, 553 U.S. 474, 490 (2008); *see* Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53, 70 (2006).
89. Vance v. Ball State Univ., 570 U.S. 421, 450 (2013).
90. *See* discussion *infra* Section II.A.
91. *See* discussion *infra* Section II.B.
92. *See* discussion *infra* Section II.C.
93. *See* discussion *infra* Sections II.A–C.

A. Employer Liability for Coworker Retaliation

Notwithstanding the Supreme Court's attention to retaliation cases in recent years,[94] employer responsibility for retaliatory actions by coworkers remains a muddle.[95] Clarity about employer liability for coworker retaliation is important not only for litigating individual cases, but also for incentivizing employers to prevent retaliatory actions and promote workplace cultures that enable employees to oppose discrimination.[96] Without guidance from the Supreme Court, lower courts have varied greatly in how they apply Title VII to retaliation by coworkers.[97]

Among the more skeptical courts, the Fifth Circuit stands out.[98] It has long resisted an interpretation of Title VII that would protect complainants from retaliation by coworkers.[99] In order for coworker retaliation to give rise to an actionable claim, the Fifth Circuit requires a plaintiff to prove that the coworker's actions were undertaken "in furtherance of the employer's business."[100] To meet this standard, there must be a "direct relationship" between the retaliatory acts by coworkers and the employer's business interests.[101] Coworker retaliation must serve the employer's business in order for the employer to be responsible for taking corrective action.[102]

Both the standard itself and the way courts apply it are troubling in the #MeToo era of escalating reports of sexual harassment.[103] The Fifth Circuit's standard posits a sharp distinction between retaliation that does and does not serve the employer's business interests.[104] The difficulty is not just that there is no bright line between these two poles, but that there is no line whatsoever.[105] Any action that discourages employees from complaining about sexual harassment can be said to serve the interest of the employer in maintaining a

94. *See, e.g.*, Michael J. Zimmer, *A Pro-Employee Supreme Court?: The Retaliation Decisions*, 60 S.C. L. REV. 917, 923 (2009).
95. *See infra* notes 100–36, 153–242 and accompanying text.
96. *See infra* notes 285–90 and accompanying text.
97. *See infra* notes 100–36, 153–242 and accompanying text.
98. *See infra* notes 99–151 and accompanying text.
99. *See* Hernandez v. Yellow Transp., Inc., 670 F.3d 644, 657 (5th Cir. 2012).
100. *Id.* (quoting Long v. Eastfield Coll., 88 F.3d 300, 306 (5th Cir. 1996).
101. *Id.*
102. *See id.*
103. *See infra* notes 104–13 and accompanying text.
104. *See Hernandez*, 670 F.3d at 657.
105. *See id.*

placid workforce that tolerates whatever sexual misconduct is encountered.[106] The employer strategy of "divide and conquer" is a tried and true tactic of employers seeking to remain unconstrained by unions and other collective action demands.[107] At least in the short run, chilling complaints may serve the employer's business interests by enforcing loyalty to the organization rather than to an employee's contrary expectations or ideals about what employees should have to tolerate.[108] When troublemakers are silenced, the employer can proceed with business as usual.[109] The Fifth Circuit rule misunderstands how retaliatory workplace dynamics of divisiveness may, at least in the short term, serve profit-making goals, and that employers may benefit from inter-group dissension and conflict among workers.[110]

As courts have applied the Fifth Circuit's rule, it is not enough for plaintiffs to argue that retaliation serves the employer's interest in maintaining a placid and divided workforce.[111] Something more is required, and it is not clear what connections between the retaliatory acts and the employer's business interests could possibly suffice.[112] The Fifth Circuit's liability standard appears to import a principle of agency law approximating scope of employment.[113] Adopting scope of employment for coworker retaliation, however, sets an insurmountable hurdle.[114] Under the Supreme Court's discussion of the scope of employment doctrine in *Burlington Industries, Inc. v. Ellerth*,[115] scope of employment is a narrow construct, excluding even supervisors' sexual harassment as the equivalent of a frolic and detour.[116] Claims for coworker retaliation would fare no better under

106. *See id.*
107. *See* Eric A. Posner et al., *Divide and Conquer*, 2 J. LEGAL ANALYSIS 417, 438–40 (2010).
108. *See* Elizabeth Wolfe Morrison & Frances J. Milliken, *Organizational Silence: A Barrier to Change and Development in a Pluralistic World*, 25 ACAD. MGMT. REV. 706, 719 (2000).
109. *See id.* at 716–17.
110. *See Hernandez*, 670 F.3d at 657.
111. *See* Green v. Trimac Transp. S., Inc., No. 1:10-CV-444, 2012 WL 12893293, at *16–17 (E.D. Tex. Sept. 12, 2012); *see* Sapp v. Potter, No. 1:07-CV-00650, 2012 WL 3890259, at *10–11 (E.D. Tex. July 26, 2012), *aff'd* Sapp v. Donohoe, 539 F. App'x 590 (5th Cir. 2013).
112. *See Green*, 2012 WL 12893293, at *16–17; *see Sapp*, 2012 WL 3890259, at *10–11.
113. *See Hernandez*, 670 F.3d at 657.
114. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 756–57 (1998).
115. *See id.*
116. *See id.*

this understanding of the scope of employment.[117] As long as the retaliating coworker is not acting in an agency capacity for the employer, it is difficult to fathom how a plaintiff could show that the retaliation directly furthers the employer's business in this sense.[118]

The Supreme Court's 2013 decision in *Vance v. Ball State University* makes threading the Fifth Circuit's needle all the more difficult.[119] In *Vance*, the Court restricted the definition of a supervisor for the purposes of applying the employer liability framework adopted in *Ellerth* for sexual harassment by a supervisor.[120] Only persons with authority to take a tangible employment action against the plaintiff qualify as supervisors;[121] it is not enough to have day-to-day control over the plaintiff's work assignments and job conditions.[122] Although *Vance* considered this question in the context of employer liability for racial harassment,[123] the Court's reasoning is equally applicable to the question of who qualifies as a supervisor for purposes of retaliation law.[124]

In the Fifth Circuit, the combination of *Vance* and the "must serve the employer's business" rule is deadly for plaintiffs bringing claims for coworker retaliation.[125] By narrowing the category of "supervisor" in a retaliation case, the employer liability standard for coworker harassment will apply to a broad swath of retaliatory conduct.[126] Not only does *Vance* mean that the legal standards governing coworker retaliation will govern a larger class of cases, it also interacts with the Fifth Circuit's liability standard for coworker retaliation in troubling ways, further winnowing the chances for meeting the further-the-employer's business standard.[127]

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117. *See* Elizabeth A. Cramer, *Taking Matters into Their Own Hands: Retaliatory Actions by Coworkers and the Fifth Circuit's Narrow Standard for Employer Liability*, 82 U. CIN. L. REV. 591, 600–01 (2014).
118. *See id.* at 601.
119. *See* Vance v. Ball State Univ., 570 U.S. 421, 431–32 (2013).
120. *See id.*
121. *See id.*
122. *See id.* at 449–50.
123. *See id.* at 425.
124. *See* Elizabeth Lee, *Simplicity v. Reality in the Workplace: Balancing the Aims of* Vance v. Ball State University *and the Fair Employment Protection Act*, 67 HASTINGS L.J. 1769, 1773–74, 1786 (2016).
125. *See infra* notes 126–36 and accompanying text.
126. *See Vance*, 570 U.S. at 453–54, 466–68 (Ginsburg, J., dissenting).
127. Hernandez v. Yellow Transp., Inc., 670 F.3d 644, 657 (5th Cir. 2012); *see also* Lakisha A. Davis, *Who's the Boss? A Distinction Without a Difference*, 19 BARRY L. REV. 155, 167 (2013) (considering when the harasser is not a supervisor, "then an

One post-*Vance* decision by the Fifth Circuit, *Spencer v. Schmidt Electric Co.*, traces the narrow path left for challenging retaliation by coworkers.[128] The plaintiff, an apprentice on a job site, was racially harassed by two foremen who oversaw his work.[129] In addition to making repeated racist comments, the foremen texted the plaintiff a picture of a white Santa Clause wearing a white hood, holding a noose, and standing in front of a burning cross.[130] After the plaintiff complained to his union steward, the foremen cornered him in a room, blocked him from leaving and intimidated him, and asked him whom else he had told about the offending text message.[131] The appellate court did not address whether the incident met the standard of severity required for actionable retaliation (the district court held it did not) because even if it did, the employer was not liable for the foremen's actions because they did not act as agents of the employer.[132] Although the foremen had day-to-day supervisory control over the plaintiff and could recommend his dismissal, they did not have the ultimate authority to take tangible employment actions and so they were not considered "supervisors" under *Vance*.[133] Because the foremen lacked the power to hire or fire the plaintiff, the court reasoned their conduct was not in furtherance of the employer's interest.[134] The court did not address whether the employer might be held responsible under some other fault-based standard, but the court's reasoning appeared to foreclose that result.[135] As the court explained the law, a plaintiff "must establish that *the employer* was effectively the intimidator, and 'that the desire to retaliate was the but-for cause of the challenged employment action.'"[136]

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employee's only recourse is to prove the employer's liability under the negligence standard").

128. *See* Spencer v. Schmidt Elec. Co., 576 F. App'x. 442, 447–50 (5th Cir. 2014).

129. *Id.* at 444.

130. *Id.* The plaintiff also saw nooses left around the work site, was mocked about the quality of his work, and was required to repeat tasks for no apparent reason. *Id.*

131. *Id.* at 444, 449.

132. *See id.* at 448–50.

133. *See id.* at 447–48.

134. *See id.* at 449–50.

135. *See id.* at 450.

136. *Id.* at 449 (emphasis added) (citing Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 352 (2013)). One judge dissented in regard to the retaliation claim on the grounds that the majority was too quick to say that the foremen were not supervisors as a matter of law because the issue appeared to be a question of fact. *See id.* at 452–53, 455 (Graves, J., concurring in part and dissenting in part).

The combination of applying *Vance*'s definition of a supervisor to retaliation law,[137] and then limiting the class of persons whose retaliatory acts may occur within the scope of employment to supervisors,[138] creates a *de facto* bar to employer liability for retaliatory acts by coworkers.[139] "[A]ny alleged retaliation must be by the employer,"[140] the court proclaimed in *Spencer*, explaining that employers are only liable "in accordance with common law agency principles, for the acts of employees committed in furtherance of the employer's business."[141] With "agent" defined narrowly to conform to the definition of a supervisor empowered to take tangible employment action,[142] the court's reasoning shows how *Vance*, combined with the requirement that the retaliator act in furtherance of the employer's business, sets an insurmountable hurdle to establishing employer liability for coworker retaliation.[143]

A recent decision from a district court in the Fifth Circuit put it even more starkly: "The actions of ordinary employees are not imputable to" the employer.[144] Instead, there must be "a direct relationship" between the retaliatory act and the employer's business.[145] Predictably, the retaliation claim failed in that case because the plaintiff could not show that the coworker retaliation occurred in furtherance of the employer's business, because the coworker did not act as an agent of the employer.[146] The circularity of the rule did not deter the court from applying it.[147]

The Fifth Circuit's liability standard reflects a narrow, formalistic understanding of organizational power, holding employers accountable only for abuses of power by persons with the delegated authority to take tangible employment actions, such as hiring and

137. Vance v. Ball State Univ., 570 U.S. 421, 431–32 (2013).
138. *See Spencer*, 576 F. App'x. at 447–50.
139. *See supra* notes 113–24 and accompanying text.
140. *Spencer*, 576 F. App'x at 449.
141. *Id.* (quoting Long v. Eastfield Coll., 88 F.3d 300, 306 (5th Cir. 1996)).
142. *See id.* at 448–50.
143. *See supra* notes 133–42 and accompanying text.
144. Beard v. Yamane, No. 3:14-CV-2828, 2015 WL 1525076, at *5 (N.D. Tex. Feb. 2, 2015) (plaintiff's retaliation claim failed where plaintiff did not allege that the retaliating coworkers "were anything other than ordinary employees or that their alleged retaliatory harassment was committed in furtherance of [defendant's] business").
145. *Id.* (quoting Long v. Eastfield Coll., 88 F.3d 300, 306 (5th Cir. 1996)).
146. *See id.*
147. *See id.*

firing.[148] Other abuses of power are viewed as separate from the employer's interests.[149] This approach rejects any potentially broader fault-based liability standards, leaving vicarious liability as the only possible path to employer liability.[150] This approach recognizes formal delegations of tangible employment actions as the only form of power that matters for employer accountability and neglects the importance of both formal and informal power over day-to-day responsibilities and the workplace environment.[151]

Although the Fifth Circuit is the most restrictive in its approach to coworker retaliation, other circuits have also imposed tougher limits on employer liability for coworker retaliation than they apply to sexual harassment by coworkers, albeit with some uncertainty about the extent of the difference.[152] The Eighth Circuit's evolution in its treatment of coworker retaliation illustrates the difficulties courts have faced in calibrating an approach to employer liability for coworker retaliation.[153] Prior to the Supreme Court's decision in *Burlington Northern & Santa Fe Railway Co. v. White*,[154] the Eighth Circuit refused to recognize a retaliation claim based on coworker harassment, on the grounds that retaliation by coworkers could not amount to a materially adverse employment action.[155] After the *Burlington Northern* decision, in which the Supreme Court held the materially adverse doctrine under § 703 of Title VII to be inapplicable to a retaliation claim under § 704,[156] the Eighth Circuit changed course. The court ruled that coworker retaliation may be actionable if it is sufficiently severe to chill a reasonable employee from complaining but applied a different employer liability standard than the negligence standard governing coworker harassment claims.[157]

For coworker retaliation to be actionable, the Eighth Circuit explained, the plaintiff must prove that the employer's failure to take reasonable corrective action was because of the plaintiff's participation in the protected activity.[158] In the case announcing this rule, the plaintiff, who was white, was racially harassed for having

148. *See* Spencer v. Schmidt Elec. Co., 576 F. App'x 442, 449–50 (5th Cir. 2014).
149. *See id.* at 449.
150. *See id.*
151. *See id.*
152. *See infra* notes 153–96 and accompanying text.
153. *See infra* notes 154–57 and accompanying text.
154. Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006).
155. *See* Manning v. Met Life, 127 F.3d 686, 692–93 (8th Cir. 1997).
156. *See Burlington N.*, 548 U.S. at 57.
157. *See* Carpenter v. Con-Way Cent. Express, Inc., 481 F.3d 611, 618 (8th Cir. 2007).
158. *See id.* at 619.

married a black woman.[159] After he complained about the harassment, and after he testified in a racial harassment case brought by an African American coworker, a white coworker retaliated against him.[160] The court granted summary judgment to the employer, reasoning that because the plaintiff could not show that the employer's failure to respond to the coworker's harassing conduct was motivated by the plaintiff's protected conduct, the employer could not be held liable for the coworker's retaliation.[161] The difference between this rule for coworker retaliation and the standard of liability for coworker sexual harassment is apparent.[162] Employer liability for coworker harassment stems from the employer's failure to take appropriate corrective action once the employer is on notice of the harassment, with no requirement to prove that the employer's failure to respond was motivated by the plaintiff's protected class.[163] Employer liability for sexual harassment is grounded in a theory of negligence based on the employer's failure to reasonably respond once on notice of the harassment,[164] while the court's approach to coworker retaliation rests on a theory of intentional wrongdoing.[165]

Other circuits have also required some showing of employer intent or wrongdoing beyond mere negligence to support employer liability for coworker harassment.[166] A leading example is the Tenth Circuit's decision in *Gunnell v. Utah Valley State College*.[167] The plaintiff there alleged that she was sexually harassed by two individuals she worked for and then experienced retaliation for complaining, including sabotage of her work, worse assignments, and other unfair treatment by coworkers.[168] The district court instructed the jury that the plaintiff had the burden to prove that the employer's retaliatory actions constituted intentional discrimination.[169] The plaintiff challenged the instruction on appeal, arguing that it incorrectly foreclosed a retaliation claim predicated on coworker retaliation.[170] The Tenth Circuit agreed that coworker retaliation can

159. *See id.* at 614.
160. *See id.* at 614–15.
161. *See id.* at 614.
162. *See infra* notes 163–65 and accompanying text.
163. *See* Hawkins v. Anheuser-Busch, Inc., 517 F.3d 321, 338 (6th Cir. 2008).
164. *See* Burlington Indus., Inc. v. Ellerth, 542 U.S. 742, 759 (1998).
165. *See Carpenter*, 481 F.3d at 618.
166. *See infra* notes 167–74 and accompanying text.
167. Gunnell v. Utah Valley State Coll., 152 F.3d 1253 (10th Cir. 1998).
168. *See id*. at 1257.
169. *See id.* at 1263.
170. *See id.* at 1262.

be the basis for employer liability, but disagreed with the plaintiff's argument that the standard for employer liability in such cases is mere negligence.[171] The court explained that:

> [B]ecause harassment must be intentional on the part of the employer, we hold that an employer can only be liable for coworkers' retaliatory harassment where its supervisory or management personnel either (1) orchestrate the harassment or (2) know about the harassment and acquiesce in it in such a manner as to condone and encourage the coworkers' actions.[172]

The court's intent-based approach differs in two respects from a pure negligence standard: first, constructive knowledge of the retaliation is not enough,[173] and second, the employer's fault must exceed a mere failure to respond and reach the level of encouraging the coworkers' retaliatory actions.[174] A district court in the Tenth Circuit later described this liability standard as recognizing a Title VII claim for coworker retaliation "in a very limited context."[175]

A post-*Gunnell* district court decision from the Tenth Circuit reveals the distance between the "condone or encourage" standard and a pure negligence standard.[176] In *Ferguson v. Associated Wholesale Grocers, Inc.*,[177] after experiencing severe and persistent sexual harassment from a colleague at work, the plaintiff reported the sexual harassment to a supervisor.[178] The supervisor helpfully responded that he would help her out if she had sex with him.[179] Eventually, after the plaintiff pursued other channels, the employer investigated her allegations, found them substantiated, and fired the

171. *See id.* at 1264–66. The court's opinion, decided before *Burlington Northern*, first grappled with the question of whether coworker retaliation can ever be an adverse action, concluding that it may, if sufficiently severe. *See id*. at 1264 (citing Berry v. Stevinson Chevrolet, 74 F.3d 980, 986–87 (10th Cir. 1996)) (finding a coworker's initiation of a criminal complaint against the plaintiff, at management's direction, in retaliation for complaining about discrimination, was an adverse action).

172. *Id.* at 1265.

173. *See id.*

174. *See id.*

175. Farrier v. Nicholson, No. CIV-06-825-D, 2008 WL 1882848, at *10 (W.D. Okla. Apr. 24, 2008).

176. *See generally* Ferguson v. Associated Wholesale Grocers, Inc., 469 F. Supp. 2d 961, 971–72 (D. Kan. 2007).

177. *Id.* at 961.

178. *See id.* at 964.

179. *See id.*

harasser.[180] That was only the beginning of the plaintiff's ordeal, however.[181] When she returned to work after being placed on paid administrative leave,[182] she was harassed for having the harasser fired.[183] Her tires were slashed, she received threatening phone calls from inside the warehouse where she worked, and she was the subject of hostile epithets (including such gems as "'whore', 'bitch', 'slut' and 'liar'").[184] At one point, two cans of soda were thrown at her when she turned away, and one of them hit her in the back.[185] Aware of the retaliatory harassment, the employer offered to reassign her to a position outside the warehouse until things "settled down."[186] She did not want to be reassigned, however, and pressed the employer to investigate and take corrective action.[187] The employer instead offered to install a listening device on the plaintiff's home phone to try to intercept retaliatory phone calls.[188] The plaintiff declined this option too, choosing instead to install a call blocker to block calls from the number used to make the retaliatory phone calls.[189] Because the plaintiff did not know the identity of the retaliators (even the name calling was behind her back from a distance in the warehouse, and she could not see the perpetrators nor recognize their voices), the employer claimed that there was little it could do.[190] The employer did hold a meeting to reiterate its policy against retaliation, but it did not investigate or interview anyone to try to identify the retaliatory harassers.[191] Despite these failings, the court granted summary judgment to the employer on the retaliation claim.[192]

Applying the liability standard from *Gunnell*, the court explained that an employer is liable for coworker retaliation only when

180. *See id.* at 966–67.
181. *See id.* at 967.
182. *Id.* at 966. The employer placed the plaintiff—not the accused harasser—on administrative leave while it investigated her allegations. *Id.*
183. *See id.* at 967.
184. *Id.*
185. *Id.*
186. *Id.*
187. *See id.*
188. *See id.*
189. *See id.*
190. *See id.* at 967–68.
191. *See id.* at 968.
192. *Id.* at 971–72. However, the court denied the employer's motion for summary judgment on the sexual harassment claim for failure to establish the applicable affirmative defense because the plaintiff reported the harassment without any unreasonable delay. *Id.* at 970.

supervisory or management personnel either orchestrated the retaliation or knew about it and acquiesced so as to condone and encourage it.[193] The court rejected the plaintiff's theory of liability that the employer knew of the retaliation, failed to investigate, and "threw up [its] hands" because it did not already know the identity of the perpetrators.[194] Instead, the court found that the employer took enough responsive actions to dispel any inference that it condoned or encouraged the retaliation.[195] By rejecting mere negligence, the "encourage or condone" standard effectively demands a showing of wrongdoing akin to intentionality.[196]

Not all courts explicitly treat coworker retaliation more stringently than coworker harassment, however, in marking the boundaries of employer liability.[197] The courts most receptive to coworker retaliation claims borrow the familiar "knew or should have known" negligence-based standard from coworker sexual harassment cases and extend it to cases involving retaliation by coworkers.[198] These courts justify this choice in terms of the similarity between the two forms of coworker misconduct.[199] An influential case from the Sixth Circuit announced its decision to hold employers liable for failing to take reasonable remedial action in response to known retaliatory harassment in a case that revealed the blurriness of the line separating coworker retaliation from coworker harassment.[200] In the oft-cited case of *Hawkins v. Anheuser-Busch*, three women claimed they were sexually harassed by the same male coworker, and one of them, along with a fourth woman, sued for retaliation based on retaliatory conduct by the same coworker.[201] The facts stand out because of the virulence of both the sexual harassment and the subsequent retaliation.[202]

193. *Id.* at 971.
194. *Id.* at 971–72.
195. *See id.* at 971. The court cited the employer's actions of offering to install a phone tracking device, offering to transfer her out of the warehouse, calling a meeting to inform employees of its policy against retaliation, viewing the security tapes to, unsuccessfully, try to ascertain who threw the soda cans, and granting the plaintiff a leave of absence after the soda incident. *Id.*
196. *Id.*; *see also supra* notes 164–65 and accompanying text.
197. *See infra* notes 198–217 and accompanying text.
198. *See infra* notes 214–28 and accompanying text.
199. *See infra* notes 225–36 and accompanying text.
200. *See* Hawkins v. Anheuser-Busch, Inc., 517 F.3d 321, 347 (6th Cir. 2008).
201. *Id.* at 326. Although they filed suit under Ohio's antidiscrimination statute, the court borrowed from Title VII, noting that the state statute tracked Title VII. *Id.* at 332.
202. *See id.* at 327–44.

The coworker was a serial sexual harasser, accosting and lewdly propositioning multiple women.[203] After one of the women reported his conduct and it was under investigation, someone set fire to her car.[204] She suspected it was the harasser and reported it to the employer.[205] The employer never investigated the car fire, however, and instead faulted the woman for accusing her male coworker of setting fire to the car without proof that he did it.[206] Meanwhile, the employer's sexual harassment investigation determined that the coworker sexually harassed two of the women.[207] Nevertheless, the employer took no disciplinary action against him at that time, ostensibly because, when the employer previously attempted to fire him for prior sexual harassment, the harasser was granted reinstatement after filing a grievance with the union.[208] Even though the employer's own sexual harassment investigator found that the more recent allegations of sexual harassment likely occurred, the company told the complaining woman that it could not "substantiate" her allegations.[209] Eventually, after more women came forward with similar allegations, the coworker was finally terminated for sexual harassment, and the union grievance committee upheld the termination.[210] Soon after the harasser was fired, one of the women had gasoline poured into her basement and her house set on fire.[211] At that point, an investigation began into the two fires (the car fire and the house fire).[212] While that investigation was underway, the coworker, who was fired for sexual harassment, shot his girlfriend and killed himself.[213]

The Sixth Circuit held that an employer may be liable for "manifest[] indifference or unreasonableness" in response to

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203. *Id.* at 327–31.
204. *Id.* at 329.
205. *Id.*
206. *Id.*
207. *Id.* at 338.
208. *Id.* at 344.
209. *Id.* at 329.
210. *Id.* at 331. One of the supervisors told the investigator that the alleged harasser's "primary target is single black women." *Id.* Perhaps that explains why it took so many women complaining about the coworker's sexual harassment to get him fired. *Id.* at 327–28. Catharine MacKinnon famously said it typically takes three women claiming sexual harassment by the same person to be believed. MacKinnon, *supra* note 40. Perhaps it takes even more when the women are women of color. *See id*.
211. *Hawkins*, 517 F.3d at 331.
212. *Id.*
213. *Id.*

coworker retaliation of which it knew or should have known.[214] Although the court insisted that this was not a "mere negligence" standard, it analogized employer fault for coworker retaliation to the standard of liability for coworker sexual harassment.[215] The obligation to avoid manifest indifference and unreasonableness requires an employer response that is reasonably calculated to end the retaliation.[216] In the case at hand, the company's failure to investigate the plaintiff's charge, that the coworker had set fire to her car after she reported him for sexual harassment, satisfied the standard and gave rise to actionable retaliation.[217]

Other circuit courts too have looked to the liability standard for coworker harassment to formulate the rule for employer liability in coworker retaliation cases.[218] An early adopter, the Second Circuit first announced this rule in a case involving coworker retaliation for racial harassment, *Richardson v. New York State Department of Corrections*.[219] The coworkers' retaliatory acts in that case included putting hair in the complainant's food, placing manure in her parking space, shooting rubber bands at her, and vandalizing her car.[220] The employer responded flippantly to the plaintiff when it learned of these actions, suggesting that she try mediation and telling her that attitudes are hard to change.[221] The court denied the employer's motion for summary judgment on the retaliation claim, holding that unchecked retaliatory coworker harassment, if severe enough, is actionable under the same standard of employer liability that governs coworker harassment.[222]

The Third Circuit also regards coworker harassment as the model for employer liability for coworker retaliation.[223] In an influential case recognizing coworker retaliation claims under Title VII, *Jensen v. Potter*, the court reversed the district court's decision that

214. *Id.* at 338 (quoting Blankenship v. Parke Care Ctrs., Inc., 123 F.3d 868, 873 (6th Cir. 1997)). The Sixth Circuit reversed the grant of summary judgment for two of the plaintiffs' sexual harassment claims. *Id.* at 327.

215. *Id.* at 338.

216. *See id.* at 342–43.

217. *Id.* at 349. However, the employer's prompt investigation of the house fire warranted summary judgment for the employer on that plaintiff's retaliation claim. *Id.*

218. *See infra* notes 219–28 and accompanying text.

219. Richardson v. N.Y. State Dep't of Corr., 180 F.3d 426, 441 (2d Cir. 1999).

220. *Id.* at 446–47.

221. *Id.* at 447.

222. *Id.* at 446.

223. *See* Jensen v. Potter, 435 F.3d 444, 448–51 (3d Cir. 2006), *abrogated on other grounds by* Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006).

coworker retaliation did not violate Title VII.[224] While noting a split in the circuits on the issue, the court sided with the majority that have recognized a claim for retaliatory harassment.[225] The court saw no reason for applying a higher standard of employer liability to coworker retaliatory harassment than courts apply to coworker sexual harassment, which it understood to be grounded in a theory of employer negligence.[226] Numerous courts have followed suit and, after considering the uncertain state of the law,[227] have settled upon the "knew or should have known" negligence standard for coworker retaliation.[228]

The negligence-only courts have a better understanding of the relationship between retaliation and discrimination and the implications for employer liability. Courts applying a higher standard of liability to coworker retaliation than to coworker harassment ignore the slipperiness of the line separating retaliatory harassment from sexual (and other forms of discriminatory) harassment.[229] A recent district court case, *Parra v. City of White Plains*, illustrates how sexual harassment and retaliation by coworkers can intertwine to give rise to the challenged conduct.[230] In that case, a Hispanic female police officer claimed that she was sexually harassed by two fellow officers.[231] Her complaints were followed by a substantial amount of negative harassment by other officers, including gender-specific name-calling and threats.[232] The facts portray a hostile reaction to her sexual harassment complaint that was inextricably tied to her being *a woman* who complained about sexual harassment by men on the force.[233] Where retaliatory

224. *Id.* at 454.
225. *Id.* at 448.
226. *Id.* at 452–53.
227. *See* cases cited *infra* note 228.
228. *See* Noviello v. City of Boston, 398 F.3d 76, 95 (1st Cir. 2005); *see* Madeja v. MPB Corp., 821 A.2d 1034, 1044–45 (N.H. 2003) (expressing disagreement with *Gunnell v. Utah Valley State College* and finding no justification for imposing a higher standard for coworker retaliation than for coworker harassment).
229. *See infra* notes 230–36 and accompanying text.
230. *See* Parra v. City of White Plains, 48 F. Supp. 3d 542, 547 (S.D.N.Y. 2014).
231. *Id.* at 547.
232. *Id.* at 549. Gender-specific insults frequently appear in retaliatory harassment against women who report sexual harassment. *See, e.g.*, Knox v. Indiana, 93 F.3d 1327, 1335 (7th Cir. 1996) (finding that plaintiff's coworkers called plaintiff a "fucking bitch" for reporting sexual harassment). *See generally* Flockhart v. Iowa Beef Processors, Inc., 192 F. Supp. 2d 947, 967 (N.D. Iowa 2001) (concluding that the terms "'slut,' 'whore,' 'bitch,' and a 'cunt'" are gender-based insults).
233. *See Parra*, 48 F. Supp. 3d at 547–49.

and discriminatory reasons intertwine to motivate a coworker's hostile treatment of the plaintiff, the same underlying conduct can form the basis for both a retaliation claim and a harassment claim.[234] Neither the court nor the employer will likely be able to accurately parse and apportion the retaliatory and discriminatory underpinnings of a particular hostile act.[235] The impossibility of the task warrants imposing the same obligation on employers to respond to coworker retaliation as they are required to do in responding to sexual harassment by coworkers.[236]

Even when negligence is the standard used for determining employer liability for coworker retaliation, uncertainty remains about how the standard applies to retaliation claims specifically.[237] One issue courts are likely to face in coworker retaliation claims based on a negligence theory, is how to evaluate whether the employer had notice of the retaliation.[238] What constitutes notice of coworker retaliation, and who must receive it?[239] Even for coworker sexual harassment, imputing notice to the employer can be tricky.[240] Some courts require notice to come through the employer's official anti-harassment policy.[241] Others require notice to be directed to a person who meets the definition of a supervisor under *Vance*, rather than to persons who are mere coworkers.[242] But modeling how notice is handled for coworker sexual harassment may not chart the best path

234. *See* Rhonda Reaves, *Retaliatory Harassment: Sex and the Hostile Coworker as the Enforcer of Workplace Norms*, 2007 MICH. ST. L. REV. 403, 429 (discussing how conduct can be a form of both retaliation and harassment).

235. *See id.* at 405–07, 429–31.

236. *See id.* at 405–07.

237. *See infra* text accompanying notes 238–46.

238. *See* Thomas J. Hook, Jr., *Defining Employer Liability in Sexual Harassment and Title VII Retaliation Claims: The Supreme Court Creates the Same Problem Twice*, 13 SUFFOLK J. TRIAL & APP. ADVOC. 121, 135 (2008).

239. *Cf.* Noviello v. City of Boston, 398 F.3d 76, 96–97 (1st Cir. 2005) (concluding that there was evidence of actual notice where plaintiff complained to persons defined as "senior" and "high-level" supervisors and the deputy commissioner).

240. *See* Ronald Turner, *Title VII and Hostile Environment Sexual Harassment: Mislabeling the Standard of Employer Liability*, 71 UNIV. DET. MERCY L. REV. 817, 827–828 (1994).

241. *Id.* In coworker harassment cases, the failure to report harassment through official channels has blocked employer liability based on the employer's knowledge and failure to respond. *See, e.g.*, Spencer v. Schmidt Elec. Co., 576 Fed. Appx. 442 (5th Cir. 2014) (holding that employer did not have notice of coworker racial harassment where plaintiff, an apprentice, complained about the harassment to his union steward, who was not an employee, even though the union steward brought the complaint to a superintendent, who responded merely by saying the plaintiff should put it in writing).

242. *See Noviello*, 398 F.3d at 96–97.

for coworker retaliation claims.[243] If the channels used to report coworker sexual harassment resulted in retaliation, the plaintiff may reasonably choose not to go down that same path again; choosing instead to report the retaliation to persons outside of official channels, who nonetheless have responsibility under employer policies to report up the chain of command.[244] Relatedly, an important question in the #MeToo era is whether social media disclosures, when read by agents of the employer, might provide notice to the employer, either of the underlying harassment or of any subsequent retaliation.[245] Imposing tight limits on the channels and persons that effectively impute notice of retaliatory actions may hamper the ability of Title VII to offer meaningful protection from coworker retaliation.[246]

Rather than track the same strictures that limit employer notice of coworker retaliation, retaliation law should take a more expansive approach to notice, precisely because of the well-known likelihood that complaints about sexual harassment will provoke retaliatory reactions by others, including coworkers, in the workplace.[247] Constructive notice should play a greater role in coworker retaliation cases by putting the onus on the employer, once aware that plaintiff has complained about sexual harassment, to be watchful for signs of retaliation.[248] Incentivizing a more proactive employer stance might deter some retaliatory responses from occurring.[249]

An even greater area of uncertainty about how a negligence standard applies to coworker retaliation is in calibrating the

243. *See* Reaves, *supra* note 234, at 428–29.

244. *See* Crowley v. L.L. Bean, Inc., 303 F.3d 387, 403 (1st Cir. 2002) ("[R]epresentatives admitted that the proper procedure for an employee to report a claim of harassment was to notify his or her team leader. Once a team leader received a complaint from an employee, it was the team leader's duty to report the complaint up the chain of command to his or her supervisor. Therefore, by maintaining a policy that permitted workers to report sexual harassment claims to team leaders, L.L. Bean provided these team leaders with actual authority to receive notice of sexual harassment complaints on behalf of the company, and their knowledge was imputed to it.").

245. *See* Kristen N. Coletta, *Sexual Harassment on Social Media: Why Traditional Company Sexual Harassment Policies Are Not Enough and How to Fix It*, 48 SETON HALL L. REV. 449, 460–463, 470–471 (2018).

246. *See* Reaves, *supra* note 234, at 432.

247. *See id.* at 433.

248. *See* EEOC TASK FORCE REPORT, *supra* note 3, at 35.

249. *See id.* at 25, 33, 56.

reasonableness of the employer's response.[250] This is, at-best, a gray area even for coworker sexual harassment, and coworker retaliation claims likely pose additional challenges.[251] What constitutes a reasonable response to actionable conduct in the workplace has long been contested.[252] In coworker sexual harassment cases, courts require the employer, once on notice of the harassment, to take prompt and appropriate action "reasonably calculated" to end the harassment.[253] Factors relevant to the reasonableness of the employer's response include: whether the employer conducted an investigation, the promptness of any response, the reasonableness of any remedial measures and, if ineffective, whether stronger measures followed.[254]

Despite the open-endedness of this inquiry, some principles and outer limits are discernible.[255] Ignoring, not investigating, and failing to follow up on known coworker retaliation is an unreasonable employer response that may render the employer liable.[256] Even when the employer does respond, certain actions may be too little, too late to be reasonable.[257] Waiting an unreasonable amount of time to act may render the employer liable, as occurred in *Jensen*, where management personnel waited nineteen months before meeting with

250. *See generally* Polanco v. UPS Freight Servs. Inc., 217 F. Supp. 3d 470, 496–97 (D.P.R. 2016) (finding a variety of factors that could result in reasonably calculated action by the employer to prevent a claim of negligence).

251. *See id.* at 496–99.

252. *See infra* notes 253–71 and accompanying text.

253. *Polanco*, 217 F. Supp. 3d at 496.

254. *Id.* at 497 (denying employer's motion for summary judgment on coworker sexual harassment claim where the employer gave warnings and took mild measures, but the harassment continued without appropriate follow-through by the employer).

255. *See infra* notes 256–271 and accompanying text.

256. *See* Noviello v. City of Boston, 398 F.3d 76, 81, 95–97 (1st Cir. 2005) (not taking action and speculating that harassment will likely become ten times worse after the plaintiff's shift change survived summary judgement on the knew or should have known and failed to take reasonable corrective action standard of liability); *see* Patton v. Sears, Roebuck & Co., 234 F.3d 1269, 4–6 (6th Cir. 2000) (upholding retaliation verdict where employer failed to follow up on or condemn coworker's retaliatory harassment); *see* Richardson v. N.Y. State Dep't Corr. Servs., 180 F.3d 426, 447 (2d Cir. 1999) (replying to complaint of coworker retaliation by suggesting that the plaintiff try mediation and reminding her that it might be "hard to change attitudes" was unreasonable).

257. *Cf.* Kelley v. Conco Cos., 126 Cal. Rptr. 3d 651, 659–71 (Cal. Ct. App. 2011) (considering the employer's action of moving the employee to a different job site and blaming the work culture created enough of a genuine issue of material fact to deny Defendant's motion for summary judgment).

the offending coworker—an intervention that occurred only at the initiative of a new (female) supervisor.[258]

In a closer case, *Knox v. Indiana*,[259] the court upheld a jury verdict in a coworker retaliation case based on a shorter, one-month delay by the employer in responding.[260] In that case, after the plaintiff reported a supervisor's sexual harassment, she was met with threats by coworkers to make her life "hell," to "get her," and a campaign of "insulting and demeaning statements" and "vicious gossip."[261] When told about the campaign of coworker harassment, the employer's affirmative action officer did "nothing at the time," telling the plaintiff that she could not take any action without the plaintiff providing names of the persons retaliating.[262] Because much of the harassment was behind the plaintiff's back, that was a tall order.[263] About a month after this exchange, the plaintiff was able to find out the names of several of the retaliatory harassers and provided them to the affirmative action officer, who subsequently investigated, counseled the offending employees, and recommended disciplinary action against one of them.[264] Regarding it as a close case, the court upheld the jury verdict for the plaintiff, finding that the jury could have reasonably concluded that the affirmative action officer's initial response amounted to a "brush-off" followed by an unwarranted delay given the extent and severity of the retaliatory harassment.[265]

While these principles impose some affirmative obligations on employers to respond to coworker retaliation,[266] there are limits to what the law requires.[267] Importantly, courts do not require the employer to actually stop the coworker's retaliation, as long as the employer's response was "reasonably calculated" to end the retaliation.[268] Nor do courts find it unreasonable as a matter of law to take no remedial action if the employer investigated but found insufficient evidence of wrongdoing.[269] As the Third Circuit clarified

258. Jensen v. Potter, 435 F.3d 444, 447, 452–53 (3d Cir. 2006).
259. Knox v. Indiana, 93 F.3d 1327 (7th Cir. 1996).
260. *Id.* at 1335–36.
261. *Id.* at 1331, 1335.
262. *Id.* at 1330–31.
263. *See id.* at 1335.
264. *Id.* at 1331.
265. *Id.* at 1335–36.
266. *See supra* text accompanying notes 255–65.
267. *See infra* text accompanying notes 268–71.
268. Jensen v. Potter, 435 F.3d 444, 453 (3d Cir. 2006) (citing Knabe v. Boury Corp., 114 F.3d 407, 412–13 (3d Cir. 1997)).
269. *See Knabe*, 114 F.3d at 412–13.

in *Jensen*, Title VII is satisfied if the employer promptly investigates allegations of coworker retaliation but finds insufficient evidence to take disciplinary action.[270] Conversely, if the coworker retaliation does in fact stop after the employer's response, courts have found the employer's response to be *per se* reasonable, even if it could be faulted as insufficient on its face.[271]

While these principles offer some guidance, they still leave substantial gray area as to what is required for a reasonable employer response to coworker retaliation.[272] One risk to plaintiffs is that courts may believe it is reasonable to give employers more latitude in responding to coworker retaliation than in responding to coworker sexual harassment.[273] Although not tethered to the legal framework governing employer liability, courts have expressed sympathy for the emotional bonds that could lead coworkers to side with friends and colleagues accused of harassment[274] and have cautioned that retaliation law should not interfere with the expression of support for coworkers who have been accused of sexual harassment.[275] For example, the court in *Noviello v. City of Boston* observed a "unique" difficulty in adjudicating retaliatory harassment claims, as compared to sexual harassment claims, in that there is a plausibly defensible purpose motivating employees to side with an accused friend or avoid the complainant in order to stay out of the fray.[276] Judicial sympathy for coworkers whose inclination is to side with the accused may cause courts to be more sympathetic to employers who decline to intervene in coworker retaliation and more likely to pronounce an employer's minimal efforts as reasonable.[277] The perception that coworker retaliation is more excusable than coworker sexual

270. *See Jensen*, 435 F.3d at 453.

271. *Id.* (citing *Knabe*, 114 F.3d at 411–12 & n.8) ("An effective remedy—one that stops the harassment—is adequate per se."); *see also* Ryan v. Shulkin, No. 1:15-CV-02384, 2017 WL 6270209, at *11 (N.D. Ohio Dec. 8, 2017) (holding that the plaintiff cannot show the employer's response to be unreasonable if the retaliatory harassment stopped soon after she reported it).

272. *See supra* notes 250–54 and accompanying text.

273. *See infra* notes 276–78 and accompanying text.

274. *See* Noviello v. City of Boston, 398 F.3d 76, 93 (1st Cir. 2005).

275. *See id.*

276. *Id.* at 92–93.

277. *See id.* at 93 ("We think . . . that those actions that are hurtful to a complainant only because coworkers do not take [their] side in a work-related dispute may not be considered as contributing to a retaliatory hostile work environment."); *see also* Ryan v. Shulkin, No. 1:15-CV-02384, 2017 WL 6270209, at *11 (N.D. Ohio Dec. 8, 2017) (finding that simply conducting a mandatory in-service training to address an employee's complaints of sexual harassment was a reasonable response by the employer because the offensive conduct stopped).

harassment may create an unstated higher threshold for retaliation plaintiffs to prove unreasonableness in the employer's responsive action.[278]

This same understanding of the possible legitimacy behind a coworker's inclination to "circle the wagons" and side with the accused may lead both courts and employers to believe there is little they can do to effectively prevent and correct the coworker dynamics that lead to retaliation.[279] Courts may view such dynamics as ungovernable, falling in the realm of the social rather than the formal, professional environment, such that they are sympathetic to employers who effectively throw up their hands when faced with the difficult task of preventing or halting coworker retaliation, placing only weak obligations on employers to take corrective action.[280] To be sure, this can be a problem in coworker sexual harassment claims too, but the inclination to view sexual harassers as aberrational bad actors may make it easier for courts to conclude that the employer could have, and should have, done something to weed out the sexual harasser.[281]

It is not at all clear, however, that courts' perceptions of the intractability of mounting an effective employer response to coworker retaliation corresponds to reality.[282] In *Jensen*, where the

278. *See Noviello*, 398 F.3d at 92–93. Judicially enforced obligations on employers to remedy coworker retaliation can be especially complex in academic settings, where academic freedom is involved. *See, e.g.*, Shott v. Katz, 829 F.3d 494 (7th Cir. 2016) (holding § 1981's ban on retaliation for opposing race discrimination was not violated by fellow university professor's refusal to collaborate with the plaintiff on research for retaliatory reasons, citing first amendment concerns that a contrary ruling would raise).

279. *See supra* notes 274–76 and accompanying text.

280. *See Noviello*, 398 F.3d at 93 ("The very act of filing a charge against a coworker will cause tension and result in a less agreeable workplace."); *see also* Brooks v. City of San Mateo, 229 F.3d 917, 929 (9th Cir. 2000) ("Because an employer cannot force employees to socialize with one another, ostracism suffered at the hands of coworkers cannot constitute an adverse employment action."); *cf.* Greer v. City of Escodido, Nos. D038093, D038644, 2002 WL 31555286, at *11 (Cal. Ct. App. Nov. 19, 2002) ("[T]he alleged lack of civility of coworkers does not constitute adverse employment action upon which a retaliation claim can be based. Absent facts that an employer instructed coworkers to avoid or shun the plaintiff in retaliation for asserting a harassment complaint, there is no actionable retaliation.").

281. *See Noviello*, 398 F.3d at 92–93 (stating that there is seldom, if ever, a defensible purpose behind discriminatory harassment as opposed to retaliatory harassment which requires a more nuanced analysis for determining whether the purpose was proper).

282. *See* Schoenbaum, *supra* note 61, at 629–31 (arguing that coworker reactions to harassment and to the reporting of harassment are largely determined by the employer's actions and managerial responses).

plaintiff experienced persistent and escalating coworker retaliation for over a year, once the employer finally held a formal meeting with the retaliating coworker, the retaliation stopped immediately.[283] But the perception, if not the reality, of greater difficulty managing and deterring coworker retaliation than harassment by coworkers may nudge courts to accept lower-level responses as reasonable in retaliation cases.[284]

With all of this uncertainty, employer liability for coworker retaliation stands out as an under-developed area of retaliation law at a time when courts have otherwise been highly attentive to the development of the law governing retaliation claims.[285] The legal framework treats coworker retaliation as a less-favored stepchild in relation to other discrimination and retaliation claims.[286] The second-tier status of employer liability for coworker retaliation claims maps onto the well-worn public/private dichotomy by treating informal relationships and interactions between colleagues at work as more private than public, and farther from the law's legitimate reach.[287] Doing so understates the harm and silencing power of coworker interactions, and their centrality to the workplace.[288] The social dimensions of workplace relationships overlap with the professional dimensions, making coworker relationships integrally connected to job performance and job satisfaction.[289] Indeed, changes in workplace structures that flatten lines of authority and push collaborative work cultures have made coworker relationships all the more powerful in shaping professional opportunities.[290]

These loose chickens may come home to roost in the #MeToo era. Judicial reluctance to police exercises of informal power in the workplace and to intrude into the "social" realm of workplace

283. Jensen v. Potter, 435 F.3d 444, 453 (3d Cir. 2006).
284. *See supra* notes 272–81 and accompanying text.
285. *See* discussion *supra* Section II.A.
286. *See supra* notes 281–83 and accompanying text.
287. *See* Laura A. Rosenbury, *Working Relationships*, 35 WASH. U. J.L. & POL'Y 117, 120–22 (2011).
288. *See* Schoenbaum, *supra* note 61, at 613, 629 (discussing the impact of coworker relationships on productivity and moral).
289. *See* Rosenbury, *supra* note 287, at 129–34 (discussing findings of social science research on the role of coworkers in succeeding at work); *see also* CYNTHIA ESTLUND, WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY 20, 27 (2003); *see also* Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1948, 1959 (2000).
290. *See* Schoenbaum, *supra* note 61, at 613 (discussing the centrality of coworker relationships to work productivity and employee job performance).

dynamics does not bode well for protecting women who complain of sexual harassment from a #MeToo backlash.[291]

B. When Does Coworker Retaliation Deter a Reasonable Employee from Complaining?

Not all negative reactions to employees for opposing discrimination are unlawful.[292] Retaliation must rise to a certain level of severity to violate Title VII.[293] The Supreme Court formulated the governing standard in *Burlington Northern & Santa Fe Railway v. White*, requiring the retaliation to rise to a level of severity such that "it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'"[294] In keeping with the Court's emphasis on the purpose of the retaliation claim, the Court explained that the standard should take into account how the alleged retaliation would likely affect an employee in the circumstances of the plaintiff.[295] Although the Court described this as an objective standard, it instructed lower courts to apply it to the situated employee by considering the relevant circumstances that might impact the employee's likelihood of complaining.[296] For example, the Court noted that a shift change might be trivial to many workers but chilling to a single mother for whom predictability in work schedules was necessary to coordinate her children's school and day care schedules.[297] The Court had little trouble determining that the retaliatory actions in *Burlington Northern*, assigning the plaintiff more difficult job responsibilities and placing her on an unpaid leave (for which she subsequently received backpay), met the standard.[298] The Court distinguished such actionable retaliation from what it called "normal" workplace slights of snubbing and shunning, which fall outside the reach of Title VII's protection from retaliation.[299]

The retaliation in *Burlington Northern* was undertaken by supervisors who had the authority to change the plaintiff's job

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291. *See supra* note 280 and accompanying text.
292. *See* Hernandez v. Yellow Transp. Inc., 670 F.3d 644, 657 (5th Cir. 2012).
293. *See* Jensen v. Potter, 435 F.3d 444, 449–50 (3d Cir. 2006).
294. Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006) (quoting Rochon v. Gonzales 438 F.3d 1211, 1219 (D.C. Cir. 2006)).
295. *See id.* at 69.
296. *Id.* at 68–69.
297. *Id.* at 69.
298. *See id.* at 70–73.
299. *Id.* at 68.

responsibilities and work status.[300] Post-*Burlington Northern* case law, lower courts suggest that retaliatory actions by coworkers are less likely to meet the standard.[301] Courts applying the *Burlington Northern* framework tend to dismiss retaliatory harassment by coworkers as "pranks," placing coworker harassment on the same footing as the "snubbing" that the Court indicated was part and parcel of a "normal" workplace.[302] Sometimes courts even place coworker sabotage and vandalism in this category, despite its progression well past the point of social ostracism or snubbing.[303] In one such case, the retaliation included loading up the complaining employee's trailer with garbage dozens of times over four years, requiring the complainant to repeatedly clear off the trailer in order to ready it for use on the job.[304] The court dismissed the incidents as "pranks" and held that it did not meet the *Burlington Northern* threshold for actionable retaliation.[305]

As commentators have noted, lower courts tend to assume that complainants are resilient enough to hold their own and will tolerate a good bit of pushback from colleagues without it weakening their

300. *Id.* at 57–59.

301. *See* Fercello v. County of Ramsey, 612 F.3d 1069, 1081 (8th Cir. 2010) (finding that coworkers' actions making plaintiff feel unwelcome at meetings, rolling their eyes at her, interrupting her, and ignoring her contributions were not sufficiently severe to support her retaliation claim); *see also* Nordike v. Verizon Bus., Inc., No. 12-2686-JAR, 2014 WL 4749185 at *10 (D. Kan. Sept. 24, 2014) (finding that a statement by "difficult employee" on a conference call that he would never work with plaintiff again was not materially adverse); *see also* Perkins v. Harvey, 368 F. App'x 640, 648 (6th Cir. 2010) (finding that a coworker's statement that he did not believe in filing lawsuits or EEO complaints was not materially adverse); *see also* Verrinder v. Rite Aid Corp., No. 3:06cv00024, 2007 WL 4357595, at *19 (W.D. Va. Dec. 11, 2007) (finding that a coworker's warning, "[d]o you know what happens in a lawsuit? The lawyers will know everything about your life and it will come out in court. It won't be pretty," would not be materially adverse to a reasonable employee, although acknowledging that "a naïve employee might find [the coworker's] statement to be materially adverse"). *But see* Burrell v. Shephard, 321 F. Supp. 3d 1, 13–14 (D.D.C. 2018) (denying summary judgment for employer on plaintiff's retaliation claim where plaintiff alleged "that her coworkers refused to speak to her, 'making it very difficult for her to perform her assigned tasks,'" and "made derogatory comments about [her] on social media," and sent an email questioning her motives for reporting the alleged discrimination, in addition to other retaliatory acts).

302. *Burlington N.*, 548 U.S. at 68; *see* Carpenter v. Con-Way Cent. Express, Inc., 481 F.3d 611, 615 (8th Cir. 2007).

303. *See Carpenter*, 481 F.3d at 618–19.

304. *Id.* The plaintiff was also the target of a series of hostile and racist remarks, which he learned about from other coworkers. *Id.* at 614.

305. *Id.* at 618–19.

resolve to complain.[306] Professor Sandra Sperino has critiqued the case law for determining that certain actions do not meet the *Burlington Northern* standard as a matter of law because it ignores the Court's directive to apply the objective reasonable person standard to the situated plaintiff and does not take into account all relevant circumstances.[307] By not examining the circumstances that make a plaintiff vulnerable to coworker retaliation, this approach understates the harm of retaliation in particular cases in ways that are likely to chill #MeToo stories of workplace harassment.[308]

The cases also minimize the deterrent force of retaliatory threats and other verbally abusive behavior.[309] Threats of retaliation generally do not meet the *Burlington Northern* standard, even when made by supervisors.[310] Harassing, shunning, and ostracizing also fall on the lawful side of the line.[311] When the shunning and verbal offense comes from coworkers, courts are particularly circumspect.[312] Verbal retaliation by coworkers typically falls short of what courts view as likely to chill a reasonable person from complaining.[313]

The line that courts seem most comfortable enforcing separates run-of-the-mill retaliatory comments from specific threats of violence and physical harm.[314] In *Noviello v. City of Boston*, for example, the

306. *See* CHARLES A. SULLIVAN & MICHAEL J. ZIMMER, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 428 (9th ed. 2017) (describing the post-*Burlington Northern* lower court decisions as assuming that employees are made of "stern stuff").

307. *See* Sandra F. Sperino, *Retaliation and the Reasonable Person*, 67 FLA. L. REV. 2031, 2052–55 (2015).

308. *See id.* at 2079–80.

309. *See infra* notes 310–13 and accompanying text.

310. *See* SULLIVAN & ZIMMER, *supra* note 306, at 429.

311. *See* Porter, *supra* note 2, at 54.

312. *See* cases cited *infra* note 313.

313. *See* Juarez v. Utah, 263 F. App'x 726, 733, 737 (10th Cir. 2008) (holding coworkers' negative reactions to Latina dental assistant who filed a sexual harassment complaint against the dentist, including comment that the complainant is "good only to do dishes at the office," would not have dissuaded a reasonable worker from complaining); *see* Reeves v. Tenn. Farmers Mut. Ins. Co., No. 1:12-CV-00018, 2013 WL 2177918, at *10 (M.D. Tenn. May 20, 2013) (finding that intimidating, unprofessional behavior, and rudeness would not dissuade a reasonable employee from complaining); *see* Clay v. Lafarge N. Am., 985 F. Supp. 2d 1009, 1030 (S.D. Iowa 2013) (finding that shunning and ostracism at work did not satisfy the *Burlington Northern* standard); *cf.* Ramsdell v. Huhtamaki, 992 F. Supp. 2d 1, 19 (D. Maine 2014) (finding that mere rudeness, social ostracism, and staring were not severe enough to be qualifying "anchoring events" within the limitations period to make the subsequent untimely retaliation actionable).

314. *See infra* notes 315–19 and accompanying text.

court acknowledged that rudeness, social ostracism, siding with the accused, and avoiding the complainant would all fail to satisfy the *Burlington Northern* standard, but distinguished the facts in *Noviello*, holding that they did meet the standard.[315] The coworker retaliation in *Noviello* included physically threatening conduct, a false accusation of misconduct, and actions calculated to interfere with the plaintiff's work performance; the court found these to be ubiquitous, severe, and having a "natural tendency to humiliate" a reasonable person.[316] Similarly, the court in *Jensen v. Potter* emphasized that the nineteen months of retaliatory harassment by two coworkers went far beyond "the silent treatment" and siding with the accused over the complainant; rather, their actions crossed over to violent threats and vandalism.[317] The retaliatory conduct included sneaking up behind the complainant and then frightening her with a loud clap, running toward her with a mail cart in threatening way as if to run her over, and vandalizing her car in the employee parking lot.[318] As another court explained, getting the cold shoulder from coworkers does not cross the line, but one coworker repeatedly calling the plaintiff and threatening physical violence would dissuade a reasonable worker from complaining.[319]

Although courts issue such pronouncements regularly and with great confidence, the empirical justification offered for them is thin or nonexistent.[320] Indeed, the empirical research regarding what actions are likely to deter people from complaining about discrimination cuts in the opposite direction.[321] In fact, shunning the complainant and siding with the accused appears highly likely to dissuade many, if not most, persons from complaining.[322] Professor

315. *See* Noviello v. City of Boston, 398 F.3d 76, 93–94 (1st Cir. 2005).

316. *Id.* (citing Harris v. Forklift Sys. Inc., 510 U.S. 17, 23 (1993)).

317. Jensen v. Potter, 435 F.3d 444, 452 (3d Cir. 2006).

318. *Id.* at 447. *Jensen* was decided before *Burlington Northern*, but its rationale survives that decision even though its precise holding, which assumed that retaliation is governed by the same standard of material adversity that governs discrimination claims under § 703 of Title VII, does not. *Compare id.* at 448–49, *with* Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 60–61 (2006). In finding the pattern of retaliatory harassment in *Jensen* to be sufficiently severe to be materially adverse under § 703, the court's reasoning necessarily means that the conduct would also meet the *Burlington Northern* standard of likely to chill a reasonable employee from complaining. *See Burlington N.*, 548 U.S. at 68.

319. Ryan v. Shulkin, No. 1:15-CV-02384, 2017 WL 6270209, at *11 (N.D. Ohio Dec. 8, 2017).

320. *See infra* notes 322–27 and accompanying text.

321. *See infra* notes 322–27 and accompanying text.

322. Sperino, *supra* note 307, at 2043, 2045.

Sperino's study of law students asking whether certain actions would dissuade them from reporting discrimination elicited affirmative responses to numerous kinds of actions courts have found unlikely to chill discrimination complaints.[323] When asked whether social ostracism by coworkers might dissuade them from complaining, 50% of the law students surveyed responded affirmatively.[324]

Social science research on the workplace also calls into question courts' reluctance to find retaliatory acts by coworkers, as opposed to supervisors, to satisfy the *Burlington Northern* test.[325] Research on workplace dynamics has found that the harms to employees from misconduct and ostracism by others at work is actually greater when coming from coworkers than from higher-ups.[326] Coworker shunning, social exclusion, and incivility push targeted employees to leave their employers at a greater rate than similar conduct by supervisors.[327]

Regardless of the organizational position of the retaliator, the literature reveals a gap between what actually deters employees from raising complaints about discrimination and what people, including judges, believe will stop people from complaining.[328] People are more easily deterred from speaking out than is commonly realized.[329] The case law applying the *Burlington Northern* standard in the lower courts exposes that gap in stark relief, as courts hew to the line that ostracism, threats, and a great deal of other negative behaviors would not deter a reasonable person from complaining.[330]

What explains the gap between judges' predictions of what is reasonably chilling and real world experience?[331] Law Professor Nicole Buonocore Porter speculates that federal judges, with their lifetime job security, have a particularly distorted understanding of

323. *Id.* at 2043.

324. *Id.* at 2045. Interestingly, 80% of the respondents said that a negative evaluation would likely deter them from complaining, even though courts often find such actions insufficiently severe to satisfy the *Burlington Northern* standard. *Id.*

325. *See* Sandra L. Robinson et al., *Coworkers Behaving Badly: The Impact of Coworker Deviant Behavior upon Individual Employees*, 1 ANN. REV. ORG. PSYCHOL. & ORG. BEHAV. 123, 129 (2014) (summarizing literature and finding harms from coworker aggression and ostracism are greater than from persons higher in the organizational hierarchy).

326. *Id.*

327. *Id.* at 127.

328. *See* Sperino, *supra* note 307, at 2033.

329. *See id.*

330. *See id.* at 2041.

331. *See infra* notes 332–47 and accompanying text.

how job insecurity affects reasonable people in their calculations about whether to report discrimination.[332] Her explanation has great intuitive appeal, but there seems to be an additional element of resistance when it comes to predicting reactions to coworker retaliation.[333] A distinctive consideration driving the coworker retaliation decisions is judicial anxiety about how deeply courts would have to involve themselves in overseeing employer intrusions into the coworker dynamics of a workplace if snubbing and social ostracism met the standard.[334] If more coworker negative reactions, short of violence, triggered an employer duty to respond, a reasonable response may need to be more nuanced than simply firing the hostile employee.[335] Judicial supervision of employer responses to more subtle coworker interactions may trigger ham-fisted reactions that overreach into employee relationships, and instead of changing norms to support #MeToo callouts, result in greater backlash and #MeToo fatigue.[336]

This is a legitimate concern with no easy answers.[337] A few courts recognizing coworker retaliation claims have grappled with it forthrightly.[338] In *Jensen*, the court expressed concern that, despite recognizing coworker retaliation as potentially actionable, the law should not interfere with the reality that strains on relationships are inevitable, stating "[s]ides will be chosen, lines will be drawn," and former friends may become not so friendly.[339] The court took pains to explain that "what the statute proscribes is retaliation, not loyalty to an accused coworker or a desire to avoid entanglement."[340] The court appears to be more concerned that the law leaves ample room for employers to allow "[m]ere expressions of opinion" than the chilling effect on complaining employees.[341] In *Jensen*, the court found statements from coworkers that the harasser should not have

332. Porter, *supra* note 2, at 55.
333. *See infra* notes 334–36 and accompanying text.
334. *See generally* Jansen v. Packaging Corp. of Am., 123 F.3d 490, 513 (7th Cir. 1997) (Posner, C.J., concurring and dissenting) ("[W]hen it comes to designing the optimum system for reining in the discretion of supervisory employees, the courts are at sea and it makes sense therefore to shift the responsibility entirely to the employer to create and administer an effective system for the review and control of company actions taken by supervisors in the exercise of their delegated authority.").
335. *See supra* notes 252–57, 266–80 and accompanying text.
336. *See infra* notes 479–83 and accompanying text.
337. *See infra* notes 479–83 and accompanying text.
338. *See infra* notes 339–44 and accompanying text.
339. Jensen v. Potter, 435 F.3d 444, 452 (3d Cir. 2006).
340. *Id.*
341. *See id.*

been fired, that he "shouldn't have to apologize for anything," and that a petition to have the harasser rehired all failed the *Burlington Northern* standard.[342] Title VII is "not 'a general civility code,'" the court reiterated.[343] The court in *Noviello* engaged in a similar analysis, adding that, unlike status-based harassment, there may well be a defensible purpose underlying retaliatory harassment, because there is "nothing inherently wrong" with supporting an accused friend or wanting to stay out of the fray by avoiding the complainant.[344]

My reading of the cases is that judicial resistance to taking Title VII more deeply into the realm of coworker interactions has more to do with concerns about judicially enforced employer responses to employee expressions of support than the actual inhibitive effects on complaining employees, which may be quite devastating.[345] The reality is that siding with the accused over the complaining employee and the risk of widespread shunning may well chill reasonable employees from complaining about sexual harassment,[346] but the courts are loathe to force or incentivize employer surveillance of the social and relational aspects of work.[347]

At one level, this is problematic for complainants and does not bode well for the continued traction of #MeToo, at least when it comes to calling out sexual harassment at work while remaining employed in the workplace where the harassment occurred.[348] The "social" aspects of the job may not be severable from job performance and professional advancement, especially in workplace cultures where collaboration is key.[349] Being ostracized by

342. *Id.*; *see* Burlington N. & Santa Fey Ry. Co. v. White, 548 U.S. 53, 68 (2006).
343. *Jensen*, 435 F.3d at 449 (quoting Oncale v. Sundance Offshore Servs., 523 U.S. 75, 80 (1998)).
344. Noviello v. City of Boston, 398 F.3d 76, 93 (1st Cir. 2005).
345. *See Burlington N.*, 548 U.S. at 68.
346. *See generally* Porter, *supra* note 2, at 51, 55, 59 (explaining that many employees do not report sexual harassment because they fear social ostracism or that no one will believe them).
347. *See generally* Jansen v. Packaging Corp. of Am., 123 F.3d 490, 511 (7th Cir. 1997) (Posner, C.J., concurring and dissenting) (arguing that forcing an employer to continuously monitor employees would be too expensive and invasive to their privacy).
348. *See generally* Ferguson v. Associated Grocers, Inc., 469 F. Supp. 2d 961, 967–68 (D. Kan. 2007) (the employee who reported harassment received threatening phone calls and had her tires slashed when she returned to work following administrative leave).
349. *See* sources cited *supra* note 289.

coworkers on a rampage to support the accused might be enough to chill all but the most stalwart of complainants.[350]

And yet, there are reasons to pause before pressing too far in the direction of capturing all negative coworker reactions as retaliation.[351] If all reasonably chilling coworker interactions triggered the employer's duty to take corrective action, Title VII might require employers to intrude deeply into coworker relationships and expression of authentic sentiments.[352] Even setting aside the potential First Amendment implications of requiring employers to monitor employee expressions of support for either side in a contested allegation (which is beyond the scope of this essay), it is not clear that the most stringent legal approach would have the most positive impact in opening up the channels of dissent to sexual harassment.[353] Shifting workplace norms against sexually harassing behaviors at work may require adequate space for airing differences of opinion about what happened and who is right, even if some of these expressions will inevitably be chilling.[354]

Even while acknowledging this difficulty, it is possible to recognize the need for employers to allow room for expressing differences of opinion while still criticizing the lines that courts have drawn.[355] It should not require coworker violence or threats of violence to cross the line from legitimate social interactions to actionable retaliation.[356] Courts should be more attentive to how coworkers impact an employee's ability to work and opportunities for advancement.[357] It should not be too much to require expressions

350. *See* Porter, *supra* note 2, at 55.

351. *See* Burlington N. and Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006).

352. *See Jansen*, 123 F.3d at 511 (Posner, C.J., concurring and dissenting) (arguing that the constant surveillance of employees would invade their privacy and would be too costly).

353. *See* Olivia B. Waxman, *The Surprising Consequences of the Supreme Court Cases that Changed Sexual Harassment Law 20 Years Ago*, TIME (June 26, 2018), https://time.com/5319966/sexual-harassment-scotus-anniversary/ [http://perma.cc/X9AU-2BY2].

354. *See* Valerie Bolden-Barrett, *Study: Men and Women Disagree Over Impact and Tracking of Harassment*, HR DIVE (July 27, 2018), https://www.hrdive.com/news/study-men-and-women-disagree-over-impact-and-tracking-of-harassment/528676/ [http://perma.cc/YEK6-N2N3].

355. *See* Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 73–74 (2005) (explaining the importance of in-person discussions of social values at work).

356. *See id.* at 81–82.

357. *See generally* Rosabeth M. Kanter, *The Impact of Hierarchical Structures on the Work Behavior of Women and Men*, 23 SOC. PROBS. 415, 420 (1975) (data supports the proposition that employee relationships impact work performance and one's overall interest in the job).

of support for the accused to be bound by professional norms and basic civility, even if hard and fast rules for such boundaries are elusive.[358]

It remains to be seen how the #MeToo movement will affect the development of retaliation law as it responds to the murkiness of coworker interactions.[359] Will courts judge coworker retaliation more or less likely to dissuade a reasonable employee from reporting harassment amidst the aftershocks of #MeToo?[360] I can imagine two possible divergent paths.[361]

One possibility is that the outpouring of #MeToo stories,[362] and the increasing receptiveness of the public to listen to and believe them,[363] will persuade courts that the norms have shifted to encourage the telling of stories of sexual harassment, so that it should take more in the way of negative reactions to chill complainants.[364] Especially for critics of the movement who are feeling under siege by an onslaught of #MeToo stories,[365] the takeaway from #MeToo might be that women are now hellbent on telling their stories of harassment, and that the norms have swung far in the other direction.[366] This view would support increased expectations for what coworkers would have to do to chill the reasonable employee from complaining.[367]

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358. *See generally* Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1796 (1992) (discussing the difficulty in limiting speech in the workplace with First Amendment and Harassment Law protections).

359. *See* MacKinnon, *supra* note 40.

360. *See infra* notes 362–75 and accompanying text.

361. *See infra* notes 362–75 and accompanying text.

362. *See* Anna Codrea-Rado, *#MeToo Floods Social Media with Stories of Harassment and Assault*, N.Y. TIMES (Oct. 16, 2017), https://www.nytimes.com/2017/10/16/technology/metoo-twitter-facebook.html [https://perma.cc/RL7F-T2EL].

363. *See* Dalvin Brown, *19 Million Tweets Later: A Look at #MeToo a Year After the Hashtag Went Viral*, USA TODAY (Oct. 13, 2018, 10:12 PM), https://www.usatoday.com/story/news/2018/10/13/metoo-impact-hashtag-made-online/1633570002/ [https://perma.cc/JTM7-KL8A].

364. *See* Alyssa Rosenberg, *Why I Thought Twice Before Saying #MeToo*, WASH. POST (Oct. 16, 2017, 2:00 PM), https://www.washingtonpost.com/news/act-four/wp/2017/10/16/metoo-of-course-but-what-comes-next/?noredirect=on [https://perma.cc/U7N6-XBG4].

365. *See* Katie Roiphe, *The Other Whisper Network*, HARPER'S MAG. (Mar. 2018), https://harpers.org/archive/2018/03/the-other-whisper-network-2/ [https://perma.cc/VJE4-DNHK].

366. *Id.*

367. *See id.*

It would be unfortunate if the aftermath of #MeToo moved the law to discourage workplace complaints of sexual harassment at a time when more employers are inclined to do something about them.[368] But that is not the only possible lesson from #MeToo that courts and lawyers might draw.[369] Another possibility is that the #MeToo movement has shown how difficult it is to tell these stories in the moment and to stand up to abuses of power from a vulnerable position.[370] The vast majority of high-profile #MeToo stories have come out long after the fact, when the women who suffered abuses are no longer in the vicinity of the abuser or his protectors.[371] The strength of the movement and the importance of the communal nature of supportive responses demonstrates how difficult it is to tell these stories without the support of coworkers.[372] The very name of the movement, Me*Too*, emphasizes the importance of validation by others.[373] This lesson might support easing the stringency of the *Burlington Northern* standard,[374] recognizing that coworker reactions are no less important than the reactions of supervisors in either narrowing or expanding the space to bring forward complaints of harassment.[375]

Because the standard for measuring the severity of actionable retaliation is highly sensitive: to descriptive judgments about how people respond to retaliation and to prescriptive judgments about how resilient they should be in forging ahead with complaints;[376] the shifts in the cultural norms governing the reception of such stories are likely to influence the development of the law in this area.[377] It is too soon to say what the #MeToo movement will portend, but a

368. *See* Sindhu Sundar, *How #MeToo Is Changing Internal Investigations*, LAW360 (Jan. 28, 2018, 9:17 PM), https://www.cov.com/-/media/files/corporate/publications/2018/01/how_metoo_is_changing_internal_investigations.pdf [https://perma.cc/ZMW2-3D49].

369. *See infra* notes 370–75 and accompanying text.

370. *See* Jacey Fortin, *#WhyIDidntReport: Survivors of Sexual Assault Share Their Stories After Trump Tweet*, N.Y. TIMES (Sept. 23, 2018), https://www.nytimes.com/2018/09/23/us/why-i-didnt-report-assault-stories.html [https://perma.cc/UCH4-3CJB].

371. *Id.*

372. Elizabeth C. Tippett, *The Legal Implications of the MeToo Movement*, 103 MINN. L. REV. 229, 252 & nn.148–50 (2018) (discussing the benefits of affirmative responses from coworkers in sexual abuse disputes in the workplace).

373. *See* Wexler et al., *supra* note 1, at 71–72.

374. *See supra* notes 370–73 and accompanying text.

375. *See* Robinson et al., *supra* note 325, at 126–27.

376. *See* Schoenbaum, *supra* note 61, at 629–31 (arguing that coworker reactions to harassment and to the reporting of harassment are largely determined by the employer's actions and managerial responses).

377. *Id.*

recent decision from the Third Circuit looks to lead the way.[378] In *Minarsky v. Susquehanna County*, the court opined that the #MeToo movement has underscored the difficulty of speaking up in the face of sexual harassment and abuse.[379] The court's discussion focuses on a different doctrine, the second prong of the affirmative defense to supervisory sexual harassment, which asks whether the plaintiff reasonably took advantage of the employer's preventive and corrective measures for responding to sexual harassment.[380] But the court's analysis is equally pertinent to the question of whether a reasonable employee would persevere and complain anyway, even knowing that it would trigger the retaliatory acts at issue.[381] The court's acknowledgement of the difficulty, even under the best of circumstances, to report sexual harassment goes toward a more grounded application of the *Burlington Northern* standard to coworker retaliation.[382]

C. Causation: Disentangling Mixed Motives and But-For Causes in the Wake of Nassar and #MeToo

In 2013, the Supreme Court sent shock waves through retaliation law by deciding in *University of Texas Southwestern Medical Center v. Nassar* that plaintiffs bringing retaliation claims under Title VII must prove that the retaliatory motive was the "but-for cause" of the adverse action being challenged.[383] Even though Title VII authorizes employer liability for discrimination when the plaintiff's protected class is a motivating factor for an adverse employment decision,[384] the Court in *Nassar* restricted that proof framework to claims for status-based discrimination under § 703 of the statute.[385] Henceforth, the retaliation provision, § 704, which prohibits discrimination "because of" the plaintiff's protected conduct, would be governed by the stricter but-for standard of causation.[386]

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378. *See* Minarsky v. Susquehanna County, 895 F.3d 303, 310–11 (3d Cir. 2018).
379. *Id.*
380. *Id.*
381. *See id.* at 311.
382. *See id.* at 314.
383. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 360 (2013).
384. *See id.* at 349.
385. *See id.* at 360.
386. *See id.* at 360–63.

> The text, structure, and history of Title VII demonstrate that a plaintiff making a retaliation claim under § 2000e-3(a) must establish that his or her protected activity was a but-for cause of the alleged adverse action by the employer. The University claims

That decision, which was criticized at the time for ignoring the mixed motive model of causation dating back to 1989 in *Price Waterhouse v. Hopkins*,[387] sets retaliation law on a collision course with the real-world experience of discrimination and retaliation that has been revealed in the #MeToo movement.[388] The requirement of but-for causation makes it harder to prove retaliation at a time when norms are beginning to encourage coming forward with experiences of sexual harassment, even while fatigue and backlash heighten the risk of punishing responses to such stories.[389] The causation proof hurdle may increasingly challenge the ability of the law to adequately protect sexual harassment complainants.[390]

Apart from raising the bar for the proof required to demonstrate causation,[391] the but-for standard rests on assumptions about retaliatory motivations and their severability from discriminatory motivations, which are on shaky premises.[392] A threshold question in approaching proof of causation, but one that is rarely, squarely addressed by courts, is what kind of frame of mind qualifies as a retaliatory motive.[393] To win a retaliation claim even before *Nassar*, courts required plaintiffs to prove that the challenged conduct was motivated by retaliatory intent.[394] *Nassar* did not create the need to

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> that a fair application of this standard, which is more demanding than the motivating-factor standard adopted by the Court of Appeals, entitles it to judgment as a matter of law.

Id. at 362–63.

387. Price Waterhouse v. Hopkins, 490 U.S. 228, 252 (1989).

388. *See supra* notes 6–14 and accompanying text.

389. *See supra* notes 6–14, 385 and accompanying text; *see also Understanding the Me Too Movement: A Sexual Harassment Awareness Guide*, MARYVILLE U., https://online.maryville.edu/blog/understanding-the-me-too-movement-a-sexual-harassment-awareness-guide/ [https://perma.cc/SF2W-AZSY] (last visited Nov. 9, 2019).

390. *See supra* notes 383–86 and accompanying text; *see also Nassar*, 570 U.S. at 383–85 (Ginsburg, J., dissenting).

391. *See Nassar*, 570 U.S. at 362–63 (stating that the but-for causation standard is "more demanding" than the motivating-factor standard).

392. *See id.* at 342.

393. *See infra* notes 398–408 and accompanying text.

394. *See, e.g.*, Perkins v. Harvey, 368 F. App'x 640, 647–48 (6th Cir. 2010) (holding in order to survive summary judgment on plaintiff's retaliation claim, plaintiff must "produce[] some evidence that the complained-of-actions were motivated by the exercise of his protected right"; mere "uncivil or even abusive behavior" based on "a personality conflict" will not suffice). Although proximity alone may be enough to support a question of fact on whether the plaintiff's protected conduct caused the retaliation, the time frame separating them must be very short in order to prove causation without additional evidence. *See* Carlson v. CSX Transp., Inc., 758 F.3d

define a retaliatory motive, but it does make the task of disentangling the retaliatory motive from other, non-retaliatory motivations more pressing.[395] The retaliatory motive need not be the sole cause for what occurred, and another motive may co-exist alongside a retaliatory motive.[396] But proving but-for causation when multiple motives are involved requires greater clarity about how to define a retaliatory motive and how to distinguish it from other motives.[397] The narrower the definition of retaliatory motive, the more difficult it becomes to isolate retaliation as the but-for cause of conduct that is traceable to multiple motivations.[398] If retaliatory motive means animus above and beyond a "normal" desire to support a well-liked colleague, that could make proof of but-for causation difficult to establish in a retaliation claim.[399]

This difficulty is present in all retaliation claims, but it is particularly thorny in coworker retaliation cases due to judges' understanding of the complexity of coworker emotions and motivations when confronted with accusations of harassment leveled against a colleague.[400] In coworker retaliation cases, courts are quick to view a coworker's motivation to side with an accused harasser and protect him from repercussions as a legitimate motive.[401]

The court in *Noviello* discussed such motivations by coworkers as legitimate and distinguished coworker retaliation from coworker harassment by explaining that in the case of the former, but not the latter, there is more likely to be a legitimate motivation behind the coworker's offending conduct.[402] This legitimate motivation, the court explained, could include taking the side of the person accused of harassment and siding against the complainant.[403] Although the court was not discussing causation specifically, so much as articulating its understanding of differences in the underlying motivation in the two claims, the discussion holds important

819, 828 (7th Cir. 2014) ("Even intervals shorter than four months are unlikely, standing alone, to establish the causation element of a retaliation claim.").

395. *See Nassar*, 570 U.S. at 360.

396. *See id.* at 346–47 (stating that the requirement of but-for causation does not mean that the retaliatory motive must be the sole cause, but rather that the retaliation would not have occurred but for the protected activity).

397. *See id.* at 385 (Ginsburg, J., dissenting).

398. *See id.*

399. *See* Kachmar v. SunGard Data Sys., Inc., 109 F.3d 173, 178 (3d Cir. 1997).

400. *See* Porter, *supra* note 2, at 55.

401. *See* Noviello v. City of Boston, 398 F.3d 76, 93 (1st Cir. 2005).

402. *See id.* at 87.

403. *Id.* at 93.

implications for proof of causation in a coworker retaliation claim—especially after the *Nassar* decision.[404] The court assumed that a retaliatory motive must rise to the level of animus above and beyond a mere desire to support and defend a person accused of harassment.[405] Unlike status-based harassment, the *Noviello* court reasoned that there may be a defensible purpose underlying retaliatory harassment because "there is nothing inherently wrong . . . with supporting [an accused] friend or" wanting to stay out of the fray by avoiding the complainant.[406] Such reasoning narrows what counts as a retaliatory motive.[407] In many cases, it may be difficult to prove a motive to punish the accuser above and beyond a motive to side with the accused.[408] To return to the earlier discussion of social closure,[409] that work shows that closing ranks to show in-group favoritism is just as pernicious as animus toward the outgroup.[410]

The difficulty of parsing an alleged retaliator's desire to punish the complainant from a motive to support the accused employee may be difficult when the alleged retaliator is a coworker.[411] With courts viewing coworker interactions through a lens that highlights the social nature of the dynamic rather than the professional,[412] courts may be more likely to classify the motive as personal or social, seeing it as distinct from animus toward the protected conduct.[413] For example, the court in *Sandberg v. Brennan*, ruled that the plaintiff failed to prove causation in her retaliation claim in which:

> [A]nother worker [said] that Plaintiff was a 'troublemaker' in reference to her previous lawsuit. Plaintiff allege[d] that because of such statements, her coworkers avoided her, gave her the cold shoulder, or were openly hostile to her . . . [however, the court found the] statement to 'be careful' in the Plaintiff's presence, in and of itself, does not necessarily

404. *Id.* at 92.
405. *Id.* at 93.
406. *Id.*
407. *Id.*
408. *See id.*
409. *See supra* notes 66–75 and accompanying text.
410. *See* Albiston & Green, *supra* note 68, at 7.
411. *See infra* notes 412–16 and accompanying text.
412. *See* Rosenbury, *supra* note 287, at 121–23.
413. *See id.* at 125–26.

> indicate a desire to retaliate, but instead could demonstrate a desire to placate Plaintiff.[414]

Although causation is a separate doctrinal hurdle from meeting the standard of severity in *Burlington Northern*,[415] a similar tendency to separate the social from the professional in analyzing coworker retaliation may affect judicial approaches to both doctrines, with the effect of making it harder for plaintiffs to recover.[416]

An additional burden on plaintiffs for proving causation in coworker retaliation cases, post-*Nassar*, is disentangling the retaliatory motives from any discriminatory motives in the coworker's conduct.[417] After *Nassar*, the presence of possible discriminatory motives complicates proof of causation on the retaliation claim, since the protected conduct, and not the protected class, must be found to be the but-for cause of the challenged retaliation.[418] Prior to *Nassar*, under a mixed motive framework, both a retaliatory motive and a sex-based motive might co-exist without undermining liability for either sexual harassment or retaliation.[419] Following *Nassar*, the plaintiff must now disentangle them, showing the retaliatory motive as the but-for cause, in order to prevail on a retaliation claim.[420]

This sets a high bar regardless of whether the retaliator is a supervisor or a coworker.[421] But in cases involving coworker retaliation, courts may be particularly likely to attribute discriminatory motives alongside retaliatory motives.[422] This is because coworker retaliation typically involves harassment[423]—coworkers not having the authority to take tangible employment

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414. Sandberg v. Brennan, No. 14-4033 (DWF/HB), 2017 WL 455931, at *4 (D. Minn. Feb. 2, 2017). The plaintiff was able to survive summary judgment on a separate retaliation claim by challenging retaliatory acts occurring in a different time period in response to protected conduct. *Id.* at *5–6.

415. Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 57 (2006).

416. *See* sources cited *supra* note 289.

417. *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 360–63 (2013).

418. *See id.* at 359–60.

419. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 241 (1989) (holding that "Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations"), *superseded by statute*, Civil Rights Act of 1991, tit. I, § 107(a), 105 Stat. 1075 (codified as 42 U.S.C. § 2000e-2(m)), *as recognized in* Burrage v. United States, 571 U.S. 204 (2014).

420. *See Nassar*, 570 U.S. at 360.

421. *See id.*

422. *See* Reaves, *supra* note 234, at 404–05.

423. *See id.*

actions[424]—and retaliatory harassment can be difficult to distinguish from sexual harassment.[425] As previously mentioned, following the Supreme Court's decision in *Vance*, more retaliation allegations than before will be classified as coworker retaliation,[426] making it all the more important for retaliation plaintiffs to be able to parse the retaliatory and discriminatory motives of coworker actions.[427]

Court decisions in coworker retaliation cases have assumed that retaliatory and discriminatory motives are distinct, requiring plaintiffs to prove that coworker retaliation was caused by a retaliatory motive and not merely by a discriminatory motive.[428] In *Noviello*, for example, although the court allowed the sexually hostile environment and the post-complaint retaliatory harassment to be part of the same hostile environment for purposes of applying the continuing violation doctrine for tolling the statute of limitations, the court asserted that the "majority of cases are not cut from this seamless cloth," and "[m]ost often" retaliation and sex discrimination motives are "distinct," with the "intention to punish a person" for complaining being "a different animus than the sexual animus that drove the original harassment."[429] After scouring the record in that case, the court asserted that nothing in the record indicated "that the[] retaliatory acts were undertaken for reasons related to the plaintiff's gender," insisting instead that they were "two separate and independent harms."[430] The court's understanding of the relationship between the sexual harassment and retaliation in *Noviello* enabled it to hold that an earlier sexually harassing act, which occurred outside the limitations period, could be folded into a timely retaliatory harassment claim.[431] But the court's discussion of the nature and relationship between retaliatory and discriminatory motives heralds difficulties for plaintiffs seeking to prove causation in a post-*Nassar* world.[432]

Similarly, in *Jensen v. Potter*, the court emphasized that to prevail on a retaliation claim, the reason for the harassment must be retaliatory animus.[433] In a passage suggesting a high burden on the

424. *See id.*
425. *See id.*
426. *See* Vance v. Ball State Univ., 570 U.S. 421, 431–32 (2013).
427. *See supra* notes 417–26 and accompanying text.
428. *See infra* notes 429–35 and accompanying text.
429. Noviello v. City of Boston, 398 F.3d 76, 87 (1st Cir. 2005).
430. *Id.*
431. *See id.* at 87–88.
432. *See id.* at 86–87.
433. *See* Jensen v. Potter, 435 F.3d 444, 449–50 (3d Cir. 2006).

plaintiff to parse retaliatory motives from discriminatory ones, the court explained the following:

> [W]hen a woman who complains about sexual harassment is thereafter subjected to harassment based on that complaint, a claim that the harassment constitute[s] sex discrimination (because a man who made such a complaint would not have been subjected to similar harassment) will almost always present a question that must be presented to the trier of fact.[434]

Linking the harassment that follows the protected activity to a retaliatory motive may be particularly difficult, if the harassing coworkers contributed to the sexually harassing environment prior to the plaintiff's original sexual harassment complaint.[435]

While courts insist on parsing retaliatory motives from discriminatory ones, the cases themselves demonstrate how interrelated these motivations actually are.[436] Sexism is often at the root of punishing women for complaining about sexual harassment, which represents a departure from gender norms that expect women to remain docile and put up with sexually harassing behaviors.[437] The facts of *Noviello* and *Jensen* show that retaliatory and discriminatory motives often coincide, and stand in stark contrast to those courts' insistence on separating discriminatory from retaliatory motives.[438] In *Noviello*, the court insisted that the retaliatory harassment and the gender-based motives were distinct,[439] but the facts showed retaliation that was inseparable from the plaintiff's status as a woman complaining of sexual harassment.[440] For example, one of the retaliatory acts taken by coworkers involved a coworker falsely accusing the complainant of throwing a tampon at another coworker.[441] And in *Jensen*, where the court's discussion of retaliatory motivation also reflected its assumption that a retaliatory intent is distinct from a discriminatory one,[442] the alleged retaliator

434. *Id.* at 454.
435. *See id.*
436. *See supra* notes 428–35 and accompanying text.
437. *See* Reaves, *supra* note 234, at 408–10.
438. *See Jensen*, 435 F.3d at 446–47; *see* Noviello v. City of Boston, 398 F.3d 76, 82–83 (1st Cir. 2005).
439. *Noviello*, 398 F.3d at 87.
440. *See id.* at 82–83.
441. *Id.* at 93.
442. *See Jensen*, 435 F.3d at 454.

called the plaintiff "the [obscenity] who got [the harasser] in trouble."[443]

Fact patterns in cases where plaintiffs allege that coworker retaliation followed a complaint of sexual harassment often involve a combination of retaliatory and gender-specific post-complaint harassment.[444] In one district court case alleging coworker retaliation, *Juarez v. Utah*, a coworker's negative reactions to a female dental assistant who filed a sexual harassment complaint against the male dentist were both punishing and gendered—for example, telling the plaintiff, who was Latina, after she complained that she "was good only to do dishes at the office."[445] In another case, *Maldonado-Catala v. Municipality of Naranjito*, the female plaintiff was called "machito" (which the court translated as "manly") and subjected to sexually explicit, threatening, and vulgar epithets referencing her gender and sexual orientation after she complained of sexual harassment.[446] In the latter case, the court denied summary judgment to the employer on both the sexual harassment claim and the retaliatory harassment claim, finding that the "same evidence" could support causation for both retaliatory animus and gender-based or sexual motivation,[447] but the court reiterated that it was the plaintiff's burden to prove that the post-complaint harassment would not have occurred but for the retaliatory animus in order to prevail on the retaliation claim.[448]

Ironically, the current state of the law may mean that the more terrible and overt the sexually discriminatory behavior, the more difficult it will be for plaintiffs to prove that the post-complaint harassment would not have occurred but for the retaliatory motive.[449] Instead, a court may view it as a continuation of the earlier sexual and gender-based motivation.[450] On one hand, that makes it harder for plaintiffs to meet the causation standard necessary to prove retaliation.[451] Alternatively, if the plaintiff is able to prove but-for causation for a retaliatory motive, the courts' dichotomous view of

443. *Id.* at 447.
444. *See infra* notes 445–48 and accompanying text.
445. Juarez v. Utah, 263 F. App'x 726, 732–33 (10th Cir. 2008).
446. Maldonado-Catala v. Municipality of Naranjito, 255 F. Supp. 3d 300, 307 (D.P.R. 2015), *aff'd*, 876 F.3d 1 (1st Cir. 2017).
447. *Id.* at 311.
448. *See id.* at 317–18.
449. *See supra* notes 395–399 and accompanying text.
450. *See* Noviello v. City of Boston, 398 F.3d 76, 86 (1st Cir. 2005).
451. *See Maldonado-Catala*, 255 F. Supp. 3d at 320–21 (explaining that long periods of delay between protected actions and termination can negate the inference of retaliation).

retaliatory and sex-based motivation, as either/or and not both, may mean that classifying the motive as retaliatory may hurt the plaintiff on a sexual harassment claim,[452] especially if the court then fails to see continuation of harassment post-complaint as proof that the employer's responsive action was unreasonable.[453] The dichotomous parsing of retaliatory and discriminatory motives, whether it interferes with proof on the retaliation claim or the sexual harassment claim, poses a potential downside for the plaintiff either way.[454]

III. RETALIATION LAW AND #METOO: IMPLICATIONS FOR THE DEVELOPMENT OF THE LAW AND FOR THE TRANSFORMATIVE POTENTIAL OF THE MOVEMENT

The above discussion of how Title VII applies to coworker retaliation raises two related questions concerning the law's intersection with the #MeToo movement.[455] First, does the #MeToo movement contain lessons that might shape the development of retaliation law to better remedy the harms of retaliation by coworkers?[456] Second, will the promise and limits of retaliation law affect the transformative potential of the movement?[457] These questions are not limited to coworker retaliation, but in keeping with the focus of this article, the following discussion seeks to highlight the coworker angle, even as it discusses the movement's relationship to retaliation law more broadly.[458]

Social movements can have a dramatic impact on how courts understand and apply the law, even without legislative or regulatory change.[459] One tangible indication that #MeToo may be having such an effect is the Third Circuit's recent decision in *Minarsky v. Susquehanna County*, a case involving sexual harassment by a supervisor.[460] Because the employer had a sexual harassment policy in place which the plaintiff failed to use to report the harassment, the district court granted summary judgment to the employer on the affirmative defense.[461] The Third Circuit reversed, citing facts

452. *Cf. Noviello*, 398 F.3d at 87–88.
453. *See* Jensen v. Potter, 435 F.3d 444, 453 (3d Cir. 2006).
454. *Cf. Noviello*, 398 F.3d at 87–88.
455. *See supra* notes 359–61 and accompanying text.
456. *See supra* notes 362–67 and accompanying text.
457. *See infra* notes 480–506 and accompanying text.
458. *See infra* notes 459–506 and accompanying text.
459. *See supra* notes 245–46 and accompanying text.
460. Minarsky v. Susquehanna County, 895 F.3d 303, 306 (3d Cir. 2018).
461. *Id.*

showing that the employer was on notice that the same supervisor had sexually harassed other women, and that the plaintiff testified that she was afraid to report him because her daughter had cancer and she relied on her job for medical coverage.[462] In a remarkable footnote, the court expressly acknowledged lessons from the #MeToo movement, stating:

> This appeal comes to us in the midst of national news regarding a veritable firestorm of allegations of rampant sexual misconduct that has been closeted for years, not reported by the victims. It has come to light, years later, that people in positions of power and celebrity have exploited their authority to make unwanted sexual advances. In many such instances, the harasser wielded control over the harassed individual's employment or work environment. In nearly all of the instances, the victims asserted a plausible fear of serious adverse consequences had they spoken up at the time that the conduct occurred. While the policy underlying *Faragher-Ellerth* places the onus on the harassed employee to report her harasser, . . . there may be a certain fallacy that underlies the notion that reporting sexual misconduct will end it. Victims do not always view it in this way. Instead, they anticipate negative consequences or fear that the harassers will face no reprimand; thus, more often than not, victims choose not to report the harassment.[463]

This alone is a stunning revelation of one court's newfound skepticism of the assumption underpinning the *Faragher-Ellerth* framework, that the reasonable response to harassment is to report it.[464] But the court went further to cite studies showing that non-reporting is "pervasive," noting both the prevalence of sexual harassment in the workplace and a finding from the EEOC task force that "three out of four women who have been harassed fail to report it" and instead would "avoid the harasser, deny or downplay the gravity of the situation, or attempt to ignore, forget, or endure the behavior."[465] Digging deeper, the court listed as reasons for

462. *Id.* at 307, 314–16.

463. *Id.* at 313 n.12.

464. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764–65 (1998) (citing Faragher v. Boca Raton, 524 U.S. 775 (1998)) (discussing affirmative defenses to a 42 U.S.C. § 2000e-2(a) claim).

465. *Minarsky*, 895 F.3d at 313 n.12 (citing and quoting EEOC TASK FORCE REPORT, *supra* note 3, at v).

women's non-reporting: "[B]ecause they fear[ed] disbelief of their claim, inaction on their claim, blame, or social or professional retaliation."[466]

Although the *Minarsky* case did not involve a retaliation claim, the court's new-found sensitivity to employees' fears of retaliation for speaking out about sexual harassment reveals that #MeToo has had a powerful effect on at least a few federal judges in their understanding of, and empathy for, women's reluctance to report sexual harassment.[467] The footnote's window into judges' thinking about the relationship between reporting sexual harassment and fears of retaliation suggests that #MeToo holds promise for influencing how courts apply retaliation law, including to coworker retaliation.[468]

In fact, there are several ways that insights from #MeToo might further shape courts' understanding of Title VII's application to coworker harassment.[469] Many of the stories of sexual abuse and harassment show the importance of informal power dynamics, and not just formal organizational power, in silencing women and keeping them vulnerable to continued abuse.[470] Coworkers as well as higher-ups contribute to a culture of silence.[471] This observation has implications for the standard of liability courts apply to coworker retaliation, insofar as it rejects formally delegated power as the exclusive means of employer control,[472] and for the standard for retaliatory action under *Burlington Northern*, insofar as it evidences the chilling effect of coworker responses to complaining.[473] Among the court's reflections on retaliation in *Minarsky*, the court included citations to sources making the point that women are deterred from reporting sexual harassment by fears of social as well as professional reactions.[474] This observation suggests that courts may be receptive

466. *Id.*
467. *Id.* at 313–17 (discussing the reasonableness of plaintiff's failure to report harassment).
468. *Id.* at 313–14 n.12.
469. *See supra* notes 60–64, 76–82 and accompanying text.
470. *See supra* notes 65–72 and accompanying text.
471. *See supra* notes 44–45, 73–75 and accompanying text.
472. *See supra* notes 137–47 and accompanying text.
473. *See supra* notes 292–99 and accompanying text.
474. Minarsky v. Susquehanna County, 895 F.3d 303, 313 n.12 (3d Cir. 2018) (first citing EEOC TASK FORCE REPORT, *supra* note 3, at v; then citing Stefanie Johnson et al., *Why We Fail to Report Sexual Harassment*, HARV. BUS. REV. (Oct. 4, 2016), https://hbr.org/2016/10/why-we-fail-to-report-sexual-harassment [https://perma.cc/G576-U7LK]; and then citing ABC News/Wash. Post, *Unwanted*

to appreciating the blurriness of the boundary between the social and professional realms.[475]

Another take-away from the #MeToo movement is that the stories reveal sexual harassment and abuse occurring simultaneously with silencing and threats to punish reporting.[476] This insight has implications for both the liability standard for coworker retaliation, supporting using the same standard for coworker retaliation as for coworker sexual harassment,[477] and for the causation analysis, because it exposes the falsity of a dichotomous view of retaliatory and sex/gender-based motivation for post-complaint harassment.[478]

But there may be limits to how far #MeToo insights can take retaliation law.[479] As #MeToo fatigue sets in, courts may be wary about pressing employers to go too far in policing complicated coworker dynamics in reaction to sexual harassment complaints.[480] Although calibrating a reasonable employer response to known coworker retaliation should not necessarily be more difficult than determining employer reasonableness in responding to coworker sexual harassment, courts may tread lightly into what they view as the social realm of coworker reactions in the workplace.[481] This may not be an entirely bad thing for the impact of the movement. If courts pressed too far by censoring expressions of support for the accused, backlash may ensue, thereby solidifying resistance to #MeToo rather than changing the norms of sexual abuses of power.[482] In calibrating the determination of employer reasonableness, retaliation law must leave enough space for civil discourse surrounding #MeToo moments without allowing coworkers to punish and deter such allegations.[483]

Sexual Advances: Not Just a Hollywood Story, ABC NEWS (Oct. 16, 2017, 7:00 AM), https://www.langerresearch.com/wpcontent/uploads/1192a1SexualHarassment.pdf [https://perma.cc/HX79-9ZZH]).

475. *Id.*

476. *See* Knox v. Indiana, 93 F.3d 1327, 1329–30 (7th Cir. 1996); *see also* Parra v. White Plains, 48 F. Supp. 3d 542, 547–49 (S.D.N.Y. 2014); *see also* Ferguson v. Associated Wholesale Grocers, Inc., 469 F. Supp. 2d 961, 963–68 (D. Kan. 2007).

477. Polanco v. UPS Freight Servs., Inc., 217 F. Supp. 3d 470, 496 (D.P.R. 2016).

478. *Id.* at 498–99.

479. *See supra* Section II.C.

480. Sara H. Jodka, *In the #MeToo Era, Why Retaliation Is the Scariest Word for Employers*, LEXOLOGY: DW HR BLOG (Oct. 15, 2018), https://www.lexology.com/library/detail.aspx?g=cf64fb64-011d-4c4c-bd20-8a02b1b30f0e [https://perma.cc/GU3V-XKCW].

481. *See id.*

482. *See id.*

483. *See id.*

There is also ambiguity in how #MeToo will affect the standard under *Burlington Northern*.[484] One possible interpretation of where #MeToo has taken mainstream culture is that a normative shift has occurred, incentivizing the disclosures of sexual harassment so that it would take more now to deter the telling of these stories than before #MeToo.[485] It would be unfortunate if the very success of #MeToo in breaking down the silence surrounding sexual harassment and abuse resulted in heightening the legal standard for determining what retaliatory actions are likely to deter a reasonable woman from speaking up about sexual harassment. A better interpretation, and one more consistent with the tenor of the movement and with the purpose of retaliation law to open up the channels of complaint, would highlight the takeaway from the #MeToo narrative of how difficult it is to break the code of silence and reveal a sexually harassing incident.[486] Many of the #MeToo stories are disclosures from long ago, revealed well after the woman left the site of the harassment.[487] The avalanche of pent-up stories shows how difficult it is to speak out in the moment, when action might (at least in theory) be taken to correct the harassment.[488] Despite the impact of #MeToo, employees who are sexually harassed remain vulnerable to retribution by coworkers and supervisors to punish and chill complaints.[489]

Whatever effect #MeToo has on the law of retaliation, a related question is what impact retaliation law will have on the trajectory of the movement.[490] Fear of retaliation has long been the primary force deterring victims of sexual harassment from speaking out.[491] Will the limited effectiveness of Title VII law constrain how far the movement can go in promoting disclosures of sexual harassment at work?

Even if #MeToo pushes retaliation doctrine to be more encompassing of coworker retaliation, there are limits to how effectively the law can clear the channels of communicating sexual

484. *See supra* Section II.B.

485. *See* Deepti Hajela & Juliet Linderman, *1 Year After MeToo, Survivors Reflect on Their Disclosures*, AP NEWS (Oct. 15, 2018), https://www.apnews.com/5ea53cb201ca415292f5d42b19e9abec [https://perma.cc/48SE-3UDQ].

486. *See* Chira & Einhorn, *supra* note 71.

487. *See* Hajela & Linderman, *supra* note 485.

488. *See id.*

489. *See* Jodka, *supra* note 480.

490. *Id.*

491. Chira & Einhorn, *supra* note 71.

misconduct in the workplace.[492] Retaliation law was designed to protect official channels of complaining either through the legal system or the employer's internal reporting channels.[493] To the extent disclosures are made outside the workplace and on social media, it will be more difficult to prove employer knowledge, which is a prerequisite to proving that protected activity was the cause of retaliatory actions.[494] Furthermore, it is by no means clear that social media disclosures would count as protected activity at all, which Title VII requires to be reasonable in form and proportionate to the harassment.[495] Tweeting about sexual harassment instead of telling a manager will likely not meet this standard and not rise to the level of protected conduct.[496]

The main import of retaliation law in relation to #MeToo, however, is in protecting disclosures of sexual harassment—disclosures that may be inspired by the attention that #MeToo has focused on sexual harassment—that are made through the proper legal or employer-created channels for reporting.[497] Here too retaliation law can only promise so much.[498] There has long been a tension between retaliation law's (and employers') promise of protection from retaliation and the reality of employer discretion in overseeing the implementation of internal anti-harassment policies.[499] The reasonableness of an employer's response will inevitably be measured with a good dose of judicial appreciation for an employer's discretionary judgment about how to manage the workplace.[500]

There is also the risk that #MeToo may be changing the norms of appropriate sexual conduct too quickly for the law to keep up.[501] Retaliation law protects internal opposition to sexual harassment only if it is predicated on an objectively reasonable belief that the underlying conduct was in fact unlawful.[502] Some of the #MeToo stories are pushing the boundaries of cultural understanding of sexual

492. *See* EEOC TASK FORCE REPORT, *supra* note 3, at 15.
493. *See* Jodka, *supra* note 480.
494. *See id.*
495. *See* Jensen v. Potter, 435 F.3d 444, 449–50 (3d Cir. 2006).
496. *See id.*
497. *See supra* Section II.A.
498. *See supra* Section II.A.
499. *See* Chira & Einhorn, *supra* note 71 (discussing this tension within Ford plants).
500. *See supra* Section II.A.
501. *See supra* Section II.C.
502. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (explaining that in order to be actionable, conduct must be such that it creates an "environment that a reasonable person would find hostile or abusive").

harms far beyond what the law recognizes as actionable.[503] The Aziz Ansari story—although not a story of workplace misconduct—and the ensuing controversy surrounding it, serves as a reminder of how a #MeToo narrative can articulate an experience of sexual harm that goes well beyond the contours of what the law captures.[504] To the extent that a more expansive understanding of sexual harm is emerging from #MeToo, the reasonable belief doctrine might leave more internal complaints about sexual harm in the workplace unprotected from retaliation than before.[505]

In the final analysis, the continuing strength of #MeToo will depend more on the changing norms of support for telling these stories than from the scope of legal protection from retaliation. Perhaps the most we can expect from Title VII when it comes to coworker retaliation is to set outer limits that pressure employers not to let negative coworker reactions get too far out of hand.[506]

IV. CONCLUSION

At bottom, one of the biggest explanatory forces behind #MeToo is the failure of law, not just of sexual harassment law, but of retaliation law.[507] The manifest reluctance to express opposition to sexual harassment in a timely fashion through workplace channels speaks volumes about the limits of law in offering meaningful protection from retaliation at work.[508] The bubbling over of #MeToo stories on social media, an extralegal channel is, in a very real sense, strong evidence not just of the failure of the substantive law of sexual harassment, but also of retaliation law's failure to reassure people that they are safe to expose such conduct through official legal and workplace channels.[509] In terms of the relationship between law and social movements, that is both a pessimistic indicator of the limits of law to fuel social change, and also an optimistic sign that real-world limits on the ability to reshape law may not, in the end, cause too

503. *See* Way, *supra* note 12.
504. *Id.*
505. *Id.*
506. *See* EEOC TASK FORCE REPORT, *supra* note 3, at 43 (discussing steps employers should take in order to prevent negative coworker reactions and retaliation from getting out of hand).
507. *See* Porter, *supra* note 2, at 49–50 (discussing the rise of the #MeToo movement and the failure of retaliation law).
508. *See* Minarsky v. Susquehanna County, 895 F.3d 303, 313 n.12 (3d Cir. 2018).
509. *See* Vedantam, *supra* note 61 (discussing Facebook, Twitter, and Google as powerful tools to connect victims and reassure people they are safe to expose offensive conduct).

great a hindrance to the deepening of the movement.[510] Seen in that light, the difficulty retaliation law has encountered in policing coworker retaliation in particular may not spell doom for the continuation of the #MeToo narratives after all.[511]

Retaliation law can only do so much to shield complainants from the daggers and darts of coworker hostility.[512] Nevertheless, it can and should do better at setting outer boundaries to police coworker retaliatory targeting at work.[513] Better tailoring of retaliation law to recognize the harms of coworker retaliation may help nudge workplace norms, and by extension social norms, away from punishing responses and toward constructive dialogue; thereby discouraging efforts to shut down disclosures of sexual harassment.[514]

The ultimate issue underlying the question of how retaliation law should respond to the #MeToo movement is how much the law should protect these stories.[515] Any judgment about the reasonableness of an employer's response to retaliatory responses to sexual harassment allegations,[516] the severity of retaliatory harassment required to violate Title VII,[517] and the stringency required for proof of causation,[518] must be informed by the value of bringing such allegations to light. At the end of the day, these doctrinal choices depend on how much space we think the law should protect for calling out sexual harassment at work. Recently, New York Times columnist David Brooks cautioned that "call out culture"—an implicit reference to #MeToo—represents a feudal vigilante justice that weakens communal social ties and drains the empathy and nuance necessary for a healthy society.[519] This

510. *See Minarsky*, 895 F.3d at 313 n.12.
511. *Id.*
512. *See* Schoenbaum, *supra* note 61, at 639–40 ("Employment law prohibits retaliation for taking action against legal violations, but it does so too narrowly to insulate coworker support from employer discipline, leaving employers free to retaliate against coworkers who exchange support in many circumstances.").
513. *See* Albiston & Green, *supra* note 68, at 34–35.
514. *See* Porter, *supra* note 2, at 61 (discussing how the #MeToo movement and an overhaul of retaliation law would ideally "lead to all workers being more sensitive to harassment, which would ideally lead to less workplace harassment").
515. *See* Green, *supra* note 42, at 152.
516. *See supra* Section II.A.
517. *See supra* Section II.B.
518. *See supra* Section II.C.
519. David Brooks, *The Cruelty of Call-Out Culture: How Not to Do Social Change*, N.Y. TIMES (Jan. 14, 2019), https://www.nytimes.com/2019/01/14/opinion/call-out-social-justice.html [https://perma.cc/4FZD-JM9R].

perspective should not be too quickly dismissed: Brooks articulates real risks that black and white stories of villains and victims oversimplify and polarize, where empathy and understanding are needed for lasting normative change.[520] But Brooks's account understates the value of #MeToo-inspired complaints of sexual harassment at work.[521] The deluge of #MeToo stories represents the failure of law and civil discourse at work, and the turn to social media for telling these stories indicates the failure of other channels to provide support and justice.[522] In order to have more due process in the course of deciphering contested allegations, and more civility in the discourse around them, we need more—not less—space for telling accounts of sexual harassment in settings where accountability and redress are possible.[523]

The critique of #MeToo "call out" culture also misses something important about the value of narratives of sexual harm.[524] The power of the narratives lends believability and credibility to the stories of women and sexual harm, which have long been vulnerable to discrediting tactics.[525] It has always been easy to dismiss the lone woman who comes forward to accuse a powerful man of sexual harassment.[526] This skepticism affects girls and women of any age and in virtually any setting where sexual misconduct is encountered.[527] In the foundational case recognizing peer sexual harassment as a violation of Title IX, for example, the principal responded to the 5th grade girl's repeated complainants of sexual harassment from a 5th grade boy by asking, doubtfully, why she was the only one complaining.[528] The me *too* part of #MeToo has been critical for bolstering the believability of girls and women coming forward with stories of sexual harm.[529] That need not, as Brooks fears, force absolutist claims to believe all women.[530] Nor need #MeToo devolve into false equivalencies of a wide range of sexual

520. *Id.*
521. *Id.*; *see also supra* notes 60–64 and accompanying text.
522. *See supra* notes 509–11 and accompanying text.
523. *See supra* notes 354–58 and accompanying text.
524. *See supra* notes 484–88 and accompanying text.
525. Minarsky v. Susquehanna County, 895 F.3d 303, 313 n.12 (3d Cir. 2018).
526. *See supra* notes 40–50 and accompanying text.
527. *See* Davis *ex rel.* LaShonda v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 632–35 (1999).
528. *Id.* at 635.
529. *See* MacKinnon, *supra* note 40.
530. *See* Brooks, *supra* note 519.

harms nor dehumanize all purveyors of sexual harm.[531] Feminists, and the culture at large, have the capacity for nuanced moral judgment and tolerance for ambiguity when the truth is elusive.[532]

Perhaps most importantly, the critique of #MeToo as vigilante justice fails to account for the healing power of the stories themselves for the survivors who tell them.[533] We should remember that the originator of #MeToo, Tarana Burke, founded the movement, focusing on black girls and women, for its collective therapeutic power to heal the scars of long-suppressed sexual abuse.[534] Calls for repercussions for the perpetrators of abuse came much later, and are not the only value of #MeToo disclosures.[535]

The deeply personal narratives of #MeToo have forced people far and wide to take notice of, and try to understand and empathize with, survivors of sexual harassment and abuse.[536] They have deepened our cultural understanding of the injuries of sexual misconduct, with the potential to generate social change to make these harms less common, particularly for younger generations.[537] Retaliation law may not be able to fully protect future sexual harassment claimants who are inspired by #MeToo to tell their stories, but insights from the movement have the potential to make the law at least a moderately better fit.[538] Particularly when it comes to retaliation by coworkers, long the stepchild of retaliation law, Title VII has room to grow, and lessons from #MeToo can help light the way.[539]

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531. *See id.*
532. *See* Bari Weiss, *The Limit of 'Believe All Women,'* N.Y. TIMES (Nov. 28, 2017), https://www.nytimes.com/2017/11/28/opinion/metoo-sexual-harassment-believe-women.html [https://perma.cc/9H7L-DL4C].
533. *See* KK Ottesen, *#MeToo Founder Tarana Burke Reflects on the Movement—and the Reckoning*, WASH. POST (Nov. 6, 2018), https://www.washingtonpost.com/lifestyle/magazine/metoo-founder-tarana-burke-reflects-on-the-movement--and-the-reckoning/2018/11/02/c17c31e4-cbd7-11e8-a3e6-44daa3d35ede_story.html [https://perma.cc/747V-X5RQ].
534. *Id.*
535. *See id.*
536. *See* Rebecca Seales, *What Has #MeToo Actually Changed?*, BBC NEWS (May 12, 2018), https://www.bbc.com/news/world-44045291 [https://perma.cc/X5VG-73XC].
537. Wexler et al., *supra* note 1, at 98.
538. *See supra* notes 479–83 and accompanying text.
539. *See supra* notes 469–78 and accompanying text.