

# The Other 20 Cents Isn't Worth It: The Inadequacy of Title VII's Anti-Retaliation Framework

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"No."

- an experienced plaintiff-side employment lawyer when asked if she knew of anyone who remained employed by an employer after suing them.

*This Article examines the framework for resolving Title VII retaliation disputes through the lens of gender pay disparity and proposes that the current framework is inadequate. The Article begins by illustrating the issue and the impact of retaliatory conduct in the workplace through the stories of two female workers. It also explains the Title VII retaliation standard and explores the process for filing and pursuing an anti-retaliation claim under this framework.*

*Ultimately, the current framework is inadequate for two reasons. First, it does little to discourage retaliatory conduct by employers or co-workers because what amounts to "retaliation" under the law is under-inclusive and difficult to prove. Second, the employment relationship is among the most important in American society, but instead of seeking to salvage it, the current litigation-driven anti-retaliation framework destroys it. Consequently, the Article proposes an alternative dispute resolution method for solving retaliation disputes and provides examples from the transformative mediation and ombudsman models.*

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## I. INTRODUCTION

The Equal Employment Opportunity Commission (EEOC) filed charges on behalf of Professor Lucy Marsh against the University of Denver Sturm College of Law. While those charges were pending, Professor Marsh continued teaching at the school and as one of her students during that time, the case became an interest of mine.<sup>1</sup> The EEOC lawsuit filed on behalf of Professor Marsh centered on the pay

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1. Debra Weis, *EEOC Sues University of Denver Law School for Alleged Pay Discrimination*, ABA JOURNAL (Oct. 3, 2016), [http://www.abajournal.com/news/article/eec\\_sues\\_university\\_of\\_denver\\_](http://www.abajournal.com/news/article/eec_sues_university_of_denver_)

disparities that exist between male and female professors at the Sturm College of Law.<sup>2</sup> The lawsuit has since been settled, but it made me wonder what the workplace looks like for employees who have sued their employers, whether an employment relationship can remain intact after such an occurrence, and even whether an opportunity might exist for the employment relationship to be strengthened through proceedings that are inherently adversarial.

Women working full time in the United States make eighty cents for every dollar made by their male counterparts.<sup>3</sup> To combat the wage discrimination inherent in this disparity, Title VII of the Civil Rights Act of 1964 provides a cause of action<sup>4</sup> to women facing discrimination by their employers.<sup>5</sup> But what happens next? What happens after a woman sues or attempts to sue her employer to vindicate her rights? And the even bigger question – is it really worth it?

Title VII prohibits an employer from discriminating against any individual with respect to “compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, *sex*, or national origin.”<sup>6</sup> The provision also provides that it is unlawful for an employer to retaliate against an employee for opposing an unlawful employment practice, making a formal complaint, or participating in any action against an employer for violating the provisions of Title VII.<sup>7</sup>

The anti-retaliation provision is intended to deter employers from punishing employees for exercising their rights under Title VII, while encouraging employees to oppose discrimination by protecting them from such punishment.<sup>8</sup> However, retaliation is the most commonly charged type of discrimination, implying that the current framework is not serving its intended purpose of deterring retaliatory conduct.<sup>9</sup> In reality, the anti-retaliation provision simply provides an opportunity for additional, drawn out, expensive, and often fruitless litigation between wronged employees and the employers who wronged them.

The current anti-retaliation framework is inadequate for two reasons. First, it does little to discourage retaliatory conduct by employers or co-workers because what amounts to “retaliation” under the law is under-inclusive and difficult to prove.<sup>10</sup> Second, the employment relationship is among the most important

law\_school\_for\_alleged\_pay\_discrimination/.

2. *Id.*

3. Deborah J. Vagins, *The Simple Truth About the Gender Pay Gap*, AAUW, <http://www.aauw.org/research/the-simple-truth-about-the-gender-pay-gap/> (last visited Sept. 10, 2018).

4. The Equal Pay Act provides an additional cause of action to women facing gender pay discrimination, but this Article focuses on issues arising out of a Title VII claim for relief, which is applicable on a broader level.

5. 42 U.S.C. § 2000e-2 (2012).

6. *Id.* (emphasis added).

7. 42 U.S.C. § 2000e-3 (2012).

8. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006).

9. *Facts about Retaliation*, EQUAL EMP'T OPPORTUNITY COMM'N, <https://www.eeoc.gov/laws/types/retaliation.cfm> (last visited Dec. 13, 2016) (“Retaliation is the most frequently alleged basis of discrimination in the federal sector.”).

10. See generally David A. Drachler, *Supreme Court Sets High Bar for Title VII Retaliation Claims*, 64 LAB. L. J. 205 (2013).

relationships in American society,<sup>11</sup> but instead of seeking to salvage it, the current litigation-driven anti-retaliation framework destroys it.

Part II of this Article seeks to demonstrate the inadequacies of Title VII's anti-retaliation regime in two ways: first, by illustrating the impact that retaliatory conduct in the workplace has had on the employment relationships of two women on opposite ends of the employment spectrum, both of whom have faced wage discrimination; and second, by explaining the Title VII retaliation standard and describing the lengthy process of filing a charge.

Next, this Article will prescribe an alternative dispute resolution method for solving employer retaliation disputes using examples from the transformative mediation model that has been successfully implemented by the U.S. Postal Service<sup>12</sup> and the ombudsman model employed by workplaces in the United Kingdom.<sup>13</sup>

## II. ILLUSTRATING THE PROBLEM THROUGH THE EXPERIENCES OF TWO FEMALE WORKERS

Women account for 56.8% of the labor force.<sup>14</sup> Their experiences are varied, but the effect of wage discrimination, and the retaliation they may face for challenging it, takes a heavy toll on women employed in any arena.

### A. The Experience of the Low Wage Worker

Karen was unemployed for six months after she was laid off from her job as a cashier at a small bakery.<sup>15</sup> She was willing to take pretty much any opportunity that presented itself, so she was very pleased when she found a job stocking shelves at a housewares store close to her apartment. The store offered her \$12.00 an hour and promised around forty hours a week of work. Karen quickly noticed that she was the only female worker stocking shelves at this location, but that did not bother her. She preferred hard work and being active to standing at a cash register all day, and her male co-workers were extremely friendly and chatty. After a few months at the job, Karen overheard two of the men discussing their pay. Karen was shocked to learn that the store was paying them \$14.50 an hour to stock shelves. She knew they had been working at the store about the same amount of time as she had, and she could not figure out any reasonable explanation for the \$2.50 discrepancy between their pay and hers.

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11. See generally PETER HERRIOT, *THE EMPLOYMENT RELATIONSHIP* 15 (2001).

12. See Lisa Bingham, *Mediation at Work: Transforming Workplace Conflict at the United States Postal Service*, IBM CTR. FOR THE BUS. OF GOV'T (2003), [http://businessofgovernment.org/pdfs/Bingham\\_Report.pdf](http://businessofgovernment.org/pdfs/Bingham_Report.pdf).

13. *Where Ombudsman Schemes Work*, OMBUDSMAN ASSOC., <http://www.ombudsmanassociation.org/about-where-ombudsmen-work.php> (last visited Sept. 10, 2018).

14. *Labor Force Participation by Sex, Race, and Hispanic Ethnicity*, U.S. DEP'T OF LAB. WOMEN'S BUREAU, [https://www.dol.gov/wb/stats/NEWSTATS/latest/Lf\\_sex\\_race\\_hisp2016\\_txt.htm](https://www.dol.gov/wb/stats/NEWSTATS/latest/Lf_sex_race_hisp2016_txt.htm) (last visited Sept. 10, 2018).

15. This fact scenario is a realistic representation of a female worker in this category (low wage worker) based on assorted news stories, cases, experience, and various other sources.

Karen sat with this information for two weeks before she decided she had to say something to the assistant manager, Ashley, with whom she had become close. Ashley was a young woman who had been at the store for a little over a year, and Karen felt comfortable discussing the issue with her. The two went to lunch together often, and Karen thought this would be the ideal time for her to mention the issue to Ashley. However, when Karen told her, Ashley did not seem surprised at all. Ashley told Karen that the difference in pay was deliberate. She said the position was extremely physically demanding and Karen could not possibly be as productive as the male workers, so her pay was lowered accordingly.

That explanation did not sit right with Karen. She worked just as hard as the men in her position did, and she wanted to be paid the same. She was nervous about the possibility of losing her job, but after reading online that her employer was not allowed to fire her for complaining about the pay discrepancy, she decided to file a charge with the Equal Employment Opportunity Commission (EEOC). Karen mentioned this to Ashley a few days later.

The following week, Karen was disappointed to see that she was only scheduled to work thirty hours instead of her usual thirty-five to forty hours. The week after, she was down to twenty-eight hours. Ashley also began consistently rejecting her lunch invitations. Karen was unhappy and barely earning enough money to scrape by. The job she had once enjoyed became unbearable. She decided to quit. She was beside herself with stress over the situation and filed an additional complaint with the EEOC charging retaliation, even though she had not heard anything from them regarding her original charge.

Almost a year went by, and Karen finally received a letter in the mail from the EEOC. It informed her that her case had little legal merit because the change in her hours could be explained by seasonal staffing differences, but it included a Notice of Right to Sue. By this time, Karen was settled into a new job as an office assistant. She did not have the money for an attorney. She put the letter in a desk drawer and has not looked at it since.

## B. The Experience of the Protected Worker

Meredith had been a full time medical school professor for thirty years when she discovered that she was the lowest paid member of the school's faculty.<sup>16</sup> From further research, she learned that on average, full-time female professors at the university were paid \$20,000 less than their male counterparts. She immediately filed charges with the EEOC alleging gender pay discrimination under Title VII and the Equal Pay Act. Over the course of the three years following her original complaint, the EEOC investigated and slowly attempted to facilitate conciliation and settlement efforts, but to no avail. In those three years, Meredith was forced to teach classes she had no desire to teach, subjected to numerous performance evaluations, and no longer invited to certain events held by co-workers and other university staff members. It became clear to Meredith that most of the other female faculty members did not want to be associated with her or her complaint.

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16. This fact scenario is a realistic representation of a female worker in this category (protected worker) based on assorted news stories, cases, and various other sources.

Throughout the process, the university openly maintained its position that Meredith and all faculty members were paid in accordance with their performance and that Meredith was the lowest performing full-time professor. Meredith's desire to teach and her passion for the profession began to fade. She filed an additional charge with the EEOC alleging retaliation.

A little over four years after Meredith filed her initial complaint, after all settlement efforts had failed, she began the expensive and lengthy process of litigating her discrimination charges in court without further assistance from the EEOC. Meredith found a private attorney who was willing to take her case. She provided him with all the information she had collected and relayed her experiences at the university to him. She also provided him with a substantial first payment for his services. The process of the continued litigation wore on Meredith – the time, the money, the effort, the depositions and meetings, the gathering of witnesses – all took a strong emotional toll. She was anxious and stressed, and her teaching and work began to suffer.

Five years after filing her initial charge, Meredith's case went to trial. She prevailed on her original wage discrimination claims but failed on her retaliation claim. It did not seem right to Meredith that the university was able to escape punishment for their conduct towards her after she had made her initial complaint. She wondered what was to deter them from acting that way towards her or others in her position in the future. She wondered if it had all been worth it.

These are just two depictions illustrating the pervasive issues caused by the current framework for resolving Title VII retaliation disputes and the impact that framework has on real women in workplaces across the country.

### III. THE CURRENT FRAMEWORK UNDER TITLE VII

Under Title VII's current framework, retaliation plaintiffs are required to prove that: 1) they engaged in protected activities; 2) they suffered adverse employment actions;<sup>17</sup> and 3) their opposition of unlawful employment practices or participation in protected activities was the but-for cause of the adverse actions they suffered.<sup>18</sup> This is a burdensome and difficult task for many plaintiffs seeking to vindicate the rights afforded to them by Title VII.

#### A. Title VII's Purpose

Congress enacted Title VII as part of the Civil Rights Act of 1964 to combat discriminatory employment practices by removing an employer's ability to discriminate against employees and potential employees based on certain protected characteristics.<sup>19</sup> These characteristics include race, color, religion,

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17. Sandra F. Sperino, *Retaliation and the Reasonable Person*, 67 FLA. L. REV. 2031, 2032 (2015).

18. Univ. of Tex. S.W. Med. Ctr. v. Nassar, 570 U.S. 338, 360 (2013); see also Sperino, *supra* note 17.

19. Gina Oderda, Note, *Opposition at the Water Cooler: The Treatment of Non-Purposive Conduct Under Title VII's Anti-Retaliation Clause*, 17 DUKE J. GENDER L. & POL'Y 241, 243 (2010) (citing McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 280 (1976)).

national origin, and though not originally intended for inclusion, sex.<sup>20</sup> The text of Title VII states:

It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to [that individual's] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.<sup>21</sup>

Claims of discrimination brought under this provision of Title VII are frequently referred to as “status-based discrimination” claims, but Title VII also protects against another form of discrimination – employer retaliation.<sup>22</sup>

## B. The Anti-Retaliation Provision and Its Current Framework

Title VII's anti-retaliation provision is intended to serve as a form of security for those employees who seek “to secure or advance enforcement of the Act's basic guarantees.”<sup>23</sup> It endeavors to achieve this by making it unlawful for an employer to take adverse action against employees who fall into either of two protected categories<sup>24</sup> – those who oppose unlawful conduct or those who participate in the furtherance or investigation of a complaint.<sup>25</sup> The anti-retaliation provision of Title VII states:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has *opposed* any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or *participated* in any manner in an investigation, proceeding, or hearing under this subchapter.<sup>26</sup>

In order to succeed on a claim arising out of this provision, complainants must prove that: 1) they engaged in a protected activity under the opposition clause or the participation clause; 2) they suffered an adverse action at the hands of their employer;<sup>27</sup> and 3) their opposition or participation was the but-for cause of the adverse action they suffered.<sup>28</sup>

20. 42 U.S.C. § 2000e (2012); *see also* Oderda, *supra* note 19 (citing Jeff Mitchell, *Title VII's "Sex Life"*, 24 WOMEN'S RTS. L. R. 137, 137 (2003)) (explaining that Title VII originally did not include sex as a protected class, but that it was added as an attempt to thwart the passage of the Act).

21. 42 U.S.C. § 2000e-2 (2012).

22. *Nassar*, 570 U.S. at 343 (citing 42 U.S.C. § 2000e-3 (2012)).

23. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006).

24. *Id.*

25. *See* 42 U.S.C. § 2000e-3 (2012); *see also* David Long-Daniels & Peter N. Hall, *Risky Business: Litigating Retaliation Claims*, 28 A.B.A. J. LAB. & EMP. L. 437, 439 (2012-2013) (“[C]ommonly referred to as the ‘opposition clause’ and the . . . ‘participation clause.’”).

26. 42 U.S.C. § 2000e-3 (2012) (emphases added).

27. *Sperino*, *supra* note 17, at 2032.

28. *Univ. of Tex. S.W. Med. Ctr. V. Nassar*, 570 U.S. 338, 360 (2013); *see also* *Sperino*, *supra* note 17, at 2032.

### 1. Protected Activities under the Anti-Retaliation Provision

Claimants seeking to succeed on a retaliation claim must first prove that they engaged in a protected activity.<sup>29</sup> The anti-retaliation provision of Title VII protects two categories of activities: opposition and participation.<sup>30</sup>

#### a. The Opposition Clause

Under the anti-retaliation provision, it is unlawful for an employer to take an adverse action against an employee for opposing a discriminatory employment practice.<sup>31</sup> The most obvious form of opposition is an affirmative complaint, but there are additional forms of opposition not rising to the level of an affirmative complaint that still qualify for protection against retaliation under the opposition clause.<sup>32</sup> According to the EEOC, these additional forms of opposition include: threats to file charges alleging discrimination, formal or informal complaints about discrimination, and refusals to obey orders upon belief that the orders are discriminatory.<sup>33</sup>

The decision of the U.S. Supreme Court in *Crawford v. Metropolitan Government of Nashville & Davidson County, Tennessee* also broadened the scope of actions that may qualify for protection under the opposition clause by clarifying that employees need not be instigators or initiators of their own opposition.<sup>34</sup> In *Crawford*, plaintiff Vicky Crawford was interviewed as part of an internal investigation regarding allegations of sexual harassment against another employee.<sup>35</sup> During questioning, she described instances in which the accused employee had sexually harassed her.<sup>36</sup> Crawford's employer fired her and two other employees who described instances of sexual harassment during their interviews.<sup>37</sup> The Supreme Court held that it was unnecessary for an employee to be an instigator or initiator, or to constantly and actively oppose conduct, in order for that employee to be protected under the opposition clause.<sup>38</sup> It is enough, the Court held, that the employee in this case voiced opposition to the conduct in response to her employer's inquiry.<sup>39</sup>

This decision may have broadened the scope of what actions qualify for protection under the opposition clause, but the clause also has two limitations that narrow its coverage.<sup>40</sup> First, the manner in which an employee opposes alleged

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29. Sperino, *supra* note 17, at 2032.

30. 42 U.S.C. § 2000e-3 (2012).

31. *Id.*

32. *Crawford v. Metro. Gov. of Nashville & Davidson Cty., Tenn.*, 555 U.S. 271, 274 (2009).

33. EQUAL EMP'T OPPORTUNITY COMM'N, EEOC ENFORCEMENT GUIDANCE ON RETALIATION AND RELATED ISSUES § 2(a) (2016), [https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm#2.\\_Opposition](https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm#2._Opposition).

34. 555 U.S. at 273–74.

35. *Id.*

36. *Id.* at 274.

37. *Id.*

38. *Id.* at 276.

39. *Id.*; see also Long-Daniels & Hall, *supra* note 25, at 441.

40. May M. Monsour, Note, *Why Title VII's Participation Clause Needs to be Broadly Interpreted to Protect Those Involved in Internal Investigations*, 88 ST. JOHN'S L. REV. 825, 829 (2014).



discrimination must be reasonable.<sup>41</sup> Second, the employee must have a reasonable and good faith belief that the employer's actions or practices were unlawful.<sup>42</sup>

#### b. The Participation Clause

Under Title VII's anti-retaliation provision, it is also unlawful for an employer to take an adverse action against an employee for making a claim, testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing arising under Title VII.<sup>43</sup> Unlike the limitations narrowing the coverage of the opposition clause, the validity or reasonableness of an employee claim is irrelevant when considering whether the participation clause protects an employee.<sup>44</sup>

Instead, the limitation placed on employees seeking protection under the participation clause comes from the judicially-created standard that an employee's participation must occur within the context of a complaint that has been filed with the EEOC.<sup>45</sup> This means that any employee participation occurring before an EEOC complaint remains unprotected by the participation clause.<sup>46</sup>

### 2. Adverse Actions in the Context of Retaliation

The second requirement of a complainant in a Title VII retaliation case is that the complainant needs to have suffered an adverse action.<sup>47</sup> "The antiretaliation provision protects an individual not from all retaliation, but from retaliation that produces an injury or harm."<sup>48</sup> *Burlington Northern & Santa Fe Railway Co. v. White* articulates the standard for what constitutes an injury or harm in Title VII retaliation cases.<sup>49</sup>

The plaintiff in that case, Sheila White, was the only female forklift operator at Burlington Northern & Santa Fe Railway Co.'s Tennessee yard.<sup>50</sup> She suffered sexual harassment by a supervisor, complained, and although her supervisor was disciplined for his sexual harassment, White was removed from her position as a forklift operator and transferred to a different department.<sup>51</sup> She filed a complaint with the EEOC alleging gender discrimination and retaliation.<sup>52</sup> Her employer suspended her for insubordination, for which she filed another retaliation charge,

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41. *Id.*

42. *Id.*

43. 42 U.S.C. § 2000e-3 (2012).

44. *Id.*

45. See EQUAL EMP'T OPPORTUNITY COMM'N, EEOC ENFORCEMENT GUIDANCE ON RETALIATION AND RELATED ISSUES (2016), <https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm>.

46. See Monsour, *supra* note 40, at 829.

47. Sperino, *supra* note 17, at 2032.

48. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006).

49. *Id.* at 68.

50. *Id.* at 53.

51. *Id.*

52. *Id.*

but she was eventually reinstated with back pay.<sup>53</sup> The Supreme Court held that White's employer's conduct constituted an adverse employment action.<sup>54</sup>

In that case, the Supreme Court held that the applicable standard for what constitutes a harm in retaliation cases is whether a reasonable employee would have found an employer's action to be materially adverse according to the objective totality of the circumstances.<sup>55</sup> "Materially adverse" is further defined as any action that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."<sup>56</sup> However, this standard of material adversity does not include "those petty slights or minor annoyances that often take place at work and that all employees experience."<sup>57</sup> This makes the standard difficult to apply uniformly, as what is deemed materially adverse by one court in one situation may not be deemed so by another court in another situation. For example, while one court may determine that it is simply a petty slight to stop inviting an employee to lunch after that employee engages in a protected activity under Title VII, other courts may determine that this is an action that may well have dissuaded that employee from engaging in the protected activity.

### 3. The Standard for Causation

The third element required of retaliation claims, and by far the hardest to satisfy, is a causal link between an employee's protected activity and the adverse action taken against the employee by the employer.<sup>58</sup> In *Nassar*, the Supreme Court interpreted a 1991 amendment to Title VII to require that retaliation claims under Title VII be proven using a but-for causation standard.<sup>59</sup> This is a higher causation standard than that required of status-based discrimination claims and retaliation claims under other federal provisions, such as protection for First Amendment speech and protections under the Whistleblower Protection Act.<sup>60</sup>

#### a. The 1991 Amendment to Title VII

In 1991, Congress amended Title VII to include language making it explicit that in order to prove a claim for status-based discrimination, a claimant need only show that discrimination was a motivating factor in the adverse action taken against them.<sup>61</sup> The section on status-based discrimination with this lower causation standard language appears in a different section than the section on retaliation.<sup>62</sup> The status-based discrimination section now states:

[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a *motivating*

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53. *Id.*

54. *Id.*

55. *Id.* at 68–69.

56. *Id.* at 68 (internal quotation marks omitted).

57. *Id.* at 70.

58. Sperino, *supra* note 17, at 2032.

59. *Univ. of Tex. S.W. Med. Ctr. v. Nassar*, 570 U.S. 338, 360 (2013).

60. Drachslar, *supra* note 10, at 205.

61. *Id.*

62. *See Nassar*, 570 U.S. 338 at 351.

*factor* for any employment practice, even though other factors also motivated the practice.<sup>63</sup>

This lower “motivating factor” causation standard is also the standard for most federal retaliation claims, except for those arising under Title VII, which require but-for causation.<sup>64</sup>

#### b. The Effect of *Nassar*

The Supreme Court’s decision in *Nassar* made Title VII retaliation claims more difficult to prove.<sup>65</sup> In that case, the Court interpreted the 1991 amendment to Title VII as intentionally separating status-based discrimination claims from retaliatory discrimination claims and refused to extend the lower causation standard to retaliation claims.<sup>66</sup> As such, the language expressing the “motivating factor” causation standard only applies to status-based discrimination claims and not to retaliation claims, which are prohibited by a separate, subsequent section of the provision.<sup>67</sup>

Accordingly, the Court held that Title VII retaliation claims must be proven according to a higher standard – traditional but-for causation.<sup>68</sup> This standard requires a claimant to prove that the claimant’s employer would not have taken an adverse action against the claimant in the absence of the protected activity.<sup>69</sup> This is an extremely high bar for employees seeking to avail themselves of Title VII’s protections against retaliation.<sup>70</sup>

#### IV. THE FIRST STEP – FILING A RETALIATION CLAIM

An employee does not have the right to take an employer to court to litigate a dispute without first filing a charge with the EEOC.<sup>71</sup> The EEOC is the federal agency tasked with enforcing anti-discrimination laws and investigating the charges made by employees against employers.<sup>72</sup> The agency is important not only because it is a wronged employee’s first point of contact, but also because it essentially performs a gatekeeping function for employees seeking to avail themselves of federal anti-discrimination protections.

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63. 42 U.S.C. § 2000e-2(m) (2012) (emphasis added).

64. Drachsler, *supra* note 10, at 205–06.

65. *Nassar*, 570 U.S. 338 at 353.

66. *Id.*

67. *Id.* at 356.

68. *Id.* at 360.

69. *Id.*; see also Drachsler, *supra* note 10, at 205.

70. *Id.*

71. *How to File a Charge of Employment Discrimination*, EQUAL EMP’T OPPORTUNITY COMM’N, <https://www.eeoc.gov/employees/howtofile.cfm> (last visited Sept. 10, 2018).

72. *Overview*, EQUAL EMP’T OPPORTUNITY COMM’N, <https://www.eeoc.gov/eeoc/index.cfm> (last visited Dec. 12, 2018).

### A. The Role of the Equal Employment Opportunity Commission

The first step a wronged employee must take to combat employer retaliation is to file a charge with the EEOC.<sup>73</sup> An employee must file their charge with the EEOC by mail or in person<sup>74</sup> within 180 days<sup>75</sup> of when the claimed discriminatory act took place.<sup>76</sup>

After an employee files a charge, the EEOC has broad discretion to respond in whatever way it sees fit. In some cases, the EEOC responds by asking the employee and the employer to solve their dispute through mediation,<sup>77</sup> but both parties must agree to the mediation.<sup>78</sup> If mediation fails, the charge is given to an investigator.<sup>79</sup>

If the investigator finds that an employer did not violate the law, then the employee will be given a Notice of Right to Sue, granting the employee permission to file a lawsuit on her own.<sup>80</sup> If the investigator finds a violation, the EEOC will try to settle, and then may or may not decide to file a lawsuit on behalf of the employee.<sup>81</sup> If the EEOC decides not to sue, as it does in more than ninety-nine percent of cases,<sup>82</sup> then the employee will be given a Notice of Right to Sue.<sup>83</sup> The EEOC also has the authority to dismiss a complaint altogether before investigating – leaving the employee without any remedy – if it decides that the complaint has little chance of success.<sup>84</sup> To put this into perspective, in 2015 the EEOC found sixty-four percent of gender pay discrimination complaints received to have “no reasonable cause” for action.<sup>85</sup>

Moreover, the EEOC’s investigation of a complaint alone can take an average of ten months,<sup>86</sup> leaving most wronged employees without the EEOC’s help in litigating their claims and a substantial amount of time lost while they had to wait.

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73. *How to File a Charge of Employment Discrimination*, *supra* note 71.

74. *Id.*

75. The 180-day time frame is subject to certain modifications. For example, the 180-day filing deadline is extended to 300 calendar days if a state or local agency enforces a state or local law that prohibits employment discrimination on the same basis. *Time Limits for Filing a Charge*, EQUAL EMP’T OPPORTUNITY COMM’N, <https://www.eeoc.gov/employees/timeliness.cfm> (last visited Sept. 10, 2018).

76. *Id.*

77. *Filing a Charge of Discrimination*, EQUAL EMP’T OPPORTUNITY COMM’N, <https://www.eeoc.gov/employees/charge.cfm> (last visited Sept. 10, 2018).

78. *What You Can Expect After You File a Charge*, EQUAL EMP’T OPPORTUNITY COMM’N, <https://www.eeoc.gov/employees/process.cfm> (last visited Sept. 10, 2018).

79. *Mediation*, EQUAL EMP’T OPPORTUNITY COMM’N, <https://www.eeoc.gov/employees/mediation.cfm> (last visited Sept. 10, 2018).

80. *What You Can Expect After You File a Charge*, *supra* note 78.

81. *Id.*

82. *Charge Statistics (Charges filed with EEOC) FY 1997 Through FY 2017*, EQUAL EMP’T OPPORTUNITY COMM’N, <https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Mar. 5, 2019).

83. *Filing a Lawsuit*, EQUAL EMP’T OPPORTUNITY COMM’N, <https://www.eeoc.gov/employees/lawsuit.cfm> (last visited Sept. 10, 2018).

84. *Id.*

85. Gwen Moran, *Here’s What it Takes to Sue for Gender Discrimination – and Win*, FORTUNE (Apr. 12, 2016), <http://fortune.com/2016/04/12/how-to-sue-for-gender-pay-discrimination/>.

86. *What You Can Expect After You File a Charge*, *supra* note 78.

## B. Filing the Suit

Given that the EEOC takes less than one percent of its cases to court, an employee will likely have to pursue litigation efforts on her own.<sup>87</sup> After receiving a Notice of Right to Sue from the EEOC, an employee has only ninety days to file a suit.<sup>88</sup> And then the employee must prove her case in court according to the burdensome three-part framework required of Title VII retaliation plaintiffs: 1) that she engaged in a protected activity under the opposition clause or the participation clause; 2) that she suffered an adverse employment action;<sup>89</sup> and 3) that her opposition or participation was the but-for cause of the adverse action she suffered.<sup>90</sup>

## V. EMBRACING THE SOLUTION

The employment relationship is valuable. As such, a method for resolving employment disputes that protects, mends, and grows the relationship is preferable to a method that further pulls the relationship apart and leaves the wronged party without a remedy. This Part proposes such a method.

### A. The Employment Relationship is Valuable

People spend the majority of their time in two places: at home and at work. It follows that the relationships people cultivate in these two arenas are vitally important. Employment relationships that foster feelings of support and security are mutually beneficial,<sup>91</sup> meaning that a positive employment relationship has value for both the employer and the employee.

#### 1. The Employment Relationship Benefits the Employer

Maintaining the employment relationship has value for the employer not only from a monetary perspective, but also in terms of productivity and overall performance.<sup>92</sup>

Employee turnover is a huge expense to employers.<sup>93</sup> The median cost of replacing a mid-range employee is slightly over twenty-one percent of that employee's salary, meaning that on average, it would cost an employer \$15,000 to

87. See Barbara Repa, *Filing an EEOC Charge of Discrimination*, NOLO, <http://www.nolo.com/legal-encyclopedia/free-books/employee-rights-book/chapter7-2.html> (last visited Sept. 10, 2018). The EEOC reported 84,254 total charges filed by individuals in Fiscal Year 2017. See *Charge Statistics (Charges filed with EEOC)*, *supra* note 82. Of these charges, only 201 resulted in enforcement suits filed by the EEOC. See *EEOC Litigation Statistics*, EQUAL EMP'T OPPORTUNITY COMM'N, <https://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm> (last visited Sept. 10, 2018).

88. *Filing a Lawsuit*, *supra* note 83.

89. Sperino, *supra* note 17, at 2032.

90. *Univ. of Tex. S.W. Med. Ctr. v. Nassar*, 570 U.S. 338, 360 (2013); see also Sperino, *supra* note 17, at 2032.

91. HERRIOT, *supra* note 11, at 15.

92. See *id.*; see also *Turnover and Retention*, CATALYST (May 23, 2018), <http://www.catalyst.org/knowledge/turnover-and-retention>.

93. *Id.*

replace a single employee who makes \$45,000 a year.<sup>94</sup> Higher rates of retention would save employers this cost.

Another significant cost to employers with low employee retention rates is decreased productivity.<sup>95</sup> It not only takes one to two years for a new employee to reach the same productivity level as an existing employee, but high turnover rates can also lower existing employee engagement thus causing existing employees to lose productivity as well.<sup>96</sup> Conversely, employers with high employee retention will likely reap the benefits, which include more conscientious employees, improved motivation and morale, and increased innovation.<sup>97</sup> For example, a study of how the retailer Sears operated during its most successful years in the 1990s and early 2000s demonstrates the importance of employee morale and its connection to overall business success.<sup>98</sup> Sears provided a compelling and secure employment opportunity to its employees.<sup>99</sup> In return, employee attitudes were positive and helpful, making it a compelling place for customers to shop.<sup>100</sup> As a result, Sears became a compelling company for investors to invest in, resulting in an impressive return on assets, operating margin, and revenue growth.<sup>101</sup>

This phenomenon is also referred to as “the loyalty effect.”<sup>102</sup> Loyal employees lead to loyal customers, and loyal customers lead to loyal investors, and all of this together makes for a successful business.<sup>103</sup> Therefore, investing in strategies that encourage and cultivate long-term employment relationships should be an obvious choice for employers.

## 2. The Employment Relationship Benefits the Employee

Unemployment and underemployment are issues facing millions of Americans.<sup>104</sup> It is apparent that people need and find value in stable employment and stable pay. Moreover, the benefits of maintaining the employment relationship for the employee can also include: the ability to gain seniority, which can lead to more leadership opportunities within the company; the chance to build

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94. *Id.*

95. Josh Bersin, *Employee Retention Now a Big Issue: Why the Tide Has Turned*, LINKEDIN (Aug. 16, 2013), <https://www.linkedin.com/pulse/20130816200159-131079-employee-retention-now-a-big-issue-why-the-tide-has-turned>.

96. *Id.*

97. HERRIOT, *supra* note 11, at 14–15.

98. *Id.* at 65.

99. *Id.*

100. *Id.*

101. *Id.*

102. FREDERICK F. REICHFIELD, *THE LOYALTY EFFECT* 2–3 (1996).

103. *Id.*

104. *Labor Force Statistics from the Current Population Survey*, BUREAU OF LABOR STAT., <http://data.bls.gov/timeseries/LNS14000000> (last visited Sept. 10, 2018); see also Erik Sherman, *Underemployment Takes an Outsized Toll on the Economy, According to New Study*, FORBES (Sept. 25, 2018, 1:44pm), <https://www.forbes.com/sites/eriksherman/2018/09/25/underemployment-takes-an-outsized-toll-on-the-economy-according-to-a-new-study/#6c2b0e53234e>.

and maintain a retirement fund; increased benefits, such as more paid time off; and an overall feeling of job security.<sup>105</sup>

In turn, job security cultivates a better, healthier work environment for the employee and higher job satisfaction, which can have an overall positive effect on an individual's mood and mental health.<sup>106</sup> Accordingly, long-term, stable employment relationships have value for the employee as well as the employer.

## B. Alternate Dispute Resolution as a Solution

Now that the inadequacies of the current anti-retaliation framework have been described and the benefits of maintaining the employment relationship illuminated, the need for a new method of resolving retaliation disputes should be more readily apparent.

Retaliation consists of any negative consequence employees may face for exercising a protected right.<sup>107</sup> The anti-retaliation provision is included in Title VII in an effort to prevent those negative consequences from taking place.<sup>108</sup> But the framework is broken. It is not fulfilling the deterrent purpose it is intended to serve.<sup>109</sup> What is needed is a model that protects the employment relationship, helps employers grow, and allows employees adequate resolution.

One proposed solution to the problem is to implement an alternative dispute resolution method in workplaces, such as the ombudsman system or transformative mediation, which would allow the parties involved to preserve their employment relationship, bypass the strenuous legal framework, and satisfactorily resolve their issues while avoiding costly litigation and saving time.

### 1. The Ombudsman System

An ombudsman system could help deter litigation in employment disputes and provide an opportunity for employees' concerns to be heard and addressed, while also allowing employers to grow and improve their public perception.<sup>110</sup> As Gadlin notes:

The Ombudsman system provides a forum which enables citizens to have access to an independent, impartial and inexpensive dispute resolution mechanism which can resolve their grievances, protect their human rights, and restore their dignity and confidence in the democratic process. In this context, it has three essential elements in its favor — independence in operation; flexibility in dispute

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105. David K. Williams, *10 or More Reasons to Stay at a Job for 10 or More Years*, FORBES (Sept. 29, 2012, 8:00 PM), <https://www.forbes.com/sites/davidkwilliams/2012/09/29/10-reasons-to-stay-at-a-job-for-10-or-more-years/2/#75f911e6d96e>.

106. See Bersin, *supra* note 95; see also HERRIOT, *supra* note 11, at 14–15.

107. *Facts About Retaliation*, *supra* note 9.

108. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006).

109. See *Facts about Retaliation*, *supra* note 9 (“Retaliation is the most frequently alleged basis of discrimination in the federal sector.”).

110. See Ryan Spanheimer, *Justification for Creating an Ombudsman Privilege in Today's Society*, 96 MARQ. L. REV. 659, 661 (2012).

resolution; and credibility with the public and the organization subject to jurisdiction.<sup>111</sup>

The ombudsman system operates through the use of a neutral third party within an organization – the ombudsman – who takes employee complaints and helps resolve employment issues within the company using non-litigation methods.<sup>112</sup> Ombudsmen have the ability to compel participation and cooperation from both parties involved in a potential dispute, unlike traditional mediators, who often must rely on voluntary participation.<sup>113</sup> After receiving a complaint, compelling the cooperation of the parties, and thoroughly investigating the complaint, the ombudsman also acts as the adjudicator, rendering a judgment on the merits of the claim and making a recommendation to the parties on how to proceed.<sup>114</sup> In addition to serving this function, one of the benefits unique to the use of an ombudsman is the ombudsman's ability to help prevent disputes from occurring in the first place by detecting and reporting potential problems to the organization before they become more severe and pervasive.<sup>115</sup> This can help employers to avoid liability and employees to avoid harm.<sup>116</sup>

## 2. Transformative Mediation

Transformative mediation, as opposed to litigation, also offers the opportunity for a win-win situation for employers and employees. The objective of a typical mediation is to reach a settlement, either based on legal merit or artful negotiation.<sup>117</sup> Transformative mediation differs from this traditional objective.<sup>118</sup> It focuses not on settlement, but on fostering opportunities for the parties to experience empowerment and recognition.<sup>119</sup> Mediators working under the transformative model work to change the interaction between the parties from negative and destructive to positive and constructive, while they work together to discuss issues and find resolution.<sup>120</sup> These features of transformative mediation make it an apt fit for resolving Title VII retaliation disputes.

### a. The Concept Driving Transformative Mediation

The goal of the transformative model is not solely the resolution of the parties' problems.<sup>121</sup> Instead, it seeks to transform the individuals involved on a more personal level by allowing them to become more confident, responsive, and

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111. Howard Gadlin, *The Ombudsman: What's in a Name?*, 16 NEGOT. J. 40, 45–46 (2000) (quoting Michael Brophy, Barrister in the Office of the Ombudsman for Ireland (1998)).

112. Spanheimer, *supra* note 110, at 661.

113. Gadlin, *supra* note 111, at 42.

114. *Id.*

115. Spanheimer, *supra* note 110, at 665–66.

116. *See id.*

117. Bingham, *supra* note 12, at 13.

118. *Id.*

119. *Id.*; *see also* CARRIE MENKEL-MEADOW, LELA LOVE, & ANDREA SCHNEIDER, *MEDIATION PRACTICE, POLICY, AND ETHICS* 123 (1st ed. 2006).

120. *Id.* at 122–23.

121. ROBERT BUSH & JOSEPH FOLGER, *THE PROMISE OF MEDIATION* 82 (1st ed. 1994).



caring through the process – the ultimate goal being for these small-scale, personal changes to have an effect on society as a whole.<sup>122</sup>

In practice, transformative mediation can take a variety of forms because it is not structured like a traditional mediation.<sup>123</sup> The mediator does not set ground rules, require opening statements from the parties, caucus with the parties, or anything of the sort, but rather allows the parties to structure the mediation in any way they see fit.<sup>124</sup> Mediators in transformative mediations, much like ombudsmen, have no interest in the outcome.<sup>125</sup> Rather, they remain neutral facilitators of discussion, taking opportunities to focus on the parties' contributions, encourage deliberation and choice-making, and help the parties consider each other's perspectives.<sup>126</sup> The parties have full control over the process, ideas for settlement, and the ultimate outcome.<sup>127</sup> As a result of the transformative mediation process and its goals of empowerment and recognition, participants are expected to learn how to better address and resolve future conflicts.<sup>128</sup>

#### b. The United States Postal Service REDRESS Program

In 1994, the United States Postal Service (USPS) implemented a pilot program for resolving workplace conflict.<sup>129</sup> Three years later, after receiving positive results, the program went nationwide.<sup>130</sup> The program, called REDRESS (Resolve Employment Disputes Reach Equitable Solutions Swiftly), still successfully operates nationwide and is recognized as a leading conflict resolution program.<sup>131</sup> REDRESS utilizes the transformative model of mediation.<sup>132</sup>

USPS employee-complainants are offered REDRESS mediation on a voluntary basis, but the respondent's participation is mandatory.<sup>133</sup> The mediation is offered at no cost to the employee, is private, and occurs on the clock during regular business hours.<sup>134</sup> Another key feature of the program is how quickly the mediation occurs after an employee requests it – generally within two to three weeks.<sup>135</sup>

122. *Id.* at 82–83.

123. Bingham, *supra* note 12, at 13, 15.

124. *Id.*

125. BUSH & FOLGER, *supra* note 121, at 104–05.

126. *Id.* at 100.

127. Bingham, *supra* note 12, at 15.

128. Lisa Bingham & Tina Nabatchi, *Transformative Mediation in the USPS REDRESS Program: Observations of ADR Specialists*, 18 HOFSTRA LAB. & EMP. L. J. 399, 402 (2001).

129. Bingham, *supra* note 12, at 3.

130. Bingham & Natachi, *supra* note 128, at 404.

131. REDRESS, UNITED STATES POSTAL SERV., <http://about.usps.com/what-we-are-doing/redress/welcome.htm> (last visited Sept. 10, 2018).

132. Bingham, *supra* note 12, at 15.

133. *Id.* at 13.

134. *All You Need To Know About REDRESS*, UNITED STATES POSTAL SERV., <http://about.usps.com/what-we-are-doing/redress/programs.htm> (last visited Sept. 10, 2018).

135. Bingham, *supra* note 12, at 13.

The success of the REDRESS program was monitored and evaluated by a third party from its inception in 1994 until 2006.<sup>136</sup> Results from this research indicate that REDRESS has received very positive feedback from participants.<sup>137</sup> 91.2% of complainants and 91.6% of supervisors reported that they were somewhat satisfied or very satisfied with the mediation process;<sup>138</sup> 93.6% of complainants and 93.2% of supervisors were satisfied with the way in which they were afforded an opportunity to present their views;<sup>139</sup> and 94.5% of complainants and 93.8% of supervisors were satisfied with their ability to participate in the process.<sup>140</sup> The research also indicated a high level of satisfaction with the mediators assigned to the cases.<sup>141</sup>

REDRESS also yielded high satisfaction levels regarding case outcome – 64.2% amongst employees and 69.5% amongst supervisors.<sup>142</sup> Particular satisfaction came from the speed of the outcome and the participants' control over the outcome.<sup>143</sup>

### 3. Benefits of an Alternative Dispute Resolution Method

An alternative dispute resolution method, such as the ombudsman system or the transformative mediation technique, has the features required of an adequate solution to the problems with the current Title VII retaliation framework.

#### a. Alternative Dispute Resolution Techniques Protect the Employment Relationship

One of the primary issues with the current Title VII anti-retaliation framework and the EEOC complaint process is that it does nothing to preserve or heal the damaged employment relationship. The current framework pushes the parties towards continued litigation by offering separate or additional causes of action to employees with already strained employment relationships without offering viable alternatives.

The EEOC complaint and investigation processes are long and burdensome, and litigation is inherently adversarial. It is unsurprising that there is rarely, if ever, an employment relationship left after an employee makes an attempt to utilize the available framework.

Alternative dispute resolution techniques, such as the ombudsman system and transformative mediation, are different. By offering both parties an immediate and safe space to discuss and air their grievances, the tactic used can actually mend the damaged employment relationship.

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136. Lisa Bingham et al., *Dispute System Design and Justice in Employment Dispute Resolution: Mediation at the Workplace*, 14 HARV. NEGOT. L. REV. 1, 27 (2009).

137. *Id.* at 37.

138. *Id.* at 39.

139. *Id.*

140. *Id.* at 40.

141. *Id.*

142. *Id.*

143. *Id.*

### b. Alternative Dispute Resolution Helps Employers Grow

Another issue with the current framework under Title VII is that retaliation is difficult to prove. This undermines the provision's intended deterrent effect by not adequately punishing employers for their wrongful conduct. Under this framework, employers cannot learn from past wrongful conduct and will continue the cycle of retaliatory behavior towards any future employees who may attempt to combat discriminatory conduct.

Through the use of an ombudsman who constantly reports their observations about the workplace to an employer, employers can actually become aware of potential problems and disputes before they occur. This can have the effect of encouraging employers to correct certain behaviors and practices that may have had a negative effect on employees in the past. This leads to employer growth.

Through transformative mediation, the parties grow and learn from each other. With a transformative mediation program, employers would learn how to better address conflict in the future. This would make workplace and its atmosphere better as a whole.

### c. Alternative Dispute Resolution Techniques Provide Adequate Resolution

The current framework for Title VII retaliation disputes does not provide the parties adequate resolution. Litigation always produces a winner and a loser. With the ombudsman system, fair and well-investigated recommendations can be made by the ombudsman, acting as a neutral, unbiased adjudicator. With transformative mediation, the parties themselves create the solution, so the resolution can be more fluid. In both systems, the parties can effectively solve their problems in a fast, productive, and less expensive manner than litigating the dispute in court.

## VI. CONCLUSION

Providing an alternative dispute resolution method as an option for resolving Title VII retaliation disputes would be an ideal solution for overcoming the inadequacies of the current anti-retaliation framework. First, the current framework does not deter bad conduct by employers against complainant-employees because the bar for proving retaliation is too high and the process takes too long. With a transformative mediation program like the one employed by USPS or an ombudsman system used widely in other countries, employers would see immediate action being taken against retaliatory conduct, as well as have the opportunity to learn and grow from the process. Second, the litigation-driven framework pulls apart the employment relationship, which has enormous value for both employers and employees. Conversely, alternative dispute resolution techniques heal and protect the employment relationship, while also helping the parties on a larger scale to improve the workplace environment.

While this Article focuses on retaliation occurring in a gender pay disparity context, it is important to note that the problem identified and the solution prescribed are broadly applicable to retaliation occurring in any Title VII status-based discrimination context.