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When Just Saying "No" is Not Enough: How an Employee Who Rejects a Supervisor's Sexual Advances May Not be Protected from Retaliation--And What the Supreme Court Can Do About It

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WHEN JUST SAYING “NO” IS NOT ENOUGH: HOW AN EMPLOYEE
WHO REJECTS A SUPERVISOR’S SEXUAL ADVANCES MAY NOT
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I. INTRODUCTION

A. The Societal Importance of Title VII of the Civil Rights Act of 1964

Imagine a scenario where a male employer propositions a female employee who is eager to move up the corporate ladder. He asks her for sexual favors while at work, and she expressly rejects his advances. Although she is an exemplary employee, the female employee is subsequently terminated from the company as a result of her rejection of her supervisor's advances. Would she have a retaliation claim against the employer? If she lives within the geographical boundaries of the Fifth Circuit, the answer may very well be "no,"¹ but the Eighth Circuit might disagree and allow the suit if she lives within its jurisdiction.² Unfortunately, since the Supreme Court has not directly addressed the issue and given direction to the lower courts, whether the former employee has a retaliation claim against her employer would likely depend on where she lives.

To determine whether an employee has a retaliation claim against an employer, one must examine Title VII of the Civil Rights Act of 1964, which forbids discrimination on the basis of an "individual's race, color, religion, sex, or national origin."³ Described as the "most important legislation of the twentieth century,"⁴ the Act "reflected for America a new sense of national identity, an America no longer ambivalent about who it included or what its values were."⁵

1. See *LeMaire v. La. Dep't of Transp. & Dev.*, 480 F.3d 383, 389 (5th Cir. 2007) (finding that an employee's rejection of a supervisor's sexual advances was not a protected activity, and therefore the employee's retaliation claim failed).

2. See *Ogden v. Wax Works, Inc.*, 214 F.3d 999, 1007 (8th Cir. 2000) (holding that an employee engaged in a protected activity for purposes of a retaliation claim by rejecting a supervisor's sexual advances).

3. 42 U.S.C. § 2000e-2 (2006).

4. D. Marvin Jones, *The Death of the Employer: Image, Text, and Title VII*, 45 VAND. L. REV. 349, 350 (1992).

5. *Id.* at 351. Title VII symbolizes a point in our nation's history where America sought to rise above the racism of the past and eliminate discrimination in

Interestingly enough, however, discrimination based upon one's sex was not originally a part of the Act. Because the addition of this category has had significant ramifications since its passage in 1964, "one must infer a Congressional intention that such legislation be effective to carry out its underlying social policy—which in this case is to eradicate every instance of sex-based employment discrimination that is not founded upon a bona fide occupational qualification."⁶ Thus, it is important to look at the history of the Act to determine how the addition of sex as a forbidden basis of discrimination should be understood and interpreted in the employment context.

B. How Sex as a Forbidden Basis of Discrimination was Added to Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964 was Congress' first successful attempt to protect women and minorities engaged in private employment from discrimination.⁷ The Act originally did not protect against discrimination based on one's sex. Howard Smith, a congressman of Virginia who did not support the Act, made the addition of sex as a forbidden basis of discrimination as a floor amendment without any previous legislative hearings or debates.⁸ One academic who examined the history of the Civil Rights Act concluded that "it is abundantly clear that a principal motive in introducing [the floor amendment] was to prevent passage of the basic legislation being considered by Congress, rather than solicitude for women's employment rights."⁹ Congressman Smith, however, maintained that

the workplace. *Id.* "If discrimination in the workplace was a stone in the path of national progress, Title VII would be the instrument by which it was rolled away." *Id.*

6. Leo Kanowitz, *Sex-Based Discrimination in American Law III: Title VII of the 1964 Civil Rights Act and the Equal Pay Act of 1963*, 20 HASTINGS L.J. 305, 312 (1968).

7. WILLIAM F. PEPPER & FLORYNCE R. KENNEDY, SEX DISCRIMINATION IN EMPLOYMENT 17-18 (noting that although "basic cultural and biological differences exist between men and women," employers have used such differences to discriminate "without a firm basis in reason or fact, and now, since the passage of Title VII, without a basis in law").

8. 110 CONG. REC. 2577 (1964).

9. Kanowitz, *supra* note 6, at 311 (citations omitted). "Had the sex provisions of Title VII been presented then as a separate bill, rather than being coupled as they

he was “very serious about this amendment” and that it had “been offered several times before, but it was offered at inappropriate places in the bill.”¹⁰ He further stated he did “not think it can do any harm to this legislation; maybe it can do some good.”¹¹ The amendment passed with little discussion by a vote of 168 - 133,¹² but its impact has had profound implications in the workplace environment.

Accordingly, while the employment relationship has historically been an “at-will” relationship, meaning that the employer or employee may end the relationship at any time, with or without cause or reason and suffer no legal liability for doing so,¹³ Title VII of the Civil Rights Act sets out specific limitations to the at-will relationship. The Act makes it illegal for employers to engage in any unlawful employment practice, including not hiring a person based on one’s sex or depriving a person of other opportunities associated with the workplace based on gender.¹⁴

While 42 U.S.C. § 2000e-3 of Title VII of the Civil Rights Act protects the employee from unwelcome sexual advances or hostile activities based on one’s sex,¹⁵ it also protects the employee who opposes such unlawful employment practices from retaliation.¹⁶ The

were in an effusion of Congressional gimmickry with legislation aimed at curbing racial and ethnic discrimination, their defeat in 1964 would have been virtually assured.” *Id.* at 310.

10. 110 CONG. REC. 2577 (1964).

11. *Id.*

12. *Id.* at 2584.

13. Deborah A. Ballam, *Employment-At-Will: The Impending Death of a Doctrine*, 37 AM. BUS. L.J. 653, 653 (2000).

14. 42 U.S.C. § 2000e-2(a) (2006).

15. PEPPER & KENNEDY, *supra* note 7, at 41. Discrimination based on one’s sex forbids any employer action that denies the privileges of employment to a person based on sexual requirements or sexual behavior. *Id.* This includes “sexually related threats, intimidation or coercion,” as well as “pressures imposed upon an employee by a supervisor . . . in an effort to coerce desired sexual behavior. . . .” *Id.*

16. BARBARA LINDEMANN & DAVID D. KADUE, *SEXUAL HARASSMENT IN EMPLOYMENT LAW* 51, 275 (The Bureau of National Affairs 1995) (1992). The common defenses that an employer might assert after an employee has initiated a retaliation claim are that the employee’s protest was too outrageous; the employee could not have reasonably believed the challenged employment practice is unlawful under Title VII; the employer was not aware of the employee’s opposition to the alleged unlawful practice; or that the employee was disciplined for “legitimate business reasons” and not for retaliation based on the employee’s participation or

Supreme Court articulated differences in the purposes of the anti-discrimination provision and the anti-retaliation provision of § 2000e-3.¹⁷ Specifically, while the primary objective of the anti-discrimination provision is to protect employees based on "racial, ethnic, religious, or gender-based status," the purpose of the anti-retaliation provision is to prevent an employer from retaliating against an employee who seeks to enforce the guarantees of the Act.¹⁸ Although the Supreme Court set a high threshold for establishing claims of sexual harassment,¹⁹ it has been less strict in interpreting retaliation claims. In making this distinction, the Court examined the purposes of the two types of claims, finding that

The anti-discrimination provision seeks a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status. The anti-retaliation provision seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees.²⁰

It is now well settled that an employer may not *discriminate* against an employee based on his or her gender by sexually harassing him or her.²¹ The Supreme Court has opined that the test for whether

opposition. *Id.* at 276.

17. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006). The Supreme Court opined that "the anti-retaliation provision, unlike the substantive provision, is not limited to discriminatory actions that affect the terms and conditions of employment." *Id.* at 64.

18. *Id.* at 63.

19. *See, e.g., Clark County Sch. Dist. v. Breeden*, 532 U.S. 268 (2001). The Supreme Court held that "no reasonable person" would believe that an employer's "single incident" of sexual harassment violated Title VII of the Civil Rights Act of 1964. *Id.* at 271.

20. *Burlington*, 548 U.S. at 63 (citation omitted).

21. The Equal Employment Opportunity Commission (EEOC) has defined sexual harassment as "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" provided that the employer: (i) explicitly or implicitly requires the employee to submit to the conduct as a condition of employment, (ii) bases employment decisions on the employee's willingness to engage in such conduct, or (iii) creates a hostile work environment if the employee refuses to engage in the conduct. 29 C.F.R. § 1604.11(a) (1972). While EEOC

sexual harassment has occurred is not a “mathematically precise test” and requires the Court to evaluate the totality of the circumstances.²² The Supreme Court has included unwelcome sexual advances, requests for sexual favors, and other verbal or physical sexual communication in its definition of sexual harassment.²³ However, the Supreme Court has also noted that some behaviors clearly do not implicate a sexual harassment claim. For example, “‘simple teasing,’ offhand comments, and isolated incidents (unless extremely serious)” do not amount to a sexual harassment claim.²⁴

Although the Supreme Court has set clear definitional boundaries for what behaviors may constitute sexual harassment for a *discrimination* claim, it has not decided the issue of whether activities such as an employee rejecting an employer’s sexual advances may also qualify as a protected activity for the purpose of establishing a *retaliation* claim.

This Comment proceeds in four parts. Part II examines the necessary elements to prove a *prima facie* case of retaliation against an employer, one of which is that the employee engaged in a protected

guidelines are not binding on the courts, most courts, including the Supreme Court, look to EEOC findings for guidance when defining sexual harassment. *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986) (stating that courts should look to EEOC findings for guidance since the findings are based on the agency’s informed and experienced judgment); Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 65-66 (2006) (deferring to the EEOC’s interpretation that the anti-retaliation provision provides broad coverage to the employee).

22. *Harris v. Forklift Sys.*, 510 U.S. 17, 22-23 (1993). In evaluating the totality of the circumstances, factors to consider are “the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.” *Id.* at 23.

23. *Burlington*, 548 U.S. at 63. By including these sorts of behaviors in its definition of sexual harassment, the Supreme Court follows its standard set forth in *Harris v. Forklift Systems, Inc.*, which takes a “middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a chological injury.” *Harris v. Forklift Sys.*, 510 U.S. 17, 21 (1993).

24. *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998). The court noted that it had “made it clear that conduct must be extreme to amount to a change in the terms and conditions of employment” *Id.* Such a distinction between conduct that is extreme and conduct that is not extreme filters out complaints attacking “the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing.” LINDEMANN & KADUE, *supra* note 16, at 175.

activity. Part II compares the two separate clauses outlined in 42 U.S.C. § 2000e-3, the participation clause and the opposition clause, which define the parameters of what constitutes a protected activity for purposes of a retaliation claim. In addition, Part II focuses on the circuit splits in applying the opposition clause standard, examining the rationale as to why circuits that have analyzed the opposition clause of 42 U.S.C. § 2000e-3 have come to contradictory holdings.

Part III emphasizes the importance of the Supreme Court resolving the conflict among the circuits as to whether an employee's rejection of a supervisor's sexual advances constitutes a protected activity. Part III explores how the Court would likely resolve the issue, particularly in light of the recent Supreme Court ruling in *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*.²⁵

Finally, Part IV examines how the Supreme Court should rule on the issue of whether rejecting a supervisor's sexual advances in the workplace is a protected activity for purposes of a retaliation claim under § 2000e-3. Part IV advances a social science argument and a statistics argument to support the ultimate conclusion that rejecting a supervisor's sexual advances should constitute a protected activity. Additionally, Part IV asserts the Supreme Court should give appropriate deference to the Equal Employment Opportunity Commission (EEOC), the federal administrative agency which enforces laws prohibiting retaliation in the workplace, including Title VII of the Civil Rights Act of 1964.

II. LOGISTICS OF A RETALIATION CLAIM

A. *The Prevalence of Retaliation in the Workplace*

Retaliation is prevalent in the workplace, comprising a significant portion of claims asserted in discrimination cases.²⁶ For example, in 2007, the EEOC received 26,663 claims of retaliation,²⁷ compared to a

25. *Crawford v. Metro. Gov't of Nashville & Davidson County, Tenn.*, 129 S. Ct. 846 (2009).

26. Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18 (2005); *see also infra* Part IV.A.

27. Equal Employment Opportunity Commission, *Retaliation*, <http://www.eeoc.gov/types/retaliation.html> (last visited Feb. 15, 2009).

total of 12,510 claims of sexual harassment.²⁸ Retaliation claims increased dramatically from 1997, where 22.6% of the total 80,680 charges were retaliation claims, to 2007, where 32.3% of the total 82,792 charges were retaliation claims.²⁹ The increase in the number of retaliation claims may have come about partially because retaliation claims are often more successful than discrimination claims.³⁰ This may be due in part to the fact that the EEOC has defined the anti-retaliation provision as exceptionally broad,³¹ and courts have found exceptions to remedial statutes such as Title VII should be interpreted narrowly.³²

B. The Prima Facie Case of a Retaliation Claim

Because a retaliation claim may be more successful than a discrimination claim, a functional understanding of the elements that comprise a retaliation claim is necessary to determine the scope of such claims. Once the scope is defined, one may evaluate those employer actions, such as sexually propositioning an employee, which may give rise to an employee-initiated retaliation claim against the employer.

Section 2000e-3 of Title VII of the Civil Rights Act of 1964 is an anti-retaliation provision that provides that

28. Equal Employment Opportunity Commission, *Sexual Harassment*, http://www.eeoc.gov/types/sexual_harassment.html (last visited Feb. 15, 2009).

29. Equal Employment Opportunity Commission, *Charge Statistics*, <http://www.eeoc.gov/stats/charges.html> (last visited Feb. 15, 2009).

30. *See* *Quinn v. Green Tree Credit Corp.*, 159 F.3d 759, 762 (2d Cir. 1998) (opining “[i]t sometimes happens—more frequently than might be imagined—that an employee whose primary claim of discrimination cannot survive pre-trial dispositive motions is able to take to trial the secondary claim that he or she was fired or adversely affected in retaliation for asserting the primary claim”).

31. 2 EEOC Compliance Manual § 8, p. 8-13 (1998); *see also* *Jencks v. Modern Woodmen of Am.*, 479 F.3d 1261, 1264 (10th Cir. 2007) (determining that the anti-retaliation provision of Title VII be construed liberally); discussion and sources cited *supra* note 21.

32. *Cobb v. Contract Transp., Inc.*, 452 F.3d 543, 559 (6th Cir. 2006) (explaining that narrowly construing exceptions to remedial statutes follows the “traditional canons of statutory interpretation.”).

“[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because [the employee] has opposed any practice made an unlawful employment practice . . . or because [the employee] has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.”³³

The Supreme Court has interpreted § 2000e-3 of Title VII as “[m]aintaining unfettered access to statutory remedial mechanisms.”³⁴

The Supreme Court has held the employee bears the initial burden of establishing a prima facie case of employer retaliation.³⁵ The employee must provide evidence establishing: (i) that he or she was engaged in a statutorily protected activity; (ii) that the employer knew of the statutorily protected activity and took an adverse employment action against the employee; and (iii) that a causal connection exists between the two.³⁶ Once the employee produces the necessary evidence, the burden then shifts to the employer to provide a legitimate, non-discriminatory motive for its employment decision.³⁷ Finally, the court affords the employee the opportunity to show that the employer’s stated motive for its decision is in actuality a pretext for the prohibited retaliation.³⁸

C. The Participation Clause as Compared to the Opposition Clause

Section 2000e-3 contains two separate clauses: the “participation clause” and the “opposition clause.” These clauses define the parameters of what constitutes a “protected activity” for purposes of a retaliation claim. In other words, an employee who engages in activities under either the “participation clause” or activities under the

33. 42 U.S.C. § 2000e-3(a) (2006).

34. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997).

35. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

36. LAWRENCE SOLOTOFF & HENRY S. KRAMER, *SEX DISCRIMINATION AND SEXUAL HARASSMENT IN THE WORKPLACE* 3-64 (Law Journal Press 2007) (1994); *see also* *LeMaire v. La. Dept. of Transp. & Dev.*, 480 F.3d 383, 388 (5th Cir. 2007); *Boumehti v. Plastag Holdings, LLC*, 489 F.3d 781, 792 (7th Cir. 2007); *Xin Liu v. Amway Corp.*, 347 F.3d 1125, 1143-44 (9th Cir. 2003).

37. *McDonnell Douglas*, 411 U.S. at 802.

38. *Id.* at 804.

“opposition clause” has engaged in a protected activity for the purposes of bringing a retaliation claim.³⁹

The participation clause of § 2000e-3 refers to the employee who “has made a charge, testified, assisted, or participated” in a discrimination claim. Among other things, this clause protects the employee who has filed an EEOC complaint or indicated an intent to file an EEOC complaint of employment discrimination.⁴⁰ It also protects the employee who has testified on behalf of another employee who has filed a sexual harassment charge; the employee who has refused to testify at the request of his or her employer; and the employee who has filed charges against prior employers.⁴¹

The opposition clause, in contrast, protects the employee who “has opposed any practice made an unlawful employment practice.”⁴² The purpose of the opposition clause is to deter a supervisor from invoking retaliatory measures against the employee who has opposed the supervisor’s unlawful employment practices.⁴³ In order for a court to determine whether an employee is protected by the opposition clause, it must ask two questions. First, the court must determine whether the employee’s conduct was oppositional in nature, and second, if the employee’s conduct was oppositional, whether the oppositional conduct was directed at an employment practice made unlawful by Title VII.⁴⁴

39. FRANCES ACHAMPONG, *WORKPLACE SEXUAL HARASSMENT LAW—PRINCIPLES, LANDMARK DEVELOPMENTS, AND FRAMEWORK FOR EFFECTIVE RISK MANAGEMENT* 23 (Quorum Books 1999). As one circuit court has noted, “[t]he distinction between employee activities protected by the participation clause and those protected by the opposition clause is significant because federal courts have generally granted less protection for opposition than for participation in enforcement proceedings.” *Booker v. Brown & Williamson Tobacco, Inc.*, 879 F.2d 1304, 1312 (6th Cir. 1989).

40. *See generally* *Mariani Colon v. Dep’t of Homeland Sec. ex. rel. Chertoff*, 511 F.3d 216, 223 (1st Cir. 2007) (finding that contacting the EEOC is a protected activity); *Gifford v. Atchison, Topeka & Santa Fe Ry. Co.*, 685 F.2d 1149, 1156 (9th Cir. 1982) (making no legal distinction between filing an EEOC charge and indicating an intent to file an EEOC charge).

41. LINDEMANN & KADUE, *supra* note 16, at 276-77.

42. 42 U.S.C. § 2000e-3(a) (2006).

43. *Manoharan v. Columbia Univ. Coll. of Physicians and Surgeons*, 842 F.2d 590, 593 (2d Cir. 1988).

44. Brianne J. Gorod, *Rejecting “Reasonableness”: A New Look at Title VII’s*

In answering the first question, most courts agree the opposition clause, "by definition, applies in the absence of a formal charge of discrimination. It protects a variety of precharge and noncharge conduct, ranging from the informal voicing of complaints to supervisors to the formal invocation of an employer's internal grievance procedures."⁴⁵ Although the lower courts have indicated what sorts of activities might be considered a protected activity under the opposition clause, the Supreme Court has not yet explicitly defined that conduct which it considers oppositional for purposes of a retaliation claim under the opposition clause.⁴⁶

In answering the second question, most courts have found that the employee must only show that he or she had a *reasonable belief* that

Anti-Retaliation Provision, 56 AM. U. INT'L L. REV. 1469, 1482 (2007). "[T]he Supreme Court has yet to address the first question and only recently provided limited guidance with respect to the second." *Id.* (footnote omitted). *See also* LINDEMANN & KADUE, *supra* note 16, at 278. For example, courts have systematically held that a plaintiff may prevail on his or her retaliation claim even if a jury determines the employer's activity was not unlawful under Title VII of the Civil Rights Act of 1964. Gorod, *supra*, at 1484.

45. LINDEMANN & KADUE, *supra* note 16, at 278 (citing *Rollins v. Florida Dep't of Law Enforcement*, 868 F.2d 397, 400 (11th Cir. 1989)) (noting that an employee who informally voices a complaint is protected by the opposition clause); *Armstrong v. Index Journal Co.*, 647 F.2d 441, 448 (4th Cir. 1981) (finding that informal protests, such as "voicing complaints to employers or using an employer's grievance procedures" is protected by the opposition clause); *Ferguson v. E.I. du Pont de Nemours & Co.*, 560 F. Supp. 1172, 1200 (D. Del. 1983) (recognizing that the opposition clause does not define which specific activities are protected and is therefore unclear, but finding that an employee's internal complaints to management is a protected activity); *see also* *Passer v. Am. Chem. Soc'y*, 935 F.2d 322, 331 (D.C. Cir. 1991) ("The statute itself proscribes 'discriminat[ion]' against those who invoke the Act's protections; the statute does not limit its reach only to acts of retaliation that take the form of cognizable employment actions such as discharge, transfer, or demotion.").

46. The Supreme Court only recently decided *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*, whereby the Court held an employee who participates in an internal investigation is protected by the opposition clause of 42 U.S.C. § 2000e-3. *See* *Crawford v. Metro. Gov't of Nashville and Davidson County, Tenn.*, 129 S. Ct. 846 (2009). We do not yet know how far the Supreme Court is willing to extend this holding to other types of employee conduct. It remains to be seen whether an employee who rejects a supervisor's sexual advances has engaged in conduct that is "oppositional in nature," thereby triggering protection under the opposition clause. *See* discussion *infra* Part III.A-B.

the opposed employment practice was unlawful.⁴⁷ Most courts do not limit the scope of this clause to actual violations and instead apply the “reasonable belief” standard since such a narrow interpretation would be contrary to the purpose of the opposition clause.⁴⁸ Specifically, courts are concerned that employees may not assert legitimate claims if the “reasonable belief” standard did not apply. If employees were incorrect in believing the conduct they opposed was unlawful, the employees would not be protected from retaliation.⁴⁹

The circuit courts largely agree on the standard to determine whether the opposition clause applies, looking at whether the employee’s conduct was oppositional in nature and whether the employee’s conduct was directed at an unlawful employment practice. However, courts have differed in how to apply the standard,⁵⁰ thereby coming to inconsistent findings.⁵¹

D. The Circuit Splits in Applying the Opposition Clause Standard Offer Little Guidance in Determining the Scope of a “Protected Activity”

The Supreme Court recently clarified the second element of a prima facie case of retaliation, that the employer had knowledge of the statutorily protected activity that the employee was engaged in and took an adverse employment action against the employee.⁵² The Court

47. *Trent v. Valley Elec. Ass’n Inc.*, 41 F.3d 524, 526 (9th Cir. 1994) (noting that the reasonable belief standard is consistent with the purpose of Title VII to eliminate employment discrimination); *see also* *McHenry v. City of Rochester*, 241 F.3d 279, 285 (2d Cir. 2001); *Alexander v. Gerhardt Enters.*, 40 F.3d 187, 195 (7th Cir. 1994); *Payne v. McLemore’s Wholesale & Retail Stores*, 654 F.2d 1130, 1137-38 (5th Cir. 1981); *Sisco v. J.S. Alberici Constr. Co.*, 655 F.2d 146, 150 (8th Cir. 1981).

48. LINDEMANN & KADUE, *supra* note 16, at 280.

49. *Id.*

50. *Gorod*, *supra* note 44, at 1484. The standard employed by the appellate courts has resulted in “significant variation in [its] application,” in large part because “the standard actually says little about what a plaintiff must show in practice to establish that her conduct is protected.” *Id.*

51. *See* *LeMaire v. La. Dep’t of Transp. & Dev.*, 480 F.3d 383 (5th Cir. 2007); *Ogden v. Wax Works, Inc.*, 214 F.3d 999 (8th Cir. 2000).

52. SOLOTOFF & KRAMER, *supra* note 36, at 63-64; *see also* *LeMaire*, 480 F.3d at 388; *Boumehdi v. Plastag Holdings, LLC*, 489 F.3d 781, 792 (7th Cir. 2007); *Xin Liu v. Amway Corp.*, 347 F.3d 1125, 1143-44 (9th Cir. 2003).

examined the parameters of an "adverse employment action," noting that the purpose of the anti-retaliation provision is to prohibit employers from retaliating against those employees who might complain of discrimination to the EEOC.⁵³ In regard to clarifying an adverse employment action, the Court stated that "normal petty slights, minor annoyances, and simple lack of good manners will not create such deterrence."⁵⁴

Although the Supreme Court cleared up confusion as to the definition of an "adverse employment action" in *Burlington Northern and Santa Fe Railway Co. v. White*, the Court has yet to fully define the boundaries of a "protected activity" under the opposition clause of § 2000e-3. Therefore, as noted above, confusion exists in the lower courts. In particular, the lower courts have not come to a consensus as to whether an employee's rejection of a supervisor's sexual advances—without more—qualifies as a statutorily "protected activity" under the opposition clause.

1. Two Federal Circuit Courts Have Specifically Addressed the Issue, Arriving at Differing Conclusions

a. The Fifth Circuit

Only two federal circuits, the Fifth Circuit and the Eighth Circuit, have directly addressed the issue of whether an employee who rejects a supervisor's sexual advances has engaged in a protected activity under the opposition clause of § 2000e-3 for purposes of a retaliation claim, with the courts arriving at differing conclusions.⁵⁵ The Fifth Circuit held in *LeMaire v. Louisiana Department of Transportation and Development* that a person who rejects an employer's sexual advances has not engaged in a protected activity.⁵⁶ *LeMaire* involved

53. *Burlington N. and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67-68 (2006).

54. *Id.* at 68.

55. *Compare, e.g., LeMaire*, 480 F.3d at 389 (finding that an employee's rejection of a supervisor's sexual advances was not a protected activity, and therefore the employee's retaliation claim failed) *with Ogden*, 214 F.3d at 1007 (holding that an employee has engaged in a protected activity for purposes of a retaliation claim by rejecting a supervisor's sexual advances).

56. *LeMaire*, 480 F.3d at 388.

an employee who refused his supervisor's sexual advances.⁵⁷ Following this rejection, LeMaire's supervisor ordered LeMaire to spray herbicide, a task that LeMaire argued was retaliatory since his job consisted of operating and maintaining drawbridges.⁵⁸ The court found that LeMaire had not engaged in a protected activity for purposes of his retaliation claim.⁵⁹ In reaching this conclusion, the court stated that at the time of the supervisor's order to spray herbicide, LeMaire had not yet complained of the sexual advances, and that rejection of the advances without such a complaint was not a protected activity.⁶⁰

In another Fifth Circuit case, *Frank v. Harris County*, Yolanda Frank was terminated from her position as deputy constable for Harris County.⁶¹ Frank alleged that she was terminated for rejecting, though not reporting, at least six sexual advances initiated by her supervisor, Constable Chambers.⁶² In assessing Frank's retaliation claim, the Fifth Circuit found that Frank failed to engage in a protected activity, giving no credence to Frank's proposition that her express rejection of Chambers' sexual advances itself constituted a protected activity.⁶³ The court stated that Frank provided "no authority" for her position, and therefore her retaliation claim failed.⁶⁴

b. The Eighth Circuit

In contrast to the Fifth Circuit's findings in *LeMaire* and *Frank*, the Eighth Circuit ruled in *Ogden v. Wax Works, Inc.* that an employee who rejects an employer's sexual advances has engaged in a protected activity.⁶⁵ Ogden's supervisor made several sexual advances to

57. *Id.* at 389.

58. *Id.* at 385.

59. *Id.* at 389.

60. *Id.* In addition, the court noted that in a previous unpublished case, the Fifth Circuit held that an employee's single "express rejection" of an employer's sexual advances was not protected. *Id.* (citing *Frank v. Harris County*, 118 F. App'x 799, 804 (5th Cir. 2004)).

61. *Frank*, 118 F. App'x at 800.

62. *Id.* at 801.

63. *Id.* at 804.

64. *Id.*

65. *Ogden v. Wax Works, Inc.*, 214 F.3d 999, 1007 (8th Cir. 2000).

Ogden, including grabbing her by the waist and consistently propositioning her.⁶⁶ He conditioned her yearly evaluation, and consequently her yearly raise, on Ogden accepting these sexual advances.⁶⁷ After repeatedly rejecting her supervisor's advances, Ogden eventually quit her job without receiving the evaluation and filed a retaliation claim against her employer.⁶⁸ Although Ogden's former employer argued she had not engaged in a protected activity, the Eighth Circuit decided that Ogden's rejection of her supervisor's advances was in opposition to her employer's discriminatory practices, finding that Ogden engaged in "the most basic form of protected activity" when she told him to stop his unlawful conduct.⁶⁹

2. *The Silent Circuits*

In addition to the conflicting decisions of the Fifth and Eighth Circuits on this issue, several other circuits have discussed the scope of the opposition clause of § 2000e-3 without expressly ruling on the issue. The Seventh Circuit, for example, has avoided resolving this dispute, deciding relevant cases based on lack of an adverse employment action or lack of an employee's reasonable belief that the action opposed was a Title VII violation.⁷⁰

The Second Circuit has reacted similarly, deciding not to rule on whether rejection of an employer's sexual advances constitutes a protected activity, holding that a ruling on the issue would have had no bearing on the outcome of the case before it.⁷¹ Several district

66. *Id.* at 1003.

67. *Id.* at 1003-04.

68. *Id.* at 1004.

69. *Id.* at 1007.

70. *See* Murray v. Chi. Transit Auth., 252 F.3d 880, 890 (7th Cir. 2001). The court acknowledged that no precedent existed in the Seventh Circuit as to whether rejection of an employer's sexual advances constitutes a protected activity for purposes of a retaliation. *Id.* However, the court chose not to decide the issue since the employee did not demonstrate an adverse employment action. *Id.*; *see also* Tate v. Executive Mgmt. Servs., Inc., 546 F.3d 528, 532-33 (7th Cir. 2008). The court chose not to resolve the issue since the employee did not show a reasonable belief that the employment practice he opposed was unlawful. *Id.*

71. Fitzgerald v. Henderson, 251 F.3d 345, 366 (2d Cir. 2001) (finding that the employee's retaliation claim was "coextensive" with her discrimination claim in this circumstance and would not warrant a separate award).

courts within this jurisdiction, however, have opined on the issue, coming to differing conclusions.⁷² One district court within this circuit has decided “even the broadest interpretation of a retaliation claim cannot encompass instances where the alleged ‘protected activity’ consists simply of declining a harasser’s sexual advances If it were otherwise, every harassment claim would automatically state a retaliation claim as well.”⁷³ The court noted the employer did not “mistreat, demote, fire, discipline, or punish” the employee after she rejected the sexual advances and that the employee made no effort to report the advances, though posters were displayed throughout the workplace with phone numbers to report such behavior.⁷⁴ Another district court in the same circuit, however, has interpreted the breadth of “protected activities” under the opposition clause more broadly, noting that an employer who engages in sexual harassment against an employee is acting unlawfully, and that the employee’s rejection of the behavior therefore conforms to the purpose of the opposition clause.⁷⁵

While the Second and Third Circuits have not squarely ruled on this particular issue, the circuits have confronted the issue of what constitutes a protected activity in regard to retaliation in response to a race discrimination and an age discrimination claim, respectively.⁷⁶

72. The Second Circuit has declined to review the analysis of the district courts in interpreting the scope of protected activities under the opposition clause or otherwise to resolve this conflict.

73. *Del Castillo v. Pathmark Stores, Inc.*, 941 F. Supp. 437, 438-39 (S.D.N.Y. 1996). After the employee rejected her supervisor’s sexual advances, the supervisor ordered her to move heavy items beyond her capabilities to lift, and she was subsequently injured. *Id.* at 439. The court held that although she had made the sufficient minimal showing necessary to survive a summary judgment motion on her sexual harassment claim, her allegations concerning her supervisor’s conduct did not rise to the level necessary to prove a retaliation claim. *Id.*

74. *Id.* at 439.

75. *Little v. Nat’l Broad. Co., Inc.*, 210 F. Supp. 2d 330, 387 (S.D.N.Y. 2002). The court found that the “prohibition against retaliation is intended to protect employees who resist unlawful workplace discrimination. Sexual harassment by an employer or supervisor is an unlawful practice, and an employee’s refusal is a means of opposing such unlawful conduct.” *Id.*

76. *See Barber v. CSX Distrib. Servs.*, 68 F.3d 694 (3d Cir. 1995); *Sumner v. U.S. Postal Serv.*, 899 F.2d 203 (2d Cir. 1990).

The Second Circuit held in *Sumner v. United States Postal Service* that

In addition to protecting the filing of formal charges of [race] discrimination, [the] opposition clause protects as well informal protests [such as] making complaints to management, writing critical letters to customers, protesting against discrimination by industry or by society in general, and expressing support of co-workers who have filed formal charges.⁷⁷

The Third Circuit adopted a more restrictive view of the opposition clause in an age discrimination case decided five years after *Sumner*, holding that although the plaintiff had voiced his opinion that he had been unfairly treated in the workplace, he had not "explicitly or implicitly allege[d]" the reason for the unfair treatment was due to his age, and therefore had not adequately stated a claim for retaliation under § 2000e-3.⁷⁸

Extrapolating and comparing the Second and Third Circuit's rulings in their race and age discrimination cases to the present issue, it is likely that these circuits may decide that rejection of an employer's sexual advances is a protected activity in regard to a retaliation claim, *provided that* the employee explicitly or implicitly alleges that the adverse employment action is in response to the rejection of the employer's sexual advances. Thus, although this view would not be as expansive as the Eighth Circuit's holding that *mere rejection* of an employer's sexual advances, without more, constitutes a protected activity, it would allow an employee the opportunity to bring a retaliation claim if he or she explicitly or implicitly communicated a causal connection between the protected activity in which he or she was engaged and a consequent adverse employment action taken by the employer.

Like the Second, Third, and Seventh Circuits, the Fourth Circuit also has not decided the issue of whether rejection of an employer's sexual advances constitutes a protected activity in regard to a retaliation claim. However, the Fourth Circuit has indicated it will adopt a broad interpretation of the term "protected activity," cautioning in *Armstrong v. Index Journal* that a protected activity is

77. *Sumner*, 899 F.2d at 209.

78. *Barber*, 68 F.3d at 701-02.

not necessarily one that rises to the level of a formal complaint.⁷⁹ Interpreting *Armstrong*, one district court within the Fourth Circuit held that “voicing complaints to employers or using an employer’s grievance procedures” are only examples of what may constitute a protected activity and not an exhaustive list of protected activities.⁸⁰ Accordingly, the district court in *Fleming* found that “an employer cannot retaliate against an employee for engaging in protected activity, which includes an employee’s refusal of the sexual advances of a supervisor or employer.”⁸¹ Moreover, responding to the idea expressed in other district courts that every harassment claim would automatically state a retaliation claim if rejection of a supervisor’s sexual advances constituted a protected activity,⁸² the *Fleming* court held:

[N]ot every sexual harassment claim would automatically state a retaliation claim [T]he gravamen of a sexual harassment case is sexual harassment, while the gravamen of a retaliation case is retaliation. If the employer is motivated to take adverse employment action because of retaliatory animus, it is properly categorized as a retaliation claim. Even if permitting the refusal of a supervisor’s sexual advances did permit a plaintiff to bring a retaliation claim and sexual harassment claim, there has been no explanation as to the harm that such a result would have. The

79. *Armstrong v. Index Journal*, 647 F.2d 441, 448 (4th Cir. 1981) (holding that although the opposition clause “was not intended to immunize insubordinate, disruptive, or nonproductive behavior at work,” it encompassed “informal protests” such as complaints to one’s employer).

80. *Fleming v. S.C. Dep’t of Corr.*, 952 F. Supp. 283, 287 n.4 (D.S.C. 1996).

81. *Id.* at 288.

82. *See Del Castillo v. Pathmark Stores, Inc.*, 941 F. Supp. 437, 438-39 (S.D.N.Y. 1996). The district court rejected an employee’s claim of unlawful retaliation, finding that her supervisor “did not mistreat, demote, fire, discipline, or punish plaintiff in any way.” *Id.* at 439. Rather, “[t]he sole act of ‘retaliation’ . . . is that her . . . supervisor, after being rebuffed in his unwanted sexual advances, ‘forced Plaintiff to move material which was beyond her physical capabilities’” *Id.* The court remarked that “even the broadest interpretation of a retaliation claim cannot encompass instances where the alleged ‘protected activity’ consists simply of declining a harasser’s sexual advances . . .” *Id.* at 438-39.

plaintiff would always be separately required to separately prove the elements necessary under both causes of actions.⁸³

However, like the Second Circuit,⁸⁴ the Fourth Circuit has not reviewed this district court's ruling.

III. CONJECTURE AS TO HOW THE SUPREME COURT WOULD RULE ON THIS ISSUE

Based on the fact that the Fifth and Eighth Circuits have come to differing conclusions as to whether an employee's rejection of a supervisor's sexual advances is a protected activity, and also because the other circuits have either not addressed or not squarely ruled on the issue, the Supreme Court should resolve the controversy. Applying the Supreme Court's recent decision in *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee* to its previous jurisprudence in this area,⁸⁵ it seems likely the Supreme Court would rule that rejecting a sexual advance is a protected activity, despite the Court's more stringent rulings in regard to discrimination claims.⁸⁶

A. *The Crawford Spin*

Supporting the proposition that the Court would find a protected activity in these types of cases is the recent Supreme Court ruling in *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*.⁸⁷ In this case, employee Vicki Crawford cooperated with an internal investigation of inappropriate sexual

83. *Fleming*, 952 F. Supp. at 295.

84. *See Del Castillo*, 941 F. Supp. at 438-39.

85. *See, e.g., Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006) (expanding the anti-retaliation provision beyond "workplace-related or employment-related retaliatory acts and harms" rather than limiting the scope to strictly "ultimate employment decisions"); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997) (broadening the definition of "employee" within the context of § 2000e-3 to include former employees as well as current employees).

86. *See discussion supra* Part II.A.

87. *Crawford v. Metro. Gov't of Nashville & Davidson County, Tenn.*, 129 S. Ct. 846 (2009).

conduct by employee Dr. Gene Hughes.⁸⁸ She neither initiated the investigation nor filed a formal complaint.⁸⁹ Rather, Crawford merely responded to questions her employer asked about Hughes, stating he had sexually harassed her in the workplace.⁹⁰ After the investigation concluded, Crawford and the other employees who had cooperated with their employers were investigated on other grounds and eventually terminated.⁹¹ In her subsequent suit alleging unlawful retaliation under § 2000e-3, Crawford asserted that during the initial investigation when she came forward with the incidents of sexual harassment, she believed she was exercising her right to oppose unlawful behavior by participating in the investigation.⁹²

In granting a summary judgment motion made by Metropolitan, the district court held that because Crawford had not initiated the harassment complaint against Hughes, but rather had merely answered questions asked of her pursuant to an internal company investigation, she had not engaged in a protected activity for purposes of a retaliation claim under § 2000e-3.⁹³ On Crawford's appeal, the Sixth Circuit agreed, likewise finding that Crawford's complaints of sexual harassment during the company's internal investigation was not a protected activity.⁹⁴ The court determined that an employee's "opposition" must be active and consistent to qualify as a protected activity under the opposition clause of § 2000e-3.⁹⁵

88. *Id.* at 849.

89. *Id.*

90. *Id.* Additionally, two other employees accused Hughes of sexually harassing them. *Id.*

91. The employer accused Crawford of embezzlement and drug use, which Crawford states was "ultimately found to be unfounded." *Crawford v. Metro. Gov't of Nashville & Davidson County, Tenn.*, 211 F. App'x 373, 375 (6th Cir. 2006), *overruled by* 129 S. Ct. 846 (2009).

92. *Crawford*, 211 F. App'x at 374-75. Specifically, Crawford stated in an affidavit that she "opposed" Hughes's actions by participating in the investigation against him. Brief for the Petitioner at 4 n.5, *Crawford v. Metro. Gov't of Nashville & Davidson County, Tenn.*, No. 06-1595 (6th Cir. Apr. 9, 2008) (quoting R. at 12). She believed she was "exercising [her] rights under Federal law." *Id.*

93. *Crawford*, 129 S. Ct. at 850 (2009).

94. *Crawford*, 211 F. App'x at 376.

95. *Id.*

The Supreme Court subsequently granted certiorari in the case,⁹⁶ and a unanimous Court ultimately rejected the Sixth Circuit's reasoning, finding that an employee *is protected* under the opposition clause if he or she chooses to participate in an internal investigation of a supervisor's alleged discrimination.⁹⁷ In supporting its decision, the Supreme Court stated the word "'oppose' goes beyond 'active, consistent' behavior in ordinary discourse."⁹⁸ However, the Court also noted that "oppose" could be used in a different, more passive context, such as a person who opposed slavery before the Emancipation or those who oppose capital punishment today.⁹⁹ Thus, the Court reasoned a person can "oppose" conduct when responding to questions asked by an employer, just as surely as a person can "oppose" conduct when initiating the discussion, noting "nothing in the statute requires a freakish rule protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when her boss asks a question."¹⁰⁰

*B. Broadening the Crawford Reasoning to Cover an Employee's
Rejection of a Supervisor's Sexual Advances*

By interpreting the scope of the opposition clause of § 2000e-3 so broadly, the Supreme Court implies that it might construe an employee's rejecting his or her supervisor's sexual advances as a protected activity.¹⁰¹ Indeed, in deciding that an employee is protected under the opposition clause if he or she chooses merely to participate in an internal investigation, the Court indicates that the breadth of protected activities is much wider than most lower courts have

96. *Crawford*, 129 S. Ct. at 850.

97. *Id.* at 852-53.

98. *Id.* at 851.

99. *Id.* "Opposition" is defined as a "hostile or contrary action or condition." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 816 (10th ed. 1993).

100. *Crawford*, 129 S. Ct. at 851.

101. Justice Alito wrote a concurring opinion with Justice Thomas joining. Justice Alito stressed that he understood the Court's holding to only apply to employees participating in internal investigations, extending no further because opposition requires "active" and "purposive" conduct. *Crawford*, 129 S. Ct. at 854 (Alito, J., concurring). Although these two justices might disagree, it is likely the majority will not apply the strict reasoning set forth in Justice Alito's concurring opinion in future retaliation cases.

previously thought, particularly since many lower courts have interpreted the opposition clause as relating only to an “affirmative complaint or report” of the alleged sexual misconduct in violation of Title VII.¹⁰² Crawford neither initiated the investigation nor filed a formal complaint against Dr. Hughes.¹⁰³

Expanding upon the reasoning given in *Crawford* that active, consistent activities “exemplify opposition” but “are not limits of [opposition],” it is reasonable to assume the Court would find that the opposition clause covers an employee’s rejection of an employer’s sexual advances, particularly in light of the Court’s acknowledgement that the primary goal of § 2000e-3 is to keep employees from harm.¹⁰⁴ The *Crawford* decision suggests the Supreme Court understands the workplace reality that employees fear retaliation if they decide to speak out against discrimination,¹⁰⁵ and thus the Court would continue to expand upon the opposition clause in order to encourage employees to come forward with claims. In response to the *Crawford* decision, Professor Paul Secunda, an employment law scholar at Marquette University Law School, stated “[t]his holding makes sense from what the court wants employers to do—investigate and promptly correct discrimination—and what it wants employees to do—speak up and not worry about retaliation. It makes complete sense.”¹⁰⁶

102. See, e.g., *Coe v. N. Pipe Products, Inc.*, 589 F. Supp. 2d 1055, 1105 (N.D. Iowa 2008). The court stated that “[i]t is not enough [for purposes of establishing a retaliation claim] to show that the plaintiff simply deflected invitations or advances that the recipient considered improper or offensive.” *Id.*

103. *Crawford v. Metro. Gov’t of Nashville & Davidson County, Tenn.*, 211 Fed. Appx. 373, 376 (6th Cir. 2006), *overruled by* 129 S. Ct. 846 (2009).

104. *Crawford*, 129 S. Ct. at 852.

105. Joanna L. Grossman & Deborah Brake, *The Supreme Court Restores Title VII’s Protection Against Retaliation, but Employees Still Face Gaps in Retaliation Law*, Feb. 3, 2009, <http://writ.news.findlaw.com/grossman/20090203.html>. An employee who fears retaliation “might be tempted to feign ignorance, memory lapse, or worse, lie to protect an accused harasser.” *Id.* Such a response by the employee “would greatly undermine the statutory goal of voluntary compliance, and would leave the complainant out in the cold, with the discrimination unverified and unremedied.” *Id.* Nothing in Title VII requires employees to face such a predicament.” *Id.*

106. Marcia Coyle, *Lawyers Say Ruling Could Cause Increase in Retaliation Claims*, 239 THE LEGAL INTELLIGENCER 20 (2009).

IV. WHY THE SUPREME COURT SHOULD EXPAND THE DEFINITION OF A
 "PROTECTED ACTIVITY" TO INCLUDE REJECTION OF A
 SUPERVISOR'S SEXUAL ADVANCES

A. *The Social Science Argument*

Social science research indicates that legal protections against retaliation are important measures in protecting an employee from discrimination. In order for discrimination laws to remain an effective control against sexual harassment in our society, it is of paramount importance that employees do not feel that their supervisors will retaliate against them for speaking out against perceived discrimination in the workplace.¹⁰⁷

A person who is potentially subject to a lawsuit, regardless of the substantive claim, is likely to feel frustrated, particularly due to threat of injury or of defeat.¹⁰⁸ Thus, it is not surprising that those who have been discriminated against in the workplace are reluctant to report it, in large part because they are fearful of the litigation process. Further, employees, particularly women and racial minorities, subjected to discrimination do not want to perceive themselves as victims.¹⁰⁹ The tendency is to look inward and blame themselves rather than to look to an external factor such as discrimination.¹¹⁰ Even for those who do recognize employer behavior as discriminatory, many employees are reluctant to publicly and actively confront the discriminatory behavior.¹¹¹ This may be due in part to the fact that the employee is aware that he or she may have to answer "intimidating questions" and be exposed to "invasive inquiries" as a result of confronting the

107. Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 20 (2005). Because an employee's fears of retaliation may suppress his or her valid discrimination claim, "the effectiveness and very legitimacy of discrimination law turns on people's ability to raise concerns about discrimination without fear of retaliation." *Id.*

108. Robert S. Redmount, *Psychological Discontinuities in the Litigation Process*, 4 DUKE L.J. 571, 572 (1959).

109. Brake, *supra* note 107, at 26. For example, "[p]ersons who acknowledge that discrimination disadvantages their social group as a whole nonetheless tend to see themselves as the lucky exceptions, even when confronted with reason to believe that they themselves have experienced discrimination." *Id.*

110. *Id.* at 27.

111. *Id.* at 31.

discriminatory behavior.¹¹² Additionally, those who choose to report discrimination are often perceived as troublemakers.¹¹³ Research shows that a large number of individuals in the workplace dislike women and minorities who allege discrimination in the workplace, even if the allegations can be supported.¹¹⁴

Most importantly, the threat of retaliation silences many from challenging workplace discrimination.¹¹⁵ Before speaking out against discrimination, a person will typically conduct a cost-benefit analysis to determine whether he or she should speak out against the employer.¹¹⁶ If a person thinks, based on past observations, he or she may be retaliated against by his or her employer, the person will not be likely to come forward to expose the employer's unlawful practices.¹¹⁷ Further, since "[r]etaliation has heightened power to silence discrimination claims within institutions that have a high tolerance for discrimination and retaliation,"¹¹⁸ an employee who sees the employer retaliate against a colleague for confronting discrimination in the workplace is less likely to report his or her legitimate claims.

Ultimately, although "[j]udicial opinions on sexual harassment portray reporting [by filing a formal complaint] as the only reasonable course of action,"¹¹⁹ many victims are reluctant to report the unlawful

112. Larry J. Cohen & Joyce H. Vesper, *Forensic Stress Disorder*, 25 LAW & PSYCHOL. REV. 1, 8 (2001). For example, the employee may be asked probing questions which seem insulting since such questions may challenge his or her honesty or integrity. *Id.* at 10. Further, the employee may not see the relationship between the questions asked of him or her and the specific claim. *Id.*

113. *See, e.g.*, *White v. Burlington N. & Santa Fe Ry. Co.*, 364 F.3d 789, 794 (2004), *aff'd*, 548 U.S. 53 (2006). The employee testified that her supervisor informed her that a company official considered her a "troublemaker" after she filed charges with the EEOC about specific acts of workplace sexual harassment. *Id.*

114. Brake, *supra* note 107, at 32.

115. *Id.* at 25.

116. *Id.* at 37. An employee conducting such an analysis will likely find that reporting discrimination in the workplace entails high costs, particularly a fear of provoking retaliation. *Id.*

117. *Id.* at 39.

118. *Id.*

119. Anne Lawton, *Between Sylla and Charybdis: The Perils of Reporting Sexual Harassment*, 9 U. PA. J. LAB. & EMP. L. 603, 604 (2007).

behavior.¹²⁰ Thus, it is imperative that rejection of a supervisor's sexual advances, which is the only course of action most employees take in such a situation,¹²¹ is protected from retaliation.

B. The Statistics Argument

Statistical data also shows the need for more expansive legal protections to insulate employees from discrimination and subsequent retaliation in the workplace. Estimates suggest that between 40% and 60% of working women have been sexually harassed in the workplace. In male-dominated workplaces, even conservative estimates suggest that as many as 75% of women have been harassed.¹²²

The largest and most well-known survey of sexual harassment, commissioned by Congress in 1995, found that most federal employees, who made up an alarming 44% of employees who were victims of workplace discrimination, reacted to sexual harassment by doing nothing.¹²³ Of those who took action, most responded by simply asking the harasser to stop and rejecting the advances.¹²⁴ This comprised 35% of the actions taken by remaining victims, and only 12% reported the matter to a supervisor or other official.¹²⁵ Of those who chose not to file formal complaints against their employer, several indicated fears of retaliation in the workplace: 29% feared the

120. See, e.g., *id.* at 608. Professor Anne Lawson rejected sexual advances from a tenured professor. *Id.* She admits she was reluctant to report the sexual harassment out of fear that he would retaliate by voting against her during school deliberations to assess her future tenure and promotion possibilities. *Id.*

121. See discussion *infra* Part IV.B.

122. Louise F. Fitzgerald, *Science v. Myth: The Failure of Reason in the Clarence Thomas Hearings*, 65 S. CAL. L. REV. 1399, 1400-01 (1992).

123. BEN L. ERDREICH, BETH S. SLAVET, & ANTONIO C. AMADOR, *SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: TRENDS, PROGRESS, CONTINUING CHALLENGES* ix (1995). One famous example of an employee who initially did not confront sexual harassment in the workplace is Professor Anita Hill, who once worked for Supreme Court Justice Clarence Thomas. Fitzgerald, *supra* note 122, at 1402. Several senators who asserted the falsity of her later accusations against Justice Thomas referenced her initial inaction as support for their position. *Id.*

124. ERDREICH, SLAVET, & AMADOR, *supra* note 123, at 30.

125. *Id.*

work situation would become unpleasant, and 17% thought it would adversely affect their careers.¹²⁶

Similarly, after the media reported that large numbers of employees at the National Institutes of Health (NIH) had filed complaints of sexual harassment in recent years, NIH requested the General Accounting Office (GAO) to conduct a survey of its workplace to determine the prevalence and severity of the problem.¹²⁷ GAO surveyed 4,110 NIH employees, of which 32% responded by alleging sexual harassment in the workplace the previous year.¹²⁸ An astonishing 96% of those who stated they had been harassed chose not to report the unlawful behavior.¹²⁹ The employees cited varying reasons for not reporting the harassment, the most common of which were: 1) they did not believe the conduct was serious enough to report; 2) the employees chose to deal with it themselves; and 3) they chose to ignore the harassment.¹³⁰

Although these statistics represent sexual harassment in the federal workplace, the survey determined that findings in the non-federal workplace were similar.¹³¹ For example, the American Bar Association Commission on Women in the Profession reported that fewer than 10% of women lawyers who were victims of sexual assault filed a formal complaint due to fear of retaliation in the workplace.¹³² As the Seventh Circuit has opined, “[p]assive resistance is a time honored form of opposition.”¹³³

126. *Id.*

127. U.S. GEN. ACCOUNTING OFFICE, EQUAL EMPLOYMENT OPPORTUNITY: NIH’S HANDLING OF ALLEGED SEXUAL HARASSMENT AND SEX DISCRIMINATION MATTERS 1, 1 (1995), <http://www.gao.gov/archive/1995/gg95192.pdf>.

128. *Id.* Appendix III of the report describes in detail the methodology of data collection.

129. *Id.*

130. *Id.* The employees stated additional reasons, though not as common, for not reporting the harassment, such as a belief the harasser would not be punished, thoughts that the incident would not be kept confidential, and a fear of retaliation. *Id.*

131. ERDREICH, SLAVET, & AMADOR, *supra* note 123, at 19.

132. Deborah L. Rhode, *The Unfinished Agenda: Women and the Legal Profession*, 2001 A.B.A. COMM’N ON WOMEN IN THE PROFESSION 20, available at <http://www.abanet.org/ftp/pub/women/unfinishedagenda.pdf>.

133. *McDonnell v. Cisneros*, 84 F.3d 256, 262 (7th Cir. 1996).

Because it is not only prevalent, but also frighteningly customary, that employees in the workplace do not report discriminatory employer practices due to fears of retaliation, it is crucial that the Supreme Court broadens the scope of what constitutes a protected activity for purposes of a retaliation claim. Doing so will afford the necessary legal protections under the anti-retaliation provision of § 2000e-3 to those employees who merely reject sexual advances from their supervisors.

C. Deference to the EEOC

If the Supreme Court decides to take the Eighth Circuit's approach in dealing with the issue of whether an employee who rejects his or her supervisor's sexual advances is protected under the opposition clause by finding that an employee has engaged in a protected activity,¹³⁴ it would give appropriate deference to the EEOC's determinations in this area.¹³⁵ The Supreme Court has stated "the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation." Instead, the court must decide "whether the agency's answer [to a specific issue] is based on a permissible construction of the statute."¹³⁶

Just as the Supreme Court looks to EEOC findings for guidance in defining sexual harassment,¹³⁷ it should give appropriate deference to the EEOC in shaping the boundaries of the opposition clause of § 2000e-3.¹³⁸ The EEOC has described an action or statement as

134. See discussion *supra* Part II.D.1.b.

135. The EEOC is the federal agency entrusted with the enforcement of the federal laws prohibiting job discrimination and retaliation, including Title VII of the Civil Rights Act of 1964. See Equal Employment Opportunity Commission, *Federal Equal Employment Opportunity Laws*, http://www.eeoc.gov/abouteeoc/overview_laws.html (last visited Mar. 1, 2009).

136. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

137. See *supra* note 21.

138. The Supreme Court has acknowledged that, in some circumstances, "Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law" and thus the reviewing court should not reject the agency's contentions simply because the court disagrees with the agency's findings. *United States v. Mead Corp.*, 533 U.S. 218,

oppositional if it “would reasonably [be] interpreted as opposition [against the unlawful employment practice].”¹³⁹ Additionally, the EEOC has indicated that protection under the opposition clause applies if the employee has “explicitly or implicitly [communicated] a belief that [the employer’s] activity constitutes a form of employment discrimination.”¹⁴⁰

As a district court in the Second Circuit has reasoned, “[t]he prohibition against retaliation is intended to protect employees who resist unlawful workplace discrimination. Sexual harassment by an employer or supervisor is an unlawful practice, and an employee’s refusal is a means of opposing such unlawful conduct.”¹⁴¹ The EEOC and other supporters of a broad encompassment of the opposition clause see Title VII as “undoubtedly written against the common sense understanding that no reasonable employee welcomes discrimination in the workplace, especially when it is directed at the employee herself, and that declarations that a supervisor engaged in, for example, sexual harassment, constitutes opposition to that activity.”¹⁴²

D. Conclusion

The body of law that defines the scope of a retaliation claim is largely judge-made, meaning that the scope varies immensely from circuit to circuit.¹⁴³ Based on the radically different and contradictory interpretations of what actions constitute a protected activity at the district and circuit court levels, the Supreme Court should issue a decision to clear up confusion. “[A] uniform interpretation of the anti-

229 (2001).

139. 2 EEOC Compliance Manual § 8, p. 8-5 (1998).

140. *Id.* § 8-4.

141. *Little v. Nat’l Broad. Co.*, 210 F. Supp. 2d 330, 386 (S.D.N.Y. 2002) (citation omitted).

142. Brief of Amicus Curiae National Employment Lawyers Ass’n in support of Petitioner, *Crawford v. Metro. Gov’t of Nashville & Davidson County, Tenn.*, 2007 WL 2049297 (No. 06-1595).

143. Michael Newman & Faith Isenhath, *Fidelity and Retaliation*, 56 FEDERAL LAWYER 18, 32 (Jan. 2009).

retaliation provision would increase judicial economy and ensure consistency in both the state and federal levels."¹⁴⁴

A scholar at Florida A&M College of Law observed in the aftermath of the Supreme Court's ruling in *Burlington Northern and Santa Fe Railway Company v. White*,¹⁴⁵ which resolved the circuit splits concerning what employer actions constitute an "adverse employment action" for purposes of a retaliation claim, that "retaliatory harassment presents a substantial barrier to achieving Title VII's goal of equality."¹⁴⁶ The Court's decision, which added clarity to the second element necessary to prove a retaliation claim, gave "much-needed guidance to the courts."¹⁴⁷ Likewise, a Supreme Court decision resolving the circuit splits of what constitutes a "protected activity," the first element of a retaliation claim, will further the goals of Title VII and offer "much-needed guidance" to the lower courts.

Based on the social science and statistics arguments, as well as the "considerable weight [that] should be accorded to [the EEOC's] construction of a statutory scheme it is entrusted to administer,"¹⁴⁸ the Supreme Court should affirm the Eighth Circuit's reasoning in *Ogden v. Wax Works, Inc.*¹⁴⁹ and expand upon its holding in *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*,¹⁵⁰ ruling that merely resisting an employer's sexual advances, without more, constitutes a "protected activity," thus satisfying the opposition clause of § 2000e-3(a).

Further, in addition to the assertion that a "uniform interpretation" of the opposition clause would aid the circuits in applying the law consistently, direction from the Supreme Court would offer guidance to employers who wish to act in compliance with the law and to employees who are unsure as to whether they have a valid retaliation

144. Karl Jahnke, *Retaliatory Harassment Against Employees by Employees: Should the Employer Be Liable?*, 16 LAB. LAW 465, 498-99 (2001).

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

146. Rhonda Reaves, *Retaliatory Harassment: Sex and the Hostile Coworker as the Enforcer of Workplace Norms*, 2007 MICH. ST. L. REV. 403, 418 (2007).

147. *Id.* at 421.

148. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

149. *Ogden v. Wax Works, Inc.*, 214 F.3d 999 (8th Cir. 2000).

150. *Crawford v. Metro. Gov't of Nashville & Davidson County, Tenn.*, 129 S. Ct. 846 (2009).

claim. Such a uniform interpretation would hopefully lead to a decrease in litigation and more predictable results in the federal court system as both employers and employees would be aware of the retaliatory behaviors which are forbidden by § 2000e-3(a), thereby furthering the purposes of Title VII of the Civil Rights Act of 1964 and the balance of rights between employer and employee.

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