

UNCOVERING HARASSMENT RETALIATION

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As the #MeToo movement has exposed, workplace harassment is prevalent, underreporting likely contributes to its prevalence, and fears of retaliation underlie underreporting. Thus, the cycle of harassment continues. Yet we still know very little about the prevalence of retaliation or how employers respond to harassment. This Article highlights retaliation following workplace harassment as a unique and prevalent problem and examines the characteristics of harassment that affect an employer's response to it. The data empirically analyzed in this Article support a reversal of the trend toward narrowing employer liability for harassment and retaliation that has occurred over the previous twenty years.

Upwards of 70% of harassment claims filed with the EEOC include a retaliation charge, and as this Article reveals for the first time, harassment charges are more than 90% more likely to include a retaliation charge than any other type of discrimination claim filed with the EEOC. These statistics are striking, but also predictable. Absent legal liability, unique characteristics of an employer's response to harassment may increase the likelihood that an employer will act against a harassment victim. Unlike many forms of discrimination, when an employer learns of harassment, the victim and harasser are still employed and the employer may believe that if it separates the two employees, the harassment will stop. The employer may be more likely to act against the victim if the harasser is more valuable to the company. Current liability standards, which make an employer more likely to be liable for supervisor harassment and harassment that is reported, should decrease an employer's incentives to act against a victim. But an empirical analysis of the 2016 Merit Systems Protection Board harassment survey of federal employees provides evidence that being harassed by a supervisor and reporting harassment increases the likelihood that a victim experiences an adverse employment action as a result of the harassment. These results support a call to broaden employer liability standards for harassment and retaliation in order to combat an employer's incentives to act against the victim, lessen retaliation, encourage reporting, and decrease the prevalence of workplace harassment.

INTRODUCTION

One almost universal element of the #MeToo movement's accounts of workplace harassment is powerful employees using that power to harass and silence their victims. For example, in April 2017, the New York Times published an article exposing settlements with at least five employees following allegations of sexual harassment against Fox News's Bill O'Reilly.¹ The

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1. Emily Steel & Michael S. Schmidt, *Bill O'Reilly Thrives at Fox News, Even as Harassment Settlements Add Up*, N.Y. TIMES (Apr. 1, 2017), <https://www.nytimes.com/2017/04/01/business/media/bill-oreilly-sexual-harassment-fox-news.html>.

exposure of these settlements brought to light a variety of issues that plague the workplace and may lead to increased workplace harassment including toxic workplaces, the use of confidentiality provisions in settlement and employment agreements, and the power that those at the top have to silence their victims. One element that has been less explored is the company's decision to continue to employ the harasser, and not the victims, following these allegations.² Following each settlement, O'Reilly remained in his powerful position and generally the victims that had not already left the company departed as part of their agreement.³

The Fox News settlements—valued at upwards of \$1.6 million⁴—are extreme examples of the lengths companies will take to maintain valuable employees, even alleged harassers. But the desire to keep valuable employees (even alleged harassers) is not limited to extremely prominent employees or to settlement agreements and confidentiality provisions. For example, in 2010, the Eleventh Circuit upheld a finding that a company reasonably responded to a harassment complaint by meeting with the harasser, “counsel[ing] him to avoid harassing conduct in the future,” and transferring the complainant from the harasser’s crew “to one with a different supervisor.”⁵ These examples illustrate what this Article uncovers: victims of harassment are particularly vulnerable to experiencing some form of adverse employment action following harassment in part because separating the employees may be viewed as a solution to the problem, the harasser may be particularly valuable to the company, the law requires internal reporting for employer liability, and the law may not adequately deter such adverse actions.

Multiple federal statutes, including Title VII of the Civil Rights Act, the Americans with Disabilities Act, and the Age Discrimination in Employment Act, prohibit workplace discrimination that occurs on the basis of numerous protected classes. Workplace harassment is considered discrimination under those statutes. Since the U.S. Supreme Court adopted a framework for employer liability for workplace harassment that encouraged the internal reporting of harassment, scholars and the Equal Employment Opportunity Commission (EEOC) have posited that victims who report harassment have

2. See CHAI R. FELDBLUM & VICTORIA A. LIPNIC, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, REPORT OF THE CO-CHAIRS OF THE SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE n.121 (June 2016), https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm (gathering examples where the company “looked the other way” for years when a valuable employee was the harasser).

3. Steel & Schmidt, *supra* note 1.

4. *Id.*

5. *Speigner v. Shoal Creek Drummond Mine*, 402 F. App'x 428, 431 (11th Cir. 2010).

reasonable fears of experiencing negative workplace outcomes in addition to the harassment, including retaliation if they report the harassment.⁶ And fear of experiencing an adverse employment action is frequently pointed to as one of the main reasons for the prevalence of harassment and underreporting of harassment claims.⁷ But very little is actually known about employers' responses to harassment or supervisors' use of adverse employment actions as a tool to silence victims.⁸ Little is known about the prevalence of this problem,⁹ and even less is known about how characteristics of the harassment, the victim's response, and the workplace affect the likelihood of experiencing such adverse employment outcomes.¹⁰

This Article empirically examines harassment retaliation and theoretically explores why retaliation following harassment might be more pervasive than

6. See, e.g., L. Camille Hébert, *Why Don't "Reasonable Women" Complain About Sexual Harassment?*, 82 IND. L.J. 711, 723 (2007); Joanna L. Grossman, *The First Bite Is Free: Employer Liability for Sexual Harassment*, 61 U. PITT. L. REV. 671, 676 (2000); E. Jacob Lindstrom, *All Carrots and No Sticks: Moving Beyond the Misapplication of Burlington Industries, Inc. v. Ellerth*, 21 HASTINGS WOMEN'S L.J. 111, 111 (2010); Ian Ayres & Cait Unkovic, *Information Escrows*, 111 MICH. L. REV. 145, 146 (2012) (discussing the first-mover fear of embarrassment and retaliation when suggesting the use of information escrows to encourage reporting); U.S. EQUAL EMP. OPPORTUNITY COMM'N, NOTICE NO. 915.002, ENFORCEMENT GUIDANCE: VICARIOUS LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS (June 18, 1999), <http://www.eeoc.gov/policy/docs/harassment.html>.

7. Nicole Buonocore Porter, *Ending Harassment by Starting with Retaliation*, 71 STAN. L. REV. ONLINE 110, 111 (2018) (recognizing that retaliation is a problem that must end to stop harassment and the legal hurdles for such claims); Deborah L. Brake, *Coworker Retaliation in the #MeToo Era*, 49 U. BALT. L. REV. 1, 4–6 (2019); Ernest F. Lidge III, *The Necessity of Expanding Protection from Retaliation for Employees Who Complain About Hostile Environment Harassment*, 53 U. LOUISVILLE L. REV. 39, 40–41 (2014) (recognizing there is less protection for those who report harassment than other discriminatory actions and that harassment victims have a duty to report the harassment that other discrimination victims do not have).

8. In this Article, "adverse employment action" generally refers to an action by an employer (or supervisor) that is related to the victim's employment and that an employee would want to avoid, such as receiving worse work assignments or being transferred.

9. A recent report shows that between 2014 and 2016, approximately 68% of sexual harassment charges included a retaliation charge. Carly McCann et al., *Employer's Responses to Sexual Harassment*, UNIV. OF MASS. AMHERST, <https://www.umass.edu/employmentequity/employers-responses-sexual-harassment> (last visited Feb. 28, 2021). A recent report from the Department of Defense found that 21% of women who reported sexual assault experienced some conduct in line with the "legal definition" of retaliation, but roughly 64% perceived experiencing conduct in line with retaliation more broadly. Dr. Rachel A. Breslin et al., *2018 Workplace and Gender Relations Survey of Active Duty Members: Overview Report*, OFF. PEOPLE ANALYTICS, at viii, 38 (May 2019).

10. Studies analyzing data from before 1995 found a relationship between reporting harassment and experiencing an adverse employment outcome. See, e.g., Margaret S. Stockdale, *The Direct and Moderating Influences of Sexual-Harassment Pervasiveness, Coping Strategies, and Gender on Work-Related Outcomes*, 22 PSYCH. WOMEN Q. 521, 529 (Dec. 1, 1998); Matthew S. Hesson-McInnis & Louise F. Fitzgerald, *Sexual Harassment: A Preliminary Test of an Integrative Model*, 27 J. APPLIED SOC. PSYCH. 877, 895–96 (1997); Mindy E. Bergman et al., *The (Un)reasonableness of Reporting: Antecedents and Consequences of Reporting Sexual Harassment*, 87 J. APPLIED PSYCH. 230, 237 (2002).

retaliation following other forms of discrimination.¹¹ This Article shows for the first time that harassment charges filed with the EEOC are much more likely than other discrimination charges to include a retaliation charge. This Article also empirically examines how employers respond to harassment in their workplaces. The empirical results support the broadening of liability standards for workplace harassment, particularly in the wake of #MeToo as the number of victims reporting harassment has and will likely continue to increase.¹²

Legal liability is necessary to combat adverse employment actions following harassment due to characteristics that are particularly unique to harassment as opposed to other forms of discrimination. As discussed in Part II of this Article, when an employer is alerted to workplace harassment, both employees are often still employed because the law (and company policy) requires internal reporting, and the employer may face a choice that is unlikely to be a perceived solution in other discrimination contexts. Due to the relationship nature of harassment (or perceived relationship nature), even if the employer believes the victim, the employer may view transferring or firing the victim as a solution—if one party is removed, the harassment may stop.¹³ Accordingly, if the harasser is more valuable to the company, absent the threat of legal liability, the employer may

11. The scope of this Article is actually broader than what one would legally consider “retaliation.” This Article also analyzes adverse employment actions that may have occurred even if the victim did not formally report the harassment, but I use the term “retaliation” for simplicity. By “harassment retaliation,” I am referring to retaliation following harassment, not harassment as a form of retaliation, which is also a recognized problem. See Rhonda Reaves, *Retaliatory Harassment: Sex and the Hostile Coworker as the Enforcer of Workplace Norms*, 2007 MICH. ST. L. REV. 403, 404 (2007).

12. *Charges Alleging Sex-Based Harassment (Charges Filed with EEOC) FY 2010 - FY 2018*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, https://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_new.cfm (last visited Feb. 27, 2021) (reporting a 14% increase in sex-based harassment charges in 2017 and 2018). I recognize that broadening liability standards is not the only potential solution and will likely not be sufficient on its own. Increasing legal liability particularly may not be an adequate deterrent for companies with deep pockets who can easily settle claims, such as Fox News. See Kate Webber Nuñez, *Toxic Cultures Require a Stronger Cure: The Lessons of Fox News for Reforming Sexual Harassment Law*, 122 PENN ST. L. REV. 463, 465 (2018) (arguing that more stringent liability standards in New York City did not deter harassment at Fox News).

13. In a report to the U.S. Commission on Civil Rights, the EEOC described a recent decision regarding a complaint of sexual harassment against the Department of Defense:

The Commission noted that management did not separate Complainant and the male co-worker immediately after learning of the allegations of sexual harassment, and the Agency erred when it eventually did separate them by forcing Complainant to change her shift against her will, while the male co-worker was allowed to keep his shift.

Statement of Dexter R. Brooks, Assoc. Dir., U.S. Equal Emp. Opportunity Comm’n, Before the U.S. Commission on Civil Rights: Federal Me Too: Examining Sexual Harassment in Government Workplaces 3 (May 9, 2019), available at https://securisync.intermedia.net/us2/s/folder?public_share=Cw5d2N47Zoq3vCkv3tuRjg0011ef58&id=L1BhbmVsaXN0IE1hdGVyaWFscy9QYW5lbCAx; see also Lauren B. Edelman & Jessica Cabrera, *Sex-Based Harassment and Symbolic Compliance*, 16 ANN. REV. L. & SOC. SCI. 361, 374 (2020) (summarizing literature finding that employers are more likely to “resolve complaints through educational or therapeutic means or by transferring complainants” than by punishing harassers).

be inclined to act against the victim instead of the harasser. Legal liability, if effective, can play a significant role in affecting this decision.

On a first look, it would appear that the current legal regime (described in Part I of this Article) was tailored to deter an employer from taking an adverse employment action against the harassment victim: employers are more likely to be liable for harassment if the harasser is a supervisor and if the victim reports the harassment. Under *Harris v. Forklift Systems, Inc.*, there are two forms of harassment that are actionable under federal antidiscrimination statutes.¹⁴ Quid pro quo harassment occurs when harassment is conditioned on a workplace action, and hostile work environment harassment occurs when harassment is so severe or pervasive that it affects the victim's ability to work.¹⁵

Under the 1998 U.S. Supreme Court cases *Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Boca Raton*,¹⁶ an employer is only liable for quid pro quo harassment if the harasser is a supervisor and the harassment resulted in a tangible employment action. But courts have since narrowly defined *supervisor* and *tangible employment action* limiting that liability.¹⁷ Further, hostile work environment liability requires that victims timely report the harassment, often before the harassment is actionable (severe or pervasive) and without any regard to reasonable fears of retaliation.

Retaliation in response to such a report of harassment is illegal under Section 2000e-3(a) of Title VII and other federal antidiscrimination laws.¹⁸ But an employer is only liable for retaliation following an internal report of harassment if the victim had a reasonable belief that the harassment was actionable, meaning that the harassment was severe or pervasive. If the victim timely and internally reported hostile work environment harassment as required

14. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (defining hostile work environment and severe or pervasive requirement).

15. *Id.* Put another way, quid pro quo harassment is when “an employee or supervisor uses his or her superior position to extract sexual favors from a subordinate employee, and if denied those favors, retaliates by taking action adversely affecting the subordinate’s employment.” *O’Rourke v. City of Providence*, 235 F.3d 713, 728 (1st Cir. 2001).

16. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764–65 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998). The defense also requires that the employer take precautions to prevent workplace harassment. *Ellerth*, 524 U.S. at 765.

17. See *Vance v. Ball State Univ.*, 570 U.S. 421, 431–32 (2013).

18. Harassment and retaliation are two separate legal actions that can be pursued in the same action. For race, sex, color, national origin, and religion discrimination, a retaliation claim is brought under the antiretaliation provisions of Title VII, § 2000e-3(a), and a harassment claim is considered discrimination and brought under the antidiscrimination provision, § 2000e-2(a). 42 U.S.C. §§ 2000e-2(a), 2000e-3(a). Age harassment and retaliation claims are brought under the Age Discrimination and Employment Act, 29 U.S.C. § 623, and disability harassment and retaliation claims are brought under the Americans with Disabilities Act, 42 U.S.C. §§ 12131–12134. Race discrimination and harassment claims can also be brought under Section 1981 of the Civil Rights Act, 42 U.S.C. § 1981. And this list is not exhaustive.

under *Faragher/Ellerth*, the victim is unlikely to have an actionable hostile-environment claim and unlikely to have a retaliation claim if the victim experiences an adverse employment action in response to that claim.

Under these standards, an employer is still more likely to be liable for harassment and retaliation if a victim reports the harassment and is harassed by his or her supervisor. But the narrowing of such liability and the economic incentives to not act against a supervisor make it difficult to predict whether the law adequately deters an employer from acting against a harassment victim.

In Part III of this Article, using data from the EEOC, I first confirm that harassment retaliation is a unique and prevalent problem. Harassment charges are more than 90% more likely to include a retaliation charge than any other type of charge.¹⁹ Then, using the 2016 Merit Systems Protection Board (MSPB) survey of federal employees, I empirically analyze what characteristics of the workplace, harasser, and victim influence an employer's response to the harassment, particularly whether the victim experiences an adverse action as a result of the harassment. This study confirms the prediction that all things equal (including the severity of the harassment, the gender of the victim, and whether or not the victim reported the harassment), victims harassed by their supervisors are much more likely to experience an adverse action as a result of the harassment than victims harassed by any other individual. In addition, this analysis provides evidence that victims who report sexual harassment, particularly harassment by a supervisor, are more likely to experience an adverse action as a result of the harassment as compared to those who do not report. These results support the longstanding argument that the current liability standards for harassment and retaliation, which should have deterred adverse actions following supervisor harassment and a victim's report, have not done enough. Accordingly, this Article concludes in Part IV by tying the empirical results to a call to legislatures (and courts) to close the loopholes that exist for employer liability for workplace harassment and retaliation.

I. THE LAW THAT INFORMS AN EMPLOYER'S RESPONSE TO HARASSMENT

When an employer responds to workplace harassment, there are two separate, but related, legal regimes that should affect its decision: antidiscrimination law and antiretaliation law. Numerous federal statutes prohibit workplace discrimination on the basis of an employee's membership in a protected class (race, color, national origin, sex, religion, disability, age,

19. See *infra* empirical results in Part III.B.

etc.).²⁰ And workplace harassment is considered discrimination under those statutes.²¹ Further, those same statutes prohibit discrimination on the basis of an employee's opposition to such discrimination.²² An employer can be liable for both workplace harassment and retaliation following the harassment.

A. Employer Liability for Workplace Harassment

In 1987, in *Meritor Savings Bank v. Vinson*, the Supreme Court recognized sexual harassment as a form of sex discrimination under Title VII.²³ It defined two forms of sexual harassment. Quid pro quo harassment occurs when an employer makes a workplace decision because of an employee's submission to or rejection of harassment.²⁴ Hostile work environment harassment is defined as unwanted conduct that is so severe or pervasive that it alters an employee's workplace conditions.²⁵

When the Supreme Court defined quid pro quo and hostile work environment harassment as actionable under Title VII in *Meritor Savings Bank v. Vinson*, the Court did not address when an employer is liable for such harassment. Instead, it simply instructed lower courts "to find guidance in the common law of agency, as embodied in the Restatement," and noted that employers are not "always automatically liable for sexual harassment by their supervisors."²⁶ Notably, there are no limitations on strict liability for any other form of discrimination under Title VII—an employer is always liable if discrimination is proven.

20. 42 U.S.C. § 2000e-2(a) (prohibiting discrimination on the basis of race, color, national origin, sex, and religion). Private and public employees can advance age harassment and retaliation claims under the Age Discrimination and Employment Act (ADEA), 29 U.S.C. § 623. Disability harassment and retaliation claims can be brought by private employees under the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12131–12134, and by public employees under the Rehabilitation Act, 29 U.S.C. § 791. Claims of race discrimination can also be brought under Section 1981 of the Civil Rights Act, 42 U.S.C. § 1981.

21. *See, e.g., Ford v. Marion Cnty. Sheriff's Off.*, 942 F.3d 839, 856 (7th Cir. 2019) (analyzing disability harassment claim under the ADA).

22. Section 2000e-3(a) of Title VII makes it unlawful "for an employer to discriminate against any of his employees . . . because [the employee] has opposed any practice made an unlawful employment practice by [Title VII], or because [the employee] has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]."

23. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 63–66 (1986). Courts had generally considered hostile work environment due to racial harassment as a form of race discrimination. *See* Heather L. Kleinschmidt, *Reconsidering Severe or Pervasive: Aligning the Standard in Sexual Harassment and Racial Harassment Causes of Action*, 80 IND. L.J. 1119, 1120–21 (2005) (describing history of racial harassment claims).

24. *Meritor*, 477 U.S. at 65. According to this definition, quid pro quo harassment necessarily involves some form of adverse employment action.

25. *Id.* at 66–67; *see also Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (defining hostile work environment and severe or pervasive requirement).

26. *Meritor*, 477 U.S. at 72.

In the 1998 cases *Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Boca Raton*, the Supreme Court addressed employer liability for harassment.²⁷ The Court held that if an employee experiences quid pro quo harassment, meaning the employee experiences a tangible employment action as a condition of harassment by his or her supervisor, then the employer will be vicariously liable for that harassment.²⁸ The Court defined tangible employment action as “a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.”²⁹

But when addressing vicarious liability for hostile work environment harassment committed by a supervisor, the Court held that the employer is not liable for supervisor harassment if the employer can meet the following affirmative defense, known as the *Faragher/ Ellerth* defense³⁰:

The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.³¹

27. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). Lower courts had concluded employers are strictly liable for quid pro quo harassment (with differing opinions over what was considered quid pro quo harassment), but they were split over whether employers were only liable for hostile work environment harassment when the employer was negligent, even if the harasser was a supervisor. *Ellerth*, 524 U.S. at 750–51. The Court held that the proper analysis lies under a principle of agency law: that an employer

is not subject to liability for the torts of his servants acting outside the scope of their employment unless . . . the servant purported to act or speak on behalf of the principal and there was reliance on apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

Faragher, 524 U.S. at 801 (quoting RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1957)). The Court initially noted that supervisors are often aided by their relationship with the employer when engaging in harassing behavior. *Id.* at 803 (“The agency relationship affords contact with an employee subjected to a supervisor’s sexual harassment, and the victim may well be reluctant to accept the risks of blowing the whistle on a superior. When a person with supervisory authority discriminates in the terms and conditions of subordinates’ employment, his actions necessarily draw upon his superior position over the people who report to him, or those under them, whereas an employee generally cannot check a supervisor’s abusive conduct the same way that she might deal with abuse from a co-worker.”). But ultimately, the Court was bound by *Meritor*’s limitation that an employer is not always vicariously liable for supervisor harassment—which no party asked it to revisit—and the Court was concerned that an implied use of supervisory authority was not enough. *Id.* at 804.

28. *Ellerth*, 524 U.S. at 762–63; *Faragher*, 524 U.S. at 807.

29. *Ellerth*, 524 U.S. at 761.

30. *Id.* at 765. The Supreme Court justified this defense as consistent with Title VII’s “primary objective,” [which] like that of any statute meant to influence primary conduct, is not to provide redress but to avoid harm.” *Faragher*, 524 U.S. at 806. The Court cited EEOC guidance that encourages employers to have policies preventing harassment and providing for reporting mechanisms. *Id.*

31. A helpful graphic of this framework can be found in *Casiano v. AT&T Corp.*, 213 F.3d 278, 288 (5th Cir. 2000).

The employer is also unlikely to be liable if the employee is harassed by his or her coworker and the employee does not take advantage of the employer's preventative opportunities because the current standard for employer liability for coworker harassment is negligence: whether the employer knew or should have known about the harassment and whether the employer took reasonable steps to prevent the harassment.³² This liability structure has been adapted for all harassment claims brought under any federal antidiscrimination statute, although quid pro quo harassment is generally thought to be harassment of a sexual nature.³³

Scholars have suggested that the adoption of this standard did not improve the likelihood that harassment plaintiffs prevailed in court.³⁴ Perhaps this is because over the past twenty years, the Supreme Court (and lower courts) have limited an employer's liability for harassment under these standards, including by narrowly defining supervisor and tangible employment action, and expanding the *Faragher/Ellerth* affirmative defense.³⁵

First, in 2013, the Supreme Court settled a circuit split over which employees qualify as "supervisors" under *Ellerth* and *Faragher*. In *Vance v. Ball State University*, the Supreme Court narrowly defined supervisor.³⁶ The Court rejected EEOC guidance and other courts' holdings that defined supervisor as one who has "the ability to exercise significant direction over another's daily work," holding instead that "[t]he ability to direct another employee's tasks is simply not sufficient" and that ability to inflict economic harm is what "hangs as a threat over the victim" and justifies vicarious liability.³⁷

32. See, e.g., *Bouton v. BMW of N. Am., Inc.*, 29 F.3d 103, 107 (3d Cir. 1994) (noting that an antiharassment policy and "prompt and effective action by the employer will relieve it of liability").

33. See, e.g., *McPherson v. NYP Holdings*, 227 F. App'x 51, 53 (2d Cir. 2007) (applying *Faragher/Ellerth* in a racial harassment claim); *Stapp v. Curry Cnty. Bd. of Cnty. Comm'rs*, 672 F. App'x 841, 846 (10th Cir. 2016) (applying *Faragher/Ellerth* in an ADEA claim).

34. David J. Walsh, *Small Change: An Empirical Analysis of the Effect of Supreme Court Precedents on Federal Appeals Court Decisions in Sexual Harassment Cases, 1993-2005*, 30 BERKELEY J. EMP. & LAB. L. 461, 508 (2009) (empirically analyzing the adoption of the *Faragher/Ellerth* affirmative defense and finding "[t]he results . . . provide no support whatsoever for the notion that the affirmative defense is a more stringent standard, one that makes it easier for plaintiffs to satisfy the liability element").

35. One interpretation not discussed below and adopted by several courts is that some circuits (at least the Second, Fourth, and Eighth) only requires the employer to meet the first prong of the *Faragher/Ellerth* defense when the harassment is a one-time severe incident. Natalie S. Neals, Comment, *Flirting with the Law: An Analysis of the Ellerth/Faragher Circuit Split and a Prediction of the Seventh Circuit's Stance*, 97 MARQ. L. REV. 167, 182-85 (2013) (providing analysis of courts that had dropped the second prong). These courts argue that this interpretation helps to avoid strict liability and advocates fairness. *Id.*

36. See *Vance v. Ball State Univ.*, 570 U.S. 421, 440 (2013).

37. *Id.* at 439-40.

The *Vance* definition of supervisor has been enforced strictly and narrowly by some lower courts and critiqued by legal scholars.³⁸ For example, the Sixth Circuit recently held that a store manager harasser was not a supervisor because he could not hire or fire the employees even though he had the “ability to direct the victims’ work at the store” and could “initiate the disciplinary process and recommend demotion or promotion.”³⁹

Second, regarding quid pro quo harassment, lower courts have defined “tangible employment action” to include only a change that affects an employee’s economic position. Tangible employment action does not include a lateral transfer of employment or receiving worse or more work assignments. And in *Pennsylvania State Police v. Suders*, the Supreme Court held that constructive discharge—when an employee is forced to quit because of working conditions—does not meet the definition of tangible employment action unless there is an “official act” by a supervisory employee, such as an undesirable transfer, that underlies the discharge.⁴⁰

Third, courts have substantially broadened the *Faragher/Ellerth* defense to hostile work environment harassment conducted by a supervisor. Courts have broadly interpreted the first element of the *Faragher/Ellerth* defense—that the employer took reasonable care to prevent harassment.⁴¹ Today, this element is

38. See LaDelle “DeDe” Davenport, Comment, *Vance v. Ball State University and the Ill-Fitted Supervisor/Co-Worker Dichotomy of Employer Liability*, 52 HOUS. L. REV. 1431, 1433 (2015); Zev J. Eigen et al., *When Rules Are Made to Be Broken*, 109 NW. U. L. REV. 109, 171 (2014) (“We predict that courts will thus follow a de facto ‘negligence’ standard in all non-tangible loss cases. Thus, all but the most obvious supervisors will now be deemed coworkers in order to perpetuate the de facto lower-court-created vicarious liability standard.”).

39. *Equal Emp. Opportunity Comm’n v. AutoZone, Inc.*, 692 F. App’x 280, 283 (6th Cir. 2017) (gathering similar cases). The Fifth Circuit recently held that a manager who controlled certain performance reviews and could assign responsibilities was not a supervisor under *Vance*. *Matherne v. Ruba Mgmt.*, 624 F. App’x 835, 840 (5th Cir. 2015).

40. 542 U.S. 129, 148 (2004) (“[W]hen an official act does not underlie the constructive discharge, the *Ellerth* and *Faragher* analysis, we here hold, calls for extension of the affirmative defense to the employer.”). The Court held that absent an official act, it is not “beyond question” that the supervisor has used his managerial or controlling position to the employee’s disadvantage.” *Id.* Consider two examples of the narrow definition of tangible employment action. In *Whitten v. Fred’s, Inc.*, the Fourth Circuit held that “changes in [the victim’s] work schedule, assignment of unpleasant tasks as punishment, [and] verbal and physical abuse” did not constitute a tangible employment action because they did not “inflict[] economic harm . . . nor did they involve sufficient changes to her professional responsibilities to effect a significant change in her employment status.” 601 F.3d 231, 247–48 (4th Cir. 2010), *abrogated on other grounds by* *Vance v. Ball State Univ.*, 570 U.S. 421 (2013). Similarly, in *Kramer v. Wasatch County Sheriff’s Office*, the Tenth Circuit held that a bad performance review that was not submitted, denial of vacation days, and assignment of the victim to an undesirable position did not amount to a tangible employment action in part because although unpleasant, there were no “economic consequences or reduced . . . opportunities for advancement.” 743 F.3d 726, 745 (10th Cir. 2014). *But see* *Jin v. Metro. Life Ins.*, 310 F.3d 84, 98 (2d Cir. 2002) (holding that tangible employment action can be a threat and not economic consequences).

41. *Faragher v. City of Boca Raton*, 524 U.S. 775, 778 (1998) (“[T]he employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior.”).

often met if the employer has a policy in the employee handbook admonishing harassment and providing a mechanism for reporting it.⁴² If the employer received a previous complaint, the court will also ask whether it reasonably addressed the previous complaint.⁴³ But investigation will often meet this requirement, and punishment of the harasser is not always required.⁴⁴ In fact, courts often find that transferring the victim is a reasonable solution particularly if the transfer did not cause the victim any harm.⁴⁵

42. See LAUREN B. EDELMAN, WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS 186–87, 205–08, 212–13 (2016) (providing examples of courts deferring to grievance procedures and discussing the symbolic nature of such policies and the EEOC’s position that the policies must be effective even prior to *Faragher/Ellerth*); Anne Lawton, *Operating in an Empirical Vacuum: The Ellerth and Faragher Affirmative Defense*, 13 COLUM. J. GENDER & L. 197, 215 (2004) (conducting an analysis of district court cases); David Sherwyn et al., *Don’t Train Your Employees and Cancel Your “1-800” Harassment Hotline: An Empirical Examination and Correction of the Flaws in the Affirmative Defense to Sexual Harassment Charges*, 69 FORDHAM L. REV. 1265, 1272 (2001) (describing policies that satisfy the first element); Walsh, *supra* note 34, at 513 (empirically analyzing appellate court cases and noting that “[e]ven though the existence of a harassment policy is a basic fact that also appeared in the majority of non-affirmative defense cases, it was virtually de rigueur in affirmative defense cases” and recognizing that employers did not have to prove the effectiveness of their policies); Blair T. Jackson & Kunal Bhatheja, *Easy as P.I.E.: Avoiding and Preventing Vicarious Liability for Sexual Harassment by Supervisors*, 62 DRAKE L. REV. 653, 656 (2014) (laying out the steps necessary to meet the low burden of this element). For example, the Tenth Circuit has held, “[An] employer[] act[s] reasonably as a matter of law [to prevent harassment if it] adopted valid sexual harassment policies [and] distributed those policies to employees via employee handbooks, [even if it] either provided no sexual harassment training or provided training only to managers.” *Debord v. Mercy Health Sys. of Kansas, Inc.*, 737 F.3d 642, 653 (10th Cir. 2013). This remains the law despite a considerable debate over whether such policies are effective. See, e.g., Frank Dobbin & Erin L. Kelly, *How to Stop Harassment: Professional Construction of Legal Compliance in Organizations*, 112 AM. J. SOCIO. 1203 (2007) (arguing that such policies are mostly symbolic); LAUREN EDELMAN, WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS 101 (2016); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 466–69 (2001) (arguing benefits of policies); Elizabeth C. Tippet, *Harassment Trainings: A Content Analysis*, 39 BERKELEY J. EMP. & LAB. L. 481, 510–13 (2018) (analyzing harassment training policies and discussing limitations); see also Lindstrom, *supra* note 6, at 123; Meredith A. Newman et al., *Sexual Harassment in the Federal Workplace*, 63 PUB. ADMIN. REV. 472, 473 (2003) (summarizing the literature and reporting results from 1994 MSPB showing some effect for cohesive training). But see Heather Antecol & Deborah Cobb-Clark, *Does Sexual Harassment Training Change Attitudes? A View from the Federal Level*, 84 SOC. SCI. Q. 826, 826 (2003) (empirically analyzing the 1994 MSPB survey and finding training does have a positive impact on perceptions of sexual harassment). Today, such policies are almost universal. The 2016 MSPB survey shows that 95% of those responding to the survey knew that their agency had a policy prohibiting sexual harassment. For 2016 MSPB survey data, see *2016 Merit Principles Survey Data*, U.S. MERIT SYS. PROT. BD., <https://www.mspb.gov/foia/SurveyData.htm> (last visited Feb. 7, 2021).

43. See, e.g., *Hunt v. Wal-Mart Stores, Inc.*, 931 F.3d 624, 629–31 (7th Cir. 2019) (determining if the response to the previous complaint was a reasonable measure to prevent harassment).

44. Elizabeth C. Tippet, *The Legal Implications of the MeToo Movement*, 103 MINN. L. REV. 229, 245–46 (2018) (gathering cases and recognizing that the #MeToo movement may provide more evidence of prior complaints and a pattern of harassment). But see Michael Conklin, *#MeToo Effects on Juror Decision Making*, 11 CAL. L. REV. ONLINE 179, 187 (2020) (finding a reduction in the likelihood that a jury convicts a sexual assault defendant following the #MeToo movement).

45. See, e.g., *Speigner v. Shoal Creek Drummond Mine*, 402 F. App’x 428, 431 (11th Cir. 2010) (“Drummond also promptly ameliorated the situation as soon as Speigner informed the general mine manager, Richard Painter, of the harassment. Painter met with Cain, interviewed him, and counseled him to avoid harassing conduct in the future. Painter then moved Speigner off of Cain’s crew to one with a different supervisor, without any change in Speigner’s pay or hours.”); *Swenson v. Potter*, 271 F.3d 1184, 1194 (9th Cir. 2001) (finding that the employer responded reasonably to the complaint when it promptly investigated the complaint and separated the harasser and victim by relocating the victim to a not less desirable position);

Courts have also broadened the second element of the *Faragher/Ellerth* defense—“that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”⁴⁶ This element is now almost always met if an employee fails to report the harassment, and courts frequently reject an employee’s fear of retaliation or embarrassment when determining whether it was reasonable.⁴⁷ For example, the Eleventh Circuit has broadly held, as recently as September 2019, “that fear of retribution is not a valid reason for failing to use a company’s reporting procedures.”⁴⁸

Lower courts have also (1) read reasonability to require strict adherence with the company’s policies and (2) read a timeliness requirement into “unreasonable failure.” As to the first concern, take the following example: In *Minix v. Jeld-Wen, Inc.*, the employer’s policy required harassment to be reported to certain defined supervisors, but the plaintiff reported to a group manager.⁴⁹ The Eleventh Circuit held that the plaintiff did not reasonably take advantage of the company’s procedures because the plaintiff at issue did not timely “report . . . harassment to any company official specifically designated by the anti-harassment policy.”⁵⁰ As for timeliness, courts have found the second

Barton v. United Parcel Serv., Inc., 175 F. Supp. 2d 904, 908 (W.D. Ky. 2001) (gathering cases holding that “where an employer takes prompt action to transfer an employee to a non-hostile environment, that action is generally appropriate and therefore sufficient to meet its legal obligations”); Kerri Lynn Stone, *License to Harass: Holding Defendants Accountable for Retaining Recidivist Harassers*, 41 AKRON L. REV. 1059, 1068 (2009) (recognizing law incentivizes “band aid” approach for recidivist harassers).

46. *Faragher v. City of Boca Raton*, 524 U.S. 775, 778 (1998).

47. See Hébert, *supra* note 6, at 721 (gathering cases illustrating low burden for failing to report); Lawton, *supra* note 42, at 260–63 (same and providing a detailed analysis of district court cases); U.S. EQUAL EMP. OPPORTUNITY COMM’N, *supra* note 6; Lindstrom, *supra* note 6, at 123. EEOC guidance interpreting federal statutes is not binding on courts. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986).

48. *Joyner v. Woodspring Hotels Prop. Mgmt. LLC*, 785 F. App’x 771, 775 (11th Cir. 2019). When rejecting this argument in an earlier case, the Eleventh Circuit held:

Every employee could say, as Baldwin does, that she did not report the harassment earlier for fear of losing her job or damaging her career prospects. As the First Circuit has explained, the Supreme Court undoubtedly realized as much when it designed the *Faragher-Ellerth* defense, but it nonetheless decided to require an employee to make the choice in favor of ending harassment if she wanted to impose vicarious liability on her employer. Were it otherwise, the *Faragher-Ellerth* defense would be largely optional with plaintiffs, and it would be essentially useless in furthering the important public policy of preventing sexual harassment.

Baldwin v. Blue Cross/Blue Shield of Ala., 480 F.3d 1287, 1307 (11th Cir. 2007) (citing *Reed v. MBNA Mktg. Sys., Inc.*, 333 F.3d 27, 35 (1st Cir. 2003)) (internal citations omitted).

49. *Minix v. Jeld-Wen, Inc.*, 237 F. App’x 578, 580–81 (11th Cir. 2007) (describing the policy that required reporting to an “immediate Supervisor” or to the harassed employee’s “General or Corporate Manager, Vice President or Subsidiary President”).

50. *Id.* at 585. This strict application is not universal. Some courts will analyze whether it was reasonable to not follow the policy. See, e.g., *Parkins v. Civ. Constructors of Ill., Inc.*, 163 F.3d 1027, 1035 (7th Cir. 1998); Brianna Messina, Comment, *Redefining Reasonableness: Supervisory Harassment Claims in the Era of #MeToo*, 168 U. PA. L. REV. 1061, 1092 (2020) (discussing the Third Circuit’s recent recognition that the jury is in the best place to determine reasonability and suggesting the adoption of such an approach).

element to be met when an employee did not report the harassment in as little as two weeks.⁵¹

B. *Employer Liability for Retaliation*

If a harassment victim experiences an adverse employment action after reporting the workplace harassment, the employee may have a claim of retaliation even if there is no actionable harassment claim. Section 2000e-3(a) of Title VII makes it unlawful “for an employer to discriminate against any of his employees . . . because [the employee] has opposed any practice made an unlawful employment practice by [Title VII], or because [the employee] has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII].”⁵² And corresponding federal antidiscrimination statutes similarly prohibit such retaliation.

Generally, a retaliation claim can be proven by establishing that an employee suffered an “adverse employment action” because he participated in a “protected activity,” meaning he “opposed any practice made an unlawful employment practice” by Title VII.⁵³ Although this regime provides protection

51. 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, 869–71 (2006); Deborah Epstein, *Discounting Credibility: Doubting the Stories of Women Survivors of Sexual Harassment*, 51 SETON HALL L. REV. 289, 301 (2020) (gathering cases holding that a victim’s report was not timely). There are numerous examples provided in the scholarship addressing this expansion of the defense, and courts continue to read timeliness into the reporting requirement today. See, e.g., Lindstrom, *supra* note 6, at 122; Hébert, *supra* note 6, at 724; White, *supra* note 51, at 869–91; Eigen et al., *supra* note 38, at 156 (gathering cases); Walsh, *supra* note 34, at 156 (same); see also Hunt v. Wal-Mart Stores, Inc., 931 F.3d 624, 631 (7th Cir. 2019); Williams v. United Launch All., LLC, 286 F. Supp. 3d 1293, 1309 (N.D. Ala. 2018) (discussing Eleventh Circuit cases holding as little as two months was not reasonable). Again, this application is not universal; some courts may allow the jury to determine if a certain delay was reasonable. See Hardy v. Univ. of Ill. at Chi., 328 F.3d 361, 365–66 (7th Cir. 2003) (allowing the jury to determine if an employee’s six-week delay in reporting was reasonable). An empirical study of harassment appellate cases suggests that courts are more likely to strictly scrutinize the employee’s response (and find it unreasonable) if the employer takes corrective action following the report. Eigen et al., *supra* note 38, at 156.

52. 42 U.S.C. § 2000e-3(a).

53. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 338, 352 (2013). In 2006, the Supreme Court broadened the definition of “adverse employment action” required for retaliation. In *Burlington Northern and Santa Fe Railway Co. v. White*, 548 U.S. 53, 57 (2006), the Court adopted a more liberal standard, holding that acts that “could well dissuade a reasonable worker from making or supporting a charge of discrimination” are considered retaliatory acts or adverse employment actions. Deborah L. Brake, *Retaliation in an EEO World*, 89 IND. L.J. 115, 123 (2014). Courts do not apply this definition when determining whether there was a tangible employment action for the purposes of *Faragher/Ellerth* as discussed above. See Ray v. Int’l Paper Co., 909 F.3d 661, 670 (4th Cir. 2018) (“This standard for establishing an adverse employment action under Title VII’s antiretaliation provision is more expansive than the standard for demonstrating a tangible employment action under the statute’s antidiscrimination provisions.”). Further, it is not clear that every judge broadly applies this definition. See Alex B. Long, *A Response to Professor Sperino’s Retaliation and the Unreasonable Judge*, 67 FLA. L. REV. F. 202 (2016) (reviewing Sandra F. Sperino, *Retaliation and the Reasonable Person*, 67 FLA. L. REV. 2031 (2015) and discussing the judicial backlash of retaliation claims); Sandra F. Sperino, *Retaliation and the Reasonable Person*, 67 FLA. L. REV. 2031 (2015) (proposing the adoption of a standard defining tangible employment action as simply more than a *de minimis* employment action).

for victims who report harassment, the likelihood of liability has decreased through recent interpretations of antiretaliation provisions.

In 2013, in a 5–4 split in *University of Texas Southwestern Medical Center v. Nassar*, the Supreme Court rejected a mixed-motive causation standard and held that in order to establish a retaliation claim under the antiretaliation provision of Title VII, the charging party must prove that he or she would not have experienced the relevant adverse employment action but-for the fact that he or she participated in a protected activity.⁵⁴ A harassment victim or witness of workplace harassment who reports the harassment and experiences an adverse employment action following that report must now prove that it was a but-for reason the plaintiff experienced the adverse action, instead of a “motivating factor” in that decision.⁵⁵

54. *Nassar*, 570 U.S. at 359–62. As described by Robert Tananbaum in 2013, before *Nassar*, the federal courts of appeals were divided over this standard. Robert Tananbaum, *Grossly Overbroad: The Unnecessary Conflict over Mixed Motives Claims in Title VII Anti-Retaliation Cases Resulting From Gross v. FBL Financial Services*, 34 CARDOZO L. REV. 1129, 1139–41 (2013). Some courts required the plaintiff to prove a mixed-motive theory, or that partaking in the protected activity was one of the employer’s reasons for acting against the plaintiff, and others required proof that the protected activity was the sole reason the employee experienced discrimination. The mixed-motive standard was codified in the Civil Rights Act of 1991 for Title VII discrimination claims (and therefore harassment claims), but the Supreme Court refused to adopt the “lessened standard” in part because Congress did not incorporate that standard in Title VII’s antiretaliation provisions. *Nassar*, 570 U.S. at 359. The Supreme Court very recently weighed in on the meaning of this standard, noting that it does not have to be the sole reason, but instead, “a but-for test directs us to change one thing at a time and see if the outcome changes.” *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1739 (2020).

55. The Supreme Court recently determined that but-for causation is required to prove discrimination under Section 1981. *See Comcast Corp. v. Nat’l Ass’n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1014 (2020). At least some courts (and not all) have held that the but-for causation standard applies to retaliation claims brought under the Rehabilitation Act, the ADEA, and the ADA. *See, e.g.*, *Brooks v. Capistrano Unified Sch. Dist.*, 1 F. Supp. 3d 1029, 1037 (C.D. Cal. 2014) (Rehabilitation Act); *Gallagher v. San Diego Unified Port Dist.*, 14 F. Supp. 3d 1380, 1386 (S.D. Cal. 2014), *aff’d*, 668 F. App’x 786 (9th Cir. 2016) (ADA); *Guerrero v. Vilsack*, 134 F. Supp. 3d 411, 427 (D.D.C. 2015) (ADEA); *Wright v. St. Vincent Health Sys.*, 730 F.3d 732, 737 (8th Cir. 2013) (Section 1981). *But see* *St. Ange v. ASML, Inc.*, No. 3:10-cv-00079-WWE, 2015 WL 7069649, at *3 (D. Conn. Nov. 13, 2015) (applying mixed motive in a Section 1981 retaliation claim); *Nat’l Ass’n of Afr. Am.-Owned Media v. Charter Commc’ns, Inc.*, 915 F.3d 617, 626 (9th Cir. 2019) (holding the same for Section 1981 claims generally). Not surprisingly, critiques of the but-for standard are common, citing the likelihood that an employer frequently has something on an employee’s record to point to as an alternative reason, or the possibility that employers will wait until that record develops to terminate the reporter. *See* Steven Curry, Note, *After University of Texas Southwestern Medical Center v. Nassar, Another Call to Congress to Restore Title VII’s Protections*, 2014 WIS. L. REV. 1001, 1004 (2014); Alex B. Long, *Retaliation Backlash*, 93 WASH. L. REV. 715, 716 (2018); Porter, *supra* note 7, at 53; Kimberly A. Pathman, Note, *Protecting Title VII’s Antiretaliation Provision in the Wake of University of Texas Southwestern Medical Center v. Nassar*, 109 NW. U. L. REV. 475, 491–92 (2015). It is worth recognizing that following *Nassar*, courts appear to still only require mixed-motive causation to establish that a tangible employment action was made in response to supervisor harassment under *Faragher/Ellerth*. *Richardson-Holness v. Alexander*, 196 F. Supp. 3d 364, 371 n.5 (E.D.N.Y. 2016) (“[T]he Supreme Court adopted a ‘but-for’ causation standard for Title VII retaliation claims asserted under 42 U.S.C. § 2000e-3(a). Although quid pro quo claims involve an element of retaliation, it is not retaliation in response to an employee’s protected activity (the form of retaliation addressed in § 2000e-3(a)) but retaliation in response to an employee’s refusal to accede to a supervisor’s sexual advances. Courts have thus treated quid pro quo claims as a type of status-based discrimination falling under § 2000e-2(a), and not retaliation cognizable under § 2000e-3(a). In sum, the ‘motivating factor’ causation standard set out at § 2000e-2(m) remains applicable to status based claims asserted under § 2000e-2(a).” (internal citations omitted)). This analysis of quid pro quo being a form of “retaliation” calls into question why tangible

In addition, there is one barrier to retaliation claims that is particularly applicable to reports alleging hostile work environment harassment. As the Supreme Court recognized in *Clark County School District v. Breeden*, Title VII prevents discrimination based on (1) the filing of a claim under Title VII and (2) opposition to acts “made unlawful” under Title VII.⁵⁶ Accordingly, internal reports are not protected unless the employee reasonably believed that the underlying conduct was “made unlawful” by Title VII.⁵⁷ This is a particular problem for employees reporting alleged hostile work environment harassment because the harassment is not actionable unless it is severe or pervasive such that it would have impeded a reasonable person’s ability to work.⁵⁸ As the Supreme Court recognized in *Breeden*, a plaintiff will not have an actionable retaliation claim if a reasonable person would not believe that the complained of conduct “violated Title VII’s standard.”⁵⁹ In a 2014 article, Ernest Lidge provided the following example: an employee complained when her “supervisor made two highly sexual comments, referring very graphically to

employment action for quid pro quo harassment is defined more narrowly than adverse employment action in retaliation law.

56. *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 269 (2001) (quoting 42 U.S.C. § 2000e-3(a)); see Sperino, *supra* note 53 (discussing the reasonable belief requirement).

57. See *Breeden*, 532 U.S. at 269–70; see also Porter, *supra* note 7, at 53 (“Thus, if a woman complains about one offensive or demeaning statement or joke, and the employer retaliates against her for complaining, courts will often hold that she did not have a reasonable, good faith belief that the conduct she complained about violated Title VII, and her claim will fail.”); Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 80 (2005); B. Glenn George, *Revenge*, 83 TUL. L. REV. 439, 476 (2008) (characterizing this problem as the *Breeden* problem); Brianne J. Gorod, *Rejecting “Reasonableness”: A New Look at Title VII’s Anti-Retaliation Provision*, 56 AM. U. L. REV. 1469, 1473 (2007) (recognizing the troubling requirement of reasonableness especially in sexual harassment law); Lawrence D. Rosenthal, *To Report or Not to Report: The Case for Eliminating the Objectively Reasonable Requirement for Opposition Activities Under Title VII’s Anti-Retaliation Provision*, 39 ARIZ. ST. L.J. 1127, 1141–42 (2007) (summarizing several decisions recognizing this problem); Long, *supra* note 55, at 728.

58. “Severe or pervasive” is not an easy standard to prove. See Vicki Schultz, *Open Statement on Sexual Harassment from Employment Discrimination Law Scholars*, 71 STAN. L. REV. ONLINE 17, 43 (2018) (“The courts have set an unduly high bar for meeting this standard that prevents many victims from having their day in court, let alone winning.”); Susan Grover & Kimberley Piro, *Consider the Source: When the Harasser Is the Boss*, 79 FORDHAM L. REV. 499, 514 (2010) (arguing that additional considerations, such as the source of the harasser, need to be considered when determining whether harassment is severe or pervasive). *But see* James Concannon, *Actionable Acts: “Severe” Conduct in Hostile Work Environment Sexual Harassment Cases*, 20 BUFF. J. GENDER, L. & SOC. POL’Y 1, 31–32 (2012) (suggesting that courts properly interpret “severe” or “pervasive”). But as Elizabeth Tippet has suggested, the #MeToo movement may expand the definition of “severe or pervasive,” improving this conundrum. Tippet, *supra* note 44, at 235–36 (citing Sandra F. Sperino & Suja A. Thomas, *Boss Grab Your Breasts? That’s Not (Legally) Harassment*, N.Y. TIMES (Nov. 29, 2017), <https://www.nytimes.com/2017/11/29/opinion/harassment-employees-laws-.html> (summarizing an example of harassment that was not deemed actionable)). If a plaintiff internally reported that he or she believed the employer did not promote him or her due to his or her race, the employer would be reporting what a reasonable person would believe constituted discrimination. Alternatively, the plaintiff reporting an offensive comment based on race or ethnicity would not because, according to the Supreme Court, no reasonable person would believe that conduct was actionable.

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

pubic hair and male masturbation,” and the court found that report unprotected.⁶⁰

C. Liability Conundrum for Hostile Work Environment Harassment and Retaliation

To advance a hostile work environment claim under *Faragher/Ellerth*, the victim must timely report the harassment according to any applicable company policy. The strict application of *Faragher/Ellerth*'s reporting requirement is at odds with the severe and pervasive requirement for actionability of a hostile work environment claim and the reasonable belief requirement for retaliation claims.⁶¹ Interpretations of *Faragher/Ellerth* require that a hostile work environment harassment victim timely complain according to company policies in order to meet the second prong of the defense—something that is not required for any other type of discrimination claim.⁶² But timely complaint often means that the harassment is not yet severe or pervasive.⁶³ Accordingly, when the victim properly reports and then experiences an adverse employment action, the victim is unlikely to have an actionable hostile work environment or retaliation claim.⁶⁴ The harassment may not yet be severe or pervasive and the employee likely would not have a reasonable belief that it is.

60. Lidge, *supra* note 7, at 39 (citing *Crews v. Ennis, Inc.*, No. 4:12-CV-00009, 2012 WL 5929032, at *1–2, *8–9 (W.D. Va. Nov. 27, 2012)). Critiques of such a narrow interpretation of “protected activity” are common. Proposed solutions have included using the definition of harassment in the company’s reporting policy to determine reasonable belief and adopting an “if repeated on a daily basis” test—meaning that if the conduct being reported would be actionable harassment if repeated on a daily basis, then it is reasonable to assume it is actionable. George, *supra* note 57, at 490; Lidge, *supra* note 7, at 85; Brake, *supra* note 53, at 168.

61. This conflict with harassment actionability has been explored by legal scholars. See sources cited *supra* note 57; Schultz, *supra* note 58, at 39 (“[Victims] must report acts of harassment to their employers within a short time frame in order preserve the right to sue, but they must not report before the acts have become sufficiently severe or pervasive to be deemed legally actionable.”). As John Marks pointed out, the proper question for reporting could be whether a reasonable person would have reported before the harassment crossed the threshold from not actionable to actionable (severe and pervasive). See 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 Harassment*, 38 HOUS. L. REV. 1401, 1436 (2002). Scholars have highlighted the conflict of the reporting requirement and retaliation standards as well. See George, *supra* note 57, at 490; Lidge, *supra* note 7, at 40–41; Gorod, *supra* note 57; Rosenthal, *supra* note 57.

62. Schultz, *supra* note 58, at 42.

63. Even if victims of harassment do not know that they are required to internally report under the law, *Faragher/Ellerth* encourages employers to have policies requiring such a report because they will not be liable if the victim does not follow the policy. And company policies often require reporting of acts that may not be actionable discrimination. Brake, *supra* note 53, at 165. Further, requiring internal reporting is also problematic from an evidentiary standpoint. It will always be more difficult to prove an employer’s knowledge of an internal report than an external report that the EEOC or court communicated to the employer.

64. Similarly, the employer would likely be off the hook for the supervisor harassment because the victim will be unable to show that the adverse action was in response to any quid pro quo threat.

II. MODELING AN EMPLOYER'S RESPONSE TO HARASSMENT

There are two ways in which a harassment victim might suffer an adverse employment action above and beyond the harassing behavior itself. First, as part of quid pro quo harassment, the supervisor may use an adverse action to silence or coerce the victim. The employer has a role in supervising and deterring such conduct. Second, an employer may respond to its knowledge of hostile work environment harassment by acting adversely against the victim—either to silence the victim, punish the victim, or to potentially “end” the harassment.⁶⁵ Both of these pathways to adverse employment actions are particularly unique to harassment victims and not victims of other forms of discrimination.

An employer may consider many potential responses when responding to workplace harassment. For example, the employer may choose between ignoring the behavior, punishing the harasser, or transferring the victim. Notably, this response is not necessarily conditioned on the victim reporting the harassment because the employer may become aware of the harassment through a variety of traditional channels. But it is reasonable to assume that the employer is more likely to know of the harassment if it is reported, which as noted above, is required for hostile work environment victims to successfully advance a claim. It is also reasonable to assume that once harassment is reported, the employer feels obligated to act, and that the employer's response depends on whether it believes the reporter.

For the purposes of understanding this decision and highlighting the unique problem of retaliation following harassment (particularly sexual harassment), let's first assume that the employer takes that the harassment occurred as a given. Let's next assume that the employer thinks he has two choices that will decrease the likelihood of the harassment occurring: fire (or transfer) the victim or fire (or transfer) the harasser.⁶⁶ The employer believes

65. There are additional reasons why an employer might act against a victim, including to maintain the expected social order. *See* Brake, *supra* note 57, at 32 (providing a thorough discussion of the sociology behind such reasons).

66. It is worth noting that if the harassment is quid pro quo harassment, the victim may have already experienced an adverse employment action through the supervisor harasser. Of course, although not required by law under the at-will employment doctrine, there are due process concerns with transferring a harasser that would also need to be considered by the employer after investigating. *See, e.g.,* Rachel Arnow-Richman, *Of Power and Process: Handling Harassers in an At-Will World*, 128 *YALE L.J. F.* 85, 87 (2018) (recognizing the need for due process protections for rank-and-file employees). This consideration would entail determining whether the victim is telling the truth. And as Deborah Epstein has noted, the employer may be more likely to believe the harasser when the harasser is a supervisor. Epstein, *supra* note 51, at 324; *see also* James Gerard Caillier, *Does the Rank of the Perpetrator and Reporter Affect How Agencies Handle Workplace Aggression? A Test of Resource Dependence Theory*, 00 *REV. OF PUB. PERSONNEL ADMIN.* 1, 6 (2020) (discussing the hierarchy of the workplace and how the employer may be less likely to believe employees with less resources). One article has suggested artificial intelligence can help determine the truth and prevent future harassment. *See* James P. de Haan, *Preventing #MeToo: Artificial Intelligence, the Law, and Prophylactics*, 38 *MINN. J. L. & INEQ.*, 69, 104–05 (2020).

this to be a solution because it believes that the harassment (particularly the sexual harassment) is relationship dependent or that there is a personality conflict between the two employees. This potential dichotomous decision is unique to responding to harassment because in all other cases of discrimination, transferring the victim would generally have little value—it would not remedy the alleged discrimination.⁶⁷ This decision is illustrated in a recent EEOC appeal from a Department of Defense attorney:

The Commission noted that management did not separate Complainant and the male co-worker immediately after learning of the allegations of sexual harassment, and the Agency . . . eventually did separate them by forcing Complainant to change her shift against her will, while the male co-worker was allowed to keep his shift.⁶⁸

When determining whether to transfer the victim or the harasser, the employer will choose the option with the greatest expected payoff for the company. That expected payoff will be viewed imperfectly, but will be informed by a variety of factors. The employer will consider the cost of replacing the harasser or victim because the employer will have to pay to replace the employee it acts against. This cost is a function of many characteristics of the harasser and victim, including the supervisor status of the harasser or victim, which one can assume is a function of education, skill level, and tenure with the company. These characteristics increase the responsibility of the employee and the cost of recruiting a replacement.⁶⁹ The employer might also consider the

67. This would not generally solve any other form of discrimination—transferring a victim who was not promoted due to race discrimination will not fix the past discrimination and is unlikely to remedy future instances of race discrimination. I recognize that harassers may be likely to harass other employees other than the original victim but separating the two employees is often viewed as a potential and reasonable solution by courts and employers. See *supra* note 49. Notably, the #MeToo movement may have changed this (likely incorrect) perception that separation fixes the problem by exposing serial harassers and making employers more aware of a harasser's tendency to harass no matter the specific victim, at least for sexual harassers. See Tippet, *supra* note 44, at 245–46 (recognizing that the #MeToo movement may provide more evidence of prior complaints and a pattern of harassment by harassers); see also Vicki Schultz, *Reconceptualizing Sexual Harassment, Again*, 128 *YALE L.J. F.* 22, 47–48 (2018) (recognizing and discussing work pre-#MeToo that recognized that sexual harassers are often motivated by “maintaining a sense of masculine prerogative and status in and through their work,” which is not relationship dependent). The data analyzed in this Article predates #MeToo. Knowing that harassers are serial, the employer should be more likely to act against the harasser because it should also recognize that the employee is costly to the workplace due to future liability, productivity effects, and the possibility of losing additional employees. See Michael Housman & Dylan Minor, *Toxic Workers* 3 (Harv. Bus. Sch., Working Paper No. 16-057, 2015); Bryce Covert, *The Real Cost of Keeping Les Moomes*, *N.Y. TIMES* (Aug. 3, 2018), <https://www.nytimes.com/2018/08/03/opinion/les-moonves-cbs-sexual-harassment.html>.

68. Statement of Dexter R. Brooks, *supra* note 13.

69. As of 2008, “[r]esearch suggest[ed] that direct replacement costs can reach as high as 50% [to] 60% of an employee's annual salary, with total costs associated with turnover ranging from 90% to 200%.” David G. Allen, *Retaining Talent: A Guide to Analyzing and Managing Employee Turnover*, *SOC'Y HUM. RES. MGMT.* 3 (2008).

impact that its action may have on the productivity of the employee—and it is more expensive to have a less productive supervisor than a less productive employee without such responsibilities.⁷⁰ As the EEOC has recognized, the employer might also be less likely to punish a harasser if the harasser is a superstar (meaning very productive) employee for similar reasons.⁷¹

When determining how to respond, the employer may also consider the expected costs of future harassment, which would include a decrease in productivity of future victims and the potential constructive discharge of those victims.⁷² The costs of future harassment are dependent on the probability that the harasser harasses again. This probability is likely zero if the employer fires the harasser, but it also might not be very high if the employer keeps the harasser and removes the victim because the employer may view the harassment as solely between this particular harasser and the victim (meaning it is relationship dependent). The employer may be less likely to view the harassment as relationship dependent if it has received previous complaints about the alleged harasser. The employer may also be more likely to view the harassment as relationship dependent instead of discrimination if it is sexual harassment rather than if it is harassment on the basis of some other protected class, such as race or disability.

The employer may also consider its reputational damage. Perhaps it is more likely that others become aware of the harassment if the employer acts against the victim because the victim may be more willing to tarnish the company's reputation. And #MeToo is an example of the damage this threat poses.⁷³ Of

70. See, e.g., Gjergji Cici et al., *#MeToo Meets the Mutual Fund Industry: Productivity Effects of Sexual Harassment* 3 (Ctr. for Fin. Rsch., Working Paper No. 19-03, 2019) (finding female employees more productive as harassment threat decreases).

71. Feldblum & Lipnic, *supra* note 2. The EEOC called for employers to recognize the costs that “toxic workers” pose, including the risk of harassment, even if they are productive employees. *Id.* (“Employers should avoid the trap of binary thinking that weighs the productivity of a harasser *solely* against the costs of his or her being reported.”) (citing Housman & Minor, *supra* note 67, at 23). In the at-will employment world that exists today, employers are generally free to fire either employee unless prohibited by law or a private contract. High performing harassers may be protected by provisions requiring just cause for termination and additional procedural protections. Arnow-Richman, *supra* note 66, at 92 (recognizing that employers are less likely to punish harassers that are more valuable to the company particularly because of the “top dog” employee’s availability to negotiate contract provisions requiring due process protections); Rachel Arnow-Richman, *Finding Balance, Forging a Legacy: Harassers’ Rights and Employer Best Practices in the Era of MeToo*, 54 U.S.F. L. REV. 1, 25–26 (2020) (calling for employers to include harassment as a cause for termination in employment contracts with “top dogs”).

72. See Housman & Minor, *supra* note 67, at 2 (discussing the costs of “toxic workers”); Cici et al., *supra* note 70 (finding female employees more productive as the harassment threat decreases).

73. See, e.g., Jeff Green, *#MeToo Snares More Than 400 High-Profile People*, BLOOMBERG, (June 27, 2018), <https://www.bloomberg.com/news/articles/2018-06-25/-metoo-snares-more-than-400-high-profile-people-as-firings-rise> (reporting statistics including that 60% of a collection of high-profile harassers exposed during the movement were punished).

course, there are numerous other factors that I am not highlighting to keep this “model” as basic as possible.

In a world where there is no liability (including negative reputational effects) for harassment or for adversely acting against the victim, based on these factors alone—and there may be many more—the employer should be more likely to act against the victim if the harasser is a supervisor and less likely to act against the victim if the victim is a supervisor.⁷⁴ The employer should also be more likely to be put in this situation if the victim reports the harassment. The employer may also be more likely to view this decision as a solution if the harassment is sexual in nature because it may be more likely to view sexual harassment as relationship based. But an employer will also consider the expected costs of litigation.

The expected costs of litigation are comprised of the probability that the victim sues the employer, the costs of the litigation, and the expected damages awarded. The expected damages are equivalent to the probability that the plaintiff prevails times the expected award amount.⁷⁵ The costs include (but are not limited to) the costs of settlement negotiations, of hiring an attorney, and of defending a lawsuit, which are lower if the threat of liability is lower.⁷⁶ The employer will view both the probability that the victim sues and that the victim prevails with error, but it will likely know that these probabilities are informed by harassment and retaliation law, as described above. The employer may also know that an employee should be more likely to bring a lawsuit if his or her chances of prevailing are greater.

Under the above-described legal regime, an employer should be less likely to act against a victim who is harassed by his or her supervisor because that victim will be more likely to succeed under either a quid pro quo or hostile work environment theory of liability—and the victim will be more likely to sue if it also experiences an adverse employment action.⁷⁷ Further, an employer should

74. These predictions are played out in many of the #MeToo allegations. For example, as reported by the New York Times in April 2017, Fox News settled at least five allegations of sexual misconduct against Bill O'Reilly, and following each settlement, O'Reilly remained employed and in his same prominent reporting role. Steel & Schmidt, *supra* note 1.

75. For a general discussion of the economic model of litigation, including the expected costs, see Steven Shavell, *Economic Analysis of Litigation and the Legal Process* (Nat'l Bureau Econ. Rsch., Working Paper No. 9697, 2003).

76. A recent analysis of EEOC charges found that only 27% of sexual harassment charges resulted in a financial award. McCann et al., *supra* note 9. A recent analysis of federal court cases conducted by Lex Machina found that only 1% of all employment discrimination cases filed result in a trial verdict for the plaintiff. Sean Captain, *Workers Win Only 1% of Federal Civil Rights Lawsuits at Trial*, FAST CO. (July 31, 2017), <https://www.fastcompany.com/40440310/employees-win-very-few-civil-rights-lawsuits>.

77. In fact, in an analysis of 650 sexual harassment cases published between 1986 and 1996, Juliano and Schwab found that being harassed by a supervisor increased the likelihood that a plaintiff prevailed as did the fact that the supervisor knew of the harassment before an external report occurred. Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548, 571–72 (2001).

have incentive to deter quid pro quo harassment—or adverse actions taken by supervisors—due to this increase in liability. In addition, an employer should be less likely to act against a victim who reports harassment because that victim will be more likely to prevail in a hostile work environment claim than those that do not report and is much more likely to prevail on a retaliation claim.

However, this increase in likely liability for supervisor harassment and for harassment following an internal report has tightened over the previous twenty years through the strict definitions of supervisor and tangible employment action for quid pro quo harassment, the strict internal reporting requirement for hostile work environment harassment, the but-for retaliation standard for retaliation claims, and the lack of protection for internal reporting of hostile work environment claims under current retaliation standards.⁷⁸ Under this arguably employer-friendly regime for harassment, the employer should only be less likely to act against the victim in response to harassment if the harasser was a narrowly defined supervisor and if the victim timely reported the harassment. Under retaliation law, an employer should be less likely to act against the victim if the victim reported the harassment, but that may not be true if the harassment was not “severe” and the victim did not file a formal report.⁷⁹

As noted previously, an employer’s decision will also be informed by liability for any future harassment conducted by the alleged harasser. But under current liability standards, if an employer keeps a harasser, the employer is not necessarily more likely to be liable for the employee’s future harassment simply because of that fact.⁸⁰ As long as the employer has an antiharassment policy and conducted an investigation following a complaint (if one was even made), the employer is often not more likely to be liable if it does not punish or remove the harasser.⁸¹

78. Even before this narrowing, one study suggested being harassed by a supervisor has the same effect post-*Faragher/Ellerth* as it did before the cases, which heightened liability. Walsh, *supra* note 34, at 508 (“For all intents and purposes, the outcomes for plaintiffs alleging harassment by supervisors or managers remained the same over time.”). Further, empirical results presented in a study of the federal judiciary suggest retaliation is more common when the reporter is low status and the harasser is high status. Lilia M. Cortina & Vicki J. Magley, *Raising Voice, Risking Retaliation: Events Following Interpersonal Mistreatment in the Workplace*, 8 J. OCCUPATIONAL HEALTH PSYCH. 247, 255 (2003) (“According to Figure 1a, the lowest status victims mistreated by high-power wrongdoers were most likely to endure SRV [(social retaliation victimization)].”).

79. For other reasons, internal reporting makes it less likely that an employer will be liable—it is much more difficult to deny receiving an allegation of discrimination if an EEOC charge is filed because the EEOC then contacts the employer for a response. And, because the legal system requires it, as do the employee handbooks that adopt that regime, internal reporting is likely more common for harassment claims than any other form of discrimination.

80. Tippet, *supra* note 44, at 245–46 (gathering cases showing that an employer was not liable for keeping the harasser as long as an investigation occurred and suggesting that #MeToo may change this standard by highlighting the unreasonableness of failing to punish the harasser).

81. *See id.*

The high cost of replacing a supervisor and the narrowing of these liability standards make it difficult to predict whether the law adequately deters an employer from adversely acting against a victim and protecting victims who report. For this reason, I turn to an empirical analysis of the most recent comprehensive harassment dataset to determine whether these characteristics or any other characteristic of the harassment or workplace increase the likelihood that a harassment victim experiences an adverse employment action as a result of the harassment under today's legal regime and to analyze the prevalence of the problem. This analysis informs how the law can be tailored to increase the cost of harassment associated with those characteristics to provide adequate deterrence for adverse actions following harassment. This analysis can also provide insight into the agency relationship between supervisors and employers.

III. EMPIRICAL ANALYSIS OF HARASSMENT RETALIATION

As noted previously, although retaliation is thought to be a main contributor to the underreporting and prevalence of harassment, we know very little about the problem empirically. Through two empirical analyses of underexplored datasets, I sought to confirm the hypothesis that harassment retaliation is a unique and prevalent problem. I also sought to understand if there are any factors—such as characteristics of harassment, the workplace, the victim, or the victim's response—that affect the likelihood that a victim experiences an adverse employment action as a result of the harassment in order to say something about the adequacy of the legal regime's deterrent effect currently and to know whether the law should be tailored to address certain determinants of retaliation.

A. Existing Data and Data Limitations

We know a lot about sexual harassment, including that workplace sexual harassment is prevalent, but we know little about other forms of harassment and even less about an employer's response to harassment. In part due to data limitations described below, this Article presents the most recent and comprehensive analysis of an employer's response to workplace harassment.

We know that workplace sexual harassment is common: a recent EEOC report found that depending on whether harassment was defined as more than one action or a specific action, 25% to 70% of women had experienced sexual harassment in the workplace.⁸² We also know that workplace sexual harassment

82. Feldblum & Lipnic, *supra* note 2; see also Holly Kearn, *The Facts Behind the #MeToo Movement: A National Study on Sexual Harassment and Assault*, STOP ST. HARASSMENT 8 (2018) (finding that 38% of women and 13% of men experienced some form of workplace sexual harassment in their lifetime).

is costly—to both the victim and the workplace—and that those costs include altering the career trajectory of the victim.⁸³

We know something about what characteristics of the employee or workplace affect the likelihood that a victim experiences harassment.⁸⁴ Studies have found that women more frequently receive unwanted sexual attention as the percentage of male employees in their workplace increases and that men are more likely to experience harassment as the ratio of women to men in their workplace increases.⁸⁵ Studies have also shown that younger, more educated women are more likely to be harassed than their counterparts.⁸⁶ There is also some evidence that more fair workplaces (as described in the organizational justice literature) may decrease the tendency of men to sexually harass.⁸⁷

83. Many studies have explored the negative health and productivity effects that harassment has on victims. Darius K-S. Chan et al., *Examining the Job-Related, Psychological, and Physical Outcomes of Workplace Sexual Harassment: A Meta-Analytic Review*, 32 *PSYCH. WOMEN Q.* 362, 370 (2008); see also L. Camille Hébert, *The Economic Implications of Sexual Harassment for Women*, 3 *KAN. J.L. & PUB. POL'Y* 41, 46 (1994) (analyzing the 1980 MSPB survey and reporting that 36% of the respondents had negative thoughts about work following sexual harassment and that 11% of the respondents had decreased work attendance following sexual harassment); Heather McLaughlin et al., *The Economic and Career Effects of Sexual Harassment on Working Women*, 31 *GENDER & SOC'Y* 333, 351 (2017) (finding sexual harassment negatively impacts women's careers with qualitative data); Hébert, *supra* note 6, at 731–32 (citing several studies that found that women who reported harassment were labeled as troublemakers and that women who took more assertive responses experienced negative job-related and health-related consequences); Joni Hersch, *Compensating Differentials for Sexual Harassment*, 101 *AM. ECON. REV.* 630, 633 (2011) (using EEOC statistics paired with census-level data and finding that employees who work in industries with high rates of harassment actually received a compensating differential (higher wages) for working in such environments); Richard A. Posner, *Employment Discrimination: Age Discrimination and Sexual Harassment*, 19 *INT'L REV. L. & ECON.* 421 (1999) (recognizing that employers have an incentive to deter harassment because of productivity effects); Nicole Buonocore Porter, *Relationships and Retaliation in the #MeToo Era*, 72 *FLA. L. REV.* 797 (2020) (discussing adverse consequences of harassment and reporting harassment on workplace relationships). In the 2016 MSPB survey, 25% of the sexual harassment victims and 40% of other harassment victims stated that they experienced decreased work productivity as a result of the harassment. Twenty percent of the sexual harassment victims and 33% of other harassment victims used sick or annual leave as a result of the harassment. U.S. MERIT SYS. PROT. BD., *UPDATE ON SEXUAL HARASSMENT IN THE WORKPLACE* 8–10 (March 2018).

84. The EEOC presented known “risk factors” in its recent task force report. Feldblum & Lipnic, *supra* note 2.

85. Robert A. Jackson & Meredith A. Newman, *Sexual Harassment in the Federal Workplace Revisited: Influences on Sexual Harassment by Gender*, 64 *PUB. ADMIN. REV.* 705, 709–11 (2004) (analyzing 1994 MSPB data); see also Newman et al., *supra* note 42, at 475–77 (reporting similar results analyzing earlier MSPB data); Schultz, *supra* note 67, at 62–63 (recognizing the importance of workplace integration in deterring sexual harassment); Shiu-Yik Au et al., *Times Up: Does Female Leadership Reduce Workplace Sexual Harassment?*, *ACAD. MGMT. PROC.* 22 (July 29, 2020), <https://journals.aom.org/doi/abs/10.5465/AMBPP.2020.21007abstract> (finding in an analysis of job reviews that firms with more women on the board of directors had lower rates of sexual harassment). This statistic is also true in the 2016 data—based on regression analyses that I ran, women are more likely to experience harassment in male-dominated workplaces.

86. Newman et al., *supra* note 42, at 475–77. The authors also concluded that increased sexual harassment training did not decrease the prevalence of sexual harassment. *Id.*; see also Anne Lawton, *Between Scylla and Charybdis: The Perils of Reporting Sexual Harassment*, 9 *U. PA. J. LAB. & EMP. L.* 603, 616–17 (2007) (discussing similar studies); Edelman & Cabrera, *supra* note 13, at 375 (summarizing literature finding generally that training does not decrease harassment rates).

87. Franciska Krings & Stéphanie Facchin, *Organizational Justice and Men's Likelihood to Sexually Harass: The Moderating Role of Sexism and Personality*, 94 *J. APPLIED PSYCH.* 501, 507 (2009).

We know that many victims don't report harassment in part because they fear retaliation.⁸⁸ A recent EEOC report estimated based on other empirical studies that approximately 30% of victims report the harassment.⁸⁹ Empirical studies have found that employees' fears of retaliation,⁹⁰ employers' previous experiences with harassment,⁹¹ and perceptions of organizational justice—meaning the victim believes that his or her complaint will be treated fairly—also affect the likelihood that a victim reports harassment.⁹²

We know from studies analyzing the 1987 MSPB data and data from the Department of Defense that retaliation occurs,⁹³ but there are very few studies analyzing which characteristics of the harassment, victim, or workplace influence the likelihood of a person experiencing retaliation. In 1998, Margaret Stockdale empirically analyzed the 1987 MSPB data and found that taking confronting actions, such as reporting the harassment, increased the likelihood

88. See Lawton, *supra* note 6, at 618; Feldblum & Lipnic, *supra* note 2 (including 1994 data showing that 12% of the victims reported the harassment and the 2016 dataset showing that 37% of the harassment victims reported the harassment); Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form over Substance in Sexual Harassment Law*, 26 HARV. WOMEN'S L.J. 3, 52 (2003) (summarizing studies discussing reasons victims do not report).

89. Feldblum & Lipnic, *supra* note 2; see also Grossman, *supra* note 88, at 26 (summarizing studies showing low instances of reporting); Lilia M. Cortina & Jennifer L. Berdahl, *Sexual Harassment in Organizations: A Decade of Research in Review*, 25 SAGE HANDBOOK ORG. BEHAV. 469, 485 (2008) (providing statistics on the lack of reporting).

90. See Charlotte S. Alexander & Arthi Prasad, *Bottom-Up Workplace Law Enforcement: An Empirical Analysis*, 89 IND. L.J. 1069, 1089 (2014) (empirically analyzing a 2009 survey of workplace safety violations and finding that three of the top four reasons that employees did not report workplace violations (one of which was related to sexual harassment) were related to retaliation fears); Elissa L. Perry et al., *Blowing the Whistle: Determinants of Responses to Sexual Harassment*, 19 BASIC & APPLIED SOC. PSYCH. 457, 465–70 (1997) (discussing a 1997 study that presented 434 individuals with hypothetical scenarios and finding that the personal power of the victim and the organization's previous reactions to harassment affected the respondent's likelihood of reporting harassment); Deborah Erdos Knapp et al., *Determinants of Target Responses to Sexual Harassment: A Conceptual Framework*, 22 ACAD. MGMT. REV. 687, 695 (1997) (citing studies finding that the severity and frequency of harassment increases the likelihood that it is reported); Porter, *supra* note 7, at 51 (summarizing the literature citing MSPB data); Lawton, *supra* note 86, at 632 (same); Brake, *supra* note 57, at 104 (same). The 1994 MSPB survey asked respondent victims why they did not report the harassment if they did not. Almost 30% of the harassment victims in 1994 did not take formal action because they thought it would adversely affect their career. U.S. MERIT SYS. PROT. BD., *SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: TRENDS, PROGRESS, CONTINUING CHALLENGES*, at vii (1995). Unfortunately, that question is not asked in the 2016 survey.

91. Bergman et al., *supra* note 10, at 237 (analyzing Department of Defense data, which found that a victim's previous experience with harassment dominated his or her likelihood of reporting harassment, and that other workplace characteristics did not); see also Claudia Benavides Espinoza & George B. Cunningham, *Observers' Reporting of Sexual Harassment: The Influence of Harassment Type, Organizational Culture, and Political Orientation*, 10 PUB. ORG. REV. 323, 330–32 (2010) (surveying 183 individuals and finding that more liberal individuals who observed harassment were more willing to report it).

92. Andrea M. Butler & Greg A. Chung-Yan, *The Influence of Sexual Harassment Frequency and Perceptions of Organizational Justice on Victim Responses to Sexual Harassment*, 20 EUR. J. WORK & ORG. PSYCH. 729, 742 (2011) (summarizing earlier studies and updating that research with a study of almost 300 women).

93. See, e.g., Porter, *supra* note 7, at 51 (summarizing literature); see also Breslin et al., *supra* note 9, at viii (“In 2018, roughly one-quarter (21%) of women who experienced and reported sexual assault experienced a behavior in line with retaliation.”); Cortina & Magley, *supra* note 78, at 255 (finding that 66% of employees of the judiciary who were surveyed and reported retaliation experienced retaliation).

that a victim experienced negative workplace outcomes and that more frequent harassment tended to result in a higher likelihood of negative workplace outcomes, including being denied a promotion or transferred against one's wishes.⁹⁴ Matthew S. Hesson-McInnis and Louise F. Fitzgerald also examined the 1987 MSPB data and found that taking an assertive action and more severe harassment were associated with more negative consequences.⁹⁵ And in 2002, a group of researchers analyzed the data collected by the Defense Manpower Data Center from the U.S. Armed Forces in 1995 and found that reporting harassment resulted in lowered job satisfaction and greater psychological distress.⁹⁶ Finally, although not the focus of their paper, Cortina and Magley analyze a dataset of federal judiciary employees and found that individuals who report harassment are most likely to experience retaliation if they are lower status and the wrongdoer is higher status.⁹⁷ The authors hypothesize that this result is due to deviation from expectation for lower status workers.⁹⁸

The reason we know so little about an employer's response to harassment is primarily because datasets are limited. Most nationally representative surveys only ask whether the respondent has been harassed,⁹⁹ making it impossible to analyze the determinants of retaliation. For example, the General Social Survey (GSS) included a question about sexual harassment and other forms of harassment as recently as 2018. However, the response was limited to one question asking if the individual had experienced any form of harassment in the previous twelve months.¹⁰⁰

A large number of sexual harassment surveys with smaller samples elicit information about the characteristics of sexual harassment in the workplace and its consequences, but they are limited due to the representativeness of the samples. Examples of these surveys can be found in a 2008 meta-analysis of

94. Stockdale, *supra* note 10, at 529.

95. Hesson-McInnis & Fitzgerald, *supra* note 10, at 895–96.

96. Bergman et al., *supra* note 10, at 237; Edelman & Cabrera, *supra* note 13, at 369 (summarizing literature finding such consequences of harassment).

97. Cortina & Magley, *supra* note 78 (“According to Figure 1a, the lowest status victims mistreated by high-power wrongdoers were most likely to endure SRV.”). Alexander and Prasad also examine survey responses of 4,387 front-line, low-wage workers and find that “about 43% of workers reported experiencing employer retaliation as a result of their most recent claim about a justiciable workplace problem in the twelve months before the survey.” Alexander & Prasad, *supra* note 90, at 1073. Justiciable workplace problems included harassment. *Id.* This study also looked at predictors of retaliation conditioned on reporting, and found that race, gender, age, education, immigration status, union status, tenure, and employer size had no effect. Only reporting alone increased the likelihood of experiencing retaliation. *Id.* at 1129. The study did not analyze whether harassment claims were more likely than others to result in retaliation. *Id.*

98. Cortina & Magley, *supra* note 78, at 260.

99. And more often than not, these studies only ask about sexual harassment.

100. The 1994 survey asked if the respondent had ever experienced sexual harassment, and the 2002 and 2006 surveys asked if the respondent had experienced sexual harassment in the previous twelve months. *Search Variables*, GSDATAEXPLORER, <https://gssdataexplorer.norc.org/variables/vfilter> (last visited Feb. 28, 2021).

forty-nine sexual harassment studies.¹⁰¹ Additional sexual harassment studies have analyzed hypothetical surveys and experiments. While these surveys and experiments often elicit information such as how a hypothetical victim would respond to harassment, these surveys are limited in two ways: they are not nationally representative or comparable to the workplace, and they are hypothetical.¹⁰²

One of the largest publicly available sexual harassment datasets is the Armed Services Workplace and Gender Relations Survey of Active Duty Members, which the Department of Defense issued most recently in 2018.¹⁰³ Although this survey does include questions about retaliation, the survey is limited to harassment in the military.

In this Article, I analyze a dataset of all charges filed with the EEOC that I received through a Freedom of Information Act (FOIA) request. I also analyze a 2016 survey of federal employees, the MSPB harassment survey, which I believe to be the most recent, representative, and comprehensive workplace harassment survey.¹⁰⁴

B. EEOC Data, Statistics, and Empirical Results

Under § 706 of Title VII of the Civil Rights Act, any individual with a Title VII employment discrimination claim must first file the claim with the EEOC or a corresponding state Fair Employment Practices Agency (FEPA) before filing a claim in federal court.¹⁰⁵ Accordingly, every harassment claim and

101. Chan et al., *supra* note 83, at 370. Though several studies included in this meta-analysis had sample sizes of over 1,000 observations, these studies are limited to employees of one company. For example, Mueller, Coster, and Estes analyzed a dataset consisting of employees of a large national telephone company, and Lim and Cortina analyzed a dataset consisting of employees of a federal judicial circuit. See Charles W. Mueller et al., *Sexual Harassment in the Workplace: Unanticipated Consequences of Modern Social Control in Organizations*, 28 WORK & OCCUPATIONS 411 (2001); Sandy Lim & Lilia M. Cortina, *Interpersonal Mistreatment in the Workplace: The Interface and Impact of General Incivility and Sexual Harassment*, 90 J. APPLIED PSYCH. 483 (2005); see also Hilary J. Gettman & Michele J. Gelfand, *When the Customer Shouldn't Be King: Antecedents and Consequences of Sexual Harassment by Clients and Customers*, 92 J. APPLIED PSYCH. 757 (2007) (analyzing a sample of employees working for a national grocery store chain).

102. See, e.g., Roger C. Katz et al., *Effects of Gender and Situation on the Perception of Sexual Harassment*, 34 SEX ROLES 35, 35 (1996); Joni Hersch & Beverly Moran, *Coitus and Consequences in the Legal System: An Experimental Study*, 68 SMU L. REV. 927 (2015).

103. See Breslin et al., *supra* note 9.

104. U.S. MERIT SYS. PROT. BD., *supra* note 83, at 3–4.

105. Many states have agencies that receive claims of employment discrimination under state law and Title VII. If the state has a worksharing agreement with the EEOC, the charge will be dual filed with the EEOC and the FEPA. The EEOC has worksharing agreements with more than ninety FEPAs. See *EEOC's Relationship with State & Local Fair Employment Practices Agencies*, EQUAL EMP. OPPORTUNITY COMM'N TRAINING INST. RES. GUIDE, at Q-6 (2008); *E.E.O.C. v. Com. Off. Prods. Co.*, 486 U.S. 107, 110 (1988) (citing 42 U.S.C. § 2000e-5(c)) (describing timing procedures for filing a charge with a local agency); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). Private and public employees advance age harassment and retaliation claims under the Age Discrimination and Employment Act (ADEA), 29 U.S.C. § 623. Disability harassment and retaliation claims can be brought by private employees under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12131–12134, and by public employees under the Rehabilitation Act, 29 U.S.C. § 791.

corresponding retaliation claim brought under the statute (and most federal antidiscrimination statutes) must be filed with the EEOC or a corresponding state agency before being filed in federal court.¹⁰⁶

Through a FOIA request, I received data on every charge filed with the EEOC or corresponding FEPA between 1985 and August 2013.¹⁰⁷ For each charge, the EEOC records characteristics of the charging party (the employee or applicant), the employer, and the charge itself. Most importantly, the EEOC records what statute or statutes the charging party is filing under and the basis or bases of the claim. The basis is the type of violation that the charging party is claiming occurred, for example, sex discrimination. The EEOC also records the issue or issues that the charging party claims illustrated this basis. For example, the charging party could complain that he or she was harassed, fired, denied a promotion, transferred, received less pay, or was not accommodated. Charging parties often file charges with more than one basis and more than one issue. Very often, retaliation charges are filed with a discrimination charge.

I conducted an empirical analysis of this data for the years 1990–2013 to determine whether harassment charges were statistically more likely than other claims to include a retaliation claim.¹⁰⁸ Figure One illustrates that a much higher percentage of harassment charges include retaliation claims than charges that do not include harassment claims. Over this time period, 49% of harassment

Private employees must file charges under the ADEA and ADA with the EEOC. *See* 42 U.S.C. § 12117 (ADA) (applying procedures from Title VII, 42 U.S.C. § 2000e-5(f)); 29 U.S.C. § 626(e) (same for ADEA). Claims of race discrimination (including harassment) and retaliation brought under § 1981 of the Civil Rights Act, 42 U.S.C. § 1981, do not have to be filed with the EEOC before being filed in federal court. *See, e.g., Richardson v. Delta Drayage Co.*, No. 76-3725, 1977 WL 15336, at *1 (E.D. La. Mar. 23, 1977) (“Administrative proceedings before the EEOC are not a prerequisite to suit for violation of Section 1981 . . .”). Procedures for federal employees differ. *See* discussion *infra* note 106.

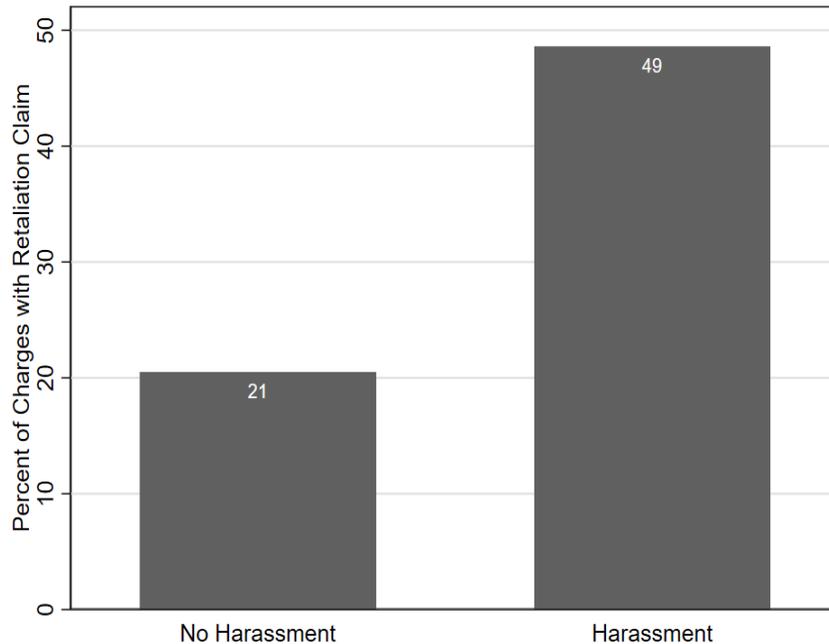
106. Federal government employees must follow different procedures to advance most discrimination claims against the federal government. Under Title VII and relevant EEOC regulations, federal employees are required to report any alleged Title VII discrimination (including harassment) to an EEO counselor (generally an internal agency employee) within forty-five days from the harassment. 29 C.F.R. § 1614.105 (2021); 29 C.F.R. § 1614.103 (2021) (providing what types of complaints are covered by these provisions, including Title VII, ADEA, Rehabilitation Act, and retaliation under each statute). The EEO counselor will then conduct counseling or alternative dispute resolution depending on what the employee agrees to. If the issue is not resolved during that counseling, the employee may file a formal complaint, which will then be investigated by the counselor. This process is generally conducted within the agency. 29 C.F.R. § 1614.106 (2021). Following the investigation, the employee can ask the agency to make a final decision or request a hearing in front of an EEOC administrative judge. Both of these decisions can then be appealed to the EEOC or by filing a claim in federal district court. EEOC statistics report that in 2018, there were 4,292 harassment and 246 sexual harassment hearings, and that in 2019, as of Q4, there were 9,815 harassment hearings and 599 sexual harassment hearings. *Equal Employment Opportunity Data Posted Pursuant to the No Fear Act: Hearings*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/eeoc/statistics/nofear/hearings.cfm> (last visited Feb. 28, 2021).

107. This dataset is comprised of almost two million charges for the years 1990–2013.

108. I limit this analysis to after 1990 because sexual harassment was not actionable under Title VII until 1987. This analysis does not include charges alleging a failure to hire. Excluding charges alleging termination lowers the percentage of harassment claims including retaliation claims to 44%, the percentage of other charges including a retaliation charge to 20%, and the regression results to a 75% greater likelihood of including a retaliation charge. Of the charges, 25% included a harassment claim.

charges included a retaliation claim.¹⁰⁹ In comparison, on average 21% of all other charges filed with the EEOC included a retaliation claim.¹¹⁰

Figure One: Percent of Charges with Retaliation Claim



It is possible that this difference is actually due to some other observable characteristic that is correlated with harassment charges and filing retaliation claims. To mitigate the likelihood that observable factors other than claiming harassment contribute to this difference, I control for all other observable characteristics using regression analysis.¹¹¹ In these equations, the dependent variable (or outcome) is an indicator variable for whether the charge included a retaliation claim. The independent variables (or controls) include all of the

109. This is consistent with a 2009 study finding that nearly half of the analyzed appellate court harassment cases included a retaliation claim. Walsh, *supra* note 34, at 521; *see also* David E. Terpstra & Susan E. Cook, *Complainant Characteristics and Reported Behaviors and Consequences Associated with Formal Sexual Harassment Charges*, 38 PERS. PSYCH. 559 (1985) (stating 65% of eighty-one sexual harassment charges resulted in job discharge).

110. The harassment sample includes all harassment charges. Limiting this sample to sexual harassment charges increases the percentage of harassment charges with retaliation charges to 55%. Other charges do not include failure to hire, which cannot result in retaliation. Excluding claims of termination results in a similar disparity. *See supra* note 108.

111. I utilize Ordinary Least Squares regression analyses.

demographic variables available for the employer, charging party, and charge.¹¹² The variable of interest in this analysis is a dichotomous variable equal to one if the claim included a harassment charge. The coefficient on that variable can be interpreted as the percentage point increase in the likelihood that a charge includes a retaliation claim due to the charge being a harassment charge.

The empirical results confirm the relationship illustrated in Figure One. From 1990 to 2013, harassment claims were twenty-five percentage points more likely to include retaliation claims than any other type of claim, and this result is statistically significant at the 1% level. This equates to a 93% increase in the likelihood that a charge includes a retaliation claim if it also includes a charge of harassment.¹¹³ These findings demonstrate that retaliation is a unique and prevalent problem associated with harassment. The next analysis seeks to understand that problem by analyzing an employer's response to harassment.

C. MSPB Data and Summary Statistics

The MSPB is a federal agency that Congress created in 1978 to monitor prohibited employment practices in the federal workplace.¹¹⁴ As part of a Congressional mandate, the agency issued surveys to investigate the prevalence of sexual harassment in the workplace; the effectiveness of sexual harassment training; and the federal agencies' responses to sexual harassment in 1978, 1987, 1994, and 2016.¹¹⁵ The 2016 survey was expanded to cover employees' experiences with other types of harassment and workplace discrimination. Responding to the surveys was voluntary.¹¹⁶ The 2016 dataset analyzed here contains 5,048 women and 7,060 men.¹¹⁷

112. I control for the type of charge, the bases, the year and state the charge was filed in, and characteristics of the parties. The demographic variables of the parties include the following: charging party's race, charging party's gender, charging party's age, the employer's industry, the employer's number of employees, and whether the employer is the state or federal government.

113. The mean percent of claims that include a retaliation claim is 27%. In these analyses, standard errors were clustered at the EEOC receipt office. Full results are available upon request to the author.

114. *About MSPB*, U.S. MERIT SYSTEMS PROT. BD., <https://www.mspb.gov/About/about.htm> (last visited Feb. 28, 2021).

115. NAT'L ACADS. OF SCIS., ENG'G, AND MED., *SEXUAL HARASSMENT OF WOMEN: CLIMATE, CULTURE, AND CONSEQUENCES IN ACADEMIC SCIENCES, ENGINEERING, AND MEDICINE* 39 (Paula A. Johnson et al. eds., 2018).

116. U.S. MERIT SYS. PROT. BD., *MSPB ANNOUNCES THE 2016 MERIT PRINCIPLES SURVEY (MPS)* (July 2016). The response rate was 39% in 2016. U.S. Merit Sys. Prot. Bd., Off. Policy & Evaluation, *The Perceived Incidence of Prohibited Personnel Practices 2* (2019).

117. The 1994 MSPB dataset contains 8,081 observations, 4,259 women and 3,560 men. Newman et al., *supra* note 42; V. Blair Druhan, Note, *Severe or Pervasive: An Analysis of Who, What, and Where Matters When Determining Sexual Harassment*, 66 VAND. L. REV. 355, 359 (2013).

Like the previous surveys, the 2016 survey asks a variety of questions about workplace harassment and culture. Most importantly, the survey asks whether the victim experienced or witnessed sexual harassment in the previous two years by asking the respondent whether he or she experienced certain types of unwanted conduct over the previous two years.¹¹⁸ The survey then asks the respondent to describe “one experience that had the greatest impact on [him or her]” by “answer[ing] the remaining questions in the sexual harassment section in terms of that experience.”¹¹⁹ Following that question is a variety of questions related to that harassment, including whether the employee reported the harassment “to the supervisor or other officials, such as an EEO counselor” or “filed a formal complaint, such as an EEO complaint or grievance.”¹²⁰ In addition, the survey asks whether the respondent experienced certain adverse employment actions “as a result of the sexual harassment or [his or her] response to it,” including receiving worse work assignments; being denied a promotion, pay increase, positive review, or reference; or being transferred or reassigned against one’s wishes.¹²¹

The resulting dataset shows workplace harassment remains prevalent in the federal government and that adverse actions as a result of harassment are common. In 2016, 22.6% of the women and 9.2% of the men answered that they had experienced sexual harassment in the previous two years, and 38% of those victims reported the harassment. Twenty-two percent of sexual harassment victims experienced some form of adverse employment action as a result of the harassment. For the purpose of this empirical analysis, I defined adverse employment action as receiving worse work assignments; being denied a promotion, review, pay raise, or reference; or being transferred or reassigned as a result of the harassment. Fifteen percent of the sexual harassment victims were denied a promotion, pay increase, favorable review, or favorable reference, and 6% were reassigned or transferred against their wishes.¹²² Comparably, 7%

118. For example, the survey asks, “In the past two years in your workplace, have any of the following behaviors been directed at you? . . . Pressure for sexual favors.” U.S. MERIT SYS. PROT. BD., 2016 MERIT PRINCIPLES SURVEY PATH 1, (drft. Dec. 2015).

119. *Id.*

120. *Id.* I acknowledge that federal employees have stricter reporting requirements under Title VII. *See supra* note 106.

121. U.S. MERIT SYS. PROT. BD., *supra* note 118.

122. As the federal government recently reported, the number of respondents who experienced sexual harassment was lower in the 2016 sample than the 1994 sample, and the percentage of victims who reported the harassment increased during that time period. U.S. MERIT SYS. PROT. BD., *supra* note 104, at 3–4. Of the 1994 respondents, 48% of the women and 24.5% of the men responded that they had experienced some form of workplace sexual harassment in the previous two years, and of the 2016 respondents, 22.6% of the women and 9.2% of the men answered that they had experienced sexual harassment in the previous two years. *Id.* In addition, in 2016, 38% of the individuals that had been sexually harassed reported the harassment, as compared to 18% in 1994. *Id.* Despite those improvements, the percentage of victims who experienced an adverse employment action following harassment (receiving worse work assignments; being denied a promotion, review, pay raise, or reference; or being transferred or reassigned) increased between 1994 and 2016, from 12% to 22%. In fact, all forms of adverse employment actions (receiving worse work assignments;

of the sexual harassment victims responded that the harasser was punished as a result of the harassment.¹²³

For the first time, the 2016 MSPB survey also asked respondents about their experience with other types of harassment. The survey asks if the respondents experienced harassment based on their race, political beliefs, religion, national origin, marital status, age, disability, sexual orientation, or parental status (whether or not they had children).¹²⁴ Of the sample, 42% responded that they experienced some form of harassment in the previous two years, and 68% of the victims reported the harassment. Fifty percent of the victims experienced an adverse action as a result of the harassment (33% of the victims were denied a promotion, pay advance, or positive performance review, and 9% were transferred or reassigned against their wishes).¹²⁵ Comparably, 15% of the victims believed that the harasser was punished following the harassment.

Additional summary statistics show a relationship between the characteristics of the harassment, harasser, and victim and the probability of experiencing an adverse action as a result of the harassment.¹²⁶ The following figures provide the percentage of victims who experienced an adverse employment action conditioned on two characteristics that relate to current legal standards for harassment and retaliation liability.

being denied a promotion, review, pay raise, or reference; or being transferred or reassigned) increased. Note that these numbers are slightly different than those reported by the MSPB in its 2018 report likely due to how they defined sexually harassed—they excluded certain reported categories of conduct.

123. Fifteen percent of the sexual harassment victims responded that the harasser was punished in 1994. Additional summary statistics are available upon request to the author.

124. Each of these categories is protected from discrimination in the federal government. *See* Exec. Order No. 13,152, 65 Fed. Reg. 26,115 (May 2, 2000) (protecting discrimination against status as parent); Exec. Order No. 13,087, 63 Fed. Reg. 30,097 (June 2, 1998) (same for sexual orientation); 5 U.S.C. § 2302 (1978) (same); 5 U.S.C. § 2302 (prohibiting discrimination on the basis of marital status and political beliefs, in addition to Title VII protected categories (color, race, sex, religion, and national origin), age, and disability). 5 U.S.C. § 2302 also prohibits retaliation because of complaints based on such discrimination.

125. The question regarding adverse actions asks whether the employer has experienced certain actions “as a result of” either the harassment or the victim’s response to the harassment. U.S. MERIT SYS. PROT. BD., *supra* note 118. It is possible that if the respondent received worse work assignments as part of the harassment, then the respondent would mark that response in this question as well. If I exclude individuals that responded that they received “[a]ssignment of tasks with unreasonable deadlines or demands with the intent of setting the targeted person up to fail” from the percentage of people that experienced other harassment, *id.*, the percentages are 23% experienced other harassment, 64% reported the harassment, and 28% of the victims experienced an adverse action. Seventeen percent were denied a promotion, pay advance, or positive performance review, and 5% were reassigned against their wishes.

126. Each of the summary statistics presented in this Part has been weighted with a sample weight provided by the MSPB to correct for the oversampling of females, certain pay grades, and certain agencies. This weight is also utilized in the regression analyses.

These two characteristics are:

- “Supervisor Harassment”: whether the victim was harassed by his or her immediate supervisor or “[o]ther higher level supervisors,”¹²⁷ and
- “Reported”: whether the victim reported the harassment “to the supervisor or other officials, such as an EEO counselor” or “filed a formal complaint, such as an EEO complaint or grievance.”¹²⁸

First, Figure Two illustrates that the percentage of sexual harassment victims experiencing an adverse action as a result of the harassment is much higher when the victim is harassed by his or her immediate supervisor or other higher-level supervisor as compared to any other individual. Fifty-one percent of those sexually harassed by their supervisors experienced an adverse action, as compared to only 14% of those sexually harassed by any other individual.¹²⁹ Similarly, as the right-hand side of Figure Two illustrates, of harassment victims other than sexual harassment, the percentage of victims experiencing an adverse employment action is much higher for those who are harassed by their supervisor as compared to those harassed by another individual. Seventy-one percent of those victims harassed by their supervisor experience an adverse employment action as compared to 28% of the remaining victims.¹³⁰ Notably, the comparisons each remain the same when adverse employment action includes only being denied a promotion, pay increase, positive review, or reference, or being transferred or reassigned.

127. U.S. MERIT SYS. PROT. BD., *supra* note 118. The alternative options for this response included coworkers, subordinates, other employees, contractors, customers, criminals, or someone with a personal relationship with an employee (such as a spouse).

128. *Id.* at 46.

129. Twenty-four percent of sexual harassment victims were harassed by their supervisor.

130. Fifty-two percent of other harassment victims were harassed by their supervisor. If I exclude individuals that responded that they received “[a]ssignment of tasks with unreasonable deadlines or demands with the intent of setting the targeted person up to fail” from the percentage of people that experienced other harassment, 50% of other harassment victims harassed by their supervisor experienced an adverse action, as compared to 21% of those harassed by another individual.

Figure Two: Percent Experienced Adverse Action by Whether Harassed by Supervisor

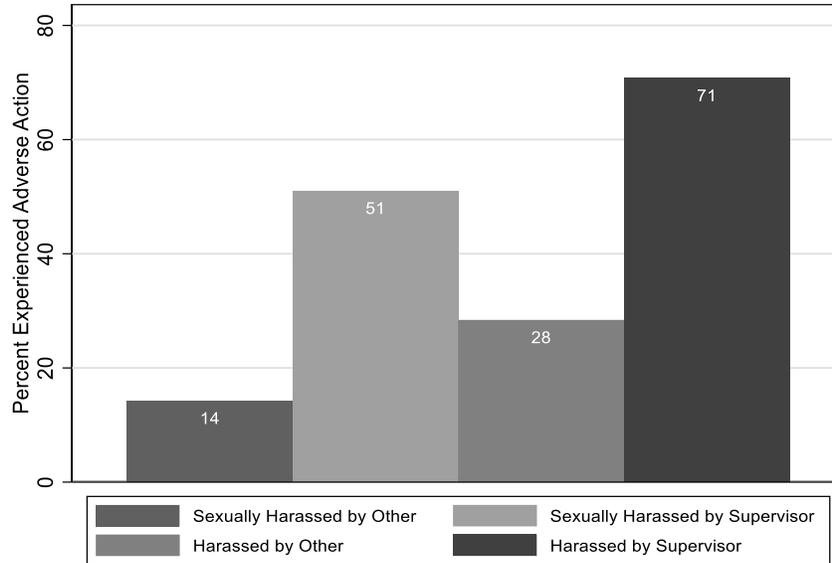
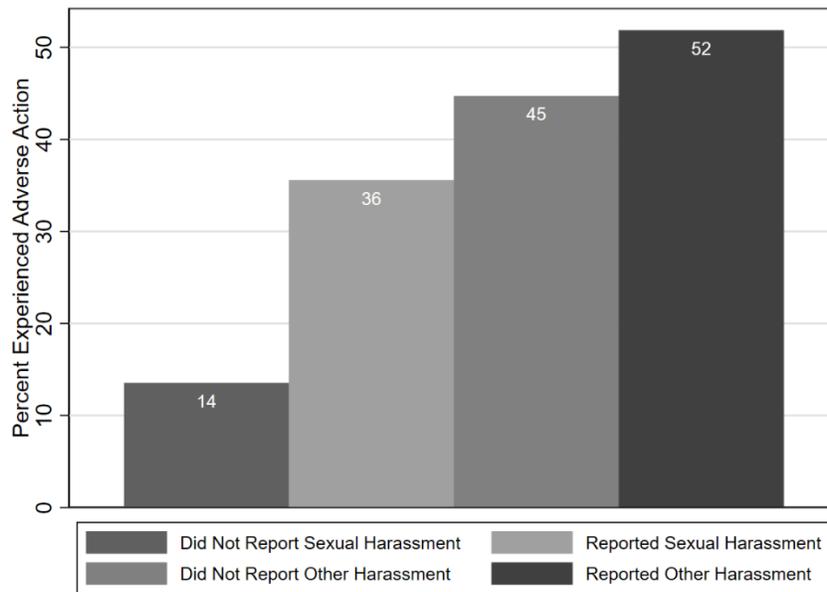


Figure Three illustrates that the percentage of victims experiencing an adverse action after sexual harassment is much higher when the victim reports the harassment. Thirty-six percent of those victims who reported the sexual harassment experienced an adverse action as compared to only 14% of those who did not report the harassment. This relationship is not as clear for victims of other forms of harassment. As seen in the right-hand side of Figure Three, 52% of the victims who reported the harassment experienced an adverse action, and 45% of the victims who did not report experienced an adverse action.

Figure Three: Percent Experienced Adverse Action by Whether Reported Harassment

Although these graphs suggest that victims of harassment and sexual harassment are more likely to experience an adverse action if they are harassed by their supervisor and that victims of sexual harassment are more likely to experience retaliation if they report the harassment, they do not take into account that other characteristics that are determinants of experiencing an adverse action may be correlated with supervisor harassment and reporting harassment. To isolate the impact of each individual characteristic, I employ regression analysis.

D. MSPB Methodology and Results

I use regression analysis to determine what characteristics of the workplace, victim, or harassment affect the victim's likelihood of experiencing an adverse action as a result of the harassment.¹³¹ Regression analysis allows me to isolate the effect that each individual characteristic has on the likelihood that a victim experiences an adverse action. In these equations, the dependent variable is a dichotomous variable indicating whether the victim experienced an adverse employment action in the form of receiving worse work assignments; being denied a promotion, pay increase, positive review, or reference; or being transferred or reassigned. In additional specifications, I redefine adverse

131. I utilized Ordinary Least Squares regressions.

employment action to not include receiving work assignments and to only include being transferred or reassigned.

The independent variables (controls) include the demographic variables provided by the respondent, including variables controlling for the victim's education level, age, supervisor status, race, union membership, and salary.¹³² I also control for the type of agency, the gender composition of the workplace, and whether the victim is aware of the agency's harassment and complaint policies.¹³³ Finally, I control for characteristics of the harassment, including the sex of the harasser, how many harassers there were, the supervisor status of the harasser, the frequency of the harassment, and the type of unwanted conduct that occurred.¹³⁴ In the specifications addressing victims of harassment other than sexual harassment, the equations also include variables indicating whether the harassment was because of the victim's race, political beliefs, religion, national origin, marital status, age, disability, sexual orientation, or parental status.¹³⁵

Each estimation is limited to victims of harassment. In addition, I run separate specifications for victims of sexual harassment as compared to other

132. I include indicator variables equal to one if the victim has the following characteristics: highest degree is high school degree, highest degree is college degree, is over thirty-nine, is a supervisor, identifies as a racial minority, is member of a union, and has an annual salary of over \$100,000.

133. These variables include indicator variables equal to one if the following characteristics are met: agency is a part of the department of defense, there are more women than men in the workplace, there are an equal number of men and women in the workplace, victim worked at the agency headquarters, victim teleworked most of the week, victim was aware of the complaint procedures for discrimination complaints, and respondent is aware of the agency's harassment policy.

134. I include the following indicator variables, which are equal to one if the harassment or harasser meets the following characteristics related to characteristics of the harassment and harasser: harasser was female, there were multiple harassers, harasser was the victim's immediate supervisor or other higher level supervisor, harassment occurred more than once, harassment included more than one type of unwanted conduct, and additional variables controlling for the type of unwanted conduct that occurred. For sexual harassment, these variables include indicator variables for whether the victim experienced: pressure for sexual favors; pressure for dates; sexual comments or teasing; the harassment included sexual looks or gestures; the presence of sexually oriented materials, such as photos or videos; people having sexually oriented conversations in front of others; different treatment (such as the nature of assignments) based on sex; use of derogatory terms related to a person's gender; unwanted touching or interference with personal space; "[s]omeone offering preferential treatment in the workplace in exchange for sexual favors"; stalking; and assault or attempted assault. U.S. MERIT SYS. PROT. BD., *supra* note 118. For victims of other harassment, these variables include indicator variables for whether the victim experienced: physical intimidation; verbal intimidation; spreading rumors or negative comments to undermine the victim's status; persistent, undeserved criticism of the victim's work; assignment of unreasonable deadlines or demands with the intent to set the victim up for failure; undermining performance by sabotaging work or withholding cooperation; and being excluded from work-related or social activities.

135. Some of the survey questions included broader responses: for example, the respondent provided what racial minority they identified with. But when releasing this data, the MSPB recoded that response to only indicate if the respondent identified with any racial minority. This was also true with age, education level, and salary, which are reported in broader categories than asked in the survey. Similarly, to make the interpretation of the results clearer, I often created indicator variables based on responses that may have provided more detail.

harassment because the questions were asked separately and the variables for the unwanted conduct are different. I estimate each equation separately for male and female victims, which is consistent with prior literature.¹³⁶

The regression results generally confirm the relationships suggested by the previously reported summary statistics, and I will focus on those results as they are the only results that are consistent throughout each specification and that are directly related to the legal landscape. Multiplying the coefficients on each independent variable by 100 can be interpreted as the percentage point change that having a certain characteristic or working in a certain type of workplace increases or decreases the likelihood that a victim experiences an adverse employment action as a result of the harassment.

The main results for the sexual harassment victims are reported in Figure Four. Each point represents the effect that the characteristic (reporting the harassment or being harassed by one's supervisor) has on the likelihood that a victim experiences an adverse action as a result of the harassment. The bars represent the 95% confidence intervals.

First, the empirical results show that victims who report sexual harassment are more likely to experience an adverse employment action. In 2016, female sexual harassment victims who reported the harassment were 11.4 percentage points more likely to experience an adverse employment action compared to those that did not report the harassment. Male sexual harassment victims who reported the harassment were 35.2 percentage points more likely to experience an adverse action.¹³⁷ These estimates indicate that the probability of experiencing an adverse employment action as a result of harassment increases from 22% to 33.4% (a 52% increase) for women who report the harassment

136. Full regression results are available upon request to the author. Because the empirical specifications are limited to individuals who respond to the MSPB survey saying that they have been sexually harassed in the workplace during the previous two years, the specifications may suffer from selection bias. It may be the case that individuals who did not report the harassment and did experience an adverse employment action as a result of the harassment are less likely to answer the question positively on the survey. Under that scenario, in the equations analyzing retaliation, those individuals would be missing from the specification, which would bias the coefficient on reported upwards. Other scenarios could bias the specification downwards. For example, individuals who do not report the harassment may wish to finally come clean and may be more likely to answer the question positively on the survey. I utilized a Heckman selection model, which suggested that the equations predicting whether a respondent experienced harassment and those predicting whether they experienced an adverse action are independent and that selection is not an issue. Further, the coefficients in those models are also of similar size and significance.

137. I also analyzed the 1994 data using regression analyses. In 1994, the coefficients were slightly smaller (10 percentage points for women and 12.7 percentage points for men), but due to the lower percentage of victims experiencing an adverse action, the percentage effect was very similar.

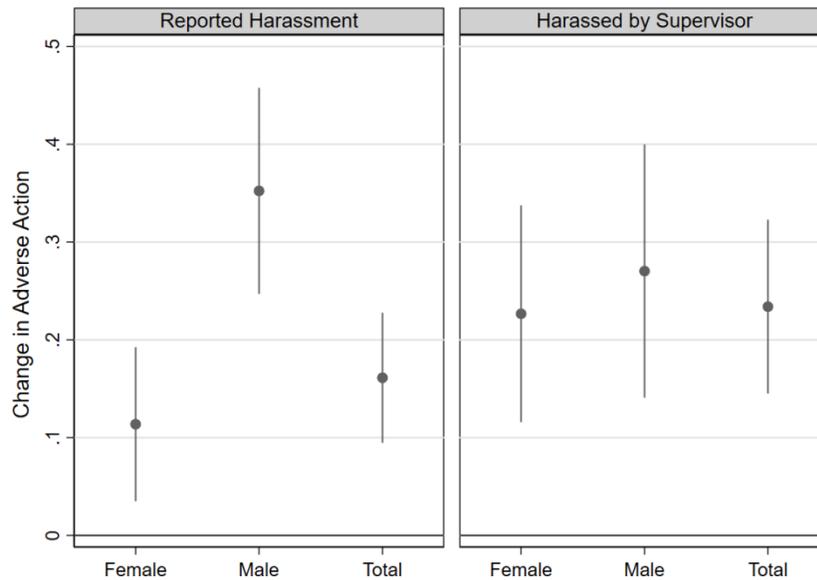
and from 24.9% to 60.1% (a 141% increase) for men who report the harassment.¹³⁸ The larger effect for men could suggest a greater stigma associated with same-sex harassment. But additional analyses showed that although men harassed by other men are 18.9 percentage points more likely to experience an adverse action, there is no additional effect for reporting same-sex harassment. Accordingly, there may be a stigma associated with men complaining of harassment more broadly—both same-sex harassment and female harassment of men might not be viewed as actionable harassment or discrimination.

Second, sexual harassment victims who were harassed by their supervisor as compared to their coworker are statistically significantly more likely to experience an adverse employment action. Female victims who are harassed by their supervisor are 22.7 percentage points more likely to experience an adverse action, and male victims harassed by their supervisor are 27 percentage points more likely to experience an adverse action. These estimates indicate that the probability of experiencing adverse employment actions as a result of harassment increases from 22% to 43.7% (a 99% increase) for women who are harassed by their supervisor and from 24.9% to 51.9% (a 108% increase) for men who are harassed by their supervisor.

138. Due to how the adverse action question is worded (“as a result of the harassment or your response to the harassment”), the causal relationship between these variables and adverse actions could be overstated. Victims who experienced adverse actions as part of the harassment may respond that they experienced an adverse action “as a result” of the harassment and be more likely to report the harassment. I analyzed several additional statistics to see if this was likely. First, respondents who reported the harassment or filed a formal report answered whether that response made the situation better or worse, or whether it stayed the same. Victims who reported the harassment and experienced an adverse employment action were much more likely to respond that reporting the harassment worsened the situation as compared to those who reported the harassment and did not experience an adverse employment action. In addition, I excluded victims who responded only that the harassment included “different treatment (such as the nature of assignments) based on sex,” assuming that these victims were most likely to experience an adverse action during the harassment and before responding. Excluding those individuals did not change the size and significance of the supervisor result, and the reported result remained significant at the 10% level, though it was slightly smaller. Further, controlling for observable characteristics, these individuals were not more likely to report the harassment, nor were victims more likely to say that they experienced an adverse action if they reported the harassment and experienced differential treatment. This suggests that at least some of the relationship is driven by adverse actions that occurred after the harassment and following the victim’s response to the harassment. I am also unable to determine whether this effect is driven by filing a formal complaint or simply reporting the unwanted conduct to a supervisor because the question regarding adverse actions does not specify when the adverse action occurred “as a result of the harassment.” The victim could have received worse work assignments before filing the formal complaint but after filing the complaint or reporting to his or her supervisor. Thirty-one percent of the sexual harassment victims who reported the harassment filed a formal complaint. As described above, federal employees must report the harassment to an EEO counselor before filing a formal complaint, so not surprisingly, 98% of sexual harassment victims who filed a formal complaint also reported the harassment to an EEO counselor or his or her supervisor.

Interestingly, when the dependent variable is limited to being transferred or reassigned against the victim's wishes, the empirical results show that those who report supervisor harassment are even more likely than those who report coworker harassment to be transferred against one's wishes.¹³⁹ For female victims, it is in fact reporting supervisor harassment that is driving the reporting effect—suggesting that reporting coworker harassment does not increase the likelihood of being transferred.

Figure Four: Effect of Supervisor Harassment and Reporting for Sexual Harassment Victims¹⁴⁰



139. In these specifications, the supervisor effect is even larger, more than doubling the likelihood of experiencing being transferred against one's own wishes. Female sexual harassment victims who reported supervisor harassment were 21.1 percentage points more likely to be transferred or reassigned against their wishes. Interestingly, I ran additional specifications where the dependent variable was whether the alleged harasser was punished, and although reporting harassment increases the likelihood that a harassment victim is punished, reporting supervisor harassment does not increase that likelihood for female sexual harassment victims.

140. Figure Four reports the results for 95% confidence intervals, but all of the results (with the exception of the coefficient on whether the victim reported the harassment in the female specification) are significant for 99% confidence intervals as well. The female specifications have a sample size of 595, and the male specifications have a sample size of 277. All reported standard errors are robust. These results remain similar in magnitude and significance if I exclude victims of sexual harassment who state that they received different treatment in assignments as a form of sexual harassment. The results are also similar if the dependent variable excludes "receiving worse work assignments," which is unlikely to be considered a "tangible employment action" under *Faragher/Ellerth* but would be considered an "adverse action" under retaliation law.

The results are slightly different for the sample that experienced some form of harassment other than sexual harassment. As seen in Figure Five, being harassed by one's supervisor increased the likelihood that a victim experienced an adverse action. Being harassed by one's supervisor increased the likelihood that a victim experienced an adverse employment action by 24.3 percentage points for women and 26.4 percentage points for men. These results are significant at the one percent level. Although the bars on the graphs indicate 90% confident intervals, the results are statistically significant for 99% confidence intervals. This equates to a 47% increase for female victims and a 55% increase for male victims.¹⁴¹

Reporting other forms of harassment did not statistically significantly increase or decrease the likelihood that the victim experienced an adverse employment action, as is seen by the inclusion of zero in the 90% confidence intervals in Figure Five.¹⁴² But, if I include both an indicator variable for reporting the harassment to a supervisor or EEO counselor and an indicator variable for filing a formal complaint (instead of combining those options into one reporting variable), female victims who filed a formal complaint are 10.1 percentage points (20%) more likely to experience an adverse action.¹⁴³

141. Of the female victims, 51.7% experienced an adverse employment action, and 47.8% of the male victims experienced an adverse employment action. Supporting this result, a recent analysis of the 2016 MSPB survey found that “[e]mployees reporting hierarchical aggression were more likely to face retaliation than employees experiencing coworker aggression.” Caillier, *supra* note 66, at 6.

142. Unfortunately, the data does not allow me to determine why reporting sexual harassment (but not other forms of harassment) increases the likelihood of experiencing an adverse action. It could be that other forms of harassment are more visible so reporting is not required to experience an adverse action, or it could be that there is less stigma and less retaliation associated with reporting other forms of harassment. Due to how the adverse action question is worded, it could also be because more victims of other forms of harassment experience adverse actions as part of the harassment itself. I again explored other statistics to see if this was likely. First, the percentage of respondents answering that reporting the harassment made the outcome worse is much higher when the respondent experienced an adverse action. In addition, excluding respondents who answered that they experienced “persistent, undeserved criticism of the victim’s work,” “assignment of unreasonable deadlines or demands with the intent to set the victim up for failure,” or “undermining performance by sabotaging work or withholding cooperation” as part of the harassment does not change the results, and those individuals were not more or less likely to report the harassment.

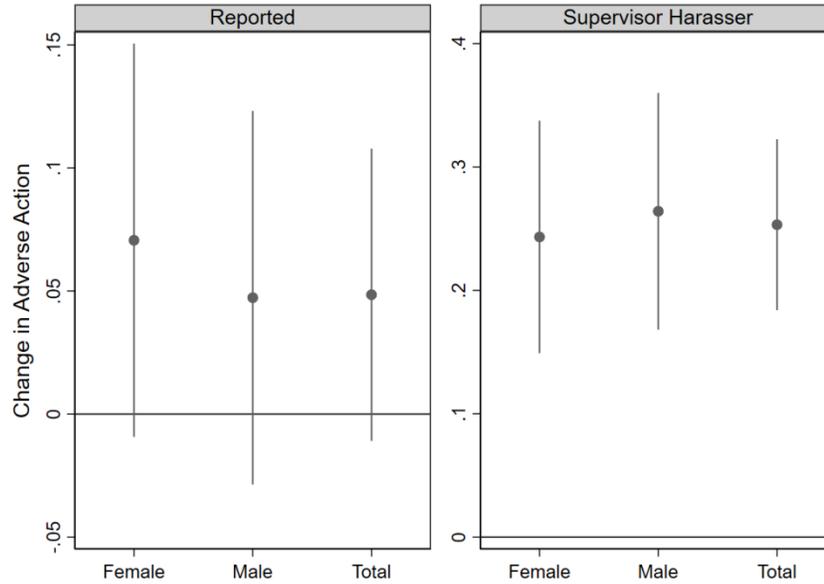
143. When determining whether to report the harassment, the victim may attempt to predict how the employer will respond to the harassment before the victim chooses whether to report the harassment. As a result, estimates of the coefficients on each variable in these equations may be biased due to the endogeneity of the variable indicating that the victim reported the harassment and the independent variable (whether the victim experienced retaliation). It is likely that a victim will be less likely to report the harassment if the victim anticipates that the employer is more likely to respond adversely to the harassment, which would bias the coefficient on whether the victim reported downwards. I took several measures to test for and correct for the bias, including an instrumental variable model confirmed by Durbin-Wu-Hausman tests for endogeneity. The Durbin-Wu-Hausman tests suggested that the reporting variable (the variable of interest) is not endogenous, and as a result, suggested that the presented results are valid.

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Figure Five: Effect of Supervisor Harassment and Reporting for Other Harassment Victims¹⁴⁴



The smaller effects for supervisor harassment and no effect for reporting harassment that I find with victims of other forms of harassment compared to sexual harassment is interesting but may not be too surprising. As discussed in the section modeling an employer's response to harassment, other forms of harassment may be more likely to be considered discrimination and thus an employer may be much more aware of the implications of applicable antiretaliation and antidiscrimination law.

144. Figure Five reports the results for 90% confidence intervals, but the supervisor results are significant at the 99% confidence intervals as well. The female specifications have a sample size of 914, and the male specifications have a sample size of 861. All reported standard errors are robust. These results remain similar in magnitude and significance if I exclude victims of harassment who state that they received different treatment in assignments as a form of harassment. The results are also similar if the dependent variable does not include receiving worse work assignments.

There were some other interesting, consistent results that support the hypothesis that an employer acts against the less valuable employee.¹⁴⁵ Female victims of harassment other than sexual harassment were statistically significantly less likely to experience an adverse action if they were supervisors themselves.¹⁴⁶ In addition, male victims of sexual harassment and other forms of harassment were statistically significantly more likely to experience an adverse action if they had only a high school degree as compared to those with graduate degrees.¹⁴⁷

Overall, consistent with the theory described above, victims of supervisor harassment are much more likely to experience an adverse employment action. In addition, despite the increase in liability that exists for an adverse action following reported harassment, reporting harassment does not decrease a victim's likelihood of experiencing an adverse action, and there is evidence that reporting harassment increases that likelihood for victims of sexual harassment.

IV. TAKEAWAYS AND LEGAL IMPLICATIONS

The empirical results presented in this Article suggest that work still must be done to combat adverse employment actions following harassment—both through the deterrence of quid pro quo harassment and of adverse actions following an employer's awareness of hostile work environment harassment. The results suggest that employers are not adequately incentivized to deter quid pro quo harassment and that the incentives of employers responding to harassment to act against the victim instead of the more valuable harasser are often not outweighed by the expected penalties that would be incurred under current legal standards.¹⁴⁸

145. I explored a variety of additional specifications, including specifications that included variables interacting the reporting variable with other variables. There are a few additionally interesting results: victims reporting types of harassment that are more likely to be thought of as sexual in nature and more severe (think invasion of space, pressure for sexual favors, assault) are less likely to experience an adverse action when they report, oftentimes negating the reported effect. This suggests that the threat of liability for the underlying harassment or the protection for reasonably believing it is harassment might be coming into play. In addition, when I combine men and women, women are less likely than men to experience an adverse action when they report. Most other interactions were not consistently significant.

146. This result was statistically significant at the one percent level and was 18.7 percentage points.

147. These results were significant at the one percent level and equal to 13 and 25 percentage points respectively.

148. Of course, there are many other explanations for why an employer might act against a subordinate employee, particularly a female, such as attempts to maintain dominance. Grossman, *supra* note 88, at 38. It may be optimistic to think broadening employer liability will address such toxic motivations or cultures. One additional explanation for this result could be that employers are more likely to believe supervisors, but that too is consistent with a need to deter adverse actions when a supervisor is the harasser, assuming the harassment actually occurred.

A. Reforms Supported by the Data

The empirical results presented in this Article provide support for tailoring the current legal regime for retaliation and harassment liability in at least two theoretical ways. First, the results conflict with the legal theory underlying the liability regime created by *Faragher/Ellerth* and several components of retaliation law.¹⁴⁹ Second, the results suggest that something needs to be done to change an employer's incentives when responding to harassment, and one solution may be altering liability standards for harassment and/or retaliation to increase the likelihood of a lawsuit being filed and of liability being rendered against the employer.

First, the results provide additional support for the critiques of the *Faragher/Ellerth* regime. As to the second element of the defense—the victim's response to the harassment—the results provide support for the argument that victims (or at least sexual harassment victims) have a reasonable fear that if they report harassment they will experience retaliation. This provides further support for the argument that courts must move away from treating the failure to report as determinative of the *Faragher/Ellerth* affirmative defense or even to negligence liability for coworker harassment—especially under the current regime where not all victims who report are protected under retaliation law.¹⁵⁰ Instead, courts could consider the reasonability of failing to report.¹⁵¹

The results also show that supervisor harassment is much more likely to result in an adverse action even if the victim does not report the harassment. Being harassed by a supervisor increases the likelihood that a victim experiences an adverse action by upwards of 100%. This consistent and large result supports

149. As noted in Part I, scholars have questioned this affirmative defense for years. *See, e.g.*, L. Camille Hébert, *How Sexual Harassment Law Failed Its Feminist Roots* 49–50 (Pub. L. & Legal Theory, Working Paper Series No. 567 Sept. 3, 2020); Schultz, *supra* note 58, at 44; Arnow-Richman, *supra* note 71, at 31.

150. As noted previously, federal employees are required to internally report the harassment within their agency. Generally, if that report follows the EEOC regulation requirements, it will be protected under retaliation law. Courts have recognized that “participation in an ongoing EEO investigation constitutes protected activity under Title VII.” *See Bryant v. McAleenan*, No. CV ELH-18-1183, 2019 WL 4038565, at *18 (D. Md. Aug. 27, 2019); *Diamond v. U.S. Postal Serv.*, 29 F. App'x 207, 213 (6th Cir. 2002). But simply reporting to a supervisor would not constitute such conduct. *See Stennis v. Bowie State Univ.*, 716 F. App'x 164, 166–67 (4th Cir. 2017). Unfortunately, I am unable to discern whether the victims reported to an EEO counselor or just a supervisor because the two are asked in one question, so it is unclear whether the victims reporting the harassment would have been protected by retaliation law or not. Ultimately, federal employees receive more protection for their required reporting mechanisms, and it should be even less likely that an adverse action follows reporting harassment. The fact that there is some evidence that reporting sexual harassment in the federal government increases the likelihood of experiencing an adverse employment action is surprising.

151. Anne Lawton has suggested that reporting is not necessary because the hostile work environment is often caused by and known by the employer. Anne Lawton, *The Bad Apple Theory in Sexual Harassment Law*, 13 GEO. MASON L. REV. 817, 820 (2005).

the argument that supervisors always use their agency authority when harassing employees.¹⁵² The very large increase in the likelihood that a victim of supervisor harassment experiences some adverse employment action even if the victim does not report the harassment supports the likelihood that supervisors use their agency relationship when harassing employees. Notably, this threat may be looming over a victim even if no “tangible employment action” actually occurs, particularly even if a change that causes economic harm does not occur.

Second, these empirical results suggest that something must be done to change the incentives that employers have when determining how to respond to harassment. In part, employers will consider the following when responding to harassment: (1) the cost of future litigation, including the probability of losing or settling a claim; (2) the cost of replacing the harasser if the harasser is removed from the workplace; and (3) the cost of future harassment, including any legal liability. When the harasser is a supervisor, the cost of replacing the harasser is high and higher than replacing a non-supervisor victim. Absent legal consequences, the employer will likely act against the victim. The empirical results confirm this prediction and reflect that the legal regime has not effectively combatted it. One way to combat that higher cost is to increase the expected cost of litigation to the employer, which is of course informed by the probability that a victim wins a lawsuit. That same probability also affects the likelihood that a victim files an action—a victim will be more likely to file if the victim has a higher likelihood of prevailing, assuming that the victim is aware of the legal standards.¹⁵³

Although many scholars have been skeptical that changing the legal standards is a realistic and effective method for deterring unwanted actions, such a change should theoretically increase the cost of retaliation and of supervisor harassment by increasing the likelihood of liability, particularly for

152. In fact, the Supreme Court recognized this fact, but was bound by *Meritor's* limitation that employers are not always liable for supervisor harassment. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986) (rejecting that employers are not “always automatically liable for sexual harassment by their supervisors”).

153. In her 2018 article, Joni Hersch suggested that based on the compensating differential employees were receiving to withstand harassment, the damages cap should be raised to \$7.6 million to raise the costs appropriately. Joni Hersch, *Valuing the Risk of Workplace Sexual Harassment*, 57 J. RISK & UNCERTAINTY 111, 127 (2018). Expanding the available damages is another reasonable way to raise the expected costs of litigation and liability. In fact, New York's recent legislation addressing sexual harassment actually allows for unlimited punitive damages. Assemb. B. 8421, 2019–2020 Leg., Reg. Sess. (N.Y. 2019); see also Grossman, *supra* note 88, at 74 (proposing a change in punitive damages standards and individual liability as potential ways to deter harassment); Daniel Hemel & Dorothy S. Lund, *Sexual Harassment and Corporate Law*, 118 COLUM. L. REV. 1583, 1679 (2018) (suggesting ways that corporate law can be tailored to deter harassment, such as liability when a fiduciary acts and ways securities law can act as a deterrent).

employers with tighter budgets.¹⁵⁴ And these changes support the numerous critiques of the narrowing of employer liability described in Part I of this Article. This Article's empirical results suggest that *Faragher/Ellerth* did not do enough to deter adverse actions following supervisor harassment, and that is likely due to the narrowing employer liability over the previous twenty years. They also suggest that retaliation law does not adequately deter adverse actions following a report.

The Supreme Court (and lower courts) narrowed the definitions of tangible employment action and supervisor, further lessening the likelihood that an employer would be liable for quid pro quo harassment. Courts have also lowered the likelihood of liability for failing to punish the harasser, as such a failure is unlikely to be determinative of liability for future harassment. Because a victim is more likely to file a lawsuit if the victim experiences an adverse action, an employer's liability for supervisor harassment (in addition to retaliation) will inform its decision to act against the victim.¹⁵⁵ If that expected liability is low, then the employer will be more likely to punish the victim instead of the harasser supervisor. In addition, if liability is low for quid pro quo harassment, an employer will be less likely to take steps to deter harassment, including punishing an alleged harasser following an initial complaint and investigation.

Retaliation law should also decrease the likelihood that an employee experiences an adverse action after reporting workplace sexual harassment, but the data show that reporting harassment does not have this effect—and often has the opposite effect, increasing the likelihood of experiencing an adverse action. This result is not too surprising because the Supreme Court and lower courts have lowered the likelihood that an employer will be liable for retaliation following harassment. First, the Supreme Court's adoption of the but-for causation standard raises the bar for retaliation claims.¹⁵⁶ Second, the requirement that the victim have a reasonable belief that the harassment be actionable greatly lowers the likelihood of liability when the employee reports internally.¹⁵⁷ This standard should be reconsidered particularly given the fact

154. For such a critique see Nuñez, *supra* note 12, at 465 (arguing that more stringent liability standards in New York City did not deter harassment at Fox News). Although I recognize the merit of this critique, I do not think Nuñez's argument proves that increasing the likelihood of liability has no effect, in part, because it focuses on a very wealthy employer.

155. See Brent Gleeson, *6 Big Reasons Employees Sue, and How To Protect Yourself*, FORBES (June 27, 2014), <https://www.forbes.com/sites/brentgleeson/2014/06/27/6-big-reasons-employees-sue-and-how-to-protect-yourself/#2543b174857b>.

156. See, e.g., Daiquiri J. Steele, *Protecting Protected Activity*, 95 WASH. L. REV. 1891, 1919 (2020); Long, *supra* note 53 (reviewing Sperino, *supra* note 53, and discussing the judicial backlash of retaliation claims).

157. See Michael Z. Green, *A New #MeToo Result: Rejecting Notions of Romantic Consent with Executives*, 23 EMP. RTS. & EMP. POL'Y J. 115, 151 (2019) (calling for altering the reasonable belief standard to consider whether "the employee reasonably believed the single incident was part of an overall hostile environment in progress, then that would be all the protected activity needed to prevail").

that under Supreme Court precedent, internal reporting is required for hostile work environment harassment claims to be actionable under Title VII.¹⁵⁸ This Article's empirical results show that retaliation is even a significant threat following a report in the federal government where reporting to an EEO counselor is required and considered protected activity.¹⁵⁹

An alternative or addition to closing these above-described “loopholes” could be to address the issue head on by recognizing the intersection of these two claims and either increasing the viability of (1) retaliation claims following supervisor harassment or (2) harassment claims that occur before retaliation. First, the court could hold that a victim who experiences an adverse employment action after supervisor harassment has an actionable retaliation claim even if the victim does not formally report the harassment. In fact, the Sixth Circuit has held that asking a supervisor harasser to stop the harassing behavior constitutes protected activity.¹⁶⁰ So if the victim asks the supervisor to stop and experiences an adverse employment action, the victim may have a retaliation claim, even if the harassment claim fails.¹⁶¹

158. Because an EEO counselor is a member of the agency, all reports analyzed in this article were internal; however, all of the reports to an EEO counselor or a formal action would be considered protected activity under Title VII's antiretaliation provisions. *See* *Bryant v. McAleenan*, No. ELH-18-1183, 2019 WL 4038565, at *18 (D. Md. Aug. 27, 2019); *Diamond v. U.S. Postal Serv.*, 29 F. App'x 207, 213 (6th Cir. 2002). As noted in note 114, reporting the harassment included reporting to a supervisor, which would not be protected under Title VII's antiretaliation provisions. Accordingly, there is an argument that the report should be considered an “investigation under Title VII” under Section 2000e-3(e).

159. In addition, the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (No FEAR Act) became effective on October 1, 2003. The No FEAR Act requires each agency to provide statistics, including resolution outcomes, of all of the allegations made under Title VII, including retaliation, to Congress and the EEOC on a quarterly basis. Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002, Pub. L. No. 107-174, 116 Stat. 566. A recent bill introduced in the House of Representatives, “Ending Secrecy About Workplace Sexual Harassment Act,” would require disclosure of the number of harassment settlements settled annually by an employer with more than 100 employees in its EEO-1 report to the EEOC. H.R. 4729, 115th Cong. (2017). In addition, the “Sunlight in Workplace Harassment Act” would require disclosure of sexual harassment settlements by publicly traded companies under the Securities Exchange Act. H.R. 5028, 115th Cong. (2018). Although these bills remain proposals, similar disclosure requirements have been passed by Illinois and New York City for public agencies, by Maryland for employers with over fifty employees, and by Illinois and Vermont for the state employment agencies. ANDREA JOHNSON ET AL., NAT'L WOMEN'S L. CTR., *PROGRESS IN ADVANCING ME TOO WORKPLACE REFORMS IN #20STATESBY2020*, at 8–9 (Dec. 2019). These steps could also increase the cost of retaliation by exposing patterns of harassment that could be investigated if the employer does not properly respond and prevent future harassment.

160. *E.E.O.C. v. New Breed Logistics*, 783 F.3d 1057, 1068 (6th Cir. 2015).

161. *Id.*; *see also* *Ogden v. Wax Works, Inc.*, 214 F.3d 999, 1007 (8th Cir. 2000) (“Employers may not retaliate against employees who ‘oppose discriminatory conduct,’ *see* 42 U.S.C. § 2000e-3(a), and the jury reasonably concluded Ogden did so when she told Hudson to stop his offensive behavior.”). The EEOC appears to agree with this position. *Questions and Answers: Enforcement Guidance on Retaliation and Related Issues*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Aug. 26, 2016), <https://www.eeoc.gov/laws/guidance/questions-and-answers-enforcement-guidance-retaliation-and-related-issues>. But this position has not been adopted by most courts. *See* Simi Lorenz, *Opposing Sexual Harassment May Not Be Enough for a Retaliation Claim Under Title VII: Why Refusing Sexual Advances Is Not Enough*, 50 J. MARSHALL L. REV. 1007, 1008 (2017); *Williams v. New York City Dep't of Educ.*, No. 19 Civ. 1353 (CM), 2019 WL 4393546, at *11 (S.D.N.Y. Aug. 28, 2019) (analyzing the split and collecting cases and rejecting this argument).

Second, the employer could be strictly liable for the underlying harassment when an employer acts against a victim following a harassment allegation.¹⁶² It could be argued that when an employer acts against a victim instead of an alleged harasser following awareness of the harassment, the employer ratified the harassment.¹⁶³ The employer's action against the victim following awareness of the harassment is arguably "conduct that justifies a reasonable assumption that the [employer] so consent[ed]" to the harassment, and these same actions may illustrate the employer's knowledge.¹⁶⁴ Accordingly, under the same principles of agency analyzed by the Supreme Court in *Faragher/Ellerth*, the employer should be liable for any harassment when the employer acts against the victim following the harassment, no matter if the victim reported the conduct, if the report was timely, or if the supervisor could take a tangible employment action against the victim. At the very least, for a future claim, such a response to an initial complaint to harassment should make an employer fail the first element of the *Faragher/Ellerth* defense as evidence that the employer did not take reasonable precautions to prevent the harassment.¹⁶⁵

Assuming that courts effectively apply the new standards and that employers respond to changing legal standards, altering the liability standards in one or several of these proposed ways may increase the cost of adverse employment actions, encourage employers to take measures to decrease quid pro quo harassment, and in turn, decrease the number of harassment victims experiencing an adverse employment action.¹⁶⁶

B. Role for State Legislatures

Reversing the Supreme Court's jurisprudence in *Faragher*, *Ellerth*, *Vance*, *Nassar*, and a number of other related cases either by federal courts or Congress

162. One attorney has suggested a rebuttable presumption of retaliation when the harasser is a supervisor, the employee and employer were aware of the harassment, and the employee knew of previous instances of retaliation. Ramit Mizrahi, *Sexual Harassment Law After #MeToo: Looking to California as a Model*, 128 YALE L.J. F. 121, 150 (2018).

163. See Stone, *supra* note 45, at 1080 (discussing why negligent retention is not a sufficient cause of action).

164. RESTATEMENT (THIRD) OF AGENCY §§ 4.01, 4.06 (AM. L. INST. 2006).

165. But as discussed in note 42, courts often consider such a response to be reasonable.

166. Of course, for a change in the legal regime to have an impact, victims must report and file harassment complaints. I recognize that there are a number of additional concerns that may prevent reporting, including the first-mover fear and psychological hurdles that prevent a victim from reporting harassment, particularly if the required report is internal. See, e.g., Porter, *supra* note 7, at 59 (listing additional reasons reports do not occur and suggesting that the climate must change). It is simply my suggestion that a change in the legal regime may address one small component of those fears. One additional suggestion has been for the EEOC to maintain a log of alleged harassers in order to investigate repeat offenders. Samuel Estreicher & Joseph Scopelitis, *How the EEOC's Maintenance of an "Alleged Offenders" Log Can Help Prevent the Next Harvey Weinstein*, JUSTIA VERDICT (2020).

seems like a tall, though not currently impossible, order. However, as state legislatures continue to amend their antidiscrimination laws in the wake of #MeToo, these reforms could be adopted. All fifty states have some form of antidiscrimination statute, but not all address sex discrimination or harassment.¹⁶⁷ Although many of these statutes include language identical or substantially similar to Title VII and some states recognize deference to federal interpretation, state courts are not bound to follow the U.S. Supreme Court's interpretation of Title VII when enforcing their own discrimination laws. And state legislatures are not required to wait until Congress amends Title VII to amend their own laws.¹⁶⁸

In response to the #MeToo movement, many states and localities have enacted legislation aimed at stopping workplace sexual harassment and providing redress for victims. As of July 2019, at least fifteen states and one locality had passed legislation addressing workplace sexual harassment specifically, and many more have proposed similar reforms.¹⁶⁹ These laws take several common actions: prohibiting nondisclosure agreements,¹⁷⁰ preventing disclosure of sexual harassment allegations, expanding protections to independent contractors and other nonemployees, prohibiting mandatory arbitration provisions, and requiring specific harassment training.¹⁷¹

167. Kevin J. Koai, Note, *Judicial Federalism and Causation in State Employment Discrimination Statutes*, 119 COLUM. L. REV. 763, 775 (2019). Because not all states address discrimination or harassment, amending such legislation will not be a solution in every state, and federal legislation would be necessary.

168. Further, empirical research suggests that the addition of claims filed under state antidiscrimination statutes in federal court increases damages. Catherine M. Sharkey, *Dissecting Damages: An Empirical Exploration of Sexual Harassment Awards*, 3 J. EMPIRICAL LEGAL STUD. 1, 4–5 (2006).

169. JOHNSON ET AL., *supra* note 159, at 2. Other characteristics include making mandatory arbitration provisions illegal and lengthening statutes of limitations.

170. In the wake of #MeToo, it became clear that many sexual harassment allegations resulted in settlements that contained provisions prohibiting the parties from disclosing the settlement itself and the alleged instance of sexual harassment. Some employers also required confidentiality agreements to be signed as a condition of employment, and these agreements had been interpreted to cover sexual harassment allegations. As of July 2019, at least fifteen states passed legislation addressing nondisclosure agreements. *Id.* Such agreements could have legalized retaliation because if the victim was fired for disclosing the harassment in violation of a nondisclosure agreement, then it would have been legal (under the but-for causation standard) for the employer to fire the victim. The reason the victim was terminated, the employer would argue, was due to a violation of this legal (at the time) policy. A future empirical analysis will be necessary to see if reporting improves and retaliation decreases following the adoption of these new laws. For a discussion of intermediate preventions, which may allow for nondisclosure agreements and also target repeat offenders, see Ian Ayres, *Targeting Repeat Offender NDAs*, 71 STAN. L. REV. ONLINE 74 (2018). The Tax Cuts and Jobs Act also prohibits deductions of settlements and attorneys' fees if the agreement has a nondisclosure agreement. Pub. L. No. 115-97, 131 Stat. 2054 (2017).

171. *Id.* New York City and Vermont have passed provisions requiring companies to distribute climate surveys regarding harassment in certain circumstances. See NEW YORK, N.Y., ADMIN. CODE § 8-107 (2018),

Unfortunately, very few of these laws do anything to address the liability standards discussed above, particularly those addressing retaliation, and most do not address workplace harassment more generally. These states could remove the reporting requirement for supervisor harassment, broadly define supervisor,¹⁷² codify a mixed-motive standard for retaliation, or expand protections for retaliation to cover all forms of opposition. Two state legislatures have taken similar actions. New York's recent legislation provides that an employee's failure to report the harassment is not determinative of liability.¹⁷³ And Maryland enacted legislation that makes the employer strictly liable for supervisor harassment and broadly defines supervisor. Maryland's statute reads:

In an action alleging a violation of this subtitle based on harassment, an employer is liable:

- (1) for the acts or omissions toward an employee or applicant for employment committed by an individual who:
 - (i) undertakes or recommends tangible employment actions affecting the employee or an applicant for employment, including hiring, firing, promoting, demoting, and reassigning the employee or an applicant for employment; or
 - (ii) directs, supervises, or evaluates the work activities of the employee; or
- (2) if the negligence of the employer led to the harassment or continuation of harassment.¹⁷⁴

Less attention has been paid to retaliation in these statutes.¹⁷⁵ Although many define retaliation as a legal action, some, including Delaware's statute,

provide at least two hours of sexual harassment training to all employees with supervisor responsibilities and at least one hour of training to all employees without supervisor duties by 2020, and once every two years after the initial training. Interestingly, the text of the law states that failure to meet the standards of the law does not automatically make the employer liable for sexual harassment, but also that compliance does not insulate the employer from liability. S.B. 1343, 2018 Gen. Assemb. Reg., Sess. (Cal. 2018) (amending the California Fair Employment and Housing Act, Sections 12950 and 12950.1). Similar legislation has been proposed in the federal government as well. *See* BE HEARD in the Workplace Act, S. 1082, 116th Cong. (2019).

172. The New Jersey Supreme Court has rejected the *Vance* definition of supervisor, defining supervisor "more expansively to include not only employees granted the authority to make tangible employment decisions, but also those placed in charge of the complainant's daily work activities." *Aguas v. State*, 107 A.3d 1250, 1271 (2015); *see also* *Diemer v. Minute Men, Inc.*, 110 N.E.3d 152, 161 (Ohio Ct. App. 2018) (distinguishing *Vance*).

173. N.Y. LAB. LAW § 201-G (Consol. 2018).

174. H.B. 679, 2019 Leg., Reg. Sess. (Md. 2019). Notably, California and New York have also held that the *Faragher/Ellerth* defense does not apply to supervisor harassment in those states. *See* *Zakrzewska v. New Sch.*, 620 F.3d 168, 170 (2d Cir. 2010); *State Dep't of Health Servs. v. Superior Ct.*, 79 P.3d 556, 559 (Cal. 2003) (acknowledging that the defense is applicable for damages purposes).

175. California proposed a bill that would create a rebuttable presumption of retaliation when an employer took an action against a harassment victim "within 90 days after the [victim] filed a sexual harassment complaint," but to my knowledge the governor vetoed that bill. *See* Assemb. B. 3081, 2017-2018 Leg., Reg. Sess. (Cal. 2018).

continue to adopt very limited definitions for this cause. Delaware's antiretaliation provision makes an employer liable for "[a] negative employment action . . . taken against an employee in retaliation for the employee filing a discrimination charge, participating in an investigation of sexual harassment, or testifying in any proceeding or lawsuit about the sexual harassment of an employee" and defines "negative employment action" as "an action taken by a supervisor that negatively impacts the employment status of an employee and includes termination, failure to promote or hire and loss of wages or benefits."¹⁷⁶ Notably, this definition does not appear to include internal reporting, unless it is considered participating in an investigation.

I have also not found any statute addressing the causation standard for retaliation or expanding protections for retaliation to all forms of reporting or opposition of harassment. There is room for states to modify or interpret their antiretaliation provisions to provide for mixed-motive causation, and some courts have done so. California's Supreme Court interpreted "because of" in its antidiscrimination statute to mean that the discrimination was a motivating factor for the decision, rejecting the but-for causation standard.¹⁷⁷

State courts or state legislatures could take this opportunity to address harassment retaliation more broadly by addressing (1) liability for supervisor harassment, including the definition of supervisor, the definition of tangible employment action, and the internal reporting requirement, and (2) antiretaliation provisions, including altering the causation standard and broadening the definition of protected activity to include internal reporting of harassment that may not yet be severe or pervasive. These and similar actions should theoretically increase the expected costs of liability for employers and help combat the economic incentives to adversely act against a harassment victim. And now is the time to take these actions—in the wake of a national movement to address the prevalence of workplace harassment.

CONCLUSION

As illustrated in the 2016 MSPB survey data and the EEOC data analyzed in this Article, victims of harassment are very likely to experience additional adverse employment actions as a result of that harassment. Twenty-two percent

176. H. Substitute No. 1 for H.B. 360, 149th Gen. Assemb., Reg. Sess. (Del. 2018).

177. *Harris v. City of Santa Monica*, 294 P.3d 49, 55 (Cal. 2013). For a discussion of other court interpretations of the causation standard see *Koai*, *supra* note 167, at 783. At least one bill has been proposed in the Senate and the House of Representatives that would adopt a motivating factor standard for retaliation claims. BE HEARD in the Workplace Act, S. 1082, 116th Cong. (2019); Protecting Older Workers Against Discrimination Act, H.R. 1230, 116th Cong. (2020).

to fifty percent of the victims who believed that they experienced harassment in the federal government between 2014 and 2016 experienced some adverse employment action as a result of the harassment, and upwards of sixty-eight percent of harassment claims filed with the EEOC include a retaliation claim.

The consequences of harassment in the workplace are severe, and the consequences are even greater when adverse employment actions occur and when victims fail to report. Not only is it necessary to decrease the likelihood of retaliation to increase reporting, but because an organization's tolerance for harassment directly impacts the likelihood of future harassment, it is also necessary to decrease harassment more directly. While the law has protections in place to reduce the likelihood of workplace harassment and the likelihood of experiencing adverse employment actions, including the antidiscrimination and antiretaliation provisions of Title VII, these standards have been greatly narrowed through case law over the previous twenty years and likely do not adequately deter retaliation following harassment.

Following *Faragher/Ellerth*, an employer should be less likely to act against a harassment victim when the harasser is a supervisor and when the victim reports the harassment. But the empirical analyses presented in this Article confirm that these legal standards have not done enough. The results confirm that victims of sexual harassment still have a reasonable fear that reporting the harassment will increase their likelihood of experiencing an adverse employment action. In addition, individuals who were harassed by their supervisor as compared to their coworker were upwards of 100% percent more likely to experience retaliation, supporting that supervisors use their agency relationship when harassing employees and that employers are more likely to act against a non-supervisor victim than a supervisor harasser.

Certain standards could be tailored to address the prevalence of adverse employment actions in the workplace with support from the empirical results of this Article. For example, if *Faragher/Ellerth* remains good law, state legislatures could consider removing the internal reporting requirement (which is not required for other forms of discrimination), broadening the definition of supervisor, and clarifying that internal reports always qualify as protected activities. The likelihood of employer liability for adverse actions occurring as a result of harassment must be raised to lessen the prevalence of retaliation following harassment, and in turn, to encourage victims to report and to deter workplace harassment altogether.