

Angry Employees: Revisiting Insubordination in Title VII Cases

Susan D. Carle*

INTRODUCTION

To read federal case law decided under Title VII of the Civil Rights Act of 1964¹—the provision that prohibits employment discrimination on the basis of race, sex, and other characteristics—is to be struck by the continuing racial and sexual hostility in U.S. workplaces today, and also at courts’ too frequent unwillingness to address it. Courts throw out plaintiffs’ cases even where the facts involve such egregious employer behavior as, in the race context, supervisors repeatedly calling employees the n-word and using other racial epithets, ordering African American employees to perform work others in the same job classification do not have to do, and imposing discipline white employees do not face for comparable conduct.² In the gender context, courts throw out plaintiffs’ cases even where supervisors have engaged in egregious sexual harassment.³ Why such results? In all the cases just described, employees reacted to employers’ demeaning treatment angrily—for example, by cursing, shouting, refusing an order, or leaving the workplace—and then were fired for “insubordination.” The article will refer to such acts, which fall short of threats of violence and are brief in duration, as “mild to moderate” insubordination and will use the approach of the National Labor Relations Board (NLRB or the Board) to define this term. Under the Board’s approach, to be discussed further in Section III below, the conduct may not involve violence or actual threats of violence; it may not substantially interfere with workplace productivity; and it may not continue over a sustained period but instead involve a short, spontaneous outburst by an employee who generally exhibits acceptable workplace conduct but has been angered by a supervisor’s problematic act.

Under the NLRB’s approach, such acts do not cause employees to lose their rights to protection against the employer conduct prohibited under the National Labor Relations Act (NLRA). But when plaintiffs in the analogous Title VII context commit acts of mild or moderate insubordination in reac-

* Professor of Law, American University Washington College of Law; J.D. Yale Law School, 1988. I would like to thank Binny Miller, Michael Selmi, Charles A. Sullivan and the participants in the 2013 Colloquium on Scholarship in Employment and Labor Law for very helpful comments on an earlier draft, and Daniel B. Amodeo, Walakewon Blegay, Sara Falk, David Kutch, and Erin Zacuto for excellent research assistance.

¹ Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., and 42 U.S.C.).

² See cases discussed *infra* Section II-A.

³ See generally Anne C. Levy, *Righting the “Unrightable Wrong”*: A Renewed Call for Adequate Remedies Under Title VII, 34 ST. LOUIS U. L.J. 567 (1990) (citing examples of employees fired for insubordination following their reactions to egregious sexual harassment).

tion to discrimination-tinged treatment and then file cases to challenge their terminations, courts often uphold their employers' invocation of "insubordination" as the legitimate, nondiscriminatory reason for the plaintiffs' discharge.

To be sure, employers are entitled to enforce legitimate workplace rules prohibiting employee insubordination. But in the cases just described, the scenarios were more complex than courts recognized. Employee insubordination occurred in reaction to troubling evidence of employer discrimination, even though the evidence did not suffice to establish a Title VII violation under the high burdens of proof plaintiffs bear in proving an actionable claim.⁴ Employers' agents engaged in conduct rife with blatant and provocative race and/or sex animus, yet received no censure for terminating employees on insubordination grounds because the employees reacted, understandably enough, with anger at the treatment they endured. This article will argue that, in such cases involving evidence of provocative discriminatory acts, courts should examine with special care an employer's reliance on insubordination as the legitimate, nondiscriminatory reason for an adverse employment action.

The scenarios just described have thus far received too little attention from Title VII courts, scholars, and policymakers. As this article will show, some courts' reasoning in Title VII insubordination cases is not only logically untenable but also undermines the objectives of Title VII. Mishandling insubordination leads to premature dismissal of lawsuits despite strong evidence of discrimination-tinged work environments. Indeed, mishandling insubordination cases creates perverse incentives, resulting in employers having higher chances of prevailing in discrimination suits when their conduct is so infuriating that it causes employees to lose their temper. Moreover, Title VII courts' failure to deal thoughtfully with insubordination cases contravenes the statute's objective of encouraging employees and employers to resolve antidiscrimination disputes before cases end up in court.

This article will propose a number of ways that Title VII courts could improve their jurisprudence in the insubordination situation. To gain ideas for this purpose, it looks both to Title VII precedent and to the doctrines the NLRB has developed in insubordination cases. Unlike many Title VII courts, the NLRB and courts reviewing its decisions often grant some leeway to what this article will refer to as "angry employees"—*i.e.*, employees who have gone some distance past the line of proper decorum (but not too far) in expressing their indignation at what they perceive to be illegal treatment. Instead of routinely accepting insubordination as legitimate grounds for an adverse employment action as Title VII courts often do, the NLRB scrutinizes the relationship between insubordination and an employee's exer-

⁴ In many of these cases, the plaintiff cannot prove an underlying discrimination claim because the acts do not rise to the "severe and pervasive" level necessary to prove a hostile environment harassment claim and/or lead to an adverse employment action only after the plaintiff has been insubordinate. For further discussion of the high burden of proof Title VII plaintiffs bear, *see infra* notes 59 and 182.

cise of statutorily protected rights. This article will argue that Title VII courts should do more of that scrutiny too.

The NLRB's institutional capacity and historical experience shape its perspective on the acceptable dynamics of workplace relations between employers and employees. Contrasting images of acceptable employee conduct emerge as a result. Over its more than seven decades of existence, the NLRB has developed specialized expertise in regulating workplace relations.⁵ Its doctrines are based on its long observation of dynamics between employers and employees and as a result tend to be more finely calibrated than those of Title VII courts. As I will show below, the Board strives to balance protection of workers' rights with employers' ability to run their workplaces effectively. To this end, it has developed several approaches, as I will explain in Section III below, to distinguish mild or moderate insubordination in the exercise of protected NLRA rights from acts that constitute grounds for discharge regardless of their cause. Employees in NLRB cases sometimes argue with supervisors, raise their voices, curse, and refuse an order—all without losing their statutory protections.⁶ To be sure, the Board also draws lines as to when insubordinate conduct goes too far but it draws those lines in a different place than Title VII courts do.

Under NLRB precedent, employees may stick up for themselves more vigorously at the moment of offense. Even if employees go a bit over the line in their efforts at self-advocacy, the NLRB reasons that it is better to err in the direction of protecting self-advocacy because doing so ensures more secure protection of employees' exercise of statutorily protected rights.⁷ Under Title VII courts' very different way of looking at employee conduct, on the other hand, employee self-expression at the moment of a dispute risks termination without later legal protection. As I will show below, the current Title VII regime insists on a kind of "sanitized workplace"⁸ where employees must behave with decorum, remaining docile to the point of virtual pas-

⁵ The NLRB was established under the so-called "Wagner Act" or National Labor Relations Act of 1935 ("NLRA"), 29 U.S.C. §§ 151–169 (2012), to administer the NLRA, and it does so in large part by prosecuting unfair labor practice cases when it finds them to be meritorious.

⁶ See, e.g., *NLRB v. Steinerfilm, Inc.*, 669 F.2d 845, 851–52 (1st Cir. 1982); *Opelika Welding*, 305 N.L.R.B. 561, 568 (1991); *Atlantic Steel*, 245 N.L.R.B. 814, 816 (1979).

⁷ To reiterate, this argument is *not* that "anything goes"; angry behavior can obviously go far over the line of what can be tolerated in a work environment. See, e.g., *Smith v. Bennett*, 50 FEP Cases 1762, 1764 (D.D.C. 1989) (involving an employee who allegedly repeatedly phoned her supervisor and swore at him while he was in meetings; banged on his door until led away, requiring three employees to spend the afternoon calming her; and confronted the supervisor by the elevator and screamed threats using swear words). Likewise, some conduct by employees in special positions of trust cannot be tolerated even if it might be protected in other contexts. See, e.g., *Laughlin v. Metro. Wash. Airports Auth.*, 149 F.3d 253, 260 (4th Cir. 1998) (involving an employee who stole confidential company documents and lost opposition clause protection). This article's point is simply that courts applying antidiscrimination law too often err in the opposite direction, by holding that *no* emotional outburst or expression of anger is tolerable in the workplace regardless of the circumstances leading to such acts.

⁸ Cf. Vicki Schultz, *The Sanitized Workplace*, 112 *YALE L.J.* 2061 (2003) (focusing on employers stripping romance and sex out of the workplace).

sivity, or risk termination. To energetically express outrage at discrimination in real time at the workplace is to risk creating a fact scenario that will prevent later prevailing in court.

In other areas of Title VII doctrine, however, the U.S. Supreme Court has crafted interstitial federal common law doctrines that create incentives for parties to resolve discrimination allegations in workplaces rather than courts. The vicarious liability affirmative defense to supervisor sexual harassment, which calls on employers to set up internal complaint and investigation procedures, is a prime example of the Court's initiative in this regard.⁹ Title VII courts could similarly fashion doctrines to encourage employers to rectify the kinds of offensively discriminatory workplace environments and supervisor actions that provoke insubordination in reaction to reasonably perceived humiliating treatment.

It is no wonder that courts become the primary adjudicators of Title VII discrimination disputes. Employees in Title VII cases end up "making a federal case" out of matters that could be better resolved in real time between the parties precisely because Title VII courts lack sufficiently robust employee self-help doctrines. Just as the NLRB has done, Title VII courts could develop doctrines that protect employees who have been provoked into conduct that somewhat exceeds the bounds of polite workplace behavior. This suggestion helps not only employees but also courts and even employers in the long run. Angry employees apprise employers of festering discriminatory situations; a bit of low-level workplace friction is better than later litigation. This article's proposed doctrinal reforms aim to create incentives for employers to rectify race- and sex-based friction *before* it blows up into a federal lawsuit.

A hypothetical illustrates the point of this article's proposals more concretely. Consider the following scenario, created out of an amalgam of cases discussed in Section II below: Rosa Morales, a Latina assembly line worker, is subjected to constant racial and sexual slurs from her white male supervisor and ordered to conduct degrading tasks that other employees are not asked to do. When she refuses to conduct these tasks and leaves the workplace, she is terminated for insubordination.

Morales files a Title VII lawsuit alleging sex, race, and national origin discrimination and harassment, and her employer moves for summary judgment. In many courts, Morales loses. She did in fact commit insubordination under the definition contained in the company's policy manual, because she disobeyed her supervisor's direct orders. This insubordination constituted a

⁹ See, e.g., *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). These two cases announced a new affirmative defense that the Court crafted in the exercise of its interstitial common law powers. Under it, an employer is not held vicariously liable for supervisor sexual harassment provided the employer shows that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior" and "the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer." *Ellerth*, 524 U.S. at 765.

“legitimate, nondiscriminatory reason” for her termination regardless of what provoked her.¹⁰

But what if the court had investigated the connection between Morales’s “insubordinate” act of violating her supervisor’s orders and his prior discrimination-tinged conduct? After investigating this connection, the court could conclude that Morales’s evidence would allow a rational trier of fact to find that race- and sex-based acts provoked her insubordination. Morales would go on to get her day in court, and, if able to persuade the fact-finder that race- and sex-based provocation, based on reasonable perceptions of discrimination, caused her insubordination, could win reinstatement and other appropriate Title VII relief. In turn, her employer might learn that prohibiting supervisors from engaging in provocative, discrimination-tinged conduct would not only lower its potential costs for defending Title VII claims, possibly losing them, and/or having to defend them beyond the summary judgment stage, but also, best of all, would avoid unnecessary employee terminations in the first place.

To develop the arguments underlying this article’s doctrinal reform proposals, I proceed as follows: Section I situates this article in the important recent literature examining Title VII’s failures on a variety of fronts, because any proposal for reform must take these critiques into account. Section II documents examples of Title VII courts’ approaches to assessing discrimination-related insubordination cases, some erroneous and some handled properly.¹¹ More specifically, Section II identifies three categories of cases: (A) those in which courts regard employee verbal outbursts or similar acts of mild or moderate insubordination as the “legitimate nondiscriminatory reason” for an adverse employment action; (B) those in which courts use mixed motive analysis;¹² and (C) those in which courts analyze facts under the “opposition conduct” clause of the Title VII anti-retaliation provision, which protects employees against retaliation for exercising rights to complain about conduct unlawful under the Act.¹³

¹⁰ The court also does not sustain Morales’ sex and race harassment claims because she did not complain about this through company channels, and because the court find that the harassment was not sufficiently severe and pervasive to amount to hostile environment discrimination in any event, and no tangible employment action occurred before she was terminated for insubordination. See *infra* note 182 (discussing legal standards for hostile environment discrimination).

¹¹ In the interests of manageability, this article confines its discussion to Title VII federal courts of appeal cases, but its analysis can be easily extended to other antidiscrimination statutes, such as the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621–634 (2012), and Title I of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12111–12117 (2012).

¹² For further explanation of mixed motive analysis, see *infra* text accompanying notes 88–91.

¹³ See 42 U.S.C. § 2000e-(3)(a) (2012). This provision states, in relevant part: “It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has *opposed* any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or *participated* in any manner in an investigation, proceeding, or hearing under this subchapter.” (emphasis supplied). Opposition conduct analysis is further explained *infra* Section II-C.

Section III suggests a series of tweaks to Title VII jurisprudence that could serve to better protect “angry employees.” All of these reforms could be easily accomplished through the courts’ exercise of their interstitial common law authority in areas of federal statutory interpretation. More specifically, Sections III-A-1 & 2 propose that courts more carefully examine employer assertions of insubordination as the “legitimate, nondiscriminatory reason” for taking an adverse employment action against an employee by looking for evidence of discrimination. Where such evidence is present, courts should examine whether the plaintiff’s insubordination was related to these conditions. Where the answers to these questions are affirmative, courts should decline to accept on face value the employer’s proffered reason of insubordination as a legitimate, nondiscriminatory reason for an adverse employment action. Instead, courts should engage in searching scrutiny of the facts, as indeed some Title VII judges have already called for in insubordination cases. Even better, in the presence of evidence raising discrimination concerns, courts could even switch the burden of *disproving* pretext to employers when an employee has allegedly been terminated for insubordination. Courts should also expand the scope of the *manner* of conduct protected under the opposition clause of Title VII’s anti-retaliation provision in order to protect mild to moderate insubordination that is proportionate in relation to the egregiousness of the employer conduct the plaintiff sought to oppose.

Finally, but no less importantly, courts could modify two NLRB doctrines so as to make their use appropriate in Title VII insubordination cases. These are the *Atlantic Steel* doctrine, used to evaluate whether an employer should have tolerated an employee’s brief angry outburst or other form of insubordination (such as disobeying an order) when the employee was pursuing statutorily protected rights, and the NLRB’s “provoked insubordination” doctrine, which holds that in certain circumstances an employer may not discipline an employee for insubordination provoked by the employer’s conduct. Taken together, these doctrinal adjustments would better advance Title VII’s dual objectives of eliminating discrimination in the nation’s workplaces while also encouraging employers and employees to work out discrimination-related disputes in real time in workplaces rather than later in courts.

I. THE SETTING FOR TITLE VII REFORM

Proposals for Title VII reform must take account of the statute’s background and the current state of Title VII law. Reform proposals should be in the realm of the possible and should also address scholars’ assessments of the flaws and limits of Title VII’s functioning in today’s political and judicial climate. As this Section will argue, in today’s “second generation” stage of

developing employment antidiscrimination law,¹⁴ doctrine should seek to shape employers' incentives to deal with discrimination problems *before* they become federal court cases. This Section briefly sketches the state of Title VII enforcement and lays the background against which this article's reform proposals will be made.

A. Title VII's Enforcement Scheme

Today's Title VII jurisprudence arises from peculiarities of Title VII's legislative history. This history caused courts to become the first-line adjudicators of Title VII claims, so that courts are now inundated with Title VII cases and are eager to dismiss them at the earliest stage of litigation possible. As discussed below, they have developed doctrinal "short cuts" to accomplish this, with results many employment discrimination scholars find unfairly stacked against plaintiffs.

It is no wonder this has occurred. When Congress first proposed Title VII, its drafters envisioned a regime in which complaints of discrimination would be resolved by an adjudicatory agency much like the NLRB—where complainants have a limited right to federal court review.¹⁵ In an attempt to "defang" this newly proposed federal administrative agency, however, congressional Republicans altered this proposal to require plaintiffs to maintain lawsuits in court.¹⁶ At the time, Republicans apparently believed that this statutory scheme would be less onerous on employers.¹⁷ What resulted instead, however, was that privately filed Title VII federal court cases created

¹⁴ For further explanation of second generation approaches, see *infra* text accompanying notes 35–39.

¹⁵ See H.R. REP. NO. 88-914, *reprinted in* LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964 2001, 2057 (1968) (reflecting Congress's intent to create an enforcement regime for Title VII similar to the enforcement powers set forth for the NLRB under the NLRA).

¹⁶ 42 U.S.C. § 2000e-(5)(f)(1) (2012). As finally enacted in 1964, Title VII gave the EEOC no litigation authority but only powers to investigate and attempt to "conciliate" employment discrimination claims. See H.R. REP. NO. 87-1370, *reprinted in* LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964 2155, 2160 (1968) (promoting conciliation under Title VII, and noting that the EEOC will have less enforcement power than the NLRB). For a comprehensive historical analysis of the EEOC's use of informal procedures to resolve discrimination complaints, see generally Marjorie A. Silver, *The Uses and Abuses of Informal Procedures in Federal Civil Rights Enforcement*, 55 GEO. WASH. L. REV. 482 (1987). Amendments in 1972 granted the EEOC more enforcement powers. See 42 U.S.C. § 2000e-5 (2012). To this day, however, the EEOC litigates only a minuscule number of all cases filed under the several statutes it is charged with enforcing. See *Charge Statistics FY 1997 Through FY 2014*, EEOC, <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> [<http://perma.cc/D5P3-L88D>] (reporting a total of 88,778 charges filed with the Commission in FY 2014); see also *EEOC Litigation Statistics, FY 1997 Through FY 2014*, EEOC, <http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm> [<http://perma.cc/QV84-NK57>] (noting that the EEOC sponsored a total of 167 suits in FY 2014, which was less than one percent of all cases filed with the Commission).

¹⁷ STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS, PART II 900–91 (Bernard Schwartz ed., 1970) (detailing the importance of the congressional compromise that emphasized private initiative in enforcement).

great pressure on the judiciary, especially because the EEOC's conciliation process rarely results in settlement.¹⁸

Today, some courts and policymakers rue Title VII's statutory design.¹⁹ Civil rights advocates, however, often see the private federal right of *de novo* action as a great benefit to plaintiffs—which it might have been if Title VII jurisprudence had developed to grant plaintiffs' strong enforcement rights.²⁰ The real fact is that, in a host of ways, courts engage in improper or illogical reasoning to rid their dockets of Title VII cases. Many of these trends have been well documented, as the section below will summarize briefly.

B. Low Win Rates for Title VII Plaintiffs

In the first decade and a half after Congress passed Title VII of the Civil Rights Act of 1964, committing the country to a new era of nondiscrimination in employment,²¹ many federal courts battled entrenched traditions to demand that employers eliminate discriminatory employment practices.²² But after that early heady period, federal courts, and especially the U.S. Supreme Court—turned conservative by the early 1980s—began a period of retrenchment on employment antidiscrimination doctrine.²³ In the 1980s and 1990s, the Court issued many pro-defendant opinions that heightened the standards for proving employment discrimination claims.²⁴ Plaintiffs found it increasingly difficult to prevail, law firms that specialized in bringing plaintiff-side employment antidiscrimination cases found it increasingly difficult to stay afloat, and juries and public opinion generally took a turn against employment discrimination plaintiffs.²⁵ Although evidence

¹⁸ Indeed, the agency has come under fire for a lack of meaningful conciliation attempts. *See Mach. Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1649 (2015) (holding that EEOC conciliation efforts are subject to limited judicial review).

¹⁹ *See, e.g.*, Stanley Sporkin, *Reforming the Federal Judiciary*, 46 SMU L. REV. 751, 757 (1992) (arguing that Title VII cases contribute to an overload of the judicial system and that specialized courts should be established to address this overflow issue).

²⁰ *See generally* Richard D. Kahlenberg & Moshe Z. Marvit, *WHY LABOR ORGANIZING SHOULD BE A CIVIL RIGHT* (2012) (arguing that labor rights should be re-codified in the U.S. statutory code under Title VII because its *de novo* right to federal court is better than the NLRB's administrative adjudication scheme).

²¹ *See* 110 CONG. REC. 15886 (1964) (statement of Rep. Dwyer) (“Just as with the Declaration of Independence and the Constitution, enactment of the civil rights bill marks the beginning of a new era in our life as a free people . . .”).

²² *See, e.g.*, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (discussed *infra* in text accompanying notes 131–136); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (approving the disparate impact theory of discrimination); *Teamsters v. United States*, 431 U.S. 324 (1977) (approving a large “pattern or practice” employment discrimination case).

²³ *See* William A. Wines, *Title VII Interpretation and Enforcement in the Reagan Years (1980–89): The Winding Road to the Civil Rights Act of 1991*, 77 MARQ. L. REV. 645, 659–89 (1994) (conducting a statistical analysis of Title VII opinions throughout the 1980s to show the trend towards restricting Title VII's provisions).

²⁴ *Id.*

²⁵ A large literature has studied this trend among the public, the media, and judicial decision-makers. *See, e.g.*, Katie R. Eyer, *That's Not Discrimination: American Beliefs and the*

points to continuing discrimination in employment,²⁶ courts often fail to penalize employers for conduct that is troubling in relation to Title VII's antidiscrimination goals. A number of studies expose these statistics: even though workplace discrimination remains a serious national problem, Title VII plaintiffs rarely win their cases.²⁷

Scholars have generated a large literature examining the factors that account for this state of affairs.²⁸ These factors include cognitive biases that lead courts and juries to favor employers' explanations.²⁹ In addition, courts have turned many issues that might be viewed as questions of fact into questions of law, resulting in early dismissal of cases even when underlying facts strongly suggest discrimination.³⁰ At the most basic level, courts have set

Limits of Anti-Discrimination Law, 96 MINN. L. REV. 1275 (2012) (surveying the social psychology literature documenting fact-finders' tendency to discount evidence of discrimination); Laura Beth Nielsen & Aaron Beim, *Media Misrepresentation: Title VII, Print Media, and Public Perceptions of Discrimination Litigation*, 15 STAN. L. & POL'Y REV. 237, 238 (2004) (analyzing media reporting and negative public perception of Title VII cases, such as a case in which the media portrayed a plaintiff as "not strong-willed enough to withstand teasing"); Elizabeth Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517 (2010) (discussing the trend by federal courts to prematurely dismiss employment discrimination and other civil rights cases); Michael Selmi, *Why Are Employment Discrimination Cases So Hard To Win?*, 61 LA. L. REV. 555 (2001) (arguing that various kinds of bias account for inordinately low win rates for plaintiffs and ruling out other explanations); Michael J. Zimmer, *Systemic Empathy*, 34 COLUM. HUM. RTS. L. REV. 576 (2003) (analyzing causes of legal system's lack of empathy for employment discrimination plaintiffs).

²⁶ See, e.g., Marc Bendick Jr. & Ana P. Nunes, *Developing the Research Basis for Controlling Bias in Hiring*, 68 J. Soc. Iss. 238, 243–49 (2012) (noting net rates of twenty to forty percent discrimination in employment tester studies); see also Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1154–55 (2012) (providing examples of implicit bias leading to discrimination as identified in various tester studies).

²⁷ One such study comes from the Federal Judicial Center. See JOE CECIL & GEORGE CORT, REPORT ON SUMMARY JUDGMENT PRACTICE ACROSS DISTRICTS WITH VARIATIONS IN LOCAL RULES (2008), www.uscourts.gov/file/sujulrs2pdf [http://perma.cc/LK7W-3W2H]. Plaintiffs in Title VII cases fare less well in federal court than do plaintiffs in any other kind of case, including torts and contracts. *Id.* at 9, 16–17 and accompanying tables. For the small group of employment discrimination cases that did make it to trial, the win rate for plaintiffs in federal district court was fifteen percent, much lower than the fifty-one percent win rate for non-employment cases. See Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 128–29 (2009).

²⁸ A recent symposium entitled *Trial by Jury or Trial by Motion: Summary Judgment, Iqbal, and Employment Discrimination*, 57 N.Y.L. SCH. L. REV. 659 (2013), explores these issues in detail in a collection of articles by leading scholars, some of which will be cited below.

²⁹ See, e.g., Ann McGinley, *Cognitive Illiberalism, Summary Judgment, and Title VII: An Examination of Ricci v. DeStefano*, 57 N.Y.L. SCH. L. REV. 865 (2013) (using the social psychology literature on "cognitive illiberalism," pioneered by scholars such as Dan Kahneman, to analyze judges' unwillingness to fairly evaluate facts in Title VII cases); Kang et al., *supra* note 26, at 1156–59 (noting that jurors "frequently engage in motivated reasoning" and thus commit errors of implicit bias in civil rights cases).

³⁰ See Kerri Lynn Stone, *Shortcuts in Employment Discrimination Law*, 56 ST. LOUIS U. L.J. 111, 113, 168 (2011) (identifying "short cuts" courts use in Title VII cases and arguing that, taken together, these "compris[e] a larger movement of the judiciary toward foreclosing employment discrimination plaintiffs' cases without the necessary analysis"); see also Anne Lawton, *The Meritocracy Myth and the Illusion of Equal Employment Opportunity*, 85 MINN.

very high standards of proof in Title VII cases. Under disparate treatment theory, plaintiffs must persuade the trier of fact that it is more likely than not that an invidious discriminatory motive led the employer to take an adverse employment action against the plaintiff.³¹ Under disparate impact analysis, plaintiffs must put forth elaborate statistical analysis and expert testimony identifying a specific practice and proving it had a statistically significant adverse impact on members of plaintiffs' class in order to make out a prima facie case.³²

A host of other pro-employer doctrines contribute to plaintiffs' loss rate as well. One example is the Court's evolving "stray comments" doctrine, which distinguishes between supervisor statements that can be taken as admissions of discriminatory motive and mere "stray comments" that cannot be accorded such strong evidentiary weight. Expansive use of this doctrine has made it harder for plaintiffs to meet their burden of proving discrimination because evidence that is arguably probative of a supervisor's state of mind, such as the use of racial epithets, ends up being dismissed as mere "stray comments."³³ On top of these hurdles, new opinions heightening the pleading standards for federal court filings, which the Court announced in the *Ashcroft v. Iqbal* and *Bell Atlantic Corp. v. Twombly* cases, further decrease Title VII plaintiffs' chances.³⁴

Of course, there is not necessarily anything wrong with the fact that few Title VII cases result in wins for plaintiffs in court today, provided that Title VII's employment nondiscrimination goals are being satisfied. Thoughtful scholars have argued that assessments of Title VII's efficacy should include its symbolic and incentive-producing effects. If Title VII law can induce

L. REV. 587, 634–42 (2000) (demonstrating how courts "convert contested issues of fact into issues of law," and in so doing increase employers' chances of winning on summary judgment and on circumstantial evidence cases after trial).

³¹ The Court's latest articulation of this burden of proof is in *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 142–43 (2000), as discussed *infra* note 60.

³² Title VII of the Civil Rights Act of 1964, § 703(k), 42 U.S.C. § 2000e-2(k) (2012).

³³ See Keri Lynn Stone, *Taking in Strays: A Critique of the Stray Comment Doctrine in Employment Discrimination Law*, 77 MO. L. REV. 149 (2012) (arguing that courts too often dismiss probative evidence of discrimination as mere "stray comments" in order to grant summary judgment to employers despite strong evidence of discriminatory motive).

³⁴ See *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (holding that new pleading standards apply to all types of cases including Title VII claims); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 544 (2007) (holding that plaintiffs' claims must have facial plausibility to survive a motion to dismiss and that to have such plausibility, complaints must aver facts detailed enough that, if proved true, they would allow a court to enter judgment in the plaintiff's favor). These standards require plaintiffs to plead very specific facts to support their legal claim of discrimination, even before they have begun discovery. In many instances, plaintiffs cannot meet these heightened pleading standards and find their claims thrown out of court for failure to state a claim upon which relief can be granted, even though discovery could have produced ample concrete evidence to support plaintiffs' case theories. For further discussion, see Joseph A. Seiner, *After Iqbal*, 45 WAKE FOREST L. REV. 179, 187 (2010) (finding that federal courts grant motions to dismiss in employment discrimination cases far more often under the *Twombly* standard than under the standard applied previously); Suzette M. Malveaux, *Front Loading and Heavy Lifting: How Pre-Dismissal Discovery Can Address the Detrimental Effect of Iqbal on Civil Rights Cases*, 14 LEWIS & CLARK L. REV. 65 (2010) (finding civil rights cases particularly vulnerable to dismissal under the new *Iqbal* standards).

employers to adopt antidiscrimination policies without being hauled into court, then its objectives are being met regardless of plaintiffs' win rates through lawsuits. An important article making this argument is Susan Sturm's "Second Generation Discrimination: A Structural Approach."³⁵ Sturm calls on courts, policymakers, and scholars to adopt a new approach in the way they think about Title VII law. Her analysis of how Title VII law can create incentives for resolving disputes outside courts can help guide proposals for doctrinal reform.

C. *Finding Paths to Address Second Generation Discrimination*

In a classic article, Sturm identifies the problem of "second generation" discrimination. Such discrimination is not blatant (such as signs saying "no Irish need apply") but instead involves "patterns of interaction" and cognitive bias.³⁶ Sturm points out that second generation discrimination is much harder to reach by simple legal edicts: "the complex and dynamic problems inherent in second generation discrimination cases pose a serious challenge for a first generation system that relies solely on courts (or other governmental institutions) to articulate and enforce specific, across-the-board rules."³⁷ She argues that antidiscrimination law should approach second generation discrimination in a problem solving mode that "shifts emphasis away from primary reliance on after-the-fact enforcement of centrally defined, specific commands."³⁸ Rather than thinking about law in terms of rule enforcement, which focuses on the creation of legal claims, lawyers and other legal actors should use law to create incentives for employers to "identify, prevent, and redress exclusion, bias, and abuse," *before* cases get to court.³⁹

Sturm gives several examples of how the Court's Title VII jurisprudence has created incentives for employers to address discrimination problems internally. Chief among her examples is the Court's initiative in crafting an affirmative defense to employer vicarious liability in supervisor sex harassment cases.⁴⁰ This defense allows employers to avoid liability for supervisor sex harassment if they have set up reasonable policies to deter and investigate sex harassment cases and plaintiffs have failed to use them.⁴¹ Sturm argues, against critics of this doctrine,⁴² that this example of a second

³⁵ Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001).

³⁶ *Id.* at 460.

³⁷ *Id.* at 461.

³⁸ *Id.* at 462.

³⁹ *Id.* at 463.

⁴⁰ See *supra* note 9 and accompanying text for a discussion of this doctrine.

⁴¹ *Id.*

⁴² See, e.g., Anne Lawton, *Operating in an Empirical Vacuum: The Ellerth and Faragher Affirmative Defense*, 13 COLUM. J. GENDER & L. 197 (2004) (arguing that courts' focus on paper policies and procedures ends up shifting the burden of proof on prevention back to employees, contrary to the Court's intent); John H. Marks, *Smoke, Mirrors, and the Disappearance of "Vicarious" Liability: The Emergence of a Dubious Summary-Judgment Safe Harbor for Employers Whose Supervisory Personnel Commit Hostile Environment Workplace Harass-*

generation approach will help eliminate discrimination. It will do so, Sturm explains, by encouraging plaintiffs to raise issues *within* the workplace to be dealt with effectively there, even though it also makes cases much harder for plaintiffs to win later.⁴³ Sturm's point is that the main objective of civil rights law is not necessarily to create more opportunities for plaintiffs to win cases in courts; rather, the core objective may be to bring about workplaces in which lawsuits are not needed because problems have been resolved there rather than being removed to outside institutions.⁴⁴

Focusing on sex discrimination, Sturm shows how employers can set up internal processes to examine policies and reform them to increase women's career success. Sturm identifies "the pivotal role of intermediaries"⁴⁵ in these processes, and discusses some of the problems these employers encountered, including discrimination suits where local managers circumvented central administration policies designed to promote fair and inclusive hiring and promotion. Thus, Sturm notes, litigation may still sometimes prove "essential to focus attention on identified problems where internal systems failed to correct them."⁴⁶ Sturm closes by calling for further inquiry into the role of intermediaries.

Sturm focuses on the practices of the "best," most well-meaning employers. These are often (though not always) employers that draw their employees from a professional, highly educated, and thus relatively privileged, labor pool. Intel and Deloitte are cases in point: These employers must compete for top talent and use their progressive employment policies to do so.⁴⁷ Far too many other employers are less motivated to achieve high marks for

ment, 38 HOUS. L. REV. 1401, 1405 (2002) ("This Article challenges the logic and the policy implications of [the *Ellerth*] safe-harbor strategy and argues that post-*Ellerth* lower courts have been far too deferential to the strategy at the summary judgment stage of litigation."); Susan D. Carle, *Acknowledging Informal Power Dynamics in the Workplace: A Proposal for Further Development of the Vicarious Liability Doctrine in Hostile Environment Sexual Harassment Cases*, 13 DUKE J. GENDER L. & POL'Y 85 (2006) (arguing that the Court's affirmative defense fails to appreciate workplace power dynamics).

⁴³ See Sturm, *supra* note 35, at 483 (noting that the sexual harassment affirmative defense "creates considerable incentives for [the] employer[] to focus on the meaning and application of the antidiscrimination norm in relation to its own workplace culture and dynamics").

⁴⁴ Sturm goes on to identify the criteria for evaluating the effectiveness of such second generation antidiscrimination doctrines. These include whether they "set[] the stage for institutional self-reflection that can enable organizations to address new problems," produce information about second generation problems, and "build the capacity of workplace participants to prevent and address bias." *Id.* at 483, 489–90.

⁴⁵ *Id.* at 522. These intermediaries in her case examples included senior officials, independent consultants, problem solving lawyers, and employee identity caucuses. *Id.* at 524, 527, 531.

⁴⁶ *Id.* at 544.

⁴⁷ Cf. Sarah Lacy, *Google Takes Another Big Step to Retain Employees: Autonomous Business Units*, TECHCRUNCH (Dec. 17, 2010), <http://techcrunch.com/2010/12/17/google-takes-another-big-step-to-retain-employees-autonomous-business-units/> [<http://perma.cc/XD93-VW4Z>] (discussing Google's policy of providing greater employee autonomy to retain workforce talent); Jennifer Ludden, *Unlimited Vacation Time Not a Dream for Some*, NAT'L PUB. RADIO (Aug. 12, 2010), <http://www.npr.org/templates/story/story.php?storyId=129137542&ps=cprs> [<http://perma.cc/R9KN-KC8Y>] (discussing elite firms such as Social Strata and Netflix seeking to attract the best white collar professionals by offering unlimited time off).

their employment practices, especially if they rely on less skilled workers who are easily replaced. Thus, Sturm's ideas may need modification to extend them to less ideal working environments in which employers are less motivated to engage in self-examination of their workplace practices. This article argues that the law should push them to do so anyway.

This article proceeds from Sturm's ideas but expands them in several respects. First, antidiscrimination law needs to be modified not only to create incentives by making Title VII cases easier for *employers* to win in some circumstances, as in sex harassment vicarious liability doctrine, but also by making it easier for *employees* to win in other circumstances. Of course employers never like legal rules that increase the specter of liability, but incentives based on heightened prospects of liability may increase employers' level of care.⁴⁸ If employers know that courts will look beneath their reasons for firing employees for insubordination to search for provocation arising from employees' reasonable perceptions of discriminatory conduct, employers will have greater incentives to look out for and eliminate such scenarios. Moreover, altering liability standards may serve employers well in the end, by inducing them to eliminate festering atmospheres of racial, sexual and/or other forms of discriminatory hostility *before* they lead to insubordination situations and lawsuits. In contrast, premature employer victories in discrimination-linked insubordination cases signal that employers have little reason to be concerned about supervisors who spew forth the n-word, engage in egregious sex-based harassment, or exhibit other types of discrimination-tinged animosity.

This article thus proposes that second-generation regulation should consider both "carrot" and "stick" approaches to encouraging employers to eliminate workplace discrimination. Sturm's ideas require expansion to take account of not only the best employers, which respond well to the motivations of carrots, but also highly imperfect employers, which may be better incentivized by sticks. In a world of non-ideal conduct on both sides of the employment relationship, law should not ignore reality. Indeed, the less ideal the employer, the more likely the possibility that employees will react angrily to perceived and unrectified discrimination. Sturm's concept of "second generation" regulation, joined with the concept of the imperfect angry employee reacting to an imperfect employer, can point to new directions for Title VII doctrine.

One reason to adjust Title VII doctrine is to create incentives for employers to do more to prevent the conditions that can lead to discrimination-related insubordination cases. Another reason is to better protect employee self-help efforts under Title VII even when they extend beyond the bounds of politeness. This is especially important given the low chances that Title VII plaintiffs will succeed through litigation, as discussed in Section I-B. If

⁴⁸ Indeed, this is the basic theoretical assumption underlying law and economic theories of how law creates behavioral incentives through legal liability rules. See, e.g., GUIDO CALEBRESI, *THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970).

federal courts can no longer be looked to as staunch guardians of Title VII's nondiscrimination edicts in individual cases, might they still be convinced to set up "second generation" rules that would create incentives for employers to clean up discrimination-laden working environments? The proposals outlined in Section III have this goal. Although there is no way to know whether there would in the end be fewer lawsuits under these proposals, there could well be less discrimination, as employers respond to changed liability risks by striving to eradicate discrimination-tinged scenarios that would prevent a court from being able to grant summary judgment to them later.

To sum up the points made above, today's federal courts, burdened by huge case dockets and guided by the Supreme Court's directives encouraging dismissal of Title VII cases at early stages of litigation, do not sufficiently scrutinize the facts in Title VII cases. Facts that might have troubled pro-civil rights courts in an earlier period receive cursory treatment before case dismissal today. As a result, a buzzing atmosphere of discrimination—*i.e.*, manifest hostility around race, sex, and other protected characteristics—is evident in many case narratives even when plaintiffs do not succeed, as this article will discuss in detail in Section II below. Into this atmosphere steps the angry worker who has experienced situations indicative of discrimination. Attempting to engage in self-help, this angry employee engages in mildly or moderately insubordinate behavior, such as an angry outburst, uttering swear words and/or a brief refusal to follow a supervisor's instruction. The typical result is termination for insubordination. This terminated employee files a lawsuit, only to have the court uphold the employer's action on insubordination grounds. A more thoughtful approach could lead to different results. To begin the process of formulating a different approach to these cases, Section II will explore this pattern of troubling cases as a prerequisite to proposing doctrinal reform.

II. HOW TITLE VII COURTS GET INSUBORDINATION CASES WRONG

In thinking about the state of Title VII insubordination law today, consider the following facts, taken from the record in *Morgan v. National Railroad Passenger Corp.*⁴⁹ Abner Morgan, a trained and experienced electrician, applied for a position at an Amtrak maintenance yard in Oakland, California.⁵⁰ Amtrak offered Morgan a job, which he believed was as an electrician.⁵¹ When he began work, however, he received the title of "electrician helper."⁵² Morgan was the only person ever hired as a "helper" in this yard. Because of his job classification, he was paid less than other

⁴⁹ 232 F.3d 1008 (9th Cir. 2000).

⁵⁰ *Id.* at 1010–11. The facts offered here are those the court took as true for purposes of summary judgment. *Id.* at 1011.

⁵¹ *Id.*

⁵² *Id.*

workers who were doing the same electrician's work. As Morgan saw it, the relevant difference was that these other workers were white and Morgan was black.

Morgan complained of race discrimination, setting in motion a series of negative interactions with management.⁵³ He eventually succeeded in having his salary equalized through union arbitration, but he continued to face discipline that was harsher than sanctions imposed on other workers. His supervisors ordered him to do demeaning cleanup work others did not have to do and called him racially derogatory names.⁵⁴ The final incident leading to Morgan's termination took place when a supervisor yelled at Morgan to "get his 'black ass' into the office." Morgan refused and went home, and Amtrak terminated him for violating the company's rule prohibiting insubordination.⁵⁵

Morgan filed a lawsuit under Title VII,⁵⁶ offering as evidence not only his own treatment but also the testimony of fellow employees who described a "racially-laden atmosphere at the Yard."⁵⁷ He lost his first jury trial following the district court's decision to exclude evidence of this long history of race-based treatment against Morgan and others. His appeal from this ruling eventually produced an important U.S. Supreme Court opinion holding that pre-limitations incidents may be used to establish "hostile environment" discrimination⁵⁸ but not to support claims involving discrete acts of discrimination.⁵⁹

⁵³ For example, Morgan was asked to attend a meeting in a supervisor's office, but when he insisted on union representation, as was his right under federal labor law, a supervisor refused to allow this and then fired Morgan for failing to obey orders to attend the meeting. *See id.* at 1011–13. Morgan filed a union grievance, and his termination was reduced to a 10-day suspension, which was the most severe discipline ever imposed on an employee at the yard for more than a decade. After he came back to work, Morgan's problems at his job became even worse. When he applied to participate in an apprenticeship program, the yard supervisor told him he had "'a snowball's chance in hell of becoming an electrician'" at his yard. *Id.* Morgan never received a response from the main office about his application. *Id.* Based on this and other incidents, Morgan filed a race discrimination complaint with the EEOC. *Id.* He and other employees met with their congresswoman to complain about conditions at the yard. *Id.* But instead of conditions improving, Morgan began to receive various disciplinary charges he believed were unfounded, such as a charge of absenteeism for taking leave he had properly requested and had approved. *Id.*

⁵⁴ *See id.* at 1011–13.

⁵⁵ *See id.* at 1012–13.

⁵⁶ 42 U.S.C. §§ 2000e–2000e-17 (2012).

⁵⁷ This evidence included testimony of approximately a dozen employees, including a former manager, stating that supervisors frequently made racial jokes, used the "n word" and other racial epithets, called an African American employee "boy," performed racially derogatory acts in front of higher management officials, and made negative comments about the capacity of African American employees. *Morgan*, 232 F.3d at 1013.

⁵⁸ Under this theory of discrimination a plaintiff must show that racial harassment was so "severe and pervasive" as to constitute discrimination because it altered the "terms and conditions of employment" for the plaintiff. *See infra* note 182 (discussing doctrinal prerequisites for establishing hostile environment discrimination).

⁵⁹ *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113–15 (2002). Commentators have criticized the Court's formulation of continuing violations theory in *Morgan*. *See, e.g., Vincent Cheng, National Railroad Passenger Corporation v. Morgan: A Problematic For-*

A virtually unnoticed aspect of the *Morgan* case was Amtrak's invocation of insubordination as its "legitimate, nondiscriminatory reason"⁶⁰ for firing Morgan. As this article has already pointed out, Amtrak's theory that termination for insubordination constituted a legitimate, nondiscriminatory reason for Morgan's termination was problematic. The alleged insubordination took place in reaction to the provocative, race-related acts of the employer's supervisors and thus logically should not have been said to be a reason for his termination independent of the alleged discrimination.

This logical flaw in the employer's case theory in *Morgan* could be dismissed as an anomaly, if it were not for the fact that, in numerous other cases, courts routinely enter judgment in favor of employers where the facts show that employees were mildly or moderately insubordinate in reaction to their perceptions of discriminatory treatment. In other words, an employee has made an angry outburst, cursed, and/or refused to carry out a supervisor's order but has not gone so far as to engage in physical violence or threats of violence nor engaged in a long, sustained course of misconduct. The cases in which Title VII courts have gotten insubordination wrong span the lifetime of Title VII; they are neither a historical relic nor a recent development.⁶¹ This Section highlights a handful of cases that span a variety of federal courts of appeals in order to show that this problem of analytic error extends across jurisdictions, though some courts, especially in the Third Circuit,⁶² have better track records than others. I examine federal courts cases only, since that is the focus of this article; state courts may be making similar errors (or, conversely, doing a better job).

The cases discussed below can be broken into several categories, namely: (A) single motive cases in which courts regard employee verbal outbursts as the legitimate, nondiscriminatory reason for an adverse employment action despite evidence of related discrimination or retaliation; (B) cases applying Title VII mixed motive analysis but reaching similar results; and (C) cases analyzed under Title VII's "opposition conduct" clause, which

mulation of the Continuing Violation Theory, 91 CAL. L. REV. 1417, 1442–50 (2003) (arguing that *Morgan* rests on a "dubious doctrinal distinction."). In the case itself, however, admission of the additional evidence of a long pattern of race-based harassment led to victory for the plaintiff on retrial. See Jury Verdict, *Morgan v. National Railroad et al.*, No. 3:96-cv-03585 (N.D. Cal. June 4, 2004). Morgan won a \$500,000 jury verdict, which the judge adjusted downward, and the parties then entered into a confidential settlement dismissing an appeal. See Stipulation and Order to Dismiss the Appeal, *Morgan v. National Railroad et al.*, No. 3:96-cv-03585 (N.D. Cal. Jan. 6, 2005).

⁶⁰ Under Title VII, an employer must present a "legitimate, nondiscriminatory reason" for an adverse employment action after the plaintiff has made out a prima facie case of discrimination, and the plaintiff then bears the burden of persuasion that discrimination was the real reason for the action. See *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 142–43 (2000).

⁶¹ As I discuss further below, Terry Smith identified a similar phenomenon, which he called "subtle discrimination," in his powerful article, *Everyday Indignities: Race, Retaliation, and the Promise of Title VII*, 34 COLUM. HUM. RTS. L. REV. 529, 535 (2003).

⁶² See, e.g., *Robinson v. Se. Pa. Transp. Auth.*, 982 F.2d 892 (3d Cir. 1993); *Goodwin v. Pittsburgh*, 480 F. Supp. 627 (W.D. Pa. 1979), *aff'd*, 624 F.2d 1090 (3d Cir. 1980).

protects employees against retaliation for opposing workplace discrimination.⁶³ The sections below discuss each category in turn.

A. *Insubordination as the Legitimate Nondiscriminatory Reason for an Adverse Employment Action*

The fact pattern of *Morgan* follows a common theme: an African American employee alleges that he has been “‘consistently harassed and disciplined more harshly than other employees on account of his race,’” through such steps as denying him the right to participate in training opportunities and assigning him demeaning work beneath his job classification.⁶⁴ He also has evidence of supervisors’ repeated use of racial epithets.⁶⁵ These incidents lead to an escalation of hostility between the employee and management that ultimately culminates in an altercation and the employee’s termination for insubordination, later upheld in court.⁶⁶

A similar case is *Clack v. Rock-Tenn Co.*, where an African American line worker in a recycling plant presented considerable evidence that he had been subjected to a long series of harassing statements and conduct by Murphy, his direct supervisor, who was white and known to openly express racial prejudice.⁶⁷ The incident that led to Clack’s termination occurred when Murphy ordered Clack to carry out a clean-up task that Clack believed was not within his job duties.⁶⁸ Clack refused and left the area to find the plant superintendent, after which Murphy sent him home for insubordination. The company general manager then conducted a limited investigation and accepted the plant superintendent’s recommendation that Clack be fired.⁶⁹

The Sixth Circuit upheld summary judgment for the employer, because, while the plaintiff had “‘established a *prima facie* case of both discrimination and retaliation,” he had not presented evidence to prove that the “‘defendants’ stated reason for termination was pretextual.”⁷⁰ The majority further opined that the evidence of Murphy’s racial animus could not be imputed to higher management because Murphy’s role had been limited to reporting the incident and letting higher management officials form their own opinions.⁷¹ But this reasoning overlooked the evidence of blatant racial animus and Clack’s reasonable attempts to protest. This circuit has followed similar du-

⁶³ Title VII of the Civil Rights Act of 1964, § 704(a), 42 U.S.C. § 2000e-3(a) (2012).

⁶⁴ Nat’l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 105–08 (2002).

⁶⁵ *Id.* at 105 n.1.

⁶⁶ *Id.* at 114 n.8.

⁶⁷ 304 F. App’x 399, 401 (6th Cir. 2008).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 401–02.

⁷¹ *Id.* at 405–06. This reasoning rested in part on the “cat’s paw” theory of when discrimination by non-decision makers can be imputed to an employer’s managers, which has since been clarified by the U.S. Supreme Court in *Staub v. Proctor Hospital*, 562 U.S. 411 (2011) (holding that illegally motivated actions by non-decision makers can be attributed to the employer where they are the proximate cause of an adverse employment action because they influenced the decision maker’s deliberations).

bious logic in other recent opinions in Title VII insubordination cases as well.⁷²

In contrast, the *Clack* dissent points to the fact that higher-level managers knew about Murphy's racially discriminatory conduct, arguing that the court should have considered the "taint of Murphy's discriminatory animus" as evidence of pretext and allowed the case to be submitted to the jury.⁷³ This focus on evidence that Clack's termination for insubordination was pretextual can provide helpful guidance to other courts, as discussed further in Section III-A-1 below.

But other circuits have rendered *Clack*-type decisions instead.⁷⁴ The Seventh Circuit found no Title VII violation in *McClendon v. Indiana Sugars, Inc.*⁷⁵ on facts very similar to those of *Clack*. In *McClendon*, the plaintiff, an African American man, had worked his way up in a sugar processing plant from janitor to warehouse manager, but then found himself subjected to random searches after sugar disappeared from the plant.⁷⁶ During the course of one such search a plant manager called McClendon a "black thief."⁷⁷ McClendon filed EEOC charges and then complained of unlawful retaliation when the company assigned overtime work to a less senior white employee. When a supervisor directed McClendon to develop a list of performance goals for himself, he objected, believing he had been singled out for this task. McClendon became increasingly confrontational in several meetings with supervisors in which he questioned their motivations and was terminated for insubordination.⁷⁸

The state unemployment compensation agency found as a matter of fact that he had not been insubordinate, but the Seventh Circuit found this evidence irrelevant because in those proceedings the burden of proof had been on the employer rather than on McClendon as it would be in a Title VII case.

⁷² See *Davis v. Omni-Care, Inc.*, 482 F. App'x 102, 111 (6th Cir. 2010) (holding that an African American plaintiff, who had filed a claim for hostile work environment after finding a noose hanging in his workspace and whose employer refused to address his complaint, and who was then fired for not answering his employer's phone calls, failed to demonstrate that his termination was a pretext for retaliation for his discrimination claims); *Tibbs v. Calvary Methodist Church*, 505 F. App'x 508, 515 (6th Cir. 2012) (finding that an African American teacher could not prove that her insubordination—leaving a "heated" meeting early after she was reassigned to a new classroom—was mere pretext and that she had been fired because she had filed age and race discrimination complaints).

⁷³ *Clack*, 304 F. App'x at 408–10 (Moore, J., dissenting).

⁷⁴ See, e.g., *Stallworth v. Singing River Health Sys.*, 469 F. App'x 369, 370 (5th Cir. 2012). *Stallworth*, a religious discrimination case, involved a plaintiff's complaint to her supervisor about coworker harassment when she engaged in lunchtime prayer, after which her supervisor declined her requests to take part in a training program. *Id.* at 371. When she contacted another official in an attempt to obtain the training, her employer fired her on insubordination grounds. *Id.* at 370. Both the district court and Fifth Circuit rejected Stallworth's claims on summary judgment, holding that her "subjective belief that her actions did not constitute insubordination is insufficient to create an inference of discriminatory intent by" the defendant. *Id.* at 372.

⁷⁵ 108 F.3d 789 (7th Cir. 1997).

⁷⁶ *Id.* at 792.

⁷⁷ *Id.*

⁷⁸ *Id.* at 792–94.

Affirming the district court's grant of summary judgment to the employer, the Seventh Circuit held that it was "not relevant whether Mr. McClendon actually was insubordinate. All that is relevant is whether his employer was justified in coming to that conclusion."⁷⁹ Concluding that the record raised no triable issue of fact "as to whether Mr. McClendon's supervisors believed in good faith that he was insubordinate," the Seventh Circuit found no reason to disturb the lower court's judgment for the employer.⁸⁰ Here, as in *Clack*, evidence of discrimination that rendered the situation more complicated than simple insubordination did not motivate the court to take a closer look. But as the dissent in *Clack* argued, the Seventh Circuit should have done so.⁸¹

Professor Terry Smith further documents numerous cases involving employee "self-help" responses to what he terms "subtle" workplace discrimination.⁸² For example, a district court in California found that there was no Title VII violation when an employer fired his employee for "gross insubordination" after the plant manager provoked the African American employee by calling him "sunshine" and the employee responded, "Don't call me 'sunshine,' you motherfucker."⁸³ The court did not deem it relevant that the employee had previously requested that the manager not call him "sunshine," nor did it find significance in the fact that the plaintiff had "previously charged [the manager] with racially motivated employment practices, such as denying the plaintiff proper routes, overtime, and equipment."⁸⁴

While not all plaintiffs are as sympathetic as those in the cases cited above, reviewing courts nevertheless get the analysis wrong by failing to even consider the employer's reason for discharge in light of whether a reasonable plaintiff would have cause to display indignation in light of justified perceptions of discrimination. The answer to this question may be no, but courts should at least consider it.⁸⁵ Mixed motive analysis is available in

⁷⁹ *Id.* at 799.

⁸⁰ *Id.*

⁸¹ *Clack v. Rock Tenn. Co.*, 304 F. App'x 399, 408–10 (6th Cir. 2008). (Moore, J., dissenting).

⁸² Smith, *supra* note 61. Another article that collects additional race discrimination/insubordination cases not discussed here is Richard Bales, *A New Standard for Title VII Opposition Cases: Fitting the Personnel Manager Double Standard into a Cognizable Framework*, 35 S. TEX. L. REV. 95 (1994) (discussing insubordination cases involving personal managers) (citing EEOC v. Kendon of Dallas, Inc., 34 Empl. Prac. Dec. (CCH) ¶ 34,393 (E.D. Tex. Mar. 8, 1984)). See also Elizabeth Chambliss, *Title VII as Displacement of Conflict*, 6 TEMPLE POL. & CIV. RTS. L. REV. 1 (1997) (analyzing and critiquing courts' unwillingness to protect EEO officers from employer retaliation).

⁸³ Smith, *supra* note 61, at 530 (discussing *Edwards v. Foucar, Ray & Simon, Inc.*, 23 Fair Empl. Prac. Cas. (BNA) 1644, 1645 (N.D. Cal. Aug. 19, 1980)).

⁸⁴ *Id.* at 531.

⁸⁵ A case in this category is the Eighth Circuit's opinion in *Garrett v. Mobil Oil Corp.*, 531 F.2d 892 (8th Cir. 1976). There the plaintiff, an African American mailroom employee, believed she had been the victim of a discriminatory performance evaluation. Without permission from her supervisor she left her work station in an attempt to see a manager and resisted with rude language when ordered to return to work. Later she and several other African American women with similar complaints again tried to visit this manager; he came out of his office and demanded that they leave. The company later notified her that she was fired for "repeated

Title VII cases to deal with situations such as these—where both legitimate and illegitimate reasons, such as a legitimate performance evaluation documenting inadequate performance as well as discrimination and/or opposition conduct⁸⁶—may have motivated an employer’s adverse employment action against a plaintiff.⁸⁷ The next section will evaluate how courts have analyzed such mixed motive cases, in which employers may have both legitimate and discriminatory motives for firing an employee.

B. *Mixed Motive Analysis*

The cases discussed in Section II-A above are “single motive” cases, meaning that the parties contested what one reason was the real reason for an employee’s termination. Other cases fall in the category of mixed motive cases, in which multiple factors, some discriminatory and some legitimate or nondiscriminatory, allegedly motivated the employer’s termination of the employee.⁸⁸ Under the relevant statutory provisions, plaintiffs win complete relief if they show that discrimination was a “motivating factor” in an adverse employment decision and the employer then fails to show that it would have made the same decision absent the discriminatory factor. But employers receive a far less painful liability judgment (consisting of declaratory relief only) if they show they would have made the same decision even if discrimination had not been a motivating factor.⁸⁹ Either side may choose to introduce mixed motive analysis in a Title VII case.⁹⁰ The plaintiff bears the burden of proof at the “motivating factor” stage, and the burden of proof then switches to the defendant to show that it would have made the same decision even if it had not taken a discriminatory consideration into account.⁹¹

violation of by-passing your supervis[or] in presenting complaints to management, and disrupting operations.” *Id.* at 895.

After a bench trial, the court found that the employer properly discharged the plaintiff for “leaving her work area, disobeying work regulations in presenting her complaints to management and disrupting operations.” *Id.* The Eighth Circuit affirmed, holding that the employer presented a valid reason for the discharge because “[c]ertainly an employer can fire a worker who refuses to obey reasonable regulations, leaves the work area without permission, and barges in on conferences and meetings of management personnel.” *Id.* at 895–96

⁸⁶ For a definition of opposition conduct, see text accompanying notes 13 and 118.

⁸⁷ See HAROLD S. LEWIS, JR. & ELIZABETH J. NORMAN, *EMPLOYMENT DISCRIMINATION: LAW AND PRACTICE* 365 (2d ed. 2004).

⁸⁸ *Id.*

⁸⁹ See Title VII of the Civil Rights Act of 1964, § 706(g)(B); 42 U.S.C. § 2000e-5(g)(B) (2012). Moreover, in the retaliation clause context, the Court recently held that *no* mixed motive analysis is available, meaning that plaintiffs now must prove that retaliation is the “but for” cause of the adverse employment action they endured. See *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2528 (2013). This makes retaliation cases even harder for plaintiffs.

⁹⁰ The decision about whether to use mixed motive analysis can present a problem for either of the parties. Each side would rather win outright on a single motive theory but at the same time may not want to risk losing outright in cases in which the facts are murky as to what factors played into an adverse employment action by an employer.

⁹¹ Title VII of the Civil Rights Act of 1964, § 706(g)(B) (1964); 42 U.S.C. § 2000e-5(g)(B) (2012).

In mixed motive cases, one might think that the link between the underlying allegations of discrimination and the allegedly independent nondiscriminatory reason for the discharge—*i.e.*, insubordination—would be clearer: After all, if the employer's asserted legitimate reason for the discharge, namely, insubordination, was itself provoked by the very discrimination alleged to be a motivating factor in the employer's conduct, then the employer has not shown that it would have taken the same action absent discrimination. Logically, if the decision-maker finds that discrimination or retaliation was a motivating factor, it cannot then be said that the employer had an *independent* legitimate reason for its action when it fires an employee for insubordination related to or caused by that discrimination or retaliation. Discrimination or retaliation are instead intertwined with discrimination; the "reason" for the discharge would not have occurred if the discrimination or retaliation had not occurred.

Courts applying mixed motive analysis, however, have sometimes disregarded this logical point. A few examples can illustrate this problem. In *Matima v. Celli*,⁹² the plaintiff, a black South African national with a master's degree in pharmaceuticals, believed that he was being subjected to unlawful race and national origin discrimination and engaged in a long, escalating series of protests at the pharmaceutical company where he worked.⁹³ Some of these protests were disruptive of the manager's time and efficiency.⁹⁴ A jury found that he had not been subject to unlawful discrimination but had been subject to unlawful retaliation after he began to complain of discrimination. The jury next concluded, on the basis of the court's jury instructions, that the employer would have discharged the plaintiff even in the absence of retaliation, and the district court entered judgment for the employer.

On appeal, the plaintiff pointed out that there was a patent logical flaw in the jury's conclusion that the employer would have fired Matima even if he had not complained of discrimination, since it was his perception of discrimination that led him to complain.⁹⁵ The Second Circuit did not find this point compelling, however. Instead it pointed out, "We have held generally that insubordination and conduct that disrupts the workplace are 'legitimate reasons for firing an employee,' and we see no reason why the general principle would not apply, even when a complaint of discrimination is involved."⁹⁶ But this cannot be true in a mixed motive case where the insubordination and the discrimination are causally connected, as already discussed.

The Second Circuit further opined, "An employer does not violate Title VII when it takes adverse employment action against an employee to preserve a workplace environment that is governed by rules, subject to a chain

⁹² 228 F.3d 68 (2d Cir. 2000).

⁹³ *Id.* at 71.

⁹⁴ *Id.* at 79.

⁹⁵ *Id.* at 71.

⁹⁶ *Id.* at 79.

of command, free of commotion, and conducive to the work of the enterprise.”⁹⁷ The court noted that it was the employer that opted to proceed under a mixed motive analysis and thus agreed to shoulder the burden of proving that it fired the plaintiff for legitimate reasons. But because a “wealth of testimony and incident was available to show that the plaintiff’s behavior was disruptive,” the Second Circuit concluded that the record amply supported the jury’s verdict.⁹⁸

Here again the court must be wrong as a matter of logic. It may well be that Matima’s termination was justified because his behavior went too far. But it was not justified because it was a cause “independent” of the perceived discrimination.⁹⁹ In cases like these, the underlying claim of discrimination and the resulting “insubordination” are not distinct causal factors; instead, one factor allegedly caused the other. A better decisionmaking process in such cases, as discussed further in Section III-A-2, would (1) consider the relationship, if any, between the insubordination and the perceived discrimination, and then, if such a relationship exists, (2) balance the circumstances causing the insubordination against the nature or degree of the response.

The Third Circuit’s analysis in *Goodwin v. City of Pittsburgh* is an example of a well-reasoned case.¹⁰⁰ There the plaintiff, an African American traffic control worker, experienced discrimination in his wages and job classification.¹⁰¹ The plaintiff filed a claim with the EEOC for racial harassment, after which he was called to a meeting in which city managers asked him to withdraw his EEOC charge. When he refused to do so and called one of these superiors a liar, he was terminated because of his “uncooperative attitude” and “disruptive influence.”¹⁰²

After a bench trial, the district court held that the city’s contention that it fired Goodwin for insubordination must be considered *in relation to* his prior protected activities.¹⁰³ It concluded that a “retaliatory motive . . . played a substantial causal role in the decision to fire Goodwin when, on only one occasion, he called his boss a ‘liar,’ under circumstances which were, at the least, provoked, and, at most justified.”¹⁰⁴ The court continued, “[t]o be sure, calling a supervisor a liar is a serious matter. However, it takes on less significance if it occurs privately, during a heated debate initiated by the employer, about the employee’s decision to engage in protected

⁹⁷ *Id.*

⁹⁸ *Id.* at 80.

⁹⁹ *Cf. Staub v. Proctor Hosp.*, 562 U.S. 411, 420 (2011) (citing *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 837 (1996)) (explaining proximate cause and independent cause analysis in employment discrimination cases).

¹⁰⁰ 480 F. Supp. 627 (W.D. Pa. 1979), *aff’d*, 624 F.2d 1090 (3rd Cir. 1980).

¹⁰¹ *Id.* at 629–30.

¹⁰² *Id.* at 630–31 (citations omitted).

¹⁰³ *Id.* at 634.

¹⁰⁴ *Id.*

activities.”¹⁰⁵ The court ruled that Goodwin had satisfied Title VII’s burden of showing pretext and entered judgment in his favor.¹⁰⁶

Robinson v. SEPTA presents another well-reasoned analysis from the Third Circuit.¹⁰⁷ There the district court entered judgment for the plaintiff on race discrimination and retaliation claims involving multiple incidents of harassment and other employer conduct that, the district court found, were aimed at “generally trying to provoke Robinson to insubordination.”¹⁰⁸ The employer asserted that Robinson had been properly fired for insubordination, but the district court rejected this claim. The Third Circuit affirmed, noting that “[a] play cannot be understood on the basis of some of its scenes but only on its entire performance, and similarly, discrimination analysis must concentrate not on individual incidents, but on the overall scenario.”¹⁰⁹

Robinson captures an important point about mixed motive insubordination cases: To determine whether insubordination is an independent, legitimate reason or a related reason for employee discipline, courts must look at all the “scenes in the play” to understand the context underlying the insubordination. Insubordination provoked by perceptions of discrimination should not be accepted as an independent factor for mixed motive analysis.¹¹⁰

As the facts in *Robinson* reflect, insubordination cases often include retaliation claims. A plaintiff complains about discrimination and then experiences treatment the plaintiff perceives as employer retaliation for complaining. In reaction to escalating tension the employee displays anger, which the employer labels as insubordination and grounds for disciplining the employee. Title VII explicitly protects employees from retaliation, so any analysis of insubordination doctrine must study retaliation doctrine as a potential source of protection for employees in such scenarios. Unfortunately, Title VII law has not developed robust protections for employees in such situations, as Section II-C discusses.

C. Retaliation Cases: The Unduly Narrow Confines of “Reasonable” Opposition Conduct

Another common scenario in which courts fail to protect employees who have engaged in mildly or moderately insubordinate conduct involves “opposition conduct” retaliation cases. All major federal employment antidiscrimination statutes contain anti-retaliation provisions.¹¹¹ These gener-

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 635.

¹⁰⁷ 982 F.2d 892 (3d. Cir. 1993).

¹⁰⁸ *Id.* at 895.

¹⁰⁹ *Id.* at 896 (quoting *Andrews v. City of Phila.*, 895 F.2d 1469, 1484 (3d. Cir. 1990)).

¹¹⁰ *Id.*

¹¹¹ *See, e.g.*, 29 U.S.C. § 623(d) (2012) (ADEA anti-retaliation provisions); 42 U.S.C. § 2000e-5(b) (2012) (ADA anti-retaliation provisions); 29 U.S.C. § 215(a)(3) (2012) (Fair Labor Standards Act anti-retaliation provisions); 29 U.S.C. § 158(a)(4) (2012) (NLRB anti-retaliation provisions); 42 U.S.C. § 2000e-3(a) (2012) (Title VII anti-retaliation provisions).

ally distinguish between two types of retaliation, which correspond to two potential stages of antidiscrimination legal proceedings. The first stage, which is the one most often relevant here, involves employee complaints about discrimination that take place before or in the absence of a formal charge of discrimination filed with a public agency.¹¹² This type of conduct is known as “opposition conduct.”¹¹³ Employees typically lose their protection against retaliation when they engage in opposition conduct that the employer labels insubordination.

A classic case in this category is *Pendleton v. Rumsfeld*, which the Circuit Court of Appeals for the District of Columbia decided in 1979 over a powerful dissent by Judge Patricia Wald.¹¹⁴ In *Pendleton*, the Walter Reed Army Medical Center fired one African American Equal Employment Opportunity (EEO) officer and demoted another for attending an employee meeting to discuss and protest perceived employer discrimination. There was strong evidence of racial troubles in the institution. Nevertheless, the lower court and the court of appeals both concluded that this background evidence was irrelevant.¹¹⁵ The circuit court majority opinion agreed with the trial court that the plaintiffs’ “manner” of protesting—in other words, their activity of attending a demonstration against race discrimination—was not protected opposition conduct because a “reasonable person” would have felt it “fatally compromised their ability to gain the confidence of middle management.”¹¹⁶

In dissent, however, Judge Wald argued: “I do not think a simple finding that two EEO Counselors ‘actively participated’ in a peaceful if noisy protest during a turbulent period in race relations at the medical complex, without more, renders their conduct unprotected under Title VII’s ban against retaliation for opposition to discriminatory practices.”¹¹⁷ Judge Wald pointed out that the counselors’ presence at the protest may have helped them in their duties, as defined in their employment manual, to serve as “bridges” and attempt “informal resolution of disputes while keeping management informed of employee grievances.”¹¹⁸ Judge Wald argued that the case should have been remanded for “more detailed findings about what they did and why it was inconsistent with the EEO Counselors’ roles in context.”¹¹⁹

¹¹² The second stage is the period after the employee has filed a discrimination charge with a public agency. Conduct in this later period is known as “participation” conduct. See HAROLD S. LEWIS, JR. & ELIZABETH J. NORMAN, *EMPLOYMENT DISCRIMINATION LAW AND PRACTICE* 148–52 (2d ed. 2001). The protections at this stage are usually more robust and will not be my focus here.

¹¹³ *Id.* at 146–48.

¹¹⁴ 628 F.2d 102 (D.C. Cir. 1980).

¹¹⁵ *Id.* (affirming the district court’s decision).

¹¹⁶ *Id.* at 108. Elizabeth Chambliss collects and criticizes other EEO officer cases that adopt similar reasoning. See Chambliss, *supra* note 82.

¹¹⁷ *Id.* at 114 (Wald, J., dissenting).

¹¹⁸ *Id.* at 113 (Wald, J., dissenting).

¹¹⁹ *Id.* at 114 (Wald, J., dissenting).

Despite Judge Wald's dissenting view about opposition conduct analysis, the case law has continued to develop in restrictive directions.¹²⁰ Courts have drawn the bounds of "reasonableness" for opposition conduct so narrowly as to the acceptable *manner* of protest as to exclude all mild to moderate insubordination, even when the facts show why an employee exhibited anger in complaining.¹²¹

To be sure, the narrow scope of protection for opposition conduct presents a problem broader than insubordination cases alone. Other scholars have amply documented this general problem, as I discuss further in Section III-A-3 below. Preliminarily, suffice it to say that opposition clause jurisprudence produces perverse incentives: employees risk being fired without recourse if they express themselves adamantly, and opposition clause jurisprudence thus pushes employees towards the courts for help in the first instance. In short, this jurisprudence "sanitizes" workplaces—reflecting a vision of employees as passive persons who should do what they are told and refrain from all but polite complaints about perceived discrimination.

III. REVISING TITLE VII INSUBORDINATION DOCTRINE

This article has argued that courts should be more cautious about accepting insubordination as the legitimate, nondiscriminatory reason for discharge in cases that raise discrimination concerns. In these situations, some workplace friction may be necessary—even desirable—as employers and

¹²⁰ See, e.g., *Hochstadt v. Worcester Found. for Experimental Biology*, 425 F. Supp. 318 (D. Mass. 1976). In *Hochstadt*, a biological research foundation discharged a cell biologist after she protested a disparity in her pay as compared to that of male Ph.D.'s in the same job classification. *Id.* at 320. The district court found, in rejecting the plaintiff's motion for a preliminary injunction reinstating her to her job, that the employer discharged Dr. Hochstadt for legitimate, nondiscriminatory reasons. *Id.* at 330. These reasons were that Hochstadt had complained about various discrimination-related matters in meetings to discuss workplace issues among her small group of cell biologists. *Id.* at 329–30. Her complaints included her salary and the inadequacy of the Foundation's affirmative action program. *Id.* at 326. Hochstadt had also sought to elicit salary information from other employees and had spread a rumor that the Foundation might lose federal funding for failing to comply with affirmative action regulations. *Id.* at 326. The court concluded that these actions "showed a lack of cooperation, disruptive influence, hostility and threats towards the Institution and its Directors." *Id.* at 325. On appeal, the First Circuit agreed, concluding that the plaintiff was not insulated from adverse action for conduct that "went beyond the pale of reasonable opposition activity." 545 F.2d 222, 230 (1st Cir. 1976).

The appeals court opined, "Congress certainly did not mean to grant sanctuary to employees to engage in political activity for women's liberation on company time." *Id.* Instead, it concluded, "[a]n employer remains entitled to loyalty and cooperativeness from employees." *Id.* The court then articulated a test for assessing opposition conduct that is still used to assess whether the manner of opposition is protected. *Id.* at 233. Under it, courts are called to "balance the employer's right to run his business" against "the rights of the employee to express his grievances and promote his own welfare." *Id.*

¹²¹ Briane J. Gorod argues that another problem with opposition conduct retaliation analysis is the limited scope of reasonableness accorded to employees' perceptions of what constitutes illegal activity. See *Rejecting Reasonableness: A New Look at Title VII's Anti-Retaliation Provision*, 6 AM. U. L. REV. 1469 (2007). In contrast, the analysis in this article focuses on a different prong of the reasonable analysis, namely, that regarding the *manner* of protest.

employees engage in dialogue about fairness in employment practices “in the shadow” of antidiscrimination law.¹²² If these arguments have merit, the question becomes: what can be done to improve Title VII courts’ handling of insubordination cases? This section proposes a variety of measures that Title VII courts could take towards this end. Courts interpreting Title VII could exercise their interstitial common law power to fill in statutory gaps¹²³ in a similar way to that in which the U.S. Supreme Court created the *Ellerth/Faragher*¹²⁴ affirmative defense to employer vicarious liability in supervisor sexual harassment cases.

This article’s proposals are, to be sure, different from the *Ellerth/Faragher* doctrine in that they enhance rather than decrease employer liability concerns—though only in cases involving employee terminations for insubordination. As argued in Section I-C above, there is no reason such “second generation”¹²⁵ employment antidiscrimination approaches should not create incentives through sticks as well as carrots. Requiring courts to more carefully scrutinize the factual scenarios underlying insubordination cases increases the incentives on employers to eliminate troubling atmospheres in workplace environments—such as, to use typical examples from the case law discussed in Section II above, supervisors’ frequent use of the n-word, egregious harassment, and assigning demeaning job duties others are not required to perform. In turn, eliminating such environments avoids incidents of insubordination caused by reasonable perceptions of discrimination, which in turn avoids unnecessary terminations, which then in turn avoids lawsuits in court. Of course employers will not like stricter rules, but incentive effects may produce better results for employers, too, in the end.

This Section will propose several steps courts could take to enhance employers’ incentives to detect and deter troubling workplace conduct. It argues for the gradual development of law through decisions in specific cases after courts have been sensitized to the issues this article raises. The reforms suggested do not require major statutory reforms but instead doctrinal tweaks that courts can make in exercising their interstitial interpretative power in applying law to facts. A review of existing case law and dissents in some Title VII cases points out the directions in which such doctrinal development should go. Other ideas for doctrinal adjustments come from the approaches of the NLRB. Part B of this Section will mine the law the NLRB

¹²² Cf. Robert N. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979) (examining how legal rules affect parties’ negotiations conduct).

¹²³ See Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 525–37 (1954) (explaining that federal courts retain interstitial powers to clarify statutory uncertainty and create uniformity in federal policy).

¹²⁴ 524 U.S. 742 (1998); 524 U.S. 775 (1998). These cases are further discussed *supra* in notes 9, 40–41, and accompanying text.

¹²⁵ For a fuller discussion of second generation approaches, see *supra* text accompanying notes 35–39.

and reviewing courts have developed as another source of ideas for doctrinal adjustments in the Title VII context.

More specifically, this Section will suggest that courts could, in appropriate cases, revise Title VII doctrine to protect employees from termination for mild or moderate insubordination in reaction to reasonable perceptions of discrimination in the following ways:

(A) Where an employer offers insubordination as the legitimate, non-discriminatory reason for employee discipline, courts should consider whether discrimination concerns motivated the insubordination. If so, courts should decline to accept the employer's reason without more searching scrutiny. Courts should grant the plaintiff the opportunity for further fact development, including the opportunity to demonstrate that the insubordination charge was pretext for discrimination, as discussed in *McDonnell Douglas Corp. v. Green*.¹²⁶

(B) When discrimination and insubordination are factually intertwined, courts should reject mixed motive defenses in Title VII insubordination cases. Under basic causation principles, such related causes are not independent causes.

(C) When considering retaliation claims, courts should broaden the protections accorded to opposition conduct to extend to "mild or moderate" insubordination¹²⁷ in reaction to reasonable perceptions of discrimination.

(D) In insubordination cases raising discrimination concerns, Title VII courts should apply the NLRB's *Atlantic Steel* factors to scrutinize the context underlying the inappropriate employee behavior. Where the employee's conduct in reaction to reasonable perceptions of discrimination does not exceed the mild to moderate insubordination defined as still protected under the factors *Atlantic Steel* applies, it should not be viewed as legitimate grounds for termination.

(E) Finally, where an employer has provoked an employee's insubordination through conduct a reasonable person in the employee's circumstances would view as discrimination, courts should apply a provoked insubordination doctrine modeled on the NLRB's jurisprudence of the same name. In other words, if an employee's mild or moderate insubordination was provoked by employer conduct that a reasonable employee would perceive as discriminatory, the employee's termination should be reversed provided that the degree of her insubordination was not out of proportion to the provocation.

Some of these doctrinal revisions involve reexamining Title VII precedent while others call for adapting doctrine from the NLRB. The discussion below will start with a discussion of the first category of reforms and then offer suggestions about borrowing from NLRB precedent.

¹²⁶ 411 U.S. 792 (1973).

¹²⁷ See *supra* note 7 (discussing examples of cases that go beyond the limits of mild or moderate insubordination).

A. *Reforming Title VII Insubordination Doctrine from Within*

Title VII doctrine has not developed uniformly or as a monolith. Courts have disagreed with each other and judges have disagreed within courts. Law established at one historical moment has been disregarded or deemphasized at another. Highlighting these moments of disagreement and historical forgetting illuminates junctures for future change. Section III-A-1 notes some of these pivot points that illuminate opportunities for doctrinal revision going forward.

1. *Probing Insubordination Cases Where the Record Contains Evidence of Discrimination*

Insubordination cases that arise in the context of protests about perceived discrimination require more searching scrutiny before accepting an employer's asserted reason of insubordination for disciplining an employee. The dissent in *Clack*, for example, argued that plaintiffs should be able to present evidence of background discrimination and supervisor expressions of animus in order to survive summary judgment despite uncontested evidence of an employee's violation of an employer's insubordination rules.¹²⁸ Furthermore, the dissent argued, courts should allow plaintiffs to offer pretext evidence that other employees who engaged in similar conduct after an altercation with a supervisor were not fired.¹²⁹ Similarly, in the *Pendleton* dissent, Judge Wald would have required a much more searching inquiry into the background facts in order to assess the reasonableness of the plaintiffs' opposition conduct in the situation.¹³⁰

Still more helpful guidance comes from returning to the historical precedent of *McDonnell Douglas v. Green* to extract from it the wisdom of the Court's start in developing Title VII jurisprudence. Green's conduct was not simply a short angry outburst or an unreasonably insistent pursuit of complaints of discrimination, as in many insubordination cases. Instead Green's behavior involved leading an organization that engaged in an extended course of plainly illegal actions, including stalling cars on company property to block others from coming to work and a "lock in," in which protestors barred the employer's workforce from leaving the plant by placing chains and padlocks on the workplace doors.¹³¹ Nonetheless, even on these vivid facts, the *McDonnell Douglas* Court held that Green's race discrimination case should be retried.¹³² The Court reasoned that the employer's proffered legitimate, nondiscriminatory reason—namely, its policy of not rehiring em-

¹²⁸ See *Clack v. Rock-Tenn Co.*, 304 F. App'x 399, 409–10 (6th Cir. 2008) (Moore, J., dissenting) (courts should probe the "taint of . . . discriminatory animus" evident in the background facts of cases and the possibility of pretexts in termination decisions).

¹²⁹ See *id.*

¹³⁰ See 628 F.2d at 109–14 (Wald, J., dissenting).

¹³¹ *McDonnell Douglas*, 411 U.S. at 795 n.3.

¹³² *Id.* at 807.

ployees who had previously engaged in illegal activity—had to be tested for pretext before being accepted as the “real” reason for not recalling him to work.¹³³ The Court instructed the lower court to compare the employer’s treatment of Green to that of other employees who had engaged in illegal acts. Title VII doctrine today no longer encourages this kind of close, skeptical analysis of employers’ assertions that they are terminating employees due to misconduct, and this is one of a number of reasons why courts often get insubordination cases wrong.

The Court in *McDonnell Douglas* cautioned that even what might look like an eminently valid, “legitimate, nondiscriminatory reason” for an adverse employment action—such as Green’s leadership role in persistent, unlawful protest activity at the plant—could mask an invidiously discriminatory motive. To prevent such subterfuge, the Court held (noting similar case law developed under the NLRA) that finders of fact should look probingly into questions of pretext.¹³⁴ In other words, the decision maker should ask whether other employees with different racial identities—or, to extend the analysis to opposition conduct claims, other employees who had not engaged in protected opposition conduct¹³⁵—were treated similarly for similar misconduct. If the answer to this question is “no”—in other words, if identity or protected opposition conduct are the “but for” cause of the employer’s challenged act—then unlawful discrimination has been proved, and the plaintiff should prevail.¹³⁶

Indeed, to better protect employees and to deter the kinds of discriminatory atmospheres that often produce insubordination cases, courts could shift the burden of proof of pretext onto employers in insubordination cases raising discrimination concerns. When an employer asserts insubordination as the reason for taking an adverse action against an employee who has raised discrimination concerns, for example, courts could require the employer to prove that it would have taken the adverse action against the employee even if he or she had not complained of discrimination.¹³⁷ This would help deter the continued existence of the discriminatory environments reflected in the facts of many cases despite plaintiffs’ inability to win their claims of underlying discrimination under the current high standards for proving such

¹³³ *Id.*

¹³⁴ *Id.* at 803.

¹³⁵ The Court did not consider the retaliation issue because Green lost on that question below and did not appeal this ruling. *See Green v. McDonnell Douglas Corp.*, 463 F.2d 337, 341 (8th Cir. 1972), *vacated on other grounds*, 411 U.S. 792 (1973) (holding that participation in an unlawful “stall in” was not protected activity under Section 704 (a)).

¹³⁶ *McDonnell Douglas*, 411 U.S. at 805–07.

¹³⁷ In a discrimination case, the employer would do so by putting on persuasive evidence that other employees who were not in the protected identity category suffered comparable discipline after engaging in similar insubordination. In a retaliation case based on opposition conduct, the employer’s burden would be to persuade the finder of fact by putting on evidence that it had in the past taken the same adverse action against employees engaged in similar insubordination even when the underlying facts did not involve a discrimination complaint. In cases in which this evidence was unavailable or inconclusive, the plaintiff would win.

claims.¹³⁸ While shifting the burden of proof in discrimination-tinged insubordination cases might create incentives for employees to raise more discrimination concerns (because they might know that employers would have to spend time, energy, and money in meeting their burden of proof), that risk is sufficiently outweighed by the potential decrease in employer discrimination and increase in protection for employee self-help.

Such a burden-shifting rule would encourage employers to take steps to deter supervisor conduct that generates evidence typical of the cases discussed in Section II *supra*—such as blatant statements of prejudice against protected identity groups, low-grade harassment, failure to discipline co-workers, discriminatory task assignments, and the like. Just as the *Faragher/ Ellerth* affirmative defense encourages employers to set up complaint procedures for sexual harassment,¹³⁹ an affirmative defense that makes it worthwhile for employers to eradicate discrimination-tinged workplace environments could reduce the discrimination-related insubordination cases coming to the courts.

In sum, the basic analysis when an employer alleges insubordination as the reason for an employee's discharge should involve applying a several-part test that asks:

- 1) Is there evidence of discriminatory animus, a discrimination-charged work environment, and/or hostile acts towards the plaintiff that a reasonable person in the plaintiff's position would perceive as evidence of discriminatory treatment (even if insufficient to satisfy the high standards for proving the underlying discrimination claim)?
- 2) If so, was the plaintiff's insubordination related to these conditions?

Where the answer to questions (1) and (2) is affirmative, courts should:

- 3) Decline to accept on face value the employer's proffered reason of insubordination as a legitimate, nondiscriminatory reason for an adverse employment action, and instead
- 4) Engage in searching scrutiny of the facts, and in appropriate cases find the plaintiff's conduct protected, so long as it was not too extreme, and
- 5) Finally, in the presence of background evidence raising discrimination concerns, courts could switch the burden of *disproving* pretext to employers in insubordination cases.

These steps would go a long way towards improving Title VII courts' handling of insubordination cases. But additional steps could help as well.

2. *Rejecting Mixed Motive Defenses when Discrimination and Insubordination Interrelate*

Another simple but important step Title VII courts can take would involve declining to entertain mixed motive defenses where facts involve (1)

¹³⁸ See *supra* Section I-B.

¹³⁹ See Sturm, *supra* note 35.

employer conduct that raises discrimination concerns and (2) employee insubordination in reaction to it. As discussed in Section II-B, insubordination cannot serve as an employer's legitimate, nondiscriminatory reason for disciplining an employee if the employer's discrimination and the employee's insubordination are factually intertwined. As further discussed in Section II-B, such reasoning contravenes standard causation principles: a factually related reason is not an independent cause; insubordination would not have happened if discrimination concerns had not triggered this reaction. Thus no mixed motive defense should be available to an employer that states that insubordination was the nondiscriminatory reason for an adverse employment action but the insubordination arose from an employee's reasonable perceptions of discrimination. To be sure, under such facts an employer may retain the defense that the insubordination went too far and thus lost its protection under Title VII opposition conduct doctrine. But that is a different argument, and should be handled under opposition conduct doctrine as discussed further below.

3. *Expanding Opposition Conduct Protection*

As discussed in Section II-C, courts draw the bounds of reasonable conduct in opposition cases too narrowly, typically excluding any degree of employee misconduct from the opposition clause's protections. As a result, courts usually refuse to grant opposition clause protection to an employee whose conduct falls with an employer's legitimate insubordination policy. But this approach compounds the problem of unaddressed discrimination in the nation's workplaces, permitting employers to fire employees for insubordination with impunity and leaving unaddressed the legitimate complaints that may have caused the employee's intemperate reaction. Improving Title VII courts' approach to insubordination cases thus requires revisiting opposition conduct doctrine.

Other scholars have already forcefully argued for the need to expand opposition conduct doctrine to more securely protect plaintiffs who engage in opposition conduct. This literature discusses many aspects of this complex doctrine,¹⁴⁰ but one revision most obviously emerges as of key importance in insubordination cases—namely, the need to expand the bounds of reasonableness as to the *manner* of opposition in order to protect instances of mild or moderate insubordination that are understandable in reaction to reasonable perceptions of discrimination. This article will build from this helpful literature and then offer some additional points to further support these calls for reform.

¹⁴⁰ See, e.g., Gorod, *supra* note 121 (arguing that courts should eliminate the aspect of the opposition clause reasonableness requirement that requires employees to demonstrate that they had a good faith, reasonable belief that a challenged practice violates Title VII); Matthew W. Green, Jr., *Express Yourself: Striking a Balance between Silence and Active, Purposive Opposition under Title VII's Anti-Retaliation Provision*, 28 HOFSTRA LAB. & EMP. L.J. 107, 113 (2010) (analyzing issue of silent opposition).

More robust protection for opposition clause conduct would grant greater protection to employees disciplined for seeking to protest discrimination. Terry Smith argues that courts should grant protection to the “employee who chooses to exercise self-help in opposing workplace racism rather than remain silent or avail herself of the cumbersome and expensive recourse of formal charge and suit.”¹⁴¹ Similarly, Richard Bales, in an article considering the appropriate rules for personnel managers’ opposition conduct, criticizes the narrowness of the *Hochstadt* test,¹⁴² pointing out that it causes far too many employees to lose protection for opposition clause conduct because most such conduct is at least a bit disruptive.¹⁴³ Bales would have the courts craft a rule that would protect all opposition conduct provided it was not illegal or in conflict with the job duties the plaintiff was hired to perform.¹⁴⁴

Elizabeth Chambliss, too, notes these problems with the *Hochstadt* test in her article focused on EEO officer retaliation clause protection. As she notes in quoting a Ninth Circuit case, “almost every form of opposition to an unlawful employment practice is in some sense ‘disloyal’ to the employer, since it entails a disagreement with the employer’s views and a challenge to the employer’s policies. Otherwise the conduct would not be ‘opposition.’”¹⁴⁵ Pointing to Title VII’s legislative history, in which Congress’s intent to promote private resolution of workplace disputes is clear, Chambliss argues for the importance of “hold[ing] Title VII to its original promise, by encouraging—and protecting—private workplace regulation.”¹⁴⁶

Chambliss’s proposal, in the context of her focused examination of EEO officers’ opposition conduct, is that all “[g]ood faith opposition that causes no measurable harm should be protected to protect the EEO officer’s regulatory role.”¹⁴⁷ This proposal is a sensible one, but should be expanded to cover all employees in the insubordination context. Starting with Professor Sturm’s ideas about developing second generation antidiscrimination rules to resolve discrimination problems in workplaces rather than courts, this article has argued for an expanded idea as to how to protect a broader array of figures who play crucial roles in resolving discrimination problems in the nation’s workplaces. These “key intermediaries,” to use Sturm’s term, should include employees who experience discrimination, including the line-level, non-managerial employees on whom this article has focused.¹⁴⁸ Chambliss’s point thus can be expanded to urge an adjustment in the standard for

¹⁴¹ See Smith, *supra* note 61, at 533.

¹⁴² The *Hochstadt* test is discussed in *supra* note 120.

¹⁴³ Cf. *Kiewit Power Constructors Co. v. NLRB*, 652 F.3d 22, 29 (D.C. Cir. 2011) (holding that the employee’s act “did not involve the kind of insubordination that requires withdrawing the Act’s protection. It would defeat section 7 if workers could be lawfully discharged every time they threatened to ‘fight’ for better working conditions.”).

¹⁴⁴ See Bales, *supra* note 82, at 117.

¹⁴⁵ Chambliss, *supra* note 82, at 28 (quoting *EEOC v. Crown Zellerbach Corp.*, 720 F.2d 1008, 1014 (9th Cir. 1983)).

¹⁴⁶ *Id.* at 54.

¹⁴⁷ *Id.* at 52.

¹⁴⁸ See *supra* Section II-C.

protecting employee opposition conduct generally: Wherever such conduct does not cause appreciable harm—*i.e.*, harm beyond minor disruption and supervisor pique—it should be protected even if it arguably goes a bit too far, in order to better foster the conditions for on-site resolution of discrimination protests. Such protests are likely to be, as Chambliss notes, inherently somewhat “oppositional”—*i.e.*, something a bit less than polite—but protecting them as they occur in the workplace is a far more economical approach than processing them later as lawsuits in courts.¹⁴⁹

The analysis offered in this article further supports taking opposition conduct analysis a step further in the following way: the more outrageous the facts regarding background discrimination, the broader should be the zone of protection for opposition conduct that a court should observe. In other words, humiliating treatment, as seen through the eyes of the reasonable person in the plaintiff’s position,¹⁵⁰ should create a broader zone of protection with regard to the manner of opposition conduct than an insignificant slight.¹⁵¹ Courts, understandably enough, often have trouble putting themselves in the shoes of average employees—a problem compounded by the likely class and social location differences between federal judges and the less privileged workers that make up much of the U.S. workforce.¹⁵² But they could strive to develop increased sensitivity by applying such a sliding scale rule that starts by considering the situation from the perspective of a reasonable person in the plaintiff’s position.

Workplaces need not be sanitized forums full of docile employees for purposes of Title VII law any more than they need to be this under the NLRB’s more expansive jurisprudence. Indeed, importing more of the NLRB’s understanding of the realities of U.S. workplaces would be another excellent step in reforming Title VII courts’ view of insubordination cases, as Section III-B will discuss below.

B. *Borrowing from the NLRB*

To be sure, Title VII and the NLRA are different statutes with different purposes. But Title VII courts have long borrowed from NLRB jurisprudence where they have found it helpful to do so.¹⁵³ Looking to the NLRB

¹⁴⁹ See Chambliss, *supra* note 82, at 28 (citation omitted).

¹⁵⁰ Cf. *Harris v. Forklift Sys.*, 510 U.S. 17, 21 (1993) (using this formulation of the reasonable person standard in the context of Title VII sexual harassment).

¹⁵¹ Cf. *Opelika Welding, Mach. and Supply, Inc. v. AFL-CIO*, 305 N.L.R.B. 561, 568 (1991) (“An employer cannot provoke an employee to the point where she commits such an indiscretion as is shown here and then rely on this to terminate her employment (citation omitted). The more an employer’s wrongful provocation the greater would be the employee’s justified sense of indignation and the more likely its excessive expression.” (citing *NLRB v. M & B Headwear*, 349 F.2d 170, 174 (4th Cir. 1965))).

¹⁵² Cf. Smith, *supra* note 61, at 536.

¹⁵³ Indeed, in developing Title VII doctrine courts have frequently looked to NLRB precedent on a wide range of issues. A comprehensive discussion of these fascinating parallels is beyond the scope of this article, but a few examples can illustrate this long tradition: Title VII courts have frequently and explicitly borrowed from the NLRB to fashion doctrines on rein-

doctrines can help illuminate ideas for doctrinal reform even though those doctrines must be adapted for the Title VII context. The NLRB has addressed insubordination in several ways. One longstanding analysis, known as the *Atlantic Steel* test, analyzes the relationship between employee insubordination and the exercise of protected statutory rights.¹⁵⁴ A second doctrine, the “provoked insubordination” rule, looks for evidence that the employer provoked the insubordination.¹⁵⁵ If so, the Board holds that the insubordination, as long as it is not too extreme, cannot be grounds for the adverse employment action. The sections below sketch and apply each of these areas of NLRB case law in turn.

1. *The NLRB’s Atlantic Steel Doctrine*

Atlantic Steel arose out of a dispute between a foreman and a worker active in his union on the subject of a probationary worker performing overtime work.¹⁵⁶ The worker called the foreman either a “lying son of a bitch” or a “m— f” liar, and the employer suspended and then terminated the worker for doing so.¹⁵⁷ He alleged that the same foreman had repeatedly harassed him for circulating a petition concerning benefits, and that the real reason for his discharge was his exercise of his rights under Section 7 of the NLRA, which protects employees’ rights to engage in concerted activities for mutual aid and protection.¹⁵⁸

In considering this case, the Board announced that it would assess the inappropriateness of an employee’s conduct by examining four factors: “(1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee’s outburst; and (4) whether the outburst was, in any

statement and back pay, mixed-motive analysis, and retaliation. *See, e.g.*, *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 179 (2011) (Ginsburg, J., concurring) (citing *NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086, 1088–89 (7th Cir. 1987)) (observing that the EEOC’s retaliation doctrine is much like the NLRB’s); *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 366 (1977) (borrowing from NLRB reinstatement doctrine in allowing a non-applicant to proceed with discrimination claims); *Franks v. Bowman Transp. Co., Inc.*, 424 U.S. 747, 774 n.34 (1976) (using NLRA remediation models for Title VII); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973) (following NLRB precedent on employers’ rights to not rehire an employee who has committed an illegal act). Similarly, Title VII courts have borrowed from NLRB doctrine to establish tests for enterprise liability and liability for acts of agents. *See EEOC v. Wooster Brush Co. Emp. Relief Ass’n*, 727 F.2d 566, 571–72 (6th Cir. 1984) (citing *Baker v. Stuart Broadcasting Co.*, 560 F.2d 389, 392 (8th Cir. 1977)) (providing a four-part test to assess whether common enterprise liability might apply under both the NLRA and Title VII). As Professor Michael Green has recently pointed out, borrowing across these two statutes can present useful directions for the development of law. *See Michael Z. Green, How the NLRB’s Light Still Shines on Anti-Discrimination Law Fifty Years after Title VII*, 14 *NEV. L.J.* 754 (2014) (arguing that NLRB law should be used to strengthen anti-discrimination protection in areas where Title VII enforcement leaves gaps).

¹⁵⁴ *Atlantic Steel*, 245 N.L.R.B. 814, 816 (1979).

¹⁵⁵ *See infra* Section III-B-2.

¹⁵⁶ *Atlantic Steel*, 245 N.L.R.B. at 814.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 814–15.

way, provoked by the employer's unfair labor practice."¹⁵⁹ Under the facts at issue in *Atlantic Steel*, the Board held that the employee's action failed this test and therefore lost its protection.¹⁶⁰ Thus, the *Atlantic Steel* doctrine is far from "an anything goes" rule: the extent of tolerable employee insubordination depends on careful analysis of the circumstances.

The Board and reviewing courts frequently apply the *Atlantic Steel* doctrine. This doctrine sometimes produces favorable results for employees, though this certainly is not always the case, as the disposition in *Atlantic Steel* shows. In one recent case, *Kiewit Power Constructors Co. v. NLRB*, for example, two employees disagreed with an employer's decision to shorten their break period.¹⁶¹ When their supervisor warned them that they had taken too long of a break, they shouted back that "things would get ugly" if they were disciplined.¹⁶² They also told the supervisor that he had "better bring [his] boxing gloves."¹⁶³ The employer fired both employees, and they filed unfair labor practice charges, alleging that their statements were protected as concerted action under Section 7 of the NLRA.¹⁶⁴ The Board ruled in the employees' favor, concluding that the two employees should be reinstated because their statements were merely figures of speech made in the course of exercising their rights to protest working conditions.¹⁶⁵ The Board further emphasized that the statements, in context, were not real physical threats.¹⁶⁶ On review, the D.C. Circuit affirmed the Board's ruling, noting that in context it was reasonable for the employees to object forcefully to enforcement of the new break policy on the spot so that other employees would not think they consented to it. The court also noted that the supervisor had chosen to "pick a public scene" for what was "likely to lead to a quarrel."¹⁶⁷ Acknowledging the soundness of the employer's argument that it should have the right to maintain rules prohibiting harassment and abusive or threatening

¹⁵⁹ *Id.* at 816. The *Atlantic Steel* doctrine derives from earlier cases that delineated broad bounds of protection for employee outbursts and similar behavior in the exercise of rights protected under the NLRA. See, e.g., *Hawaiian Hauling Serv., Ltd.*, 219 N.L.R.B. 765, 766 (1975) (using broad language to protect an employee discharged for calling his supervisor a liar during a grievance proceeding). These cases emphasized the need for "[a] frank, and not always complimentary, exchange of views" in furtherance of the collective bargaining process. *Bettcher Mfg. Corp.*, 76 N.L.R.B. 526, 527 (1948). The test excluded from protection only those "flagrant cases in which the misconduct is *so violent or of such serious character as to render the employee unfit for further service.*" *NLRB v. Ill. Tool Works*, 153 F.2d 811, 815-16 (7th Cir. 1946) (emphasis added). The *Atlantic Steel* test narrowed this doctrine. This article focuses on post-*Atlantic Steel* cases, though decision-makers, especially courts, still occasionally quote from these earlier cases.

¹⁶⁰ *Atlantic Steel*, 245 N.L.R.B. at 817 ("[W]e conclude that it will effectuate the purposes of the Act to give conclusive effect to the grievance award, and, on that basis, we shall dismiss the complaint in its entirety.").

¹⁶¹ 652 F.3d 22, 24 (D.C. Cir. 2011).

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ For a discussion of the conduct that Section 7 of the NLRA protects, see *supra* note 169 and accompanying text.

¹⁶⁵ *Kiewit Power Constructors Co.*, 652 F.3d at 29.

¹⁶⁶ *Id.* at 24.

¹⁶⁷ *Id.* at 27 (citing *NLRB v. Sw. Bell Tel. Co.*, 694 F.2d 974, 978 (5th Cir. 1982)).

language, the D.C. Circuit nevertheless concluded that the statements at issue “did not involve the kind of insubordination that requires withdrawing the Act’s protection. It would defeat section 7 if workers could be lawfully discharged every time they threatened to ‘fight’ for better working conditions.”¹⁶⁸ Many other cases reach similar conclusions.¹⁶⁹

These NLRB and reviewing court opinions applying the *Atlantic Steel* doctrine stand in contrast to many of the Title VII cases cited in Section I above, in which vulgar language, a raised voice, or disrespectful conduct towards a supervisor immediately caused an employee to lose protection under Title VII. Decisionmakers in the NLRA context are more lenient about the bounds of protected conduct, though they, too, draw clear boundaries as to what degree of insubordination is permissible.¹⁷⁰ The image of the worthy employee that arises under the NLRA encompasses a more active, emotional, and sometimes ribald or vulgar human being (but not one who is threatening or destructive). This NLRB image of the worthy worker arguably embodies a more realistic view of individuals contending with, and sometimes reacting imperfectly and overly strongly to, the stress of workplace interactions related to the exercise of protected rights.

To point this out is not to say, of course, that anything goes under the Board’s precedents. To the contrary, employees found to have engaged in threatening behavior, or to have exceeded what a reasonable employer should tolerate by way of outbursts, swearing, harassment, or other inappropriate conduct, lose their Section 7 protection.¹⁷¹ But the contrast remains

¹⁶⁸ *Id.* at 29.

¹⁶⁹ *See, e.g.*, *Hitachi Capital Am. Corp.*, No. 34-CA-130112, 2012 WL 2861686, (N.L.R.B. Div. of Judges July 11, 2012), *aff’d*, 361 N.L.R.B. 19 (2014) (“The protections of Section 7 would be meaningless were we not to take into account the realities of industrial life and the fact that disputes over wages, bonus and working conditions are among the disputes most likely to engender ill feelings and strong responses.”); *Plaza Auto Center, Inc.*, 355 N.L.R.B. 493, 496 (2010) (holding that an employee was not “unfit for further service,” and was thus protected by the *Atlantic Steel* factors, because (1) his cursing had only occurred in front of supervisors, so did not undermine morale among other employees, (2) he was protesting pay policies and related terms and conditions of employment, and thus was clearly engaged in concerted action protected under NLRA Section 7, and (3) the employer’s repeated invitations to quit if he did not like his work situation had been provocative); *Cibao Meat Prods., Inc.*, 338 N.L.R.B. 934, 935 (2003) (holding that protests of an order that employees arrive to work early was a protected initiation of concerted action, not unprotected insubordination as the employer claimed); *NLRB v. Sw. Bell Tel. Co.*, 694 F.2d 974, 978 (5th Cir. 1982) (protecting a union shop steward who engaged in an intemperate spontaneous outburst since one outburst had taken place in the context of discussion of terms and conditions of employment, activity protected under Section 7, and that the other had been provoked by the earlier disciplinary action); *Severance Tool Indus., Inc.*, 301 N.L.R.B. 1166, 1169 (1991), *aff’d*, 953 F.2d 1384 (in the “absence of any threats of violence, actual insubordination, or acts of violence,” an employee’s rude and defiant behavior and the use of vulgar words did not cause the employee to lose the protections of the Act).

¹⁷⁰ *See, e.g.*, *NLRB v. Starbucks Corp.*, 679 F.3d 70, 79 (2d Cir. 2012) (noting that the Board has recognized only “some leeway for impulsive behavior” by an employee) (quoting *Piper Realty Co.*, 313 N.L.R.B. 1289, 1290 (1994)).

¹⁷¹ *See, e.g., id.* at 78–80 (reversing the Board’s application of the *Atlantic Steel* test where an employee engaged in an outburst in a public area in which customers as well as employees could see her, even though it was brief in duration and connected with her protected conduct of

clear: NLRB precedent recognizes more room for active protest in furtherance of protected statutory rights than Title VII federal court opinions do.

A proposal for helping courts properly handle Title VII cases involving employee insubordination under facts raising discrimination concerns would have courts apply the *Atlantic Steel* factors to evaluate whether an employee's conduct has gone too far in response to perceptions of discrimination. Those factors look not only to the issue of provocation as just discussed above, but also to the time, place, and manner of the employee's insubordination, the subject under discussion at the time, and the nature of the employee's reaction.¹⁷² All of these factors would be equally appropriate to discuss in evaluating insubordination cases under Title VII. Applying them, courts might often hold that an employee's insubordination was too extreme in context to be tolerated, as, for example, when the facts involving violence, threats of violence, or prolonged insubordination that substantially undermines the efficiency of the workplace or the authority of the boss. These considerations have frequently led the NLRB and/or administrative law judges to find that an employee's actions, though potentially protected under the NLRA, lost their protection by becoming too extreme. Similar results could be expected in Title VII insubordination cases: plaintiffs would often lose.¹⁷³ But applying the *Atlantic Steel* factors would still improve Title VII courts' jurisprudence because judges would be called upon to evaluate the connection between insubordination and underlying discrimination-tinged scenarios. Under current Title VII doctrine, which simply accepts insubordination as a legitimate reason for discharge and/or finds insubordination inappropriate opposition conduct *per se*, these inquiries do not even begin to occur. In the interests of promoting nondiscrimination in the nation's workplaces, they should.

2. *Borrowing from the NLRB's Provoked Insubordination Doctrine*

The NLRB's *Atlantic Steel* doctrine is not the only helpful contrast to Title VII insubordination law. Another helpful NLRB doctrine looks for "provoked insubordination" in assessing the lawfulness of an employee's termination. As we have seen, whether management conduct has "provoked" an employee's response is factor four in the *Atlantic Steel* test. But the Board's doctrine extends even beyond the *Atlantic Steel* context of Section 7 rights; the Board has held that employee insubordination cannot be grounds for discharge where an agent of the employer provoked an angry outburst or similar act, even when the employee was not engaged in action protected under Section 7. In brief, the Board's provoked insubordination

wearing a union button); *Felix Indus. v. NLRB*, 251 F.3d 1051, 1053 (D.C. Cir. 2001) (reversing the Board where the level of the employee's vitriol in calling his supervisor a "f—king kid" three times in a short conversation about the employee's right to receive premium pay for working night shifts was abusive and unprovoked).

¹⁷² *Atlantic Steel*, 245 N.L.R.B. 814, 816 (1979).

¹⁷³ See, e.g., cases cited *supra* note 7.

doctrine holds that an “employer cannot provoke an employee to the point where she commits . . . an indiscretion . . . and then rely on this to terminate her employment.”¹⁷⁴ To determine whether application of this principle is appropriate, the Board balances the severity of the provocation against the response, so that the “more an employer’s wrongful provocation the greater would be the employee’s justified sense of indignation and the more likely its excessive expression.”¹⁷⁵

Appellate courts reviewing Board cases have approved and applied the Board’s provoked insubordination doctrine in many cases. In *NLRB v. Steinerfilm, Inc.*, the First Circuit upheld the Board’s reinstatement of an employee fired for insubordination because “the Board could reasonably conclude that the insubordination was an excusable, if a regrettable and undesirable, reaction to the unjustified warning [the employee] had received just minutes before, and that the discharge was therefore improper.”¹⁷⁶ The court went on to observe that “[o]ther circuits have similarly recognized that, in a proper case, the Board may order reinstatement of an employee whose rudeness and ‘excessive expression’ were the result of unjustified treatment by the employer.”¹⁷⁷

To be sure, NLRB provoked insubordination cases rest on rules that do not apply in the individual employment rights context usually at issue under Title VII. This is because, in a unionized workplace, a collective bargaining agreement typically mandates a “just cause” standard for employee discipline, meaning that an employee cannot be terminated for reasons that are unfair, unjustified, or arbitrary.¹⁷⁸ The Board’s provoked insubordination doctrine essentially assumes a just cause standard in reasoning that an employer should not discharge an employee for insubordination where a supervisor’s conduct unfairly provoked the employee’s misconduct. In the nonunion context, an at-will employment regime typically applies, under which employees can be discharged for any reason except a discriminatory or otherwise illegal one.¹⁷⁹ Thus the provoked insubordination doctrine cannot be imported wholesale into the individual employment antidiscrimina-

¹⁷⁴ *Opelika Welding, Mach. and Supply, Inc. v. AFL-CIO*, 305 N.L.R.B. 561, 568 (1991) (quoting *NLRB v. M & B Headwear*, 349 F.2d 170, 174 (4th Cir. 1965)).

¹⁷⁵ *Id.* (listing situations in which the Board has applied this reasoning, including “where the supervisor came up close to the employee and shouted at him, whereupon the employee placed his hand on the supervisor’s chest and pushed him back; and where the supervisor appeared to be waving his finger in the employee’s face, whereupon the employee defensively clenched his fists.”).

¹⁷⁶ 669 F.2d 845, 852 (1st Cir. 1982) (citing *Trustees of Boston Univ. v. NLRB*, 548 F.2d 391, 392–93 (1st Cir. 1977)).

¹⁷⁷ *Id.* (citing *Crown Cent. Petrol. Corp. v. NLRB*, 430 F.2d 724 (5th Cir. 1970); see also *Hugh H. Wilson Co. v. NLRB*, 414 F.2d 1345, 1355–56 (3d Cir. 1969); *NLRB v. Thor Power Tool Co.*, 351 F.2d 584 (7th Cir. 1965); *NLRB v. M & B Headwear Co.*, 349 F.2d 170, 174 (4th Cir. 1965)).

¹⁷⁸ See Roger I. Abrams & Dennis R. Nolan, *Toward a Theory of “Just Cause” in Employee Discipline Cases*, 1985 DUKE L.J. 594, 611–12 (1985).

¹⁷⁹ See Clyde W. Summers, *The Contract of Employment and the Rights of Individual Employees: Fair Representation and Employment at Will*, 52 FORDHAM L. REV. 1082, 1097 (1984).

tion rights context because employees have no general protection against an employer treating them unfairly. But a more limited version, which protects employees where provocation *relates to discrimination*, or would at least lead a reasonable employee to perceive such a relationship between employer provocation and discrimination, would go far to advance Title VII's objectives. Such a rule would address the kinds of troubling cases documented in Section II *supra*, in which discrimination triggers mild to moderate insubordination.

In cases raising potential provoked insubordination issues, Title VII courts should ask whether reasonable perceptions of discrimination triggered an employee's mild or moderate insubordination. Where the evidence supports this conclusion, the court should invoke a provoked insubordination rule to bar the employer from terminating the employee on grounds of insubordination even if the evidence of discrimination is insufficient to prove a Title VII discrimination claim. Introducing a provoked insubordination doctrine to Title VII jurisprudence in this way would help ensure that courts take a second look in the many cases described in Section II above involving workplace atmospheres tinged with discrimination, even where facts are not sufficient to meet the plaintiff's high burden of proof on a discrimination claim.

At bottom, such provoked insubordination cases will become opposition conduct cases, in the sense that they fall within the category of cases in which an employee is seeking to protest discrimination but has been provoked to intemperate conduct through the acts of the employers' agents. The provoked insubordination doctrine remains a helpful additional tool for courts, however, because identifying the existence of provoked insubordination points out why the plaintiff's conduct should not lose its protection even if it goes somewhat beyond the strict decorum Title VII courts typically expect of employees. The doctrine explains why an employee's outburst or short-term refusal to follow a supervisor's order was reasonable opposition conduct in context—*i.e.*, because it was provoked. If a court were to apply the provoked insubordination doctrine in the *Morgan* case, for example, Morgan's insubordination in refusing to go into his supervisor's office and going home instead would remain protected conduct even though it violated Amtrak's insubordination policy. His supervisor's comment that Morgan must "get his black ass" into his office, coupled with a long history of supervisors' use of such racial epithets and other incidents of harassment, provoked Morgan's intemperate response. Plaintiffs' lawyers handling cases with facts supporting provoked insubordination claims, as in *Morgan* and *Clack*, could use this concept to direct the factfinder's attention to the connection between a workplace atmosphere tinged with discrimination and subsequent alleged "insubordination" by an employee subject to it.

Many additional considerations counsel in favor of recognizing a provoked insubordination doctrine in Title VII insubordination cases as well. Disapproving of provoked insubordination by protecting employees from discharge in such scenarios would deter employers' agents from exacerbat-

ing negative workplace dynamics—as, for example in workplaces in which supervisors use racially derogatory language, even of the “stray remarks” variety.¹⁸⁰ In the cases discussed in Section II above in which plaintiffs lost their discrimination claims, for example, such language included, in the race context, “nigger,” “black ass,” “black thief,” and “sunshine,” and acts such as hanging nooses. Such statements are surely provocative, even if not ultimately sufficient to prove discrimination. In these cases the controversy might never have come to court if agents of the employer had not berated the plaintiffs to the point of anger labeled as insubordination.

Importing a provoked insubordination doctrine into Title VII would also encourage employers to conduct more effective antidiscrimination training. Just as the Court’s *Ellerth/Faragher* affirmative defense in supervisor sexual harassment cases motivates employers to set up sexual harassment trainings,¹⁸¹ a provoked insubordination doctrine in the Title VII context would create incentives for managers to emphasize the need to avoid demeaning racial or sexual epithets and/or other acts encoding messages that reasonable employees could perceive to be discriminatory and thus provocative.

Nor can Title VII hostile environment discrimination alone handle cases involving abusive and provocative, racially or sexually “loaded,” language or acts. Hostile environment discrimination is a Title VII doctrine that holds that harassment on the basis of a protected characteristic constitutes discrimination if it is so “severe and pervasive” that it alters the terms and conditions of employment for the plaintiff.¹⁸² This doctrine cannot suffice to handle provoked insubordination cases because in many instances plaintiffs are unable to show a situation *so* “severe and pervasive” as to literally “change the terms and conditions of employment” for affected employees. The cases discussed in Section II-A did not meet this high standard required for a plaintiff to prevail on a hostile environment theory; the decision maker remained unconvinced that the evidence of a hostile environment, though abundant, had risen to this high level.¹⁸³

¹⁸⁰ For an excellent critique of “stray comments” doctrine, see Stone, *supra* note 33 (arguing that the stray comments doctrine results in courts discounting probative evidence of discriminatory intent).

¹⁸¹ Sturm, *supra* note 35, at 483.

¹⁸² See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 69–72 (1986) (announcing this standard for hostile environment sex harassment); *Ceros v. Steel Techs., Inc.*, 288 F.3d 1040, 1044–45 (7th Cir. 2002) (applying the same standard for racial harassment). As Evan White persuasively points out, the combination of this high “severe and pervasive” standard with the *Ellerth/Faragher* affirmative defense to hostile environment liability makes it very difficult for plaintiffs to prevail in hostile environment cases because “once the harassment has gone on long enough to become severe or pervasive, the employer’s affirmative defense is increasingly likely to bar the plaintiff’s prima facie case. The result is that as the plaintiff’s prima facie case grows stronger, the probability that the employer will prevail on its affirmative defense also increases.” Evan D. H. White, *A Hostile Environment: How the “Severe or Pervasive” Requirement and the Employer’s Affirmative Defense Trap Sexual Harassment Plaintiffs in a Catch-22*, 47 B.C. L. REV. 853, 853 (2006).

¹⁸³ See, e.g., *Clack v. Rock Tenn. Co.*, 304 F. App’x 399, 403 (6th Cir. 2008).

Even though plaintiffs cannot win hostile environment discrimination claims where they cannot make out these high proof standards, courts should not disregard the effects on employees of workplaces tinged with discrimination. Without a doctrine of provoked insubordination, Title VII courts essentially come to ignore—and thus in essence tacitly to approve—workplace situations that are highly problematic even if not provably illegal under the nation’s antidiscrimination laws.¹⁸⁴ By ruling in defendants’ favor to uphold the discharges of employees who react to discrimination-related provocation, courts send the message that such provocation is acceptable. The law should not send such signals, which encourage rather than deter discrimination-related talk and employee abuse and thus fuel rather than alleviate tensions within U.S. workplaces based on protected identity characteristics.¹⁸⁵

Those opposed to the changes presented here may point out their potential drawbacks. For example, these doctrinal changes require more searching scrutiny of the totality of the circumstances in particular cases as well as the reasonableness of employee perceptions of discrimination. Both of these inquiries will increase the time courts must spend on these types of cases. Yet isn’t avoiding such probing, time- and resource-intensive inquiry the very reason courts use doctrinal shortcuts in Title VII cases? Moreover, a critic might point out, would not the adoption of pro-plaintiff doctrines increase the incentives for employees to sue—or even to be insubordinate—knowing that such doctrinal changes would render courts more likely to find for employees?

To be sure, under my proposed reforms more employees might sue or speak up more often to protest perceptions of discrimination (if one assumes, of course, that employees know about these subtle doctrinal tweaks). As already discussed, however, the current doctrinal regime leads to too few cases succeeding, which has incentive effects in the opposite direction. An ideal liability regime would penalize employers that allow discrimination-tinged workplaces to continue, because these conditions could lead a plaintiff to challenge a firing for insubordination on provoked insubordination grounds.

A better response to critics’ objections is to acknowledge their legitimacy to some extent, but point out the countervailing objectives achieved. To be sure, courts will have to examine the background facts in insubordination cases more carefully; that is the very point of the doctrinal changes I suggest. But my proposals call for greater scrutiny in only a limited set of Title VII cases—where, as this article has pointed out, the danger of outcomes that condone discrimination is most severe. Courts *should* more care-

¹⁸⁴ Smith, *supra* note 61, at 531.

¹⁸⁵ Cf. Hitachi Capital Am. Corp., No. 34-CA-130112, 2012 WL 2861686, (N.L.R.B. Div. of Judges July 11, 2012), *aff’d*, 361 N.L.R.B. 19 (2014) (citing Consumers Power Co., 282 N.L.R.B. 131, 132 (1986) (“The protections of Section 7 would be meaningless were we not to take into account the realities of industrial life and the facts that disputes over wages, bonus [sic] and working conditions are among the *disputes most likely to engender ill feelings and strong responses.*” (emphasis added))).

fully consider cases involving evidence of provocative discriminatory animus, such as the use of the n-word or egregious sexual harassment.

Moreover, in these situations employees should have greater prospects of success, for all of the public policy, incentive-creating, and fairness reasons that the NLRB and reviewing courts have recognized in the cases discussed in Section III above. If employers respond to these changed incentives by refraining from terminating employees for mild or moderate insubordination provoked by reasonable perceptions of discrimination, then employers might even face fewer, not more, lawsuits because they will have refrained from adverse employment actions in these fraught situations. If employers do not refrain from employee terminations in these situations, then courts should examine the underlying scenarios because of their troubling implications.

Another important point notes that the proposed shifts in Title VII doctrine are narrow in scope. The proposals made here represent a surgical intervention that can be accomplished through interstitial doctrinal development in particular cases (much like case law development gave rise to a variety of sexual harassment doctrines), rather than through a grand attempt to redirect the great morass of Title VII case law. The proposals made above identify and address a specific issue that can be fixed through doctrinal tweaks in a limited but important set of cases.

CONCLUSION

This article has argued that courts evaluating employment antidiscrimination claims should borrow from the insights and approaches of both some Title VII courts and the NLRB in order to more sensitively and appropriately handle “angry employee” cases. Doing so would not result in an “anything goes” philosophy towards angry employees; physically threatening, violent, or persistently inappropriate workplace behavior remains beyond the line under Board law just as it should in Title VII cases. However, Title VII courts could do a better job of protecting employee conduct directed against perceived discriminatory workplace treatment by giving more searching scrutiny to the facts in Title VII insubordination cases. The specific doctrinal reforms proposed above have this aim. Title VII courts could also attend to the factors the NLRB applies in deciding whether employee misconduct warrants loss of statutory protections. The approaches outlined above call on courts to interpret employment antidiscrimination rights so as to preserve a space for somewhat imperfect, sometimes intemperate, expressions of protest by employees who are experiencing workplaces in which troubling signs of discrimination continue to exist. By enhancing the legal protection of employees who challenge employer authority when exercised in a manner employees reasonably believe to be discriminatory, all actors in the employment context are granted more power to achieve change from within, a goal second generation antidiscrimination approaches embrace. Modification of Title VII doctrine to tolerate a broader range of employee

protest behavior would have salutary results in encouraging employers and employees to work out problems in workplaces rather than in courts.

