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Offering Balance in Title VII Retaliation Claims Involving the Rejection of Sexual Advances

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OFFERING BALANCE IN TITLE VII RETALIATION CLAIMS INVOLVING THE REJECTION OF SEXUAL ADVANCES

Benjamin I. Han

Title VII of the Civil Rights Act of 1964 contains an anti-retaliation provision that protects employees when they oppose activity unlawful under the statute. To be protected from retaliation, however, the employee’s opposition must be performed in a manner that Title VII protects. The requirements for protected activity are that the employee must: 1) speak out or protest against an act, 2) that s/he has a reasonable, good-faith belief violates Title VII, 3) in a reasonable manner.

A split of authority has emerged as a result of the courts addressing facts involving an employee’s rejection of a supervisor’s sexual advances. The Fifth Circuit and a minority of district courts hold that the employee’s rejection, without more, is not enough to be protected from retaliation. The Eighth Circuit and a majority of district courts, however, hold that rejection of sexual advances is by definition “opposition,” and should be a protected activity.

This comment will argue that an employee who rejects a supervisor’s sexual advances should be granted the presumption that s/he has spoken out against the act and will offer a framework for courts to apply when confronted with the factual scenario at bar. The framework involves granting the employee the presumption that s/he has properly protested, but having her/him show that s/he had a reasonable, good-faith belief that her supervisor’s advances violated Title VII. If diligently applied, this approach will allow the courts to reasonably balance the interests and vulnerabilities of the employee and employer, while staying true to the purposes of Title VII.

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INTRODUCTION

Imagine a female employee working at your everyday company. Like any employee with ambition, her goal is to do her job, and do it well. She has worked hard through college to get to her current position, and she can visualize that with the right amount of determination, her future with the company is bright. Months into her tenure, however, she begins to notice that her supervisor has been giving her attention that many would deem inappropriate. It begins with comments that demonstrate an appreciation of her presence, such as statements involving her physical appearance and attire. Then the comments escalate into sexual advances when the supervisor asks the employee to join him for dinner or to take their lunch break to a local motel room. Inexperienced, third-person observation would provide that the employee has clear and simple options to remedy her situation. It is a valuable exercise, however, to consider what goes through the

female employee's mind as her supervisor is waiting for a response to his sexual propositions.

It is no secret that women have historically struggled to reach equality in the workplace, and, given this knowledge, women likely perceive that they face an uphill battle in terms of promotion and recognition. It has been observed that women face “pervasive occupational segregation, underrepresentation in leadership positions, and inequities in compensation.”¹ In 2008, it was measured that women earn approximately 75% of what men earn and that wage gap has “closed very little in three decades.”² One year after their college graduation, full-time female workers earn only 80% of their male counterparts, and the gap widens to females earning only 69% of male earnings ten years after graduation, “even when occupation, hours, parent-hood, and other factors typically associated with earnings over time are statistically controlled.”³ Another study also revealed that when women are acknowledged to have been successful in a male gender-typed job, they are “less liked and more personally derogated than equivalently successful men” and that being disliked can have career-affecting outcomes in terms of evaluations and recommendations.⁴

Given the issues above, and others like “fear of job loss, especially if insecurely employed, fear of retribution or retaliation, reluctance to be viewed as a victim, self-doubt or the fear of being seen as ‘too sensitive’, the belief that the harasser will not receive any penalty, lack of knowledge of rights, and lack of accessibility of external supports . . . ,”⁵ it is easy to believe the estimation that only 5-30% of sexual harassment victims file any complaints, with fewer than 1% subsequently participating in legal proceedings.⁶ Considering these factors, it may be easier said than done to take action through traditional means, such as filing a formal complaint with human resources or complaining to another supervisor.

Under Title VII of the Civil Rights Act of 1964, an employer cannot discriminate against employees who have opposed any

¹ Ruth E. Fassinger, *Workplace Diversity and Public Policy: Challenges and Opportunities for Psychology*, 63 *AMERICAN PSYCHOLOGIST* 252, 253 (2008).

² *Id.* at 253-54.

³ *Id.* at 254.

⁴ Madeline E. Heilman et al., *Penalties for Success: Reactions to Women Who Succeed at Male Gender-Typed Tasks*, 89 *JOURNAL OF APPLIED PSYCHOLOGY* 416 (2004).

⁵ Paula McDonald, *Workplace Sexual Harassment 30 Years on: A Review of the Literature*, 14 *INTERNATIONAL JOURNAL OF MANAGEMENT REVIEWS* 1, 9 (2011).

⁶ *Id.*

unlawful employment practice under the statute.⁷ This assertion under the opposition clause of Title VII's anti-retaliation provision protects employees from adverse employment actions when they oppose an unlawful act that violates the statute. To prove retaliation on the basis of opposition activity, the employee has the burden of establishing a prima facie case by showing that the employee: (1) "engaged in protected activity that Title VII protects;" (2) was subjected to "an adverse employment action;" and (3) the protected activity is causally connected to the adverse employment action.⁸ The source of much litigation in Title VII retaliation cases arises from the issue of whether the employee engaged in a statutorily protected activity. The courts have generally required that for an opposition act to be protected, the employee must: 1) speak out or protest against activity⁹ 2) have a reasonable, good-faith belief that the activity is unlawful under Title VII,¹⁰ 3) protest in a reasonable manner.¹¹ A particular scenario that has caused confusion among the lower courts is whether an employee's rejection of a supervisor's sexual advances is a protected activity under the opposition clause. The disagreement arises from the issue of what an employee is required to do when s/he engages in an act of opposition.

The Fifth Circuit Court of Appeals and a minority of district courts subscribe to the belief that an employee's rejection of sexual advances, without more, is not enough to be statutorily protected activity under Title VII.¹² The Eighth Circuit and a majority of district courts, however, subscribe to the belief that an employee's rejection of sexual advances is by definition, "opposing" unlawful activity, and is therefore, protected activity under Title VII.¹³

This comment will provide a layered argument in proposing a reasonable approach to retaliation claims involving an employee's rejection of a supervisor's sexual advances. Part I of the comment will provide an overview of the Title VII retaliation landscape, summarizing the relevant statutory language, the employee's burden in retaliation cases, the Supreme Court's jurisprudence on retaliation claims grounded in the opposition clause, and the split of authority

⁷ 42 U.S.C. § 2000e-3 (2006); *Clark Cnty. Sch. Dist. v. Breedon*, 532 U.S. 268, 269 (2001).

⁸ *Harvill v. Westward Commc'ns, L.L.C.*, 433 F.3d 428, 439 (5th Cir. 2005).

⁹ See *Crawford v. Metro. Gov't of Nashville & Davidson Cnty.*, 555 U.S. 271, 278 (2009).

¹⁰ See *Breedon*, 532 U.S. at 271.

¹¹ *Rollins v. Fla. Dep't of Law Enforcement*, 868 F.2d 397, 401 (11th Cir. 1989).

¹² See *LeMaire v. La. Dep't of Transp.*, 480 F.3d 383, 389 (5th Cir. 2007).

¹³ See *Ogden v. Wax Works, Inc.*, 214 F.3d 999, 1007 (8th Cir. 2000).

among the lower courts in terms of the rejection of sexual advances. Part II of the comment, the argument section, will proceed in layers. The first subsection will argue that the current federal case law on opposition activity reveals that the rejection of sexual advances should be considered protected activity under the opposition clause. The second subsection will argue that, even if a court does not agree with the contention that the current federal case law protects the rejection of sexual advances, such a unique circumstance demands different treatment from the more traditional forms of opposition activity. The third subsection will propose a reasonable framework for the courts to apply when addressing a retaliation claim involving the rejection of sexual advances. This framework includes granting the employee the presumption that she has spoken out against discrimination if she rejected a sexual advance, which is harnessed by the inquiry of whether the employee had a reasonable, good-faith belief that the supervisor violated Title VII by creating a hostile work environment. The fourth subsection will raise various policy considerations involving the protection of the rejection of sexual advances and the application of the suggested framework.

I. BACKGROUND

A. *Anti-Retaliation Provision under Title VII*

Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, religion, sex, or national origin.¹⁴ Within the overarching prohibition against discrimination, Section 704(a) of Title VII also protects employees from retaliation should they oppose discrimination or participate in Title VII processes, the relevant language stating: “It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency . . . to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice, made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.”¹⁵ This retaliation provision of Title VII is separated into the opposition clause and the participation clause, with the former protecting a wider range of employee conduct than the

¹⁴ See 42 U.S.C. § 2000e-2 (2006).

¹⁵ 42 U.S.C. § 2000e-3 (2006).

latter.¹⁶ The participation clause protects employees from retaliation only when s/he has participated in the Title VII machinery, meaning that the employee participated in an investigation, proceeding, hearing, or litigation under Title VII.¹⁷ The opposition clause, however, serves as a catchall for many activities that are not covered under the participation clause, in that the employee will be protected from retaliation if s/he opposes unlawful conduct in a proper manner, even though the Title VII machinery has not been initiated.¹⁸ An example of opposition activity that is generally accepted by the courts is when an employee complains to her human resources department about a supervisor who is sexually harassing her. The rejection of sexual advances, which is the subject of this comment, does not fall under the participation clause. So accordingly, we will proceed solely within the bounds of the opposition clause.

In a retaliation case where the employee is invoking protection under the opposition clause, the court will apply the traditional three-step *McDonnell Douglas* burden shifting analysis.¹⁹ First, the employee must establish a prima facie case of retaliation under the opposition clause, where s/he must show that s/he engaged in an activity that Title VII protects, s/he was subjected to an adverse employment action, and the adverse employment action is causally connected with the employee's protected activity.²⁰ If the employee is able to establish a prima facie case, the employer will then have the burden to produce evidence showing a legitimate non-retaliatory reason for the adverse employment action.²¹ If the employer is able to produce evidence showing such a reason, the employee will have the opportunity to prove that that the employer's stated reason was pretextual.²²

This comment focuses on the first element of the employee's prima facie case in an opposition clause retaliation claim, the requirement being that the employee must show that s/he engaged in an opposition act that Title VII protects. Courts have established guidelines to determine whether an employee's opposition should be

¹⁶ See *Valentin-Almeyda v. Municipality of Aguadilla*, 447 F.3d 85, 94 (1st Cir. 2006) (stating that “[p]rotected conduct . . . also [includes] complaining to one’s supervisors”).

¹⁷ See *Equal Emp’t Opportunity Comm’n v. Total Sys. Serv., Inc.*, 221 F.3d 1171, 1174 (11th Cir. 2000).

¹⁸ BARBARA T. LINDEMANN ET AL., *EMPLOYMENT DISCRIMINATION LAW* 15-12 (Barbara T. Lindemann et al. eds., 5th ed. 2012).

¹⁹ *Lemire*, 480 F.3d at 388-89.

²⁰ *Id.* at 388.

²¹ *Id.*

²² *Id.*

“protected activity” under Title VII. The guidelines are that the employee must 1) speak out or protest against activity that, 2) s/he has a reasonable, good-faith belief is unlawful under Title VII, 3) in a reasonable manner.²³ Although on the surface, the framework for seeking protection from retaliation seems relatively clear, many issues persist as to what should be considered “protected activity” when confronted with the complexities of the modern-day workplace. The Supreme Court of the United States has only addressed the contours of “protected activity” against retaliation on a few occasions, and has not directly addressed whether certain forms of opposition, like the rejection of a supervisor’s sexual advances, should be considered protected under the opposition clause.²⁴

*B. The Supreme Court and Protected Activity under the
Opposition Clause*

In 2001, the Supreme Court addressed the reasonable, good-faith belief requirement for protected activity in *Clark County School District v. Breeden*.²⁵ There, a supervisor made a single sexually explicit remark in the presence of the plaintiff-employee, saying “I hear making love to you is like making love to the Grand Canyon.”²⁶ The employee later complained about the comment to several people, including the offending employee’s supervisor and the Assistant Superintendent, and alleged that she was later punished for her complaints.²⁷ Since sexual harassment was what the employee was opposing, the Supreme Court stated the relevant legal standard that establishes a hostile work environment and concluded “no reasonable person could have believed that the single incident recounted above violated Title VII’s standard [for sexual harassment].”²⁸

In 2009, the Supreme Court addressed the opposition clause in *Crawford v. Metropolitan Government of Nashville*.²⁹ There, the employer’s human resources department began looking into rumors of sexual harassment by the employee relations director, Gene Hughes.³⁰ As part of the investigation, the human resources director called in the

²³ See LINDEMANN, *supra* note 18, at 15-13 to 15-24.

²⁴ Diana M. Watral, Note, *When “No” is Not Enough: The Express Rejection of Sexual Advances Under Title VII*, 77 U. CHI. L. REV. 521, 527 (2010).

²⁵ *Breeden*, 532 U.S. at 268.

²⁶ *Id.* at 269.

²⁷ *Id.*

²⁸ *Id.* at 271.

²⁹ See *Crawford*, 555 U.S. at 271.

³⁰ *Id.* at 274.

plaintiff-employee to ask if she had witnessed any inappropriate behavior on the part of Hughes, to which she provided several instances of sexual harassment committed by Hughes.³¹ After the investigation, Crawford and the two other employees who accused Hughes of sexual harassment were terminated, the official reason being for embezzlement.³² The issue before the Court was whether the plaintiff-employee engaged in protected activity even though her opposition was not on her own initiative.³³ The Court held even though she gave her account of Hughes's sexually harassing behavior after she had been summoned by the human resources director, the plaintiff-employee still engaged in protected activity under the opposition clause.³⁴ The Court elaborated, "nothing in [Title VII] 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."³⁵

Ultimately, *Breeden* and *Crawford* provide two narrow clarifications of protected activity covered under the opposition clause. According to *Breeden*, the courts should inquire as to whether the employee had a reasonable, good-faith belief that the act s/he opposed is unlawful under Title VII.³⁶ To determine if such a reasonable, good-faith belief existed, a court should, like the Supreme Court in *Breeden*, refer to the standard of the discriminatory act that the employee opposed, and decide whether the offending supervisor's act created a reasonable, good-faith belief that the standard was violated.³⁷ According to *Crawford*, the courts should not limit protected activity under the opposition clause to protests that are initiated by the complaining employee. The Court made clear that protection under the opposition clause may cover untraditional situations where the employee is not the party that instigates or initiates a complaint.³⁸ Given the limited nature of these rulings, however, the lower courts have struggled when addressing such untraditional forms of opposition. An employee's rejection of a supervisor's sexual advances is no exception, with the situation being illustrated by an employee simply replying with a "No." to a supervisor's sexual advance. The lower federal courts have understandably split over the issue as to

³¹ *Id.*

³² *Id.*

³³ *Id.* at 276-77.

³⁴ *Id.* at 277.

³⁵ *Id.* at 277-78.

³⁶ See *Breeden*, 532 U.S. at 271.

³⁷ *Id.* at 270-71.

³⁸ See *Crawford*, 555 U.S. at 277-78.

whether the employee's rejection is enough to be protected activity under the opposition clause. The subsection that follows illustrates the split of authority.

C. *Circuit Split over the Rejection of Sexual Advances*

The circuit split regarding the protected status of rejections of sexual advances is illustrated through decisions of the Fifth and Eighth Circuit Courts of Appeal. The Fifth Circuit subscribes to the belief that such rejections are not protected activity while the Eighth Circuit believes that the rejections should be protected under the opposition clause.

In *LeMaire v. Louisiana Department of Transportation*, the Fifth Circuit held that an employee's rejection of his supervisor's sexual advances was not protected activity under the opposition clause.³⁹ There, the employee claimed that on two separate occasions his supervisor subjected him to sexually explicit stories that included past acts of molestation, his sex life with his wife, and his homosexual inclinations.⁴⁰ The employee asked his supervisor to stop talking about such topics, but the supervisor refused and continued the conversation.⁴¹ The supervisor later ordered the employee to spray herbicide on a large area of a lawn, which the employee believed was outside of his job description, and, therefore, believed was retaliation for asking the supervisor to stop telling the sexually explicit stories.⁴² The employee later left the job site and reported the incident to the Bridge Operator Foreman.⁴³ The employee was then suspended without pay by the District Maintenance Engineer for refusing to spray the herbicide as ordered by the supervisor and for leaving the work site without authorization.⁴⁴ In holding that the rejection of the supervisor's sexual advances was not protected activity, the Fifth Circuit simply asserted that the employee "provide[d] no authority for the proposition that rejecting sexual advances constitutes a protected activity for purposes of a retaliation claim under Title VII."⁴⁵

In *Ogden v. Wax Works, Inc.*, the Eighth Circuit held that the employee's rejection of sexual advances was protected activity under

³⁹ *Lemaire*, 480 F.3d at 389.

⁴⁰ *Id.* at 385.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 386.

⁴⁵ *Id.* at 389.

the opposition clause.⁴⁶ There, the employee, Kerry Ogden, was subjected to multiple sexual advances by her supervisor, including numerous physical advances and sexual propositions.⁴⁷ As a result of her rebuffs, the supervisor berated Ogden over work matters and also refused to complete her evaluation, thereby preventing the effectuation of her annual raise.⁴⁸ The Eighth Circuit agreed with Ogden, holding that she engaged in “the most basic form of protected activity” when she rebuffed her supervisor’s sexual advances, and further asserted in a general manner that “[e]mployers may not retaliate against employees who ‘oppose discriminatory conduct’”⁴⁹

D. *Federal District Court Treatment of Rejection of Sexual Advances*

Currently, the vast majority of district courts align with the Eighth Circuit in holding that the rejection of sexual advances is protected activity under the opposition clause. An example of the lower courts’ treatment of the issue is illustrated in *Burrell v. City University of New York*, a 1995 decision from the Southern District of New York.⁵⁰ The employee, Cherie Burrell, was employed as an assistant to the Dean of CUNY Medical School/Sophie Davis School of Biomedical Education (the “Dean”).⁵¹ The Dean served as Burrell’s supervisor, and throughout Burrell’s employment, he made numerous sexual advances towards her, all of which were rebuffed.⁵² The advances began as comments and actions that revealed a sexual interest in Burrell, but later turned into advances that included invitations to dinner and even propositions to engage in sex over the telephone.⁵³ Burrell later complained to the school system’s Affirmative Action Office, and she was subsequently transferred to another department and ultimately terminated for her immigration status.⁵⁴ The Southern District of New York held that “Burrell has presented evidence which would support an inference that she was terminated in retaliation either for making her initial complaint to

⁴⁶ See *Ogden*, 214 F.3d at 999.

⁴⁷ *Id.* at 1003-04.

⁴⁸ *Id.*

⁴⁹ *Id.* at 1007.

⁵⁰ *Burrell v. City Univ. of N.Y.*, 894 F. Supp. 750 (S.D.N.Y. 1995).

⁵¹ *Id.* at 753.

⁵² *Id.* at 754-55.

⁵³ *Id.* at 755.

⁵⁴ *Id.* at 756.

CUNY's Affirmative Action Office or for refusing to accede to the Dean's sexual advances."⁵⁵

A minority of district courts, however, does agree with the Fifth Circuit and holds that the rejection of sexual advances is not protected activity under the opposition clause. An example of such alignment is *Bowers v. Radiological Society of North American, Inc.*, a 1999 case from the Northern District of Illinois.⁵⁶ There, the employee, Beverly Bowers, was subjected to sexual advances by her supervisor, with whom she lived in the same townhouse.⁵⁷ After rejecting the advances, she moved out of the townhouse and a month later, the supervisor gave what Bowers believed to be an unfair negative performance review.⁵⁸ Bowers was later replaced by another employee and ultimately discharged on the ground that her position was being eliminated.⁵⁹ The court asserted that "[o]pposition clearly includes filing a charge with the EEOC, bringing a lawsuit in court, or submitting a complaint to management . . . [and that] [i]nformal methods can also constitute protected activity."⁶⁰ The court held, however, that Bowers "has not alleged that she engaged in any form of opposition . . . [, but,] [i]nstead, she [only] alleges that she refused Ms. Davis' advances and that she did not participate in the conduct."⁶¹

In assessing the split of authority, it becomes clear that the disagreement arises from what the courts require of employees during the act of opposition. The courts aligning with the Fifth Circuit subscribe to a strict approach where the employees may be required to do more than merely reject a supervisor's sexual advances. Compared to the traditional methods of opposition such as complaining to the human resources department, this side of the split believes that a mere rejection, without more, seems too ambiguous of a protest to invoke protection under Title VII, likely because the employee has not spoken out against the discriminatory act. The courts aligning with the Eighth Circuit, however, subscribe to a more relaxed approach, in that a rejection of sexual advances is by definition "opposition" of unlawful activity. Regardless of the side of the split, however, many of the courts have not engaged in thorough analyses as to why they do or do not find the rejection of sexual advances protected under Title VII. The present issue requires a more involved and detailed discussion

⁵⁵ *Id.* at 761.

⁵⁶ *Bowers v. Radiological Soc'y of N. Am., Inc.*, 57 F. Supp. 2d 594 (N.D. Ill. 1999).

⁵⁷ *Id.* at 597.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 599.

⁶¹ *Id.*

compared to what the courts have engaged in past opinions, especially in light of the ambiguous nature of the rejection of sexual advances and the complicated nature of the workplace.

II. ARGUMENT: REJECTING A SUPERVISOR'S SEXUAL ADVANCES IS "SPEAKING OUT" AGAINST DISCRIMINATION, BUT COURTS MUST ASSESS THE EMPLOYEE'S REASONABLE, GOOD FAITH BELIEF TO DETERMINE PROTECTED ACTIVITY

This comment will argue that when an employee responds, "No." to a supervisor's sexual advances, the rejection is sufficient to satisfy the "speaking out" requirement for protected activity under the opposition clause. This comment will make this argument by first establishing similarities and then by establishing differences. The first subsection will maintain that finding rejection of sexual advances to be protected activity is consistent with federal case law. The second subsection will argue that if one finds the first subsection unconvincing, then realizing what makes the rejection of sexual advances unique should persuade courts to distinguish this scenario from other, more traditional forms of opposition activity. The third subsection will argue that if a court should agree with the arguments of either the first or the second subsection, that court should assess whether the employee had a reasonable, good-faith belief that the supervisor violated Title VII. Finally, the fourth subsection will consider the policy implications surrounding the issue at bar.

A. *Drawing Comparisons: Current Federal Case Law on Protected Activity Under the Opposition Clause of Title VII.*

Although there is a split of authority on the precise issue of whether the rejection of sexual advances constitutes "speaking out" against discrimination, the federal courts have established a landscape that indicates that such activity is indeed "speaking out." As addressed in the introduction section above, the Supreme Court addressed the scope of the opposition clause for the first time in *Crawford*.⁶² In the opinion, Justice Souter revealed insight as to how the Court would likely rule on facts involving the rejection of sexual advances. In ruling that the plaintiff engaged in opposition activity, Justice Souter maintained that the Court adopted a broad interpretation of opposition, and the term could be used "to speak of someone who has taken no action at all to advance a position beyond disclosing it."⁶³ He went

⁶² See *Crawford*, 555 U.S. at 271.

⁶³ *Id.* at 277.

further and asserted that it would be opposition activity “if an employee took a stand against an employer’s discriminatory practices not by ‘instigating’ action, but by standing pat, say, by refusing to follow a supervisor’s order to fire a junior worker for discriminatory reasons.”⁶⁴ Although this statement was made in dictum, it is arguable that the rejection of sexual advances is less ambiguous of an opposition than Justice Souter’s opposition hypothetical in *Crawford*. Justice Souter’s employee, who defies his supervisor’s discriminatory intent by refusing to fire a subordinate, could be defying the supervisor for one of many reasons.⁶⁵ The subordinate may be a close friend of the employee, the employee may think that the subordinate is too valuable to terminate, or any other reason that does not serve as opposing a violation of Title VII. Ultimately, Justice Souter gives the employee the benefit of the doubt and would assume that the employee is opposing the Title VII violation, even though it is ambiguous as to what the employee is actually opposing. In terms of an employee who rejects a sexual advance, among the variety of reasons s/he could be doing so is that s/he opposes behavior that violates Title VII. So why should s/he not receive the similar benefit of the doubt received by the hypothetical employee in *Crawford*?

It is also helpful to refer to the Supreme Court’s labor law jurisprudence, as the Court has previously looked to its labor law decisions for guidance in determining a Title VII issue.⁶⁶ In the 1984 case *National Labor Relations Board v. City Disposal Systems, Inc.*, the employer had a collective bargaining agreement with Local 247 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America where the provision read:

[t]he Employer shall not require employees to take out on the streets or highways any vehicle that is not in safe operating condition or equipped with safety appliances prescribed by law. It shall not be a violation of the Agreement where employees refuse to operate such equipment unless such refusal is unjustified.⁶⁷

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ See *Pennsylvania State Police v. Suders*, 542 U.S. 129, 142 (2004) (stating that constructive discharge has been recognized in the labor law context).

⁶⁷ *National Labor Relations Board v. City Disposal Sys. Inc.*, 465 U.S. 822, 824-25 (1984).

The employer asked the plaintiff-employee to drive a truck that needed to have repairs performed on the brakes.⁶⁸ The employee refused, but he refused in a general manner without referring to his rights pursuant to the collective bargaining agreement or the National Labor Relations Act (the “NLRA”).⁶⁹ The employee was subsequently discharged, and he later filed an unfair labor practice charge.⁷⁰ The Supreme Court held that the employee had engaged in protected, concerted activity, which prevents the employer from discharging him on the grounds of his protected behavior under the NLRA.⁷¹ The Court maintained that even though the employee did not mention he was asserting his rights under the collective bargaining agreement or the NLRA,

[a]s long as the employee’s statement or action is based on a reasonable and honest belief that he is being, or has been, asked to perform a task that he is not required to perform under his collective-bargaining agreement, and the statement or action is reasonably directed toward the enforcement of a collectively bargained right . . .

the employee has engaged in protected, concerted activity.⁷²

The factual scenario in the *City Disposal* decision is analogous to an employee’s rejection of sexual advances in the Title VII context. The employer in *City Disposal* ordered the employee to drive a defective truck, which was a violation of the collective bargaining agreement, and the employee simply refused without asserting any rights other than his own safety.⁷³ The employee who rejects a sexual advance performs an analogous act by giving a general, negative response to a request by her supervisor that we assume violated Title VII by creating a hostile work environment. If the refusal in *City Disposal* sufficed to be protected *and* concerted in the labor law context, the analogous refusal of a sexual advance should be enough to be considered “speaking out” in the Title VII context.

The lower federal courts have also deemed scenarios similar to the rejection of sexual advances protected under the opposition clause. The scenario most comparable to sexual advance rejections would be an employee’s refusal to participate in a supervisor’s discriminatory

⁶⁸ *Id.* at 827.

⁶⁹ *Id.*

⁷⁰ *Id.* at 829.

⁷¹ *Id.* at 841.

⁷² *Id.* at 837.

⁷³ *Id.*

practice, which generally occurs not by the employee orally objecting to a discriminatory practice, but by the employee merely failing to engage in the discriminatory activity. An example of such a scenario is illustrated in *EEOC v. St. Anne's Hospital of Chicago*, where the Seventh Circuit Court of Appeals held that an employee's refusal to participate in the employer's discriminatory activity was a protected activity.⁷⁴ There, the employee was in charge of the security department of the hospital, and in 1978, she hired a black man to fill a vacant position in her department.⁷⁵ The hiring was met with violent public opposition, as the hospital began receiving bomb threats from one or more persons claiming membership in the American Nazi Party, with several fires also starting unexpectedly.⁷⁶ The employee was subsequently discharged because she "was an irritant to the person or persons making the calls and/or setting the fires."⁷⁷ Like an employee who rejects a sexual advance, the employee in *St. Anne's Hospital* did not make it clear that she was opposing an unlawful activity under Title VII when she made the hire.⁷⁸ Indeed, the Seventh Circuit interpreted the facts to show that the employee hired the black applicant without any contrary directions from the employer.⁷⁹ With no discriminatory act from the employer prior to the employee's hiring of the black applicant, the employee had nothing to oppose when she hired him, and yet, the Seventh Circuit still deemed the employee's action as protected opposition.

Similarly, in *Taylor v. Scottpolar Corp.*, the Federal District Court of Arizona held that an employee's refusal to participate in discriminating against a pregnant subordinate constituted protected activity.⁸⁰ There, the plaintiff was a district manager of Scottpolar, and he alleged that his supervisor sought to terminate a foreman because of her pregnancy by "fish[ing] for damning information against her."⁸¹ Although the plaintiff "did not openly disagree with [his supervisor] . . . he refused to participate."⁸² Drawing a comparison to rejection of sexual advances, it was not clear whether the plaintiff in *Taylor* refused to participate because he opposed

⁷⁴ See *Equal Employment Opportunity Commission v. St. Anne's Hospital, Inc.*, 664 F.2d 128 (7th Cir. 1981).

⁷⁵ *Id.* at 129.

⁷⁶ *Id.* at 129-30.

⁷⁷ *Id.* at 130.

⁷⁸ *Id.* at 32.

⁷⁹ *Id.*

⁸⁰ *Taylor v. Scott Polar Corp.*, 995 F. Supp. 1072, 1077 (D. Ariz. 1998).

⁸¹ *Id.* at 1074-75.

⁸² *Id.* at 1075.

discrimination that violated Title VII, or for some other reason not related to the discriminatory act. In the face of this ambiguity, the court still asserted that if the plaintiff could prove he refused to participate, his actions would be protected under the opposition clause.⁸³

By assessing the current landscape of opposition activity under Title VII, it becomes clear that the rejection of sexual advances should constitute “speaking out” against discrimination. When courts decide cases involving Title VII retaliation, the opinions have had a tendency to neglect addressing *why* a certain act is protected opposition activity. What is clear is that in cases of an ambiguous protest, such as a refusal to participate in discriminatory activities, there is a judicial inclination to give the employee the benefit of the doubt when determining if the employee’s opposition should be protected. It only seems natural that this inclination should exist in a rejection of sexual advances scenario as well, and there are many reasons why this should be the case. It may be as simple as the desire to stay true to Title VII’s main purpose of protecting employees from discrimination in the workplace, or it may be that the rejection of sexual advances seems no different than other forms of protected opposition activity, in that the employee’s goal is to put a stop to the discriminatory conduct. Additionally, judges may find it burdensome to require employees to reject the sexual advance and then later oppose the discriminatory act in a more traditional way, considering that s/he may receive an adverse employment action before s/he has the chance to protest in that traditional manner (i.e., complaining to another supervisor, human resources, or an equal employment opportunity officer). Lastly, judges may continue to sympathize with employees regarding the complicated dynamics of the workplace, in that employees must maintain a difficult balance, weighing the need to keep a job with the need to maintain personal sanctity. Judges may also remember that in sexual harassment cases, the courts do not allow an employee’s consent to sexual advances to eliminate an otherwise meritorious claim, considering that the advances may still have been “unwelcome.”⁸⁴ In light of that sympathetic and realistic approach to sexual harassment claims, allowing a retaliation claim to fail when an employee actually rejected the advance would seem contradictory.

B. Drawing Distinctions: Rejecting Sexual Advances is a Unique Situation That Calls for Flexibility in Assessing Protected Activity.

⁸³ See *Id.* at 1077.

⁸⁴ See *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 69 (1986).

The previous section argued that the federal courts have created a body of case law that indicates that the rejection of sexual advances should constitute “speaking out” against discrimination. If a court remains unconvinced by drawing comparisons to current case law, then perhaps distinguishing rejection of sexual advances from other, more traditional forms of opposition activity will be more persuasive. This subsection will first argue that the courts have long understood that the facts underlying a retaliation claim under the opposition clause come in a wide variety, and that the weights applied to the different requirements of protected activity depends on the details of the retaliation scenario. The second part of this section will address the unique nature of the rejection of sexual advances, which will ultimately set up the argument that such scenarios call for a particular legal analysis.

1. The Courts Have Recognized That Flexibility is Required to Properly Analyze Opposition Activity Regarding Title VII Retaliation Claims.

The facts arising out of a retaliation claim under the opposition clause can take a wide variety of forms. In deciding opposition clause cases, the lower courts have made it clear that the language of the opposition clause protects a wider range of activities than does Title VII’s participation clause.⁸⁵ Protests, demonstrations, confrontation, refusal to participate in discriminatory practices, and self-help activities may, in appropriate instances, constitute “opposition” under the statute.⁸⁶ So in a sense, the opposition clause is meant to serve as a limited catchall provision for protected activity that is not covered under the participation clause. As discussed in the Background Section of this comment, the courts have determined that for opposition to be protected, the employee must “speak out” against the employer’s discriminatory act and the opposition must be accompanied by a reasonable, good-faith belief that the discriminatory act was unlawful under Title VII.⁸⁷ These two requirements can be applied to virtually any retaliation fact pattern imaginable, with some scenarios being easier to assess than others. The easiest fact pattern for a court to assess is when an employee witnesses a discriminatory act that is clearly in violation of Title VII and s/he goes forward to

⁸⁵ See LINDEMAN, *supra* note 18.

⁸⁶ *Id.* at 15-23.

⁸⁷ Watral, *supra* note 24 at 526.

report the act to an upper-level supervisor. The employee here fulfills the requirements of the opposition clause by speaking out against the discriminatory act in a reasonable way to a superior, which is among the most traditional ways to handle such situations. And since the act was clearly in violation of Title VII, the employee possessed a reasonable, good-faith belief that the discriminatory act violated the statute.

The courts, however, are not always presented with facts where it is clear that the employee should receive protection under the opposition clause. And not surprisingly, “in cases where it is not clear whether an employee’s words or conduct constitute ‘opposition,’ the decisions are not easily reconciled.”⁸⁸ Ambiguous protests, like our own rejection of sexual advances, have forced courts to engage in an exercise of flexibility to ensure that an employee’s meritorious claim proceeds while still staying faithful to the statutory language of Title VII. So given the countervailing interests involved in determining whether an employee’s opposition activity should be protected, courts often choose to balance the requirements of protected activity depending on the facts with which they are presented.

An example of such flexibility in the face of an ambiguous protest is illustrated in *Casna v. City of Loves Park*.⁸⁹ There, the employee had a hearing impairment, and upon apologizing to her supervisor for failing to file a report in a timely manner, the supervisor responded, “How can you work if you cannot hear?”⁹⁰ The employee responded, “Aren’t you being discriminatory?”⁹¹ Although the supervisor knew that the employee had a hearing impairment, she also had seen the employee listening to music at her desk.⁹² In ruling that the employee’s response was protected activity under the opposition clause, the Seventh Circuit Court of Appeals did not even consider whether the employee had a reasonable, good-faith belief that the supervisor’s question amounted to a statutory violation.⁹³ Therefore, it is evident that the “speaking out” component outweighed the reasonable, good-faith belief requirement, considering the employee used the word “discriminatory” in her opposition act.⁹⁴ Additionally, in *Green v. Franklin National Bank of Minneapolis*, the Eighth Circuit Court of Appeals ruled that the employee engaged in a protected

⁸⁸ See LINDEMANN, *supra* note 18, at 15-17.

⁸⁹ See *Casna v. City of Loves Park*, 574 F.3d 420 (7th Cir. 2009).

⁹⁰ *Id.* at 423.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 427.

⁹⁴ *Id.*

activity because she complained to higher-level supervisors of alleged racial discrimination.⁹⁵ Like the Seventh Circuit in *Casna*, the Eighth Circuit failed to consider whether the employee had a reasonable, good-faith belief that a discriminatory act was conducted in violation of Title VII.

There is value to the proposition that courts should exercise flexibility when assessing retaliation claims. The workplace is a highly political and complicated environment, and opposition activity and the corresponding retaliation come in an infinite amount of shapes and sizes. Just like with any issue before the court, however, giving a judge too much discretion in determining which opposition activity should be protected under Title VII can be dangerous. To balance this judicial flexibility, the court should consider the facts of each case. Where the facts demonstrate a clear and egregious act of discrimination by the employer, the court should focus on analyzing the “speaking out” component of protected activity, as it is obvious that the employee had a reasonable, good-faith belief that Title VII was violated. Regarding the rejection of sexual advances, however, elements of flexibility and strict diligence are required in the protected activity analysis to arrive at a fair determination. The following subsection will provide the context for what makes the rejection of sexual advances fundamentally different from other traditional forms of opposition, thereby setting up the proposed framework that incorporates flexibility and diligence in one analysis.

2. Articulating the Judicial Inclination: What Makes the Rejection of Sexual Advances Unique?

The rejection of sexual advances presents a unique dynamic that deserves flexible treatment when determining whether such activity is protected. Title VII, however, does not permit judges to protect conduct from retaliation because certain conduct just *feels* like it should be protected. As addressed previously, opposition clause doctrine demands that employees engage in opposition in a particular manner to be deemed protected activity. We have seen, however, that federal courts have neglected to engage in a rigorous analysis when determining whether the employee’s opposition is a protected activity. The courts instead act on an inclination to find such opposition protected. The rejection of sexual advances is a scenario where such a judicial inclination would arise, and although never articulated, the

⁹⁵ See *Green v. Franklin Nat’l Bank*, 459 F.3d 903 (8th Cir. 2006).

inclination is justified by the fact that the scenario is distinguishable from any other discriminatory act covered under Title VII.

Consider the different situations in which life places us. We are often thrown into scenarios where we must interact with superiors, interact with children, study in a library, play a round of golf, and so on. If you are a reasonable and rational person, you realize that each of these different situations has its own particular rules, and as a reasonable and rational person, you would abide by them. When interacting with a superior, you know to speak in a manner that conveys respect, whereas when you speak to a child, you know to speak using simple words so that the child understands what you are saying. Just like when studying in a library, you know to speak quietly, so you do not disturb others in their studies and on a golf course, you know not to speak during someone's backswing so you do not disturb their concentration.

With these concepts in mind, the unique nature of the rejection of sexual advances can be illustrated by using the following analogy. First, imagine two people playing a game of hot potato, which is the game where participants toss each other a ball to the sound of music and the player holding the ball when the music stops is eliminated from the game. As the game begins, the first player tosses the ball to the second player, and the second player, of course, tosses the ball back. The first player fully expects to receive the ball back and the second player naturally, and quickly, tosses the ball back, as she knows the rules of the game. Stepping away from hot potato, now imagine a baseball game, with a pitcher throwing a pitch to a batter, and assume that the pitch is one that the batter is able to hit. The rules of baseball instill much different expectations on the pitcher, as the batter has many choices on how to approach the pitch. He may take a swing at the ball, go for a bunt, or let the ball pass. These hypotheticals demonstrate that the rules of the game dictate the players' expectations and choices.

The typical discriminatory act that would violate Title VII resembles the baseball hypothetical: an act is done or a comment is made at, or in the presence of, an employee, and the employee is left with a choice on how to respond. The game here could be titled "Self-Preservation," where the rules dictate that one considers all consequences before responding to a situation. Applying these rules, the supervisor, like the pitcher, acts in a unilateral manner and does not expect a particular reaction from the employee. But the employee, like the batter, is left with a choice on how to address what s/he has witnessed or experienced. There is not a single natural or normal way for a person to oppose the discriminatory act, meaning that observing

the act and making the conscious decision to protest is only one of the many options available to her.

An employee's rejection of sexual advances resembles the game of hot potato, in that the situation exists in the form of a "back and forth" initiated by the supervisor. The game here could be titled "Human Interaction," and the rules dictate that if you are asked a question, you should respond. Applying the rules, the supervisor makes advances, typically in the form of a question or invitation, and the employee responds. The employee here is provided with a natural and sole mechanism to respond to an employer's discriminatory act, and more importantly, the mechanism exists because of the format constructed by the supervisor in making the advance. Although the substance of the employee's response may vary, the rules of "Human Interaction" dictate that s/he must respond, as opposed to the rules of "Self-Preservation." Simply not responding to a sexual advance, or any question for that matter, would be a violation of human interaction rules, and is not something that a reasonable and rational person would do.

The courts have always been open to considering the importance of context, or the rules of the situation, in deciding cases under Title VII. Considering these analogies, it is clear that the rejection of sexual advances presents a situation that is unique from any other opposition activity scenario. The supervisor provides a framework where the employee must respond to the advances, and upon rejecting the advance, the courts should give the employee the presumption that s/he has "spoken out." The rules dictating more traditional opposition scenarios do not require the employee to respond at all, as the employee must make an active choice to protest. So accordingly, it is fair to expect employees in more traditional scenarios to speak out against discriminatory acts in a more concrete manner.

C. A Reasonable Solution: When to Exercise Flexibility and When to Exercise Diligence

When confronting a rejection of sexual advances scenario in a Title VII retaliation case, the courts should prevent an employee's claim to live or die based on whether that employee has properly "spoken out" against the discriminatory act. This comment has presented several arguments that assert that the rejection of sexual advances is a unique situation where the courts should presume that the employee has indeed "spoken out" against discrimination, even though the employee did not do so in a traditional manner to which courts are accustomed to protecting. First, the Supreme Court has

maintained in *Crawford* that activity similar to rejection of sexual advances should be considered protected activity. Second, many federal appellate courts have held that opposition activity fundamentally similar to rejection of sexual advances is protected activity. Third, even if one were to disregard the current case law that is applicable to the issue at bar, the rejection of sexual advances is a unique scenario because it occurs in a “question and answer” framework that is initiated by the supervisor. There is no other opposition scenario that occurs in such a manner, meaning that the rejection of sexual advances demands a flexible approach in terms of the “speaking out” requirement of protected activity. Thus, although the employee does not exercise the most traditional form of opposition when s/he rejects a sexual advance, the courts should be flexible in the analysis and presume that the employee has successfully spoken out against an allegedly discriminatory act.

This presumption of speaking out, however, should come at a cost to the employee. As previously illustrated, the courts have often been lax when it comes to assessing whether the employee had a reasonable, good-faith belief that the employer’s act violated Title VII. The courts have determined through interpreting the opposition clause that the employee should at least have a reasonable, good-faith belief that the supervisor violated Title VII for their opposition to be protected from retaliation. This second requirement serves the purpose of preventing employees from improperly shielding themselves from termination by complaining about issues that Title VII does not cover. Considering the complicated nature of rejection of sexual advances, the situation is one that demands a harder look at the reasonable, good-faith belief requirement to protect employers from frivolous opposition activity. Surprisingly, however, the lower courts that have addressed facts involving rejection of sexual advances have neglected to apply the reasonable, good-faith belief requirement in deciding whether the rejection should be protected.

The discriminatory act arising from a rejection of a sexual advance will likely be sexual harassment based on a hostile work environment. The Supreme Court’s jurisprudence regarding sexually hostile work environments is relatively clear, in that the Court requires that “[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive ‘to alter the conditions of [the victim’s] employment and create an abusive working environment.’”⁹⁶ The Court has maintained that the work environment must be one that ‘a reasonable person’ would find hostile, looking at all of the

⁹⁶ See *Meritor Savings*, 477 U.S. at 67.

circumstances, and that, additionally, the plaintiff must have subjectively perceived the environment as hostile.⁹⁷ Factors to assess within the totality of circumstances include “the frequency of the discriminatory conduct, its severity, whether [the conduct] is physically threatening or humiliating, or a mere offensive utterance, and whether [the conduct] unreasonably interferes with [the complainant’s] work performance.”⁹⁸

An employee’s claim for retaliation based on the rejection of sexual advances is linked to an underlying claim of a sexually hostile work environment. A federal court analyzing such a retaliation claim must evaluate whether the employee had a reasonable, good-faith belief that her supervisor has created a hostile work environment that actually changed the conditions of the employee’s employment. The fact that a supervisor’s sexual advance was met with an employee’s rejection is insufficient to establish that the employee’s act is protected, because there is no inquiry into whether the employee had a reasonable, good-faith belief that the supervisor created a hostile work environment. Considering that sexual advances are relatively tame compared to other scenarios that create a sexually hostile work environment, showing that the employee had a reasonable, good-faith belief that such a work environment existed should not be an easy burden for the employee to bear. The court must be sure that the advances were made in such a manner and frequency that would objectively create a hostile work environment and must also confirm that the employee found the conduct unwelcoming, as opposed to, say, flattering.

The recommended analysis provides a reasonable compromise in addressing the rejection of sexual advances. Although the employee’s rejection is ambiguous in terms of speaking out against Title VII violations, s/he is presumed to have spoken out considering the unique nature of such opposition activity. The employer, however, receives protection from frivolous claims by requiring the employee to make the difficult showing that s/he had a reasonable, good-faith belief that her supervisor created a sexually hostile work environment through his advance.

D. Policy Considerations

Aside from the legal considerations that justify this comment’s suggested framework, several policy issues exist that support the

⁹⁷ See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22-23 (1993).

⁹⁸ *Id.* at 23.

framework as well. The reality of the workplace is a controlling force for all employees, and courts should take care to apply the law in a manner that protects the reasonable party, whether it be the employee or employer.

1. Reasons to Presume that an Employee Speaks Out Against a Title VII Violation in a Rejection of a Sexual Advance Scenario.

If an employee rejects a sexual advance with a simple “No,” and the courts were to rule that such a rejection is not protected for the lack of speaking out against a Title VII violation, an untenable dynamic would result in the workplace. An employee would know that her rejection is only protected if s/he either engages in traditional forms of opposition, such as reporting the incident(s) to human resources or other supervisors, or if s/he specifically references illegal discrimination in her rejection. Considering that the discriminatory act the employee will be opposing is a sexually hostile work environment, the question arises as to when s/he should oppose the conduct in a way that would be protected. If s/he opposes in a protected manner too early in a series of advances, s/he runs the risk of being terminated with no meritorious retaliation claim because s/he likely had no reasonable, good-faith belief that the supervisor’s behavior was severe or pervasive enough to create a hostile work environment. Therefore, if the employee wants to preserve a potential retaliation claim, the employee would be encouraged to wait and withstand the abuse of the sexual advances until it becomes objectively clear that a sexually hostile work environment has been created. Requiring the plaintiff to oppose retaliation in a more traditional, specific manner puts her in a Catch-22, in that s/he risks losing protection under a potential retaliation claim, or s/he is forced to withstand the abuse of unwanted sexual advances until s/he can satisfy the requirement that a hostile work environment was objectively established.

2. Reasons to Require the Employee to Show That S/he Had a Reasonable, Good-Faith Belief That a Supervisor Created a Sexually Hostile Work Environment.

If courts neglect to consider whether an employee had a reasonable, good-faith belief that a supervisor created a sexually hostile work environment, then efficiency in the workplace will surely be affected. First, once management becomes aware that an employee has rejected the sexual advance of a supervisor, there will be a presumptive shield around the employee, because the conduct has already been deemed protected by the law. This can handcuff

management from applying an adverse employment action against an employee who may legitimately deserve to be disciplined. Additionally, from a retaliation claim standpoint, management will have no incentive to keep supervisors in check once it becomes known that an employee has rejected a sexual advance. If courts do not consider an employee's reasonable, good-faith belief that a sexually, hostile work environment was created, then there is nothing else in the retaliation analysis that rewards management for trying to put a stop to the harassing behavior. If courts would consistently consider the employee's reasonable, good-faith belief, then management would have the incentive to interfere before the employee could objectively establish the belief that a hostile, work environment has been created.

3. University of Texas Southwestern Medical Center v. Nassar

In June of 2013, the United States Supreme Court determined the critical issue of causation in the plaintiff's prima facie case for retaliation in *University of Texas Southwestern Medical Center v. Nassar*. The case came from the Fifth Circuit Court of Appeals, and involved Dr. Nassar, who was a member of the University of Texas Southwestern Medical Center ("UTSW") medical faculty.⁹⁹ Nassar claimed that UTSW retaliated against him when the medical center blocked his transfer to an affiliated hospital in response to his complaint that a supervisor engaged in racial harassment.¹⁰⁰ The issue before the Court was whether the but-for standard, or the mixed-motive standard of causation applies when an employee shows that his/her protected activity was connected to the employer's adverse employment action.¹⁰¹ The Court held that the but-for standard of causation applies to the plaintiff's prima facie case in retaliation claims.¹⁰² The Court supported this conclusion through the lack of any difference between the statutory language in Title VII's anti-retaliation provisions and the relevant provisions of the Age Discrimination in Employment Act, where in the latter, the Court has previously determined that the but-for standard of causation applies.¹⁰³

The *Nassar* decision further demonstrates that this comment's suggested framework would provide a reasonable balance between employee and employer in rejection of sexual advances scenarios. The

⁹⁹ *Nassar v. Univ. of Texas Southwestern Med. Ctr.*, 674 F.3d 448 (5th Cir. 2012).

¹⁰⁰ *Univ. of Texas Southwestern Med. Ctr. v. Nassar*, 133 U.S. 2517, 2524 (2013).

¹⁰² *See Id.* at 2535.

¹⁰³ *See Nassar*, 133 U.S. at 2517

Court has altered the balance of the plaintiff's prima facie case by placing a weight in favor of the employer by establishing a but-for standard of causation, as opposed to the employee-friendly mixed-motive analysis used in Title VII discrimination claims. In a rejection of sexual advances scenario, if the courts required employees to oppose the sexual harassment in a traditional manner beyond the rejection itself, and further required the employee to show that the opposition activity was the but-for cause of the adverse employment action, a fundamental rule of the prima facie case would be lost. It is well established that the prima facie case, as a whole, is not intended to be a high hurdle for the plaintiff to clear. Favoring the employer throughout the plaintiff's prima facie case is particularly burdensome considering the fact that the plaintiff must also maintain the burden of proof throughout the entire McDonnell-Douglas analysis (with the employer only bearing the burden of production in establishing a legitimate, non-retaliatory reason for the adverse employment action). Additionally, more traditional forms of opposition, like complaining to human resources, is a more revealing process than a mere rejection of a sexual advance. Traditional forms of opposition signal to management that the employee is serious about putting an end to the harassment, which as a result, could lead management to be more careful in terminating a "trouble-maker" employee by thoroughly searching for any performance deficiencies. Considering the but-for standard of causation the employee bears, it will be much harder for that employee to meet the standard when the employer is given such a clear warning signal to cover its bases before a termination. A mere rejection of a sexual advance will not put such a burden on the employee when s/he has to prove but for causation, because management would be unsure of the employee's degree of resolve to put an end to the potential harassment.

CONCLUSION

The workplace is a complicated environment, where professional aspirations will often intersect with personal desires. When these two interests conflict, particularly in the context of one party having power over another, adverse consequences like victimization and decreased efficiency will likely result. Legislators and the courts do what they can to protect employees in such situations, but statutory language and judicial frameworks can only address so many workplace issues. When a unique situation slips through the cracks, the courts should keep in mind the many countervailing interests of the workplace in making their determinations, rather than forcing circles in places that have only been occupied by squares.

It has been clear that for an employee to be protected from retaliation for opposing unlawful acts under Title VII, the employee must oppose in a way that is statutorily protected. In the factual scenario involving an employee's rejection of a supervisor's sexual advances, the lower federal courts disagree as to whether such acts are statutorily protected against retaliation. Some courts subscribe to the belief that such rejections are not protected against retaliation because employees have to oppose unlawful acts in a more traditional, explicit manner to gain statutory protection. Other courts argue that a rejection alone suffices as a statutorily protected activity, because such rejections are inherently opposition activity against unlawful acts. This comment has attempted to demonstrate that the present issue is too complicated to determine protected activity through an "eyeball test," and that the rejection of sexual advances raises a wide range of considerations and implications that demand a careful analysis. These considerations and implications reveal that when an employee rejects her supervisor's sexual advance(s), s/he should be granted the presumption that s/he properly "spoke out" against the act. The presumption, however, should be harnessed by a consistent and diligent judicial analysis as to whether the employee had a reasonable, good-faith belief that the supervisor violated Title VII, by referring to the "severe and pervasive" standard of sexual harassment. This approach provides a reasonable balance in that it protects the employee who has rejected sexual advances in the highly political workplace, but also protects the employer in that the sexual advances need to rise to a certain level of severity and pervasiveness so that the employee reasonably believed that she was being subjected to a sexually hostile work environment.